IN THE SUPREME COURT OF THE STATE OF NEVADA

DENZEL DORSEY, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 79845

RESPONDENT'S ANSWERING BRIEF

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number:

Cases

Statutes

Other Authorities

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ROUTING STATEMENT

This is an appeal from a judgment of conviction based on a plea of guilty. This appeal is presumptively retained by the Nevada Court of Appeals pursuant to Nev. R. App. P. Rule 17(b)(1).

STATEMENT OF THE ISSUE

1. Whether the district court erred in not allowing Appellant to withdraw his guilty plea.
2. Whether Appellant's guilty plea agreement was invalid due to an incorrect stipulated sentence.
3. Whether it is unconstitutional to stipulate to habitual criminal status.

4. Whether Appellant's sentence violates the Eighth Amendment.

5. Whether cumulative error warrants reversal.

STATEMENT OF THE CASE

On February 16, 2017, an amended criminal complaint was filed in Henderson Justice Court charging Denzel Dorsey (hereinafter "Appellant") with one (1) count of INVASION OF THE HOME (Category B Felony – NRS 206.067 – NOC 50435), and one (1) count of MALICIOUS DESTRUCTION OF PROPERTY (Gross Misdemeanor – NRS 206.310, 193.155 – NOC 50905). 1 Appellant's Appendix ("AA") 0001.

On May 2, 2017, a preliminary hearing was held. Appellant was bound over to district court on both charges. 1 AA0050.

On May 9, 2017, the State filed an Information in district court charging Appellant with one (1) count of INVASION OF THE HOME (Category B Felony – NRS 206.067 – NOC 50435), and one (1) count of MALICIOUS DESTRUCTION OF PROPERTY (Gross Misdemeanor – NRS 206.310, 193.155 – NOC 50905). 1 AA0003-06. This Information also placed Appellant on notice that the State intended to seek punishment pursuant to the provisions of NRS 207.010 as a habitual criminal in the event of a felony conviction.

On March 13, 2018, Appellant entered into a guilty plea negotiation with the State. Appellant pled guilty to one (1) count of INVASION OF THE HOME

(Category B Felony – NRS 205.067 – NOC 50435). As part of the negotiation, the State retained the right to argue, but agreed not to seek habitual criminal treatment. The guilty plea negotiation further stated that if Appellant failed to go to the Division of Parole and Probation, failed to appear at any future court date, or was arrested for any new offenses, he would stipulate to habitual criminal treatment, and to a sentence of sixty (60) to one hundred twenty (120) months in the Nevada Department of Corrections. 1 AA0055. Following Appellant's entry of plea, Appellant was released on his own recognizance and instructed to appear for sentencing on July 17, 2018. 1 AA0065. The Court admonished Appellant that if he failed to appear for his court date he would serve a minimum of sixty (60) to one hundred twenty (120) months in the Nevada Department of Corrections. Id. Sentencing was later rescheduled to June 5, 2018. I AA0070.

On June 5, 2018, Appellant requested that sentencing be continued, as Appellant wanted to withdraw his plea and dismiss his counsel. On June 6, 2018, Appellant filed a pro-per Motion to Withdraw Plea. 1 AA076. On June 12, 2018, the district court granted Appellant's motion to dismiss counsel and then set a status check for confirmation of counsel. 1 AA0082. On June 28, 2018, all matters were continued to July 17, 2018. 1 AA0093. On July 3, 2018, the State filed its Opposition to Appellant's Pro per Motion to Dismiss Counsel. 1 AA0094.

On July 17, 2018, Appellant failed to appear in district court. 1 AA0104. The district court issued a bench warrant. On July 31, 2018, Appellant's counsel made representations to the district court that Appellant had been arrested in California and was currently in custody there. 1 AA0105.

