IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY BROWN,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 81962

RESPONDENT'S ANSWERING BRIEF

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

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STATEMENT OF THE ISSUES

1. Whether the district court did not commit evidentiary errors.

2. Whether the State did not violate Batson v. Kentucky and the district court did not commit structural error.

3. Whether the district court's rulings did not violate Appellant's rights under the Confrontation Clause.

4. Whether cumulative error does not exist.

STATEMENT OF THE CASE

On December 13, 2017, the State filed a Third Superseding Indictment charging Larry Brown ("Appellant") with Count 1: Conspiracy to Commit Robbery; Count 2: Robbery with Use of a Deadly Weapon; and Count 3: Murder with Use of

a Deadly Weapon. 1 AA 167–70.[1] Appellant's jury trial began on December 9, 2019. 5 AA 965. Appellant's trial concluded on December 20, 2019, when the jury returned verdicts of guilty as to Counts 1, 2, and 3. 17 AA 3360–61. On December 20, 2019, the State filed an Amended Fourth Superseding Indictment adding Count 4: Ownership or Possession of Firearm by Prohibited Person, to which Appellant plead guilty pursuant to North Carolina v. Alford. 14 AA 2728–30.

Appellant appeared before the district court for sentencing on September 18, 2020, and was sentenced as follows: as to Count 1, to a minimum term of twenty-eight (28) months and a maximum term of seventy-two (72) months; as to Count 2, to a minimum term of seventy-two (72) months and a maximum of one hundred eighty (180) months, with a consecutive deadly weapon enhancement of seventy-two (72) to one hundred eighty (180) months, concurrent to Count 1; as to Count 3, to life with the possibility of parole after a minimum term of twenty (20) years, with a consecutive deadly weapon enhancement of ninety-six (96) to two hundred forty (240) months, concurrent to Count 2; and as to Count 4, to a minimum term of twenty-eight (28) months and a maximum term of seventy-two (72) months, consecutive to Count 3. 18 AA 3398–3421. Appellant's aggregate total sentence is

1Appellant's co-defendant Anthony Carter ("Carter") was charged with Counts 1, 2, and 3, as well as Count 4: Possession of Controlled Substance with Intent to Sell, and Count 5: Ownership or Possession of Firearm by Prohibited Person.

a minimum term of thirty (30) years and a maximum term of life in prison. 18 AA 3421.

Appellant's Judgment of Conviction was filed on September 23, 2020. 18 AA 3425–27. An Amended Judgment of Conviction was filed on October 20, 2020, to correct a clerical error. 18 AA 3431–33. A Second Amended Judgment of Conviction was filed on December 2, 2020, to further correct clerical errors. 18 AA 3453–55.

STATEMENT OF THE FACTS

On February 21, 2017, Kwame Banks ("Kwame") was spending time with his girlfriend, Tiffany Seymour ("Tiffany"), who was eight months pregnant at the time, and their three-year-old son. 8 AA 1557–59. Kwame had been on the phone throughout the day, speaking to someone with a contact on his phone named "POE ATL." 8 AA 1560. That phone number was later determined to be associated with Carter. 9 AA 1692–93. Carter asked Kwame to come over because Carter and an unidentified third person were waiting to buy marijuana from him. 8 AA 1560. Tiffany saw Kwame load several large bags of marijuana into his car and subsequently, Kwame left their house. 8 AA 1560. After roughly five to ten minutes, Kwame returned to drop off their son's car seat and have a meal. 8 AA 1563. Kwame then departed their house for the final time. 8 AA 1564.

The investigation revealed that in the week preceding Kwame's murder, Carter and Appellant were formulating their plan to rob Kwame. 17 AA 3294–3306. After further analysis of the cell phones found at the crime scene, detectives learned that on February 21, 2017, Kwame received a text from Carter at 9:26 a.m. saying, "Fam Bros called me for bags still. Should I tell him today or tomorrow, my dawg?" 9 AA 1778; 11 AA 2146–47. Kwame called Carter at 9:32 a.m., and the phone call lasted forty-two seconds. 11 AA 2147. Carter then texted Kwame at 9:34 a.m. saying, "Brodie he just text me. He get off at 7:30. Then he ready." 9 AA 1778; 11 AA 2147. Two minutes later, at 9:36 in the morning, Carter made a call to Appellant. 11 AA 2130, 2147. Then, just one minute later, Carter texted Appellant at 9:37 a.m. saying, "Tonight the Night, my brother….." 11 AA 2130, 2148; 17 AA 3310. At 9:38 a.m., Kwame texted Carter saying "Okay," and at 9:40 a.m., Kwame called Carter. 9 AA 1778; 11 AA 2148.

At 10:55 a.m., an individual named Carnell Cave ("Cave") called Carter and the call lasted forty-five seconds. 11 AA 2148–49.[2] Appellant then called Carter at 11:39 a.m., and the two had a seventeen-second phone call. 11 AA 2131; 17 AA 3310. Appellant subsequently texted Carter at 11:40 a.m. saying, "Just seen yo text okkk COOL!!!!" 11 AA 2131; 17 AA 3310. Carter responded to Appellant via text

2 Cave, who lived in Building 21, #2003 at the Sky Pointe Apartments, did not answer his door when officers attempted to make contact with potential witnesses. 9 AA 1675.

at 11:41 a.m. saying, "Ok I'm in the mix don't trip I'm going to hit u bk." 11 AA 2131; 17 AA 3310. At 11:42 a.m., Appellant texted Carter back. 11 AA 2131. Beginning at 11:42 a.m., and ending around 4:38 p.m., Carter and Cave called one another six times. 11 AA 2150–52. The next call that was placed was at 4:43 p.m., from Appellant to Carter, and it lasted eighteen seconds. 11 AA 2132.

At 7:10 p.m., Carter called Kwame and the call lasted forty-one seconds. 11 AA 2153. Then one minute later, at 7:11 p.m., Carter called Appellant, and the two had a roughly two-minute conversation. 11 AA 2132. Next, Carter made a call to Cave at 7:13 p.m., with a duration of roughly two minutes. 11 AA 2154. Carter's phone began to hit off cell towers in the area of the crime scene around 7:36 p.m. 11 AA 2182. At 7:57 p.m., Carter called Kwame and the call lasted ten seconds. 11 AA 2154. Then, at 7:58 p.m., Carter called Appellant and they had a twenty-nine second phone call. 11 AA 2132. Carter called Appellant again shortly after 8 p.m., and this call lasted about fifteen minutes. 11 AA 2133. The two had another fifteen-minute phone call shortly thereafter, and then a twenty-one-minute call at around 9:15 p.m. 11 AA 2133–34. These calls were all hitting off the cell tower that covers the crime scene. 11 AA 2134, 2194.

At 9:38 p.m., Appellant texted Carter and asked, "How are we looking," and Carter responded one minute later with two texts saying "He suppose to be Pullen up my man that want the bags not here either. I told him be here at 9:30." 11 AA

2134–35; 17 AA 3309. Appellant responded via text at 9:40 p.m. and 9:43 p.m. saying "Ok." and "On standby" and Carter texted back "K" at 9:45 p.m. 11 AA 2135; 17 AA 3309. At 10:06 p.m., Carter called Appellant and their call lasted thirty-two seconds. 11 AA 2136.

Between 9:56 p.m. and 10:06 p.m., Carter and Kwame called each other three times. 11 AA 2156–57. At 10:07 p.m., Carter called Appellant. 11 AA 2157. Both Carter and Appellant's phones had remained in the area of the crime scene. 11 AA 2199. From 10:13 p.m. to 10:40 p.m., Appellant and Carter texted fourteen times, both phones still hitting off the cell tower that covers the crime scene. 11 AA 2138, 2200. The conversation was as follows:[3]

> From: 7025812072 Poke [10:13 PM]: His girl he having problem with work at umc medical
>
> To: 7025812072 Poke [10:14 PM]: Now
>
> From: 7025812072 Poke [10:15 PM]: Yes
>
> To: 7025812072 Poke [10:17 PM]: But you on the way right
>
> From: 7025812072 Poke [10:17 PM]: Yes Yes
>
> From: 7025812072 Poke [10:17 PM]: I'm here
>
> From: 7025812072 Poke [10:18 PM]: I been here fam he on the way
>
> To: 7025812072 Poke [10:18 PM]: Yeah I saw go in. ok
>
> From: 7025812072 Poke [10:18 PM]: If u need Nard he on stand by

3 The State has inserted timestamps from the exhibit for added clarity.

> From: 7025812072 Poke [10:19 PM]: At the hou
>
> To: 7025812072 Poke [10:21 PM]: I'm on it
>
> From: 7025812072 Poke [10:21 PM]: He have money in middle console 2 sum time mostly on him and in trunk in bags if he riding heavy he keep small pocket nife on right side
>
> From: 7025812072 Poke [10:22 PM]: Ok fam
>
> To: 7025812072 Poke [10:22 PM]: Ok
>
> From: 7025812072 Poke [10:40 PM]: Pullen in

17 AA 3292–93. At 10:39 p.m., Kwame called Carter and approximately one minute later, Carter texted Appellant "pullen in." 11 AA 2159–60. It was at about 10:39 p.m. when Kwame's phone first placed him in the area of the crime scene. 11 AA 2199. Then, at 10:40 p.m., Kwame called Carter again, Kwame's phone now being squarely within the cell tower's coverage of the area of the crime scene. 11 AA 2160, 2200.

