IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID BURNS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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Elizabeth A. Brown
Clerk of Supreme Court

SUPREME COURT CASE NO. 77424

District Court Case No. C267882-2

APPELLANT'S OPENING BRIEF

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Appeal from Order Denying Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

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RULE 26.1 DISCLOSURE

Pursuant to Rule 26.1, Nevada Rules of Appellate Procedure, the undersigned hereby certifies to the Court as follows:

1. Appellant David Burns is an individual and there are no corporations, parent or otherwise, or publicly held companies requiring disclosure under Rule 26.1;

2. Appellant David Burns is represented in this matter by the undersigned and the law firm of which counsel is the owner, Resch Law, PLLC, d/b/a Conviction Solutions. Appellant was represented below at trial by Anthony Sgro, Esq., and Christopher Oram, Esq.

DATED this 28th day of February, 2019.

RESCH LAW, PLLC d/b/a Conviction Solutions

By: _____
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TABLE OF CONTENTS

RULE 26.1 DISCLOSURE i

TABLE OF AUTHORITIES iii

I. JURISDICTION vi

II. ROUTING STATEMENT (RULE 17) vi

III. ISSUES PRESENTED FOR REVIEW vi

IV. STATEMENT OF THE CASE 1

V. STATEMENT OF FACTS 2

VI. SUMMARY OF ARGUMENT 10

VII. ARGUMENT 11

A. Burns' state or federal constitutional rights were violated when the trial court refused to grant relief on a claim that Burns was deprived of his direct appeal. 12

B. Trial counsel provided constitutionally ineffective assistance throughout the trial. 19

C. The cumulative effect of counsel's errors warrants reversal of the convictions and sentences. 51

VIII. CONCLUSION 53

TABLE OF AUTHORITIES

Cases

Alcock v. SBA, 50 F.3d 1456 (9th Cir. 1995) 20
Anderson v. Bessemer City, 470 U.S. 564 (1985) 20
Artiga-Morales v. State, 130 Nev.Adv.Rep. 77, 335 P.3d 179 (2014) 37
Atkins v. Virgina, 536 U.S. 304 (2002) 38, 40, 46
Barron v. State, 105 Nev. 767, 783 P.2d 444 (1989) 34
Brady v. Maryland, 373 U.S. 83 (1963) 24, 26
Brecht v. Abrahamson, 507 U.S. 619 (1993) 32
Browning v. State, 120 Nev. 347, 91 P.3d 39 (2004) 26
Buffalo v. State, 111 Nev. 1139, 901 P.2d 647 (1995) 52
Burnside v. State, 131 Nev. Adv. Op. 40, 352 P.3d 627 (2015) 22
Byford v. State, 123 Nev. 67, 156 P.3d 691 (2007) 20
Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) 32
Colley v. State, 98 Nev. 14, 639 P.2d 530 (1982) 34
Collier v. State, 101 Nev. 473, 705 P.2d 1126 (1985) 37
Foster v. State, 116 Nev. 1088, 13 P.3d 61 (2000) 26
Giglio v. United States, 405 U.S. 150 (1972) 26, 27
Goodman v. Bertrand, 467 F.3d 1022 (6th Cir. 2006) 31
Grey v. State, 124 Nev. 110, 178 P.3d 154 (2008) 21
Hall v. Florida, 134 S.Ct. 1986 (2014) 44, 45
Hernandez v. State, 118 Nev. 513, 50 P.3d 1100 (2002) 51, 52
In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970) 34
Jackson v. State, 128 Nev.Adv.Op. 55, 291 P.3d 1274 (2012) 47
Jones v. Barnes, 463 U.S. 745 (1983) 11, 12
Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996) 11
Kyles v. Whitley, 514 U.S. 419 (1995) 25, 26
Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994) 12, 13

Manning v. State, 131 Nev.Adv.Op. 26, 348 P.3d 1015 (2015) 47
Mendoza-Lobos v. State, 125 Nev. 634, 218 P.3d 501 (2009) 50
Mulder v. State, 116 Nev. 1, 992 P.2d 845 (2000) 52
Mullaney v. Wilbur, 421 U.S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975) 34
Musladin v. Lamarque, 555 F.3d 830 (9th Cir.2009) 47
Napue v. Illinois, 360 U.S. 264 (1959). 26, 27, 28
People v. Seumanu, 61 Cal. 4th 1293, 355 P.3d 384 (2015) 33
Profit v. State, 2008 WY 114, 193 P.3d 228 (2008).....31
Roberts v. State, 110 Nev. 1121, 881 P.2d 1 (1994).....26
Rodriguez v. United States, 395 U.S. 327 (1969) 16
Roe v. Flores-Ortega, 528 U.S. 470 (2000).....13, 16, 17
Rose v. State, 123 Nev. 24, 163 P.3d 408 (2007) 52
Ross v. State, 106 Nev. 924, 803 P.2d 1104 (1990).....34
Sheriff, Clark County v. Keeney, 106 Nev. 213, 791 P.2d 55 (1990) 20
State v. Agee, 358 Ore. 325, 364 P.3d 971 (2015).....45, 46
State v. Bennett, 119 Nev. 589, 81 P.3d 1 (2003) 26
State v. Gonzales, 125 P.3d 878, 2005 UT 72 (2005).....30
State v. Love, 109 Nev. 1136, 865 P.2d 322 (1993);.....11
Stockmeier v. State Board of Parole Comm'rs, 127 Nev. 243, 255 P.3d 209 (2011).....50
Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) 11
Suggs v. United States, 513 F.3d 675 (7th Cir. 2008) 12
Tavares v. State, 117 Nev. 725, 30 P.3d 1128 (2001).....32
Taylor v. State, 132 Nev.Adv.Rep. 27, 371 P.3d 1036 (2016) 37
Toston v. State, 127 Nev. 971, 267 P.3d 795 (2011).....13, 15, 17
Townsend v. Burke, 334 U.S. 736 (1948) 51
United States v. Agurs, 427 U.S. 97 (1976) 24, 27
United States v. Bagley, 473 U.S. 667 (1985) 25
United States v. Barragan-Devis, 133 F.3d 1287 (9th Cir.1998).....47

United States v. Frazin, 780 F.2d 1461 (9th Cir.1986) 47
United States v. Sandoval-Lopez, 409 F.3d 1193 (9th Cir. 2005) 17
United States v. Waller, 2013 U.S.Dist. LEXIS 39845 (W.D. Tenn. 2013).....16
United States v. Watson, 171 F.3d 695 (D.C. Cir. 1999).....49
United States v. Williams, 739 F.2d 297 (7th Cir. 1984).....35
United States v. Yeley-Davis, 632 F.3d 673 (10th Cir. 2011) 22
Valdez v. State, 196 P.3d 465 (2008) 31, 32, 51, 52
Wade v. State, 115 Nev. 290 986 P.2d 438 (1999) 26
Watters v. State, 129 Nev. 886, 313 P.3d 243 (2013) 36
Whitney v. State, 112 Nev. 499, 915 P.2d 881 (1996) 34, 35
Ybarra v. State, 127 Nev. 47, 247 P.3d 269 (2011) 40, 41, 42
Zapata v. Vasquez, 788 F.3d 1106 (9th Cir. 2015) 32

Statutes

NRS 174.098 .....38, 39, 44, 46
NRS 174.234 21
NRS 177.015(1)(b).....vi
NRS 177.015(3) vi
NRS 193.165(1) 50
NRS 34.575(1).....vi
NRS 34.830.....vi, 20

Rules

NRAP 17(b)(1) vi
NRAP 4(c).....13, 18

I. JURISDICTION

This is an appeal from the denial of a post-conviction petition for writ of habeas corpus in State v. David Burns, Case No. C267882-2. The written judgment of conviction was filed on May 5, 2015. 11 AA 2281. The trial court's order denying post-conviction relief was filed October 25, 2018. 12 AA 2623. A timely notice of appeal was filed on November 8, 2018. 12 AA 2651. This Court has appellate jurisdiction over the instant appeal under NRS 34.575(1), NRS 34.830, NRS 177.015(1)(b) & NRS 177.015(3).

