IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID BURNS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 80834

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

JAMIE J. RESCH, ESQ.
Nevada Bar #007154
Resch Law, PLLC d/b/a
Conviction Solutions
2620 Regatta Dr., Suite 102
Las Vegas, Nevada 89128
(702) 483-7360

Counsel for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

AARON D. FORD
Nevada Attorney General
Nevada Bar #007704
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number:

Cases

Statutes

Other Authorities

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID BURNS, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 80834

RESPONDENT'S ANSWERING BRIEF

Appeal from Judgment of Conviction
Eighth Judicial District Court, Clark County

ROUTING STATEMENT

This appeal is presumptively retained by the Supreme Court because it relates to a conviction for a Category A felony. NRAP 17(b)(2)(A).

STATEMENT OF THE ISSUES

1. Whether Appellant has waived all of his appellate issues as part of his stipulated plea agreement.
2. Whether the district court properly denied Appellant's Batson v. Kentucky, 476 U.S. 79 (1986) challenge.
3. Whether the district court erred by providing the jury with a video of Monica Martinez's testimony.
4. Whether the State committed prosecutorial misconduct during closing arguments.
5. Whether the district court erred by denying Appellant's pretrial Motion in Limine #1.
6. Whether Appellant's sentence is unreasonable or unconstitutional.

STATEMENT OF THE CASE

On October 13, 2010, the State charged David Burns, (hereinafter "Appellant"), 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 AA 001-008. On October 28, 2010, the State filed a Notice of Intent to Seek the Death Penalty in this matter. I AA 009-012.

From the time the State filed the Superseding Indictment up until trial, Appellant filed numerous pretrial motions with the district court.[1] On October 12, 2014, Appellant filed a Motions in Limine #1-3. I AA 013-046. The State filed its

[1] These pretrial motions, except for the Motions in Limine #1-3, are not relevant to this direct appeal.

Opposition on October 13, 2014. I AA 047-053. Following a hearing on October 20, 2014, the district court denied Appellant's Motions in Limine #1-3. I AA 054-094.

Appellant's fifteen-day jury trial began on January 20, 2015. I AA 095. On February 9, 2015, the twelfth day of trial, Appellant signed a Stipulation and Order Waiving Separate Penalty Hearing. XIV AA 2820-2821. Appellant agreed that in the event of a finding of guilty on Murder in the First Degree, he will be sentenced to life without the possibility of parole. XIV AA 2820-2821. **Appellant also agreed to waive all appellate rights stemming from the guilt phase of the trial.** XIV AA 2821. On February 17, 2015, the jury returned a verdict finding Appellant guilty on all eight (8) counts. XVI AA 3354-3357.

On April 23, 2015, Appellant was adjudged guilty and sentenced to the Nevada Department of Corrections (NDC) as follows: Count 1 – a maximum of seventy-two (72) months and a minimum of twelve (12) months; Count 2 – a maximum of one hundred twenty (120) months and a minimum of twenty-four (24) months; Count 3 – a maximum of one hundred eighty (180) months and a minimum of twenty-four (24) months; Count 4 – a maximum of one hundred eighty (180) months and a minimum of twenty-four (24) months, plus a consecutive term of a maximum of one hundred eighty (180) months and a minimum of twenty-four (24) months for the deadly weapon enhancement; Count 5 – life without parole, plus a consecutive term of a maximum of two hundred forty (240) months and a minimum

of forty (40) months for the deadly weapon enhancement; Count 6 – a maximum of one hundred eighty (180) months and a minimum of twenty-four (24) months, plus a consecutive term of a maximum of one hundred eighty (180) months and a minimum of twenty-four (24) months for the deadly weapon enhancement; Count 7 – a maximum of two hundred forty (240) months and a minimum of forty-eight (48) months, plus a consecutive term of a maximum of two hundred forty (240) months and a minimum of forty (40) months for the deadly weapon enhancement; and Count 8 – a maximum of one hundred eighty (180) months and a minimum of twenty-four (24) months. XVI AA 3373-3376. Counts 1, 2, 3, and 4 are to run concurrent with Count 5. XVI AA 3379. Counts 6 and 8 are to run concurrent with Count 7. XVI AA 3379. Count 8 is to run consecutive to Count 5. XVI AA 3379. Appellant received one thousand six hundred seventy-one (1,671) days credit for time served. XVI AA 3379. The Judgment of Conviction was filed on May 5, 2015. XVI AA 3379.

On October 13, 2015, Appellant filed a Pro Per Post-Conviction Petition for Writ of Habeas Corpus, Motion to Appoint Counsel, and Request for an Evidentiary Hearing. I RA 001-034. The State filed its Response on January 26, 2016. I RA 035-101. On February 16, 2016, the district court denied Appellant's Post-Conviction Petition, Motion to Appoint Counsel, Request for Evidentiary Hearing. I RA 105. The Findings of Fact and Conclusions of Law Order was filed on March 21, 2016. I RA 105-113.

Appellant filed a Notice of Appeal on March 11, 2016. I RA 102-104. On February 17, 2017, the Nevada Supreme Court remanded it back to the district court for appointment of counsel. I RA 114-118. Remittitur issued on March 21, 2017. I RA 118. On March 30, 2017, Appellant's counsel, Jamie J. Resch, Esq., confirmed. I RA 119. Appellant's Supplemental Petition was filed on November 27, 2017. I RA 120-165. The State filed its Response on January 16, 2018. I RA 166-196. Appellant filed his Reply on February 6, 2018. I RA 197-207. On April 17, 2018, the district court set the matter for an evidentiary hearing. I RA 208. Following the evidentiary hearing on September 20, 2018, the district court denied Appellant's Supplemental Petition. I RA 209-212. The Findings of Fact, Conclusions of Law and Order was filed on October 25, 2018. I RA 209-236.

On November 8, 2018, Appellant filed a Notice of Appeal, appealing the district court's denial of his Supplemental Petition. I RA 237-238. On January 23, 2020, the Nevada Supreme Court issued an Order Affirming in Part, Reversing in Part and Remanding the district court's denial of the Petition. I RA 239-249. This Court found that counsel performed deficiently, and Appellant was prejudiced by counsel not filing a direct appeal. I RA 246. Specifically, a panel of this Court recognized, "During trial, Burns waived all appellate claims arising from the guilt phase of his trial pursuant to a stipulation with the State to a sentence of life without the possibility of parole, if he were to be convicted, in exchange for the State's

withdrawing its notice of intent to seek the death penalty." I RA 246. However, the panel of this Court held that Appellant should be able to file an appeal, even if his attorney deems it to be meritless. I RA 246-247. Remittitur issued February 25, 2020. I RA 249.

Appellant filed a Notice of Appeal on March 17, 2020. XVI AA 3380-3381. Appellant filed the instant Opening Brief on August 12, 2020.

STATEMENT OF THE FACTS

Cornelius Mayo lived at 5662 Miekle Lane Apartment A, Las Vegas, Clark County, Nevada. XI AA 2320. 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). VII AA 1492-1493; XI AA 2320-2321. On August 6, 2010, Newman's minor sister, Erica Newman, was also staying with the family. VII AA 1468, 1489; XI AA 2323.

In the early morning hours of August 7, 2010, the household received a phone call on their landline phone at 3:39 am. XI AA 2326. Mayo heard Newman answer the phone. XI AA 2326. About 10 minutes later, there was another call. XI AA 2327. At the time, Mayo was in the bathroom, but he heard Newman answer the front door. XI AA 2327.

Then, Mayo heard a woman scream. XI AA 2327-2328. Two (2) gunshots followed. XI AA 2327-2328. Mayo also heard someone he knew to be Stephanie

Cousins screaming. XI AA 2328. He then heard three (3) more gunshots, and saw 12-year-old D.N. run into the bathroom. XI AA 2328-2329. A bullet came through the bathroom door. XI AA 2330. Mayo watched as D.N. tried to get up and run from the bathroom, only to be shot in the stomach. XI AA 2330. Mayo could not see who fired the shot. XI AA 2330-2331. Mayo told D.N. she would be alright, told her to be still, and left the bathroom. XI AA 2331-2332.

