IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS CASH, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 77018

RESPONDENT'S ANSWERING BRIEF

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

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STATEMENT OF THE ISSUE(S)

I. **WHETHER THE STATE INTRODUCED SUFFICIENT EVIDENCE TO CONVICT APPELLANT**
II. **WHETHER DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN SENTENCING APPELLANT**

STATEMENT OF THE CASE

On April 19, 2018, the State filed an amended information charging Appellant with MURDER WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.010, 200.030, 193.165 - NOC 50001) and BATTERY WITH INTENT TO KILL (Category B Felony - NRS 200.400.3 - NOC 50153). 6 Appellant's Appendix ("AA") 1342.

Thereafter, Appellant pleaded not guilty and went to trial. Appellant's trial started on June 18, 2018, 1AA001. The jury trial lasted eight days and concluded on June 28, 2018. 6AA1339. On that date, the jury found Appellant guilty of Second Degree Murder with Use of a Deadly Weapon and not guilty of Battery with Intent to Kill. 6AA1339. On August 20, 2018, District Court sentenced Appellant to life without the possibility of parole under the large habitual criminal statute. 6AA1347-1348.

STATEMENT OF THE FACTS

On December 11, 2017, a verbal argument led to Appellant, a fifty-two-year-old man, stabbing and killing Ezekiel Devine, thirty-one years his junior, in the middle of the street. 4AA983.

The events of this day started when Kyriell Davis, twenty-eight years Appellant's junior, and his girlfriend Brittney had a heated verbal argument while exchanging their children. 4AA878-879, 886-887, 983. Eventually, Kyriell pushed Brittney away from him with his hands. 4AA887-888. Upon hearing this verbal argument, Appellant came down to intervene. 4AA889-890. Appellant asked whether Kyriell hit Brittney—Brittney answered no and told Appellant to mind his own business. 4AA889.

Thereafter, Appellant and Kyriell tussled. Appellant started this fight with Kyriell: multiple witnesses observed Appellant punch towards Kyriell when Kyriell

had his back turned to Appellant, without provocation by Kyriell. 4AA889-892, 910-911, 967. Appellant later admitted that he threw the first punch. 6AA1242. Ezekiel, who had been sitting in the car having a video chat and who only came to help with the child exchange, was alerted to the fight and attempted to break it up. 4AA878-879, 885, 895, 937. At about that time, two cars drove up the road and separated Ezekiel and Appellant from Kyriell. 4AA896. Kyriell saw a flash in Appellant's hand as the cars came by and tried to warn Ezekiel. 4AA896. While Appellant and Kyriell were separated, Appellant stabbed Ezekiel straight through the heart. 3AA698; 4AA896. Ezekiel collapsed in the middle of the street and quickly died. 3AA702-703, 730.

Kyriell testified about his recollection of the fight and the events leading up to it. Kyriell remembered the verbal argument between Britany and himself starting when Brittany began ranting and calling Kyriell names. 4AA889. He then observed Brittany yelling at Appellant. 4AA890. Appellant took a swing at Kyriell as he attempted to put his baby in his car seat, when his back was towards Appellant. 4AA890, 892. After Appellant tried to punch Kyriell, Kyriell and Appellant interlocked and Appellant tried to slam him to the ground. 4AA891. Kyriell never swung his fist at Appellant. 4AA892-893. Appellant and Kyriell wrestled for a while until they ended up in the street and Ezekiel intervened to break up the fight by pushing his hand through the middle of the two. 4AA893-4AA895. Kyriell saw a

flash from Appellant's hand as a car came drove in between the group, leaving Appellant and Ezekiel on one side of the street and Kyriell on the other side of the street—far apart. 4AA895-897. Soon after, Ezekiel fell to the ground after being stabbed by Appellant. See 4AA896.

Appellant's actions after the victim died demonstrated his consciousness of guilt. Appellant did not call 911—even though he later told police that Kyriell said that he would shoot up the house after Kyriell and Brittany verbally fought. 5AA1001; 6AA1248. Despite these alleged threats and after he killed Ezekiel, Appellant locked the door, left his home, and ran from the scene. 4AA900. In his haste to leave, Appellant left an older crippled woman, a three-year-old, a seventeen-year-old, and his niece in the home. 4AA822-823, 829, 954. Appellant escaped the scene by climbing over two walls and jumping down from a high point of one of the walls. 5AA1032-1035. Appellant also destroyed and hid the murder weapon, a knife. 6AA1244. Appellant did not go back to his home until just after the police left and did not account for where he went between 7:00pm and 2:00am the night of the crime, when he finally turned himself in to police. 5AA1041; 6AA1245.