On February 15, 2019, Appellant filed a Motion to Withdraw Guilty Plea. 1 AA0131. On March 19, 2019, the State filed its Opposition. 1 AA0211. On March 28, 2019, Appellant filed his Reply. 2 AA0277. On May 28, 2019, and July 11, 2019, the district court held an evidentiary hearing on the merits of Appellant's Motion to Withdraw Guilty Plea. 2 AA0302; 2 AA0388-90. On August 6, 2019, the district court filed an Order Denying Defendant's Motion to Withdraw Guilty Plea. 2 AA0339.

On September 23, 2019, Appellant filed a Sentencing Memorandum. 2 AA0353. On October 1, 2019, the State filed its Response. 2 AA0371.

On October 3, 2019, the district court adjudicated Appellant guilty of one (1) count of INVASION OF THE HOME (Category B Felony – NRS 205.067 – NOC 50435). The district court sentenced Appellant under the small habitual criminal statute to a maximum one hundred fifty (150) months and a minimum of sixty (60) months in the Nevada Department of Corrections. 2 AA0379.

On October 15, 2019, Appellant filed a Notice of Appeal. 2 AA0385.

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STATEMENT OF THE FACTS

On June 5, 2020, Appellant filed a Motion to Transmit the Presentence Investigation Report. One June 12, 2020, this Court filed an Order Directing Transmission of the Presentence Investigation Report. The following facts are derived from said transmitted Presentence Investigation Report.

> On November 28, 2016, an officer responded to a local residence in reference to a home invasion. Upon arrival, the officer met the one of the residents of the house, who advised the officer that a male, later identified as the defendant, Denzel Dorsey, punched a hole in the glass door window. Mr. Dorsey proceeded to place his hand through the hole and unlock the deadbolt on the door. The resident then ran to the door and locked the deadbolt back. Mr. Dorsey, realized someone was home, fled the scene in a vehicle parked in front of the residence. The officer made contact with the owner of the residence, the victim, who advised that she would like to press charges against Mr. Dorsey.
>
> A records of the vehicle revealed that it had been rented from a local car rental agency. A detective responded to the rental agency and was advised that the vehicle was equipped with a GPS Tracker. The travel history of the vehicle confirmed that vehicle was present at the time of the aforementioned incident. Detectives located the vehicle and made contact with Mr. Dorsey, the driver, and another male as they exited the vehicle. The detective attempted to speak with Mr. Dorsey and the male. Both were uncooperative, denied being in the vehicle, and provided fictitious names. When Mr. Dorsey was advised that he was being charged with home invasion, Mr. Dorsey looked down and stated "Ah shit." Mr. Dorsey was observed to be wearing a coat with fresh tears on it, and he had fresh cuts on his right hand. A search incident to arrest located the key to the vehicle in Mr. Dorsey's right pocket along with a glove with fresh blood on it. A search of the vehicle located three prescription muscle relaxers, a package

> of ziplock baggies, a prescription bottle for Oxycodone with another individual's name imprinted on it, a several pieces of miscellaneous jewelry, and a glove matching the one retrieved from Mr. Dorsey's pocket.
>
> Based on the above facts, Mr. Dorsey was arrested, transported to the Henderson Detention Center and booked accordingly.

PSI at 6-7.

SUMMARY OF THE ARGUMENT

Appellant argues that the district court incorrectly denied his Motion to Withdraw Guilty Plea. However, the arguments Appellant now brings are not the arguments he presented to the district court as grounds to withdraw his guilty plea. As such, this Court should not entertain them here. Further, the arguments Appellant now brings are without merit. Any argument by Appellant that he was not competent to enter into his guilty plea agreement is belied by the record. Further, the fact that the guilty plea agreement incorrectly stated the stipulated sentence for a habitual criminal adjudication did not make the guilty plea invalid.

