IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Oct 12 2020 01:53 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

DAVID BURNS,
Appellant,

v.

THE STATE OF NEVADA,
Respondent.

Case No. 80834

RESPONDENT'S APPENDIX

JAMIE J. RESCH, ESQ., 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
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
State of Nevada

AARON D. FORD
Nevada Attorney General
Nevada Bar #0007704
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

INDEX

Document Page No.

Court Minutes, 3/30/17 119

Court Minutes, 4/17/18 208

Findings of Fact, Conclusions of Law and Order, 3/21/16..... 105-113

Findings of Fact, Conclusions of Law and Order, 10/25/18..... 209-236

Motion to Appoint Counsel, 10/13/15 30-34

Nevada Supreme Court Order, 2/17/17 114-118

Nevada Supreme Court Order, 1/23/20 239-249

Notice of Appeal, 3/11/16..... 102-104

Notice of Appeal, 11/8/18..... 237-238

Pro Per Petition for Writ of Habeas Corpus, 10/13/15 1-23

Reply, 2/6/18..... 197-207

Request for Evidentiary hearing, 10/13/15 24-29

State's Response to Petition for Writ of Habeas Corpus, 1/26/16..... 35-101

State's Response to Supplemental Petition for Writ Of Habeas Corpus, 1/16/18..... 166-196

Supplemental Petition, 11/27/17..... 120-165

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

BY *<u>/s/ E. Davis</u>*
Employee, District Attorney's Office

AC/Brianna Stutz/ed

25

Case No. C-10-267882-2
Dept. No. 20

IN THE 8th JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF Clark

FILED
OCT 13 2015
CLERK OF COURT

David Burns
Petitioner,

v.

State of Nevada
Respondent.

PETITION FOR WRIT
OF HABEAS CORPUS
(POSTCONVICTION)

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you are not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.

(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: High Desert State Prison

2. Name and location of court which entered the judgment of conviction under attack: 8th judicial district Dept 20

3. Date of judgment of conviction: April 23, 2015

4. Case number: ~~[illegible]~~ C-10-267882-2

5. (a) Length of sentence: Life Without parole, 8-20, 8-20, 1-5

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C-10-267882-2
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23

(b) If sentence is death, state any date upon which execution is scheduled:....

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion?

Yes ..... No ..✓.....

If "yes," list crime, case number and sentence being served at this time: ~~Murder, Robbery, Burglary, Attempted~~

1.....

.....

7. Nature of offense involved in conviction being challenged: Murder, Robbery, Attempted Murder, Burglary, Substantial bodily harm, Conspiracy Murder, Conspiracy Attempt Murder, Conspiracy Robbery

8. What was your plea? (check one)

(a) ✓ Not guilty .....

(b) Guilty .....

(c) Guilty but mentally ill .....

(d) Nolo contendere .....

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: .....

.....

10. If you were found guilty or guilty but mentally ill after a plea of not guilty, was the finding made by: (check one)

(a) Jury .....

(b) Judge without a jury .....

11. Did you testify at the trial? Yes ..... No ..✓....

12. Did you appeal from the judgment of conviction? Yes ..... No ..✓....

13. If you did appeal, answer the following:

(a) Name of court: .....

(b) Case number or citation: .....

(c) Result: .....

(d) Date of result: .....

(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not: Attorney told me to waive my rights to appeal, but didn't tell me that the court likes certain issues brought up through direct appeal instead of Habeas

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes ..... No ✓

16. If your answer to No. 15 was "yes," give the following information:

(a) (1) Name of court: .....

(2) Nature of proceeding: .....

.....

(3) Grounds raised: .....

.....

.....

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ..... No .....

(5) Result: .....

(6) Date of result: .....

(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

.....

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: .....

(2) Nature of proceeding: .....

(3) Grounds raised: .....

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ..... No .....

(5) Result: .....

(6) Date of result: .....

(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

.....

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion? Yes ..... No ✓.....

Citation or date of decision: .....

(2) Second petition, application or motion? Yes ..... No .....

Citation or date of decision: .....

(3) Third or subsequent petitions, applications or motions? Yes ..... No .....

Citation or date of decision: .....

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.).....

.....

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other postconviction proceeding? If so, identify:

(a) Which of the grounds is the same: .....

.....

(b) The proceedings in which these grounds were raised: .....

.....

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) .....

.....

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) .....

.....

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) .....

.....

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ..... No ..✓....

If yes, state what court and the case number: .....

.....

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: ..Christopher Oram and Anthony Sgro.....

.....

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes ..... No ..✓.....

If yes, specify where and when it is to be served, if you know: .....

.....

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) Ground ONE: Prosecutorial Misconduct

Supporting FACTS (Tell your story briefly without citing cases or law.): On August 8th 2010 Detective Bunting gave an interview to Devonia Newman at UMC. Devonia Newman a 12 year old minor at the time of the interview, should of had a nurse or any type of adult in the room during the interview. The interview, which starts with Ms. Newman and Dt. Bunting already talking before being recorded, was coerced. Devonia Newman made the same mistakes in clothing that Stephanie Cousins did a day before. After defendants arrest in San Bernardino, CA, a six pack lineup was done. Devonia Newman supposedly picked defendant out with 10% surety. 4 years later, when interviewed by Christopher Oram, Anthony Sgro, and private investigator, Ms. Newman states that "words where put in my mouth" by detectives. Ms. Newman also states that how can someone pick out of a facial lineup if they wore a mask or bandana over there face. Ms. Newman drew a picture of a person wairing a mask of bandana and a hat worn low over there face. Ms. Newman also wrote "words where put in my mouth" by detectives on a piece of paper. It was entered as Defence CC. There was obvious misconduct done in this case that prejudiced me from a fair trial. Dt. Bunting no longer works with Metro Homicide after a 4 or 5 year run. I ask that the court recognize this as misconduct and due to this I was not given a fair trial. Due to the prosecutors knowing of this and going forth with it. I was not presented with the right to be informed of the nature of the accusation.

(b) Ground TWO: Prosecutorial Misconduct

Supporting FACTS (Tell your story briefly without citing cases or law.): Devonia Newman stated to Attorney Christopher Oraman and Anthony Sgro in front of a private investigator, that she told Marc Diagicomo that she had words put in her mouth when she reviewed her statement. She also said when she told Diagicomo of person wearing a mask or bandana, she was told dont worry about it and dont bring it up. When defence attorney Anthony Sgro tried to present hand written statement and drawn mask by Devonia Newman, Marc Diagicomo tried to not have it entered into evidence. Upon hearing this from Devonia Newman and not reporting it, prosecutors where in violation of my due process rights. This was a violation of my Sixth amendment right to be informed of the nature of the accusation. Due to this I ask that the court recognize this grand as prosecutorial misconduct and that this conviction due to this case be given back

Thank you!

(c) Ground THREE: Prosecutors shocking and outrages conduct

Supporting FACTS (Tell your story briefly without citing cases or law.): During the cross-examination of the states witness, Marc Diagicomo was observed loudly going through folders. Doing this he was purposely trying to get the attention of closest jurors. Once Marc Diagicomo had there attention he would state watch this wait until you see this. This action was brought up by Anthony Sgro, but nothing further was done of this. This action of taking away the jurors attention at a crucial time during trial, which was done more than once, prejudiced me of having a fair trial. Due to this I ask that my conviction be given back.

(d) Ground FOUR: Ineffective assistance of counsel for failing to object and raise ground on direct appeal

Supporting FACTS (Tell your story briefly without citing cases or law.): On the first day of co-defendant Monica Martinez's testimony, her attorneys where in the back of the court coaching Ms. Martinez through questions she got stuck on in cross-examination. When Ms Martinez would get stuck, her attorneys would give yes or no head nods, or finger jesters done under their chins in open court. This was seen by both defendants at defence table. Ms Martinez would get caught in a question given by Christopher Oram, then look around then look back at her attorneys who would help her out. This was brought to the attention of Willie Mason's counsel Robert Langford. When this was seen by Mr. Langford, he brought a huddle to the bench to bring this issue to the judge. The judge said he would look out for it, but the damage was done. Attorney Christopher Oram mentioned to me that he reviewed the camaras during lunch break and seen this, but nothing was done of this. There was no objection raised by attorneys. This open and obvious coaching done by co-defendants attorneys in court prejudiced me of a fair trial. Attorneys did not raise any objection. Due to this I ask that Ineffective assistance of counsel be found on Christopher Oram and Anthony Sgro for not objecting or raising on direct appeal. Thank you!

Ground 5 Five: Ineffective Assistance failure to raise on direct appeal

Supporting FACTS (Tell your story briefly without citing cases or law) On August 8th 2010 Detective Bunting gave an interview to Devonia Newman at UMC. Devonia Newman a 12 year old minor at the time of the interview, should of had a nurse or any type of adult in the room during the interview. The interview, which starts with Ms. Newman and Dt. Bunting already talking before being recorded, was coerced. Devonia Newman Made the same mistakes in clothing that Stephanie Cousins did a day before. After defendants arrest in San Bernardino, CA, a six pack line-up was done. Devonia Newman supposedly picked defendant out with 10% surety. 4 years later when interviewed by Christopher Oram, Anthony Sgro, and private investigator, Devonia states that words where put into her mouth by detectives, Ms. Newman also states that how can ~~someone~~ she pick someone out of a line-up if the person who did it wore a mask or bandana over there face. Ms. Newman drew a picture of a parson wairing a mask of bandana and a hat worn low over there face. Ms. Newman also wrote "words where put in my mouth" by detectives on a piece of paper. It was entered as Defence CC. There was obvious misconduct done in ~~that~~ this case that prejudiced me from a fair trial. Dt. Bunting no longer works with Metro Homicize after a 4 or 5 year run. I ask that the court recognize this as ineffective assistance of counsel for Christopher Oram and Anthony Sgro not raising it on direct appeal or even informing me of my right to direct appeal even though rights where waived.

Ground six: Ineffective assistance of counsel failure to raise issue on direct appeal

Supporting FACTS (Tell your story briefly without citing cases or law) Devonia Newman stated to Attorney Christopher Oram and Anthony Sgro in front of private investigator that she told Marc Diagicomo that she had words put in her mouth when she reviewed her statement. She also said when she told Diagicomo of person wairing mask or bandana, she was told "dont worry about it and dont bring it up". When Defence attorney Anthony Sgro tried to present hand written statement and drawn mask done by Devonia Newman, Marc Diagicomo tried to not have it entered into evidence. Upon hereing this and not reporting this as an officer of the court, prosecutor Marc Diagicomo was in violation of defendants due process rights. Anthony Sgro and Christopher Oram failed to raise this or any issue what so ever on direct appeal. After closing arguements, Anthony Sgro was never seen again by defendant and was never told of direct appeal even though rights where waived. Attorneys knew of defendants desires of appeal from convirsations had before and during trial. I ask that the court recognize this ground as ineffective assistance of counsel for failure to raise issue on direct appeal

Thank you

Ground 7 Seven: Ineffective assistance of counsel failure to raise mental disabilities for removal of death penalty

Supporting FACTS (Tell your story briefly without citing cases or law) Attorney Anthony Sgro argued for removal of the death penalty some time in 2012 in front of Judge Jerome Tao. His full argument was on the cost of the death penalty. Not once did he or Christopher Oram argue or present any evidence of having defendant tested for brain issues and legal retardation. The issues Anthony Sgro raised went on deaf ears in front of Judge Tao. His presentation was not allowed to even be showed. If Anthony Sgro would of presented the evidence of defendants mental issues, which are Fetal Alcohol Syndrome and Neurological brain ~~[illegible]~~ development issues, the death penalty could have been tooken off. Mr. Sgro spent $50,000 in testing and it was determined by Paul D. Conner PH.D, Nevada Imaging Center Phyician Norton A. Roitman, Natalie Novick Brown PHD, and Richard Adler PHD, that these brain issues are real. Adults with FAS typically function like children 7-8 years old. Presenting this to the courts could of removed the death penalty. I ask that ineffective assistance of counsel be found on Anthony Sgro for not presenting evidence of mental issues and brain damage to the court that could of removed the death penalty. I ask that ineffective assistance of counsel be found on Christopher Oram in knowing of these mental issues and filing nothing on behalf of defendant. For not presenting it to jurors when asked of any mental disabilities. When jurors asked this question it went unanswered. Due to this defendant was not given a fair trial.

Grand Eight: Ineffective assistance of counsel for not investigating the witness and destroying her credibility

Supporting FACTS (Tell your story briefly without citing cases or law) Defence counsel denied defendant of his right to effective assistance of counsel by presenting the testimony of Stephanie Cousins who was a co-defendant that made three damaging statements towards defendants defence. Christopher Oram offered statement taken on 9.30.10 as defence evidence. Mr. Oram used one line of the statement that stated "why did they call him Job loc." The rest of this statement was completely damaging and undermined the defence. Stephanie Cousins picked defendant out of a line up with 100% surety. Prosecutor Marc Diagicomo used this statement against defence. Stephanie Cousins never testified at trial. This statement was presented for the jury review. Marc Diagicomo used this statement in his closing. I was given no right to confront this witness, which is a sixth amendment violation. This right would of not been violated if not for the presenting of this statement by Christopher Oram. I ask that the court recognize this as ineffective assistance of counsel.

Thank you!

Ground Nine: Ineffective assistance of counsel. Failure to raise any grounds or put forward a direct appeal even though rights to appeal where waived. Failure to inform of right to direct appeal

Supporting FACTS (Tell your story briefly without citing cases or law) During trial Attorney Christopher Oram came to defendant and told defendant of a deal to drop the death penalty. Mr. Oram informed me that if I wheir to agree to automatic life without parole with no right to appeal if found guilty of first degree murder. I asked and spoke to him about my right to appeal. Mr. Oram informed me that I would still have Habeas Corpus Post Conviction to go off of. This deal was taken before a turning point in trial. Before trial, appeals where spoken about with both attorneys. Mr. Oram informed me that if which "was a small chance in his eyes" that we lost trial, he would show me how to file Habeas. If it would of been my knowledge that atlornies can still file direct appeal, I would of asked for them to file. It was never brought to my attention that the courts like certain issues filed on direct appeal. After being found guilty on all charges Mr. Sgro was never seen again. Mr. Oram only came down to county jail upon my request. I still had to make another call to his secretary for a Habeas corpus post conviction packet, and was given no further instructions. Due to Christopher Orams bad advise and promising of showing defendant how to file Habeas, and also in promising if deal was taken then Stephanie Gousins wouldn't testify, but turns right around and presents her statement, I ask that ineffective assistance of counsel be found.

Thank you!

Ground Ten: Prosecutorial misconduct for injecting his own opinion and facts not in evidence

Supporting FACTS (Tell your stor briefly without citing cases or law)

On the last day of trial in closing arguements, Marc Diagicomo brings up a background noise of a whistle heard during a 911 call. Then Mr. Diagicomo proceeds to inject his own theory of how the jury can here the same whistle being made in defendants 9·13·10 statement. This whistle very well could of been a back ground noise from other inmates or ~~guards~~ guards in the CDC county jail of San Bernardino. There was no surveillance done in this interview, due to lack of technology in this San Bernardino jail. Never once in the statement or on the stand, did the detectives say anything about whistling. There was times in the statement where humming and even singing was going on, but no whistling. When humming and singing started, detectives commented on it and asked defendant to stop humming and stop singing. If defendant made any whistling in this small inclosure, it would of been brought up like every other action of the defendant. By being the last person to argue, Marc Diagicomo had the last words said to the jury and these last words where not of evidence, but of something he made up on his own. Due to this I was not given a fair trial. My sixth amendment right was violated by Marc Diagicomo, by not giving me the right to confront or to be informed of this accusation. Due to this I ask that my sentence be given back on the ground of prosecutorial misconduct.

Thank you!

Ground Eleven: Ineffective assistance of counsel for failure to object to the prosecutor injecting his own opinion on facts not in evidence. Failure to raise on direct appeal

Supporting FACTS (Tell your story briefly without citing cases or law)
On the last day of trial in closing arguements, Marc Diagicomo brings up a background noise of a whistle heard during a 911 call. Then Marc Diagicomo proceeds to inject his own theory of how the jury can here the same whistle being made in defendants 9-13-10 statement. This whistle very well could of been a background noise from other inmates or guards in the CDC county jail of San Bernardino. There was no surveillance in this interview, due to lack of technology in this San Bernardino jail. Never once in the statement or on the stand, did detectives say anything about whistling. There was times in the statement where humming and singing even started, detectives commented on it and asked defendant to stop humming and singing. If defendant made any whistling in this small inclosing, it would have been brought up like every other action of the defendant. By being the last person to argue, Marc Diagicomo had the last words said to the jury, and these last words where not of evidence, but of something he made up on his own. There was no objection raised by Christopher Oram or Anthony Sgro. They let these last character damaging comments go right over and raised no type of protest. These where the last words uttered to the jury before the judge sent them into deliberation. Due to Christopher Oram and Anthony Sgro not objecting to the prosecution injecting his own opinion on facts not in evidence, I ask that Ineffective assistance of counsel be found. Due to not raising this issue on direct appeal I ask that ineffective counsel be found. Thank you!

Ground Twelve: Prosecutor Marc Diagicomos gross & shocking misconduct of misleading and lying to the jury.

Supporting FACTS (Tell your story briefly without citing cases or law) Prosecutor Marc Diagicomos gross and shocking misconduct of leading and lying to the jury is a common occurance in the Clark County courtrooms. See Manuel Tarango vs. State of Nevada (2005) Mr. Diagicomo used Metro officers to threaten juror. Franklin Jackson vs. State of Nevada (2014) Prosecutor Diagicomo paying witnesses out of a personal account (not reported to the state) and not telling the defence. Shawn Pritchett vs. State of Nevada (2010) Prosecutor Marc Diagicomo, Henderson Police Department detective Michael Condratavich fabricated historical cell site evidence. Used it in grand jury, then changed it in trial. There are several investigations running on this case.

Prosecutor Marc Diagicomos antics run the courtrooms. The cumulative effect on this trial is no different. The fabrication of cell site evidence being presented to the grand jury as an exibit, not reporting victim Devonia Newmans claim that assailant wore mask or bandana and having been coerced, trying and succeeding in getting attention of closest jurors during cross-examination of states witness and mouthing loud enough to be heard by jurors watch this, and making up facts not in evidence such as his mystery whistle, has to stop. When is this courtroom gonna take control back. Instead of focusing on the political career.

Ground Thirteen: Ineffective assistance of trial counsel failure to object at trial. Failure to cross examine detectives lie. Failure to bring up mental issues

Supporting FACTS (Tell your story briefly without citing cases or law) In the grand jury indictment on October 12th, 2010, Prosecutor Pam Weckerly was in the middle of questioning Detective Marty Wildemann of the Metro homicide unit, when the question comes up of mental issues. Pam Weckerly asks Dt. Wildemann "was there a point in time where you actually asked him (meaning defendant David Burns) whether or not he had any mental problems or any diagnosis of mental problems?" Dt. Wildemann's reply was "I asked him if he was mentally handicapped and he said no." Yet in questioning dated 9/13/10, the answer was, but at later point in questioning there is admittance of mental issues by defendant says "I think I gots mental problems". Dt. Wildemann's response was "You think you gots mental problems. Well you know how to do a robbery motherfucker. You know that? You didn't have mental problems then". This statement by detective Wildemann shows that he knows defendant has mental issues, yet when asked of question by Pam Weckerly he answered no. It is known by attorney Christopher Oram and Anthony Sgro of defendants mental issues, yet no cross-examination was given about this lie that detectives told and prosecution presented at grand jury. Stephanie Cousins testimony or statement was used in grand jury but she did not testify to any of it at trial. This was not brought up by attorneys in a motion or verbally by attorneys. Detectives presented things she said as truth, but none of this was sworn under oath on the stand. I ask that ineffective assistance of counsel be found on Christopher Oram and Anthony Sgro.

Ground Fourteen: Prosecutorial misconduct for fabricating cell site evidence and presenting it in grand jury exibit.

Supporting FACTS (Tell your story briefly without citing cases or law) Prosecutors Marc Diagicomo and Pam Weckerly presented fabricated cell site evidence against defendant in the grand jury indictment exibits. This was brought to my attention by Christopher Oram. There was suppose to be no cell phone associated with me what so ever. There was no phone linked to me or these crimes in my ~~possession~~ possession. There for anything associating my name with a phone is a fabrication of evidence. Specially if it is presented to a grand jury for indictment.

Ground Fifteen: Prosecutorial Misconduct ~~for~~ for state hiding 911 call. Brady violation.

Supporting FACTS (Tell your story briefly without citing cases or law)

On Feburary 6th 2015 in the middle of trial, Marc Diagicomo presents a 911 call from daughter of Stephanie Cousins, as states evidence. It was argued infront of Judge Tao atleast twice, about Marc Diagicomo hiding evidence in the past. Judge Tao ordered Prosecutors Marc Diagicomo and Pam Weckerly turn over everything they have in a timely fashion. Attorney Anthony Sgro and Christopher Oram went down to D.A's office atleast twice to review D.A's Murder file. Not once did they stumble accross this hidden tape. Defence attorneys were given no time before trial to listen or prepare for 911 phone call tape. Numerous times Marc Diagicomo lied in open court and told Judge Thompson that Defence has everything he has. Once again in this case we have Marc Diagicomo hiding something from Defence. This issue is an obvious Brady violation and I ask that the court recognize this ground of prosecutorial misconduct.

WHEREFORE, petitioner prays that the court grant petitioner relief to which petitioner may be entitled in this proceeding.

EXECUTED at **High Desert State Prison** on the ____ day of the month of _____, 20___.

David Burns 1139521
*

High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

VERIFICATION

Under penalty of perjury, the undersigned declares that the undersigned is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of the undersigned's own knowledge, except as to those matters stated on information and belief, and as to such matters the undersigned believes them to be true.

David Burns 1139521
*

High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

AFFIRMATION (Pursuant to NRS 239B.030)

The undersigned does hereby affirm that the preceeding PETITION FOR WRIT OF HABEAS CORPUS filed in District Court Case Number C-267882-2 Does not contain the social security number of any person.

David Burns 1139521
*

High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

CERTIFICATE OF SERVICE BY MAIL

I, David Burns, hereby certify pursuant to N.R.C.P. 5(b), that on this ____ day of the month of _____, 20___, I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS addressed to:

D.W. Neven, Warden High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070

Attorney General of Nevada
100 North Carson Street
Carson City, Nevada 89701

Clark County District Attorney's Office
200 Lewis Avenue
Las Vegas, Nevada 89155

David Burns 1139521
*

High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

* Print your name and NDOC back number and sign

David Burnes 1139521
High Desert State Prison
P.O. Box 650
Indian Springs, NV 89070

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Clerk of the 8th Judicial
District Court
200 Lewis Avenue-3rd floor
Las Vegas, NV 89155

Legal Mail

HIGH DESERT STATE PRISON
OCT 2 5 2015
UNIT 7

RA 000022

5% Jzelaya

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David Burns ID NO. 1139521
HIGH DESERT STATE PRISON
22010 COLD CREEK ROAD
POST OFFICE BOX 650
INDIAN SPRINGS, NEVADA 89070

David Burns In Proper Person

FILED
OCT 13 2015
CLERK OF COURT

8th Judicial District Court
County of Clark

State of Nevada,
Plaintiff,
vs.
David Burns,
Defendant,

CASE NO.: [redacted] C-10-267882-2
DEPT NO.: 20

DATE OF HEARING:
TIME OF HEARING:

COMES NOW, Burns, David, In Proper Person and Requesting the court give a evidentiary hearing on issues listed in writ of habeas corpus.

THIS _____, is made and based upon the attached Memorandum of Points and Authorities, all of the pleadings and other documents on file in this case, as well as _____.

DATED This 16 day of September, 20 15.

Respectfully submitted,

David Burns
ID NO. 1139521
David Burns In Proper Person

C-10-267882-2
REQT
Request
4494176

RECEIVED
OCT 13 2015
CLERK OF THE COURT

6

Case No. [redacted] C-10-267882-2

Dept. No. 20

IN THE 8th JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF Clark

State of Nevada
Plaintiff

vs.

David Burns
Defendant

Case No. [redacted] C-10-267882-2

Dept No. 20

Docket

NOTICE OF MOTION

YOU WILL PLEASE TAKE NOTICE, that _____

_____,

will come on for hearing before the above-entitled Court on the ____ day of _____, 20___, at the hour of ____ o'clock ___. M. In Department ___, of said Court.

CC:FILE

DATED: this 16 day of September, 2015.

BY: David Burns
#113952
/In Propria Personam

Motion for evidentiary hearing on issues in writ of habeas corpus

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CERTIFICATE OF SERVICE BY MAILING

I, David Burns, hereby certify, pursuant to NRCP 5(b), that on this 16 day of September 2015, I mailed a true and correct copy of the foregoing, "Motion for evidentiary hearing" by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid, addressed as follows:

Clerk of the 8th Judicial
District Court
200 Lewis Avenue - 3rd floor
Las Vegas, NV 89155

Nevada Attorney General
100 North Carson Street
Carson City, NV
89701

Clark County District
Attorney
200 Lewis Avenue
Post Office Box 552212
Las Vegas, NV 89155-2212

CC:FILE

DATED: this 16 day of September 2015.

David Burns
#1139531
/In Propria Personam
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018
IN FORMA PAUPERIS

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding _____

Motion for evidentiary hearing
(Title of Document)

filed in District Court Case number [redacted] C-10-267882-2

☑ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

_____
(State specific law)

-or-

B. For the administration of a public program or for an application for a federal or state grant.

David Burns
Signature

9.16.15
Date

David Burns
Print Name

Motion For evidentiary hearing
Title

25

David Burns 1139521
In Propria Persona
Post Office Box 650 (HDSP)
Indian Springs, Nevada. 89018

FILED
OCT 13 2015
CLERK OF COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

State of Nevada
Plaintiff

vs.

David Burns
Defendant

Case No. C-10-267882-2

Dept. No. 20

Docket _____

MOTION TO APPOINT COUNSEL

DATE OF HEARING: _____

TIME OF HEARING: _____

COMES NOW the David Burns, in proper persona and moves this court for an Order granting him counsel in the proceeding action.

This motion is made and based upon all papers and pleadings on file herein and attached points and authorities.

Dated this 16 day of September, 2015.

Respectfully Submitted,

David Burns

C-10-267882-2
MOT
Motion
4494177

RECEIVED
OCT 13 2015
CLERK OF THE COURT

David Burns 1139521
/ In Propria Personam
Post Office Box 650 [HDSP]
Indian Springs, Nevada 89018

DISTRICT COURT

CLARK COUNTY, NEVADA

State of Nevada
Plaintiff

vs.

David Burns
Defendant

Case No. [redacted]C-10-267882-2

Dept No. 20

Docket _____

NOTICE OF MOTION

YOU WILL PLEASE TAKE NOTICE, that David Burns _____, will come on for hearing before the above-entitled Court on the ____ day of _____, 20___, at the hour of ____ o'clock ___. M. In Department ___, of said Court.

CC:FILE

DATED: this 16 day of September, 2015.

BY: David Burns
#1139521
/In Propria Personam

POINTS AND AUTHORITIES

NRS 34.750 Appointment of Counsel for indigents; pleading supplemental to petition; response to dismiss.

"If the Court is satisfied that the allegation of indigency is true and the petition is not dismissed summarily, the Court may appoint counsel to represent the petitioner."

NRS 171.188 Procedure for appointment of attorney for indigent defendant.

"Any defendant charged with a public offense who is an indigent may, be oral statement to the District Judge, justice of peace, municipal judge or master, request the appointment of an attorney to represent him."

NRS 178.397 Assignment of counsel.

"Every defendant accused of a gross misdemeanor or felony who is financially unable to obtain counsel is entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before a magistrate or the court through appeal, unless he waives such appointment."

WHEREFORE, petitioner prays the Court will grant his motion for appointment of counsel to allow him the assistance that is needed to insure that justice is served.

Dated this 16 day of September, 2015

Respectfully submitted,

David Burns

CERTIFICATE OF SERVICE BY MAILING

I, David Burns, hereby certify, pursuant to **NRCP** 5(b) that on this 16 day of September, 20[illegible] I mailed a true and correct copy of the foregoing "Motion to Appoint Counsel" by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, Fully prepaid, addressed as follows:

Clerk of the 8th Judicial
District Court
200 Lewis Avenue - 3rd Floor
Las Vegas, NV 89155

Clark County District Attorney
200 Lewis Avenue
Post Office Box 552212
Las Vegas, NV 89155-2212

Nevada Attorney General
100 North Carson Street
Carson City, NV 89701

DATED: THIS 16 **day of** September, 20 15

David Burns 1139521
/In Propria Persona
High Desert State Prison
P.O. Box 650
Indian Springs, Nevada. 89018

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Motion to Appoint Counsel
(Title of Document)

filed in District Court Case number [redacted] C-10-267882-2

☑ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)

-or-

B. For the administration of a public program or for an application for a federal or state grant.

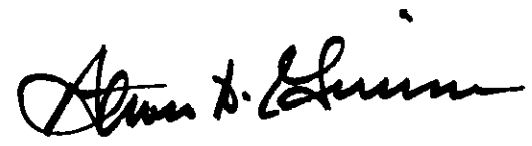
David Burns
Signature

9.16.15
Date

David Burns
Print Name

Motion to Appoint Counsel
Title

Electronically Filed
01/26/2016 03:28:10 PM



CLERK OF THE COURT

RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- DAVID JAMES BURNS, aka D-Shot, #2757610 Defendant.	CASE NO: C-10-267882-2 DEPT NO: XX

STATE'S RESPONSE TO DEFENDANT'S PRO PER POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS, MOTION TO APPOINT COUNSEL, AND REQUEST FOR AN EVIDENTIARY HEARING

DATE OF HEARING: FEBRUARY 2, 2016
TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through STEVEN S. OWENS, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's Pro Per Post-Conviction Petition for Writ of Habeas Corpus, Motion to Appoint Counsel, and Request for an Evidentiary Hearing.

This response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

//

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On October 13, 2010, the State charged DAVID JAMES BURNS, aka D-Shot, (hereinafter "Defendant"), by way of 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). On October 28, 2010, the State filed a Notice of Intent to Seek the Death Penalty in this matter.

On July 18, 2012, Defendant, through counsel, filed many pretrial Motions, to which the State filed its Oppositions on July 23, 2012. This Court ruled on these Motions on July 18, 2013.[1]

On July 19, 2013, Defendant filed a 500-page Motion to Strike the State's Notice of Intent to Seek the Death Penalty. The State filed its Opposition on July 25, 2013. This Court denied Defendant's Motion on September 12, 2013. In the interim, Defendant also filed multiple Motions to continue his trial date.

Defendant's jury trial finally began on January 20, 2015. Following a 15-day trial on February 17, 2015, the jury returned a guilty verdict on all eight counts.

On April 23, 2015, Defendant was adjudged guilty and sentenced to the Nevada Department of Corrections (NDC) as follows: COUNT 1 – a maximum of 72 months and a minimum of 12 months; COUNT 2 – a maximum of 120 months and a minimum of 24 months; COUNT 3 – a maximum of 180 months and a minimum of 24 months; COUNT 4 – a maximum of 180 months and a minimum of 24 months, plus a consecutive term of a maximum of 180

[1] The State notes that most of these pretrial Motions, which were filed by counsel, are not relevant for purposes of this Petition.

months and a minimum of 24 months for the deadly weapon enhancement; COUNT 5 – Life without parole, plus a consecutive term of a maximum of 240 months and a minimum of 40 months for the deadly weapon enhancement; COUNT 6 – a maximum of 180 months and a minimum of 24 months, plus a consecutive term of a maximum of 180 months and a minimum of 24 months for the deadly weapon enhancement; COUNT 7 – a maximum of 240 months and a minimum of 48 months, plus a consecutive term of a maximum of 240 months and a minimum of 40 months for the deadly weapon enhancement; and COUNT 8 – a maximum of 180 months and a minimum of 24 months, with 1,671 days credit for time served. COUNTS 1, 2, 3 & 4 are to run concurrent with COUNT 5. COUNTS 6 & 8 are to run concurrent with COUNT 7, and COUNT 8 is to run consecutive to COUNT 5. A Judgment of Conviction was filed on May 5, 2015.

Furthermore, regarding Defendant's sentence as to COUNT 5, on February 9, 2015, a Stipulation and Order Waiving a Separate Penalty Hearing was filed where Defendant 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, and waives all appellate rights. See Stipulation and Order Waiving Separate Penalty Hearing, Dated February 9, 2015.

On October 13, 2015, Defendant filed a Motion to Withdraw Counsel. He also filed the instant Pro Per Post-Conviction Petition for Writ of Habeas Corpus, Motion to Appoint Counsel, and Request for an Evidentiary Hearing. The State responds as follows.

STATEMENT OF FACTS

On August 7, 2010, Cornelius Mayo lived at 5662 Miekle Lane Apartment A, Las Vegas, Clark County, Nevada. He resided with his girlfriend, Derecia Newman, her twelve year old daughter, Devonia Newman, and his and Derecia's three young children, Cashmere Mayo (6), Cornelius Mayo Junior (5), and Cordaja Mayo (3). On August 6, 2010, Derecia's sister, Erica Newman, was also staying with the family. In the early morning hours of August 7, 2010, the household received a phone call on their landline phone. The number for that landline phone was 702-444-9446. The phone had a caller-identification feature. Cornelius Mayo heard Derecia answer the phone. The call was at 3:39 am. About 10 minutes later, there

was another call. At the time, Cornelius was in the bathroom, but he heard his girlfriend, Derecia, answer the front door. Cornelius then heard a commotion, he heard Derecia scream and then he heard two gunshots. Cornelius also heard someone he knew to be Stephanie Cousins screaming. He then heard three more gunshots, and then saw 12-year-old Devonia run into the bathroom.

Cornelius told Devonia to sit quietly. A bullet came through the bathroom door, and Cornelius saw Devonia get up and try to run from the bathroom. At that point, Cornelius saw Devonia get shot, but he could not see who fired the shot. He could see that Devonia had been shot in the stomach. Cornelius told Devonia to be still, and left the bathroom. He checked the bedroom where Erica Newman and the small children were sleeping, and they were undisturbed. He called 911 from his cell phone, which was phone number 702-609-4483. Police and paramedics arrived, and the paramedics took Devonia to the hospital.

From looking at the landline phone's caller-identification feature, Cornelius saw that the two calls before the shooting were from "S. Cousins." Cornelius had known Stephanie Cousins for six or seven years. According to Cornelius, Derecia had sold marijuana to Stephanie Cousins in the past. After the police had arrived, Cornelius called Stephanie Cousins. He was extremely angry when he called. Stephanie Cousins told him that when she knocked on the door, two men happened to be waiting around the corner, and forced their way in when Derecia opened the door. Cornelius told Cousins that he believed she was lying.