Mayo called 911 from his cell phone. XI AA 2332. As he spoke with the operator, Mayo checked the bedroom where Erica Newman and the small children were sleeping. XI AA 2332-2333. He saw them all in their beds. XI AA 2333. However, Erica Newman had been awoken by the gunshots. VII AA 1495. She testified that after she heard the shots, she saw a tall, skinny, black man in overalls standing near the master bedroom. VII AA 1496. D.N. testified that she also saw the shooter was wearing overalls, and told lead Detective Christopher Bunting about the overalls shortly after her mother was murdered. XII AA 2517; XIV AA 2828, 2853-2854. Monica Martinez was the getaway driver from the murder scene, also testified that Appellant had been wearing overalls that night. VIII AA 1700. Appellant, himself, admitted in a letter that he was wearing overalls. XIV AA 2892-2899.

Police and paramedics arrived, and the paramedics took D.N. to the hospital. VII AA 1498; VIII AA 1540, 1542. However, on the couch in the living room, responders found Newman—with an obvious, massive gunshot wound to her head.

VIII AA 1518-1519, 1582. She was in nearly a sitting position, with a $20 bill clutched in her hand. VIII AA 1581-1582. 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. VIII AA 1651-1660.

Mayo had his phone in his hand when the police arrived, and they could tell that he was extremely angry. VIII AA 1519-1520. A responding officer testified that Mayo was speaking on the phone and that he could hear a female voice on the other end. VIII AA 1529-1530. 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. XI AA 2325-2326. 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. VIII AA 1531; XI AA 2336-2338. Mayo told Cousins that he believed she was lying. XI AA 2348. After he hung up, he told officers that he had been speaking with Cousins. VIII AA 1531-1532. Mayo noticed that $450.00 had been taken from his residence, as well as a sack of marijuana and other minor property. XI AA 2376.

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"). VIII AA 1669, 1671, 1687-1688; XIV AA

2863-2864. All were involved in illegal activity, including selling drugs. VIII AA 1673-1675. 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. X AA 2126-2138; XII AA 2441-2469. 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[2] met up with Cousins the night of the murder. VIII AA 1687-1693, 1704-1706. 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. VIII AA 1668, 1680. As the four co-conspirators discussed committing robberies, Appellant said he was "going to go in shooting." VIII AA 1715. 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. VIII AA 1722-1723. From the car, Martinez heard screaming and

[2] Martinez's testimony identifies Appellant as "D-Shock" rather than "D-Shot," but admits that the two names refer to the same person. VIII AA 1687-IX AA 1782.

multiple gunshots. VIII AA 1724-1725. G-Dogg and Appellant returned to the car. VIII AA 1725. Martinez testified that Appellant said he had blood on him and, after picking up and dropping off Cousins, that he should have shot Cousins. IX AA 1728-1729. 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. IX AA 1734. 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. IX AA 1811-1812.

SUMMARY OF THE ARGUMENT

This Court should affirm Appellant's Judgment of Conviction. As an initial matter, Appellant waived all of his claims. On the twelfth day of trial, Appellant signed a Stipulation and Order, and entered negotiations with the State. Appellant agreed to waive all appellate rights stemming from the guilt phase of the trial, and the State agreed to no longer seek a sentence of death and reduce Appellant's sentence to a stipulated life without the possibility of parole. Because of this bargained-for-exchange, all of Appellant's claims as they related to the guilt phase of trial have been waived.

But even on the merits, Appellant's claims still fail. First, Appellant alleges that the district court erred by denying his Batson challenge. However, the district court correctly found that Appellant could not establish a prima facie case for racial

discrimination. And even had he established a prima facie case, the State provided a valid race-neutral reason for using the peremptory challenge on the juror. Therefore, the district court did not err by denying the Batson challenge.

Second, Appellant alleges that the district court erred by providing the JAVS video of Monica Martinez's testimony to the jury during deliberations and that it violated his rights under the Confrontation Clause. However, the parties agreed to send the JAVS video to the jury, and Appellant was present for her testimony. Therefore, the district court did not err by providing the video to the jury.

Third, Appellant alleges that the State committed prosecutorial misconduct during its closing argument. However, Appellant cannot demonstrate that the prosecutor's statements and PowerPoint presentation so contaminated the proceedings with unfairness as to make the result a denial of due process. And even if the statements or PowerPoint were error, the error was harmless. Thus, the State did not commit prosecutorial misconduct.

Fourth, Appellant alleges that the district court erred by denying his Motion in Limine #1 before trial and failing to suppress the photo lineup. However, because the photo lineup was not impermissibly suggestive to give rise to a very substantial likelihood of irreparable misidentification, the district court did not err by denying the Motion in Limine.

Finally, Appellant alleges that his sentence is unreasonable and unconstitutional because he was eighteen at the time the crime was committed, and he suffers from Fetal Alcohol Syndrome. Appellant's sentence falls within the statutory range and is not out of proportion to the severity of the crime. Because his sentence comports with the Eighth Amendment, the statutory authority, and the facts of this case, his sentence is not unreasonable or unconstitutional. Thus, this Court should affirm Appellant's Judgment of Conviction.

ARGUMENT

I. APPELLANT WAIVED ALL HIS APPELLATE CLAIMS[3]

On February 9, 2015, the twelfth day of his jury trial, Appellant signed a Stipulation and Order Waiving Separate Penalty Hearing. XIV AA 2820-2821. The Stipulation and Order stated:

> [T]he parties hereby stipulate and agree to waive the separate penalty hearing in the event of a finding of guilt on Murder In the First Degree and pursuant to said Stipulation and Waiver agree to have the sentence of LIFE WITHOUT THE POSSIBILITY 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.

[3] The State could have filed a Motion to Strike under Rule 27(a)(3), but this would have needed to occur within 7 days. Admittedly, the State did not file such a motion within the 7 days required.

XIV AA 2820-2821. The district court also thoroughly canvassed Appellant on this agreement with the State:

> THE COURT: All right. Mr. Burns. Mr. Burns, as you're aware, the State has sought a conviction of first degree murder and other offenses, and in the event you were found guilty by the jury of first degree murder, the State was going to seek the death penalty.
>
> In colloquy that has been provided to me a few minutes ago, the attorneys explained that the State is waiving, giving up its right 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?
>
> DEFENDANT BURNS: Yes, sir.
>
> THE COURT: Do you have any questions about it?
>
> DEFENDANT BURNS: Yes, sir.
>
> THE COURT: Do you agree with it?
>
> DEFENDANTT BURNS: Yes, sir.
>
> THE COURT: You understand that you have a right to a penalty hearing where the jury would determine the punishment in the event they found you guilty of first degree murder?
>
> DEFENDANT BURNS: Yes, sir.
>
> THE COURT: You understand you're giving up that right to have the jury determine that punishment?
>
> DEFENDANT BURNS: 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 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 this?
>
> DEFENDANT BURNS: 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 getting paroled, you're never going to get out, do you understand that?

> DEFENDANT BURNS: Yes, sir.
>
> THE COURT: You're also giving up your appellate rights. Do you understand this?
>
> DEFENDANT BURNS: Yes, sir.

XIII AA 2629-2631.

