

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2
3 TROY MULLNER

4 Appellant,

5 vs.

6 THE STATE OF NEVADA,

7 Respondent.

S.Ct. No. 71030

D.C. No. C283463

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9 **APPELLANT'S OPENING BRIEF**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii-iv
STATEMENT OF JURISDICTION.....	1
ROUTING STATEMENT.....	1
STATEMENT OF THE ISSUES.....	2
STATEMENT OF THE CASE.....	2-6
STATEMENT OF FACTS	6-8
SUMMARY OF THE ARGUMENT	8
ARGUMENT	8-17
CONCLUSION	17
CERTIFICATE OF COMPLIANCE.....	18-19
CERTIFICATE OF SERVICE	20

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>PAGE</u>
<u>Allred v. State</u> , 120 Nev. 410, 92 P.2d 1246 (2004)	14-15
<u>Arajakis v. State</u> , 108 Nev. 976, 843 P.2d 800 (1992)	9
<u>Blume v. State</u> , 112 Nev. 472, 915 P.2d 282 (1996)	14
<u>Culverson v. State</u> , 95 Nev. 433, 596 P.2d 220 (1979)	14
<u>French v. State</u> , 98 Nev. 235, 645 P.2d 440 (1982)	9, 11
<u>Harmelin v. Michigan</u> , 501 U.S. 957, 111 S.Ct. 2680 (1991)	14
<u>Lozada v. State</u> , 110 Nev. 349, 871 P.2d 944 (1994)	1
<u>Mulder v. State</u> , 116 Nev. 1, 992 P.2d 845 (2000)	16-17
<u>Sessions v. State</u> , 106 Nev. 186, 789 P.2d 1242 (1990)	9, 11
<u>Solem v. Helm</u> , 463 U.S. 277, 288, 103 S.Ct. 3001 (1983)	14
<u>State v. Javier</u> , 289 P.3d 1194, 128 Nev. Adv. Op. 50 (Oct. 4, 2012)	12-13
<u>STATUTES & REGULATIONS</u>	<u>PAGE</u>
Nev. Rev. Stat. § 62A.330	12
Nev. Rev. Stat. §193.165	2-3
Nev. Rev. Stat. § 193.330	2-3

Nev. Rev. Stat. § 200.310	2
Nev. Rev. Stat. § 200.320	2
Nev. Rev. Stat. § 200.380	2-3
Nev. Rev. Stat. § 200.481	13
Nev. Rev. Stat. § 202.360	3
Nev. Rev. Stat. § 205.060	2-3
Nev. Rev. Stat. § 207.010	8-11
Nev. Rev. Stat. § 207.190	2-3
NV. CONST. Art I, §6	14
U.S. CONST. AMEND. VIII	14

TROY MULLNER

S.Ct. No. 71030

Appellant,

D.C. No. C283463

VS.

THE STATE OF NEVADA,

Respondent.

STATEMENT OF JURISDICTION

This Court has appellate jurisdiction over the instant matter pursuant to Nev. Rev. Stat. § 177.015(3). The Appellant appeals from his Amended Judgment of Conviction, which was entered on January 28, 2014. Appellate counsel filed an untimely Notice of Appeal on April 15, 2014. However, the District Court granted Appellant an appeal pursuant to Lozada v. State¹ after post-conviction habeas proceedings, and filed a timely Notice of Appeal on August 11, 2016.

ROUTING STATEMENT

Appellant was convicted of a category A felony. Therefore, pursuant to N.R.A.P. 17(b)(1), this appeal presumptively is routed to the Supreme Court of Nevada.

¹ 110 Nev. 349, 871 P.2d 944 (1994).

- I. THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING MULLNER AS A SMALL HABITUAL CRIMINAL**
- II. MULLNER’S SENTENCE AMOUNTS TO CRUEL AND UNUSUAL PUNISHMENT**
- III. CUMULATIVE ERROR**

On August 15, 2012, the State charged TROY LEE MULLNER (“Mullner”) by way of Indictment with the following: Eleven (11) counts of BURGLARY (Category B Felony – NRS 205.060); Sixteen (16) counts of ROBBERY (Category B Felony – NRS 200.380); Two (2) counts of FIRST DEGREE KIDNAPPING (Category A Felony – NRS 200.310, 200.320); Four (4) counts of COERCION (Category B Felony – NRS 207.190); Four (4) counts of BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Category B Felony – NRS 200.060, NRS 193.165); Two (2) Counts of ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380, 193.330, 193.165); Three (3) counts of ATTEMPT ROBBERY (Category B Felony – NRS 200.380,