Appellant initially denied killing the victim, but then later argued that he killed the victim in self-defense, despite multiple witnesses seeing Appellant throw the first punch. 4AA889-892, 910-911, 967; 5AA1094-1095, 1166. Brittney told police that Appellant, Brittney's stepdad, threw the first punch. 4AA967. Brittney also stated

that she never felt in danger and that Kyriell did not hit her. 4AA976, 979. Moreover, multiple witnesses stated, including Appellant, that no one but Appellant had a weapon. 4AA921-922, 5AA1148-1149, see 6AA1242. Appellant told police that he stabbed Ezekiel because he did not want to get hit again. 6AA1243.

Brittany also testified about her recollection of the fight. After she argued with Kyriell, Appellant came out of the house and tried to punch Kyriell. 4AA962. After Appellant started this fight with Kyriell, both Appellant and Kyriell locked together in a bear hug and after Appellant's first punch, no one threw punches. 4AA962-963. Both men were "equally locked up." 4AA963. Brittany also testified that she held Kyriell after Ezekiel attempted to break up the fight. 4AA966-967. Brittany told police that she did not feel scared or threatened during her verbal argument with Kyriell. 4AA976. She also said that during the argument, Kyriell did not hit her or slam her into a car. 4AA979.

Through their actions, Appellant's family telegraphed that Appellant did not act in self-defense. Appellant's family did not call the police; instead, they went back into the house and shut the door. 5AA1148, 1151. Furthermore, Appellant's family did not bring out towels or water or ask if the victim needed any help. 4AA925; 5AA1148. Ultimately, Appellant's family did not come out of the house until police made them, through use of a bullhorn, about forty minutes later. 4AA820-821, 925; 5AA1148. After Appellant left the scene, Appellant spoke with family members

while police were outside his home. 5AA1228. Appellant told his family that he did not kill Ezekiel and did not even touch him—and his family informed him that Ezekiel was dead. 5AA1228.

SUMMARY OF THE ARGUMENT

Appellant cannot entice this Court into invading the province of the jury by mislabeling a credibility argument as a sufficiency of the evidence claim. Appellant fails to demonstrate that no rational jury could have convicted him on the evidence presented. Instead, Appellant invites this Court to discredit the testimony of witnesses in favor of his self-serving version of the events. Such an invitation to error is beyond the scope of a sufficiency review since this Court does not sit as a thirteenth juror, with veto power over the other twelve.

This Court should also find that District Court did not abuse its discretion by sentencing Appellant, a four-time violent felon who has spent the vast majority of the last thirty-to-forty years in prison, to large habitual criminal treatment. Appellant stands convicted of Second-Degree Murder with Use of a Deadly Weapon and has four prior felonies: one count of Possession of Cocaine, and three counts of Robbery with Use of a Firearm. Large habitual treatment fits Appellant. To the extent that this Court disagrees, any error was harmless because Appellant also is a habitual felon as a matter of law.

ARGUMENT

I. THE STATE INTRODUCED SUFFICIENT EVIDENCE TO SUPPORT APPELLANT'S CONVICTION

Appellant alleges that the State produced insufficient evidence to prove that he did not act in self-defense. AOB at 6.[1]

When reviewing a sufficiency of the evidence claim, the relevant inquiry is *not* whether the court is convinced of the defendant's guilt beyond a reasonable doubt. Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980). Rather, when the jury has already found the defendant guilty, the limited inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable

[1] Appellant also briefly argues that the State incorrectly and improperly told the jury that Appellant had the duty to retreat and thereby committed prosecutorial misconduct. AOB at 10. Appellant does not seriously present this issue for this Court's consideration because he does not cite any authority for prosecutorial misconduct. It is Appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this Court. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (refusing to consider prosecutorial misconduct argument where no authority is presented). Moreover, the record belies this argument. The State argued that he could have retreated, in the context of explaining that self-defense claims are not available to the original aggressor unless the original aggressor attempts to retreat. Culverson v. State, 106 Nev. 484, 481, 797 P.2d 238, 241 (1990) ("a person who as a reasonable person believes that he is about to be killed or seriously injured by his assailant does not have a duty to retreat unless he is the original aggressor."). This statement of law directly applies to the facts of the case; multiple witnesses stated that Appellant threw the first punch during the fight and Appellant claimed that he killed Ezekiel, the victim, in self-defense. 4AA889-892, 910-911, 967; 5AA1094-1095, 1166.

doubt." Milton v. State, 111 Nev. 1487, 1491, 908 P.2d 684, 686-87 (1995) (internal quotation and citation omitted).

