IN THE SUPREME COURT OF THE STATE OF NEVADA

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TONEY A. WHITE, III,, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 78483

RESPONDENT'S ANSWERING BRIEF

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

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ROUTING STATEMENT

This appeal is presumptively retained by the Supreme Court because it relates to a conviction for a Category A felony based on Appellant's plea of guilty. NRAP 17(b)(1).

STATEMENT OF THE ISSUES

1. Whether Appellant unequivocally requested to proceed pro per.
2. Whether Appellant's claims of ineffective assistance of counsel are appropriate on direct appeal.
3. Whether Appellant's guilty plea was entered into freely and voluntarily.
4. Whether Appellant affirmed the factual basis surrounding his guilty plea and discussed the details of the kidnapping charge.
5. Whether Appellant's sentence does not amount to cruel and unusual punishment under the Eighth Amendment.
6. Whether there was no cumulative error.

STATEMENT OF THE CASE

On March 9, 2016, the State charged Toney A. White ("Appellant"), by way of Indictment, with the following: Count 1 – Conspiracy to Commit Robbery (Category B Felony – NRS 200.380, 199.480 – NOC 50147); Count 2 – Burglary While in Possession of a Deadly Weapon (Category B Felony – NRS 205.060 – NOC 50426); Count 3 – First Degree Kidnapping with Use of a Deadly Weapon (Category A Felony – NRS 200.310, 200.320, 193.165 – NOC 50055); Count 4 – First Degree Kidnapping with Use of a Deadly Weapon (Category A Felony – NRS 200.310, 200.320, 193.165 – NOC 50055); Count 5 – Attempt Robbery with Use of a Deadly Weapon (Category B Felony – NRS 200.380, 193.330, 193.165 – NOC 50145); Count 6 – Attempt Robbery with Use of a Deadly Weapon (Category B Felony – NRS 200.380, 193.330, 193.165 – NOC 50145); Count 7 – Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Category B Felony – NRS 200.481 – NOC 50226); and Count 8 – Impersonation of an Officer (Gross Misdemeanor – NRS 199.430 – NOC 53013). I AA a-e.

On October 19, 2017, Appellant pled guilty in District Court and signed a Guilty Plea Agreement. I AA 063-075. On January 30, 2018, Appellant filed a Motion for Withdrawal of Guilty Plea, and for Appointment of New Counsel, or alternatively, to proceed in Pro Per. I AA 052-061. On February 6, 2018, the Court granted Appellant's Motion for Appointment of New Counsel. III AA 660-663. On

December 20, 2018, the Court granted the Appellant's Motion to Withdraw Guilty Plea and set the case for trial. III AA 687-690.

On February 19, 2019, Appellant's Jury Trial commenced. I AA 133. After two days of trial, on February 21, 2019, Appellant pled guilty to the charges in the Amended Indictment. III AA 487-509. The Court conducted a thorough plea canvass of Appellant and set a date for sentencing. III AA 496-509.

On March 19, 2019, the Court sentenced Appellant as follows: Count 1 – to a minimum of twenty-eight (28) months and a maximum of seventy-two (72) months; Count 2 – to a minimum of sixty-six (66) months and a maximum of one-hundred eighty (180) months, concurrent to Count 1; Count 3 – to life in the Nevada Department of Corrections with parole eligibility beginning after a minimum of five (5) years, plus a consecutive five (5) to twenty (20) years for the deadly weapon enhancement; Count 4 – to life in the Nevada Department of Corrections with parole eligibility beginning after a minimum of five (5) years, plus a five (5) to twenty (20) years for the deadly weapon enhancement, consecutive to Count 3; Count 5 – to a minimum of forty-eight (48) months and a maximum of one-hundred twenty (120) months, plus a consecutive forty-eight (48) to one-hundred twenty (120) months for the deadly weapon enhancement, to run concurrent; Count 6 – to a minimum of forty-eight (48) months and a maximum of one-hundred twenty (120) months, plus a consecutive forty-eight (48) to one-hundred twenty (120) months for the deadly

weapon enhancement, to run concurrent; Count 7 – to a minimum of sixty-six (66) and a maximum of one-hundred eighty (180) months, to run concurrent; and Count 8 – to 364 days in the Clark County Detention Center, concurrent. I AA 131-132. The aggregate sentence was twenty (20) years to life in the Nevada Department of Corrections, with 1,134 days credit for time served. I AA 132.

The Judgment of Conviction was filed on March 27, 2019. I AA 113-115. On March 28, 2019, Appellant filed a Notice of Appeal. I AA 116-117. On July 26, 2019, Appellant filed a Motion to Withdraw Guilty Plea. III AA 513-516. The State's Opposition was filed on October 7, 2019.[1]

STATEMENT OF THE FACTS

The District Court relied on the following factual determination:

> On January 20, 2016, Henderson Police dispatch received a call for service at a local Henderson apartment community in reference to a loud verbal dispute taking place in an apartment and a possible home invasion. Upon the officer's arrival, he observed a male standing behind a Jeep Cherokee. The officer briefly spoke with the male, identified as one of the co-defendants, Kevin Wong, as the officer approached the door. Screaming was heard from the apartment and a male victim (Victim 2) was found lying on the floor handcuffed and bleeding. The officer freed the handcuffs from the victim and also found a female victim (Victim 1) and secured the apartment. At this time, Mr. Wong entered his Jeep and fled the scene eventually being stopped by patrol units for several driving infractions.
>
> Victim 2 was transported to the hospital with significant head injuries to include lacerations and loss of teeth. He also suffered from numerous strikes from a baton to the head and torso area. Photographs were taken of his

[1] Appellant left out the State's opposition in its appendix pursuant to NRAP 30(b)(3). However, this is not essential and does not impact Respondent's analysis.