Appellant also argues that it is unconstitutional to allow a defendant to stipulate to habitual criminal adjudication in a guilty plea agreement. However, this Court has explicitly held otherwise in Hodges v. State, 119 Nev. 479, 484, 78 P.3d 67, 70 (2003). Appellant further argues that his sentence was cruel and unusual. However, the sentencing court sentenced Appellant to the lightest possible sentence under the small habitual statute. Finally, Appellant argues that cumulative error

warrants reversal. However, there was no individual error in this case, and therefore, no error to cumulate.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN NOT ALLOWING APPELLANT TO WITHDRAW HIS GUILTY PLEA

Appellant first argues that the district court erred by not allowing him to withdraw his guilty plea.

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).

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).

A plea of guilty is presumptively valid, particularly where it is entered 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); 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).

Specifically, the record must affirmatively show the following: 1) the defendant knowingly waived his privilege against self-incrimination, the right to trial by jury, and the right to confront his accusers; 2) the plea was voluntary, was not coerced, and was not the result of a promise of leniency; 3) the defendant understood the consequences of his plea and the range of punishment; and 4) the defendant understood the nature of the charge, i.e., the elements of the crime. Higby v. Sheriff, 86 Nev. 774, 781, 476 P.2d 950, 963 (1970).

Stevenson v. State, 131 Nev. 598, 354 P.3d 1277 (2015), held that the statement in Crawford v. State, 117 Nev. 718, 30 P.3d 1123 (2001), which focuses the "fair and just" analysis solely upon whether the plea was knowing, voluntary, and intelligent is more narrow than contemplated by NRS 176.165. The Nevada Supreme Court therefore disavowed 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. Id. at 603, 354 P.3d at 1281 (2015). However, the Court also held that Stevenson had failed to present a fair and just reason favoring withdrawal of his plea and therefore affirmed his judgment of conviction. Stevenson, 131 Nev. at 604-5, 354 P.3d at 1281. The Court made clear that one of the goals of the fair and just analysis is to allow a hastily entered plea made with unsure heart and confused mind to be undone, not to allow a defendant to make a tactical decision

to enter a plea, wait several weeks, and then obtain a withdrawal if he believes that he made a bad choice in pleading guilty. Id. at 605, 354 P.3d at 1281-1282. The Court found that considering the totality of the circumstances, they had no difficulty in concluding that Stevenson failed to present a sufficient reason to permit withdrawal of his plea, finding that permitting Stevenson to withdraw his plea under the circumstances would allow the solemn entry of a guilty plea to become a mere gesture, a temporary and meaningless formality reversible at the defendant's whim, which the Court cannot allow. Id. at 605, 354 P.3d at 1282. In 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).

When a defendant has made a tactical decision to enter into a guilty plea, a change of mind or a determination that choosing to enter the plea was a bad choice is not sufficient to allow withdrawal of the plea. Id. The purpose of focusing on what is fair and just is "to allow a hastily entered plea made with unsure heart and confused mind to be undone, not to allow a defendant to make a tactical decision to enter a plea, wait several weeks, and then obtain a withdrawal if he believes that he made a bad choice in pleading guilty." United States v. Alexander, 948 F.2d 1002, 1004 (6th Cir. 1991) (internal quotation marks omitted). The passage of weeks or months before moving to withdraw a plea militates against a finding that the plea

was entered hastily, rather than as a result of a calculated tactical decision. Stevenson, 131 Nev. at 605, 354 P.3d at 1281–82 (citing United States v. Barker, 514 F.2d 208, 222 (D.C. Cir. 1975) ("A swift change of heart is itself strong indication that the plea was entered in haste and confusion…")).

A defendant may not use the agreement as a placeholder until he determines a more favorable course of action. Ensminger, 567 F.3d at 593. Even a good-faith change of heart is not a fair and just reason. Id. ("Our prior decisions make clear that a change of heart—even a good faith change of heart—is not a fair and just reason that entitles Ensminger to withdraw his plea, even where the government incurs no prejudice."). Similarly, the Court must not "allow the solemn entry of a guilty plea to 'become a mere gesture, a temporary and meaningless formality reversible at the defendant's whim.'" Stevenson, 131 Nev. at 605, 354 P.3d at 1282 (quoting Barker, 514 F.2d at 221).