Thus, the evidence is only insufficient when "the prosecution has not produced a minimum threshold of evidence upon which a conviction may be based, even if such evidence were believed by the jury." Evans v. State, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996) (quoting State v. Purcell, 110 Nev. 1389, 1394, 887 P.2d 276, 279 (1994)) (emphasis removed) (overruled on other grounds). "[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992)). It is further the jury's role "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). Moreover, in rendering its verdict, a jury is free to rely on circumstantial evidence. Wilkins, 96 Nev. at 374, 609 P.2d at 313. Indeed, "circumstantial evidence alone may support a conviction." Hernandez v. State, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002).

In order to claim self-defense, [a] person who does the killing [must] actually and reasonably believe: [t]hat there is imminent danger that the assailant will either kill him or cause him great bodily injury; and [t]hat it is absolutely necessary under

the circumstances for him to use in self-defense force or means that might cause the death of the other person, for the purpose of avoiding death or great bodily injury to himself. Runion v. State, 116 Nev. 1041, 1051, 13 P.3d 52, 59 (2000). Moreover, the right of self-defense is not available to an original aggressor, Id. Whether a defendant reasonably believed he was in fear of death or great bodily harm is a question of fact for the jury. Davis v. State, 130 Nev. 136, 143, 321 P.3d 867, 872 (2014).

The State introduced credible and sufficient evidence proving that Appellant did not act in self-defense. Multiple witnesses stated that Appellant threw the first punch during the fight. 4AA889-892, 910-911, 967; 5AA1094-1095, 1166. Runion, 116 at 1051, 13 P.3d at 59 (2000) ("[t]he right of self-defense is not available to an original aggressor."). Moreover, multiple witnesses testified, including Appellant, that no one but Appellant had a weapon. 4AA921-922, 5AA1148-1149, see 6AA1242. Appellant stated that he stabbed the victim, Ezekiel, because he did not want to get hit again. 6AA1243. Appellant's reason for stabbing the victim does not seriously demonstrate that he was afraid for his life—in his own words he just wanted to not get hit again. Id. A "reasonable" person would not find it necessary to resort to deadly force in this situation—particularly where a car came by and split up the fight.

The State introduced credible and sufficient evidence of Appellant's actions after the crime, which demonstrated that Appellant did not have a reasonable fear of death. Appellant did not call 911—even though he later told police that Kyriell said that he would shoot up the house after Kyriell and Brittany verbally fought. 5AA1001; 6AA1248. Despite these alleged threats and after he killed Ezekiel, Appellant locked the door, left his home, and ran from the scene. 4AA900. In his haste to leave, Appellant left an older crippled woman, a three-year-old, a seventeen-year-old, and his niece in the home while claiming that Kyriell would should up his home. 4AA822-823, 829, 954. Appellant fled the scene by jumping two walls and jumping down from a high point of one of the walls. 5AA1032-1035. Appellant also destroyed and hid the murder weapon, a knife. 6AA1244. Appellant did not go back to his home until just after the police left and did not account for where he went between 7:00pm and 2:00am the night of the crime, when he turned himself in to police. 5AA1041; 6AA1245. The State submits that these actions, after the fact, are not those of a person who feared for his life or the safety of others.

Appellant's arguments to the contrary only extensively relitigate the trial and the jury determination that Appellant did not act in reasonable fear. AOB at 6-10. For example, Appellant discusses the circumstances of the verbal argument between Kyriell and Brittney, the fight between Appellant started with Kyriell, the victim Ezekiel attempting to break up the fight, and the aftermath. Id. Even if Appellant

believed that Ezekiel was the initial aggressor and had a "bar," and therefore had a reasonable fear of death or great bodily harm, Appellant's arguments fail: "it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." Origel-Candido, 114 Nev. at 381, 956 P.2d at 1380 (quoting McNair, 108 Nev. at 56, 825 P.2d at 573); 6AA1032. Whether a defendant reasonably believed he was in fear of death or great bodily harm is a question of fact for the jury. Davis v. State, 130 Nev. 136, 143, 321 P.3d 867, 872 (2014). Indeed, Appellant made these same types of arguments to the jury during his closing argument. 6AA1030-1032. The jury rejected these arguments—this Court should too.

II. DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN SENTENCING APPELLANT

Next, Appellant complains that District Court abused its discretion by adjudicating him as a habitual criminal and imposing a sentence of life without the possibility of parole. AOB at 11.

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. The Court Properly Adjudicated Appellant as a Habitual Criminal

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)) (emphasis in original). 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, 207.012 or 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. 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.