> injuries. A detective arrived at the scene and interviewed Victim 1. She stated she was sitting on the couch and heard someone knocking at the door. She answered and there was a female, identified as co-defendant Amanda Sexton and two male suspects, identified as co-defendants Marland Dean, and Toney White who forcibly opened the door and entered the apartment. Firearms were drawn and aimed at both of the victims. Ms. Sexton places Victim 1 in handcuffs and Mr. White and Mr. Dean began to yell at Victim 2 stating, "We have a search warrant, US Marshalls; get on the ground." Mr. White and Mr. Dean began beating Victim 2 with metal batons and struck him in the head and face.
>
> A detective responded to a traffic stop location involving Mr. Wong. Mr. Wong gave the detective consent to search his vehicle. The detective observed a purse on the passenger seat and located a Nevada Identification card with Amanda Sexton's name on it. Mr. White, Mr. Dean, and Ms. Sexton met up with Mr. Wong and forced their way into the victim's apartment. Mr. Wong stated he observed officers arriving so he left the complex when he saw Mr. White, Mr. Dean, and Ms. Sexton flee the residence.
>
> All four suspects were arrested, transported to the Henderson Detention Center and booked accordingly.

Supplemental Presentence Investigation Report, Prepared March 11, 2019, at 8-9.[2]

SUMMARY OF THE ARGUMENT

This Court should affirm the Judgment of Conviction because Appellant freely and voluntarily entered his guilty plea. First, Appellant requested new counsel, or *alternatively*, to continue pro per, and the judge honored his request by appointing new counsel. Because Appellant only asked alternatively to represent himself pro per if the judge did not appoint new counsel, the court did not need to conduct a Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525 (1975), canvass.

[2] Respondent has filed a Motion to Transmit PSI contemporaneously with this pleading.

Additionally, Appellant's claims of ineffective assistance of counsel should be reserved for post-conviction petitions. However, even on the merits, Appellant does not point to any specific factual allegations demonstrating that counsel was ineffective. Appellant simply claims that counsel should have conducted a more thorough investigation before trial, but cannot identify what counsel would have discovered through an investigation. Appellant also does not point to any specific instance from the record where counsel was ineffective.

Appellant's allegations that his plea was not voluntary is belied by the record because Appellant freely and voluntarily entered his plea when he affirmed to the judge at multiple points during the plea canvass that he was not coerced by anybody. Additionally, Appellant's claims that there was no evidence to support the charges is without merit because he affirmed the court's factual determination, and even explained how he aided his co-conspirator in the kidnapping by handcuffing the victim.

Moreover, Appellant's claim that his sentence amounts to cruel and unusual punishment is belied by the record. During his plea canvas, Appellant told the court he understood the range of sentences he could face for these charges, including the life sentence, and wanted to plea anyway. Appellant's sentence is within the statutory range and is reasonable relative to his crimes and criminal history.

Therefore, Appellant's claims are all belied by the record, and the Judgment should be affirmed.

ARGUMENT

I. APPELLANT NEVER UNEQUIVOCALLY REQUESTED TO PROCEED PRO PER

Generally, a criminal defendant has the right to representation by counsel under the Sixth Amendment of the United States Constitution and the Nevada Constitution. See U.S. Const. amend. VI; Nev. Const. art. 1, § 8, cl. 1. However, a defendant can waive this right and, where he chooses to represent himself, he must satisfy the court that his waiver of the right to counsel is knowing and voluntary. Faretta, 422 U.S. at 818-19, 835, 95 S. Ct. at 2525; Vanisi v. State, 117 Nev. 330, 337-38, 22 P.3d 1164, 1169-70 (2001).

Both the United States Supreme Court and this Court have recognized that "'the right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.'" Johnson v. State, 117 Nev. 153, 162, 17 P.3d 1008 (2001) (quoting Faretta, 422 U.S. at 819-20, 95 S. Ct. at 2533). The Court further emphasized that "'[i]t is the defendant . . . who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law.'" Id. Indeed, once a defendant is found competent to stand trial, so long as he freely,

intelligently, and knowingly waives his right to counsel a district court has little power to prevent the defendant from representing himself: "[I]n the absence of some indication that Johnson's attempt to waive counsel was not knowing, intelligent and voluntary, or that some other factor warranted denial of the right to self-representation under this court's holding in Tanksley, the district court could not properly preclude Johnson from waiving his right to counsel." Id. at 164, 17 P.3d 1008.

