IN THE SUPREME COURT OF THE STATE OF NEVADA

JUSTIN D. PORTER, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 85782

RESPONDENT'S ANSWERING BRIEF

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

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ROUTING STATEMENT

Pursuant to the Nevada Rules of Appellate Procedure 17(b)(2)(A), this appeal is presumptively retained by the Nevada Supreme Court because it is an appeal from a Judgment of Conviction that involves Category A or B felonies.

STATEMENT OF THE ISSUES

1. Whether Porter's speedy trial rights were violated.
2. Whether Porter's sentence violates the Nevada and United States Constitutions'.
3. Whether the district court abused its discretion at sentencing under NRS 176.017.
4. Whether cumulative error occurred.

STATEMENT OF THE CASE

On April 26, 2001, Justin Porter (hereinafter "Porter") was charged by way of Criminal Information with forty-two (42) felony counts: nine (9) counts of Burglary While In Possession Of A Deadly Weapon; four (4) counts of First Degree

Kidnapping With Use Of A Deadly Weapon; six (6) counts of Sexual Assault With Use Of A Deadly Weapon; five (5) counts of Robbery With Use Of A Deadly Weapon; one (1) count of First Degree Kidnapping With Use Of A Deadly Weapon With Substantial Bodily Harm; two (2) counts of Sexual Assault With Use Of A Deadly Weapon With Substantial Bodily Harm; two (2) counts of Attempt Murder With Use Of A Deadly Weapon; one (1) count of First Degree Arson With Use Of A Deadly Weapon; one (1) count of First Degree Kidnapping With Use Of A Deadly Weapon, Victim 62 Years Of Age Or Older; one (1) count of Sexual Assault With Use Of A Deadly Weapon, Victim 65 Years of Age or Older; three (3) counts of Robbery With Use Of A Deadly Weapon, Victim 65 Years of Age or Older; two (2) counts of Battery With Intent To Commit A Crime, Victim 65 Years of Age or Older; three (3) counts of Attempt Robbery With Use Of A Deadly Weapon; one (1) count of Murder With Use Of A Deadly Weapon (Open Murder); and one (1) count of Battery With Use Of A Deadly Weapon. 1 AA 001–017.

On May 2, 2001, an Amended Information was filed in open court to correct a typographical error. 1 AA 018– 034. In addition, Porter was arraigned and pled not guilty.[1] Further, Porter waived his right to a speedy trial. Id.

[1] Porter failed to include in his appendix various Reporter's Transcripts of Hearings that he requested to be transcribed. Porter has the "responsibility to provide the materials necessary for this court's review." Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975). Under NRAP 30(d), the required appendix should include "[c]opies of relevant and necessary exhibits." See also Thomas v. State, 120 Nev.

On October 11, 2001, a Second Amended Information was filed reducing the total charges to thirty-eight (38) counts: adding one (1) count of First Degree Kidnapping With Use Of A Deadly Weapon With Substantial Bodily Harm and dismissing one (1) count of First Degree Kidnapping With Use Of A Deadly Weapon; one (1) count of Robbery With Use Of A Deadly Weapon; one (1) count of First Degree Kidnapping With Use Of A Deadly Weapon, Victim 62 Years Of Age Or Older; two (2) counts of Battery With Intent To Commit A Crime, Victim 65 Years of Age or Older; and removing the "deadly weapon" enhancement from the Arson charge. 1 AA 035–045.

On May 15, 2008, Porter filed a Motion to Sever Counts 30-32 from the remainder of the charges. 1 AA 107–120. Counts 30-32 included crimes against Gyaltso Lungtok: Burglary While in Possession of a Deadly Weapon, Attempt Robbery with Use of a Deadly Weapon, and Murder with Use of a Deadly Weapon (Open Murder). Id. On June 12, 2008, the State filed its Opposition. On July 3, 2008, the district court granted Porter's Motion. 1 AA 0121. On April 30, 2009, the State

37, 43 & n. 4, 83 P.3d 818, 822 & n. 4 (2004) ("Appellant has the ultimate responsibility to provide this court with 'portions of the record essential to determination of issues raised in appellant's appeal.' " (quoting NRAP 30(b)(3)); Fields v. State, 125 Nev. 785, 220 P.3d 709 (2009) (appellant's burden to provide complete record on appeal). "When an appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision." Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007).

filed a Third Amended Information charging the three counts that were severed from the large group of charges. 1 AA 125–126.

On May 8, 2009, a jury found Porter guilty of Second-Degree Murder with Use Of A Deadly Weapon and not guilty of Burglary While in Possession of a Deadly Weapon and Attempt Robbery With Use of a Deadly Weapon. 1 AA 127–128.

