IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID BURNS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 77424

RESPONDENT'S ANSWERING BRIEF

Appeal From Denial of Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

This matter is not presumptively assigned to the Court of Appeals because it is a post-conviction appeal that involves a challenge to a judgment of conviction or sentence for offenses that are category A felonies. NRAP 17(b)(3).

STATEMENT OF THE ISSUE(S)

1. Whether the district court properly found that Appellant did not receive ineffective assistance of counsel regarding direct appeal.
2. Whether the district court properly found that Appellant did not receive ineffective assistance of counsel during trial.
3. Whether there was no cumulative error.

STATEMENT OF THE CASE

On October 13, 2010, the State charged Appellant David James Burns, a.k.a. D-Shot, by way of Superseding Indictment with the following: Count 1 – Conspiracy to Commit Robbery (Felony – NRS 199.480, 200.380); Count 2 – Conspiracy to Commit Murder (Felony – NRS 199.480, 200.010, 200.030); Count 3 – Burglary While in Possession of a Firearm (Felony – NRS 205.060); Count 4 – Robbery With Use of a Deadly Weapon (Felony – NRS 200.380, 193.165); Count 5 – Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165); Count 6 – Robbery With Use of a Deadly Weapon (Felony – NRS 200.380, 193.165); Count 7 – Attempt Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.330, 193.165); and Count 8 – Battery with a Deadly Weapon Resulting in Substantial Bodily Harm (Felony – NRS 200.481). I Appellant's Appendix ("AA") 001–08. On October 28, 2010, the State filed a Notice of Intent to Seek the Death Penalty in this matter. I AA 009–12.

On July 19, 2013, Appellant filed a Motion to Strike the State's Notice of Intent to Seek the Death Penalty. I Respondent's Appendix ("RA") 001–250; II RA 251–500. The State filed its Opposition on July 25, 2013. III RA 501–08. Appellant filed a Reply on August 26, 2013. III RA 509–12. Appellant filed Supplemental Exhibits regarding the Motion to Strike on September 11, 2013. III RA 513–621.

The district court denied Defendant's Motion on September 12, 2013. III RA 622–79.

The State field a Notice of Witnesses on September 6, 2013. I AA 013–17. The State filed a first Notice of Expert Witnesses on September 4, 2013. IV RA 680–752. The State filed a Second Supplemental Notice of Witnesses on October 15, 2014. I AA 222–25. The State filed a Third Supplemental Notice of Witnesses on January 12, 2015. II AA 323–27.

Appellant's jury trial, a joint trial with co-defendant Willie Darnell Mason, finally began on January 20, 2015. II AA 328. Jury selection lasted six (6) days. II AA 328; Appellant's Opening Brief ("AOB") at 1. During trial, on February 9, 2015, Appellant entered into a Stipulation and Order Waiving a Separate Penalty Hearing ("Stipulation"), waiving his appellate rights and waiving a penalty hearing, agreeing to a sentence of life without the possibility of parole if convicted of Murder with Use of a Deadly Weapon. XII AA 2444–45. Following a fifteen (15) day trial, on February 17, 2015, the jury returned a guilty verdict on all eight (8) counts. XI AA 2257–68, 2269–72.

In early April 2015, prior to sentencing, Appellant's counsel filed a sentencing memorandum with several lengthy exhibits with the district court. Appellant's Sealed Appendix ("ASA") 001–154. The district court permitted it to be filed in open court, under seal. XI AA 2280. On April 23, 2015, Appellant was adjudged

guilty and sentenced to life without the possibility of parole in the Nevada Department of Corrections (NDC), along with a consecutive sentences for the deadly weapon enhancement and other consecutive and concurrence sentences for his other offenses. XI AA 2274–80. Appellant received 1,671 days credit for time served. I AA 2279. The Judgment of Conviction was filed on May 5, 2015. XI AA 2281–83.

On October 13, 2015, Appellant filed a pro per Petition for Writ of Habeas Corpus (Postconviction) ("Petition") and Request for an Evidentiary Hearing. XI AA 2284–2312. The State responded on January 26, 2016. XI AA 2313–79. On February 16, 2016, the district court denied Appellant's Petition, Request for Evidentiary Hearing, and found Appellant was not entitled to counsel; the court also granted Appellant's Motion to Withdraw Counsel. XI AA 2380, 2387. The Findings of Fact and Conclusions of Law Order was filed on March 21, 2016. XI AA 2380–88.

Appellant filed a Notice of Appeal. XI AA 2389. This Court remanded the Petition back to the district court for appointment of counsel. XI AA 2389–93. Appellant was appointed post-conviction counsel, and Appellant's Supplemental Petition ("Supplement") was filed on November 27, 2017. XI AA 2394–2439. He field lengthy exhibits that same day. XII AA 2440–2513. The State filed its Response on January 16, 2018. XI AA 2514–44. Appellant filed a Reply on February 6, 2018. XII AA 2545–55. The district court heard argument on April 17, 2018. XII

AA 2556–65. At that hearing, the district court stated it would grant an evidentiary hearing to explore whether there were certain understandings or misleading statements communicated by trial counsel to Appellant as to the issue of the waiver of Appellant's direct appeal rights. XII AA 2562–63. The district court also stated trial counsel could be questioned as to other decisions that were made during the course of trial, but that the evidentiary hearing would not be opened up as to the issue of ineffectiveness of counsel. XII AA 2563.

The district court held the evidentiary hearing on September 20, 2018, wherein both of Appellant's trial attorneys, Christopher Oram Esq. and Anthony Sgro Esq., and Appellant himself testified. XII AA 2566–2621. The district court denied the Petition and Supplement on September 20, 2018. XII AA 2619. The Findings of Fact, Conclusions of Law were field October 25, 2018. XII AA 2622–50. Appellant filed a Notice of Appeal on November 8, 2018. XII AA 2651–52.

STATEMENT OF RELEVANT FACTS

Cornelius Mayo lived at 5662 Miekle Lane Apartment A, Las Vegas, Clark County, Nevada. VI AA 1223. He resided with his girlfriend, Derecia Newman, her twelve-year-old daughter, D.N., and his and Newman's three young children, C.M. (6), C.M.J. (5), and C.M. (3). II AA 395–96; VI AA 1223–24. On August 6, 2010, Newman's minor sister, Erica Newman, was also staying with the family. II AA 389, 392; VI AA 1226.

In the early morning hours of August 7, 2010, the household received a phone call on their landline phone at 3:39 am. VI AA 1229. Mayo heard Newman answer the phone. VI AA 1229. About 10 minutes later, there was another call. VI AA 1230. At the time, Mayo was in the bathroom, but he heard Newman answer the front door. VI AA 1230.

Then, Mayo heard a woman scream. VI AA 1230–31. Two gunshots followed. VI AA 1230–31. Mayo also heard someone he knew to be Stephanie Cousins screaming. VI AA 1231. He then heard three more gunshots, and then saw 12-year-old D.N. run into the bathroom. VI AA 1231–32. A bullet came through the bathroom door. VI AA 1233. Mayo watched as D.N. tried to get up and run from the bathroom, only to be shot in the stomach. VI AA 1233. Mayo could not see who fired the shot. VI AA 1233–34. Mayo told D.N. she would be alright, told her to be still, and left the bathroom. VI AA 1234–35.

