IN THE SUPREME COURT OF THE STATE OF NEVADA

OSCAR GOMEZ, JR., Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 76487

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction (Guilty Plea)
Eighth Judicial District Court, Clark County

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JURISDICTIONAL STATEMENT

This case is presumptively assigned to the Court of Appeals because it is an appeal from a judgment of conviction based on a plea of guilty. NRAP 17(b)(1).

STATEMENT OF THE ISSUE(S)

1. Whether Appellant's claims of ineffective assistance are inappropriate on direct appeal
2. Whether Appellant voluntarily entered his plea
3. Whether the waiver of appellate rights contained in the guilty plea agreement is valid

4. Whether the district court's failure to state the factors of NRS 193.165(1) is not plain error
5. Whether the district court did not abuse its discretion in sentencing Appellant
6. Whether Appellant has not shown that cumulative error warrants relief

STATEMENT OF THE CASE

After the State filed a criminal complaint against Oscar Gomes, Jr. ("Appellant"), on June 28, 2016, a preliminary hearing was held on August 2, 2016. AA 1, AA 5. Appellant was bound over, and by way of Information, charged with Murder with Use of a Deadly Weapon (Category A Felony – NRS 200.010, 200.030, 193.165 – NOC 50001) on August 3, 2016. AA 3. On April 19, 2018, Appellant entered a guilty plea agreement, pursuant to which the State filed an Amended Information charging Appellant with Murder (Second Degree) with Use of a Deadly Weapon (Category A Felony – NRS 200.010, 200.0302, 193.165 – NOC 50011). AA 20, 22.

A sentencing hearing was held on June 14, 2018. AA 90. The district court filed its Judgment of Conviction on June 22, 2018. AA 28. It sentenced Appellant to life with the eligibility for parole after serving a minimum of ten years plus a consecutive term of between ninety-six and two hundred forty months for using a

deadly weapon. AA 28-29. Appellant was given seven hundred sixteen days credit for time served. AA 29.

Appellant filed a Notice of Appeal on July 17, 2018. AA 30. On November 15, 2018, Appellant sought to stay his appeal to file a motion to withdraw guilty plea with the district court, but it was denied. AA 109, 114.

STATEMENT OF THE FACTS

The following factual summary was contained in the Presentence Investigation Report (PSI):

> Officers were assigned to investigate the crime of murder with a weapon. Officers determined on June 24, 2016, Oscar Gomez, aka Oscar Gomez Jr., the defendant and co-defendant, Gustavo Ernesto Delacruz, aka Gustavo Ernesto Delacruzcortez [sic] arrived at a local food mart to make a purchase. When the victim [Shawn Manymules] and his friend entered the store, they passed Mr. Gomez and Mr. Delacruz as they were exiting. As the victim and his friend exited the store they were confronted by Mr. Gomez and Mr. Delacruz. Thereafter, Mr. Gomez and Mr. Delacruz remarked "You're not from around here, this is our town." The exchange continued as Mr. Gomez pulled out a semiautomatic pistol from the waist of his pants. The victim's friend instructed Mr. Gomez to put away the gun and "fight like a man." The victim and Mr. Delacruz started fist fighting in the parking lot in front of the local food mart, while the defendant walked around the area of the fight with his hand on his gun. Both the victim and Mr. Delacruz sustained injuries as a result of punching each other in the face.
>
> The fight ended and Mr. Delacruz got into his vehicle and started to pull out of the parking lot. Mr. Gomez and the victim continued to exchange more words. The victim and his friend were walking away from the parking lot while Mr. Gomez continued to walk behind them, asking them where they were going. When the victim responded, "to your mom's house," Mr. Gomez pulled his gun and pointed it at the victim. The victim told him to put the gun down and fight, to which Mr.

> Gomez responded "I'm not that stupid." The victim told Mr. Gomez to put the gun down because he was not going to use it, at which point Mr. Gomez fired one shot into the victim's chest, fleeing the scene towards Mr. Delacruz's vehicle. The victim's friend then ran to the store and asked to have 911 called because his friend had been shot. The victim was transported to a local hospital where he was pronounced dead.
>
> Video surveillance and paychecks that had been cashed at the food mart led officers to the defendant as being the offender.
>
> A Warrant of Arrest was issued for Mr. Gomez and Mr. Delacruz. On June 29, 2018, both individuals were arrested and transported to the Clark County Detention Center, where they were booked accordingly.
>
> According to the Coroner's report, the victim's manner of death was homicide caused by a gunshot wound to the chest.