On September 30, 2009, the district court sentenced Porter to the Nevada Department of Corrections (NDOC) for one hundred twenty (120) months to life, plus a consecutive term of one hundred twenty (120) months to life for the Use of a Deadly Weapon Enhancement with three thousand three hundred thirty-eight (3338) days credit. 1 AA 129–135.

The Judgment of Conviction was filed on October 13, 2009. 1 AA 136–137.

After years of continuances, largely by Porter, for numerous Motions and Petitions, failed negotiations, and requests for alternative counsel, Porter ‘s second trial for the remaining charges was set for August 29, 2022. 2 AA 376.

On September 6, 2022, the State filed a Fourth Amended Information charging Porter with the remaining thirty-five (35) counts. 4 AA 753–763.

On September 20, 2022, a jury rendered a verdict as follows: guilty of seven (7) counts of Burglary While In Possession Of A Deadly Weapon; guilty of two (2) counts of First Degree Kidnapping With Use Of A Deadly Weapon; guilty of four

(4) counts of Sexual Assault With Use Of A Deadly Weapon; guilty of four (4) counts of Robbery With Use Of A Deadly Weapon; guilty of one (1) count of First Degree Kidnapping With Use Of A Deadly Weapon With Substantial Bodily Harm; guilty of two (2) counts of Sexual Assault With Use Of A Deadly Weapon With Substantial Bodily Harm; guilty of one (1) count of Attempt Murder With Use Of A Deadly Weapon; guilty of one (1) count of First Degree Arson; guilty of one (1) count of Sexual Assault With Use Of A Deadly Weapon, Victim 65 Years of Age or Older; guilty of three (3) counts of Robbery With Use Of A Deadly Weapon, Victim 65 Years of Age or Older; guilty of two (2) counts of Attempt Robbery With Use Of A Deadly Weapon; and guilty of one (1) count of Second Degree Kidnapping with Use of a Deadly Weapon. 11 AA 2478–2488.

On November 3, 2022, the district court sentenced Porter to the Nevada Department of Corrections (NDOC) for an aggregate sentence of one hundred twenty-six (126) years to life consecutive to the Second-Degree Murder conviction with eight thousand one hundred twelve (8,112) days. 11 AA 2497–2530.

On December 27, 2022, the State of Nevada filed a Fifth Amended Information. 11 AA 2533. The Fifth Amended Information merged the Third and Fourth Amended Information's to include all of Porter's convictions, in the instant case, in a single Information. Id.

On February 16, 2023, Porter filed a Notice of Appeal. 11 AA 2558.

STATEMENT OF THE FACTS

Porter was specifically charged with thirty-eight (38) separate crimes committed against eleven different victims, between February 1, 2000, through June 9, 2000.

All of the following Statements of Facts refer to Porter as the perpetrator of the crimes being described. Porter was linked to every one of the following incidents by either DNA evidence, fingerprint evidence, shoe wear impression evidence, admission or confession evidence, eyewitness identification and/or by a combination of a number of the above types of evidence.

Facts Pertinent to The Crimes Committed Against Teresa Taylor.

On February 1, 2000, at approximately 7:30 p.m., Teresa Taylor heard a knock on the front door of her residence, located at 2895 E. Charleston, #2-106, Las Vegas, Nevada. 4 AA 908, 913. Teresa had spoken to her mother earlier and was expecting her mother to come to the residence and pick something up from her. 4 AA 937.

Ms. Taylor opened the door and encountered Porter, whom she thought was looking for her sister. 4 AA 913, 942. Porter asked her for a drink of water.4 AA 915. Porter entered her residence without Ms. Taylor's consent. 4 AA 916. Ms. Taylor grabbed Porter's arm and attempted to pull him out of the apartment, at which time Porter pulled a knife on her. 4 AA 918.

After brandishing the weapon, Porter forced Ms. Taylor to follow him around the apartment while he looked around her apartment. 4 AA 919. Porter ordered Ms. Taylor into her bedroom and her clothes were taken off. 4 AA 920. Ms. Taylor laid face down on her bed. 4 AA 921. Porter then placed his penis in Ms. Taylor's vagina, from behind, against her will, while still holding the knife in his hand. 4 AA 920–922, 936–37.

Porter tied Ms. Taylor up in her closet. 4 AA 923 Porter then put water down Ms. Taylor's pants, in an attempt to remove his DNA from her vaginal area. Id. Afterwards, Porter placed a knife from Ms. Taylor's kitchen in the closet with her, for the purpose of freeing herself after he left the residence. 4 AA 930. Ms. Taylor was eventually able to cut herself free. AA 931.

