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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

DARRELL RASHARD EWING,  
Petitioner,

Case No. 2:15-cv-10523

v.

HON. DENISE PAGE HOOD

JEFFREY WOODS,  
Respondent.

\_\_\_\_\_ /

REPLY TO RESPONDENT'S ANSWER OPPOSING  
PETITIONER'S EMERGENCY MOTION TO UNCONDITIONALLY  
GRANT WRIT OF HABEAS CORPUS

NOW COMES, Petitioner, Darrell Rashard Ewing, pro per, replying to Respondent's answer that asserts they have complied with this Court's grant of an conditional relief, mistakenly or more so deceptively arguing it mandated that only a Remmer hearing be held. (Respondent's Brief ECF No. 26 Page Id. 3471). When this sophistry is the farthest from the truth and must be how Respondent has went contrary to the spirit and letter of this Court's grant of relief.

CASE HISTORY:

On November 20, 2017, this Court issued an order conditionally granting Petitioner habeas relief; specifically, Petitioner was granted a new trial to be held within (90) days. (ECF No. 8). Respondent then upset with this ruling, appealed to the Sixth Circuit, taking a diametrically different stance than it did to this Court. Noteworthy, conceding that the state court ruling was "contrary to" clearly established precedent for its denial of the Remmer hearing, but that this Court went way to far in its grant of relief, as the remedy for such a

trial error was a Remmer hearing and not a new trial.

The Sixth Circuit solely noting Respondent's concessions agreed with Respondent and remanded the case back to this Court with instructions to issue the grant premised first on the state court conducting an evidentiary hearing on the claim of Juror Misconduct. Ewing v. Horton, 914 F.3d 1027, 1034 (6th Cir. 2019).

This Court adhering to the Sixth Circuit then issued an opinion modifying the original order granting habeas relief. (ECF No. 16). Respondent attempts to mislead this Court concerning its very own decree. Arguing this Court order only required "the State of Michigan to take action to afford petitioner an evidentiary hearing of his juror misconduct claim in the Wayne County Circuit Court within (120) days of this court order[.]" (Respondent's Brief ECF No. 16 Page Id. 3470). When in fact this Court's order reads as follows:

"The grant is conditioned upon the state trial court conducting an evidentiary hearing on petitioner's juror misconduct claim within 120 days of this Court's order and making a determination as to whether the extraneous information had a prejudicial effect upon the jury's verdict. If the judge so finds, he or she shall order a new trial for petitioner." (ECF No. 16).

Quite plainly, this Court's letter and spirit of the conditional writ decreed a whole lot more than Respondent submits. As this Court held Petitioner also receive a new trial and not for the case to be appealed to an inferior court, steady wasting and tying up already strained judicial resources with Respondent's Janus faced gamesmanship that the principles of "Judicial Estoppel" alone should be employed. Putting an end to this merry-go-round Respondent attempts to play on at the

expense of this Court on top of Petitioner's innocence and risk of passing to Covid-19 as it steady rears its head at Petitioner's facility, with 3 new cases today and already being fatal for over 69 inmates in the Department of Corrections, prompting the need for a quick determination of compliance to be made.

JUDICIAL ESTOPPEL:

The judicial estoppel doctrine is "utilized in order to preserve the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship." Browning v. Levy, 283 F.3d 761, 775 (6th Cir. 2002).

In the present petition judicial estoppel should be enforced, as Respondent conceded that the Michigan Court of Appeals ruling in Docket No. 301758 was "contrary to" clearly established precedent and that their finding of harmless error was "erroneous" while in the Sixth Circuit on appeal. Ewing v. Woods 914 F.3d at 1030. And based solely on these concessions was the Respondent able to succeed in getting the Sixth Circuit to remand the case for a Remmer hearing, rather than uphold this Court's original grant of a new trial.

At the hearing which followed, Wayne County Third Circuit Judge, Michael Hathaway found prejudice and granted Petitioner a new trial, adhering to this Court's decree. The Respondent however in an attempt to circumvent and undermine this Court's authority, filed an application for leave to appeal not on the Sixth Circuit Court of Appeals, but the Michigan Court of Appeals instead, doing a complete Janus faced 180°, arguing judge

Hathaway erred, as he was bound by the Law of the Case doctrine in the Michigan Court of Appeals determination of Harmless error, that mind this Court, in the Sixth Circuit Respondent conceded the Michigan Court of Appeals ruling in Docket No. 301758 was "contrary to" clearly established supreme court precedent and their finding of harmless error was also "erroneous."

These Janus faced positions alone warrant this Court to apply the judicial estoppel doctrine in this petition, see: (Exhibit One, Respondent's brief filed on to the Michigan Court of Appeals in their application for leave to appeal, pg. no. 22, 29-30).

**2. Respondent has not Complied with this Court's Conditional Order:**

Respondent misleads this Court submitting they have complied with the terms of this Court's conditional writ and that this Court does not retain any further jurisdiction over the matter. (ECF No. 26 Page Id. 3473). Yet, Petitioner will quickly highlight how respondent is so wrong.

The Sixth Circuit in Gentry v. Deuth, 456 F.3d 687, 697 (6th Cir. 2006) long ago settled Respondent's claim when it proclaimed "a Federal district court always retains jurisdiction to determine whether a party has complied with the terms of a conditional order in a habeas case."

Additionally, this very Court announced in Balfour v. Lafley, 2013 U.S. Dist. LEXIS 181563, "when a petitioner alleges noncompliance with a conditional writ the district court must; and I quote "must", make a finding concerning the sufficiency of the action that the state court took pursuant to its mandate."

(Emphasis added).

So it is plain, that Petitioner has all rights to bring this noncompliance petition for this Court to settle once and for all.

In making this determination, this Court considers whether the state's action ran afoul of the "letter and spirit of the conditional writ." Patterson v. Haskins, 470 F.3d 645 (6th Cir. 2006). Here, Petitioner submits that the state's actions despite any of their claims have ran afoul, as the Respondent has deprived Petitioner of a new trial as decreed by this Court after a finding of prejudice.

Respondent has failed to petition this Court for a Stay of Judgment and in addition failed to appeal to this Court's superior court, the Sixth Circuit. Instead is attempting to circumvent this Court's authority.

Respondent's claim that their actions hasn't ran afoul is hinged on the erroneous belief and misleading position that this Court only ordered "the State of Michigan to take action to afford petitioner and evidentiary hearing on his juror misconduct claim in the Wayne County Circuit Court within (120) days of the Court's order[.]" (ECF No. 26, Page Id. 3470). However, Respondent fails to continue on and cite the rest of this Court's decree that states:

"If the judge, so finds, he or she shall order a new trial for petitioner." (ECF No. 16).

To which, one would assume square with this Court original ruling at [ECF No. 8] that ordered a new trial be held within 90 days.

So seeing that Respondent fails to acknowledge this Court's order of a new trial as previously held following a finding of prejudice. Petitioner brings this petition of non-compliance, as this was a highly contested position even judge Michael Hathaway didn't believe could take place, whether Respondent could file an appeal to the state court after this Court ordered a new trial to be conducted following a finding of prejudice.