As an initial point, the only arguments Appellant made to the district court regarding why he should be entitled to withdraw his guilty plea was that he was actually innocent of the crime charged, and that his counsel was ineffective for failing to investigate the underlying facts of the case. 1 AA0076-80; 1 AA0131-37. While Appellant briefly argues that his counsel was ineffective for failing to investigate (see AOB at 19), he dedicates only three pages of his Opening Brief to this point. The remainder of Appellant's Opening Brief raises a series of new

arguments. Given that these arguments were never presented to the district court as grounds to allow Appellant to withdraw his guilty pleas, the district court never addressed the merits of these arguments. As such, this Court should decline to consider these arguments. See Guy v. State, 108 Nev. 770, 780, 839 P.2d 578, 584 (1992) (stating: "[b]ecause appellant failed to present these hearsay exceptions at trial, the trial court had no opportunity to consider their merit. Consequently, we will not consider them for the first time on appeal"); see also McNelton v. State, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999) (declining to address arguments not raised before the district court).

The State would further note that it is not even clear what Appellant is appealing, or what relief he is seeking. For example, in Section II of his AOB, Appellant states that material misstatements in the guilty plea memo provides justification for Appellant to withdraw his plea of guilty or modify his sentence. But Appellant never filed any Motion seeking to Modify his sentence in district court. This Court does not have the ability to modify Appellant's sentence. See Sims v. State, 107 Nev. 438, 440, 814 P.2d 63, 64 (1991) (stating: "…we do not view the proper role of this court to be that of an appellate sentencing body.") Such vagueness in the relief requested is in violation of NRAP 28(a)(11).

However, even if this Court decides to entertain this claim, the claim is without merit. First, Appellant seems to allege that he was entitled to withdraw his

guilty plea because his counsel was ineffective for failing to investigate the facts of his case. However, Appellant does not allege what a more thorough investigation would have revealed, or how he was prejudiced. Pursuant to Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004), such a claim cannot support post-conviction relief.

Appellant also seems to raise a new ineffective assistance of counsel claim arguing that his counsel was ineffective for not investigating his competency before Appellant entered his plea. AOB at 16-17. However, any ineffective assistance of counsel claim is not suitable for review here. An ineffective assistance of counsel claim must first be raised in a Petition for Writ of Habeas Corpus, not on appeal. See Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

To the extent Appellant is arguing that he was entitled to withdraw his guilty plea because he was incompetent to sign this plea, such an argument is belied by the record. Appellant's argument seems to be based on the fact that Appellant is alleging he has a substance abuse problem. AOB at 19-20. However, in signing his guilty plea agreement, Appellant affirmed the following statements:

> I have discussed the elements of all of the original charge(s) against me with my attorney and I understand the nature of the charge(s) against me.
>
> I understand that the State would have to prove each element of the charge(s) against me at trial.

> I have discussed with my attorney any possible defenses, defense strategies and circumstances which might be in my favor.
>
> All of the foregoing elements, consequences, rights, and waiver of rights have been thoroughly explained to me by my attorney.
>
> I believe that pleading guilty and accepting this plea bargain is in my best interest, and that a trial would be contrary to my best interest.
>
> I am signing this agreement voluntarily, after consultation with my attorney, and I am not acting under duress or coercion or by virtue of any promises of leniency, except for those set forth in this agreement.
>
> I am not now under the influence of any intoxicating liquor, a controlled substance or other drug which would impair my ability to comprehend or understand this agreement or the proceedings surrounding my entry of this plea.
>
> My attorney has answered all my questions regarding this guilty plea agreement and its consequences to my satisfaction and I am satisfied with the services provided by my attorney.

1 AA0059. Further, Appellant's counsel at the time of his entry into this guilty plea negotiation signed the GPA and thereby affirmed the following statement:

> (5) To the best of my knowledge and belief, the Defendant:
> (a) Is competent and understands the charges and the consequences of pleading guilty as provided in this agreement.
> (b) Executed this agreement and will enter all guilty pleas pursuant hereto voluntarily, and
> (c) Was not under the influence of intoxicating liquor, a controlled substance or other drug at the time I consulted with the Defendant as certified in paragraphs 1 and 2 above.