II. ROUTING STATEMENT (RULE 17)

It appears this matter is not presumptively assigned to the Court of Appeals, as it is a post-conviction appeal which arises from a Category A felony. See NRAP 17(b)(1).

III. ISSUES PRESENTED FOR REVIEW

A. Whether Burns' state or federal constitutional rights were violated when the trial court refused to grant relief on a claim that Burns was deprived of his direct appeal.

B. Whether trial counsel provided constitutionally ineffective assistance throughout the trial including by: 1) Failing to move to exclude improperly noticed cellular phone expert witness testimony, 2) Failing to discover, or challenge the State's withholding of, exculpatory information concerning a key prosecution witness, 3) Ineffectively opening the door to damaging and otherwise inadmissible evidence, 4) Failing to challenge prosecutorial misconduct, 5) Failing to move to strike the death penalty as a sentencing option based on Burns' ineligibility for it, 6) Failing to properly handle a juror note, and 7) Failing to effectively represent Burns at the time of sentencing.

C. Whether the cumulative effect of errors throughout the trial warrant reversal of Appellant's convictions and sentences.

IV. STATEMENT OF THE CASE

Appellant David Burns ("Burns") was charged with murder and attempt murder, both with use of a deadly weapon, along with other serious crimes. 1 AA 1. The incident which led to these charges occurred on August 7, 2010, and resulted in Derecia Newman being shot and killed, while twelve year old Devonia Newman was shot and survived.

The state filed notice of its intent to seek the death penalty against Burns. 1 AA 9. The case was extensively litigated for several years before it proceeded to trial in 2015. 2 AA 328.[1] On day twelve of the trial proceedings, a stipulation was reached in which the State agreed to waive its right to seek the death penalty against Burns in the event of a conviction for first degree murder. 8 AA 1723. The jury ultimately did return guilty verdicts on all charges, including first degree murder. 11 AA 2269.

[1] The trial transcript is provided in the appendix starting with day six. Days one through five contain the jury selection. No issues are raised in this appeal concerning the selection of jurors.

Burns was sentenced on April 23, 2015. 11 AA 2274. The trial court sentenced him to life without possibility of parole, which remains the controlling sentence.

No direct appeal was ever filed. Instead, Burns filed a proper person petition for writ of habeas corpus on October 13, 2015. 11 AA 2284. That petition was denied by the trial court. 11 AA 2380. However, this Court reversed that decision and ordered that counsel be appointed to assist Burns with his claims. 11 AA 2390. Undersigned counsel was appointed and filed a supplemental petition on Burns' behalf. 11 AA 2394.

The trial court held an evidentiary hearing on the deprivation of appeal claim. 12 AA 2566. Following the hearing, the trial court issued an order that denied relief on all post-conviction claims including the deprivation of appeal claim. 12 AA 2623. This appeal followed.

V. STATEMENT OF FACTS

The facts required to understand the claims in this appeal include facts from the events leading up to and at trial, trial proceedings related to the alleged appellate waiver, and the post-conviction evidentiary hearing.

Facts related to trial proceedings

As indicated in the charging document, Burns was charged with murder, robbery, and other serious crimes. The State alleged that Burns, an associate named Willie Mason, and a third individual identified as Stephanie Cousins, killed and robbed Derecia Newman. 1 AA 4. Newman lived in an apartment with Cornelius Mayo, and the two of them sold drugs for a living. 2 AA 337. Cousins had previously purchased drugs from Derecia, which is what apparently led the group to her apartment the night of the offense. 2 AA 342.

Although Burns did not own a cellular phone, the State noticed several "custodian of records" witnesses from phone companies. These included Metro PCS, T-Mobile, and Nextel. 1 AA 14.

Also prior to trial, the defense moved for the disclosure of any deals made to potential state witnesses, including Mayo. 1 AA 21. Mayo was present the night of the shooting, and had admitted to police that drugs were present in the apartment. 1 AA 21. As explained in a declaration of arrest, cocaine was found both in the apartment and in Mayo's shoe the

night of the incident. 12 AA 2478. The defense correctly noted that while these events led to serious felony charges, the cases against Mayo were delayed for over four years pending trial in Burns' case. 1 AA 22. A second felony case also had languished for three years and counting. 1 AA 22.

It was obvious the State intended for Mayo to testify as a witness against Burns. Therefore, the defense sought disclosure of any benefits Mayo received from the State by way of the long continuances his cases received. 2 AA 290. However, at a hearing on the issue, the State represented that the only benefit was the continuances themselves – not any agreement to a particular outcome. 2 AA 291.

The case ultimately proceeded to a sixteen day jury trial. At trial, the State did utilize two witnesses from cellular phone companies. Kenneth LeCesne testified as the "custodian of records" from Metro PCS. 5 AA 1028. The following day, a Ray MacDonald testified on behalf of T-Mobile. MacDonald explained that, while he did not use the term custodian of records, he was part of a group within the company that "is responsible for

all subpoena and court order complaints that come[s] into our office." 6 AA 1344.

The State also presented Mayo as a witness, who did acknowledge that he had the pending criminal cases as of the time of trial, *and* that the cases had been postponed for years. 6 AA 1261. But Mayo claimed he did not know if the cases were postponed until after Burns' trial was over. 6 AA 1261. Additionally, Mayo denied that it helped him in any way in those cases to testify against Burns. 6 AA 1261. He also denied that it was any type of favor or benefit for his cases to be delayed for years. 6 AA 1263.

The appellate waiver

On the twelfth day of trial, a deal was reached between Burns and the State. As explained by counsel, if Burns was convicted of first degree murder, he "would agree that the appropriate sentencing term would be life without parole. The State has agreed to take the death penalty off the table, so they will withdraw their seeking of the death penalty." 7 AA 1530.

The agreement also included a waiver of appellate rights. But counsel explained that the waiver was limited, stating "we are not waiving any

potential misconduct during the closing statements. We understand that to be a fertile area of appeal." 7 AA 1530. The prosecutor appeared to agree, as he explained to the court that Burns "will waive appellate review of the guilt phase issues." 7 AA 1531.

The actual written agreement was also made part of the record. It provides that in exchange for the benefits of the agreement, "Defendant agrees to waive all appellate rights stemming from the guilt phase of the trial." 8 AA 1724. Burns was ultimately convicted but no direct appeal was ever filed by counsel. This was despite there being, as counsel predicted, several instances of misconduct during the State's closing argument.

Evidentiary Hearing

With assistance from counsel, Burns filed a supplemental post-conviction petition with the court. At the argument on the petition, the court only granted an evidentiary hearing on the issue of whether Burns was deprived of a direct appeal. 12 AA 2562-63.

At the evidentiary hearing, both of Burns' trial attorneys testified. Mr. Sgro explained that the idea to approach the State about removing the

death penalty as a sentencing option was his. 12 AA 2571. The idea was born out of thinking that the trial was going as well as it could have, and that there were not many issues to appeal at that point in the trial, along with a consideration to always try and get rid of the death penalty as an option. 12 AA 2572.