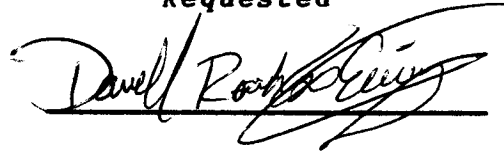
Which leaves this question, would or could the Respondent following this Court's ruling in (ECF No. 8) appealed to the Michigan Court of Appeals this Court's grant of a new trial within 90 days as originally found. The answer would be of course not, and Petitioner holds the same here.

RELIEF REQUESTED

As it is Petitioner's strong position that Respondent has failed to comply with the explicit order of this Honorable Court, Petitioner ask this Court to make a determination of compliance, to which Petitioner submits they haven't and therefore prays this Court grant an unconditional writ, entering an order voiding the state conviction and the immediate release of Petitioner. Gentry v. Deuth, 456 F.3e 687, 691 (6th Cir 2006).

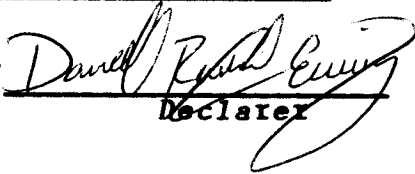
Respondent insist this Court let the case play out in state court and make its way back up the ladder, however, justice delayed is justice denied. This Court therefore has the avenue to intervene now, assure justice is served and save numerous courts of their already strained resources with this determination of compliance Petitioner puts forth.

Respectfully and Humbly  
Requested



cc: File, Court, Attorney General

I, Darrell Rashard Ewing, declare under penalty of perjury  
that the foregoing was served on all parties via U.S. mail on  
9-2-20. 28 U.S.C. § 1746.

1s/   
Declarer

9-2-20  
Date

**EXHIBIT 1**

Respondent's Application for Leave  
to appeal filed onto  
The Michigan Court of Appeals



STATE OF MICHIGAN  
IN THE COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellant,

v

No. 351446

DARRELL EWING,  
Defendant-Appellee.

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Third Circuit Court No. 10-1495-02

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PLAINTIFF-APPELLANT'S BRIEF ON APPEAL  
ORAL ARGUMENT REQUESTED

Filed under AO 2019-6

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### COUNTERSTATEMENT OF JURISDICTION

The People appeal the order of the Third Judicial Circuit Court, the Honorable Michael Hathaway, granting defendant, Darrell Ewing, a new trial. On remand from the United States Court for the Eastern District of Michigan, an evidentiary hearing was conducted in the lower court on the issue of whether defendant and his co-defendant, Derrico Searcy, were denied a fair trial by the alleged misconduct of the jurors. On October 24, 2019, Judge Hathaway granted defendant a new trial. The People sought leave to appeal the lower court's order from this Court of Appeals. On April 13, 2020, this Court granted leave to appeal in both defendant and Searcy's cases. Those cases have been consolidated on appeal.<sup>1</sup> The People now timely file their brief on appeal. The Court has jurisdiction over this appeal through MCR 7.203(B)(1), MCR 7.203(E), MCR 7.205(E)(3), and MCL 770.12(2)(a).

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<sup>1</sup> The Court of Appeals case for Searcy has been designated Case No. 351442.

## COUNTERSTATEMENT OF QUESTIONS PRESENTED

### I

A juror's hypotheses on the trial evidence, even if supported by extrinsic information, comprises part of the deliberative process in determining witness credibility and the weight of the evidence and cannot be used to impeach the jury's verdict. Here, the lone holdout juror testified at an evidentiary hearing that, despite several jurors sharing extraneous information, only one thing influenced her to vote to convict defendant—the opinion of another juror, supported by that juror's extrinsic research of gangs, explaining why another person would falsely admit to committing the charged crimes. Can a juror's hypotheses on the admitted testimony—part of the jury's deliberative process—be used to impeach the jury's verdict and grant a new trial?

The trial court did not answer this question.

The People answer, "NO."

Defendant would answer, "YES."

### COUNTERSTATEMENT OF FACTS

On December 29, 2009, at approximately 11:00 a.m., LaRita Thomas was driving her van in the area of Whittier in Detroit. (10/26, 139)<sup>2</sup> J.B. Watson and Willie Williams were also in the van. The van passed a parked white vehicle, described as an Impala. (10/26, 142) Defendant, Darrell Ewing, was attempting to enter the white car. (10/26, 142) Accompanying Defendant were two other men known as the Twins, Delmari and Deonte Morris. (10/26, 142) Defendant looked into the van as it passed. Watson and Williams were members of the Knock Out Boys gang. The Knock Out Boys had a long-standing "beef" with members of the Hustle Boys gang. Defendant, known as Apple, was a member of the Hustle Boys. Defendant had participated in some of the beefs between the gangs. (10/26, 132, 137) Defendant and the Twins got into the white car, with Defendant driving. (10/26, 145) Defendant followed the van. Noticing Defendant following, Thomas attempted to elude him. (10/26, 147) Thomas was successful in eluding Defendant until the area of Seymour and Hayes in Detroit where the white car cut off the van. Defendant looked into the van and "mean mugged," before driving away. (10/26, 149-150) Later that day, Thomas drove the van to her house where she was dropped off. At approximately 3:00 p.m., Watson drove the van, accompanied by Williams, to pick up Phillip Reed. (10/26, 71-72) Reed, known as L.P., was Watson's cousin and another member of the Knock Out Boys. (10/26, 62) Watson then drove the van back to Thomas's house to pick her up again. Thomas got in the driver's

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<sup>2</sup>References to the trial court record will be cited by the date of the hearing followed by the page number.

seat and Watson got into the front passenger seat with Williams and Reed seated behind them in the van. (10/26, 73) The intent was for Thomas to drive the van to her work, so she could start her shift at 4:00 p.m.. (11/1, 285) Along the way, Thomas stopped the van at a traffic light located at Harper and Van Dyke. (10/26, 77; 11/1, 8) As the van was sitting at the light, gunshots erupted. (10/26, 79, 157; 11/2, 9) Bullets began entering the van from behind. (10/26, 80, 159) Williams was struck by a bullet in the hand. (10/26, 80) Watson was also shot. (11/2, 10) Approximately nine gunshots were fired. (10/26, 81; 11/2, 69) During the shooting, Thomas looked behind the van and saw a tall, skinny male in his 20's firing a handgun at the van. (11/2, 12, 17) Thomas did not see the shooter's face. (11/2, 18) Thomas drove from the intersection, striking vehicles as she fled. (11/2, 21) Eventually, Thomas reached the hospital. Watson died by the time he reached the hospital. (10/26, 86) Watson died from a single gunshot wound that entered his left back and traveled through both lungs and the aorta. (11/8, 196-199)