Mayo called 911 from his cell phone. VI AA 1235. As he spoke with the operator, Mayo checked the bedroom where Erica Newman and the small children were sleeping. VI AA 1235–36. He saw them all in their beds. VI AA 1236. However, Erica Newman had been awoken by the gunshots. II AA 398. She testified that after she heard the shots, she saw a tall, skinny black man in overalls standing near the master bedroom. II AA 399. D.N. testified that, she, too, could see that the shooter was wearing overalls; she told lead Detective Christopher Bunting about the

overalls shortly after her mother was murdered. VII AA 1420; VIII AA 1731, 1756–57. Monica Martinez, who as discussed *infra* was the getaway driver from the murder scene, also testified that Appellant had been wearing overalls that night. III AA 603. Appellant, himself, admitted in a letter that he was wearing overalls. VIII AA 1801–02.

Police and paramedics arrived, and the paramedics took D.N. to the hospital. II AA 401, 443, 445. However, on the couch in the living room, responders found Newman—with an obvious, massive gunshot wound to her head. II AA 421–22; III AA 485. She was in nearly a sitting position, with a $20 bill clutched in her hand. III AA 485–86. Dr. Alane Olson, who performed the autopsy, testified that the barrel of the gun had actually been pressed against her forehead when the trigger was pulled. III AA 554, 556, 563.

Mayo had his phone in his hand when the police arrived, and they could tell that he was extremely angry. II AA 422–23. A responding officer testified that Mayo was speaking on the phone and that he could hear a female voice on the other end. II AA 432–33. After the police had arrived, Mayo called Cousins—whose name, Mayo testified, had been displayed on the house's landline phone's caller-identification feature. VI AA 1228–29. Cousins told him that when she knocked on the door, two men happened to be waiting around the corner and that they forced their way in when Newman opened the door. II AA 434; VI AA 1239–41. Mayo told

Cousins that he believed she was lying. VI AA 1241. After he hung up, he told officers that he had been speaking with Cousins. II AA 433–34.

After the police arrived, Mayo noticed that $450.00 had been taken from his residence, as well as a sack of marijuana and other minor property. VI AA 1279.

In the course of the investigation, detectives became aware of several individuals who appeared to be involved, including Appellant ("D-Shot" or "D-Shock"), Willie Darnell Mason ("G-Dogg"), Monica Martinez, and her boyfriend Jerome Thomas ("Job-Loc" or "Slick"). III AA 572, 574, 590–91; VIII AA 1766–67. All were involved in illegal activity, including selling drugs. III AA 576–78. At trial, a T-Mobile and a Metro PCS records custodian each testified to the mechanics of cell phones that yielded information about these individuals' cell phones. V AA 1029–1041; VI 1344–51; VII AA 1352–72. Phone records showed that just a couple days after the murder, Job-Loc's phone was no longer in use; further, cell site records showed that on August 7, 2010, Job-Loc was near his own apartment. Id. Phone records also revealed that G-Dogg's and Cousins' phones called each other shortly before and after the murder and that Cousins' phone had called the victim's landline. Id. Cell site records also revealed that Martinez, Cousins, and G-Dogg's cell phones were all near the scene of the murder. Id.

At trial, Martinez testified that she, G-Dogg, and Appellant[1] met up with Cousins the night of the murder. III AA 590–96, 607–08. She testified that Job-Loc was not there and that he had a medical brace on his knee and was using crutches due to an injury he sustained. III AA 571, 583. She testified that as the four co-conspirators discussed committing robberies, Appellant said he was "going to go in shooting." III AA 618. Before Cousins, G-Dogg, and Appellant entered the victims' apartment, Martinez gave G-Dogg a $20 bill so that the scene would look like a drug buy. III AA 625–626. From the car, Martinez heard screaming and then multiple gunshots. III AA 627–28. G-Dogg and Appellant returned to the car. III AA 628. Martinez testified that Appellant —Appellant—said he had blood on him and, after picking up and dropping off Cousins, that he should have shot Cousins. III AA 631–62. When all the co-conspirators had returned to Job-Loc's house, Martinez heard Job-Loc tell Appellant to take a shower to get the blood off him. III AA 637. Martinez testified that she identified Appellant in a photo lineup after she was arrested, as one of the people who had been in the car with herself, Cousins, and G-Dogg. IV AA 714–15.

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/ / /

[1] Martinez's testimony identifies Appellant as "D-Shock" rather than "D-Shot," but admits that the two names refer to the same person. III AA 590–685.

SUMMARY OF THE ARGUMENT

The district court properly denied each of Appellant's claims of ineffective assistance of counsel, including those regarding his appellate rights and counsel's performance at trial. First, Appellant affirmatively waived his right to a direct appeal in exchange for the State taking the death penalty off the table; and Appellant never manifested any intention of withdrawing from that Stipulation. Therefore, counsel was not ineffective for not seeking a direct appeal on Appellant's behalf, and the district court did not deny Appellant any constitutional rights in so finding. Second, counsel did not perform in an objectively unreasonable manner at trial and Appellant suffered no prejudice due to counsel's actions. Third, cumulative error does not apply to post-conviction Strickland claims—and even if it did, Appellant has not demonstrated that there are any errors to cumulate. This Court should affirm the district court's denial of Appellant's Petition.

ARGUMENT

I. THE DISTRICT COURT PROPERLY FOUND THAT APPELLANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE REGARDING DIRECT APPEAL

Appellant complains the district court violated his state and federal constitutional rights when it denied his claim of ineffective assistance of counsel resulting in appeal deprivation. AOB at 12–18. Specifically, Appellant alleges he did not intend to waive, and in fact expressly reserved, the right to appeal any issues

arising after the waiver was entered—including those which may have occurred during closing argument—and that therefore, counsel was ineffective for not pursuing a direct appeal on Appellant's behalf. AOB at 13–14. However, as the district court found, this claim is belied by the record, including by the testimony offered at the evidentiary hearing on the underlying Petition. XII AA 2628–33.

A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review." Evans v. State, 117 Nev. 609, 622, 28 P.3d 498, 508 (2001). The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686–87, 104 S. Ct. at 2063–64; see also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's representation fell below an *objective* standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at

687–88, 694, 104 S. Ct. at 2065, 2068 (emphasis added); Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

Defendants are entitled to "effective assistance of counsel at critical stages of a criminal proceeding." Lafler v. Cooper, 566 U.S. 156, 165, 132 S. Ct. 1376, 1386 (2012). This includes at sentencing in both capital and noncapital cases. Id. (internal citations omitted). This Court has found that in order to be effective, counsel at sentencing must be aware of the sentencing options available and present mitigating evidence, if available. See Brown v. Nevada, 110 Nev. 846, 851, 877 P.2d 1071, 1074 (1994). When evaluating the effectiveness of counsel at sentencing, claims are evaluated using the two-pronged test from Strickland. Id. at 848, 877 P.2d at 1072.

With all ineffective assistance claims, the court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence

demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). This analysis does not mean that the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. To be effective, the Constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed *as of the time of counsel's conduct*." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066 (emphasis added). Indeed, the United States Supreme Court has recognized that:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proven unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland, 466 U.S. at 698, 104 S. Ct. at 2065.

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable

probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687–89, 694, 104 S. Ct. at 2064–65, 2068).

Finally, claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" or "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id.; see also NRS 34.735(6).

Specifically with regard to counsel's performance in seeking a direct appeal on a defendant's behalf, when a defendant is found guilty pursuant to a plea, counsel normally does not have a duty to inform a defendant about his right to an appeal. Toston v. State, 127 Nev. 971, 977, 267 P.3d 795, 799–800 (2011) (citing Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999)). The duty arises in the guilty plea context only when the defendant inquires about the right to appeal or in circumstances where the defendant inquiries about the right to direct appeal "such as the existence of a claim that has reasonable likelihood of success." Toston, 127 Nev. at 977, 267 P.3d at 799.