On the specific topic of the scope of the agreement, Mr. Sgro believed the agreement allowed Burns to appeal misconduct during the State's closing argument. 12 AA 2575. That specific understanding is, in fact, what Mr. Sgro put on the record. 12 AA 2576. This was important because Burns had previously informed counsel that he wanted to appeal in the event he was convicted. 12 AA 2576. Mr. Sgro believed that Burns was comfortable with waiving his appeal as to potential errors that arose prior to the agreement being signed. 12 AA 2577.

Christopher Oram also testified, and confirmed that the scope of the agreement was to waive appellate rights as to items that occurred before the agreement was entered, but not as to misconduct that occurred after the agreement was signed. 12 AA 2590. Mr. Oram testified that carving

out misconduct during the State's closing was a "good anticipation." 12 AA 2590. Mr. Oram explained that the agreement likewise would not waive an appeal based on anything that might occur in the future at sentencing. 12 AA 2591.

Mr. Oram explained that he represented Burns at sentencing and that he prepared a sentencing memorandum for the court. 12 AA 2592. Mr. Oram testified that the sentencing memorandum identified two errors with the pre-sentence report. 12 AA 2592. However, the court did not permit Mr. Oram to explain what those errors were. 12 AA 2592.

Mr. Oram explained that after the sentencing, having worked on the case for years, he paid Burns one final visit in jail to close out the matter. 12 AA 2593. Oram claimed that despite Burns wanting to challenge his sentence further, Burns did not inquire about an appeal. 12 AA 2593. Instead, Mr. Oram explained to Burns about how post-conviction worked and that he might want to pursue that avenue instead. 12 AA 2594. Mr. Oram stated he often keeps a journal of issues that arise during trial and will provide that to the client upon request. 12 AA 2598.

Burns also testified at the hearing, and remembered the final meeting somewhat differently than did Mr. Oram. Burns explained that he did ask Oram about filing a notice of appeal during that meeting. 12 AA 2604. Burns testified that Oram provided him a "facts sheet" of issues that could be raised on appeal. 12 AA 2604. Burns testified that Oram explained to him that an appeal would be "futile" and that his better avenue was to file a post-conviction petition. 12 AA 2605. Burns was clear that he wanted his attorneys to appeal his conviction. 12 AA 2605.

After the testimony, the court indicated its belief that neither lawyer had testified whether Burns had requested an appeal "pursuant to any appellate rights that he had carved out." 12 AA 2612. The court also noted Burns "never testified that he told them to file an appeal on those issues." 12 AA 2616. The court ultimately denied the appeal deprivation claim and directed an order be prepared that denied all claims for relief.

VI. SUMMARY OF ARGUMENT

The record shows that Burns informed his lawyers that he wanted to appeal in the event of a conviction, discussed potential appellate issues with his lawyers, and that the waiver of appellate rights was limited in its scope. Further, the totality of Burns' circumstances, having reserved the right to appeal certain issues and having been convicted of the most serious charges he faced, should have alerted counsel that Burns wanted to file a direct appeal. Yet, at a final discussion between counsel and Burns, counsel talked Burns out of appealing and directed him to instead seek post-conviction relief. Because Burns wanted to appeal, as any criminal defendant in his position would, counsel was obligated to have filed a notice of appeal. Burns was deprived of his direct appeal and this Court should direct the lower court clerk to file an untimely notice of appeal on Burns' behalf.

Aside from being deprived of a direct appeal, several instances of ineffective assistance of counsel affected the reliability of the jury's verdict. These errors, alone or cumulatively, were prejudicial as there was a

reasonable probability of a more favorable verdict or sentence had the errors not occurred. As a result, the convictions and sentences should be set aside and a new trial and/or sentencing ordered.

VII. ARGUMENT

Ineffective assistance claims present mixed questions of law and fact and are subject to independent review. State v. Love, 109 Nev. 1136, 1139, 865 P.2d 322, 323 (1993); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102, 1107 (1996). A claim of ineffectiveness of counsel requires a showing that counsel acting for the defendant was ineffective, and that the defendant suffered prejudice as a result—defined as a reasonable probability of a more favorable outcome. Strickland v. Washington, 466 U.S. 668 (1984). To prove ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice meaning the omitted issue would have a reasonable probability of success on appeal. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102 (1996). Appellate counsel need not raise every non-frivolous issue on appeal. Jones v.

Barnes, 463 U.S. 745, 751 (1983). Still, ineffectiveness may be found where counsel presents arguments on appeal while ignoring arguments that were stronger. Suggs v. United States, 513 F.3d 675, 678 (7th Cir. 2008).

These errors deprived Burns of his right to effective assistance of counsel under the United States and Nevada Constitutions.

A. Burns' state or federal constitutional rights were violated when the trial court refused to grant relief on a claim that Burns was deprived of his direct appeal.

This Court has noted that "an attorney has a duty to perfect an appeal when a convicted defendant expresses a desire to appeal or indicates dissatisfaction with a conviction." Lozada v. State, 110 Nev. 349, 354, 871 P.2d 944 (1994). If counsel fails to file an appeal after a convicted defendant makes a timely request, the defendant (at least previously) was entitled to the "Lozada remedy," which consisted of filing a post-conviction petition with assistance of counsel in which the actual direct appeal claims were raised. Id. The petitioner did not have to identify the potential appellate claims in making an appeal deprivation claim. Rather, it is enough to receive the relief contemplated by Lozada if a petitioner shows

that he was deprived of his right to a direct appeal without his consent. Id. at 357.

The remedy contemplated by Lozada was replaced by recent revisions to the Nevada Rules of Appellate Procedure, although the basis for obtaining relief remains generally the same. Now, under NRAP 4(c), an untimely notice of appeal is filed by the Clerk of the Court when a deprivation claim is timely asserted in a post-conviction petition, and, the trial court makes findings that the petitioner "has established a valid appeal-deprivation claim." NRAP 4(c), see also Toston v. State, 127 Nev. 971, 267 P.3d 795 (2011); Roe v. Flores-Ortega, 528 U.S. 470 (2000). This Court goes on to hear the direct appeal in the same manner it would hear any other direct appeal.

That Burns wanted to appeal, was dissatisfied with his sentence, and that counsel knew these facts is well established in the record. Counsel unequivocally testified that Burns had requested they appeal in the event of a conviction. 12 AA 2576. Counsel further testified that the appellate waiver was limited, in that it reserved the right to appeal likely areas of

error such as prosecutorial misconduct during the closing argument. 12 AA 2575-76. Additionally, regardless of the precise scope of the waiver, it was limited to the trial proceedings and therefore could not have, by definition, applied to the subsequent sentencing proceeding.

The trial court's denial of this claim rests heavily on what it perceived to be a lack of potential issues to appeal. 12 AA 2616. But the trial court's decision is circular, as it refused to allow testimony by counsel about errors which counsel could have raised as appellate issues, and then used the lack of testimony on that topic as a basis for denying relief on the claim. 12 AA 2592-93.

