IN THE SUPREME COURT OF THE STATE OF NEVADA

DWIGHT CONRAD SOLANDER, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 76405

RESPONDENT'S ANSWERING BRIEF

Appeal from Judgement of Conviction (Guilty Plea)
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

This case is presumptively assigned to the Nevada Court of Appeals because it involves a challenge to a Judgment of Conviction based upon a guilty plea. NRAP 17(b)(1).

STATEMENT OF THE ISSUE(S)

1. Whether the State's decision to charge Appellant with sexual assault was not absurd.
2. Whether sexual assault is a general intent crime.
3. Whether the 2015 amendment to the sexual-penetration definition applies to conduct committed before its enactment.
4. Whether Appellant's guilty plea was knowingly and voluntarily entered.

STATEMENT OF THE CASE

On March 25, 2014, a Criminal Complaint was filed charging Dwight Solander ("Appellant"), Janet Solander ("Janet"), and Danielle Hinton ("Hinton")

with the following offenses: Counts 1-3, 16-22: Child Abuse, Neglect, or Endangerment with Substantial Bodily Harm (Category B Felony – NRS 200.508(1)); Counts 4-15: Child Abuse, Neglect, or Endangerment (Category B Felony – NRS 200.508(1)); and Count 23: Sexual Assault with a Minor Under Fourteen Years of Age (Category A Felony – NRS 200.364, 200.366). 1 RA 1-8. A Preliminary Hearing was held over the course of five separate days. Afterwards, on July 23, 2014, the State filed a Second Amended Criminal Complaint based on the evidence presented at the preliminary hearing charging the Defendants as follows: Counts 1-2, 14, 24-25: Child Abuse, Neglect, or Endangerment with Substantial Bodily Harm (Category B Felony – NRS 200.508(1)); Counts 3-6, 9-12, 15-18, 20-22, 26-29, 40-45: Child Abuse, Neglect, or Endangerment (Category B Felony – NRS 200.508(1)); Counts 7-8, 19, 30-37: Sexual Assault with a Minor Under Fourteen Years of Age (Category A Felony – NRS 200.364, 200.366); Counts 13, 23, 46: Assault with a Deadly Weapon (Category B Felony – NRS 200.471); and Counts 38-39: Battery with Intent to Commit Sexual Assault (Category A Felony – NRS 200.400.4). 4 RA 763-79. Defendants were bound over on all charges included in the Second Amended Criminal Complaint.

On July 28, 2014, the State filed an Information charging the same offenses included in the Second Amended Criminal Complaint. 4 RA 780-98. On August 8, 2014, Appellant filed a Motion to Extend Time to File Petition for Writ of Habeas

Corpus. 4 RA 799-803. The State filed an Opposition on August 13, 2014. 4 RA 804-07. On August 19, 2014, the District Court granted Appellant's request and required him to file a pretrial Petition for Writ of Habeas Corpus no later than September 16, 2014. 4 RA 808-09.

On September 16, 2014, Appellant filed a pretrial Petition for Writ of Habeas Corpus. 4 RA 810-29. The State filed its Return on September 25, 2014. 4 RA 830-51. At a hearing on Appellant's Petition on September 30, 2014, the Court expressed concern regarding the use of catheters to commit sexual assault and invited both parties to submit supplemental briefs. 4 RA 854-55. The State filed a Bench Memorandum Pursuant to Court's Request Regarding Issue in Pretrial Writs of Habeas Corpus on October 15, 2014. 4 RA 857-64. On October 16, 2014, Janet filed a Joinder to Appellant's pretrial Petition for Writ of Habeas Corpus. 4 RA 865-67. On November 5, 2014, Appellant filed a Response to the State's Bench Memorandum. 4 RA 868-75.

On November 5, 2014, Janet filed a pretrial Petition for Writ of Habeas Corpus. 4 RA 876-94. The State filed an Opposition and Motion to Dismiss Janet's Petition on November 19, 2014. 4 RA 929-34. The State's Motion to Dismiss was denied and the State subsequently filed a Return to Janet's Petition on December 17, 2014. 4 RA 935-71. On January 28, 2015, the District Court issued a minute entry

granting both Petitions in part, denying them in part, and striking the sexual assault counts. 4 RA 972-73.

