No. 79554

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
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CHRISTIAN STEPHON MILES,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Appeal

From the Eighth Judicial District Court, Clark County
The Honorable Mary Kay Holthus, District Court Judge

APPELLANT'S OPENING BRIEF

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Docket 79554 Document 2020-14969

NRAP 26.1 Disclosure

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Carmine J. Colucci, Esq. initially represented appellant, Christian Stephon Miles, in the district court proceedings. Mr. Colucci withdrew as counsel in February 2016. Robert S. Beckett, Esq. was then appointed to represent Miles. Miles then moved to withdraw Mr. Beckett as counsel and to represent himself. The district court granted Miles' motion. Miles then represented himself with Mr. Beckett as standby counsel.

/s/ Mario D. Valencia
MARIO D. VALENCIA
Attorney for Appellant

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Jurisdictional Statement

This is a direct appeal in a criminal case. This court has jurisdiction in accordance with NRS 177.015(3). The written Judgment of Conviction (Jury Trial) was entered on September 5, 2019.[1] 8 AA 1383-84.[2] Appellant, Christian Stephon Miles, filed his pro per Notice of Appeal on September 3, 2019, the same day he was sentenced. 8 AA 1382. The Notice of Appeal is timely pursuant to NRAP 4(b)(2).

Routing Statement

This case is presumptively retained by the Nevada Supreme Court for two reasons. First, the appeal raises "a question of first impression involving the United States or Nevada Constitutions or common law." *See* NRAP 17(a)(11). Miles raises the following issues of first impression involving the U.S. and Nevada

[1] The district court entered an Amended Judgment of Conviction on March 26, 2020, clarifying that Miles' aggregate total sentence is 163 months to life, 8 AA 1385, 1388, not 167 months to life as noted in the original judgment, 8 AA 1384. Miles appealed from the Amended Judgment of Conviction. 8 AA 1389-90. That appeal is No. 80963. Miles has moved to consolidate the appeals. On April 17, 2020, however, the Nevada Supreme Court issued an Order to Show Cause why appeal No. 80963 should not be dismissed, since it appears Miles was not aggrieved by the Amended Judgment of Conviction. The response to the Order to Show Cause is due May 8, 2020.

[2] "AA" means Appellant's Appendix. The number before "AA" is the volume number of the appendix, and the number(s) after "AA" refer to the page number(s) in the appendix. For example, "8 AA 1383-84" is a reference to volume 8 of Appellant's Appendix, pages 1383 through 1384.

Constitution: is NRS 176.035(1) unconstitutionally vague[3] as applied to Miles, does the court need to adopt factors to be used in determining whether a punishment is disproportionately severe; must the court give guidelines to the lower courts regarding criteria to be used during concurrent versus consecutive sentencing, and should the court allow defendants to waive their right to counsel based on inadequate inquiry.

Second, this appeal raises "a question of statewide public importance." *See* NRAP 17(a)(12). The questions raised in Miles' case involve constitutional protections that include: whether NRS 176.035(1) is unconstitutionally vague, whether disproportionate sentencing constitutes cruel and unusual punishment; whether the court's lack of sentencing guidelines regarding consecutive versus concurrent terms are constitutionally valid; and what constitutes a knowing and voluntary waiver of a defendant's right to counsel. All of these are questions of statewide importance that should be addressed by this court.

However, should this court determine that the case ought to be heard by the Court of Appeals, Miles has no objection.

[3] We note that this issue has been raised at the Court of Appeals, *see Pitmon v. State*, 131 Nev. 123, 352 P.3d 655 (Nev. Ct. App. 2015), but never at the Nevada Supreme Court. Therefore, it is an issue of first impression and public importance.

Statement of Issues Presented for Review

1. Whether Miles' Eighth Amendment constitutional right to avoid cruel and unusual punishment was violated when the district court imposed a disproportionately severe sentence in light of the facts of the case?

2. Whether NRS 176.035(1) is unconstitutionally vague as-applied and violated Miles' Fifth and Fourteenth Amendment constitutional rights to due process when the district court imposed consecutive prison sentences for all of Miles' convictions in the absence of any specific, reviewable criteria or guidelines for doing so?

3. Whether Miles' Sixth Amendment constitutional right to representation was violated when the district court failed to (1) ensure that his waiver was knowing and voluntary by discussing possible punishments and elements to the crimes and (2) implement standby counsel once it was apparent that Miles was abusing his right to self-representation?

Statement of the Case

A. Nature of the Case

This is a direct appeal in a criminal case.

B. The Course of the Proceedings

The State filed a Criminal Complaint against Miles on March 11, 2015. 1 AA 1-2. They charged Miles with Sex Trafficking of a Child Under 18 Years of Age (Count 1), First Degree Kidnapping (Count 2), and Living from the Earnings of a Prostitute (Count 3). *Ibid*. On March 13, 2015, an arrest warrant for Miles was issued. 1 AA 3. On March 24, 2015, Miles was arrested. 1 AA 4, 5.

Miles had his initial arraignment in Justice Court on March 26, 2015. 1 AA 6. He pled not guilty to the charges, bail was set at $150,000, and a preliminary hearing was scheduled. *Ibid*.

After several continuances, the preliminary hearing was held on May 7, 2015. 1 AA 7-20. At the hearing, the State moved to add a charge for child abuse, neglect, or endangerment (Count 4). 1 AA 16. The court granted the motion and found there was probable cause to bind Miles over to answer to the charges in the amended complaint, including Count 4: child abuse, neglect or endangerment. *Ibid*.; 1 AA 21, 22.

On May 12, 2015, the State filed an Information in the district court against Miles, charging him with Sex Trafficking of a Child under 18 Years of Age (Count 1), a violation of NRS 201.300(2)(a)(1), First Degree Kidnapping (Count 2), a violation of NRS 200.310 and NRS 200.320, Living from the Earnings of a Prostitute (Count 3), a violation of NRS 201.320, and Child Abuse, Neglect, or Endangerment (Count 4), a violation of NRS 200.508(1). 1 AA 23-25. Miles' initial arraignment in the district court was held on May 18, 2015. 1 AA 26. He pled not guilty to the charges and invoked the 60-day rule, so calendar call was scheduled for June 11, 2015 and the jury trial was scheduled for June 22, 2015. *Ibid*.

At the calendar call on June 11, 2015, Miles moved to continue the trial and waived his rights to a speedy trial. 1 AA 29-32. The court granted the motion and trial was set for August 31, 2015. 1 AA 31. During this time, Miles was represented by attorney Carmine J. Colucci. *See e.g.*, 1 AA 27.

The trial was continued several more times, and in February 2016, Colucci moved to withdraw as counsel for Miles. 1 AA 34-40. The court held a hearing on February 5, 2016 and granted Colucci's motion. 1 AA 41-42, 43-59.