In the late evening hours around 10:40 p.m., Dereka Nelson, who lived in apartment #2008, heard a man yell out for help, followed by a gunshot. 8 AA 1568–70; 9 AA 1675. She looked out her bedroom window and saw two men "tussling" on top of her car. 8 AA 1571–72. Nelson then heard a second gunshot, which prompted her to hide in her closet and call 9-1-1 at 10:49 p.m. 8 AA 1574. Dispatch asked Nelson to look out her window again and describe what she saw. 8 AA 1574. Nelson told the dispatcher that she saw a body on the ground and after about five

seconds went by, the same man who was just on top of the tussle came back and picked the pockets of the person laying on the ground, who was the person on the bottom of the tussle. 8 AA 1574.

Jakhai Smith, a then-fifteen-year-old who lived with his mother in apartment #2005, testified that he was asleep when he heard two men arguing and then a gunshot. 8 AA 1578; 9 AA 1676. He looked out the window and saw one man slamming another man into a car. 8 AA 1585. The aggressor, a black male dressed in all black, then shot the other man while he was on his back. 8 AA 1593. The shooter left and then returned shortly thereafter to check the pockets of the man he just shot. 8 AA 1593.

Later that evening, homicide detectives responded to the scene and discovered Kwame in between two vehicles in a carport located outside Building 21. 9 AA 1657. Very near to Kwame's body, officers located two series of footwear impressions in apparent blood. 9 AA 1658–59. Officers also found a cell phone broken into three separate pieces and a torn latex glove by the apartment complex exit. 9 AA 1661–62. It had appeared that someone went through Kwame's pockets, as the pockets had been "rabbit eared." 9 AA 1663–64. Further, a .40 caliber cartridge case was located just near Kwame's body. 9 AA 1665. A portion of a torn latex glove matching the one found by the exit was located directly next to Kwame's body. 9 AA 1666–67; 16 AA 3017. This torn glove piece, which was a portion of the thumb, partial index

finger, and a piece of the palm area, contained Appellant's DNA on the inside. 12 AA 2262. Just between one of the cars in the carport and the curb, officers found a black cloth glove. 9 AA 1668–69. The inside of this glove also contained Appellant's DNA. 12 AA 2303. Kwame's DNA was found on the outside of both the torn piece of latex glove and cloth work glove. 12 AA 2266, 2284. The second of three cell phones found on the scene was located in the landscaping rocks in front of Building 21, and the third cell phone was found underneath Kwame's left arm. 9 AA 1669–70.

Detectives identified Tiffany as Kwame's next of kin and conducted an interview with her to gather information. 9 AA 1676–77. Tiffany informed detectives that a phone contact by the name of "POE ATL" had placed an order with Kwame for marijuana earlier in the evening on February 21, 2017. 9 AA 1677. Kwame left to meet "POE ATL" at approximately 10:15 p.m. and was driving his Nissan Altima. 9 AA 1677–78. Detectives had not previously been aware that there should have been a vehicle associated with Kwame at the crime scene. 9 AA 1677–78. Upon learning this fact from Tiffany, detectives began to search for Kwame's car. 9 AA 1677–79.

Kwame's car was ultimately located, scorched and filled with smoke, in a business park less than half a mile from the apartment complex on February 23, 2017. 9 AA 1679–82. Detectives conducted an offline search of the vehicle and

discovered that Officer Mel English ran the license plates of Kwame's car shortly after midnight on February 22, 2017.[4] 9 AA 1684–85. Upon speaking with detectives, Officer English relayed that he saw the car parked in the business park with a black male nearby, but by the time he proceeded to the vehicle, the male was gone and a newer model, mid-sized, white SUV was leaving the business park. 9 AA 1685–88. After reviewing surveillance footage from the nearby businesses, detectives concluded that the driver of the white SUV had picked up the black male adult that dropped off Kwame's vehicle. 9 AA 1688. Upon a search of the vehicle, no marijuana was found inside. 9 AA 1683.

On February 24, 2017, detectives received the phone examination information for the three phones found at the crime scene. 9 AA 1688. The phone found in the landscaping rocks five to six feet away from Kwame's body was encrypted and unable to be accessed. 9 AA 1688. However, detectives were able to determine that the phone was registered to Larry Brown with an Atlanta, Georgia address. 9 AA 1689–90. The phone number was 404-808-2233. 9 AA 1690. The other two numbers of the phones found at the scene, 702-277-4856 and 702-755-2805, belonged to Kwame and both had "POE ATL" listed as a contact. 9 AA 1691–92. The number associated with that contact was 702-581-2072, which was registered to Carter. 9

4 Offline searches involve the communications bureau determining whether a particular item or person has been checked through law enforcement records within a particular date range, and if so, by whom and when. 9 AA 1684.

AA 1692–93. Carter had Appellant's phone number saved in his contacts. 9 AA 1697. Cave was determined to be the subscriber of the phone number 702-517-3499, which had numerous instances of contact with Carter. 9 AA 1694–95.

Based upon the above information, detectives obtained a search warrant for Carter's residence located at 6828 Rosinwood Street. 9 AA 1698. During the execution of that search warrant, officers recovered marijuana and a 9-millimeter semi-automatic handgun. 9 AA 1698. Detectives also executed a search warrant on Cave's apartment, 5850 Sky Pointe Drive, Building 21, #2003, where officers recovered marijuana. 9 AA 1702.

Lastly, a warrant was executed on 2520 Sierra Bello Avenue, Unit 103, Appellant's address. 9 AA 1702–03. Appellant shared this residence with his girlfriend, Angelisa Ryder, who was present when the warrant was executed. 9 AA 1703. Ms. Ryder's white, 2015 Jeep Compass SUV was found in the driveway. 9 AA 1703. Black, Polo Ralph Lauren boots were recovered and impounded from Appellant's address. 9 AA 1731. Detectives subsequently issued a warrant for Appellant's arrest and enlisted the help of the Federal Bureau of Investigation to locate him. 9 AA 1703. Appellant was ultimately located in Atlanta, Georgia and arrested by the FBI on June 29, 2017, after a brief chase and Appellant's attempt to barricade himself in a friend's home. 9 AA 1703–04; 10 AA 1899–1902; 11 AA 2097–2103.

SUMMARY OF THE ARGUMENT

The district court's decision to admit footwear impression evidence was proper because the evidence was clearly understandable to the average person and did not require expert opinion. Appellant's girlfriend's text messages and cell phone search history were appropriately admitted into evidence because they were authenticated and not hearsay, as they were not offered for the truth of the matter contained therein. The State did not violate Batson v. Kentucky and the district court did not commit structural error because the State had race-neutral reasons for striking the potential jurors and the district court conducted the proper inquiry. Appellant's right to confront witnesses against him was not violated by either the limitation of Cellebrite's testimony or the fact that they testified via audiovisual transmission. Cellebrite's testimony was appropriately limited to protect the integrity of proprietary law enforcement software. Moreover, Appellant was able to extensively cross-examine Cellebrite. The district court's decision to allow Cellebrite to testify audiovisually comported with this Court's decision in Lipsitz. Cumulative error does not exist because there are no errors to cumulate. Alternatively, if this Court finds error, any error is harmless in light of the overwhelming evidence of Appellant's guilt.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING THE FOOTWEAR IMPRESSION EVIDENCE OR THE TEXT MESSAGES

This Court generally reviews a district court's decision to admit evidence for an abuse of discretion. Hernandez v. State, 124 Nev. 639, 646, 188 P.3d 1126, 1131 (2008); see e.g., McLellan v. State, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008) ("We review a district court's decision to admit or exclude evidence for an abuse of discretion.").

a. The district court properly admitted the footwear impressions into evidence.

Appellant argues that the district court abused its discretion by admitting the footwear impression evidence without expert testimony. AOB at 22. In so arguing, Appellant claims that the photos admitted into evidence "required forensic analysis and testimony." AOB at 23. Appellant's claim must be denied because the footwear impression was relevant and did not require an expert opinion.

"Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015. The key to determining whether testimony constitutes lay or expert testimony lies with a careful consideration of the substance of the testimony—does the testimony concern information within the common knowledge of or capable of perception by the average layperson or does it require some specialized knowledge or skill beyond the

realm of everyday experience? Burnside v. State, 131 Nev. 371, 383, 352 P.3d 627, 636 (2015).