The State filed a Notice of Appeal on March 30, 2015. 4 RA 974-76. The District Court issued Findings of Fact, Conclusions of Law, and Order on June 17, 2015. 4 RA 977-82. This Court reversed and remanded the district court's decision on April 19, 2016. AA 69.

On January 31, 2018, Appellant entered a guilty plea to three counts of Child Abuse, Neglect, or Endangerment Resulting in Substantial Bodily Harm (Category B Felony). 5 RA 983.

Appellant was sentenced on June 5, 2018. AA 1. The district court sentenced him to between three and ten years for each count, and the sentences were ordered to run concurrently. AA 63-64.

The Judgment of Conviction was filed on June 18, 2018. AA 91. Appellant filed a Notice of Appeal on July 10, 2018. AA 117.

STATEMENT OF THE FACTS

The Presentence Investigation Report (PSI)[1] in this case reports the facts as follows:

> On March 4, 2014, LVMPD received a report from Child Protective Services (CPS) detailing an extensive history of abuse and neglect to three female victims (DOB: 10-21-01; DOB: 01-23-03;

[1] The State has filed a Motion to Transmit PSI along with this answering brief.

DOB: 07-25-04) by Janet Solander, Dwight Conrad Solander, and Danielle Hinton. Janet Solander and Dwight Conrad Solander had adopted the three victims on January 19, 2011. Danielle Hinton is Janet Solander's adult daughter.

The victims reported to CPS that Janet, Dwight, and Danielle would hit them with a paint stick until they bled. They would hit the girls with the stick if they had an accident in their underwear, if they took too long going to the bathroom, or if they answered homework problems incorrectly. They mainly hit the girls on their legs and buttocks.

The victims related further that Janet had a timer, and they were not allowed to use the bathroom until the timer went off. This caused the girls to have trouble using the bathroom and made their stomachs hurt. If the girls had bathroom accidents, they were not allowed to eat for days. Janet blended their food, and they did not know what they were eating. If the victims got in trouble, they had to sit on a bucket with a toilet seat on top for hours at a time. If they got into trouble, Janet made them take a cold shower and Janet would pour ice water on them. They were not provided a towel to dry off, but they had to stand in front of a large fan. Additionally, the girls slept on boards with no sheets or blankets. They slept in their underwear with a fan blowing on them. Victim #2 (DOB: 01-23-03) has a scar on her back from Janet pouring hot water on her. Sometimes after the victims had bathroom accidents, Janet would make them put their soiled underwear in their mouths and leave it there until their mouths would bleed. Victim #3 (DOB: 07-25-04) reported that Janet stuck a paint stick in her vagina because she could not hold her bladder. Victim #3 also has scarring on her right ear and back from Janet pouring hot water on her. The girls also reported that Janet would put a catheter in them, and if urine came out, she would hit them with a paint stick.

All three victims have scars on their arms, legs, and buttocks.

PSI at 4.

SUMMARY OF THE ARGUMENT

The Opening Brief recycles three arguments which Appellant has previously presented to this Court. Each claim has been rejected, and this Court's ruling is now the law of the case. Moreover, even if this Court had not previously decided these

issues, they would nevertheless lack merit. The State's reading of the sexual assault statute which alleged that Appellant and his co-defendant inserted a catheter into the urethra of a child to punish that child is not absurd and is encompassed by a plain reading of the relevant statute. Moreover, this Court held previously that Appellant would have been free to argue that the catheter was used for a bona fide medical purpose had this case gone to trial, and therefore his argument about the 2015 amendment is irrelevant. Finally, the only new argument on appeal is a challenge to the validity of the guilty plea, but it fails under the overwhelming weight of authority holding that guilty pleas are not invalidated by the risk of a higher penalty at trial. This Court should affirm the judgment of conviction.