While this Court "indulge[s] in every reasonable presumption against waiver of the right to counsel," it gives deference to the lower court's decision to grant a defendant's waiver of his right to counsel. Hooks v. State, 124 Nev. 48, 55, 57, 176 P.3d 1081, 1085-86 (2008). "Through face-to-face interaction in the courtroom, the trial judges are much more competent to judge a defendant's understanding" of his rights than the appellate court since a "cold record is a poor substitute for demeanor observation." Graves v. State, 112 Nev. 118, 124, 912 P.2d 234, 238 (1996). Indeed, "[e]ven the omission of a canvass is not reversible error if it appears from the whole record that the defendant knew his rights and insisted upon representing himself." Hooks, 124 Nev. at 55, 176 P.3d at 1085 (quotation marks and citation omitted).

In assessing a waiver, the inquiry is whether the defendant can knowingly and voluntarily waive his right to counsel, not whether the defendant can competently represent himself. Tanksley v. State, 113 Nev. 997, 1000-01, 946 P.2d 148, 150

(1997). A defendant's technical knowledge is not relevant to the inquiry and a request for self-representation may not be denied solely because the defendant lacks legal skills. Id. However, a request *may* be denied if the request is equivocal, the defendant abuses his right by disrupting the judicial process, or the defendant is incompetent to waive his right to counsel. Id. (emphasis added).

Here, Appellant did not knowingly and voluntarily waive his right to counsel. Instead, Appellant only expressed a desire to represent himself *alternatively*, if the court was not inclined to appoint him new counsel. I AA 052-062. Appellant titled his January 30, 2018 motion, "Defendant White's Motion for Withdrawal of Guilty Plea and for Appointment of New Counsel or Alternatively to Proceed in Pro Per." I AA 052. Appellant's motion was one long complaint about his previous counsel listing all the ways counsel was neglecting his case. I AA 052-062. Appellant argues that after ten months of counsel representing him, he has failed to defend him properly. I AA 061. Appellant concluded by stating, "Defendant moves to withdraw his October 19, 2017, guilty plea and for recusal of counsel, appointment of new counsel, or alternatively to proceed pro se." I AA 061. Appellant only asked to proceed pro per if the court was not inclined to appoint him new counsel. I AA 061.

Moreover, when the court granted the motion and appointed Appellant new counsel, he accepted the new counsel instead of ever mentioning that he wanted to proceed Pro Per:

> THE COURT: …And so at this time I'm going to appoint – based on the allegations that you've made, I'm going to appoint another attorney to represent you to see if there's a legal basis to withdraw your plea. Do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Okay. And if your attorney – your independent attorney thinks there's a legal basis he or she will file that motion. If they don't believe there's a legal basis we'll proceed with sentencing. Mr. Gruber will be back on the case and you can file any appeal or anything else that you deem appropriate; okay?
>
> …
>
> THE COURT: Anything else? I mean, we've addressed all your issues?
>
> THE DEFENDANT: Yes.
>
> …
>
> THE COURT: So, Mr. White, Mr. Sanft is going to be appointed and I'll continue it till February 15th.
>
> MR. SANFT: Thank you, Your Honor.
>
> THE COURT: We'll just leave the date.
>
> MR. SANFT: Yes, Your Honor.
>
> THE COURT: If you need more time though I would be inclined to grant that.
>
> MR. SANFT: Yes, Your Honor.
>
> THE COURT: Thank you very much for taking this.
>
> MR. SANFT: Thank you.

III AA 658-663.

Instead of asking to proceed pro per, Appellant was thankful for the court appointing new counsel. Therefore, this claim is without merit and should be denied.

/ / /

/ / /

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

Appellant complains that his counsel was constitutionally ineffective in both "investigating and counseling the Defendant before the guilty plea." AOB at 17.

"[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 cannot be certain what further investigation would have yielded." AOB at 15. Accordingly, Appellant has

not adequately briefed this issue. Thus, this Court should decline to consider Appellant's claim that his trial counsel was ineffective.

However, if the Court decides to entertain the claim, it is still belied by the record because Appellant knowingly, voluntarily, and intelligently entered his plea. Pursuant to NRS 176.165, a defendant who has pleaded guilty, but has not been sentenced, may petition the district court to withdraw his plea. "A district court may, in its discretion, grant a defendant's [presentence] motion to withdraw a guilty plea for any substantial reason if it is fair and just. However, the district court must also look to the totality of the circumstances and the entire record." Woods v. State, 114 Nev. 468, 469, 958 P.2d 91, 91 (1998); See State v. Second Judicial Dist. Court (Bernardelli), 85 Nev. 381, 385, 455 P.2d 923, 926 (1969).

In Crawford v. State, 117 Nev. 718, 721-22, 30 P.3d 1123, 1125-26 (2001), this Court held that the only relevant question when determining whether a defendant presented a fair and just reason sufficient to permit a withdrawal of his plea is whether the plea was knowingly, voluntarily, and intelligently entered. However, this Court recently rejected Crawford's exclusive focus on the validity of the plea and affirmed that the district court must consider the totality of the circumstances to determine whether permitting withdrawal of a guilty plea before sentencing would be fair and just. Stevenson v. State, 116 Nev. __, __, 354 P.3d 1277, 1279 (2015). In Stevenson, this Court still affirmed the Judgment of Conviction even though the

district court applied the Crawford standard, finding that the defendant failed to present a fair and just reason favoring the withdrawal of his guilty plea. Id.

