

STATE OF MARYLAND
v.
ADAN ESPINOZA CANELA

IN THE
CIRCUIT COURT FOR
BALTIMORE CITY
CRIMINAL CASE NOS. 104176021,
023, 025, 027, 029, 031

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IN THE
COURT OF SPECIAL APPEALS
OF MARYLAND
September Term, 2006
No. 1719

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STATE OF MARYLAND
v.
POLICARPIO ESPINOZA PEREZ

IN THE
CIRCUIT COURT FOR
BALTIMORE CITY
CRIMINAL CASE NOS. 104176020,
022, 024, 026, 028, 030

* * * *

IN THE
COURT OF SPECIAL APPEALS
OF MARYLAND
September Term, 2006
No. 1944

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**FINDINGS AND CONCLUSIONS OF THE CIRCUIT COURT FOR BALTIMORE CITY
UPON THE LIMITED REMAND FROM THE COURT OF SPECIAL APPEALS**

PROCEDURAL BACKGROUND

In their briefs to the Court of Special Appeals, Appellants, Adan Espinoza Canela (“Canela”) and Policarpio Espinoza Perez (“Perez”), in these consolidated cases raised for the first time an issue about how jury communications were handled by the judge at trial.

Appellant Canela framed the issue as:

THE TRIAL COURT ERRED IN FAILING TO NOTIFY APPELLANT OF THE RECEIPT OF NUMEROUS NOTES FROM THE JURY.

Appellant Perez (also referred to as Espinoza) was more detailed in stating the issue:

THE TRIAL COURT VIOLATED MARYLAND RULE 4-326(D), AND DEN[IED] ESPINOZA HIS RIGHT TO BE PRESENT AT ALL CRITICAL STAGES OF HIS TRIAL AND HIS RIGHT TO A FAIR TRIAL WHEN, THROUGHOUT THE TRIAL, THE COURT RECEIVED, AND IN SOME CASES RESPONDED TO, SUBSTANTIVE JURY NOTES WITHOUT INFORMING ESPINOZA.

In response, the Appellee, the State of Maryland, filed a Motion To Correct and Supplement Omissions in the Record, and later a Second Motion to Correct Omissions in the Record. Appellants filed responses or answers to these motions, and finally the State filed a Response to Opposition to Motion to Correct Omissions in the Record. Therein, the State requested that, if the Court of Special Appeals would not summarily grant its motion to correct the record, and alternatively, if the court determined that there existed a dispute regarding what occurred at trial, then pursuant to Md. Rule 8-413 (a),

the Court of Special Appeals order a hearing be held so the trial judge could resolve the dispute. Appellants opposed the request.

On August 15, 2008, Chief Judge Peter B. Krauser, for a panel of the Court of Special Appeals, entered the following order:

Upon consideration of the Motion to Correct Omission in the Record and the supplement to that Motion and the opposition to those motions filed by appellants, it appearing that there exists a genuine issue of fact as to whether the trial court communicated various jury motions [sic] to defense counsel, it is therefore this 15th day of August, 2008 pursuant to Md. Rule 8-413 (a): 1) Ordered, that this case be remanded to the Circuit Court for Baltimore City for the limited purpose of conducting a hearing to resolve the dispute between the State and appellants as to whether the contents of several jury notes received by the court were communicated to defense counsel during trial; 2) ORDERED, that the hearing be presided over by a judge other than the Honorable David B. Mitchell because Judge Mitchell may be a witness at the hearing; 3) ORDERED, that oral argument, currently scheduled in this court for September 4, 2008, be postponed, pending the outcome of the hearing; and 4) ORDERED, that the record in this appeal be supplemented by any Exhibits, Orders or transcripts that result from the hearing to be held in the Circuit Court.

RULE 4-326

Rule 4-326 (d), the Rule cited by the Appellants, provides:

The court shall notify the defendant and the State's Attorney of the receipt of any communication from the jury pertaining to the action as promptly as practicable and in any event before responding to the communication. All such communications between the court and the jury shall be on the record in open court or shall be in writing and filed in the action. The clerk or the court shall note on a written communication the date and time it was received from the jury.