Here, Appellant asserts that the footwear impression evidence should have been excluded because it is not scientifically valid. His only support for this assertion is his citation to a 2016 report by the President's Council of Advisors on Science and Technology ("PCAST"). AOB at 21. In sum, the report opines that conclusions that foot impressions came from a specific piece of footwear do not appear to be scientifically valid. AOB at 21–22. Importantly, the PCAST report did not assess the reliability of analyses as to whether a particular shoeprint was made by a particular size and make of shoe; thus, the PCAST report is irrelevant to Appellant's case. See President's Counsel of Advisors on Sci. & Tech., Exec. Office of the President, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods 114-15 (2016), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf ("we do not address the question of whether examiners can reliably determine class characteristics—for example, whether a particular shoeprint was made by a size 12 shoe of a particular make…PCAST chose not to focus on this aspect of footwear examination because it is not inherently a challenging measurement problem to determine class characteristics, to estimate the frequency of shoes having a particular class characteristic, or (for jurors) to

understand the nature of the features in question."). The PCAST report's conclusions only call into question the validity of footprint comparisons, not the relevance of photos taken of footprints at the scene of a murder, or the shoes impounded from a suspect's residence.

The State did not admit testimony from any witness, expert or not, who claimed to have compared the shoes recovered from Appellant's residence to the footprints at the crime scene, and found that they matched. This is the only type of footwear impression evidence that was called into question by the PCAST report. Nothing in the PCAST report, or in Nevada law, prevents the State from presenting jurors with photographs of footprints made at the crime scene, or footwear recovered from the defendant's residence.

In determining that the State was permitted to present this evidence to the jury, the district court found:

> Look, I considered all of it and to me it's pretty clear. I mean, you don't even need two eyes. You need one eye to look at that footprint. And I think any lay person can look at the footprint and evaluate it.
>
> Now, clearly, they can't argue anything about, you know, the weight or somebody's apparent size based on the print or their gait or whether [they're] right handed or left [handed]. Anything like that. And that clearly is now expert. Or if they were running or walking, but just to look at the print and the blood, to me it's pretty clear. And I don't think you need any kind of expert training to see what's to me in my mind perfectly clear.
>
> Now again, if they want to get into well, he pronates this way or, you know, he's pigeon toed or something like that, then that's clearly

> beyond the, you know, understanding of a lay person and that's expert. But if they just limit it to showing the photo and showing the sneaker, I think it's really obvious.

5 AA 884–85. Further, the trial court explained, "the issue is can a person of ordinary understanding, an average person look at this evidence and interpret it without the benefit of any specialized skill, knowledge, training or education? The answer is yes." 5 AA 890. The analysis done by the district court comports with this Court's caselaw.

Notably, not the State, nor the State's witnesses, discussed comparisons of the footwear impressions. In its opening statement, the extent of the commentary on the footwear evidence was as follows:

> In addition to that, these are just two of them, but there was a series of footprints leading away from Mr. Banks' body, bloody footprints that had a distinctive feature as to their soles.
>
> Inside [Appellant's] residence they located two pairs of Polo size 13 D boots with this distinctive sole. Upon further comparison, looking to the bloodied foot print that was found on scene you can see exactly . . . what that is.

8 AA 1548, 1553. The State *only* admitted the photos of the footwear impressions and shoes impounded from Appellant's residence. 16 AA 2941, 2943, 2949, 2951, 3075, 3077, 3107, 3109; 17 AA 3225, 3227, 3253, 3255, 3263, 3265, 3267, 3269, 3271, 3273, 3275, 3277, 3279. None of the State's witnesses testified as to the comparison between the photos of the bloody shoeprints and Appellant's shoes. In its closing argument, the extent of argument regarding the footwear evidence was:

"The orange cones down by – if you can kind of see it in the frame, that blue car, the four of them, the five of them you're going to have there, are all bloody footprints." 14 AA 2673. Next, in rebuttal, the State limited its argument with respect to the footwear evidence to the following:

> And remember this: Mr. Brown told you these are his shoes. Okay. That's the bloodstain, like, inches from the victim's body. *This is where your common sense comes in.* This is where looking at the evidence as a whole comes in, as opposed to in a vacuum. Would it have been nice to test those little red stains for [blood]? Absolutely. I'm not going to argue it wouldn't have been. *But can you look at that as reasonable men and women and say that's not Larry Brown's shoe in the middle? I'll let you make that determination.*

14 AA 2714 (emphases added). The State and its witnesses unambiguously abided by the Court's limitations and did not opine about the comparison between the bloody shoeprints and Appellant's shoe—the State simply presented the evidence to the jury and requested that the jurors use their common sense in looking at the evidence. The State encouraged the jurors to rely on their everyday experience and make the determination as to whether the bloody footprints and the soles of Appellant's boots were similar.

Expert testimony was not necessary for the reasons stated by the district court. 5 AA 884–90. The distinctive characteristics from the bloody shoeprints at the scene of the crime were so clearly similar to the boots recovered from Appellant's residence that an expert was not required to testify as to a comparison. The jurors, using their everyday common sense and life experience, were more than capable of

looking at the photos of the footprints and then at Appellant's shoes and making their own determination of whether the prints were made by that type of shoe. An expert's opinion as to a comparison would not have aided the jury in this endeavor and thus was not warranted.

Moreover, Appellant's argument is contradictory—on one hand, Appellant is arguing that footprint comparisons are not valid science, yet on the other, Appellant is simultaneously claiming that photos of footprints and shoes cannot be admitted without expert scientific testimony. Either the comparisons are *not* valid science, or they *are*, and require expert testimony—it cannot be both.

Assuming this Court finds that the district court erred, any error was harmless when confronted with the overwhelming evidence of Appellant's guilt. Under NRS 178.598, any "error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Non-constitutional trial error is reviewed for harmlessness, based upon whether the error had substantial and injurious effect or influence in determining the jury's verdict. Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008). On the other hand, constitutional error is evaluated by the test laid forth in Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828 (1967). The test under Chapman for constitutional trial error is "whether it is 'clear beyond a reasonable doubt that a rational jury would have found the

defendant guilty absent the error.'" Tavares v. State, 117 Nev. 725, 732 n.14, 30 P.3d 1128, 1132 n.14 (2001).

The evidence against Appellant was absolutely overwhelming. Appellant's DNA was found *inside* the ripped latex glove located underneath Kwame's lifeless body near his turned-out pocket, Appellant's DNA was found *inside* the black cloth work glove located near Kwame's body, Appellant's phone was found at the scene of the murder, Appellant's phone was calling and messaging Carter about setting up the robbery, Appellant's girlfriend's car was seen leaving the parking lot where Kwame's torched car was ultimately located, and Appellant's girlfriend was reading news articles about the murder on her cell phone the day after the crime. 9 AA 1669–70, 1688–90, 1703; 12 AA 2262, 2303; 14 AA 2542, 2620; 17 AA 3292–93. On top of all of that, Appellant testified and provided an unbelievable version of events, which the jury clearly rejected in its entirety. 13 AA 2435-87, 2491-96.

In sum, Appellant's argument that the district court erred in admitting the footwear impression evidence is meritless. The district court's decision to admit the evidence was proper—the district court determined that a person with ordinary intelligence could analyze the evidence without the need for an expert's opinion. However, if this Court is inclined to find that the lower court erred, such error is harmless after consideration of the overwhelming evidence of Appellant's guilt. Appellant's judgment of conviction must be affirmed.

b. Ms. Ryder's cell phone search history and text messages were appropriately admitted.

Appellant alleges that the district court erred by admitting text messages and search history from Angelisa Ryder's cell phone. AOB at 32. Specifically, Appellant asserts that the text messages and history were unauthenticated, impermissible hearsay, and improper rebuttal evidence. AOB at 33, 38.

Ms. Ryder's text messages and search history were properly authenticated. In arguing otherwise, Appellant relies on Rodriguez v. State. 128 Nev. 155, 273 P.3d 845 (2012). There, this Court held that "when there has been an objection to admissibility of a text message, the proponent of the evidence must explain the purpose for which the text message is being offered and provide sufficient direct or circumstantial corroborating evidence of authorship in order to authenticate the text message as a condition precedent to its admission." 128 Nev. at 162, 273 P.3d at 849 (internal citations omitted). NRS 52.015(1) requires that the proponent make some "showing sufficient to support a finding that the matter in question is what its proponent claims." In Rodriguez, this Court found that text messages on the victim's phone were not properly admitted because they were not authenticated. 128 Nev. at 162, 273 P.3d at 850. "[T]he State offered the text messages to prove that Rodriguez was one of the men who assaulted the victim." 128 Nev. at 162, 273 P.3d at 849. This Court held that the text messages were accordingly only relevant to the extent the State could prove that Rodriguez authored them. Id. However, the record in that

case did not support a finding that Rodriguez had any part in the authorship of the text messages after a certain point in time, and thus they were not properly admitted. 128 Nev. at 163, 273 P.3d at 850. Notwithstanding the text messages being improperly admitted, this Court upheld Rodriguez's conviction—any error was harmless in light of the overwhelming evidence of his guilt. Id.