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

Homicide Detective Christopher Bunting was one of the detectives assigned to the case. He responded to the scene around 5:00 am. The apartment itself was a two bedroom, two bathroom apartment. It also had a living room and a kitchen. Immediately inside the front door of the apartment was the living room. On the couch in the living room, detectives observed Derecia Newman. She was in nearly a sitting position on the couch with a $20 bill clutched in her hand. She had an obvious, massive gunshot wound to her head. From Derecia's location, detectives examined the scene for evidence of additional gunshots or bullet

strikes. They found a bullet strike in the hallway, and this shot hit the refrigerator. The third shot went down the hallway of the residence, the fourth went through the bathroom, and the fifth went into Devonia Newman. Later, detectives found another impact site, accounting for a sixth shot. There were no cartridge casings observed at the scene, leading detectives to believe that the weapon used was a revolver.

At the autopsy, Dr. Alane Olson testified that Derecia Newman sustained a gunshot wound to the head. Upon examination, Dr. Olson could see that the barrel of the gun had actually been pressed against her head when the trigger was pulled.

In the course of the investigation, detectives became aware of a woman named Monica Martinez. Martinez has a teenaged daughter named Tyler. Detectives met with Tyler and showed her a photographic line-up of several individuals, one of whom was Defendant. Defendant's nickname is "D-Shot."

Tyler Mitchell lived with her mom and younger siblings in August 2010. At the beginning of August, weeks before this incident, Tyler's mom, Monica Martinez, brought three men to the home. One of those men was "Job-Loc," Monica Martinez's boyfriend. The other two were (Willie) Darnell Mason, and Defendant. Mason's nickname was "G-Dogg." The three stayed for one night. During this time period, Monica had a silver, gray Crown Victoria sedan type car. Tyler knew Job-Loc's cell phone number to be 512-629-0041. Her mother's cell phone number was 702-927-8742. Mason's cell phone number was 909-233-0860. After being shown three photographic line-ups, Tyler was able to identify Job-Loc. She also identified G-Dogg or Willie Darnell Mason. And she identified D-Shot or Defendant. Tyler also knew where Job-Loc lived during this time period: at the Brittany Pines Apartments between Lake Mead and Torrey Pines.

Detectives also interviewed Donovon Rowland. Rowland knew Job-Loc by a different nickname: Slick. He became friends with him. Through the course of his relationship with Slick, Rowland came to know Slick's girlfriend, Monica Martinez. At some point after Rowland met Slick, Slick broke his leg. Rowland also knew G-Dogg (Mason) through Slick or saw him at Slick's apartment while Monica Martinez was also present. One morning,

Rowland was at Slick's apartment, as was Monica. G-Dogg (Mason) was there too. Another person was also present, although Rowland could not identify him. G-Dogg (Mason) was the person who opened the door for Rowland. The door was blocked from the inside by a chair and a box. G-Dogg (Mason) even looked out the window before he opened the door for Rowland. Rowland saw and recognized Monica and Slick. The fourth individual was named, like D-Shot or D-Shock. Monica and Slick were arguing. Rowland testified that he did not see Slick holding a gun. The State impeached Rowland with his statements to detectives. Rowland commented that he was highly intoxicated at the time. In fact, Rowland admitted that twice he had told the police that he saw Slick cleaning a gun, but at trial suggested that he actually did not see that. Eventually, Slick handed the gun to Rowland. Upon being impeached with his statement to detectives, Rowland acknowledged that he told the police that Slick had asked him to hold a gun for him and that he had to leave. The next morning, Slick called Rowland and told him to look at the newspaper, and Rowland saw a story about a mother killed and a daughter being critically injured in a shooting. Rowland called Slick back, and Slick told him that G-Dogg (Mason), Monica, and D-Shot/Defendant had done something. He said there was a crack-head who set up the whole thing. Slick also asked Rowland to sell the gun or bury it. Instead, Rowland left the gun at a friend's house and later tried to sell it. Slick had told Rowland he could keep the money from selling the gun. The gun was a revolver. It was also empty of bullets.

Detectives were able to obtain video surveillance tape from the Opera House, located in North Las Vegas. The relevant tape was from 2:37 am on the morning of August 7, 2010 to approximately 3:00 am, less than an hour before the homicide.

Through investigation, detectives were able to get in contact with Stephanie Cousins. They also were able to contact Monica Martinez. Through investigation, detectives learned that Martinez had a cell phone registered under the name "Wineford Hill." The carrier was T-Mobile. At trial, a representative from T-Mobile testified regarding Martinez's cell phone records and history. The representative explained how cell site towers work, or how the cell phone essentially looks for the closest tower for use.

With assistance from the FBI, detectives were able to identify Job-Loc as Jerome Thomas. From Tyler, detectives knew his cell phone number was 512-629-0041. Investigators learned that this number was no longer used as of August 9th or 10th, just a couple of days after the murder. Tyler also knew G-Dogg or Willie Darnell Mason's number to be 909-233-0860. From Cornelius Mayo, detectives knew Stephanie Cousins had cell number 702-542-4661. With those known numbers, the FBI obtained cell site records for August 7, 2010.

Records indicated that Job-Loc (Jerome Thomas) was in the area of Teneya and Lake Mead from the night of August 6, 2010 through the early morning of August 7, 2010. This corresponded with the location of his apartment. Cell phone records of Donovan Rowland indicated that he was not in the area of Meikle Lane during the time of the murder. Conversely, records of Monica Martinez, Stephanie Cousins, and Willie Darnell Mason did indicate that they were near the crime scene when the murder was committed.[2] The address associated with Mason's phone was in Rialto, California, just outside of San Bernardino. Job-Loc is also from San Bernardino. D-Shot/Defendant is also from San Bernardino.

When Special Agent Hendricks examined Mason's phone on August 1, 2010, records indicated that Mason was in Rialto, California. Records from that phone also indicated that the phone was dialed to family members and associates of Willie Mason. On the night of August 1, 2010, just days before the murder, Mason's phone was hitting off towers heading northbound on I-15. The phone hit off a tower in Baker, California. Later it hit off a tower on Tropicana and I-15. Later, it hit off a tower in the area of the Brittany Pines Apartments, Job-Loc's residence. On the night of the murder, August 7, 2010, his phone hit off a tower near the Brittany Pines Apartments. Later, the phone hits off a tower near Rancho and Bonanza. Later, the phone hit off a tower in the area of Vegas Valley and Nellis. At just before 3:00 am, it hit off a tower north of downtown Las Vegas. Next, the phone hit off a tower near the Opera House in North Las Vegas. Detectives obtained a video surveillance tape from the Opera

[2] Testimony established that Mason used phone 909-233-0860. The phone, however, was registered to "Ricc James."

House for that same time period which depicted Mason with Monica Martinez and D-Shot/Defendant.

After that, at 3:24 am, Mason's phone was in the area of Nellis and Vegas Valley. At 3:51 am, the phone hit off the tower by Meikle Lane, the time and location of the murder. By 4:24 am, the phone was hitting off towers back by the Brittany Pines Apartments, or Job-Loc's residence.

Special Agent Hendricks also examined Stephanie Cousins' phone. Throughout the early morning hours of August 7, 2010, her cell phone hit off the same towers as Mason's phone. In fact, at 3:24 am, Cousins' phone calls Mason, and then Mason calls Cousins. At 3:37 am, Cousins calls the landline of Derecia Newman two times. Shortly after that, at 3:51 am, Mason calls Cousins. After that, Cousins received the incoming call from Cornelius Mayo.

Special Agent Hendricks also examined Monica Martinez's phone. Throughout the early morning hours, her phone was hitting off towers in the same area as Mason's and Cousins. In fact, when Cousins is calling Derecia Newman's land line, Martinez's phone is hitting off the same tower.

Detectives also obtained a video surveillance tape from Greyhound. On August 8, 2010, at 11:33 pm, detectives identified Mason, Defendant, and Job-Loc getting off the bus that traveled from Las Vegas to Los Angeles, about 24 hours after the crime. Thereafter, they traveled to San Bernardino, California. None used their real names for travel.

ARGUMENT

I. DEFENDANT'S CLAIMS OF PROSECUTORIAL MISCONDUCT ARE NOT COGNIZABLE IN A HABEAS PETITION.

In Grounds 1, 2, 3, 10, 12, 14 & 15 of Defendant's Petition, he is alleging multiple instances of prosecutorial misconduct. Petition ("Pet.") 6, 7, 8, 15, 17, 19 & 20. However, these claims of misconduct are not cognizable in a post-conviction habeas petition because they are appropriate for direct appeal, and are thus waived in the instant proceedings. See Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), overruled in part by Thomas

v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999) ("[C]laims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceeding . . . . [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*.") (emphasis added); NRS 34.810(1)(b)(2) ("The court shall dismiss a petition if the court determines that . . . [t]he petitioner's conviction was the result of a trial and the grounds for the petition could have been . . . [r]aised in a direct appeal or a prior petition for a writ of habeas corpus or post-conviction relief"); NRS 34.724(2) (stating that a post-conviction petition is not a substitute for the remedy of a direct review). Even though Defendant claims in this Petition that he was never told about a direct appeal, Defendant waived his appellate rights. Pursuant to Defendant's Stipulation and Order Waiving a Separate Penalty Hearing, in exchange for the State withdrawing the Notice of Intent to Seek the Death Penalty, the Defendant agreed to waive all appellate rights stemming from the guilt phase of his trial. See Stipulation and Order Waiving Separate Penalty Hearing, Dated February 9, 2015. Therefore, Defendant waived any and all prosecutorial misconduct claims, and they are not appropriate for review in this instant Petition.

II. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.[3]

Claims of ineffective assistance of counsel are analyzed under the two-pronged test articulated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), wherein the defendant must show: 1) that counsel's performance was deficient, and 2) that the deficient performance prejudiced the defense. Id. at 687, 104 S. Ct. at 2064. Nevada adopted this standard in Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984). "A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one." Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1997).

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371,130 S. Ct. 1473, 1485 (2010). The question is whether an attorney's

[3] Throughout this entire Petition, Defendant fails to cite to anywhere in the record when he refers to statements or actions that allegedly occurred during trial. It is not the State's burden to cite to the record for Defendant to find out what he is talking about. The burden is on Defendant for Post-Conviction Petitions.

representations amounted to incompetence under prevailing professional norms, "not whether it deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 88, 131 S. Ct. 770, 778 (2011). Further, "[e]ffective 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, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449 (1970)).

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, 1011-1012, 103 P.3d 25, 32-33 (2004). The role of a court in considering alleged 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) (citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)).

This analysis does not indicate 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." Donovan, 94 Nev. at 675, 584 P.2d at 711 (citing Cooper, 551 F.2d at 1166 (9th Cir. 1977)). 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. However, counsel cannot be deemed ineffective for failing to make futile objections, file futile motions, or for failing to make futile arguments. Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

In order to meet the second "prejudice" prong of the test, the defendant must 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). "A reasonable

probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.

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).

Ground 4: Counsel was Not Ineffective for Failing to Object or Raise on Direct Appeal an Alleged Instance of "Witness Coaching."

Defendant contends that his counsel was ineffective for not objecting to an alleged instance of witness coaching, and he should have raised it on direct appeal. Pet. 9. At trial, Defendant alleges that one of the State's witnesses, Monica Martinez, had her attorney's coach her from the back of the courtroom while she was testifying if she got stuck on a cross examination question. Id. During Defendant's cross examination of this witness, a bench conference was held where the co-defendant's attorney objected and raised this issue claiming that this witness was getting signals from her lawyers during the questioning. See Reporter's Transcript, "R.T.", Jury Trial - Day 8, January 29, 2015, p. 108. The Court advised that it had been watching the lawyers in the back, and had not seen them do anything that could be interpreted as witness coaching. Id.

The attorney, not the client, is tasked with "...the immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Wainwright v. Sykes, 433 U.S. 72, 93, 97 S. Ct. 2497, 2510 (1977); Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002). Counsel cannot be ineffective for failing to make futile objections. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Defendant is making conclusory allegations, and does not cite to anywhere specific in the record to show how the witness was being coached. Moreover, Defendant cannot show deficiency because co-defendant's counsel objected to this alleged conduct, and the Court found it did not exist, thus it would have been futile for Defendant's counsel to make the same objection. Ennis, 112 Nev. at 706, 137 P.3d at 1103.

Moreover, Defendant cannot show prejudice. He fails to allege what this witness said that prejudiced him, or how the outcome of his trial would have been different if his attorney had objected to this alleged conduct. These allegations are unsupported by the record. All Defendant states is that this "coaching" prejudiced him from receiving a fair trial, but he fails to show how he was prejudiced by her testimony, and thus, this a bare and naked allegation not sufficient to entitle Defendant to relief. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Lastly, regarding Defendant's contention that this should have been raised on direct appeal, as stated above, Defendant waived his appellate rights, and thus is not entitled to a direct appeal.

Ground 5: Counsel was Not Ineffective for Failing to Raise Prosecutorial and Police Misconduct on Direct Appeal.

Defendant argues that his counsel was ineffective for failing to raise alleged police and prosecutorial misconduct on direct appeal, or for even informing him of his right to a direct appeal. Pet. 10. Defendant contends that Devonia Newman's interview with police was coerced, and that she was forced by detectives into making a false identification of Defendant. Id. Defendant claims this alleged misconduct prejudiced him of the right to a fair trial.

However, Defendant cannot show deficiency or prejudice. First, counsel cannot be deemed ineffective for failing to raise this issue on direct appeal, as Defendant waived his appellate rights. See Stipulation and Order Waiving Separate Penalty Hearing, Dated February 9, 2015. Thus, it would have been futile for counsel to file a direct appeal. See Ennis, 112 Nev. at 706, 137 P.3d at 1103. Further, Defendant cannot show any prejudice, as he had no right to an appeal per the stipulation order. Also, Defendant has failed to show how the outcome of his trial would have been different, and does not cite to where in the record these alleged statements by the witness were made, and does not attach this interview as an exhibit. Because Defendant fails to give any factual support or authority, his claim must be denied. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

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Ground 6: Counsel was Not Ineffective for Failing to Raise Prosecutorial Misconduct on Direct Appeal.

Defendant claims that his counsel was ineffective for failing to raise on direct appeal an alleged instance of prosecutorial misconduct. Pet. 11. Defendant argues that Devonia Newman told Defendant's attorney that she was coached by one of the prosecutors regarding Defendant's identification, and what she should and should not say during her testimony. Id. Defendant claims that this conduct was in violation of his due process rights, and his counsel should have raised it on direct appeal. Id.

However, Defendant cannot show deficiency or prejudice. First, counsel cannot be deemed ineffective for failing to raise this issue on direct appeal, as Defendant waived his appellate rights. See Stipulation and Order Waiving Separate Penalty Hearing, Dated February 9, 2015. Thus, it would have been futile for counsel to file an appeal. See Ennis, 112 Nev. at 706, 137 P.3d at 1103. Further, Defendant cannot show any prejudice, as he had no right to an appeal per the stipulation order. He also fails to show how the outcome of his trial would have been different even if counsel would have raised this issue on a direct appeal.

Moreover, Defendant's claim that Devonia was coached is belied by the record. During trial, Devonia testified that no one ever told her what to say during her initial interview. R.T., Jury Trial - Day 11, February 6, 2015, p. 113. On redirect, the State asked Devonia, "Did we tell you how you had to answer questions," to which Devonia answered, "No." R.T., Jury Trial - Day 11, February 6, 2015, p. 135.

Also, Defendant cannot claim that he was never told about a direct appeal, as he was canvassed by the court about his appellate rights.

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

Reporter's Transcript of Jury Trial, Day 12- Dated Monday, February 9, 2015, p.9

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Thus, it does not matter if Defendant had a desire to a direct appeal from his conviction, because he agreed to a sentence of life without the possibility of parole, and he waived all his appellate rights from the guilt phase of his trial. Thus, Defendant's claim must be denied.

Ground 7: Counsel was Not Ineffective for Failing to Raise Mental Disabilities for Removal of the Death Penalty as Defendant Stipulated to a Sentence of Life Without Parole.

Defendant claims that counsel was ineffective because he knew about Defendant's mental issues, and never presented any evidence of this to the Court. Defendant argues if his counsel were to have presented this to the Court, the death penalty would have been removed as an option. Pet., 12. However, Defendant's claim is without merit, and belied by the record.

Defendant cannot demonstrate deficient performance or prejudice. First, Defendant's claims are belied by the record, as the death penalty was removed as a possible option. On February 9, 2015, a Stipulation and Order Waiving a Separate Penalty Hearing was filed where Defendant agreed that in the event of a finding of guilty on Murder in the First Degree to have the sentence of Life without the possibility of parole, and to waive all appellate rights. See Stipulation and Order Waiving Separate Penalty Hearing, Dated February 9, 2015. Thus, even if counsel would have presented evidence of Defendant's mental disabilities to this Court, the Court would not have sentenced Defendant to death. Thus, it would have been futile for counsel to do so. Ennis, 112 Nev. at 706, 137 P.3d at 1103.

Moreover, Defendant has failed to present any evidence that he qualifies as intellectually disabled as described by Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242 (2002). Fetal Alcohol syndrome (as alleged by Defendant in his Petition), does not, as a matter of law, qualify for intellectually disabled. Unless Defendant presents evidence of Atkins qualifying information, he is not entitled to post-conviction relief. Even if he were intellectually disabled, Defendant's sentence would likely have been Life Without Parole. As such, Defendant cannot demonstrate prejudice.

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Ground 8: Counsel was Not Ineffective for Discussing Stephanie Cousin's Statements to the Police.

Defendant claims that his counsel was ineffective because he presented a statement from Stephanie Cousins.[4] Defendant argues that because his counsel presented one exact statement, that the State was then able to use the rest of her statement that was damaging for him. Pet., 13. However, Defendant's claims are without merit, and belied by the record.

First, Defendant cannot show deficient performance. Stephanie Cousin's statements came out at trial during Cornelius Mayo's and Detective Christopher Bunting's testimony; she did not testify. Defendant claims that his counsel offered the statement, "Why did they call him Job-Loc," however, this exact statement was never presented, thus, Defendant's claims are belied by the record. See R.T., Jury Trial Day 13- February 10, 2015. However, even if this statement was presented during trial, it was a strategic decision by defense counsel about what to ask the detective and Mayo. Counsel's actions were well-reasoned and strategically made which is presumed to be and was 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).

Furthermore, during trial, the jury learned that Ms. Martinez' boyfriend was Jerome Thomas, aka Job-Loc. The defense at trial tried to suggest that Job-Loc was in fact the shooter in the instant case. Defendant attempted to cast doubt on the identity of himself by suggesting that the police had information from Ms. Cousin's that the shooter's name was Job-Loc. Some of Ms. Cousin's initial statements were admissible either as a hearsay exception or as non-hearsay statements of a co-conspirator. When Ms. Cousins highlighted that the name she ascribed to the shooter was Job-Loc, that allowed, pursuant to NRS 51.069, the identification that she made of the shooter from a picture of Defendant, who Ms. Cousins believed was named Job-Loc. This clarified that while Ms. Cousins used the name Job-Loc, she was actually speaking of the Defendant. Police showed her a photograph, and she was able to identify the shooter with 100% accuracy as Defendant. R.T., Jury Trial Day 14, February 11,

[4] Stephanie Cousins was an original co-defendant, who ended up taking a plea deal in this matter, however, at the time of trial, she was severed and not yet convicted. See Case Number C267882-3.

2015, p. 35. Considering that the statement of Ms. Cousins that Job-Loc was the shooter was an important piece of evidence, defense counsel made a reasonable decision to attempt to elicit that information. The defense tried to preclude the rehabilitation of the statement pursuant to NRS 51.069.[5] Certainly, that was a reasonable strategic decision by Defendant's counsel, thus there was no deficient performance.

Furthermore, Defendant argues he was denied the right to confront Ms. Cousins because her statements were introduced and she did not testify; however, Detective Bunting and Mayo testified about what she said, and Defendant had the opportunity to confront them about it. Moreover, Bruton does not apply to non-testimonial statements like a statement of a co-conspirator, so her testimony would not violate his confrontation rights. Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620 (1968). Thus, Defendant cannot show prejudice or how the outcome of his trial would have been different had Ms. Cousins testified.

Based on the facts alleged by Defendant, Defendant has failed to demonstrate that trial counsel's strategic decisions regarding what questions were asked were objectively unreasonable, and further, Defendant fails to demonstrate prejudice and how the exclusion of this statement would have led to a more favorable outcome at trial. As such, his claim must be denied.

Ground 9: Counsel was Not Ineffective As Defendant Waived his Right to a Direct Appeal, and Defendant had no Right to Counsel for a Post-Conviction Habeas Petition.

Defendant claims that his counsel was ineffective because: 1) he did not know that the court likes certain issues to be filed on direct appeal, and 2) that his attorney promised to show him how to file a habeas petition, and he was never given instructions by his attorney on how to file one. Pet, 14. However, neither of these claims have any merit.

Defendant waived his right to a direct appeal, thus counsel cannot be deemed ineffective for failing to file one. Defendant clearly understood that he was giving up his appellate rights:

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[5] Also, rehabilitation under NRS 51.069 does not go to the truth of the matter asserted, but rather relates to the credibility of the statement.

THE COURT: You're also giving up your appellate rights. Do you understand that?

DEFENDANT BURNS: Yes, sir.

Reporter's Transcript of Jury Trial, Day 12- Dated Monday, February 9, 2015, p.9; See also Stipulation and Order Waiving Separate Penalty Hearing, Dated February 9, 2015. Thus, Defendant has failed to show that counsel was deficient or that he was prejudiced.

Moreover, regarding Defendant's claim that his counsel promised to show him how to file a habeas petition, Defendant did not have a right to counsel for habeas proceedings. Brown v. Warden, 130 Nev. ___, ___, 331 P.3d 867, 870 (2014). Therefore, counsel had no obligation to inform Defendant of habeas corpus procedures, or to file a post-conviction petition. Instead, Nevada law compels Defendants to file their own habeas petitions, and to seek appointment of post-conviction counsel. See Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); (quoting McKague v. Warden, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996)) (footnote omitted) ("[T]here is no constitutional or statutory right to the assistance of counsel in noncapital post-conviction proceedings, and '[w]here there is no right to counsel there can be no deprivation of effective assistance of counsel.') Thus, Defendant's claim must be denied.

Ground 11: Counsel Was Not Ineffective for Failing to Object as the Prosecutor Made Fair Comments On the Evidence Presented During Closing Argument.

Defendant claims that during closing argument, the State brought up a "whistle" noise heard during the playing of the 9-1-1 call, and that this same whistle was heard in Defendant's 9-13-10 statement to Detective Wildemann, that was also played for the jury. Pet., 16. Defendant claims this whistle could have been a background noise from the jail in San Bernardino, and no evidence was presented at trial that Defendant was "whistling." Id. He claims his counsel was ineffective for not objecting to the prosecutor "injecting his own opinion of facts not in evidence." Id. However, Defendant's claims are belied by the record and/or without merit.

First, Defendant has failed to show how counsel was deficient. During closing argument, the prosecutor stated, "[Defendant] is whistling and humming and doing whatever

he can to avoid having to answer the questions." R.T., Jury Trial-Day 15, February 12, 2015, p. 57. Both the 9-1-1 call[6] and the 9-13-10[7] statement were played at trial, and the prosecutor was arguing an inference that jury could conclude that the whistling and humming the prosecutor was referring to in the 9-1-1 call did sound like the whistling and humming in the 9-13-10 statement. In Defendant's 9-13-10 statement, it is clear that he is humming and singing. See Exhibit 1, p. 35-39. Thus, all of these arguments 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.

Additionally, Defendant cannot show any prejudice suffered as a result of these arguments, and he fails to show how the outcome of his trial would have been different even if his counsel objected to this during closing argument. Thus, Defendant's claim should be denied.

Lastly, regarding Defendant's claim that counsel did not raise this issue on direct appeal, this claim must be denied as Defendant waived his appellate rights.

Ground 13: Counsel was Not Ineffective for Failing to Object at Trial, or for Failing to Cross Examine Witnesses about an Alleged Lie about Defendant's Mental Issues.

Defendant claims that his counsel was ineffective for failing to cross-examine Detective Marty Wildemann during the grand jury proceeding about the fact that he allegedly knew Defendant had mental issues. Pet., 18. Defendant argues that at the grand jury, one of the prosecutors asked Detective Wildemann if he asked Defendant if he had mental problems, to which he responded that he did not. Pet., 18. Defendant then argues in questioning dated September 13, 2010, he told detectives that he had mental problems so the Detective knew he did, and his attorney should have questioned the Detective about this alleged lie, and was thus ineffective. However, Defendant's claims are without any merit.

First, Defendant fails to show deficient performance. Defendant's claim is essentially about the alleged failures to cross-examine a particular witness about an issue. However, these claims relate to trial strategy, which is "virtually unchallengeable," and Defendant cannot

[6] R.T., Jury Trial Day 10, February 5, 2015, p. 226. State's Exhibit 323.
[7] See Exhibit 1.

show deficient performance. Doleman v. State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996). Because this claim contests trial strategy, it should not be second-guessed, and instead should be honored by this Court. Id.

Moreover, according to the 9-13-10 statement, Detective Wildemann never agreed that Defendant actually had mental problems, and never believed that he did. Rather he disagreed, stating that Defendant did not have a mental problem at the time of the murder. Thus, Defendant's claim is belied by the record. See Exhibit 1.

Furthermore, Defendant cannot show prejudice. Defendant fails to prove how the outcome of his trial would have been different even if his counsel had cross examined Detective Wildemann about this issue.

Lastly, Defendant claims that Stephanie Cousin's testimony was used in the grand jury proceeding, but at trial she did not testify, and his counsel failed to raise this issue either in a motion or verbally as her statements were not under oath.[8] However, this is a naked allegation by Defendant as he fails to show how counsel was deficient in this regard, or how even if she did testify to this at trial, how the outcome of his trial would have been different. Thus, this a bare and naked allegation not sufficient to entitle Defendant to relief. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

III. DEFENDANT IS NOT ENTITLED TO THE APPOINTMENT OF COUNSEL.

In addition to this Petition, Defendant has filed a Motion to Appoint Counsel. In Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566 (1991), the United States Supreme Court ruled that the Sixth Amendment provides no right to counsel in post-conviction proceedings. The Nevada Supreme Court has similarly observed that "[t]he Nevada Constitution . . . does not guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision as being coextensive with the Sixth Amendment to the United States Constitution." McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996).

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[8] Defendant is incorrect that Ms. Cousin's statement to police were introduced at the Grand Jury. Pet. 18. The Grand Jury was specifically instructed that they could not consider Ms. Cousin's statements to police in determining probable cause. See Grand Jury Transcript, Dated October 12, 2012. p.7.

NRS 34.750 provides that a court has discretion to appoint post-conviction counsel:

> A petition may allege that the Defendant is unable to pay the costs of the proceedings or employ counsel. If the court is satisfied that the allegation of indigency is true **and the petition is not dismissed summarily,** the court may appoint counsel at the time the court orders the filing of an answer and a return. In making its determination, the court may consider, among other things, the severity of the consequences facing the petitioner and whether:
> (a) The issues are difficult;
> (b) The Defendant is unable to comprehend the proceedings; or
> (c) Counsel is necessary to proceed with discovery.

(emphasis added). Factors a court may consider when making such a determination include the severity of the consequences facing the petitioner, difficulty of the presented issues, the defendant's ability to comprehend the proceedings, and whether counsel is necessary to proceed with discovery. NRS 34.750(1). Additionally, the Nevada Supreme Court has concluded a petitioner "must show that the requested review is not frivolous before he may have an attorney appointed." Peterson v. Warden, 87 Nev. 134, 136, 483 P.2d 204, 205 (1971) (citing former statute NRS 177.345(2)).

Here, Defendant's claims do not establish ineffective assistance of counsel and/or are inappropriate for a Post-Conviction Petition. Because Defendant has not set out sufficient allegations of ineffective assistance of counsel, the Petition must be dismissed summarily. Moreover, Defendant has failed to set forth any specific reasons in this Motion why he is entitled to counsel, and thus has failed to provide specific factual allegations to warrant post-conviction relief. Hargrove, 100 Nev. at 503, 686 P.2d at 225. Considering Defendant's well-pleaded Petition, it is clear that he understands the proceedings, despite the fact that he is claiming he has mental issues. Finally, there is no need for additional discovery as his Petition has not been granted. As such, this Court should deny Defendant's request for counsel.

IV. DEFENDANT IS NOT ENTITLED TO AN EVIDENTIARY HEARING.

Defendant has also filed a Request for an Evidentiary Hearing on the issues listed in his Petition. NRS 34.770 determines when a defendant is entitled to an evidentiary hearing:

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether

> an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent unless an evidentiary hearing is held.
> 2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
> 3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002); Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; Hargrove, 100 Nev. at 503, 686 P.2d at 225 (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002).

Here, an evidentiary hearing is unwarranted because the petition may be resolved without expanding the record. Mann, 118 Nev. at 356, 46 P.3d at1231; Marshall, 110 Nev. at 1331, 885 P.2d at 605. As explained above, Defendant's claims fail to sufficiently allege ineffective assistance of counsel and/or are inappropriate for a Post-Conviction Petition, and therefore no evidentiary hearing is warranted in order to deny such claims. Hargrove, 100 Nev. at 503, 686 P.2d at 225. Furthermore, Defendant fails to give any explanation as to why he would be entitled to an evidentiary hearing. Accordingly, Defendant's request for an evidentiary hearing must be denied.

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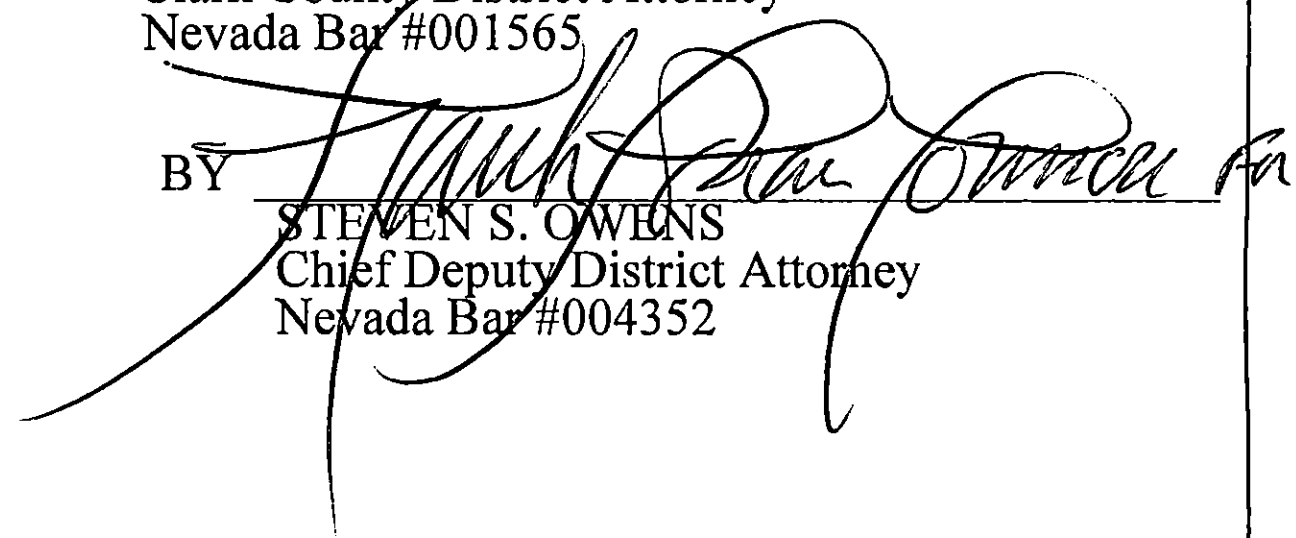
CONCLUSION

Based on the foregoing, the State respectfully requests that Defendant's Pro Per Post-Conviction Petition for Writ of Habeas Corpus, Motion to Appoint Counsel, and Request for an Evidentiary Hearing be DENIED.

DATED this 26th day of January, 2016.

Respectfully submitted,

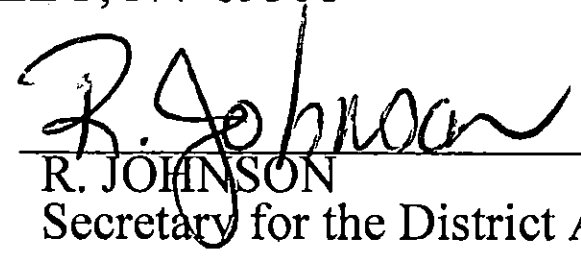
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY 
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 26th day of January, 2016, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

DAVID JAMES BURNS,
aka D-Shot #1139521
ELY STATE PRISON
4569 NORTH STATE ROUTE 490
P.O. BOX 1989
ELY, NV 89301

BY 
R. JOHNSON
Secretary for the District Attorney's Office

KE/SSO/rj/M-1

LAS VEGAS METROPOLITAN POLICE DEPARTMENT

SURREPTITIOUS RECORDING

EVENT #: 100807-0732

SPECIFIC CRIME: HOMICIDE

DATE OCCURRED: 08/07/2010 **TIME OCCURRED:** 0353 HOURS

LOCATION OF OCCURRENCE: 5662 MEIKLE LN # A

CITY OF LAS VEGAS **CLARK COUNTY**

NAME OF PERSON GIVING STATEMENT: DAVID JAMES BURNS

DOB: **SOCIAL SECURITY #:**

RACE: **SEX:** MALE

HEIGHT: **WEIGHT:**

HAIR: **EYES:**

HOME ADDRESS: **PHONE 1:**

WORK ADDRESS: **PHONE 2:**

The following is the transcription of a tape-recorded interview conducted by DETECTIVE M. WILDEMANN, P# 3516, LVMPD Homicide Section, on 09/13/2010 at 1420 hours. Also present Det. Chris Bunting, P# 3610.

Q: Hey, this is Marty. We're doing a surreptitious, ah, inmate recording under, I'm not sure of the event number, I'll let you know. Oh, hold on.

CB: (Detective Chris Bunting) 100807-0732.

Q: Ah, date and time of this is going to be, ah, 09/13/2010 at approximately 1420 hours. Person, ah, getting interviewed is going to be inmate, ah, David James Burns, and this is gonna be at the San Bernardino County, ah, Corrections Facility. Um, once again, it'll be a surreptitious recording, there will be dead air time.

EXHIBIT "1"

(background voices not transcribed)

CB: You know what? _____(inaudible)

Q: I know. _____(inaudible), right?

CB: Yeah.

(background voices not transcribed)

??: Thank you.

Q: Hey David. How you doing?

A: _____(inaudible)

Q: You alright? Alright. My name's Marty. This is Chris. Okay. When'd you get booked in here?

A: I don't know, sir.

Q: I'm sorry?

A: I don't know, sir.

Q: You don't know when you got booked in here? Couple days ago? Four days ago?

A: I think so.

Q: Okay. Alright. What'd you get booked on?

A: Trespassing.

Q: Trespassing. Okay. Alright. And you've been in the system before? Is that why they're holding onto you, is 'cause you've been in the system?

A: I think so.