Here, as the district court found, although Appellant did not plead guilty, the Stipulation he entered into is analogous to a guilty plea in that it waives all appellate rights and thus defense counsel would not believe a defendant would want to appeal. XII AA 2444–45, 2628–33. The Stipulation stated:

> Pursuant to the provisions of NRS 175.552, the parties hereby stipulate and agree to waive the separate penalty hearing in the event of a finding of guilty on Murder In the First Degree and pursuant to said Stipulation and Waiver agree to have the sentence of LIFE WITHOUT THE POSSIBILTY OF PAROLE imposed by the Honorable Charles Thompson, presiding trial judge. FURTHER, in exchange for the State withdrawing the Notice of Intent to Seek the Death Penalty, Defendant agrees to waive *all appellate rights stemming from the guilt phase of the trial*.

Id. (emphasis added).

Further, with regard to the Stipulation, the following exchange occurred on Day 12 of trial:

> MR. SGRO: The State and the defense on behalf of [Appellant] have agreed to conclude the remainder of the trial, settle jury instructions, do closings, et. cetera. If the jury returns a verdict of murder in the first degree, [Appellant] would agree that—
>
> THE COURT: As to [Appellant].
>
> MR. SGRO: As to [Appellant] only. [Appellant] 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. If the verdict comes back at anything other than first degree murder and there's guilty on some of the counts, and the judge—then Your Honor will do the sentencing in the ordinary course like it would any other case. In—and I believe that states the agreement, other than there is a proviso[sic] that we, for purposes of further review down the road, *we are not waiving any potential misconduct during the closing statements. We understand that to be a fertile area of appeal. The State has assured us that they are—would never do anything intentionally. The Court's been put on notice to be careful relative to the closing arguments, so that there's not unnecessary inflamed passion, et cetera, et cetera. Mr. Mason has not given up his rights to appeal, and so*

there is a prophylactic safety measure that exists relative to the arguments advanced by the prosecution at the time of the closing statements.

So the long and short of it is, Your Honor, the State's agreed to abandon their seeking of the death penalty in exchange for [Appellant] is agreeing to life without after we get through the trial. Yeah. And the waiver of his appellate rights.

MR. DIGIACOMO: Correct. So that it's clear, should the jury return a guilty—a verdict of guilty in murder of the first degree or murder in the first degree with use of a deadly weapon, Mr. Mason [sic] and the State will agree to waive the penalty hearing with the stipulated life without the possibility of parole on that count, as well as he will waive appellate review of the guilt phase issues.

…

THE COURT: In the colloquy that has been provided to me a few minutes ago, the attorneys explained to me that the State is waiving, giving up its rights to seek the death penalty in exchange for which you are agreeing, in the event the jury returns a verdict of murder in the first degree, that I will sentence you to life without the possibility of parole. Do you understand this?

[Appellant]: Yes, sir.

THE COURT: Do you have any questions about it?

[Appellant]: Yes, sir.

THE COURT: Do you agree with it?

[Appellant]: Yes, sir.

THE COURT: You understand that you have a right to have a penalty hearing where the jury would determine the punishment in the event they found you guilty of first degree murder?

> [Appellant]: Yes sir.
>
> THE COURT: You understand you're giving up that right to have the jury determine that punishment?
>
> [Appellant]: Yes, sir.
>
> THE COURT: And in exchange for which the State will waive its right to seek the death penalty against you, and you are giving—and you are agreeing that I will impose a punishment—in the event that you're found guilty of murder in the first degree, I will impose a punishment of life without the possibility of parole. Do you understand that?
>
> [Appellant]: Yes, sir.
>
> THE COURT: You understand that there are—in the event I impose a sentence of life without the possibility of parole, you're never going to get paroled, you're never going to get out, do you understand that?
>
> [Appellant]: Yes, sir.
>
> THE COURT: *You're also giving up your appellate rights. Do you understand that*?
>
> [Appellant]: *Yes, sir*.

VII AA 1529–33 (emphases added). Appellant specifically gave up *all* his appellate rights, in writing and orally. The only mention of future appeal issues is specifically as to Appellant's co-defendant—who, since he did not give up his own appeal rights, created a "prophylactic safety measure" to prevent any misconduct during closing arguments. Id. As the negotiations specified, Appellant would have no direct

appeal—and thus, counsel could not have been objectively unreasonable for not seeking one. XII AA 2628–33.

Appellant's claims that the scope of his wavier was limited, or that he "preserved" any appellate rights, is totally belied by the black-and-white Stipulation above and by Appellant's own admissions. Hargrove, 100 Nev. at 502, 686 P.2d at 225. In his Petition, Appellant claimed that he did not know that "the court likes certain issues brought up through direct appeal instead of habeas" and that his attorney failed to show Appellant how to file a habeas petition as he said he would. XI AA 2286, 2297. In other words, Appellant clearly knew he was not going to be able to file an appeal at all—even a "limited" one. And yet, Appellant's Supplement claimed that "it is obvious Petitioner desired to appeal and that his attorneys knew that fact, because the scope of the purported waiver is limited to events which precede its filing." XI AA 2420. Appellant repeats the claims of a "limited waiver" on appeal. AOB at 13–14. However, as the district court found, any claim that the waiver was "limited" is belied by both the plain language of the Stipulation and by Appellant's own admissions in his Petition. He did *not* ask his attorney to file a direct appeal—even regarding any alleged appealable issues that occurred after the Stipulation was made, for example in closing arguments—because he had waived all his appellate rights altogether.

The claim of "limited" waiver is further belied by the testimony during the evidentiary hearing on the underlying Petition. Mr. Sgro testified that he did not know whether "the agreement [was] intended to bar any appellate issues that might occur at the time of sentencing." XII AA 2576. Mr. Oram agreed that the Stipulation did not contemplate preserving sentencing issues for appeal. XII AA 2591. Mr. Oram testified that he explained to Appellant that he "would not have any appellate issues," but that he would still be able to pursue habeas relief. XII AA 2589, 2594. Appellant himself confirmed this, testifying that his attorneys explained to him that he could not appeal but that he would "still have habeas corpus." XII AA 2603–05.

Appellant's arguments that it should somehow have been obvious that he wanted an appeal are also belied by the record. See AOB at 17. The mere fact that Appellant was sentenced to life without the possibility of parole does not indicate that he would have desired to appeal—because he stipulated to that exact sentence. See id. Even after trial and sentencing had both concluded, Appellant never moved to withdraw from the Stipulation, to appeal any "non-waived" issues that occurred after entering into the Stipulation, or to file an appeal despite the Stipulation. In fact, at the evidentiary hearing, Mr. Sgro testified that he did not "recall conversations after the agreement was formalized that [Appellant] continued in his quest to appeal," and that he did not recall any conversation wherein Appellant said he wanted to back out of the Stipulation. XII AA 2577, 2584. Mr. Oram testified that

even after conviction, Appellant did not ask him about filing an appeal. XII AA 2593. Appellant himself testified that his attorneys explained to him that he was giving up his right to a direct appeal. XII AA 2608–09. As the district court stated at the evidentiary hearing, Appellant "never testified that he told [his attorneys] to file an appeal on those issues"—that is, the issues Appellant alleges were not waived. XII AA 2616–17. Neither did counsel testify they believed there were any appealable issues outside the allegedly limited scope of the Stipulation. XII AA 2616–17. Thus, any case law holding that counsel who fails to file a direct appeal when so instructed by a defendant, or where a defendant express a desire for appeal, is irrelevant. See, e.g., Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000); Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

Given the record, there was every indication that Appellant had affirmatively waived his right to appeal and never attempted to backpedal from that waiver. Thus, as the district court found counsel was not objectively unreasonable for not filing a direct appeal. Even on a de novo review, it is clear that given the affirmative waiver, and the utter lack of indication that Appellant was dissatisfied with the Stipulation or wished to pursue allegedly non-waived appellate issues, counsel had no duty to perfect an appeal. Lozada, 110 Nev. at 349, 871 P.2d at 944.