ARGUMENT

In 2015, the State appealed the district court's decision to grant Appellant's pretrial petition for writ of habeas corpus. AA 69. The district court had determined that "as a matter of law, … the insertion of a catheter into the urethra of a minor under the age of 14 cannot constitute sexual assault." Id. In Docket No. 67710,[2] Appellant filed an Answering Brief which made three arguments:

1. Statutes Must be Interpreted to Avoid an Absurd Result.

[2] A court may take judicial notice of facts that may be verified from a reliable source such that their accuracy may not be reasonably questioned. NRS 147.130(2); Mack v. Estate of Mack, 125 Nev. 80, 91, 206 P.3d 98, 106 (2006). The State respectfully requests that this Court take judicial notice of the Answering Brief Appellant filed in Docket No. 67710 on December 2, 2015 and the identical arguments he raises here.

2. Even Under the Plain Language of the Statute, a Sexual Intent is Required.
3. The Subsequent Statutory Amendment Sheds Great Light on the Legislature's Intent to Exclude Medical Devices from the Sexual Assault Statute.

Respondent's Answering Brief, Docket No. 67710 (Dec. 2, 2015) at 6-13.

This Court disagreed with Appellant, and it reversed the district court's determination that "as a matter of law, the insertion of a catheter into the urethra of a minor under the age of 14 cannot, under any circumstances, constitute sexual assault." AA 77. Instead of adopting the district court's per se rule, this Court held that while a bona fide medical purpose can be a defense to sexual assault, the question of whether a person was penetrated for an appropriate purpose was a question of fact to be determined by the jury. AA 76-77.

Appellant inappropriately takes a second bite at the apple here. The instant opening brief raises four arguments:

1. Statutes Must be Interpreted to Avoid an Absurd Result.
2. Even Under the Plain Language of the Statute, a Sexual Intent is Required.
3. The Subsequent Statutory Amendment Sheds Great Light on the Legislature's Intent to Exclude Medical Devices from the Sexual Assault Statute.
4. Appellant entered a plea of guilty in order to avoid an excessive, unconstitutional prison sentence, his conviction should be reversed.

AOB at 11-15.

A careful reader will notice that the first three headings are identical. These are not the only similarities, however, as Appellant has also repeated the arguments

beneath them. Appellant recites—nearly verbatim—the three arguments which this Court rejected in Solander v. State, Docket Nos. 67710, 67711, Order of Reversal and Remand (Apr. 19, 2016). His Opening Brief makes no material changes to these three issues which have previously been litigated in this Court—instead, it removes occasional references to the State's opening brief in Docket No. 67710 to make his previously litigated issues seem novel.[3] Each is now barred by the law-of-the-case doctrine.

The only issue presented which this Court has not already adjudicated is the question of the validity of the guilty plea. It alleges that because of the potential penalties Appellant faced if he went to trial, he was coerced into his guilty plea. AOB at 16-19. For reasons below, this claim fails. The Judgment of Conviction should be affirmed.

I. THE STATE'S DECISION TO CHARGE APPELLANT WITH SEXUAL ASSAULT WAS NOT ABSURD

Appellant first complains that reading NRS 200.366(1), the sexual-assault statute, as not requiring a sexual intent would be absurd. AOB at 11.

Appellant and his co-defendant have already asked this Court to determine whether this reading "produces an absurd result." AA 73. When squarely presented with the argument, this Court rejected it:

[3] Appellant's attempt to make his brief appear new was not entirely successful, as at one point he refers to himself as Respondent. AOB at 15.

> The Solanders argue that a literal reading of NRS 200.364(5) and NRS 200.366 produces an absurd result, for it "criminalize(s) every doctor, nurse or parent who must, for example, insert a finger inside a child's rectum to dislodge a stoppage caused by constipation or to clean areas soiled by dirty diapers of a suppository." On this basis, the Solanders urge this court to apply the rule of lenity to NRS 200.364's definition of sexual penetration. … We decline to apply the rule of lenity because the statutory definitions of "sexual assault" and "sexual penetration" are not ambiguous.

Id.

That holding is now the law of the case. "The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (*citing* McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)).

Moreover, even if this Court were considering this issue for the first time, Appellant waived his right to raise it by entering a guilty plea. Woods v. State, 114 Nev. 468, 477, 958 P.2d 91, 97 (1998); Reuben C. v. State, 99 Nev. 845, 845-46, 673 P.2d 493, 493 (1983); Powell v. Sheriff, 85 Nev. 684, 687, 462 P.2d 756, 758

(1969). Further, the Amended Information, to which Appellant pleaded guilty, did not charge him with Sexual Assault, so this question is moot. See Morford v. State, 80 Nev. 438, 443, 395 P.2d 861, 863 (1964). Appellant will never spend a day in prison for this charge which he now claims is absurd.