On appeal from the district court's determination, a reviewing court will presume that the lower court correctly assessed the validity of the plea, and will not reverse the district court's determination absent a clear showing of an abuse of discretion. Mitchell v. State, 109 Nev. 137, 138, 848 P.2d 1060, 1060 (1993). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). Deference must be given to factual findings made by the district court in the course of a motion to withdraw a guilty plea. Little v. Warden, 117 Nev. 845, 854, 34 Pd. 3d 540, 546 (2001).

A plea of guilty is presumptively valid, particularly where it is entered into on the advice of counsel. Jezierski v. State, 107 Nev. 395, 397, 812 P.2d 355, 356 (1991). The defendant has the burden of proving that the plea was not entered knowingly or voluntarily. Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986) overruled on other grounds, State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 1442, 448 (2000); Wynn v. State, 96 Nev. 673, 615 P.2d 946 (1980); Housewright v. Powell, 101 Nev. 147, 710 P.2d 73 (1985). 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 proper standard set forth in Bryant requires the trial court to 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. at 271; State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000). The guidelines for voluntariness of guilty pleas "do not require the articulation of talismanic phrases." Heffley v. Warden, 89 Nev. 573, 575, 516 P.2d 1403, 1404 (1973). It requires only "that the record affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily." Brady v. United States, 397 U.S. 742, 747-748, 90 S.Ct. 1463, 1470 (1970); United States v. Sherman, 474 F.2d 303 (9th Cir. 1973).

If Appellant did not object or raise a specific issue and/or argument below, the claim is waived and reviewable only for plain error. Dermody v. City of Reno, 113 Nev. 207, 210-11, 931 P.2d 1354, 1357 (1997); Guy v. State, 108 Nev. 770, 780, 839 P.2d 578, 58 (1992), cert. denied, 507 U.S. 1009, 113 S. Ct. 1656 (1993); Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991). 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 v. State, 131 Nev. __, __, 343 P.3d, 590, 594 (2015).

Appellant failed to present a sufficient reason to permit withdrawal of his guilty plea. Appellant alleged that he did not voluntarily enter his plea because of his medications. III AA 514-515. However, this claim is belied by the record, discussed infra, Section IV. Appellant also claimed that he should be allowed to withdraw his guilty plea because it is "illogical" that he would "suddenly plead guilty to all counts." III AA 516. What Appellant did not allege in his Motion to Withdraw Guilty Plea was that counsel was ineffective and did not properly counsel him before his plea. Therefore, because he did not raise this issue below, it is reviewable only for plain error.

Further, Appellant cannot demonstrate ineffective assistance because even he admits that he does not know what better investigation would have developed. AOB at 15. This admission is fatal because Appellant must show what a better investigation would have revealed to establish ineffective assistance of counsel. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). As such, this claim must be denied.

III. APPELLANT'S GUILTY PLEA WAS ENTERED INTO FREELY AND VOLUNTARILY

Appellant alleges that his plea was involuntary because of his "long history with mental instability." AOB at 17. However, this claim is without merit because based on the totality of the circumstances, it is clear that Appellant freely and voluntarily decided to plead guilty, with full knowledge of the rights waived.

In Nevada, guilty pleas are "presumptively valid," especially when entered on advice of counsel, and the defendant has the burden to show that the district court abused its discretion in denying a motion to withdraw a guilty plea. Baal v. State, 106 Nev. 69, 72, 787 P.2d 391, 394 (1990); Molina, 120 Nev. at 190, 87 P.3d at 537. Thus, the presumption is that the district court correctly assessed the validity of the plea. Riker v. State, 111 Nev. 1316, 1322, 905 P.2d 706, 710 (1995).

A district court, after sentencing a defendant, "may set aside the judgment of conviction and permit the defendant to withdraw his plea" in order "[t]o correct manifest injustice." NRS 176.165; Baal, 106 Nev. at 72, 787 P.2d at 394. Manifest injustice may be demonstrated by counsel's failure to adequately inform a defendant of the consequences of his plea. Kirksey, 112 Nev. at 988, 923 P.2d at 1107. However, this Court has concluded that a manifest injustice does not occur "if the trial court sufficiently canvassed the defendant to determine whether the defendant knowingly and intelligently entered into the plea." Baal, 106 Nev. at 72, 787 P.2d at 394.