Here, Appellant's situation is drastically different than that contemplated by Rodriguez. The text messages Appellant now complains about were not admitted for the substance contained in the texts, nor were they admitted for the truth of what was said. The text messages between Appellant and Ms. Ryder were admitted to provide context to the conversation between the two and rebut Appellant's version of events that he testified to. 14 AA 2643–44. In fact, the text messages are not even the crucial evidence, making the Rodriguez standard inapplicable because that case was limited to the authenticity of *text messages*. The more important evidence, about which Appellant also raises complaints, was Ms. Ryder's *cell phone search history* showing she clicked on the link of a news article covering Kwame's murder the day after the shooting. 14 AA 2542, 2620. This evidence was admitted to show that Ms. Ryder had knowledge of the murder shortly after it occurred and yet Appellant claimed that he had no knowledge of the murder until after March 20, 2017. 14 AA 2677. Further, the text messages were admitted to contradict Appellant's testimony with respect to what time he was allegedly robbed of his cell phone and that he never

changed his phone number, as well as to show that Ms. Ryder had access to her cell phone when the news search took place. Specifically, the evidence showed that Ms. Ryder and Appellant were texting after the point in time that Appellant claims he was robbed of his cell phone. Further, Appellant asserted he never changed his phone number, yet Ms. Ryder began texting a new contact in her phone with the name "Larry Brown" the day after the murder.

Ms. Ryder's phone search history is not hearsay because it was not offered to prove the truth of the matter asserted. The search history was not offered to prove that the murder occurred or that a news article covering the murder existed. Rather, the search history was admitted to establish Ms. Ryder's knowledge of the murder at that point in time and show that either Ms. Ryder, whether on her own or at Appellant's direction, or Appellant himself, was reading a news article covering the murder the very next day.

The phone itself was authenticated in that it was collected by detectives directly from Ms. Ryder after the execution of the warrant on her and Appellant's house. Ms. Ryder's phone number, 678-760-3664, was associated with an account under the name of Angelisa Ryder. 14 AA 2596, 2615. The search history on Ms. Ryder's phone clearly was authenticated as well. In rebuttal, Detective Mangione testified that Ms. Ryder's history showed searches for hotels in Las Vegas that do not require a credit card or deposit. 14 AA 2618. A news article titled "Homicide

Detectives Investigating Man's Death in Northwest Las Vegas" was accessed on February 22, 2017, at 11:06 a.m. 14 AA 2621, 2623. Detective Mangione also established that on February 25, 2017, the contact saved in Ms. Ryder's phone for "Brown, Larry" changed to a new number: 678-412-8290. 14 AA 2628. There was text message contact between Ms. Ryder's phone and Appellant's phone number indicating both respective individuals had access to their phones. For example, a text message from Ms. Ryder's phone to Appellant's phone number at 8:30 p.m. on February 21, 2017, read "You good, babe?" 14 AA 2626. Three minutes later, Appellant's number replied, "Yes, indeed." 14 AA 2626. Further, Detective Ryan Jaeger spoke with Ms. Ryder on March 20, 2017, and personally collected Ms. Ryder's cell phone from her and sent it to be impounded, where it was subsequently analyzed by the digital forensic lab. 14 AA 2607–11.

Accordingly, Appellant's instant assertion that the district court erred in admitting Ms. Ryder's text messages and search history is without merit. The text messages nor the search history were offered for their truth. The purpose of admitting the evidence was to provide the jury with context as to Appellant's and Ms. Ryder's communication and refute Appellant's claims of being robbed of his cell phone and never having changed his number. Thus, his instant claim must be denied and his judgment of conviction affirmed. Alternatively, should this Court find that this decision was error, any error would be harmless. This evidence was offered

in rebuttal in response to Appellant's testimony. The other remaining evidence, standing on its own, was sufficient to establish Appellant's guilt. Thus, his judgment of Conviction must be affirmed.

II. THE STATE DID NOT VIOLATE BATSON V. KENTUCKY AND THE DISTRICT COURT DID NOT COMMIT STRUCTURAL ERROR

Appellant claims that the State violated Batson v. Kentucky and he is therefore entitled to a reversal of his conviction. AOB at 43. His argument is meritless.

The United States Supreme Court has held that the racially discriminatory use of peremptory challenges is unconstitutional under the Equal Protection clause. Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712 (1986). Batson also applies to criminal defendants and forbids their exercise of peremptory challenges to remove potential jurors on the basis of race, gender, or ethnic origin. United States v. Martinez-Salazar, 528 U.S. 304, 120 S. Ct. 774 (2000); Georgia v. McCollum, 505 U.S. 42, 112 S. Ct. 2348 (1992).

In Purkett v. Elem, 514 U.S.765, 766–67, 115 S. Ct. 1769, 1770–71 (1995), the United States Supreme Court pronounced a three-part test for determining whether a prospective juror has been impermissibly excluded under the principles enunciated in Batson. Specifically, the Court ruled:

> Under our Batson jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide

> (step three) whether the opponent of the strike has proved purposeful racial discrimination. The second step of this process does not demand an explanation that is persuasive, or even plausible.

Purkett, 514 U.S.at 766–67, 115 S. Ct. at 1770–71. This Court adopted the Purkett three-step analysis of a Batson claim in Doyle v. State, 112 Nev. 879, 921 P.2d 901, 907–08 (1996); Washington v. State, 112 Nev. 1067, 1071, 922 P.2d 547, 549 (1996).

In deciding whether the requisite showing of a prima facie case of racial discrimination has been made, the court may consider the "pattern of strikes" exercised or the questions and statements made by counsel during the voir dire examination. Batson, 476 U.S. at 96–97, 106 S. Ct. at 1723; Libby v. State, 113 Nev. 251, 255, 934 P.2d 220, 222 (1997); Doyle, 112 Nev. at 887–88, 921 P.2d at 907. "[T]he mere fact that the State used a peremptory challenge to exclude a member of a cognizable group is not, standing alone, sufficient to establish a prima facie case of discrimination under Batson's first step." Watson v. State, 130 Nev. 764, 776, 335 P.3d 157, 166 (2014).

In step two, assuming the opposing party makes the above-described prima facie showing, the burden of production then shifts to the proponent of the strike to provide a race-neutral explanation. Williams v. State, 134 Nev. 687, 691, 429 P.3d 301, 307 (2018). "The second step of this process does not demand an explanation that is persuasive or even plausible." Purkett, 514 U.S. at 768, 115 U.S. at 1771. If

"a discriminatory intent is not inherent in the State's explanation, the reason offered should be deemed neutral." Diomampo v. State, 124 Nev. 414, 422, 185 P.3d 1031, 1036 (2008) (quoting Ford v. State, 122 Nev. 398, 403, 132 P.3d 574, 578 (2006)).

In step three, a district court must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available and consider all relevant circumstances…" Matthews v. State, 136 Nev. 343, 345, 466 P.3d 1255, 1260 (2020) (quoting Williams, 134 Nev. at 689, 429 P.3d at 305-06). At this stage, implausible or fantastic justifications may, and probably will, be found to be pretexts for purposeful discrimination. Purkett, 514 U.S. at 768, 115 U.S. at 1771. "[T]he issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor, by how reasonable, or how improbable, the explanations are, and by whether the proffered rationale has some basis in accepted trial strategy." Miller-El v. Cockrell, 537 U.S. 322, 324, 123 S. Ct. 1029, 1032 (2003). The court should evaluate all the evidence introduced by each side on the issue of whether race was the real reason for the challenge and then address whether the defendant has met his burden of persuasion." Kaczmarek v. State, 120 Nev. 314, 334, 91 P.3d 16, 30 (2004). This requires "giving the defendant the opportunity to challenge the State's proffered race-neutral explanation as pretextual." Williams, 134 Nev. at 692, 429 P.3d at 308.

In reviewing the denial of a Batson challenge, the reviewing court should give great deference to the determining court. Hernandez, 500 U.S. at 364, 111 S. Ct. at 1868–69; Doyle, 112 Nev. at 889–90, 921 P.2d at 908; Thomas v. State, 114 Nev. at 1137, 967 P.2d at 1118; Walker v. State, 113 Nev. 853, 944 P.2d 762 (1997). The reasoning for such a standard is the trial court is in the position to best assess whether from the totality of the circumstances that racial discrimination is occurring. "The credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that has been settled, there seems nothing left to review." Hernandez, 500 U.S. at 367, 111 S. Ct. at 1870.

"Race-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention, etc.), making the trial court's firsthand observations of even greater importance." Snyder v. Louisiana, 552 U.S. 472, 477, 128 S. Ct. 1203, 1208, 170 L. Ed. 2d 175 (2008). In such a situation, "the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor. We have recognized that these determinations of credibility and demeanor lie "peculiarly within a trial judge's province," and that "in the absence of exceptional circumstances, we would defer to [the trial court]." Id. at 477 (internal quotations and citations omitted).

The law is clear that a juror's demeanor constitutes a legitimate reason for the exercising of a peremptory strike. Further, the law is clear that when such a reason is asserted, it is the responsibility of the trial court to determine whether such a reason is pretext for discrimination. Finally, findings by the trial court as to whether the demeanor of a juror constitutes pretext for racism should be overturned only in exceptional circumstances.