On March 10, 2016, the court appointed attorney Robert S. Beckett as counsel for Miles. 1 AA 60, 61-63. On May 2, 2016, Miles moved to have Beckett removed as counsel. 1 AA 64-68. On June 28, 2016, the court held a hearing on Miles' motion. 1 AA 69-70, 71-88. At that time, Miles informed the court he wanted Beckett removed as counsel, and he wanted to represent himself. 1 AA 72-73. After conducting a *Faretta* canvass, the district court granted Miles' motion, removed Beckett as counsel, and let Miles represent himself, with Beckett on deck as standby counsel. 1 AA 69, 85-86.

Miles represented himself in the district court proceedings for the next three plus years. During that time and before his jury trial, Miles filed over twenty-five motions and supplements to those motions for various relief (*e.g.*, to dismiss, to suppress evidence, in limine). *See e.g.*, 8 AA 1391-1469. There were oppositions and replies filed to the motions, and there were about 37 hearings, including multi-

day evidentiary hearings, held during this time period. *Ibid*. In the meantime, although Miles did not object, his trial was continued over and over and over again, while all this was going on. All of Miles' substantive motions were ultimately denied. *See* 1 AA 89-90, 91-92, 93-99, 100-01, 102-03, 104-05, 106-07, 108-09, 110-11; 2 AA 281-82, 283-84, 285-86. Miles also filed two pro per appeals before trial, Appeal Nos. 75839, 75839-COA, 77220, and 77220-COA.

Finally, on April 1, 2019, a little more than four years after Miles was arrested, his jury trial began. 2 AA 114. The trial lasted seven days. It ended on April 9, 2019. 8 AA 1271, 1337-40. The jury found Miles guilty of all four counts. 8 AA 1337-40, 1345-46.

Miles' original sentencing date was June 27, 2019. 8 AA 1347. However, sentencing was delayed because the court ordered a psychological evaluation be performed. *Ibid*. That evaluation was completed on August 15, 2019. Miles was then supposed to be sentenced on August 27, 2019, but there was an issue with his presentence investigation report (PSI), and the victim and her family did not show up to speak at the hearing. 8 AA 1348-54. So, the hearing was continued again. *Ibid*.

Miles was finally sentenced on September 3, 2019. 8 AA 1355-81. The Judgment of Conviction was entered on September 5, 2019. 8 AA 1383-84. And, Miles filed his notice of appeal on September 3, 2019. 8 AA 1382.

C. Case Disposition

As noted, the jury found Miles guilty of Count 1 (Sex Trafficking of a Child Under 18 Years of Age), Count 2 (First Degree Kidnapping), Count 3 (Living from the Earnings of a Prostitute), and Count 4 (Child Abuse, Neglect, or Endangerment). 8 AA 1337-40, 1345-46. The court then imposed the following sentences:

Count 1 — 5 years (60 months) to Life;

Count 2 — 5 years (60 months) to Life, *consecutive* to Count 1;

Count 3 — 19 to 48 months, *consecutive* to Counts 1 and 2; and

Count 4 — 24 to 72 months, *consecutive* to Counts 1, 2, and 3.

8 AA 1373, 1383-84. Miles' aggregate total sentence, as reflected in the Judgment of Conviction, was 167 months to Life.[4] 8 AA 1383-84.

The court also ordered Miles to pay a $25.00 Administrative Assessment Fee, a $2,500.00 Administrative Assessment Fee pursuant to AB241, a $150.00 DNA Analysis Fee, and a $3.00 DNA Collection Fee. 8 AA 1384. The court also ordered Miles to register as a sex offender in accordance with NRS 179D.460 within 48 hours after any release from custody. *Ibid*.

[4] *See supra* note 1, however, which informs this court that on March 26, 2020, the district court entered an Amended Judgment of Conviction, clarifying that Miles' aggregate total sentence is 163 months to life, 8 AA 1388, not 167 months to life.

Statement of the Facts

A. Facts of the Underlying Alleged Offense

On the night of February 8, 2015, 16-year-old Gabrielle (Gabby) King was at home, serving out her term on juvenile house arrest. *See* Supplemental PSI 6;[5] *see also* 4 AA 584. Her probation—which she was given after being convicted of previous prostitution problems—required an ankle monitor. 4 AA 507, 520-21, 548. That night, she reached out to Miles via Facebook and asked him to come pick her up. Supplemental PSI 6; *see also* 4 AA 577-79. Gabby had previously interacted with Miles in person a few days prior—on or about February 5, 2015—when he had taken Gabby to the Rio Hotel to discuss her working for him as a prostitute. 4 AA 573-75, 577.

On February 8, 2015, after contacting Miles, Gabby snuck out of her mother and stepfather's house and ran away. 4 AA 578-79. She then met him at the back gate outside of her neighborhood where she got into his car and they drove away. 4 AA 578-79. Gabby's stepfather saw her get into the car and attempted to follow them in his own car. 4 AA 557-58, 581.

[5] In accordance with NRAP 30(b)(6), Miles has filed a motion with the clerk of the Nevada Supreme Court asking that the court direct the district court clerk to transmit the Supplemental Presentence Investigation Report to the clerk of the Supreme Court in a sealed envelope.

After Gabby noticed her stepfather following them, she told Miles to lose him and Miles began driving erratically. 4 AA 558, 559-60, 581. Gabby's stepfather stopped following them when he saw how dangerously Miles was driving. 4 AA 559-60. However, he was able to get Miles' license plate number, make, and model of the car. 4 AA 559. Once Gabby's stepfather returned home, Gabby's mother called 911 and gave the operator Miles' license plate number. 4 AA 549. Using that information, Gabby's neighborhood security guards were able to pull up photos of Miles attempting to gain entrance to her neighborhood three days earlier, on February 5, 2015. 4 AA 551.

After leaving Gabby's neighborhood and losing her stepfather, Miles took Gabby to a Walmart where he bought tools to remove her ankle monitor. 4 AA 581-82. Miles then took Gabby to his home and cut off her monitor. 4 AA 582-83. At the time, Miles was living with Jahnay LaPorsha Ramsey, who testified that she was working for him as a prostitute. 5 AA 749. Ramsey was at home when Miles and Gabby arrived. 4 AA 583.

Ramsey testified that Miles took her and Gabby to a nearby Budget Suites, where Miles had Ramsey rent a room for Gabby. 4 AA 583-84, 620; 5 AA 762-63. The next day, February 9, 2015, Miles bought a white cell phone for Gabby and installed an app called "TextNow" onto the device. 4 AA 586. TextNow allowed Gabby to log in to the app from her own phone, and send text messages from a

different phone number provided by the app. 4 AA 586-88, 622. Miles could then log in to the app from his own phone and see all of the texts Gabby had sent to anyone from that number. *Id.* This included any conversations that Gabby instigated with men who wanted to have sex with her for money. 4 AA 622, 627.

Miles then took Gabby to a green room in his home where he took photos of her. 4 AA 587. Miles used these photos to create sexually explicit Craigslist ads for Gabby. 4 AA 625-30. Once these Craigslist ads were posted, men began sending messages and meeting Gabby to have sex for money. 4 AA 601-08. Gabby had sex with five or six men and earned around $500 to $600, all of which she gave to Miles. 1 AA 10; *see also e.g.*, 4 AA 605-06, 607-08.