Even if it this argument were not barred by the law-of-the-case doctrine, not waived by the guilty plea, and not mooted by the plea negotiations, it would nevertheless lack merit. In arguing that the State's interpretation is absurd, Appellant cites multiple examples of medical procedures that he alleges would suddenly become sexual assault if the State's interpretation were to hold. AOB at 12. He argues, for example, that a rape kit performed by a Sexual Assault nurse, a "routine gynecological medical procedure," the use of catheters on comatose patients, and invasive ultrasounds would suddenly constitute sexual assault if the person lacked "the full ability to consent." Id. This court has rejected this argument—in those cases, the penetration is "undertaken for a bona fide medical purpose" and "consent to the penetration is implied," there is no mens rea, and "the defense of necessity applies." AA 75.

When this question was initially before the Court, the State agreed throughout the course of this case that the mens rea could be "negated by the defense of a legitimate medical purpose." AA 75. Whether an act of penetration was committed for a legitimate medical purpose, however, was a question of law and fact which

must be decided by the jury. AA 76-77. This Court, accordingly, held that it was erroneous to hold "as a matter of law, that the insertion of a catheter into the urethra of a minor under the age of 14 cannot, *under any circumstances*, constitute sexual assault." AA 77 (emphasis added).

The State's theory was that despite Appellant's claim that he and the co-defendant inserted the catheters for a medical purpose, they were actually inserted to punish the sisters, not treat them. AA 76. Any of the situations enumerated by Appellant would be sexual assault if implemented to punish the person being penetrated. Context matters. Appellant ignores context in his attempt to manufacture a slippery slope, but the interpretation he is calling absurd is a straw man. This Court should affirm the Judgment of Conviction.

II. SEXUAL ASSAULT IS A GENERAL INTENT CRIME

Appellant next complains that the plain language of NRS 200.366(1) requires a sexual intent. This fails for the same reasons as Appellant's other previously litigated issues.

First, this Court has already rejected Appellant's argument, and that holding is now the law of the case. Hall, 91 Nev. at 315-16, 535 P.2d at 798-99. When presented with this very argument, this Court held:

> Neither the definition of "sexual assault" nor the definition of "sexual penetration" includes an element of sexual motivation or gratification. See NRS 200.364(5); NRS 200.366. Because NRS

> 200.364(5) and 200.366 are unambiguous, the plain language of the statutes control, and we give that language its ordinary meaning.
> …
> Comparing the statutory provision making sexual seduction a crime with the sexual assault statutes confirms our reading of the latter. In contrast to sexual assault, the offense of statutory sexual seduction expressly requires sexual motivation in addition to sexual penetration. See NRS 200.364(6) (2013) ("'Statutory sexual seduction' means: … (b) Any other sexual penetration committed by a person 18 years of age or older with a person under the age of 16 years old *with the intent of arousing, appealing to, or gratifying the lust or passions of sexual desires of either of the persons*." (emphasis added)). Because the Legislature included an element of sexual motivation in its definition of statutory sexual seduction but did not do so in its definitions of sexual assault or sexual penetration, "it should be inferred that the omission was intentional." Ir re Christensen, 122 Nev. 1309, 1323, 149 P.3d 40, 49 (2006) ("One basic tenet of statutory construction dictates that, if the legislature includes a qualification in another similar statute, it should be inferred that the omission was intentional.").
> The fact that "sexual" modifies "assault" and "penetration" in NRS 200.364(5) does not, as the Solanders suggest, impliedly require sexual motivation; the more reasonable reading, especially given the Legislature's express articulation of a sexual motivation requirement in NRS 200.364(6) for sexual seduction, is that the word "sexual" as used in NRS 200.364(5) and NRS 200.366 references the *body parts involved*, not *motivation*.

AA 71-73 (emphasis added) (internal footnote omitted).

