No. _____

In the Supreme Court of the United States

TIMOTHY FILSON, WARDEN, *et al.*,
Petitioners,

v.

MANUEL TARANGO, JR.,
Respondent.

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

Returning to the courthouse in rush-hour traffic for a second day of deliberations, a juror believed that a police car "followed" him closely for several miles. After the jury returned a unanimous guilty verdict, that juror later stated that he voted guilty because he believed that the police had identified him as a hold-out juror.

The state court held a hearing to address this allegation of misconduct, but under state law excluded evidence of the juror's statements about any influence on the deliberative process. The court denied a new trial, and the Nevada Supreme Court affirmed.

On federal habeas review, over the dissent of Judge Rawlinson, the Ninth Circuit held that "the Nevada trial court improperly restricted the scope of the evidentiary hearing" and remanded for a second hearing, ordering the federal district court to (1) apply a presumption of prejudice, and (2) consider the juror's subjective mindset that the Nevada courts held was inadmissible under Nevada law.

The questions presented are:

1. Whether allegations of extraneous juror contact arising post-verdict compel a trial court to question a juror about his subjective mindset in addressing the possibility of any prejudice.

2. Whether an "external contact with the jury" requires a court to apply a presumption of prejudice, "whether or not the contact was intentional, … involved a verbal communication," "concern[s] a matter pending before the jury," or whether or not the court even "knows 'what actually transpired.'"

PARTIES TO THE PROCEEDING

Petitioner Timothy Filson is the warden of Ely State Prison in Nevada, and replaces E. K. McDaniel, who was the warden named in the court below. Petitioner Adam Paul Laxalt, Attorney General of the State of Nevada, is a party to the proceeding not listed in the caption. He joins this petition in full. Respondent Manuel Tarango, Jr., is an inmate at Ely State Prison.

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The state trial court denied Tarango's request for a new trial after an evidentiary hearing into post-verdict allegations that external contact between a juror and law enforcement influenced deliberations. The Ninth Circuit vacated a federal district court's decision denying federal habeas relief on grounds that the Nevada trial court failed to conduct a constitutionally adequate inquiry into the possibility that Tarango suffered prejudice from the alleged contact; the circuit remanded to the federal district court for an evidentiary hearing and directed it to consider evidence the Nevada Supreme Court found inadmissible under Nevada law.

The Ninth Circuit portrayed the decision as a run-of-the-mill ruling under 28 U.S.C. § 2254(d), but a deeper inquiry reveal two splits of authority that call for this Court's intervention.

First, the Ninth Circuit charged the Nevada courts with improperly restricting the scope of the inquiry when those courts precluded consideration of the impact of external contact on a juror's subjective mindset for purposes of impeaching the verdict. Federal circuit courts divide over whether courts must inquire into a juror's subjective state of mind when allegations of external influence on the jury arise post-verdict.

Second, the Ninth Circuit suggested that clearly established federal law compels the application of a presumption of prejudice to allegations of extraneous juror contact. Yet a four-way split of authority exists between the federal circuits on the existence and

application of a presumption of prejudice to allegations of an extraneous influence on the jury.

This Court should grant plenary review on one or both questions. At the very least, however, the splits of authority noted in this petition demonstrate that federal habeas relief was not warranted in this case. There is room for reasoned debate about whether this Court's clearly established holdings compelled the Nevada Supreme Court to reach a different conclusion.

OPINIONS BELOW

The original opinion of the Ninth Circuit vacating and remanding, and the accompanying dissenting opinion, are reported at *Tarango v. McDaniel*, 815 F.3d 1211 (9th Cir. 2016). App. 45-88. The Ninth Circuit's amended opinion and dissent, which issued upon denial of rehearing, are reported at *Tarango v. McDaniel*, 837 F.3d 936 (9th Cir. 2016). App. 1-44. The order and judgment of the United States District Court for the District of Nevada denying federal habeas relief is unreported. App. 89-105. The Nevada Supreme Court's order of affirmance on direct appeal is also unreported. App. 106-14.

JURISDICTION

The Ninth Circuit initially vacated the judgment of the district court and remanded in an opinion issued March 3, 2016 (App. 45-74), and issued an amended opinion vacating and remanding, (App. 1-31). On December 7, 2016, Justice Kennedy extended the time to file a petition for a writ of certiorari to, and including, February 13, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides, in part, that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury …."

Section 1 of the Fourteenth Amendment of the U.S. Constitution provides, in part, that: "No State shall … deprive any person of life, liberty, or property, without due process of law."

Section 2254 of Title 28 of the United States Code provides, in part, that:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) 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.

STATEMENT OF THE CASE

I. Factual Background

A group of masked men that included Manuel Tarango, Jr., entered a bar in Las Vegas and announced a robbery. App. 5. They picked the wrong bar. It was full of off-duty Las Vegas police officers watching their fellow officers perform in the band Metro Mike's Pigs in a Blanket.[1] *Id*. A shoot-out ensued. Several people were injured, including a police officer, and one of the robbers died. *Id*.

The State charged Tarango with seven felonies and the case went to trial. *Id*. After the court submitted the case to the jury for deliberation, the jury foreman wrote a note to the court stating that the jury could not come to a unanimous verdict "because of a 'problem juror' who had 'made it very clear he does not want to be part of [the] process [and] is refusing to discuss or interact with the other jurors.'" *Id*. (alterations in original). In a separate note to the court, Juror No. 2 indicated that he had doubt "beyond the limit of reasonable doubt" that was not being cured by the deliberations. *Id*.

Over defense objections, the district court ordered the jury to continue deliberating. *Id*. Then, returning for a second day, and after a few more hours of deliberations, the jury returned a unanimous guilty verdict. App. 5-6, 109.

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[1] The Las Vegas Metropolitan Police Department is frequently referred to as "Metro."

Two days later, Juror No. 2 wrote the trial judge a letter stating that he continued to have doubt about Tarango's guilt, but that he was "unnerve[ed]" because "from the Henderson area, a Metro squad car followed [him] northbound on I-95 and into the downtown area" when he was returning to the courthouse for the second day of deliberations. App. 6-7, 101-02, 110-11. The juror believed, based on this, that Metro had identified him as a holdout juror; he then claimed he changed his vote to guilty under "duress." App. 7.

A week later the juror sent an e-mail to defense counsel and attached the letter he had sent to the judge. *Id*. This prompted defense counsel to file a motion with the court seeking dismissal of the charges, or, in the alternative, a new trial. *Id*. Tarango's motion asserted that the jury had been tampered with and argued that under binding Nevada authority, *Meyer v. State*, 80 P.3d 447 (Nev. 2003), both intrinsic and extrinsic misconduct had occurred. App. 7-8. Defense counsel also submitted a declaration stating that, after the Court read the jurors' notes, defense counsel overheard the prosecutor inform a detective that Juror No. 2 "was holding out." App. 8.

The trial court ordered a full hearing on Tarango's motion. *Id*. Juror No. 2, defense counsel, the prosecutor, and a detective all testified at the hearing. *Id*. The court limited questioning of Juror No. 2 based on NEV. REV. STAT. § 50.065 and the Nevada Supreme Court's holding in *Meyer*, which preclude admission of jury testimony to impeach a verdict where the testimony is about the effect of any influences on the jury's deliberative process. App. 9, 111-12.

Juror No. 2, answering the trial court's questions, testified that he noticed "a Metro squad car" following him while he was in the center lane of US-95. App. 9. He testified that the squad car stayed close behind him when he signaled to change lanes and followed him all the way to the courthouse but never pulled him over. App 9-11. The State disputed defense counsel's assertions that the prosecutor knew the identity of the holdout juror. App. 108-09.

At the close of the hearing, the trial court denied the motion from the bench. App. 11. Accepting as fact Juror No. 2's testimony that he was closely followed by a police car, the Court stated:

> I don't think there's any evidence of juror misconduct. There were no attempts to influence the jury. There's no outside influence on this particular juror. There's no communication or contact. The alleged conduct is ambiguous, it's vague and nonspecific in content. I'm required to consider this extrinsic influence in light of the trial as a whole, and consider the weight of the evidence against Mr. Tarango and with that, and based on the [*Meyer*] decision, and the reasonable person test that I'm required to apply. I don't think Mr. Tarango has met his burden.

App. 11-12 (emphasis added).

Tarango raised the juror misconduct issue on appeal. The Nevada Supreme Court affirmed the district court's denial of Tarango's motion, holding that the district court correctly excluded Juror No. 2's writings, as they related to his mental thought process

in deliberating, in accord with NEV. REV. STAT. § 50.065 and *Meyer*. App. 112. The court further concluded that no other testimony established facts demonstrating that Juror No. 2 committed misconduct. *Id*.

Finally, the Nevada Supreme Court concluded that Tarango's allegations of an improper external influence on the jury failed. The court noted that an unauthorized communication between law enforcement and the jury about a matter before the jury "may be 'presumptively prejudicial,'" but also acknowledged that such a standard required "an actual communication." App. 113. The court then stated:

> Here, even assuming arguendo that [the juror] was followed by a marked police car, it is not clear whether being followed by a marked police car qualifies as a communication at all. It is even more dubious as to whether such a "communication" was about a matter pending before the jury. In any event, we conclude that the alleged external influence in the case at bar was far too speculative to sustain a motion for a new trial.

Id.

II. The Proceedings Below

Tarango sought federal habeas relief in the United States District Court for the District of Nevada. In his petition, he presented his claim of extraneous juror influence. The district court denied relief.

With respect to the claim of extraneous juror influence, the district court discussed the events that occurred with jurors writing notes to the trial judge on

the first day of deliberations, Juror No. 2's letter to the trial judge and his e-mail to defense counsel, and the evidentiary hearing on Tarango's motion. App. 90-91. Then the district court evaluated the facts of the case under the standard set forth in *Remmer v. United States*, 347 U.S. 227 (1954). App. 97-98. Acknowledging the Nevada Supreme Court's determination that Tarango failed to trigger a presumption of prejudice, the district court determined that the Nevada Supreme Court's decision did not contradict clearly established federal law. *Id*. The district court also rejected the assertion that it was unreasonable for the Nevada Supreme Court to find that Tarango failed to present evidence that would trigger a presumption of prejudice. App. 99-101.

Tarango appealed. App. 58. On appeal, the Ninth Circuit, in a split decision, vacated the district court's judgment and ordered the district court to hold a new evidentiary hearing. App. 74.

Writing for the majority, Judge Murguia faulted the Nevada Supreme Court for "limiting its inquiry" into prejudice and "failing to examine the potential impact of the non-communicative contact on Juror No. 2's verdict." App. 60. (The majority refers to that contact as a "police tail.") First, the panel majority observed that the Ninth Circuit had previously held that "*any* external contact with a juror is subject to the presumption that the contact prejudiced the jury's verdict," and that it is the government's burden to "overcome that presumption by showing that the contact was harmless." App. 61 (emphasis added) (citing *Caliendo v. Warden of Cal. Men's Colony*, 365 F.3d 691, 696 (9th Cir. 2004); *United States v.*

Armstrong, 654 F.2d 1328, 1331-33 (9th Cir. 1981)). The majority repeatedly emphasized its conclusion that a presumption of prejudice must attach in virtually all circumstances involving any allegation of external contact with the jury, and that it had "little trouble concluding that the contact" here "cross[ed] *Mattox*'s low threshold." App. 68. *See*, *e.g.*, App. 65 ("The *Mattox* Court categorically mandated that 'possibly prejudicial' external contacts 'invalidate the verdict, at least unless their harmlessness is made to appear. This is required even if … the contact did not constitute a communication nor concern a matter pending before a jury.'") (citations omitted); App. 66-67 ("the trial court must presume the external contact prejudiced the defendant unless the government provides contrary evidence. This is true whether or not the contact was intentional, whether or not the contact involved a verbal communication, and whether or not the trial court or defendant 'knows what actually transpired.'") (citations and alteration marks omitted); App. 71 ("Under our precedent … prejudice is presumed and the government bears the burden of rebutting the presumption of prejudice.").

Second, the panel majority also held that the Nevada trial court "improperly restricted the scope of the evidentiary hearing" by refusing to allow a juror to testify about "the 'effect of extraneous information or improper contacts on the juror's state of mind.'" App. 71 (citing *United States v. Rutherford*, 371 F.3d 634, 644 (9th Cir. 2004)). *See also* App. 4 ("Because the trial court prevented Tarango from offering certain evidence to demonstrate prejudice, we remand ….''). The Ninth Circuit directed the federal district court, on remand, to hold a second evidentiary hearing consistent with

"our precedent," which, "[u]nlike Nevada law … instructs that a court should not limit juror testimony to the existence of an external contact," but "should also consider the effect of extraneous information or improper contacts on a juror's state of mind, a juror's general fear and anxiety following such an incident, and any other thoughts a juror might have about the contacts or conduct at issue." App. 72-73 (internal quotation marks, alteration marks, and citations omitted); *see also* App. 73-74.

Judge Rawlinson, dissenting, stated that she felt bound to defer to the Nevada Supreme Court's factual and legal determinations, recognizing that habeas relief was unavailable if the Nevada Supreme Court's ultimate conclusion—that the allegation of an intentional external influence on the jury "was far too speculative to sustain a motion for a new trial"—was reasonable. App. 77-79. Judge Rawlinson faulted the majority for (1) misreading *Mattox*; (2) not properly deferring to the Nevada courts and engaging in improper fact-finding; and (3) granting federal habeas relief based upon an analysis not supported by any clearly established holdings of this Court. App. 79-88. Judge Rawlinson wrote that she "doubt[ed] the Supreme Court will be amused" by the majority "mak[ing] light of the many rebukes we have received from the Supreme Court for ignoring the demanding standard under which we review habeas cases." App. 78 n.3.

Respondents moved for rehearing and reconsideration *en banc*. Although the Ninth Circuit called for a response to Respondents' petition, the court ultimately denied the petition. The panel issued

superseding amended opinions, but with only minor, inconsequential changes. App. 1-45.

REASONS FOR GRANTING THE PETITION

I. Lower courts are split on whether a trial court must consider juror testimony regarding the juror's state of mind when addressing the possible effect of an extraneous contact on the juror's ability to remain impartial.

Predating the Constitution itself is the rule that a juror may not later testify about the deliberative process as a means of impeaching his own verdict. *United States v. Lakhani*, 480 F.3d 171, 184 (3d Cir. 2007) ("The origin of this rule is attributed to the 1785 decision of Lord Mansfield in *Vaise v. Delaval*. 99 Eng. Rep. 944 (K.B.1785).") The justifications supporting the rule include (1) avoiding harassment of jurors post-trial; (2) encouraging unfettered discussion amongst jurors during deliberations; (3) reducing the incentive for tampering; (4) promoting finality of verdicts; and (5) protecting the sanctity of jury and maintaining its "viability…as a judicial decision making body." *Virgin Islands v. Gereau*, 523 F.2d 140 (3d Cir. 1975).

This Court has reaffirmed the importance of this rule in protecting the *internal* workings of jury deliberations, for instance holding that the Sixth Amendment's right to jury trial did not require an evidentiary hearing into allegations that jurors were intoxicated and sleeping at trial. *Tanner v. United States*, 483 U.S. 107, 126-27 (1987). Yet despite *Tanner*, circuit decisions have eroded the rule, resulting in a split of authority on the admissibility of

juror testimony on the impact of an *extraneous* influence. *United States v. Honken*, 541 F.3d 1146 (8th Cir. 2008).

One side of the split strictly adheres to the common-law rule traced to Lord Mansfield, permitting only objective evidence as to whether an extraneous contact occurred, while excluding any juror testimony about that contact's impact on the juror's state of mind. *United States v. Greer*, 285 F.3d 158, 173-74 (2d Cir. 2002) ("[T]he District Court asked jurors whether the extra-record information impacted their ability to be fair and impartial. Because this was a post-verdict hearing, that line of questioning was improper."); *United States v. Cheek*, 94 F.3d 136, 143 (4th Cir. 1996) ("By asking Davis whether he had listened to and considered all the evidence, the government was delving into Davis' mental processes about the sufficiency of the evidence in reaching his personal verdict. Such an inquiry exceeded the strict limits imposed by Rule 606(b)."); *Hough v. Jones & Laughlin Steel Corp.*, 949 F.2d 914, 917 (7th Cir. 1991) ("The proper procedure therefore is for the judge to limit the questions asked the jurors to whether the communication was made and what it contained, and then, having determined that the communication took place and what exactly it said, to determine—without asking the jurors anything further and emphatically without asking them what role the communication played in their thoughts or discussion—whether there is a reasonable possibility that the communication altered their verdict."); *Honken*, 541 F.3d at 1168-69 ("Rule 606(b) prohibits a juror from testifying at a post-verdict hearing as to whether extraneous information or an outside influence affected that juror's ability to be

impartial. The plain language of Rule 606(b) permits a juror to testify as to '*whether* extraneous prejudicial information was improperly brought to the jury's attention [and] *whether* any outside influence was improperly brought to bear upon any juror' but the rule expressly prohibits a juror from testifying as 'to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or concerning the juror's mental processes in connection therewith.') (alteration marks omitted); *United States v. Simpson*, 950 F.2d 1519 (10th Cir. 1991) ("The language of Rule 606(b) allows a juror to testify as to *whether* any extraneous prejudicial information was improperly brought to bear upon a juror. However, the language of the rule is equally clear that a juror may not testify as to the *effect* the outside information had upon the juror."). As the Ninth Circuit recognized, Nevada's courts fall on this side of the split. App. 9 & n.4, 13, 27, 29.

Courts on the other side of the split require a trial judge to consider juror testimony on the juror's state of mind to address the possible impact of the extraneous influence on the juror's ability to remain impartial. *See United States v. Herndon*, 156 F.3d 629, 637 (6th Cir. 1998) (holding that it was error for a trial court to prevent a defendant from calling a juror to testify about the effect an extraneous influence had on his ability to remain impartial); *United States v. Rutherford*, 371 F.3d 634 (9th Cir. 2004) (excluding evidence "regarding the affected juror's mental process *in reaching the verdict*" but permitting consideration of "the 'effect of extraneous information or improper contacts on a juror's state of mind,' a juror's 'general fear and anxiety following' such an incident, and any

other thoughts a juror might have about the contacts or conduct at issue," including "a juror's testimony concerning his fear that individuals would retaliate against him if he voted to acquit (or convict)," but not "that he actually cast his vote one way or the other because of that fear"); App. 30 ("Consistent with the principles announced in *Rutherford*, the district court should admit Juror No. 2's statements about how the police tail impacted him ….").

The contrast between the two sides is apparent when comparing the Ninth Circuit's decision in this case and the decisions of the Third and Eighth Circuits in *Gereau* and *United States v. Krall*, 835 F.2d 711 (8th Cir. 1987) respectively. In this case, the Ninth Circuit directed the federal district court to conduct an evidentiary hearing, despite the development of an evidentiary record in the state trial court on all but one point: whether the police following Juror No. 2 resulted in fear or anxiety that influenced his ability to deliberate impartially. App. 27-31.

The Third Circuit in *Gereau* precluded admission of evidence that jurors heard rumors of an F.B.I. investigation of the jurors and their families. 523 F.2d at 152-54 (stating that more than the mere occurrence of an unknown and incomplete contact is necessary to find an extraneous influence). In *Krall*, the Eighth Circuit held that a juror's generalized fear of an I.R.S. investigation, should she not vote for a guilty verdict, was also inadmissible. 835 F.3d at 715-16 ("The affidavit of the juror in this case does not fall within the exception for objective events or incidents. A juror's fear of I.R.S. retaliation necessarily goes to the juror's own mental process. The verdict of a jury may

not be impeached by evidence of the thought processes and undisclosed subjective prejudices of individual jurors who concurred in the verdict.").

This case presents an excellent vehicle for addressing this split. Here, the split is exacerbated by an identical conflict between relevant circuit precedent and state law. Nevada, in *Meyer*, has unequivocally sided with the majority rule that in turn strictly adheres to Mansfield's rule. 80 P.3d at 454 ("[A] motion for a new trial may only be premised upon juror misconduct where such misconduct is readily ascertainable from objective facts and overt conduct without regard to the state of mind and mental processes of any juror."). But the Ninth Circuit, "hold[ing] that the Nevada trial court improperly restricted the scope of the evidentiary hearing," App. 28, ordered the federal district court to hold another evidentiary hearing and permit the juror to testify about his general state of mind as part of an inquiry into allegations of extraneous juror influence. App. 30-31.

With the state district court having already conducted a hearing that addressed everything but the juror's subjective state of mind, and concluding in light of all the admissible evidence that the "alleged conduct is ambiguous, it's vague and nonspecific in content," this case squarely presents the issue of whether majority or minority rule is correct. There is no other purpose for holding a new evidentiary hearing than to permit the admission of evidence that the Nevada Supreme Court deemed inadmissible (and which a majority of federal circuits would likewise deem inadmissible). Accordingly, this Court should grant

plenary review to address whether trial courts must consider a juror's testimony regarding his or her subjective state of mind when allegations of an extraneous contact arise post-verdict.

II. Tension between decisions of this Court has resulted in a pervasive split of authority on the test for reviewing allegations of extraneous juror influence under the Sixth and Fourteenth Amendments.

An entirely independent ground for certiorari concerns the split over the standard in reviewing allegations of extraneous juror influence. As the Ninth Circuit recognized in this case, this Court's precedents addressing claims of this nature reach back to 1892. App. 17 (citing *Mattox*, 146 U.S. 140, 149-50). Building from *Mattox*, this Court decided *Remmer v. United States*, 347 U.S. 227 (1954), followed by *Smith v. Phillips*, 455 U.S. 209 (1982), and *United States v. Olano*, 507 U.S. 725 (1993). Differing interpretations of these cases have caused widespread disagreement about whether and how the Sixth Amendment applies in this context, especially regarding its application to the States through the Due Process Clause of the Fourteenth Amendment. While the existence of reasonable disagreement over this Court's precedents is an obvious basis for summarily reversing the Ninth Circuit's decision to vacate the district court's judgment and remand for an evidentiary hearing, this case presents this Court with an opportunity to cleanly resolve a discrete legal question on which lower courts are deeply divided: if, and when, the Sixth and Fourteenth Amendments compel courts to apply a

presumption of prejudice to allegations of extraneous juror influence.

A. This Court's precedents provide conflicting views on the burden of proof in addressing claims of extraneous juror influence.

In *Mattox*, this Court addressed a claim that the defendant was entitled to a new trial based on allegations that the bailiff made improper statements to the jury and that the jury was exposed to a newspaper article about the case during deliberations. 146 U.S. at 142-43, 147. This Court held that "[p]rivate 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 150.

In *Remmer*, this Court addressed allegations of an unidentified individual telling a juror that he "could profit" if the jury found in the defendant's favor. 347 U.S. at 228. The judge notified the prosecuting attorneys after the juror reported the incident; this led to an investigation and report by the Federal Bureau of Investigation. *Id*. But the defense only learned of the communication after the jury returned a guilty verdict. *Id*. Addressing the defendant's challenge to the denial of a mistrial, this Court acknowledged 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, for obvious reasons, deemed presumptively prejudicial …." *Id*. at 229 (emphasis added). "The presumption is not conclusive, but the burden rests heavily upon the

Government to establish, after notice to and a hearing of the defendant, that such contact with the juror was harmless to the defendant." *Id*.