Throughout the next four days, Gabby was in and out of Miles' presence and spent time with several friends. On February 10, 2015, Miles dropped Gabby off at an Arby's to meet up with friends 4 AA 608, and she spent the night with her friend Durrell, 4 AA 609. She was also in contact with her friend Nashima. 4 AA 610-13. Though she was not physically with Miles, she remained in contact with him via text throughout this time. 4 AA 609, 610-13; 5 AA 725.

Knowing Gabby and Nashima were friends, Gabby's mother reached out to Nashima and offered to pay her $50 if she could find Gabby and help the family get Gabby back. 4 AA 521-22. Nashima agreed and on February 13, 2015, Nashima brought Gabby to Arizona Charlie's. 4 AA 613-14. Upon arrival,

Gabby's mom, stepfather, and probation officer confronted her, and she was arrested. *Ibid*.

Miles was arrested over a month later, on March 24, 2015. 5 AA 567-69. Two phones were confiscated during his arrest: one from his vehicle, and one from his person. 5 AA 817. Ramsey was with him at the time and was allowed to give Miles a hug goodbye. 5 AA 818. During the hug, Miles whispered to Ramsey to take the phones off the hood of the car where the police had placed them. 5 AA 769-771, 818-19. She did as she was told but was caught and arrested seconds later. *Ibid*.

Miles testified at trial that he did not pick up Gabby on February 8, 2015, but that he and Ramsey did pick Gabby up at her request on February 9, 2015. 7 AA 1209-10. He further stated that he could not remember where he had gotten Gabby from, but that the three of them had all gone to his house. *Ibid*. He also testified that at his house, Gabby had asked him to take photos of her, and he had obliged. 7 AA 1210. Moreover, Miles attested that because Gabby had nowhere to go, Ramsey offered to let her stay in a motel room at the Budget Suites that Ramsey's family had prepaid for but were no longer using. 7 AA 1211. Miles further stated that Gabby called a drug dealer to buy some marijuana and, when the dealer arrived, he robbed Miles and took his brand-new cell phone. 7 AA 1211-13. Thinking that Gabby had set him up, he allegedly cut off all communication with

her and did not have a cell phone until he bought one on February 25, 2015. 7 AA 1212-13. Miles also testified that the phone number in all of the text messages between Gabby and her pimp used to be his phone number back in August 2014, and he got the number back on February 25, 2015, when he purchased his new phone but that it was not his phone number between February 8, 2015 and February 13, 2015. 7 AA 1213.

B. Miles' Self-Representation Background

Carmine Colucci was appointed to represent Miles in May 2015. 1 AA 21. On February 3, 2016, Colucci filed a motion to withdraw as Miles' counsel, 1 AA 34-40, and on February 5, 2016, the district court granted that motion, 1 AA 41-42. The court noted that "if I let Mr. Colucci out, which you're asking me to do, there's no way you're going to trial on March 21st." 1 AA 52.

On March 10, 2016, the court appointed Robert S. Beckett to represent Miles, 1 AA 60, and set a status check to reset Miles' trial date for April 7, 2016, 1 AA 63. On May 2, 2016, Miles filed his own Motion to Withdraw Counsel Beckett. 1 AA 64.

The court conducted a rudimentary *Faretta* canvass to create "a record that [Miles was] properly queried about [his] abilities to represent [him]self." 1 AA 74. Miles then stated that he was not "difficult as a client," but that there were

"substantial documents in [his] case including like Backpage and Craigslist

> ads, and Facebook messages that the attorneys don't want to look over. So [he] figure[d] if the attorneys don't want to look it over, and the attorneys don't want to file motions, its suicide for me to go to trial anyway with the attorney, so I might as well fight for myself if the attorney is not going to do it for me."

1 AA 74. Miles then complained that his pretrial motions had not yet been filed, 1 AA 75, and the court explained that those motions would not be addressed until "within a few days of the trial." 1 AA 76. The court then returned to the *Faretta* canvass, stating,

> "Under the Sixth Amendment of the Constitution of the United States, you're entitled to the assistance of an attorney at all stages in a criminal proceeding. You have the right to represent yourself and conduct your own defense. The Court cannot force a lawyer upon you. You insist that you want to conduct your own defense. You're given this right under the United States Supreme Court's decision of *Faretta* versus California, but you must first knowingly and voluntarily give up your right to the assistance of an attorney before you can represent yourself. Do you understand that you have the right to the assistance of an attorney at all stages of a criminal proceeding?"

1 AA 76-77. Miles responded in the affirmative. 1 AA 77. The court then warned Miles that a lawyer would have "skills and experience" that would allow for a proper defense, and asked if Miles was "aware of the elements and the crime that you're charged with?" 1 AA 77-78. The ensuing conversation continued:

> THE DEFENDANT: Yes.
>
> THE COURT: What are they?
>
> THE DEFENDANT: Sex trafficking --

THE COURT: What's the elements of sex trafficking? Do you understand that each criminal charge has numerous elements to it that the State has to prove beyond a reasonable doubt?

THE DEFENDANT: -- yes Your Honor.

THE COURT: Do you know what the elements of the crime you're charged with are?

THE DEFENDANT: Yes, Your Honor.

THE COURT: What are they?

THE DEFENDANT: Recruiting -- recruiting, enticing a person to commit sex trafficking, conspiracy; it's a whole bunch, Your Honor. I don't know off the top of my head, but there's a whole bunch of elements Your Honor.

THE COURT: Criminal trials present difficult choices as to strategy, tactics, and even attorneys can differ as to the proper defense to be made of a case. You are not trying to make these choices. Do you understand that?

THE DEFENDANT: Yes.

1 AA 78. The district court never actually discussed each of the charges, the elements of the charges, or the possible defenses—but instead only did a cursory discussion of sex trafficking, at best. The court then asked Miles about possible punishment that he faced.

THE COURT: Okay. Do you understand the nature of the charges against you and any possible defenses?

THE DEFENDANT: Yes.

THE COURT: You understand that it's much easier for an attorney to do legal research than it is for you, because you're in custody?

THE DEFENDANT: Yes, Your Honor.

THE COURT: So, doing research is going to be very difficult for you.

THE DEFENDANT: Yes.

THE COURT: What's the range of punishment for the crimes you're charged with?

THE DEFENDANT: Five to life, life.

THE COURT: Life. You could be -- if you're convicted on first-degree kidnapping in Count 2, you could be sentenced to life. Do you understand that?

MS. RHOADS [Prosecutor]: And Your Honor, Count 1 is non-probationable, and he does have to register as a sex offender if he's convicted.

THE COURT: You understand all that?

THE DEFENDANT: Whereas sex trafficking is registered -- you have to register –

MS. RHOADS: And non-probationable.

THE DEFENDANT: -- I'm aware of that.

THE COURT: You're going to prison. You get convicted, you're going to prison.

THE DEFENDANT: I'm aware of that.