District Court did not abuse its discretion by adjudicating Appellant as habitual criminal. In the instant matter, Appellant stood convicted of Second Degree Murder with Use of a Deadly Weapon. This Court has affirmed district courts adjudicating and sentencing defendants as habitual criminals as a punishment for far less serious felonies. E.g. LaChance, 130 Nev. at 263, 279, 321 P.3d at 919, 930 (domestic battery by strangulation, domestic battery causing substantial bodily harm, possession of a controlled substance for the purpose of sale); Yarell v. State, No. 66649, 2016 WL 830847 (Nev. Mar. 1, 2016) (two counts of possession of a controlled substance) (unpublished).

Moreover, Appellant has spent the greater part of his life in custody. Appellant committed his first felony, drug possession, in 1988. PSI at 3.[2] Appellant received probation for that offense but then committed new crimes while on probation and was convicted of one count of Robbery with Use of a Firearm in 1991. PSI at 3-4. The State of California paroled Appellant in 1995. But then in 1996, Appellant committed two new Robberies with Use of a Firearm—the same charge he got parole on—and spent from 1997 until 2013 in California prison. PSI at 4. California

[2] The State has submitted a contemporaneous Motion to Transmit Pre-Sentence Investigation Report ("PSI") so that this Court may verify references to the PSI.

discharged Appellant from parole in 2016—Appellant murdered Ezekiel one year later in Las Vegas in the instant case. The State introduced, and District Court admitted, certified copies of Appellant's prior Judgments of Convictions for these crimes along with a sentencing memorandum. 6AA1350-1351; Respondent's Appendix ("RA") at 001-055.

Appellant tries to characterize his life of crime as ancient history—but he has spent nearly his entire adult life in prison. AOB at 11. Appellant's argument masks his true record. At first blush, Appellant's record seems ancient but this first impression misleads: Appellant appears to have only spent three-to-six years out of custody since 1988. PSI at 3-4. In that light, Appellant's argument that his prior felonies "were 29, 27 and 21 years old" rings hollow. AOB at 11. Appellant appears to have only spent a year or two not under sentence of prison, parole, or probation since 1989. Moreover, as a juvenile, Appellant was convicted of second degree murder and assault with a deadly weapon—in 1982 and 1980 respectively. RA007-008. Although the State referenced these convictions at sentencing to inform District Court's sentencing discretion, it did not rely on these juvenile convictions to support habitual treatment. 6AA1350-1351.

District Court correctly decided to adjudicate Appellant as a habitual criminal. Although Appellant "earned a certificate in HVAC repair," AOB at 12, his true career is violent crime—three convictions for Robbery with Use of a Firearm and

one adult conviction for Second Degree Murder with Use of a Deadly Weapon. PSI at 4; 6AA1350-1351. In this light, Appellant's citation to Sessions v. State is particularly unavailing. 106 Nev. 186, 187–88, 191, 789 P.2d 1242, 1243, 1234 (1990) (overruling habitual sentence supported by convictions for possession of marijuana, theft of property valued at over fifty dollars, grand theft, and escape without the use of force); AOB at 11. Moreover, the Sessions Court did not meaningfully discuss how many years in custody that defendant served, where here, Appellant has spent the vast majority of the last thirty-to-forty years in prison. Id. Appellant is not a reformed criminal—he is a habitual criminal who has spent most of his life in prison. To the extent that this Court disagrees with this characterization, nonetheless, District Court did not abuse its discretion.

Despite Sessions, this Court has affirmed large habitual treatment when supported by far less serious felonies than found in Appellant's record. E.g. LaChance, 130 Nev. at 279, 321 P.3d at 930 (battery causing substantial bodily harm, possession of controlled substance, possession of a stolen motor vehicle, trafficking in a controlled substance, possession of a controlled substance); McGervey v. State, 114 Nev. 460, 467, 958 P.2d 1203, 1208 (1998) (possession of cocaine for sale, kidnapping, and robbery); Brisbane v. State, 385 P.3d 55 (Nev. 2016) (possession of a controlled substance, aggravated assault with a deadly

weapon, possession of a firearm by an ex-felon, and larceny) (unpublished disposition).

This Court should find that District Court did not abuse its discretion.

C. If District Court Abused Its Discretion by Sentencing Appellant as a Habitual Criminal, this Error is Harmless: Appellant is a Habitual Felon as a Matter of Law

According to NRS 178.598, any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded. An error is harmless if the error did not have substantial and injurious effect or influence in determining the jury's verdict. Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008).