In *Smith*, this Court addressed allegations of juror bias where it was revealed that a juror was applying for a job with the prosecutors' office. 455 U.S. at 212. There, a habeas petitioner argued that "the law must impute bias," but this Court disagreed. *Id*. at 215. Citing *Remmer*, this Court receded from the idea that the Constitution compels application of a presumption of prejudice to all allegations of extraneous juror influence, acknowledging that "the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove *actual bias*." *Id.* (emphasis added). Citing various other cases where this Court rejected arguments for implied bias, this Court stated that "due process does not require a new trial every time a juror has been placed in a potentially compromising situation," because "few trials would be constitutionally acceptable" if the Constitution compelled such a rule. *Id*. at 217. And this Court held that a *Remmer*-style hearing is sufficient to guard against external influences infringing the right to trial by jury and concluded that if allegations of juror partiality in the federal system can be adequately addressed by a *Remmer*-style hearing, then "the Due Process Clause of the Fourteenth Amendment cannot possibly require more of a state court system." *Id.* 217-18.

Finally, in *Olano*, this Court was confronted with allegations that permitting alternate jurors to watch jury deliberations resulted in plain error. 507 U.S. at 727-31. Acknowledging that plain error only exists

where the error affected the defendant's substantial rights, this Court turned to both *Remmer* and *Smith* to define the test for evaluating the allegations of extraneous influence on the jury. *Id*. at 732, 737-39. This Court again declined to apply a presumption of prejudice, but instead looked to the oft-repeated presumption that jurors follow their instructions in concluding that "[t]he Court of Appeals was incorrect in finding the error 'inherently prejudicial.'" *Id*. at 740 (citation omitted). Instead, this Court identified the "ultimate inquiry" as: "Did the intrusion affect the jury's deliberations and thereby its verdict?" *Id*. at 740.

B. A four-way split of authority exists between the federal circuits on the proper standard for addressing allegations of extraneous juror influence.

Considerable disagreement has developed among the federal circuits over what this Court requires when addressing allegations of extraneous juror influence. The central dispute seems to be what, if any, impact this Court's rejection of an implied bias standard in *Smith* and *Olano* has on *Remmer*'s application of a presumption of prejudice to any unauthorized contact with a juror about a matter pending before the jury. *See*, *e.g.*, *United States v. Lawson*, 677 F.3d 629, 641-44 (4th Cir. 2012). The disagreement has led to four distinct variations for reviewing claims of extraneous juror influence.

First, the Ninth Circuit is joined by the Fourth, Seventh, Tenth, and Eleventh circuits in recognizing—in varying degrees—that, while a presumption need not be applied in *every* case,

allegations of an extraneous juror contact will generally trigger a presumption of prejudice unless the alleged contact is plainly innocuous or *de minimis*. *Id*.; *United States v. Martin*, 692 F.3d 760, 765 (7th Cir. 2012); *United States v. Scull*, 321 F.3d 1270, 1280 (10th Cir. 2003); *United States v. Ronda*, 455 F.3d 1273, 1299 (11th Cir. 2006). At a minimum these cases only require some evidence that a juror was exposed to unauthorized contact for the presumption to attach, though some cases indicate the petitioner must make some basic showing that the contact itself was likely to affect a reasonable juror's ability to deliberate.

Second, to trigger the presumption in the Second and Eighth circuits, a defendant must show that "the extrinsic contact relates to 'factual evidence not developed at trial.'" *United States v. Hall*, 85 F.3d 367, 371 (8th Cir. 1996) (*quoting United States. v. Cheyenne*, 855 F.2d 566, 568 (8th Cir. 1988)); *see also United States v. Greer*, 285 F.3d 158, 173 (2d Cir. 2000) (holding that a presumption of prejudice applies when a juror becomes aware of "extra-record information"). When the presumption applies, the Second Circuit applies an objective test to determine "the probable effect on the hypothetical average juror." *Greer*, 285 F.3d at 173 (internal quotations and citation omitted). When the presumption is triggered in the Eighth Circuit, that court shifts the burden to the government to establish the absence of prejudice beyond a reasonable doubt. 85 F.3d at 371.

Third, the First Circuit applies a presumption in cases involving egregious facts of alleged tampering or third-party communications designed to influence the jury's verdict. *See United States v. Dehertogh*, 696 F.3d

162, 167 (1st Cir. 2012). In *Dehertogh*, for example, jurors noticed an alleged co-conspirator from an extortion scheme sitting in the gallery and smiling at them; they expressed that they were intimidated and scared by him. *Id*. at 164. But that court of appeals ultimately declined to apply a presumption of prejudice because the district court had aptly dealt with the issue and received no response after giving jurors an opportunity to privately notify the court of any continued concerns. *Id*. at 165, 167.

Finally, the Third, Fifth, and Sixth circuits have rejected a presumption of prejudice. The Third Circuit places the burden on the defendant to establish substantial prejudice, with the trial court conducting an objective inquiry into the probable effect of the extraneous contact on the average hypothetical juror. *United States v. Fumo*, 655 F.3d 288, 304 (3d Cir. 2011). The Fifth Circuit requires the defendant to show a likelihood of prejudice before the burden shifts to the government to prove the absence of prejudice. *United States v. Sylvester*, 143 F.3d 923, 934 (5th Cir. 1998). And the Sixth Circuit looks to *Smith* in holding that the burden is on the defendant to establish actual prejudice. *United States v. Pennell*, 737 F.2d 521, 532 (6th Cir. 1984)

C. The split is aggravated in habeas cases where, as here, there exist inconsistent standards between state and federal courts.

While the disparate results caused by differing circuit standards are reason enough for this Court to intervene, the effect of the split is further pronounced when considering disputes between state courts of last

resort and federal circuits. Where, as here, state court authority[2] reasonably interprets this Court's holdings to require a less restrictive standard than that required by the relevant circuit court,[3] a significant conflict occurs that undermines state sovereignty and creates a potential perverse incentive for state-court criminal defendants in jurisdictions like the Ninth Circuit. Wherever such a state-federal split exists, the savvy criminal defendant will be incentivized to make allegations of some extraneous juror *contact*, knowing that if his claim fails in state court, he will almost certainly be able to obtain a new trial on federal habeas review *even if the state court held an evidentiary hearing*, because the federal courts will simply conclude that the state courts erred by not "conduct[ing] a [proper] prejudice analysis." App. 24.

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[2] As Judge Rawlinson's dissent points out, the *Meyer* decision, applied by both the state district court and the Nevada Supreme Court, includes a thorough analysis of relevant federal standards for addressing claims of extraneous juror influence. App. 33-34, 112-13.

[3] Notably, the dispute between the Ninth Circuit's and Nevada Supreme Court's interpretations of this Court's cases on this issue is not over the existence of a presumption of prejudice—both jurisdictions believe the presumption is triggered under some circumstances—but rather whether Tarango made a sufficient *prima facie* showing to trigger the presumption. But even the Ninth Circuit concedes there is no bright-line rule from this Court to define what is "possibly prejudicial" and what requires further inquiry. App. 18. That alone demonstrates that habeas relief was improper in this case; it also highlights the more fundamental need for this Court's guidance in this area.

State courts should not be presented with the Hobson's choice of either being coerced to adopt their federal circuit's side of a split or seeing state convictions repeatedly vacated in federal habeas proceedings. That is the very evil that the "clearly established federal law" standard of 28 U.S.C. § 2254(d)(1) is designed to guard against. Here, by granting review in this case, this Court can reinforce that standard (as Judge Rawlinson anticipated, *see* App. 35 n.3) while simultaneously providing guidance to the federal courts of appeal on a longstanding and intractable conflict.

III. This case is an excellent vehicle for this Court to clearly establish the appropriate constitutional standard that applies to claims of extraneous juror influence.

This case squarely presents this Court with an opportunity to provide clear guidance on the standards the Constitution compels with respect to claims of extraneous juror influence. This guidance is necessary to alleviate the tension among the circuits and state courts of last resort.

This case provides this Court with a clean set of facts that crisply accentuate the difference in outcome resulting from the two circuit splits noted above. First, the facts of this case provide this Court with the opportunity to clarify what was meant when it said, in *Smith*, that "actual bias" must be shown by the defendant. Here, by focusing only on testimony about objective facts demonstrating external contacts, and excluding any testimony as to the juror's subjective state of mind, both the Nevada trial court and the Nevada Supreme Court quite reasonably found

"speculative," "ambiguous, … vague and nonspecific" the evidence proffered of any intentional external influence "about a matter pending before the jury." App. 113; App. 11-12. On the other hand, if by "actual bias" this Court meant to invite courts like the Ninth Circuit to delve into the *effect* of extraneous influences on juror's objective state of mind, then obviously the Nevada courts did not permit that.

Likewise, if the Ninth Circuit is correct that a "low threshold" exists for a presumption of prejudice to attach, the Court can use this case to demonstrate that a presumption applies even when the allegations of extraneous influence are "speculative," "ambiguous," "vague," and "non-specific." App. 55, 112-13. On the other hand, if courts can require defendants to make some sort of non-trivial threshold showing in order to invoke the presumption (as many courts do), or if there is no presumption of prejudice at all after *Smith* (as yet other courts have concluded), then the Ninth Circuit erred and should be reversed.

No matter where this Court ends up on the spectrum of positions staked out by the federal circuits on a presumption of prejudice, this case presents an opportunity to set out what a petitioner must do to trigger the presumption. Whether the presumption (1) always applies except when the contact is innocuous or *de minimis*, (2) applies only in cases where a juror receives extra-record facts about the case, or (3) applies only to egregious facts of tampering or third-party communication demonstrating intent to influence the verdict, the facts of this case give this Court a concrete instance to determine how to apply its test for determining when a presumption of prejudice applies.

If the "innocuous or *de minimis*" standard applies, this Court can use the facts of this case to clearly distinguish where the line falls between innocuous or *de minimis* and something more than that. This Court can do so by indicating on which side of the line fall the facts here—a juror noticing a police car following him closely, during rush-hour traffic, on the main thoroughfare to the courthouse in downtown Las Vegas.

If the standard for a presumption of prejudice attaches only where a juror received extra-record factual information, then no presumption would apply in this case.

This case would also provide a good framework for addressing an "egregious intentional tampering" standard. Here, if a police officer had *intentionally* sought to influence a juror by tailgating him, that would be egregious. But as the Nevada courts reasonably concluded, it was completely "speculative" whether the alleged conduct here was intentional, much less "about a matter pending before the jury." App. 113. Thus, this case provides an exceptional vehicle to demonstrate the importance of the "intentional" part of the "egregious *intentional* tampering" standard.

IV. This Court should at least reverse the Ninth Circuit's decision granting relief under 28 U.S.C. § 2254(d)(1).

Where the precise contours of this Court's precedents are not clearly defined, federal courts must give broad deference to a state court's application of relevant federal law. *White v. Woodall*, 134 S. Ct. 1697,

1705 (2014). The first split of authority outlined above demonstrates that reasonable jurists would disagree about whether the "Nevada trial court improperly restricted the scope of the evidentiary hearing." App. 28. Jurists in most federal circuits would, in fact, agree with the Nevada courts. The second split of authority demonstrates that reasonable jurists can disagree about whether and when this Court's holdings require courts to presume prejudice and conduct a more probing inquiry into prejudice when reviewing claims of extraneous juror influence. Indeed, the fractured circuits seem to disagree more than agree about that question.

Here, the Nevada Supreme Court acknowledged that a presumption of prejudice may apply but that (1) Tarango had not done enough to trigger application of that presumption under *Meyer*, the relevant Nevada authority interpreting the standard for allegations of extraneous juror influence, and (2) "that the alleged external influence in the case at bar was far too speculative to sustain a motion for a new trial." App. 112-13. In light of these statements, the Ninth Circuit grossly misapplied AEDPA for at least three fundamental reasons, and did so in the face of Judge Rawlinson's correct statement of the analysis that AEDPA required. App. 31-36.

First, the Nevada Supreme Court's decision can reasonably be read to comply with even the strictest prejudice standard applied by the federal circuit courts. In particular, those courts acknowledge that a presumption of prejudice applies unless the alleged influence is innocuous or *de minimis*. Not only was the Nevada Supreme Court affirming a decision that

analyzed the effect of the alleged "extrinsic influence" under a "reasonable person test," (App. 11-12), but after concluding that Tarango failed to trigger a presumption of prejudice under Nevada law, that court acknowledged that the alleged influence was too speculative to warrant a new trial. App. 112-13. That conclusion is consistent with the standard that would presume prejudice in the vast majority of cases: (1) it demonstrates that the speculative[4] nature of the allegations could reasonably be viewed as innocuous or *de minimis*, and (2) characterizing the allegations of extraneous influence as speculative could reasonably be read to mean that "[i]n any event" the Nevada Supreme Court determined that the State had overcome any presumption of prejudice. App. 113.

Second, this Court's decisions like *White* acknowledge that AEDPA precludes habeas relief where reasonable jurists can disagree about the meaning and scope of this Court's decisions. 134 S. Ct. at 1705. Accordingly, the widespread disagreement about the burden of proof for addressing claims of extraneous juror influence demonstrates that the Ninth Circuit was required to give the Nevada Supreme Court broad deference.

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[4] In fact, the Ninth Circuit acknowledged that "[t]hreadbare or *speculative* allegations, or allegations involving 'prosaic kinds of jury misconduct' do not trigger a presumption of prejudice." App. 21 (emphasis added and citation omitted). But the panel majority made no effort to reconcile this statement with the Nevada Supreme Court's characterization of the allegations as speculative. Rather, it swept the Nevada Supreme Court's determination aside, relying on its own view rather than the objective reasonable jurist standard that AEDPA compels. App. 25.

The Ninth Circuit gave no deference, as Judge Rawlinson emphasized. App. 34-35 & n.3. Rather, despite acknowledging that the "Supreme Court has not established a bright-line test for determining what constitutes a possibly prejudicial 'external' influence on a jury," App. 18, the panel majority spent page after page cobbling together various statements from this Court's cases that, per the majority, "set forth a standard that 'clearly extends' to th[is] case." App. 27 n.12 (alteration marks omitted). A remedy like federal habeas relief cannot be supported in this way.

It is not enough that the Ninth Circuit thinks the Nevada Supreme Court was wrong; Tarango must show that the Nevada Supreme Court's judgment "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *White*, 134 S. Ct. at 1702 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). Thus, where—as here—the Nevada Supreme Court's decisions can be viewed as a reasonable, faithful application of the federal constitutional principles clearly established by the holdings of this Court, federal habeas relief is not warranted.

Finally, the Ninth Circuit's failure to adhere to the limitations of AEDPA review are exacerbated by the split of authority addressing what kind of evidence is admissible in addressing allegations of extraneous juror influence. Irrespective of the deference owed to the Nevada Supreme Court's resolution of the merits of Tarango's constitutional claim, the idea that a federal court can consider evidence in federal habeas review that was deemed inadmissible under state evidentiary

law—law consistent with how other federal courts interpret an equivalent Federal Rule of Evidence—turns on its head the idea that "habeas corpus is a 'guard against extreme malfunctions in the state criminal justice system' not a substitute for ordinary error correction through appeal." *Harrington*, 562 U.S. at 102-03.

In light of the foregoing, if this Court does not grant plenary review, it should summarily reverse the Ninth Circuit's decision for failing to accord the Nevada Supreme Court the deference it was owed under AEDPA.

CONCLUSION

Petitioners respectfully request that the Court grant the petition.

Respectfully submitted,

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February 2017

APPENDIX

APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-17071
D.C. No. 3:10-cv-00146-RCJ-VPC

[Filed September 16, 2016]

MANUEL TARANGO, JR., *Petitioner-Appellant*,	)
v.	)
E. K. MCDANIEL; NEVADA ATTORNEY GENERAL, *Respondents-Appellees*.	)

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Nevada
Robert Clive Jones, District Judge, Presiding

Argued and Submitted December 12, 2014
San Francisco, California

Filed March 3, 2016
Amended September 16, 2016

Before: Raymond C. Fisher, Johnnie B. Rawlinson,
and Mary H. Murguia, Circuit Judges.

App. 2

Order;
Opinion by Judge Murguia;
Dissent by Judge Rawlinson

SUMMARY[*]

Habeas Corpus

The panel filed (1) an order amending its opinion and accompanying dissent and denying a petition for panel rehearing and a petition for rehearing en banc and (2) an amended opinion and dissent in a habeas corpus case.

In the amended opinion, the panel vacated the district court's denial of a habeas corpus petition, in which a Nevada state prisoner claimed violation of his due process right to a fair and impartial jury, where a police vehicle followed a known hold-out juror, for approximately seven miles, on the second day of deliberations in a highly publicized trial involving multiple police victims.

The panel held that the Nevada Supreme Court's decision upholding the petitioner's convictions was contrary to *Mattox v. United States*, 146 U.S. 140 (1892), because the court improperly limited its inquiry to whether the external contact amounted to a "communication" and did not investigate the prejudicial effect of the police tail. The panel therefore reviewed *de novo* the question whether the extrinsic contact could have influenced the jury's verdict and prejudiced the petitioner. Because the state trial court prevented the

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[*] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

petitioner from offering certain evidence to demonstrate prejudice, the panel remanded for an evidentiary hearing and further fact finding.

Dissenting, Judge Rawlinson wrote that *Mattox* is far afield from the dispositive issue, the majority gives no deference to the decision of the Nevada Supreme Court but engages in impermissible appellate fact finding, and no Supreme Court case supports the majority's conclusion.

COUNSEL

Ryan Norwood (argued), Assistant Federal Public Defender; Rene Valladares, Federal Public Defender; Office of the Federal Public Defender, Las Vegas, Nevada; for Petitioner-Appellant.

Victor-Hugo Schulze, II (argued), Senior Deputy Attorney General; Lawrence VanDyke, Solicitor General; Adam Paul Laxalt, Attorney General; Office of the Attorney General, Las Vegas, Nevada; for Respondents-Appellees.

ORDER

The opinion and accompanying dissent filed March 3, 2016 are hereby amended.

Judge Fisher and Judge Murguia vote to deny the petition for panel rehearing and petition for rehearing en banc. Judge Rawlinson votes to grant the petition for panel rehearing and petition for rehearing en banc.

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. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are **DENIED** (Doc. 36).

No further petitions for rehearing and/or rehearing en banc will be entertained.

OPINION

MURGUIA, Circuit Judge:

Petitioner Manuel Tarango, Jr. appeals the district court's denial of his petition for a writ of habeas corpus. He claims violation of his due process right to a fair and impartial jury, where a police vehicle followed Juror No. 2, a known hold-out against a guilty verdict, for approximately seven miles, on the second day of deliberations, in a highly publicized trial involving multiple police victims. Tarango argues that the Nevada Supreme Court's decision upholding his convictions "was contrary to, or involved an unreasonable application of, clearly established federal law," *see* 28 U.S.C. § 2254(d)(1), because the court failed to consider whether the contact between the juror and the police vehicle prejudiced the jury's verdict.

We hold that the Nevada Supreme Court's decision was contrary to *Mattox v. United States*, 146 U.S. 140 (1892), because the court improperly limited its inquiry to whether the external contact amounted to a "communication" and did not investigate the prejudicial effect of the police tail. We therefore review *de novo* the question whether the extrinsic contact could have influenced the verdict and prejudiced Tarango. Because the trial court prevented Tarango from offering certain evidence to demonstrate prejudice, we remand for an evidentiary hearing and further fact finding.

BACKGROUND

On December 5, 1999, a rock band of off-duty Las Vegas police officers, Metro Mike's Pigs in a Blanket, was performing at a local bar called Mr. D's. The bar was filled with off-duty police officers. A group of masked men entered the bar announcing a robbery, and a shoot-out ensued. Several patrons were shot, one robber was shot and killed, and one police officer, Officer Dennis Devitte, was shot several times. The surviving robbers escaped the scene and, six years later, Tarango was brought to trial on seven felony counts. The 2005 trial received considerable local media attention, and numerous Las Vegas Metro police officers attended as both witnesses and spectators.

After the jury began its deliberations, on November 1, 2005, the foreperson sent a note to the trial judge indicating that the jury had "reached a stalemate" because of a "problem juror" who had "made it very clear he does not want to be part of [the] process [and] is refusing to discuss or interact with the other jurors." The "problem juror" separately wrote to the judge indicating that he had "doubt of which [he] feel[s] is beyond the limit of reasonable doubt," and that deliberations were "not curing [his] doubt." In his note, the "problem" juror identified himself as Juror No. 2.

Over Tarango's objection,[1] the judge advised the jury to continue deliberating. The next day, November 2nd, the jury returned a verdict finding Tarango guilty

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[1] Tarango argued that Juror No. 2's note indicated that the jury was hung, and moved for a mistrial, there being no alternate jurors left to take Juror No. 2's place.

of all seven felony counts as charged: burglary with the use of a deadly weapon, attempted robbery with the use of a deadly weapon, conspiracy to commit robbery with the use of a deadly weapon, three counts of battery with the use of a deadly weapon, and attempted murder with the use of a deadly weapon—all in violation of Nevada state law.

On November 3rd, the *Las Vegas Review-Journal* reported the guilty verdict in an article titled *Man Convicted in 1999 Case*. The article referenced "a juror who spoke to the *Review-Journal*." Discussing the jury's deliberation process, the interviewed juror mentioned the hold-out juror: "the case was close to a hung jury because one juror seemed unwilling to convict following nearly two days of deliberations."

On November 4th, prompted by the previous day's newspaper article, Juror No. 2 wrote a letter to the court referencing the article:

> I am the one Juror mentioned in the article. . . . I am also the Juror that wrote you the note during deliberations. It read: "I have doubt beyond the limit of what I consider reasonable doubt." I also stated, "I did not believe further deliberations would cure that doubt."
>
> Further deliberations in fact, did not cure my doubt.
>
> However, when returning to re-deliberate Wednesday November 2nd from the Henderson area, a Metro squad car followed me northbound on I-95 and into the downtown area.
>
> I found that action unnerving.

> I realize the State has much time and money invested in this case. There were [*sic*] no alternate Juror. I concluded Metro somehow knew who I was and knew of my unwillingness to convict. I have never been in trouble with the law. Therefore, I relinquished my vote under duress. I only ask, within the law, please show [Tarango] leniency.

One week later, on November 11th, Juror No. 2 emailed Tarango's trial attorney, Marc Saggese, and attached a copy of his "Letter to the Judge." The juror told Saggese that he felt "compelled to notify" Saggese of the letter. Saggese promptly filed a motion to dismiss all charges with prejudice or, alternatively, to grant a new trial on the ground of juror misconduct, arguing that Juror No. 2's communication indicated that the deliberation process had been tampered with in violation of Tarango's right to due process. Under Nevada law, juror misconduct refers to two categories of conduct: (1) intrinsic misconduct, that is, "conduct by jurors contrary to their instructions or oaths;" and (2) extrinsic misconduct, or "attempts by third parties to influence the jury process."[2] *Meyer v. State*, 80 P.3d

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[2] *Meyer* further clarifies the distinction:

> The first category includes jurors failing to follow standard admonitions not to discuss the case prior to deliberations, accessing media reports about the case, conducting independent research or investigation, discussing the case with nonjurors, basing their decision on evidence not admitted, discussing sentencing or the defendant's failure to testify, making a decision on the basis of bias or prejudice, and lying during voir dire. It also includes juror incompetence issues such as intoxication. The second

447, 453 (Nev. 2003). Tarango alleged both forms of misconduct, arguing that (1) Juror No. 2 changed his vote under pressure, rather than based on admissible evidence of Tarango's guilt, because of (2) an improper third party influence.