1 193.330) and One (1) count of POSSESSION OF FIREARM BY EX-FELON
2 (Category B Felony – NRS 202.360). 1 AA 12-27.
3

4 The State filed a Notice of Intent to Seek Punishment as a Habitual
5 Criminal. 1 AA 28-30.
6

7 Pursuant to negotiations, on October 21, 2013, the State charged Mullner by
8 way of Amended Indictment with the following: One(1) count of BURGLARY
9 (Category B Felony – NRS 205.060); Two (2) counts of ROBBERY (Category B
10 Felony – NRS 200.380); One (1) count of COERCION (Category B Felony – NRS
11 207.190); Two (2) counts of BURGLARY WHILE IN POSSESSION OF A
12 DEADLY WEAPON (Category B Felony – NRS 200.380, NRS 193.165); Two (2)
13 Counts of ROBBERY WITH USE OF A DEADLY WEAPON (Category B
14 Felony – NRS 200.380, 193.165); One (1) count of ATTEMPT ROBBERY
15 (Category B Felony – NRS 200.380, 193.330) and One (1) count of POSSESSION
16 OF FIREARM BY EX-FELON (Category B Felony – NRS 202.360). 1 AA 31-
17 34.
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22 On October 21, 2013, Mullner was arraigned on the Amended Indictment,
23 and a Guilty Plea Agreement (“GPA”) was filed. 1 AA 35-38. The State reserved
24 the full right to argue, including for habitual criminal treatment. Id. Mullner
25

1 pleaded guilty to the charges alleged in the Amended Indictment. Id. On January
2 23, 2014, Mullner was adjudged a habitual criminal and sentenced to TEN (10)
3 YEARS to LIFE on Count 1; TEN (10) YEARS to LIFE on COUNT 2 to run
4 consecutive to Count 1; TWO (2) to SIX (6) YEARS on COUNT 3 to run
5 consecutive to COUNT 2; TEN (10) YEARS to LIFE on COUNT 4 to run
6 concurrent to Count 3; TEN (10) YEARS to LIFE on COUNT 5 to run concurrent
7 to Count 4; TEN (10) YEARS to LIFE on COUNT 6 to run concurrent to COUNT
8 5; TEN (10) YEARS to LIFE on COUNT 7 to run concurrent to COUNT 6; TEN
9 (10) YEARS to LIFE on COUNT 8 to run concurrent to COUNT 7; TEN (10)
10 YEARS to LIFE on COUNT 9 to run concurrent to COUNT 8; and ONE (1) to
11 FOUR (4) YEARS on COUNT 10 to run consecutive to COUNT 9. 1 AA 49-51.
12 Mullner received FIVE HUNDRED SEVENTY-TWO (572) DAYS credit for time
13 served. Id. On January 28, 2014, the Judgment of Conviction was filed. Id. On
14 February 5, 2014, an Amended Judgment of Conviction was filed because of a
15 clerical error which was corrected to read as follows; COUNT 7 – ATTEMPT
16 ROBBERY. 1 AA 52-54.

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19 On April 15, 2014, Mullner filed an untimely Notice of Appeal after
20 repeatedly requested that his attorney do so with no success. 1 AA 55-58. On May
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1 13, 2014, the Nevada Supreme Court issued an Order of Dismissal because
2 Mullner's untimely filed his Notice of Appeal. 1 AA 59-60. Remittur issued on
3 June 12, 2014. 1 AA 74-75. On June 13, 2014, Mullner filed a Petition for Writ of
4 Habeas Corpus. 1 AA 61-73. On May 22, 2014, the Court appointed Jean
5 Schwartzer as counsel for Mullner.
6
7

8 On December 3, 2015, Mullner filed a Supplemental Memorandum of Points
9 and Authorities in Support of his Petition for Writ of Habeas Corpus (Post-
10 Conviction). 1 AA 81-100; 2 AA 101-155. On January 27, 2016, the State filed a
11 Response to Mullner's Supplemental Memorandum. 2 AA 156-169. On May 2,
12 2016, a hearing was held wherein the District Court granted an evidentiary hearing
13 on the issues raised in Muller's Petition. 2 AA 170.
14
15