Notwithstanding the trial court's improper preclusion of that testimony, the record establishes that counsel were aware of appealable issues that were outside the scope of the waiver. Counsel's prediction was spot-on, as they repeatedly objected to misconduct by the State during its closing argument. See 9 AA 2026; 10 AA 2152; 10 AA 2154; 10 AA 2172; 10 AA 2175; 10 AA 2178; 10 AA 2188. Counsel also testified at the evidentiary hearing that a sentencing memorandum had been filed that addressed two

errors in the pre-sentence report. 12 AA 2592. The sentencing memorandum itself was received as a sealed exhibit by the trial court at sentencing, and does contain an objection to two errors in the presentence report. SA 3.[2]

Despite counsels' ready awareness of appealable issues in a death penalty case that resulted in a sentence of life without parole, a notice of appeal was not timely filed. While counsels' explanation for that failure leaves a lot to be desired, under State and Federal law the "reasons" for the failure are largely irrelevant. Toston, 267 P.3d at 800. Burns wanted to appeal, counsel knew that, and the failure to file a notice of appeal therefore deprived Burns of his Constitutional right to a direct appeal.

[2] Burns is only in possession of an unfiled copy of the sentencing memorandum, which he has bates labeled "SA" and submitted in paper form for filing as a sealed appendix pursuant to motion. The District Court is believed to possess the only file-stamped copy of the sentencing memorandum, and the motion alternatively asks this Court to order a copy from the District Court Clerk if the filed document is preferred to Burns' submitted, unfiled version.

A post-conviction petition that asserted a deprivation claim was timely filed. 11 AA 2394. Despite the merit of the deprivation claim, the District Court denied relief on it.

The United States Supreme Court has made clear that "We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000). The correct and only option when confronted with a request to appeal was for counsel to file a notice of appeal. Attempting to talk a defendant out of appealing has been held to violate Flores-Ortega's holding and to require that an out-of-time appeal be granted. United States v. Waller, 2013 U.S.Dist. LEXIS 39845 (W.D. Tenn. 2013). The same should hold here where trial counsel was asked to appeal and refused to do so.

In Roe, the Supreme Court unambiguously held that where a criminal defendant is deprived of the right to a direct appeal, that defendant is "entitled to a new appeal without any further showing." Roe, 528 U.S. at 485, citing Rodriguez v. United States, 395 U.S. 327 (1969). These same

requirements are repeated in this Court's decision in Toston. See Toston, 267 P.3d at 800. The trial court's focus on what issues Burns would have raised was misplaced, because Burns testified that he specifically requested that his lawyers file a notice of appeal. 12 AA 2604.

Even if it were found that Burns did not expressly request his direct appeal, there are rational reasons to believe he would have wanted to appeal. Chiefly, he received the harshest possible sentence allowed based on his waiver of rights and the jury's verdict. This alone can indicate that a rational defendant would have wanted to appeal. Flores-Ortega, 528 U.S. at 480.

Further still, the fact the appellate agreement purported to waive some of Burns' appellate rights is no bar to relief under Flores-Ortega. See United States v. Sandoval-Lopez, 409 F.3d 1193, 1197 (9th Cir. 2005). Finally, there was no "unwisdom" to be had by an appeal. Id. at 1198. Burns received a sentence of life without parole for the murder and nothing that happened on a direct appeal, which could have challenged misconduct

during the State's closing or the sentence imposed, would have resulted in a harsher sentence.

Counsel predicted the State would commit misconduct during its closing argument and it did as evidenced by the many objections during the closing. Some of those were sustained and some were overruled, but between those objections and the sentencing issues set forth in the memorandum, counsel were well aware of appealable issues and Burns' desire to fight his conviction. This makes sense, as the alternative was for Burns to simply serve out a sentence of life without parole. Counsel readily acknowledged that Burns never indicated a desire to stop fighting his case. 12 AA 2591.

Because counsel were asked to appeal, were aware of appealable issues and Burns' desire to pursue an appeal, a notice of appeal should have been filed. It wasn't, and Burns was therefore deprived of his direct appeal. This Court should direct the lower court clerk to file a notice of appeal pursuant to NRAP 4(c) on Burns' behalf so that he may pursue his direct appeal.

B. Trial counsel provided constitutionally ineffective assistance throughout the trial.

The need for an out-of-time direct appeal would likely be moot if this Court granted Burns a new trial based on counsel's ineffectiveness. Counsel made several errors during trial which would probably have resulted in a more favorable outcome had those errors not occurred. As a result, counsel was constitutionally ineffective and this Court should grant a new trial on all charges.

Before discussing those claims, it is important to note the district court did not draft its own Findings of Fact, Conclusions of Law and Order, but instead signed a document that was submitted by the State with no direction or guidance. The district court made absolutely zero findings of law or fact regarding the claims of ineffective assistance of counsel except for those concerning the failure to file a notice of appeal. 12 AA 2619. Under these circumstances, the findings and conclusions are not entitled to any deference.

"Findings of fact prepared by counsel and adopted by the trial court are subject to greater scrutiny than those authored by the trial judge."

Alcock v. SBA, 50 F.3d 1456, 1459, n. 2 (9th Cir. 1995). Moreover, the district court's wholesale adoption of the State's proposed order, without any identifiable input by the district court, had long been held inappropriate. See Anderson v. Bessemer City, 470 U.S. 564, 572 (1985) ("We…have criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken the form of conclusory statements unsupported by citation to the record").

This Court has previously criticized lower courts for the exact same failing. Sheriff, Clark County v. Keeney, 106 Nev. 213, 216, 791 P.2d 55 (1990) (District court failed to specify basis for its decision or "expressly state its conclusions"), citing NRS 34.830; Byford v. State, 123 Nev. 67, 70-71, 156 P.3d 691 (2007). As a result, the district court/State's "findings" should be given no deference by this Court.

Failing to move to exclude improperly noticed cellular phone expert witness testimony

As noted above, Ken LeCesne testified at trial; ostensibly as a custodian of records. His actual trial testimony, however, veered deeply

into the realm of expert testimony. Counsel failed to lodge any objection to the testimony, which included explanations of how cellular phone signals work, what tower is likely to receive a call, the relationship between distance from a tower and the effect that has on a call connecting, and so forth. 5 AA 1028-1031.

The same exact testimony played out later in the trial with Ray MacDonald, a supposed custodial witness from T-Mobile. Again, the State asked the witness to explain the relationship between calls and towers, how those calls are assigned, factors affecting the same, and other type testimony. 6 AA 1346-1349. Again, no objection was made to the testimony.

Trial counsel was ineffective for failing to object to this testimony and the same should never have been admitted via an unnoticed lay witness. See NRS 174.234; Grey v. State, 124 Nev. 110, 178 P.3d 154 (2008) (due process violated by improper notice of expert witness).

Here, the State's repeated use of custodian of records witnesses as "experts" gave the jury the false impression that said witnesses were in fact

experts in their field, when in reality their sole function as witnesses was to explain billing records. But the witnesses testified to much more than just how the bills were generated and interpreted, such as testimony about towers, triangulations, and cell phone technology. Such testimony plainly required the use of a properly noticed expert witness, which was not present here.

Had trial counsel objected to this testimony it is reasonably probable that Burns would have enjoyed a more favorable outcome. Burnside v. State, 131 Nev. Adv. Op. 40, 352 P.3d 627, 637 (2015), citing United States v. Yeley-Davis, 632 F.3d 673 (10th Cir. 2011) (error to admit testimony that was beyond the common knowledge of jurors without proper expert notice).

While the independent nature of this error also resulted in prosecutorial misconduct which is discussed below, the State's reference to this testimony as "expert" testimony during its closing is further evidence of the prejudicial nature of this error. 10 AA 2187. While Burns did not own a phone, the State's argument is that Burns was with others who had phones

at the time of the murder, and their phones were apparently located at the crime scene. 10 AA 2187.