Second, this argument was waived by Appellant's decision to enter a guilty plea. Woods, 114 Nev. at 477, 958 P.2d at 97; Reuben C., 99 Nev. at 845-46, 673 P.2d at 493; Powell, 85 Nev. at 687, 462 P.2d at 758. Furthermore, Appellant's guilty plea and the charging document to which he ultimately pleaded guilty is void of any reference to sexual assault, so the question of the proper interpretation of sexual assault is moot. See Morford, 80 Nev. at 443, 395 P.2d at 863.

Third, even if this question were not already answered by this Court, the term "sexual penetration" has been defined by the Legislature, preempting what might otherwise have been the term's ordinary public meaning. NRS 200.364(9). When the Legislature defines a term, the statute's definition is conclusive and "must govern" even if the statutory definition deviates from a word's ordinary meaning. State, Dep't of Bus. & Indus. v. Check City, 130 Nev. 909, 913, 337 P.3d 755, 758 (2014).

In Nevada, "sexual penetration" is defined as follows:

> "Sexual penetration" means cunnilingus, fellatio, or any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital or anal openings of the body of another, including sexual intercourse in its ordinary meaning. The term does not include any such conduct for medical purposes.

NRS 200.364(9).

Appellant's plain language argument blatantly ignores the fact that the Legislature has given "sexual penetration," and not just "penetration," a definition. AOB at 13-15. NRS 200.364(9) does not define the adjective "sexual" and the noun "penetration" in isolation. It defines them in conjunction with one another. Appellant's failure to acknowledge the statutory definition is fatal to his plain-

meaning challenge. Appellant cannot argue about the statute's plain language while simultaneously ignoring the statute's (plain) language.[4]

Fourth, this Court has previously held that sexual assault is a general intent crime. Winnerford Frank H. v. State, 112 Nev. 520, 525-26, 915 P.2d 291, 294 (1996); Manning v. Warden, 99 Nev. 82, 84, 659 P.2d 847, 848 (1983). Appellant has not asked this Court to overturn these precedents and hold—contrary to the statute's language—that sexual assault requires a specific libidinal intent. Accordingly, his argument that sexual assault requires a specific sexual intent is unavailing.

For the many reasons listed here, this Court should affirm the Judgment of Conviction.

III. THE 2015 AMENDMENT TO THE SEXUAL-PENETRATION DEFINITION DOES NOT APPLY TO CONDUCT COMMITTED BEFORE ITS ENACTMENT

Appellant next argues that the 2015 amendment to NRS 200.364 demonstrates that the Legislature did not want the sexual-penetration definition to apply to medical devices. Once more, this argument was raised by Appellant in 2015. It fails here for the same reasons as Appellant's previous arguments.

[4] The only time Appellant cites the statutory definition of "sexual penetration" is in his Statement of the Facts. AOB at 9.

First, as this argument is merely a regurgitation of the previous argument, this Court's prior holding is the law of the case. As this Court recognized, the 2015 amendment to NRS 200.364(5) was not retroactive because by its own terms it did not "apply to an offense that is committed on or after October 1, 2015." AA 75. Despite the prospective nature of the amendment, however, the Court nevertheless held that "if the Solanders undertook the catheterization for a bona fide medical purpose, they may avoid criminal liability under NRS 200.366." AA 76.

Second, arguments on the legislature's intent were waived by Appellant's decision to enter a guilty plea. Woods, 114 Nev. at 477, 958 P.2d at 97; Reuben C., 99 Nev. at 845-46, 673 P.2d at 493; Powell, 85 Nev. at 687, 462 P.2d at 758. Furthermore, Appellant's guilty plea and the charging document to which he ultimately pleaded guilty did not include an allegation related to sexual penetration, so the determination of what the Legislature did or did not intend is moot. See Morford, 80 Nev. at 443, 395 P.2d at 863.

Third, the argument is meritless. Appellant complains that the Legislature amended the statute to preclude the State from raising sexual-assault allegations of the nature it did in this case, but this ignores the fact that the State—and, more particularly, the Clark County District Attorney's Office—supported the amendment. See, e.g., *Minutes of the Subcommittee of the Senate Committee on*

Judiciary, 78th Sess. 11-12 (May 8, 2015) (statement of Chief Deputy District Attorney James Sweetin).