PROCEEDINGS HELD ON REMAND

After receipt of the remand order, the undersigned was designated to hear the remand proceedings. This Court met with counsel for the parties and, in that meeting and subsequent e-mail communications among the Court and counsel, the issues that needed to be adjudicated and the evidence to be presented at the remand hearing were

discussed. The parties were able to agree as to the notes that were in dispute, and an agreed-upon chart was prepared by counsel that contained the text of each note, the date or time that appears on the note, and all transcript and tape references that refer to that note. This chart, labeled “Espinoza/Canela Jury Notes”, is attached and incorporated in these findings. It shows thirty-two notes being received from jurors or the jury during the trial (28 notes) and deliberations (4 notes).

The Court commends counsel for all parties for their cooperative efforts in the remand proceedings. The Court believes that all counsel worked in good faith to develop and perfect the record while still being zealous advocates for their clients. All parties met the test of taking “responsibility to make a sincere efforts to perfect the record”. *Smith v. State*, 291 Md. 125, 138 (1981).

Three days of evidentiary hearings were held in the Circuit Court for Baltimore City on January 27, 28 and 30, 2009. The following persons testified : Assistant State’s Attorney Sharon Holbeck; former Assistant State’s Attorney Tony Garcia; James Lamont Rhodes and Adam Sean Cohen, counsel for Mr. Canela; Assistant Public Defender Nicholas Panteleakis, counsel for Mr. Perez; and Hannah Hilton, the primary courtroom clerk during the 2006 trial. All parties were allowed to present any witness or evidence which they asserted were relevant to the issues on remand.

At the conclusion of the hearing, the parties requested time to submit proposed findings and conclusions to the Court for consideration. A briefing schedule was established, and the Court subsequently received these very-helpful proposals. Finally, oral argument on the proposals was held on April 9, 2009.

CONTEXT OF THE TRIAL

Prior to discussion of the jury notes at issue, it is useful to understand the background of the case since it bears upon how the notes were handled.

Appellants were each charged by indictment in June 2004, with three counts of murder and three counts of conspiracy to murder. The case was tried before a jury, the Honorable Thomas Ward presiding, in July and August of 2005. On August 30, 2005, a mistrial was declared as a result of a hung jury.

A second jury trial began on June 22, 2006, with the Honorable David B. Mitchell presiding. At the time, Judge Mitchell was a retired Judge of the Circuit Court for Baltimore City, sitting on the case as a judge subject to recall pursuant to the Maryland Rules.

Prior to the trial beginning, Judge Mitchell met with counsel to go over issues such as jury selection. There was no discussion at that meeting or at any time prior to trial as to how jury communications would be handled during the trial or jury deliberations.

The trial presented challenges for various reasons. First, two defendants were being tried together in a case with considerable public interest, since three children were the alleged victims. Second, the defendants required Spanish language interpreters who switched off every 15 minutes. Third, five counsel were involved. Fourth, the trial was expected to take two months to try -- a long case for a jury -- and involved difficult forensic issues as well as several expert witnesses. Fifth, Judge Mitchell was aware that counsel had been contentious among themselves and aggressive in their representations. Judge Mitchell was therefore interested in maintaining firm control of the difficult problem of trial administration presented by the

case. Ms. Holbrook noted that Judge Mitchell's efforts to keep the proceedings moving along were necessary in light of the logistics of the trial. She felt that all parties appreciated the judge's efforts to expedite matters. RH1 122-125.¹

From this Court's review of the trial transcript and the tape excerpts provided, it appears that Judge Mitchell conducted the trial in a firm yet courteous and even-handed fashion. He allowed counsel to fully examine and cross-examine witnesses, present arguments, and place on the record any concerns they had.

All counsel are experienced trial attorneys familiar with jury trial proceedings and had been involved in many homicide cases before the trial of this case.

GENERAL PROCESS FOR HANDLING JURY NOTES

As noted above, there was a meeting prior to trial to discuss issues relating to the trial, with no discussion at that meeting as to how jury communications would be handled. Indeed, the subject was not discussed by or with the court, on or off the record, at any time during the trial or prior to a verdict being rendered.