Just prior to the shooting, Raymond Love was driving on Harper. (11/2, 148) Raymond's wife, Jendayi, was the front passenger of the vehicle. As they were traveling on Harper, Raymond noticed a turquoise car approaching the intersection of Harper and Seneca. (11/2, 151) Raymond was worried that the car was going to run the stop sign and collide with him. Raymond looked the driver of the turquoise car in the face and cursed at him. (11/2, 152) The two cars traveled side-by-side for more than two city blocks. (11/2, 151) While next to the turquoise car, Raymond again looked over and saw the driver's face. (11/2, 153) Raymond also noticed two other black males in the car. (11/2, 157) When



the cars approached the intersection of Harper and Van Dyke, the turquoise car pulled to the side and stopped six or seven car lengths behind the Loves. Raymond pulled his vehicle to the right lane so that he could turn onto Van Dyke. (11/2, 154) While stopped at the traffic signal at the intersection, Raymond saw, through his center rear-view mirror, a male exit the back seat of the turquoise car. (11/2, 158-159) The male had a gun in his hand. (11/2, 160) Raymond leaned over his wife and continued to watch the man through the driver's side mirror. (11/2, 161) The man walked up behind a van stopped in the lane left of Raymond's car. When the man was ten feet behind the van, he raised a handgun and began shooting toward the rear of the van. (11/2, 162) Raymond looked out the rear window toward the man. (11/2, 164) Raymond saw the turquoise car make a U-turn in the middle of Harper and stop. (11/2, 165-166) The shooter got into the rear passenger seat of the turquoise car and the car drove off in the opposite direction of Van Dyke. (11/2, 166) Raymond later viewed a photo array and identified Defendant as the shooter. (11/2, 167, 194) Raymond viewed a second photo array and identified Derrico Searcy as the driver of the turquoise car. (11/2, 198) Raymond was asked to attend a later live line-up. However, Searcy refused to participate in the line-up. (11/3, 192; 11/9, 42) Raymond was instead shown another photo array and again identified Searcy as the driver of the turquoise car. (11/2, 204)

Jendayi Love similarly saw a turquoise car almost hit her husband's car near Harper and Seneca. (11/1, 122) The turquoise car pulled all the way to the side of Harper before the intersection of Van Dyke and stopped. (11/1, 126) The Loves' vehicle was in the right lane

of Harper when it stopped for the traffic light at the intersection. (11/1, 126) Jendayi noticed her husband lean over toward her. (11/1, 133) Jendayi then looked in her rearview mirror and saw a young male approaching from behind. (11/1, 134) The male walked to the middle of the street and stopped approximately 15 or 20 feet behind the Loves' vehicle. (11/1, 134-136) The male raised his hand. (11/1, 136-137) Jendayi then turned around and watched the male through the rear window. (11/1, 137) The male was wearing an "Elmer Fudd" hat and holding a gun. (11/1, 137-138) The male fired the gun several times at a van stopped in the next lane. (11/1, 137) After firing 4 or 5 shots, the male turned and walked toward the turquoise car. (11/1, 141) The turquoise car had pulled into the street and was facing the opposite direction. (11/1, 142) The shooter got into the turquoise car which then drove away. (11/1, 144) Jendayi attended a photo array and identified Defendant as the shooter. (11/1, 144, 157)

Officers collected nine 9mm casings from the scene of the shooting. (11/2, 69) The casings were in pretty close proximity to each other. (11/2, 74) On December 31, 2009, members of the Violent Crimes Task Force were in the area of Seven Mile and Reno in Detroit to conduct an arrest. (11/3, 143) A blue BMW vehicle was stopped. (11/1, 51) Searcy was the driver of the vehicle and the only other passenger was a man named Mark Davis. (11/1, 52-53) Listed on Davis's phone was a contact for "Apple" with a phone number ending in 4502. (11/3, 155) In the area of the front windshield wipers of the BMW, officers found three spent 9mm casings. (11/1, 79-84) On January 11, 2010, the violent Crimes Task Force arrested Defendant. Defendant was the rear passenger of a

vehicle. (11/1, 68) Also in the vehicle were Adrienne Jackson, William Beal, and Tyree Washington. (11/1, 71) Analysis of the casings collected from the scene of the shooting determined that they were all ejected from the same weapon. (11/8, 18) Similarly, the three casings found on the BMW driven by Searcy were determined to have been ejected from the same weapon that produced the casings found at the shooting scene. (11/8, 19)

Defendant's mother, LaSonya Dodson, had rented a white Malibu for her family during the period of December 23, 2009 to January 10, 2010. (11/8, 44) Defendant was allowed to use the white car during that time. (11/8, 45) On December 29, 2009, Dodson saw Defendant at 8:00 a.m. and then again at 1:00 p.m.. (11/8, 50) Dodson attended a funeral that day, which was followed by a repast at a hall on Whittier in Detroit. It was at the repast that Dodson saw Defendant at 1:00 p.m.. (11/8, 50) Dodson was familiar with Mark Davis and the Twins. (11/8, 54, 81) Dodson also knew Searcy, but had not seen him since 2003. (11/8, 82) Dodson had heard of the Hustle Boys and the Knock Out Boys but knew that Defendant was not a Hustle Boy. (11/8, 47) Dodson could not explain the meaning of Defendant's tattoo that read "Loyalty," "Respect," "H.B.". (11/8, 88) Dodson denied the allegation by the officer-in-charge of the case, Theopolis Williams, that she admitted that Defendant belonged to the Hustle Boys gang and that things had gotten "out of hand" between the Hustle Boys and the Knock Out Boys. (11/8, 48, 22, 224) Dodson's daughter, Cieddah, was also at the repast. Aside from a period of time where Cieddah went to the store between 3:00 and 4:00 p.m., Cieddah was at the repast the entire time up to 5:00 p.m.. (11/8,

53) Dodson noticed that Defendant did not leave the hall from 1:00 p.m. until approximately 4:45 or 5:00 p.m.. (11/8, 52) Other members of Defendant's family also reported seeing Defendant at the funeral and the repast. (11/9, 227-229, 245) Defendant was seen driving a white Impala or Malibu that day and was accompanied by one of the Twins. (11/9, 270-271) The phone number listed as "Apple" in Mark Davis's phone was registered to Cieddah. (11/8, 159) Records indicated that the phone did not remain in the area of the hall during the entire time Dodson claimed to have seen Defendant. Instead, the phone moved between several different locations between 2:55 p.m. and 4:39 p.m., including at a location along Van Dyke at 4:01 p.m.. (11/8, 178)

Christopher Richardson was a defendant in a federal prosecution and investigation. Richardson provided the federal authorities with information about his co-defendants in anticipation of leniency with his own criminal cases. (11/9, 99-105) Among the co-defendants that Richardson provided information about was Tyree Washington. Richardson reported that Washington told him about the murder of "Isaiah." (11/9, 83) According to Washington, he was in a vehicle, a green Aurora, with William Beal and Adrienne Jackson. (11/9, 90) Jackson and Beal had a child together. (11/9, 81) Washington was a "flunky" for Beal, meaning he did whatever Beal told him to do. (11/9, 82) Richardson reported that Washington indicated both that Jackson was driving the green car and Jackson's sister was the driver. (11/9, 126; 11/10, 15) The green car was following a van occupied by members of the Knock Out Boys gang. At the intersection of Harper and Gratiot or Van Dyke and Gratiot, the female driver blocked the van in. (11/9, 89; 11/10, 10, 14)