PSI at 4.

SUMMARY OF THE ARGUMENT

This Court should affirm the Judgment of Conviction because Appellant waived his right to appeal in the Guilty Plea Agreement and each of Appellant's claims fails to demonstrate reversible error. First, his claim of ineffective assistance of counsel is not an appropriate ground for relief on appeal. Second, a totality of the circumstances demonstrates that the Guilty Plea Agreement was voluntarily, knowingly, and intelligently entered, and Appellant cannot show plain error. Third, waivers of appellate rights have been expressly approved by this Court where the plea is voluntary. Fourth, Appellant has not shown that the district court plainly erred by failing to enumerate on the record the factors of NRS 193.165(1) at sentencing. Fifth, Appellant's sentence does not violate the Eight Amendment because it is statutorily appropriate and, he is not challenging the constitutionality of the

underlying statutes. Sixth, Appellant has failed to show error and cannot therefore show cumulative error. For these reasons, the Judgment of Conviction should be affirmed.

ARGUMENT

I. APPELLANT'S CLAIMS OF INEFFECTIVE ASSISTANCE ARE INAPPROPRIATE ON DIRECT APPEAL

Appellant first complains that his counsel was constitutionally ineffective because he "spent only minimal time" with Appellant and failed to "investigate and prepare pre-plea … to effectively counsel" Appellant. AOB at 2-3.

"[T]his Court has consistently concluded that it will not entertain claims of ineffective assistance of counsel on direct appeal." Corbin v. State, 111 Nev. 378, 381, 892 P.2d 580, 582 (1995); Pellegrini v. State, 117 Nev. 860, 882-83, 34 P.3d 519, 534 (2001). Claims of ineffective assistance must first be raised in petitions for post-conviction relief. Id.; Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994).

This Court should decline to consider Appellant's claim of ineffective assistance of counsel as it is an inappropriate issue for direct appeal. Furthermore, even if this Court were to find that this claim is appropriate for appeal, it must fail because of Appellant's failure to offer citations to the record to support specific factual contentions. NRAP 28(a)(19)(A); Thomas v. State, 120 Nev. 37, 43, 83 P.3d 818, 822 (2004); Pitman v. Lower Court Counseling, 110 Nev. 359, 365, 871 P.2d

953, 957 (1994), overruled on other grounds, Nunez v. City of North Las Vegas, 116 Nev. 535, 1 P.3d 959 (2000); Allianz Ins. Co. v. Gagon, 109 Nev. 990, 997, 860 P.2d 720, 725 (1993); Smith v. Emery, 109 Nev. 737, 856 P.2d 1386 (1993). Instead, he relies only on the naked assertion that "it is abundantly clear from the entire record" that counsel was ineffective because Appellant's plea was not knowingly, voluntarily, and intelligently entered. AOB at 8. He further confuses the issue by arguing that the involuntariness of the plea is "evidenced by the transcript." Id. Accordingly, Appellant has not adequately briefed this issue.

For these reasons, this Court should decline to consider Appellant's claim that his trial counsel was constitutionally ineffective.

II. APPELLANT VOLUNTARILY ENTERED HIS PLEA

Furthermore, even if the previous issue had been fully briefed, it is nevertheless meritless because the record fails to show that the district court plainly erred as Appellant voluntarily entered his plea.