Regarding his appellate rights, Appellant claims that, "Reading this provision sensibly, Burns believes that at most, he waived claims of error that arose during the State's case-in-chief only." Appellant's Opening Brief ("AOB"), at 2. Appellant also claims that the waiver was limited because defense counsel told the district court "we are not waiving any potential misconduct during the closing statements. We understand that to be a fertile area of appeal. AOB, at 7; XIII AA 2627. Defense counsel put the following negotiations on the record:

> MR. SGRO: The State and the defense on behalf of Mr. Burns have agreed to conclude the remainder of trial, settle jury instructions, do closings, et cetera. If the jury returns a verdict of murder in the first degree, Mr. Burns would agree that the –
>
> THE COURT: As to Mr. Burns.
>
> MR. SGRO: As to Mr. Burns only. Mr. Burns 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 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 ordinary course like it would any other case. In – and I believe that states the agreement, other than there is a proviso that we, for purposes of further review down the road, we are not waiving any potential misconduct during closing statements. We understand that to be a fertile area of appeal.
>
> The State 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 Mr. Burns is agreeing to life without after we get through trial. Yeah. And the waiver of his appellate rights.

XIII AA 2626-2628. The State responded by stating:

> 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 of the first degree with use of a deadly weapon, Mr. Mason 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 his appellate review of the guilt phase issues.
>
> Mr. Mason's attorney and us have not yet reached any agreement, but certainly any agreement about waiving penalty will not involve him waiving his appellate rights, and so the continued prophylactic rule of any misconduct –
>
> ..
>
> Oh, okay. Apparently we've now had that discussion. I apologize, Judge. I wasn't part of that discussion. So apparently Mr. Mason will waive, if he gets convicted of first degree murder, and allow the Court to sentence him.
>
> THE COURT: Impose penalty.
>
> MR. DiGIACOMO: But he is not waiving his appellate rights as part of the agreement.

XIII AA 2628-2629.

To put the closing arguments statement into context, Appellant and the State signed this Stipulation and Order on the twelfth day of trial. There were only a few witnesses left to testify, the settling jury instructions, and then closing arguments. It seems Appellant did not want to fully give up his appellate rights, and then have

misconduct occur during closing arguments. But as Mr. Sgro stated, there were procedural safeguards in place because Appellant's co-defendant did not agree to waive his appellate rights, like Appellant. As the State and the signed Stipulation and Order stated, Appellant agreed to "waive all appellate rights stemming from the guilt phase of the trial." XIV AA 2821.

Following trial, Appellant filed a pro per Petition for Writ of Habeas Corpus (Post-Conviction). I RA 001-023. After the district court denied Appellant's Post-Conviction Petition, this Court remanded it back to the district court for the appointment of counsel. I RA 114-118. Through counsel, Appellant filed a Supplemental Petition for Writ of Habeas Corpus (Post-Conviction). I RA 120-165. The district court held an evidentiary hearing, and denied Appellant's Supplemental Post-Conviction Petition. I RA 209-236.

Appellant then filed a Notice of Appeal, appealing the district court's denial of his Supplemental Petition. I RA 237-238. On January 23, 2020, the Nevada Supreme Court issued an Order Affirming in Part, Reversing in Part and Remanding the district court's denial of the Petition. I RA 239-249. In its Order, this Court affirmed the district court's denial of all of Appellant's ineffective assistance of counsel claims, except his one claim as to his direct appeal. I RA 239-249. This Court found that counsel was ineffective for failing to file a direct appeal on behalf

of Appellant when he requested it. I RA 246. However, this Court correctly noted that Appellant waived all his appellate claims:

> Lastly, Burns argues that counsel should have filed a direct appeal. Counsel must file an appeal when a convicted defendant's desire to challenge the conviction is reasonably inferable from the totality of the circumstances. *Totson v. State*, 127 Nev. 971, 979, 267 P.3d 795, 801 (2011); *Lozada v. State*, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994). **During trial, Burns waived all appellate claims arising from the guilt phase of his trial pursuant to a stipulation with the State to a sentence of life without the possibility of parole, if he were to be convicted, in exchange for the State withdrawing its notice of intent to seek the death penalty**. After sentencing, Burns called counsel for assistance with pursuing postconviction relief. During the meeting, Burns asked counsel about the list of issues for appeal that counsel made and conveyed that he wanted to challenge his conviction in any way that he could. Counsel responded that Burns had better issues in habeas and that a direct appeal would be futile. This response was incorrect. Counsel's duty to file a notice of appeal when one is requested is not affected by the perceived merits of the defendant's claims on appeal. Accordingly, counsel performed deficiently and Burns was prejudiced when counsel failed to initiate an appeal after Burns expressed his desire to appeal his conviction. *Cf. Garza v. Idaho*, 139 S. Ct. 738, 746-47 (2019). We therefore conclude that the district court erred in not granting the petition as to this claim and providing the relief set forth in NRAP 4(c).

I RA 246-247 (emphasis added). While counsel was ineffective for failing for failing to file a Notice of Appeal when Appellant requested one, this does not negate the fact that his appellate claims are still waived.

Appellant voluntarily signed the Stipulation and Order so the State would take the death penalty off the table. The United States Supreme Court has held that plea bargains are essentially contracts. Puckett v. U.S., 556 U.S. 129, 137, 129 S. Ct. 1423, 1430 (2009); see Mabry v. Johnson, 467 U.S. 504, 508, 104 S. Ct. 2543 (1984)). When the Government and a defendant negotiate and bargain, the

Government takes on certain obligations. Id. "If those obligations are not met, the defendant is entitled to seek a remedy, which might in some cases be rescission of the agreement, allowing him to take back the consideration he has furnished." Id. "But rescission is not the only possible remedy; … in effect, specific performance of the contract." Id. "[T]he Government is obligated to uphold its side of the bargain." Id. at 138, 129 S. Ct. at 1430.

Here, the Government upheld its side of the bargain, and withdrew its Notice of Intent to Seek the Death Penalty. Because the State fulfilled its obligation and upheld its end of the negotiations, Appellant must be held to the same standard. This Court has held that it will enforce unique terms of a guilty plea agreement, even containing an unequivocal waiver of the right to appeal. Sparks v. State, 121 Nev. 107, 112, 110 P.3d 486, 489 (2005) (*citing* Citti v. State, 110 Nev. 89, 92, 807 P.2d 724, 276 (1991)). Therefore, this Court should find that Appellant's claims stemming from the guilt phase of trial are waived.

II. EVEN ON THE MERITS, APPELLANT'S CLAIMS FAIL

Even if this Court elects to determine Appellant's claims on the merits, his claims must still be denied. It should be noted that Appellant's co-defendant, Mason, did file a direct appeal with legal issues stemming from the guilt phase of trial. Those issues were ultimately denied by this Court. Order of Affirmance, May 26, 2017, Case No. 68497. As discussed supra, Section I., Appellant entered into a binding

contract with the State where he agreed to waive all appellate rights. In return, the State withdrew its Notice of Intent to Seek the Death Penalty. Therefore, Appellant's appellate claims are waived. But even if this Court elects to determine the claims on the merit, Appellant's claims still fail.

A. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S BATSON CHALLENGE

Appellant first alleges that the district court erred by denying Appellant's Batson challenge to the State's peremptory removal of a prospective juror. AOB, at 8.

The racially discriminatory use of peremptory challenges is unconstitutional under the Equal Protection clause. Batson, 476 U.S. at 89-90. "In reviewing a Batson challenge, '[t]he trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal.'" Diomampo v. State, 124 Nev. 414, 422-423 (2008) (quoting Walker v. State, 113 Nev. 853, 867-68 (1997). This Court "review[s] the district court's ruling on the issue of discriminatory intent for clear error." Conner v. State, 130 Nev. 457, 464 (2014).

In Purkett v. Elem, 514 U.S. 765, 766-767 (1995), the United States Supreme Court announced a three-part test for determining whether a prospective juror has been impermissibly excluded under Batson:

> [O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step 1), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If a race-neutral explanation is tendered, the trial court must then decide (step 3) whether the opponent of the strike has proved purposeful racial discrimination.