1 AA 83-84. The Court did not clarify whether Miles faced five years to life imprisonment on *both* counts one and two. Miles only understood that he was facing five years to life imprisonment on count two and that he had to register as a sex offender if he was convicted of count one. *Id.* Other than that exchange, the

court did not further inquire into possible punishments Miles faced on any of the counts he was charged with. More importantly, the court never clarified that, should Miles' sentences be run consecutively rather than concurrently, he would be facing *upwards of 14 years minimum*—not the five years he clearly thought he might be facing. *Id.*

Beckett was then permitted by the court to withdraw, 1 AA 69, but was kept on the case as standby counsel. 1 AA 86. Trial was rescheduled for October 10, 2016. 1 AA 87.

After Miles was permitted to represent himself, he filed over twenty-five motions to the court between June 2016 and April 2019, including motions to dismiss, motions to suppress, and motions in limine. *See* 8 AA 1391-1469. Each of these motions was considered by the court, and in many cases, formal, written oppositions were submitted by the State and, subsequently, formal, written orders were issued regarding the court's decision. *See id.* This back-and-forth went on for nearly three years, delaying trial until April 1, 2019. *Id.*

Miles suffered prejudice by being permitted to represent himself. Not only was he incapable of coherently defending himself—he also was unaware of the potential consequences he faced. *See* 1 AA 83-84. Although the district court could easily have remedied this situation by calling on Beckett—who was already

appointed as standby counsel and ready to represent Miles, 1 AA 86—the court chose not to do so at any point.

On April 1, 2019, over four years after the original arrest, Miles was tried and convicted by a jury on all four counts. 8 AA 1337-40, 1345-46. The district court then determined that Miles' sentences should be run consecutively. 8 AA 1373. During sentencing, the district court did not elaborate on what factors—if any—were used to determine consecutive sentencing rather than concurrent, but the judge did make the following statement to Miles:

> "You get Count 1 for turning a 16-year-old out and having her have sex with complete strangers, to the point where her vagina hurts. You get Count 2 from dragging her away from her parents in order to do that. And the rest is pretty obvious. You get those all consecutive because you've done it before. The best indicator of what you're going to do in the future is what you did in the past; and then the final icing is Dr. Chambers says you're a danger, so I -- and what you do is a danger."

8 AA 1373. On September 3, 2019, Miles was sentenced to an aggregate total of 167 months to life, 8 AA 183-83, but the district court has now clarified in an Amended Judgment of Conviction that Miles' aggregate total sentence is 163 months to life. 8 AA 1388.

Summary of the Argument

The district court's decision violates Miles' constitutional rights in three fundamental ways and must be brought to the attention of the Nevada Supreme Court.

First, Miles' Eighth Amendment constitutional right to be free from cruel and unusual punishment was violated when the district sentenced him to consecutive sentences for his four charges—resulting in back-to-back life sentences—with a minimum of nearly 14 years in prison before he would even be eligible for parole. Given the facts of this case in comparison to other, similar cases, this type of punishment constitutes cruel and unusual punishment. While the maximum sentence for trafficking of a minor may have been justified, imposing a consecutive life sentence for kidnapping in this case was unjust. This was not a case where a child was forcibly taken from her home to unwillingly commit illegal acts. In this case, the victim was running away from home and Miles aided her in that endeavor. The victim may have been underage, but she was already on probation for prostitution and willingly and knowingly intended to pursue that course of action again when she reached out to Miles to come and pick her up from her neighborhood. Therefore, even though Miles was found guilty, imposing the maximum sentence consecutively with another five-to-life sentence went beyond the bounds of fairness and was unduly harsh given the circumstances. Such harsh punishments ought to be reserved for those who force a person away from their home or parents against their own will.

Second, the district court violated Miles' constitutional right to due process. The due process clause protects against defendants being held criminally

responsible for conduct which they could not reasonably understand to be proscribed and here, NRS 176.035(1) is unconstitutionally vague as applied. The statute fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited and essentially encourages, authorizes, and fails to prevent arbitrary and discriminatory enforcement. As written, the law provides district court judges with unfettered discretion in their decisions to run sentences consecutively. They need not adhere to any uniform standards, nor provide reasoning to defendants. This encourages arbitrary and discriminatory enforcement, as is poignantly depicted in this case. This court should (1) reverse the district court's decision to run Miles' sentences consecutively, and remand to the district court for resentencing; and (2) grant further guidance to its constituents on *when* it is or is not appropriate to run sentencing consecutively. To decline to do so leaves district courts with far too wide a range of possible outcomes and lends itself to "judge roulette"—a blatant violation of constitutional rights.

Third, Miles' constitutional right to representation was violated when the district court failed to (1) ensure that Miles had knowingly and intelligently waived his right to counsel and (2) implement standby counsel when it was clearly necessary to do so. While defendants have a Sixth Amendment right both to assistance of counsel and the right to waive assistance and self-represent at trial, the right to represent oneself is *not* absolute. A defendant must knowingly and

intelligently waive the right to counsel. Central to that is knowing the total, maximum prison time one is facing and the elements of their alleged crimes. In this case, Miles did not know the potential sentences for each charge against him, nor the elements to those crimes. Furthermore, the judge did not ensure that Miles knew that his sentences *could be run back-to-back* or *consecutively*—more than doubling his conceivable prison time. Additionally, if a defendant causes undue delay, disrupts the proceedings, or fails to follow court rules, the court may force standby counsel to take over. Here, Miles began causing undue delay and dragged out the case for nearly four years, and yet the court never implemented standby counsel.

Argument

I. The district court's decision to impose all of Miles' sentences consecutively constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution, and Article 1, Section 6 of Nevada's Constitution.

In general, district judges in Nevada possess wide discretion in imposing sentences in criminal cases. *See Houk v. State,*103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). That discretion, however, is not limitless. *Parrish v. State*, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000). For example, a district court may not impose a sentence that 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) (citation omitted). Here, the district court imposed a disproportionally severe

punishment on Miles in comparison with the severity of the offense for which he was convicted. Such a sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution, and Article 1, § 6 of Nevada's Constitution. The Nevada Supreme Court reviews constitutional challenges de novo. *Grey v. State*, 124 Nev. 110, 117, 178 P.3d 154, 159 (2008).

The U.S. Supreme Court has remained resolute in its prohibition of grossly disproportionate punishments, even without explicitly providing "a clear or consistent path for courts to follow" regarding sentencing. *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003). 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." *Culverson v. State*, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979) (emphasis added); *see also Harmelin v. Michigan*, 501 U.S. 957, 1000–01 (1991) (explaining that the Eighth Amendment does not require strict proportionality between crime and sentence, but forbids an extreme sentence that is grossly disproportionate to the crime). Here, Miles' punishment falls into both categories. In this section, we focus on the unreasonably disproportionate sentence. The argument regarding the unconstitutionality of the sentencing statute itself can be found *infra* Part II.

During sentencing, the district court did not elaborate on what factors—if any—were used to determine consecutive sentencing rather than concurrent. The only statement made to Miles by the district court was the following:

> "You get Count 1 for turning a 16-year-old out and having her have sex with complete strangers, to the point where her vagina hurts. You get Count 2 from dragging her away from her parents in order to do that. And the rest is pretty obvious. You get those all consecutive because you've done it before. The best indicator of what you're going to do in the future is what you did in the past; and then the final icing is Dr. Chambers says you're a danger, so I -- and what you do is a danger."