Appellant failed to preserve this issue below and therefore waived all but plain error. Arguments or objections not made in the district court are waived on direct appeal. Dermody v. City of Reno, 113 Nev. 207, 210-11, 931 P.2d 1354, 1357 (1997). When an issue is waived, this Court only reviews for plain error. Martinorellan v. State, 131 Nev. __, __, 343 P.3d 590, 593 (2015); Maestas v. State, 128 Nev. __, __, 275 P.3d 74, 89 (2012); Green v. State, 119 Nev. 542, 545, 80 P.3d

93, 95 (2003); Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 948, 987 (1995); Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995). Plain error review asks:

> To amount to plain error, the 'error must be so unmistakable that it is apparent from a casual inspection of the record.'" Vega v. State, 126 Nev. __, __, 236 P.3d 632, 637 (2010) (quoting Nelson, 123 Nev. at 543, 170 P.3d at 524). In addition, "the defendant [must] demonstrate[] that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" Valdez, 124 Nev. at 1190, 196 P.3d at 477 (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003))). Thus, reversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights.

Martinorellan, 131 Nev. at __, 343 P.3d at 594.

A casual inspection of the record does not reveal unmistakable error. The district court was never presented with any information to suggest that the plea was involuntary. Instead, Appellant filed a motion with *this Court* to remand so that he could attempt to preserve the issue. AA 109. As this argument was not made before the district court, it is now waived and, for reasons below, does not show plain error. Dermody, 113 Nev. at 210-11, 931 P.2d at 1357.

In Nevada, a guilty plea is presumptively valid, particularly where it is entered into with the advice of counsel. Jezierski v. State, 107 Nev. 395, 397, 812 P.2d 355, 356 (1991). Defendants have the burden of proving that they did not enter their pleas knowingly or voluntarily. Bryant v. State, 102 Nev. 268, 271, 721 P.2d 364, 367 (1986) (superseded by statute, on other grounds, by Hart v. State, 116 Nev.

558, 1 P.3d 969 (2000)); see also Wynn v. State, 96 Nev. 673, 675, 615 P.2d 946, 947 (1980). In determining whether a guilty plea is knowingly and voluntarily entered, the court will review the totality of the circumstances surrounding the defendant's plea. Bryant, 102 Nev. at 271; 721 P.2d at 367. The trial court must personally address a defendant at the time he enters his plea in order to determine whether he understands the nature of the charges to which he is pleading. Id.; State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000). However, determining whether the plea was knowingly and voluntarily entered is not contingent on the plea canvass alone, as the court "will not invalidate a plea as long as the totality of circumstances, as shown by the record, demonstrates that the plea was knowingly and voluntarily made and that the defendant understood the nature of the offense and the consequences of the plea." Freese, 116 Nev. at 1105; 13 P.3d at 448. When applying the "totality of circumstances" test, the most significant factors for review include the plea canvass and the written guilty plea agreement. See Hudson v. Warden, 117 Nev. 387, 399, 22 P.3d 1154, 1162 (2001).

Appellant knowingly, intelligently, and voluntarily pleaded guilty. The district court thoroughly canvased Appellant about his plea. AA 69-76. Appellant answered definitively that he had "full and ample opportunity" to discuss his plea, the charges, and the deadly-weapon enhancement with his attorney, and that his attorney answered all of his questions to his satisfaction. AA 70. He told the court

that the plea was freely and voluntarily entered, and that he signed the plea after reading it. AA 72. He told the court that he read the Amended Information, which charged him with second degree murder with use of a deadly weapon, and that he understood the charges. AA 72. The court further gave Appellant an opportunity as part of the canvas to explain exactly what it was that he did, and he said on the record that he shot Shawn Manymules with a handgun, causing him to die. AA 74. When asked if he "intentionally pointed [his] gun at [the victim] and shot into his body," Appellant responded that he had. AA 75. He told the court that he knew as a result of his decision to shoot the victim that he could "either sustain serious bodily injury or possibly die." AA 75. Furthermore, the Court made clear that the choice to plead guilty was his alone, and he was free to either "accept the negotiation or take [his] chances at trial." AA 66. His counsel reiterated this on the record, stating that she was not "coercing" Appellant, but that she had advised him to take the deal and enter the plea. AA 66. Furthermore, contrary to Appellant's claim that he "did not have adequate time to consult" with his counsel, counsel made clear on the record that she had had "so many discussions about the same offer" with Appellant, thereby belying any claim to the contrary. AOB at 8, AA 66-67; see Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

For these reasons, Appellant has failed to show that his guilty plea was invalid or that the district court plainly erred by accepting it.