Moreover, as the district court found, Appellant was not prejudiced by counsel's actions. XII AA 2628–33. Because Appellant affirmatively waived his

appellate rights, even had counsel moved to file a direct appeal on Appellant's behalf, it would have been a futile effort. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Therefore, the district court did not deprive Appellant of any of his constitutional rights in finding that he had affirmatively waived his appellate rights and that counsel was not ineffective with regard to direct appeal. This Court should affirm the district court's denial of this claim.

II. THE DISTRICT COURT PROPERLY FOUND THAT APPELLANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL DURING TRIAL

Beyond the direct appeal claim raised above, Appellant also raises seven claims of ineffective assistance of counsel during trial. AOB at 19–51. As the district court found, each is without merit. As an initial matter, Appellant challenges the Findings of Fact, Conclusions of Law and Order containing the district court's denial, which analyzes each of these claims. AOB at 19–20. However, unlike cases wherein higher courts have criticized lower courts for adopting a prevailing party's order wholesale, the Findings here did not "take the form of conclusory statements unsupported by citation to the record," and the district court did not fail to "expressly state its conclusions." Anderson v. Bessemer City, 470 U.S. 564, 572 (1985); Sheriff, Clark County v. Keeney, 106 Nev. 213, 216, 791 P.2d 55 (1990). Rather, the district court ordered the State to draft the Findings. XII AA 2619. These Findings expressly state not only the district court's conclusions but also thorough

analysis of both law and the record. XII AA 2622–50. The Findings were then signed by the district court—verifying that they did in fact reflect the district court's findings and rulings. XII AA 2650. Thus, any claim that these Findings are not the court's, or that they are not entitled to deference, is risible.

A. Expert Witness Testimony

First, Appellant complains he received ineffective assistance of counsel in that counsel should have moved to exclude allegedly improperly noticed cellular phone expert witness testimony. AOB at 20–23. Specifically, Appellant alleges Kenneth Lecense, a custodian of records for Metro PCS, and Ray MacDonald, a custodian of records for T-Mobile, inappropriately testified as experts at trial, were unnoticed as experts, and therefore counsel was objectively unreasonable in failing to object to their testimony. Id. As the district court found, Appellant has not established counsel was ineffective in this regard. XII AA 2632–33.

NRS 50.275 regarding testimony by experts states:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge.

This Court has explicitly held that custodians of records may demonstrate knowledge specialized enough—including to information such as "how cell phone signals are transmitted from cell sites and that generally a cell phone transmits from

the cell site with the strongest signal"—to testify as experts at trial. Burnside v. State, 131 Nev.___, 352 P.3d 627, 636–37 (2015). This Court held:

> [t]his testimony is not the sort that falls within the common knowledge of a layperson but instead was based on the witness's specialized knowledge acquired through his employment. Because that testimony concerned matters beyond the common knowledge of the average layperson, his testimony constituted expert testimony as experts.

Id. Furthermore, the custodian of records in Burnside was noticed as a lay witness and not an expert witness. Still, this Court held, "[w]e are not convinced that the appropriate remedy for the error would have been exclusion of the testimony." Id.

Here, Appellant was aware that two records custodians would testify as experts to the exact information about which Appellant is now complaining. The State filed its Notice of Expert Witnesses—which Appellant conveniently excluded from his own Appendix—on September 4, 2013. IV RA 680–752. The Notice stated:

> Custodian of Records Metro PCS, or Designee, will testify *as an expert* regarding *how cellular phones work, how phones interact with towers, and the interpretation of that information*.
>
> Custodian of Records T Mobile, or Designee, will testify *as an expert* regarding *how cellular phones work, how phones interact with towers and the interpretation of that information*.

IV RA 681 (emphasis added). Further, the Notice stated, "The substance of each expert witness' testimony and a copy of all reports made by or at the direction of the expert witness has been provided in discovery." IV RA 684. The Metro PCS and T Mobile Designees were again noticed in the State's Second and Third Supplemental

Notices of Witnesses. I AA 222–25; II AA 323–27.

Under Burnside, it was proper for these two records custodians to testify as experts concerning the specialized knowledge the State designated in its Notices: namely, cell phones, cell phone towers, and interpreting their information. Id.; 131 Nev. at __, 352 P.3d at 636–37. As Appellant admits, this is exactly what these two experts testified to at trial. AOB at 21; V AA 1028–31; VI AA 1346–49. Defense counsel was properly noticed of their area of expertise. Appellant has not attempted to explain what was deficient in the State's Notice. And since it was a legally sufficient notice, counsel was not objectively unreasonable for not making a futile objection to the notice, let alone for not attempting to exclude their testimony. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

Additionally, Appellant fails to demonstrate prejudice. He fails to explain how but for counsel's errors, the results of the trial would have been different or how any objection would have led to a more probable outcome for Appellant. Even if counsel had objected, the objection would have been overruled because the Notice was sufficient, the expert testimony was proper, and nothing the records custodians testified to would have been excluded from trial. Therefore, Appellant was not prejudiced.

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B. Exculpatory Information

Next, Appellant complains he received ineffective assistance of counsel regarding the Sate's alleged withholding of exculpatory information of a key State's witness. AOB at 23–28. Specifically, Appellant alleges that counsel was ineffective for not discovering or properly challenging the fact that Cornelius Mayo, the only adult eyewitness to Appellant's crimes, received "help" regarding his pending criminal cases in that they were "postponed for years and then dealt down to an unbelievable level." AOB at 24. As the district court found, Appellant has not established counsel was ineffective in this regard. XII AA 2633–37.

Only exculpatory evidence must be disclosed under Brady v. Maryland, 373 U.S. 83, 87 (1963). Only impeachment evidence must be disclosed under United States v. Bagley, 473 U.S. 667, 682 (1985). But Appellant has not established the existence of any exculpatory or impeachment evidence, let alone that the State "withheld" it. AOB at 24. Thus, all Appellant's arguments and cited authority concerning Brady and the "knowing use of perjured testimony" are irrelevant. AOB at 26–27. In fact, the alleged Brady violation underlying this ineffective assistance of counsel claim is both bare and naked, and belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Appellant has not offered any evidence of a deal between the State and Mayo. And Mayo specifically testified that he did *not* receive a benefit in exchange for testifying. VI AA 1259–63.

During the State's direct examination of Mayo, the following exchange occurred:

> Q: In the search of your apartment, there—the police found narcotics, cocaine; you're aware of that?
> A: Yes.
> Q: What—I guess what is your—how was that in the apartment?
> A: I don't know how they got there.
> Q: Okay. You don't know anything about that?
> A: No.
> Q: After these events took place, were you charged with a crime associated with this incident?
> A: Yeah.
> Q: And do you know what the charge was?
> A: It was child—child abuse or child neglect with substantially bodily harm, then just child neglect and trafficking.
> Q: Okay. And are—is that case—do you know what the status of it is or what's happening with that case?
> A: I'm still going to court.
> Q: Okay. And is that case being continued till the end of this trial?
> A: Yes.
> Q: Do you have any other cases that are pending?
> A: Yes.
> Q: Tell me about the other one, what—the charges I guess.
> A: Destruction of property or—it's destruction of—I don't know the exact charge, but it's, like, destruction of property or something like that.
> Q: And is that one similarly being continued until the end of this case?
> A: Yes.
> Q: After these events took place in August, did you have to appear in Family Court and go through proceedings there as well?
> A: Yes.