When considering a defendant's motion to withdraw a guilty plea, the district court shall look to the totality of the circumstances to determine whether the plea was made freely, knowingly and voluntarily, and whether the defendant understood the nature of the offense and the consequences of the plea. Freese, 116 Nev. at 1105, 13 P.3d at 448. The "totality of the circumstances" tests includes a review of the plea agreement, the canvass conducted by the district court, and the record as a whole. Id.; Woods, 114 Nev. at 475, 958 P.2d at 95. Further, there is "[n]o specific formula for making this determination," thus each case is evaluated on a case-by-case basis. Freese, 116 Nev. at 1106, 13 P.3d at 448. Even though there is no specific formula, the Nevada Supreme Court has concluded that "[a] thorough plea canvass coupled with a detailed, consistent, written plea agreement supports a finding that the defendant entered the plea voluntarily, knowingly, and intelligently." Molina, 120 Nev. at 191, 87 P.3d at 537-38.

Here, Appellant's claim that he was mentally incompetent due to his inability to take his prescribed medicine is belied by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (stating that "bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record). Specifically, during the guilty plea canvass, Appellant affirms multiple time that he entered into the plea freely and voluntarily:

> THE COURT: Okay. So, no one has threatened or coerced you into entering into this plea, correct?

THE DEFENDANT: No.

THE COURT: No one in the Clark County Detention Center?

THE DEFENDANT: No.

THE COURT: No one on planet earth?

THE DEFENDANT: No.

THE COURT: Okay, no one has threatened you, correct?

THE DEFENDANT: Yeah.

THE COURT: Including, has – have you spoken to Marland Dean?

THE DEFENDANT: No.

THE COURT: Okay. I know you indicated to me the other day you mom had spoken to him.

THE DEFENDANT: Yeah.

THE COURT: Were any threats communicated to you through your mom?

THE DEFENDANT: No.

…

THE COURT: Okay. And, again, you want to stop the trial and you just want to accept responsibility. Is that correct?

THE DEFENDANT: Yeah.

THE COURT: Well, why did you decide to do it today?

THE DEFENDANT: I just – I slept on it. After seeing the victims yesterday and then hearing what – hearing from the victim.

THE COURT: So, after hearing the victims' testimony you just – you'd heard enough?

THE DEFENDANT: Yeah.

III AA 505-506, 508.

Additionally, Appellant verbally acknowledged that no medical condition was affecting his capacity to enter his plea and that he was presently on the medication he now claims he was without:

> MR. SANFT: And, Your Honor, a couple of things just for the record as well. I have, during the course of my representation of Mr. White, always informed Mr. White that I believe that he is someone that's very smart and articulate. I've read his motions and he understands the law very well.
>
> I believe that, at this particular point, that Mr. White is not under any type of influence of alcohol or drugs that would impair his thinking here today with regards to his decision to enter into this plea. And I don't believe as well that, based upon my communication with Mr. White, that there's been any type of threat made against him. I have not received that as well.
>
> I just want to make sure that that's on the record because I know that was a concern the last time we were in court with regards to that.
>
> THE COURT: Okay. And that's all true, correct?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: You're not on any kind of medication?
>
> THE DEFENDANT: Just the medication that I take, my meds, but they're not impacting my decision to plead.
>
> THE COURT: What kind of medication are you on?
>
> THE DEFENDANT: Psych meds.
>
> THE COURT: Okay. And you don't think it's affecting your ability to enter into this plea today?
>
> THE DEFENDANT: No.

III AA 507-508.

As counsel admits, Appellant is intelligent and understands the law. III AA 507. Over the duration of this case, Appellant consistently handwrote his own motions and letters to the court. I AA 005-042, I AA 052-062, III AA 521-522, III

AA 619-627. This claim that Appellant is mentally incompetent is simply without merit.

Based on the totality of the circumstances, Appellant fails to demonstrate that he did not enter his plea freely and voluntarily. Appellant's contention that the district court did not make a meaningful inquiry into the voluntariness of his plea, is belied by the canvass wherein he acknowledged that he entered his plea freely and voluntarily multiple times. Further, despite Appellant's complaint that the district court did not meaningfully inquire into the voluntariness of his plea, the district court is not required to "utter talismanic phrases" so long as the totality of the circumstances demonstrates that the plea was freely and voluntarily made, and that the defendant understood the consequences of the plea. McConnell v. State, 125 Nev. 243, 250, 212 P.3d 307, 312 (2009) (quoting Freese, 116 Nev. at 1104, 13 P.3d at 447). Therefore, the plea canvass, clearly indicates that Appellant freely and voluntarily pleaded guilty.

IV. APPELLANT AFFIRMED THE FACTUAL BASIS SURROUNDING HIS GUILTY PLEA AND DISCUSSED THE DETAILS OF THE KIDNAPPING CHARGE

A defendant may enter a guilty plea, however, "the court shall not accept such a plea … without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charges and consequences of the plea." NRS 174.035(2). A guilty plea is valid "as long as the

totality of the circumstances, as shown by the record, demonstrates that the defendant understood the nature of the offense and the consequences of the plea." Freese, 116 Nev. at 1105, 13 P.3d at 1449. The record must indicate that a defendant made or adopted a factual summary "constituting an admission to the charged offense." Croft v. State, 99 Nev. 502, 505, 665 P.2d 248, 250 (1983).