This Court has adopted the Purkett three-step analysis. Doyle v. State, 112 Nev. 879, 887 (1996). In step one, a "defendant alleging that members of a cognizable group have been impermissibly excluded from the venire may make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts give rise to an inference of discriminatory purpose." Batson, 476 U.S. at 94. The court may, in deciding whether or not the requisite showing of a prima facie case has been made, consider the "pattern of strikes" exercised or the questions and statements made by counsel during the voir dire examination. Batson, 476 U.S. at 96-97; Libby v. State, 113 Nev. 251, 255 (1997). Only after the movant has established a prima facie case of intentional discrimination is the proponent of the strike compelled to proffer a race-neutral explanation.

"The second step of this process does not demand an explanation that is persuasive or even plausible." Purkett, 514 U.S. at 768. "Unless a discriminatory intent is inherent in the State's explanation, the reason offered will be deemed race neutral." Id.; Doyle, 112 Nev. at 888. What is meant by a legitimate race-neutral reason "is not a reason that makes sense, but a reason that does not deny equal protection." Purkett, 514 U.S. at 769; Thomas v. State, 114 Nev. 1127, 1137 (1999).

Step three requires a credibility determination, as "the district court must determine whether the explanation was a mere pretext and whether the opponent successfully proved racial discrimination." King v. State, 116 Nev. 349, 353 (2000). This can be measured by "how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." Miller-El v. Cockrell, 537 U.S. 322, 324 (2003). In step three, the burden is on the opponent of the strike to develop a pretext for the explanation at the district court level. Hawkins v. State, 127 Nev. 575, 578 (2011).

Here, Appellant failed to make a prima facie showing of purposeful discrimination. Batson, 476 U.S. at 94. During jury selection, the State questioned Juror No. 91 regarding his questionnaire that stated he was opposed to the death penalty:

> MR. DiGIACOMO: Okay. So let me ask you first about – your first answer is do you believe in the death penalty and you say something that a lot of jurors will say is – well, first you checked off no and your explanation was something to the effect of, you know, death is too easy, they should be forced to sit in custody for the rest of their life and think about it.
>
> PROSPECTIVE JUROR NO. 091: Uh-huh.
>
> MR. DiGIACOMO: Is that kind of the way you feel right now?
>
> PROSPECTIVE JUROR NO. 091: Yeah.
>
> MR. DiGIACOMO: Okay. Would you agree with me that somebody who is in jail being forced to think about it, that that person, by definition, has to have a conscience; right?
>
> PROSPECTIVE JUROR NO. 091: Usually. Well, if they don't have it, it comes to them.

MR. DiGIACOMO: Do you think –

PROSPECTIVE JUROR NO. 091: That's my belief, that it will come to them.

MR. DiGIACOMO: And that's my question. Do you think that everybody who winds up in prison for life without for a crime that they've committed would actually think about that crime as opposed to – you know, the average everyday person, absolutely. We're going to sit there and think, oh my God, why did I do this? Do you think that applies to everybody?

PROSPECTIVE JUROR NO. 091: I would assume it would because I also know that all – not all crimes are committed in – in sane mind. But they don't have access to all those drugs and all those other things in the prison, so sanity comes to them because they don't have access to the other drugs which will make them insane or –

MR. DiGIACOMO: So at least in your mindset – and, look, I think the Judge probably already told you, if he didn't, he normally does. There's no right or wrong answer from any of the ten jurors. And so people just – if they give their honest answers, then from there we'll be able to figure it out.

PROSPECTIVE JUROR NO. 091: Yeah.

…

MR. DiGIACOMO: The next question in the kind of series of death penalty questions kind of dealt with kind of what your general feelings are, and you checked off quite a few of the – of the various answers. And so one of them was that you believe the death penalty is appropriate in some murder cases, and you could return a verdict in a proper case which imposes the death penalty. I understand that the way the questions are worded sometimes, those aren't necessarily inconsistent answers. **I don't believe in the death penalty, but in certain cases I might be willing to impose it.**

PROSPECTIVE JUROR NO. 091: Uh-huh.

MR. DiGIACOMO: Let me ask you, is that what you were thinking when you checked that off?

PROSPECTIVE JUROR NO. 091: Yeah.

…

MR. DiGIACOMO: So at least in some factual scenario, whether or not you believe in it or don't believe in it, at

> least in some factual scenario you can see yourself voting for it?
>
> PROSPECTIVE JUROR NO. 091: Yeah.
>
> MR. DiGIACOMO: Okay. Was there – and it's hard to tell, was there some hesitation in that answer or –
>
> PROSPECTIVE JUROR NO. 091: No, there was no hesitation.
>
> MR. DiGIACOMO: Okay.
>
> PROSPECTIVE JUROR NO. 091: It depends on case to case, individual to individual. In my opinion, if somebody has – has been a criminal, has been through the justice system, has been in prison, comes out, does it again, and comes out and does it again, and there is nothing – no contribution from that individual to the society and it keeps the – the kind of acts get gruesome and gruesome, then at – at one point I would agree to that – that certain individual if it comes back to the justice system and death penalty is one of the options, then that is fair at that time. **But, again, if it's just a first stage and if you ask a grown adult what is two plus two and he says seven, you know, you look at that guy funny compared to a kid and you coach the kid. That's my opinion.**
>
> MR. DiGIACOMO: Okay. And so there is – you know, that's a very – everybody is going to have kind of – that can consider all four forms of punishment --
>
> PROSPECTIVE JUROR NO. 091: Yeah.
>
> MR. DiGIACOMO: -- everyone is going to have some factors. **And for you the – the opportunity for rehabilitation and the failure to take hold of that might be something that was important to you in making that consideration, would that be fair?**
>
> PROSPECTIVE JUROR NO. 091: **Yeah.**

I AA 123-129 (emphasis added). After thoroughly discussing the death penalty with Juror No. 91, while he stated that he could potentially vote for it, he also stated that he favored rehabilitation. Juror No. 91 told the State that it was a case-by-case decision, but that he was more in favor of rehabilitation, especially with a "kid."

During peremptory challenges, the State used its third peremptory challenge to excuse Juror No. 91:

> MR. DiGIACOMO: The State would thank and excuse Juror No. 91 who was in the first seat, Marwah Bhupesh.
>
> MR. SGRO: Your Honor, we need to make a record of that. We need a race-neutral reason on that. He characterized himself as black. The Court told us at the bench you took judicial notice that he was black.
>
> THE COURT: I would agree that a Batson challenge could be made as to Mr. Marwah.
>
> MR. DiGIACOMO: Is that all the record they want to make?
>
> MR. SGRO: Well, I don't know what –
>
> THE COURT: It's up to – its actually your burden to show a race-neutral reason –
>
> MR. SGRO Right.
>
> THE COURT: -- for excusing a juror that's black.
>
> MR. DiGIACOMO: And I apologize because we've been litigating this a lot in front of the Nevada Supreme Court. The very first thing the defense needs to do is they need to establish a prima facie case of racial discrimination, which I would not on this jury there are – we have 10 perempts out of 28 people – or we have eight perempts out of 28 people, and there is a significant number of African Americans. There's no way on earth that these individuals – that they can establish prong one of this – of this procedure, particularly for this first juror.
>
> And I will note that I know that Mr. Oram said it at the bench. Maybe it was day one before there was a recording. Mr. Oram says, Well, I think what he was saying is that he was Indian, and that gave him a skin color that made him think he was black. Mr. – and I recognize the Court said that from your perspective you were going to find him black, but certainly using this preempt against this juror does not establish step one which is a prima facie case that we are engaged in racial discrimination.
>
> The record can speak for itself on what his basis is, but if you don't find we get past step one, then there is no basis to require a race-neutral reason in step two, and I would submit that we have been very lax in this jurisdiction on step one.