This type of unnoticed expert testimony should never have been allowed in the first instance, and should have been objected to before it was given as well as when it was referred to as expert testimony by the State. If the State wanted to utilize cellular phone tracking testimony at trial, it was certainly free to notice an expert on that topic which would have given the trial court and defense proper notice of the anticipated testimony. Burns requests a new trial be granted based on counsel's ineffectiveness in handling this improper use of expert testimony by the State.

Failing to discover or challenge the State's withholding of exculpatory information concerning a key prosecution witness

Cornelius Mayo was an important State's witness as he was the only adult present at the time of the murder that was able to testify as a witness. Aside from his testimony, Mr. Mayo's 911 call was also utilized by the State and argued as direct evidence of Burns' guilt as argued further below. But

Mayo was charged with multiple serious crimes arising both from the police response to the shooting, as well as subsequent events. Those cases were delayed for years, with what was according to the State, no promise or offer of any particular outcome.

Mr. Mayo was directly asked "Well, do you believe that by testifying in this case it helps you in the cases that you're facing right now?" 6 AA 1261-62. Mr. Mayo answered "no," and that answer was never clarified or explained by the State. But the irrefutable evidence is that Mr. Mayo was helped, because his case was postponed for years and then dealt down to an unbelievable level.

The suppression of evidence by the State which is favorable to an accused violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the State. Brady v. Maryland, 373 U.S. 83, 87 (1963). The defense's failure to request favorable evidence does not free the State of this constitutional obligation. United States v. Agurs, 427 U.S. 97, 103-04 (1976). These constitutional

discovery obligations apply equally to impeachment evidence and exculpatory evidence. United States v. Bagley, 473 U.S. 667, 682 (1985).

The touchstone of materiality is a showing that there is a reasonable probability of a more favorable outcome had the suppressed material been turned over at trial. Id. at 678. The prejudicial effect of the suppressed material must be considered "collectively, not item by item." Kyles v. Whitley, 514 U.S. 419, 436 (1995). The State, "which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached." Id. at 437.

This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. Id. Whether the prosecutor succeeds or fails in meeting this obligation, the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable. Id. at 437-38. Thus, a failure to produce material exculpatory or impeachment evidence warrants a new trial if there

is a reasonable probability that the hidden information would have prevented the jury from convicting a petitioner. Id.

Nevada law follows these constitutional strictures. See Browning v. State, 120 Nev. 347, 369, 91 P.3d 39, 54 (2004) (noting Brady requires disclosure of material impeachment and exculpatory evidence); accord State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003); Wade v. State, 115 Nev. 290, 295, 986 P.2d 438, 441 (1999). Under Nevada law, however, when the defense requests discoverable evidence, rather than relying on the prosecution's duty to disclose such evidence, reversal of a conviction is required if there is a reasonably "possibility" that the undisclosed evidence would have resulted in a more favorable verdict. Roberts v. State, 110 Nev. 1121, 1132, 881 P.2d 1 (1994), overruled on other grounds, Foster v. State, 116 Nev. 1088, 1092, 13 P.3d 61 (2000).

In addition, the knowing use of perjured testimony or false evidence constitutes a denial of due process. Napue v. Illinois, 360 U.S. 264, 269 (1959). The result does not change when "'the State, although not soliciting the false evidence, allows it to go uncorrected when it appears.'" Giglio v.

United States, 405 U.S. 150 at 154 (1972) (quoting Napue at 269). In order to establish a Napue violation a party must demonstrate (1) that the challenged testimony was false, (2) that the prosecution knew or should have known it was false, and (3) that the false testimony was material. Napue, 360 U.S. at 296-271. False evidence is material if there is any reasonable likelihood that the evidence could have affected the judgment of the jury. Id., see also United States v. Agurs, 427 U.S. 97, 103 (1976).

Here, the State failed to disclose, failed to correct, and the defense failed to discover that Mr. Mayo did in fact receive "help" towards his pending criminal cases by agreeing to testify as a State's witness at Burns' trial. Said help came in the form of years of delays, which ultimately culminated in a very favorable plea agreement for Mr. Mayo. 12 AA 2501. Regardless, the fact Mr. Mayo was given a sweetheart deal that involved no prison time and a possible reduction to a gross misdemeanor on a major drug violation case in which his girlfriend was murdered, daughter shot, and crack cocaine possessed in the plain view of police officers were facts

which certainly should be considered "material" to Mr. Mayo's credibility as a witness at Burns' trial.

There is a reasonable probability Burns would have enjoyed a more favorable outcome at trial had these facts been properly disclosed by the State or discovered by the defense. Counsel could further have sought an order from the trial court that Napue had been violated, which could have required the State to correct Mayo's incomplete and misleading testimony. Had this been done, Mayo's credibility would have been severely diminished and Burns would have enjoyed a reasonable probability of a more favorable outcome.

Ineffectively opening the door to damaging and otherwise inadmissible evidence

The theory of defense at trial was that Burns was not present at the time of the crime, buttressed by multiple facts that supported an argument that the shooter during the offense was another individual known as Jerome Thomas or "Job-Loc." That theory was in fact likely the best one

available, and was generally adhered to by defense counsel throughout the trial.

At no time did the co-defendant Stephanie Cousins testify during Burns' trial. However, her statements to police were brought up by defense counsel when Detective Bunting was questioned. 9 AA 1922. This led, on re-direct examination of the detective, to the State asking the detective, "Now, ultimately, Stephanie Cousins made an identification of the shooter, correct?" 9 AA 1934. When the detective answered positively, the next question was that "It wasn't Job-Loc" to which the detective responded "No." 9 AA 1934. These statements about who Cousins identified as the shooter were hearsay and should have been objected to by counsel.

But, instead of an objection to this hearsay testimony about what Cousins said, counsel compounded the issue on further examination by reviewing with the detective, on the stand, even more hearsay between the detective and Cousins. At some point in the investigation, police informed Cousins they had caught the shooter and his name was "D-Shot" (a/k/a Burns). Cousins said others had referred to the shooter in front of her as

"Job-Loc." 9 AA 1953. On further examination by the State, the detective confirmed that Cousins had, two weeks prior, picked the shooter out of a lineup and at that time chose Burns. 9 AA 1959. The plain implication of the testimony overall was that Cousins knew who the shooter was by sight, and simply had the name attributed to that individual confused.

The harm this testimony caused became very clear during closing argument. Defense counsel referenced this exchange, noting that Cousins seemed quite certain the shooter's name was "Job-Loc." 10 AA 2124-25. But that allowed the State, during rebuttal, to argue that although Cousins thought the shooter was named Job-Loc, that she identified a photo of Burns as the shooter. 10 AA 2177.

It made no sense to question the lead detective in the manner that opened the door to a hearsay statement by Cousins that "Job-Loc" was not the shooter. State v. Gonzales, 125 P.3d 878, 893, 2005 UT 72 (2005) (Discussing ineffectiveness of counsel in opening door to damaging testimony; claim denied on basis of no prejudice where evidence admissible anyway). Other courts have found defense counsel ineffective where

counsel's questioning opened the door to prejudicial evidence which would have otherwise been excluded. Profit v. State, 2008 WY 114, 193 P.3d 228, 242-243 (2008); Goodman v. Bertrand, 467 F.3d 1022, 1030 (6th Cir. 2006).

Here, the evidence in the form of Cousins' hearsay statement was *not admissible*, as evidenced by the fact the State did not solicit it until after defense counsel's cross examination that opened the door to it. Trial counsel was ineffective in opening the door to this damaging testimony, because it completely negated what had up to that point been the exclusive theory of defense. There was a reasonable probability for a more favorable outcome in this matter absent this error, and this Court should grant a new trial on all charges.