Moreover, Appellant argues that the Legislature's intent was to "exclude medical devices" from sexual assault, but the Legislature did not use the term *medical devices*; it used the term *medical purposes*. AOB at 15-16. The applicability of NRS 200.364 does not center on the type of "device," inserted into a genital opening, but instead on the purpose, or intent, accompanying the penetration. Certainly, the fact that a medical device is inserted would go toward the purpose for which the penetration occurred, but it would not be the only relevant question. Otherwise, perpetrators such as the defendant in McNair v. State, 108 Nev. 53, 55-56, 825 P.2d 571, 573 (1992), a physician who was convicted for sexually assaulting his patients, would escape criminal liability completely merely by wearing surgical gloves in the process. Similarly, by expanding the 2015 definition to preclude prosecution for the use of *medical devices*, a criminal defendant who forcefully inserted a catheter into a genital opening would not be subject to prosecution even if the defendant inserted it without the victim's consent. This reading of the amendment is untenable. Throughout the instant proceedings, the question of whether Appellant and his co-defendant used a catheter for a medical purpose was in dispute. AA 76-77. The State alleged that the catheters were used to *punish* the sisters, not treat them. Id.

The 2015 amendment was prospective and did not apply to Appellant's conduct prior to its enactment. AA 75. This Court should once more find that this argument lacks merit and affirm the judgment of conviction.

IV. APPELLANT'S GUILTY PLEA WAS KNOWINGLY AND VOLUNTARILY ENTERED.

Finally, Appellant alleges that he was coerced into pleading guilty by the sentence he faced if he were to go to trial. Without citing a single relevant case, he argues that his possible sentence if he went to trial was "so coercive that innocent people feel they have no option but to plead guilty." AOB at 16.

Instead of addressing this Court's precedents for determining if a guilty plea was knowingly and voluntarily entered, Appellant proceeds through the history of the United States Supreme Court's Eighth Amendment jurisprudence. AOB at 18-19. 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)). If the sentence is within the limits set by the Legislature, a sentence will normally not be considered cruel and unusual. Glegola v. State, 110 Nev. 344, 348, 871 P.2d 950, 593 (1994). 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)).

Appellant was sentenced on three counts of abuse, neglect and endangerment resulting in substantial bodily harm. He has not challenged the sentence he received under any count. Nor has he challenged the constitutionality of those statutes which set the required sentence. Nor, confusingly, does he ask—anywhere—for this Court to do *anything* based on his explanation of the Supreme Court's Eight Amendment jurisprudence, which ends abruptly without any attempt to explain its relevance.

Instead, to the extent Appellant's argument can be read as a challenge to the validity of the guilty plea, Appellant challenges a sentence which is fictitious—the potential sentence he would have received had he gone to trial. The district court never sentenced Appellant for crimes to which he did not plea, and it therefore did not violate the Eighth Amendment. Furthermore, Appellant has "waived all constitutional claims based on events occurring prior to the entry of the pleas, except those involving the voluntariness of the pleas themselves." Warden, Nevada State

Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984). Accordingly, the unconstitutionality of a sentence that will never be imposed is waived and irrelevant.

The record demonstrates that Appellant knowingly and voluntarily entered his plea. In determining the validity of a guilty plea, courts do not consider potential constitutional violations. Instead, they ask whether Appellant entered his guilty plea knowingly or voluntarily. Rubio v. State, 124 Nev. 1032, 1038, 194 P.3d 1224, 1228 (2008). A guilty plea is knowing and voluntary if the defendant "has a full understanding of both the nature of the charges and the *direct consequences* arising from a plea of guilty." Id. A thorough plea canvass, coupled with a detailed, consistent, and written plea agreement supports a finding that a defendant pleaded guilty voluntarily and knowingly. See Woods, 114 Nev. at 476, 958 P.2d at 96; see also Freese v. State, 116 Nev. 1097, 1106, 13 P.3d 442, 448 (2000). Moreover, in Wilson v. State, 99 Nev. 362, 664 P.2d 328 (1983), the Nevada Supreme Court explained that:

> [C]ertain minimum requirements must be met when a judge canvasses a defendant regarding the voluntariness of a guilty plea…[T]he record must affirmatively show the following: (1) the defendant knowingly waived his privilege against self-incrimination, the right to trial by jury, and the right to confront his accusers; (2) the plea was voluntary, was not coerced, and was not the result of a promise of leniency; (3) the defendant understood the consequences of his plea and the range of punishment; and (4) the defendant understood the nature of the charge, *i.e.*, the elements of the crime.