VI AA 1204-1205. Appellant's counsel then attempted to argue a prima facie case for racial discrimination, by giving an overbroad reason that he did not want minorities to be underrepresented on juries:

> MR. ORAM: Judge, there has been some decisions, and I'd like to bring the Court's attention that causes me concern. I had an oral argument with – against Mr. DiGiacomo where he was the trial attorney. Mr. Sgro and I were defense counsel. It was an all white jury, a black defendant accused of murdering two non-African-American women, and the Supreme Court Justice Cherry started off by stating, Do you want to spend your career defending against peremptory challenges on blacks?
>
> And then there's been another case just recently where the Supreme Court overturned a capital murder conviction because the State was striking blacks, all the blacks, and when I see this, I'm, like, What did that man say that would cause him not to be a fair juror? And so now we are starting to eliminate all of these, and it causes me concern that what's going to happen here is we're going to be left with an underrepresentation of minorities, specifically African Americans, and so we would ask that he not be removed.

VI AA 1206. Then, the district court evaluated counsel's overbroad reason without any specifics regarding this case, and determined that Appellant could not demonstrate a prima facie case for racial discrimination:

> MR. DiGIACOMO: Judge, just for the record, there are three more African-American jurors on a panel of 28, which means –
>
> THE COURT: Four more.
>
> MR. DiGIACOMO: Oh, sorry. Four more on a panel of 28. So there's five total jurors out of 28. Is the suggestion we use our first preempt, five out of 28, which is more than 20 percent –
>
> THE COURT: I must tell you, of all the five jurors that are on this panel, this first one was the one that if I was the State's counsel I'd be more inclined to excuse than the other four because of his answers to the death penalty questions.
> Now, I don't know what your grounds are for doing it.

VI AA 1206-1207. As the district court and the State correctly noted, on the panel of twenty-eight (28) jurors, there were still five (5) African-American jurors remaining. Thus, the district court properly found that Appellant could not establish a prima facie case of racial discrimination.

Even though the district court found that Appellant did not establish a prima facie case, it still had the State put a race-neutral reason on the record:

> THE COURT: I don't think they've met their burden, but in an abundance of caution, would you tell me what race neutral reasons there are for excusing this particular juror?
>
> MR. DiGIACOMO: Yes, Judge. It's related to his answers in penalty, both on my direct questioning of him but on the defense. He specifically says – when I asked about whether or not he could ever impose the death penalty – I could do my best. Death is too easy. Their conscience would come to them. Not all crime's committed in the same mind. Everyone has a conscience. I don't believe in the death penalty. You should be able to coach a kid in the opportunity for rehabilitation and for failure to take advantage of that. It is proven – even if it was proven that he's the one who did it.
>
> **We have an 18-year-old defendant. We have a man who says, For children, I believe in rehabilitation. I don't believe in the death penalty, and that is the situation, what I would find very difficult to impose it.**
>
> And for that, that's clearly a race-neutral reason.
>
> THE COURT: I've looked at this, and **I saw where in answer to Question No. 24 which says: Do you believe in the death penalty? He had checked no,** and then he had checked down below, Although I could not vote to impose the death penalty, I could vote to impose a sentence of life imprisonment without any possibility of parole in the proper circumstances.
>
> I think that he – I think there's good reason-neutral reasons for excusing him. I'm going to deny the Batson challenges to Juror No. 1 or No. 91. So the State has exercised its third peremptory challenge as to Badge No. 91.

VI AA 1207-1208 (emphasis added). Even had Appellant established a prima facie case, the State clearly provided a race-neutral reason for using their peremptory challenge on Juror No. 91. In his questionnaire, Juror No. 91 stated that he did not believe in the death penalty. VI AA 1208. Then, during the State's questioning of Juror No. 91, he explained that rehabilitation was more important for younger people because you can "coach the kid." I AA 129. As the State noted, Appellant was an eighteen-year-old defendant, and Juror No. 91 would have found it difficult to vote for the death penalty with this specific defendant. VI AA 1208. Therefore, even if Appellant did establish a prima facie case, the State provided a valid race-neutral reason for using the peremptory challenge. As such, the district court correctly denied Appellant's Batson challenge.

B. THE DISTRICT COURT DID NOT ERR BY PROVIDING THE JURY WITH A VIDEO OF MONICA MARTINEZ'S TESTIMONY

Appellant alleges that the district court erred by providing the jury with a video of Monica Martinez's testimony during the jury's deliberations. AOB, at 23-31. As Appellant concedes, he did not object to this during trial, and he is not entitled to relief absent a demonstration of plain error. AOB, at 25. To demonstrate plain error, Appellant must show: "(1) there was error; (2) the error is plain, meaning that it is clear under the current law from a casual inspection of the record; and (3) the

error affected [his] substantial rights." Jeremias v. State, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018).

Before the jury deliberated, the district court provided the jury with a jury instruction that states they are allowed to request a playback of trial testimony. Jury Instruction No. 52 provides:

> If, during your deliberations, you should desire to be further informed on any point of law or hear portions of the testimony, you must reduce your request to writing signed by the foreperson. The officer will then return you to court where the information sought will be given you in the presence of the defendants and their attorneys.
>
> The testimony in this trial was recorded. A playback of portions of the testimony is possible. However, playing back the testimony is time consuming and is not encouraged unless you deem it a necessity. Should you require a playback, you must carefully describe the testimony you want to hear so that the recorder can locate your request. Remember, the court is not at liberty to supplement the evidence.

XVI AA 3352. The district court also instructed the jury of this jury instruction before the parties closing arguments. XV AA 3119.

While the jury was deliberating, the jury requested the video of Monica Martinez's testimony. Before the jury read its verdict, the district court put the jury's request and the agreement of counsels on the record:

> THE COURT: Before the jurors come into the courtroom, I wanted to make a record on a couple of things that occurred while the jury was deliberating. I had talked to counsel on the phone and I just wanted to confirm their consent to what we did. On last Friday, I believe, I had a note from the jurors requesting the testimony of Monica Martinez, and after an – and it was unclear as to exactly what they wanted.
>
> I sent them a note which is now marked as Court's 16, asking them to – if what they wanted was the – was a

> certain day of testimony. They sent me back another note indicating they wanted two days of testimony. I had the recorder prepare disks with that testimony excluding any bench conferences and comments to the Court out of the presence of the jury.
>
> Those disks were provided to the jurors, I believe, this morning. And as I'm advised that they spent all morning seeing those disks, and they had a computer with a monitor and they were able to listen and view the testimony of Ms. Martinez.
>
> MR. LANGFORD: Your Honor, I just want to inquire if those disks will be made a court exhibit.
>
> THE COURT: I believe they are marked as –
>
> THE CLERK: Eighteen.
>
> THE COURT: They're court exhibits.
>
> MR. LANGFORD: Okay. Thank you. Thank you, Your Honor.
>
> THE COURT: And then today I received a note from the juror – jury asking for clarification on the special verdict section Count 5, which had multiple boxes to check. And I gave them a clarification, a letter which counsel are aware of which has been marked as Court No. 21. And I wanted to make sure on the record that this was all done with the consent of counsel.
>
> MR. DiGIACOMO: **That's correct, including the part where the Court decided to give the JAVS video of the testimony of Monica Martinez as opposed to bringing the jury in to view that in the courtroom. All parties agreed that they could receive the Court's exhibits and review that during the deliberation process at their leisure.**
>
> MR. LANGFORD: That's correct, Your Honor.
>
> MR. ORAM: That's correct, Your Honor.

XVI AA 3359-3360. As noted by defense counsel, all parties agreed to send the JAVS video to the jury to review during their deliberations. Therefore, the district court did not err by providing the testimony to the jury when they requested it and by following the jury instruction agreed to by both parties.

Appellant's only argument that providing the video to the jury was error is that it violated his rights under the Confrontation Clause. AOB, at 25. The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." U.S. Const. amend. VI. The United States Supreme Court has held that the Confrontation Claus bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 1365-66 (2004).