The district court properly concluded that no violation under Batson occurred, and that the State offered sufficient race-neutral explanations for exercising peremptory challenges against all three minority jurors.

a. Prospective Juror Number 183

Maria Simon identified as Hispanic. 7 AA 1418. She told the court that she was "a troubled youth" who had misdemeanors all the way up until she was twenty-two years old, including for solicitation. 7 AA 1410–11. She also spent time with gang members in Los Angeles as a result of the neighborhood in which she grew up. 7 AA 1412. Ms. Simon had been incarcerated as a juvenile for assault and battery charges. 7 AA 1413. She also had previously been the victim of domestic violence and had a friend who is a police officer. 7 AA 1415–17.

When asked what the prima facie showing was, defense counsel responded, "The prima facie case is just that it's a member of a protected class . . . . So that

prima facie case is the [protected] class, doesn't matter if it's one or two." 8 AA 1489–90. The court responded:

> [T]hat's not true because that's the whole point of peremptory challenges . . . . When I was trying cases as a DA, you know, if somebody was nodding and looking like they were, you know, really, you know, digging the process, I kept them on the jury and the people who were scowling and angry I would kick them off and sometimes it's just about body language.
> . . .
> [A]gain the whole point of a perempt is to get rid of those people that you think for whatever reason, they don't like you, may be less favorable to your case . . . as long as it's not racially or improperly biased . . . .

8 AA 1490–91. Defense counsel then argued, "However, I've made my case. It's a protected class. I made the statement. It's the State's job to now insert a race neutral not to allow the Court to say it could be for any reason." 8 AA 1491.[5]

The district court found that the defense failed to make the threshold showing of a prima facie case of racial discrimination. 8 AA 1490–91. Nonetheless, the district court allowed the State to respond, "because a reviewing court may not agree with" the court's determination as to the first prong. 8 AA 1491–92. The State responded by noting that there were several Hispanic people on the jury the State did not intend to strike, Ms. Simon and her children all had criminal records, Ms.

5Counsel's statements were clearly contradictory to the law as stated by this Court. Watson, 130 Nev. at 776, 335 P.3d at 166 ("the mere fact that the State used a peremptory challenge to exclude a member of a cognizable group is not, standing alone, sufficient to establish a prima facie case of discrimination under Batson's first step.").

Simon spent time with gang members in Los Angeles, and had been the victim of a crime. 8 AA 1492–94. The court stated it was satisfied with the race-neutral reasons. 8 AA 1495–96.

Appellant's contention that the district court failed to complete the sensitive inquiry required under the third step of the Batson inquiry is belied by the record. The record reveals that the Court evaluated the State's race-neutral explanation for striking Ms. Simon, allowed Appellant's counsel an opportunity to argue that the offered explanation was a pretext for discrimination, and ultimately determined that Appellant's counsel failed to prove purposeful discrimination.

Contrary to Appellant's assertion, the district court did address defense counsel's argument made in response to the State's race-neutral explanation. After the State provided race-neutral explanations for striking Ms. Simon, defense counsel made the following response:

> Okay. And just for a response because I know we're running—probably have a further record after this. For the record many people in this panel have convictions. They might not have been a troubled youth, so to speak, that there were plenty of DUIs. There's plenty of issues so I just want to make that record clear as we go forth.

8 AA 1495.

As the opponent of the strike, it was defense counsel's burden to demonstrate that the State's proffered race-neutral explanation was a pretext. Kaczmarek, 120 Nev. at 334, 91 P.3d at 30. "Failing to traverse an ostensibly race-neutral explanation

for a peremptory challenge as pretextual in the district court stymies meaningful appellate review which, as noted, is deferential to the district court." Hawkins v. State, 127 Nev. 575, 578, 256 P.3d 965, 967 (2011).

Defense counsel did not even directly argue that the State's given reasons for the strike were pretextual. Defense counsel's sole argument in response to the State's proffered reasons was that there were others on the jury panel that also had convictions. While on appeal Appellant characterizes his counsel's argument as a claim there were other jurors with criminal records who the State did not dismiss, this was not counsel's argument. Nor could it have been, as at the time of the Batson challenge to the strike of Ms. Simon, the State had exercised a peremptory challenge against only one other prospective juror—Ms. Devine, who had previously been convicted of battery domestic violence. 6 AA 1126, 1129-30. Counsel simply stated that there were *others on the panel* who also had convictions. Additionally, counsel even acknowledged that Ms. Simon, a self-described "troubled youth" had a different type of criminal history than most of the others on the panel.

Given that defense counsel's argument failed to demonstrate any pretext on the part of the State, it is unsurprising that in response the district court gently explained to counsel that for her point to be relevant, there would need to be a pattern of the State not striking other jurors with similar criminal histories. 8 AA 1495. Counsel was given the opportunity to demonstrate that the State's reasons for the

strike were pretexts for discrimination, but counsel simply presented an irrelevant observation that others on the panel had DUI convictions. The court was only required to give defense counsel the opportunity to respond to the State's race-neutral reasons for striking the juror; the Court was not required to formulate defense counsel's arguments.

Contrary to Appellant's claim, in completing the third step of the Batson inquiry, the Court did not simply return to the first step. AOB, at 50. As required under the three-step inquiry, the Court determined whether or not Appellant had proved purposeful discrimination, finding it was "satisfied with the race neutral reason." 8 AA 1495. The Court evaluated the arguments from both sides and determined that the State's race-neutral reasons were sufficient to prove that no purposeful discrimination existed. Inherent in such an evaluation is a review of whether the state's reasons were a mere pretext for purposeful discrimination.

In an attempt to support his argument that the district court failed to conduct the required sensitive inquiry, and therefore the record does not allow for meaningful review, Appellant cites the inapposite case of Williams v. State, 134 Nev. 687, 429 P.3d 301 (2018). AOB, 51. In Williams, immediately after the State gave its race-neutral reason for the strike, the district court summarily denied the Batson challenge, without giving defense counsel an opportunity to respond to the State's race-neutral explanation. Id. at 692, 429 P.3d at 307-08. After requesting an

opportunity to respond, defense counsel was allowed to make an argument, after which the district court simply stated "I don't find the State based it on race." Id. at 693, 429 P.3d at 308. This Court found the Williams record did not allow for meaningful or deferential review, because the district court made no findings regarding the State's offered race-neutral explanations. Id. This Court noted this was particularly problematic because the State offered two race-neutral reasons, one of which was based on demeanor, and one of which appeared pretextual from the record. Id. at 693-94, 429 P.3d at 308-09.

That is not the case here. The district court did not simply conclude, without making any other findings, that the State had not based the peremptory challenge on race. The district court credited the State's demeanor argument, agreeing that Ms. Simon appeared tired and drained. 8 AA 1494. This factual finding is entitled to deference by this Court. Williams, 134 Nev. at 692, 429 P.3d at 307. As to the State's argument regarding Ms. Simon's criminal history, the record supports the State's argument. 7 AA 1410-18. Thus, unlike in Williams, the record here does allow for meaningful review. Even in cases in which the district court fails to state findings on the record, this Court has found reversal unnecessary when the record supports the State's offered race-neutral reasons. See Cooper v. State, 134 Nev. 860, 864, 432 P.**3**d 202, 206 (2018) (indicating that this Court can address steps two and three for the first time on appeal if the record includes the State's race-neutral basis for the

challenged strike); Hawkins, 127 Nev. at 578-79, 256 P.3d at 967-68 (addressing steps two and three of Batson despite the district court's failure to state its reasoning on step three because the State's neutral explanation "did not reflect an inherent intent to discriminate" and the defendant failed to show purposeful discrimination); Kaczmarek, 120 Nev. at 334-35, 91 P.3d at 30 (addressing Batson steps two and three even though the district court did not adequately state its reasons where the record included the State's race-neutral explanation and did not show any discriminatory motives).

b. Prospective Juror Number 465

Dilkshan Peries, who identified as Asian, previously had a misdemeanor Driving Under the Influence trial in Henderson and had negative interactions with law enforcement. 7 AA 1315–16, 1326; 8 AA 1497. Mr. Peries explained that because he was under the influence, he was acting aggressively and had to be placed in a segregation tank. 7 AA 1327.

Defense counsel challenged the State's exercise of its third peremptory challenge to excuse Mr. Peries. 8 AA 1497. The only other person that identified as Asian was a Taiwanese woman to whom the parties stipulated to excuse due to hardship. 8 AA 1497–98. The district court opined, "I still don't see the prima facie case because other than the fact the person happens to identify as Asian, I don't think

we can make inference from a stipulated for cause – it wasn't even for cause. It was a hardship excuse." 8 AA 1498.

The district court determined that there was no prima facie case of racial discrimination. 8 AA 1498. Nonetheless, the State again responded, and discussed that Mr. Peries' body language indicated he may not have been an interested juror—he was slouched in his chair, had his legs extended out, and was not responding much during voir dire. 8 AA 1498–90. Moreover, Mr. Peries had negative contacts with law enforcement. 8 AA 1498. The court agreed with the State's characterization of Mr. Peries' body language and stated that the State offered a legitimate reason for striking Mr. Peries. 8 AA 1450.