III. THE WAIVER OF APPELLATE RIGHTS CONTAINED IN THE GUILTY PLEA AGREEMENT IS VALID

Appellate next argues that the waiver of appellate rights contained in the Guilty Plea Agreement is invalid. In making this argument, he relies almost exclusively on nonbinding cases from the United States District Court for the District of Columbia, and blatantly ignores prior decisions of this Court:

> [A] defendant who has pleaded guilty has a right to appeal from the judgment of conviction, NRS 177.015(4); see also Franklin v. State, 110 Nev. 750, 751-52, 877 P.2d 1058, 1059 (1994), overruled on other grounds by Thomas, 115 Nev. at 150, 979 P.2d at 223-24, unless he knowingly and voluntarily waives that right, Cruzado v. State, 110 Nev. 745, 879 P.2d 1195 (1994), overruled on other grounds by Lee v. State, 115 Nev. 207, 985 P.2d 164 (1999).

Toston v. State, 127 Nev. 971, 977, 267 P.3d 795, 800 (2011).

A "knowing and voluntary unequivocal waiver of the right to appeal made pursuant to a plea bargain is valid and enforceable." Davis v. State, 115 Nev. 17, 19, 974 P.2d 658, 659 (1999). Federal courts similarly agree that the right to appeal can be waived. United States v. Hernandez, 134 F.3d 1435, 1437 (10th Cir. 1998) ("A defendant's knowing and voluntary waiver of the statutory right to appeal his sentence is generally enforceable."); DeRoo v. United States, 223 F.3d 919, 923 (8th Cir. 2000); United States v. Jeronimo, 398 F.3d 1149, 1154 (9th Cir. 2005) ("[A] waiver of the right to appeal is knowing and voluntary where the plea agreement as a whole was knowingly and voluntarily made."); United States v. Gonzalez-Melchor, 648 F.3d 959, 962 (9th Cir. 2011) (stating that although the Ninth Circuit

retains jurisdiction over an appeal by a defendant who has signed an appeal waiver, the court will not exercise that jurisdiction to review the merits of the case if the defendant knowingly and voluntarily waived the right to appeal).

Appellant has not argued that this Court should overturn decades of precedent and find that a waiver of appellate rights contained in a guilty plea agreement that is knowingly and voluntarily entered into is unenforceable. Instead, he argues that this particular waiver[1] is unenforceable because it is a "one-sided contract of adhesion." AOB at 10.

Federal courts addressing this issue have uniformly held that such waivers are not invalid contracts of adhesion because of the rights retained by the defendant if he decides to go to trial. United States v. Hare, 269 F.3d 859, 862 (7th Cir.2001) (rejecting argument that a waiver of appeal was invalid contract of adhesion, and noting that defendant was free to reject the plea offer and proceed to trial); see also United States v. McClure, 338 F.3d 847, 850-51 (8th Cir.2003) (plea agreement not contract of adhesion; defendant did not have to enter into agreement, but was free to hold out for better terms, to proceed to trial, or to plead guilty without an agreement); United States v. Difeaux, 163 F.3d 725, 728 (2d Cir.1998) (plea agreement waiving appeal rights if sentence imposed was within stipulated

[1] Despite the fact that the Guilty Plea Agreement was similarly presented to him as part of plea negotiations, Appellant does not claim that it is a contract of adhesion.

Guidelines range upheld against argument that it was adhesion contract); United States v. Robinson, 455 F.3d 602, 611 (6th Cir. 2006); United States v. Powers, 885 F.3d 728, 732-33 (D.C. Cir. 2018) (holding that a plea agreement was not an unenforceable adhesion contract where it limited the defendant's, but not the government's, appeal rights); United States v. Guevara, 941 F.2d 1299, 1299-1300 (4th Cir. 1991) (applying a non-mutual waiver of appeal against the government as well but otherwise upholding the waiver); United States v. Miles, Docket No. 18-1172, __ F.3d __ (10th Cir. Aug. 29, 2018) (upholding non-mutual appeal waiver).