1 AA0060.

Further, during Appellant's plea canvas, the following exchange between Appellant and the district court occurred:

> THE COURT: All right. How old are you?
>
> THE DEFENDANT: 24.
>
> THE COURT: All right. How far did you go in school?
>
> THE DEFENDANT: I graduated high school.
>
> THE COURT: What high school?
>
> THE DEFENDANT: In the Department of Corrections.
>
> THE COURT: I'm sorry?
>
> THE DEFENDANT: In the Department of Corrections.
>
> THE COURT: Did you get a GED or did you actually go to high school there?
>
> THE DEFENDANT: No, I just completed it High Desert.
>
> THE COURT: At High Desert. Okay. Well, you speak very well. Do you read, write, and understand the English language?
>
> THE DEFENDANT: Yes, Your Honor.
>
> …
>
> THE COURT: All right. You understand that as a consequence of your guilty plea the Court must sentence you to imprisonment in the Nevada Department of Corrections for

a minimum term of not less than one year and a maximum term of not more than ten years?

THE DEFENDANT: Yes, Your Honor.

THE COURT: DO you also understand that you could be fined up to $10,000?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you also understand that sentencing is strictly up to the Court, that no one can promise you probation, leniency, or other special treatment?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you also understand that no one could promise you a particular sentence even though this guilty plea agreement says agreement and stipulations and all that stuff that I as the Judge do not necessarily have to follow this deal>

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you also understand that you are giving up certain constitutional rights which are listed in the guilty plea agreement?

THE DEFENDANT: Yes, Your Honor.

THE COURT: I take it that you did discuss your case and your rights with your lawyer?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you have any questions regarding your rights or the negotiations?

THE DEFENDANT: No, Your Honor.

…

> THE COURT: If you fail to go to Division of Parole and Probation, if you fail to appear at any future court date or are arrested on any new offenses, that you have stipulated that you would serve habitual criminal treatment, meaning that you are stipulating to a sentence of a minimum of 60 months to a maximum of 120 months to be served in the Nevada Department of Corrections. Do you understand that?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: That's quite a hammer. So, (1) you gotta stay out of trouble and you gotta cooperate with the division, you understand?
>
> THE DEFENDANT: Yes, Your Honor.

1 AA0086-89.

The record clearly establishes that neither Appellant's counsel at the time, nor the district court, nor even Appellant himself, felt Appellant was incompetent to enter into the guilty plea agreement. In fact, Appellant had the requisite mental competence to have recently (at the relevant time) completed his high school education, and could read, write, and understand the English language. As such, any claim that Appellant was not competent to enter into his guilty plea agreement is belied by the record. In addition, counsel cannot be found ineffective for allegedly not investigating Appellant's competency, as Appellant cannot show that a different investigation would have revealed anything that would have rendered him incompetent to enter into his guilty plea.

Further, the record further reflects that the district court correctly examined the entire record when determining that Appellant's guilty plea agreement was freely and voluntarily entered. 1 AA0086-89. In fact, the district court held two days of evidentiary hearing before ruling on the merits of Appellant's Motion to withdraw guilty plea. 2 AA0302-338; 388-482. As such, the district court did not abuse its discretion in denying Appellant's Motion to Withdraw Guilty Plea, and this claim should be denied.

II. APPELLANT'S GUILTY PLEA AGREEMENT IS NOT INVALID DUE TO CONTAINING AN INCORRECT STIPULATED SENTENCE

Appellant's second claim is that a mistake in his guilty plea agreement entitles him to withdraw his guilty plea or modify his sentence. AOB at 23. The mistake Appellant complains of is that the sentence he stipulated to jointly recommend to the sentencing court for habitual treatment if he missed future court dates was listed as sixty (60) to one hundred twenty (120) months.