Judge Mitchell handled jury notes in the following fashion. The juror who wished to communicate would write a note and pass it to the Foreperson. The Foreperson would hand the note to a clerk (there were often two present) or to a sheriff who would give it to a clerk. Without reviewing the note, the clerk would hand the note to Judge Mitchell. Judge Mitchell would then decide how to handle the communication and direct the clerk as necessary.

At times, the judge would direct the clerk to give the note to counsel to review. When so directed, the clerk would take the note to counsel without explanation for them

¹ The transcripts from the remand hearing are designated "RH" -- "RH1", January 27, 2009; "RH2", January 28, 2009, and "RH3", January 30, 2009.

to review. In such cases, counsel would pass the note from one to another until all present had reviewed them. Eventually, the note would return to the clerk who would date and time the note, and keep it on file.

There was some variation as to when the date and time would be placed on the note by the clerk. On some occasions, the clerk did not want to take the time to make the notation when first receiving it since the clerk wanted the judge to see it. At other times, the time and date would be recorded when first received. When a note was retrieved that had not been timed and dated when first received, the clerk would estimate when it had originally been received and record that estimate on the note.

In his letter of May 6, 2008, Court's Exhibit 3, Judge Mitchell described how he handled jury communications once they had been given to him:

Communications from the jury were either reviewed and acted upon by the court such as in the case of juror discomfort or their inability to hear a witness, or passed to counsel for them to determine whether to conduct an inquiry of a witness based on the obvious interest of a juror, or responded to by the court without input because of the nature of the juror's request.

At the remand hearing, Judge Mitchell testified that there were several notes requesting a personal recess for physical comfort, which he believed were matters of trial administration that did not need to be shared with the lawyers. RH3 17-18. Likewise, he did not believe it was necessary to consult with the attorneys regarding jury notes saying the jurors could not see or hear something. RH3 18-19.

When asked by the Court at the remand hearing what was included in the category of notes, subsequently often referred to as the "third category", i.e., those responded to by the court without attorney input because of the nature of the juror's request, Judge Mitchell said:

One of the jurors sent a note asking for the spelling of a term used by a witness. I spelled the term. That's an example of where I acted... There were other occasions where a witness -- where a juror asked a question, and the question was basically one of common sense or obvious -- or an obvious answer, and so I answered it for the juror. ...That is, I answered it in open court on the record.

THE COURT: Okay. And in those types of situations, did you feel it was necessary to share the note with the attorneys, or was it something so obvious that you could just kind of indicate?

THE WITNESS: It was the latter, sir.

THE COURT: Okay. So that --

THE WITNESS: I just handled it.

THE COURT: Because of the nature --

THE WITNESS: That's correct.

THE COURT: -- You just handle it and let -- and let -- did you understand or did you have the understanding that the attorneys knew that you were responding to a communication from the jury, or -- take the example --

THE WITNESS: They may not have known.

THE COURT: They may not have known.

THE WITNESS: They may not have known.

THE COURT: Uh-huh.

THE WITNESS: But then the note was put -- whatever the comment was that prompted the action on my part was put into the court record.

THE COURT: Okay.

THE WITNESS: It was filed. It wasn't just crumbled and tossed.

RH3 22-23.

Later on, Judge Mitchell stated that as to the category which he called "obvious", it was his understanding that those notes did not have to be given to counsel. RH3 47.

See *also* RH3 48. Judge Mitchell also indicated that at times when he handled

questions that fell into the third category, he would ask a question without letting the attorneys know in advance that the question was one that came from the jury. RH3 62-63. For example, Judge Mitchell acknowledged that with respect to Note 21, he posed the jury's question to the witness and did not formally advise counsel or indicate in his question that it was based on a jury question. RH3 67. He said that this was in the category of the "obvious", or as he explained:

Well, maybe obvious is not the right word. It's -- it was -- it's one that would -- it would elucidate information for the jury so it would understand what was being said.

THE COURT: Okay; so clarifying.

THE WITNESS: Clarifying ... clarification.

THE COURT: Okay.

RH3 79-80.

Judge Mitchell then explained that his responses to Notes 6 and 7 also fell within the category of "clarification". RH3 81-82. *See also* RH3 70-71.