8 AA 1373. The crux of why the district court ran the sentences consecutively was that Miles had "done it before." *Id.* All the other comments made were to explain the actual sentences imposed for each count. But this one-sentence explanation-—"You get those all consecutive because you've done *it* before," *ibid*. (emphasis added)—is not enough to justify such a disproportionate sentence, in light of the mitigating aspects of this case. Furthermore, the statement made was incorrect: Miles, in fact, had never before been convicted for Sex Trafficking of a Child under 18 Years of Age (Count 1) or First Degree Kidnapping (Count 2).[6] This statement and the underlying error behind it only further demonstrate that the

[6] To be sure, Miles did have a prior conviction for pandering, which is a category C felony. *See* Supplemental PSI 5-6; *see also* NRS 201.300(1). Nevertheless, he did not have any prior convictions for sex trafficking a minor, kidnapping, living off the earnings of a prostitute, and/or child abuse, neglect, or endangerment. *See* Supplemental PSI 5-6.

district court's decision to run Miles' sentences consecutively was unreasonably disproportionate.

Unfortunately, Nevada has not followed the lead of the federal courts and many other state supreme courts[7] in adopting official factors to determine sentencing proportionality. As it stands, Nevada courts have little-to-no guidance on what constitutes proportional punishment. Considerations made by other jurisdictions in determining the proportionality of a sentence include: (1) the gravity of the crime and the harshness of the penalty; (2) how the sentence imposed compares with sentences for other crimes in the same jurisdiction; and (3) how the sentence compares with other sentences imposed for the same crime in other jurisdictions. *Solem v. Helm*, 463 U.S. 277, 290-92 (1983). Application of these factors reveals the injustice wrought in Miles' case.

[7] Other nearby state Supreme Courts, such as Washington and California, have noted the growing issue surrounding disproportionate sentencing and emphasized review of such cases. *See State v. Fain*, 617 P.2d 720, 728 (Wash. 1980) (recognizing that (1) even if the Constitution does not require a proportionality review, such review is mandated by a general sense of justice and duty and (2) the purpose of proportionality analysis, and the objective factors that such analysis requires, is to minimize the possibility that the personal preferences of judges will determine the course of a convict's life); *In re Rodriguez*, 537 P.2d 384, 390 (Cal. 1975) (recognizing that trial courts must be granted discretion and deference, but complete deference could result in grave injustice without an avenue for review).

A. Gravity of the Crime

In evaluating the gravity of the offense and the severity of the penalty, a court must evaluate the *actual* harm caused or threatened during the crime. *Solem*, 463 U.S. at 292. And while the crime of kidnapping carries a harsh maximum penalty—because it can be extremely dangerous and violent—in this case, there was no violence caused or threatened by Miles.

Without downplaying the severity of kidnapping in general, this case is simply not a typical kidnapping. Rather, it is a case of two acquaintances acting extremely recklessly. Gabby had a history of sexually explicit crimes and was on probation at the time for a related offense. 4 AA 507, 520-21, 548. Further, Miles did not use any kind of weapon against Gabby and wasn't violent or threatening in his crime. He never forced her to do anything. Moreover, although she was a little more than a year under the age of consent, she was the one who reached out to Miles to come pick her up. Supplemental PSI 6; *see also* 4 AA 577-79. She instigated sneaking out of her home and was a willing participant in the exploits committed. Supplemental PSI 6; *see also* 4 AA 577-79. Miles did not threaten her, force her, or commit any other violent act. And yet, Miles received the maximum sentence on his kidnapping charge to run consecutively with his other three, related charges. In fact, because the district court imposed all of Miles' sentences consecutive to one another, he will not be eligible for parole for almost fourteen

years. While Miles' crimes are certainly serious and should come with the requisite consequences, the kidnapping in his case was not nearly as violent or malevolent as is a typical case—and yet his punishment reflects otherwise.

B. Sentencing for Crimes Other Than Kidnapping

Nevada courts have allowed defendants who have committed much more violent, atrocious crimes——such as first-degree murder, battery, and robbery—to have their sentences run concurrently, rather than consecutively. *See Hubbard v. State*, 134 Nev. 450, 453, 422 P.3d 1260, 1263 (2018) (affirming the sentencing of a defendant to serve ten, concurrent life sentences without the possibility of parole for convictions of burglary, conspiracy to commit robbery, assault, discharge of a firearm within a structure, and seven counts of robbery with use of a deadly weapon); *Hathaway v. State*, 119 Nev. 248, 251, 71 P.3d 503, 505 (2003) (noting that a defendant charged and convicted with one count of first-degree murder, one count of sexual assault, and one count of attempted sexual assault was sentenced to serve two, concurrent terms of life with the possibility of parole and a third concurrent term of 20 years with parole eligibility after eight years); *Leonard v. State*, 117 Nev. 53, 58, 17 P.3d 397, 399 (2001) (affirming the sentence of a defendant convicted of first-degree murder and robbery to a death sentence for murder with a concurrent imprisonment term for the robbery); *Fletcher v. State*, 115 Nev. 425, 428, 990 P.2d 192, 194 (1999) (noting that a defendant found guilty

of trafficking in a controlled substance and misdemeanor battery was sentenced to six years for the trafficking charge and to a concurrent six months for the battery charge); *Atkins v. State*, 112 Nev. 1122, 1126, 923 P.2d 1119, 1122 (1996) (affirming a sentencing of first-degree murder and first-degree kidnapping to two, concurrent life sentences with the possibility of parole) *overruled on other grounds by McConnell v. State*, 120 Nev. 1043, 1062-69, 102 P.3d 606, 620-24 (2004); *King v. State*, 105 Nev. 373, 374, 784 P.2d 942, 942 (1989) (affirming the conviction and sentencing of a defendant to concurrent terms of twenty years for felony child abuse and six years for involuntary manslaughter).

After comparing Miles' offense to these other, egregiously violent crimes, it is clear that running all of Miles' sentences consecutively was unreasonably disproportionate in light of the facts and circumstances in this case.

C. Sentencing for Kidnapping

Moreover, it is not unprecedented for Nevada courts to allow sentences that include punishment for kidnapping to run concurrently. *See Honeycutt v. State*, 118 Nev. 660, 666, 56 P.3d 362, 367 (2002) ("The district court sentenced [the defendant] to serve concurrent terms of life with the possibility of parole on the kidnapping count and one sexual assault count.") *overruled on other grounds by Carter v. State*, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005); *Wright v. State*, 106 Nev. 647, 648, 799 P.2d 548, 548 (1990) (affirming a sentence of "twenty-four

concurrent life sentences as well as lesser concurrent sentences" where the defendant was convicted of first degree kidnapping, first degree kidnapping with use of a deadly weapon, and attempted first degree kidnapping with a deadly weapon). These cases highlight the fact that Miles is entitled to have his sentences run concurrently even though he was convicted of kidnapping.