Q: Okay. Alright. Ah, how old are you?

A: I just turned 19 today.

Q: Today's your birthday? Oh, okay. Alright. We'll try to make this quick. Um, we're from Vegas. Okay.

A: Mmm hmm.

Q: So we're up here, ah, or down here, I should say, kind a working some stuff, and, ah, ah, your name's come up. Okay. And, ah, so we want to give you an opportunity to, ah, ah, sit here, and chat with us for a little bit. Okay. Um, I don't know if you've ever been to Vegas. You've been to Vegas? You never been to Vegas?

A: Mmm mmm.

Q: Okay. Alright. Ah, tell me what you been arrested before for.

A: _____(inaudible)

Q: Well I've been through all that. I've been to all that. Have you been arrested for felonies?

A: Mmm hmm.

Q: Okay. So you been in the system. Did you do any time?

A: Mmm mmm.

Q: No time?

A: Mmm mmm.

Q: Okay. So you've never done time?

A: Mmm mmm.

Q: Okay. Alright. Um, listen let me get a card. You're in custody here, right?

A: Mmm hmm.

Q: I mean you're wearing the jail garb, and stuff like that, so, ah, policy is I got to read this to you, 'cause we're just sitting here talking, but, ah, you got the right to remain silent. Anything you say can be used against you in a court a law. You have the right to the presence of an attorney. If you can not afford an attorney, one will be appointed before questioning. Do you understand what I read to you?

A: Mmm hmm.

Q: Okay. And you're nodding, and you're saying yes, right? Okay. Alright. You want to sign this? You don't have to.

A: Sign it for?

Q: That you understand.

A: Understand?

Q: What I just read to you.

A: Excuse me, sir. Can you say it over?

Q: Okay. It's okay, man. Ah, you understand your rights that I read to you, right?

A: Mmm hmm.

Q: Okay. So this, this means that you understand it. You don't have to sign it. We can put that off. Okay. Um, do you stay with--I met a lady today named Monica. That's your, your aunt, right, or your cousin? Do you stay with her?

A: I just want to transient.

Q: You're transient. Ah, in between jobs right now? Not working? Okay. So you don't have a place to stay? Where are your clothes?

A: I don't have clothes.

Q: You don't have clothes. So you're wearing kind of the same thing all the time? Alright. So, obviously, yesterday you were 18, today you're 19, right?

A: Mmm hmm.

Q: Okay. So, ah, tell me about your father. Is your father alive? No? Okay. So who raised you? Nobody? Okay. So...

A: It's a blur.

Q: Yeah. Really? How come it's a blur?

A: 'Cause I kind a grew up in the system.

Q: Oh, okay. Okay. I understand that. I'm sorry about that, you know. Um, did you go to school?

A: Mmm hmm.

Q: Okay. What, ah, what grade did you get through?

A: I don't know, officer.

Q: Well I mean were you a junior? Were you a freshman? Were you a senior? Did you graduate from high school?

A: What is this behind?

Q: I'm sorry?

A: What is this behind?

Q: Well right now I'm just talking to you, but this is in regarding some stuff that happened in Vegas. Okay. But you said you've never been to Vegas, right? Or maybe you have been to Vegas, and just didn't recall it. Is that a possibility? You there, David?

A: Mmm hmm.

Q: Are you there?

A: Excuse me.

Q: That's okay. Have you been to Vegas before? No? Okay. I'm gonna pull this away from you, just so you concentrate on me for a sec, okay. I'm gonna put it right there.

A: Mmm hmm.

Q: Okay. Alright. Let me ask you this. We'll start with some easier stuff. Have you done drugs before?

A: Mmm hmm.

Q: Okay. Ah, but you been in, in here for what, two days now. Are you feeling any of the effects of not doing drugs, or are you okay?

A: I don't know, sir.

Q: Okay. Are you mentally handicapped? Alright. Well let's try it this way then. The reason we're up here, is 'cause the shooting took place in Vegas. Okay. And I know you know what, what I'm, what I'm talking about. I know you do.

Alright. So this, the whole thing of tuning in and tuning out is, is, isn't gonna work. Okay. The best thing to do is to listen to what I got to say. Alright.

A: Mmm hmm.

Q: And talk to us. Okay. Because let me tell you something about the, about the shooting. Okay. Ah, it's not a big mystery. Okay. It's not a big mystery, and here we are. We've already talked to 10, 15 people, you know, and that's how we ended up here. Okay. Now here's how I look at it. Okay. I look at it that you're a pretty young kid. Okay. You've been through the system before, ah, probably some older guys might have taken advantage of you, as far as just, you know, manipulating you into doing things that, that you didn't necessarily know were gonna happen, or, or what, but, ah, this took place August 7th. Okay. And August 7th was a, ah, ah, Friday, actually, it was a Saturday.

CB: Yeah. Friday night, Saturday night.

Q: Friday night, so it was Friday, everything started Friday night, ended Saturday morning. Okay. So were you in Vegas then?

A: Like I said, it's a blur, sir.

Q: Why is it a blur? Tell me why it's a blur.

A: I really don't remember much.

Q: Why?

A: Probably because some of the drugs I've done.

Q: Okay. What kind of drugs have you done?

A: Mmm Mmm. (I don't know)

Q: You don't know? Well let me say it this way, David. You obviously know Monica's phone number, right, because you call her every once in a while, and she's expecting you to call her today, as a matter of fact, because you've got, ah, today's your birthday, right? And you know her, 'cause she's your, your cousin, right, but you call her your aunt. Right?

A: Mmm hmm.

Q: Okay. What kind a car is parked in their driveway? What kind of a classic older car?

A: I don't even know, sir.

Q: Really? You don't remember a white El Camino in her driveway? It's a pretty nice car. I sh--I know I saw it. You don't remember that?

A: What are those under there? Those are pictures?

Q: Where? Here?

A: Mmm hmm.

Q: These are pictures. Their surveillance pictures from casinos.

A: _____(inaudible)

Q: Okay. And guess who is in 'em?

A: Who?

Q: You.

A: Let me see.

Q: I'll show 'em to you when I'm ready. Okay.

A: Mmm hmm.

Q: Okay. So listen, David. It's time to, ah, it's time to take this stuff seriously. Okay. Right now I've got a murder warrant for you going through. Okay. Do you understand that?

A: A murder one?

Q: A murder warrant. Okay.

A: Mmm hmm.

Q: Because a woman got shot. She got shot in the head. And then a little girl got shot, shot in the stomach. Okay.

A: Hmm.

Q: And I know that you were there, and I know that Willie was there, and I know that Stephanie was there, and I know that Monica was there, and I know that Job kind a had his thumb on the whole thing, pointing people in different directions. Right? So this isn't a big who done it. Okay. Willie's been in custody. You know that though, right?

A: I don't know what you're talking about.

Q: G.

A: Can I see some of your pictures though?

Q: G-Dog. No. I'll show 'em to you when I'm ready. Okay. Do you know G-Dog? No. Do you know Job-Loc?

A: Mmm mmm.

Q: No. You know a Hispanic girl in Vegas named Monica? No.

CB: Maybe you should get--you want me to get a picture of, ah, Job?

Q: Um, no. It's okay.

CB: _____(both talking)

Q: These are shitty, because these are taken, then blown up onto a paper that everybody can see. That's at the Opera House, which is a place in North Town that you were at. That's you. Okay. That's Willie.

A: _____(inaudible)

Q: G-Dog. That's Monica. Remember she was the little hoe that was, was out with you guys driving you guys all around. Remember? Okay. This is horrible. It looks a lot better on the color glossy photograph paper. That's the three of you outside the Golden Nugget. This is a better picture of you guys walking through the Opera House. Willie's smoking, Monica, you. Whoa! There you are all by yourself smoking. There's the three of you walking outside. There's Monica. Do you remember what, ah, any of this now? Do you understand what a murder warrant is? Okay. Yeah, you do. Alright. We're not here to play games with you, David. Do you understand?

A: Mmm hmm.

Q: I got no problem with you going to prison for the rest of your life.

A: Mmm hmm.

Q: And apparently you got no problem with it either.

CB: David, you said that, that, you know, a lot of it was a blur. Okay. So why don't we start with what wasn't a blur.

A: Actually, I don't remember nothing, Chris. Nothing. The people you talking about, I don't remember them either.

Q: Look, you've been up to Vegas twice.

A: Twice?

Q: 'Cause Job and Monica came down and picked you up twice, right?

CB: No. I think it was just the...

Q: Just the once.

CB: ...the once.

Q: Just the once. You came up for a week.

A: I don't know anything about this.

Q: That's a month ago. So that's not you in those pictures?

A: Sometimes I have a problem even remembering my own name, sir.

Q: Really?

A: Truthfully.

Q: Hmm. Well that's a problem. That's a problem. Because Willie's in custody on this, and we talked to Willie. Okay. Are you listening to me, or are you reading that?

A: I'm listening, sir.

Q: Okay. Willie says that you guys went out driving around looking for a lick, and that Stephanie directed you up to that apartment where the shooting took place. But here's the kicker of the whole thing. Willie says that you, Willie, and Stephanie got out of the car, and walked up to the apartment door, and that you had the gun. Willie, who's 34 years old, or something like that, puts you with the gun. I don't know. Usually that's an older guy's job, but that's what Willie says. Okay.

A: It's a blur, sir. I really don't know.

Q: Well a blur is not a good defense, David. Trust me. A blur is not gonna work in front of a jury. You understand?

CB: Yeah. Willie's...

Q: Yeah.

CB: ...almost 10 years older than you.

Q: A blur is not gonna work in front of a jury, David, but your best bet is to talk to us about what happened, and why it happened. Okay. I hate to make the world think that you're a heartless, heartless bastard. Okay. Are you a heartless bastard? Do you have a conscience?

CB: David, here's the thing. Man, there's, you know, we've got everybody else's versions of the story. Okay. And we're asking you what your version is. Alright. But, but I will tell you this, man, by just saying I don't remember anything, that's not a very good version. Okay.

Q: Are you sleepy?

CB: Do you understand where I'm coming from? Now, you know, I don't know if these guys, you know, are using you. I don't know what the deal is. I don't know the story behind the main story here, and that's what we're trying to get from you.

Q: We know that this happened. We know how it happened. We just don't know why it happened. Okay. Personally I think Willie had the gun, but I'm not sure. Are you sleepy? Do you need a nap? Really? You need a nap? Do you want to tell us why this happened?

A: Sir, I really don't know anything about this. It's kind of shocking to me.

Q: Yeah. It's shocking to you. Do you realize you're being charged with murder?

A: That's serious.

Q: Does that upset you at all? If you didn't do it, I would be pretty pissed off, personally. That's just me though. Right?

(background voices not transcribed)

Q: So is Willie and Job, are they worth taking a life sentence for? You're doing it for the hood? Doing it for the set? Monica puts you there. Stephanie puts you there. Willie puts you there with the gun. Okay. Why would Willie be putting a mouth on you like that?

CB: Look, they're looking out for themselves now, and that's why we want to get the story from you, 'cause maybe their version of it isn't the accurate truth, and that's why we're here to talk to you. Let me show you--I'm gonna grab a photo.

Q: Okay. Do you remember arriving in LA on the bus from Vegas? 'Cause that's

sure in the fuck you right there. Right? That's Job, and there's Willie. Little bit better picture of you.

CB: Can I see your keys?

Q: Sorry. You understand?

A: Sir, this is...

Q: This is what? You're shaking your head. This is what? What?

A: I don't even remember this.

Q: Yeah, you do. You do remember this, because I got ears everywhere, dude.

A: I don't remember this.

Q: Who's Job, since I can't remember her name.

A: Don't know.

Q: Who's Job's pregnant girlfriend that lives over there off of, ah, right down the street from here.

A: I don't even remember even being in Vegas.

Q: Really? That's gonna be bad for you, Dave. You understand? Say--to be honest with you, dude. I've been doing this job a long time, and the whole I don't remember anything, I'll bet I've heard it a thousand times. Sit up. I'm doing you the courtesy of sitting up. You sit up. Okay. I've heard that a thousand times, and you know why people say that, because they got no other lie to tell. They can't think of anything better to say. So the whole I don't remember, ain't gonna fly, dude. Even Monica's daughter says you guys had lucid coherent

conversations. Remember Tyler? No. You don't remember her. Tried to get her to call you. You tried to get her number. Well this is a predicament, dude. So what do you do in here all day? Sleep? Or you got a job or something? Why are you so tired? Have you ever been diagnosed with anything? No?

A: That I know of.

Q: Okay.

A: I don't think so.

Q: Are you autistic?

A: What's that?

Q: Are you retarded? You're shaking your head no. You're not retarded? You're going to prison, David. Do you understand that? Is that better than living on the streets? No more drinking. No more smoking. No more girls. Willie don't like the sound of that too much. That's why he's talking. Monica don't like the sound of that at all. That's why she's talking. All three of them pointed at your picture, dude, and ID'd you. How do you think I got here? Now Willie comes off like a big man, but believe me, he's covering his own little ass. Are you scared? Hey. Are you scared? I'll be you a thousand dollars that if I went and talked to the guys in your block, and the, and the guards, which I will incidentally, they're gonna say that you're just fine up there, that you talk hell a smack, that you laugh, that you joke, that you're pissed off, everything else, right? These would be the books on that murder that you committed. Tell me who that is.

A: I don't know who that is.

Q: You stayed at his apartment, dude.

CB: You don't know him? Don't know Job-Loc? Don't know him by any name?

Q: Well I got to tell you, you're harder than these OG's, man. These OG's don't want to go to prison. Can I tell you something bad that's bad for you too? The little 12 year old, she ID'd you too. Okay. Remember going through her pockets looking for the money as she laid there bleeding?

A: I don't remember none of this, sir.

Q: Yeah. Well, I don't remember ain't gonna work, dude. I assure you of that.

CB: Let me show you a couple other photos real quick. I got a big one right here. Recognize her? Never seen her?

A: Mmm mmm.

CB: Do you remember her daughter?

A: Mmm mmm.

Q: Do you remember getting driven around in a gray Crown Victoria?

CB: Remember her?

A: Mmm mmm.

CB: You don't remember her either, huh? You know, I have to tell you, the one thing that actually bothers me the most, is that these guys are 10 years older than you are, and it almost makes it seem like they were using you, 'cause they don't care so much, as much for you as you appear to for them. Recognize that guy?

A: Mmm mmm.

CB: Never seen him?

A: Mmm mmm.

CB: You want to _____(inaudible)? Well I'm not gonna tell you that.

A: Tell me what?

CB: I'll tell you what, I'll tell you everything as soon as you start being a little more honest. I guess my, you know, the thing that con--like I said, that confuses me the most is, is that you are 18 during this, well 19 today, and you've got these guys who are what? I think one of 'em's 34 maybe. Job. And it's like they basically go around, and recruit younger guys like yourself, and do the dirty work for them, because they don't want to get their hands dirty as much. I don't know anymore. I don't know what the deal is. I guess that what I don't understand is, it's just like the guy who the gun was given to, same thing, your age, the heats always on them, and they don't take any of the responsibility, and their willing to dump you guys off into the dirt, and I just don't understand where your loyalty comes into that.

A: Honestly, sir, I think I probably even _____(inaudible), 'cause I really don't know _____(inaudible).

CB: Well they remember you, and obviously, well I don't have a computer in here. I'd love to sit here, and pop up a computer screen, and show you, actually, the real footage, 'cause that's just paper copies of stills with Willie, the guy that we just showed you, G-Dog, with Monica. The people that you're saying that you don't

even know, and it's not just them. It's other people that, that came by. Okay. All these people know who you are. I mean don't get me wrong. It's not like they're, like Monica, or the guy with the gun is saying, "Hey. I've known this guy my whole life", but they know who you are. They know you. They were around you long enough to know who, to know that. Isn't it worth the opportunity to give your side of the story?

A: I _____(inaudible) none of this.

Q: Did Willie shoot that girl?

A: I don't remember if they shot, honestly.

Q: You were there.

A: I do not remember this.

CB: Okay. So you don't remember the incident.

A: I don't remember none of this.

CB: But there's no way...

A: I don't even remember going to Vegas. Honestly.

CB: Well...

Q: No. It's gonna be hard, because see these photos here, these are just photos, but we have the whole video. You're not stumbling. You're not being carried. Look at you. You, you, you're leading the way, man. These two mopes are following you. So it's hard for me to believe that you don't remember any of that. It's hard for me to think that you were so out of it that you have no memory of that, Dave. It

ain't like that.

A: Some mornings I wake up, I really don't even remember certain things, sir.

Q: Really? So you had seven of those mornings consecutively?

A: Some mornings I wake up, I don't even remember my own name sometimes.

CB: Do you remember your name now, David?

Q: I was telling him I can bet a thousand dollars that his homies up on this floor, and the guards say he's up there playing grab ass...

CB: Yeah.

Q: ...and joking, and smiling, and talking, conversating, right? 'Cause you sure ain't like this all the time. You'd be pummeled.

CB: Do you think that this is, that this is all just a joke, and I mean do you think these case files are just, I mean well obviously they can't be, 'cause I've shown you the pictures. There's no mystery in it. The only mystery is is why you were involved in these guys. Are they leading you around that you want to be, make a name for yourself? Did they want to, you know, were they using you? Because they know you. There's no mystery there.

Q: Tomorrow when you go see the judge for the trespass, guess what? You ain't getting out. You understand that? And in a couple few weeks, him and I will be right back here putting you in cuffs, and taking you to Vegas where you're never getting out.

CB: Not if you leave it the way you're leaving it right now.

Q: You lived 18 short years, dude.

CB: David, this is, you know, and I don't, I don't know your, your upbringing. I don't know your circumstances. I mean from what I've heard to talking to people, it hasn't been the greatest. Okay. And I don't know that maybe you haven't, you know, you've never had the opportunity, you know, to have a voice, because of how you got brought up, or the lack there of, but I will tell you this, that if you ever needed to have a voice in your life, this is that moment. Because the way that you're leaving it right now is basically, "I did it. I'm responsible for it. And nobody made me do anything. Nobody else was a part of it." Now if that's, if that's the road that you want to take, you know, that's, that's up to you. I mean you're a grown man. But what we're trying to afford you here is for you to have a voice, 'cause honestly I think it's kind a jacked up, because out of everybody involved here, they're all, they're all older than you, a lot older than you.

A: What's that?

Q: He's talking to you.

A: Oh, excuse me.

CB: Are you just taking this in, or do you just, you just don't understand the severity of the situation you're in, or you just don't care?

A: I...

Q: Do you understand that the way this is sitting right now, you're never getting out of prison? Do you understand that? Yes or no? That's a yes or no question. Do

you understand? 'Cause let me tell you how you're coming off right here, and this is what I'll tell the jury down the road. You're a heartless mother fucker that couldn't give a shit about these people's lives. Okay. And that's what I'm gonna say, and you know what, I feel good about saying that, 'cause that's exactly how you're coming off. You couldn't give a shit about the lady whose half of her face is blown off, and you couldn't give a shit about a 12 year old little girl shot in the stomach. Willie could enough to put it all on you, dude. You think we're making these names up?

CB: How do you know that?

Q: Everybody knows you, but you mysteriously can't remember anything. Bull shit. How fucking long do you think we've been doing this? A week? Do you know how many times I've gone to trial on guys that said I don't remember?

A: I think I gots mental problems.

Q: You think you gots mental problems. Well you know how to do a robbery motherfucker. You know that? You didn't have a mental problem then.

CB: How did you end up here? David.

A: Hmm?

CB: How did you end up in this? I mean what's your story?

Q: I got a guess.

A: Huh?

Q: My guess is you got no dominant male figure in your life. You're out there when you should be in school. You're roaming the streets, and guys like this guy...

CB: Right there.

Q: ...found you, and took you in. Gave you the support that you needed, right? Checked on you, took care of you, gave you something to eat if you needed it, had his girls take care of you. You know what? He's done taking care of you, David. Trust me. These guys rolled so fast it wasn't even funny. _____(inaudible) tell you the only unknown person in this whole crew. You. Okay. You. The way we got to you are them. You understand? No. They didn't give your whole name. No. They gave us enough, and it took us a little bit, but here we are, dude. The day you've been waiting for. I assure you, you've been waiting for your, your sky to fall for a while now, and it fell.

CB: David, why the, why the loyalty? I mean did they save your life earlier or something? Did they do something that significant for you? I mean look, street code, you know, the whole, you know, I'm not gonna say their name or whatever, because of some BS fricking grand larceny or something. That's one thing, but we're not talking about a grand larceny. Okay. We're talking about a lady who got her face shot off in front of her 12 year old, and then the 12 year old got shot.

Q: Tell us what happened, David, because everything, everybody's putting it on you. You were the long gunman, out a control. They had no idea you were gonna do what you did. They were shocked. Hell, Willie said he was scared of him,

remember? "I didn't say anything after, 'cause I was scared." That's what Willie says.

CB: Not just him. We got a bunch a 30 year olds, some even older than 40, for that matter, and they're all saying that they're afraid of a, of the 18 year old, but what it sounds like to me is that all the adults, the older adults, manipulated the young kid. A robbery is one thing man. Doing a lick is one thing, but shooting a girl's mom in her face in front of the girl, a 12 year old, and then shooting that girl, that's problems. Would you agree with that?

Q: Did you know Willie was gonna shoot her? Open your eyes, dude. Did you know Willie was gonna shoot her? Did you know Willie was gonna shoot her? I'll bet if I asked you, do you want a Twinkie right now, you'd say yes, or a pack a smokes. Something tells me you'd be all over that. You'd understand me. You'd answer my questions.

CB: Like the cigarette butts that were left back in the apartment.

Q: Oops.

CB: Job-Loc, and Willie, Monica, and the young man that took the gun away for you guys.

Q: Oops.

CB: David, we're trying to give you an opportunity to be straight with us. We have the gun. The chrome revolver, Ruger.

Q: You know what happens when you pull the hammer back on a gun, where you pull that trigger, where you even slide the, the cylinder open. What happens is little skin on your thumb sloughs off in those grooves. It's called neurolization, those grooves are called neurolizing, and skin sloughs off into there, it's microscopic, but it's amazing what can be done today with science. Okay. Later I'm gonna take your DNA. Okay. So you tell me, David. Is your DNA gonna be on that gun? Let me ask you this. Am I supposed to believe right now that you're totally on planet Pluto right now, and not even hearing me? 'Cause I got the whole heartless bastard thing in my mind. People don't like heartless bastards, man. You know? People want to believe there's only a few of 'em out there, and maybe Willie's one of 'em, or maybe Job's one of 'em for bringing you all the way up there to Vegas, and having Monica drive you guys around so you could do his bidding. Are you a puppet, David? Bet you a thousand dollars is someone said chow time right now, you'd make into the food line. You know? I'll talk to the guards though. I'll get statements from them saying you always manage to find the food line, and you know which cell is yours, and you know your inmate number, and you're able to fill out a chit, or a kite, or whatever they call it here. In Vegas they're kites. You're gonna need to know that.

CB: Is it really worth it, you're friendship with them. Would you even call them that when they put you in this circumstance? David. Would you? Look, David, you, you can stop with the theatrics. Are you done?

A: Hmm? Hmm?

CB: Hmm? Hmm? Are you done? Maybe you are.

Q: You know what the good news is about all this. The good news is about all this is that the three assholes are going to prison. You know, and you don't care. So I don't know why I care. Why do you care?

CB: Well if he doesn't care, I certainly don't care. And as of right now, it's definitely showing he doesn't care. Maybe I did a little too much prejudging that they were manipulating you into doing something you didn't want to do.

Q: Maybe Willie's right. Maybe this was all him.

CB: They're all right then.

Q: Willie said, Willie said you weren't, you yelled, "You ain't leaving 'til you get paid." _____(both talking)

CB: You know what's funny is that on, ah, the older lady, Stephanie, that you say you've never seen before, the crack head, the one that set up the whole thing. What's funny is that I know that when you guys before, when she ran, and you went to go pick her up, you didn't want to go pick her up. You thought that you should a just capped her. But Willie didn't want you to do that, did he, because they go way back.

Q: How do we know all that? Oh, yeah. Willie told us.

CB: If three other people that were there other than you my man, and you're the last person we're talking to.

Q: Open your mouth.

(pause) (background noise/voices not transcribed)

CB: Nineteen.

Q: So you're sloughing skin on these. This is for your DNA, right? And just like your finger did on that gun, or Willie's, we got Willie's too. It's all science, dude, when it comes out, how's that gonna look? It's gonna look bad even though you're not saying anything, on top of that you're not saying anything, it's gonna look bad. Right?

CB: Who did you live with when you were growing up? Did you live on the street the whole time? Did you live with your, with Monica? The one out in, what the heck's the name of that city? Victorville. Did you grow up with her? Did she take care of you? David. Did she take care of you, or did somebody else take care of you, or anybody, for that matter?

Q: Dude, you didn't act like this when you came in.

CB: _____(both talking)

Q: You came in, you asked questions, we introduced ourselves, you said, "Hi. What's this about?"

CB: It's a lot to take in.

Q: "I got, I got arrested for trespassing." You freaking out? Is that what it is? 'Cause I don't blame you. I'd be scare too, you know. David James Burns. We didn't pull that name out of a hat, buddy. Okay.

CB: David, what's the issue? David. You just want to play games the whole time. I'm trying to be a man with you right now, and I'm trying to be respectful. Okay. I would ask that you do the same. Have I disrespected you in any way?

A: I'm not signing.

CB: Okay. Then could you at least return that to me? Okay. I'm asking you, in all honesty, I'm just curious. Okay. I'm not asking you about this. I'm asking you what happened. Why, why did you end up in this spot? Did anybody, did you live with anybody when you were younger? How long have you been on the streets? Couple years? Five years? Is that too personal?

Q: You understood his last question. You even said, "Yes sir." Do you not want to talk? Okay.

CB: David, do you think, and all this _____(inaudible). Just look at me for a minute, man. Okay. I just want, just do me at least this favor, and just answer me this question. Okay. I mean do you, do you not understand what I'm telling you when I sit here, and I tell you that this is your one and only opportunity to explain your side of the story? Do you understand that? Do you think that I'm, that I'm lying to you or something? Look, man, I got, well wait. It's the 13th. I've got five weeks, five weeks of non-stop work. Okay. I worked 21 hours of OT in one day, in one single day during this case. That's just one day, I've worked 21 hours straight. Okay. One day. All this stuff right here, all this, okay. All this right here is nothing but on this case, and this case alone. Okay. That's how much

work has been done in five weeks. Five weeks. Okay. Now I know that this is a lot to take in, all of a sudden, when you're here on a trespass, and you got us coming here talking to you about this, and I can't imagine that you've not spent at least some of the time wondering if this was gonna catch up with you. There's no way you couldn't have, but I'm telling you this is your opportunity to counter what these people are saying. Okay. I mean if you want to play like the silent game, that's fine, that's certainly your prerogative, but it's not...

Q: Sit up.

CB: ...gonna go away.

Q: Sit up.

CB: It doesn't matter whether we're here or not my man, because the bottom line is, is that we've got a dead lady, and a 12 year old daughter who is sitting inside of the hospital recovering from her gunshot wound. I've got Willie. I've got--or G-Dog. Monica, the driver of the vehicle, Job-Loc, the apartment, which we served a search warrant on, but you probably already know that, 'cause you already know that we have the gun, and you know who had the gun. You may not remember his name, but you remember Job giving it to him, and none of that's gonna go away, man. And the crack head, the one that set up the licks, we've already talked to every one of 'em. You are it. And, like I said, a minute ago, before I came in here, and met you, which is probably my bad, is that I actually thought that maybe they manipulated into doing something you didn't want to do, since you were so

much younger than they were, but, ultimately, it doesn't seem like you really are concerned too much with that lady or her daughter.

(background voices not transcribed)

Q: That's just gross. You can stop doing that right now. Okay.

CB: So I'm in here telling you about a lady that got her face shot off, and a 12 year old girl that got shot in the stomach, and the three other people that were aware, were with you, and showing you photos of you with these guys, who you state you don't know, and you're cleaning ear wax out of your ear.

Q: Guilty. I'm gonna be honest with you.

CB: Psychopath.

Q: That's what it tells...

CB: That's...

Q: ...that's what it tells me. Guilty.

CB: I got to say, I misjudged that one. I thought, ah...

Q: I've never...

CB: ...I thought they were manipulating you a little bit, but he was...

Q: An innocent person who just said, "I don't remember." Okay. Let me tell you, the innocent person goes, "Let me tell you, Marty, what I did." Okay. "Yeah. I was in the car with them. Yeah. I took a ride. Yeah. I thought we were gonna go get weed. Yeah. I thought, ah, Stephanie was getting out of the car. Yeah. I thought Willie was getting out of the car too, but they were just gonna go up there

to get weed. Sure Stephanie wanted to get a rock for herself. Yeah. I saw Monica hand Stephanie the $20.00 bill, and we walked up there. Next thing I know someone's pulling a gat and getting busy." Right? That's what an innocent guy does, David. An innocent guy goes, "Let me tell you what happened. Okay. Sure it doesn't look great that I was there, but I did not pull the trigger. I did not want that to happen." You know what a guilty motherfucker does. A guilty guy sits there, and cleans ear wax out of his ear, 'cause he couldn't give a shit either way, and that whole game you're doing right now ain't fooling nobody pal. Okay. Oh, did you just come back? Did you hear a word I said? It's ridiculous. You're ridiculous. Do you want to talk about this incident or not? 'Cause you were bright eyed and bushy tailed when you walked in here, dude. The innocent guy wants to talk. The innocent guy wants to tell the world that he is not the heartless bastard everybody thinks he is. The innocent guy wants to prove to us that he's not a monster who could shoot a woman in the face, and shoot a 12 year old in her stomach. That's what the innocent guy wants to do. The guilty guy wants us out a here so bad, he could pop. That's what the guilty guy wants. Are you innocent or guilty, David? 'Cause we know the story, dude. We know that Monica and Job came down here, and picked you and Willie up. We know that you guys drove all the way back to Vegas, and you hung out in Monica's house. Okay. And she's got an attractive 19 year old daughter that you took a shining to. We know that you guy's stayed over at Job's apartment, and you know what, we're

gonna have you're DNA, and your fingerprints in both places. Okay. So it's gonna be really hard for you to tell the jury, "Hey", what you told me earlier, "I never been to Vegas." That's a lie. Okay. That doesn't work good for you. What works good for you is to say, "Yeah. I did go up there with those guys. They invited me to go. I'm an 18 year old kid, I got nothing going on. I'm in between jobs right now, I'm going. They said they'd pay for everything. They didn't even ask me for gas money, Marty." That's what the innocent guy does. Okay. We got your DNA. We got your fingerprints. Okay. Guess what we got out of the inside of Monica's car? DNA, fingerprints. An unknown male. You know who the unknown male is gonna be? You. 'Cause I just go your DNA. Okay. We know that you guys were at the Western Motel that night, little shit hole off a 9th and Fremont. Monica came over there, and picked you up. We know from there, you went downtown. You went into the, ah, Gold Nugget. She was gonna go and try to work her tricks. That didn't work out so good. You guys were looking for somebody to hit. That didn't work out so good. You didn't do anything. Maybe you didn't want to. We know from there you got in the car, and you drove through the parking lot at Jerry's Nugget. That didn't work out so good. You go up to the Opera House, which is in North Town. You were walking around in there, and guess how I know that, 'cause you're all over the video stupid. That's you. Okay. And I'm using a little bit harsher language, 'cause maybe that's what it's gonna take to get through to you that you're playing with the rest of your life right now.

Do you understand me? You're just juggling it like you don't care, and maybe if you'd a had an older guy years ago, telling you when you were being stupid, you wouldn't be in this predicament right now. From there you drive down to Stephanie's place, and she's waiting outside on the street for you. You guys swoop in, she hops in. It's creepy, huh? It's almost like you were in the car. Isn't it creepy? From there you go to some guys apartment that, to do the, you know, that Stephanie's thinking we can do a robbery at. Okay. And you try, maybe not you personally, maybe you didn't want to, but it didn't go over. Why? Because the guy had a gun. F that. I'm not kicking the door if he's got a gun. Maybe you got a little bit a God given sense. You go back, you get in the car, Stephanie goes, "You know what? We can got to Rhea's." That was her name incidentally, the girl with half a face, her name's Rhea. Okay. "We'll go up to Rhea's. Let me put a call into her." She dials up the phone, "Hey, girl. I need something. Can I come? Twenty minutes." Hangs up the phone. You guys drive up there. Monica drives by the apartment, backs into a parking spot at the apartment next door. You, Willie, and Stephanie get out, but not before Stephanie goes to Monica, "Hey, give me twenty bucks. Give me twenty bucks so this looks legit." Did you snap out of it again? Everything okay on Pluto? You guys walk to the door, and here's what Willie tells me. Okay. Willie tells us that Stephanie knocks on the door, Rhea lets her in, and while Stephanie's handing her the twenty dollars, you go flying through that door screaming, "Where is the

money? Where is the dope?" And pop that girl right in the head. Do you know that she died with a twenty dollar bill still clasped in her hand? Did you know that? That's what Willie tells us, and naïve as we sometimes can be, we didn't think that was true, but you know what the innocent guy says. The innocent guy says, "Listen to me. This is what happened." A guilty guy wants us to leave. Stephanie goes running. She's scared shitless. Right? And she takes off in a different direction. You two get in the car. Monica starts driving, and Willie goes, "I can't leave my home girl out here." And according to Willie you said, "I should a popped that bitch. I should a shot her too." Willie, being the white knight that he is, tells us, "I told him no way. You ain't shooting my girl." And he calls her, "Girl, where you at?" You guys turn around, don't you? Remember? Car turns around, and you go back, and you get Stephanie, you load her up in the car. You guys drive back, drop Stephanie off. Now it's you, Monica, and Willie in that car, G-Dog. G.

CB: You're a loyal homie.

Q: Yep. And G don't stand for good intention. You know? And now you guys are out and about. Monica takes you back over, eventually, to Job's apartment, and Job, he's sitting there, fat, dumb, and happy, 'cause he's, you, he didn't do nothing wrong, but you're wrong, he did. He's gonna go to prison too. Job's so worried about you that he goes in the other room and bangs Monica. Remember that? At least he told you you had blood on your clothing. Or at least that's what he told

us. "Boy, you got blood on you." And you go get in the shower. Close to sunrise a little kid shows up, little 19 year old, 'bout your, your age. Almost as dumb as you are, because what's he do? He takes the gun. It's weird, man, right? It's almost like a movie like I watched the movie. You see what I mean? We do our job? Now all we got to go on is what Willie says, and I'm starting to get more and more comfortable with that. Job tells that kid, "Hey, you can either bury that gun or you sell it." Well you know what that dipshit did. He held onto is, and guess who's got it now? We do. You better hope to God your DNA ain't on that trigger my man. You know that? So you're okay with Willie's account of what happened, 'cause why would Willie lie, and say that you weren't there, or say that you were there if you didn't go to Vegas? Why would Stephanie and Monica pick you out of a photo lineup? Why would that little girl?