Washington exited the vehicle and approached the van. Washington tapped on the window of the van to let the occupants know he was “slippin” and then began shooting inside. (11/9, 89, 91) Washington indicated that he shot off L.P.’s finger, shot a female in the neck, and killed Isaiah.<sup>3</sup> (11/9, 90, 132) The reason for the shooting concerned Jackson’s sister, Nita or Nana. (11/9, 94; 11/10, 15) Nita was dating a member of the Knock Out Boys named Trey. Trey purportedly saw Washington hugging Nita and responded by shooting at Washington. (11/9, 156) The people in the van were shot because they were members of the Knock Out Boys, like Trey. (11/9, 157) Richardson was a member of the Hustle Boys and knew Defendant as Apple. (11/9, 135) Richardson admitted that Defendant was also a member of the Hustle Boys. (11/9, 137-138) Richardson denied knowing Searcy. (11/9, 138)

LaJoia Stevenson spoke to Washington on December 29, 2009. Washington told Stevenson that he had just shot someone on Van Dyke. (11/9, 189-191) Washington told Stevenson that the shooting involved some guys he was having a beef with and was in self-defense. (11/9, 191, 193) Washington told Stevenson that Beal and Nana were present during the shooting and that Beal was the driver of the vehicle he was in. (11/9, 193) After Defendant was arrested, Stevenson asked Washington about the shooting again. Washington denied that it was the same shooting. (11/9, 194, 200)

On October 25, 2010, a joint jury trial commenced in the Third Circuit Court for Wayne County, the Honorable Carole Youngblood

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<sup>3</sup>Several witnesses at trial testified that Watson was known as Junebug and had never been called Isaiah. (10/26, 126; 11/1, 25, 278; 11/8, 141)

presiding. The criminal information charged both Defendant and Searcy with one count of First-Degree Murder and three counts of Assault with Intent to Murder. Defendant was additionally charged with one count of Felony Firearm. At trial, counsel for both defendants argued that it was Beal and Washington that committed the murder and not Searcy and Defendant. Both counsel highlighted Richardson's testimony that Washington was a flunky for Beal and would do whatever Beal asked him to do. For Searcy, counsel argued that Washington's allegiance to Beal caused him to try to diminish the role Beal played in the murder by claiming that a female was the driver and not Beal. (11/10, 120) For Defendant, counsel argued that Washington and Beal were gang members, thus Washington wanted to prove himself to Beal and gain standing with the remainder of the gang by committing the murder of a Knock Out Boy. (11/10, 86-87) On November 16, 2010, after approximately three days of deliberations, the jury found Defendant guilty as charged. The jury's reading of the verdict was interrupted by a commotion in the courtroom that required temporarily removing the jurors from the courtroom and removing Defendant for the remainder of the reading of the verdict. The jury found Searcy guilty of the lesser offense of Second-Degree Murder and three counts of Assault With Intent to Murder. On December 3, 2010, Judge Youngblood sentenced Searcy to a term of 30 to 50 years imprisonment for the murder conviction and three terms of 20 to 30 years imprisonment for the assault convictions. These terms would be served concurrent to each other. The court sentenced Defendant to the mandatory term of Life imprisonment without possibility of parole for the murder conviction

and three terms of 16 to 30 years imprisonment for the assault convictions. These terms would be served concurrent with each other and consecutive to the mandatory term of 2 years imprisonment for the firearm conviction.

On April 8, 2011, Defendant moved the trial court for a new trial. Searcy did not similarly make a motion. In support of his motion, Defendant included an affidavit from one of the jurors, Kathleen Byrnes. Byrnes asserted in her affidavit that two other jurors had conducted internet searches involving the case during deliberations. Byrnes claimed that juror Michelle Chesney had looked up Defendant's profile on Facebook and saw pictures of Defendant, including a picture of Defendant with a female captioned "Mr. and Mrs. Nasty." Byrnes also claimed that Chesney mentioned that she had read the eulogy for Watson. Byrnes made the additional claim that another juror, Karen James, had researched gang codes and that gang activity involved killing people. James stated during deliberations that, according to what she saw on the internet, gangs have a pecking order. James opined that Defendant was at the top of the pecking order and Washington was at the bottom. Thus, Washington was being sacrificed for the gang by setting him up as the fall guy for the murder. The People opposed a new trial but left to the trial court's discretion as to whether an evidentiary hearing should be conducted. Judge Youngblood found that the extraneous information alleged in the affidavit was cumulative to evidence that was presented at trial. Judge Youngblood cited to testimony regarding gang signs and photographs admitted into the record depicting gang signs. (4/8, 11) The photographs were described as

being collected from Facebook and other social websites. That the defendants and the victims were associated with gangs was not a secret to the jurors. "Assuming everything in Mrs. Byrnes' affidavit is true, the jurors had already learned, if they did not know before trial, that there are gang signs, that there are gang codes, and there are gang killings, and that there are photographs of both defendants on Facebook and other websites. The remaining information in Mrs. Byrnes' affidavit merely attacks the deliberative process and the thought-thoughts expressed by the other jurors. These are not, cannot be attacked." (4/8, 12-13) The court denied Defendant's motion for a new trial or for an evidentiary hearing.

Both Defendant and Searcy appealed their convictions to the Michigan Court of Appeals. Pertinent to the proceedings here, both defendants claimed the jury was influenced by extraneous evidence. The Court found that Searcy had abandoned his claim on appeal by failing to explain how the extraneous influences created a real and substantial possibility that the verdict was affected.<sup>4</sup> Further, adopting the analysis the Court later applied to Defendant's claim, Searcy failed to show plain error requiring reversal of his convictions. Addressing Defendant's claim, the Court found that Chesney's view of Facebook photographs was duplicative of evidence presented at trial, since numerous photographs of Defendant and Searcy obtained from social network websites were admitted into the record at trial. (11/1, 84) The "Mr. And Mrs. Nasty" photograph Byrnes described was relatively innocuous as

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<sup>4</sup>*People v. Derrico Searcy and Darrell Ewing*, unpublished opinion, COA #301751 and #301758 (August 29, 2013).



was any knowledge of the content of Watson's eulogy. The Court found that the allegation that James procured information about gang codes and that gang activity involves murders did not necessitate reversal. Information about gangs having a pecking order was duplicative of an inference drawn from Richardson's testimony in which he opined that Washington's assertion that he committed the murder amounted to bragging and an attempt to prove himself. (11/9, 98) Richardson's characterization of Washington as a "flunky" intimated a hierarchical relationship in gang membership. Any error in James procuring evidence of a pecking order was harmless because it was duplicative of evidence presented at trial. Finally, the hypothesis that James made that Washington was taking the fall for Defendant because of their position in the gang hierarchy was not extraneous information. Rather, it was part of the deliberative process. The Court affirmed both Searcy and Defendant's convictions. After exhausting their state appeals, both defendants sought writs of habeas corpus from the federal courts. Included in their petitions were claims that the jurors considered extraneous information in reaching a verdict. On November 20, 2017, Judge Denise Page Hood granted Defendant habeas relief.<sup>5</sup> Judge Hood found that the extraneous information "may have tainted the jury." The Michigan Attorney General appealed Judge Hood's decision to the Sixth Circuit Court of Appeals. On February 5, 2019, the Circuit Court of Appeals found that Defendant was unconstitutionally denied an opportunity to prove that he was prejudiced by the jury allegedly considering extraneous information. The appropriate remedy for that

