IN THE SUPREME COURT OF THE STATE OF NEVADA

TROY MULLNER, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 71030

RESPONDENT'S ANSWERING BRIEF

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

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ROUTING STATEMENT

This case is presumptively assigned to the Nevada Supreme Court pursuant to NRAP 17(b)(1) because it is a direct appeal from a conviction of a Category A Felony.

STATEMENT OF THE ISSUE(S)

I. **WHETHER THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN SENTENCING MULLNER**
II. **WHETHER MULLNER'S SENTENCE AMOUNTS TO CRUEL AND UNUSUAL PUNISHMENT**
III. **WHETHER CUMULATIVE ERROR OCCURRED**

STATEMENT OF THE CASE

On August 15, 2012, the State charged Defendant TROY LEE MULLNER ("Defendant") 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 205.060); Five (5) counts of ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380, 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, 193.330) and One (1) count of POSSESSION OF FIREARM BY EX-FELON (Category B Felony – NRS 202.360). Appellant's Appendix Volume 1 (1 AA), p. 12-27. The State filed Notice of Intent to Seek Habitual Criminal Treatment on March 13, 2013. 1 AA 28.

Pursuant to negotiations, on October 21, 2013, the State charged Defendant by way of Amended Indictment with the following: COUNT 1 – BURGLARY (Category B Felony – NRS 205.060); COUNTS 2, 5 – ROBBERY (Category B Felony – NRS 200.380); COUNT 3 – COERCION (Category B Felony – NRS 207.190); COUNTS 4, 8 – BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Category B Felony - NRS 205.060); COUNTS 6, 9 – ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS

200.380, 193.165); COUNT 7 – ATTEMPT ROBBERY (Category B Felony – NRS 200.380, 193.330); COUNT 10 – POSSESSION OF FIREARM BY EX-FELON (Category B Felony – NRS 202.360). 1 AA 31-34.

On October 21, 2013, a Guilty Plea Agreement was filed, whereby the Defendant agreed to plead guilty to the charges in the Amended Indictment. 1 AA 35. The State reserved the full right to argue, including for habitual criminal treatment. Id. Defendant pleaded guilty that day. Id.

On January 23, 2014, Defendant was adjudged a habitual criminal and sentenced to TEN (10) YEARS to LIFE on COUNT 1; TEN (10) YEARS to LIFE on COUNT 2 to run consecutive to COUNT 1; TWO (2) to SIX (6) YEARS on COUNT 3 to run consecutive to COUNT 2; TEN (10) YEARS to LIFE on COUNT 4 to run concurrent to COUNT 3; TEN (10) YEARS to LIFE on COUNT 5 to run concurrent to COUNT 4; TEN (10) YEARS to LIFE on COUNT 6 to run concurrent with COUNT 5; TEN (10) YEARS to LIFE on COUNT 7 to run concurrent with COUNT 6; TEN (10) YEARS to LIFE on COUNT 8 to run concurrent with COUNT 7; TEN (10) YEARS to LIFE on COUNT 9 to run concurrent with COUNT 8; and ONE (1) to FOUR (4) YEARS on COUNT 10 to run consecutive to COUNT 9. Defendant received FIVE HUNDRED SEVENTY-TWO (572) DAYS credit for time served. 1 AA 76-80. On January 28, 2014, the Judgment of Conviction was

filed. 1 AA 49. On February 5, 2014, an Amended Judgment of Conviction was filed to correct a clerical error. 1 AA 52-54.

On April 15, 2014, Defendant filed an untimely Notice of Appeal. 1 AA 55. On May 13, 2014, the Nevada Supreme Court dismissed Defendant's appeal due to his failure to timely file his Notice of Appeal. 1 AA 59. Remittitur issued on June 12, 2014. 1 AA 74.