Appellant is correct that the guilty plea was incorrect in listing the jointly recommended sentence as sixty (60) to one hundred twenty (120) months. Such a sentence is not even lawful, as the minimum sentence is over forty percent of the maximum sentence. NRS 193.130(1). The guilty plea agreement should have

reflected the original negotiation, which is that both parties would agree to recommend a sentence of sixty (60) to two hundred forty (240) months. 2 AA0373.[1]

As an initial point, Appellant offers no legal support for the notion that this misstatement of the sentence invalidates his guilty plea agreement. As such, this argument need not be considered by the Court. See generally Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

Further, Appellant was not denied the benefit of the bargain by this mistake. An examination of what Appellant would have reasonably interpreted the plea to mean is that if he missed a single court hearing, the State would pursue small habitual treatment under NRS 207.010. Further, the State would agree to recommend a sentence of sixty (60) to one hundred twenty (120) months. As the State has previously represented, it would have been willing to stand by this typographical error if it were not for the fact such a sentence is illegal pursuant to NRS 193.130. 2 AA0375. Instead, the State recommended, and the district court imposed, the minimum sentence for a defendant sentenced under the small habitual statute. See NRS 207.010; 2 AA0375-76, 379. Such a sentence allowed for the imposition of a lawful sentence that most accurately reflected the intent of the parties, that Appellant

[1]This citation is to a portion of the State's Response to Defendant's Sentencing memorandum.

be sentenced as a habitual criminal and receive a minimum of sixty (60) months incarceration.

Further, the original sentence both parties agreed to recommend to the sentencing court was sixty (60) to two hundred forty (240) months. 2 AA0373. As such, the typographical error actually worked to Appellant's benefit in the instant case. Second, the stipulation was not to a sentence, it was to jointly recommend a sentence. As Appellant was fully aware, the sentencing court was under no requirement to accept the recommendations, and had full discretion to impose any lawful sentence it saw fit under the circumstances, including a sentence of up to twenty (20) years incarceration. Randell v. State, 109 Nev. 5, 846 P.2d 278 (1993) (citing Deveroux v. State, 96 Nev. 388, 610 P.2d 722 (1980)); NRS 207.010; I AA0056-57; 0087. As such, Appellant was always aware that he may face a sentence of longer than sixty (60) to one hundred twenty (120) months if he failed to attend future court dates or was arrested. In addition, when Appellant signed his Guilty Plea Agreement, he affirmed that he understood that "the minimum term of imprisonment may not exceed forty (40%) of the maximum term of imprisonment."[2] 1 AA0056. Finally, the district court sentenced Appellant to the minimum sentence he was

[2]This language was in reference to the potential sentence regarding the Invasion of the Home charge Appellant was pleading guilty to. However, the point remains that Appellant was notified that a sentences minimum could not exceed 40% of the maximum.

eligible for under the small habitual statute. Given that Appellant agreed to the State seeking habitual treatment if he did not attend future court dates or was arrested, he cannot legitimately claim that he would not have agreed to such a deal if he knew he would also receive the minimum lawful sentence for such a charge. As such, this misstatement in the guilty plea agreement does not constitute a reason for Appellant to withdraw his guilty plea.

Further, this Court should not accept Appellant's invitation to modify his sentence. First, this Court has previously stated that it is not its role to act as a sentencing body. See Sims v. State, 107 Nev. 438, 440, 814 P.2d 63, 64 (1991). Further, a district court's sentencing determinations will not be disturbed absent an abuse of discretion. Gaines v. State, 116 Nev. 359, 364, 998 P.2d 166, 169 (2000). Here, part of the guilty plea agreement Appellant entered into was that the State would seek habitual criminal treatment pursuant to NRS 207.010 if Appellant failed to attend future court hearings. Appellant failed to attend a future court hearing and was arrested on a new case in California. 1 AA0105. The district court imposed the lightest possible legal sentence under NRS 207.010. 2 AA0379. Therefore, the district court did not abuse its discretion, and this Court should not find that the district court abused its discretion at sentencing.