Here, it is unclear how providing the jury with the JAVS video of Monica Martinez's testimony violated his rights under the Confrontation Clause. Appellant was present during Monica Martinez's testimony and had the opportunity to cross-examine her. The video that the district court provided to the jury was the same testimony that Appellant, all parties, the judge, and the jury heard in open court. It was simply a replay of Monica Martinez's testimony that all the parties had heard before. Therefore, providing the jury with the JAVS video of Monica Martinez's testimony did not violate Appellant's rights under the Confrontation Clause.

Appellant also claims that the video was "not evidence, and was never admitted into evidence." AOB, at 30. However, it is unclear why Appellant does not consider the testimony of Monica Martinez evidence. Monica Martinez's testimony

is evidence that the jury was supposed to consider while deliberating. To the extent Appellant claims the JAVS video was not admitted into evidence, the disks of the JAVS video provided to the jury were admitted as Court Exhibit No. 18. XVI AA 3360. The district court did not err by providing the jury Monica Martinez's testimony after the jury requested to re-watch it, especially when all the parties agreed to send the JAVS video back to the jury and Jury Instruction No. 52 allowed the jury to re-watch it. Therefore, the district court did not err by providing the jury with a video of Monica Martinez's testimony.

C. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENTS

Appellant alleges that the State committed prosecutorial misconduct during its closing arguments, and that the district court erred by overruling defense counsel's objections. AOB, at 31. Specifically, Appellant complains about: (1) the State disparaging defense counsel, (2) the State noting the defense did not present a potential witness, and (3) the State's PowerPoint that contained a "circle of guilt." AOB, at 31-35.

This Court reviews claims of prosecutorial misconduct for improper conduct and then determines whether reversal is warranted. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). It reviews improper conduct claims for harmless error. Id. Where no objection was made at trial, the standard of review for prosecutorial misconduct rests upon defendant 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)). 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). Defendant 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.

In resolving claims of prosecutorial misconduct, this Court undertakes a two-step analysis: determining whether the comments were improper; and deciding whether the comments were sufficient to deny the defendant a fair trial. Valdez, 124 Nev. at 1188, 196 P.3d at 476. The standard of review for prosecutorial misconduct rests upon a defendant showing "that the remarks made by the prosecutor were 'patently prejudicial.'" Riker, 111 Nev. at 1328, 905 P.2d at 713; Libby, 109 Nev. at 911, 859 P.2d at 1054. This is based on a defendant's right to have a fair trial, not necessarily a perfect one. Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990).

This Court views the statements in context and will not lightly overturn a jury's verdict based upon a prosecutor's statements. Byars v. State, 130 Nev. 848, 865, 336 P.3d 939, 950-51 (2014). Notably, "statements by a prosecutor, in argument

… made as a deduction or conclusion from the evidence introduced in the trial are permissible and unobjectionable." Parker v. State, 109 Nev. 383, 392, 849 P.2d 1062, 1068 (1993) (quoting Collins v. State, 87 Nev. 436, 439, 488 P.2d 544, 545 (1971)). Further, the State may respond to defense theories and arguments. Williams v. State, 113 Nev. 1008, 1018-19, 945 P.2d 438, 444-445 (1997), receded from on other grounds, Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

With respect to the second step, this Court will not reverse if the misconduct was harmless error. Valdez, 124 Nev. at 1188, 196 P.3d at 476. The proper standard of harmless-error review depends on whether the prosecutorial misconduct is of a constitutional dimension. Id. at 1188-89, 196 P.3d at 476. Misconduct may be constitutional if a prosecutor comments on the exercise of a constitutional right, or the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. 124 Nev. at 1189, 196 P.3d 476-77 (quoting Darden, 477 U.S. at 181, 106 S. Ct. at 2471). When the misconduct is of constitutional dimension, this Court will reverse unless the State demonstrates that the error did not contribute to the verdict. Id. When the misconduct is not of constitutional dimension, this Court "will reverse only if the error substantially affects the jury's verdict." Id.

First, Appellant alleges the State committed prosecutorial misconduct during its rebuttal argument. During the State's rebuttal argument, the prosecutor told the jury:

> MR. DiGIACOMO: What happens in courthouses across America and what should be happening in this courtroom by a jury of 12 people is that it's a search for truth. And before about 20 minutes ago, that would seem to be what we were all doing here for the last four weeks.

XVI AA 3249. Defense counsel immediately objected, arguing that he was "disparaging counsel." Id. The district court judge responded by stating, "Please. Objection's overruled … Sit down." Id.

Appellant's only cites to one case, from the California Supreme Court, which states that it is improper to imply counsel was "personally dishonest." People v. Seumanu, 61 Cal. 4th 1293, 1338, 355 P.3d 384, 417 (2015); AOB, at 32. In Seumanu, the prosecutor told the jury that "defense counsel 'put forward' a sham," and even implied that defense counsel knew his defendant was guilty. Id. at 1338-39, 355 P.3d at 417-418. However, Appellant overlooks the fact the California Supreme Court held that despite the prosecutor making these two statements, they still did not prejudice the defendant. Id.

In our own jurisdiction, this Court held that a prosecutor's argument, "And what happened to this trial being a truth-seeking process. That kind of went out the door, didn't it? Defense counsel comes in with smoke screens and flat-out deception," was improper, but not prejudicial. Rose v. State, 123 Nev. 194, 210-211,

163 P.3d 408, 419 (2007). Additionally, this Court held that a prosecutor's statement that defense counsel "attempt[ed] to put up a smoke screen" was not improper considered in context with the entire argument. Graf v. State, 127 Nev. 1137, 2011 WL 1044640 at *2 (2011); see Knight v. State, 116 Nev. 140, 144-45, 993 P.3d 67, 71 (2000) ("A prosecutor's comments should be viewed in context, and a 'criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.'") (quoting Untied States v. Young, 470 U.S. 1, 11, 105 S. Ct. 1038 (1985)).

Here, taken in context, the prosecutor's statement was not improper and did not prejudice Appellant. As the prosecutor continued his rebuttal argument, he put the statement into context:

> MR. DiGIACOMO: The past 20 minutes Mr. Sgro got up here as opposed to two sides arguing an issue and suggested that the players themselves somehow are manipulating what happens with the 12 people to search for that truth. Certainly a jury system, that's all this is, 12 jurors decide what the truth is and then decide whether or not Ms. Weckerly and I can establish beyond a reasonable doubt that these two individuals committed the crimes that they are accused of.
>
> Mr. Sgro suggested to you that our version of events has to be true in order for you to convict the defendants. Really? That's not what your jury instructions say. Your jury instructions say if every material element of the offense is established, you convict these defendants. If they fired six shots, if they fired seven shots, if they fired 15 shots, if someone got murdered and they're the perpetrators, you convict them.

XVI AA 3249-50. The prosecutor was explaining that the jury is supposed to follow the jury instructions, not disparaging counsel as Appellant claims. Therefore, taken

in context, Appellant cannot demonstrate that this so infected the jury and prejudiced him to warrant reversal.

Second, Appellant alleges the State committed prosecutorial misconduct by "accus[ing] the defense of failing to present a potential witness, Ulonda Cooper." AOB, at 32. To support this claim, Appellant cites to case law that states it is, "generally improper for a prosecutor to comment on the defense's failure to produce evidence or call witnesses." Whitney v. State, 112 Nev. 499, 502, 915 P.2d 881, 882-83 (1996); AOB, at 32-33. However, Appellant overlooks the fact that the State was not commenting on the defense's failure to produce the witness. Instead, the State was responding to defense counsel's own closing argument relying on Ulonda Cooper's statement to the police, after she did not testify at trial. See Williams, 113 Nev. at 1018-1019, 945 P.2d at 444-45.