In support of the motion, Saggese submitted a declaration indicating that, after the trial court read the juror notes into the record and while deliberations were ongoing, Saggese overheard Deputy District Attorney Marc DiGiacomo report to Detective James Vacarro over the phone that one juror, Juror No. 2, was holding out. Saggese thus indirectly corroborated Juror No. 2's stated belief that he was being targeted as a hold-out juror by introducing evidence that members of the Las Vegas police department both knew that Juror No. 2 favored acquittal and had knowledge of Juror No. 2's identity.[3]

The trial court held a full hearing on Tarango's motion the following month. Juror No. 2, Defense Attorney Saggese, Detective Vacarro, and Deputy D.A. DiGiacomo were all called to testify regarding their knowledge of the alleged events and communications in

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> category involves attempts to influence the jury's decision through improper contact with jurors, threats, or bribery.

80 P.3d at 453. (internal citations omitted).

[3] During voir dire, the parties and the trial court learned various details about Juror No. 2's life. Juror No. 2 had served in the Air Force for four years doing "flight instrument trainers [*sic*], [and] navigation." He completed both high school and also trade school in electronics. At the time of his jury service, Juror No. 2 was employed as a network administrator, was married, and had a daughter. He had lived in Clark County, Nevada since 1991.

question. At the hearing, the court limited the questioning of Juror No. 2 pursuant to a provision of the Nevada Code of Evidence, Nev. Rev. Stat. § 50.065, which prohibits the admission for any purpose of testimony, affidavits, or evidence of any statement by a juror indicating an effect on the jury's deliberative process. The court also relied on the Nevada Supreme Court case of *Meyer v. State*, which provides that "[u]pon an inquiry into the validity of a verdict . . . , a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations, or to the effect of anything upon that or any other juror's mind."[4] 80 P.3d at 454 (quoting Fed. R. Evid. 606(b)). The trial court ultimately conducted all questioning of Juror No. 2 itself. Juror No. 2 testified as follows:

> [Right after getting on the freeway,] I was in the center lane [of US-95]. I noticed a Metro squad car behind me; fairly close behind me. . . . He was close enough I couldn't see his front wheels or bumper. And I looked down and I was not exceeding the speed limit.

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[4] *Meyer* also observes, though, that where juror misconduct involves "extrinsic information or contact with the jury, juror affidavits or testimony establishing the fact that the jury received the information or was contacted are permitted." *Meyer*, 80 P.3d at 454. *Meyer* distinguished extrinsic information about which a juror may testify from intrinsic influences that are "generally not admissible to impeach a verdict" as follows: "An extraneous influence includes, among other things . . . third-party communications with sitting jurors. In contrast, intra-jury or intrinsic influences involve improper discussions among jurors . . . , intimidation or harassment of one juror by another, or other similar situations . . . ." *Id.* (footnotes omitted).

. . .

I signaled and got over to the far right lane anticipating being pulled over and he stayed tight behind me.

. . .

I maintained under the speed limit anticipating being pulled over. A couple minutes and he never lit up, he never indicated that he was . . . going to pull me over. So I just maintained right lane position under the speed limit. This continued on.

. . .

[At Eastern Avenue] there was a lot of traffic entering the freeway . . . . [T]here was so many cars trying to merge into the freeway that the Metropolitan squad car actually pulled up closer to prevent anyone from pulling in between our vehicles.

. . .

And as soon as the . . . exit to Las Vegas Boulevard came, I even slowed down under 50, and that's a long exit there. It's, um, a quarter mile, half a mile, and even at that, he maintained position.

And he's not pulling me over. He's not . . . giving me a citation for nothing. He followed me down the hill, and at the stoplight for Las Vegas Boulevard. . . . He followed me, still tight. And there's several stop lights, something, Stewart, and then Carson is where the juror parking

> garage is. And we did get a red light there. He was still behind me. I took a right to enter the . . . jurors parking lot. That's when he relieved me from the escort or whatever he was doing. That's when he left me alone.

When questioned, Juror No. 2 indicated that he could not tell whether the driver of the vehicle was male or female, and he could not report the squad car number. However, Juror No. 2 averred that the car behind him was "a Metropolitan black and white vehicle." When questioned a second time, Juror No. 2 reiterated that the car remained "consistently" tight behind him for the duration of his commute to the courthouse—"[c]lose enough that [he] couldn't see the officer's bumper."

At the end of the hearing, the court orally denied Tarango's motion to dismiss or to grant a new trial. The trial court did not discredit Juror No. 2's testimony, and made one factual finding that Juror No. 2 "was followed closely, tightly, however you want to state it from Tropicana on US-95 to Las Vegas Boulevard and Carson."[5] The court went on to reach the following legal conclusion:

> I don't think there's any evidence of juror misconduct. There were no attempts to influence the jury. There's no outside influence on this particular juror. There's no communication or contact. The alleged conduct is ambiguous, it's vague and nonspecific in content. I'm required to

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[5] Having taken judicial notice of a roadmap of Las Vegas, Nevada, we confirm that the distance from East Tropicana Avenue on US-95 to South Las Vegas Boulevard and East Carson Avenue is approximately 7.5 miles.

> consider this extrinsic influence in light of the trial as a whole, and consider the weight of the evidence against Mr. Tarango and with that, and based on the [*Meyer*] decision, and the reasonable person test that I'm required to apply. I don't think that Mr. Tarango has met his burden. Therefore, the motion is denied.[6]

Weeks later, at a televised proceeding on February 8, 2006, the trial court denied Tarango's motion to reconsider on the basis of jury misconduct and entered judgment against him. The trial court sentenced Tarango to a 22–58 year term of imprisonment. Tarango promptly appealed the denial.

In September 2007, the Nevada Supreme Court affirmed the state trial court's denial of Tarango's motion for a new trial. *Tarango v. State*, No. 46680 (Nev. Sept. 25, 2007). The Nevada Supreme Court stated the relevant test as follows: "For a defendant to prevail on a motion for a new trial based on misconduct, the defendant must present admissible evidence sufficient to establish (1) the occurrence of

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[6] Juror No. 2 wrote a second letter to the trial judge following the hearing. The letter begins, "Your Honor; Please accept this letter as an apology. I was given the privilege to serve as a Juror and I failed." Juror No. 2 went on to apologize to God, his fellow Jurors, the Las Vegas Metropolitan Police Department, and the "Citizens of this Great State Nevada." He explained that his verdict was "untrue to [his] conscience," because he "let fear of reprisal enter into [his] mind and heart." As a result, Juror No. 2 expressed his desire "to nullify [his] verdict." Juror No. 2 conceded that his request "may not be taken legally," because he was ignorant of legal procedures, but that he "personally nullif[ies] [his] verdict to all those that will forgive me."

misconduct, and (2) a showing that the misconduct was prejudicial."[7] *Id.*, slip op. at 2 (citing *Meyer*, 80 P.3d at 455).

The Nevada Supreme Court first concluded that Juror No. 2's letters to the trial court were properly deemed inadmissible to prove that Juror No. 2 had voted guilty in violation of the jury instructions or contrary to his oath as a juror, reasoning that "for misconduct to be proved it 'must be based on objective facts and not the state of mind or deliberative process of the jury.'" *Id.*, slip op. at 6 (quoting *Meyer*, 80 P.3d at 454). Absent Juror No. 2's letters, the Nevada Supreme Court concluded that the "testimony of [Defense Attorney Saggese, Detective Vacarro, and Deputy D.A. DiGiacomo] was insufficient to show by objective facts that [Juror No. 2] committed misconduct." *Id.* The Nevada Supreme Court held that Tarango had thus failed to show by admissible evidence that Juror No. 2 had committed misconduct. *Id.*

The Nevada Supreme Court further held that there was no evidence of an improper external influence on Juror No. 2. Although the Nevada Supreme Court assumed "arguendo that [Juror No. 2] was followed by a marked police car," and observed that "any unauthorized communication between law enforcement and a juror about a matter pending before a jury may

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[7] The Nevada Supreme Court did not cite any United States Supreme Court authority in rendering its decision, but this is immaterial provided the state law is not inconsistent with clearly established federal law. *See Early v. Packer*, 537 U.S. 3, 8 (2002). Rather, as did the trial court, the Nevada Supreme Court relied almost entirely on its 2003 decision in *Meyer*.

be 'presumptively prejudicial,'" the court concluded that "[Juror No. 2] failed to show by objective facts that there was an improper external communication between him and the police." *Id.*, slip op. at 6–7. The Nevada Supreme Court explained that "it is not clear whether being followed by a marked car qualifies as a communication at all. It is even more dubious as to whether such a 'communication' was about a matter pending before the jury." *Id.*, slip op. at 7. In other words, having found that no "communication" had occurred, the Nevada Supreme Court determined that the alleged influence of the non-communicative contact was "too speculative" to sustain Tarango's motion for a new trial and did not reach the second prong of the misconduct inquiry—whether the contact was prejudicial. *Id.*

Following state habeas proceedings, Tarango timely filed his federal habeas petition on March 15, 2010. The federal district court for the District of Nevada was "tempted to say that the fact Juror 2 rendered his verdict based not upon the law and evidence, but because of his perception of a threat, is dispositive." However, without citing authority, the district court concluded that "Supreme Court case law is clear that objective proof of external contact is required." It further concluded that the state court did not err in concluding that no external contact had occurred, although the court found that determination "debatable." The district court therefore dismissed Tarango's petition in September 2013, upholding as reasonable the state court's determination that Tarango had failed to show any improper external contact.

On October 16, 2013, the district court granted Tarango a Certificate of Appealability as to Ground One of his amended petition, and Tarango filed a Notice of Appeal the same day. Ground One reads as follows:

> Tarango was convicted because one of the jurors believed that the State was trying to intimidate him, and not because he believed Tarango was guilty. As such, Tarango is incarcerated in violation of his right to a Fair Trial, an Impartial Jury, and Due Process under the 6th and 14th Amendments of the United States Constitution.

Tarango raises only the certified issue in his appeal before us.

DISCUSSION

I.

We review de novo a district court's denial of a habeas corpus petition. *Hurles v. Ryan*, 752 F.3d 768, 777 (9th Cir. 2014). But where, as here, a state court has adjudicated a claim on the merits, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) compels us to accord significant deference to the underlying state court decision. *See* 28 U.S.C. § 2254(d)(1)–(2). This court may grant relief only when the state court's adjudication of that claim either (1) "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 (2) was "based on an unreasonable determination of the facts in light of the evidence presented at the State Court proceeding." *Id.*

Where a state court fails to apply the clearly established federal law, applying an incorrect standard in reaching its decision, "the state court's adjudication [is] contrary to clearly established law." *Lafler v. Cooper*, 132 S. Ct. 1376, 1390 (2012) (holding that state court adjudication was contrary to clearly established federal law because it failed to apply *Strickland* to an ineffective-assistance-of-counsel claim). And in that circumstance, federal habeas courts "can determine the principles necessary to grant relief." *Id.* (citing *Panetti v. Quarterman*, 551 U.S. 930, 948 (2007)). In other words, a state court's failure to apply the proper standard under clearly established federal law "allows federal-court review . . . without deference to the state court's decision" and "unencumbered by the deference AEDPA normally requires." *Panetti*, 551 U.S. at 948; *see also Castellanos v. Small*, 766 F.3d 1137, 1146 (9th Cir. 2014) ("If the state court applies a legal standard that contradicts clearly established federal law, we review de novo the applicant's claims, applying the correct legal standard to determine whether the applicant is entitled to relief." (citing *Cooperwood v. Cambra*, 245 F.3d 1042, 1047 (9th Cir. 2001))).

In conducting this review, we look to the "last reasoned decision" by a state court addressing the issue at hand. *Miles v. Ryan*, 713 F.3d 477, 486 (9th Cir. 2012) (citing *Robinson v. Ignacio*, 360 F.3d 1044, 1055 (9th Cir. 2004)). In this case, we look to the Nevada Supreme Court's September 2007 decision affirming the state trial court's judgment on direct appeal.

II.

The Nevada Supreme Court, after assuming that Juror No. 2 was followed by a police car, decided that

such contact did not implicate Tarango's right to due process because it did not amount to a "communication," much less a communication "about a matter pending before the jury." The court declined to consider whether the police tail could have prejudiced the verdict. We hold that the Nevada Supreme Court violated clearly established Supreme Court case law, first by limiting its inquiry to whether the contact amounted to a "communication . . . about a matter pending before the jury" and, second, by failing to examine the potential impact of the non-communicative contact on Juror No. 2's verdict.

A.

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, 149–50 (1892). 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. *Caliendo v. Warden of Cal. Men's Colony*, 365 F.3d 691, 696 (9th Cir. 2004) (citing *United States v. Armstrong*, 654 F.2d 1328, 1331–33 (9th Cir. 1981)).

Clearly established federal law provides that any unauthorized "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." *Remmer v. United States*, 347 U.S. 227, 229 (1954)

(emphasis added). However, clearly established federal law also compels a criminal trial court to consider the prejudicial effect of *any* external contact that has a "tendency" to influence the verdict, irrespective of whether it is about the matter pending before the jury. *Mattox*, 146 U.S. at 150–51. Moreover, an external contact need not amount to a "communication" to trigger some judicial inquiry into possible prejudice. *See Smith v. Phillips*, 455 U.S. 209, 212–15 (1982) (requiring judicial inquiry into possible prejudice arising from a juror's job application in the office of the prosecutor trying the case); *Mattox*, 146 U.S. at 150 (recognizing the prejudicial potential of "the reading of newspapers").

B.

The Supreme Court has not established a bright-line test for determining what constitutes a possibly prejudicial "external" influence on a jury. The Court has devoted more recent attention to clarifying what "falls on the 'internal' side of the line." *Warger v. Shauers*, 135 S. Ct. 521, 529 (2014) (holding that a juror's dishonesty during voir dire is internal to the deliberative process and not admissible to impeach a verdict); *see also Tanner v. United States*, 483 U.S. 107, 118–25 (1987) (holding that jurors' consumption of drugs and alcohol during trial is internal to the deliberative process and not admissible to impeach a verdict). It is clearly established that a juror's physical or mental incapacity, substance abuse, and dishonesty during voir dire all amount to internal—not external—influences on a jury's verdict. *Tanner*, 483 U.S. at 118–25; *Warger*, 135 S. Ct. at 529. On the other end of the spectrum, the Court long ago explained that

an "extraneous influence" would include "something which did not essentially inhere in the verdict,—an overt act, open to the knowledge of all the jury, and not alone within the personal consciousness of one." *Mattox*, 146 U.S. at 149 (quoting *Perry v. Bailey*, 12 Kan. 539, 545 (1874)).

In more recent decisions interpreting the *Mattox* rule, the Court has clarified that an external contact need not be intentional, *Gold v. United States*, 352 U.S. 985 (1957) (granting a new trial where the FBI approached jurors about a different but related case, even though "the intrusion was unintentional"), nor verbal, *Smith*, 455 U.S. at 212–15, 221; *see also Mattox*, 146 U.S. at 150 (noting that the presence of an officer in the jury room during the deliberations would be "fatal to the verdict"). Rather, an impermissible external influence can arise where, for example, a juror is shown to have a relationship with the office of the prosecutor trying the case. *Smith*, 455 U.S. at 212. In addition, an external contact need only have influenced one juror, because a defendant is "entitled to be tried by 12 . . . impartial and unprejudiced jurors." *Parker v. Gladden*, 385 U.S. 363, 366 (1966).

The Supreme Court has identified an "extraneous influence" requiring judicial inquiry into prejudice in cases where the jury heard and read information about the defendant's propensity for murder, which was not admitted into evidence, *Mattox*, 146 U.S. at 150–51; where members of a jury overheard the bailiff make disparaging comments about the defendant, *Parker*, 385 U.S. at 363–65; where a juror was contacted by an FBI agent after being offered a bribe to acquit the defendant, *Remmer*, 347 U.S. at 228–30; and where a

juror had submitted an application for employment at the office of the prosecutor trying the case, *Smith*, 455 U.S. at 212, 216–17.

C.

Mattox requires a trial court to examine possible prejudice when it is confronted with evidence of an external contact that has a "tendency" to be "injurious to the defendant." *Mattox*, 146 U.S. at 150. Thus, an external contact with a juror need only raise a credible risk of influencing the verdict to be deemed possibly prejudicial. *Mattox* and its progeny further establish that undue contact with a juror by a government officer almost categorically risks influencing the verdict. Indeed, *Mattox* observed that the mere presence of a court officer or bailiff during the jury's deliberations would "absolutely vitiate the verdict . . . *without regard to whether any improper influences were actually exerted over the jury or not*." *Mattox*, 146 U.S. at 150 (emphasis added); *see also Smith*, 455 U.S. at 221 (holding that a juror's pending job application with the prosecutor's office required a post-trial hearing on juror bias); *Parker*, 385 U.S. at 365 ("[T]he official character of the bailiff—as an officer of the court as well as the State—beyond question carries great weight with a jury . . . ."); *Remmer*, 347 U.S. at 229 ("The sending of an FBI agent in the midst of a trial to investigate a juror as to his conduct is bound to impress the juror and is very apt to do so unduly.").

To be sure, "it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." *Smith*, 455 U.S. at 217. "[D]ue process does not require a new trial every time a juror has been placed in a compromising situation." *Id.*

Threadbare or speculative allegations, or allegations involving "prosaic kinds of jury misconduct" do not trigger a presumption of prejudice. *United States v. Dutkel*, 192 F.3d 893, 894–85 (9th Cir. 1999); *see also Xiong v. Felker*, 681 F.3d 1067, 1077 (9th Cir. 2012) (noting that the Supreme Court jurisprudence regarding juror misconduct "all involved . . . significant, and in some cases deliberate interference with the deliberation process").

Mindful of this reality, and given the need to preserve the finality of a jury's verdict, courts universally prohibit jurors from impeaching their own verdicts through evidence of their internal deliberative process. *See, e.g.*, *Tanner*, 483 U.S. at 117–20. However, regardless of the forms of evidence admissible to demonstrate that a contact occurred, *see United States v. Rutherford*, 371 F.3d 634, 644–45 (9th Cir. 2004), the Supreme Court has unequivocally and repeatedly held that due process requires a trial judge to endeavor to "determine the effect" of occurrences tending to prejudice the jury when they happen.[8] *Smith*, 455 U.S. at 217; *see also Parker*, 385 U.S. at 365; *Remmer*, 347 U.S. at 229–30; *Mattox*, 146 U.S. at 150–51.

D.

Once a defendant shows an external occurrence having a tendency toward prejudice, federal law clearly

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[8] In *Smith*, for example, the Court held that the district court properly conducted a hearing that explored the "effect" of a juror's relationship with the prosecutor's office before concluding that the defendant was not prejudiced by that relationship. 455 U.S. at 217–18.

requires a trial court to investigate the harmlessness or actual prejudice of the occurrence. *Mattox*, 146 U.S. at 150; *Smith*, 455 U.S. at 215 ("This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias."). The *Mattox* Court categorically mandated that "possibly prejudicial" external contacts "invalidate the verdict, at least unless their harmlessness is made to appear." *Mattox*, 146 U.S. at 150. This is required even if, as noted above, the contact did not constitute a communication nor concern a matter pending before the jury. *See Smith*, 455 U.S. at 215; *Mattox*, 146 U.S. at 150. Supreme Court case law also requires this procedure irrespective of whether or not the court knows "what actually transpired" and when, as the dissent highlights, the influence of that contact is speculative or uncertain.[9] *Remmer*, 347 U.S.

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[9] The dissent incorrectly characterizes our holding as requiring an inquiry into prejudice even where the alleged contact or communication is unsubstantiated. Dissent at 41. To be clear, we agree that if the trial court had discredited Juror No. 2's testimony and found that no pursuit occurred, then neither the trial court nor the Nevada Supreme Court would have had any cause to examine prejudice. *See Caliendo*, 365 F.3d at 698 n.4. But this is not the record before us. The trial court did not discredit the juror's testimony. The trial court characterized the "content" of the police tail as "ambiguous," "vague," and "nonspecific," but the court did not find that no police tail had occurred. Absent any clear finding with respect to the alleged police tail, the Nevada Supreme Court prudently assumed that the juror had been followed. Based on that assumption, in order to determine whether jury tampering occurred, Supreme Court case law requires the court to consider the prejudice or influence of that contact. Contrary to clearly established Supreme Court case law, the Nevada Supreme Court failed to conduct this inquiry.

at 229; *see also id.* at 229–30 (mandating an evidentiary hearing where "*information* . . . [about an external contact] *was received*" by a trial court (emphasis added)). The Supreme Court has further held that prejudice is more probable where the record reflects that a jury could not agree as to the defendant's guilt. *Parker*, 385 U.S. at 365 (citing as evidence of prejudice the fact that "the jurors deliberated for 26 hours, indicating a difference among them as to the guilt of petitioner").

III.

In sum, the governing Supreme Court case law can be distilled as follows: Where a court receives information, *Remmer*, 347 U.S. at 229–30, about an unauthorized external contact between a juror and a government agent whose official position "carries great weight with a jury,"*Parker*, 385 U.S. at 365, that contact has a "tendency to . . . influence" the verdict, and the trial court must presume the external contact prejudiced the defendant unless the government provides contrary evidence. *Mattox*, 146 U.S. at 150. This is true whether or not the contact was intentional, *Gold*, 352 U.S. at 985, whether or not the contact involved a verbal communication, *Smith*, 455 U.S. at 212; *Mattox*, 146 U.S. at 150, and whether or not the trial court or defendant "know[s] . . . what actually transpired," *Remmer*, 347 U.S. at 229.[10] Once a

[10] The dissent suggests that *Mattox* "expressly" requires "proof that jury tampering actually occurred," Dissent at 41–42, but this argument misses the point. The Nevada Supreme Court presumed an unauthorized external contact with a juror had occurred. As *Mattox* and its progeny explain, a court must examine the

potentially prejudicial contact is alleged, the court should "determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." *Id.* at 230.

In this case, the Nevada Supreme Court assumed a contact—albeit not a "communication"—occurred. Our case law compels our conclusion that the contact in question had enough of a tendency to influence the jury's verdict so as to necessitate judicial inquiry into prejudice. It was thus error for the Nevada Supreme Court not to conduct a prejudice analysis merely because Juror No. 2's police tail did not amount to a "communication . . . about a matter pending before the jury."

A.

Assuming the truth of Juror No. 2's testimony that he had been followed closely for seven miles on the second day of deliberations,[11] the Nevada Supreme

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prejudice of such a contact as part of its determination as to whether the contact amounted to jury tampering. Here, the Nevada Supreme Court contravened clearly established federal law by not evaluating whether the external contact was prejudicial.

[11] The trial court specifically found that Juror No. 2 "*testified* he was followed closely, tightly, however you want to state it from Tropicana on US-95 to Las Vegas Boulevard and Carson." The trial court did not discredit Juror No. 2's testimony, and appears to have accepted the allegation as true, at least for the sake of its decision denying Tarango's motion to dismiss. In any event, our review is limited to the Nevada Supreme Court's decision, *see Miles*, 713 F.3d at 486, which assumed that Juror No. 2 was in fact followed.

Court concluded that this conduct does not constitute a "communication." On this basis, the Nevada Supreme Court then concluded that any influence was "too speculative" to warrant examination of prejudice. Thus, the Nevada Supreme Court declined to consider whether the conduct in fact influenced the verdict. As set forth above, this decision contravenes the standard clearly established by Supreme Court case law, under which a defendant need not prove a "communication . . . about a matter pending before the jury," or even a "communication" about an unrelated issue. *See Smith* 455 U.S. at 212–15. Only a threshold showing of any "contact," *Remmer*, 347 U.S. at 229, with a "tendency to adverse influence" is required to prompt the court to investigate whether that contact was, in fact, prejudicial. *Mattox*, 146 U.S. at 150.