CB: You already know where Willie's at, and you know where Job-Loc's at. Right? You know where Willie's going? 'Cause he ain't staying here. He's coming with us.

Q: Maybe you and Willie can be cellie's. G--good intentions.

CB: And we know you know, because Job-Loc is passing the word to you, 'cause he's in jail, too, with Willie, isn't he? It's like a family reunion in that place, 'cause we know people he, that he knows have been in that jail and out, and they're all passing word to you. So it's not like what we're telling you, that you need to think

that it's a lie, 'cause you already know the truth. So, once again, the question comes back to why the loyalty? 'Cause there's not much of it for you.

Q: David, how's it ____(inaudible) when I got the guards coming in to testify at your jury trial saying, "He interacts with the other cellmates. If he needs something, he asks. He knows where to go to get the food. He knows what time to be in bed. He knows the bed's got to be made." And then I testify, and say, "You know what? He didn't answer a single question, and he says he doesn't remember, doesn't understand." How's that gonna go?

CB: You have any kids, David? Well look, man, I understand it's a lot to take in. Okay. 'Cause I just can't, I don't even, and even if you are a cold-hearted sick bastard, let's just assume that was the fact. Okay. There's no way that, facing what you're facing, can make you happy at the moment, but you're not gonna get to play dumb forever. So do you want to take this opportunity to give your side of the story, or do you just want to leave us with what we've been given from everybody else that's involved? 'Cause if you think that your two homies are in jail talking to each other, and they're telling each other that everything's okay, that they don't need to worry about anything, that ain't the case, and they can front with each other all they want. So what do you want to do?

(pause)

A: (humming)

Q: You're humming?

A: (humming)

CB: David, what do you want to do? Are they worth it?

A: (humming)

CB: David, do you want to stop acting like an ass?

A: (humming)

CB: Do you think you can just ignore _____(inaudible), and this is gonna go away? Do you need a minute to think about it?

A: (humming)

CB: David, do you need a minute to think about it? Yes or no?

A: Mmm.

Q: Here's exactly how everybody describes it, isn't it? Exactly.

A: (humming)

CB: Can you give me a minute?

Q: Mmm hmm.

A: (humming)

CB: I'll put that back away in a minute.

A: (humming)

CB: David, can you stop? Don't be annoying, please. Okay. You don't have to be rude. I haven't been disrespectful for--to you. Right? Okay. And all I'm asking you is to not be disrespectful, which is what you're doing. Do you want a minute to think about this or not?

(background voices not transcribed)

CB: At the very least, could you at least explain to me why? And I don't mean why, I mean why are you so, why are you not even willing to answer a simple question like that?

A: (humming)

CB: What is it you doubt? What is it you doubt? What is it you want me to prove to you? I have the whole case file right here. What is it that you want me to prove to you? Do you doubt that we have the gun? I know you've been told that we have the gun, 'cause I know that Job knows that we have the gun. I don't know, maybe he didn't tell you that. Actually, I can't assume that you knew that, 'cause maybe he didn't tell you that part. Would you like me to show you a picture of the gun? David, do you want me to show you a picture of the gun? David, do you want me to show you a picture of the gun? I know you know how to say yes or no. Yes or no?

A: (humming & singing inaudible)

CB: Does that comfort you or something?

A: (humming)

CB: Somebody sing to you when you were a child?

A: (humming)

CB: You honestly don't have any, not even a slight remorse for what happened. Nothing?

A: (humming)

CB: I mean seriously, has your life been that jacked up that you don't even have the slightest remorse for what happened?

A: (humming)

CB: David.

A: Hmm?

CB: Hmm? Hmm? Hmm?

A: Excuse me.

CB: No. Don't--bullshit. You--cut the shit, dude. You're 18, I'm twice your fucking age. You think you're playing me for some sucker on the street? Give me a break, dude. All you're proving to me is that you are a jackass. Oh, let's stretch. You feel better now? You're a twisted fricking person aren't you? You really do not care, do you? Not even a little bit.

(background voices not transcribed)

CB: Did you get that jacked up when you were younger? You don't know how to say yes or no now?

A: Do you believe in heaven or hell?

CB: I do. Probably not in the same context that you do, but, yeah, I do.

A: Mmm hmm. (humming)

CB: Why do you ask?

A: (humming)

CB: David?

A: Hmm?

CB: Why do you ask? Why do you ask? Do you?

A: (humming)

CB: David. _____(inaudible) You asked me a question, I answered it. All I'm asking you is why you asked. It has nothing to do with this. It's a simple question. You can answer it. Why do you ask? You know, I also believe in forgiving people, but if somebody does me wrong it's certainly nice for them to ask for forgiveness, or to say that they're sorry, than for me to just forgive them for, when they're still acting the same way. Do you have any kids?

A: Mmm mmm.

CB: No. If you had a kid, theoretically, and your kid does something wrong, and you, you know that, know that your kid did something wrong, and you know it, okay, you know it without a shadow of a doubt, and your kid comes to you, and, and you ask him, "Hey. Did you do this?" And bear in mind that you know that they did it, and your son says to you, "No. I didn't do it." Versus, "Yeah. I, I did do it. I made a mistake, and this is how it happened." How do you think that you're gonna react to him? What do you think that the difference is gonna be between how you deal with your son in that situation?

A: I don't understand.

CB: Okay. If you have a kid, and your kid does something wrong, you know that he did something wrong at school, whatever. A teacher witnessed it, they tell you, "Hey. Your son did this at the school." Okay. And he comes up to you, and you ask him about it, and you say, "Did you do it?" Let's say you had video of him doing it. Let's just forget that it's somebody just saying it. Say you have video of it, of them committing that act, and you ask him, he doesn't know that you have video, and you ask him, "Did you do it?" And he says, "No." And he lies to you. Are you gonna punish him harder, because he lied than if he came to you, and he said, "Yeah. I did it. I made a mistake. I'm sorry. It won't happen again."

A: I don't understand.

CB: You just still want to play games.

A: (singing inaudibly) (humming)

CB: David. David. Stop humming. Be a man for heaven sakes. I'm trying to have a conversation with you here, and you're acting very rude.

(pause)

CB: Do you want to tell me your side of the story? David, do you want to tell me your side of the story? David, do you want to tell me your side of the story?

A: (humming)

CB: David. David. Stop playing games. It's a simple question. Do you want to tell me your side of the story?

(pause)

CB: Do you want to see a picture of the gun?

A: Can I see all your pictures?

Q: It's a lot a pictures.

CB: I don't know that I'm gonna show you the victim. I'll show you some of 'em.

A: I can see your pictures.

CB: I'll show you some of them, but I'm not gonna show them all to you. What do you want to see pictures of? There's a lot a pictures, David. I've got four different search warrants alone of pictures, just of the search warrants. There's hundreds of pictures. You're gonna have to be more specific. What is it, specifically, that you want to see?

A: I don't even know, sir. I just want to see the pictures.

CB: Well I'm not just gonna go through pictures of autopsy. I'm not gonna go through all these pictures of every search warrant we did. You have to be specific. There's over, probably, 400 pictures in here. So what, specifically, do you want to see pictures of?

A: Can I go now?

CB: What do you want to see pictures of?

A: Can I go now?

CB: Do you not want to tell me your side of the story?

A: I don't even remember, Chris.

CB: So your final, your final version is that you don't know those people that I showed you pictures of.

(background voices not transcribed)

CB: You sure that's where you want to go, that you don't know them? Yes or no? Is that your final answer, that you don't know them? That's what you telling me, right?

A: Las Vegas--did they, will they get the death penalty?

CB: Are you gonna answer one of my questions, or are you just gonna play games all day?

A: Are we done?

CB: Do you want to see some? See that? See the gun? You see it? _____(inaudible). Bullet holes in the residence, and the residence, more bullet holes. You already saw the surveillance, some of them, enough to know. Here's the apartment that you guys were at, that you went to after. That's another search warrant. Here's Monica's car, served a search warrant on, and her residence, for that matter. Cigarette butts, medication, stuff that was inside of the apartment where you guys were at afterwards, where the guy came and got the gun, and Job-Loc gave it to him to get rid of. Ash tray, all the different cigarette butts everybody was smoking, not just there, but throughout the whole apartment. All you're leaving us with, my man, is the version that we are getting from them, which basically puts the blame on you. So here's some more cigarette butts,

more cigarette butts. You guys are sure doing a lot a smoking. This bullet, I think it's this one, yep. You see that bullet right there?

A: Mmm hmm.

CB: You see that one? That came from inside of the 12 year old girl. The surgeon's, when they cut her open, that bullet came from inside a her. There's another bullet that we recovered at the scene, which is gonna go back matching to that gun, forensically, being fired from that weapon, which we also have, which you already know that. Surveillance video from the Western. Surveillance video from the Golden Nugget where she went inside when you guys were on Fremont Street, where she was tying--trying to turn tricks, that would be Monica, G-Dog, or Job-Loc's girl. Um, the Opera House, which you saw footage of. Greyhound bus station where you guys used fake names to come down to LA. You saw video of that there though, stills, paper stills of that, in Vegas when you guys got on the bus, in LA when you got off the bus, then got on another bus. And the rest of this file I'll tell you when you start telling me. By the way, this is nothing but statements from the people that I showed you photos of, that you supposedly don't know, that picked you out of a photo lineup, since we have your photo, 'cause you've been arrested. This is just from those people that I showed you the pictures of. This one's my favorite. It's the longest interview I've ever done, since I've been doing this job. Guess that.

A: And who is that from?

CB: That's, these are the people that are telling your story, that you're allowing to.

A: _____(inaudible) Are we done?

CB: If you don't want to tell me your version of the story, then, yeah, I guess we are.

A: Honestly, I don't remember.

CB: It's just a big foggy mystery, huh? All week long when you were going to all those places.

A: _____(inaudible)

CB: Well you're only 19. I guess I, honestly, can't expect you to know any better.

A: 19 today. Thank you for the birthday present. This is the best birthday present I think I ever had.

CB: Don't thank me. Thank yourself, my man, 'cause you're the one who _____(inaudible). Not me.

A: (humming)

CB: And you can thank your buddies. Your loyal, your loyal buddies.

A: (humming)

CB: They're the ones who _____(inaudible). Well, actually, you can thank yourself the most, 'cause you were dumb enough to go there, and do the lick to begin with. Well, my man, I don't plan on sitting here for the rest of the day. Sit down. I'll have somebody come and get you, and if you are smart enough to pull your head out a your ass, and decide that you actually want to tell me your side of the story, because, as of right now, it's basically on you, 'cause that's what

everybody else is saying, and since you're not telling me otherwise, that's what you get. But you'll get a ticket to Vegas, so you'll be back there more than once, and, ah, _____(inaudible) pull your head out a your asshole, and stop acting like a _____(inaudible), by all means, let them know, and they'll get a hold of me. Otherwise, see you later. Operator, that's gonna end the interview, and today's date is 09/13/10, and the time is 1611 hours.

THIS VOLUNTARY STATEMENT WAS COMPLETED AT SAN BERNARDINO COUNTY CORRECTIONS FACILITY ON THE 13TH DAY OF SEPTEMBER, 2010 AT 1611 HOURS.

MW/CB/jc
10V1194

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CLERK OF THE COURT

NOTC
DAVID BURNS # 1139521

DA
PP

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

THE STATE OF NEVADA, Plaintiff, vs. DAVID BURNS, Defendant.	CASE NO. C-10-267882-2 DEPT. NO. XX

NOTICE OF APPEAL

NOTICE is hereby given that Defendant, DAVID BURNS, hereby appeals to the Supreme Court of the State of Nevada from the denial of his Petition for Writ of Habeas Corpus on February 16, 2016 by the Honorable Eric Johnson. The Order not having been entered as of this date.

DATED this 8 day of March, 2016.

DAVID BURNS # 1139521

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MAR 11 2016
CLERK OF THE COURT

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CLERK OF THE COURT

CERTIFICATE OF MAILING

I hereby certify that I am an employee of CHRISTOPHER R ORAM and that on the 8 day of March, 2016, I did deposit in the United States Post Office, at Las Vegas, Nevada, in a sealed envelope with postage fully pre-paid thereon, a true and correct copy of the above and foregoing **NOTICE OF APPEAL**, addressed to:

Supreme Court Clerk
Supreme Court Building
201 S. Carson Street
Carson City, Nevada 89701

Clark County
District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101

ADAM PAUL LAXALT
Attorney General
100 North Carson Street
Carson City, Nevada 89701

David Burns 1139521
DAVID BURNS # 1139521

David Burns #1139521
4569 North State Rt. 490
P.O. Box 1989
Ely, Nevada 89301

Clerk of Courts
200 Lewis Ave, 3rd Floor
Las Vegas, Nevada 89101

Legal Mail

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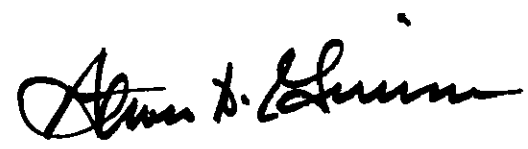

CLERK OF THE COURT

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- DAVID JAMES BURNS, aka D-Shot, #2757610 Defendant.	CASE NO: C-10-267882-2 DEPT NO: XX

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER

DATE OF HEARING: FEBRUARY 16, 2016
TIME OF HEARING: 8:30 AM

THIS CAUSE having come on for hearing before the Honorable JUDGE ERIC JOHNSON, District Judge, on the 16th Day of February, 2016, the Petitioner not being present, PROCEEDING IN FORMA PAUPERIS, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through WILLIAM J. MERBACK, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, no arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT, CONCLUSIONS OF LAW

On October 13, 2010, the State charged DAVID JAMES BURNS, aka D-Shot, (hereinafter "Defendant"), by way of 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). On October 28, 2010, the State filed a Notice of Intent to Seek the Death Penalty in this matter.

On July 18, 2012, Defendant, through counsel, filed many pretrial Motions, to which the State filed its Oppositions on July 23, 2012. This Court ruled on these Motions on July 18, 2013.

On July 19, 2013, Defendant filed a 500-page Motion to Strike the State's Notice of Intent to Seek the Death Penalty. The State filed its Opposition on July 25, 2013. This Court denied Defendant's Motion on September 12, 2013. In the interim, Defendant also filed multiple Motions to continue his trial date.

Defendant's jury trial finally began on January 20, 2015. Following a 15-day trial on February 17, 2015, the jury returned a guilty verdict on all eight counts.

On April 23, 2015, Defendant was adjudged guilty and sentenced to the Nevada Department of Corrections as follows: COUNT 1 – a maximum of 72 months and a minimum of 12 months; COUNT 2 – a maximum of 120 months and a minimum of 24 months; COUNT 3 – a maximum of 180 months and a minimum of 24 months; COUNT 4 – a maximum of 180 months and a minimum of 24 months, plus a consecutive term of a maximum of 180 months and a minimum of 24 months for the deadly weapon enhancement; COUNT 5 – Life without parole, plus a consecutive term of a maximum of 240 months and a minimum of 40 months for the deadly weapon enhancement; COUNT 6 – a maximum of 180 months and a minimum of 24 months, plus a consecutive term of a maximum of 180 months and a minimum of 24 months for the deadly weapon enhancement; COUNT 7 – a maximum of 240 months and a minimum of 48 months, plus a consecutive term of a maximum of 240 months and a minimum

of 40 months for the deadly weapon enhancement; and COUNT 8 – a maximum of 180 months and a minimum of 24 months, with 1,671 days credit for time served. COUNTS 1, 2, 3 & 4 are to run concurrent with COUNT 5. COUNTS 6 & 8 are to run concurrent with COUNT 7, and COUNT 8 is to run consecutive to COUNT 5. A Judgment of Conviction was filed on May 5, 2015.

Furthermore, regarding Defendant's sentence as to COUNT 5, on February 9, 2015, a Stipulation and Order Waiving a Separate Penalty Hearing was filed where Defendant 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, and waived all appellate rights. See Stipulation and Order Waiving Separate Penalty Hearing, Dated February 9, 2015.

On October 13, 2015, Defendant filed a Motion to Withdraw Counsel. He also filed the instant pro per Post-Conviction Petition for Writ of Habeas Corpus, Motion to Appoint Counsel, and Request for an Evidentiary Hearing. The State filed its Response on January 26, 2016.

In Grounds 1, 2, 3, 10, 12, 14 & 15 of Defendant's Petition, he is alleging multiple instances of prosecutorial misconduct. However, this Court finds that these claims of misconduct are not cognizable in a post-conviction habeas petition because they are appropriate for direct appeal, and are thus waived in the instant proceedings. See Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), overruled in part by Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999) ("[C]laims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceeding . . . . [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings."). NRS 34.810(1)(b)(2). Even though Defendant claims in this Petition that he was never told about a direct appeal, Defendant waived his appellate rights pursuant to Defendant's Stipulation and Order Waiving a Separate Penalty Hearing. Therefore, Defendant waived all prosecutorial misconduct claims, and this Court finds they are not appropriate for review in this instant Petition.

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Claims of ineffective assistance of counsel are analyzed under the two-pronged test articulated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), wherein the defendant must show: 1) that counsel's performance was deficient, and 2) that the deficient performance prejudiced the defense. Id. at 687, 104 S. Ct. at 2064. Nevada adopted this standard in Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984). "A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one." Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1997). 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).

First, Defendant contends that his counsel was ineffective for not objecting to an alleged instance of witness coaching, and his counsel should have raised it on direct appeal. Defendant alleges that one of the State's witnesses, Monica Martinez, had her attorney's coach her from the back of the courtroom while she was testifying at trial. During Defendant's cross examination of this witness, the co-defendant's attorney objected and raised this issue. The Court advised that it had been watching the lawyers in the back, and had not seen them do anything that could be interpreted as witness coaching. Here, this Court finds that these allegations are unsupported by the record, and Defendant does not cite to anywhere specific in the record to show how the witness was being coached. Moreover, this Court finds that Defendant fails to show deficiency because co-defendant's counsel objected to this alleged conduct and the Court found it did not exist, thus it would have been futile for Defendant's counsel to make the same objection. Ennis v. State, 112 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Further, this Court finds that Defendant fails to show prejudice, as he fails to allege what this witness said that prejudiced him, or how the outcome of his trial would have been different if his attorney had objected to this alleged conduct. Lastly, regarding Defendant's contention that this should have been raised on direct appeal, Defendant waived his appellate rights, and thus is not entitled to a direct appeal. As such, this Court DENIES this claim.

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Defendant argues that his counsel was ineffective for failing to raise alleged police and prosecutorial misconduct on direct appeal. Defendant contends that Devonia Newman's interview with police was coerced, and that she was forced by detectives into making a false identification of Defendant. However, this Court finds that Defendant has failed to show deficiency or prejudice. Counsel cannot be deemed ineffective for failing to raise this issue on direct appeal, as Defendant waived his appellate rights. Further, Defendant cannot show any prejudice, as he had no right to an appeal per the stipulation order. Also, Defendant has failed to show how the outcome of his trial would have been different, and does not cite to where in the record these alleged statements by the witness were made, and does not attach this interview as an exhibit. Because Defendant fails to give any factual support or authority, this Court DENIES this claim.

Defendant claims that his counsel was ineffective for failing to raise on direct appeal an alleged instance of prosecutorial misconduct. Defendant argues that Devonia Newman told Defendant's attorney that she was coached by one of the prosecutors regarding Defendant's identification, and what she should and should not say during her testimony. This Court finds that Defendant has failed to show deficiency or prejudice. Counsel cannot be deemed ineffective for failing to raise this issue on direct appeal, as Defendant waived his appellate rights. Further, Defendant cannot show any prejudice, as he had no right to an appeal per the stipulation order. He also fails to show how the outcome of his trial would have been different even if counsel would have raised this issue on a direct appeal. More importantly, this Court finds that Defendant's claim that Devonia was coached is belied by the record. Also, this Court finds that Defendant cannot claim that he was never told about a direct appeal, as he was canvassed by the court about his appellate rights, and agreed to waive them. Thus, this Court DENIES this claim.

Defendant claims that counsel was ineffective because he knew about Defendant's mental issues, and never presented any evidence of this to the Court. Defendant argues if his counsel were to have presented this to the Court, the death penalty would have been removed as an option. This Court finds that Defendant has failed to demonstrate deficient performance

or prejudice. First, Defendant's claim is belied by the record, as the death penalty was removed as a possible option per the Stipulation Order filed on February 9, 2015. Thus, even if counsel would have presented evidence of Defendant's mental disabilities to this Court, the Court would not have sentenced Defendant to death. Moreover, this Court finds that Defendant has failed to present any evidence that he qualifies as intellectually disabled as described by Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242 (2002). Fetal Alcohol syndrome (as alleged by Defendant in his Petition), does not, as a matter of law, qualify for intellectually disabled. As such, this Court DENIES this claim.

Defendant claims that his counsel was ineffective because he presented a statement from Stephanie Cousins. Defendant argues that because his counsel presented one exact statement, that the State was then able to use the rest of her statement that was damaging for him. This Court finds that Defendant has failed to show deficient performance or prejudice. Stephanie Cousin's statements came out at trial during Cornelius Mayo's and Detective Christopher Bunting's testimony; she did not testify. Defendant claims that his counsel offered the statement, "Why did they call him Job-Loc," however, this exact statement was never presented, thus, Defendant's claims are belied by the record. However, even if this statement was presented during trial, it was a strategic decision by defense counsel about what to ask the detective and Mayo. Counsel's actions regarding Stephanie's statements were well-reasoned and strategically made which is presumed to be and was effective assistance of counsel. Moreover, this Court finds that Defendant has failed to show how he was prejudiced by these statements. Furthermore, Defendant argues he was denied the right to confront Ms. Cousins because she did not testify; however, Detective Bunting and Mayo testified about what she said, and Defendant had the opportunity to confront them about it. Moreover, Bruton does not apply to non-testimonial statements like a statement of a co-conspirator, so her testimony would not violate his confrontation rights. Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620 (1968). Thus, this Court finds that Defendant cannot show prejudice or how the outcome of his trial would have been different had Ms. Cousins testified. Thus, this Court DENIES this claim.

Defendant claims that his counsel was ineffective because: 1) he did not know that the court likes certain issues to be filed on direct appeal, and 2) that his attorney promised to show him how to file a habeas petition, and he was never given instructions by his attorney on how to file one. Here, Defendant waived his right to a direct appeal, thus this Court finds that counsel cannot be deemed ineffective for failing to file one, or for failing to tell Defendant that the Court likes certain issues to be raised on direct appeal; and Defendant has failed to show any prejudice. Defendant clearly understood that he was giving up his appellate rights per the Stipulation Order. Moreover, this Court finds that Defendant did not have a right to counsel for habeas proceedings. Brown v. Warden, 130 Nev. ___, ___, 331 P.3d 867, 870 (2014). Therefore, counsel had no obligation to inform Defendant of habeas corpus procedures, or show him how to file a post-conviction petition. Thus, this Court DENIES this claim.

Defendant claims that during closing argument, the State brought up a "whistle" noise heard during the playing of the 9-1-1 call, and this same whistle was heard in Defendant's 9-13-10 statement to Detective Wildemann, that was also played for the jury. Defendant claims no evidence was presented at trial that Defendant was "whistling," and his counsel was ineffective for not objecting to the prosecutor arguing facts not in evidence. First, this Court finds that Defendant has failed to show how counsel was deficient. Both the 9-1-1 call and the 9-13-10 statement were played at trial, and the prosecutor was arguing an inference that the jury could conclude that the whistling and humming the prosecutor was referring to in the 9-1-1 call did sound like the whistling and humming in the 9-13-10 statement. In Defendant's 9-13-10 statement, it is clear that he is humming and singing. Thus, all of these arguments 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. Additionally, this Court finds that Defendant cannot show any prejudice, as he fails to show how the outcome of his trial would have been different even if his counsel objected to this during closing argument. Lastly, regarding Defendant's claim that counsel did not raise this issue on direct appeal, Defendant waived his appellate rights. Thus, this Court DENIES this claim.

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Defendant claims that his counsel was ineffective for failing to cross-examine Detective Marty Wildemann during the grand jury proceeding about the fact that he allegedly knew Defendant had mental issues. However, Defendant's claim is essentially about the alleged failures to cross-examine a particular witness. This claim relates to trial strategy, which is "virtually unchallengeable." Doleman v. State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996). According to the 9-13-10 statement, Detective Wildemann never agreed that Defendant actually had mental problems, and never believed that he did. Rather he disagreed, stating that Defendant did not have a mental problem at the time of the murder. Thus, this Court finds that Defendant's claim is belied by the record. This Court also finds that Defendant cannot show prejudice, as he fails to prove how the outcome of his trial would have been different even if his counsel had cross examined Detective Wildemann about this issue. Lastly, Defendant claims that Stephanie Cousin's testimony was used in the grand jury proceeding, but at trial she did not testify, and his counsel failed to raise this issue either in a motion or verbally as her statements were not under oath. However, this Court finds that this is a naked allegation by Defendant as he fails to show how counsel was deficient, or how even if Stephanie did testify at trial, how the outcome of his trial would have been different. Thus, this Court DENIES this claim

This Court also finds that because Defendant has not set out sufficient allegations of ineffective assistance of counsel, he is not entitled to an attorney, and additionally, no evidentiary hearing is warranted in order to deny such claims.

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ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

DATED this 19 day of March, 2016.

DISTRICT JUDGE
ERIC JOHNSON

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

BY
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352

CERTIFICATE OF SERVICE

I certify that on the 8th day of March, 2016, I mailed a copy of the foregoing proposed Findings of Fact, Conclusions of Law, and Order to:

DAVID JAMES BURNS,
aka D-Shot #1139521
ELY STATE PRISON
4569 NORTH STATE ROUTE 490
P.O. BOX 1989
ELY, NV 89301

BY
R. JOHNSON
Secretary for the District Attorney's Office

KE/SSO/rj/M-1

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID JAMES BURNS, A/K/A D-SHOT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 69959
District Court Case No. C267882

FILED
MAR 21 2017
CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Elizabeth A. Brown, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order."

Judgment, as quoted above, entered this 17th day of February, 2017.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this March 14, 2017.

Elizabeth A. Brown, Supreme Court Clerk

By: Dana Richards
Deputy Clerk

C-10-267882-2
CCJR
NV Supreme Court Clerks Certificate/Judgn
4633252

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID JAMES BURNS, A/K/A D-SHOT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69959

FILED

FEB 17 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

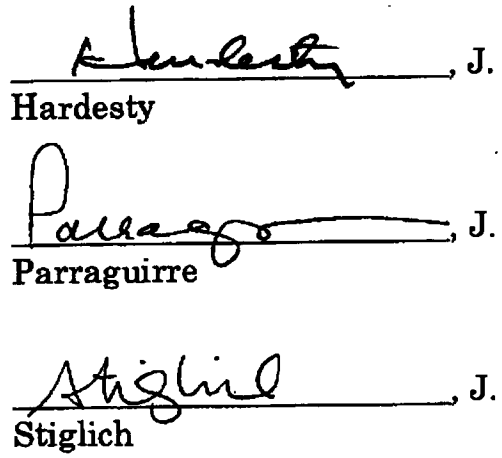
Appellant filed a timely petition on October 13, 2015. The district court declined to appoint counsel and denied the petition. We conclude that the district court abused its discretion in denying the petition without appointing counsel for the reasons discussed below.

NRS 34.750 provides for the discretionary appointment of postconviction counsel and sets forth the following factors which the court may consider in exercising that discretion: the petitioner's indigency, the severity of the consequences to the petitioner, the difficulty of the issues presented, whether the petitioner is unable to comprehend the proceedings, and whether counsel is necessary to proceed with discovery. The decision is not necessarily dependent upon whether a petitioner has identified issues which, if true, would entitle the petitioner to relief.

Appellant's petition challenges a judgment of conviction that was the result of a lengthy trial with potentially complex legal issues and factual issues that may require development outside the record. Appellant is indigent and was represented by appointed counsel at trial. Appellant

is serving a significant sentence. Considering the relevant factors and circumstances, the failure to appoint postconviction counsel prevented a meaningful litigation of the petition. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[1]



_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Stiglich

cc: Hon. Eric Johnson, District Judge
David James Burns
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[1]We deny the motion for appointment of counsel on appeal and motion to proceed in forma pauperis on appeal as moot. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.

CERTIFIED COPY
This document is a full, true and correct copy of the original on file and of record in my office.
DATE: March 14, 2017
Supreme Court Clerk, State of Nevada
By D. Richards Deputy

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID JAMES BURNS, A/K/A D-SHOT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 69959
District Court Case No. C267882

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: March 14, 2017

Elizabeth A. Brown, Clerk of Court

By: Dana Richards
Deputy Clerk

cc (without enclosures):
Hon. Eric Johnson, District Judge
David James Burns
Clark County District Attorney
Attorney General/Carson City

RECEIPT FOR REMITTITUR

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on MAR 21 2017.

HEATHER UNGERMANN
Deputy District Court Clerk

RECEIVED
MAR 20 2017
CLERK OF THE COURT

17-08483

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor	COURT MINUTES	March 30, 2017

C-10-267882-2	State of Nevada vs David Burns

March 30, 2017 **9:00 AM** **Confirmation of Counsel (Resch)**

HEARD BY: Johnson, Eric **COURTROOM:** RJC Courtroom 12A

COURT CLERK: Linda Skinner

RECORDER: Angie Calvillo

REPORTER:

PARTIES PRESENT: Resch, Jamie J. Attorney for Defendant

JOURNAL ENTRIES

Court noted Defendant is in prison and not present today. Upon Court's inquiry, Mr. Resch advised he can confirm as counsel of record. COURT SO ORDERED. Mr. Resch requested a status check in sixty days to set a briefing schedule after he reviews the file. Ms. Rose had no objection. COURT ORDERED, matter SET for status check in SIXTY (60) DAYS.

NDC

6/1/17 9:00 AM STATUS CHECK: SET BRIEFING SCHEDULE

Electronically Filed
11/27/2017 8:58 AM
Steven D. Grierson
CLERK OF THE COURT

SUPP
RESCH LAW, PLLC d/b/a Conviction Solutions
By: Jamie J. Resch
Nevada Bar Number 7154
2620 Regatta Dr., Suite 102
Las Vegas, Nevada, 89128
Telephone (702) 483-7360
Facsimile (800) 481-7113
Jresch@convictionsolutions.com
Attorney for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

DAVID BURNS, Petitioner, vs. THE STATE OF NEVADA, Respondent.	Case No.: C267882-2 Dept. No: XX **SUPPLEMENT TO PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)** Date of Hearing: March 8, 2018 Time of Hearing: 9:00 a.m.

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: **Ely State Prison, White Pine County, Nevada**.

2. Name and location of court which entered the judgment of conviction under attack: **Eighth Judicial District Court, Dept. XX, 200 Lewis Avenue, Las Vegas, NV 89101.**

3. Date of judgment of conviction: **May 5, 2015.**

4. Case number: **C267882-2.**

5(a). Length of sentence: **Count 1: 12 to 72 months NDOC, Count 2: 24 to 120 months NDOC, Count 3: 24 to 180 months NDOC, Count 4: 24 to 180 months NDOC with**

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c/s 24 to 180 months for use of deadly weapon, Count 5: Life without parole with c/s 40 to 240 months for use of deadly weapon, Count 6: 24 to 180 months NDOC with c/s 24 to 180 for use of deadly weapon, Count 7: 48 to 240 months NDOC with c/s 40 to 240 for use of deadly weapon, Count 8: 24 to 180 months NDOC, Counts 1,2,3&4 to run concurrent with count 5, counts 6&8 to run concurrent with count 7, count 8 to run consecutive to count 5.

5(b). If sentence is death, state any date upon which execution is scheduled: **N/A.**

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? **No.**

If "yes," list crime, case number and sentence being served at this time: **N/A.**

7. Nature of offense involved in conviction being challenged: **Count 1: Conspiracy to Commit Robbery, Count 2: Conspiracy to Commit Murder, Count 3: Burglary While in Possession of a Firearm, Counts 4&6: Robbery with use of a Deadly Weapon, Count 5: Murder with use of a Deadly Weapon, Count 7: Attempt Murder with use of a Deadly Weapon, Count 8: Battery with use of a Deadly Weapon.**

8. What was your plea? (check one)

(a) Not guilty __X_

(b) Guilty ___

(c) Guilty but mentally ill __

(d) Nolo contendere ___ (Alford)

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9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: **N/A.**

10. If you were found guilty or guilty but mentally ill after a plea of not guilty, was the finding made by: (check one)

(a) Jury _X_.

(b) Judge without a jury __.

11. Did you testify at the trial? Yes____**No _X_**

12. Did you appeal from the judgment of conviction? Yes__ **No _X_**

13. If you did appeal, answer the following:

(a) Name of court:

(b) Case number or citation:

(c) Result:

(d) Date of result:

(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not: **Petitioner wanted to file a direct appeal as explained in this Petition. The failure of counsel to file a direct appeal was the result of ineffectiveness and Petitioner was deprived of his right to an appeal.**

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? **Yes_X__** No __

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16. If your answer to No. 15 was "yes," give the following information: **Proper person Petition for Writ of Habeas Corpus filed October 13, 2015.**

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? **No** If so, identify:

(a) Which of the grounds is the same:

(b) The proceedings in which these grounds were raised:

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length).

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/ 2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). **N/A.**

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? **No.**

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes___ **No _X_** If yes, state what court and the case number: **N/A.**

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21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: **Trial: Christopher Oram, Anthony Sgro.**

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes___ **No _X_**

If yes, specify where and when it is to be served, if you know: **N/A.**

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) Ground One: **Petitioner received ineffective assistance of trial counsel in violation of his rights as guaranteed by the Fifth, Sixth or Fourteenth Amendments to the United States Constitution and/or under state law or the Nevada Constitution due to the fact Petitioner was wrongfully deprived of his right to a direct appeal; Petitioner hereby requests relief pursuant to <u>Lozada v. State</u>, 110 Nev. 349, 871 P.2d 944 (1994) and NRAP 4(c).**

Supporting Facts (Tell your story briefly without citing cases or law):

Petitioner did **not** "waive" his right to a direct appeal as repeatedly argued by the State in response to the proper person petition. The record on this point is very well developed, because the court minutes expressly state:

> Court advised counsel have entered into a stipulation as to the penalty phase of this trial. Mr. Sgro advised that they and the State have agreed that if the verdict comes back as 1st Degree Murder, they will waive the penalty phase, stipulate to Life without parole, Defendant waives his appellate rights and the State will remove the death penalty. Ms. Sgro advised **they are not waiving any misconduct during the remainder of the trial or of the closing arguments. Mr. DiGiacomo concurred that the death penalty will be removed,**

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Defendant stipulates to life without parole and waives any appeal as to the trial if the verdict is 1st Degree Murder.

SUPP 1-2 (Mins, 2-9-15).