Failure to challenge prosecutorial misconduct

When reviewing acts of alleged prosecutorial misconduct, a determination is made whether the prosecutor's conduct was improper. If so, it is reviewed for harmless error, which "depends on whether the prosecutorial misconduct is of a constitutional dimension." Valdez v. State, 196 P.3d 465 at 476 (2008). If it is of a constitutional dimension, then the

conviction must be reversed unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), overruled on other grounds by Brecht v. Abrahamson, 507 U.S. 619, 623 (1993); Tavares v. State, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001). "If the error is not of constitutional dimension, [the Nevada Supreme Court] will reverse only if the error substantially affects the jury's verdict." Valdez, 196 P.3d at 476; Tavares, 117 Nev. At 732, 30 P.3d at 1132.

Habeas relief can be appropriate where trial counsel fails to object to instances of prosecutorial misconduct. Zapata v. Vasquez, 788 F.3d 1106 (9th Cir. 2015). There, the Ninth Circuit noted the misconduct included the prosecutor's false arguments, which "manipulated and misstated the evidence." Id. at 1114. As the court further noted, "trial counsel's silence, and the judge's consequent failure to intervene, may have been perceived by the jury as acquiescence in the truth of the imagined scene." Id. at 1116.

There are several instances of misconduct identified in this claim. Some were objected to by trial counsel, and those claims are presented

here for consideration as part of a cumulative error claim, and as part of an independent claim that appellate counsel was ineffective for failing to raise them (or any) claims on direct appeal. Burns would raise said claims on direct appeal if this Court finds he was in fact deprived of his right to a direct appeal. However, several other instances of misconduct were not objected to and are properly before the court as ineffective assistance of trial claims.

First, the State disparaged defense counsel. During rebuttal, the prosecutor described the two-week trial as a search for truth, except as to the last twenty minutes i.e. the defense closing argument. 10 AA 2152. Disparagement of defense counsel is misconduct. People v. Seumanu, 61 Cal. 4th 1293, 1338, 355 P.3d 384 (2015) (Improper to imply defense counsel was "personally dishonest").

Second, there were multiple instances of burden shifting. The prosecutor first argued that he does not get to pick the witnesses to murder cases, and that if he did he would, in summary, take a "priest and a nun" or "Mother Theresa" over the co-conspirators in this case. 10 AA

2155. The prosecutor then later argued that Burns had "no explanation" for the murder. 10 AA 2157. Later still, the prosecutor accused the defense of failing to present a potential witness, Ulonda Cooper. 10 AA 2175. Only this final error was objected to by defense counsel.

This Court has reversed at least one conviction that relied on similar "no evidence" verbiage. Whitney v. State, 112 Nev. 499, 502, 915 P.2d 881 (1996). As noted therein:

> In Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105-06 (1990), this court stated the following:
>
> It is generally also outside the boundaries of proper argument to comment on a defendant's failure to call a witness. *Colley v. State*, 98 Nev. 14, 16, 639 P.2d 530, 532 (1982). This can be viewed as impermissibly shifting the burden of proof to the defense. *Barron v. State*, 105 Nev. 767, 778, 783 P.2d 444, 451 (1989). Such shifting is improper because "it suggests to the jury that it was the defendant's burden to produce proof by explaining the absence of witnesses or evidence. This implication is clearly inaccurate." *Id.* (citing *Mullaney v. Wilbur*, 421 U.S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975); *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970)).
>
> Accordingly, it is generally improper for a prosecutor to comment on the defense's failure to produce evidence or call witnesses as such comment impermissibly shifts the burden of proof to the defense. *Id.* It is clear from *Ross* that

> it was error for the district court to allow the prosecutor to proceed, over objection, in commenting on the defendant's failure to produce evidence and call people who were at Melinda Bohall's party as witnesses. *See United States v. Williams*, 739 F.2d 297, 299 (7th Cir. 1984). Given this impermissible burden-shifting by the prosecutor, we reverse Whitney's conviction and remand to the trial court; accordingly, we need not address Whitney's other claims of error.

Whitney v. State, 112 Nev. 499, 502, 915 P.2d 881, 882-83 (1996).

The comments at issue, individually or collectively, shifted the burden of proof to the defense and violated Burns' constitutional rights. There is a reasonable probability of a more favorable outcome had defense counsel objected to these comments, sought a mistrial, or raised them as issues of error on direct appeal.

Next, as noted above the State improperly referred to a custodian of records witness as an "expert" despite the fact he was not an expert and was not noticed as an expert witness by the State. 10 AA 2187. As explained above, cellular phone company custodians are not experts and it is error to refer to them as such. Trial counsel should have objected to this

obvious error and there is a reasonable probability of a more favorable outcome had an objection been made or the issue raised on direct appeal.

Next, the record confirms that the State played a Powerpoint presentation during its closing that contained a "circle of guilt," described as the word "guilt" with reference to Burns. 10 AA 2188. Trial counsel did object, based on recent caselaw, to which the Court noted it was "not familiar" with the case and therefore overruled the objection. Said objection should have been sustained. While the case at issue was not mentioned, it was likely the decision in Watters v. State, 129 Nev. 886, 313 P.3d 243 (2013), which found it to be error for the State to display a presentation with the word "guilty" on it during opening statement. The record here indicates the prosecutor's reliance on the fact the PowerPoint was made during closing argument as an argument against the objection. 10 AA 2188.

By its own terms, Watters did not explicitly state that it only applied to errors during opening statement. But, this Court already determined in 2014, a year before Burns' trial, that the same rationale would apply to the

display of the word "guilty" during closing argument. Artiga-Morales v. State, 130 Nev.Adv.Rep. 77, 335 P.3d 179 (2014) (denying relief based on brief display of slide and concession by defense counsel that it was proper, although a subsequent objection to its display was sustained).

No such concession was made at Burns' trial, nor is one being made here, as the law in effect at the time of trial held it was error for the prosecutor to declare to the jury during closing argument that the defendant is guilty. Taylor v. State, 132 Nev.Adv.Rep. 27, 371 P.3d 1036, 1046 (2016), citing Collier v. State, 101 Nev. 473, 480, 705 P.2d 1126 (1985). This was a meritorious issue for direct appeal and counsel and the trial court should have been aware that a "guilty" PowerPoint was forbidden during opening and closing argument. There is a reasonable probability of a more favorable outcome such as a conviction on less or less serious charges had this error not occurred.

Finally, the prosecutor presented a lengthy argument, which included audio played for the jury, that in essence the whistling heard on the 911 call during the crime matched alleged whistling heard during Burns' interview

with police. 10 AA 2194-95. But, the transcript of the police interview makes no reference whatsoever to any whistling. See 11 AA 2335-2379. Burns never admitted to being at the crime scene much less whistling during the crime. No evidence supported this argument and there is a reasonable probability of a more favorable outcome had counsel objected to it.

Failing to move to strike the death penalty

Counsel never sought to dismiss the death penalty as a sentencing option under NRS 174.098 and/or Atkins v. Virgina, 536 U.S. 304 (2002). Trial counsel's failure to do so constituted ineffectiveness, as there is a reasonable probability he would have been found intellectually disabled and thus ineligible for the death penalty had such a motion been made based on the information trial counsel possessed and utilized at sentencing concerning fetal alcohol syndrome. Burns was prejudiced by this failure because he entered an unfavorable negotiation in which he waived certain appellate rights and stipulated to a sentence of life without possibility of

parole to avoid what was, at the time, the possible imposition of a higher level sentence, i.e. death.