In light of this, we have little trouble concluding that the contact that the Nevada Supreme Court assumed occurred had enough potential for prejudice to cross *Mattox*'s low threshold. Las Vegas police officers were deeply entangled in this case as victims, witnesses, investigators, and trial spectators. Juror No. 2 testified that he had been closely followed by a marked police car for over seven miles. *See Parker*, 385 U.S. at 365 (observing that government agents "carr[y] great weight with a jury"). Juror No. 2's testimony indicates that the tail was maintained at a distance so close that Juror No. 2 could not see the police vehicle's front wheels or bumper—if true, this conduct could have reasonably been understood as an attempt to intimidate. Moreover, Juror No. 2 was a known hold-out before the contact occurred. The Supreme Court has clearly established that the likelihood of possible

prejudice increases where, as here, the jury was previously deadlocked. *See id*.

B.

Thus, because the state court assumed that the contact did in fact occur and clearly established case law demonstrates that the contact had a tendency to affect the verdict, the court should have, at a minimum, investigated the prejudice or harmlessness of the contact even if at the time the court was unaware what exactly transpired or whether the impact was harmful. *See Remmer*, 347 U.S. at 229. The Nevada Supreme Court erred when it failed to do so.

Certainly, there may be circumstances in which a trial court finds a juror's allegations of an external contact are unsupported by sufficient evidence, or in which the allegations are so implausible or incredible that they may be reasonably disregarded. There may also be cases in which an alleged external contact suggests paranoia or some underlying mental incompetence on the juror's part. *See Tanner*, 483 U.S. at 118–19. Under those circumstances, a court will not run afoul of the Constitution by refusing to consider whether the alleged contact affected the verdict. But this is not the case on the record before us.

Here, Juror No. 2's testimony was not discredited. To the contrary, crediting Juror No. 2's testimony about a plausible external contact with a juror reluctant to convict, the Nevada Supreme Court declined to consider whether Juror No. 2 may have

been prejudiced by the police tail.[12] This contravened clearly established federal law.[13] *See Remmer*, 347 U.S. at 229–30; *Mattox*, 146 U.S. at 150; *Smith*, 455 U.S. at 215.

IV.

Because the Nevada Supreme Court failed to consider the prejudicial impact of the contact, in violation of the law clearly established in *Mattox*, we may evaluate Tarango's claim "without deference to the state court's decision" and "unencumbered by the deference AEDPA normally requires."[14] *Panetti*, 551

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[12] The dissent suggests that the cited Supreme Court cases are insufficiently specific to support our holding. *See* Dissent at 41–42. To the contrary, *Mattox* and its progeny set forth a standard that "clearly extend[s]" to the case before us. *See Wright v. Van Patten*, 552 U.S. 120, 123 (2008). Where, as here, contact between a hold-out juror and a government official is shown, a court must investigate possible prejudice. The Nevada Supreme Court's failure to reach the prejudice inquiry was contrary to clearly established federal law.

[13] *Meyer*, which the Nevada Supreme Court relied upon, appears to require the same of Nevada courts. Although *Meyer* rejects "the position that any extrinsic influence is automatically prejudicial," it does not limit the occasions in which a court must consider the possibility of prejudice. *See* 80 P.3d at 455. Rather, because prejudice is not presumed for less egregious contacts, "the extrinsic information must be analyzed in the context of the trial as a whole to determine if there is a reasonable probability that the information affected the verdict." *Id.* at 455–56. *Meyer* does not, however, wholly foreclose a prejudice inquiry in the face of credible allegations of juror misconduct. *Id.*

[14] The dissent cites a number of Ninth Circuit AEDPA cases that were reversed by the Supreme Court, and in which the Supreme

U.S. at 948; *see also Castellanos*, 766 F.3d at 1146. Reviewing *de novo*, we hold that the Nevada trial court improperly restricted the scope of the evidentiary hearing, effectively preventing Tarango from proving prejudice.

Under our precedent, where an external contact with the jury is shown, a trial court should determine whether the contact "raises a risk of influencing the verdict." *Caliendo*, 365 F.3d at 697. Under such circumstances, prejudice is presumed and the government bears the burden of rebutting the presumption of prejudice. *Id.* To be sure, "certain chance contacts between witnesses and jury members—while passing in the hall or crowded together in an elevator—may be inevitable." *Id.* at 696 (internal quotation marks and citation omitted). Therefore, if the contact involves a "prosaic" or "more common and less pernicious extraneous influence" than jury tampering, the court should determine whether the jury was "substantially swayed" by the contact.[15] *United States v. Henley*, 238 F.3d 1111, 1115–16 (9th Cir. 2001). Under this circumstance, the defendant bears the burden of offering sufficient evidence to trigger a presumption of prejudice. *See Caliendo*, 365 F.3d at 696–97 (collecting authorities).

Court "chastised us" for ignoring AEDPA's demanding standard. *See* Dissent at 34. These cases have no bearing on the issue presented in this appeal.

[15] The Nevada Supreme Court has identified a similar dichotomy in its own construction of Supreme Court case law prohibiting external influences on criminal juries. *Meyer*, 80 P.3d at 455–56.

Although the anti-impeachment rule, codified as Federal Rule of Evidence 606(b)(1), prohibits juror testimony regarding "any juror's mental processes concerning the verdict," an exception to the rule permits juror testimony about whether "an outside influence was improperly brought to bear on any juror." Fed. R. Evid. 606(b)(2)(B). This court has accordingly deemed admissible limited juror testimony to determine "the impact [of an outside influence] upon the juror, and whether or not [the outside influence] was prejudicial." *Remmer*, 347 U.S. at 230; *see also Rutherford*, 371 F.3d at 643–45 (considering juror affidavits including claims that the jury felt intimidated by police officers' glares); *Caliendo*, 365 F.3d at 699 (considering a juror's testimony that the jury's external communication with a police officer left them with a favorable opinion of the officer).

Unlike Nevada law, our precedent instructs that a court should not limit juror testimony to "the existence of [an external contact]." *Rutherford*, 371 F.3d at 644 (quoting the district court in that case). Rather, a court "should [also] consider the 'effect of extraneous information or improper contacts on a juror's state of mind,' a juror's 'general fear and anxiety following' such an incident, and any other thoughts a juror might have about the contacts or conduct at issue." *Id.* (quoting *United States v. Elias*, 269 F.3d 1003, 1020 (9th Cir. 2001)). To that end, consistent with the anti-impeachment rule, this court permits the introduction of limited evidence of a juror's state of mind to prove juror misconduct. A court may not, consistent with the anti-impeachment rule, admit testimony "regarding the affected juror's mental processes in *reaching the verdict*." *Id.* (internal quotation marks omitted)

(quoting *Elias*, 269 F.3d at 1020). However, "a juror's testimony concerning his fear that individuals would retaliate against him if he voted to acquit (or convict) would be admissible, although his statement that he actually cast his vote one way or the other because of that fear would not." *Id.*

Consistent with the principles announced in *Rutherford*, the district court should admit Juror No. 2's statements about how the police tail impacted him, although not how it impacted his deliberations and verdict. Therefore, Juror No. 2's statement that he found the police tail "unnerving" is admissible, as are his statements that he "concluded Metro somehow knew who [he] was." By contrast, Juror No. 2's statements that he "relinquished his vote under duress," and "still [has] doubt as an X-Juror" are not admissible.

V.

Because the scope of the evidentiary hearing was narrowly circumscribed in the state trial court, the record before us is insufficient to determine whether the police tail influenced the verdict and prejudiced Tarango. We accordingly remand for the district court to hold an evidentiary hearing and apply the proper standard to determine whether the Nevada courts violated Tarango's due process right to a fair and impartial jury by failing to adequately consider allegations of a prejudicial external influence on the jury. Following this court's precedent, the district court should permit Tarango to offer limited evidence to show prejudice, *see Caliendo*, 365 F.3d at 696–97; *Henley*, 238 F.3d at 1115–16, including evidence of

Juror No. 2's "general fear and anxiety" following the police tail, *see Rutherford*, 371 F.3d at 644.

VACATED AND REMANDED.

RAWLINSON, Circuit Judge, dissenting:

I agree with the majority that *if* a member of the Las Vegas Metropolitan Police Department purposefully tail-gated a holdout juror on the freeway for over seven miles, because the juror was a holdout, such conduct might constitute external jury contact requiring further inquiry from the court. However, the Nevada Supreme Court determined that the juror's assumption that the police officer targeted him as the holdout juror was speculative and unsubstantiated.[1] As recognized by the majority, the Nevada Supreme Court

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[1] The majority mischaracterizes my description of the state courts' factual determination. *See Majority Opinion*, p. 22 n.9. The state court did not discredit, and I did not describe the state courts' finding as discrediting, Juror No. 2's statement that he "thought he was followed by a police car." *Nevada Supreme Court Order*, p. 2. What the state courts did discredit, and what I did describe the state courts as finding, was a lack of substantiation that the police car was following Juror No. 2 on the freeway because he was a holdout juror. There was insufficient evidence in the state courts' view that a tail-gating police officer in rush-hour morning traffic constituted an improper external influence. Rather than focusing on whether Tarango submitted evidence of an external influence, *see, e.g.*, *Mattox v. United States*, 146 U.S. 140, 141–44 (inflammatory newspaper article read to the jury); *Remmer v. United States (Remmer I)*, 347 U.S. 227, 228 (1954) (juror told he could profit from favorable verdict), the majority concludes that the existence of police tail-gating during rush hour traffic, and nothing more, compelled the state court to conduct a prejudice inquiry.

expressly found that "there was no evidence of an improper external influence on Juror No. 2. . . ." *Majority Opinion*, p. 14. We are bound by that factual determination absent a showing of unreasonableness. *See* 28 U.S.C. § 2254(d)(2).

Appellant Manuel Tarango moved for a new trial in the state court on the basis of an "outside influence on the jury process." *Nevada Supreme Court Order*, p. 1. According to the Nevada Supreme Court, the holdout juror conveyed that "*he thought he had been followed by a police car*." *Id*., p. 2. (emphasis added). Because he felt intimidated, the juror changed his vote to guilty from not guilty.

The Nevada Supreme Court also noted that a recent newspaper article attributed the juror's change of heart to the fact that "the other jurors were able to convince the holdout to convict. . . ." *Id*., p. 4. After discussing the juror's email to the trial judge and the juror's follow-up letter, the Nevada Supreme Court concluded that the trial court properly excluded from consideration the juror's emails to the trial judge and defense counsel under N.R.S. 50.065(2) and the Nevada case of *Meyer v. State*, 80 P.3d 447 (Nev. 2003).

Nevada Revised Statute 50.065(2) provides:

> Upon an inquiry into the validity of a verdict or indictment:
>
> (a) A juror shall not testify concerning the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or

> concerning the juror's mental processes in connection therewith.
>
> (b) The affidavit or evidence of any statement by a juror indicating an effect of this kind is inadmissible for any purpose.

In *Meyer*, the Nevada Supreme Court interpreted N.R.S. 50.065. Initially, the court referenced Federal Rule of Evidence 606(b), which it identified as an embodiment of "the long-standing common-law rule against admission of jury testimony to impeach a verdict . . ." 80 P.3d at 454 & n.20 (citations and internal quotation marks omitted). The court also noted that N.R.S. 50.065 was "substantially the same" as the federal rule. *Id*. at n.20.

Importantly, the Nevada Supreme Court made a distinction between juror misconduct and jury tampering. *See id*. at 454–55. Citing Supreme Court authority, the court identified extraneous influence as jury tampering rather than juror misconduct. *See id*. at 455 (citing *Remmer I*; *see also Remmer v. United States (Remmer II)*, 350 U.S. 377 (1956)).

Under this framework established by its precedent, the Nevada Supreme Court ruled that, after excluding the inadmissible evidence of the juror's state of mind and of the deliberative process of the jury, there was insufficient evidence that the juror committed misconduct. *See Nevada Supreme Court Order*, p. 6.

The Nevada Supreme Court then turned to the asserted extraneous influence of a police car following

the juror on the freeway.[2] Admittedly, the court couched its analysis in terms of whether being followed by a police car constituted a "communication." *Id*., p. 7. Nevertheless, the court ultimately concluded that "the alleged external influence in the case at bar was far too speculative to sustain a motion for a new trial." *Id*. It is this conclusion that is reviewed under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

In the last ten years, the United States Supreme Court has repeatedly rebuked this Circuit for attempting to make end-runs around the formidable obstacles to review contained in the AEDPA. As the majority acknowledges, habeas relief under the AEDPA is available only if the decision of the state court decision "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or . . . was based on an unreasonable determination of the facts in light of the evidence presented at the State Court proceeding." *Majority Opinion*, p. 16 (quoting 28 U.S.C. § 2254(d)(1)–(2)) (internal quotation marks omitted). Despite our recurring acknowledgment of this demanding standard, the Supreme Court has constantly chastised us for failing to take our professed acknowledgment to heart. In *Glebe v. Frost*, 135 S. Ct.

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[2] The majority takes judicial notice of a roadmap of Las Vegas, Nevada to approximate the distance involved as 7.5 miles. *See Majority Opinion*, p. 12 n.5. The majority should have also taken notice that US-95 is the only freeway that accesses downtown from east on Tropicana Boulevard, and therefore it would not be unusual for a police officer to take that route to police headquarters downtown.

429, 431 (2014), the Court observed that we acknowledged its ruling, "but tried to get past it." Similarly, in *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014), the Court chided this Circuit for "attempt[ing] to evade [the] barrier" established by the AEDPA.[3]

In *Nevada v. Jackson*, 133 S. Ct. 1990, 1993 (2013), the Court reversed us for relying on a decision that was "very far afield." Unfortunately, the majority opinion again strays from the narrow confines of appropriate habeas review. Rather than reviewing the state court's determination that proof of the alleged external influence was too speculative to constitute jury tampering, the majority grants habeas relief on the basis that the Nevada Supreme Court "improperly limited its inquiry to whether the external contact amounted to a communication," contrary to *Mattox v. United States*, 146 U.S. 140 (1892). *Majority Opinion*, p. 4 (internal quotation marks omitted). The majority then proceeds to "review *de novo* the question whether the extrinsic contact *could have influenced* the verdict and prejudiced Tarango." *Id*. at 4. (emphasis added). Finally, the majority remands "for an evidentiary hearing and further fact finding." *Id.*

There are three problems with the majority's analysis. The first is that *Mattox* is "far afield" from the dispositive issue in this case. *Jackson*, 133 S. Ct. at 1993. The second is that the majority gives no deference to the decision of the Nevada Supreme Court,

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[3] The majority makes light of the many rebukes we have received from the Supreme Court for ignoring the demanding standard under which we review habeas cases. *See Majority Opinion*, p. 27 n.14. I doubt the Supreme Court will be amused.

but rather engages in impermissible appellate factfinding. The third is that no Supreme Court case supports the majority's conclusion. I will address each problem in turn.

1. Reliance on *Mattox*

Mattox, a case decided in 1892, is notable not only for its age and obvious pre-dating of the AEDPA, but for its unremarkable holding. In *Mattox*, the United States Supreme Court addressed the denial of a motion for a new trial made by a defendant who was tried in *federal* court. *See* 146 U.S. at 141. The basis of the motion was the reading of an inflammatory newspaper article to jurors during their deliberations, as well as prejudicial comments made to jurors by the bailiff. *See id*. at 143–44, 151.

The Supreme Court observed that the affidavits submitted by the jurors were properly received because they refrained from articulating "what influence, if any, the communication of the bailiff and the reading of the newspaper had upon them, but confined their statements to what was said by the one [the bailiff] and read from the other [the newspaper]." *Id*. at 147. The Court emphasized that the extraneous influences were "open to the knowledge of all the jury, and not alone within the personal consciousness of one." *Id*. at 149.

The Court held that "*[p]rivate communications*, possibly prejudicial, between jurors and third persons . . . or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." *Id*. at 150 (emphasis added). However, the Court also provided that any assertion of jury tampering was "subject to rebuttal by

the prosecution; or *contingent on proof indicating that a tampering really took place*." *Id*. at 149–50 (citations omitted) (emphasis added).

In *Mattox*, the existence of the extraneous influence was undisputed. The Supreme Court summarized the newspaper article as stating:

> that the defendant had been tried for his life once before; that the evidence against him was claimed to be very strong by those who had heard all the testimony; that the argument for the prosecution was such that the defendant's friends gave up all hope of any result but conviction; and that it was expected that the deliberations of the jury would not last an hour before they would return a verdict . . .

Id. at 150–51.

The Court described the extraneous statement from the bailiff as informing the jury "that this was the third person Clyde Mattox had killed . . ." *Id*. at 151.

Considering these facts, it is unremarkable that the Supreme Court held that the undisputed evidence of jury tampering warranted the grant of a new trial. However, nothing in the holding or reasoning of *Mattox* supports the majority's disregard of the state court's determination that Tarango's evidence of jury tampering was speculative. The majority cites *Mattox* for the proposition that the trial court was compelled to "consider the prejudicial effect of *any* external contact that has a 'tendency' to influence the verdict. . . ." *Majority Opinion*, p. 18. However, the majority's analysis conveniently omits the discussion in *Mattox* of the undisputed evidence that established, without

challenge, the existence of the external contact. *See Mattox*, 146 U.S. at 150–51. The majority also elides the language in *Mattox* explaining that relief is "contingent on proof indicating *that a tampering really took place*." *Id*. at 149–50 (citations omitted) (emphasis added). Unlike in *Mattox*, the evidence submitted by Tarango was disputed. Indeed, the prosecutor denied providing the identity of the holdout juror to anyone at the Police Department. Having reviewed the testimony presented to the trial court, the Nevada Supreme Court agreed with the trial court that the evidence of jury tampering was speculative in the absence of evidence that the identity of the holdout juror was provided to anyone in the Police Department. This determination was entirely consistent with the requirement in *Mattox* of proof that jury tampering actually occurred.

It cannot be fairly said that *Mattox* compels consideration of the prejudicial effect of *speculative* evidence of jury tampering. Rather, as with other factual determinations, the existence of jury tampering is a matter to be resolved by the trial court. *See Uttecht v. Brown*, 551 U.S. 1, 17, 20 (2007) (explaining that "it is the trial court's ruling that counts" due to its ability to perceive the demeanor of the witnesses). The trial court conducted an evidentiary hearing, and determined that the allegation of jury tampering was "vague" and "ambiguous" and "nonspecific." The Nevada Supreme Court's affirmance of the trial court's determination that the evidence of jury tampering was "speculative" was not contrary to *Mattox* because the holding of *Mattox* is "far afield" from the facts of this case. *Jackson*, 133 S. Ct. at 1993.

The majority also relies on our decision in *United States v. Armstrong*, 654 F.2d 1328, 1331–33 (9th Cir. 1981). However, that case is more helpful to the dissent than to the majority. In that case, a juror reported that her husband had taken two calls using obscene language and directing the husband to "[t]ell your wife to stop hassling my brother-in-law at court." *Id*. at 1331. On direct appeal, we determined that an outside influence must be present to raise the presumption of prejudice. *See id*. at 1332. That is where the majority's analysis falters, because the Nevada state courts *never* found that an external influence was exerted upon Juror No. 2. At most, the courts assumed the juror was followed, but did not link the asserted tail-gating to Juror No. 2's status as a holdout juror. Tail-gating an individual who is not known to be a holdout juror, or a juror at all, would not have a "tendency" to influence the jury's verdict, and would not prompt a prejudice inquiry. *Mattox*, 146 U.S. at 150–51.[4]

The other cases cited by the majority as clearly established Federal law are similarly "far afield." In *Remmer I*, 347 U.S. at 228–29, unlike in this case, the allegations of jury tampering were unchallenged by the prosecution, yet the district court denied the motion for a new trial. On direct appeal, the United States Supreme Court remanded the case for a hearing on prejudice. *See id*. at 229–30. Not only is this case "far

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[4] Curiously, the majority opinion implies that a newspaper article is not a "communication." *Majority Opinion*, p. 18. Nothing could be further from the truth. *See Hillard v. Arizona*, 362 F.2d 908, 909 (9th Cir. 1966) (noting that the Judge admonished jurors "to avoid out of court communications . . . including newspaper articles).

afield" because it did not involve habeas review. *See Cullen v. Pinholster*, 131 S. Ct. 1388, 1410 (2011) (clarifying that a case offers no guidance for habeas review under the AEDPA if the court did not apply AEDPA deference); *see also Harrington v. Richter*, 562 U.S. 86, 101 (2011). The allegations were also unchallenged, and the trial court failed to conduct a hearing. *See Remmer I*, 347 U.S. at 228–29; *see also Parker v. Gladden*, 385 U.S. 363, 364–65 (1966) (allegations unrefuted).

In *Smith v. Phillips*, 455 U.S. 209, 215 (1982), the Supreme Court held that "the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias. . . ." That is precisely what occurred in the state court. Tarango had the opportunity to prove the allegations, and the state courts determined that his proof was inadequate. That should be the end of the matter under habeas review. *See Premo v. Moore*, 562 U.S. 115, 131 (2011).

2. Failure to defer to the Nevada Supreme Court

The Supreme Court has consistently and repeatedly stressed our obligation on habeas review to defer to the rulings and factual determinations made by the state courts. *See Uttecht*, 551 U.S. at 10 ("By not according the required deference, the Court of Appeals failed to respect the limited role of federal habeas relief in this area prescribed by Congress and by our cases."); *see also Jackson*, 133 S. Ct. at 1994 (referencing the "substantial deference" required by AEDPA); *Cavazos v. Smith*, 132 S. Ct. 2, 7 (2011) (mentioning Supreme Court opinions "highlighting the necessity of deference to state courts in § 2254(d) habeas cases"); *Pinholster*,

131 S. Ct. at 1398 (describing the "highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt") (citation omitted); *Richter*, 562 U.S. at 104 (reversing this Circuit for "a lack of deference to the state court's determination and an improper intervention in state criminal processes, contrary to the purpose and mandate of AEDPA and to the now well-settled meaning and function of habeas corpus in the federal system").

The trial court determined that Tarango failed to adequately establish that jury tampering occurred, due to the speculative, vague, ambiguous and disputed nature of the allegations that a police officer identified Juror No. 2 as the holdout juror and tail-gated that juror for over seven miles. Although the trial court could have credited the juror's version of events over the prosecution's rebuttal, it did not do so. Rather than deferring to the state court's determination, the majority engaged in its own factfinding, stating that: "[W]e have little trouble concluding that the contact that the Nevada Supreme Court assumed occurred had enough potential for prejudice to cross *Mattox's* low threshold. . . ." *Majority Opinion*, p. 25.[5]

The majority's disregard of the state court's determination and substitution of its alternate

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[5] The majority completely ignores the fact that the state court *never* found that the police officer was aware of the identity of the holdout juror. For that reason, the state court merely assumed that there was a tail-gating, not that there was "external contact." The assumption of "external contact" is made by the majority.

conclusion strays from our appointed role on habeas review. *See Richter*, 562 U.S. at 104.

3. No supporting Supreme Court authority

Under the rule expressed by the majority, a trial court would have to conduct a prejudice analysis whenever an allegation of jury tampering is made, even if the trial court ultimately determines that the allegation is unsubstantiated. *See Majority Opinion*, p. 22 n.9 (discounting the trial court's determination that the allegation of jury tampering was "ambiguous, vague and nonspecific") (internal quotation marks omitted).