However, a plea canvass does not "require that a defendant express an understanding of, or admit to, every specific element of the crime charged." Bryant, 102 Nev. at 273, 721 P.2d at 367-68, overruled on other grounds, Freese, 116 Nev. at 1105, 13 P.3d at 448. Further, a "'technically inadequate plea canvass' does not render a guilty plea invalid." Koerschner v. State, 111 Nev. 384, 386, 892 P.2d 942, 944 (1995) (quoting, Bryant, 102 Nev. at 270, 721 P.2d at 367); Accord, State v. Gomes, 112 Nev. 1473, 1478, 930 P.2d 701, 705 (1996). A plea will not be invalidated even where a court's canvass fails to address substantive and important legal issues if the totality of the record demonstrates that a defendant understood the omitted points. Freese, 116 Nev. at 1107, 13 P.3d at 448-49 (defendant's waiver of rights by pleading guilty was freely, voluntarily, and knowingly made despite failure of trial court to ask defendant if he understood what rights he was waiving since written plea agreement recited the rights defendant was waiving and defendant indicated during the plea canvass that he had read and understood the plea agreement and had no questions); Lee v. State, 115 Nev. 207, 209, 985 P.2d 164, 166 (1999)

(defendant was fully informed of the possibility of being ordered to pay restitution even though the plea canvass failed to address restitution where written plea agreement expressly provided defendant would be ordered to pay restitution and defendant acknowledged in open court that he read and understood the agreement); Hurd v. State, 114 Nev. 182, 184-87, 953 P.2d 270, 271-74 (1998) (guilty plea not invalidated by failure of canvass to address the level of intent required to commit the offense where record as a whole showed that defendant understood the elements of the charges and knowingly and voluntarily pleaded guilty); Bryant, 102 Nev. at 274-75, 721 P.2d at 368-69 (defendant's plea was entered voluntarily, knowingly and intelligently under the totality of the record notwithstanding trial court's acceptance of plea without explaining intent element or eliciting factual statement from defendant covering intent because defendant agreed that he discussed elements of offense with his attorney).

Here, the totality of the record reveals that the plea was supported by a sufficient factual basis. During the plea canvass, Appellant discussed the facts and circumstances of the crime with the court:

> THE COURT: Okay. All right, so, in order to accept your guilty plea, I have to go through each count and you have to tell me what you did that makes you guilty of this offense because I have to be sure that you are, in fact, guilty of these offenses before I accept you plea. Do you understand that?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: So, in Clark County, Nevada, on or between January 20th and 21st, 2016, as to Count 1, did you

willfully, unlawfully and feloniously conspire with Kevin Wong, Amanda Sexton and Marland Dean to commit a robbery by Mr. Wong, Sexton, and Marland Dean committing the acts set forth in Counts 2 through 7, said acts being incorporated by reference as through set forth fully herein?

THE DEFENDANT: Yeah.

THE COURT: So, you conspired with them to commit the robbery?

THE DEFENDANT: Yeah.

THE COURT: And Count 2, did you willfully, unlawfully and feloniously enter, with the intent to commit a robbery, the residence occupied by Marlene Burkhalter and/or Jason Cliff, located at 950 Seven Hills Drive, Henderson, Clark County, Nevada? Did you possess or gain possession of a firearm and/or a baton during the commission of the crime and/or before leaving the structure?

THE DEFENDANT: Yeah.

. . .

THE COURT: As to Count 3, the First Degree Kidnapping with Use of a Deadly Weapon, did you willfully, unlawfully and feloniously seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away Marlene Burkhalter, a human being, with the intent to hold or detain her against her will and without her consent for the purpose of committing robbery with use of a deadly weapon, a baton and/or firearm?

THE DEFENDANT: Yes.

THE COURT: Okay.

MR. SCHWARTZER: And, Your Honor, I would just ask that he state that that was done by either himself or a person with him knowingly put handcuffs on Ms. Burkhalter.

THE COURT: Okay. Is that what happened?

THE DEFENDANT: Yeah.

THE COURT: Did you do it or one of your co-conspirators do it?

THE DEFENDANT: Co-conspirator.

THE COURT: And handcuffs were placed on her?

THE DEFENDANT: Yeah.

THE COURT: And she was taken to another room?

THE DEFENDANT: No.

THE COURT: Where was she taken?

MR. SCHWARTZER: She was – she wasn't – it was just – it's under the detained theory, Your Honor.

THE COURT: I thought she said she moved.

MR. SANFT: Just moved from the living room to the kitchen table.

THE COURT: Okay. She was moved from the living room to the kitchen table?

THE DEFENDANT: Yeah.

THE COURT: Okay. And as to Count 4, the First Degree Kidnapping with Use of a Deadly Weapon, did you willfully, unlawfully and feloniously, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away Jason Cliff, with the intent to hold or detain Mr. Cliff, against his will and without his consent, for the purpose of committing a robbery with use of a deadly weapon, a baton and/or firearm?

THE DEFENDANT: Yes.

THE COURT: What did you do as to Mr. Cliff?

THE DEFENDANT: Helped my co-defendant handcuff him.

THE COURT: You helped your co-conspirator handcuff him?

THE DEFENDANT: Yeah.

. . .