Appellant argues that "policy concerns to protect defendants [sic] rights to appeal also require that a waiver be strictly construed and meet stringent criteria," but he does not state what those criteria are. AOB at 12. Nor does he offer any suggestion as to how the Guilty Plea Agreement where he "unconditionally waiv[ed his] right to a direct appeal of this conviction" can be strictly construed in a way that does not result in the unconditional waiver of his right to a direct appeal. AOB at 12. Instead, he makes the bare, self-serving claim that the waiver is invalid and should not be enforced to avoid a "miscarriage of justice." AOB at 12. This is insufficient to show that the waiver was invalid, particularly in light of this Court's express approval of appeal waivers in Toston, Cruzado, and Davis.

Moreover, for reasons listed above, Appellant has failed to show that the Guilty Plea Agreement itself was invalid because it was unknowingly or

involuntarily entered into. He argues instead that the district court never explicitly addressed this waiver or had him initial it, but he does not argue or present any authority to suggest that the district court had an explicit duty to do either. AOB at 10. In any event, he explicitly told the district court that he read the entire guilty plea agreement and understood everything therein. AA 73. Accordingly, even if the district court did have an affirmative duty to make sure that Appellant enumerated all the rights which he was waiving as a result of his plea, its failure to do so is harmless error. NRS 178.598.

Appellant has also failed to show that he has suffered a fundamental miscarriage of justice. NRS 34.724 still affords him the right to pursue habeas relief following the resolution of this appeal notwithstanding the waiver of appellate rights.

For these reasons, Appellant has failed to show that his waiver of appellate rights was an invalid contract of adhesion or otherwise invalid.

IV. THE DISTRICT COURT'S FAILURE TO STATE THE FACTORS OF NRS 193.165(1) IS NOT PLAIN ERROR

Appellant has failed to demonstrate that it was plain error for the district court to fail to consider the factors in NRS 193.165(1) in making its sentencing decision.

Pursuant to NRS 193.165(1), Courts who are enhancing a sentence because the underlying crime was committed with a deadly weapon "shall consider the following information:"

(a) The facts and circumstances of the crime;
(b) The criminal history of the person;

(c) The impact of the crime on any victim;
(d) Any mitigating factors presented by the person; and
(e) Any other relevant information.

NRS 193.165(1)(a)-(e).

Beyond the mere consideration of the following facts, district courts are required to "state on the record that it has considered the information" above. Id. The district court in this case did not state these factors on the record. AA 90-108.

Appellant never objected below, and therefore waives all but plain error. Dermody, 113 Nev. at 210-11, 931 P.2d at 1357; Davis v. State, 107 Nev. at 606, 817 P.2d at 1173. Plain error review asks:

> "To amount to plain error, the 'error must be so unmistakable that it is apparent from a casual inspection of the record.'" Vega v. State, 126 Nev. __, __, 236 P.3d 632, 637 (2010) (quoting Nelson, 123 Nev. at 543, 170 P.3d at 524). In addition, "the defendant [must] demonstrate [] that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" Valdez, 124 Nev. at 1190, 196 P.3d at 477 (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003))). Thus, reversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights.

Martinorellan, 131 Nev. at __ , 343 P.3d at 594.

Appellant cites Mendoza-Lobos v. State, 125 Nev. 634, 218 P.3d 501 (2009), to argue that the district court failed to comply with NRS 193.165(1). AOB at 12-14. Although Mendoza-Lobos found that the district court failed to articulate findings on the record as to each enumerated factor of NRS 193.165(1), the Court held that because nothing in the record indicated the failure had any bearing on the

sentencing decision, the omission did not cause prejudice or a miscarriage of justice and thus did not warrant relief. Id. at 645, 218 P.3d at 508.

Similarly here, although the district court did not specifically enumerate findings on the record regarding the factors of NRS 193.165(1)(a-e), Appellant fails to show prejudice.

First, the State outlined the facts and circumstances of the crime, thereby presenting the district court with the knowledge necessary under NRS 193.165(1)(a). AA 91-93. The PSI addressed this as well. PSI at 4.

Second, Appellant's counsel carefully explained—and the PSI contained—Appellant's criminal history, which NRS 193.165(1)(b) requires the court to consider. AA 95-96 ("You've got a 20-year-old kid, no prior history other than a misdemeanor offense."); PSI at 3.