Again, Appellant's contention that the district court failed to conduct the sensitive inquiry required under step three is belied by the record. After the State gave its race-neutral reasons, the Court made factual findings crediting the State's demeanor argument, noting "[h]e was kind of slouchy and his legs were extended." 8 AA 1498. Defense counsel was given the opportunity to respond. 8 AA 1499. Defense counsel claimed that Mr. Peries actually described his interactions with law enforcement as positive and neutral, and pointed out that Mr. Peries said he could be fair. 8 AA 1499.[6] The Court emphasized that this was not a for-cause challenge, so

6The record supports the State's explanation that Mr. Peries stated he had negative experiences with law enforcement. During voir dire, Mr. Peries responded to the State's question by saying "Yes, I've had negative interactions with law

the fact that a juror said he could be fair doesn't invalidate a preemptory challenge. 8 AA 1499-1500. After hearing both sides, the Court stated that it agreed with the State that Mr. Peries was slouching and said the things mentioned by the State, and concluded that the State gave legitimate race-neutral reasons for the strike. 8 AA 1500. Thus, the record shows that the Court did in fact conduct the required "sensitive inquiry", as the Court evaluated the arguments from both sides and determined that the State's race-neutral reasons were sufficient to justify the strike.

c. Prospective Juror Number 454

Marquita Allen, who identified as African American, informed the district court that her brothers kidnapped and robbed a drug dealer here in Clark County and were sentenced to prison. 6 AA 1154; 7 AA 1306–07. Her brothers took their case to trial and Ms. Allen attended some of the proceedings. 6 AA 1155–56. Ms. Allen's sister was arrested here in Clark County multiple times for battery. 6 AA 1157. Detective Mitchell Dosch, the lead detective in the instant case, was the lead detective in Ms. Allen's brothers' case. 8 AA 1456.

Defense counsel took issue with the State striking Ms. Allen and raised a Batson challenge. 8 AA 1504. Appellant's counsel complained that Ms. Allen had

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enforcement." 7 AA 1326. Mr. Peries did indicate he had an experience being stopped by the police where he was not taken to jail and said the experience "wasn't so negative." 7 AA 1327. However, Mr. Peries also stated that when he was charged with a DUI he was placed in a "drunk tank" and characterized the experience as negative. 7 AA 1327.

been questioned several times when her responses were in line with other panel members. 8 AA 1504. The court noted that Ms. Allen was questioned by the court initially, then by the State. 8 AA 1504. Defense counsel argued there was disparate questioning, to which the State responded:

> Yesterday, we indicated we were going to pass for cause at the bench, and that included Ms. Allen. Her responses seemed perfectly appropriate notwithstanding the cases of her brothers. There wasn't anything there that would cause – rise to a for-cause challenge. This morning, . . . I looked at the police report where the lead detective in our case is the lead detective in her brothers' case. So while I actually liked . . . her demeanor as of yesterday . . . that's a big problem if I don't know that when my lead detective walks in this room one of the jurors is going to dislike him for putting her brothers in prison.

8 AA 1507–08. The State also noted that Ms. Allen's brothers went to prison for robbing a drug dealer, and the victim in the instant case was a drug dealer who was robbed and murdered. 8 AA 1512. In explaining why there was not disparate questioning, the court stated:

> In terms of the questioning and the extent of the questioning, I'd just remind everybody that that started off in response to a question from the Court, the routine question that I always ask any, you know, friends or family, close friends or family that have been arrested or charged or accused of a crime, and she raised her hand. I would, you know, just based on my recollection, you folks took more extensive notes, but it seemed like her family members were, I don't want to say peculiar, but unique is a better word in that – in the fact that, you know, they actually went to prison, and it was here in Clark County. . . . I think her experiences or her, slash, family experience was some – unique from some of the other people that maybe it was a misdemeanor or maybe it occurred in a different state. So, you know, I think that brought on more questioning from maybe me where some people raised their hand it's a DUI; it's a misdemeanor thing in

> Connecticut or whatever. I'm not going to follow up as much as I do with people who had stuff happen here.

8 AA 1512–13.

Ultimately, the defense was unable to establish prima facie racial discrimination and the State satisfactorily offered race-neutral reasons for striking Ms. Allen, with which the Court agreed and discussed more in depth.

As to Appellant's claim that the district court failed to conduct the sensitive inquiry as required under step three, it is true that the Court did not "spell out" all three steps of the Batson inquiry with the specificity that this Court prefers. See Kaczmarek, 120 Nev. at 334, 91 P.3d at 30. However, the lengthy discussion among the Court, the State, and defense counsel, and the Court's responses to the arguments of counsel, indicate that the Court "evaluate[d] all the evidence introduced by each side on the issue of whether race was the real reason for the challenge and then address[ed] whether [Appellant had] met his burden of persuasion." Id.

When defense counsel raised the Batson challenge regarding Ms. Allen, counsel claimed that Ms. Allen was subject to disparate questioning, compared to others in the panel with family members that have had criminal cases. 8 AA 1504. The Court heard the State's race-neutral explanation, which was that the State had determined that the lead detective in the instant case, Detective Dosch, was also the lead detective in Ms. Allen's brother's case. 8 AA 1507. The State was very clear that it had no objection to Ms. Allen's demeanor, and that the sole reason for the strike was the State's concern

that Ms. Allen might recognize the lead detective when he entered the courtroom to testify, resulting in Ms. Allen disliking him for putting her brother in prison. 8 AA 1507-08. The State provided the Court a copy of the declaration of arrest from Ms. Allen's brother's case, which documented that Detective Dosch was the lead detective on the case. 8 AA 1509; Respondent's Appendix ("RA") 01-06.

The Court also found that the "disparate questioning" of which defense counsel complained was actually questioning by the Court, and the State asked some follow-up questions based on Ms. Allen's responses to the Court's questions. 8 AA 1504-05. This is supported by the record. 6 AA 1154-58; 7 AA1306-1311.

Defense counsel gave a very scattered response to the State's race-neutral explanation, most of which was not even directly responsive to the State's explanation, and primarily focused on complaints that racial minorities had been struck from the jury panel, and that the jury was not a "fair cross-section of the community." 8 AA 1509-12.[7] The Court then explained to counsel that "just the fact that people happen

7Counsel appears to have confused a Batson challenge with the right to a jury venire selected from a fair cross section of the community. Batson prohibits counsel from exercising peremptory challenges on the basis of race, but imposes no requirement that peremptory challenges be exercised in a manner that ensures a fair cross section of the community. Batson, 476 U.S. at 89, 106 S.Ct. at 1719. Not only is a Batson challenge not the appropriate vehicle for ensuring a fair cross section of the community, a defendant also does not have the right to a jury or a venire that is "a perfect cross section of the community." Williams v. State, 121 Nev. 934, 939, 125 P.3d 627, 631 (2005).

to be of a minority race or ethnicity does not necessarily mean that the State is acting in a racially motivated way." 8 AA 1511.

As stated above, the Court made factual findings stating that it did not believe there was disparate questioning of Ms. Allen. 8 AA 1512-13. The Court then gave defense counsel an additional opportunity to argue, and for the first time defense counsel addressed the State's race-neutral explanation. 8 AA 1513-1514. Counsel argued that there was a lack of evidence that Ms. Allen was connected to Detective Dosch, and that whether or not she knew Detective Dosch "could be readily determined some other way." 8 AA 1514. The Court pointed out there was no way to determine definitively whether or not Ms. Allen would recognize Detective Dosch as the person who investigated her brother's case, without revealing that information to her. 8 AA 1514. Thus, the record shows that the Court considered the arguments of each side, addressed why she disagreed with counsel's arguments, and found that counsel failed to prove purposeful discrimination.

d. Similarly Situated Jurors

Appellant argues that the State's strike of Ms. Simon was pretextual because the State did not strike other jurors with convictions like DUIs. AOB at 50. As to Mr. Peries, Appellant argues that the State's proffered race-neutral reasons were invalid because while Mr. Peries acknowledged he had negative interactions with law enforcement, he noted it was his fault, not law enforcement's. AOB at 52. Lastly, as

to Ms. Allen, Appellant asserts that the State's race-neutral reason was pretextual because "if there was any connection with Detective Dosch, it could be easily verified in records from her brother's case and the State failed to do so." AOB at 54. Appellant's arguments must be denied.

At the outset the State notes that, as discussed *supra*, when defense counsel raised the Batson challenge to the strike of Ms. Simon, counsel did not allege that the race-neutral reasons offered by the state were pretextual, and did not argue that the State failed to strike other prospective jurors with criminal convictions. 8 AA 1495. The opponent of the strike is required to develop pretext a*t the time of the Batson challenge*. Hawkins, 127 Nev. at 578-79, 256 P.3d at 967-68. It is improper to nominally raise a Batson challenge at trial, then allege pretext for the first time on appeal. Id.