16 On May 2, 2016, an evidentiary hearing was held where both Mullner and
17 his previous attorney, Frank Kocka, Esq., testified. 2 AA 171. Prior to testimony
18 being given, Mullner withdrew his request to withdraw his guilty plea. Id. The
19 Court heard testimony was given regarding only Mullner's deprivation of appeal
20 claim. Id. The District Court took the matter under advisement. Id.
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23 On May 9, 2016, the District Court issued a Minute Order granting
24 Mullner's Petition. 2 AA 172. On August 10, 2016, the Court filed its Findings of
25
26

1 Fact, Conclusions of Law and Order. 2 AA 173-178. On August 11, 2016, the
2 Court filed Notice of Entry of Decision and Order. 2 AA 179-185. On August 11,
3 2016 the District Court also filed Mullner's Notice of Appeal. 2 AA 186-187. This
4 Opening Brief follows:
5

6 **STATEMENT OF FACTS**

7
8 Between the dates of April 11, 2012 and June 30, 2012, a series of 14
9 robberies were committed in Las Vegas, Nevada and Henderson, Nevada. 1 AA 5-
10 10. A man entered these stores and demanded that the cash registers be emptied.
11 Id. He accomplished this by simulating the act of holding a weapon under his shirt,
12 showing the handle of knife tucked into his pants or wielding a fake handgun. Id.
13 After the last robbery of a Subway sandwich shop on June 30th, one of the victims
14 followed the fleeing perpetrator; he watched the man get into an older model mini-
15 van and collected a partial plate number for police officers. 1 AA 11.
16
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18

19 After the June 30, 2012 robbery of a Subway, Las Vegas Metro Police
20 Department ("Metro") Officers reviewed surveillance video and determined that
21 the suspect matched the description of a serial robbery suspect identified as
22 Mullner. 1 AA 7. Metro officers constructed two photo line-ups using recent
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1 photographs of Mullner and presented them to the two victims/eyewitnesses of the
2 June 30th robbery. 1 AA 11. Both witnesses identified Mullner as the suspect. Id.
3

4 Metro officers located Mullner's mini-van parked in front of a house and
5 began surveillance of the vehicle. 1 AA 2. After witnessing Mullner's presence at
6 the home, Metro officers obtained and executed a search warrant for the house and
7 mini-van. Id. Mullner, along with other individuals in the house, exited the house
8 as directed and without any use of force and without incident. Id. During a search
9 of the property Metro Officers found two cell phones, multiple articles of clothing
10 supposedly worn during the robberies, and a fake gun; all such items belonged to
11 Mullner. 1 AA 2-3.
12
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14

15 Dayna Curliss, Mullner's girlfriend, stated during an interview that she was
16 unaware of Mullner committing any robberies, but that Mullner had told her
17 previously that he owns a gun. 1 AA 4. Curliss had never actually seen the gun. Id.
18 Curliss also stated that Defendant is an alcoholic and suspected Mullner of
19 smoking meth due to his recent weight loss. Id.
20
21

22 After the execution of the warrant, Mullner was read his Miranda rights,
23 which he later waived. 1 AA 11. Mullner admitted to committing the June 30th
24 Subway robbery along with thirteen other robberies. Id. He further stated that he
25
26

1 had used a fake handgun on one of the robberies. Id. He voluntarily identified
2 himself in the surveillance photographs. Id. During his interview, Mullner also
3 admitted to having a methamphetamine addiction and stated that he committed the
4 robberies to pay his bills as well as to support his drug habit. Id.

5 6 **SUMMARY OF THE ARGUMENT**

7
8 Mullner was sentenced as a Large Habitual Criminal using three prior
9 felonies—2 of them were stale and one of those convictions was the result of a
10 crime committed as a juvenile. This was done in error.

11
12 Mullner was sentenced to thirty-one (31) to life for a series of crimes where
13 no one was physically harmed and a total of \$3089.40 was stolen. This sentence
14 amounts to cruel and unusual punishment.

15
16 These errors combined amount to cumulative error.