On June 13, 2014, Defendant filed a pro per Post-Conviction Petition for Writ of Habeas Corpus ("Petition"), Motion for Appointment of Counsel and Request for evidentiary hearing. 1 AA 61. On December 3, 2015, Defendant through counsel filed a Supplemental Memorandum in Support of Petition for Writ of Habeas Corpus (Post-Conviction) ("Supplement"). 1 AA 81. The State filed a response on January 27, 2016.

On May 2, 2016, an evidentiary hearing was held. 2 AA 171. On May 9, 2016, the District Court issued a Minute Order granting Mullner's Petition. 2 AA 172. The Findings of Fact, Conclusions of Law and Order were filed on August 10, 2016. 2 AA 173.

On August 11, 2016, Mullner filed a Notice of Appeal. 2 AA 186. The Opening Brief was filed on February 27, 2017. Appellant's Opening Brief (AOB), p. 1. The State responds as follows and asks this Honorable Court to AFFIRM the Judgment of Conviction.

STATEMENT OF THE FACTS

At sentencing, the District Court relied on the recitation of the facts provided in the Presentence Investigation Report (PSI). Counsel for Mullner has moved for the PSI to be transmitted to this Court for consideration on appeal. As such, the facts of this case are as follows:

> On April 11, 2012, a subject identified as Troy Mullner entered a local Radio Shack and approached two employees. Mullner stuck his hand under his shirt, simulating that he had a weapon and ordered an employee to open the register. Mullner stole $318.00 from the register and then exited the store. The employees then contacted the Las Vegas Metropolitan Police Department and a subsequent investigation was conducted by Robbery Detectives.
>
> On April 21, 2012, Mullner entered another local Radio Shack and approached two employees. Mullner then ordered one of the employees behind the counter and demanded money while simulating that he had a weapon under his shirt. Mullner then stole $179.00 and exited the store. The LVMPD was contacted and Robbery Detectives continued their on-going investigations.
>
> On April 24, 2012, Mullner entered a local Subway store and approached two employees. Mullner then simulated that he had a weapon under his shirt and ordered one of the employees to put his hands on the counter. Mullner then ordered the other employee to "give me all the money" and once the employee handed over $90 to Mullner, he stated to "get the fuck back". Mullner then exited the store and the LVMPD was contacted and Robbery Detectives continued their on-going investigations. On April 24, 2012, Mullner entered another local Subway and appeared to point a gun around the store. Mullner approached one of the employees and demanded all the money, taking

$693. Mullner then told the employee to turn around and walk away, at which point Mullner exited the store to a waiting vehicle.

On May 2, 2012, Mullner entered another local Subway store and approached an employee at the register. Mullner revealed the wooden handle of a knife in his waistband and demanded money. The employee ran out of the store, at which point Mullner went around the counter and found another employee washing dishes. Mullner ordered the employee to open the register and then took $350, and fled out of the store. The LVMPD as contacted and Robbery Detectives continued their investigations.

On May 27, 2012, Mullner entered another local Radio Shack and approached a employee. Muller then told the employee to open the register, at which the employee complied. Muller then told the employee to place his hands on the register and to not move, at which point Mullner demanded to know where the money bags were. When the employee told Muller that he did not have any bags, Mullner pulled the till out, spilling money on the floor. Muller then picked up $225 in cash/coin and told the employee to lie on the floor and to not even think about moving. Mullner then exited the store and the LVMPD was contacted. Robbery Detectives responded and continued their on-going investigations.

On June 9, 2012, Mullner entered a local Subway and told a customer not to turn around. Mullner then ordered an employee to open the register and told another employee to place his hands on the counter. The employee placed the register drawer on the counter and Mullner took $250 and fled the store. LVMPD Robbery Detectives were contacted, at which point they responded and continued their on-going investigations.

On June 16, 2012, Mullner entered another local Radio Shack with his hand in his waistband and pointed at everyone in the store with his left hand, stating "get on the ground and give me all the money out of the register". All

employees and customers complied and when Mullner did not see any money in the open till, he fled the store. The LVMPD was contacted and responded. LVMPD Robbery Detectives responded and continued their on-going investigations.