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<sup>5</sup>*Ewing v. Horton*, 2017 WL 5564603 (2017).

violation was not a new trial, but instead an evidentiary hearing where Defendant would have the opportunity to show prejudice.<sup>6</sup> The Court remanded the case back to Judge Hood. On April 30, 2019, Judge Hood granted Defendant habeas relief conditioned upon the state court conducting an evidentiary hearing on the allegations of juror misconduct.<sup>7</sup> If the state court found that Defendant was prejudiced by misconduct, the court “shall order a new trial for petitioner.” On May 31, 2019, upon stipulation of the parties, Judge Terrence Berg similarly granted Searcy habeas relief conditioned upon the state court conducting an evidentiary hearing.

On August 26, 2019, an evidentiary hearing commenced in the Third Judicial Circuit Court for Wayne County, the Honorable Michael Hathaway presiding. Kathleen Byrnes testified that she was one of the jurors. Byrnes was contacted by Defendant’s trial counsel, David Cripps, following the trial. Cripps was curious as how Byrnes felt about her experience as a juror. (8/26, 15-17) This was a cold call, not prompted by anything Byrnes had said or done. (8/26, 16) Byrnes took the opportunity to volunteer to Cripps that other jurors had conducted internet research during deliberations. Cripps invited Byrnes to his office to prepare an affidavit documenting her allegations. Byrnes testified at the evidentiary hearing that Michelle Chesney had told the other jurors that she had looked Defendant up on Facebook. (8/26, 18) Byrnes recalled Chesney indicating that she saw photographs of Defendant with guns and a photograph of Defendant with a female

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<sup>6</sup>*Ewing v. Horton*, 914 F3d 1027 (2019).

<sup>7</sup>*Ewing v. Woods*, 2019 WL 1923197 (2019).

captioned "Mr. And Mrs. Nasty." (8/26, 19) Byrnes never saw any of the photographs Chesney alleged she saw. (8/26, 46) There was a discussion among the jurors about what Chesney stated she saw on Defendant's Facebook page, but that discussion did not last terribly long. Byrnes recalled other jurors also indicating that they saw the same photographs. (8/26, 22) Byrnes testified that the discussion of Facebook photographs did not really impact her deliberations or her verdict. (8/26, 24-25)

Byrnes indicated that members of the jury, including herself, had tested out whether someone would be able to see something behind their car if they were leaned over and looking through the rearview mirror. (8/26, 56) After Byrnes conducted this test, she questioned the identification testimony from the Loves. (8/26, 59) Byrnes was uncertain whether conducting this test had any impact on the verdict. (8/26, 62) Byrnes also recalled a juror mentioned seeing a eulogy for the murder victim. (8/26, 45) But, any discussion of the eulogy had no impact on her verdict. (8/26, 69)

Byrnes also recalled juror Karen James indicated that she looked up information about gangs, specifically that gangs have a pecking order. (8/26, 26) Byrnes also remembered there was some discussion about gang codes and gangs committing murders. (8/26, 45) But, James's discussion of a pecking order is what affected Byrnes's deliberations. (8/26, 43) Prior to James discussing the pecking order, Byrnes had doubts regarding the guilt of the defendants stemming from her not understanding why someone (Washington) would confess to a murder he did not commit. (8/26, 29) James explained to Byrnes that

Washington would have confessed because, in her opinion, he was a low-level member of the gang and the gang would want him to take the fall for Defendant and Searcy, who were higher in the gang. (8/26, 29, 51) Accepting James's argument, Byrnes chose to no longer credit Richardson's testimony about what Washington told him and instead elected to find Defendant guilty. (8/26, 51) James's argument convinced Byrnes that she had a misunderstanding as to why someone would confess to a murder if they did not actually commit it. (8/26, 40) James's explanation spelled it out for Byrnes and then it made sense to her as to why Washington would have falsely admitted to the murder. (8/26, 79) Byrnes indicated at the hearing that the discussion regarding the pecking order pertained only to the deliberations involving Defendant and not Searcy. (8/26, 41) But, once a decision was made on Defendant, the feeling was that Searcy had to be guilty also. (8/26, 41) The information about the pecking order was the one piece of factual information that caused Byrnes to change her verdict to find Defendant guilty. (8/26, 43)

Michelle Chesney testified at the hearing that she recalled looking at Defendant's Facebook page during deliberations. (8/26, 101) Chesney looked at the Facebook page because another juror had mentioned that there were pictures of Defendant and his friends on Facebook and she was curious. (8/26, 108-109) Chesney remembered seeing pictures of Defendant with his friends but did not recall if there were firearms depicted in any of the photographs. (8/26, 102) Chesney also did not recall a photograph captioned "Mr. And Mrs. Nasty." (8/26, 102) Chesney did not remember discussing the photographs that she

saw with other jurors. Chesney did not remember attempting to search for Searcy's Facebook page. (8/26, 114) Chesney did not recall seeing Watson's eulogy or discussing it with other jurors. (8/26, 103) The photographs she saw on Facebook did not affect her verdict. Chesney had no memory of James indicating that she researched gang codes or a pecking order in gangs nor did Chesney remember any discussion on those topics during deliberations. (8/26, 104) Chesney did not remember what it was that swayed Byrnes to join the other jurors in finding Defendant guilty. Chesney testified that the jury considered Searcy's guilt separate from Defendant's guilt. (8/26, 115) The jury had difficulty in deciding on a verdict for Searcy because it was difficult to appreciate the concept of aiding and abetting. (8/26, 117) Chesney had no doubt that Searcy was the driver of the car but had difficulty understanding that, by driving the car with knowledge of what Defendant intended to do, Searcy was as guilty as if he was the actual shooter. (8/26, 118)

Joyce Hall testified that she was another of the jurors. Some of the jurors, but not her, conducted internet research during deliberations. Hall remembered someone indicating that she researched gang codes and pecking order. (8/26, 134) There was discussion during deliberations about those topics. Hall also recalled one of the jurors indicating that they went on Defendant's Facebook page. (8/26, 135) The juror indicated that there were pictures of Defendant hugging his girlfriend as well as pictures of people making hand signs. (8/26, 135-136) Hall assumed the hand signs were gang related. (8/26, 139) Hall did not recall any discussion of photographs of Defendant with firearms. (8/26, 139)

On September 6, 2019, Brian Tubbs testified that he was the foreman of the jury. Tubbs had no memory of any of the jurors conducting extraneous research during deliberations. Nor did Tubbs recall any discussion during deliberations about matters learned through extraneous research.