THE COURT: Okay. As to Count 5, Attempt Robbery with Use of a Deadly Weapon, did you willfully, unlawfully, and feloniously attempt to take personal property from Marlene Burkhalter, in her presence, by means of force or violence of fear of injury to, and without her consent and against her will, by striking and/or handcuffing Ms. Burkhalter, but not gaining any property, with the use of a deadly weapon, a baton and/or firearm?

THE DEFENDANT: Yeah.

> THE COURT: Okay. As to Count 6, Attempt Robbery with Use of a Deadly Weapon, did you willfully, unlawfully, and feloniously attempt to take personal property from Mr. Jason Cliff, in his presence, by means of force or violence of fear of injury to, and without his consent and against his will, by striking and/or handcuffing Mr. Cliff, but not gaining any property, with the use of a deadly weapon, a baton and/or firearm?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: Is that a yes?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: Okay, Count 7, Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm, did you willfully, unlawfully, and feloniously use force or violence upon the person of another, Jason Cliff, with use of a deadly weapon, a baton, by striking Mr. Cliff about the head and/or body with the baton resulting in substantial bodily harm to Mr. Cliff?
>
> THE DEFENDANT: Yeah.
>
> . . .
>
> THE COURT: Okay. You heard the victim's testimony yesterday about the pain and suffering he's endured because of his injuries?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: And you agree with that?
>
> THE DEFENDANT: Yeah.

III AA 498-503.

Appellant's allegation that there is no evidence to support a kidnapping charge and that the "element of the kidnapping charges could not be proved beyond a reasonable doubt" is without merit. AOB at 19. Appellant himself conceded the factual basis of the charges by admitting to the allegations in the Amended Indictment. III AA 498-500. Moreover, Appellant admits to striking the victims with a baton, moving the victim from the living room to the kitchen, and helping his co-

conspirator handcuff the other victim so they could complete the robbery. III AA 500.

Further, Appellant's decision to enter a guilty plea waives any challenge on that issue. See Woods, 114 Nev. at 477, 958 P 2.d at 97; Reuben C. v. State, 99 Nev. 845, 845-46, P.2d 493, 493 (1983); Powell v, Sheriff, 85 Nev. 684, 687, 462 P.2d 756, 758 (1969). In Woods, the Nevada Supreme Court found the appellant was estopped from challenging the validity of his guilty plea agreement because he voluntarily entered into it and accepted its attendant benefits. 114 Nev. at 477, 958 P.2d at 97.

Appellant's claim that his plea and admitting to the factual basis was not voluntary is also without merit for the reasons discussed supra in Section III. Appellant voluntarily admitted to the factual basis of his crimes and is estopped from denying its validity based on Woods. As such, this claim should be denied.

V. APPELLANT'S SENTENCE DOES NOT AMOUNT TO CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT

Appellant alleges that his sentence was cruel and unusual, and that counsel was ineffective for not challenging this sentence. AOB at 20. As discussed supra in Section II, Appellant's ineffective assistance of counsel claims are inappropriate for direct appeal and must be raised in petitions for post-conviction relief.

With regards to Appellant's sentence, 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). 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)).

Here, Appellant's sentence falls within the statutory range and is not out of proportion to the severity of the crime. Appellant makes no clear argument that the rationales supporting the court's ruling are impermissible. When Appellant decided

to plea guilty on the third day of trial, the court went through the range of sentences with Appellant at length:

> THE COURT: And you understand what the range of punishment is? Again, I just want to make sure you understand. You are entering into this guilty plea. No one can stop you from pleading straight up to the sheet.
>
> But you're entering into this guilty plea today without any guilty plea agreement by the State. They are not bound by any contract. They are not bound by expecting anything except the range of punishment for each offense.
>
> THE DEFENDANT: Yeah.
>
> THE COURT: Do you understand that?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: So, you understand that they could ask for the maximum on each count and ask me to run it all consecutive?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: You understand that, right? Okay, so you understand as to Count 1, Conspiracy to Commit Robbery, you're facing one to six years in the Nevada Department of Corrections. Do you understand that?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: As to Count 2, Burglary While in Possession of a Deadly Weapon –
>
> Is that at one –
>
> MR. SCHWARTZER: It's at two to fifteen, Your Honor.
>
> THE COURT: Two to fifteen. You are facing two to fifteen years in the Nevada Department of Corrections. You understand as to Count 3 and 4, the First Degree Kidnapping with use of a Deadly Weapon –
>
> THE DEFENDANT: Yeah.
>
> THE COURT: -- you are facing a term of years of fifteen years with minimum parole eligibility beginning after a minimum of five years has been served or life in the Nevada Department of Corrections with parole eligibility beginning after a minimum of five years has been served. And you are facing –

It's one to fifteen on the deadly weapon?

MR. SCHWARTZER: The deadly weapon would be one to fifteen, Your Honor. That's correct.

THE COURT: That's what I – And the deadly weapon is a consecutive one to fifteen. Do you understand that?

THE DEFENDANT: Yeah.

THE COURT: So, you understand on Counts 3 and 4 you are facing a life sentence?

THE DEFENDANT: Yeah.

THE COURT: Do you understand that?

THE DEFENDANT: [No audible answer.]