Based on these three factors, it is evident that Miles' total sentence, including back-to-back life sentences, is unreasonably disproportionate. Given the gravity of the crimes, as well as the comparison to other crimes and punishments in this jurisdiction, Miles should have been given a far less severe sentence by way of allowing his sentences to run concurrently because the kidnapping conviction was far less grave and completely non-violent. This court should reverse the district court's decision to run the sentences consecutively and remand to the district court for resentencing. Furthermore, it is clear that this court should adopt factors to unify the court system's approach to determining proportionality of sentencing.

II. NRS 176.035(1) is unconstitutionally vague as-applied and deprived Miles of adequate due process, in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and Article 1, Section 8, Clause 2 of Nevada's Constitution.

NRS 176.035(1) fails to comply with the Due Process Clause because the language is unconstitutionally vague on its face. The constitutionality of a statute is a question of law that the court reviews de novo. *See Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 509, 217 P.3d at 546, 551 (2009). Statutes are

presumed valid, and the burden therefore falls upon the challenger to make a "clear showing of invalidity." *Silvar v. Eighth Judicial Dist. Court*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006). A statute may be challenged as unconstitutionally vague either because it is vague on its face, or because it is vague as applied only to the particular challenger. *See Flamingo Paradise Gaming, LLC*, 125 Nev. at 509–10, 217 P.3d at 551–52. In determining whether the statute is unconstitutionally vague in an as-applied challenge, the court must apply these tests in light of the specific facts of the case at issue. *See Dahnke–Walker Co. v. Bondurant*, 257 U.S. 282, 289 (1921) ("A statute may be invalid as applied to one state of facts and yet valid as applied to another.").

In this case, NRS 176.035(1) is unconstitutionally vague as applied to Miles. The statutory language allowed the district court unfettered discretion in determining whether the sentences imposed on Miles should be concurrent or consecutive—in violation of the Constitution. The void-for-vagueness doctrine is rooted in the Due Process Clause of the Fourteenth Amendment. *State v. Castaneda*, 126 Nev. 478, 481, 245 P.3d 550, 553 (2010). The Due Process Clause "prohibits the states from holding an individual criminally responsible for conduct which he could not reasonably understand to be proscribed." *Gallegos v. State*, 123 Nev. 289, 293, 163 P.3d 465, 458 (2007) (internal citations and quotations omitted). A statute is unconstitutionally vague if it (1) fails to provide notice

sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited and (2) lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement." *Pitmon v. State*, 131 Nev. 123, 127, 352 P.3d 655, 658 (Nev. Ct. App. 2015). "In order to survive a void-for-vagueness challenge, sentencing provisions need only 'state with sufficient clarity the consequences of violating a given criminal statute.'" *United States v. Batchelder*, 442 U.S. 114, 123 (1979) (*citing United States v. Evans*, 333 U.S. 483 (1948)).

Here, NRS 176.035(1) does not "state with sufficient clarity the consequences of violating a given statute." *Batchelder*, 442 U.S. at 123 (internal citation and quotation marks omitted). Because there are no directions as to how the district court should apply the statute to different types/levels of cases, the sentencing statute fails to provide sufficient notice to defendants regarding what consequences they are likely to face. Instead, the overly inclusive language provides inadequate guidelines to the court, and the defendant, regarding whether sentences should be served consecutively or concurrently—leaving the court no choice but to extend arbitrary and discriminatory punishments. The language states,

> "[W]henever a person is convicted of two or more offenses, and sentence has been pronounced for one offense, *the court in imposing any subsequent sentence may provide that the sentences subsequently pronounced run either concurrently or consecutively with the sentence*

> *first imposed*. . . if the court makes no order with reference thereto, *all such subsequent sentences run concurrently*."

NRS 176.035(1). This language fails to provide guidelines as to what punishments should be given and when, including: factors to determine when consecutive terms should be given rather than concurrent terms, guidelines for doing so, and requirements to be enforced during a defendant's hearing.[8] This lack of clarity leaves defendants to parse out, on their own, the possible consequences they face for their crimes. This language is so broad that it leads to arbitrary and discriminatory enforcement. The current state of the law provides district court judges with unrestrained discretion in their decisions to run sentences consecutively—without receiving any further legislative or judicial guidance whatsoever. Indeed, the touchstone of the void for vagueness doctrine is ensuring that the legislature has provided adequate guidelines for enforcement in order to prevent "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *City of Las Vegas v. Dist. Ct.*, 118 Nev. 859, 866, 59 P.3d 477, 484 (2002) (internal citation and quotation marks omitted). Here,

[8] We note that NRS 176.035(3)-(4) takes away discretion from the court in certain situations, but none of those are applicable in this case. These subsections further support the argument that this court needs to supply guidelines for sentencing on NRS 176.035(1). It is clear that where the legislature intended to comment, it has commented, and under different circumstances, it has left it up to the court's discretion. However, that discretion should not be unfettered. The court is still bound by its constitutional duties.

that 'standardless sweep' has occurred, and will continue to occur without further guidance from this court. While we acknowledge that the district court is entitled to wide discretion, we urge this court to recognize that the district court's discretion should not be unlimited, and should be guided by both codified language and any precedence set by the Nevada Supreme Court. The Nevada Supreme Court should provide clarity on this issue, and their failure to do so thus far allowed for unconstitutional violations of Miles' right to due process.[9]

We note that a similar issue was taken up by the Nevada Court of Appeals in *Pitmon v. State*, 131 Nev. 123, 352 P.3d 655 (Nev. Ct. App. 2015). However,

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[9] In a dissent, one Nevada Supreme Court justice commented on this issue, stating,

> "While latitude affords trial courts the ability to impose appropriate sentences, it also permits them to impose a sentence that results in an injustice in an individual case. . . . We often observe two sentences which vary dramatically, even though the two defendants' crimes and backgrounds are similar. I do not seek to deprive the legislature of its plenary power to weigh the severity of different crimes and to dictate appropriate sentences through statutory law. However, the argument that this court would be usurping legislative functions by reviewing sentences is pure sophistry. Legislatures cannot create enough sentencing law to match the nuances of each crime and perpetrator, and thus they confer on their respective judiciaries some discretion in sentencing. This court, as the highest court in the State of Nevada, has the authority to review any discretionary matter specifically delegated to the judiciary. Since the exercise of discretion in sentencing is an integral part of the criminal judicial process, it should be subject to our review."

Sims v. State, 107 Nev. 438, 442-43, 814 P.2d 63, 65-66 (1991) (dissent of Justice Rose).

Miles challenges the statute as it has been *applied to him*, and furthermore, the reasoning of the court of appeals is inapplicable to this case. There, the defendant argued that the statute intended to require concurrent sentences. However, in Miles' case we are simply arguing that without sufficient guidelines, vagueness so permeates the language of the statute that it is impossible for the district court not to dole out arbitrary and discriminatory punishments. If this case was heard by 10 different judges, chances are that Miles would have received 10 different sentences, all varying largely in severity. This is unconstitutional and the time has come for this court to address the application of NRS 176.035(1), or at the very least, give district courts adequate guidelines for sentencing.