Id. at 367, 664 P.2d at 330-31 (internal citations omitted).

The Guilty Plea Agreement (GPA) belies any claim that Appellant entered his plea unknowingly or involuntarily under the standards set by this Court in Wilson. First, Appellant affirmatively acknowledged that he understood that he was waiving his right to a jury trial, his right to confront his accusers, and his privilege against self-incrimination:

> By entering my plea of guilty, I *understand* that I am *waiving* and forever giving up the following rights and privileges:
>
> 1. The constitutional *privilege against self-incrimination*, including the right to refuse to testify at trial, in which event the prosecution would not be allowed to comment to the jury about my refusal to testify.
>
> 2. The *constitutional right to a speedy and public trial by an impartial jury*, free of excessive pretrial publicity prejudicial to the defense, at which trial I would be entitled to the assistance of an attorney, either appointed or retained. At trial the State would bear the burden of proving beyond a reasonable doubt each element of the offense(s) charged.
>
> 3. The constitutional *right to confront and cross-examine any witnesses who would testify against me*.
>
> 4. The constitutional right to subpoena witnesses to testify on my behalf.
>
> 5. The constitutional right to testify in my own defense.
>
> 6. The right to appeal the conviction with the assistance of an attorney, either appointed or retained, unless specifically reserved in writing and agreed upon as provided in NRS 174.035(3). I understand this means I am unconditionally waiving my right to a direct appeal of this conviction, including any challenge based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings as stated in NRS 177.015(4). However, I remain free to challenge my conviction through other post-conviction remedies including a habeas corpus petition pursuant to NRS Chapter 34.

5 RA 986-87 (emphasis added).

Second, Appellant affirmatively agreed that his plea was voluntarily entered without the influence of coercion or promises of leniency:

> I am signing this agreement *voluntarily*, after consultation with my attorney, and *I am not acting under duress or coercion* or *by virtue of any promises of leniency*, except for those set forth in this agreement.

5 RA 987 (emphasis added). Appellant then admitted that he was entering the plea because he believed that it was in his best interest to accept the negotiations rather than going to trial. 5 RA 987.

Appellant seems to be claiming that he was coerced into entering his plea based on the consequences he would have faced had he decided to exercise his right to be tried by a jury. AOB at 16-17. In making this argument, Appellant has not provided any authority to suggest that the State can unconstitutionally coerce a plea based on its charging decisions. Appellant's failure to cite relevant authority is particularly troubling when the relevant law which he ignores explicitly rejects his argument.

The Constitution does not forbid "every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights." Chaffin v. Stynchcombe, 412 U.S. 17, 30, 93 S. Ct. 1977, 1984 (1973). The Supreme Court has repeatedly held that the mere stress associated with the criminal process does not amount to coercion. United States v. Mezzanatto, 513 U.S. 196, 209-10, 115 S. Ct. 797, 805-06 (1995) (*citing* Bordenkircher v. Hayes, 434 U.S. 357,

364, 98 S. Ct. 663, 668-69 (1978). Those stresses include the possibility that a criminal defendant will face "a higher sentence" if he demands a jury trial than he would if he had entered a guilty plea and waived that right. Chaffin, 412 U.S. at 30-31, 93 S. Ct. at 1985. Indeed, the Court has held that such "difficult choices" are inevitable" in "any legitimate system which tolerates and encourages the negotiation of pleas." Id. In Brady v. United States, 397 U.S. 742, 750, 90 S. Ct. 1463, 1470 (1970) for example, the Supreme Court held that a guilty plea was valid even though it was entered to avoid the death penalty.

The State did not violate the Constitution or coerce Appellant into entering a guilty plea by merely presenting him with "the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution." Corbitt v. New Jersey, 439 U.S. 212, 220, 99 S. Ct. 492, 498 (1978) (*citing* Bordenkircher, 434 U.S. at 365, 98 S. Ct. at 669).