The same is also reflected in the transcript for that day's proceedings. ("...for purposes of further view down the road, we are not waiving any potential misconduct during the closing statements. We understand that to be a fertile area of appeal"). TT, Day 12, p. 5. For its part, the State expressly acknowledged that the waiver only applied to "appellate review of the guilt phase issues." TT, Day 12, p. 6. The Court canvassed Petitioner about the waiver, but simply asked Burns: "You're also giving up your appellate rights. Do you understand that?" TT, Day 12, p. 9. Finally, a written waiver was also filed, and it indicated "Defendant agrees to waive all appellate rights stemming from the guilt phase of the trial." SUPP 3.

Petitioner and his counsel always understood the appeal waiver issue, which occurred on Day 12 of a 15 day trial, to only waive issues that predated the entry of the waiver. Petitioner never intended to waive, and in fact expressly reserved the right to appeal, any issues arising after the waiver was entered and specifically those which may have occurred during closing argument or sentencing.

Petitioner specifically alleges that he communicated these issues with and to trial counsel, Christopher Oram and Anthony Sgro, and that if granted an evidentiary hearing in this matter, they would in fact testify consistent with facts supporting a claim that Petitioner desired that a direct appeal be filed, and that counsel had no strategic reason for failing to file a notice of appeal, and/or that counsel was ineffective in failing to file a notice of appeal in light of the knowledge that Petitioner did in fact want to appeal. The remedy in such a case is found in

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NRAP 4 – which outlines a procedure wherein the trial court should direct the Clerk of Court to file a notice of appeal on Petitioner's behalf.

(b) Ground Two: **Petitioner received ineffective assistance of trial counsel and appellate counsel in violation of his rights as guaranteed by the Fifth, Sixth or Fourteenth Amendments to the United States Constitution and/or under state law or the Nevada Constitution due to the failure to require the State to prove cellular phone testimony via an expert witness.**

Supporting Facts (Tell your story briefly without citing cases or law):

The State called Kenneth Lecense as a custodian of records (COR) witness from Metro PCS. As such, his testimony should have been limited to discussions or explanations of the documents he was there to talk about. Instead, Mr. Lecense inappropriately testified as an expert and trial counsel failed to lodge any challenge or objection to the same. For example, the witness repeatedly gave explanations of how cellular phone signals work, what tower is likely to receive a call, the relationship between distance from a tower and the effect that has on a call connecting, and so forth. TT, Day 10, pp. 17-20.

The same exact testimony played out later in the trial with Ray MacDonald, a COR witness from T-Mobile. Again, the State asked the witness to explain the relationship between calls and towers, how those calls are assigned, factors affecting the same, and other type testimony. TT, Day 11, pp. 31-34. Again, no objection was made to the testimony.

While Petitioner did not own a cellular phone, his co-defendant Mason did and the State's theory of the case was quite clearly that they (and others) were operating at a group including by committing the murder at issue in the case. Petitioner was therefore prejudiced by

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this improperly admitted testimony which should have been excluded unless supported by a properly noticed expert. There is a reasonable probability of a more favorable outcome had trial counsel objected to and excluded testimony about cellular networks which required expert testimony.

(c) Ground Three: **Petitioner's conviction and sentence violate the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, section 8 of the Nevada Constitution because the State suppressed exculpatory and material evidence that an eyewitness to the crime had a deal to receive a reduced sentence in exchange for his testimony against Petitioner, and/or trial counsel was ineffective in failing to discover or utilize these facts as part of the defense in this matter and/or failed to file a motion for new trial once facts supporting this claim became known.**

Supporting Facts (Tell your story briefly without citing cases or law):

Cornelius Mayo lived in the home where the offenses in this matter occurred. Mr. Mayo called 911 after the crimes, and police arrived to take control of the scene. Officer Barry Jensen testified that Mayo was allowed to retrieve a pair of shoes to wear, and when he went to put them on, a "rock of cocaine" fell out right in front of the officer. TT, Day 6, p. 138. Another witness testified to her knowledge that Mayo sold drugs from the apartment. TT, Day 6, p. 82. When Mayo eventually testified, he noted even more cocaine was found inside the apartment, but denied any knowledge as to how it got there. TT, Day 10, p. 247. Mayo further admitted he was charged with crimes related to the incident, including child neglect and drug trafficking. TT, Day 10, p. 247.

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Mayo explained that the criminal cases against him were "postponed" until after the murder case was over, but that he did not believe testifying helped in in those cases in any way. TT, Day 10, p. 250. Mayo vigorously denied having any cocaine in the home. TT, Day 10, p. 259. Mayo denied even knowing what fell out of his shoe. TT, Day 10, p. 260.

While Mayo denied that he had any arrangement for preferential treatment in his cases in exchange for his testimony, the record simply does not support that assertion. The Justice Court documents for Mayo's case indicate that, 1) the State initially requested bail of $60,000, but then agreed to an O.R. release and 2) the case was continued for almost five years until such time as Mayo received a sweetheart deal in August, 2015. SUPP 11-16.

In September, 2015, a guilty plea agreement was filed that saw Mayo plead guilty to one count of Conspiracy to Violate the Uniform Controlled Substances Act, a felony. SUPP 60. However, Mayo received an incredible deal on those charges, including: The State did "not oppose" probation and agreed to a gross misdemeanor disposition if probation was successfully completed, and, case 11F10729X would be dismissed after entry of plea which was a pending felony charge of tampering with a vehicle. SUPP 60. Mayo was sentenced on January 21, 2016, at which time he received his bargained for sentence. SUPP 68. Alas, he violated his probation and on February 21, 2017, he was sentenced to a modified 19 to 48 in months in state prison, down from a maximum 60 month sentence imposed in the original judgment of conviction. SUPP 71-72.

It is clear from this record that some type of deal existed between the State of Nevada and Mayo in order to procure his testimony in this matter, beyond the patent "wink-nod" of indefinitely continuing Mayo's criminal charges in order to see how he did at Petitioner's trial as

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a witness. Petitioner's Due Process rights were violated when the State concealed the details of its negotiations with Mayo from him. Petitioner could not have raised this claim sooner because 1) he was deprived of a direct appeal as explained in Ground One, and 2) the facts supporting this claim did not become apparent until September, 2015, when Mayo's guilty plea agreement was publicly filed.

In addition, trial counsel was ineffective in failing to discover the facts of Mayo's arrangement with the State either before trial, but also when the guilty plea agreement was filed in 2015. Effective trial counsel could have then filed a motion for new trial based on new evidence, i.e. Mayo's guilty plea. The same was evidence that a longstanding deal between the State and Mayo had come to fruition, but also was evidence that Mayo committed perjury when he denied under oath at Petitioner's trial having any knowledge of controlled substances on the date of the murder. There is a reasonable probability Petitioner would have enjoyed a more favorable outcome had trial counsel discovered these facts before trial and/or moved for a new trial based on newly discovered evidence.

(d) Ground Four: **Petitioner received ineffective assistance of trial counsel and appellate counsel in violation of his rights as guaranteed by the Fifth, Sixth or Fourteenth Amendments to the United States Constitution and/or under state law or the Nevada Constitution due to trial counsel's questioning of Detective Bunting which led to Stephanie Cousins' hearsay statements being admitted at Petitioner's trial against him without any ability to cross-examine the declarant about those statements.**

Stephanie Cousins was an integral part of the acts which comprised the offenses in this case. Generally, the victim was her friend and drug dealer, and Cousins set the entire series of

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events into motion by luring the victim to answer her door in the middle of the night under the guise of Cousins wanting to purchase controlled substances. Cousins was prosecuted separately, eventually convicted, and is currently serving a sentence of life with possibility of parole in the Nevada Department of Corrections.

At no time did Cousins testify during Petitioner's trial. However, her statements to police were brought up by defense counsel when Detective Bunting was questioned. TT, Day 14, p. 23. This led, on re-direct examination of the detective, to the State asking the detective, "Now, ultimately, Stephanie Cousins made an identification of the shooter, correct?" TT, Day 14, p. 35. When the detective answered positively, the next question was that "It wasn't Job-Loc" to which the detective responded "No." TT, Day 14, p. 35. These statements about who Cousins told the police the shooter was were hearsay and should have been objected to by counsel.

Instead of an objection to this hearsay testimony about what Cousins said, counsel compounded the issue on further examination by reviewing with the detective, on the stand, an exchange between the detective and Cousins. Therein, the police in summary informed Cousins they had caught the shooter and his name was "D-Shot" (a/k/a Petitioner herein) and Cousins said others had referred to the shooter in front of her as "Job-Loc." TT, Day 14, p. 54. On further examination by the State, the detective confirmed that Cousins had, two weeks prior, picked the shooter out of a lineup and at that time chose Petitioner. TT, Day 14, p. 60. The plain implication of the testimony overall was that Cousins knew who the shooter was by sight, and simply had the name attributed to that individual confused.

The harm flowing from this testimony became very clear during closing argument. Defense counsel referenced this exchange, noting that Cousins seemed quite certain the

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shooter's name was "Job-Loc." TT, Day 15, pp. 23-24. But that allowed the State, during rebuttal, to argue its "favorite" testimony: The part where although Cousins thought the shooter was named Job-Loc, that she identified a photo of Petitioner as the shooter. TT, Day 15, p. 76.

Nothing about this exchange ultimately favored Petitioner and the prudent course of action would have been to object to it and/or avoid opening the door to it – rather than what was done which was to build upon Cousins' statements to police as a cornerstone of the defense. This was classic "two-sided" evidence that was better excluded from all mention, and which would have been excluded had defense counsel not brought it up to begin with. There was a reasonable probability of a more favorable outcome had the jury not heard that the person who set the entire series of events at issue into motion had identified Petitioner to the police as the shooter.

(e) Ground Five: **Petitioner received ineffective assistance of trial counsel and appellate counsel in violation of his rights as guaranteed by the Fifth, Sixth or Fourteenth Amendments to the United States Constitution and/or under state law or the Nevada Constitution due to trial counsel's failure to object to repeated instances of prosecutorial misconduct.**

As the State's response to the proper person petition notes, the proper person petition was filled with claims of prosecutorial misconduct. Response, 1-26-16, p. 8. The response also contends those claims are waived because they were not raised on direct appeal, and that Petitioner waived all claims (including those arising after the waiver was entered) as part of the appeal waiver in this case. Response, p. 9.

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Petitioner incorporates Ground One of this supplement herein to note 1) that Petitioner vehemently denies that he waived his right to challenge prosecutorial misconduct when he entered into the appeal waiver in this matter, and 2) that the so-called failure to raise those claims on direct appeal was, as set forth in Ground One, excused because counsel was ineffective in failing to file a notice of appeal in the first instance.

Although this Court could potentially hear and decide underlying claims of misconduct which were objected to by counsel by finding cause and prejudice to excuse any default of those claims on direct appeal, the analysis to do so is the same as would be required to grant Petitioner's appeal deprivation claim in the first instance. That is, if this Court determines that Petitioner was deprived of his direct appeal, he will be able to raise those claims in a belated direct appeal, and Petitioner prefers to proceed in that manner.

However, there are some instances of misconduct which were not objected to be trial counsel and in this claim, Petitioner contends trial counsel was ineffective in failing to make those objections. Petitioner objects to the following instances of misconduct during the State's rebuttal argument (all citations to TT, Day 15):

1) Disparagement of counsel (was objected to), p. 51.
2) Addressing credibility of witnesses in the case in a manner which shifted the burden of proof to the defense (no objection), p. 54.
3) Arguing Petitioner has "no explanation" for committing the murder, which was additional burden shifting (no objection), p. 56.
4) Additional burden shifting by arguing defense failed to call witness Cooper (was objected to), p. 74.

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5) Reference to T-mobile custodian of records witness as an "expert" and related reliance on inappropriate technical testimony (no objection), p. 86.

6) State displayed a powerpoint to the jury that referred to Petitioner as part of the "circle of guilt" (was objected to), p. 87.

7) Facts not in evidence that Petitioner was "whistling" during interview with detectives, which was then used to suggest Petitioner whistled while committing the offense (no objection), p. 94.

Alone or in totality, these instances of misconduct were unconstitutional and deprived Petitioner of a fair trial. Those which were objected to are appropriate to be raised in a direct appeal should this court find Petitioner was deprived of his right to an appeal, but can still be considered as part of an overall ineffectiveness claim in not moving for a mistrial based on misconduct. Those which were not objected to form the basis of a claim of ineffectiveness which this Court should grant as there was a reasonable probability of a more favorable outcome absent these instances of misconduct.

(f) Ground Six: **Petitioner received ineffective assistance of trial counsel and appellate counsel in violation of his rights as guaranteed by the Fifth, Sixth or Fourteenth Amendments to the United States Constitution and/or under state law or the Nevada Constitution at the time of sentencing.**

Petitioner at all times enjoyed a right to effective assistance of counsel at the time of sentencing. However, several errors occurred at the time of sentencing which both give rise to direct due process claims of court error, which are not defaulted to counsel's failure to file a

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notice of appeal as explained in Ground One (fully incorporated herein), and, which also give rise to various claims of ineffective assistance of counsel.

First, the trial court erred at sentencing by failing to state on the record the reasons for imposing the sentence it did for the deadly weapon enhancements. The sentencing transcript reveals that the court imposed multiple deadly weapon enhancements, such as on Counts Four through Seven – but did not state its reasons for imposing the term it selected as required by NRS 193.165. This was error which, if raised on direct appeal, should result in a new sentencing proceeding. Likewise, counsel was ineffective for not objecting to the imposition of a deadly weapon enhancement that was unsupported by the required statutory findings.

Second, the trial court erred by failing to address the defense's request to correct the pre-sentence report prior to imposition of sentence. Such a claim is, again, preferably raised on direct appeal and would have been had a notice of appeal been filed. Here, trial counsel filed a sealed sentencing memorandum in which objections to errors in the pre-sentence report were raised. Those errors included that (1) the PSI stated that there had never been a diagnosis that Petitioner suffered from fetal alcohol syndrome when in fact there had been such a diagnosis, and (2) the PSI inaccurately states that De'Vonia identified Petitioner as the shooter at the time of the offense.

The trial court actually noted at sentencing that it "read the memorandum" prior to sentencing. Transcript, 4-23-15, p. 3. Notwithstanding that fact, the trial court completely failed to address the errors identified in the pre-sentence report. Likewise, counsel was ineffective in not seeking a definitive ruling by the court as to those errors at the time of sentencing. There is a reasonable probability the errors would have been corrected has such a ruling been sought.

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(g) Ground Seven: **Petitioner received ineffective assistance of trial counsel and appellate counsel in violation of his rights as guaranteed by the Fifth, Sixth or Fourteenth Amendments to the United States Constitution and/or under state law or the Nevada Constitution when trial counsel failed to move to strike the notice of intent to seek the death penalty on grounds that Petitioner is ineligible for the death penalty due to suffering from Fetal Alcohol Spectrum Disorder which rendered him intellectually disabled.**

During trial, the record does not indicate that defense counsel ever sought to dismiss the death penalty under NRS 174.098 and/or Atkins v. Virgina, 536 U.S. 304 (2002). Trial counsel's failure to do so constituted ineffectiveness, as there is a reasonable probability he would have been found intellectually disabled and thus ineligible for the death penalty had such a motion been made based on the information trial counsel possessed and utilized at sentencing concerning fetal alcohol syndrome. Petitioner was prejudiced by this failure because he entered an unfavorable negotiation in which he waived certain appellate rights and stipulated to a sentence of life without possibility of parole to avoid what was, at the time, the possible imposition of a higher level sentence, i.e. death. Had Petitioner been declared ineligible for the death penalty, he would have had no need to "lock in" a punishment of life without possibility of parole because that would have been the worst possible sentence the court could have imposed if he was found guilty.

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(h) Ground Eight: **Petitioner received ineffective assistance of trial counsel and appellate counsel in violation of his rights as guaranteed by the Fifth, Sixth or Fourteenth Amendments to the United States Constitution and/or under state law or the Nevada Constitution when trial counsel addressed a note from a juror during trial without advising Petitioner and/or ensuring his presence.**

After the close of evidence, the record reflects the jury sent at least two notes to the court: one concerning a readback of testimony and one concerning the verdict form. TT, Day 16, pp. 2-3. The same record further indicates that Petitioner was not consulted or present for any discussion about how those notes would be responded to, as the judge merely contacted counsel by telephone to discuss how to proceed.

At all times, Petitioner enjoyed a Due Process right to be present for the discussion of how to respond to jury notes. Because jury notes were responded to here outside his presence, that right was violated. Trial counsel was ineffective for failing to ensure Petitioner was present for, or at an extreme bare minimum consulted prior to, any decision on how to respond to the jury notes. There is a reasonable probability of a more favorable outcome had Petitioner been consulted as he could have provided his input into the process as was required by law.

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(i) Ground Nine: **Petitioner's conviction and sentence violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, section 8 of the Nevada Constitution because the cumulative effect of the errors alleged in this petition deprived him of his federal constitutional rights, including, but not limited to, his rights to due process of law, equal protection, confrontation, the effective assistance of counsel.**

Supporting Facts (Tell your story briefly without citing cases or law):

Petitioner has set forth separate post-conviction claims and arguments regarding numerous errors, and each one of these errors independently compels reversal of the judgment or alternative post-conviction relief. However, even in cases in which no single error compels reversal, a defendant may be deprived of due process if the cumulative effect of all errors in the case denied him fundamental fairness. Taylor v. Kentucky, 436 U.S. 478, n. 15; Harris v. Wood, 64 F.3d 1432, 1438-1439 (9th Cir. 1995); United States v. McLister, 608 F.2d 785, 791 (9th Cir. 1979).

Petitioner submits that the errors alleged in this petition and those which should have been raised on direct appeal to the Nevada Supreme Court require reversal both individually and because of their cumulative impact. As explained in detail in the separate claims and arguments on these issues, the errors in this case individually and collectively violated federal constitutional guarantees under the Fifth, Sixth, Eighth, and Fourteenth Amendments, as they individually and collectively had a substantial and injurious effect or influence on the verdict, judgment and sentence and are moreover prejudicial under any standard of review.

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See Supplemental Points and Authorities provided herewith for additional argument in support of all claims.

WHEREFORE, Petitioner prays that the court grant petitioner relief to which petitioner may be entitled in this proceeding.

DATED this 27th day of November, 2017.

Submitted By:

RESCH LAW, PLLC d/b/a Conviction Solutions

By: _____
JAMIE J. RESCH
Attorney for Petitioner

Conviction Solutions
2620 Regatta Dr., Suite 102
Las Vegas, Nevada 89128

VERIFICATION

I, JAMIE J. RESCH, ESQ., declare under penalty of perjury as follows:

That I am the attorney of record for Petitioner / Defendant David Burns; that I have read the foregoing supplement and know the contents thereof; that the same are true and correct to the best of my knowledge, information and belief, except for those matters stated therein on information and belief, and as to those matters, I believe them to be true; that Petitioner/Defendant personally authorized me to commence this Supplemental Petition for Writ of Habeas Corpus.

I declare under penalty of perjury that the foregoing is true and correct.

11-27-17
Executed on

Signature

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Resch Law, PLLC d/b/a Conviction Solutions and that, pursuant to N.R.C.P. 5(b), on November 27, 2017, I served a true and correct copy of the foregoing Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) via first class mail in envelopes addressed to:

Clark County District Attorney
200 Lewis Ave.
Las Vegas, NV 89155

Mr. David Burns #1139521
Ely State Prison
PO BOX 1989
Ely, NV 89301

and via Wiznet's electronic filing system, as permitted by local practice to the following person(s):

Steven B. Wolfson
Clark County District Attorney
PDMotions@ClarkCountyDA.com

An Employee of Conviction Solutions

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

David Burns ("Burns") was convicted of murder with use of a deadly weapon and other serious crimes, and was sentenced to life without the possibility of parole. The acts underlying those offenses occurred when he was just 18 years old.

Burns was represented at trial by Christopher Oram and Anthony Sgro. While most aspects of his defense were quite vigorous, several errors were made which worked to Burns's extreme prejudice. Those errors were serious enough that Burns should be granted relief in the form of a new trial and/or a belated direct appeal.

II.

PROCEDURAL BACKGROUND

On October 13, 2010, Burns was charged by way of superceding indictment with murder with use of a deadly weapon and other serious crimes. The charges arose from an incident on August 7, 2010, during which Burns was alleged to have been present with co-defendants Willie Mason, Stephanie Cousins, and Monica Martinez. The allegations were that Cousins arranged a fake drug buy with an acquaintance Derecia Newman, and that the collective defendants then traveled to that individual's home. When Ms. Newman answered the door, Burns allegedly shot her in the head which resulted in her death. Burns then allegedly ransacked the home, stole drugs or cash from the same, and shot Newman's twelve year old daughter in the stomach. After substantial police investigation, Burns was identified as a potential suspect and taken into custody in California.

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Trial commenced on January 20, 2015. The matter was tried as a death penalty case, however; on the twelfth day of trial a deal was struck to waive the death penalty as a possible sentence as explained more fully in Ground One. Burns was tried alongside his co-defendant Willie Mason. Ms. Martinez previously accepted a plea deal and testified as a State's witness at the trial. Ms. Cousins was severed from the case and was eventually tried and convicted following a separate trial. Burns was ultimately convicted of all charges.

Despite the lengthy trial and substantial sentence imposed on Burns, his attorneys failed to file a notice of appeal and no direct appeal was ever taken. Thereafter, on October 13, 2015, Burns filed a proper person petition for writ of habeas corpus. After several proceedings, including a trip to the Nevada Supreme Court, the matter was remanded with instructions to appoint counsel to assist Burns with post-conviction proceedings. Thereafter, this Court appointed counsel to assist Petitioner and this supplement is being filed to aid in the presentation of post-conviction proceedings.

III.

GROUNDS FOR RELIEF

Due to the ineffective assistance of trial and appellate counsel, Burns's conviction and sentence are Constitutionally infirm, and Burns should receive a new trial. In addition, it is obvious from the record that Burns wanted to appeal and that he specifically reserved the right to do so. Despite this, his trial attorneys failed to file a notice of appeal which deprived Burns of his right to a direct appeal. This Court should, at a minimum, grant the writ and order the Clerk of the Court to process an untimely appeal on Burns' behalf.

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A. Grounds One alleges that Burns was deprived of his right to a direct appeal.

An ineffective assistance of counsel claim has two components. First, the petitioner must show counsel's performance was deficient, and second, must show the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). This requires the petitioner to show the result of the proceeding probably would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. at 694. The Nevada Supreme Court has further recognized the sum total of counsel's failures may justify post-conviction relief if the result of the trial is rendered unreliable. Buffalo v. State, 111 Nev. 1139, 1149, 901 P.2d 647 (1995) (Holding that, "Defense counsel's failure to investigate the facts, failure to call witnesses, failure to make an opening statement, failure to consider the legal defenses of self-defense and defense of others, failure to spend any time in legal research and general failure to present a cognizable defense rather clearly resulted in rendering the trial result 'unreliable'"). Thus, relief can be granted when even one error by counsel constitutes constitutionally ineffective assistance of counsel, or, where the cumulative effect of errors violates due process. Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007).

To prove ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal. Kirksey v. State, 112 Nev. 980, 998, 923 P.3d 1102 (1996). Appellate counsel is not required to raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). Still, ineffectiveness may be found where counsel presents arguments

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on appeal while ignoring arguments that were clearly stronger. Suggs v. United States, 513 F.3d 675, 678 (7th Cir. 2008).

Petitioner alleges he was deprived of his right to a direct appeal and therefore requests he be allowed to file an untimely notice of appeal. In Lozada v. State, the Nevada Supreme Court noted that "an attorney has a duty to perfect an appeal when a convicted defendant expresses a desire to appeal or indicates dissatisfaction with a conviction." Lozada v. State, 110 Nev. 349, 354, 871 P.2d 944 (1994). If counsel fails to file an appeal after a convicted defendant makes a timely request, the defendant (at least previously) was entitled to the Lozada remedy, which consisted of filing a post-conviction petition with assistance of counsel in which the actual appellate claims could be raised. Id. Such a claim did not require any showing of merit as to the issues sought to be raised. Rather, it is sufficient to receive the relief contemplated by Lozada if a petition shows that he was deprived of his right to a direct appeal without his consent. Id. at 357.

The remedy contemplated by Lozada has been largely subsumed by recent revisions to the Nevada Rules of Appellate Procedure, although the basis for obtaining relief remains generally the same. Now, under NRAP 4(c), an untimely notice of appeal may be filed if:

> (A) A post-conviction petition for a writ of habeas corpus has been timely and properly filed in accordance with the provisions of NRS 34.720 to 34.830, asserting a viable claim that the petitioner was unlawfully deprived of the right to a timely direct appeal from a judgment of conviction and sentence; and
> (B) The district court in which the petition is considered enters a written order containing:
>
> > (i) specific findings of fact and conclusions of law finding that the petitioner has established a valid appeal-deprivation claim and is entitled to a direct appeal with the assistance of appointed or retained appellate counsel;
> > (ii) if the petitioner is indigent, directions for the appointment of

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> appellate counsel, other than counsel for the defense in the proceedings leading to the conviction, to represent the petitioner in the direct appeal from the conviction and sentence; and
> (iii) directions to the district court clerk to prepare and file—
> within 5 days of the entry of the district court's order—a notice of appeal from the judgment of conviction and sentence on the petitioner's behalf in substantially the form provided in Form 1 in the Appendix of Forms.

NRAP 4(c).

The question to be decided is whether Petitioner was in fact deprived of a direct appeal, and as to that issue, pre-existing Lozada-based decisions remain binding. The Nevada Supreme Court recently and exhaustively discussed the contours of appeal deprivation claims that arise in the context of a guilty plea. Toston v. State, 127 Nev.Adv.Op. 87, 267 P.3d 795 (2011). As explained therein, such claims are reviewed under the ineffectiveness standards set forth in Strickland v. Washington, 466 U.S. 668 (1984). In particular, deficient performance can take the form of a failure to inform and consult with the client regarding the right to appeal, or, failure to in fact file an appeal. Toston, 267 P.3d at 799.

As acknowledged in Toston, an attorney's duty to in fact file a direct appeal arises, irrespective of whether the conviction arose from a guilty plea or verdict following a trial, when the defendant actually informs counsel that he would like to appeal. Id. at 800, citing Lozada, 871 P.2d at 949 ("Assuming Lozada's trial counsel failed to perfect an appeal without Lozada's consent, Lozada presumably suffered prejudice because he was deprived of his right to appeal."); and citing Davis v. State, 115 Nev. 17, 974 P.2d 658, 660 (1999) ("[I]f the client does express a desire to appeal, counsel is obligated to file the notice of appeal on the client's behalf").

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Here, 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. Petitioner's attorneys, and the court's minutes, both indicate that the waiver only applied to issues which arose prior to entry of the waiver. That is, there was no waiver as to the remainder of the trial, which would have necessarily included closing argument. Likewise, the sentencing proceeding was not part of the "trial" at all and thus issues that arose during sentencing were also outside the scope of the waiver.

Petitioner contends that the waiver meant exactly what counsel and the court said that it did: In exchange for the benefit of taking the death penalty off the table, Petitioner waived any appellate challenges to trial errors that arose prior to entry of the waiver. This mostly meant that trial error claims were waived, as the waiver occurred near the end of the State's case. But counsel specifically stated they anticipated, and wanted to appeal, claims of prosecutorial misconduct. That prediction was very accurate as this Petition identifies several areas of prosecutorial misconduct for further review.

Petitioner further alleges that his attorneys would testify at any evidentiary hearing that he was aware, as reflected in the trial record, that Petitioner desired to file a direct appeal, and that despite this knowledge, trial counsel failed to file a notice of appeal. They would also be anticipated to agree that these actions deprived Petitioner of his right to a direct appeal.

As a result, this Court should grant the writ, make findings that Petitioner was deprived of his direct appeal, and direct the Clerk to file a notice of appeal on his behalf so that he may proceed with a direct appeal to the Nevada Supreme Court from the conviction and sentence herein.

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B. Ground Two challenges errors concerning custodian of records witnesses that were instead utilized as experts.

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

Here, the State's repeated use of custodian of records witnesses as "experts" gave the jury the false impression that said witnesses were in fact experts in their field, when in reality their sole function as witnesses was to explain billing records. But the witnesses testified to much more than just how the bills were generated and interpreted, such as testimony about towers, triangulations, and cell phone technology. Such testimony plainly required the use of a properly noticed expert witness, which was not present here.

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

C. Ground Three challenges the State's failure to reveal the full extent of negotiations with critical witness Cornelius Mayo.

In Ground Three, it is explained that Cornelius Mayo was an important State's witness as he was the only adult present at the time of the murder that was able to testify as a witness.

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Aside from his testimony, Mr. Mayo's 911 call was also utilized by the State and argued as direct evidence of Petitioner's guilt as explained in Ground Five.

Mr. Mayo was directly asked "Well, do you believe that by testifying in this case it helps you in the cases that you're facing right now?" TT, Day 10, p. 250. Mr. Mayo answered "no," and that answer was never clarified or explained by the State. But the irrefutable evidence is that Mr. Mayo was helped, because his case was postponed for years and then dealt down to an unbelievable level.

The suppression by the State of evidence favorable to an accused violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the State. Brady v. Maryland, 373 U.S. 83, 87 (1963). The defense's failure to request favorable evidence does not free the State of this constitutional obligation. United States v. Agurs, 427 U.S. 97, 103-04 (1976). These constitutional discovery obligations apply equally to impeachment evidence and exculpatory evidence. United States v. Bagley, 473 U.S. 667, 682 (1985). The touchstone of materiality is a showing that there is a reasonable probability of a more favorable outcome had the suppressed material been turned over at trial. Id. at 678. The prejudicial effect of the suppressed material must be considered "collectively, not item by item." Kyles v. Whitley, 514 U.S. 419, 436 (1995). The State, "which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached." Id. at 437. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. Id. Whether the prosecutor succeeds or fails in meeting this obligation, the prosecution's

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Las Vegas, Nevada 89128

responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable. Id. at 437-38. Thus, a failure to produce material exculpatory or impeachment evidence warrants a new trial if there is a reasonable probability that the hidden information would have prevented the jury from convicting a petitioner. Id.

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

In addition, the knowing use of perjured testimony or false evidence constitutes a denial of due process. Napue v. Illinois, 360 U.S. 264, 269 (1959). The result does not change when "'the State, although not soliciting the false evidence, allows it to go uncorrected when it appears.'" Giglio, 405 U.S. at 154 (quoting Napue at 269). In order to establish a Napue violation a party must demonstrate (1) that the challenged testimony was false, (2) that the prosecution knew or should have known it was false, and (3) that the false testimony was material. Napue, 360 U.S. at 296-271. False evidence is material if there is any reasonable likelihood that the evidence could have affected the judgment of the jury. Id., see also United States v. Agurs, 427 U.S. 97, 103 (1985).

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Las Vegas, Nevada 89128

Here, the State failed to disclose, failed to correct, and the defense failed to discover that Mr. Mayo did in fact receive "help" towards his pending criminal cases by agreeing to testify as a State's witness at Petitioner's trial. Said help came in the form of years of delays, which ultimately culminated in a very favorable plea agreement for Mr. Mayo – which he then promptly screwed up.[1] Regardless, the fact Mr. Mayo was given a sweetheart deal that involved no prison time and a possible reduction to a gross misdemeanor on a major drug violation case in which his girlfriend was murdered, daughter shot, and crack cocaine possessed in the plain view of police officers were facts which certainly should be considered "material" to Mr. Mayo's credibility as a witness at Petitioner's trial. There is a reasonable probability Petitioner would have enjoyed a more favorable outcome at trial had these facts been properly disclosed by the State or discovered by the defense.

D. Ground Four alleges trial counsel was ineffective in opening the door to damaging hearsay evidence.

The theory of defense at trial was essentially that Petitioner was not present at the time of the crime, buttressed by multiple facts that supported an argument that the shooter during the offense was another individual known as "Job-Loc." That theory was in fact likely the best one available, and was generally stuck to by defense counsel throughout the trial.

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[1] Petitioner may seek discovery of any written offers from the State to Mayo or his counsel if this Court grants an evidentiary hearing on this claim. It remains unbelievable that Mayo's case was delayed for years without some form of written plea discussions.

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Las Vegas, Nevada 89128

With that in mind, it made no sense to question the lead detective in the manner raised in Ground Four which opened the door to a hearsay statement by Ms. Cousins that "Job-Loc" was not the shooter. State v. Gonzales, 125 P.3d 878, 893, 2005 UT 72 (2005) (Discussing ineffectiveness of counsel in opening door to damaging testimony; claim denied on basis of no prejudice where evidence admissible anyway). Here, the evidence in the form of Ms. Cousins' hearsay statement was *not admissible*, as evidenced by the fact the State did not solicit it until after defense counsel's cross examination that opened the door to it. Trial counsel was ineffective in opening the door to this damaging testimony and Petitioner's theory of defense was substantially harmed as a result. There is a reasonable probability for a more favorable outcome in this matter absent this error.

E. Ground Five contains alleges various claims of ineffective assistance of counsel that should have been raised on direct appeal and/or objected to by trial counsel.

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

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

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

First, Petitioner contends the State disparaged defense counsel. During rebuttal, the prosecutor described the two-week trial as a search for truth, except as to the last twenty minutes during the defense closing argument. TT, Day 15, p. 51. Disparagement of defense counsel is misconduct. People v. Seumanu, 61 Cal. 4th 1293, 1338, 355 P.3d 384 (2015) (Improper to imply defense counsel was "personally dishonest").

Second, there were multiple instances of burden shifting. The prosecutor first argued that he does not get to pick the witnesses to murder cases, and that if he did he would, in summary, take a "priest and a nun" or "Mother Theresa" over the co-conspirators in this case. TT, Day 15, p. 54. The prosecutor then later argued that Petitioner had "no explanation" for the

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murder. TT, Day 15, p. 56. Later still, the prosecutor accused the defense of failing to present witness Ulonda Cooper. TT, Day 15, p. 74. Only this final error was objected to by defense counsel, and the prior instances of burden shifting were not.

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

> In Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105-06 (1990), this court stated the following:
>
> It is generally also outside the boundaries of proper argument to comment on a defendant's failure to call a witness. *Colley v. State*, 98 Nev. 14, 16, 639 P.2d 530, 532 (1982). This can be viewed as impermissibly shifting the burden of proof to the defense. *Barron v. State*, 105 Nev. 767, 778, 783 P.2d 444, 451 (1989). Such shifting is improper because "it suggests to the jury that it was the defendant's burden to produce proof by explaining the absence of witnesses or evidence. This implication is clearly inaccurate." *Id.* (citing *Mullaney v. Wilbur*, 421 U.S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975); *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970)).
>
> Accordingly, it is generally improper for a prosecutor to comment on the defense's failure to produce evidence or call witnesses as such comment impermissibly shifts the burden of proof to the defense. *Id.* It is clear from *Ross* that it was error for the district court to allow the prosecutor to proceed, over objection, in commenting on the defendant's failure to produce evidence and call people who were at Melinda Bohall's party as witnesses. *See United States v. Williams*, 739 F.2d 297, 299 (7th Cir. 1984). Given this impermissible burden-shifting by the prosecutor, we reverse Whitney's conviction and remand to the trial court; accordingly, we need not address Whitney's other claims of error.