Appellee takes portions of Judge Mitchell's testimony and argues that it shows an unequivocal and conclusive statement that all jury notes were shared with counsel, albeit at times not before the Court asked questions based on the notes. *See*, Appellee's Reply to Appellants' Proposed Findings of Fact, pp.6-9. The Court finds that this conclusion extends Judge Mitchell's testimony further than it fairly allows when viewed in its totality, which was more nuanced and cautionary on the point. To the extent that the Appellee relies on Judge Mitchell's statements to support its broad conclusion of eventual disclosure of all notes, that reliance is not justified.

Counsel did not expressly agree to any process for handling jury notes or communications. Counsel did observe at various times that notes were coming from

the jury foreperson and being given to the judge for consideration. Counsel did not observe all jury notes being handed to the clerk since they were busy with other tasks such as examining or cross-examining witnesses, taking notes or, in the case of the parties with more than one attorney, counsel may have been absent from the courtroom preparing an upcoming witness or handling other matters needing attention outside of the courtroom. At no time did counsel object to the process by which Judge Mitchell was handling jury notes throughout the course of the trial or prior to the verdict being reached.

The clerk was keeping the jury notes as part of the record in the case. At any time, counsel in the case could have reviewed any or all of the jury notes that the judge had returned to the clerk. There is no evidence that any of the counsel asked to review the notes in the possession of the clerk.

Notes received during deliberations were handled in a somewhat different fashion. The jury would indicate to the clerk by a buzzer system that they had a note. The clerk would retrieve the note and give it to Judge Mitchell (or, in one case when Judge Mitchell was unavailable, to Judge Themelis). The judge would consult with counsel and pen a response to the note on the note itself. The note would then be returned to the clerk who would either give the note with the response back to the jury or read the court's response to the jury. The note would then be filed in the court file with the date and time noted. These notes would also be available for counsel and the public to review when the clerk retrieved them.

BURDEN OF PROOF

In their memoranda, the parties have asserted that the opposing party has the burden of proof in this proceeding. To some extent, this issue is less important than it

would be in other situations. As noted above, all the parties have conscientiously undertaken their obligations to sincerely perfect the record and have presented evidence without regard to whether it favored their ultimate position or not. To the extent that it is relevant, the Court does find that the State has the burden in these proceedings because it is the party seeking to supplement the record with the additional information. Further, this conclusion seems to be in accord with *Fields v. State*, 172 Md. 496, 515 (2007), *cert. denied*, 399 Md. 33 (2007).

Appellants have also argued that the standard of proof applied to these proceedings should be one of “clear and convincing evidence”. In other words, no factual finding should be made unless the Court is convinced of that fact by evidence that meets that standard. Appellants acknowledge that this assertion is not supported by established Maryland law, but they argue by analogy that this standard should be employed. This Court does not conclude that the current status of Maryland law supports the use of this strict standard when a court in a remand proceeding under Md. Rule 8-413 (a) is attempting the task here -- the reconstruction of a record from available sources of what occurred in the trial and deliberations. The Court concludes that it should employ the usual and traditional standard of preponderance of the evidence in making factual determinations, and that is what the Court employs in making these findings.

PARTICULAR PROBLEMS PRESENTED WITH REMAND TESTIMONY

The adjudication of this case presented particular problems in evaluating the testimony presented. All witnesses were either attorneys or court personnel, and the Court believes that they were all doing their best to recall the events that occurred at trial in the summer of 2006. However, they were clearly hampered by the fact that the

issue was not one that any of the trial participants saw as noteworthy at the time of trial, and the significance of the issue did not come to any of their attention until they were contacted by Appellee's counsel in the spring of 2008.

It appears that none of the participants were specially tracking the issue of jury notes while trial was ongoing, and thus they were trying to recollect well after the fact what occurred either by reading the transcript of the trial or from their memories. At times, witnesses would say they recall a note when it appears later that what they likely recall is the issue coming up while having no specific recollection of the note itself.