The lack of clarity in this sentencing statute makes it void for vagueness; thus, violating Miles' constitutional right to due process. The court, therefore, should reverse the district court's decision to run Miles' sentences consecutively, and remand to the district court for resentencing.

III. Miles' constitutional right to counsel was violated when the district court failed to (1) ensure that his waiver was knowingly and intelligently made; and (2) implement standby counsel once it was apparent Miles was abusing his right to self-representation.

The district court did not properly protect Miles' right to representation. The Sixth Amendment to United States Constitution, like Article 1, § 8, Cl. 1 of Nevada's Constitution, guarantees every defendant the right to be represented by counsel. *Faretta v. California*, 422 U.S. 806, 820 (1975). This Amendment also

permits defendants to waive their right and represent themselves without counsel. *Id*. However, the right to self-representation is not without limits—a criminal defendant must knowingly, intelligently, and voluntarily waive the right to counsel. *Id.* at 835. Further, a district court may also deny a request for self-representation if the request is untimely, made solely for purposes of delay, or if the defendant is disruptive. *See Tanksley v. State*, 113 Nev. 997, 1001, 946 P.2d 148, 150 (1997). Denial of the right to representation is per se reversible error. *Hymon v. State*, 121 Nev. 200, 212, 111 P.3d 1092, 1101 (2005).

A. The district court should never have allowed Miles to represent himself without properly ensuring that his waiver was knowing, intelligent, and voluntary.

"To knowingly, intelligently, and voluntarily waive the right to counsel, the defendant should . . . be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Hooks v. State*, 124 Nev. 48, 54, 176 P.3d 1081, 1084 (2008) (internal citations and quotations omitted). Here, proper waiver never occurred and Miles should not have been permitted to self-represent for two reasons: (1) the district court failed to adequately determine that Miles' waiver was knowing, intelligent, and voluntary through a proper *Faretta* canvass or otherwise; and (2) the record as a whole does not establish that Miles' waiver was valid.

1. Inadequate Court Inquiry

In 2008, the Nevada Supreme Court held that district courts must inquire into a defendant's waiver to self-represent, stating:

> "District courts should conduct a *Faretta* canvass and make specific findings as to whether a defendant's waiver of the right to counsel is knowing, intelligent, and voluntary before allowing a defendant to represent himself. Nonetheless, in the absence of such an inquiry, this court need not reverse the judgment of conviction if the record as a whole demonstrates that the defendant's waiver of the right to counsel was valid."

Hooks, 124 Nev. at 58, 176 P.3d at 1087.[10] In Miles' case, district court never made specific findings regarding whether Miles' waiver was knowing, intelligent, and voluntary. 1 AA 76-85. A knowing, intelligent, and voluntary waiver may be established through proper court inquiry, such as through a proper *Faretta* canvass. *Hooks*, 124 Nev. at 54, 176 P.3d at 1084. The court should make a defendant "aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Ibid*. (internal citation and quotations omitted). But here, the court failed to ascertain that Miles' decision was made knowingly because the court never

[10] The court further noted that, "[a]lthough such inquiries take time, they are a far better alternative to a new trial in the event that the record as a whole is insufficient to establish a valid waiver." *Hooks v. State*, 124 Nev. 48, 55-56, 176 P.3d 1081, 1085-86 (2008).

properly discussed Miles' possible punishment or the elements to his alleged crimes. 1 AA 83-84.

a. Potential Punishment

In *Hooks v. State*, the Nevada Supreme Court reversed and granted a new trial where "[o]ther than the district court's limited inquiry, the record [did] not demonstrate that [the defendant] had a sufficient understanding of the dangers, disadvantages, and consequences of representing himself at trial. And of particular significance in this case, it [did] not appear that [the defendant] *understood the potential sentence* when he chose to represent himself." 124 Nev. at 57, 176 P.3d at 1086 (emphasis added); *see also United States v. Forrester*, 495 F.3d 1041, 1045 (9th Cir. 2007) (holding that the district court must ensure that a defendant understands "the possible penalties" in order to properly waive his right to self-representation); *United States v. Erskine*, 355 F.3d 1161, 1167 (9th Cir. 2004) ("In order to deem a defendant's *Faretta* waiver knowing and intelligent, the district court must insure that he understands 1) the nature of the charges against him, 2) the possible penalties, and 3) the dangers and disadvantages of self-representation"); *United States v. Balough*, 820 F.2d 1485, 1487 (9th Cir. 1987) ("[A] criminal defendant must be aware of . . . the possible penalties. . . before his decision to waive counsel will be knowing and intelligent"); *Banks v. State*, 2019 WL 4791704, No. 75106, (Nev. September 27, 2019) (unpublished disposition)

("The defendant should understand the elements of each crime charged, including the possible penalties or punishments, and the total possible sentence the defendant could receive if convicted.") (internal citation and quotation marks omitted); SCR 253(3)(g) (noting that to determine proper waiver, the district court may inquire as to the "[d]efendant's understanding of the elements of each crime" as well as the "[d]efendant's understanding of the possible penalties or punishments, and the total possible sentence the defendant could receive").

In this case, the district court did not properly inquire into whether Miles' waiver was knowing, intelligent, and voluntary—specifically regarding the attendant risks of possibly being sentenced to a minimum of 14 years imprisonment, and consecutive life sentences. Miles never understood the punishment or range of punishment he faced if convicted on *each* count, nor did he understand the potentially compounded punishment (i.e., "total possible sentence") looming if convicted of all of his crimes. The court made clear that it was not in favor of Miles representing himself,[11] but the problem lies in the fact that the court

[11] The Court made the following comments during its *Faretta* canvass: "[A]nd you want to represent yourself?" 1 AA 73. "That is certainly a bonehead move? What do you know about the law?" *ibid*.; and "[O]ver 37 years, I probably had a 100 or more pro per cases. You know how many of them were acquitted? . . . Zero, not one. That is the stupidest thing in the world. You think you can do a better job representing yourself than – you know . . ." *Ibid.*

did not ensure that Miles understood his potential sentence, as demonstrated by the following exchange:

> **THE COURT:** Okay. Do you understand the nature of the charges against you and any possible defenses?
>
> **MILES:** Yes.
>
> . . .
>
> **THE COURT:** What's the range of punishment for the crimes you're charged with?
>
> **MILES:** Five to life, life.
>
> **THE COURT:** Life. You could be – if you're convicted on first-degree kidnapping in Count 2, you could be sentenced to life. Do you understand that?
>
> . . .
>
> **MILES:** -- I'm aware of that.

1 AA 83-84. The potential punishment for Miles was not simply five years to life imprisonment. That was the range for just *one* crime with which he was charged. The record does not show that Miles adequately understood that if he were to be sentenced to consecutive terms, he was actually facing a sentencing range of 13.9 years to double-life sentences for *all the crimes* with which he was charged. Instead, the record shows that he believed he would be eligible for parole after five years if convicted. As it turned out, he will not be eligible for parole for almost 14 years.

b. Elements of the Crime

Moreover, the court failed to ensure that Miles understood the elements of the crimes with which he was charged. This court has held that a defendant "should understand 'the elements of each crime' charged." *Banks v. State*, 2019 WL 4791704, No. 75106, (Nev. September 27, 2019) (unpublished disposition); *see also Harris v. State*, 113 Nev. 799, 802, 942 P.2d 151, 155 (1997) (requesting that the district attorney explain to the defendant "the elements of the crimes charged, the burden of proof, the potential penalties, and the fact that he could not claim ineffective assistance of counsel on appeal if he represented himself.").