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

The comments at issue, individually or collectively, shifted the burden of proof to the defense and violated Petitioner's constitutional rights. There is a reasonable probability of a

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more favorable outcome had defense counsel objected to these comments, sought a mistrial, or raised them as issues of error on direct appeal.

Next, the State improperly referred to a custodian of records witness as an "expert" despite the fact he was not an expert and was not noticed as an expert witness by the State. TT, Day 15, p. 86. As explained in Ground Two, incorporated herein, cellular phone company custodians are not experts and it is error to refer to them as such. Trial counsel should have objected to this obvious error and there is a reasonable probability of a more favorable outcome had an objection been made or the issue raised on direct appeal.

Next, the record confirms that the State played a Powerpoint presentation during its closing that contained a "circle of guilt," described as the word "guilt" with reference to Petitioner. TT, Day 15, p. 87. Trial counsel did object, based on recent caselaw, to which the Court noted it was "not familiar" with the case and therefore overruled the objection. Said objection should have been sustained. While the case at issue was not mentioned, it was likely the decision in Watters v. State, 129 Nev.Adv.Rep. 94, 313 P.3d 243 (2013), which found it to be error for the State to display a presentation with the word "guilty" on it during opening statement. Indeed, the record here indicates the prosecutor's reliance on the fact that the instant case involved closing argument as an argument against the objection. TT, Day 15, p. 87.

However, by its own terms Watters did not explicitly state that it only applied to errors during opening statement. Moreover, the Nevada Supreme Court determined in 2014, a year before Petitioner's trial, that the same rationale would apply to the display of the word "guilty" during closing argument. Artiga-Morales v. State, 130 Nev.Adv.Rep. 77, 3335 P.3d 179 (2014) (denying relief based on brief display of slide and concession by defense counsel that it was

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proper, although a subsequent objection to its display was sustained). No such concession was made at trial, nor is one being made here, as existing law established that it was error for the prosecutor to declare to the jury during closing argument that the defendant is guilty. Taylor v. State, 132 Nev.Adv.Rep. 27, 371 P.3d 1036, 1046 (2016), citing Collier v. State, 101 Nev. 473, 480, 705 P.2d 1126 (1985). This was a meritorious issue for direct appeal and even though objected to by defense counsel, it is an appropriate consideration as part of the cumulative error claim before this Court.

Finally, the prosecutor presented a lengthy argument, which included audio played for the jury, that in essence the whistling heard on the 911 call during the crime matched alleged whistling heard during Petitioner's interview with police. TT, Day 15, pp. 93-94. The transcript of the police interview with Petitioner makes no reference whatsoever to any whistling. See State's Response to Proper Person Petition, 1-26-16, pp. 23+ (Exhibit 1).

F. Ground Six alleges errors during or leading up to sentencing.

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

Second, trial counsel filed a sentencing memorandum under seal, fully incorporated herein, that raised errors in the pre-sentence report pursuant to Stockmeier v. State Board of

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Parole Comm'rs, 127 Nev. 243, 255 P.3d 209 (2011) (requiring such errors be fixed prior to sentencing). However, the trial court completely failed to address the errors, despite stating that it had reviewed the sentencing memorandum. The errors were of significant importance, because the presentence report incorrectly stated that Petitioner had never been diagnosed with fetal alcohol syndrome (when he had), and that the surviving victim who was shot had identified Petitioner as the assailant, when at best she stated she was "10% sure" it was Petitioner. Trial counsel was ineffective in failing to insist that the Court address these errors during sentencing. Because no objection was made during sentencing, the Court presumably relied on this inaccurate information in sentencing Petitioner, in violation of Petitioner's right to a sentencing proceeding based on accurate information. Townsend v. Burke, 334 U.S. 736, 741 (1948).

G. Ground Seven alleges trial counsel was ineffective in not seeking to invalidate the death penalty notice on the basis that Petitioner is intellectually disabled.

Next, trial counsel is alleged to have been ineffective in not seeking to dismiss or otherwise disqualify Petitioner for the death penalty based on the findings concerning Fetal Alcohol Syndrome ("FAS") and NRS 174.098. Petitioner raised a version of this claim in his proper person petition. See Petition, 10-13-15, Ground Seven. In response, the State pointed out that the death penalty had been removed as an option, and that FAS "does not, as a matter of law, qualify for intellectually disabled." Response, 1-26-16, p. 14.

The first of the State's arguments is easily addressed. It is the character of the agreement to remove the death penalty itself that is at issue here. Trial counsel was ineffective in negotiating that agreement in the first instance without having first sought to remove the

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death penalty under Atkins v. Virginia, 536 U.S. 304 (2002) or state law. That is, there would have been no need to negotiate away the death penalty in exchange for an appeal waiver and a sentence of life without parole if the death penalty had already been negated as an option via a meritorious motion under NRS 174.098. There is a reasonable probability of a more favorable outcome in such a scenario because, at a bare minimum, Petitioner would have retained his appellate rights and been able to argue for a sentence of less than life without parole had such a motion been granted prior to trial.

The State's other argument is far more complex than proffered by the State. No known authorities hold, and the State certainly did not cite any, that FAS can never be the basis for an intellectual disability claim. Petitioner certainly does not contend that because he has FAS, he is per se ineligible for the death penalty. However, there was a strong argument to be made that, whether it be via FAS or any other source, the fact was that Petitioner has severe adaptive deficits that place him into the intellectually disabled range and thus render him ineligible for the death penalty.

Under NRS 174.098, an intellectually disabled individual cannot be subjected to the death penalty. Intellectually disabled means "significant subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period." The statute was enacted in response to the Supreme Court's decision in Atkins, which forbid the execution of what was then described as mental retarded individuals, but left it to states to determine what standards would be used to make such a determination. Ybarra v. State, 127 Nev. 47, 53, 247 P.3d 269 (2011).

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Explaining the concept of "limitations in intellectual functioning," the Nevada Supreme Court noted this was measure in "large part," – and thus not exclusively, by IQ tests. Id. at 55. In fact the Nevada Supreme Court went on to explicitly state that IQ tests are not the sole source of evidence on this topic, although the common definition was a generalized IQ of 75 or less. Id.

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

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

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

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Petitioner plainly meets the age of onset requirement.

Turning to the case at hand, there should be little debate that Petitioner's disabilities, the severity of which is explored below, plainly arose before the age of 18. Available records indicate that, from birth, Petitioner's mother was found to have "tested positive for cocaine, amphetamines, and valium." Sentencing Memorandum ("SM"), p. 25 of 154 (all future page references are based on the 154 page document).[2] These accounts of substance abuse are consistent with circumstances of alcohol abuse during pregnancy. SM, p. 28.

Petitioner was examined by a team of experts in connection with this case. Dr. Adler, in particular, reviewed various brain scans of Petitioner and concluded that the abnormalities detected were "more likely the result of prenatal rather than postnatal damage." SM, p. 29. Dr. Adler also notes the "early onset of symptoms," which could only mean childhood since Petitioner was merely 18 when the actual offense occurred. In any event, Dr. Adler's conclusion is that Petitioner's documented brain damage was prenatal in nature, which by definition means it arose prior to birth, much less the age of 18.

[2] The memorandum was sealed by the Court at the time of sentencing. While the privacy concerns raised at sentencing are laudable, it is questionable if they actually prohibit the document from being filed in open court. Petitioner references the same as needed here to present the factual basis for his claims and will provide an unfiled copy of the memorandum to chambers and the District Attorney. For purposes of subsequent appellate review Petitioner fully desires that the information in the memorandum be considered part of the record of these proceedings.

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Petitioner meets the definition of "intellectually disabled" based on a functional equivalency analysis of his intelligence and adaptive functioning.

To be sure, when tested for general IQ, Petitioner was found to have a generalized IQ of 93, with a range of specific scores between 102 and 80. SM, p. 125. However, as Yberra explains, IQ is not the only measure of subaverage intellectual functioning. This is particularly true as to Petitioner, who was referred for special education classes starting in the third grade. SM, p. 110. His problems in school escalated as time went by, including 60 disciplinary infractions in sixth grade, subsequently being held back a grade, being repeatedly expelled, and finally dropping out of school "after trying for three years to finish eleventh grade." SM, p. 111.

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

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

SM, p. 130.

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

The concept being advanced here, that IQ is not the end-all-be-all of the first prong of NRS 174.098, finds support in recent developments in both the law and the scientific community. As to the law, the Supreme Court's decision in Hall v. Florida, 134 S.Ct. 1986 (2014) is highly instructive. There, the Supreme Court held invalid a state scheme for determining intellectual disability that was too rigidly married to "an IQ score as final and conclusive evidence of a defendant's intellectual capacity." Id. at 1995. The Court further noted that at least five states, including Nevada, allow a "defendant to present additional evidence of intellectual disability even when an IQ test score is above 70." Id. at 1998. The Court further noted the science behind IQ scores had changed, such that the newest version of the DSM (DSM-5) recognized that "A person with an IQ score above 70 may have such severe adaptive behavior problems…that the person's actual functioning is comparable to that of individuals with a lower IQ Score"). Id. at 2001.

Cases that bring these concepts together are rare, but the best available example appears to be State v. Agee, 358 Ore. 325, 364 P.3d 971 (2015). Interestingly, the defendant in that matter apparently retained Dr. Conner and Dr. Addler, which may be the same experts

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utilized by defense counsel in this matter. Whether they are or not, the two basically testified in the case to what they have argued in support of Petitioner in this matter: FAS and severe deficits in adaptive functioning supported a diagnosis of intellectual disability even where IQ scores were well above 70. Id. at 984-85.

As the case further noted, the DSM-5 manual contains a significant change from the version before it. The DSM-IV-TR manual defined significantly subaverage intellectual functioning as "an IQ of approximately 70 or below on an individually administered IQ test." Id. at 987. However, the DSM-5 deletes references to particular IQ scores, and "provides that the severity level is defined by adaptive functioning, not by IQ score." Id. The Oregon Supreme Court ultimately found that the trial court erred by adhering too closely to the use of rigid IQ scores, and remanded the case for a new Atkins hearing which was to utilize these new definitions and concepts.

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

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H. Ground Eight alleges a violation of Petitioner's right to be present at the time any notes from the jury were discussed.

As set forth in the claim above, at least two notes from the jury were received and Petitioner was not consulted about or present for any of the discussions related to those notes. The Nevada Supreme Court has already held that criminal defendants have a right to be present when jury notes are discussed. See Manning v. State, 131 Nev.Adv.Op. 26, 348 P.3d 1015, 1018 (2015); Jackson v. State, 128 Nev.Adv.Op. 55, 291 P.3d 1274, 1277 (2012). When a district court responds to a note from the jury without notifying the parties or seeking input on the response, the error will be reviewed to determine whether it was harmless beyond a reasonable doubt. Manning, 348 P.3d at 1018.

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

The first part of the jury note discussion, which was not recorded at all as it took place over the phone, apparently involved a readback of Monica Martinez's complete testimony. TT, Day 16, p. 2. Petitioner, if he had been consulted, would have vehemently objected to this, as Ms. Martinez's testimony was some of the most incredible, and yet most damaging, to

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Petitioner's case. Worse, whatever was presented to the jury was not even evidence: As the trial court explained, it "had the recorder prepare disks with that testimony excluding any bench conferences and comments to the Court out of the presence of the jury." TT, Day 16, p. 2. The prosecutor then explained that what was given to the jury was the "JAVS" video, which as the Court knows is a running video of the court proceedings that **easily** could capture non-evidentiary materials such as sounds, comments, and voices heard in the courtroom, and a variety of emotional and visual cues that simply would not be present whatsoever if a true readback of the actual court testimony and/or transcript of the actual court testimony were provided to the jury. There is further zero indication in the record that defense counsel (or anyone) reviewed the JAVS videos in their entirety to ensure their accuracy and that irrelevant materials were removed.

The presentation of extra-evidentiary materials in the form of JAVS videos of a key State's witness violated Petitioner's right to Due Process and is a wholly meritorious issue to be raised on direct appeal should this Court determine Petitioner was in fact deprived of a direct appeal. United States v. Watson, 171 F.3d 695, 700 (D.C. Cir. 1999) (wrongfully admitted evidence reviewed to determine if its affected the jury's verdict). The wrongful admission of nonevidence in the form of the unofficial JAVS video was plainly harmful to Petitioner, as Ms. Martinez was a key State's witness who – summarizing her two days of largely tangential musings on many topics – pinned blame for the murder on Petitioner while exonerating her boyfriend Job-Loc. Petitioner was not consulted about this decision and was not asked about the response to the verdict form either. There is a reasonable probability of a more favorable outcome had Petitioner been present as required.

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I. Ground Nine alleges cumulative error.

The cumulative effect of any of the errors identified herein, and those found on direct appeal, if any one were not sufficient in severity to justify a grant of post-conviction relief, justify relief in their combined magnitude. The cumulative effect of those errors rendered the trial fundamentally unfair and supports relief based on a claim of cumulative error. Petitioner is entitled to relief on a claim of cumulative error.

IV.

CONCLUSION

For each of the reasons set forth herein, Petitioner submits that he is entitled to an evidentiary hearing and/or relief on his claims herein.

Wherefore, petitioner prays this Court (1) grant a new trial on all charges, (2) issue an order finding Petitioner was deprived of his right to a direct appeal and directing the Clerk of Court to file notice of appeal on his behalf, (3) grant an evidentiary hearing, and/or (4) grant any other relief to which petitioner may be entitled.

DATED this 27th day of November, 2017.

Submitted By:

RESCH LAW, PLLC d/b/a Conviction Solutions

By: _____
JAMIE J. RESCH
Attorney for Petitioner

Conviction Solutions
2620 Regatta Dr., Suite 102
Las Vegas, Nevada 89128

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Steven D. Grierson
CLERK OF THE COURT

RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #4352
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- DAVID BURNS, #2757610 Defendant.	CASE NO: C-10-267882-2 DEPT NO: XX

STATE'S RESPONSE TO DEFENDANT'S SUPPLEMENT TO PETITION FOR WRIT OF HABEAS CORPUS

DATE OF HEARING: March 8, 2018
TIME OF HEARING: 9:00 a.m.

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through STEVEN S. OWENS, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's Supplement to Petition for Writ of Habeas Corpus.

This response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On October 13, 2010, the State charged DAVID JAMES BURNS, aka D-Shot, (hereinafter "Defendant"), by way of 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). On October 28, 2010, the State filed a Notice of Intent to Seek the Death Penalty in this matter.

On July 18, 2012, Defendant, through counsel, filed many pretrial Motions, to which the State filed its Oppositions on July 23, 2012. This Court ruled on these Motions on July 18, 2013.[1]

On July 19, 2013, Defendant filed a 500-page Motion to Strike the State's Notice of Intent to Seek the Death Penalty. The State filed its Opposition on July 25, 2013. This Court denied Defendant's Motion on September 12, 2013. In the interim, Defendant also filed multiple Motions to continue his trial date.

Defendant's jury trial finally began on January 20, 2015. Following a 15-day trial on February 17, 2015, the jury returned a guilty verdict on all eight counts.

On April 23, 2015, Defendant was adjudged guilty and sentenced to the Nevada Department of Corrections (NDC) as follows: COUNT 1 – a maximum of 72 months and a minimum of 12 months; COUNT 2 – a maximum of 120 months and a minimum of 24 months; COUNT 3 – a maximum of 180 months and a minimum of 24 months; COUNT 4 – a maximum of 180 months and a minimum of 24 months, plus a consecutive term of a maximum of 180

[1] The State notes that most of these pretrial Motions, which were filed by counsel, are not relevant for purposes of this Petition.

months and a minimum of 24 months for the deadly weapon enhancement; COUNT 5 – Life without parole, plus a consecutive term of a maximum of 240 months and a minimum of 40 months for the deadly weapon enhancement; COUNT 6 – a maximum of 180 months and a minimum of 24 months, plus a consecutive term of a maximum of 180 months and a minimum of 24 months for the deadly weapon enhancement; COUNT 7 – a maximum of 240 months and a minimum of 48 months, plus a consecutive term of a maximum of 240 months and a minimum of 40 months for the deadly weapon enhancement; and COUNT 8 – a maximum of 180 months and a minimum of 24 months, with 1,671 days credit for time served. COUNTS 1, 2, 3 & 4 are to run concurrent with COUNT 5. COUNTS 6 & 8 are to run concurrent with COUNT 7, and COUNT 8 is to run consecutive to COUNT 5. A Judgment of Conviction was filed on May 5, 2015.

Furthermore, regarding Defendant's sentence as to COUNT 5, on February 9, 2015, a Stipulation and Order Waiving a Separate Penalty Hearing was filed where Defendant agreed that in the event of a finding of guilty of Murder in the First Degree, he would be sentenced to life without the possibility of parole, and he waived all appellate rights. Stipulation and Order Waiving Separate Penalty Hearing, filed February 9, 2015.

On October 13, 2015, Defendant filed a Motion to Withdraw Counsel. He also filed a Pro Per Post-Conviction Petition for Writ of Habeas Corpus, Motion to Appoint Counsel, and Request for an Evidentiary Hearing. The State responded on January 26, 2016. On February 16, 2016, the Court denied Defendant's Petition, Motion to Appoint Counsel, Request for Evidentiary Hearing, and granted Defendant's Motion to Withdraw Counsel. The Findings of Fact and Conclusions of Law Order was filed on March 21, 2016.

Defendant filed a Notice of Appeal on March 11, 2016. The Nevada Supreme Court remanded it back to the District Court for appointment of counsel. On March 30, 2017, Defendant's counsel was confirmed. Defendant's Supplemental Petition was filed on November 27, 2017. The State herein responds.

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STATEMENT OF FACTS

On August 7, 2010, Cornelius Mayo (hereinafter "Mayo") lived at 5662 Miekle Lane Apartment A, Las Vegas, Clark County, Nevada. He resided with his girlfriend, Derecia Newman, her twelve-year-old daughter, Devonia Newman, and his and Derecia's three young children, Cashmere Mayo (6), Cornelius Mayo Junior (5), and Cordaja Mayo (3). On August 6, 2010, Derecia's sister, Erica Newman, was also staying with the family. In the early morning hours of August 7, 2010, the household received a phone call on their landline phone. The number for that landline phone was 702-444-9446. The phone had a caller-identification feature. Cornelius Mayo heard Derecia answer the phone. The call was at 3:39 am. About 10 minutes later, there was another call. At the time, Cornelius was in the bathroom, but he heard his girlfriend, Derecia, answer the front door. Cornelius then heard a commotion, he heard Derecia scream and then he heard two gunshots. Cornelius also heard someone he knew to be Stephanie Cousins screaming. He then heard three more gunshots, and then saw 12-year-old Devonia run into the bathroom.

Cornelius told Devonia to sit quietly. A bullet came through the bathroom door, and Cornelius saw Devonia get up and try to run from the bathroom. At that point, Cornelius saw Devonia get shot, but he could not see who fired the shot. He could see that Devonia had been shot in the stomach. Cornelius told Devonia to be still, and left the bathroom. He checked the bedroom where Erica Newman and the small children were sleeping, and they were undisturbed. He called 911 from his cell phone, which was phone number 702-609-4483. Police and paramedics arrived, and the paramedics took Devonia to the hospital.

From looking at the landline phone's caller-identification feature, Cornelius saw that the two calls before the shooting were from "S. Cousins." Cornelius had known Stephanie Cousins for six or seven years. According to Cornelius, Derecia had sold marijuana to Stephanie Cousins in the past. After the police had arrived, Cornelius called Stephanie Cousins. He was extremely angry when he called. Stephanie Cousins told him that when she knocked on the door, two men happened to be waiting around the corner, and forced their way in when Derecia opened the door. Cornelius told Cousins that he believed she was lying.

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

Homicide Detective Christopher Bunting was one of the detectives assigned to the case. He responded to the scene around 5:00 am. The apartment itself was a two-bedroom, two-bathroom apartment. It also had a living room and a kitchen. Immediately inside the front door of the apartment was the living room. On the couch in the living room, detectives observed Derecia Newman. She was in nearly a sitting position on the couch with a $20 bill clutched in her hand. She had an obvious, massive gunshot wound to her head. From Derecia's location, detectives examined the scene for evidence of additional gunshots or bullet strikes. They found a bullet strike in the hallway, and this shot hit the refrigerator. The third shot went down the hallway of the residence, the fourth went through the bathroom, and the fifth went into Devonia Newman. Later, detectives found another impact site, accounting for a sixth shot. There were no cartridge casings observed at the scene, leading detectives to believe that the weapon used was a revolver.

At the autopsy, Dr. Alane Olson testified that Derecia Newman sustained a gunshot wound to the head. Upon examination, Dr. Olson could see that the barrel of the gun had actually been pressed against her head when the trigger was pulled.

In the course of the investigation, detectives became aware of a woman named Monica Martinez. Martinez has a teenaged daughter named Tyler. Detectives met with Tyler and showed her a photographic line-up of several individuals, one of whom was Defendant. Defendant's nickname is "D-Shot."

Tyler Mitchell lived with her mom and younger siblings in August 2010. At the beginning of August, weeks before this incident, Tyler's mom, Monica Martinez, brought three men to the home. One of those men was "Job-Loc," Monica Martinez's boyfriend. The other two were (Willie) Darnell Mason, and Defendant. Mason's nickname was "G-Dogg." The three stayed for one night. During this time period, Monica had a silver, gray Crown Victoria sedan type car. Tyler knew Job-Loc's cell phone number to be 512-629-0041. Her mother's cell phone number was 702-927-8742. Mason's cell phone number was 909-233-

0860. After being shown three photographic line-ups, Tyler was able to identify Job-Loc. She also identified G-Dogg or Willie Darnell Mason. And she identified D-Shot or Defendant. Tyler also knew where Job-Loc lived during this time period: at the Brittany Pines Apartments between Lake Mead and Torrey Pines.

Detectives also interviewed Donovon Rowland. Rowland knew Job-Loc by a different nickname: Slick. He became friends with him. Through the course of his relationship with Slick, Rowland came to know Slick's girlfriend, Monica Martinez. At some point after Rowland met Slick, Slick broke his leg. Rowland also knew G-Dogg (Mason) through Slick or saw him at Slick's apartment while Monica Martinez was also present. One morning, Rowland was at Slick's apartment, as was Monica. G-Dogg (Mason) was there too. Another person was also present, although Rowland could not identify him. G-Dogg (Mason) was the person who opened the door for Rowland. The door was blocked from the inside by a chair and a box. G-Dogg (Mason) even looked out the window before he opened the door for Rowland. Rowland saw and recognized Monica and Slick. The fourth individual was named, D-Shot or D-Shock. Monica and Slick were arguing. Rowland testified that he did not see Slick holding a gun. The State impeached Rowland with his statements to detectives. Rowland commented that he was highly intoxicated at the time. In fact, Rowland admitted that twice he had told the police that he saw Slick cleaning a gun, but at trial suggested that he actually did not see that. Eventually, Slick handed the gun to Rowland. Upon being impeached with his statement to detectives, Rowland acknowledged that he told the police that Slick had asked him to hold a gun for him and that he had to leave. The next morning, Slick called Rowland and told him to look at the newspaper. Rowland saw a story about a mother killed and a daughter being critically injured in a shooting. Rowland called Slick back, and Slick told him that G-Dogg (Mason), Monica, and D-Shot/Defendant had done something. He said there was a crack-head who set up the whole thing. Slick also asked Rowland to sell the gun or bury it. Instead, Rowland left the gun at a friend's house and later tried to sell it. Slick had told Rowland he could keep the money from selling the gun. The gun was a revolver. It was also empty of bullets.

Detectives were able to obtain video surveillance tape from the Opera House, located in North Las Vegas. The relevant tape was from 2:37 a.m. on the morning of August 7, 2010, to approximately 3:00 a.m., less than an hour before the homicide.

Through investigation, detectives were able to get in contact with Stephanie Cousins. They also were able to contact Monica Martinez. Through investigation, detectives learned that Martinez had a cell phone registered under the name "Wineford Hill." The carrier was T-Mobile. At trial, a representative from T-Mobile testified regarding Martinez's cell phone records and history. The representative explained how cell site towers work, or how the cell phone essentially looks for the closest tower for use.

With assistance from the FBI, detectives were able to identify Job-Loc as Jerome Thomas. From Tyler, detectives knew his cell phone number was 512-629-0041. Investigators learned that this number was no longer used as of August 9th or 10th, just a couple of days after the murder. Tyler also knew G-Dogg or Willie Darnell Mason's number to be 909-233-0860. From Cornelius Mayo, detectives knew Stephanie Cousins had cell number 702-542-4661. With those known numbers, the FBI obtained cell site records for August 7, 2010.

Records indicated that Job-Loc (Jerome Thomas) was in the area of Tenaya and Lake Mead from the night of August 6, 2010, through the early morning of August 7, 2010. This corresponded with the location of his apartment. Cell phone records of Donovan Rowland indicated that he was not in the area of Meikle Lane during the time of the murder. Conversely, records of Monica Martinez, Stephanie Cousins, and Willie Darnell Mason did indicate that they were near the crime scene when the murder was committed.[2] The address associated with Mason's phone was in Rialto, California, just outside of San Bernardino. Job-Loc is also from San Bernardino. D-Shot/Defendant is also from San Bernardino.

When Special Agent Hendricks examined Mason's phone on August 1, 2010, records indicated that Mason was in Rialto, California. Records from that phone also indicated that the phone was dialed to family members and associates of Willie Mason. On the night of

[2] Testimony established that Mason used phone 909-233-0860. The phone, however, was registered to "Ricc James."

August 1, 2010, just days before the murder, Mason's phone was hitting off towers heading northbound on I-15. The phone hit off a tower in Baker, California. Later it hit off a tower on Tropicana and I-15. Later, it hit off a tower in the area of the Brittany Pines Apartments, Job-Loc's residence. On the night of the murder, August 7, 2010, his phone hit off a tower near the Brittany Pines Apartments. Later, the phone hits off a tower near Rancho and Bonanza. Later, the phone hit off a tower in the area of Vegas Valley and Nellis. At just before 3:00 a.m., it hit off a tower north of downtown Las Vegas. Next, the phone hit off a tower near the Opera House in North Las Vegas. Detectives obtained a video surveillance tape from the Opera House for that same time period which depicted Mason with Monica Martinez and D-Shot/Defendant.

After that, at 3:24 am, Mason's phone was in the area of Nellis and Vegas Valley. At 3:51 am, the phone hit off the tower by Meikle Lane, the time and location of the murder. By 4:24 am, the phone was hitting off towers back by the Brittany Pines Apartments, or Job-Loc's residence.

Special Agent Hendricks also examined Stephanie Cousins' phone. Throughout the early morning hours of August 7, 2010, her cell phone hit off the same towers as Mason's phone. In fact, at 3:24 am, Cousins' phone calls Mason, and then Mason calls Cousins. At 3:37 am, Cousins calls the landline of Derecia Newman two times. Shortly after that, at 3:51 a.m., Mason calls Cousins. After that, Cousins received the incoming call from Cornelius Mayo.

Special Agent Hendricks also examined Monica Martinez's phone. Throughout the early morning hours, her phone was hitting off towers in the same area as Mason's and Cousins. In fact, when Cousins is calling Derecia Newman's land line, Martinez's phone is hitting off the same tower.

Detectives also obtained a video surveillance tape from Greyhound. On August 8, 2010, at 11:33 p.m., detectives identified Mason, Defendant, and Job-Loc getting off the bus that traveled from Las Vegas to Los Angeles, about 24 hours after the crime. Thereafter, they traveled to San Bernardino, California. None used their real names for travel.

ARGUMENT

I. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

Claims of ineffective assistance of counsel are analyzed under the two-pronged test articulated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), wherein the defendant must show: (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. Id. at 687, 104 S. Ct. at 2064. Nevada adopted this standard in Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984). "A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one." Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1997).

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371,130 S. Ct. 1473, 1485 (2010). The question is whether an attorney's representations amounted to incompetence under prevailing professional norms, "not whether it deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 88, 131 S. Ct. 770, 778 (2011). Further, "[e]ffective 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, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449 (1970)).

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, 1011-1012, 103 P.3d 25, 32-33 (2004). The role of a court in considering alleged 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) (citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)).

This analysis does not indicate 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." Donovan, 94 Nev. at 675, 584 P.2d at 711 (citing Cooper, 551 F.2d at 1166 (9th Cir. 1977)). 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. However, counsel cannot be deemed ineffective for failing to make futile objections, file futile motions, or for failing to make futile arguments. Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

In order to meet the second "prejudice" prong of the test, the defendant must 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). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.

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).

A. Defendant Waived His Direct Appeal

Defendant alleges "Petitioner never intended to waive, and in fact expressly reserved the right to appeal, any issues arising after the waiver was entered and specifically those which may have occurred during closing argument or sentencing." Petition at 6.

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. Adv. Op. 87, 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 v.

State, 127 Nev. 971, 977, 267 P.3d 795, 799 (2011).

Here, although Defendant did not plead guilty the Stipulation and Order he entered into is analogous to a guilty plea. It is the same in that defense counsel would not believe a defendant would want to appeal, especially after Defendant waived all his appellate rights. Stipulation and Order Waiving Separate Penalty Hearing, filed February 9, 2015, p. 1-2. The Order stated the following:

> 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.

Further, in regards to the Stipulation and Order the following exchange was made:

> Mr. Sgro: The State and the defense on behalf of Mr. Burns 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, Mr. Burns would agree that—
>
> 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 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 Mr. Burns 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 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?

Defendant Burns: Yes, sir.

The Court: Do you have any questions about it?

Defendant Burns: Yes, sir.

The Court: Do you agree with it?

Defendant Burns: 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?

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: 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 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?

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 going to get 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 that?

Defendant Burns: Yes, sir.

Recorder's Trial Transcript (hereinafter "RTT"), Trial Day 12, p. 4-9.

The very negotiations called for no direct appeal. Additionally, Defendant did not move to withdraw the Stipulation and Order after trial ended. After trial Defendant and defense counsel still felt it was in Defendant's best interest to not move to withdraw the Stipulation and Order. If there were meritorious issues or errors that caused Defendant concern, defense counsel could have moved to withdraw the Stipulation and Order. It is not deficient for counsel to assume Defendant is satisfied, absent Defendant backing out of the negotiations.

Defendant in his Pro Per Petition stated that he did not know the court likes certain issues to be filed on direct appeal, and his attorney said he would show him how to file a habeas petition and he never did. Pro Per Petition, filed October 13, 2015, p.14. This Court

has already found that, "Defendant waived his right to direct appeal, thus this Court finds that counsel cannot be deemed ineffective for failing to file one, or for failing to tell Defendant that the Court likes certain issues to be raised on direct appeal; and Defendant has failed to show any prejudice." Findings of Fact and Conclusions of Law Order, filed March 21, 2016, p. 7. Additionally, defense counsel in Defendant's Supplemental Petition now claims "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." Petition at 27. However, this statement is belied by Defendant's own admissions in his Pro Per Petition. He did *not* ask his attorney to file a direct appeal. Therefore, counsel was not deficient for not filing a direct appeal. Moreover, Defendant was not prejudiced because he waived his right to appeal, and received the benefit of having the State withdraw its intent to seek the death penalty. Further, Defendant did not request a direct appeal regarding the days of trial after the Stipulation and Order was made. Therefore, counsel was not ineffective.

B. Counsel was Not Ineffective for Failing to Object to the Testimony of Kenneth Lecense and Ray MacDonald and Defense Counsel was Properly Noticed

Defendant claims Kenneth Lecense (hereinafter "Lecense"), a Custodian of Records for Metro PCS, and Ray MacDonald (hereinafter "MacDonald)", a Custodian of Records for T-Mobile, inappropriately testified as experts at trial and counsel failed to object. Petition at 7. Additionally, Defendant argues this improperly admitted testimony should have been excluded unless supported by a properly noticed expert and should never have been admitted as an unnoticed lay witness. Petition at 8, 28. 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.

Custodians of records can testify as experts at trial. When discussing testimony of a custodian of records, the Nevada Supreme 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.

Burnside v. State, 131 Nev.___, 352 P.3d, 627, 637 (2015). Furthermore, in Burnside, the custodian of records was noticed as a lay witness and not an expert witness. However, even when the custodian of record was noticed as a lay witness instead of an expert witness, the Nevada Supreme Court held, "[w]e are not convinced that the appropriate remedy for the error would have been exclusion of the testimony." Id.

Here, Defendant was aware the two custodians of records would testify as experts. The State filed its Notice of Expert Witnesses on September 4, 2013. 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. Further, 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.

Notice of Expert Witnesses, filed September 4, 2013, p. 2. 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." Id at 5. Therefore, it was proper for the custodian of records to testify as experts and counsel was noticed they would be testifying as experts.[3] Counsel is not required to make futile objections. Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Therefore, counsel was not deficient.

Additionally, Defendant 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 Defendant. Even if counsel would have objected, the objection would have been overruled because the expert testimony was proper

[3] Defendant fails to specify what was improper about the State's Notice of Experts, but instead argues the testimony "should have been excluded unless supported by a properly noticed expert." Petition at 8.

and would not have been excluded. Therefore, Defendant was not prejudiced.

C. Counsel was not Ineffective in Failing to Discover Exculpatory and Material Evidence Because There was No Secret Agreement and the Jury Was Aware of Mayo's Pending Cases Were Postponed

Defendant alleges that "the State failed to disclose, failed to correct, and the defense failed to discover that Mr. Mayo did in fact receive 'help' towards his pending criminal cases by agreeing to testify as a State's witness at Petitioner's trial." Petition at 31.

During the State's direct examination with 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.

RTT, Trial Day 10, p. 245-248.

Further on cross-examination with Anthony Sgro:

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 is 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.

RTT, Trial Day 10, p. 248- 252.

Defense counsel was not deficient. Mr. Sgro thoroughly cross-examined Mayo regarding his pending cases. He brought attention to the postponement of Mayo's cases and although never specifically mentioned an OR release, the fact that the jury knew his other cases had been postponed, was sufficient because it would be assumed he was not in custody. Furthermore, Mayo's Guilty Plea Agreement was not filed until January 21, 2016, almost a year after Defendant's trial concluded. There was no way for defense counsel to know at the time of trial how Mayo's other cases were going to resolve. Defendant alleges that because Mayo received a "sweetheart deal" this is evidence that there was a secret deal between the State and Mayo. Petition at 9.

Defendant's allegations are bare and naked, and Defendant does not cite to any place in the record that would support his allegation that the State withheld information from the defense or the jury. Just because Mayo was ultimately granted probation is not evidence that there was an undisclosed agreement between Mayo and the State that Defendant and the jury were unaware of. Defendant's claim is belied by the record and should be denied

Defendant alleges "there is a reasonable probability Petitioner would have enjoyed a more favorable outcome at trial had these facts been properly disclosed by the State or discovered by the defense." Petition at 31. The postponement of Mayo's cases were disclosed during direct examination and cross-examination. RTT, Trial Day 10, p. 245-252. Further, defense counsel was clearly aware of the postponement of the prosecution of Mayo's cases because he thoroughly cross-examined Mayo regarding his pending cases as showed above. Thus, Defendant fails to show prejudice because the facts were presented to the jury and defense counsel was aware. Thus defense counsel was not ineffective.