No Supreme Court precedent supports the majority's rationale. As previously noted, *Remmer I* and *Mattox* involved undisputed evidence of extraneous influence. *See Remmer I*, 347 U.S. at 229; *see also Mattox*, 146 U.S. at 151. *Smith* merely stands for the proposition that the defendant asserting jury tampering must be afforded a hearing. *See* 455 U.S. 215. It is without question that Tarango was afforded a hearing. So we are left with the majority's premise untethered to any controlling Supreme Court authority. Rather, *Mattox* expressly points in the other direction, requiring proof that jury tampering actually occurred. *See* 146 U.S. at 149–50.[6]

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[6] The majority accuses me of missing the point, *see Majority Opinion*, p. 23 n.10, but it is the majority that is off-base. The state courts NEVER "presumed an unauthorized external contact with a juror had occurred." *Id.* The most the state courts assumed was that a police car tail-gated Juror No. 2 during morning rush-hour traffic on the only freeway that accesses downtown from east Tropicana Boulevard. The majority presumes the rest.

The Supreme Court has addressed the tendency of this Circuit to reach beyond the confines of Supreme Court precedent. In *Lopez*, 135 S. Ct. at 4, the Supreme Court scolded us for relying on "older cases that stand for nothing more than [a] general proposition." Here, the majority similarly cites older cases standing for the general proposition that a defendant is entitled to a hearing when jury tampering is asserted, and a determination of prejudice when jury tampering has been established. *See Remmer I*, 347 U.S. at 228–29; *see also Smith*, 455 U.S. at 215. Just as in *Lopez*, "[n]one of [the Supreme Court] decisions that the [majority] cited addresses, even remotely, the specific question presented by this case." 135 S. Ct. at 4 (citations omitted). The specific question in this case is whether the trial court is required to conduct a prejudice inquiry when that court has determined that the allegations of jury tampering are "ambiguous, vague and nonspecific." The majority has cited no Supreme Court case addressing this specific question.[7] Consequently, the Nevada Supreme Court decision could not have been contrary to federal law under the AEDPA. *See Knowles v. Mirzayance*, 556 U.S. 111, 122

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[7] The majority takes issue with, and in the process implicitly concedes, my point that the Supreme Court cases relied upon by the majority "are insufficiently specific." *Majority Opinion*, p. 26 n.12. In the very next sentence, the majority seeks to "extend" the standards set forth in "*Mattox* and its progeny." *Id*. However, the Supreme Court has expressly instructed us against extending its precedent beyond its specific holdings. *See White v. Woodall*, 134 S. Ct. 1697, 1706 (2014) ("[I]f a habeas court must extend a rationale before it can apply to the facts at hand, then by definition the rationale was not clearly established . . .") (citation and internal quotation marks omitted).

(2009) ("With no Supreme Court precedent establishing [the standard adopted by the panel], habeas relief cannot be granted pursuant to § 2254(d)(1) based on such a standard. . . .").

CONCLUSION

I have no quarrel with the notion that we must faithfully adhere to the panoply of procedural protections afforded the criminal defendant. However, on habeas review, we are cabined by the deference owed to state court decisions and by the requirement that relief be granted only if the decision of the state court was contrary to established Supreme Court authority. *Mattox* is not that authority in this case.

The Supreme Court has repeatedly reminded us that the standard for relief on habeas review "is difficult to meet . . . because it was meant to be. . . ." *Richter*, 562 U.S. at 102. Federal habeas review "is a guard against *extreme malfunctions* in the state criminal justice systems, not a substitute for ordinary error correction through appeal. . . ." *Id*. (citation and internal quotation marks omitted) (emphasis added). Rather than applying the "difficult" habeas standard, at best the majority engages in "ordinary error correction." *Id*.

Because the majority cites no applicable Supreme Court authority to support its grant of habeas relief, because the majority completely disregards the findings of the state courts, and because the majority fails to adhere to the confines of habeas review, I respectfully dissent.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-17071
D.C. No. 3:10-cv-00146-RCJ-VPC

[Filed March 3, 2016]

MANUEL TARANGO, JR., *Petitioner-Appellant*,	)
v.	)
E. K. MCDANIEL; NEVADA ATTORNEY GENERAL, *Respondents-Appellees*.	)

OPINION

Appeal from the United States District Court
for the District of Nevada
Robert Clive Jones, District Judge, Presiding

Argued and Submitted
December 12, 2014—San Francisco, California

Filed March 3, 2016

Before: Raymond C. Fisher, Johnnie B. Rawlinson,
and Mary H. Murguia, Circuit Judges.

Opinion by Judge Murguia;
Dissent by Judge Rawlinson

SUMMARY*

Habeas Corpus

The panel vacated the district court's judgment denying a habeas corpus petition, and remanded, in a case in which a Nevada state prisoner claims violation of his right to a fair and impartial jury, where a police vehicle followed a known hold-out juror, for approximately seven miles, on the second day of deliberations in a highly publicized trial involving multiple police victims.

The panel held that the Nevada Supreme Court's decision upholding the petitioner's convictions was contrary to *Mattox v. United States*, 146 U.S. 140 (1892), because the court improperly limited its inquiry to whether the external contact amounted to a "communication" and did not investigate the prejudicial effect of the police tail. The panel therefore reviewed *de novo* the question whether the extrinsic contact could have influenced the jury's verdict and prejudiced the petitioner. Because the state trial court prevented the petitioner from offering certain evidence to demonstrate prejudice, the panel remanded for an evidentiary hearing and further fact finding.

Dissenting, Judge Rawlinson wrote that *Mattox* is far afield from the dispositive issue, the majority gives no deference to the decision of the Nevada Supreme

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Court but engages in impermissible appellate fact finding, and no Supreme Court case supports the majority's conclusion.

COUNSEL

Rene Valladares, Federal Public Defender; Ryan Norwood (argued), Assistant Federal Public Defender, Las Vegas, Nevada, for Petitioner-Appellant.

Catherine Cortez Mastro, Attorney General; Victor-Hugo Schulze, II (argued), Senior Deputy Attorney General, Las Vegas, Nevada, for Respondents-Appellees.

OPINION

MURGUIA, Circuit Judge:

Petitioner Manuel Tarango, Jr. appeals the district court's denial of his petition for a writ of habeas corpus. He claims violation of his due process right to a fair and impartial jury, where a police vehicle followed Juror No. 2, a known hold-out against a guilty verdict, for approximately seven miles, on the second day of deliberations, in a highly publicized trial involving multiple police victims. Tarango argues that the Nevada Supreme Court's decision upholding his convictions "was contrary to, or involved an unreasonable application of, clearly established federal law," *see* 28 U.S.C. § 2254(d)(1), because the court failed to consider whether the contact between the juror and the police vehicle prejudiced the jury's verdict.

We hold that the Nevada Supreme Court's decision was contrary to *Mattox v. United States*, 146 U.S. 140

(1892), because the court improperly limited its inquiry to whether the external contact amounted to a "communication" and did not investigate the prejudicial effect of the police tail. We therefore review *de novo* the question whether the extrinsic contact could have influenced the verdict and prejudiced Tarango. Because the trial court prevented Tarango from offering certain evidence to demonstrate prejudice, we remand for an evidentiary hearing and further fact finding.

BACKGROUND

On December 5, 1999, a rock band of off-duty Las Vegas police officers, Metro Mike's Pigs in a Blanket, was performing at a local bar called Mr. D's. The bar was filled with off-duty police officers. A group of masked men entered the bar announcing a robbery, and a shoot-out ensued. Several patrons were shot, one robber was shot and killed, and one police officer, Officer Dennis Devitte, was shot several times. The surviving robbers escaped the scene and, six years later, Tarango was brought to trial on seven felony counts. The 2005 trial received considerable local media attention, and numerous Las Vegas Metro police officers attended as both witnesses and spectators.

After the jury began its deliberations, on November 1, 2005, the foreperson sent a note to the trial judge indicating that the jury had "reached a stalemate" because of a "problem juror" who had "made it very clear he does not want to be part of [the] process [and] is refusing to discuss or interact with the other jurors." The "problem juror" separately wrote to the judge indicating that he had "doubt of which [he] feel[s] is beyond the limit of reasonable doubt," and that

deliberations were "not curing [his] doubt." In his note, the "problem" juror identified himself as Juror No. 2.

Over Tarango's objection,[1] the judge advised the jury to continue deliberating. The next day, November 2nd, the jury returned a verdict finding Tarango guilty of all seven felony counts as charged: burglary with the use of a deadly weapon, attempted robbery with the use of a deadly weapon, conspiracy to commit robbery with the use of a deadly weapon, three counts of battery with the use of a deadly weapon, and attempted murder with the use of a deadly weapon—all in violation of Nevada state law.

On November 3rd, the *Las Vegas Review-Journal* reported the guilty verdict in an article titled *Man Convicted in 1999 Case*. The article referenced "a juror who spoke to the *Review-Journal*." Discussing the jury's deliberation process, the interviewed juror mentioned the hold-out juror: "the case was close to a hung jury because one juror seemed unwilling to convict following nearly two days of deliberations."

On November 4th, prompted by the previous day's newspaper article, Juror No. 2 wrote a letter to the court referencing the article:

> I am the one Juror mentioned in the article. . . . I am also the Juror that wrote you the note during deliberations. It read: "I have doubt beyond the limit of what I consider reasonable

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[1] Tarango argued that Juror No. 2's note indicated that the jury was hung, and moved for a mistrial, there being no alternate jurors left to take Juror No. 2's place.

> doubt." I also stated, "I did not believe further deliberations would cure that doubt."
>
> Further deliberations in fact, did not cure my doubt.
>
> However, when returning to re-deliberate Wednesday November 2nd from the Henderson area, a Metro squad car followed me northbound on I-95 and into the downtown area.
>
> I found that action unnerving.
>
> I realize the State has much time and money invested in this case. There were [*sic*] no alternate Juror. I concluded Metro somehow knew who I was and knew of my unwillingness to convict. I have never been in trouble with the law. Therefore, I relinquished my vote under duress. I only ask, within the law, please show [Tarango] leniency.

One week later, on November 11th, Juror No. 2 emailed Tarango's trial attorney, Marc Saggese, and attached a copy of his "Letter to the Judge." The juror told Saggese that he felt "compelled to notify" Saggese of the letter. Saggese promptly filed a motion to dismiss all charges with prejudice or, alternatively, to grant a new trial on the ground of juror misconduct, arguing that Juror No. 2's communication indicated that the deliberation process had been tampered with in violation of Tarango's right to due process. Under Nevada law, juror misconduct refers to two categories of conduct: (1) intrinsic misconduct, that is, "conduct by jurors contrary to their instructions or oaths;" and (2) extrinsic misconduct, or "attempts by third parties

to influence the jury process."[2] *Meyer v. State*, 80 P.3d 447, 453 (Nev. 2003). Tarango alleged both forms of misconduct, arguing that (1) Juror No. 2 changed his vote under pressure, rather than based on admissible evidence of Tarango's guilt, because of (2) an improper third party influence.

In support of the motion, Saggese submitted a declaration indicating that, after the trial court read the juror notes into the record and while deliberations were ongoing, Saggese overheard Deputy District Attorney Marc DiGiacomo report to Detective James Vacarro over the phone that one juror, Juror No. 2, was holding out. Saggese thus indirectly corroborated Juror No. 2's stated belief that he was being targeted as a hold-out juror by introducing evidence that members of the Las Vegas police department both knew that Juror

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[2] *Meyer* further clarifies the distinction:

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

80 P.3d at 453. (internal citations omitted).

No. 2 favored acquittal and had knowledge of Juror No. 2's identity.[3]

The trial court held a full hearing on Tarango's motion the following month. Juror No. 2, Defense Attorney Saggese, Detective Vacarro, and Deputy D.A. DiGiacomo were all called to testify regarding their knowledge of the alleged events and communications in question. At the hearing, the court limited the questioning of Juror No. 2 pursuant to a provision of the Nevada Code of Evidence, Nev. Rev. Stat. § 50.065, which prohibits the admission for any purpose of testimony, affidavits, or evidence of any statement by a juror indicating an effect on the jury's deliberative process. The court also relied on the Nevada Supreme Court case of *Meyer v. State*, which provides that "[u]pon an inquiry into the validity of a verdict . . . , a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations, or to the effect of anything upon that or any other juror's mind."[4] 80 P.3d at 454 (quoting Fed. R. Evid.

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[3] During voir dire, the parties and the trial court learned various details about Juror No. 2's life. Juror No. 2 had served in the Air Force for four years doing "flight instrument trainers [*sic*], [and] navigation." He completed both high school and also trade school in electronics. At the time of his jury service, Juror No. 2 was employed as a network administrator, was married, and had a daughter. He had lived in Clark County, Nevada since 1991.

[4] *Meyer* also observes, though, that where juror misconduct involves "extrinsic information or contact with the jury, juror affidavits or testimony establishing the fact that the jury received the information or was contacted are permitted." *Meyer*, 80 P.3d at 454. *Meyer* distinguished extrinsic information about which a juror may testify from intrinsic influences that are "generally not

606(b)). The trial court ultimately conducted all questioning of Juror No. 2 itself. Juror No. 2 testified as follows:

> [Right after getting on the freeway,] I was in the center lane [of US-95]. I noticed a Metro squad car behind me; fairly close behind me. . . . He was close enough I couldn't see his front wheels or bumper. And I looked down and I was not exceeding the speed limit.
>
> . . .
>
> I signaled and got over to the far right lane anticipating being pulled over and he stayed tight behind me.
>
> . . .
>
> I maintained under the speed limit anticipating being pulled over. A couple minutes and he never lit up, he never indicated that he was . . . going to pull me over. So I just maintained right lane position under the speed limit. This continued on.
>
> . . .
>
> [At Eastern Avenue] there was a lot of traffic entering the freeway . . . . [T]here was so many cars trying to merge into the freeway that the

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admissible to impeach a verdict" as follows: "An extraneous influence includes, among other things . . . third-party communications with sitting jurors. In contrast, intra-jury or intrinsic influences involve improper discussions among jurors . . . , intimidation or harassment of one juror by another, or other similar situations . . . ." *Id.* (footnotes omitted).

> Metropolitan squad car actually pulled up closer to prevent anyone from pulling in between our vehicles.
>
> . . .
>
> And as soon as the . . . exit to Las Vegas Boulevard came, I even slowed down under 50, and that's a long exit there. It's, um, a quarter mile, half a mile, and even at that, he maintained position.
>
> And he's not pulling me over. He's not . . . giving me a citation for nothing. He followed me down the hill, and at the stoplight for Las Vegas Boulevard. . . . He followed me, still tight. And there's several stop lights, something, Stewart, and then Carson is where the juror parking garage is. And we did get a red light there. He was still behind me. I took a right to enter the . . . jurors parking lot. That's when he relieved me from the escort or whatever he was doing. That's when he left me alone.

When questioned, Juror No. 2 indicated that he could not tell whether the driver of the vehicle was male or female, and he could not report the squad car number. However, Juror No. 2 averred that the car behind him was "a Metropolitan black and white vehicle." When questioned a second time, Juror No. 2 reiterated that the car remained "consistently" tight behind him for the duration of his commute to the courthouse—"[c]lose enough that [he] couldn't see the officer's bumper."

At the end of the hearing, the court orally denied Tarango's motion to dismiss or to grant a new trial. The trial court did not discredit Juror No. 2's testimony,

and made one factual finding that Juror No. 2 "was followed closely, tightly, however you want to state it from Tropicana on US-95 to Las Vegas Boulevard and Carson."[5] The court went on to reach the following legal conclusion:

> I don't think there's any evidence of juror misconduct. There were no attempts to influence the jury. There's no outside influence on this particular juror. There's no communication or contact. The alleged conduct is ambiguous, it's vague and nonspecific in content. I'm required to consider this extrinsic influence in light of the trial as a whole, and consider the weight of the evidence against Mr. Tarango and with that, and based on the [*Meyer*] decision, and the reasonable person test that I'm required to apply. I don't think that Mr. Tarango has met his burden. Therefore, the motion is denied.[6]

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[5] Having taken judicial notice of a roadmap of Las Vegas, Nevada, we confirm that the distance from East Tropicana Avenue on US-95 to South Las Vegas Boulevard and East Carson Avenue is approximately 7.5 miles.

[6] Juror No. 2 wrote a second letter to the trial judge following the hearing. The letter begins, "Your Honor; Please accept this letter as an apology. I was given the privilege to serve as a Juror and I failed." Juror No. 2 went on to apologize to God, his fellow Jurors, the Las Vegas Metropolitan Police Department, and the "Citizens of this Great State Nevada." He explained that his verdict was "untrue to [his] conscience," because he "let fear of reprisal enter into [his] mind and heart." As a result, Juror No. 2 expressed his desire "to nullify [his] verdict." Juror No. 2 conceded that his request "may not be taken legally," because he was ignorant of legal procedures, but that he "personally nullif[ies] [his] verdict to all those that will forgive me."

Weeks later, at a televised proceeding on February 8, 2006, the trial court denied Tarango's motion to reconsider on the basis of jury misconduct and entered judgment against him. The trial court sentenced Tarango to a 22–58 year term of imprisonment. Tarango promptly appealed the denial.

In September 2007, the Nevada Supreme Court affirmed the state trial court's denial of Tarango's motion for a new trial. *Tarango v. State*, No. 46680 (Nev. Sept. 25, 2007). The Nevada Supreme Court stated the relevant test as follows: "For a defendant to prevail on a motion for a new trial based on misconduct, the defendant must present admissible evidence sufficient to establish (1) the occurrence of misconduct, and (2) a showing that the misconduct was prejudicial."[7] *Id.*, slip op. at 2 (citing *Meyer*, 80 P.3d at 455).

The Nevada Supreme Court first concluded that Juror No. 2's letters to the trial court were properly deemed inadmissible to prove that Juror No. 2 had voted guilty in violation of the jury instructions or contrary to his oath as a juror, reasoning that "for misconduct to be proved it 'must be based on objective facts and not the state of mind or deliberative process of the jury.'" *Id.*, slip op. at 6 (quoting *Meyer*, 80 P.3d at 454). Absent Juror No. 2's letters, the Nevada Supreme

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[7] The Nevada Supreme Court did not cite any United States Supreme Court authority in rendering its decision, but this is immaterial provided the state law is not inconsistent with clearly established federal law. *See Early v. Packer*, 537 U.S. 3, 8 (2002). Rather, as did the trial court, the Nevada Supreme Court relied almost entirely on its 2003 decision in *Meyer*.

Court concluded that the "testimony of [Defense Attorney Saggese, Detective Vacarro, and Deputy D.A. DiGiacomo] was insufficient to show by objective facts that [Juror No. 2] committed misconduct." *Id.* The Nevada Supreme Court held that Tarango had thus failed to show by admissible evidence that Juror No. 2 had committed misconduct. *Id.*

The Nevada Supreme Court further held that there was no evidence of an improper external influence on Juror No. 2. Although the Nevada Supreme Court assumed "arguendo that [Juror No. 2] was followed by a marked police car," and observed that "any unauthorized communication between law enforcement and a juror about a matter pending before a jury may be 'presumptively prejudicial,'" the court concluded that "[Juror No. 2] failed to show by objective facts that there was an improper external communication between him and the police." *Id.*, slip op. at 6–7. The Nevada Supreme Court explained that "it is not clear whether being followed by a marked car qualifies as a communication at all. It is even more dubious as to whether such a 'communication' was about a matter pending before the jury." *Id.*, slip op. at 7. In other words, having found that no "communication" had occurred, the Nevada Supreme Court determined that the alleged influence of the non-communicative contact was "too speculative" to sustain Tarango's motion for a new trial and did not reach the second prong of the misconduct inquiry—whether the contact was prejudicial. *Id.*

Following state habeas proceedings, Tarango timely filed his federal habeas petition on March 15, 2010. The federal district court for the District of Nevada was

"tempted to say that the fact Juror 2 rendered his verdict based not upon the law and evidence, but because of his perception of a threat, is dispositive." However, without citing authority, the district court concluded that "Supreme Court case law is clear that objective proof of external contact is required." It further concluded that the state court did not err in concluding that no external contact had occurred, although the court found that determination "debatable." The district court therefore dismissed Tarango's petition in September 2013, upholding as reasonable the state court's determination that Tarango had failed to show any improper external contact.

On October 16, 2013, the district court granted Tarango a Certificate of Appealability as to Ground One of his amended petition, and Tarango filed a Notice of Appeal the same day. Ground One reads as follows:

> Tarango was convicted because one of the jurors believed that the State was trying to intimidate him, and not because he believed Tarango was guilty. As such, Tarango is incarcerated in violation of his right to a Fair Trial, an Impartial Jury, and Due Process under the 6th and 14th Amendments of the United States Constitution.

Tarango raises only the certified issue in his appeal before us.

DISCUSSION

I.

We review de novo a district court's denial of a habeas corpus petition. *Hurles v. Ryan*, 752 F.3d 768, 777 (9th Cir. 2014). But where, as here, a state court has adjudicated a claim on the merits, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) compels us to accord significant deference to the underlying state court decision. *See* 28 U.S.C. § 2254(d)(1)–(2). This court may grant relief only when the state court's adjudication of that claim either (1) "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 (2) was "based on an unreasonable determination of the facts in light of the evidence presented at the State Court proceeding." *Id.*

Where a state court fails to apply the clearly established federal law, applying an incorrect standard in reaching its decision, "the state court's adjudication [is] contrary to clearly established law." *Lafler v. Cooper*, 132 S. Ct. 1376, 1390 (2012) (holding that state court adjudication was contrary to clearly established federal law because it failed to apply *Strickland* to an ineffective-assistance-of-counsel claim). And in that circumstance, federal habeas courts "can determine the principles necessary to grant relief." *Id.* (citing *Panetti v. Quarterman*, 551 U.S. 930, 948 (2007)). In other words, a state court's failure to apply the proper standard under clearly established federal law "allows federal-court review . . . without deference to the state court's decision" and "unencumbered by the deference AEDPA normally requires." *Panetti*, 551 U.S. at 948;

see also Castellanos v. Small, 766 F.3d 1137, 1146 (9th Cir. 2014) ("If the state court applies a legal standard that contradicts clearly established federal law, we review de novo the applicant's claims, applying the correct legal standard to determine whether the applicant is entitled to relief." (citing *Cooperwood v. Cambra*, 245 F.3d 1042, 1047 (9th Cir. 2001))).

In conducting this review, we look to the "last reasoned decision" by a state court addressing the issue at hand. *Miles v. Ryan*, 713 F.3d 477, 486 (9th Cir. 2012) (citing *Robinson v. Ignacio*, 360 F.3d 1044, 1055 (9th Cir. 2004)). In this case, we look to the Nevada Supreme Court's September 2007 decision affirming the state trial court's judgment on direct appeal.

II.

The Nevada Supreme Court, after assuming that Juror No. 2 was followed by a police car, decided that such contact did not implicate Tarango's right to due process because it did not amount to a "communication," much less a communication "about a matter pending before the jury." The court declined to consider whether the police tail could have prejudiced the verdict. We hold that the Nevada Supreme Court violated clearly established Supreme Court case law, first by limiting its inquiry to whether the contact amounted to a "communication . . . about a matter pending before the jury" and, second, by failing to examine the potential impact of the non-communicative contact on Juror No. 2's verdict.

A.

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, 149–50 (1892). 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. *Caliendo v. Warden of Cal. Men's Colony*, 365 F.3d 691, 696 (9th Cir. 2004) (citing *United States v. Armstrong*, 654 F.2d 1328, 1331–33 (9th Cir. 1981)).