On June 18, 2012, Mullner entered a local Subway and told an employee to get behind the register, while simulating that he had a weapon under his shirt. At this point, Mullner told all employees to look away and he grabbed $168 from the register and fled the store. The LVMPD was contacted and responded. LVMPD Robbery Detectives responded and continued their on-going investigations. A pair of sunglasses was subsequently recovered near the business and the witnesses advised that they were Mullner's, and that he was wearing them when he entered the store.

On June 20, 2012, Mullner entered another local Radio Shack and ordered an employee to give him all the money. Mullner reached into his waist as if he had a weapon and when the employee was not moving fast enough, Mullner pushed him. The employee told Mullner that he did not have access to the register and that there was no money. Mullner told the employees to hurry up, that he needed money and that he would "Bring this whole thing". Mullner then exited the store and the LVMPD was contacted and responded. Robbery Detectives responded and continued their on-going investigations.

On June 20, 2013, Mullner entered a local Little Caesars Pizza and approached an employee. Mullner asked for a pepperoni pizza and stated, "And can I get everything in your drawer as well." The employee replied "are you serious", at which point Mullner stated, "Give me all the fucking money in the drawer." The employee did not see a weapon so he called 9-1-1. Mullner then left the store as the employee walked to the back of the store. Henderson Police Department officers responded and investigated the

crime. LVMPD Robbery Detectives were notified and continued their on-going investigations.

On June 21, 2012, Muller entered a local Port of Subs and told an employee, "I hate to ruin your day, but I need you to open the register", while simulating that he had something under his shirt. The employee then opened the register and then ran out of the store to call the police. The employee then observed Muller exit the store as she was calling the police, after he apparently reached over the drawer and removed $150 from the register. The LVMPD was contacted and responded. LVMPD Robbery Detectives responded and continued their ongoing investigation.

On June 23, 2012, Mullner entered a local Subway and yelled at the employee, "I need to take your register!" Muller then hopped the counter, at which point the scared employee ran in the back room to hide. The employee heard Mullner ripping off the register and then saw him run out the back door. The cash register with $420 was stolen. The LVMPD was contacted and responded. LVMPD Robbery Detectives responded and continued their on-going investigations.

On June 29, 2012, an LVMPD officer came into contact with Mullner and believed that he could be the serial robber based on his description/clothing, and the information was forwarded to Detectives.

On June 30, 2012, Mullner entered another local Subway and approached an employee standing at the register. Mullner pointed a handgun at the employee and demanded the money from the register. In fear of being shot, the employee handed Mullner $246.40 and while this was happening, a second employee walked up to the register. Mullner pointed the gun at this employee and demanded that he walk with him to the front of the store. The employee refused and took a position of cover in the rear of the store, at which point the second employee also ran

> to the rear of the store. Mullner then fled the store and one of the employees was able to get a partial plate number. Robbery Detectives responded and the victims viewed line-ups, at which point Mullner was picked out by both victims. Detectives were then able to locate the vehicle at a local residence and Mullner was taken into custody. Items worn in the robberies and a bb gun were seized and impounded. *During the subsequent interview with Detectives, Mullner admitted to fourteen (14) robberies* and that he had an alcohol and methamphetamine addiction. Mullner stated that he would drink a couple of malt liquor drinks to boost his confidence and that he obtained $200 on average, using the stolen money to pay bills and "score meth". Mullner did not involve anyone else in the robberies, but did recall a female named Zoey driving him once; however, she believed he was buying meth and had no idea about the robberies. [Mullner] was arrested and booked into the Clark County Detention Center.

Presentence Investigation Report, p. 8-10 (emphasis added).