17 18 **ARGUMENT**

19 **I. THE TRIAL COURT ABUSED ITS DISCRETION IN** 20 **SENTENCING MULLNER AS A SMALL HABITUAL CRIMINAL**

21 **a. Standard of Review**

22 Pursuant to Nev. Rev. Stat. § 207.010, “It is within the discretion of the
23 prosecuting attorney whether to include a count under this section in any
24 information or file a notice of habitual criminality if an indictment is found. The
25

1 trial judge may, at his or her discretion, dismiss a count under this section which is
2 included in any indictment or information.” The purpose of this section is to permit
3 dismissal “when the prior offenses are stale or trivial, or in other circumstances
4 where an adjudication of habitual criminality would not serve the purposes of the
5 statute or the interests of justice.” Sessions v. State, 106 Nev. 186, 190, 789 P.2d
6 1242, 1244 (1990) *quoting* French v. State, 98 Nev. 235, 237, 645 P.2d 440, 441
7 (1982). A trial court’s adjudication of a defendant as a habitual criminal is
8 reviewed for abuse of discretion. Sessions, 106 Nev. at 190, 789 P.2d at 1244.
9 Under the habitual offender statute, considerations of the nonviolent nature of
10 charged crimes or remoteness of prior convictions are within the discretion of
11 district court. N.R.S. 207.010. Tillema v. State, 112 Nev. 266, 914 P.2d 605
12 (1996); Arajakis v. State, 108 Nev. 976, 843 P.2d 800 (1992).

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18 **b. The Court Erred in Adjudicating Mullner as a Small Habitual**
19 **Criminal by Basing its Decision on Stale Prior Convictions**

20 On March 13, 2013, the State filed a Notice of Intent to Seek Punishment as
21 a Habitual Criminal pursuant to NRS 207.012 and NRS 207.101. 1 AA 28-30. In
22 this Notice the State listed following three prior convictions: 2006 Robbery in Case
23 No. C226003 (Clark County, Nevada); 1997 Second Degree Kidnapping in Case
24
25

1 No C134348 (Clark County, Nevada); and 1984 First Degree Robbery in Case No.
2 CR84-147 (South Dakota). Id. Although the state sought habitual criminal
3 treatment under either NRS 207.012 or NRS 207.010, it appears from the
4 Judgment of Conviction and the sentencing transcript that Mullner was adjudicated
5 a Large Habitual Criminal under NRS 207.010. 1 AA 49-51; 1 AA 76-80.
6
7

8
9 NRS 207.010 provides in relevant part:

10 1. Unless the person is prosecuted pursuant to NRS 207.012 or
11 207.014, a person convicted in this State of:

12 (a) Any felony, who has previously been two times convicted,
13 whether in this State or elsewhere, of any crime which under
14 the laws of the situs of the crime or of this State would amount
15 to a felony is a habitual criminal and shall be punished for a
16 category B felony by imprisonment in the state prison for a
17 minimum term of not less than 5 years and a maximum term of
18 not more than 20 years.

19 (b) Any felony, who has previously been three times convicted,
20 whether in this State or elsewhere, of any crime which under
21 the laws of the situs of the crime or of this State would amount
22 to a felony is a habitual criminal and shall be punished for a
23 category A felony by imprisonment in the state prison:

24 (1) For life without the possibility of parole;

25 (2) For life with the possibility of parole, with eligibility for
26 parole beginning when a minimum of 10 years has been served;
27 or

28 (3) For a definite term of 25 years, with eligibility for parole
beginning when a minimum of 10 years has been served.

1
2 Pursuant to NRS 207.010(2), “It is within the discretion of the prosecuting
3 attorney whether to include a count under this section in any information or file a
4 notice of habitual criminality if an indictment is found. The trial judge may, at his
5 or her discretion, dismiss a count under this section which is included in any
6 indictment or information.” The purpose of this section is to permit dismissal
7 “when the prior offenses are stale or trivial, or in other circumstances where an
8 adjudication of habitual criminality would not serve the purposes of the statute or
9 the interests of justice.” Sessions v. State, 106 Nev. 186, 190, 789 P.2d 1242, 1244
10 (1990) *quoting* French v. State, 98 Nev. 235, 237, 645 P.2d 440, 441 (1982).
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14 In Sessions, Sessions was convicted of drug trafficking and drug possession
15 adjudicated a Habitual Criminal under NRS 207.010. 106 Nev. at 187, 789 P.2d at
16 1242-43. Sessions was sentenced to, *inter alia*, life without the possibility of
17 parole. Id. at 187-88, 789 P.2d at 1243. The prior convictions used to obtain
18 habitual criminal status were for theft, grand theft and escape, which ranged from
19 twenty-three (23) to thirty (30) years old. Id. This Court held that it was an abuse
20 of discretion for the district court to sentence Sessions as a Habitual Criminal and
21 impose the maximum sentence because “surely a case involving crimes less violent
22 and more stale than presented here would be hard to find; hence, the adjudication
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1 of habitual criminality in this case serves neither the purpose of the statute nor the
2 interests of justice.” Id. at 191, 789 P.2d at 1245.