D. Counsel was Not Ineffective for Making Strategic Decisions

Defendant states that trial counsel was ineffective in opening the door to damaging hearsay evidence. Petition at 31. Further, "the prudent course of action would have been to object to it and/or avoid opening the door to it—rather than what was done which was to build

upon Cousins' statements to police as a cornerstone of the defense." Petition at 12.

Counsel's actions were well-reasoned and strategically made which is presumed to be and was 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). However, these claims relate to trial strategy, which is "virtually unchallengeable," and Defendant cannot show deficient performance. Doleman v. State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996). Because this claim contests trial strategy, it should not be second-guessed, and instead should be honored by this Court. Id.

Defense counsel made a strategic decision to inquire about Cousins' statements to police when on cross-examination with Detective Bunting about the statements Cousins made to him:

> 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.

RTT, Trial Day 14, p.23.

Counsel's strategy decisions are "tactical" decisions and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280. This was an important piece of evidence for the defense and defense counsel made a reasonable decision to attempt to elicit that information in front of the jury. Defendant argues counsel should have objected to the following exchange with the State and 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.

RTT, Trial Day 14, p. 35. However, because defense counsel opened the door in regards to identification, making an objection would have been futile. Counsel cannot be ineffective for failing to make futile objections. Ennis, 122 Nev. at 706, 137 P.3d at 1103. The fact that counsel decided to make this decision to use this evidence, even though the State would be

able to then admit the evidence that she had identified the Defendant, was strategic. Counsel weighed the benefits versus the harm and made a reasonable tactical decision to state Defendant's theory of the case and provide evidence of that theory.

Furthermore, Defendant cannot show there would have been a more favorable outcome had this evidence not come in because this was not the only incriminating evidence against Defendant. Defendant would have still been found guilty due to the other overwhelming evidence against him, including but not limited to, the testimony of Monica Martinez that he was the shooter, the evidence that Devonia said the shooter was in overalls and Defendant admitted to being in overalls, and cell phone records placing him at the crime scene. RTT, Trial Day 14, p. 145-146. Therefore, Defendant has failed to establish prejudice.

E. Counsel was not Ineffective for Failing to Object at Alleged Prosecutorial Misconduct

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)). 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). 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.

Defendant only brings claims that were not objected to for consideration of ineffective assistance of counsel. Petition at 33. However, Defendant argues he's bringing claims that were objected to for a cumulative error claim and as part of an ineffective assistance of appellate counsel for failing to raise any claims on direct appeal. Id.

Defendant recognizes that in regards to the claims that were objected to and should have been raised on an appeal, bringing them in a habeas petition is not the proper form. Id.

However, he claims he's offering these objected to claims for two other purposes: 1. a cumulative error claim, and 2. as part of an ineffective assistance of appellate counsel for failure to bring these claims on direct appeal. Id. Defendant also stated earlier in his Petition, claims that were objected to "can still be considered as part of an overall ineffectiveness claim in not moving for a mistrial based on misconduct." Petition at 14.

To the extent Defendant 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 A *supra*. Second, Defendant 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. Additionally, the Nevada Supreme Court has never held that ineffective assistance of counsel claims can amount to cumulative error. Further, claims that are improperly brought in habeas, and should have been raised on direct appeal cannot be considered for an "overall ineffectiveness claim." Therefore, this Court should only consider Defendant's claims of ineffective assistance of trial counsel when there was no objection.

Claims Objected To:

The claims counsel objected to at trial were disparagement of counsel, additional burden shifting by arguing defense failed to call witness Cooper, and a PowerPoint to the jury that referred to Defendant as part of the "circle of guilt.[4]" To the extent that counsel is alleging appellate counsel was ineffective in raising the issues on direct appeal, he waived his direct appeal. Additionally, this argument has been thoroughly addressed *supra.* See section A.

Claims Not Objected to Reviewed for Ineffective Assistance of Counsel: [5]

Credibility of Witness shifted burden

Defendant claims that there were multiple instances of burden shifting that were not

[4] The claims that were objected to are also known as claims 1, 4, and 6 on page 13 of Defendant's Supplemental Petition.
[5] As stated above, the only proper claim for this Court to address in this Petition is the ineffective assistance of counsel at the trial level. To the extent that Defendant alleges these several claims of ineffective assistance of counsel regarding prosecutorial misconduct that were not objected to should have been raised on direct appeal, and it constituted ineffective assistance of counsel for failure to do so, his direct appeal was waived. See section A *supra*.

objected to, or that counsel failed to seek a mistrial.[6] Petition at 35. Defendant claims that the words "priest and and a nun" or "Mother Theresa" and that there was "no explanation" were statements that constituted burden shifting. Petition at 33.

The State on rebuttal said:

> 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.

RTT, Trial Day 15, p. 54, 56.

These statements were made during the State's rebuttal. 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)). Therefore, this did not constitute burden shifting.

[6] Further, Defendant continues to state ineffective assistance of counsel for not seeking a mistrial, but does not state any legal authority or standard for what or why a mistrial should have been sought.

Furthermore, 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. Therefore, because this was not burden shifting, counsel was not deficient for failing to object or for failing to argue to seek a mistrial.[7]

Additionally, Defendant 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. Therefore, Defendant's claim is without merit and should be denied.

Custodian of Records

Defendant alleges again, defense counsel should have objected to the State using a custodian of records as an expert, and that defense counsel should have objected because the custodian of records were not properly noticed as experts. Petition at 35. However, this claim was already addressed *supra*. See section B., p. 13.

Whistling during interview

Lastly, Defendant claims counsel failed to object to the argument the prosecutor made that the whistling heard on the 911 call during the crime matched the alleged whistling heard during Petitioner's interview with police. Petition at 36, 14. Further, he argues that the transcript of the police interview with Petitioner makes no reference to any whistling. Petition at 36. He argues these facts were not in evidence. Petition at 14.

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 the following during rebuttal:

[7] Defendant includes examples of "errors" that were objected to, and thus should have been brought on direct appeal, and not in a habeas petition. Therefore, it is improper for Defendant to ask this Court to consider those claims in any way.

> 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 Cornerlius 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 Devonia Newman—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 Devonia until after the whistling ends.

RTT, Trial Day 15, p. 94.

The State introduced State's Exhibit #323, which was Mayo's 911 phone call from the bathroom. It was played for the jury and was admitted by stipulation. RTT, Day 10, p .226. What was heard during the 911 phone call was played for the jury, and anything they heard was admitted into evidence Id. Thus, during the State's rebuttal argument it was proper to refer to the noises made in the background of the 911 phone call because it was admitted into evidence and the State was making inferences about the admitted evidence.

Further, the State admitted a recording of Defendant's interview with Detective Bunting and Detective Wildemann on September 13, 2010. RTT, Trial Day 13, p.61. It was marked as State's Exhibit #332. After the video was played the following exchange with Detective Bunting and the State occurred:

> 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.

Id. at 70-71.

The transcript of Defendant's interview transcription states Defendant was humming throughout the interview. State's Response to Defendant's Petition, filed January 26, 2016, Exhibit 1, p. 35, 36, 38, 39, 44. Further, it is transcribed in the interview that Defendant is humming and singing. Id. at 37, 40.

Thus, when the State argues all "the humming and singing and whistling" all of these arguments 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. The State is permitted to address evidence that is admitted at trial and respond to Defendant's arguments. Therefore, counsel was not deficient. Further, Defendant fails to even allege that Defendant was prejudiced by this. Thus, counsel was not ineffective, and Defendant's claim should be denied.

F. Counsel was Not Ineffective at Sentencing[8]

Defendant alleges that counsel was ineffective for not objecting to the imposition of a deadly weapon enhancement that was unsupported by the required statutory findings. Petition at 36. Further that counsel failed to object to incorrect information recorded in the PSI. Petition at 37. 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;

[8] To the extent Defendant is claiming this issue should have been raised on direct appeal, and counsel was ineffective for failing to do so. This claim is waived. See Section A *supra*.

(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, Defendant was not prejudiced by the fact that the Court failed to make its specific findings for each factor because like in Mendoza-Lobos v. State, 125 Nev. 634, 644, 218 P.3d 501, 508 (2009), "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." Furthermore, Defendant had already stipulated to a sentence of life without the possibility of parole. Thus, there was no higher sentence he could have received, as evidenced by the exchange between defense counsel and the Court:

> Mr Oram: Well and at the time just a kid. And unfortunately Mr. Burns 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 Mr. Burns' 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.

Recorder's Transcript of Sentencing Proceedings, April 23, 2015, p. 4. Thus Defendant was not prejudiced, even if counsel's performance was deficient. Therefore, counsel was not ineffective.

Further, according to Defendant, trial counsel did raise errors in the sentencing memorandum, and the Court had an opportunity to review the sentencing memorandum. Petition at 36. Therefore, counsel was not deficient because he did draw the Court's attention to the errors. Further, the Court had the opportunity to read the sentencing memorandum.

Recorder's Transcript of Sentencing Proceedings, filed July 13, 2017, p. 3. Thus, there was no prejudice because the Court was aware of the errors and likely took that into consideration before sentencing. Furthermore, the sentencing judge was the trial judge, and he had firsthand knowledge of the testimony that was introduced at trial. Therefore, counsel was not ineffective.

G. Counsel was Not Ineffective for Failing to invalidate the Death Penalty Per NRS 174.098 Because Defendant Was Not Intellectually Disabled

Defendant alleges trial counsel was ineffective for not seeking to dismiss or otherwise disqualify Petitioner for the death penalty based on the findings concerning Fetal Alcohol Syndrome ("FAS") and NRS 174.098. Petition at 38. First, Defendant in his Pro Per Petition alleged he had Fetal Alcohol Syndrome and neurological development issues and counsel was ineffective for failing to raise those issues. Defendant's Pro Per Petition, filed October 13, 2015, ground 7. Furthermore, Defendant cites to the sealed sentencing memorandum to support his diagnosis of FAS, which the District Attorney's office was never provided with. Furthermore, on page 40 of Defendant's Supplemental Petition, in footnote two, Defendant claims to have provided an unfiled copy of the memorandum to the District Attorney, which the District Attorney's Office did not receive. Therefore, the State cannot respond to the memorandum at this time.

To the extent this Court is inclined, this claim can still be denied based off the evidence of Defendant's IQ score. 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.

The Nevada Supreme Court has said "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). Further, the Court explained, "although 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.

"The first concept—significant limitations in intellectual functioning—has been measured in large part by intelligence (IQ) tests." Id. Although the Nevada Supreme Court has said IQ scores are not required, and can be proven by other records, here Defendant's IQ score has been tested and is at 93. This is significantly higher than the range of 70-75, the range of subaverage general intellectual functioning. Defendant claims that because there is evidence that Defendant has deficits in adaptive behavior, he should be diagnosed as intellectually disabled. Petition 41-42. However, Defendant's claims that because he dropped out of high school, had disciplinary problems in school, and was in special education, does not overcome his high IQ. Id.

Defendant's PreSentence Investigation Report (hereinafter "PSI) stated Defendant attended high school until the 11th grade, and obtained his GED in 2013 while incarcerated at CCDC. PSI, filed, April 1, 2015, p. 4. Further, Defendant's mental health history consisted of him being evaluated at the request of his attorney. Id. at 5.

Defense counsel's failure to dismiss the death penalty under NRS. 174.098 did not constitute deficient performance because he made the decision based on the evidence he had, and Defendant's IQ score of 93, that this would not be a successful argument. See Ennis, 122 Nev. at 706, 137 P.3d at 1103. Moreover, Defendant 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. Furthermore, the death penalty was ultimately negotiated away. Even if Defendant would have been diagnosed as intellectually disabled, he still would likely have received the same sentence considering the egregious nature of his crime, and the overwhelming evidence presented. As such, Defendant cannot demonstrate prejudice.

H. Counsel was Not Ineffective in Regards to the Jury Notes

Defendant argues that two notes from the jury were received and Petitioner was not consulted about or present for any of the discussions related to the notes. Petition at 44. Further, Defendant states trial counsel was ineffective for failing to ensure Petitioner was present for

the discussion of how to respond to jury notes. Petition at 17. Defendant relies on Manning v. State, 131 Nev.___, 348 P.3d 1015, 1018 (2015) to demonstrate counsel's ineffectiveness. However, Manning was filed May 7, 2015. Defendant's trial ended on February 17, 2015. Further, his Judgment of conviction was filed on May 5, 2015.

Here, Defendant cannot establish deficient performance on the part of his counsel nor prejudice. Defendant's trial and Judgment of Conviction were final before Manning was published and made law; thus, there was no clear right to have criminal defendant present when jury notes are discussed. See Strickland, 466 U.S. at 690, 104 S. Ct. at 2066 (finding 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*") (emphasis added).

Moreover, 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, Defendant is not entitled to relief because Manning does not apply retroactively. "Generally, new rules are not retroactively applied to final convictions." Ennis, 122 Nev. at 694, 137 P.3d at 1099. Therefore, because defense counsel was not deficient, Defendant was not prejudiced.

I. Defendant has Failed to Show Cumulative Error[9]

Defendant asserts a claim of cumulative error in the context of ineffective assistance of counsel. Petition at 18. The Nevada Supreme Court has never held that instances of ineffective assistance of counsel can be cumulated; it is the State's position that they cannot. However, even if they could be, it would be of no moment as there was no single instance of ineffective assistance in Defendant'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."). Furthermore, Defendant's claim is without merit. "Relevant factors to consider in evaluating a claim of cumulative error are (1)

[9] Defendant states that "errors alleged in this petition and those which should have been raised on direct appeal to the Nevada Supreme Court require reversal both individually and because of their cumulative impact." Petition at 18. Defendant claims that alleged errors that should have been raised on direct appeal also contribute to the cumulative impact. Petition at 18. However, as discussed *supra*, Defendant's direct appeal claims have been waived and thus claims that should have been brought on direct appeal are improperly brought in a habeas Petition.

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, 855 (2000). Furthermore, any errors that occurred at trial were minimal in quantity and character, and 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). Therefore, Defendant's claim of cumulative error is without merit and should be denied.

CONCLUSION

Based on the foregoing, the State respectfully requests that Defendant's Supplemental Petition for Writ of Habeas Corpus be DENIED.

DATED this 16th day of January, 2018.

Respectfully submitted,

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

BY /s/PAMELA WECKERLY for
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #4352

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of the above and foregoing, was made this 16th day of January, 2018 by Electronic Filing to:

JAMIE RESCH, ESQ.
Email: Jresch@convictionsolutions.com

BY: /s/ Deana Daniels
Deana Daniels
Secretary for the District Attorney's Office

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Steven D. Grierson
CLERK OF THE COURT

RPLY
RESCH LAW, PLLC d/b/a Conviction Solutions
By: Jamie J. Resch
Nevada Bar Number 7154
2620 Regatta Dr., Suite 102
Las Vegas, Nevada, 89128
Telephone (702) 483-7360
Facsimile (800) 481-7113
Jresch@convictionsolutions.com
Attorney for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

DAVID BURNS, Petitioner, vs. THE STATE OF NEVADA, Respondent.	Case No.: C-10-267882-2 Dept. No: XX **REPLY TO STATE'S RESPONSE TO SUPPLEMENT TO PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)** Date of Hearing: March 29, 2018 Time of Hearing: 9:00 a.m.

COMES NOW, Defendant/Petitioner, David Burns, by and through his attorney, Jamie J. Resch, Esq., and hereby files his reply to the State's Response to Petition for Writ of Habeas Corpus (Post-Conviction). This reply is based on the pleadings and papers herein, any attached exhibits, and any argument as may be presented to the Court at the time of hearing.

Conviction Solutions
2620 Regatta Dr., Suite 102
Las Vegas, Nevada 89128

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that service of the foregoing Reply to Response to Petition for Writ of Habeas Corpus (Post-Conviction) was made this 6th day of February, 2018, by Electronic Filing Service to:

Clark County District Attorney's Office
Motions@clarkcountyda.com
PDmotions@clarkcountyda.com

_____
An Employee of Conviction Solutions

Conviction Solutions
2620 Regatta Dr., Suite 102
Las Vegas, Nevada 89128

I.

POINTS AND AUTHORITIES

The State's response raises procedural and substantive arguments which this Court should reject. Instead, as explained herein, Burns is entitled to post-conviction relief on his claims.

A. The record says what it says: Burns did not completely waive his right to a direct appeal.

First, the State argues that the instant case "called for no direct appeal." Response, p. 13. However, for this Court to reach that conclusion, it would have to turn a blind eye to the trial transcripts, court minutes, and record, which all confirm the reservation of rights to some form of a direct appeal. The transcripts, cited by the State, confirm that "we are not waiving any potential misconduct during the closing statements." Response, p. 11. This Court's minutes

confirm that "they are not waiving any misconduct during the remainder of the trial or of the closing arguments." SUPP 1. While there may be some debate as to the precise scope of the reservation of appellate rights, there is no factual support for the State's claim that there was a complete waiver of all appellate rights.

The State further resorts to parsing the proper person petition for illumination on the topic, and by referencing this Court's prior denial of the proper person version of this claim. Response, p. 14. It goes without saying, this matter was remanded for appointment of counsel by the Nevada Supreme Court and that remand included a reversal of this Court's previous order denying the petition. See Nevada Supreme Court decision filed February 17, 2017. Any "findings" from that prior proceeding are no longer binding in this matter. While the State is certainly free to reference Burns' proper person petition to rebut his claims, this Court might keep in mind the factors that led everyone here to begin with: Mr. Burns functions at the approximate level of a third grade elementary student, has significant cognitive impairments, and knows nothing about the law. What he *does* know is what undersigned counsel has helped him explain in the supplemental petition: He was promised some form of a direct appeal and did not receive one.

The State's final suggestion, that Burns should have moved to withdraw from the stipulation if he wanted to appeal, practically merits no response. Would the State seek the death penalty again if Burns tried to do that? This Court need not engage this line of thinking, because Burns' position is the agreement as written plainly allowed for a direct appeal and that is all Burns is requesting here. There is, therefore, no need for Burns to withdraw from it for him to receive the direct appeal to which he was entitled.

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B. Assuming custodians of records could even provide expert testimony, the State failed to properly notice cellular phone experts in this matter.

In Ground Two, Burns contended that custodian of records witnesses, who went on to provide substantive testimony about how cellular communications work, were repeatedly referred to as "experts" with no objection by counsel. In response, the State contends essentially that there was no harm, no foul, because the witnesses were noticed as experts by the State.

The State's response, while true in one respect, does not ultimately resolve this issue. The true part appears to be that on September 4, 2013, the State filed a notice of witnesses that listed "custodian of records…or Designee" from Metro PCS, T-Mobile, and Nextel. Said notice further indicated the witness would testify as an "expert" regarding how cellular phones work and how they interact with towers. The problem with this designation is it 1) failed to identify a specific individual who would provide that testimony, and 2) failed to provide the "expert's" CV as required by NRS 174.234.

These problems dovetail into Burns' substantive argument which is, the purported experts were in fact not experts at all, and instead were exactly what the designation "custodian of records" would imply: custodians who would explain billing records. An expert witness as that term is used in NRS 174.234 would have been identifiable by name and would have been able to provide a CV. None of those things happened in the instant case.

Therefore, Burns would submit that his trial attorneys were in fact ineffective by failing to object to the repeated use of the word "expert" in reference to these witnesses and that there is a reasonable probability he would have enjoyed a more favorable outcome absent this error.

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C. Ground Three properly asserts a claim that the State did not disclose, and counsel failed to discover the extent of negotiations between the State and Cornelius Mayo, and/or failed to move for a new trial once those facts became public.

In Ground Three, Burns contended that witness Cornelius Mayo received a "sweetheart" deal and this was not disclosed by the State. Burns still feels that way. At the end, Mayo received a deal for what could have been a gross misdemeanor in a case in which two members of his family were shot, a bedroom full of drugs was discovered, and a baggie of crack cocaine fell out of his shoe right in front of a police officer. It was, and still is, inconceivable that Mayo could receive that type of offer after years of delays without any communication between the State and Mayo's attorneys regarding the substance of any actual plea offer.

Burns continues to submit that this Court should grant the writ as to this claim which would enable him to serve a request for discovery on the State concerning all plea offers it extended to Mr. Mayo to resolve his case, and/or require Mayo's attorney to testify about any offers received at an evidentiary hearing. If in fact it turns out as the State suggests here, that any negotiations were entirely known to Burns' attorneys and did not conclusively occur until after Burns' trial, then maybe the claim ultimately fails. However, the record to date including the ultimate deal that was offered to Mayo suggests that his patience was well-rewarded, and Burns should have been informed as to all plea offers extended to Mayo by the State. Because Mayo testified under oath that there were none, the existence of such offers would be strong evidence that Burns' conviction rests at least in part on false testimony by a material witness and should be overturned.

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D. As the State acknowledges, counsel opened the door to damaging hearsay evidence.

In Ground Four, Burns alleged that counsel opened the door to hearsay concerning the identity of the shooter by another individual to police. The State's response confirms that counsel opened the door to the hearsay identification. Response, p. 20. The response goes on to suggest counsel "weighed the benefits versus the harm" of that decision and that the decision was therefore tactical.

Burns would humbly submit that the record is completely devoid of any support for the conclusion that this decision was tactical. The State certainly does not provide any. While decisions by counsel can sometimes be labeled "strategic," this would apply where there is evidence the decision in question was a reasonably competent one. Harrington v. Richter, 562 U.S. 86, 110 (2011). Here, the decisions that led to the admission of the hearsay evidence ran contrary to every other aspect of the defense theory that Job-Loc was the shooter. Because the admission of hearsay that ruled out Job-Loc as the shooter had no strategic connection to the theory of defense, the admission of the evidence was not a matter of strategy.

E. Trial counsel failed to object to several instances of misconduct during the closing argument.

In Ground Five, Burns identified several instances of misconduct during the closing argument. The State contends that any challenge to alleged misconduct which was objected to is waived, due to the previously discussed appellate waiver. Response, p. 22. Again, whatever the specific of the appellate waiver, it unambiguously provided for a direct appeal concerning

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misconduct during the closing argument because that is expressly what the record says, as quoted by the State. See Response, p. 11.

As to misconduct which was not objected to, there was no strategic reason not to raise the requested objections. Several of the subclaims here deal with burden shifting. Counsel did object to at least one instance of burden shifting. TT, Day 15, p. 74. That objection resulted in the court confirming: "You don't have a duty to call witnesses." TT, Day 15, p. 74. There was no strategic reason to skip objections to other instances of burden shifting as well. Burns submits his other misconduct claims as presented in the supplemental petition and continues to request that they entitle him to post-conviction relief, either individually or viewed collectively.

F. Burns received ineffective assistance of counsel at sentencing.

Burns also alleges he received ineffective assistance of counsel at sentencing. The State's response appears to verify that the sentencing court failed to state the reasons for any deadly weapon enhancements as required by NRS 193.165(1). However, the State contends any error was harmless due to the life without parole sentence that was also imposed.

The argument that this error did not prejudice Burns because he was never going to be released anyway rings somewhat hollow in light of the State's argument at sentencing. At sentencing, the State specifically requested "not only the maximum possible punishment of 8 to 20 years with a consecutive 8 to 20 years on that count but it should be consecutive to the murder." Sentencing transcript, p. 3. In other words, it sure mattered to the State at the time of sentencing that the deadly weapon enhancements be maximized. The State's current position, that it does not matter if they were maximized or not, is contrary to that position and should be given no weight.

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The better approach is two-fold. First, Nevada law required that the reasons for the deadly weapon enhancement be stated on the record and there is no known "but the underlying sentence is really long" exception to that requirement. Second, this proceeding proves the point: Burns has the potential for several years of attacks on his convictions in state and federal court ahead of him and there is no telling if or when a court will grant relief on any particular claim. An accurate sentence, properly imposed in compliance with all requirements of state law and state and federal due process, ensures all parties that even if a portion of Burns' sentence is one-day overturned, the remaining sentences are correctly and accurately imposed.

Burns also contends there were errors in the PSI that the trial court may have relied upon in imposing sentence. The State contends that the trial court "likely" gave less weight to incorrect information in the PSI. Respectfully, the record does not say that and Burns has no way to know that. Trial counsel should therefore have insisted that errors in the PSI be corrected prior to sentencing.

G. Ground Seven asserts that the death penalty should never have been a sentencing option in the first instance and counsel was ineffective for failing to address this prior to trial.

In Ground Seven, Burns raises the claim that due to Fetal Alcohol Syndrome, which has affected not just his intelligence but also his adaptive functioning, he is not eligible for the death penalty. The State contends it never received the sentencing memo upon which this claim is raised. Burns can only say a copy was provided with the supplement that was mailed to the District Attorney's office. If the State really cared, and the remainder of their response suggests they do not, they could have contacted counsel for yet another copy, contacted the Court, or

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moved for the Court to provide a copy of the memo. None of those things happened, but the State's response suggests they would have no different position regardless.

The core of the State's response boils down to an argument that, on its face, Burns' claim must fail because his IQ is too high. Response, p. 29. But Burns has addressed that concern in the supplemental petition. IQ is not the only measure of intellectual disability in Nevada. NRS 174.098. Burns functions at the level of a 12 year old according to the reports generated by appointed experts. Supplement, p. 42. As a result, even though some of his IQ scores may be higher, his overall level of functioning is on par with someone who is intellectually disabled under the statute.

The State further suggests this claim is moot because the death penalty was "negotiated away." That fact is the whole claim. Negotiating away something that should not have applied to begin with was not very good negotiation on Burns' behalf. If counsel has filed a motion to deem Burns ineligible for the death penalty, and it was granted, his negotiating position would have been greatly improved. At a minimum, there would have been no need for any type of appellate waiver in order to secure a maximum sentence of life without parole. Burns submits that fact alone constitutes a "more favorable outcome" for purposes of a Strickland analysis.

H. Counsel was ineffective with respect to jury notes.

Next, Burns contends his attorneys were ineffective for failing to properly handle jury notes that were received prior to verdict. The State contends that to the extent this claim relies on Manning v. State, 131 Nev. Adv. Op. 26, 348 P.3d 1015 (2015), that the trial was over before Manning was decided. While that rote fact may be true, the State notes Manning was decided May 7, 2015, and Burns' judgment of conviction was filed May 5, 2015. Response, p. 30.

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The State's arguments regarding retroactivity are flawed. It is well accepted, whether Manning announced a new rule or not, it was applicable to cases which were not final at the time the decision in question was pronounced. See Ennis v. State, 122 Nev. 694, 699, 137 P.3d 1095 (2006) (criminal defendants entitled to benefit of new rules announced prior to conclusion of direct review).[1] "Final" means the conclusion of direct review. While Burns never got his promised direct appeal, his conviction certainly could not have been final until at least the expiration of the time for seeking direct review, which was thirty days from the filing of the judgment of conviction. Thus, even to the extent Manning announced a new rule, Burns was entitled to the benefits of it because his conviction was not yet final when the rule was announced.

The State's response does not say anything about the merits of this claim and Burns submits it should be granted. Essentially, the fact evidence which was never admitted during trial (i.e. JAVS video) was given to the jury is a costly error that surely affected the jury's verdict due to the damaging nature of the testimony at issue. Again, while this may also amount to a violation of Due Process on the court's part in admitting that evidence, counsel should further have objected to it, and ensured Burns fully understood and consented to it. None of that happened, and there is a reasonable probability of a more favorable outcome had this improper evidence not been provided to the jury.

---

[1] Burns would suggest any rule here is not new, because the decision in Manning relies heavily on the Ninth Circuit's 2009 decision that failure to involve the defendant in the response process to a jury note violates federal Due Process. Musladin v. Lamarque, 555 F.3d 830 (9th Cir. 2009).

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Las Vegas, Nevada 89128

I. Relief should be granted on the claim of cumulative error.

The State generally argues there were not any errors to cumulate. Burns disagrees. This Court should therefore grant post-conviction relief on a claim of cumulative error to the extent it finds errors that individually did not entitle Burns to relief.

II.

CONCLUSION

For each of the reasons set forth herein, Petitioner submits that he is entitled to an evidentiary hearing and/or relief on his claims herein.

DATED this 6th day of February, 2018.

Submitted By:

RESCH LAW, PLLC d/b/a Conviction Solutions

By: _____
JAMIE J. RESCH
Attorney for Petitioner

Conviction Solutions
2620 Regatta Dr., Suite 102
Las Vegas, Nevada 89128

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **April 17, 2018**

C-10-267882-2 State of Nevada
vs
David Burns

April 17, 2018 08:30 AM Argument

HEARD BY: Johnson, Eric COURTROOM: RJC Courtroom 12A

COURT CLERK: Skinner, Linda

RECORDER: Calvillo, Angie

REPORTER:

PARTIES PRESENT:

Jamie J. Resch	**Attorney for Defendant**
Marc P. Di Giacomo	**Attorney for Plaintiff**
State of Nevada	**Plaintiff**

JOURNAL ENTRIES

Defendant is in prison and not present today. Arguments in support of the Petition including requesting an Evidentiary Hearing by Mr. Resch. Objections by Mr. DiGiacomo. Following, Court noted it does not see a lot in terms of an Evidentiary Hearing, however, due to the conviction and significant sentence, Court will grant an Evidentiary Hearing to explore whether or not there were certain understandings or misleading's by trial counsel to the Defendant as to the issue of direct appeal and you can question trial counsel as to other decisions that were made during the course of trial, but it will not be opened up as to ineffectiveness of counsel. Upon inquiry, counsel feel the hearing will take 2-3 hours. COURT ORDERED, matter SET for hearing.

NDC

6/29/18 8:30 AM EVIDENTIARY HEARING

Electronically Filed
10/25/2018 9:29 AM
Steven D. Grierson
CLERK OF THE COURT

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
CHARLES W. THOMAN
Chief Deputy District Attorney
Nevada Bar #12649
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- DAVID JAMES BURNS, #2757610 Defendant.	CASE NO: C-10-267882-2 DEPT NO: XII

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: SEPTEMBER 20, 2018
TIME OF HEARING: 10:30 a.m.

THIS CAUSE having come on for hearing before the Honorable JUDGE MICHELLE LEAVITT, District Judge, on the 20th Day of September, 2018, Petitioner DAVID BURNS present and represented by counsel JAMIE J. RESCH, ESQ., the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through JACQUELINE BLUTH, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, no arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law.

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STATEMENT OF THE CASE

On October 13, 2010, the State charged DAVID JAMES BURNS, aka D-Shot, (hereinafter "Defendant"), by way of 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). On October 28, 2010, the State filed a Notice of Intent to Seek the Death Penalty in this matter.

On July 18, 2012, Defendant, through counsel, filed many pretrial Motions, to which the State filed its Oppositions on July 23, 2012. This Court ruled on these Motions on July 18, 2013.[1]

On July 19, 2013, Defendant filed a 500-page Motion to Strike the State's Notice of Intent to Seek the Death Penalty. The State filed its Opposition on July 25, 2013. This Court denied Defendant's Motion on September 12, 2013. In the interim, Defendant also filed multiple Motions to continue his trial date.

Defendant's jury trial finally began on January 20, 2015. Following a 15-day trial on February 17, 2015, the jury returned a guilty verdict on all eight counts.

On April 23, 2015, Defendant was adjudged guilty and sentenced to the Nevada Department of Corrections (NDC) as follows: COUNT 1 – a maximum of 72 months and a minimum of 12 months; COUNT 2 – a maximum of 120 months and a minimum of 24 months; COUNT 3 – a maximum of 180 months and a minimum of 24 months; COUNT 4 – a maximum of 180 months and a minimum of 24 months, plus a consecutive term of a maximum of 180 months and a minimum of 24 months for the deadly weapon enhancement; COUNT 5 – Life

[1] The State notes that most of these pretrial Motions, which were filed by counsel, are not relevant for purposes of this Petition.

without parole, plus a consecutive term of a maximum of 240 months and a minimum of 40 months for the deadly weapon enhancement; COUNT 6 – a maximum of 180 months and a minimum of 24 months, plus a consecutive term of a maximum of 180 months and a minimum of 24 months for the deadly weapon enhancement; COUNT 7 – a maximum of 240 months and a minimum of 48 months, plus a consecutive term of a maximum of 240 months and a minimum of 40 months for the deadly weapon enhancement; and COUNT 8 – a maximum of 180 months and a minimum of 24 months, with 1,671 days credit for time served. COUNTS 1, 2, 3 & 4 are to run concurrent with COUNT 5. COUNTS 6 & 8 are to run concurrent with COUNT 7, and COUNT 8 is to run consecutive to COUNT 5. A Judgment of Conviction was filed on May 5, 2015.

Regarding Defendant's sentence as to COUNT 5, on February 9, 2015, a Stipulation and Order Waiving a Separate Penalty Hearing was filed where Defendant agreed that in the event of a finding of guilty of Murder in the First Degree, he would be sentenced to life without the possibility of parole, and he waived all appellate rights. Stipulation and Order Waiving Separate Penalty Hearing, filed February 9, 2015.

On October 13, 2015, Defendant filed a Motion to Withdraw Counsel. He also filed a Pro Per Post-Conviction Petition for Writ of Habeas Corpus, Motion to Appoint Counsel, and Request for an Evidentiary Hearing. The State responded on January 26, 2016. On February 16, 2016, the Court denied Defendant's Petition, Motion to Appoint Counsel, Request for Evidentiary Hearing, and granted Defendant's Motion to Withdraw Counsel. The Findings of Fact and Conclusions of Law Order was filed on March 21, 2016.

Defendant filed a Notice of Appeal on March 11, 2016. The Nevada Supreme Court reversed the order of the district court denying the post-conviction petition for writ of habeas corpus and remanded it back to the District Court for appointment of counsel. On March 30, 2017, Defendant's counsel was confirmed. Defendant's Supplemental Petition was filed on November 27, 2017. The State filed a Response on January 16, 2018. Petitioner's Reply Brief was filed February 6, 2018. The matter came before Judge Eric Johnson for argument on April 17, 2018. At that hearing the court stated it would grant an evidentiary hearing to explore

whether there were certain understandings or misleading statements communicated by trial counsel to the Defendant as to the issue of the waiver of Defendant's direct appeal rights. The 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.

