IN THE SUPREME COURT OF THE STATE OF NEVADA

TROY MULLNER Appellant, vs. THE STATE OF NEVADA, Respondent.	S.Ct. No. 71030 D.C. No. C283463

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. THE TRIAL COURT MAY ONLY CONSIDER THREE OF MULLNER'S FOUR PRIOR FELONY CONVICTIONS FOR THE PURPOSE OF APPLYING NRS 207.010 AND SHOULD HAVE DISMISSED ONE OF THOSE THREE

The State argues that the District Court properly adjudicated Mullner a Large Habitual Criminal based upon "four prior felony convictions" when the State only has to provide proof of three prior felonies. *See Respondent's Answering Brief ("RB") at 11-12.* While the District Court can take into account anything it wants to determine the appropriate sentence within the sentencing range allowed by statute, pursuant to NRS 207.010, for the purpose of ascertaining whether a defendant should be adjudicated a Large Habitual Criminal, which has distinct

sentencing ranges, the Court may only take into consideration prior felony convictions.

This Court has previously held that "based on the language and intent of NRS 207.010, we have held that where two or more convictions grow out of the same act, transaction or occurrence, and are prosecuted in the same indictment or information, those several convictions may be utilized only as a single prior conviction for purposes of applying the habitual criminal statute." Lachance v. State, 321 P.3d 919, 130 Nev. Adv. Op. 29 (Nev., 2014) *citing* Rezin v. State, 95 Nev. 461, 462, 596 P.2d 226, 227 (1979); *see also* Halbower v. State, 96 Nev. 210, 211–12, 606 P.2d 536, 537 (1980)(internal quotations omitted).

Two of the four prior felony convictions that Muller had on his record stemmed from one indictment or information: Case No CR84-147 out of South Dakota in 1984. Appellant's Appendix ("AA") 28-30. These two convictions may only be viewed as one single prior conviction for purposes of applying the habitual statute. Lachance, 321 P.3d 919. Therefore, the District Court may only consider three of Mullner's prior felony convictions, not four as the State argues.

Of those three convictions, one was twenty-eight (28) years old and committed when Mullner was a juvenile. Another was fifteen (15) years old. At the

very least the District Court should have dismissed the twenty-eight (28) years old prior conviction for the purpose of applying the habitual criminal statute due to the fact that it was so remote in time that it was stale. Sessions v. State, 106 Nev. 186, 190, 789 P.2d 1242, 1244 (1990); French v. State, 98 Nev. 235, 237, 645 P.2d 440, 441 (1982).

The State argued that "NRS 207.010 makes no special allowance for non-violent crimes or for the remoteness of convictions." *See RB at 11*. The State is correct in the sense that the plain language of the statute does not make any allowance *specific* to non-violent or remote convictions. However, the plain language does leave the door open for such allowances in section 2 of the statute.

NRS 207.010(2) provides as follows:

> "It is within the discretion of the prosecuting attorney whether to include a count under this section in any information or file a notice of habitual criminality if an indictment is found. **The trial judge may, at his or her discretion, dismiss a count under this section which is included in any indictment or information.**"

Nev. Rev. Stat. § 207.010 (emphasis added).

However, looking at the plain language addresses only half of the inquiry. When dealing with a legal issue stemming from the application of a statute, the Court takes into consideration the plain language of the statute **and the case law**

on point, which directs the Court on how to apply the statute or clears up ambiguities in the plain language, which can include but is not limited to, special allowances, considerations, or caveats. This Court did just that in Sessions and French when it interpreted NRS 207.010(2) and held that special allowances may (and in some cases should) be made where prior convictions are non-violent and/or so remote in time that they are stale:

> "The purpose of this section is to **permit dismissal 'when the prior offenses are stale or trivial**, or in other circumstances where an adjudication of habitual criminality would not serve the purposes of the statute or the interests of justice.'"

Sessions, 106 Nev. at 190, 789 P.2d at 1244 *quoting* French, 98 Nev. at 237, 645 P.2d at 441 (emphasis added).

Mullner's fifteen (15) year old conviction for Second Degree Kidnapping is arguably stale and the twenty-eight (28) year old conviction for Robbery is most certainly stale. More important is the fact that Mullner was a juvenile at the time he committed the twenty-eight (28) year old crime, discussed *infra* in the following section. Id. Therefore, this Court should have certainly dismissed the twenty-eight (28) year old prior conviction leaving only two prior felony convictions to consider for the purposes of determining whether Mullner should be adjudicated a Large Habitual Criminal under NRS 207.010. Had the District Court only considered

those two, Mullner would only have been eligible for the Small Habitual, which carries with it a lesser sentencing range. Failure to do so amounts to abuse of discretion. Sessions, 106 Nev. at 190; French, 98 Nev. at 237.

II. MULLNER IS ASKING THIS COURT TO EXTEND ITS RULING IN STATE V. JAVIER TO CASES IN WHICH JUVENILES ARE CERTIFIED AS ADULTS

The State argues that Javier [1] is not applicable to Mullner's case because Mullner was certified as an adult and therefore his conviction is no different from a regular adult conviction whereas Javier was convicted in juvenile court. *See RB at 15-16.* Mullner is aware of this distinction. In fact, Mullner pointed this distinction out in his Opening Brief. *See Appellant's Opening Brief ("OB") at 13.* **Mullner is asking this Court to *extend* its holding in Javier to cases wherein adult convictions stemming from crimes committed as a juvenile are used to adjudicate a defendant as a habitual criminal.** *See OB at 13.* Again, this felony conviction, although not a juvenile adjudication, is the result of the actions of a juvenile and therefore it should not be used to enhance the sentence of the adult defendant twenty-eight (28) years later. The State does not contest Mullner's

[1] 289 P.3d 1194, 128 Nev. Adv. Op. 50 (Oct. 4, 2012)

request to extend the holding of Javier to a case such as his. *See OB, generally.* Typically, failure to respond to the appellant's argument as a confession of error. [2]

Therefore, Mullner respectfully asks this Court hold that crimes committed as a juvenile, regardless of whether they result in a juvenile conviction or adult conviction, may not be used for purposes of applying the habitual criminal statute.

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[2] *See* Bates v. Chronister, 100 Nev. 675, 681–82, 691 P.2d 865, 870 (1984) (treating the respondent's failure to respond to the appellant's argument as a confession of error); *see also* A Minor v. Mineral Co. Juv. Dep't, 95 Nev. 248, 249, 592 P.2d 172, 173 (1979) (determining that the answering brief was silent on the issue in question, resulting in a confession of error); *see also* Moore v. State, 93 Nev. 645, 647, 572 P.2d 216, 217 (1977) (concluding that even though the State acknowledged the issue on appeal, it failed to supply any analysis, legal or otherwise, to support its position and "effect[ively] filed no brief at all," which constituted confession of error), *overruled on other grounds by* Miller v. State, 121 Nev. 92, 95–96, 110 P.3d 53, 56 (2005).

CONCLUSION

Based upon the arguments herein, *supra*, Mullner's sentence should be VACATED and the matter REMANDED for a new sentencing hearing.

Dated this 28th day of June, 2017.

Respectfully submitted,

/s/ Jean Schwartzer
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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:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 Edition in Times New Roman 14 point font; or

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2. This brief exceeds the 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:

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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 28th day of June, 2017.

/s/ Jean Schwartzer

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CERTIFICATE OF SERVICE

I hereby certify that Appellant's Reply Brief was filed electronically with the Nevada Supreme Court on the 28th day of June, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM LAXALT, ESQ.

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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