3
4 Here, the District Court used three prior felony convictions to adjudicate
5 Mullner a Large Habitual Criminal. 1 AA 28-30. At the time of the commission of
6 these crimes, these convictions were six (6), fifteen (15) and twenty-eight (28)
7 years old. (See Presentence Investigation Report at 5). ²The fifteen (15) year old
8 conviction for Second Degree Kidnapping is arguably stale and the twenty-eight
9 (28) year old conviction for Robbery is most certainly stale. More important is the
10 fact that Mullner was a juvenile at the time he committed the twenty-eight (28)
11 year old crime. Id.

12
13 Juvenile convictions are civil in nature pursuant to Chapter 62 of the Nevada
14 Revised Statutes and that because of this, the activity is not “felonious.” In State v.
15 Javier, this Court recently addressed the civil nature of juvenile adjudications. 289
16 P.3d 1194, 128 Nev. Adv. Op. 50 (Oct. 4, 2012). In Javier, Javier C. was
17 adjudicated delinquent and committed to the Nevada Youth Training Center
18 (NYTC), “a state facility for the detention or commitment of [delinquent]
19 children.” NRS 62A.330. While there, he allegedly battered a group supervisor.
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25 ² This document is not contained in the Appellant’s Appendix. Mullner will file a
26 Motion for Order Directing District Court to Transmit Appellant’s PSI.

1 The State charged him as an adult with battery by a prisoner under NRS
2 200.481(2)(f), a category B felony. Id. This Court dismissed and held that, because
3
4 Javier C.'s detention at NYTC was civil, not criminal, he was not a “prisoner” to
5 whom NRS 200.481(2)(f) could apply. Id. The State appealed. Id. This Court held
6 that Javier’s confinement was civil in nature, not criminal, and that he was not a
7 prisoner for purposes of the charge of battery by a prisoner, despite the fact that
8 had he committed these crimes as an adult, he would have been in prison being
9 punished for a felony. Id., at 1196-97.
10
11

12 While Mullner recognizes that Chapter 62 of the Nevada Revised Statutes
13 and this Court’s holding in Javier are not directly applicable to the instant case due
14 to the fact that, according to his PSI, Mullner was certified up as an adult, Muller
15 would ask on appeal that the Supreme Court extend its holding in Javier to
16 instances where a juvenile is certified up to District Court and then convicted of a
17 felony. This felony conviction, although not a juvenile adjudication, is the result of
18 the actions of a juvenile and therefore it should not be used to enhance the sentence
19 of the adult defendant twenty-eight (28) years later. Therefore, it was an abuse of
20 discretion for the District Court to adjudicate Mullner a Large Habitual Criminal
21 based upon three felonies, 2 of which were stale and one of which was a juvenile
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1 offense. Mullner was prejudiced by this error given the fact that being adjudicated
2 a Large Habitual Criminal exposed him to and resulted in a sentence of thirty-one
3 (31) to Life, effectively putting him in prison for a majority of the rest of his life
4 for stealing \$3089.40 without physically injuring anyone.
5

6 **II. MULLNER’S SENTENCE AMOUNTS TO CRUEL AND** 7 **UNUSUAL PUNISHMENT**

8 **a. Standard of Review**

9
10 The Eighth Amendment to the United States Constitution as well as Article
11 1, Section 6 of the Nevada Constitution prohibits the imposition of cruel and
12 unusual punishment. The Nevada Supreme Court has stated that “[a] sentence
13 within the statutory limits is not ‘cruel and unusual punishment unless the statute
14 fixing punishment is unconstitutional or the sentence is so unreasonably
15 disproportionate to the offense as to shock the conscience.’” Allred v. State, 120
16 Nev. 410, 92 P.2d 1246, 1253 (2004) *quoting* Blume v. State, 112 Nev. 472, 475,
17 915 P.2d 282, 284 (1996) *quoting* Culverson v. State, 95 Nev. 433, 435, 596 P.2d
18 220, 221-22 (1979)(emphasis added); *see also* Harmelin v. Michigan, 501 U.S.
19 957, 1001, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (plurality opinion) *quoting*
20 Solem v. Helm, 463 U.S. 277, 288, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983).
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b. A Sentence of Thirty-One Years to Life in Prison is Disproportionate to the Crimes Mullner Committed