Third, the majority of the sentencing hearing was spent hearing from the victim's family, allowing the court to hear firsthand the impact of Shawn's murder had on his family, who themselves were victims, as required by NRS 193.165(1)(c). The court heard testimony from three witnesses, as well as argument from both the State and Appellant's counsel. The victim's sister testified that the family lost a brother, whom she can no longer call or see, and his mother testified that his loss compounded their sorrows and that the family feels hopeless. AA 103, 106. Shawn's mother further testified that she was constantly weeping, that a part of her died when

Appellant took Shawn's life, and that life on Earth now consisted of constant "suffering to find the day" she gets to see her son again. AA 106-107. A third witness testified that Shawn lost the opportunity to meet his new nephew and that he had done everything for his family. AA 101. Shawn's family made perfectly clear that their lives were forever changed on the day that Appellant decided to senselessly murder Shawn in cold blood. Appellant himself admitted to the impact his decision had on Shawn's family. AA 94 He apologized, and recognized that he could not possibly understand what the family was going through. Id.

Fourth, mitigating factors were also presented to the Court as required by NRS 193.165(d). Letters discussed how Appellant was raised by his older sister because his mother suffered from mental illness, and how he was never able to put down roots as a result. AA 95-96. He never had friends because he spent half a year in one state and half in another. AA 95.

Fifth, and finally, as required by NRS 193.165(e), the district court was given information about other relevant information, such as Appellant's employment history, his acceptance of his guilt, his love of animals, his youth, and the fact that the crime was what his counsel called a mere "split-second decision." AA 99-100.

Because the district court was presented with information probative of each factor in NRS 193.165(1), its failure to enumerate those factors on the record does not constitute plain error warranting reversal of Appellant's sentence.

Further, pursuant to NRS 178.598, "any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." See also Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008) (noting that nonconstitutional trial error is reviewed for harmlessness based on whether it had substantial and injurious effect or influence in determining the jury's verdict). On the other hand, constitutional error is evaluated by the test laid forth in Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828 (1967). The test under Chapman for constitutional trial error is "whether it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" Tavares v. State, 117 Nev. 725, 732 n.14, 30 P.3d 1128, 1132 n. 14 (2001).

Here, Appellant has made no claims of constitutional error, only that the district court's failure to enunciate the factors of NRS 193.165(1)(a-e) at sentencing somehow renders moot the testimony and argument which the district court heard at testimony. Appellant's arguments run counter to Nevada law. This court has long held that the district court is under no duty to utter "talismanic phrases" or "particularized findings" in support of its sentencing decisions:

> …nothing in Clark stands for the proposition that in meeting this obligation the sentencing court must utter specific phrases or make "particularized findings" that it is "just and proper" to adjudicate a defendant as a habitual criminal. The sole issue pursuant to Clark is whether the sentencing court actually exercised its discretion. While it may be easier to answer this question if the sentencing court makes particularized findings and specifically addresses the nature and gravity of the prior convictions*, this court has never required the district courts*

> *to utter "talismanic" phrases*. See Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986). Instead, this court looks to the record as a whole to determine whether the sentencing court actually exercised its discretion.

Hughes v. State, 116 Nev. 327, 333, 996 P.2d 890, 893 (2000) citing Clark v. State, 109 Nev. 426, 428, 851 P.2d 426, 427 (1993) (emphasis added). Here, the weight of the evidence against the Appellant was clear, as Appellant signed a guilty plea agreement and the court heard substantial testimony in support of the harm that Appellant caused. As Appellant failed to object to the district court's failure to utter the talismanic phrases of NRS 193.165(1)(a-e), this Court should find that any omission of the sentencing enhancement factors caused Appellant no prejudice and affirm the Judgment of Conviction.

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN SENTENCING APPELLANT

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 long as 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). Furthermore, 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)).

NRS 200.030(5) provides that:

> A person convicted of murder of the second degree is guilty of a category A felony and shall be punished by imprisonment in the state prison:
>
> (a) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or
>
> (b) For a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served.