VI AA 1258–59.

Further, on cross-examination with defense counsel, Mayo testified concerning specifics of these case:

> Q: Mr. Mayo, I want to start with sort of where you left off. You have some cases that are currently pending against you, right, some charges against you?
> A: Yes.
> Q: One of them is for drug trafficking; is that right?
> A: Yes.
> Q: And that's for crack cocaine?
> A: I don't know—I don't know exactly what it's for, but I know it's trafficking.
> Q: Well, would it refresh your memory if I showed you the docket for your case?
> MR. SGRO: May I approach, Your Honor?
> THE COURT: Yes, if he's familiar with the docket.
> THE WITNESS: Yeah, I've never seen it.
> BY MR. SGRO:
> Q: Does it look like—according to this document—the charge is trafficking in cocaine?
> A: Yes, that's what it—yeah.
> Q: Now, you just told the jury that the cocaine was in your house, you don't know where it came from, right?
> A: No, I don't.
> Q: Okay. Did you tell that to the DAs before they charged you with trafficking?
> A: Like, we never had a conversation about that.
> Q: You know trafficking is a serious crime; it carries prison time?
> A: Yes.
> Q: Okay. Despite you telling the DAs that you don't know where the cocaine came from, they still are charging you with trafficking, right?
> A: Yes, that's the charge.
> Q: Would you agree that it seems like they don't believe your version?
> MS. WECKERLY: Objection.
> THE COURT: Sustained.
> BY MR. SGRO:

Q: You also got charged with child neglect with substantial bodily harm; is that right?
A: Yes.
Q: And all these charges, including allowing children to be present where drug laws are being violated, all those charges have been postponed for now for several years, right?
A: Yes.
Q: And *it's all being postponed until after you—until this trial is over, right?*
A: *I guess. I'm not sure. I don't know.*
Q: *Well, do you believe that by testifying in this case it helps you in the cases that you're facing right now?*
A: *No.*
Q: *You don't think it helps you?*
A: *No.*
Q: Do you think that the DA indefinitely postpones cases all the time, or do you think you're getting some—
A: I don't know how the DA work.
Q: Okay. Let me finish my question, okay. *Do you believe that the DA is just postponing these cases coincidently and that they're not giving you any sort of favor because you're testifying in this case? Is that what you think?*
A: *I don't think they giving me no type of favor.*
Q: Okay. You also have I think you said some kind of destruction of property, but it's actually tampering with a vehicle, which is a felony, right?
A: No, it was a misdemeanor.
MR. SGRO: May I approach, Your Honor?
THE COURT: Yes.
BY MR. SGRO:
Q: I'm showing you a court document. Does it look like tampering with a vehicle charge you're charged with is a felony?
A: That's what it say, but my court papers say it's a misdemeanor.
Q: So this court document is a mistake?
A: Or my court paper is a mistake, one of them, but when I was charged with is, it was a misdemeanor.
Q: Okay. In this particular felony, if I'm right, this felony was charged in June of 2011, right?
A: Yeah, that sounds about right.

> Q: About nine months after the events that we're talking about, right?
> A: Yes.
> Q: And you haven't faced anything in this case yet either, right?
> A: No, we still going to court.
> Q: Okay. *Do you think that the fact that the DA is postponing this felony case as well that it is a favor to you or a benefit to you or no?*
> A: *No*.

VI AA 1259–63 (emphasis added).

There is no "irrefutable evidence" of any secret deal between Mayo and the State—indeed, there is no evidence at all, other than Appellant's bare speculation that the postponements and Mayo's eventual plea were a direct result of Mayo agreeing to testify at Appellant's trial. AOB at 24, 27–28. Indeed, there is evidence that undermines Appellant's speculations. Mayo's Guilty Plea Agreement was not filed until January 21, 2016, almost a year after Appellant's trial concluded. XII AA 2501–08. It beggars belief that the plea negotiation between Mayo and the State would have been extended so long if Appellant's speculations are true.

Moreover, Appellant cannot establish the first prong of Strickland because defense counsel did not act in an objectively unreasonable manner concerning this information. Defense counsel thoroughly cross-examined Mayo regarding his pending cases. VI AA 1259–63. He brought attention to their postponement, and although he never specifically mentioned Mayo's custody status, the implication was clearly that Mayo's other cases had been postponed and he was not in custody in

exchange for testifying for the State. VI AA 1259–63. That the jury likely did not believe this oblique accusation of secret dealings does not mean that counsel was deficient in the way he presented it.

Appellant also fails to establish prejudice. The postponement of Mayo's cases were disclosed during direct examination and the defense's thorough cross-examination. VI AA 1259–63. Though Mayo did not admit to the imaginary deal between the State and himself, the jury was presented with the fact of his cases' postponement. They could not have been presented with the fact of his negotiation simply because he did not sign his Guilty Plea Agreement until almost a year later. XII AA 2501–08.[2] Appellant does not explain how any other actions by counsel would have led to a different result. Absent prejudice, counsel was not ineffective.

C. Opening the Door to Evidence

Next, Appellant complains he received ineffective assistance of counsel in that counsel opened the door to damaging hearsay evidence. AOB at 28–31. Specifically, Appellant claims that counsel should have objected to Detective Bunting's testimony about Cousins's statement, rather than examining that statement further and build upon it as a cornerstone of the defense. AOB at 29. As

[2] In fact, Appellant never attempts to explain how the State could have "withheld" a plea negotiation that was not finalized until almost a year *after* Mayo testified nor how it could have been material at Appellant's trial.

the district court found, Appellant has not established counsel was ineffective in this regard. XII AA 2638–39.

Counsel's actions were well-reasoned and strategically made—and such strategic decisions are presumed to be effective assistance of counsel. Strickland, 466 U.S. at 681, 104 S. Ct. at 2061; Rhyne, 118 Nev. at 8, 38 P.3d at 167–68; State v. LaPena, 114 Nev. 1159, 1166, 968 P.2d 750, 754 (1998). Trial strategy is "virtually unchallengeable." Doleman v. State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996). It should not be second-guessed, and instead should be honored by this Court. Id. Indeed, counsel's strategic decisions are "tactical" decisions and will be "virtually unchallengeable absent extraordinary circumstances." Id.

First, Appellant's entire premise that a specific theory "was in fact likely the best one available" is faulty. AOB at 28–29. Again, counsel's strategic decisions and trial tactics should not be second-guessed by this Court absent extraordinary circumstances—and Appellant has presented none. In fact, defense counsel made a strategic decision to inquire about Cousins' statements to police on cross-examination with Detective Bunting:

> Q: Early on in the morning hours of this case you had information that the assailant in this case had a white T-shirt on, correct?
> A: I believe Ms. Cousins has said that, yes.
> Q: And that came hours after the investigation began, correct?
> A: Sometime around the time of the investigation, yes sir.

IX AA 1922–23. Given that what Appellant / the shooter was wearing was discussed by several witnesses, this was an important piece of evidence for the defense. II AA 399; III AA 603; VII AA 1420; VIII AA 1731, 1756–57, 1801–02. Thus, counsel made a reasonable, strategic decision to attempt to elicit that information in front of the jury.

Appellant argues counsel should have objected to the following exchange that occurred after the exchange above, on the State's redirect of Detective Bunting:

> Q: Now, ultimately, Stephanie Cousins made an identification of the shooter, correct?
> A: She did.
> Q: It wasn't Job-Loc?
> A: No.

IX AA 1934.