Given that Appellant is not entitled to withdraw his guilty plea or have his sentence modified on these grounds, this claim should be denied.

III. IT IS NOT UNCONSTITUTIONAL TO STIPULATE TO HABITUAL CRIMINAL STATUS

Appellant next argues that his stipulation to habitual criminal status under NRS 207.010 was unconstitutional. As evidence for this notion, Appellant cites to McAnulty v. State, 108 Nev. 179, 826 P.2d 567 (1992), and Staley v. State, 106 Nev. 75, 787 P.2d 396 (1990).

However, this Court explicitly overruled McAnulty and Staley in Hodges v. State, 119 Nev. 479, 484, 78 P.3d 67, 70 (2003) (stating: "[t]his court has not explicitly overruled Staley and McAnulty and held that a defendant can stipulate to the existence of prior convictions as a basis for habitual criminal adjudication, but given NRS 207.016(6) and our reasoning in Krauss, we now do so."). More specifically, this Court held in Hodges that as long as a defendant is not stipulating to "status alone" and admits "that he received specific prior convictions," then a defendant may stipulate to habitual criminal adjudication. Id.

Such is the case here. In his guilty plea agreement, Appellant stipulated "to habitual criminal treatment" and "to the fact that I have the requisite priors." 1 AA0055. Further, in the Information attached to the guilty plea agreement, the State listed the specific convictions that made Appellant eligible for habitual criminal adjudication. 1 AA0063-64. As such, it was clearly not unconstitutional for Appellant to stipulate to habitual criminal adjudication, and this claim should be denied.

IV. APPELLANT'S SENTENCE DOES NOT VIOLATE THE EIGHTH AMENDMENT

Appellant next argues that the sentencing court's decision to sentence Appellant to sixty (60) to one hundred fifty (150) months under NRS 207.010 was cruel and unusual punishment. AOB at 25-27.

The Eighth Amendment to the United States Constitution as well as Article 1, Section 6 of the Nevada Constitution prohibits the imposition of cruel and unusual punishment. The Nevada Supreme Court has stated that "[a] sentence within the statutory limits is not 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'" Allred v. State, 120 Nev. 410, 92 P.2d 1246, 1253 (2004) (quoting Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 95 Nev. 433, 435, 596 P.2d 220, 221 22 (1979))).

Additionally, the Nevada Supreme Court has granted district courts "wide discretion" in sentencing decisions, and these 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, 120 Nev. at 410, 92 P.2d at 1253 (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, 846 P.2d 278 (1993) (citing Deveroux v. State, 96 Nev. 388, 610 P.2d 722 (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, 871 P.2d 950 (1994).

Here, the sentencing court sentenced Appellant to the lightest possible sentence under the applicable statute. See NRS 207.010. Given that Appellant stipulated to habitual criminal status, it is unclear what sentence he believes would have been more proportional. To the extent Appellant is arguing he should have been sentenced to a minimum of sixty (60) months and a maximum of one hundred twenty (120) months, such a sentence is not even legal under NRS 207.010 and NRS 193.130. Therefore, the district court could not impose it. Therefore, Appellant's sentence was not cruel and unusual, and this claim should be denied.

V. CUMULATIVE ERROR DOES NOT WARRANT REVERSAL

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, 854–55 (2000). Appellant must 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)).

In the instant case, the issue of guilt was not close. Appellant pled guilty to the crime. 1 AA0055. Further, the quantity and character of the error is nonexistent, as Appellant has not shown that any error exists to be cumulated. Therefore, cumulative error does not warrant reversal of the judgment of conviction, and this claim should be denied.

CONCLUSION

For the foregoing reasons, Appellant's Judgment of Conviction should be AFFIRMED.

Dated this 9th day of July, 2020.

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 5,673 words and 25 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 9th day of July, 2020.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 9th day of July, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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