Appellant was subject to prosecution for each of the charges which the State raised against him in the Information. "In our adversarial system, the State has an almost exclusive right to decide how to charge a criminal defendant." Righetti v. Eighth Judicial Dist. Court of State in & for Cty. of Clark, 133 Nev. __, __, 388 P.3d 643, 647 (2017). In making that determination, the State must demonstrate probable cause that each count was committed by the defendant. NRS 171.206. The State does not have the burden of proving the counts beyond a reasonable doubt in its initial

charging decision. Instead, "[p]robable cause to bind a defendant over for trial may be based on slight, even marginal, evidence because it does not involve a determination of guilt or innocence of an accused." Sheriff, Washoe Cty. v. Dhadda, 115 Nev. 175, 180, 980 P.2d 1062, 1065 (1999).

The State in this case exercised its prosecutorial discretion to charge Appellant with thirty-six counts which it had probable cause to believe were committed by Appellant and his wife. As Appellant acknowledges, the State carried its burden in proving those counts against his wife, the co-defendant in this case, who chose to go to trial. AOB at 17. Moreover, as this Court has already determined that the State had probable cause to proceed with the Sexual Assault Counts, the underlying Information was valid. AA 77. Because the State could legally have proceeded against Appellant on these counts had he proceeded to trial, he cannot say that he was impermissibly coerced into entering the guilty plea.

Third, Appellant affirmatively agreed that he understood the consequences of his plea and the potential range of punishments:

> I understand that by pleading guilty, I admit the facts which support all the elements of the offenses to which I now plead as set forth in Exhibit "1".
>
> **AS TO COUNT 1** – I understand that as a consequence of my plea of guilty the Court must sentence me to imprisonment in the Nevada Department of Corrections for a minimum term of not less than TWO (2) years and a maximum term of not more than TWENTY (20) years. The minimum term of imprisonment may not exceed forty

> percent (40%) of the maximum term of imprisonment. I understand that I may also be fined.
>
> **AS TO <u>COUNT 2</u>** – I understand that as a consequence of my plea of guilty the Court must sentence me to imprisonment in the Nevada Department of Corrections for a minimum term of not less than TWO (2) years and a maximum term of not more than TWENTY (20) years. The minimum term of imprisonment may not exceed forty percent (40%) of the maximum term of imprisonment. I understand that I may also be fined.
>
> **AS TO <u>COUNT 3</u>** – I understand that as a consequence of my plea of guilty the Court must sentence me to imprisonment in the Nevada Department of Corrections for a minimum term of not less than TWO (2) years and a maximum term of not more than TWENTY (20) years. The minimum term of imprisonment may not exceed forty percent (40%) of the maximum term of imprisonment. I understand that I may also be fined.

5 RA 984-85.

The assertions included in the opening brief similarly support the validity of the guilty plea. Appellant alleges that he knew the length of the sentence he was facing and "chose" to enter his plea "to avoid a possible life sentence." AOB at 17. These words demonstrate that Appellant understood the consequences of his plea—he knew that by entering the plea, he would no longer be risking a life sentence by proceeding to trial.

Fourth, and finally, Appellant affirmatively acknowledged that he understood the elements of both the original charges and the charges to which he ultimately pleaded guilty:

> I have discussed the elements of all of the original charge(s) against me with my attorney and I understand the nature of the charge(s) against me.
>
> I understand that the State would have to prove each element of the charge(s) against me at trial.
>
> I have discussed with my attorney any possible defenses, defense strategies and circumstances which might be in my favor.
>
> All of the foregoing elements, consequences, rights, and waiver of rights have been thoroughly explained to me by my attorney.

5 RA 987.

Appellant's sole challenge to the validity of his plea is based on the possible sentence he faced had he gone to trial. This does not invalidate the agreement. This Court should affirm the judgment of conviction and find that the guilty plea was knowingly and voluntarily entered.

CONCLUSION

For these reasons, the State respectfully requests that this Court affirm the Judgment of Conviction.

Dated this 23rd day of May, 2019.

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 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 6,209 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 23rd day of May, 2019.

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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 23, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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