Had Burns been declared ineligible for the death penalty, he would have had no need to "lock in" a punishment of life without possibility of parole because that would have been the worst possible sentence the court could have imposed if he was found guilty. Likewise there would then have been a reasonable probability of a sentence of less than life without parole being imposed.

The record, and particularly the sealed appendix, contains ample evidence that Burns suffers from Fetal Alcohol Syndrome ("FAS"). Burns does not contend that because he has FAS, he is per se ineligible for the death penalty. However, there was a strong argument to be made that, based on FAS and other factors, Burns has severe adaptive deficits that place him into the intellectually disabled range and thus render him ineligible for the death penalty.

Under NRS 174.098, an intellectually disabled individual cannot be subjected to the death penalty. Intellectually disabled means "significant

subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period." The statute was enacted in response to the Supreme Court's decision in Atkins, which forbid the execution of what was then described as mentally retarded individuals, but left it to states to determine what standards would be used to make such a determination. Ybarra v. State, 127 Nev. 47, 53, 247 P.3d 269 (2011).

Explaining the concept of "limitations in intellectual functioning," this Court noted this was measured in "large part," – and thus not exclusively, by IQ tests. Id. at 55. This Court held that IQ tests are not the sole source of evidence on this topic, although the common definition was a generalized IQ of 75 or less. Id.

As to the concept of "significant deficits in adaptive behavior," this Court explained the other side of the coin: That if one's IQ was below 70 but that there were no impairments in adaptive functioning, the individual would not be considered intellectually disabled. Id. at 55. The Court held

that the "interplay between intellectual functioning and adaptive behavior is critical to a mental retardation diagnosis." Id.

The final factor to consider is the age of onset. As to that, any deficits must occur during the developmental period, which the Court ultimately concluded meant before the age of 18. Id. at 58.

Ultimately, this Court concluded that the defendant in Ybarra was not intellectually disabled. This was in part based on the fact that the first IQ test given to the appellant in that matter was not administered until age 27, and it returned an IQ score of 86. Id. at 62. Meanwhile, testing some twenty years later scored his IQ at closer to 60. A review of school records showed the individual to be a "C to C+" student who had "no learning problems." Id. Available records further showed the individual was able to join the military, where he was described as "dull normal." Id. Therefore, it was not shown he suffered from an intellectual disability or that any such disability arose before the age of 18. Id. at 71.

But in Burns' case, records indicate that, from birth, his mother was found to have "tested positive for cocaine, amphetamines, and valium." SA,

p. 25. These accounts of substance abuse are consistent with circumstances of alcohol abuse during pregnancy. SA, p. 28. Burns also was examined by a team of experts in connection with this case. Dr. Adler, in particular, reviewed various brain scans and concluded that the abnormalities detected were "more likely the result of prenatal rather than postnatal damage." SA, p. 29. Dr. Adler also notes the "early onset of symptoms," which could only mean childhood since Burns was merely 18 when the actual offense occurred. In any event, Dr. Adler's conclusion is that Burns' documented brain damage was prenatal in nature, which by definition means it arose before the age of 18.

When tested for general IQ, Burns was found to have a generalized IQ of 93, with a range of specific scores between 102 and 80. SA, p. 125. However, as Ybarra explains, IQ is not the only measure of subaverage intellectual functioning. This is particularly true as Burns was referred for special education classes starting in the third grade. SA, p. 110. His problems in school escalated as time went by, including 60 disciplinary infractions in sixth grade, subsequently being held back a grade, being

repeatedly expelled, and finally dropping out of school "after trying for three years to finish eleventh grade." SA, p. 111.

These deficits lead to the conclusion that Burns suffers from "significant deficits in day-to-day adaptive abilities including deficits that are much worse than would be expected based on his level of intellectual functioning." SA, pp. 128-129. Dr. Connor explained:

> Figure 1 graphically represents Mr. Burns' pattern of performance on the current testing where all scores are converted to standard deviations from the mean (a score ofO, green line) and the direction of deficit is made consistent (lower scores = poorer performance). With the exception of full scale intellectual functioning, standard deviations below -1 represent areas of impaired functioning (red line). Intellectual functioning is considered in deficit if performance is at least 2 standard deviations below average. As can be seen in Figure 1, Mr. Burns demonstrated tests that were in deficit in 9 domains of functioning (verbal and visuospatial memory, impulsivity, processing speed, motor coordination, suggestibility, executive functioning, and all three domains of adaptive functioning).The guidelines developed by the CDC for diagnosing FASD require at least 3 domains of cognitive functioning that are at least one standard deviation below average and/or intellectual functioning within the mentally retarded range. Mr. Burns' pattern of current neuropsychological functioning meets these guidelines.

SA, p. 130.

The translation of all this is simply that Burns' extreme low adaptive functioning and FAS combined (1) meet the requirement of significant deficits in adaptive behavior but (2) are so detrimental that, notwithstanding his overall general IQ score, he functions at a level more consistent with someone who tests at a level of intellectual disability, i.e. an IQ score in the 70 to 75 range. Based on the available records and tests, Burns does in fact suffer from subaverage general intellectual functioning despite his IQ score. (Level is, at best, the level of a 12 year old). SA, p. 129.

The concept being advanced here, that IQ is not the end-all-be-all of the first prong of NRS 174.098, finds support in recent developments in both the law and the scientific community. As to the law, the Supreme Court's decision in Hall v. Florida, 134 S.Ct. 1986 (2014) is highly instructive. There, the Supreme Court held invalid a state scheme for determining intellectual disability that was too rigidly married to "an IQ score as final and conclusive evidence of a defendant's intellectual capacity." Id. at 1995. The Court further noted that at least five states, including Nevada, allow a "defendant to present additional evidence of intellectual disability even

when an IQ test score is above 70." Id. at 1998. The Court further noted the science behind IQ scores had changed, such that the newest version of the DSM (DSM-5) recognized that "A person with an IQ score above 70 may have such severe adaptive behavior problems…that the person's actual functioning is comparable to that of individuals with a lower IQ Score"). Id. at 2001.

Cases that bring these concepts together are rare, but the best available example appears to be State v. Agee, 358 Ore. 325, 364 P.3d 971 (2015). There, what appear to be the same experts retained by Burns testified that FAS and severe deficits in adaptive functioning supported a diagnosis of intellectual disability even where IQ scores were well above 70. Id. at 984-85.

As the case further noted, the DSM-5 manual contains a significant change from the version before it. The DSM-IV-TR manual defined significantly subaverage intellectual functioning as "an IQ of approximately 70 or below on an individually administered IQ test." Id. at 987. However, the DSM-5 deletes references to particular IQ scores, and "provides that the

severity level is defined by adaptive functioning, not by IQ score." Id. The Oregon Supreme Court ultimately found that the trial court erred by adhering too closely to the use of rigid IQ scores, and remanded the case for a new Atkins hearing which was to utilize these new definitions and concepts.

The argument here is simply that, notwithstanding his IQ, Burns is intellectually disabled because his adaptive functioning is extremely below average. If the trial court found Burns ineligible for the death penalty, he would not have been subjected to a death penalty trial. Absent a death penalty trial, there would have been zero incentive to stipulate to a sentence of life without possibility of parole. Trial counsel were ineffective in failing to move to dismiss the death penalty as a sentencing option pursuant to Atkins and NRS 174.098.