Clearly established federal law provides that any unauthorized "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." *Remmer v. United States*, 347 U.S. 227, 229 (1954) (emphasis added). However, clearly established federal law also compels a criminal trial court to consider the prejudicial effect of *any* external contact that has a "tendency" to influence the verdict, irrespective of whether it is about the matter pending before the jury. *Mattox*, 146 U.S. at 150–51. Moreover, an external contact need not amount to a "communication" to trigger some judicial inquiry into possible prejudice. *See Smith v. Phillips*, 455 U.S. 209, 212–15 (1982) (requiring judicial inquiry into possible prejudice arising from a juror's job application in the office of the prosecutor trying the case); *Mattox*, 146 U.S. at 150 (recognizing the prejudicial potential of "the reading of newspapers").

B.

The Supreme Court has not established a bright-line test for determining what constitutes a possibly prejudicial "external" influence on a jury. The Court has devoted more recent attention to clarifying what "falls on the 'internal' side of the line." *Warger v. Shauers*, 135 S. Ct. 521, 529 (2014) (holding that a juror's dishonesty during voir dire is internal to the deliberative process and not admissible to impeach a verdict); *see also Tanner v. United States*, 483 U.S. 107, 118–25 (1987) (holding that jurors' consumption of drugs and alcohol during trial is internal to the deliberative process and not admissible to impeach a verdict). It is clearly established that a juror's physical or mental incapacity, substance abuse, and dishonesty during voir dire all amount to internal—not external—influences on a jury's verdict. *Tanner*, 483 U.S. at 118–25; *Warger*, 135 S. Ct. at 529. On the other end of the spectrum, the Court long ago explained that an "extraneous influence" would include "something which did not essentially inhere in the verdict,—an overt act, open to the knowledge of all the jury, and not alone within the personal consciousness of one." *Mattox*, 146 U.S. at 149 (quoting *Perry v. Bailey*, 12 Kan. 539, 545 (1874)).

In more recent decisions interpreting the *Mattox* rule, the Court has clarified that an external contact need not be intentional, *Gold v. United States*, 352 U.S. 985 (1957) (granting a new trial where the FBI approached jurors about a different but related case, even though "the intrusion was unintentional"), nor verbal, *Smith*, 455 U.S. at 212–15, 221; *see also Mattox*, 146 U.S. at 150 (noting that the presence of an officer

in the jury room during the deliberations would be "fatal to the verdict"). Rather, an impermissible external influence can arise where, for example, a juror is shown to have a relationship with the office of the prosecutor trying the case. *Smith*, 455 U.S. at 212. In addition, an external contact need only have influenced one juror, because a defendant is "entitled to be tried by 12 . . . impartial and unprejudiced jurors." *Parker v. Gladden*, 385 U.S. 363, 366 (1966).

The Supreme Court has identified an "extraneous influence" requiring judicial inquiry into prejudice in cases where the jury heard and read information about the defendant's propensity for murder, which was not admitted into evidence, *Mattox*, 146 U.S. at 150–51; where members of a jury overheard the bailiff make disparaging comments about the defendant, *Parker*, 385 U.S. at 363–65; where a juror was contacted by an FBI agent after being offered a bribe to acquit the defendant, *Remmer*, 347 U.S. at 228–30; and where a juror had submitted an application for employment at the office of the prosecutor trying the case, *Smith*, 455 U.S. at 212, 216–17.

C.

Mattox requires a trial court to examine possible prejudice when it is confronted with evidence of an external contact that has a "tendency" to be "injurious to the defendant." *Mattox*, 146 U.S. at 150. Thus, an external contact with a juror need only raise a risk of influencing the verdict to be deemed possibly prejudicial. *Mattox* and its progeny further establish that undue contact with a juror by a government officer almost categorically risks influencing the verdict. Indeed, *Mattox* observed that the mere presence of a

court officer or bailiff during the jury's deliberations would "absolutely vitiate the verdict . . . *without regard to whether any improper influences were actually exerted over the jury or not*." *Mattox*, 146 U.S. at 150 (emphasis added); *see also Smith*, 455 U.S. at 221 (holding that a juror's pending job application with the prosecutor's office required a post-trial hearing on juror bias); *Parker*, 385 U.S. at 365 ("[T]he official character of the bailiff—as an officer of the court as well as the State—beyond question carries great weight with a jury . . . ."); *Remmer*, 347 U.S. at 229 ("The sending of an FBI agent in the midst of a trial to investigate a juror as to his conduct is bound to impress the juror and is very apt to do so unduly.").

To be sure, "it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." *Smith*, 455 U.S. at 217. "[D]ue process does not require a new trial every time a juror has been placed in a compromising situation." *Id.* Mindful of this reality, and given the need to preserve the finality of a jury's verdict, courts universally prohibit jurors from impeaching their own verdicts through evidence of their internal deliberative process. *See, e.g.*, *Tanner*, 483 U.S. at 117–20. However, regardless of the forms of evidence admissible to demonstrate that a contact occurred, *see United States v. Rutherford*, 371 F.3d 634, 644–45 (9th Cir. 2004), the Supreme Court has unequivocally and repeatedly held that due process requires a trial judge to endeavor to "determine the effect" of occurrences tending to

prejudice the jury when they happen.[8] *Smith*, 455 U.S. at 217; *see also Parker*, 385 U.S. at 365; *Remmer*, 347 U.S. at 229–30; *Mattox*, 146 U.S. at 150–51.

D.

Once a defendant shows an external occurrence having a tendency toward prejudice, federal law clearly requires a trial court to investigate the harmlessness or actual prejudice of the occurrence. *Mattox*, 146 U.S. at 150; *Smith*, 455 U.S. at 215 ("This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias."). The *Mattox* Court categorically mandated that "possibly prejudicial" external contacts "invalidate the verdict, at least unless their harmlessness is made to appear." *Mattox*, 146 U.S. at 150. This is required even if, as noted above, the contact did not constitute a communication nor concern a matter pending before the jury. *See Smith*, 455 U.S. at 215; *Mattox*, 146 U.S. at 150. Supreme Court case law also requires this procedure irrespective of whether or not the court knows "what actually transpired" and when, as the dissent highlights, the influence of that contact is speculative or uncertain.[9] *Remmer*, 347 U.S.

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[8] In *Smith*, for example, the Court held that the district court properly conducted a hearing that explored the "effect" of a juror's relationship with the prosecutor's office before concluding that the defendant was not prejudiced by that relationship. 455 U.S. at 217–18.

[9] The dissent incorrectly characterizes our holding as requiring an inquiry into prejudice even where the alleged contact or communication is unsubstantiated. Dissent at 40. To be clear, we agree that if the trial court had discredited Juror No. 2's testimony

at 229; *see also id.* at 229–30 (mandating an evidentiary hearing where "*information* . . . [about an external contact] *was received*" by a trial court (emphasis added)). The Supreme Court has further held that prejudice is more probable where the record reflects that a jury could not agree as to the defendant's guilt. *Parker*, 385 U.S. at 365 (citing as evidence of prejudice the fact that "the jurors deliberated for 26 hours, indicating a difference among them as to the guilt of petitioner").

III.

In sum, the governing Supreme Court case law can be distilled as follows: Where a court receives information, *Remmer*, 347 U.S. at 229–30, about an unauthorized external contact between a juror and a government agent, whose official position "beyond question carries great weight with a jury," *Parker*, 385 U.S. at 365, that contact has a "tendency to . . . influence" the verdict, and the trial court must presume the external contact prejudiced the defendant

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and found that no pursuit occurred, then neither the trial court nor the Nevada Supreme Court would have had any cause to examine prejudice. *See Caliendo*, 365 F.3d at 698 n.4. But this is not the record before us. The trial court did not discredit the juror's testimony. The trial court characterized the "content" of the police tail as "ambiguous," "vague," and "nonspecific," but the court did not find that no police tail had occurred. Absent any clear finding with respect to the alleged police tail, the Nevada Supreme Court prudently assumed that the juror had been followed. Based on that assumption, in order to determine whether jury tampering occurred, Supreme Court case law requires the court to consider the prejudice or influence of that contact. Contrary to clearly established Supreme Court case law, the Nevada Supreme Court failed to conduct this inquiry.

unless the government provides contrary evidence. *Mattox*, 146 U.S. at 150. This is true whether or not the contact was intentional, *Gold*, 352 U.S. at 985, whether or not the contact involved a verbal communication, *Smith*, 455 U.S. at 212; *Mattox*, 146 U.S. at 150, and whether or not the trial court or defendant "know[s] . . . what actually transpired," *Remmer*, 347 U.S. at 229.[10] Once a potentially prejudicial contact is alleged, the court should "determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." *Id.* at 230.

In this case, the Nevada Supreme Court assumed a contact—albeit not a "communication"—occurred. Our case law compels our conclusion that the contact in question had enough of a tendency to influence the jury's verdict so as to necessitate judicial inquiry into prejudice. It was thus error for the Nevada Supreme Court not to conduct a prejudice analysis merely because Juror No. 2's police tail did not amount to a "communication . . . about a matter pending before the jury."

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[10] The dissent suggests that *Mattox* "expressly" requires "proof that jury tampering actually occurred," Dissent at 40, but this argument misses the point. The Nevada Supreme Court presumed an unauthorized external contact with a juror had occurred. As *Mattox* and its progeny explain, a court must examine the prejudice of such a contact as part of its determination as to whether the contact amounted to jury tampering. Here, the Nevada Supreme Court contravened clearly established federal law by not evaluating whether the external contact was prejudicial.

A.

Assuming the truth of Juror No. 2's testimony that he had been followed closely for seven miles on the second day of deliberations,[11] the Nevada Supreme Court concluded that this conduct does not constitute a "communication." On this basis, the Nevada Supreme Court then concluded that any influence was "too speculative" to warrant examination of prejudice. Thus, the Nevada Supreme Court declined to consider whether the conduct in fact influenced the verdict. As set forth above, this decision contravenes the standard clearly established by Supreme Court case law, under which a defendant need not prove a "communication . . . about a matter pending before the jury," or even a "communication" about an unrelated issue. *See Smith* 455 U.S. at 212–15. Only a threshold showing of any "contact," *Remmer*, 347 U.S. at 229, with a "tendency to adverse influence" is required to prompt the court to investigate whether that contact was, in fact, prejudicial. *Mattox*, 146 U.S. at 150.

In light of this, we have little trouble concluding that the contact that the Nevada Supreme Court assumed occurred had enough potential for prejudice to cross *Mattox*'s low threshold. Las Vegas police officers

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[11] The trial court specifically found that Juror No. 2 "*testified* he was followed closely, tightly, however you want to state it from Tropicana on US-95 to Las Vegas Boulevard and Carson." The trial court did not discredit Juror No. 2's testimony, and appears to have accepted the allegation as true, at least for the sake of its decision denying Tarango's motion to dismiss. In any event, our review is limited to the Nevada Supreme Court's decision, *see Miles*, 713 F.3d at 486, which assumed that Juror No. 2 was in fact followed.

were deeply entangled in this case as victims, witnesses, investigators, and trial spectators. Juror No. 2 testified that he had been closely followed by a marked police car for over seven miles. *See Parker*, 385 U.S. at 365 (observing that government agents "carr[y] great weight with a jury"). Juror No. 2's testimony indicates that the tail was maintained at a distance so close that Juror No. 2 could not see the police vehicle's front wheels or bumper—if true, this conduct could have reasonably been understood as an attempt to intimidate. Moreover, Juror No. 2 was a known hold-out before the contact occurred. The Supreme Court has clearly established that the likelihood of possible prejudice increases where, as here, the jury was previously deadlocked. *See id*.

B.

Thus, because the state court assumed that the contact did in fact occur and clearly established case law demonstrates that the contact had a tendency to affect the verdict, the court should have, at a minimum, investigated the prejudice or harmlessness of the contact even if at the time the court was unaware what exactly transpired or whether the impact was harmful. *See Remmer*, 347 U.S. at 229. The Nevada Supreme Court erred when it failed to do so.

Certainly, there may be circumstances in which a trial court finds a juror's allegations of an external contact are unsupported by sufficient evidence, or in which the allegations are so implausible or incredible that they may be reasonably disregarded. There may also be cases in which an alleged external contact suggests paranoia or some underlying mental incompetence on the juror's part. *See Tanner*, 483 U.S.

at 118–19. Under those circumstances, a court will not run afoul of the Constitution by refusing to consider whether the alleged contact affected the verdict. But this is not the case on the record before us.

Here, Juror No. 2's testimony was not discredited. To the contrary, crediting Juror No. 2's testimony about a plausible external contact with a juror reluctant to convict, the Nevada Supreme Court declined to consider whether Juror No. 2 may have been prejudiced by the police tail.[12] This contravened clearly established federal law.[13] *See Remmer*, 347 U.S. at 229–30; *Mattox*, 146 U.S. at 150; *Smith*, 455 U.S. at 215.

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[12] The dissent suggests that the cited Supreme Court cases are insufficiently specific to support our holding. *See* Dissent at 40. To the contrary, *Mattox* and its progeny set forth a standard that "clearly extend[s]" to the case before us. *See Wright v. Van Patten*, 552 U.S. 120, 123 (2008). Where, as here, contact between a hold-out juror and a government official is shown, a court must investigate possible prejudice. The Nevada Supreme Court's failure to reach the prejudice inquiry was contrary to clearly established federal law.

[13] *Meyer*, which the Nevada Supreme Court relied upon, appears to require the same of Nevada courts. Although *Meyer* rejects "the position that any extrinsic influence is automatically prejudicial," it does not limit the occasions in which a court must consider the possibility of prejudice. *See* 80 P.3d at 455. Rather, because prejudice is not presumed for less egregious contacts, "the extrinsic information must be analyzed in the context of the trial as a whole to determine if there is a reasonable probability that the information affected the verdict." *Id.* at 455–56. *Meyer* does not, however, wholly foreclose a prejudice inquiry in the face of credible allegations of juror misconduct. *Id.*

IV.

Because the Nevada Supreme Court failed to consider the prejudicial impact of the contact, in violation of the law clearly established in *Mattox*, we may evaluate Tarango's claim "without deference to the state court's decision" and "unencumbered by the deference AEDPA normally requires."[14] *Panetti*, 551 U.S. at 948; *see also Castellanos*, 766 F.3d at 1146. Reviewing *de novo*, we hold that the Nevada trial court improperly restricted the scope of the evidentiary hearing, effectively preventing Tarango from proving prejudice.

Under our precedent, where an external contact with the jury is shown, a trial court should determine whether the contact "raises a risk of influencing the verdict." *Caliendo*, 365 F.3d at 697. Under such circumstances, prejudice is presumed and the government bears the burden of rebutting the presumption of prejudice. *Id.* To be sure, "certain chance contacts between witnesses and jury members—while passing in the hall or crowded together in an elevator—may be inevitable." *Id.* at 696 (internal quotation marks and citation omitted). Therefore, if the contact involves a "prosaic" or "more common and less pernicious extraneous influence" than jury tampering, the court should determine whether

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[14] The dissent cites a number of Ninth Circuit AEDPA cases that were reversed by the Supreme Court, and in which the Supreme Court "chastised us" for ignoring AEDPA's demanding standard. *See* Dissent at 33. These cases have no bearing on the issue presented in this appeal.

the jury was "substantially swayed" by the contact.[15] *United States v. Henley*, 238 F.3d 1111, 1115–16 (9th Cir. 2001). Under this circumstance, the defendant bears the burden of offering sufficient evidence to trigger a presumption of prejudice. *See Caliendo*, 365 F.3d at 696–97 (collecting authorities).

Although the anti-impeachment rule, codified as Federal Rule of Evidence 606(b)(1), prohibits juror testimony regarding "any juror's mental processes concerning the verdict," an exception to the rule permits juror testimony about whether "an outside influence was improperly brought to bear on any juror." Fed. R. Evid. 606(b)(2)(B). This court has accordingly deemed admissible limited juror testimony to determine "the impact [of an outside influence] upon the juror, and whether or not [the outside influence] was prejudicial." *Remmer*, 347 U.S. at 230; *see also Rutherford*, 371 F.3d at 643–45 (considering juror affidavits including claims that the jury felt intimidated by police officers' glares); *Caliendo*, 365 F.3d at 699 (considering a juror's testimony that the jury's external communication with a police officer left them with a favorable opinion of the officer).

Unlike Nevada law, our precedent instructs that a court should not limit juror testimony to "the existence of [an external contact]." *Rutherford*, 371 F.3d at 644 (quoting the district court in that case). Rather, a court "should [also] consider the 'effect of extraneous information or improper contacts on a juror's state of

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[15] The Nevada Supreme Court has identified a similar dichotomy in its own construction of Supreme Court case law prohibiting external influences on criminal juries. *Meyer*, 80 P.3d at 455–56.

mind,' a juror's 'general fear and anxiety following' such an incident, and any other thoughts a juror might have about the contacts or conduct at issue." *Id.* (quoting *United States v. Elias*, 269 F.3d 1003, 1020 (9th Cir. 2001)). To that end, consistent with the anti-impeachment rule, this court permits the introduction of limited evidence of a juror's state of mind to prove juror misconduct. A court may not, consistent with the anti-impeachment rule, admit testimony "regarding the affected juror's mental processes in *reaching the verdict*." *Id.* (internal quotation marks omitted) (quoting *Elias*, 269 F.3d at 1020). However, "a juror's testimony concerning his fear that individuals would retaliate against him if he voted to acquit (or convict) would be admissible, although his statement that he actually cast his vote one way or the other because of that fear would not." *Id.*

Consistent with the principles announced in *Rutherford*, the district court should admit Juror No. 2's statements about how the police tail impacted him, although not how it impacted his deliberations and verdict. Therefore, Juror No. 2's statement that he found the police tail "unnerving" is admissible, as are his statements that he "concluded Metro somehow knew who [he] was." By contrast, Juror No. 2's statements that he "relinquished his vote under duress," and "still [has] doubt as an X-Juror" are not admissible.

V.

Because the scope of the evidentiary hearing was narrowly circumscribed in the state trial court, the record before us is insufficient to determine whether the police tail influenced the verdict and prejudiced

Tarango. We accordingly remand for the district court to hold an evidentiary hearing and apply the proper standard to determine whether the Nevada courts violated Tarango's due process right to a fair and impartial jury by failing to adequately consider allegations of a prejudicial external influence on the jury. Following this court's precedent, the district court should permit Tarango to offer limited evidence to show prejudice, *see Caliendo*, 365 F.3d at 696–97; *Henley*, 238 F.3d at 1115–16, including evidence of Juror No. 2's "general fear and anxiety" following the police tail, *see Rutherford*, 371 F.3d at 644.

VACATED AND REMANDED.

RAWLINSON, Circuit Judge, dissenting:

I agree with the majority that *if* a member of the Las Vegas Metropolitan Police Department purposefully tail-gated a holdout juror on the freeway for over seven miles, because the juror was a holdout, such conduct might constitute external jury contact requiring further inquiry from the court. However, the Nevada Supreme Court determined that the juror's assumption that the police officer targeted him as the holdout juror was speculative and unsubstantiated.[1] As

[1] The majority mischaracterizes my description of the state courts' factual determination. *See Majority Opinion*, p. 21 n.9. The state court did not discredit, and I did not describe the state courts' finding as discrediting, Juror No. 2's statement that he "thought he was followed by a police car." *Nevada Supreme Court Order*, p. 2. What the state courts did discredit, and what I did describe the state courts as finding, was a lack of substantiation that the police car was following Juror No. 2 on the freeway because he was

recognized by the majority, the Nevada Supreme Court expressly found that "there was no evidence of an improper external influence on Juror No. 2. . . ." *Majority Opinion*, p. 13. We are bound by that factual determination absent a showing of unreasonableness. *See* 28 U.S.C. § 2254(d)(2).

Appellant Manuel Tarango moved for a new trial in the state court on the basis of an "outside influence on the jury process." *Nevada Supreme Court Order*, p. 1. According to the Nevada Supreme Court, the holdout juror conveyed that "*he thought he had been followed by a police car*." *Id*., p. 2. (emphasis added). Because he felt intimidated, the juror changed his vote to guilty from not guilty.

The Nevada Supreme Court also noted that a recent newspaper article attributed the juror's change of heart to the fact that "the other jurors were able to convince the holdout to convict. . . ." *Id*., p. 4. After discussing the juror's email to the trial judge and the juror's follow-up letter, the Nevada Supreme Court concluded that the trial court properly excluded from consideration the juror's emails to the trial judge and

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a holdout juror. There was insufficient evidence in the state courts' view that a tail-gating police officer in rush-hour morning traffic constituted an improper external influence. Rather than focusing on whether Tarango submitted evidence of an external influence, *see, e.g.*, *Mattox v. United States*, 146 U.S. 140, 141–44 (inflammatory newspaper article read to the jury); *Remmer v. United States (Remmer I)*, 347 U.S. 227, 228 (1954) (juror told he could profit from favorable verdict), the majority concludes that the existence of police tail-gating during rush hour traffic, and nothing more, compelled the state court to conduct a prejudice inquiry.

defense counsel under N.R.S. 50.065(2) and the Nevada case of *Meyer v. State*, 80 P.3d 447 (Nev. 2003).

Nevada Revised Statute 50.065(2) provides:

> Upon an inquiry into the validity of a verdict or indictment:
>
> (a) A juror shall not testify concerning the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith.
>
> (b) The affidavit or evidence of any statement by a juror indicating an effect of this kind is inadmissible for any purpose.

In *Meyer*, the Nevada Supreme Court interpreted N.R.S. 50.065. Initially, the court referenced Federal Rule of Evidence 606(b), which it identified as an embodiment of "the long-standing common-law rule against admission of jury testimony to impeach a verdict . . ." 80 P.3d at 454 & n.20 (citations and internal quotation marks omitted). The court also noted that N.R.S. 50.065 was "substantially the same" as the federal rule. *Id*. at n.20.

Importantly, the Nevada Supreme Court made a distinction between juror misconduct and jury tampering. *See id*. at 454–55. Citing Supreme Court authority, the court identified extraneous influence as jury tampering rather than juror misconduct. *See id*. at 455 (citing *Remmer I*; *see also Remmer v. United States (Remmer II)*, 350 U.S. 377 (1956)).

Under this framework established by its precedent, the Nevada Supreme Court ruled that, after excluding the inadmissible evidence of the juror's state of mind and of the deliberative process of the jury, there was insufficient evidence that the juror committed misconduct. *See Nevada Supreme Court Order*, p. 6.

The Nevada Supreme Court then turned to the asserted extraneous influence of a police car following the juror on the freeway.[2] Admittedly, the court couched its analysis in terms of whether being followed by a police car constituted a "communication." *Id*., p. 7. Nevertheless, the court ultimately concluded that "the alleged external influence in the case at bar was far too speculative to sustain a motion for a new trial." *Id*. It is this conclusion that is reviewed under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

In the last ten years, the United States has repeatedly rebuked this Circuit for attempting to make an end-run around the formidable obstacles to review that are contained in the AEDPA. As the majority acknowledges, habeas relief under the AEDPA is available only if the decision of the state court decision "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States,

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[2] The majority takes judicial notice of a roadmap of Las Vegas, Nevada to approximate the distance involved as 7.5 miles. *See Majority Opinion*, p. 11 n.5. The majority should have also taken notice that US-95 is the only freeway that accesses downtown from east on Tropicana Boulevard, and therefore it would not be unusual for a police officer to take that route to police headquarters downtown.

or . . . was based on an unreasonable determination of the facts in light of the evidence presented at the State Court proceeding." *Majority Opinion*, p. 15 (quoting 28 U.S.C. § 2254(d)(1)–(2)) (internal quotation marks omitted). Despite our recurring acknowledgment of this demanding standard, the Supreme Court of the United States has constantly chastised us for failing to take our professed acknowledgment to heart. In *Glebe v. Frost*, 135 S. Ct. 429, 431 (2014), the Court observed that we acknowledged its ruling, "but tried to get past it." Similarly, in *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014), the Court chided this Circuit for "attempt[ing] to evade [the] barrier" established by the AEDPA.[3]

In *Nevada v. Jackson*, 133 S. Ct. 1990, 1993 (2013), the Court reversed us for relying on a decision that was "very far afield." Unfortunately, the majority opinion again strays from the narrow confines of appropriate habeas review. Rather than reviewing the state court's determination that proof of the alleged external influence was too speculative to constitute jury tampering, the majority grants habeas relief on the basis that the Nevada Supreme Court "improperly limited its inquiry to whether the external contact amounted to a communication," contrary to *Mattox v. United States*, 146 U.S. 140 (1892). *Majority Opinion*, p. 3 (internal quotation marks omitted). The majority then proceeds to "review *de novo* the question whether the extrinsic contact *could have influenced* the verdict and prejudiced Tarango." *Id*. at 4. (emphasis added).