SUMMARY OF THE ARGUMENT

The District Court did not abuse its discretion in sentencing Mullner. The three convictions used to establish that Mullner was eligible for sentencing under the habitual criminal statute were proper and demonstrate Mullner's continued criminal activity over a period of thirty years. Mullner's sentence did not amount to cruel and unusual punishment because it is well within the statutory range does not shock the conscience and is not grossly disproportionate to the crimes he committed. Finally, the claim of cumulative error lacks merit and does not warrant relief from this Court.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN SENTENCING MULLNER

A. Standard of Review

This Court has granted district courts "wide discretion" in sentencing decisions, which are not to be disturbed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." Allred v. State, 120 Nev. 410, 413, 92 P.3d 1246, 1248 (2004) (quoting Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976)). A sentencing judge is permitted broad discretion in imposing a sentence, and absent an abuse of discretion, the district court's determination will not be disturbed on appeal. Randell v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993) (citing Deveroux v. State, 96 Nev. 388, 610 P.2d 722 (1980)).

B. Mullner Was Properly Adjudicated a Habitual Criminal

Mullner was sentenced under the large habitual criminal statue as to Counts 1, 2, 4, 5, 6, 7, 8, and 9 to Count 1: 10 to Life, Count 2: 10 to Life consecutive to Count 1, Count 3: 2 to 6 years consecutive to Count 2, Count 4: 10 to Life concurrent to Count 3, Count 5: 10 to Life concurrent to Count 4, Count 6: 10 to Life concurrent to Count 5, Count 7: 10 to Life concurrent to Count 6, Count 8: 10 to Life, concurrent to Count 7, Count 9, 10 to Life, concurrent to Count 8, Count 10: 1 to 4 consecutive to Count 9. 1 AA 49-51. Mullner does not argue that his sentence under the large

habitual statute was not within the statutory range prescribed by the Legislature. Rather, Mullner contends he was impermissibly sentenced as a habitual criminal. AOB 9.

Pursuant to NRS 207.010:

> [A] person convicted in this state of:
> (b) Any felony, who has previously been three times convicted, whether in this state or elsewhere, of any crime which under the laws of the situs of the crime or of this state would amount to a felony, or who has previously been five times convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or the intent to defraud is an element, is a habitual criminal and shall be punished for a category A felony by imprisonment in the state prison:
> (1) For life without the possibility of parole;
> (2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or
> (3) For a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served.

Adjudication of a defendant as a habitual criminal is "subject *to the broadest kind of judicial discretion."* LaChance v. State, 130 Nev. ___, ___, 321 P.3d 919, 929 (2014) (quoting Tanksley v. State, 113 Nev. 997, 1004, 946 P.2d 148, 152 (1997)). NRS 207.010 makes no special allowance for non-violent crimes or for the remoteness of convictions; instead, these are considerations within the discretion of the district court. Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805, (1992); French v. State, 98 Nev. 235, 645 P.2d 440 (1982). Further, the district court has the

discretion to adjudge a defendant as a habitual criminal when the defendant has been convicted of a felony and has at least three prior felonies. NRS 207.010(1)(a).

For purposes of NRS 207.010 the State need only provide proof of three prior felony convictions. The felony convictions utilized to adjudicate a defendant as a habitual criminal need not follow any particular sequence. Carr v. State, 96 Nev. 936, 939, 620 P.2d 869, 871 (1980). They must merely precede the date of the underlying offense. Brown v. State, 97 Nev. 101, 102, 624 P.2d 1005, 1006 (1981). "Exemplified copies of the prior felony convictions and certified fingerprint cards from the penal institutions where the defendant had been incarcerated both have been approved in habitual criminal proceedings." Curry v. Slansky, 637 F. Supp. 947, 952 (D. Nev. 1986) (citing Plunkett v. State, 84 Nev. 145, 437 P.2d 92, 94 (1968)); Atteberry v. State, 84 Nev. 213, 438 P.2d 789, 791 (1968). "If a defendant charged pursuant to NRS 207.010, NRS 207.012 or NRS 207.014 pleads guilty to or is found guilty of the primary offense but denies any previous conviction charged, the court shall determine the issue of the previous conviction after hearing all relevant evidence presented on the issue by the prosecution and the defendant." NRS 207.016.