Because counsel had opened the door with regard to identification, an objection to this testimony would have been futile. Counsel cannot be ineffective for failing to make futile objections. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Nor was the underlying "opening the door" to identification evidence objectively unreasonable. As Appellant admits, Appellant's defense rested on misidentification. AOB at 28. And it was not objectively unreasonable to present to the jury Cousins' apparent confusion over who the shooter was: D-Shot, or Job-Loc. The fact that counsel decided to use this evidence, even though the State would be able to then admit the evidence that Cousins had identified the Appellant, was strategic. Counsel

weighed the benefits versus the harm and made a reasonable tactical decision to state Appellant's theory of the case and provide evidence of that theory.

Furthermore, Appellant cannot show there would have been a more favorable outcome had this evidence not been presented to the jury. Cousins's identification was far from the only incriminating evidence against Appellant. Appellant would have still been found guilty due to the other overwhelming evidence against him, including, but not limited to, Monica Martinez's testimony that Appellant was the shooter, D.N.'s statement that the shooter was in overalls and Appellant's admission to being in overalls, and cell phone records placing Appellant at the crime scene. X AA 2036, 2044–45. Therefore, Appellant has failed to establish prejudice.

D. Prosecutorial Misconduct

Next, Appellant complains he received ineffective assistance of counsel in handling various instances of alleged prosecutorial misconduct. AOB at 31–38. As the district court found, Appellant has not established counsel was ineffective in this regard. XII AA 2639–44.

The standard of review for prosecutorial misconduct rests upon Appellant showing "that the remarks made by the prosecutor were 'patently prejudicial.'" Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (citing Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993)). This is based on a defendant's right to have a fair trial, not a perfect one. Ross v. State, 106 Nev. 924, 927, 803

P.2d 1104, 1105 (1990). The relevant inquiry is whether the prosecutor's statements so contaminated the proceedings with unfairness as to make the result a denial of due process. Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986). Appellant must show that the statements violated a clear and unequivocal rule of law, he was denied a substantial right, and as a result, he was materially prejudiced. Libby, 109 Nev. at 911, 859 P.2d at 1054.

Appellant only presents the instances of alleged prosecutorial misconduct that were not objected to for consideration of ineffective assistance of counsel. AOB at 32–33. However, Appellant also presents instances that were objected to in order to bolster his cumulative error claim and as part of a claim of ineffective assistance of appellate counsel for failing to raise any claims on direct appeal. Id.

To the extent Appellant is arguing that counsel was ineffective for failing to raise these claims that were objected to on appeal, he waived his right to a direct appeal; therefore, this claim is without merit. See Section I, *supra*. Moreover, Appellant cannot use claims that were objected to, and should have been brought up on a direct appeal, to attempt to have this Court consider them in the context of cumulative error. As discussed in Section III, *infra*, this Court has never held that ineffective assistance of counsel claims can amount to cumulative error. Further, claims that are improperly brought in a post-conviction habeas petition, and should have been raised on direct appeal cannot be considered for an "overall

ineffectiveness claim." Therefore, this Court should only consider Appellant's claims of ineffective assistance of trial counsel when there was no objection.

i. *Alleged Misconduct to which Counsel Objected*

The alleged ineffective assistance that counsel did object to at trial were: disparagement of defense counsel, burden shifting by arguing defense failed to call witness Cooper, and a PowerPoint to the jury that referred to Appellant as part of the "circle of guilt. " AOB at 33–34, 36. As discussed, supra, these claims cannot be brought before this Court under an ineffective assistance of counsel framework.

ii. *Alleged Misconduct to which Counsel Did Not Object*

Alleged Burden Shifting

Appellant claims that there were multiple instances of burden shifting that were not objected to and that counsel failed to seek a mistrial based on these instances. AOB at 33–35. Appellant claims that the words "priest and a nun" or "Mother Theresa," and the State's statement that there was "no explanation" for the murder, constituted burden shifting. AOB at 33.

The United States Supreme Court has held that the State on rebuttal is entitled to fair response to arguments presented by the defense counsel in closing argument. United States v. Robinson, 485 U.S. 25, 108 S.Ct. 864 (1988). This Court has long recognized that "[d]uring closing argument, the prosecution can argue inferences from the evidence and offer conclusions on contested issues." Jones v. State, 113

Nev. 454, 467, 937 P.2d 55, 63 (1997). A prosecutor is allowed to comment on the lack or quality of the evidence in the record to substantiate the defendant's theory of the case. Evans v. State, 117 Nev. 609, 630–33, 28 P.3d 498, 514 (2001) (overruled in part on other grounds by Lisle v. State, 131 Nev.__, 351 P.3d 725 (2015)).

On rebuttal, the State argued:

> It would be a wonderful situation should we be standing in—or we should be living in a world in which people who are selling crack out of their house who get murdered happen to have a priest and a nun who's standing there and is part of the witnesses in the case. Or maybe Mother Theresa to tell us who's living in Job-Loc's apartment over at the Brittnae Pines.
>
> …
>
> David Burns has no explanation that is going to save him from the horrific knowledge that he put a gun, a .44 caliber, that giant hog-leg of a revolver, to the head of a woman and pulled the trigger without ever letting her getting a word out edgewise, and then chased a 12-year-old girl down. What reasonable explanation could he give? Well, I was really high on drugs. That wouldn't excuse it.

X AA 2154, 2157.

This did not constitute burden shifting. First, Appellant makes absolutely no argument for how the State conceding that religious figures would make better witnesses than the witnesses in this case constitutes burden shifting. Second, the prosecutor did not argue that Appellant had failed to provide evidence. Rather, he stated that there was no explanation or excuse for the murder and attempt murder. Thus, Appellant's authorities are inapplicable. See AOB at 34; Whitney v. State, 112

Nev. 499, 915 P.2d 881 (1996). Because this was not burden shifting, any objection or motion for mistrial would have been futile, and counsel cannot be found ineffective for failing to make futile objections, file futile motions, or for failing to make futile arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

Additionally, Appellant was not prejudiced because he fails to allege how objecting to this evidence would have provided a more favorable outcome. Even if counsel would have objected, the objection would have been overruled because none of the statements made on rebuttal constituted burden shifting. Appellant has failed to establish either Strickland prong.

Calling Custodian of Records an Expert

Appellant again alleges counsel should have objected to the State using a custodian of records as an expert and to the alleged improper notice. AOB at 35. However, the records custodians were properly noticed, and so there was no prosecutorial misconduct in calling the records custodians "experts." Section II(A), *supra*. Any objection would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Appellant has failed to establish either Strickland prong.

Referencing Whistling / Humming

Lastly, Appellant claims counsel failed to object to the prosecutor's argument that the whistling heard on the 911 call during the crime matched the whistling heard during Appellant's interview with police. AOB at 37–38. He argues that the

transcript of that interview does not reference whistling, and thus there was no basis for the prosecutor's argument. AOB at 38.

The State may respond to defense theories and arguments. Williams v. State, 113 Nev. 1008, 1018–19, 945 P.2d 438, 444–45 (1997) (receded from on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000)). This Court has long recognized that "[d]uring closing argument, the prosecution can argue inferences from the evidence and offer conclusions on contested issues." Jones v. State, 113 Nev. 454, 467, 937 P.2d 55, 63 (1997).