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[3] The majority makes light of the many rebukes we have received from the Supreme Court for ignoring the demanding standard under which we review habeas cases. *See Majority Opinion*, p. 26 n.14. I doubt the Supreme Court will be amused.

Finally, the majority remands "for an evidentiary hearing and further fact finding." *Id.*

There are three problems with the majority's analysis. The first is that *Mattox* is "far afield" from the dispositive issue in this case. *Jackson*, 133 S. Ct. at 1993. The second is that the majority gives no deference to the decision of the Nevada Supreme Court, but rather engages in impermissible appellate factfinding. The third is that no Supreme Court case supports the majority's conclusion. I will address each problem in turn.

1. Reliance on *Mattox*

Mattox, a case decided in 1892, is notable not only for its age and obvious pre-dating of the AEDPA, but for its unremarkable holding. In *Mattox*, the United States Supreme Court addressed the denial of a motion for a new trial made by a defendant who was tried in *federal* court. *See* 146 U.S. at 141. The basis of the motion was the reading of an inflammatory newspaper article to jurors during their deliberations, as well as prejudicial comments made to jurors by the bailiff. *See id*. at 143–44, 151.

The Supreme Court observed that the affidavits submitted by the jurors were properly received because they refrained from articulating "what influence, if any, the communication of the bailiff and the reading of the newspaper had upon them, but confined their statements to what was said by the one [the bailiff] and read from the other [the newspaper]." *Id*. at 147. The Court emphasized that the extraneous influences were "open to the knowledge of all the jury, and not alone within the personal consciousness of one." *Id*. at 149.

The Court held that "*[p]rivate communications*, possibly prejudicial, between jurors and third persons . . . or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." *Id*. at 150 (emphasis added). However, the Court also provided that any assertion of jury tampering was "subject to rebuttal by the prosecution; or *contingent on proof indicating that a tampering really took place*." *Id*. at 149–50 (citations omitted) (emphasis added).

In *Mattox*, the existence of the extraneous influence was undisputed. The Supreme Court summarized the newspaper article as stating:

> that the defendant had been tried for his life once before; that the evidence against him was claimed to be very strong by those who had heard all the testimony; that the argument for the prosecution was such that the defendant's friends gave up all hope of any result but conviction; and that it was expected that the deliberations of the jury would not last an hour before they would return a verdict . . .

Id. at 150–51.

The Court described the extraneous statement from the bailiff as informing the jury "that this was the third person Clyde Mattox had killed . . ." *Id*. at 151.

Considering these facts, it is unremarkable that the Supreme Court held that the undisputed evidence of jury tampering warranted the grant of a new trial. However, nothing in the holding or reasoning of *Mattox* supports the majority's disregard of the state court's determination that Tarango's evidence of jury

tampering was speculative. The majority cites *Mattox* for the proposition that the trial court was compelled to "consider the prejudicial effect of *any* external contact that has a 'tendency' to influence the verdict. . . ." *Majority Opinion*, p. 17. However, the majority's analysis conveniently omits the discussion in *Mattox* of the undisputed evidence that established, without challenge, the existence of the external contact. *See Mattox*, 146 U.S. at 150–51. The majority also elides the language in *Mattox* explaining that relief is "contingent on proof indicating *that a tampering really took place*." *Id*. at 149–50 (citations omitted) (emphasis added). Unlike in *Mattox*, the evidence submitted by Tarango was disputed. Indeed, the prosecutor denied providing the identity of the holdout juror to anyone at the Police Department. Having reviewed the testimony presented to the trial court, the Nevada Supreme Court agreed with the trial court that the evidence of jury tampering was speculative in the absence of evidence that the identity of the holdout juror was provided to anyone in the Police Department. This determination was entirely consistent with the requirement in *Mattox* of proof that jury tampering actually occurred.

It cannot be fairly said that *Mattox* compels consideration of the prejudicial effect of *speculative* evidence of jury tampering. Rather, as with other factual determinations, the existence of jury tampering is a matter to be resolved by the trial court. *See Uttecht v. Brown*, 551 U.S. 1, 17, 20 (2007) (explaining that "it is the trial court's ruling that counts" due to its ability to perceive the demeanor of the witnesses). The trial court conducted an evidentiary hearing, and determined that the allegation of jury tampering was "vague" and "ambiguous" and "nonspecific." The

Nevada Supreme Court's affirmance of the trial court's determination that the evidence of jury tampering was "speculative" was not contrary to *Mattox* because the holding of *Mattox* is "far afield" from the facts of this case. *Jackson*, 133 S. Ct. at 1993.

The majority also relies on our decision in *United States v. Armstrong*, 654 F.2d 1328, 1331–33 (9th Cir. 1981). However, that case is more helpful to the dissent than to the majority. In that case, a juror reported that her husband had taken two calls using obscene language and directing the husband to "[t]ell your wife to stop hassling my brother-in-law at court." *Id*. at 1331. On direct appeal, we determined that an outside influence must be present to raise the presumption of prejudice. *See id*. at 1332. That is where the majority's analysis falters, because the Nevada state courts *never* found that an external influence was exerted upon Juror No. 2. At most, the courts assumed the juror was followed, but did not link the asserted tail-gating to Juror No. 2's status as a holdout juror. Tail-gating an individual who is not known to be a holdout juror, or a juror at all, would not have a "tendency" to influence the jury's verdict, and would not prompt a prejudice inquiry. *Mattox*, 146 U.S. at 150–51.[4]

The other cases cited by the majority as clearly established Federal law are similarly "far afield." In

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[4] Curiously, the majority opinion implies that a newspaper article is not a "communication." *Majority Opinion*, p. 17. Nothing could be further from the truth. *See Hillard v. Arizona*, 362 F.2d 908, 909 (9th Cir. 1966) (noting that the Judge admonished jurors "to avoid out of court communications . . . including newspaper articles).

Remmer I, 347 U.S. at 228–29, unlike in this case, the allegations of jury tampering were unchallenged by the prosecution, yet the district court denied the motion for a new trial. On direct appeal, the United States Supreme Court remanded the case for a hearing on prejudice. *See id*. at 229–30. Not only is this case "far afield" because it did not involve habeas review. *See Cullen v. Pinholster*, 131 S. Ct. 1388, 1410 (2011) (clarifying that a case offers no guidance for habeas review under the AEDPA if the court did not apply AEDPA deference); *see also Harrington v. Richter*, 562 U.S. 86, 101 (2011). The allegations were also unchallenged, and the trial court failed to conduct a hearing. *See Remmer I*, 347 U.S. at 228–29; *see also Parker v. Gladden*, 385 U.S. 363, 364–65 (1966) (allegations unrefuted).

In *Smith v. Phillips*, 455 U.S. 209, 215 (1982), the Supreme Court held that "the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias. . . ." That is precisely what occurred in the state court. Tarango had the opportunity to prove the allegations, and the state courts determined that his proof was inadequate. That should be the end of the matter under habeas review. *See Premo v. Moore*, 562 U.S. 115, 131 (2011).

2. Failure to defer to the Nevada Supreme Court

The United States Supreme Court has consistently and repeatedly stressed our obligation on habeas review to defer to the rulings and factual determinations made by the state courts. *See Uttecht*, 551 U.S. at 10 ("By not according the required deference, the Court of Appeals failed to respect the

limited role of federal habeas relief in this area prescribed by Congress and by our cases."); *see also Jackson*, 133 S. Ct. at 1994 (referencing the "substantial deference" required by AEDPA); *Cavazos v. Smith*, 132 S. Ct. 2, 7 (2011) (mentioning Supreme Court opinions "highlighting the necessity of deference to state courts in § 2254(d) habeas cases"); *Pinholster*, 131 S. Ct. at 1398 (describing the "highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt") (citation omitted); *Richter*, 562 U.S. at 104 (reversing this Circuit for "a lack of deference to the state court's determination and an improper intervention in state criminal processes, contrary to the purpose and mandate of AEDPA and to the now well-settled meaning and function of habeas corpus in the federal system").

The trial court determined that Tarango failed to adequately establish that jury tampering occurred, due to the speculative, vague, ambiguous and disputed nature of the allegations that a police officer identified Juror No. 2 as the holdout juror and tail-gated that juror for over seven miles. Although the trial court could have credited the juror's version of events over the prosecution's rebuttal, it did not do so. Rather than deferring to the state court's determination, the majority engaged in its own factfinding, stating that: "[W]e have little trouble concluding that the contact that the Nevada Supreme Court assumed occurred had

enough potential for prejudice to cross *Mattox's* low threshold. . . ." *Majority Opinion*, p. 24.[5]

The majority's disregard of the state court's determination and substitution of its alternate conclusion strays from our appointed role on habeas review. *See Richter*, 562 U.S. at 104.

3. No supporting Supreme Court authority

Under the rule expressed by the majority, a trial court would have to conduct a prejudice analysis whenever an allegation of jury tampering is made, even if the trial court ultimately determines that the allegation is unsubstantiated. *See Majority Opinion*, p. 21 n.9 (discounting the trial court's determination that the allegation of jury tampering was "ambiguous, vague and nonspecific") (internal quotation marks omitted).

No Supreme Court precedent supports the majority's rationale. As previously noted, *Remmer I* and *Mattox* involved undisputed evidence of extraneous influence. *See Remmer I*, 347 U.S. at 229; *see also Mattox*, 146 U.S. at 151. *Smith* merely stands for the proposition that the defendant asserting jury tampering must be afforded a hearing. *See* 455 U.S. 215. It is without question that Tarango was afforded a hearing. So we are left with the majority's premise untethered to any controlling Supreme Court

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[5] The majority completely ignores the fact that the state court *never* found that the police officer was aware of the identity of the holdout juror. For that reason, the state court merely assumed that there was a tail-gating, not that there was "external contact." The assumption of "external contact" is made by the majority.

authority. Rather, *Mattox* expressly points in the other direction, requiring proof that jury tampering actually occurred. *See* 146 U.S. at 149–50.[6]

The Supreme Court has addressed the tendency of this Circuit to reach beyond the confines of Supreme Court precedent. In *Lopez*, 135 S. Ct. at 4, the Supreme Court scolded us for relying on "older cases that stand for nothing more than [a] general proposition." Here, the majority similarly cites older cases standing for the general proposition that a defendant is entitled to a hearing when jury tampering is asserted, and a determination of prejudice when jury tampering has been established. *See Remmer I*, 347 U.S. at 228–29; *see also Smith*, 455 U.S. at 215. Just as in *Lopez*, "[n]one of [the Supreme Court] decisions that the [majority] cited addresses, even remotely, the specific question presented by this case." 135 S. Ct. at 4 (citations omitted). The specific question in this case is whether the trial court is required to conduct a prejudice inquiry when that court has determined that the allegations of jury tampering are "ambiguous, vague and nonspecific." The majority has cited no Supreme Court case addressing this specific question.[7]

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[6] The majority accuses me of missing the point, *see Majority Opinion*, p. 22 n.10, but it is the majority that is off-base. The state courts NEVER "presumed an unauthorized external contact with a juror had occurred." *Id.* The most the state courts assumed was that a police car tail-gated Juror No. 2 during morning rush-hour traffic on the only freeway that accesses downtown from east Tropicana Boulevard. The majority presumes the rest.

[7] The majority takes issue with, and in the process implicitly concedes, my point that the Supreme Court cases relied upon by the majority "are insufficiently specific." *Majority Opinion*, p. 25

Consequently, the Nevada Supreme Court decision could not have been contrary to federal law under the AEDPA. *See Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009) ("With no Supreme Court precedent establishing [the standard adopted by the panel], habeas relief cannot be granted pursuant to § 2254(d)(1) based on such a standard. . . .").

CONCLUSION

I have no quarrel with the notion that we must faithfully adhere to the panoply of procedural protections afforded the criminal defendant. However, on habeas review, we are cabined by the deference owed to state court decisions and by the requirement that relief be granted only if the decision of the state court was contrary to established Supreme Court authority. *Mattox* is not that authority in this case.

The Supreme Court has repeatedly reminded us that the standard for relief on habeas review "is difficult to meet . . . because it was meant to be. . . ." *Richter*, 562 U.S. at 102. Federal habeas review "is a guard against *extreme malfunctions* in the state criminal justice systems, not a substitute for ordinary error correction through appeal. . . ." *Id*. (citation and internal quotation marks omitted) (emphasis added).

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n.12. In the very next sentence, the majority seeks to "extend" the standards set forth in "*Mattox* and its progeny." *Id*. However, the Supreme Court has expressly instructed us against extending its precedent beyond its specific holdings. *See White v. Woodall*, 134 S. Ct. 1697, 1706 (2014) ("[I]f a habeas court must extend a rationale before it can apply to the facts at hand, then by definition the rationale was not clearly established . . .") (citation and internal quotation marks omitted).

Rather than applying the "difficult" habeas standard, at best the majority engages in "ordinary error correction." *Id*.

Because the majority cites no applicable Supreme Court authority to support its grant of habeas relief, because the majority completely disregards the findings of the state courts, and because the majority fails to adhere to the confines of habeas review, I respectfully dissent.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

3:10-cv-00146-RCJ-VPC

[Filed September 16, 2013]

MANUEL TARANGO, JR., Petitioner,	)
vs.	)
E.K. MCDANIEL et al., Respondents.	)

ORDER

Petitioner Manual Tarango, Jr., a prisoner in state custody, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons given herein, the Court denies the Petition.

I. FACTS AND PROCEDURAL HISTORY

A Judgment of Conviction was entered against Petitioner on February 8, 2006 following a jury trial, wherein he was convicted of burglary with the use of a deadly weapon, attempted robbery with the use of a deadly weapon, conspiracy to commit robbery with the use of a deadly weapon, three counts of battery with the use of a deadly weapon, and attempted murder

with the use of a deadly weapon. *See* Pet'r's Ex. 48.[1] Petitioner's sentence includes various terms of imprisonment totaling a minimum of 22 years and a maximum of 58 years. *See* Pet'r's Ex. 44.

The event giving rise to the charges was a robbery wherein Petitioner and two co-conspirators entered a bar filled with off-duty police officers and committed armed robbery, resulting in the death of one of the co-conspirators and the wounding of several other people, including one of the police officers. Petitioner and the surviving co-conspirator escaped. Petitioner was later arrested, and he was the only co-conspirator brought to trial. Petitioner defended based upon mistaken identity. *See* Pet'r's Ex., pp. 2–10. His lengthy trial was attended daily by numerous Las Vegas Metropolitan Police Department ("Metro") officers. *See* Pet'r's Ex. 77.

At the completion of the evidence, the jury began its deliberations, which continued over the next two days. After an initial five hours of deliberation, the jury sent notes to the judge posing various questions. *See* Pet'r's Ex. 23. A note regarding a stalemate the jury had reached because a of "problem juror" who had doubts "beyond the limit of reasonable doubt" soon followed. Pet'r's Exs. 23, 25, 27. The trial court directed the jury to continue its deliberations. *See* Pet'r's Ex. 23, p. 12. Ultimately the jury reached a verdict of guilty. *See* Pet'r's Ex. 30. Two days later, Juror 2, the juror with the "problem," wrote a letter to the trial court in which he had changed his vote to "guilty" as a result of having

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[1] The exhibits referred to in this Order were submitted by Petitioner in support of his First Amended Petition and are found in the electronic docket at ECF Nos. 18–20.

been followed to the courthouse on the second full day of deliberations by a Metro squad car, which caused him to "conclude Metro somehow knew who [he] was and knew of [his] unwillingness to convict." Pet'r's Ex. 31. He claimed he had "relinquished [his] vote under duress." *Id*. The juror also sent a copy to Petitioner's defense counsel, who filed a motion to overturn the verdict and for a new trial. *See* Pet'r's Ex. 33.

After an evidentiary hearing wherein Petitioner's counsel, a deputy district attorney, the lead police detective, and Juror 2 testified, the trial court denied the motion.[2] *See* Pet'r's Ex. 40, p. 41. The trial court permitted testimony concerning the object fact of whether Juror 2 had been contacted by Metro and found that Petitioner had not made any such showing; however, the trial court excluded the proffered testimony of Juror 2's subjective state of mind as to whether he had voted to convict not based upon the law and the evidence but only because he perceived a threat. Thereafter, Juror 2 wrote a second letter to the trial court which became the basis for a motion to reconsider, *see* Pet'r's Ex. 41, p. 7, which the trial court also denied, *see* Pet'r's Ex. 47.

The trial court entered Judgment on February 8, 2006. *See* Pet'r's Ex. 48. Petitioner appealed. *See* Pet'r's Ex. 52. The appeal rested on a single claim that Petitioner was entitled to a new trial because there had

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[2] Petitioner's trial counsel, Attorney Saggese, was disqualified from representing petitioner in the evidentiary proceedings because of his status as a witness. While the three other witnesses were questioned by counsel, the trial judge posed all questions to the juror in order to closely control what evidence was elicited.

been "misconduct whether real or perceived which coerced a juror into changing his verdict, not based on the evidence at trial." *Id.*, p. 12. The Nevada Supreme Court affirmed on September 25, 2007, *see* Pet'r's Ex. 56, and issued the remittitur on December 3, 2007, *see* Pet'r's Ex. 59.

Petitioner filed a state post-conviction petition in October 2008 *in pro se*, raising five claims of ineffective assistance of trial counsel—in Nevada, ineffective assistance of counsel claims may not be brought on direct appeal, but only in post-conviction proceedings—one ground of ineffective assistance of appellate counsel, and a claim of cumulative error. *See* Pet'r's Ex. 63. No counsel was appointed nor any evidentiary hearing conducted. However, following an *ex parte* hearing involving only the state, and after entertaining arguments only from the state, the trial court denied the post-conviction petition. *See* Pet'r's Ex. 69. The Findings of Fact, Conclusions of Law, and Order were entered, and Petitioner appealed. *See* Pet'r's Exs. 70,72. The Nevada Supreme Court affirmed on February 4, 2010. *See* Pet'r's Ex. 73.

Petitioner submitted his Petition to this Court on March 15, 2010, and the Federal Public Defender was appointed to represent him. (*See* ECF Nos. 1, 9). Petitioner filed the First Amended Petition ("FAP") on January 3, 2011, (*see* ECF No. 17), and Respondents moved to dismiss it, arguing it contained an unexhausted claim, (*see* ECF No. 22). The Court granted the motion in part, and Petitioner abandoned the unexhausted claim. (*See* ECF No. 25). The Answer and Reply to the FAP are now before the Court.

II. DISCUSSION

A. Legal Standards

Section 2254(d) of Title 28, a provision of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), provides the legal standards for a federal court's consideration of a petition for habeas corpus by a prisoner in state custody:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> > (1) 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
> >
> > (2) 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.

28 U.S.C. § 2254(d). These standards of review "reflect the . . . general requirement that federal courts not disturb state court determinations unless the state court has failed to follow the law as explicated by the Supreme Court." *Davis v. Kramer*, 167 F.3d 494, 500 (9th Cir. 1999). This Court's ability to grant a writ is limited to cases where "there is no possibility fair-minded jurists could disagree that the state court's decision conflicts with [Supreme Court] precedents."

Harrington v. Richter, 131 S. Ct. 770, 786 (2011). "[A] state court decision is 'contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases' or 'if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.'"*Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000)). A state court decision is an unreasonable application of clearly established Supreme Court precedent, "if the state court identifies the correct governing legal principle from our decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 74 (quoting *Williams*, 529 U.S. at 413). The "unreasonable application" standard requires the state court decision to be more than incorrect or erroneous; the state court's application of clearly established law must be objectively unreasonable. *Id*. (quoting *Williams*, 529 U.S. at 409).

In determining whether a state court decision is contrary to federal law, a federal court looks to the last reasoned decision in the state courts. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803—04 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000), *cert. denied*, 534 U.S. 944 (2001). Furthermore, "a determination of a factual issue made by a State court shall be presumed to be correct," and a petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

B. Merits

1. Ground One - Juror Misconduct/ Jury Tampering

Ground One states:

> Tarango was convicted because one of the jurors believed that the State was trying to intimidate him, and not because he believed Tarango was guilty. As such, Tarango is incarcerated in violation of his right to a Fair Trial, an Impartial Jury, and Due Process under the 6th and 14th Amendments of the United States Constitution.

FAP 7. The Court finds that the claim is meritorious. The state trial court denied the motion for a new trial and the subsequent motion to reconsider after finding that there had been no contact with Juror 2 and refusing to admit Petitioner's proffered evidence concerning the effect of the perceived contact upon his vote to convict. The state court refused to admit this evidence because it interpreted section 50.065(2) of the Nevada Revised Statutes to prohibit the admission of any evidence bearing upon a juror's mental processes in challenging a verdict, and the state rule included mental pressures brought to bear via external jury tampering:

> 2. Upon an inquiry into the validity of a verdict or indictment:
>
> > (a) A juror shall not testify concerning the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the

> verdict or indictment or concerning the juror's mental processes in connection therewith.
>
> (b) The affidavit or evidence of any statement by a juror indicating an effect of this kind is inadmissible for any purpose.

Nev. Rev. Stat. § 50.065(2). The Nevada Supreme Court affirmed, noting that Juror 2's perception of a threat to him was "speculative." The analogous federal rule, however, permits several exceptions, including that "an outside influence was improperly brought to bear on any juror." Fed. R. Evid. 606(b)(2)(B).

The Court finds that the state trial court did not unreasonably apply clearly established federal law in refusing to consider the proffered evidence of Juror 2's perception of jury tampering. First, the Court must accept the state courts' interpretation of the state rule. Second, no conflict between the federal and state evidentiary rules is at issue here. Federal rules of evidence of course apply in federal court notwithstanding any conflicting state rule, but federal evidence rules do not apply to preempt state rules in state court, and therefore Petitioner cannot maintain an argument that the state court's refusal to adhere to the federal rule was an error of federal law. Rather, the clearly established federal law relevant to the present case provides:

> In 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, for obvious reasons, deemed presumptively prejudicial, if

> not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

United States v. Angulo, 4 F.3d 843, 846 (9th Cir. 1993) (quoting *Remmer v. United States*, 347 U.S. 227, 229 (1954)). Where there is an indication that a juror may have been improperly influenced, a hearing is required to determine prejudice. *See Dennis v. United States*, 339 U.S. 162, 171–72 (1950) ("Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury."). And a state court cannot limit the effect of a federal constitutional rule via a state evidentiary rule. *Cf. Sears v. Upton*, 130 S. Ct. 3259, 3263 & n.6 (2010) (noting that the Eighth and Fourteenth Amendments mandate the opportunity to adduce all evidence relevant to mitigation at the sentencing-phase of a death-penalty case, notwithstanding its usual inadmissibility under a state hearsay rule). The same principal applies here: a state court cannot exclude reliable evidence relevant to a *Remmer* inquiry based upon a state evidentiary rule.