Mullner pleaded guilty to committing numerous robberies and burglaries. That being said, this was done over the course of only three months, and appears to have been drug fueled. He admitted to stealing a total of \$3,089.40 combined from fourteen different victims. Although someone could have been harmed physically and no doubt there was a certain amount of emotional and mental harm, no one was physically harmed and the monetary impact on each individual victim was not incredibly large and *totaled* across all victims \$3089.40. Therefore, his sentence of thirty-one (31) years to life is so unreasonably disproportionate to the offense as to shock the conscience and amounts to cruel and unusual punishment in violation of The Eighth Amendment to the United States Constitution as well as Article 1, Section 6 of the Nevada Constitution. Allred v. State, 120 Nev. 410, 92 P.2d at 1253.

Although Mullner is not arguing that his sentence is an *illegal* sentence under Nevada law, it is certainly disproportionate to the crimes he was convicted of given the affect this has had on the victims and the amount of damage done to society. Therefore, Mullner's sentence of thirty-one (31) years to life amounts to cruel and unusual punishment. *Allred*, 120 Nev. 410.

1
2 **III. CUMULATIVE ERROR**

3 When evaluating a claim of cumulative error, this Court considers the
4 following factors: (1) whether the issue of guilt is close, (2) the quantity and
5 character of the error, and (3) the gravity of the crime charged. Mulder v. State,
6 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000).
7

8 Here, even if the aforementioned instances of misconduct are viewed by this
9 Court as harmless individually, the cumulative effect of the District Court's errors
10 are harmful and have prejudiced Mullner.
11

12 The issue of guilt was not close and Mullner pleaded guilty to the crimes he
13 was charged with. However, in the instant case, the cumulative error does not
14 occur in the guilt phase of Mullner's case but, rather, it does so in the sentencing
15 phase. As discussed *supra*, every error that occurred during Mullner's sentencing
16 was prejudicial resulting in him spending at least thirty-one (31) years in prison
17 and potentially the rest of his life in prison. Mullner was adjudicated a Large
18 Habitual Criminal based upon stale convictions, one of which was committed
19 when Mullner was a juvenile, and his sentence amounts to cruel and unusual
20 punishment. Finally, the crimes Mullner were charged with were not grave—there
21 was no physical injury suffered by the victims and a total sum of \$3,089.40 was
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1 stolen. Therefore, this Court should vacate Mullner's sentence because the
2 cumulative effect of the District Court's errors renders his sentence prejudicial. See
3 Mulder v. State, 116 Nev. at 17, 992 P.2d at 854-55.
4

5
6 **CONCLUSION**

7 Based upon the arguments herein, *supra*, Mullner's sentence should be
8 VACATED and the matter REMANDED for further proceedings according to the
9 dictates and rulings of this Court.
10

11 Dated this 27th day of February, 2017.

12
13 Respectfully submitted,

14
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1 **CERTIFICATE OF COMPLIANCE**

2 1. I hereby certify that this brief complies with the formatting requirements of
3 NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style
4 requirements of NRAP 32(a)(6) because:
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6 **[X] This brief has been prepared in a proportionally spaced typeface**
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1 3. Finally, I hereby certify that I have read this appellate brief, and to the best
2 of my knowledge, information, and belief, it is not frivolous or interposed for any
3 improper purpose. I further certify that this brief complies with all applicable
4 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires
5 every assertion in the brief regarding matters in the record to be supported by a
6 reference to the page and volume number, if any, of the transcript or appendix
7 where the matter relied on is to be found. I understand that I may be subject to
8 sanctions in the event that the accompanying brief is not in conformity with the
9 requirements of the Nevada Rules of Appellate Procedure.
10
11
12

13 DATED this 27th day of February, 2017.
14
15
16

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Page 20