On October 24, 2019, Judge Michael Hathaway granted both defendants a new trial. The lower court found that Byrnes's testimony that extraneous information was shared in the jury room during deliberations was credible. The lower court further found that Byrnes was influenced to convict the defendants based upon this extraneous information. The court finally found that the evidence of guilt presented at trial was not so overwhelming as to overcome the prejudice caused by Byrnes's consideration of the extraneous information.

The People applied to this Court of Appeals for leave to appeal the lower court's decision. On April 13, 2020, the Court granted the requested leave. The People argue that the lower court was bound to follow the reasoning of this Court when it previously found the alleged extraneous influence on Byrnes to be either cumulative to evidence presented at trial or part of the deliberative process and unable to be impeached after the verdict.

## ARGUMENT

### I.

A juror's hypotheses on the trial evidence, even if supported by extrinsic information, comprises part of the deliberative process in determining witness credibility and the weight of the evidence and cannot be used to impeach the jury's verdict. Here, the lone holdout juror testified at an evidentiary hearing that, despite several jurors sharing extraneous information, only one thing influenced her to vote to convict defendant—the opinion of another juror, supported by that juror's extrinsic research of gangs, explaining why another person would falsely admit to committing the charged crimes. A juror's hypotheses on the admitted testimony—part of the jury's deliberative process—cannot be used to impeach the jury's verdict and grant a new trial.

#### Standard of Review

This Court reviews a trial court's grant of a new trial on the basis of juror misconduct for an abuse of discretion.<sup>8</sup> The lower court's findings of fact in reaching its decision are reviewed for clear error. Whether a jury was exposed to prejudicial extraneous information has a constitutional implication which this Court reviews de novo.<sup>9</sup> A new trial should not be granted unless some showing is made that “the misconduct affirmatively prejudiced the defendant's right to a trial before a fair and impartial jury.”<sup>10</sup> A new trial may only be granted when

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<sup>8</sup>*People v. Johnson*, 245 Mich App 243, 250 (2001).

<sup>9</sup>*People v. Budzyn*, 456 Mich 77, 88 (1997); *People v. Shenoskey*, 320 Mich App 80, 82 (2017).

<sup>10</sup>*People v. Fetterley*, 229 Mich App 511, 545 (1998).

the juror misconduct affected the impartiality of the jury or disqualified the jurors from exercising the powers of reason and judgment.<sup>11</sup>

### **Discussion**

The People appeal the decision of the lower court granting defendant a new trial. The lower court found that a juror was exposed to extraneous information that influenced her to find defendant guilty. The court further found that the prejudice caused by the consideration of extraneous information was not overcome by the strength of the evidence presented at trial supporting guilt. The People argue that the extraneous information that found its way into deliberations did not merit a new trial, because the influenced juror testified that her verdict was unaffected by that information. What did purportedly affect the juror's verdict was an argument presented to her by another juror. The influencing argument was that, based upon research the other juror conducted on the internet regarding gang codes and hierarchy, it was likely that Tyree Washington falsely admitted to committing the charged offenses in order to take the fall for the defendants who, the other juror hypothesized, were higher ranking members of Washington's gang. The Court of Appeals previously analyzed the juror's alleged misconduct. The Court found a critical distinction between what was extraneous information—that gangs have codes and hierarchies—and what was intrinsic to the deliberations—the juror's opinion that, based upon her belief of where Washington was in the gang hierarchy, it was probable that Washington's "confession" was false. This Court found

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<sup>11</sup>*Id.*



that the other juror's opinion and argument "comprised part of the deliberative process in determining witness credibility and the weight to be given to particular testimony. As such, it cannot be used to impeach the jury's verdict."<sup>12</sup> The affected juror's decision to find defendant guilty was influenced by the deliberative process, not extraneous information. As such, the lower court should have followed this Court's prior decision on the issue and denied defendant a new trial.

Both the Sixth Amendment of the United States Constitution and the Michigan Constitution protect a defendant's right to be tried by an impartial jury.<sup>13</sup> "During their deliberations, jurors may only consider the evidence that is presented to them in open court. Where the jury considers extraneous facts not introduced in evidence, this deprives a defendant of his rights of confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment."<sup>14</sup> "Misconduct can be demonstrated with evidence pertaining to outside or extraneous influences, but cannot be demonstrated with evidence indicating matters that inhere in the verdict, such as juror thought processes and interjuror inducements."<sup>15</sup> Any conduct that is inherent in the deliberative process is not subject to challenge or review; a verdict may be challenged only when the verdict is influenced by matters unrelated to the trial proceedings. "[T]he distinction between an external influence

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<sup>12</sup>*People v. Searcy and Ewing*, supra at \*10.

<sup>13</sup> *Duncan v. Louisiana*, 391 US 145, 153, 88 S Ct 1444, 20 L Ed 2d 491 (1968); *People v. Miller*, 482 Mich 540, 547 (2008).

<sup>14</sup> *Budzyn*, supra at 88; *Tanner v. United States*, 483 US 107, 117-118, 107 S Ct 2739, 97 L Ed 2d 90 (1987).

<sup>15</sup> *People v. Messenger*, 221 Mich App 171, 175 (1997).

and inherent misconduct is not based on the location of the wrong, e.g., distinguished on the basis whether the ‘irregularity’ occurred inside or outside the jury room. Rather, the nature of the allegation determines whether the allegation is intrinsic to the jury’s deliberative process or whether it is an outside or extraneous influence.”<sup>16</sup> “Generally speaking, information is deemed ‘extraneous’ if it derives from a source ‘external’ to the jury. ‘External’ matters include publicity and information related specifically to the case the jurors are meant to decide, while ‘internal’ matters include the general body of experiences that jurors are understood to bring with them to the jury room.”<sup>17</sup> As an illustration, if a juror has read an article containing details undisclosed during trial about the specific case she is deliberating, and uses those details to reach a verdict, unquestionably that would be deemed extrinsic information. However, if the juror has read an article containing general information or statistics about the type of crime involved in the case she is deliberating, and uses what she has read to form an opinion on the credibility of the evidence presented, that information should be deemed internal.<sup>18</sup> “Any conduct, even if misguided, that is inherent in the deliberative process is not subject to challenge or review.”<sup>19</sup>

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<sup>16</sup>*Budzyn*, supra at 91.

<sup>17</sup> *Warger v. Shauers*, 574 US \_\_\_, 135 S Ct 521, 529, 190 L Ed 2d 422 (2014).

<sup>18</sup> See, *People v. Garay*, 320 Mich App 29, 41-42 (2017). In *Garay*, the distinction between “external” and “internal” was illustrated where information on a witness, gained outside of the trial, was discussed by a juror to influence the other jurors to find the witness credible. The Court held that the information, although not part of the evidence presented at the trial, was not specific to the offense being tried and constituted an internal matter unable to be impeached.

<sup>19</sup> *People v. Fletcher*, 260 Mich App 531, 540 (2004).