Here, the district court did not abuse its discretion when adjudicating Mullner a habitual criminal. Not only did Mullner plead guilty to TEN Category B felonies in the instant case, but it was determined at sentencing that he had four prior felony

convictions. 1 AA 35, 2 AA 152. Thus, Mullner was clearly eligible to be adjudged as a habitual criminal.

Moreover, one of the purposes of this statute is to prevent recidivism. Rezin v. State, 95 Nev. 461, 463, 596 P.2d 226, 227 (1979). Based on Mullner' prior convictions he clearly poses a risk of recidivism, and thus sentencing him under this statute was appropriate. As such, the district court sentencing Mullner under the large habitual criminal statute to life without the possibility of parole was not an abuse of discretion.

C. Mullner's Convictions Should Not Be Dismissed as Stale

Mullner argues that two of his prior convictions were stale. AOB 9-10. Although the district court has the discretion to look at the staleness and seriousness of the prior felonies, it is not required to make special allowances for these types of crimes. Arajakis 108 Nev. at 983, 843 P.2d at 805. Here, the district court considered Mullner's argument and examined the totality of his record prior to adjudging him as a habitual criminal. 2 AA 152-53.

Mullner's reliance on Sessions v. State, 106 Nev. 186, 789 P.2d 1242 (1990), is misplaced. In Sessions, the defendant was convicted of trafficking in marijuana in 1989. At sentencing, he was adjudicated a habitual criminal because of three felony convictions: a 1959 Texas conviction for theft of property valued at over fifty dollars, a 1963 California conviction for grand theft, and a 1965 California

conviction for escape without the use of force. There was no indication that Sessions had been involved in any criminal activity between 1965 and 1989. The Nevada Supreme Court held that it was an abuse of discretion for the district court to adjudicate Sessions as a habitual criminal using ONLY convictions that were over twenty years old.

Mullner is not is the same position as Sessions. As the State outlined in its habitual notice, Mullner has a continuous criminal history spanning more than thirty years:

> 1. Having in 2006, been convicted of Robbery, in Case Number C226003, in the Eighth Judicial District Court, Clark County, a felony under the laws of the State of Nevada.
> 2. Having in 1997, been convicted of Second Degree Kidnapping, in Case Number C134348, in the Eighth Judicial District Court, Clark County, a felony under the laws of the State of Nevada.
> 3. Having in 1984, been convicted of First Degree Robbery, in Case Number CR84-147, a felony in the State of South Dakota.
> 4. Having in 1984, been convicted of Third Degree Burglary, in Case Number CR84-142, a felony in the state of South Dakota.

It is also important to note that Mullner committed other felony, misdemeanor and gross misdemeanor offenses throughout the course of those thirty years, which resulted in either misdemeanor or gross misdemeanor convictions or were dismissed pursuant to global negotiations, or otherwise dispelled. See PSI, p. 5-7. Although Mullner claims that the sentence imposed was not proper, it is clear that the sentencing judge weighed his high risk to reoffend with the severity of the crime. As

Mullner was sentenced within the statutory guidelines, the district court did not abuse its discretion in sentencing Mullner.

D. The District Court Did Not Abuse Its Discretion By Considering Mullner's 1984 Conviction

Mullner also argues that this Court should apply the ruling in State v. Javier, 128 Nev. __, 289 P.3d 1194 (2012), to the instant case. However, Javier is vastly distinguished. Javier was adjudicated delinquent and committed to the Nevada Youth Training Center. While there, Javier battered a group supervisor. For this action, Javier was charged as an adult with battery by a prisoner under NRS 200.481(2)(f). However, this Court determined that because Javier was at the NYTC as a juvenile delinquent, he was not a prisoner due to the civil nature of juvenile convictions. Therefore, he could not be a "prisoner" and NRS 200.481(2)(f) did not apply.