Moreover, if a deadly weapon is used in the commission of second-degree murder, the sentence for the underlying crime is enhanced, and "any person who uses a firearm … in the commission of a crime shall, in addition to the term of imprisonment prescribed by statute for the crime, be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 20 years." NRS 193.165(1).

Here, Appellant's sentence was not an abuse of discretion and did not violate the Eighth Amendment for several reasons. First, following the entry of Appellant's guilty pleas for second-degree murder with the use of a deadly weapon, the district court sentenced him for the underlying crime to life with the possibility of parole after a minimum of ten years, one of only two possible sentences under NRS 200.030(5), the constitutionality of which Appellant has not challenged. AA 29. The enhancement for using a deadly weapon also fell directly within the statutory range, as Appellant's sentence was enhanced by a minimum of 96 and a maximum of 240 months, a range entirely permissible under NRS 193.165(1). AA 29. Appellant has similarly failed to allege that NRS 193.165 is unconstitutional.

Second, Appellant relies on the Supreme Court's decision in Weems v. United States, 217 U.S. 349, 30 S. Ct. 544 (1910) to argue that it is possible for a minimum sentence to be unconstitutional even if statutorily permissible. AOB at 16. Weems is inapposite. Weems was convicted of falsifying a public document and using that document to pay employees of two different establishments a total of 612 pesos. Id. at 357-58, 30 S. Ct. at 545. He was sentenced to pay a fine of 4000 pesos and serve fifteen years cadena.[2] Id. at 358, 30 S. Ct. at 545.

[2] Cadena in Spanish law was "confinement at hard labor while chained from waist to ankle." Cadena, Black's Law Dictionary 244 (10th ed. 2014).

Unlike in Weems, there is no conceivable argument that Appellant's sentence was disproportionate to the severity of the crime. Appellant took a life, and then pleaded guilty to second-degree murder with the use of a deadly weapon. Appellant argues that "the punishment he received in this case far exceeded the length of a reasonable sentence for a second degree murder conviction," underlining the word "second" as if it somehow mitigates the fact that Appellant shot an unarmed victim in the chest. AOB at 16.

Even if Appellant had not used a deadly weapon, however, the Legislature has still determined that second-degree murder is an offense egregious enough to carry with it a life sentence. NRS 200.030(5)(a). His use of a firearm only adds to its seriousness.

The sentence comports with the Eighth Amendment, the statutory authority afforded the judge, and ultimately, the facts of this case. Appellant's argument is nothing more than a self-serving and conclusory complaint that he subjectively disagrees with the sentence. AOB at 16. This is simply insufficient to demonstrate an abuse of discretion by the lower court or a violation of the Eight Amendment. This Court should affirm the sentence imposed in the Judgment of Conviction.

VI. APPELLANT HAS NOT SHOWN THAT CUMULATIVE ERROR WARRANTS RELIEF

Appellant alleges that the cumulative effect of error deprived him of his rights. AOB at 16-18. This Court considers the following factors in addressing a claim of

cumulative error: (1) whether the issue of guilt is close; (2) the quantity and character of the error; and (3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-5 (2000). Appellant needs to present all three elements to be successful on appeal. Id.

First, the issue of Appellant's guilt was not close, as (1) video surveillance, as did Shawn's friend at the preliminary hearing, identified Appellant as the murderer, and (2) Appellant pleaded guilty to the murder. Presentence Investigation Report at 4, AA 8, 11, 71-72. Second, Appellant has not asserted any meritorious claims of error, and, thus, there is no error to cumulate. United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("…cumulative-error analysis should evaluate only the effect of matters determined to be error, *not the cumulative effect of non-errors*.") (emphasis added). Third, although the gravity of Appellant's crime weighs in Appellant's favor, as Shawn lost his life as a result of Appellant's decision, he has not shown cumulative error in light of the other two Mulder factors.

Each of Appellant's claims has failed to demonstrate that he is entitled to relief. Accordingly, this Court should affirm the Judgment of Conviction.

CONCLUSION

For the aforementioned reasons, this Court should affirm the Judgment of Conviction.

/ / /

Dated this 7th day of January, 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 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 5,491 words and 22 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 7th day of January, 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 7th day of January, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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