JURY NOTES NOT AT ISSUE

Through the intensive efforts of counsel, the parties have agreed and stipulated that certain jury notes are not at issue in this case. These notes are ones that were either clearly disclosed to counsel or are of such an obviously administrative or trivial nature that there is no claim that they needed to be disclosed. With the agreement of counsel, the Court will make no further findings regarding these notes, although on occasion, they are referred to as examples of practices employed by the court or counsel in dealing with notes during the trial. The notes that fall into this category are Notes 1, 2, 3, 4, 5, 8, 11, 12, 15, 17, 18, 19, 20, 24, 31 and 32.

JURY NOTE 12

Jury Note 12, which clearly was fully disclosed on the record, is not at issue as not being disclosed. However, Appellants have placed emphasis on this note with the suggestion that it was being "hidden" by Judge Mitchell and only revealed when one of the attorneys, Mr. Panteleakis, noticed it at the bench while they were discussing Jury Note 11 and asked Judge Mitchell about it. Mr. Panteleakis stated he received "a stern look" from Judge Mitchell upon making the inquiry. RH2 32-34.

Judge Mitchell testified that he was not trying to hide any notes, and this is credible to the Court. He was instead going to get to the note when he chose to do so -- not on counsel's schedule. He was preempted by counsel's arguably presumptuous inquiry and then fully disclosed Note 12 to counsel. This incident does show that all defense counsel were aware at that juncture that at least some jury notes were being handled in a fashion that did not totally suit them. Mr. Cohen said he discussed this incident with his co-counsel, but they decided not to challenge Judge Mitchell about his methods. RH3:116-117. None of the Defense counsel asked Judge Mitchell to alter or amend the way in which he was handling juror notes, despite their purported concerns.²

JURY NOTES AT ISSUE

The jury notes that remain at issue and need specific findings are Notes 6, 7, 9, 10, 13, 14, 16, 21, 22, 23, 25, 26, 27, 28, 29, and 30. The Court will discuss each note individually or in conjunction with a related note.

Notes 6 and 7

Notes 6 and 7 are considered together since they deal with the same subject matter of the time when certain items were purchased.

Note 6: Text: "When were these things purchased? When everybody got out of the car to carry stuff to the house." Date: 7/7, Time: 10:00, Transcript Reference: T9 30, Tape Reference: 10:09; 10:32; 10:53 [should be 10:51].

Note 7, Text: "Please I need to know when these things were purchased. If they only made two stops. 1. Bank 2. The babysitters house 3. Home." Date 7/7, Time: 11:11, Transcript Reference: T9 74-75, Tape Reference: 11:10-11:27; 12:23-12:27.

² Similarly, in connection with Note 15, Mr. Panteleakis said he was "pretty upset" by the way Judge Mitchell asked the question from the jury without first involving counsel. RH 2-17. However, none of the defense attorneys objected or asked Judge Mitchell to change his method.

It appears that Judge Mitchell handled these notes in the category which he referred to as “obvious” or “clarification”. He asked questions about this subject while the witness was on the stand, but did not indicate on the record that his question was as a result of an inquiry from a juror. There is no indication that the existence of the jury note was discussed with counsel, either on or off the record. Judge Mitchell did ask counsel if they had any follow-up to his questioning.

Ms. Holbeck did remember the subject matters of Notes 6 and 7 being discussed. However, it was unclear whether she actually remembered seeing the notes or was merely recalling the subject matter being raised, which she admitted stuck in her mind because she had “missed that point entirely.” RH1 141-43.

There is no evidence that the notes were seen by defense counsel. It appears that these two notes were handled by Judge Mitchell and disposed of under his “clarification” category. As to Note 7, Judge Mitchell stated that he did not advise counsel that his question was pursuant to a jury note. RH3 70-71. The notes were given to the clerk and became part of the record, but the Court can not conclude that defense counsel saw them at that time or that they were made aware that the judge’s questions arose from questions posed by a juror. Counsel were given full opportunity to pose any questions on this subject before the witness left the stand. T9 75-76.

The State relies on Judge Mitchell’s statement that counsel were advised “at some point” of items in the third category of questions. Appellee’s Proposed Findings of Fact, p.6-7. This general statement is too vague and non-specific to support the conclusion that *these* notes were seen by all counsel on or about the time the questions were asked by the court or before the witness left the stand.

Notes 6 and 7 were not disclosed to defense counsel as proposed questions coming from the jury.