The instant case is distinguished from Javier in that the Juvenile Court certified Mullner and he was prosecuted as an adult on the charged used to habitualize him. When Mullner was certified the juvenile court waived jurisdiction over him. Thus, the conviction is no different than any other conviction. Once a juvenile is certified to the adult system, the adult system has original jurisdiction over the juvenile. NRS 62B.390(5)(a); Anthony Lee R., 113 Nev. 1406, 1409, 952 P.2d 1, 3 (1997); Castillo v. State, 106 Nev. 349, 351, 792 P.2d 1133, 1134 (1990). Javier could not be charged under NRS 200.481(2)(f) for battery by a prisoner

because for all intents and purposes, he was not actually a prisoner. Here, Mullner's age at the time did not because he was prosecuted and convicted as an adult. Once he was certified, the District Court was well within its jurisdiction to find Mullner guilty of the crimes he had committed.

Based on the foregoing, the District Court did not abuse its discretion in finding that Mullner was previously convicted of three felonies, and adjudicating him guilty under the Habitual Criminal Statute NRS 207.010. As such, this Court should AFFIRRM the Judgment of Conviction.

II. MULLNER'S SENTENCE DID NOT AMOUNT TO CRUEL AND UNUSUAL PUNISHMENT

The Eighth Amendment to the United States Constitution and Article 1, Section 6 of the Nevada Constitution prohibit the imposition of cruel and unusual punishment. The Eighth Amendment and Nevada Constitution do not require the sentence to be strictly proportionate to the crime; they only forbid a sentence that is grossly disproportionate to the crime. Chavez v. State, 125 Nev. 328, 347-348, 213 P.3d 476, 489 (2009) (citing Harmelin v. Michigan, 501 U.S. 957, 1001, 111 S. Ct. 2680, 2705 (1991) (plurality opinion)). A sentence will not be deemed cruel and unusual if it is within the statutory range unless the statute fixing the punishment is unconstitutional, or the sentence is so unreasonably disproportionate to the offense as to shock the conscience. Chavez v. State, 125 Nev. 328, 348, 213 P.3d 476, 489 (2009); Allred v. State, 120 Nev. 410, 420, 92 P.2d 1246, 1253 (2004). A

punishment is considered "excessive" and unconstitutional if it: ""(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."' Pickard v. State, 94 Nev. 681, 684, 585 P.2d 1342, 1344 (1978) (quoting Coker v. Georgia, 433 U.S. 584, 592, 97 S.Ct. 2861, 2865 (1977)). Additionally, a sentencing judge is permitted broad discretion in imposing a sentence and, absent an abuse of discretion, the district court's determination will not be disturbed on appeal. Randell v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993) (citing Deveroux v. State, 96 Nev. 388, 390, 610 P.2d 722, 723-724 (1980)).

As Mullner' sentence is within the applicable statutory range, Mullner must show that either: 1) the statute is unconstitutional; or 2) that the "sentence is so unreasonably disproportionate to the offense as to shock the conscience."' Blume v. State, 112 Nev. at 475, 915 P.2d at 284 (1996). Mullner has failed to demonstrate either. As discussed *supra*, the District Court did not abuse its discretion in sentencing Mullner under the habitual criminal statute. Pursuant to NRS 207.010, as a habitual criminal, Mullner could have been sentenced to:

> (1) For life without the possibility of parole;
> (2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or

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

Although Mullner was sentenced to a Life tail under this statute on eight of the ten counts, his punishment was well within the statutory guidelines. Moreover, the sentence imposed is not so unreasonably disproportionate to the offense as to shock the conscience. Mullner was initially charged with a total of 46 counts including: 11 counts of Burglary, 16 counts of Robbery, 2 Counts of First Degree Kidnapping, 4 Counts of Coercion, 4 Counts of Burglary While in Possession of a Deadly Weapon, 5 Counts of Robbery with Use of a Deadly Weapon, 2 Counts of Attempt Robbery with Use of a Deadly Weapon, 3 Counts of Attempt Robbery and 1 Count of Possession of Firearm by Ex-Felon. 1 AA 12-27. The 2 Category A Felony charges, each carry a potential sentence of death, life without the possibility of parole or life with the possibility of parole. NRS 193.130. Each of the 44 category B Felonies carries a potential sentence of 1 to 20 years in the Nevada Department of Corrections. Id. It should be noted that pursuant to negotiations, Mullner pleaded guilty to only 10 counts and was adjudicated guilty and sentenced under only those ten counts. The remaining 36 counts were dismissed.