THE COURT: Is that a yes?

THE DEFENDANT: Yes.

THE COURT: Okay. And you also understand as to count 5, the Attempt Robbery with Use of a Deadly Weapon – What is he facing on Count 5?

MR. SCHWARTZER: Count 5, Your Honor, would be – for the Attempt Robbery it would be one to ten for the Robbery and then a consecutive one to ten for the deadly weapon.

THE COURT: Okay. So the Attempt Robbery you are facing one to ten years in the Nevada Department of Corrections, plus a consecutive one to ten years for the deadly weapon enhancement. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And you understand that I am required by law to impose that deadly weapon enhancement consecutive to the original sentence. Do you understand that?

THE DEFENDANT: Yeah.

THE COURT: Okay. And you understand Count 6, the Attempt Robbery with Use of a Deadly Weapon, it's the same thing. You're facing one to ten, plus a consecutive one to ten for the deadly weapon enhancement?

THE DEFENDANT: Yeah.

THE COURT: Do you understand that?

> THE DEFENDANT: Yeah.
>
> THE COURT: And then the Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm, it's a two to fifteen.
>
> MR. SCHWARTZER: That's correct.
>
> THE COURT: You're facing two to fifteen years in the Nevada Department of Corrections. And then as to Count 8, Impersonation of Officer, that was –
>
> MR. SANFT: It's a gross misdemeanor, Your Honor.
>
> MR. SCHWARTZER: It's a gross misdemeanor.
>
> THE COURT: Okay,
>
> MR. SCHWARTZER: So, it would be up to 364 days.
>
> THE COURT: -- 364 days in the Clark County Detention Center. Do you understand all that?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: And you understand the range of punishment on each offense?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: And you understand that the State is not bound by any agreement that they have entered into with you?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: So, again, I just want to make sure you understand; I mean you're facing a life sentence on the First Degree Kidnapping. Do you understand that?
>
> THE DEFENDANT: Yeah.

III AA 491-495.

At sentencing, the State discussed the violent crime Appellant committed by dressing up as a U.S. Marshall to force his way into the victims' apartment. I AA 123-124. The State told the sentencing judge how the Appellant used a fake search warrant to enter the victims' apartment, handcuffed them, and beat them so badly

they were in the hospital for three days. I AA 124. The judge also heard the opening statements at trial and heard some witness testimony before Appellant pled and was therefore, extremely familiar with the facts of the case. I AA 123.

The State also noted that Appellant's prior criminal history warranted a harsher sentence. Id. Appellant had six prior felony convictions and was in and out of prison from 1991 to 2014. Id. In each of those cases, anytime Appellant was granted some type of supervised release, he would go out and commit new crimes. Id. In the most recent case, Appellant spent twelve (12) years in prison and within a few months of release, went to Washington and committed new felonies. Id. At the time of sentencing, Appellant was still in warrant status from his crimes in Washington. Id.

Moreover, it is important to note that at the time of sentencing, the Division of Parole and Probation actually recommended a sentence of thirty (30) years to life in prison. I AA 122. The State disagreed with Parole and Probation and asked for the lesser sentence of twenty (20) to life. I AA 122-123. The Prosecutor told the court, "I'm actually going – although I very rarely do this, I'm going to actually ask for a little less time than that." Id. Despite Appellant's lengthy criminal history and the violent nature of the crime, the State still asked for a sentence less than what the Division of Parole and Probation was recommending.

It was well within the District Court's discretion to contemplate past convictions and more specifically the likelihood of success on probation. See 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) (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). Appellant's sentence contemplated the seriousness of the offense as well as the surrounding facts of the case, including his criminal history and his previous failed attempts at rehabilitation. The sentence comports with the Eighth Amendment, the statutory authority afforded the judge, and ultimately, the facts of this case.

When citation to boilerplate law is subtracted, Appellant's argument is revealed to be nothing more than a complaint that his sentence "removed any meaningful opportunity for rehabilitation or reentry into society." AOB at 20. However, Appellant had many attempts at reentry into society, and always committed more felonies after each of his six felony convictions. The court took into consideration the seriousness of the crime and Appellant's repeated failed attempts at reentry into society. Therefore, the sentence does not amount to cruel and unusual punishment.

/ / /

/ / /

VI. THERE WAS NO CUMULATIVE ERROR

Appellant alleges that the cumulative effect of error requires reversal because there was reason to doubt his guilt. AOB at 24. 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. Moreover, a defendant "is not entitled to a perfect trial, but only a fair trial. . . ." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975) (citing Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974).

First, 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). Second, as discussed supra, Appellant pled guilty to the charges after sitting through two days of trial freely and voluntarily. Thus, though the crimes charged were grave indeed, the third Mulder factor is the only one that remotely applies to Appellant's cumulative error argument. However, without any error to cumulative, and with overwhelming evidence to convict Appellant on each count, his argument is

meritless. Therefore, Appellant's claim of cumulative error has no merit and his conviction should be affirmed.

CONCLUSION

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

Dated this 21st day of October, 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 type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 8,156 words.
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 21st day of October, 2019.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on October 21, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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