Notes 9 and 10

Both of these notes deal with phone calls made.

Note 9: Text: "Question -- the time for the phone call is only for answered calls. Not only if you dial??" Date: 7/11, Time: No time, Transcript Reference: T11 67-68, Tape Reference: 10:53; 4:45-5:00.

Note 10: Text: "Today she remembers making these calls?" Date: 7/11, Time: No time, Transcript Reference: None, Tape Reference: 10:53; 4:45-5:00.

Counsel recall this issue but do not recall seeing the notes. There is evidence of the notes being at the bench when counsel approached, although there is nothing explicit in the transcript. Mr. Panteleakis did ask questions that are related to the inquiry in the note. T11 67-68. Ms. Holbeck did have some recollection of a note during the testimony of a witness named Guadalupe. RH1 145-46.

I find that these notes were ones that were seen by counsel either at the bench or distributed by the clerk, and counsel were then able to decide whether to ask questions about the subject matter. This would be consistent with the method Judge Mitchell says he employed for notes he did not himself deal with by asking questions.

Note 13

Text: "Your Honor: To clarify in my mind would you ask [forensic] witness to answer if she wipes table with bleach and puts new craft paper down with each piece [unintelligible] she works on [remainder of note unavailable]". Date: 7/12, Time: 3:53, Transcript Reference: T12 221, 224, Tape Reference: None [Tape missing].

It appears that this was a note given to counsel and that they could decide whether to ask anything about it. The record explicitly indicates that this note was

shared with counsel, and that was consistent with Ms. Holbeck's testimony. All counsel saw this note at the approximate time it was received by the court.

Note 14

Text: " We the juror feel that juror #6 should be removed, because of lack of concentration and constantly nodding during this trial. Two men lives are at stake and we believe they deserve a fair trial." Date: 7/13, Time: 9:40, Transcript Reference: T13 2-10, 228. Tape Reference: None.

Judge Mitchell believed that this note was shared with counsel. Defense counsel were adamant that they had not seen this note and that they would have recalled it since it was such a significant statement from the jury. RH2 15, RH3 94, 156.

Defense counsel had argued on the record to keep Juror Number 6 despite that juror having been late on the morning of July 13. This was apparently after the note was received by the court, since the time on the note is given as 9:40 a.m. It seems unlikely that experienced defense counsel would have argued to keep Juror Number 6, as they did, if they had known of the note, since the other jurors were so adamant about the juror's conduct denying their clients a "fair trial". Since the juror was subsequently removed for not showing up, making it unnecessary for the court to deal with the jury's note, it may have been that the court did not believe it was necessary at the time to share the note. In other words, Juror Number 6's continued participation in the trial had become a moot issue.

The Court finds that defense counsel did not see this note at the time it was presented to Judge Mitchell or during the trial of the case. They are adamant about not seeing the note, and the fact that they argued for not dismissing Juror Number 6 supports this conclusion.

Note 16

Text: "I work at the Baltimore City detention center, but I do not work anywhere in the vicinity of the defendants. Would you see any problems with me working during this trial. (On the weekends)." Date 7/14, Time 4:57, Transcript Reference: None, Tape Reference: None.

Mr. Panteleakis stated that he could not recall the note or this issue coming up.

RH2 17. Mr. Cohen said he could not recall seeing the note. RH3 100. Mr. Rhodes similarly said he did not see the note. RH3 158.

On the other hand, Ms. Holbeck had a specific recollection of this note:

I remember this one and I think we already knew that the juror worked at the Detention Center. I don't think it was shocking. And my recollection is [Judge Mitchell] discussed it with the juror at the bench ... With counsel. RH1 149.

Judge Mitchell was also certain that this note had been dealt with. He said:

Yes ... I believe we handled that note at the bench on the record. I don't remember the point in the trial when it – when the note came to our attention, but – or how directly it came to the attention of the – or it may have come in the morning before we started, I'm not sure, but – of how it happened – came to our attention, but I'm pretty positive that we discussed that on the record because both Defendants were incarcerated at the Baltimore City Detention Center. The note itself presents an obvious question of whether the juror had access to the ... men and/or their records, and whether the juror could be fair to the Defendants. RH3 30.