Regardless, the three jurors complained about above all had previous, negative interactions with law enforcement. Regardless of them identifying as non-Caucasian, they are similarly situated in that they all had interactions with law enforcement which could result in partiality. Mr. Peries and Ms. Simon both had criminal histories of their own, while Ms. Allen had a connection to the lead detective in the instant case. Further, the State struck Mr. Flangas, Prospective Juror Number 367, who is Caucasian and had a prior DUI charge. 7 AA 1135–36; 8 AA 1501. While Appellant

argues that the State failed to verify Ms. Allen's connection to Detective Dosch, this claim is blatantly contradicted by the record:

> [THE STATE]: Right. The problem is, is [the State] pulled the reports associated with that case, and it's Event 081209-3779, and in reviewing them this morning, our lead detective on the instant case, Detective Dosch was the lead detective on her brother's cases. Detective Dosch conducted interviews; he responded to the scene where the 3-year-old child was located. He pulled phone records of her brothers and their cohort. He's one of the lead detectives. This did go to trial.

8 AA 1456. The State offered the declaration of arrest as a court's exhibit showing Detective Dosch's connection to Ms. Allen's brothers' case. 8 AA 1509. Next, the State used one of its challenges to strike Christina Devine, Prospective Juror Number 338, who is Caucasian. 8 AA 1525. Ms. Devine had a battery domestic violence case that was previously in warrant status. 6 AA 1126. The State also used struck Susan Vargas, Prospective Juror Number 354, who identified as Caucasian, and who had been arrested with a group of friends in a shoplifting incident. 6 AA 1135. Lastly, the State struck Stephanie Blankenship, Prospective Juror Number 521, who identified as Caucasian, and who had a sister who had been convicted of DUI. 7 AA 1287–90.

Furthermore, Appellant's contention that the strike of Ms. Allen was racially motivated is undermined by the fact that there were three other individuals identifying as African-American on the panel that the State did not strike. 8 AA

1506.[8] The record also reflects that the seated jury contained one African-American juror (Philip Davis), one Native American juror (Gavin Williams), and three Hispanic jurors (Joanne Calderon-Arkensburg, Diana Vallejo-Rodriguez, and Edwin Herrera). 7 AA 2520; 15 AA 2806-09.[9]

As evidenced above, the State's strikes of Prospective Jurors 183, 454, and 465 were not pretextual because the State also struck similarly situated jurors that identified as Caucasian. Thus, the State was clearly not using their race-neutral reasons as pretexts to strike non-Caucasian jurors. Appellant's claims the State violated Batson and that the district court erred are belied by the record and without merit and must therefore be denied.

e. Judicial Bias

Appellant alleges that the district court was biased against him and improperly assisted the State. AOB at 55–57. Additionally, Appellant claims that the State was able to raise a reverse Batson challenge after the court pointed out that the defense struck a juror for a racial reason. AOB at 56. The full context of the commentary evinces otherwise:

> THE COURT: Don't forget if they're, you know, excluding people in a racially biased way, State –
> MS. TRUJILLO: Judge, you can't help the State.

8This includes the Eritrean prospective juror struck by defense counsel. 8 AA 1506-07.

9The State has also filed a Motion to Transmit Video Recording of Proceedings, so that this Court may observe the racial composition of the seated jury.

> THE COURT: No.
> MS. TRUJILLO: You cannot help the State.
> THE COURT: No, I mean I've had cases where I wanted to make the Batson challenge where I've seen the defense excuse like – and I'll just say –
> MS. TRUJILLO: Right.
> THE COURT: -- look, if you excuse another Asian person –
> MS. TRUJILLO: Right.
> THE COURT: -- and, you know, and this is unusual. Usually there are more Asians on the panel.

8 AA 1503–04. Defense counsel then immediately moved on to their next challenge—they took no issue with the court's comments at the time because it was clear that the court was not trying to improperly assist the State. 8 AA 1504. Shortly thereafter, defense counsel took issue with the State striking Ms. Allen and the State responded by pointing out that there were other African Americans on the panel and that defense counsel struck Ms. Gebretensie, who the State wanted to keep. 8 AA 1505–06. Ms. Gebretensie identified as Eritrean, and when asked why they struck her, defense counsel indicated, "Because historically from my experience and other people's experiences, people from Africa tend to have discriminatory views toward black African Americans." 8 AA 1506–07, 1515. The State then questioned, "Isn't that a racial reason?" and indicated the State was going to make a Batson challenge. 8 AA 1515–16.

The court and attorneys for both sides then engaged in a general conversation about racism and colorism within different cultures which the court concluded with, "All right. Just to be clear, we were engaged in some lighthearted joking, is the State

making a Batson challenge as to the gal who identified as . . . Eritrean?" 8 AA 1519. The State responded, "No. . . . We are not making a Batson challenge, and for the record I am not calling Ms. Trujillo racist." 8 AA 1519. Ms. Trujillo then indicated, "For the record, I am not calling Mr. Giordani racist, and we were bantering informally because the panel is not here." 8 AA 1520.

Despite Appellant now characterizing the colloquy as improper, it is clear from the record that the attorneys were merely engaging in lighthearted joking outside the presence of the panel, and that the district court was not inappropriately assisting the State.[10] Thus, Appellant's instant assertion that there was judicial bias must be denied.

III. THE DISTRICT COURT DID NOT VIOLATE APPELLANT'S RIGHT TO CONFRONT WITNESSES AGAINST HIM

This Court reviews whether a district court's evidentiary ruling violated a defendant's rights under the Confrontation Clause de novo. Chavez v. State, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009). Appellant asserts that the district court erred by allowing Cellebrite to limit its testimony so as not to disclose proprietary trade secrets as well as by allowing Cellebrite to testify via audiovisual transmission.

10Appellant appears to imply that it would have been an error for the State to raise a Batson challenge, but this is incorrect, as the Equal Protection Clause requires that neither party exercise a peremptory challenge to remove a potential juror solely on the basis of the juror's race, ethnicity, or gender. Batson, 476 U.S. at 79, 106 S. Ct. at 1712; Martinez-Salazar, 528 U.S. at 304, 120 S. Ct. at 774.

AOB at 59, 66. The district court's rulings did not violate Appellant's rights under the Confrontation Clause and his arguments must accordingly be denied.

a. Limitations of Cellebrite's Testimony

Appellant asserts that the district court's decision to allow Cellebrite to limit their testimony and decline to answer questions which would expose their trade secrets violated his rights under the Confrontation Clause. AOB at 57–66. Further, Appellant claims that Cellebrite "would not even explain in a sealed hearing why certain questions would reveal proprietary secrets." AOB at 65. As to the latter assertion, Appellant provides no citation to the record because indeed, Cellebrite *did* explain why certain questions would reveal proprietary secrets.

"The Sixth Amendment's Confrontation Clause provides criminal defendants the right to confront the witnesses against them and to cross examine such witnesses who bear testimony against them." Lipsitz v. State, 135 Nev. 131, 442 P.3d 138 (2019) (citing Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354, 1364 (2004) (internal quotation marks and citation omitted). This Court has held that "it is a fundamental principle in [this Court's] jurisprudence to allow an opposing party to explore and challenge through cross-examination the basis of an expert witness's opinion." Blake v. State, 121 Nev. 779, 790, 121 P.3d 567, 574 (2005).

Here, the district court permitted Cellebrite to limit the scope of their testimony at the sealed hearing as well as at trial. 11 AA 1996. As to Appellant's

claim that Cellebrite failed to explain why limiting their testimony was necessary, Appellant fails to acknowledge the following:

> THE COURT: Do you know whether or not your company doesn't want you to disclose the proprietary software?
> THE WITNESS: I wouldn't know why – why. All I know is I have signed NDAs and there is protection of our product in place.
> MR. STORMS: So if I tried to ask you specific questions about your product, you're saying your NDA would prevent you from answering my question?
> THE WITNESS: Yes. I would feel uncomfortable really asking or testifying to what the product does due to those NDAs.
> MR. STORMS: Okay. And you signed those NDAs because these things you know are your company's trade secrets?
> THE WITNESS: Yes.
> MR. STORMS: And they don't – they had you sign an NDA because disclosing these things could get to your competitors and you'd lose your competitive edge; fair to say?
> THE WITNESS: I wouldn't say that they're probably – I wouldn't know a hundred percent, but, *for example, it's secrets that probably be like, for example, getting out into the public because this is a law enforcement only thing. So that's why we don't want to discuss this stuff out in public too.* Also the competitor edge too.

11 AA 2015–16 (emphasis added). Cellebrite, and frankly the community at large, has an interest in protecting the inner workings of their proprietary software to promote public safety. Cellebrite's software, as evidenced by the instant case, assists law enforcement in solving and proving murder cases. If Cellebrite was forced to testify in a sealed or public hearing, there is a high likelihood that the information would fall into the wrong hands and make it possible for individuals to learn how to circumvent the software in order to avoid detection or prosecution.