NRS 207.012 requires that district courts to sentence a defendant convicted of certain offenses as a habitual felon if two qualifying prior convictions are found. Nelson v. State, 123 Nev. 534, 551, 170 P.3d 517, 528 (2007). District courts must sentence defendants to habitual felon treatment, a Category A felony, when a person is convicted of murder or other enumerated felonies, and has been previously twice convicted of any crime which under the laws of the situs of the crime or of this State that would constitute a robbery, murder, or other enumerated felony, whether the prior convictions occurred in this State or elsewhere. NRS 207.012. This statute and this Court's case law stands for the proposition that the district court has no discretion and must sentence defendants to habitual felon treatment if the statute applies and the state makes an offer of proof. Nelson, 123 Nev. at 551, 170 P.3d at

528. Moreover, Nevada law requires that a habitual felon sentence only operates to increase, not to reduce, the sentence otherwise provided by law. NRS 207.016(1).

Appellant qualifies as a habitual felon and District Court should have adjudicated Appellant as a habitual felon. Appellant has two prior qualifying robberies. Appellant stood convicted of one count of Robbery with Use of a Firearm in 1991. PSI at 3-4. The State of California paroled Appellant in 1995. But then in 1996, Appellant committed two new Robberies with Use of a Firearm—the same charge he received parole on—and spent from 1997 until 2013 in California prison. PSI at 4. California discharged Appellant from parole in 2016. One year later, Appellant murdered Ezekiel with use of a deadly weapon and the jury ultimately convicted him for the crime in the instant case. The State introduced, and the Court admitted, certified copies of Appellant's Judgments of Convictions for these crimes. 6AA1350-1351.

Appellant's convictions for Robbery with Use of a Firearm would qualify as a felony under Nevada law; the elements are the same. California defines robbery as the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear. Cal. Penal Code § 211 (West). Nevada similarly defines robbery, in pertinent part, as the unlawful taking of personal property from the person of another, or in the person's presence, against his or her will, by means of force or violence or fear

of injury. NRS 200.380. Appellant's robbery convictions, based upon two separate transactions and occurrences, would qualify as prior convictions sufficient to support and require District Court to sentence Appellant to mandatory habitual felon treatment.[3]

Nevada law required District Court to sentence Appellant to life without parole because—mandatory—habitual felon treatment must operate to increase a sentence otherwise faced by Appellant as a matter of law. Appellant stood convicted of Second-Degree Murder with Use of a Deadly Weapon. A person standing in Appellant's shoes shall be punished by imprisonment in the state prison: for life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or for a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served. NRS 200.030(5). For use of a deadly weapon, Appellant must be sentenced to a consecutive minimum term of not less than 1 year and a maximum term of not more than 20 years. NRS 193.165. Habitual criminal and felon treatment both allow District Court three choices when

[3] Appellant cites federal law interpreting whether robbery in California qualifies as a violent felony under a federal statutory scheme, to argue that Appellant's Robbery with Use of a Firearm convictions do not qualify under Nevada's habitual felon statute as prior felonies. AOB at 11 n.1. This law does not apply here for obvious reasons. And this federal law is not persuasive here as the elements of both state robbery statutes are the same—and robbery qualifies as a felony sufficient to support a mandatory habitual felon sentence. NRS 207.012(2). There is no material difference between robbery in Nevada and robbery in California.

sentencing to habitual treatment, two of which are the minimum Appellant already faced for his second-degree murder conviction:

> (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*.

NRS 207.010(1)(b); NRS 207.012(1)(b). Thus, based upon Appellant's conviction, District Court—as a matter of law—must sentence to habitual felon treatment and must sentence Appellant to life without the possibility of parole. Appellant already faced a life with parole and a ten-years to twenty-five years sentencing range for his second-degree murder conviction, plus a consecutive minimum of one year: District Court could only *increase* his Appellant's sentencing exposure, as required by NRS 207.016(1), by sentencing him to life without parole. In this light, even if this Court believes that District Court abused its discretion by adjudicating Appellant as a habitual criminal, this error was harmless because it did not have a substantial and injurious effect or influence on Appellant's sentence as a matter of law. Knipes, 124 Nev. at 935, 192 P.3d at 1183. Appellant would have received the same sentence under either the permissive habitual criminal adjudication or the mandatory habitual felon adjudication.

CONCLUSION

For the foregoing reasons, this Court should affirm Appellant's Judgment of Conviction.

Dated this 15th day of April, 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 4,867 words and 21 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 April, 2019.

Respectfully submitted

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Nevada Bar #001565

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 15th day of April, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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