In further examination, Judge Mitchell conceded that, while he had no independent recollection of Note 16 being discussed with counsel, it *would* have been discussed with counsel, and the discussion may have been off the record in chambers, in the corridor, or at sidebar. RH3 50-51. Judge Mitchell also said he recalled there having been a conversation about this matter, but did not recall any specifics; nor did he recall what action was taken. RH3 51-52.

It is clear that there was no discussion on the record about this note. This note was timed at 4:57 p.m., very late in the court day -- and on a Friday at that --and likely after formal proceedings had ended. Given Judge Mitchell's affirmative recollection of it being handled with counsel – a recollection supported by Ms. Holbeck's recollection as well – the Court believes it is most likely that the note was handled off the record, as Judge Mitchell suggests, either in chambers, in the hallway, or at an off-the-record sidebar. Obviously, all parties were wrapping up a long day and week of trial, and at that point, it may have been handled in a fashion where defense counsel, who already knew the juror was a State correctional officer and had accepted her as a juror, did not at the time appreciate the full import of the possible problem created by the juror's specific employment at the Detention Center.

The Court finds that the contents of Note 16 were disclosed to counsel on July 14 in one of the ways testified to by Judge Mitchell.

Note 21

Text: "When you say call 'received' does that mean the call went through and was answered at the other end?" Date: 7/20, Time [before lunch], Transcript Reference: T18 95-97, Tape Reference: 12:50- 12:53.

Judge Mitchell asked several questions related to the note but did not disclose that it was a jury note that prompted the inquiry. There is nothing on the record that indicates that the note was shared with counsel.

Therefore, the Court finds that Note 21 was not disclosed to counsel as being a question prompted by the jury's question.

Note 22

Text: "Is possible to get the exact time of death or a roundabout time?" Date: 7/21, Time: 10:13, Transcript Reference: T19 5-88 [time of death is at T 19 33-34.].

Appellants now concede that Note 22 was disclosed. See Appellant's Proposed Findings of Fact, Post Hearing Memorandum, and Request for Argument, p.64.

Note 22 was disclosed to counsel.

Note 23

Text: "Is it possible to vacuum those types of Glove? If possible did you vacuum them 1 and 2?". Date: 7/24, Time: 3:49, Transcript Reference: T20 173-74, Tape Reference: 3:49-5:00.

None of the witnesses could recall this note. Judge Mitchell did not himself ask a question arising from this note. One of the prosecutors did ask questions about vacuuming the gloves, but it is unclear whether this arose from the note. The tape does not disclose the note being handled.

It is unclear what happened with this note. On this record, the Court cannot conclude that the note was seen by defense counsel.

Note 25

Text: "Can we get a spelling [unintelligible] of the two types of testing that are being discussed". Date: 7/28. Time: 3:01, Transcript Reference: T24 138-39. Tape Reference: 3:01-3:02.

Judge Mitchell asked the question and stated that it was a jury question. Counsel were thus aware that a question had come from the jury, but they made no inquiry to follow up or ask to see the note.

The Court cannot conclude that counsel actually saw this note; however, they were aware that Judge Mitchell's question was based on a note from the jury and they did not take any action to seek inspection of the note. There was a functional disclosure of the jury question to counsel by the way that Judge Mitchell handled this note.

Note 26

Text: “Is it possible for another DNA expert to look at the same reports and have a different opinion?”. Date: 7/31. Time: 10:18. Transcript Reference: T 25 48. Tape Reference: 10:40-10:42.

It appears that this question was handled by the court asking the question but not revealing that the question came from the jury. It does not appear that the note itself was shared with counsel at the time it was asked. All three defense counsel testified that they did not see this note. RH2 22, RH3 159-160, RH3 101. Counsel indicated that they are certain of their recollections because had they known of a juror’s interest, they would have been more likely to call a defense DNA expert which they did not do.³ The Court finds that defense counsel did not see this note.

Note 27

Text: “Hi, -- regarding Alexis’ T-shirt. If the murders occurred late in the afternoon, could the skin cells of classmates, neighbors, teachers etc account for unaccounted alleles?” Date: 7/31. Time: 2:11, Transcript Reference: T25 188-89 [SAH], 192-93 [NP]. Tape Reference: 2: 13-2:16.