Further, the way Cellebrite's proprietary software works is irrelevant. As the district court opined, the technology is so immensely complicated, anyone without a computer science degree would be unlikely to understand it. 5 AA 921–22. Even if the Cellebrite employee testified about how the software works, the jury would not be any more informed as to the actual issue: the chain of custody of Appellant's phone. See AOB at 61 (Appellant asserts that a "crucial aspect of cross-examination is the ability to *challenge the chain of custody* related to evidence presented by the State.") (emphasis added). All Cellebrite did with Appellant's phone was access the data on the device and copy it onto a drive which was sent back to LVMPD; Cellebrite does not analyze or alter the data in any way. 10 AA 1792-93, 1795. In this circumstance, the particular lines of computer software code underlying Cellebrite's proprietary software that allows them to access encrypted or locked devices has absolutely nothing to do with chain of custody and is thus inconsequential.

Moreover, Appellant was able to cross-examine Cellebrite *twice*, both at the closed hearing and in front of the jury, thus his rights under the Confrontation Clause were satisfied. Appellant questioned the Cellebrite employee on their receipt of a device, their verification procedures, their process of returning devices to law enforcement agencies, whether they encounter devices that are unable to be accessed, the treatment of Appellant's specific phone, and more. 11 AA 2006–2064. Appellant was able to, and did, cross-examine Cellebrite on every single relevant aspect of their

involvement in the instant case. His claim that his Confrontation Clause rights were somehow infringed upon by the fact that Cellebrite was not forced to divulge proprietary information or trade secrets is without merit and must be denied.

b. Audio-Visual Testimony

Appellant claims that the district court abused its discretion by allowing Cellebrite to testify via audio-visual means. AOB at 66. His argument is without merit and must be denied.

"The Sixth Amendment's Confrontation Clause provides criminal defendants the right to confront the witnesses against them and to cross examine such witnesses who bear testimony against them." Lipsitz, 135 Nev. at 442 P.3d at 138 (internal quotation marks and citation omitted). Physical presence, oath, cross-examination, and observation of demeanor by the jury ensure that the evidence against the defendant is reliable. Maryland v. Craig, 497 U.S. 836, 845–46, 110 S. Ct. 3157, 3163 (1990). However, while physical presence is *preferred*, that preference "must occasionally give way to considerations of public policy and the necessities of the case." Id. at 849, 110 S. Ct. at 3165.

In Lipsitz, this Court adopted the test from Craig and held that the district court did not abuse its discretion by allowing a victim to testify at trial via two-way audiovisual transmission. Lipsitz, 135 Nev. at 138, 442 P.3d at 144. So long as an important public policy is being advanced and the testimony's reliability is otherwise ensured, a defendant's right to confront witnesses against him may be satisfied

without face-to-face confrontation. Craig, 497 U.S. at 850, 110 S. Ct. at 3166; Lipsitz, 135 Nev. at 131, 442 P.3d at 140.

In this case, the district court allowed Cellebrite, a mobile forensic company, to testify by audiovisual means. 9 AA 1632–33; 10 AA 1789. During the discussion about whether the company would be permitted to testify remotely, the State noted that it had originally scheduled all out-of-state witnesses for Monday, December 16, 2019. 9 AA 1628. However, it was subsequently learned that the court was not in session that day, and accordingly, the State was forced to reschedule their witnesses. 9 AA 1628. The State was able to reschedule a majority of the out-of-state witnesses and stipulate to several records to eliminate witnesses, but Cellebrite was having issues rescheduling their witness's travel to Las Vegas. 9 AA 1628.

Specifically, Cellebrite's lawyer informed the State that Cellebrite had about one hundred pending contracts that needed to be closed out by the end of the year, one specialist was on vacation, and very few employees do what the scheduled witness does. 9 AA 1630. Accordingly, moving the testimony even one day would pose an undue burden on Cellebrite's business because the witness would have to fly into Las Vegas from New Jersey. 9 AA 1628–30.

Defense counsel objected to the witness testifying via Skype at trial and argued that defense would like to have the witness physically present to be cross-examined in front of the jury. 9 AA 1631. However, in so arguing, defense counsel

did not indicate why cross-examination could not be successfully accomplished via audiovisual transmission as opposed to face-to-face. 9 AA 1631.

The district court decided to allow the witness to testify via Skype, both for the evidentiary hearing and at trial, over defense's objection. 9 AA 1633. The court noted that sometimes it is impossible to have a witness testify audiovisually, like when the testimony requires a lot of physical documents, but in Cellebrite's case, the issue was essentially limited to establishing chain of custody, and that could be accomplished via Skype testimony. 9 AA 1629, 1632–33.

First, audiovisual testimony is permissible so long as there is an important public interest being advanced. That requirement has been met in several ways here. By conducting Cellebrite's testimony via audiovisual transmission, several public interests were advanced: (1) having to fly the Cellebrite witness out to testify in person would have required delaying the trial, thus impacting judicial economy and efficiency; (2) the jurors would have been even more financially impacted by a delay because they were already required to forego working and earning their salaries to serve on the jury; and (3) it would have posed a financial hardship for Cellebrite to have their witness travel to Las Vegas since they were experiencing manpower issues. Moreover, allowing Cellebrite to testify audiovisually benefited the defense, as they were the ones requesting Cellebrite's testimony to inquire about chain of custody matters. 4 AA 723–27.

The second prong articulated by the Lipsitz Court requires that the reliability of the testimony be otherwise assured. Id. at 131, 442 P.3d at 132. There, this Court held that the audiovisual transmission procedure set forth in Supreme Court Rules Part IX-A(B) "adequately ensured the reliability of the testimony, as it allowed Lipsitz to cross-examine the victim and the jury could hear and observe the victim." Id. The audiovisual transmission procedure "allows the witness to swear under oath, the defendant can cross-examine the witness, and the court and jury have the ability to observe the witness's demeanor and judge [his] credibility." Id. at 138, 442 P.3d at 144.

The second prong was satisfied here. Cellebrite's technical forensic specialist, Brian Stofik, was sworn under oath in front of the jury, Appellant was able to cross examine him, and the court and jury were able to see Mr. Stofik during his testimony. 10 AA 1788, 1796–97. This squarely comports with Lipsitz.

Accordingly, both prongs of the Lipsitz standard have been met: several important interests were advanced by allowing Cellebrite to testify audiovisually and the reliability of the testimony was adequately assured. The State also would note that while this trial occurred before the COVID-19 pandemic, the importance and the extent of the benefit of audiovisual testimony has dramatically increased since and respectfully, this Court should take that into consideration.

Assuming *arguendo* that the district court erred by allowing Cellebrite to limit their testimony or testify via audiovisual means, any error was harmless based upon the overwhelming evidence of Appellant's guilt discussed *supra*.

Moreover, it should be noted Appellant testified and not only did he acknowledge the cell phone was his, he confessed authorship of the text messages. Any alleged limitations on the cross examination as to chain of custody is inconsequential. The evidence against Appellant, to include his DNA, was overwhelming, and he had to testify to try to explain it away. During the course of his testimony, Appellant did not claim that the text messages pulled from his phone were somehow doctored, nor did he claim they were inaccurate. To the contrary, he embraced the text messages as his own and attempted to use them to support is incredible version of events. To take issue with the chain of custody at this point is disingenuous.

IV. APPELLANT HAS NOT DEMONSTRATED THE EXISTENCE OF CUMULATIVE ERROR

Appellant argues that he is entitled to a new trial based on cumulative error. AOB at 70–73. This Court considers the following factors in addressing a claim of cumulative error: (1) whether the issue of guilt is close; (2) the quantity and character of the error; and (3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854–55 (2000). Appellant needs to present all three elements to be successful on appeal. Id. Moreover, 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) (citing Michigan v. Tucker, 417 U.S. 433, 94 S. Ct. 2357 (1974)).

First, as noted throughout, the issue of guilt is not close. There is a substantial amount of evidence proving Appellant's guilt: his DNA inside the torn latex glove found by the victim's turned-out pocket, his DNA inside the work glove also found in the middle of the crime scene[11], his cell phone in the middle of the crime scene, the connection between his girlfriend's car and the location of Kwame's burned vehicle, the communication between Carter and Appellant linked with the communication between Carter and Cave, as well as Carter's communication with Kwame, and the fact that Appellant's girlfriend was reading a news article covering the murder the very next day. Moreover, Appellant's version of events during his testimony was fantastical, to say the least, and was obviously rejected by the jury.

The second step of the inquiry leans in favor of denying Appellant's claim of cumulative error as well. When looking at the quantity and character of the error, it is crucial to note that no error has been established. As mentioned *supra*, if this Court were inclined to agree with Appellant's numerous assertions of error, all such errors would be harmless and cannot support granting Appellant's request for a new trial.

11The mere fact that Appellant equipped himself prior to the robbery with two layers of gloves, one of which was latex, clearly demonstrates his mens rea.

Lastly, the crime with which Appellant is charged *is* grave but that alone does not warrant a finding of cumulative error nor a new trial when Appellant has failed to otherwise show he is entitled to such. Consequently, Appellant's judgment of conviction should be affirmed.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm Appellant's Judgment of Conviction.

Dated this 8th day of September, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 13,904 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 8th day of September, 2021.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 8th day of September, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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