During defense counsel's closing argument, he stated:

> [MR. SGRO]: According to Detective Bunting, I was garbage in, garbage out; that's what Ulanda Cooper told me; I never got her taped statement; that's what she told me and I just put it in there.
>
> …
>
> And you know what the most ironic thing about his, Ulonda Cooper was right. She was right. It is because of her that they found the gun. Why is it fair? Why is it fair that Ulonda Cooper gets to be right about the gun and about finding the gun, but she has to be wrong about the rest of her statement? Isn't that picking and choosing from the case, and that – does that help or hurt when they tell you we've proven all this?

XV AA 3231-3232. Then during the State's rebuttal argument, because defense counsel brought up Ulonda Cooper's statement to Detective Bunting, the prosecutor reminded the jury that Ulonda Cooper did not testify:

> [MR. DiGIACOMO]: Baby Job-Loc. Once again, the suggestion that he's associated with Baby Job-Loc, how is that relevant? Is there any evidence whatsoever that Baby Job-Loc could even be the shooter in this case? He doesn't match the physical description in the least bit, he's not on any video, his cell phone records don't seem to be connecting with – with Job-Loc at the time that the crime committed. There's no connection whatsoever to him other than Ulonda Cooper. Oh, wait, we didn't hear from Ulonda Cooper. She's not a witness in this case. Did you assess Ulonda Cooper's credibility?
>
> MR. ORAM: Objection. Burden shifting. That's burden shifting. We didn't hear from Ulonda Cooper is implying that we had a duty to call a witness. So I object.
>
> THE COURT: You don't have a duty to call witnesses.
>
> MR. DiGIACOMO: They don't have a duty. But they certainly want them to rely upon Ulonda Cooper's statement that's relayed by Detective Bunting –
>
> THE COURT: All right.
>
> MR. DiGIACOMO: -- in a police report.
>
> THE COURT: Objection – go ahead.
>
> MR. DiGIACOMO: Thank you. How do you assess that woman's credibility? How do you know if she was telling the truth or not telling the truth? …

XVI AA 3272-3273.

While Appellant claims that the prosecutor's argument regarding Ulonda Cooper's statement to Detective Bunting was "burden shifting," the State was actually responding to counsel's closing argument regarding Ulonda Cooper's statement. Defense counsel brought up her statement themselves in closing, and the

State is allowed to respond to defense counsel's closing arguments in rebuttal. Therefore, the State did not commit prosecutorial misconduct by responding to defense counsel's closing argument during the State's rebuttal.

Third, Appellant alleges the State committed prosecutorial misconduct during its rebuttal argument by using a PowerPoint that contained a "circle of guilt." AOB, at 33. During defense counsel's closing argument, he used what he described as a "circle of coincidence" for Job-Loc. XV AA 3186. While displaying his "circle of coincidence" to the jury, he explained, "And I'm going to show you just how guilty – guilty as heck he is. Guilty of murder. Not this nonsense they're charging." XV AA 3186. He also stated, "if you say that man in that circle of coincidence [Job-Loc] demonstrates his guilt, then you should find him [Appellant] not guilty." XV AA 3195. Even though counsel called this a "circle of coincidence," it was clearly a circle of guilt for Job-Loc.

Following defense counsel's "circle of coincidence," the State during rebuttal used a "circle of guilt." XVI AA 3285. Defense counsel immediately objected, arguing that this Court has found that using "guilt" with a defendant is reversible error. XVI AA 3285. Defense counsel was referring to Watters v. State, 129 Nev. 886, 313 P.3d 243 (2013), when objecting to the "circle of guilt."

"A prosecutor may use PowerPoint slides to support his or her opening statement so long as the slides' content is consistent with the scope and purpose of

opening statements and does not put inadmissible evidence or improper argument before the jury." Watters, 129 Nev. at 890, 312 P.3d at 247. In Watters, the prosecutor orally declared the State would be asking the jurors to find the defendant guilty, accompanied by a PowerPoint slide that displayed the defendant's booking photograph with the label "GUILTY." Id. "The prosecution could not *orally* declare the defendant guilty in opening statement … allowing prosecutors to use booking photos with 'guilty' written across them during opening statement does not serve an essential state interest." Id. at 891, 312 P.3d at 248. Thus, using a PowerPoint slide during opening statements with the defendant's booking photo and the word "guilty" undermines the presumption of innocence. Id.

In the instant case, the State was very clear about abiding by this Court's holding in Watters, by using the "circle of guilt" in its rebuttal closing argument and not opening statement. In fact, defense counsel had a PowerPoint slide that said "doubt equals not guilty" in his opening statement. VII AA 1482. The State noted:

> MS. WECKERLY: Mr. Sgro's last Powerpoint slide, which we'd like a copy of, entered into evidence, the whole Powerpoint, it says, doubt equals not guilty. The State has recently had a case reversed by the Nevada Supreme Court when we put the word "guilty" in an opening statement slide. The Nevada Supreme Court said that was improper. I would assume the same rules apply to the defense. So I would hope that Mr. Langford, if he has a Powrpoint, doesn't say the same thing.

VII AA 1482.

The State specifically noted this Court's holding in Watters and refrained from using the "circle of guilt" in opening statement and used it in rebuttal. While Appellant argues that this Court in Watters did not explicitly state the decision only applies to opening statements, this Court did explicitly state that an opening statement "outlines what evidence will be presented" and its purpose is to "acquaint the court and jury with the nature of the case." 129 Nev. at 889-890, 313 P.3d at 247. This Court made the proper distinction between an opening statement, and a closing *argument*. Thus, using the "circle of guilt" in the State's closing rebuttal argument was not reversible error.

Regardless, even if this was error, or the prosecutor's two statements were error, the error was harmless. Under NRS 178.598, any "error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Non-constitutional trial error is reviewed for harmlessness, based on whether the error had substantial and injurious effect or influence in determining the jury's verdict. Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008). On the other hand, constitutional error is evaluated by the test laid forth in Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828 (1967). The test under Chapman for constitutional trial error is "whether it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" Tavares v. State, 117 Nev. 725, 732 n.14, 30 P.3d 1128, 1132 n. 14 (2001).

Appellant cannot demonstrate that the two statements had substantial and injurious effect or influence in determining the jury's verdict. Even if the first statement was error, where the State instructed the jury to follow the jury instructions, telling the jury to follow jury instructions did not have an injurious effect to the jury's verdict. And even if the second statement was error, where the State responded to defense counsel's closing argument regarding Ulonda Cooper, it also did not have such an injurious effect to impact the verdict. Therefore, even if these statements were error, the error was harmless.

Moreover, Appellant cannot demonstrate that the PowerPoint slide so infected the trial with unfairness that his due process rights were denied. Valdez, 124 Nev. at 1189, 196 P.3d 476–77. Thus, the correct analysis is whether "the error substantially affect[ed] the jury's verdict." Id. Appellant has not demonstrated that this was so. In Watters, this Court found the "Guilty" PowerPoint slide error in opening statements was not harmless because, "Routinely allowing prosecutors to use PowerPoint slides during opening that label the defendant guilty carries a genuine risk of unfair bias, in part because '[h]ighly prejudicial images may sway a jury in ways that words cannot.'" 129 Nev. at 893, 313 P.3d at 249 (internal citations omitted). The same cannot be said here with the prosecutor, who argued there was a "circle of guilt" establishing Appellant was guilty during closing rebuttal *argument*. Thus, this claim is without merit.

D. THE DISTRICT COURT DID NOT ERR BY DENYING APPELLANT'S PRETRIAL MOTION IN LIMINE #1

Appellant alleges that the district court erred by not suppressing D.N.'s identification of him because it was too speculative. AOB, at 35. Prior to trial, Appellant filed Motions in Limine #1-3. I AA 013-046. Motion in Limine #1 claimed that the six-pack lineup was unnecessarily suggestive and unreliable. I AA 018-020. Following a hearing on October 20, 2014, the district court denied Appellant's Motions in Limine #1-3. I AA 054-094. In his Opening Brief, Appellant only argues that the district court erred in denying Motion in Limine #1, for not suppressing the photo lineup. AOB, at 35-39.