The State argued during rebuttal:

> But maybe what was subtle and was lost on everybody was how particularly disgusting and despicable the crime itself was. That it was—got to be something horrific got most human beings on Earth. And when you're in an interview room with detectives and you get told about it, your behavior of humming and singing and whistling is really kind of offensive, to be honest with you. And you can't really blame the cops for using the kind of terms they used with him. But it's also relevant for something else. Because Cornelius Mayo's inside that shower when the shot rings out. And he calls 911. And if that matches the clock at T-Mobile, that means it's while the shooter's still in that house. And he's obviously the person whistling on that 911. So whoever shot Derecia Newman and then put a bullet in [D.N.]—
>
> (Audio/Video played.)
>
> —whoever that shooter is, he's whistling as he's going through the crack cocaine and the drugs inside that residence as Cornelius Mayo, in that very small bathroom in that shower, is calling 911. Listen to that 911 over and over and over again. Cornelius Mayo doesn't see [D.N.] until after the whistling ends.

X AA 2195. This argument referenced only evidence that had been introduced during trial.

State's Exhibit #323, a recording of Mayo's 911 phone call from the bathroom, had been admitted by stipulation and played for the jury on Day 10 of trial. VI AA 1236–37. It was proper for the prosecutor's rebuttal to refer to the noises in the background of the 911 phone call, which was in evidence and about which the State was making inferences.

State's Exhibit #332, a video recording of Appellant's September 13, 2010 interview with Detective Bunting and Detective Wildemann, had also been admitted and played for the jury on Day 13 of trial. VIII AA 1785. After the video was played, the State asked Detective Bunting:

> Q: And there's points during the interview where you or—you or Detective Wildemann are telling Mr. Burns to—sort of sit up or pay attention. Could you describe what he was physically doing at the time?
> A: Well, he was slouching far into his chair. And as you heard—was humming while we were asking him questions. And then just kind of looking off or away. Just disinterested for the most part, I guess.

VIII AA 1794–95. The transcript of Appellant's interview also specifically states Appellant was humming and singing throughout the interview. XI AA 2369–75, 2378.

Thus, the State's arguments about "the humming and singing and whistling" were fair comments on the evidence presented, and any objection by counsel would

have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Therefore, counsel was not deficient. Further, Appellant fails to even allege that Appellant was prejudiced by this. Appellant has failed to establish either Strickland prong.

Counsel was not ineffective in any respect with regard to alleged prosecutorial misconduct, because there was no such misconduct, and even if there had been, Appellant has failed to establish that a better outcome was likely had counsel objected. This Court should affirm the district court's denial of this claim.

E. Death Penalty

Next, Appellant complains Appellant received ineffective assistance of counsel in that he failed to move to strike the death penalty. AOB at 38–46. Specifically, Appellant alleges that, because Appellant allegedly has Fetal Alcohol Syndrome ("FAS") and neurological development issues, trial counsel should have sought to dismiss or otherwise disqualify Appellant for the death penalty based on NRS 174.098 and Atkins v. Virginia, 536 U.S. 304 (2002). AOB at 38–46. As the district court found, Appellant has not established counsel was ineffective in this regard. XII AA 2646–48.

First, it must be noted that Appellant's counsel did, in fact, move to strike the death penalty. He filed a 500-page memorandum in his attempt to disqualify Appellant from the ultimate punishment—which, just as with the Notice of Expert Witness, Appellant has failed to include in his Appendix. See Section II(A), *supra*.

The State has included the Motion to Strike in its own Appendix for this Court's full consideration. I RA 001–250; II RA 251–500. Appellant's rationale included policy reasons to rule out the death penalty. I RA 015–17. The transcript of the hearing after which the district court denying the Motion to Strike is fifty eight (58) pages of argument. III RA 622–79. This Court should not second-guess the clear strategic decision to move to strike the death penalty based on other grounds and not the specific grounds Appellant now complains should have been brought. Strickland, 466 U.S. at 681, 104 S. Ct. at 2061; Rhyne, 118 Nev. at 8, 38 P.3d at 167–68; Doleman, 112 Nev. at 846, 921 P.2d at 280.

Regardless, this Court should affirm the district court's denial and hold that this was not ineffective assistance of counsel because, given the evidence of Appellant's IQ score and demonstrated levels of functioning, Atkins would not have precluded the death penalty. Atkins held that the execution of "mentally retarded" defendants constitutes cruel and unusual punishment. 536 U.S. 304, 321, 122 S. Ct. 2242, 2252 (2002). Nevada utilizes the updated term "intellectually disabled" when precluding individuals from the death penalty under Atkins. NRS 174.098(7) states:

> For the purposes of this section, "intellectually disabled" means significant subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period.

This Court has noted that "the clinical definitions indicate that 'individuals with IQs between 70 and 75' fall into the category of subaverage intellectual functioning. Ybarra v. State, 127 Nev. 47, 55, 247 P.3d 269, 274 (2011) (internal citations omitted). "Significant limitations in intellectual functioning . . . ha[ve] been measured in large part by intelligence (IQ) tests." Id. "[A]lthough the focus with this element of the definition often is on IQ scores, that is not to say that objective IQ testing is required to prove mental retardation. Other evidence may be used to demonstrate subaverage intellectual functioning, such as school and other records." Id. Still, the "interplay between intellectual functioning and adaptive behavior is critical" in this analysis. Id.

Here, Appellant's IQ score is 93. ASA at 125. This is significantly higher than the range of 70–75, the range of subaverage general intellectual functioning. Appellant claims that because there is evidence that Appellant has FAS and deficits in adaptive behavior, including dropping out of high school, disciplinary problems, and special education, counsel should have moved for a finding that he is intellectually disabled. AOB at 39, 42–43. However, Appellant's educational history does not undermine or overcome his IQ, which is almost 20 points higher than the high range of subaverage intelligence—particularly, when there is also evidence that Appellant displays positive adaptive behavior. Id.

Indeed, Appellant's Presentence Investigation Report (hereinafter "PSI") reveals that Appellant attended high school until the 11th grade and obtained his GED in 2013 while incarcerated at the Clark County Detention Center ("CCDC"). PSI, transmitted per this Court's order, at 4. Further, Appellant's mental health history consists of one evaluation only—and that, at the request of his attorney. Id. at 5. In other words, Appellant totally ignores the "interplay" between IQ score and functioning of which that this Court has required analysis. Ybarra, 127 Nev. at 55, 247 P.3d at 274. And this interplay demonstrates an IQ higher than the anticipated range and evidence of a well-functioning individual.

Thus, counsel's lack of motion to eliminate the death penalty under NRS 174.098 did not constitute deficient performance. Counsel made a strategic decision to challenge the death penalty on other grounds, and not on a slim hope of a finding of intellectual disability, based on the evidence he had: Appellant's IQ score of 93, and his educational history that would not have supported a finding that Appellant is intellectually disabled. Any motion to strike on these grounds would not have been successful, and counsel cannot be found ineffective for making such a motion. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

Moreover, Appellant cannot establish prejudice. He cannot demonstrate but for counsel's failure to dismiss the death penalty under NRS 174.098, the result of his trial would have been different. Indeed, counsel ultimately negotiated to get the

death penalty off the table, anyway. And even if Appellant had been found to be intellectually disabled, and the death penalty removed but the other first degree murder penalties available, Appellant has not demonstrated that he would have received a different sentence than life without the possibility of parole. Such a showing would be particularly difficult considering the egregious nature of his crime, including the point-blank murder of a woman in front of her twelve-year-old daughter and then the attempted murder of that child as she ran away. As such, Appellant cannot demonstrate prejudice. Counsel was not ineffective, and this Court should affirm the district court's denial of this claim.

F. Juror Note

Next, Appellant complains he received ineffective assistance of counsel regarding jury notes received by the district court during deliberations. AOB at 46–50. Specifically, Appellant argues that two notes from the jury were received and that counsel was ineffective for failing to ensure Appellant was consulted about or present for the discussions related to these notes. AOB at 49–50. Appellant relies on Manning v. State, 131 Nev.___, 348 P.3d 1015, 1018 (2015) to demonstrate counsel's ineffectiveness. However, Manning was filed after Appellant's trial. As the district court found, Appellant has not established counsel was ineffective in this regard. XII AA 2648–49.