In order to establish that the extrinsic influence was error requiring reversal, the defendant must initially prove two points. First, the defendant must prove that the jury was exposed to extraneous influences and second, that these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict.<sup>20</sup> To prove the second point, the defendant must generally demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict.<sup>21</sup> Factors to consider when making this determination are (1) whether the material was actually received, and if so how; (2) the length of time it was available to the jury; (3) the extent to which the juror discussed and considered it; (4) whether the material was introduced before a verdict was reached, and if so at what point in the deliberations; and (5) any other matters which may bear on the issue of the reasonable possibility of whether the extrinsic material affected the verdict.<sup>22</sup> If the defendant satisfies these first two burdens, the burden then shifts to the prosecution to demonstrate that the error was harmless beyond a reasonable doubt. The People may do so by proving that either the extraneous influence was duplicative of evidence produced at trial or the evidence of guilt was overwhelming.<sup>23</sup>

In the lower court, defendant met his burden as to the first prong of the *Budzyn* standard. Nearly every juror that testified at the

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<sup>20</sup>*Budzyn*, supra at 88-89.

<sup>21</sup>*Id.* at 89.

<sup>22</sup>*Id.* at n. 11.

<sup>23</sup>*Id.* at 90.

evidentiary hearing indicated that multiple jurors conducted internet searches on topics related to this case. These searches were conducted during deliberations after the jurors had all been instructed not to get or consider any information about the case unless it was presented to them in open court. One of the testifying jurors, Chesney, admitted that, out of curiosity, she looked at Defendant's Facebook page where she saw pictures of Defendant and his friends that were not admitted into the record. (8/26, 101-102) Byrnes and Hall testified to discussions during deliberations regarding Facebook photographs, the murder victim's eulogy, and gang codes and pecking order. This information was not provided to the jury during the trial but was gathered during research jurors conducted outside the courtroom.

Regarding the second *Budzyn* prong, Byrnes testified that she was uncertain of Defendant's guilt up until James discussed information with her about gang hierarchy. According to Byrnes, James indicated that she learned about gang hierarchy by doing an internet search during deliberations. James purportedly shared this information with Byrnes to help her understand why Washington would admit his guilt if he did not actually commit the murder. James opined that Washington was low on the hierarchy while Defendant was superior, meaning that Washington would be set up as the fall guy to take the blame for the murder instead of Defendant. After James spelled it out for Byrnes, based upon information she learned outside of open court, it made sense to Byrnes why a false admission of guilt would occur. (8/26, 79) Byrnes then decided to discount Richardson's testimony concerning Washington's alleged confessions. Although Byrnes reported that

several pieces of extraneous information were discussed during deliberations, none of that other information had an impact on her deliberations or verdict. James's discussion of where Washington and Defendant were in the pecking order of the Hustle Boys gang and what that meant to James was the one factor that made Byrnes change her verdict concerning Defendant from not-guilty to guilty. (8/26, 43) Hence, evidence does exist that James's argument substantially related to a material aspect of the case and that there is a direct connection between the argument and the adverse verdict entered against Defendant.

But, it must still be determined whether James's argument, even if based upon information she improperly learned by conducting her own research, constitutes an extraneous influence which is essential to the *Budzyn* analysis. This Court has already analyzed this question and determined that James's argument is information inherent to the deliberative process. The Court of Appeals recognized that "James's alleged hypotheses regarding gang hierarchies and the positions of Defendant and Washington within that structure comprised part of the deliberative process in determining witness credibility and the weight to be given to particular testimony. As such, it cannot be used to impeach the jury's verdict." The Court's determination that James's argument, although supported by information discovered outside the courtroom, constituted a matter intrinsic to the deliberations and incapable of being used to impeach the verdict is law of the case that should have bound the lower court's decision. The law of the case doctrine provides that "an appellate court's determination of law will not be differently decided on a subsequent appeal in the same case if the facts remain materially the

same.”<sup>24</sup> The law of the case doctrine “bars reconsideration of an issue by an equal or subordinate court during subsequent proceedings in the same case.”<sup>25</sup> Here, while the record has expanded since this Court last considered the direct appeal, the relevant issue—whether evidence that a juror discovered information concerning gangs having a pecking order and then using that information to form a convincing opinion as to why to discredit a false admission of guilt constitutes extrinsic or intrinsic influence—is the same legal and factual issue previously presented to and decided by the Court of Appeals. While the law of the case doctrine need not be applied if it would create an injustice,<sup>26</sup> such an injustice would not exist here. Application of the law of the case doctrine to the issue here preserves the “near-universal and firmly established common-law rule in the United States” prohibiting courts from considering juror testimony on intrinsic matters to invade the sanctity of the deliberative process and impeach the jury’s verdict.<sup>27</sup>

Byrnes testified at the evidentiary hearing that James’s theory that Washington would falsely admit his guilt because he was a low-level member of the gang and Defendant was closer to the top was just her opinion and not based on any information she discovered in her research. (8/26, 86) Removing the deliberative portion of James’s argument, the extrinsic portion that remains is James’s disclosure that gangs have a pecking order. In itself, this extraneous information had very little influence, if any. Byrnes testified that it was not so much the

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<sup>24</sup>*People v. Kozyra*, 219 Mich App 422, 433 (1996).

<sup>25</sup>*People v. Mitchell*, 231 Mich App 335, 340 (1998).

<sup>26</sup>*People v. Phillips (On Remand)*, 227 Mich App 28, 33-34 (1997).

<sup>27</sup>*Tanner*, supra at 117.

revelation that gangs have a hierarchy that influenced her to change her verdict and find Defendant guilty. Instead, it was when James applied that information to construct her hypothesis that Washington was at the bottom of the gang structure and Defendant was at the top, and then spelled it out for Byrnes, that Byrnes's verdict on Defendant was influenced. (8/26, 79) So, while James's argument substantially related to a material aspect of the case and there is a direct connection between the argument and the adverse verdict entered against Defendant, it was not the extraneous influence that created a real and substantial possibility that affected the jury's verdict. Instead, Byrnes's verdict was influenced by an opinion inherent in the deliberative process. James's opinion as to why Washington would provide a false admission to the murder cannot be used to impeach the jury's verdict and cannot satisfy defendant's burden of establishing *Budzyn's* second prong.<sup>28</sup>

Even if defendant satisfied his burden under *Budzyn*, the alleged error—that is the extraneous information that gangs have a pecking order<sup>29</sup>—was harmless beyond a reasonable doubt. First, as this Court

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<sup>28</sup> The People note that, since what James purportedly learned was not specific to the murder at issue at trial, the confusion as to whether it was extrinsic or internal seems to turn more on *when* she learned the information rather than what she learned or how it influenced her opinion and argument on the weight and credibility of the evidence. Had James learned the exact same information about gangs on the day prior to being selected as a juror and then used that information to form the same opinion and argument about the evidence during deliberations, it could only be viewed as an internal matter that the juror brought with her to the jury room.