Failing to properly handle a juror note

Burns was not consulted about or present for any of the discussions related to two notes from jurors. This Court has already held that criminal defendants have a right to be present when jury notes are discussed. See

Manning v. State, 131 Nev.Adv.Op. 26, 348 P.3d 1015, 1018 (2015); Jackson v. State, 128 Nev. 598, 291 P.3d 1274, 1277 (2012). When a district court responds to a note from the jury without notifying the parties or seeking input on the response, the error will be reviewed to determine whether it was harmless beyond a reasonable doubt. Manning, 348 P.3d at 1018.

Relatedly, the Ninth Circuit considers three factors to determine the harmlessness of the error in this context: (1) "the probable effect of the message actually sent"; (2) "the likelihood that the court would have sent a different message had it consulted with appellants beforehand"; and (3) "whether any changes in the message that appellants might have obtained would have affected the verdict in any way." Manning, 348 P.3d at 1019, citing United States v. Barragan-Devis, 133 F.3d 1287, 1289 (9th Cir.1998) and United States v. Frazin, 780 F.2d 1461, 1470 (9th Cir.1986). The right of the defendant to be present when a jury note is received is crucial and delicate. Musladin v. Lamarque, 555 F.3d 830, 840-43 (9th Cir.2009).

The first part of the jury note discussion, which was not recorded at all as it apparently occurred over the phone, involved a readback of Monica

Martinez's complete testimony. 11 AA 2258. The second involved the verdict form. Burns, if he had been consulted, would have vehemently objected to this, as Ms. Martinez's testimony was some of the most incredible, and yet most damaging, to his case.

Worse, whatever was presented to the jury was not even evidence: As the trial court explained, it "had the recorder prepare disks with that testimony excluding any bench conferences and comments to the Court out of the presence of the jury." 11 AA 2258. The prosecutor then explained that what was given to the jury was the "JAVS" video, i.e., a running video of the court proceedings that easily could capture non-evidentiary materials such as sounds, comments, and voices heard in the courtroom, and a variety of emotional and visual cues that simply would not be present whatsoever if a true readback of the actual court testimony were provided to the jury. There is further zero indication in the record that defense counsel (or anyone) reviewed the JAVS videos in their entirety to ensure their accuracy and that irrelevant materials were removed.

The presentation of extra-evidentiary materials in the form of JAVS videos of a key State's witness violated Burns' right to Due Process and is a wholly meritorious issue to be raised on direct appeal should this Court determine Burns was in fact deprived of a direct appeal. United States v. Watson, 171 F.3d 695, 700 (D.C. Cir. 1999) (wrongfully admitted evidence reviewed to determine if it affected the jury's verdict). The wrongful admission of nonevidence in the form of the unofficial JAVS video was plainly harmful, as Ms. Martinez was a key State's witness who – summarizing her two days of largely tangential musings on many topics – pinned blame for the murder on Burns while exonerating her boyfriend Job-Loc.

Burns was not consulted about this decision and was not asked about the response to the verdict form either. As to the verdict form, the trial court apparently "clarified" the verdict form without Burns' input. While these actions implicate Burns' direct right to due process of law, they also constitute ineffectiveness of counsel to the extent counsel proceeded

without Burns being present or consulted regarding the response to either juror note.

Ineffectiveness at sentencing

Trial counsel failed to object to errors during the sentencing proceedings. First, there is no indication in the record at all that the trial court complied with this Court's directive to "articulate findings on the record, for each enumerated factor…[and] for each enhancement." Mendoza-Lobos v. State, 125 Nev. 634, 218 P.3d 501 (2009), NRS 193.165(1). Trial counsel should have objected to this incomplete sentencing record and/or presented the issue on appeal, as the lack of these required findings was plain error and invalidates the sentence imposed by the Court.

Second, trial counsel filed a sentencing memorandum under seal, as set forth in the sealed appendix, that raised errors in the pre-sentence report pursuant to Stockmeier v. State Board of Parole Comm'rs, 127 Nev. 243, 255 P.3d 209 (2011) (requiring such errors be fixed prior to sentencing). However, the trial court completely failed to address the

errors, despite stating that it had reviewed the sentencing memorandum. 11 AA 2276. The errors were of significant importance, because the presentence report incorrectly stated that Burns had never been diagnosed with fetal alcohol syndrome (when he had), and that the surviving victim who was shot had identified him as the assailant, when at best she stated she was "10% sure" of his identity.

Trial counsel was ineffective in failing to insist that the Court address these errors during sentencing. Because no objection was made during sentencing, the trial court presumably relied on this inaccurate information in sentencing Burns, in violation of his right to a sentencing proceeding based on accurate information. Townsend v. Burke, 334 U.S. 736, 741 (1948). There is a reasonable probability of a more favorable sentence had Burns been sentenced based upon accurate information.

C. The cumulative effect of counsel's errors warrants reversal of the convictions and sentences.

"The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." Valdez v. State, 196 P.3d at 481, quoting Hernandez v. State,

118 Nev. 513, 535, 50 P.3d 1100,1115 (2002). When evaluating a claim of cumulative error, these factors are considered: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Valdez, 196 P.3d at 481 quoting Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000); Rose v. State, 123 Nev. 24, 163 P.3d 408, 419 (2007).

This Court has also recognized the sum total of counsel's failures may justify post-conviction relief if the result of the trial is rendered unreliable. Buffalo v. State, 111 Nev. 1139, 1149, 901 P.2d 647 (1995) (Holding that, "Defense counsel's failure to investigate the facts, failure to call witnesses, failure to make an opening statement, failure to consider the legal defenses of self-defense and defense of others, failure to spend any time in legal research and general failure to present a cognizable defense rather clearly resulted in rendering the trial result 'unreliable'").

Burns may have been acquitted absent the errors described herein. As to the overall question of who committed the offense, the evidence was suggested it was either Burns or Job-Loc. Errors that affected this dynamic,

such as the juror note concerning a readback, or presentation of Cousins' hearsay statements to police, were prejudicial in the sense there was a reasonable probability Burns might not have been convicted absent those errors.

However, many other errors affected the sentence, including the failure to move to strike the death penalty and ineffectiveness concerning the sentencing proceeding. There is an additional reasonable likelihood of a more favorable outcome in that Burns likely would have received a less substantial sentence absent these errors.

This Court should therefore grant relief on a cumulative error claim and remand the matter for a new trial or a new sentencing proceeding.

VIII. CONCLUSION

For all these reasons, Burns requests this Honorable Court grant relief on his claims above and order a new trial or new sentencing on all charges. In the alternative, if this Court denies the request for a new trial, Burns requests that relief be granted on his appeal deprivation claim and that this

Court order the Clerk of Court below to file a notice of appeal on Burns's behalf under NRAP 4.

DATED this 28th day of February 2019.

RESCH LAW, PLLC d/b/a Conviction Solutions

By: _____
JAMIE J. RESCH
Attorney for Appellant

RULE 28.2 ATTORNEY CERTIFICATE

1. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, including NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied upon is found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

2. I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font of the Ebrima style.

3. I further certify this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionally spaced, has a typeface of 14 points or more, and contains 10,319 words.

DATED this 28th day of February 2019.

RESCH LAW, PLLC d/b/a Conviction Solutions

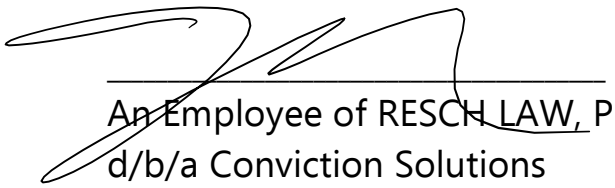
By: _____
JAMIE J. RESCH
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on February 28, 2019. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

STEVEN WOLFSON
Burns County District Attorney
Counsel for Respondent

AARON FORD
Nevada Attorney General



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