A court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, *viewed as of the time of counsel's conduct*." See Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. And counsel's performance cannot be deemed deficient for failing to anticipate a change in the law. Nika v. State, 124 Nev. 1272, 1289, 198 P.3d 839, 851; Doyle v. State, 116 Nev. 148, 156, 995 P.2d 465, 470 (2000). Moreover, "[g]enerally, new rules are not retroactively applied to final convictions." Ennis, 122 Nev. at 694, 137 P.3d at 1099.

Manning was filed May 7, 2015. Appellant's trial ended months earlier, on February 17, 2015. Even his May 5, 2015 Judgment of Conviction was filed before Manning was published and made law. Appellant has made no attempt to argue that Manning should be retroactively applied. Thus, Appellant had no clear right to be present when the jury notes were discussed. Appellant has not established that counsel was objectively unreasonable for failing to anticipate a change in the law that, regardless, does not apply retroactively, even if he had anticipated the change. Counsel was not ineffective, and this Court should affirm the district court's denial of this claim.

G. Representation at Sentencing

Finally, Appellant complains he received ineffective assistance of counsel during sentencing. AOB at 50–51. Specifically, Appellant alleges counsel should have objected to the imposition of a deadly weapon enhancement allegedly

unsupported by the required statutory findings and to the allegedly incorrect information recorded in the PSI. Id. As the district court found, Appellant has not established counsel was ineffective in this regard. XII AA 2645–46.

NRS 193.165(1) states

> Except as otherwise provided in NRS 193.169, any person who uses a firearm or other deadly weapon or a weapon containing or capable of emitting tear gas, whether or not its possession is permitted by NRS 202.375, in the commission of a crime shall, in addition to the term of imprisonment prescribed by statute for the crime, be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 20 years. In determining the length of the additional penalty imposed, the court shall consider the following information:
>
> (a) The facts and circumstances of the crime;
>
> (b) The criminal history of the person;
>
> (c) The impact of the crime on any victim;
>
> (d) Any mitigating factors presented by the person; and
>
> (e) Any other relevant information.
>
> The court shall state on the record that it has considered the information described in paragraphs (a) to (e), inclusive, in determining the length of the additional penalty imposed.

Even if counsel was deficient in not objecting, Appellant was not prejudiced by the fact that the Court failed to make its specific findings for each factor. Indeed, this Court has held in a similar case that "nothing in the record indicates that the district court's failure to make certain findings on the record had any bearing on the

district court's sentencing decision." Mendoza-Lobos v. State, 125 Nev. 634, 644, 218 P.3d 501, 508 (2009). Further, Appellant had already stipulated to a sentence of life without the possibility of parole. Thus, there was no higher—or lower—sentence he could have received, as evidenced by this exchange between defense counsel and the Court:

> MR ORAM: Well and at the time just a kid. And unfortunately [Appellant] has always been a very gracious client of mine, very easy to work with. And it's sort of sad that he didn't just have some guidance. If he had some guidance maybe surely he wouldn't be standing where he is and it's just unfortunate to see that situation. I hope there's something that come of [Appellant's] life that makes it better. I would ask you not to run these consecutive. It just seems just to pile up on him is just an overload. And so—
>
> THE COURT: The way the law stands now, unless it's changed, *he will never be released from prison*.
>
> MR. ORAM: *That's correct*.

XI AA 2277. Thus, Appellant was not prejudiced, even if counsel's performance was deficient in not ensuring the district court articulated specific factors regarding the enhancements. Therefore, counsel was not ineffective.

Nor was counsel ineffective regarding the alleged errors in the PSI. Counsel did in fact raise these alleged errors in his lengthy sentencing memorandum, and the Court had an opportunity to review the sentencing memorandum. ASA at 001–154. In other words, counsel did draw the Court's attention to the errors. Therefore, counsel was not objectively unreasonable.

In addition, Appellant has failed to establish prejudice. The district court stated on the record that it had reviewed the sentencing memorandum. XI AA 2276. Thus, the district court was aware of the PSI's alleged errors and was able to take them into consideration before sentencing. Further, the sentencing judge was the trial judge, and he had firsthand knowledge of the testimony introduced at trial, including any statements by the surviving victim, and could have weighed the PSI's alleged errors against the testimony. Therefore, counsel was not ineffective. This Court should affirm the district court's denial of each claim of ineffective assistance of counsel at trial.

III. THERE WAS NO CUMULATIVE ERROR

Finally, Appellant asserts a claim of cumulative error in the context of ineffective assistance of counsel. AOB at 51–53. However, this Court has not endorsed application of its direct appeal cumulative error standard to the post-conviction Strickland context. McConnell v. State, 125 Nev. 243, 259, 212 P.3d 307, 318 (2009). Even where available, a cumulative error finding in the context of a Strickland claim is extraordinarily rare and requires an extensive aggregation of errors. See, e.g., Harris By and through Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995).

Even if instances of ineffective assistance of counsel could be cumulated, it would be of no moment, since there was no single instance of ineffective assistance

in Appellant's case. See United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors."); Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006), cert. denied, 549 U.S. 1134, 1275 S. Ct. 980 (2007) ("a habeas petitioner cannot build a showing of prejudice on series of errors, none of which would by itself meet the prejudice test"). In other words, logic dictates that there can be no cumulative error where the defendant fails to demonstrate any single violation of Strickland. See Turner v. Quarterman, 481 F.3d 292, 301 (5th Cir. 2007) ("where individual allegations of error are not of constitutional stature or are not errors, there is 'nothing to cumulate.'") (quoting Yohey v. Collins, 985 F.2d 222, 229 (5th Cir. 1993)); Hughes v. Epps, 694 F.Supp.2d 533, 563 (N.D. Miss. 2010) (citing Leal v. Dretke, 428 F.3d 543, 552-53 (5th Cir. 2005)). Because Appellant has not demonstrated any claim warrants relief under Strickland, there is nothing to cumulate. See Section II, *supra*. Therefore, as the district court found below, Appellant's cumulative error claim should be denied.

Even if Appellant's claims could be examined for cumulative error, Appellant fails to demonstrate error sufficient to warrant reversal. In addressing a claim of cumulative error, the relevant factors are: 1) whether the issue of guilt is close; 2) the quantity and character of the error; and 3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854–55 (2000). As discussed *supra*,

the issue of guilt was not close. Further, when examining the "quality and character" of any error, it must be in the context of the fact that a defendant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975). Even assuming that any of Appellant's allegations of deficiency have merit, any error was minimal, and Appellant has failed to establish that, when aggregated, any errors deprived him of a reasonable likelihood of a better outcome at trial. Therefore, there is no reasonable probability that Appellant would have received a better result but for the alleged deficiencies. That is, Appellant has not shown that the cumulative effect of these errors was so prejudicial as to undermine the court's confidence in the outcome of Defendant's case. Therefore, Appellant's claim of cumulative error is without merit. This Court should affirm the district court's denial of this claim.

CONCLUSION

Appellant did not receive ineffective assistance of counsel. Thus, the district court properly denied Appellant's Petition for Writ of Habeas Corpus. This Court should affirm the district court's denial.

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Dated this 1st day of April, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby 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 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that 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 either proportionately spaced, has a typeface of 14 points of more, contains 12,481 words.
3. **Finally, 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, in particular 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 on is to be 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.

Dated this 1st day of April, 2019.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 1st day of April, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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