On September 20, 2018, the evidentiary hearing was conducted in Department 12 before Judge Michelle Leavitt, where Defendant was present. At the evidentiary hearing, the court noted that the hearing was limited to one claim regarding whether the Defendant was denied a direct appeal. Anthony Sgro, Esq. and Christopher Oram, Esq. provided sworn testimony, as did Defendant David Burns. Pursuant to testimony, Defendant's appellant counsel Jamie J. Resch made arguments regarding the testimony provided in regard to the underlying Petition for Writ of Habeas Corpus. Jacqueline Bluth for the Respondent argued in opposition to the Petition, noting there was a written stipulation at trial wherein the Defendant agreed to waive his appeal rights. The court noted neither attorneys were asked about misconduct during closing arguments. The court also noted that there were no discussions as to direct appeal or appellate rights that survived the stipulation. Counsel Jamie J. Resch gave additional arguments regarding potential misunderstandings, after which the court ordered the Petition for Writ of Habeas Corpus DENIED, with the State to prepare the Order regarding the evidentiary hearing and Defendant's underlying Petition. The Order DENYING Defendant's Supplements Petition for Habeas Corpus follows; if any findings of fact are more properly deemed conclusions of law, they shall be so construed.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

I. THE COURT FINDS DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

Claims of ineffective assistance of counsel are analyzed under the two-pronged test articulated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), wherein the defendant must show: (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. Id. at 687, 104 S. Ct. at 2064. Nevada adopted this

standard in Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984). "A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one." Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1997).

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371,130 S. Ct. 1473, 1485 (2010). The question is whether an attorney's representations amounted to incompetence under prevailing professional norms, "not whether it deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 88, 131 S. Ct. 770, 778 (2011). Further, "[e]ffective 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, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449 (1970)).

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, 1011-1012, 103 P.3d 25, 32-33 (2004). The role of a court in considering alleged 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) (citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)).

This analysis does not indicate 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." Donovan, 94 Nev. at 675, 584 P.2d at 711 (citing Cooper, 551 F.2d at 1166 (9th Cir. 1977)). 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. However, counsel cannot

be deemed ineffective for failing to make futile objections, file futile motions, or for failing to make futile arguments. Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

In order to meet the second "prejudice" prong of the test, the defendant must 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). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.

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).

A. THE COURT FINDS DEFENDANT WAIVED HIS DIRECT APPEAL

The court finds Defendant alleged "Petitioner never intended to waive, and in fact expressly reserved the right to appeal, any issues arising after the waiver was entered and specifically those which may have occurred during closing argument or sentencing." Petition at 6.

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. Adv. Op. 87, 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 v. State, 127 Nev. 971, 977, 267 P.3d 795, 799 (2011).

Here, the court finds that although Defendant did not plead guilty, the Stipulation and Order he entered into is analogous to a guilty plea. It is analogous in that defense counsel would not believe a defendant would want to appeal, especially after Defendant waived all his appellate rights. Stipulation and Order Waiving Separate Penalty Hearing, filed February 9, 2015, p. 1-2. The Order stated the following:

> 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.

Further, in regards to the Stipulation and Order the following exchange was made:

> Mr. Sgro: The State and the defense on behalf of Mr. Burns 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, Mr. Burns would agree that—
>
> 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 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 Mr. Burns 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 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?

Defendant Burns: Yes, sir.

The Court: Do you have any questions about it?

Defendant Burns: Yes, sir.

The Court: Do you agree with it?

Defendant Burns: 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?

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: 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 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?
>
> 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 going to get 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 that?
>
> Defendant Burns: Yes, sir.

Recorder's Trial Transcript (hereinafter "RTT"), Trial Day 12, p. 4-9.

The court finds the negotiations called for no direct appeal. Additionally, the court finds Defendant did not move to withdraw the Stipulation and Order after trial ended. After trial Defendant and defense counsel still felt it was in Defendant's best interest to not move to withdraw the Stipulation and Order. The court finds that if there were meritorious issues or errors that caused Defendant concern, defense counsel could have moved to withdraw the Stipulation and Order. The court finds it is not deficient for counsel to assume Defendant is satisfied, absent Defendant backing out of the negotiations.

Defendant in his Pro Per Petition stated that he did not know the court likes certain issues to be filed on direct appeal, and his attorney said he would show him how to file a habeas petition and he never did. Pro Per Petition, filed October 13, 2015, p.14. Additionally, defense counsel in Defendant's Supplemental Petition now claims "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." Petition at 27. However, this statement is

belied by Defendant's own admissions in his Pro Per Petition. He did *not* ask his attorney to file a direct appeal. Therefore, the court finds counsel was not deficient for not filing a direct appeal. Moreover, the court finds Defendant was not prejudiced because he waived his right to appeal, and received the benefit of having the State withdraw its intent to seek the death penalty. Further, the court finds that Defendant did not request a direct appeal regarding the days of trial after the Stipulation and Order was made. Therefore, the COURT FINDS counsel was not ineffective.

B. THE COURT FINDS COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE TESTIMONY OF KENNETH LECENSE AND RAY MACDONALD, AND THAT DEFENSE COUNSEL WAS PROPERLY NOTICED

The court notes Defendant claims Kenneth Lecense (hereinafter "Lecense"), a Custodian of Records for Metro PCS, and Ray MacDonald (hereinafter "MacDonald)", a Custodian of Records for T-Mobile, inappropriately testified as experts at trial and counsel failed to object. Petition at 7. Additionally, the court notes that Defendant argues this improperly admitted testimony should have been excluded unless supported by a properly noticed expert and should never have been admitted as an unnoticed lay witness. Petition at 8, 28. NRS 50.275 regarding testimony by experts state:

> 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.

Custodians of records can testify as experts at trial. When discussing testimony of a custodian of records, the Nevada Supreme Court has 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.

Burnside v. State, 131 Nev.___, 352 P.3d, 627, 637 (2015). Furthermore, in Burnside, the custodian of records was noticed as a lay witness and not an expert witness. However, even when the custodian of record was noticed as a lay witness instead of an expert witness, the Nevada Supreme Court held, "[w]e are not convinced that the appropriate remedy for the error would have been exclusion of the testimony." Id.

Here, the court finds the Defendant was aware the two custodians of records would testify as experts. The court notes the State filed its Notice of Expert Witnesses on September 4, 2013. 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. Further, 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.

Notice of Expert Witnesses, filed September 4, 2013, p. 2. 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." Id at 5. Therefore, it was proper for the custodian of records to testify as experts and counsel was noticed they would be testifying as experts.[2] Counsel is not required to make futile objections. Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Therefore, the court finds that counsel was not deficient.

Additionally, the court finds Defendant 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 Defendant. Even if counsel would have objected, the objection would have been overruled because the expert testimony was proper and would not have been excluded. Therefore, the court finds Defendant was not prejudiced.

[2] Defendant fails to specify what was improper about the State's Notice of Experts, but instead argues the testimony "should have been excluded unless supported by a properly noticed expert." Petition at 8.

C. THE COURT FINDS COUNSEL WAS NOT INEFFECTIVE IN FAILING TO DISCOVER EXCULPATORY AND MATERIAL EVIDENCE BECAUSE THERE WAS NO SECRET AGREEMENT AND THE JURY WAS AWARE MAYO'S PENDING CASES WERE POSTPONED

The court notes Defendant alleges that "the State failed to disclose, failed to correct, and the defense failed to discover that Mr. Mayo did in fact receive 'help' towards his pending criminal cases by agreeing to testify as a State's witness at Petitioner's trial." Petition at 31.

During the State's direct examination with 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.

RTT, Trial Day 10, p. 245-248.

Further, on cross-examination with Anthony Sgro:

> 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 is 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.

RTT, Trial Day 10, p. 248- 252.

Upon review of the above transcript, the court finds Defense counsel was not deficient. Mr. Sgro thoroughly cross-examined Mayo regarding his pending cases. He brought attention to the postponement of Mayo's cases and although never specifically mentioned an OR release, the fact that the jury knew his other cases had been postponed, was sufficient because it would be assumed he was not in custody. The court finds Mayo's Guilty Plea Agreement was not filed until January 21, 2016, almost a year after Defendant's trial concluded. There was no way for defense counsel to know at the time of trial how Mayo's other cases were going to resolve. Defendant alleges that because Mayo received a "sweetheart deal" this is evidence that there was a secret deal between the State and Mayo. Petition at 9.

The court finds Defendant's allegations are bare and naked, and that Defendant does not cite to any place in the record that would support his allegation that the State withheld information from the defense or the jury. The court finds that simply because Mayo was ultimately granted probation is not evidence that there was an undisclosed agreement between Mayo and the State that Defendant and the jury were unaware of. The court thus finds Defendant's claim is belied by the record and is DENIED.

The court finds Defendant alleges "there is a reasonable probability Petitioner would have enjoyed a more favorable outcome at trial had these facts been properly disclosed by the State or discovered by the defense." Petition at 31. The court notes the postponement of Mayo's cases were disclosed during direct examination and cross-examination. RTT, Trial Day 10, p. 245-252. Further, the court finds defense counsel was aware of the postponement of the prosecution of Mayo's cases because he thoroughly cross-examined Mayo regarding his pending cases as showed above. Thus, Defendant fails to show prejudice because the facts were presented to the jury and defense counsel was aware of the postponement of the prosecution. Thus the court finds defense counsel was not ineffective.

D. THE COURT FINDS COUNSEL WAS NOT INEFFECTIVE FOR MAKING STRATEGIC DECISIONS

The court notes that Defendant argues trial counsel was ineffective in opening the door to damaging hearsay evidence. Petition at 31. The Defendant further argues "the prudent course of action would have been to object to it and/or avoid opening the door to it—rather than what was done which was to build upon Cousins' statements to police as a cornerstone of the defense." Petition at 12.

The court finds counsel's actions were well-reasoned and strategically made, and such actions constituted 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). The court finds such claims relate to trial strategy, which is "virtually unchallengeable," and that Defendant has not shown deficient performance pursuant to Doleman v. State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996).

The court finds Defense counsel made a strategic decision to inquire about Cousins' statements to police when on cross-examination with Detective Bunting about the statements Cousins made to him:

> 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.

RTT, Trial Day 14, p.23.

The court notes Counsel's strategy decisions are tactical decisions and are "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280. The court finds the testimony regarding the white t-shirt was an important piece of evidence for the defense, and that defense counsel made a reasonable decision to attempt to elicit that information in front of the jury. The court notes Defendant argues counsel should have objected to the following exchange with the State and 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.

RTT, Trial Day 14, p. 35. However, the court finds that because defense counsel opened the door in regards to identification, making an objection would have been futile. Counsel cannot be ineffective for failing to make futile objections. Ennis, 122 Nev. at 706, 137 P.3d at 1103. The court finds that the fact that counsel decided to make this decision to use this evidence, even though the State would be able to then admit the evidence that she had identified the Defendant, was strategic. The court finds Counsel weighed the potential benefits versus the potential harm and made a reasonable tactical decision to state Defendant's theory of the case and provide evidence of that theory.

Furthermore, the court finds Defendant has not shown there would have been a more favorable outcome had this evidence not come in because this was not the only incriminating evidence against Defendant. The court finds Defendant likely would have still been found guilty due to the other overwhelming evidence against him, including but not limited to the testimony of Monica Martinez that he was the shooter, the evidence that Devonia said the shooter was in overalls and Defendant admitted to being in overalls, and cell phone records placing him at the crime scene. RTT, Trial Day 14, p. 145-146. Therefore, the court finds Defendant has failed to establish prejudice.

E. THE COURT FINDS COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO*- ALLEGED PROSECUTORIAL MISCONDUCT

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)). 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). 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.

Here, the court notes Defendant only brings claims that were not objected to for consideration of ineffective assistance of counsel. Petition at 33. However, the court notes Defendant also argues he's bringing claims that were objected to for a cumulative error claim and as part of an ineffective assistance of appellate counsel for failing to raise any claims on direct appeal. Id.

The court notes that Defendant recognizes that in regards to the claims that were objected to and should have been raised on an appeal, bringing them in a habeas petition is not the proper form. Id. However, he claims he's offering these objected to claims for two other purposes: 1. a cumulative error claim, and 2. as part of an ineffective assistance of appellate counsel for failure to bring these claims on direct appeal. Id. The court notes that Defendant also stated earlier in his Petition that claims that were objected to "can still be considered as part of an overall ineffectiveness claim in not moving for a mistrial based on misconduct." Petition at 14.

The court finds that to the extent Defendant 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 A *supra*. Second, the court finds Defendant 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. Additionally, court notes that the Nevada Supreme Court has never held that ineffective assistance of counsel claims can amount to cumulative error. Further, the court notes that claims that are improperly brought in habeas and should have been raised on direct appeal cannot be considered for an "overall ineffectiveness claim." Therefore, this Court only considers Defendant's claims of ineffective assistance of trial counsel when there was no objection.

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Claims Objected To:

The claims counsel objected to at trial were disparagement of counsel, additional burden shifting by arguing defense failed to call witness Cooper, and a PowerPoint to the jury that referred to Defendant as part of the "circle of guilt.[3]" To the extent that counsel is alleging appellate counsel was ineffective in raising the issues on direct appeal, the court finds he waived his direct appeal. Additionally, this argument has been thoroughly addressed *supra.* See section A.

Claims Not Objected to Reviewed for Ineffective Assistance of Counsel: [4]

Credibility of Witness shifted burden

The court notes that Defendant claims there were multiple instances of burden shifting that were not objected to, or that counsel failed to seek a mistrial.[5] Petition at 35. Defendant claims that the words "priest and and a nun" or "Mother Theresa" and that there was "no explanation" were statements that constituted burden shifting. Petition at 33.

The State on rebuttal said:

> 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.

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[3] The claims that were objected to are also known as claims 1, 4, and 6 on page 13 of Defendant's Supplemental Petition.

[4] As stated above, the only proper claim for this Court to address in this Petition is the ineffective assistance of counsel at the trial level. To the extent that Defendant alleges these several claims of ineffective assistance of counsel regarding prosecutorial misconduct that were not objected to should have been raised on direct appeal, and it constituted ineffective assistance of counsel for failure to do so, the court finds his direct appeal was waived. See section A *supra.*

[5] Further, Defendant continues to state ineffective assistance of counsel for not seeking a mistrial, but does not state any legal authority or standard for what or why a mistrial should have been sought.

RTT, Trial Day 15, p. 54, 56.

These statements were made during the State's rebuttal. 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)). Therefore, the court finds this did not constitute burden shifting.

Furthermore, the court notes 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. Therefore, because this was not burden shifting, the court finds counsel was not deficient for failing to object or for failing to argue to seek a mistrial.[6]

Additionally, the court finds Defendant 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. Therefore, Defendant's claim is without merit and is DENIED.

Custodian of Records

Defendant alleges again, defense counsel should have objected to the State using a custodian of records as an expert, and that defense counsel should have objected because the custodian of records were not properly noticed as experts. Petition at 35. However, this claim was already addressed *supra*. See section B.

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[6] Defendant includes examples of "errors" that were objected to, and thus should have been brought on direct appeal, and not in a habeas petition. Therefore, it is improper for Defendant to ask this Court to consider those claims in any way.

Whistling during interview

Lastly, the court notes Defendant claims counsel failed to object to the argument the prosecutor made that the whistling heard on the 911 call during the crime matched the alleged whistling heard during Petitioner's interview with police. Petition at 36, 14. He also argues that the transcript of the police interview with Petitioner makes no reference to any whistling. Petition at 36. He argues these facts were not in evidence. Petition at 14.

The court notes 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 the following 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 Cornerlius 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 Devonia Newman—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 Devonia until after the whistling ends.

RTT, Trial Day 15, p. 94.

The court notes the State introduced State's Exhibit #323, which was Mayo's 911 phone call from the bathroom. It was played for the jury and was admitted by stipulation. RTT, Day 10, p .226. What was heard during the 911 phone call was played for the jury, and anything

they heard was admitted into evidence. Id. Thus, the court finds it was proper during the State's rebuttal argument to refer to the noises made in the background of the 911 phone call because it was admitted into evidence and the State was making inferences about the admitted evidence.

Further, the court notes the State admitted a recording of Defendant's interview with Detective Bunting and Detective Wildemann on September 13, 2010. RTT, Trial Day 13, p.61. It was marked as State's Exhibit #332. After the video was played the following exchange with Detective Bunting and the State occurred:

> 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.

Id. at 70-71.

The transcript of Defendant's interview transcription states Defendant was humming throughout the interview. State's Response to Defendant's Petition, filed January 26, 2016, Exhibit 1, p. 35, 36, 38, 39, 44. Further, it is transcribed in the interview that Defendant is humming and singing. Id. at 37, 40.

Thus, the court finds that when the State argues all "the humming and singing and whistling," all of these arguments 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. The court notes the State is permitted to address evidence that is admitted at trial and respond to Defendant's arguments. Therefore, the court finds that counsel was not deficient. Further, the court finds Defendant fails to even allege that Defendant was prejudiced by this. Thus, the court finds counsel was not ineffective.

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F. THE COURT FINDS COUNSEL WAS NOT INEFFECTIVE AT SENTENCING[7]

The court notes Defendant alleges that counsel was ineffective for not objecting to the imposition of a deadly weapon enhancement that was unsupported by the required statutory findings (see Petition at 36), and that counsel failed to object to incorrect information recorded in the PSI. Petition at 37. 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.

The court finds that even if counsel was deficient in not objecting—which he was not—Defendant was not prejudiced by the fact that the Court failed to make its specific findings for each factor. Just like in Mendoza-Lobos v. State, 125 Nev. 634, 644, 218 P.3d 501, 508 (2009), "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." Furthermore, the court notes Defendant had already stipulated to a sentence of life without the possibility of parole. Thus, there was no higher sentence he could have received, as evidenced by the exchange between defense counsel and the Court:

> Mr. Oram: Well and at the time just a kid. And unfortunately Mr. Burns has always been a very gracious client of mine, very easy to

[7] To the extent Defendant is claiming this issue should have been raised on direct appeal, and counsel was ineffective for failing to do so, this claim is waived. See Section A *supra*.

> 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 Mr. Burns' 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.

Recorder's Transcript of Sentencing Proceedings, April 23, 2015, p. 4. Thus the court finds Defendant was not prejudiced, even if counsel's performance was deficient, which it was not. Therefore, the court finds counsel was not ineffective.

Further, the court notes that according to Defendant, trial counsel did raise errors in the sentencing memorandum, and the Court had an opportunity to review the sentencing memorandum. Petition at 36. Therefore, the court finds counsel was not deficient because he did draw the Court's attention to the errors. Further, the Court had the opportunity to read the sentencing memorandum. Recorder's Transcript of Sentencing Proceedings, filed July 13, 2017, p. 3. Thus, the court finds there was no prejudice because the Court was aware of the errors and took that into consideration before sentencing. Furthermore, the court notes the sentencing judge was also the trial judge, and he had firsthand knowledge of the testimony that was introduced at trial. Therefore, the court finds counsel was not ineffective.

G. THE COURT FINDS COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO INVALIDATE THE DEATH PENALTY PER NRS 174.098 BECAUSE DEFENDANT WAS NOT INTELLECTUALLY DISABLED

The court notes Defendant has alleged trial counsel was ineffective for not seeking to dismiss or otherwise disqualify Petitioner for the death penalty based on the findings concerning Fetal Alcohol Syndrome ("FAS") and NRS 174.098. Petition at 38. First, Defendant in his Pro Per Petition alleged he had Fetal Alcohol Syndrome and neurological development issues, and that and counsel was ineffective for failing to raise those issues.

Defendant's Pro Per Petition, filed October 13, 2015, ground 7. Defendant cites to the sealed sentencing memorandum to support his diagnosis of FAS, which the District Attorney's Office represented it was never provided with. Furthermore, on page 40 of Defendant's Supplemental Petition, in footnote two, Defendant claims to have provided an unfiled copy of the memorandum to the District Attorney, which the District Attorney's Office represented it did not receive. Therefore, the State did not respond to the memorandum in its response to the instant Supplement to Petition for Writ of Habeas Corpus.

However, this court DENIES Defendant's claims based on the evidence presented of Defendant's IQ score. 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.

The Nevada Supreme Court has said "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). Further, the Court explained, "although 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.

"The first concept—significant limitations in intellectual functioning—has been measured in large part by intelligence (IQ) tests." Id. Although the Nevada Supreme Court has said IQ scores are not required, and can be proven by other records, here Defendant's IQ score has been tested and is at 93. The court finds this is significantly higher than the range of 70-75, the range of subaverage general intellectual functioning. The court notes that Defendant claims that because there is evidence that Defendant has deficits in adaptive behavior, he should be diagnosed as intellectually disabled. Petition 41-42. However, the court finds that Defendant's claims that he dropped out of high school, had disciplinary problems in school, and was in special education, do not overcome his high IQ. Id.

Defendant's Pre Sentence Investigation Report (hereinafter "PSI) stated Defendant attended high school until the 11th grade, and obtained his GED in 2013 while incarcerated at CCDC. PSI, filed, April 1, 2015, p. 4. Further, Defendant's mental health history consisted of him being evaluated at the request of his attorney. Id. at 5.

The court finds Defense counsel's failure to dismiss the death penalty under NRS. 174.098 did not constitute deficient performance because he made the decision based on the evidence he had, and Defendant's IQ score of 93, that this would not be a successful argument. See Ennis, 122 Nev. at 706, 137 P.3d at 1103. Moreover, the court finds Defendant has not established prejudice, in that he has not demonstrated that but for counsel's failure to dismiss the death penalty under NRS 174.098, the result of his trial would have been different. Furthermore, the court notes the death penalty was ultimately negotiated away. Thus the court finds that even if Defendant would have been diagnosed as intellectually disabled, he still would likely have received the same sentence considering the egregious nature of his crime, and the overwhelming evidence presented. As such, the court finds Defendant has not demonstrated prejudice and counsel was not ineffective.

H. THE COURT FINDS COUNSEL WAS NOT INEFFECTIVE IN REGARDS TO THE JURY NOTES

Defendant argues that two notes from the jury were received and Petitioner was not consulted about or present for any of the discussions related to the notes. Petition at 44. Further, Defendant states trial counsel was ineffective for failing to ensure Petitioner was present for the discussion of how to respond to jury notes. Petition at 17. Defendant relies on Manning v. State, 131 Nev.___, 348 P.3d 1015, 1018 (2015) to demonstrate counsel's ineffectiveness. However, Manning was filed May 7, 2015. Defendant's trial ended on February 17, 2015. His Judgment of conviction was filed on May 5, 2015.

Here, the court finds Defendant has not establish deficient performance on the part of his counsel nor has he established prejudice. Defendant's trial and Judgment of Conviction were final before Manning was published and made law; thus, there was no clear right to have criminal defendant present when jury notes are discussed. See Strickland, 466 U.S. at 690, 104

S. Ct. at 2066 (finding 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*") (emphasis added).

The court finds 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). Thus, Defendant is not entitled to relief because Manning does not apply retroactively. "Generally, new rules are not retroactively applied to final convictions." Ennis, 122 Nev. at 694, 137 P.3d at 1099. Therefore, the court finds that because defense counsel was not deficient, Defendant was not prejudiced.

I. THE COURT FINDS DEFENDANT HAS FAILED TO SHOW CUMULATIVE ERROR[8]

The court notes Defendant asserts a claim of cumulative error in the context of ineffective assistance of counsel. Petition at 18. The Nevada Supreme Court has never held that instances of ineffective assistance of counsel can be cumulated. However, even if they could be cumulated, it would be of no merit to the Defendant in the instant case, as the court finds there were no instances of ineffective assistance in Defendant's case to cumulate. 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."). Furthermore, the court finds any errors that occurred at trial were minimal in quantity and character, and 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). Therefore, Defendant's claim of cumulative error is without merit and is denied.

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[8] Defendant states that "errors alleged in this petition and those which should have been raised on direct appeal to the Nevada Supreme Court require reversal both individually and because of their cumulative impact." Petition at 18. Defendant claims that alleged errors that should have been raised on direct appeal also contribute to the cumulative impact. Petition at 18. However, as discussed *supra*, Defendant's direct appeal claims have been waived and thus claims that should have been brought on direct appeal are improperly brought in a habeas Petition.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Supplemental Petition for Post-Conviction Relief shall be, and is, hereby DENIED in its entirety.

DATED this 23 day of October, 2018.

DISTRICT JUDGE

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

TJ

BY /s/ Charles W. Thoman
CHARLES W. THOMAN
Chief Deputy District Attorney
Nevada Bar #12649

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of the above and foregoing, was made this 15thth day of October, 2018, by Electronic Filing to:

JAMIE J. RESCH, ESQ.
jresch@convictionsolutions.com

BY: /s/ Stephanie Johnson
Employee of the District Attorney's Office

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Steven D. Grierson
CLERK OF THE COURT

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RESCH LAW, PLLC d/b/a Conviction Solutions
By: Jamie J. Resch
Nevada Bar Number 7154
2620 Regatta Dr., Suite 102
Las Vegas, Nevada, 89128
Telephone (702) 483-7360
Facsimile (800) 481-7113
Jresch@convictionsolutions.com
Attorney for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

DAVID BURNS, Petitioner, vs. THE STATE OF NEVADA, Respondent.	Case No.: C267882-2 Dept. No: XII **NOTICE OF APPEAL** Date of Hearing: N/A Time of Hearing: N/A

Defendant/Petitioner David Burns hereby appeals to the Supreme Court of Nevada from the Findings of Fact, Conclusions of Law and Order Denying Petition for Writ of Habeas Corpus (Post-Conviction) filed on October 25, 2018.

DATED this 8th day of November, 2018.

Submitted By:

RESCH LAW, PLLC d/b/a Conviction Solutions

By: _____
JAMIE J. RESCH
Attorney for Petitioner

Conviction Solutions
2620 Regatta Dr., Suite 102
Las Vegas, Nevada 89128

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Resch Law, PLLC d/b/a Conviction Solutions and that, pursuant to N.R.C.P. 5(b), on November 8, 2018, I served a true and correct copy of the foregoing Notice of Appeal via first class mail in envelopes addressed to:

Mr. David Burns #1139521
High Desert State Prison
PO BOX 650
Indian Springs, NV 89070

Clark County District Attorney
200 Lewis Ave.
Las Vegas, NV 89155

And electronic service was made this 8th day of November, 2018, by Electronic Filing Service to:

Clark County District Attorney's Office
Motions@clarkcountyda.com
PDmotions@clarkcountyda.com

_____
An Employee of Conviction Solutions

Conviction Solutions
2620 Regatta Dr., Suite 102
Las Vegas, Nevada 89128

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID JAMES BURNS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 77424
District Court Case No. C267882

FILED
FEB 25 2020
CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Elizabeth A. Brown, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order."

Judgment, as quoted above, entered this 23 day of January, 2020.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this February 18, 2020.

Elizabeth A. Brown, Supreme Court Clerk

By: Danielle Friend
Administrative Assistant

C-10-267882-2
CCJAR
NV Supreme Court Clerks Certificate/Judgn
4898582

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID JAMES BURNS,
Appellant,
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Respondent.

No. 77424

FILED

JAN 23 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge. Appellant David James Burns argues that he received ineffective assistance of counsel. The district court held an evidentiary hearing and denied his petition.

To demonstrate ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient in that it fell below an objective standard of reasonableness and resulting prejudice in that there was a reasonable probability of a different outcome absent counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012,

20-03291

103 P.3d 25, 33 (2004). We give deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous but review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

Burns first argues that counsel should have moved to exclude expert testimony from cellular company record custodians who were not noticed as experts. The record shows that the witnesses were noticed as experts on cellular phone and tower operation, the subjects of their testimony. *See Burnside v. State*, 131 Nev. 371, 384, 352 P.3d 627, 637 (2015) (presupposing that a cellular company record custodian may provide expert testimony when properly noticed as an expert). As a challenge to the witnesses' testimony on this basis would have been futile, counsel was not deficient in omitting it. *See Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). The district court therefore did not err in denying this claim.

Burns next argues that counsel should have challenged the State's withholding of exculpatory information regarding inducements given to a witness. The witness testified that he received no benefit from the State in his separate, pending prosecution in exchange for his testimony; Burns has not identified any evidence to the contrary; and counsel cross-examined the witness on his pending prosecution and its delay. Burns' contention that the witness received a "sweetheart deal" is mere speculation that does not establish that counsel deficiently failed to uncover it. *See Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). The district court therefore did not err in denying this claim.

Burns next argues that counsel should not have opened the door to a detective's testimony regarding Ms. Cousins' identification of the shooter and should have challenged her out-of-court identification as hearsay. Decisions regarding what witnesses to call or how to question them in developing the defense are tactical decisions that rest with counsel. *Rhyne v. State*, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002). Counsel made a strategic decision to elicit Cousins' statement that the shooter was wearing a white shirt, as counsel had argued that other evidence showed that Burns was not wearing a white shirt earlier that night. Counsel's tactical decisions are virtually unchallengeable absent a showing of extraordinary circumstances, which Burns has not made. *See Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004). The State then elicited on redirect examination further details from Cousins' identification of the shooter that Burns argues were disadvantageous. Counsel was not deficient in omitting a hearsay challenge that was futile by reason of counsel's cross-examining the detective on Cousins' identification first. *See McKenna v. State*, 114 Nev. 1044, 1056, 968 P.2d 739, 747 (1998) (citing *Taylor v. State*, 109 Nev. 849, 860, 858 P.2d 843, 850 (1993) (Shearing, J., concurring in part and dissenting in part)). Further, Burns has not shown a reasonable probability of a different outcome had counsel questioned Cousins differently. The district court therefore did not err in denying these claims.

Burns next argues that counsel should have challenged the prosecutor's misconduct during rebuttal argument. Counsel did not perform deficiently in omitting the argued-for objections, which would have

been futile where the State's arguments were not improper. The State's argument that it would have preferred that its witnesses were a priest and a nun was a permissible argument regarding the credibility of the State's witnesses. *See Rowland v. State*, 118 Nev. 31, 39, 39 P.3d 114, 119 (2002). The State did not shift the burden to Burns in commenting that he had no explanation for the crime, rather it permissibly commented on the brutal nature of the offense, i.e., that the killing could not be justified. *See Browne v. State*, 113 Nev. 305, 311, 933 P.2d 187, 191 (1997). The State's reference to the cellular record custodians as experts was not improper because the custodians were properly noticed as experts. Insofar as the State's discussion of the whistling heard in the background of the 911 call and Burns' humming during his police interview may be construed as arguing that the same person made both sounds, such argument was a permissible comment on matters within evidence. *See Jimenez v. State*, 106 Nev. 769, 772, 801 P.2d 1366, 1368 (1990). The district court therefore did not err in denying these claims.

Burns next argues that counsel should have argued that he was ineligible for the death penalty pursuant to NRS 174.098 on the basis of his suffering from Fetal Alcohol Syndrome Disorder (FASD). Counsel moved to strike the State's notice of intent to seek the death penalty on a different basis. The choice between arguments is a tactical decision that is entrusted to counsel and that we will not overturn absent extraordinary circumstances, which Burns has not shown. Further, Burns has not shown prejudice where the district court considered Burns' IQ and adaptive

functioning following an evidentiary hearing and concluded that Burns was not intellectually disabled, particularly in light of his normal-range IQ score. *See Ybarra v. State*, 127 Nev. 47, 53-54, 247 P.3d 269, 273 (2011). The district court therefore did not err in denying this claim.

Burns next argues that counsel should have consulted with him or ensured his presence during consultations regarding the jury's request for playback of a witness's testimony during its deliberations. The jury requested video playback of one witness's testimony, which the district court permitted after consulting with counsel. While Burns argues that he would have urged counsel to oppose replaying the testimony, whether to oppose is a tactical decision committed to counsel's discretion, and Burns has not shown extraordinary circumstances to establish deficient performance. And Burns has also not shown prejudice, as he has not shown that his objection would have brought about a reasonable probability of a different outcome in light of the wide discretion that a district court has in the manner of its response to a jury's questions. *See Scott v. State*, 92 Nev. 552, 555, 554 P.2d 735, 737 (1976). The district court therefore did not err in denying this claim.

Burns next argues that counsel should have sought his input regarding a juror note about the verdict form. Burns notes that the court "clarified" this form but does not specify how or cogently argue how he was prejudiced. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). The district court therefore did not err in denying this claim.

Burns next argues that counsel should have challenged the sentencing court's failure to make specific findings regarding the deadly weapon enhancements. Burns has not shown prejudice. The record shows

that the sentencing court did not state that it had considered the NRS 193.165(1) factors in sentencing Burns for the deadly weapon enhancements to three of his offenses. *See Mendoza-Lobos v. State*, 125 Nev. 634, 643, 218 P.3d 501, 507 (2009). Notwithstanding the sentencing court's failure to make findings regarding the deadly weapon enhancements, the parties discussed the information relevant to those factors during the sentencing hearing, and the record adequately supports the sentence imposed. *See* NRS 193.165(1). We therefore conclude that Burns has not shown a reasonable probability of a different outcome had counsel challenged the sentencing court's failure to make findings regarding the factors supporting the sentence enhancement. *See Mendoza-Lobos*, 125 Nev. at 644, 218 P.3d at 507 (holding that it was not plain error where the district court's failure to make findings regarding the sentencing enhancement did not affect the sentencing decision). The district court therefore did not err in denying this claim.

Burns next argues that counsel should have insisted that the district court address several errors in his presentence investigation report. Burns acknowledges that counsel raised these errors in his sentencing memorandum. Burns' argument that counsel should have argued this issue more strenuously does not show deficient performance, as counsel's tactical decisions are virtually unchallengeable absent a showing of extraordinary circumstances, which Burns has not made, particularly as the errors were minor. The district court therefore did not err in denying this claim.

Burns next argues that cumulative error warrants relief. Even assuming that multiple deficiencies may be cumulated in a postconviction context, *see McConnell v. State*, 125 Nev. 243, 259, 212 P.3d 307, 318 (2009),

Burns has only demonstrated a single instance of arguably deficient performance considering counsel's failure to request specific findings pursuant to NRS 193.165(1), for which relief is not warranted, and a single instance of deficiency cannot cumulate, *see United States v. Sager*, 227 F.3d 1138, 1149 (9th Cir. 2000).

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. *Toston 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's 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. Burns' request required counsel to prepare a notice of 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).[1] Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[2]

_____, C.J.
Pickering

_____, J.
Gibbons

_____, Sr. J.
Douglas

cc: Hon. Michelle Leavitt, District Judge
Resch Law, PLLC d/b/a Conviction Solutions
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[1]In light of our decision, to the extent that Burns argues that appellate counsel should have raised certain claims on appeal, we decline to consider those claims in this appeal.

[2]The Honorable Michael Douglas, Senior Justice, participated in the decision of this matter under a general order of assignment.

CERTIFIED COPY
This document is a full, true and correct copy of the original on file and of record in my office.

DATE: February 18 2020

Supreme Court Clerk, State of Nevada

By _____ Deputy

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID JAMES BURNS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 77424
District Court Case No. C267882

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: February 18, 2020

Elizabeth A. Brown, Clerk of Court

By: Danielle Friend
Administrative Assistant

cc (without enclosures):
Hon. Michelle Leavitt, District Judge
Resch Law, PLLC d/b/a Conviction Solutions
Clark County District Attorney

RECEIPT FOR REMITTITUR

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on FEB 25 2020.

HEATHER UNGERMANN
Deputy District Court Clerk

RECEIVED
APPEALS
FEB 21 2020
CLERK OF THE COURT