<sup>29</sup> And not James's alleged opinion as to defendant and Ewing's positions on that pecking order or Washington's motivation for falsely admitting to the murder which both concern the deliberative process that is immune from judicial review.

found, the extraneous information is duplicative of information provided to the jury in open court.<sup>30</sup> Christopher Richardson testified that Washington was a flunky to Beal who essentially was required to do whatever it was Beal requested. Richardson testified that Washington's admissions to the murder amounted to bragging and an attempt to pump up his status. Washington emphasized in his admission of how the murder was committed that it involved a van full of Knock Out Boys, a gang his own gang was in a longstanding "beef" with. Counsel for both defendants stressed to the jurors that Washington was a flunky in the organization and was willing to blur the facts to curry favor and lessen the culpability of his superior. Cripps, counsel for Defendant, clarified the argument that Washington was a lesser player in the organization by arguing that this is what happens in gangs-the flunky tries to prove himself to his superior and gain standing with the remainder of the gang by committing the murder of a Knock Out Boy. (11/10, 86-87) The extraneous information that James discovered during her research was duplicative of the very arguments that the defendants raised at trial. Hence, any error in considering that duplicative information was, as this Court of Appeals determined, harmless.

Any prejudice the error caused is further eliminated when considering the strength of the evidence presented establishing Defendant's guilt. Defendant had an antagonistic relationship with the Knock Out Boys, and particularly the members that occupied the van on the day of the shooting. (10/26, 132, 137) The victims were all familiar with Defendant, who they knew as Apple. In contrast, neither Williams

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<sup>30</sup>*Searcy and Ewing*, supra at \*10.



nor Reed knew Washington. (10/26, 88-89, 166) This antagonism was on display mere hours prior to the shooting. Defendant saw the van drive by with Knock Out Boys inside. Defendant immediately got into a white Impala and gave chase. Other witnesses confirmed that Defendant was driving a similar white vehicle that day. (11/9, 270-271) Defendant was accompanied by the Twins. Again, Defendant's family confirmed that he was with, at least, one of the Twins that same day. Despite the van trying to elude Defendant, he was able to catch up to them and cut them off. Defendant "mean mugged" the van before driving off. (10/26, 149-150) During the shooting, which happened only a few hours after Defendant first encountered the van, Defendant was identified as being the person that approached the van from behind. Having encountered the van earlier in the day, Defendant had the ability to recognize it as the same van and that it was probable that the same Knock Out Boys would be its occupants. Particularly relevant, Defendant was identified as the shooter by both of the Loves, a couple uninvolved in the relationship between the rival gangs. The Loves were able to identify Defendant because he was standing approximately ten feet away and there were no cars blocking their view as they both looked through their car windows. The incriminating identification, by innocent bystanders instead of any of the victims who may have had some bias against Defendant, is especially relevant of Defendant's guilt. Adding to the weight of the evidence was the location of a phone Defendant was known to use. Instead of steadily remaining in the location of the hall where a funeral repast was occurring, the phone traveled to several locations around the time of the shooting, including a location near Van Dyke.

In contrast to the evidence supporting the identification of Defendant as the shooter, there are severe defects in the version of events reportedly offered by Washington. Again, the victims are unfamiliar with Washington and had no apparent antagonistic relationship with him personally. Washington reported that he killed a person named Isaiah, except Watson was never known by that name. Washington reported that he shot a female in the van, but Thomas suffered no injury. Washington indicated that the car he was traveling in cut off the van. Thomas testified that no car cut her off. (11/2, 25) After the car allegedly cut off the van, Washington approached it. This description implies that Washington approached the van from the front. The witnesses all testified that the shooter approached from the rear. Washington reported that he tapped on the window to get the occupants' attention, to let them know he was "slippin," prior to the shooting. (11/9, 91) The surviving victims did not see or hear anyone tapping on the window and the Loves did not see the shooter tapping on the van window. (11/1, 26; 11/2, 25, 162) Washington reported that he began shooting right after he tapped on the window. The shooter was standing several feet behind the van during the shooting and all the bullets entered from the rear. Washington indicated that he ran back to the car that was still blocking in the van, again implicitly in front of the van. The eyewitnesses saw the shooter run to a car parked several feet behind the van. Washington reported that a female was driving the car he arrived and left in. The eyewitnesses saw a male driving the car. Washington was inconsistent with where the shooting actually occurred. (11/9, 89; 11/10, 10, 14) Washington was not even consistent on whether

the shooting he was bragging about was even the shooting that occurred in this case. (11/9, 200) In sum, Washington's purported admission to the murder is entirely devoid of credibility; whereas the evidence supporting Defendant's guilt, including his identification by two unbiased eyewitnesses, is substantial and compelling.

Anyone should be disturbed by the disregard the jurors in this case had for the instruction given them to refrain from any outside research or discussions about the matters at trial and should be troubled by the amount of extraneous information the jurors sought out and shared during deliberations. Yet, the issue the lower court was ordered to determine was not whether the jurors were exposed to extraneous information, but whether that information prejudiced defendant requiring reversal.<sup>31</sup> From the testimony at the evidentiary hearing, the bulk of the extraneous information had no impact on any of the jurors' verdict. Byrnes testified that one piece of information influenced her decision to find defendant guilty. That evidence was the arguments of James that, based on general research James did on the internet, Washington was a lower-level member of the Hustle Boys gang who, rather than a higher-level member such as Defendant, was set up to take the blame for the murder. As admitted by Byrnes, much of James's argument was her own opinion on the evidence. Although that opinion may have been influenced by what she viewed on the internet, it was still James's own opinion and should be considered intrinsic to the deliberative process and immune from judicial scrutiny. What extraneous information that remains cannot be directly connected to the

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<sup>31</sup>*Fetterley*, supra.

change in Byrnes's verdict. As Byrnes testified to at the hearing, it was only when James spelled it out for her--that is expressing her opinion and not any material documenting the organizational structure of the Hustle Boys--and illustrated why Washington would have falsely admitted to the murder that Byrnes agreed that Defendant was guilty. Defendant failed to meet his burden of establishing that an extraneous influence created a real and substantial possibility that could have affected the jury's verdict. Further, the People have illustrated that the extraneous information that gangs have a code and a pecking order was duplicative of evidence presented through Richardson's testimony and argued by counsel for both defendants. Additionally, the evidence presented at trial compellingly and overwhelmingly established defendant's guilt beyond a reasonable doubt. Even though the misconduct was such as would merit rebuke from the trial court, the extraneous information that found its way into the jury deliberations either did not prejudice defendant by influencing Byrnes's verdict or was harmless in light of the evidence presented. What did influence Byrnes's verdict was an opinion that this Court has already found to be part of the deliberative process and incapable of being used to impeach the verdict. The lower court abused its discretion in granting defendant a new trial.

**RELIEF**

THEREFORE, the People request that this Honorable Court reverse the lower court's decision to grant defendant a new trial based upon a finding of juror misconduct.

Respectfully submitted,

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Dated: May 27, 2020

**CERTIFICATE OF COMPLIANCE**

I certify that the foregoing brief complies with AO 2019-6. The body font is 12 pt. Century Schoolbook set to 150% line spacing. This document contains 8.415 countable words.

*/s/ Jon P. Wojtala*

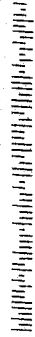
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