In determining the length of the additional penalty imposed, the court shall consider the facts and circumstances of the crime, the criminal history of the person, the impact of the crime on any victim, any mitigating factors presented by the person,

and any other relevant information. NRS 193.165. In this case, Mullner committed a total of 14 robberies. Mullner argues that because he only gained $3,089.40 from the fourteen robberies the punishment he received was grossly disproportionate to the crime. AOB 15. However, Mullner's sentences are appropriate given the ongoing criminal behavior demonstrated by this series of robberies, the impact on the victims, the facts and circumstances of the crimes and the criminal history of the defendant. Regardless of the amount of money Mullner gained during each of the robberies, he entered fourteen different establishments and threatened fourteen different victims. PSI, 8-10.

Mullner has an extensive criminal history, which also warrants a harsh punishment from the court. Mullner's continued criminal activity spans more than thirty years, with several stays in prison, revocation of parole, and the instant series of robberies, which spans over several months. This is not a single incident of poor decision making, rather it is a pattern of behavior that endangers member after member after member of this community in order to fuel Mullner's drug habit.

Several of the Counts in this case were run consecutive to one another. 1 AA 49-51. Mullner argues that the aggregate sentence of 31 to Life amounts to cruel and unusual punishment. AOB 15. However, whether to give concurrent or consecutive sentences was soundly within the discretion of the lower court. See Randell v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993) ("A sentencing judge is

allowed wide discretion in imposing a sentence; absent an abuse of discretion, the district court's determination will not be disturbed on appeal."); accord Brake v. State, 113 Nev. 579, 584, 939 P.2d 1029, 1033 (1997). It was completely appropriate for the Court to impose consecutive sentences for the counts in this case as it is within the sound discretion of the Court to do so.

Mullner was not subject to cruel and unusual punishment because his sentence is justified by his continued disregard for the laws of the State of Nevada, the safety of members of the community, and their right not to be robbed by someone such as Mullner, and his criminal history. Plainly put, Mullner's sentence is absolutely appropriate given his crimes, and in no way shocks the conscience or amounts to cruel and unusual punishment.

III. THE CUMULATIVE ERROR CLAIM LACKS MERIT

Under the doctrine of cumulative error, "although individual errors may be harmless, the cumulative effect of multiple errors may deprive a defendant of the constitutional right to a fair trial." Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994) (citing Sipsas v. State, 102 Nev. 119, 716 P.2d 231 (1986)); see also Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). The doctrine of cumulative error "requires that numerous errors be committed, not merely alleged." People v. Rivers, 727 P.2d 394, 401 (Colo.App. 1986); see also People v. Jones, 665 P.2d 127, 131 (Colo.App. 1982). Here, Mullner failed to establish any error which

would have entitled him to relief, there is and can be no cumulative error worthy of reversal. See, e.g., LaPena v. State, 92 Nev. 1, 14, 544 P.2d 1187, 1195 (1976) (Gunderson, E.M., dissenting) ("nothing plus nothing plus nothing is nothing"). Furthermore, 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 (1974)). As such, the claim of cumulative error cannot stand.

CONCLUSION

It is for the foregoing reasons that the State requests that the Judgment of Conviction in the instant case is AFFIRMED.

Dated this 15th day of May, 2017.

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 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 5,168 words and does not exceed 30 pages.
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 15th day of May, 2017.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on May 15, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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