But here, the court did not adequately review the elements of Miles' crime. The court simply stated, "[d]o you understand the nature of the charges against you and any possible defenses?" and Miles said he did. The conversation continued:

> THE COURT: An attorney knows the elements of the offense that you've been charged with and any other possible defenses that could be presented on your behalf. *Are you aware of the elements and the crime that you're charged with?*
>
> THE DEFENDANT: Yes.
>
> THE COURT: What are they?
>
> THE DEFENDANT: Sex trafficking --
>
> THE COURT: *What's the elements of sex trafficking?* Do you understand that each criminal charge has numerous elements to it that the State has to prove beyond a reasonable doubt?
>
> THE DEFENDANT: -- yes Your Honor.

> THE COURT: *Do you know what the elements of the crime you're charged with are?*
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: What are they?
>
> THE DEFENDANT: *Recruiting* -- recruiting, enticing a person to commit sex trafficking, conspiracy; it's a whole bunch, Your Honor. I don't know off the top of my head, but there's a whole bunch of elements Your Honor.
>
> THE COURT: Criminal trials present difficult choices as to strategy, tactics, and even attorneys can differ as to the proper defense to be made of a case. You are not trying to make these choices. Do you understand that?
>
> THE DEFENDANT: Yes.

1 AA 78 (emphasis added). The district court cut off Miles during the discussion of the elements. The court never actually discussed each of the charges, the elements of the charges, or the possible defenses—but instead only did a cursory discussion of sex trafficking, at best. The court then asked Miles about possible punishment that he faced. This inquiry is insufficient to show a knowing, intelligent, and voluntary waiver. The elements of Miles' offenses, including sex trafficking and kidnapping, are much more inclusive and broader than what a pro se litigant may think. Therefore, the district court had a duty to fully explain the charges and the elements before accepting Miles' waiver. Also, with the added elements of dealing with a minor, prior solicitation charges against Gabby, and complexity regarding whether or not Miles thought that Gabby had permission to leave her home, *see*

Supplemental PSI 6; see also 4 AA 584—this case was far too complex for the court to have been appeased by a simple "yes" when asked about the nature of Miles' charges and defenses. *See Lyons v. State*, 106 Nev. 438, 443-44, 796 P.2d 210, 213 (1990) (holding that the constitutional right of self-representation can be properly denied or revoked, where: "the case is especially complex, requiring the assistance of counsel").

2. Record As A Whole

Looking at the record as a whole, there is no indication that Miles' waiver of the right to counsel was made knowing the potential sentence he faced if convicted. If anything, the sparse record regarding Miles' understanding of possible punishment shows that Miles was insufficiently informed about his right to waive. While the court did conduct a cursory *Faretta* canvass, 1 AA 76-85, it did not inquire far enough. This caused Miles to suffer severe prejudice because the court permitted him to represent himself. Other than the court's limited inquiry, nowhere in the record is there any indication that Miles "had a sufficient understanding of the dangers, disadvantages, and consequences of representing himself at trial," including his potential punishment. *Hooks*, 124 Nev. at 57, 176 P.3d at 1086. Here, Miles was faced with sentencing for different offenses that he could not possibly have reasonably understood or anticipated without counsel.

B. *The district court should have revoked Miles' right to self-represent once it was apparent that Miles was abusing that right.*

In addition to the failure to acquire a knowing and voluntary waiver from Miles, the district court also failed Miles by choosing not to implement standby counsel even once it was clear that Miles was drawing out the case and causing undue delay. Although the constitutional right of self-representation is generally protected, it can be properly denied or revoked, where: "(1) the defendant's request for self-representation is untimely; (2) the request is equivocal; (3) the request is made solely for purposes of delay; (4) the defendant abuses the right of self-representation by disrupting the judicial process; (5) the case is especially complex, requiring the assistance of counsel; or (6) the defendant is incompetent to voluntarily and intelligently waive his or her right to counsel." *Lyons v. State*, 106 Nev. 438, 443-44, 796 P.2d 210, 213 (1990). Here, the court should have revoked Miles' right to self-representation.

Although there was standby counsel appointed in this case, standby counsel was never implemented as lead counsel by the court, 1 AA 86—even after it was apparent that Miles was acting improperly as his own counsel. Instead, the court

told Miles that "[t]he court [could] not force a lawyer upon [him],"[12] 1 AA 76-66, and allowed him to do what no attorney would be—stretch out the case for four years before taking it to trial, file numerous frivolous motions, and lead himself down the wrong track again and again, *see* 8 AA 1391-1469—to his own detriment and to the detriment of the court system. The delay and disruption caused by Miles at the hand of the district court was extraordinarily long and encumbered—and something that a licensed attorney would never have been permitted to do. The justice system hinges on delivery of swift, efficient justice and any justice delayed is justice denied. The court's refusal to implement counsel made for a total disruption of the criminal justice system and a huge drain of government money and resources.

Given this set of facts, the court failed to: (1) ensure that Miles knowingly and intelligently waived his Sixth Amendment right; and (2) implement counsel when it was necessary to do so. Thus, this court should reverse Miles' judgment of conviction and remand this matter to the district court for a new trial.

[12] This statement made by the district court is clearly incorrect in light of *Lyons v. State*, 106 Nev. 438, 443-44, 796 P.2d 210, 213 (1990) (holding that the right to self-representation can be properly denied or revoked where: "the request is made solely for purposes of delay," or "the defendant abuses the right of self-representation by disrupting the judicial process").

Conclusion

The district court's decision to sentence Miles to consecutive terms on *all* his convictions constituted cruel and unusual punishment, in violation of the Eighth Amendment to the United States Constitution, and Article 1, § 6 of Nevada's Constitution. Additionally, Miles' constitutional right to due process was violated because the language of NRS 176.035(1) is unconstitutionally vague on its face. Lastly, Miles' Sixth Amendment rights were violated by the district court when it failed to protect Miles' right to representation. These fundamental constitutional violations must result in Miles' sentence being reversed and the case being remanded to the district court for a new trial and/or a resentencing hearing.

DATED: April 20, 2020.

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Certificate of Compliance

1. I hereby certify that I have read this 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, including NRAP 28(e)(1), which requires every assertion 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 upon is 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.

2. 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point font of the Times New Roman style.

3. I further certify that this brief complies with the type-volume limitations of NRAP 40, 40A and 40B because it is proportionally spaced, has a typeface of 14 points and contains no more than 10,562 words.

DATED: April 20, 2020.

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Certificate of Service

I HEREBY CERTIFY AND AFFIRM that this document, Appellant's Opening Brief, was filed electronically with the Nevada Supreme Court on April 20, 2020. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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