This Court reviews "a district court's decision to admit or exclude evidence for an abuse of discretion." Mclellan v. State, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008); Thomas v. State, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006). A pretrial identification by photograph will be set aside only if the photographic identification procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Odoms v. State, 102 Nev. 27, 30-31, 714 P.2d 568, 570 (1986) (quoting Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 971 (1968)). This Court has found that a photographic lineup is not impermissibly suggestive when the lineup consists of individuals who match the victim's general description of their assailant. Id.; Thompson v. State, 125 Nev. 807, 814, 221 P.3d 708, 713 (2009).

Before trial, Appellant complained that the photo lineup was suggestive because of the different color backgrounds in all six lineup photos. I AA 018-020, 070-072. Four of the individuals had blue backgrounds, and two of the individuals had "tan or brown" backgrounds. I AA 072. Appellant argued that this made the photo lineup suggestive, and that "D.N. picked from two photos and not six." AOB, at 38. At a hearing on Motion in Limine #1, the district court found:

> THE COURT: All right. Well, in looking through the photo lineup, it is a little bit different that two people are – have brown backgrounds whereas the other four have blue backgrounds. But – and I would be a lot more concerned if the defendant were the only person with a brown background, but there's at least one other person with a brown background, and they're arranged such that the entire middle column is essentially a brown background.
>
> Referring to the bushy hair, I mean, of the six people in the photo lineup, five of them have bushy hair. There is one person who has – it looks like, I can't tell quite if they're braids or if it's just more of an unkempt kind of thing, and I'm referring to number two. The copy – I have two copies here of varying quality, and it's kind of hard to tell, but there's at least some business to it.
>
> But anyway, so my point is, I would be a lot more concerned if the defendant were the only person with the brown background. There's a ton of case law that that's almost presumptively illegal. But in this one you have six photos arranged by column. Two of the columns you can have the blue backgrounds. The middle column is the brown backgrounds. I'm not sure I agree with you that this is unduly suggestive in the sense of, you know, when I was looking through this, I'm not sure that my eye was necessarily drawn to any particular column given the way that it's arranged.
>
> If it were arranged more asymmetrically, I – I think I'd be a lot more inclined to have some concerns about this, but the way it's arranged it's kind of symmetrical. And I know it's hard – I don't – I don't know if it's – if I'm putting this on the record very clearly so that anyone reading this would understand, it's sort of hard to describe when you're talking about arrangements of photos. But given that it's symmetrical and there's more than one person with a

> brown background, I'm not sure that I agree with Mr. Sgro, so based on that the motion is denied.

I AA 073-074.

As the district court properly noted, just because the backgrounds in the six photos were different does not make it overly suggestive. There is no reason that the two of the photos with brown backgrounds were more suggestive than the photos with blue backgrounds. Appellant cannot establish that the photo lineup was so impermissibly suggestive to give rise to a very substantial likelihood of irreparable misidentification. Odoms, 102 Nev. at 30-31, 714 P.2d at 570. Therefore, the district court did not err by denying Appellant's Motion in Limine #1 and allowing the photo lineup to be introduced at trial because it was not impermissibly suggestive.

E. APPELLANT'S SENTENCE IS NOT UNREASONABLE OR UNCONSTITUTIONAL

Appellant alleges that his sentence is "unreasonable or unconstitutional, particularly where Burns was only 18 years of age at the time of the offense and suffers from cognitive deficiencies … including Fetal Alcohol Syndrome (FAS)." AOB, at 39-40.

A sentencing judge is permitted broad discretion in imposing a sentence and, absent an abuse of discretion, the district court's determination will not be disturbed on appeal. Randell v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993) (*citing* Deveroux v. State, 96 Nev. 388, 390, 610 P.2d 722, 723-724 (1980)). As long as the sentence is within the limits set by the Legislature, a sentence will normally not be

considered cruel and unusual. Glegola v. State, 110 Nev. 344, 348, 871 P.2d 950, 593 (1994). A sentence will not be deemed cruel and unusual if it is within the statutory range unless the statute fixing the punishment is unconstitutional, or the sentence is so unreasonably disproportionate to the offense as to shock the conscience. Chavez v. State, 125 Nev. 328, 348, 213 P.3d 476, 489 (2009); Allred v. State, 120 Nev. 410, 420, 92 P.2d 1246, 1253 (2004). A punishment is considered "excessive" and unconstitutional if it: "'(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."' Pickard v. State, 94 Nev. 681, 684, 585 P.2d 1342, 1344 (1978) (quoting Coker v. Georgia, 433 U.S. 584, 592, 97 S. Ct. 2861, 2865 (1977)).

Here, Appellant's sentence falls within the statutory range and is not out of proportion to the severity of the crime. As discussed supra, Section I., Appellant agreed to his sentence of life without the possibility of parole by signing the Stipulation and Order on February 9, 2015. Appellant *agreed* to his sentence of life without the possibility of parole, but now complains it is unreasonable and unconstitutional. The sentence of life without the possibility of parole falls within the statutory range for the crime of First Degree Murder. NRS 200.030(4)(b)(1). Thus, Appellant cannot demonstrate that his sentence is unreasonable or

unconstitutional when he stipulated to it and it falls within the statutory range of punishment.

Appellant argues that he should be "resentenced at which time life without possibility of parole should not be a sentencing option" because he was eighteen years old at the time of the offense. AOB, at 40, 49. The United State Supreme Court has held, "[M]andatory life without parole for those *under the age of 18* at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" Miller v. Alabama, 567 U.S. 460, 465, 132 S. Ct. 2455, 2460 (2012) (emphasis added). Appellant claims that "Nevada's federal judiciary is at least open to the argument that 18-year-old offenders should receive the protections identified in Miller." AOB, at 44. Appellant is asking this Court to not abide by Untied States Supreme Court precedent, which specifically states that Miller only affords protections do defendants under the age of 18. Put simply, Miller does not apply to Appellant, and this claim is without merit.

Moreover, Appellant alleges his sentence is unreasonable and unconstitutional because of his Fetal Alcohol Syndrome (FAS). Prior to Appellant's sentencing, he filed a Sentencing Memorandum discussing his FAS. Appellant's Sealed Appendix ("ASA"), at 001-054. At sentencing, the district court noted that it read the Sentencing Memorandum and took it into consideration before imposing the sentence. XVI AA 3372-3374. The only argument at sentencing was whether to run

the counts consecutive or concurrent because the parties stipulated to life without the possibility of parole. XVI AA 3373. Appellant acknowledges this was the agreement of counsel, but that sentencing was up to the district court. AOB, at 40. Appellant provided the district court with the Sentencing Memorandum containing information regarding his FAS, and the district court still decided to follow the stipulation of both parties. The district court contemplated the seriousness of the offense as well as the surrounding facts of the case. Therefore, Appellant cannot demonstrate how having FAS makes his sentence unreasonable or unconstitutional.

In sum, Appellant's sentence comports with the Eighth Amendment, the statutory authority, and ultimately, the facts of this case. Therefore, Appellant's sentence is not unreasonable or unconstitutional.

CONCLUSION

Wherefore, the State respectfully requests that Appellant's Judgment of Conviction be AFFIRMED.

Dated this 12th day of October, 2020.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney

BY */s/ Alexander Chen*
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
Office of the Clark County District Attorney

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 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 12,640 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 12th day of October, 2020.

Respectfully submitted

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Alexander Chen*
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on October 12, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

JAMIE J. RESCH, ESQ.
Counsel for Appellant

ALEXANDER CHEN
Chief Deputy District Attorney

/s/ E. Davis
Employee, Clark County
District Attorney's Office

AC/Brianna Stutz/ed