This note was passed to counsel at the direction of Judge Mitchell, and in fact, Mr. Panteleakis asks a question related to the subject of the note. This note was disclosed to counsel by being passed to them.

Note 28

Text: “It is uncommon to find some unknown alleles in samples that do not match known standards.”. Date: 7/31. Time: 2:43. Transcript Reference: T25 150-51. Tape Reference: 2:43-3:02.

³ By allowing and referring to such testimony of what defense counsel “would have done”, the Court in no way is making a finding of the veracity of that contention. As Appellee notes, such testimony in hindsight is speculative and self-serving. The Court did allow the testimony for the sole purpose of judging why a witness would or would not have remembered a particular jury note.

It appears from the tape that this note was reviewed by counsel during a bench conference, although nothing explicit appears in the trial transcript. Shortly thereafter, Mr. Panteleakis asks the witness a related question.

The contents of Note 28 were disclosed to counsel.

Notes 29 & 30

There were two notes, Numbers 29 and 30, received during deliberation that are in dispute. Note 29 is also identified as Deliberation Note 1:

Text: "1) We would like to see all report and interviews of Poli and Adan from every where; 2) Who's hand on exhibit 307 & 294; 3) which is Poli and which is Adan [Answers] "1. You have all the exhibits except the weapons. 2. You must rely on your collective memory. 3. You must rely on your collective memory." Date: None. Time: None. Transcript Reference: T30 12-16. Tape Reference: None.

Note 30 is Deliberation Note 2:

Text: "May we have the 911 Tape (and radio)" [Answer]: "No. [signed 'DB Mitchell'] Date: 8/3. Time: 2:37. Transcript Reference: T30 12-16. Tape Reference: None.

Both of these notes appear to have been handled in the fashion described by the courtroom clerk and by Judge Mitchell in their testimony before this Court. (RH3 30-33). Ms. Holbeck testified that she recalled the notes being discussed but could not recall whether the discussion was in the courtroom or in chambers. RH1 27-29.

There is no specific reference to Note Numbers 29 and 30 in the trial transcript. However, in the discussion of Note 31 before Judge Themelis at T.30 p.13, line 17 to p.14, line 14, counsel describe how Judge Mitchell handled "previous questions". This is an obvious reference to Notes 29 and 30. No complaint or objection was made at that time on the record as to the procedure that had been used up to that point. Defense counsel acknowledge how Judge Mitchell handled prior questions, and Mr.

Panteleakis suggests that Judge Themelis should handle the response to the jury the way that Judge Mitchell had done up to that point. Mr. Rhodes agrees with Mr. Panteleakis' suggestion.

From this, the Court makes the inference that counsel participated in the response to Notes 29 and 30 and that they were aware of the contents of the notes as well as the responses made by the court. Appellants' counsel agree in their joint filings that Note 30 was disclosed to trial counsel, but continue to assert that there is not "clear and convincing evidence" that Note 29 was disclosed. See, Appellants' Proposed Findings of Fact, Post-Hearing Memorandum and Request for Argument, p 72. It is inconceivable that a judge of Judge Mitchell's experience would not have involved counsel in responding to a question from a jury during the deliberation process for a criminal trial. He clearly did, although the consultation does not appear to be in the transcript of the proceedings.

It should be noted that there is no suggestion that defense counsel would have in any fashion suggested that Judge Mitchell should have responded differently than he did to Notes 29 and 30.

The Court finds that Judge Mitchell made counsel aware of the content of Notes Numbers 29 and 30 received during deliberations and obtained counsel's input prior to giving a written response to the jury.

CONCLUSION

The contents of Jury Note Numbers 9, 10, 13, 16, 22, 25, 27, and 28 received during trial were disclosed to counsel by the court.

The contents of Jury Note Numbers 29 and 30 received during deliberations were made available for review, and counsel were able to and did participate in the written response to the jury made by the court.

The contents of Jury Note Numbers 6, 7, 14, 21, 23 and 26 were not disclosed to counsel by the court.

4/16/09
Date

/s/ Dennis M. Sweeney
Dennis M. Sweeney
Circuit Court Judge