Under *Remmer*, the Government has the burden to show harmlessness if there is an actual improper contact. But a petitioner must make the initial threshold showing of an improper contact by a preponderance of the evidence, and the state court found that Petitioner failed to make this showing. The

Courts of Appeals generally hold that only juror fears created by actual external influence, and not subjective fears whose source is the juror's own mind, can be the basis of the impeachment of a juror's verdict. *See United States v. Krall*, 835 F.2d 711, 715–16 (8th Cir. 1987) (rejecting the argument that jurors' subjective fears of IRS retaliation constituted external influence); *Gov't of V.I. v. Gereau*, 523 F.2d 140 (3d Cir. 1975) (listing publicity, extra-record evidence reaching the jury room, and communication or contacts between jurors and litigants, the court, or other third parties as situations constituting improper external influence). The Court is tempted to say that the fact Juror 2 rendered his verdict based not upon the law and evidence, but because of his perception of a threat, is dispositive. After all, the right to a fair and impartial jury would appear to be violated in such a circumstance regardless of whether the juror is correct about having been threatened. A true external threat cannot be said to impugn the integrity of a verdict any more than a wrongly, but actually, perceived external threat. On the other hand, it simply cannot be avoided that the Courts of Appeals have rejected this approach by holding consistently that jurors cannot impeach their verdicts based upon subjective fears uncorroborated by objective evidence of external influence. There is certainly no clear Supreme Court precedent to the contrary, which is dispositive of the issue in the context of § 2254(d)(1). If anything, Supreme Court case law is clear that objective proof of external contact is required. The rule requiring objective corroboration of external influence represents a balancing of the defendant's right to a fair trial against the State's and the People's interest in the finality of verdicts and jurors' interests in peace from disgruntled litigants. *See*

Tanner v. United States, 483 U.S. 107, 116–21 (1987). A juror will simply not be heard to impeach his own verdict unless he can provide objectively verifiable evidence of improper influence, in which case there is a presumption of prejudice. The Court therefore finds that once the state trial court ruled that Petitioner had failed to show an objective external contact by Metro, it was within constitutional bounds to apply the state evidentiary rule to exclude any evidence of Juror 2's subjective perception of fear, even though the alleged fear in this case was, to be sure, less speculative than in the cases cited, *supra*.

The remaining question is whether the state trial court's determination of a lack of contact by Metro was unreasonable in light of the evidence before it. In making this determination, the Court must only grant habeas corpus relief if the state court's determination of fact was "clearly erroneous" as that term is used in the context of the Court of Appeals's review of factual determinations made by district courts, *Torres v. Prunty*, 223 F.2d 1103, 1107–08 (9th Cir. 2000), i.e., "only if [the Court is] left with a firm conviction that the determination made by the state court was wrong and that the one [Petitioner] urges was correct.," *id.* at 1108 (citing *Van Tran v. Lindsey*, 212 F.3d 1143, 1153–54 (9th Cir. 2000) (internal quotations marks omitted)). The result cannot be "merely debatable. . . . These stringent standards 'guard against extreme malfunctions in the state criminal justice systems, not as a substitute for ordinary error correction through appeal.'" *Griffin v. Harrington*, --- F.3d. ----, 2013 WL 4267105, at *4 (9th Cir. 2013) (quoting *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011)) (citation omitted).

The hearing on the motion for new trial was held on December 19, 2005. (*See* Hr'g Tr., Dec. 19, 2005, ECF No. 19-15). Trial counsel, Mr. Saggese, first testified that there had been a note from the jury foreperson that there was a juror refusing to participate in deliberations and a second note from that juror himself, which the Court did not permit to be testified to under state law prohibiting the consideration of any evidence concerning a juror's state of mind. (*See id.* 7–20). Saggese testified, however, that the note had been read in court and discussed, and that after the hearing, he overheard Assistant District Attorney DiGiacomo speaking on the telephone to Detective Vicarro, and that DiGiacomo mentioned near the end of the conversation that there was a holdout juror. (*See id.* 20–23). Sagesse heard DiGiacomo identify Juror 2 to Vicarro by number, but not by name. (*See id.* 24–25). Counsel and the court then discussed the communications from Juror 2 to the court and counsel concerning his perception of harassment by Metro. Eventually, Juror 2 himself testified. He testified that on the second day of jury deliberations, he had just entered Interstate 15 at Tropicana Avenue from his place of work in Henderson on his way to the courthouse in downtown Las Vegas when he noticed a Metro squad car so close behind him that he couldn't see the front wheels or bumper. (*See id.* 130–33). The court takes judicial notice of the facts that: (1) it is approximately 15 miles by road from central Henderson to the I-15 on-ramp at Tropicana Ave in Las Vegas, Nevada; and (2) it is approximately six more miles by road to the Regional Justice Center in downtown Las Vegas. The Metro car remained very close to him all the way to the parking garage in downtown Las Vegas, where it finally left. (*See id.*

133–37). He could only identify the car as a black-and-white police car. He could not identify any markings on the car or whether the driver was male or female. (*Id.* at 137). Juror 2 was driving the same car as he had driven to the trial the previous day and confirmed he had been followed so closely the entire way that he could not see the car's bumper. (*Id.* 146–47). After argumentation, the court noted that it was inclined to deny the motion because the evidence was ambiguous, vague, and non-specific. (*Id.* 159).

The Court cannot say it is firmly convinced the state court made an erroneous determination of fact as to whether Juror 2 had been improperly contacted. Although the state court's ruling is debatable, it was not clearly erroneous. There is room for the state court's opinion that Juror 2's perception that his experience driving to trial was related to his service as a juror was speculative. Petitioner was unable, via the testimony of Juror 2 or otherwise, to identify the officer (or vehicle) who allegedly attempted to harass Juror 2. There is a heavy patrol car presence in the downtown and "Strip" areas of Las Vegas. Interstate 15 is a common route to use to get from the Strip area or south of the Strip (such as near Tropicana Ave. near the airport) to the downtown area, because Las Vegas Boulevard itself (the Strip) is crowded with pedestrian traffic and cross-streets. I-15 is invariably heavily crowded such that it is not unusual to be followed very closely on this stretch of road. I-15 is not only the major north-south thoroughfare through the Las Vegas metropolis for the city's residents, it is packed full of taxicabs transporting tourists between the airport and the Strip. During the morning rush hour, the road is so crowded that traffic cannot maintain speed at or near

the speed limit, and accidents are common because of the heavy traffic. It was publicized in the newspapers that Senator Reid himself was involved in an accident on this very stretch of road just last year. Petitioner provided no evidence of any direct communication of any threat. The only evidence was of a perceived, implied threat via an unidentified officer in an unidentified vehicle following Juror 2's vehicle closely on a stretch of road where that is normal. There is no evidence that the alleged "tail" happened between Henderson and I-15, where similar behavior would indeed seem odd, especially if it continued through multiple turns, but only after Petitioner was on I-15, where the close following was not odd. After Juror 2 exited I-15, the car only followed him until he turned right onto Carson St. where the parking garage was. (*See id.* 136–37). In other words, the car never followed Juror 2 through any turns, except for the exit from I-15 to the downtown area. The Court rejects this claim, as it cannot be said that the state court's ruling was clearly erroneous.

2. Count 2 - Ineffective Assistance of Trial Counsel

Petitioner first argues that trial counsel was ineffective for having an improper understanding of DNA evidence. Most of the claim, however, is dedicated to attacking the State's conduct with respect to DNA evidence, which is not at issue before the Court. The claim in fact tends to indicate that trial counsel did everything reasonable with respect to DNA evidence. It is the State who is alleged to have engaged in misconduct with respect to defense counsel's requests for DNA testing and other trial tactics. The Court

perceives no ineffective assistance of trial counsel with respect to DNA evidence or that it is reasonably probable that the trial court would have ordered a mistrial or an acquittal had counsel made the objections Petitioner argues he should have.

Petitioner next argues that trial counsel was ineffective for failing to object to other alleged instances of prosecutorial misconduct. The State's rebuttal argumentation to the jury in response to the defense's arguments that here had been some kind of conspiracy against Petitioner were not improper. Nor were the State's arguments attacking the credibility of defense theories. And again, the question before this Court in the context of the present Petition is not alleged prosecutorial misconduct but whether defense counsels' objections to the alleged misconduct would have been reasonably probable to have led to a mistrial or an acquittal. The Court finds that to be exceedingly unlikely.

Petitioner next argues that trial counsel was ineffective for failing to object to a jury instruction on reasonable doubt—the Nevada pattern instruction—that states in relevant part that reasonable doubt "is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life." As Petitioner notes, however, the Court of Appeals has specifically held that this instruction comports with due process. *See Ramirez v. Hatcher*, 136 F.3d 1209, 1211–15 (9th Cir.), *cert. denied*, 525 U.S. 967 (1998). Trial counsel was not only not ineffective in failing to object to the instruction but would have been in violation of his duty of candor to the court to object to the instruction "to preserve it for later review."

Petitioner next argues that trial counsel was ineffective for failing to object to the State's description of the reasonable doubt standard in closing arguments, i.e., his repeated argument that there is no reasonable doubt if the jury has an "abiding conviction" of guilt. The Court rejects this claim. This language appears in the instruction itself, and there is no reason to think that defense counsel's failure to object could have led the jury to think that the rest of the instruction could be ignored. The State cannot have been expected to have recited the entire 100-plus-word reasonable doubt instruction every time it wished to invoke the standard during its closing arguments.

Petitioner next argues that trial counsel was ineffective for failing to litigate the issues in Ground 1, *supra*. The Court rejects this claim based upon the record, because it is clear that the jury misconduct/ tampering issue was litigated via the motion for new trial. (*See* Pet'r's Ex. 40).

3. Count 3 - Ineffective Assistance of Appellate Counsel

Petitioner first argues that appellate counsel was ineffective for failing to litigate the issues in Ground 1, *supra*, on direct appeal. The Court rejects this claim based upon the record, because it is clear that the jury misconduct/tampering issue was litigated to the Nevada Supreme Court on appeal. (*See* Pet'r's Ex. 56).

Petitioner next argues that appellate counsel was ineffective for failing to litigate the issues in Ground 2, *supra*, on direct appeal. The Court rejects this claim on its face, because ineffective assistance of trial counsel claims cannot be directly appealed in Nevada unless

the trial court has held an evidentiary hearing or one would be needless. *See Archanian v. State*, 145 P.3d 1008, 1020–21 (Nev. 2006). In any case, the question of appellate counsel's ineffectiveness in failing to challenge the effectiveness of trial counsel is rendered moot by virtue of this Court's present consideration of trial counsel's ineffectiveness directly under Count 2 of the present Petition.

4. Ground 4 - Cumulative Error

The Court rejects this claim. The Court perceives no error.

CONCLUSION

IT IS HEREBY ORDERED that the Petition is DISMISSED.

IT IS SO ORDERED.

Dated this 16th day of September, 2013.

/s/ Robert Jones
ROBERT C. JONES
United States District Judge

APPENDIX D

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 46680

[Filed September 25, 2007]

MANUEL TARANGO, JR., Appellant,

vs.

THE STATE OF NEVADA, Respondent.

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a motion for a new trial in a criminal case. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Manuel Tarango, Jr. was convicted of burglary with the use of a deadly weapon. attempted robbery with the use of a deadly weapon, conspiracy to commit robbery with the use of a deadly weapon, three counts of battery with the use of a deadly weapon, and attempted murder with the use of a deadly weapon, in relation to an attempted robbery and shootout with off-duty police officers at a local bar. The district court sentenced him to serve concurrent and consecutive terms totaling 16 to 40 years in prison.

Tarango moved for a new trial, alleging juror misconduct and outside influence on the jury process. The district court denied the motion, and this appeal followed. We now affirm.

The district court has broad discretion to deny a motion for a new trial, and we will not overturn the district court's decision absent an abuse of discretion.[1] However, if there were allegations that the jury was exposed to extrinsic evidence, then this court reviews the prejudicial effect of the juror misconduct de novo.[2]

Tarango contends that the following facts show Juror misconduct and external communication; according to a letter Shockley subsequently wrote to the district court, Shockley had doubts during jury deliberation about convicting Tarango. Shockley decided to vote for guilt on the second day of deliberations because he thought he had been followed by a police car that morning and felt intimidated. Several days later, Shockley emailed Tarango's counsel, Marc Saggese. He attached to the email a copy of a letter he had written to the judge after the jury returned its verdict, in which he told the judge he had changed his vote after feeling intimidated by police. Saggese then filed his motion for a new trial, alleging that Shockley had committed juror misconduct and that the police following Shockley constituted outside influence with the jury process and an improper external communication.

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[1] Meyer v. State, 119 Nev. 554, 561, 80 P.3d 447, 454 (2003).

[2] Id. at 561-62, 80 P.3d at 454.

For a defendant to prevail on a motion for a new trial based on misconduct, the defendant must present admissible evidence sufficient to establish (1) the occurrence of misconduct, and (2) a showing that the misconduct was prejudicial.[3] Prejudice can be shown whenever there is a reasonable likelihood that the misconduct affected the verdict.[4]

Shockley's note and letter to the district court and email to Tarango's counsel, Marc Saggese, as to his unwillingness to convict Tarango, formed the basis for his motion to dismiss with prejudice, or in the alternative, a motion for a new trial on the grounds of juror misconduct.

On the first day of jury deliberations, Shockley indicated to the district court that he was not going to be able to vote to convict Tarango. Tarango asserts that after the district court had read two notes from the jury into the record,[5] Saggese overheard an attorney from the district attorney's office, Mr. DiGiacomo, speaking on his cellular phone and indicating to Detective Vacarro of the Las Vegas Metropolitan Police Department on the other end of the call that juror number 2 was a holdout Juror. The State disputes Saggese's allegation that Shockley was identified or

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[3] Id. at 563, 80 P.3d at 454.

[4] Id. at 564, 80 P.3d at 455.

[5] One note was from Shockley and one was from the foreperson indicating a juror's unwillingness to participate in deliberations.

that his identity was known to Mr. DiGiacomo.[6] The jury continued to deliberate even after Shockley's note was received by the district court.

The next day the jury deliberated for a few hours, emerging to return a verdict of guilty on all seven counts. Several days later, Saggese received an email from Shockley. The email alerted Saggese to a letter sent by Shockley to the district court on November 4, 2005. The email reads in relevant part:

> Good day to you.
>
> I feel compelled to notify you of my 'Letter to the Judge.'
>
> I still have doubt as an X-Juror [sic], but I realize it is now too late.
>
> I do wish I really knew if Mr. Tarango was present that night in question.
>
> But I also realize my role in this case is done.
>
> Mainly, I wanted you to have a copy of the letter I mailed.
>
> And I wish you luck in your request for leniency.

The attached letter was marked confidential and its subject line included the Tarango case as well as an article from the Las Vegas Review-Journal discussing Tarango's conviction. The letter began with the headline from the Review-Journal Article: "Man

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[6] Mr. DiGiacomo would later testify that he only told Detective Vacarro that there was likely a holdout on the jury without knowing who the holdout juror was.

convicted in 1999 case." The excerpt of the newspaper article read:

> "But a juror who spoke to the Review-Journal afterward said the taped phone call was key.
>
> 'For me it was the taped call - that did it,' the juror said.
>
> The juror said the case was close to a hung jury because one juror seemed unwilling to convict following nearly two days of deliberations. But by Wednesday morning, the other jurors were able to convince the holdout to convict. Tarango faces a sentence ranging from four to 111 years in prison when he is sentenced by District Judge Michelle Leavitt in December.'"

Shockley's letter stated:

> Your Honor,
>
> First I would like to thank you for taking the time to talk to the Jury after the trial was completed. Although we never spoke, it was an honor to shake your hand.
>
> As you can see from the excerpt from the newspaper article, dated November 03, 2005, one of the Jurors talked to the press. I do not know which one. We had however agreed as a group, not to discuss the deliberations. I am the one Juror mentioned in the article. I underlined it above. I am also the Juror that wrote you the note during deliberations. It read: "I have doubt beyond the limit of what I consider a reasonable doubt." I also stated, "I did not believe further

> deliberations would cure that doubt." Further deliberations in fact, did not cure my doubt.
>
> However, when returning to re-deliberate Wednesday November 2nd from the Henderson area, A Metro squad car followed me north bound on I-95 and into the downtown area.
>
> I found that action unnerving.
>
> I realize the State has much time and money invested in this case. There were not [sic] alternate Jurors. I concluded Metro somehow knew who I was and knew of my unwillingness to convict. I have never been in trouble with the law. Therefore, I relinquished my vote under duress. I only ask, within the law, please show leniency, as it was printed in the article, Saggese said he will ask Leavitt to show Tarango leniency. "He's a good person; he's salvageable," Saggese said. "He will one day be able to contribute to society."

Based on Shockley's email and his attached letter, Saggese filed a motion for a new trial and attached to it an affidavit signed and sworn by him providing details as to the cell phone conversation he overheard between Mr. DiGiacomo and Detective Vacarro on November 1, 2005, as well as the conversation he had with Mr. DiGiacomo after DiGiacomo's phone conversation ended.

The district court held a hearing on the motion, but excluded Shockley's written communications, which included Shockley's email to Saggese and Shockley's letter to the district court. The district court denied

Tarango's motion, expressly relying on this court's opinion in Meyer v. State.[7]

Tarango argues on appeal that Shockley's note to the district court, his letter, and his email to Saggese paint a convincing picture of juror misconduct. However, the district court properly excluded these materials under NRS 50.065(2)[8] and Meyer. Under the rule set forth by Meyer, for misconduct to be proved it "must be based on objective facts and not the state of mind or deliberative process of the jury."[9] The testimony of other witnesses was insufficient to show by objective facts that Shockley committed misconduct.

Further, Shockley failed to show by objective facts that there was an improper external communication between him and the police. Although any unauthorized communication between law enforcement and a juror during trial about a matter pending before

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[7] 119 Nev. 554, 80 P.3d 447.

[8] NRS 50.065(2) provides that

> Upon an inquiry into the validity of a verdict or indictment:
>
> (a) A juror shall not testify concerning the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith.
>
> (b) The affidavit or evidence of any statement by a juror indicating an effect of this kind is inadmissible for any purpose.

[9] 119 Nev. at 563, 80 P.3d at 454.

a Jury may be "presumptively prejudicial,"[10] it follows that there must be an actual communication. An example of an unauthorized communication would be a bailiffs unauthorized communication with a juror during jury deliberation.[11]

Here, even assuming arguendo that Shockley was followed by a marked police car, it is not clear whether being followed by a marked car qualifies as a communication at all. It is even more dubious as to whether such a "communication" was about a matter pending before the jury. In any event, we conclude that the alleged external influence in the case at bar was far too speculative to sustain a motion for a new trial.

Having concluded that Tarango failed to demonstrate juror misconduct or external influence on the jury process, we

ORDER the judgment of the district court AFFIRMED.

/s/ Gibbons, J.
Gibbons

/s/ Douglas, J.
Douglas

/s/ Cherry, J.
Cherry

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[10] State v. Videau, 900 So.2d 855, 860 (La. App. 2005).

[11] See id. at 861.

cc: Hon. Michelle Leavitt, District Judge
Cristalli & Saggese, Ltd.
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

APPENDIX E

DISTRICT COURT
CLARK COUNTY, NEVADA

Case No: C165745
Dept No: XII

[Filed February 8, 2006]

THE STATE OF NEVADA,	)
Plaintiff,	)
	)
-vs-	)
	)
MANUEL TARANGO,	)
#1422959	)
Defendant.	)
	)

JOCP

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

JUDGMENT OF CONVICTION (JURY TRIAL)

The Defendant previously entered plea(s) of not guilty to the crime(s) of COUNT 1 - BURGLARY WITH USE OF A DEADLY WEAPON (Category B Felony); COUNT 2 - ATTEMPT ROBBERY WITH USE OF A

DEADLY WEAPON (Category B Felony); COUNT 3 - CONSPIRACY TO COMMIT ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony); COUNT 4 - BATTERY WITH USE OF A DEADLY WEAPON (Category B Felony); COUNT 5 - BATTERY WITH USE OF A DEADLY WEAPON (Category B Felony); COUNT 6 - BATTERY WITH USE OF A DEADLY WEAPON (Category B Felony); and COUNT 7 - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Category B Felony), in violation of NRS 205.060, 193.165, 193.330, 200.380, 199.480, 200.481, 200.010, 200.030, and the matter having been tried before a jury, and the Defendant being represented by counsel and having been found guilty of the crime(s) of COUNT 1 - BURGLARY WITH USE OF A DEADLY WEAPON (Category B Felony); COUNT 2 - ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony); COUNT 3 - CONSPIRACY TO COMMIT ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony); COUNT 4 - BATTERY WITH USE OF A DEADLY WEAPON (Category B Felony); COUNT 5 - BATTERY WITH USE OF A DEADLY WEAPON (Category B Felony); COUNT 6 - BATTERY WITH USE OF A DEADLY WEAPON (Category B Felony); and COUNT 7 - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Category B Felony); and thereafter on the 19th day of January, 2006, the Defendant was present in Court for sentencing with his counsel, MICHAEL CRISTALLI, Esquire and MARC SAGGESE, Esquire, and good cause appearing therefor,

THE DEFENDANT HEREBY ADJUDGED guilty of the crime(s) as set forth in the jury's verdict and, in addition to the $25.00 Administrative Assessment Fee,

$150.00 DNA Analysis Fee and submission to a test to determine genetic markers, the Defendant is sentenced as follows: Deft. SENTENCED as to COUNT 1 to a MINIMUM of FORTY-EIGHT (48) MONTHS and a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS in the Nevada Department of Corrections (NDC); as to COUNT 2 to a MINIMUM of FORTY-EIGHT (48) MONTHS and a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS in the Nevada Department of Corrections (NDC) plus an equal and CONSECUTIVE MINIMUM of FORTY-EIGHT (48) MONTHS and a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS for use of a deadly weapon, COUNT 2 CONCURRENT with COUNT 1; as to COUNT 3 to a MINIMUM of EIGHTEEN (18) MONTHS and a MAXIMUM of FORTY-EIGHT (48) MONTHS in the Nevada Department of Corrections (NDC), COUNT 3 CONCURRENT with COUNTS 1 & 2; as to COUNT 4 to a MINIMUM of FORTY-EIGHT (48) MONTHS and a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS in the Nevada Department of Corrections (NDC), COUNT 4 CONSECUTIVE to COUNTS 1, 2 & 3; as to COUNT 5 to a MINIMUM of FORTY-EIGHT (48) MONTHS and a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS in the Nevada Department of Corrections (NDC), COUNT 5 CONCURRENT with COUNT 4; as to COUNT 6 to a MINIMUM of FORTY-EIGHT (48) MONTHS and a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS in the Nevada Department of Corrections (NDC), COUNT 6 CONCURRENT with COUNTS 4 & 5; and as to COUNT 7 to a MINIMUM of NINETY-SIX (96) MONTHS and a MAXIMUM of TWO HUNDRED FORTY (240) MONTHS in the Nevada Department of Corrections (NDC) plus an equal and CONSECUTIVE

MINIMUM of NINETY-SIX (96) MONTHS and a MAXIMUM of TWO HUNDRED FORTY (240) MONTHS for use of a deadly weapon, COUNT 7 CONSECUTIVE to COUNTS 1, 2, 3, 4, *5,* & 6. Deft. to receive FIVE HUNDRED NINETY-SEVEN (597) DAYS credit for time served.

DATED this 6 day of ~~January~~ Feb, 2006.

/s/
DISTRICT JUDGE AW