Facts Pertinent to The Crimes Committed Against Leona Case.

Leona Case was born August 18, 1957. 5 AA 1050. On March 7, 2000, Ms. Case resided in a studio apartment located at 2900 E. Charleston, #50. Id. Ms. Case lived alone at that time, and her apartment was located on the bottom floor. Id.

At approximately half past midnight on March 7, 2000, Ms. Case was in her living room, watching a movie, when someone knocked on her door. 5 AA 1050–51. Ms. Case put the safety chain on her door and then opened it to see who was there, and she recognized the individual as somebody who had knocked on her door about three to four days prior, looking for the person who previously lived in the

apartment. 5 AA 1052. The first time the person at Leona's door had knocked on it, he asked if he could use her telephone, after telling her he was looking for the prior tenant. 5 AA 1053. Ms. Case took her telephone outside on that occasion and allowed Porter to use it outside. Id. The first time the person knocked on Ms. Case's door and asked to use her telephone, he had a friend with him. Id. Porter introduced himself to Ms. Case by stating, "My name is Jug, and this is my buddy, Chris." Id.

Ms. Case recognized the person at the door on March 7, as being the individual who identified himself as "Jug." 5 AA 1054. As he did the first time, Porter knocked on Ms. Case's door, Porter again asked to use Leona's telephone but because it was so late at night, Ms. Case told him no, and shut the door. Id.

Ms. Case was sitting in her chair in the living room and heard something rattling at the window. Id. Thereafter, Ms. Case heard a couple of bangs on her door and then Porter kicked it open, off the frame. 5 AA 1055. After Porter entered Ms. Case's apartment by kicking the door in, Ms. Case picked up the telephone and attempted to call 911, however, the call did not go through because Porter slapped Ms. Case on the face and knocked her to the ground, taking the phone away from her. 5 AA 1055–56.

Porter went into Ms. Case's kitchen, opened the drawers, and got out a steak knife. 5 AA 1056. Porter first used the knife to threaten Ms. Case, in order to find out where her money was and to move her into the bedroom. 5 AA 1057. Porter

asked Ms. Case where her money was at and she told him she did not have any, however, Porter saw Leona's purse sitting on her dresser and took $44.00 and some food stamps from it. Id. Porter also told Ms. Case to give him a little ten carat ring she was wearing that said "mom" on it. 5 AA 1057–58. Ms. Case gave Porter the ring because he had a knife. 5 AA 1058.

Porter wielded the knife and demanded Ms. Case to go into the bedroom, where he had her hold a lamp that was beside the bed, while he cut the cord off it. 5 AA 1059. After cutting the cord off with the knife, Porter put some kind of knot in it, slipped it over her neck; told her that he was going to tie her up, and started to strangle her with it. 5 AA 1059–61. Ms. Case grabbed the cord and put her fingers between her neck and the cord, while Porter climbed up on the back of the bed and wound it around both of his hands and began strangling her, pulling the cord tight with both hands. Id. Ms. Case began losing consciousness and Porter stated several times, "Why don't you just die, Bitch." 5 AA 1061. Ms. Case fell forward, and Porter let go of the cord causing Leona to pull it away from her neck and slip it off her head, at which point Porter told her to disrobe. 5 AA 1062.

Ms. Case disrobed and shoved the cord under the corner of the bed because she did not want Porter to find it. 5 AA 1062. Porter told Leona that he was going to fuck her and asked her where her condoms were at. 5 AA 1063. Ms. Case told Porter that she did not have any condoms, so he grabbed a plastic bag that covered her

coffee filters and used it as a makeshift condom, before putting his penis into Ms. Case a's vagina, against her will. 5 AA 1063.

Porter got off Ms. Case and took the plastic bag into the bathroom, where he flushed it down the toilet and then washed his private area. 5 AA 1064. After putting her clothes back on, while Porter was in the bathroom, Ms. Case found the steak knife laying on the dresser and shoved it between the mattress and box springs, like she had done with the cord. 5 AA 1065. After Porter was done in the bathroom, he went into the kitchen and got another knife. Id. He returned to the bedroom with the knife and told Ms. Case to get undressed and turn around, because he was going to "fuck her up the ass." Id. Porter used the cellophane off Ms. Case's cigarette package as a condom, and he, again, put his penis in her vagina, against her will. 5 AA 1066—67.

After completing the second act of sexual assault on Ms. Case, Porter, again, went to the bathroom and washed himself. 5 AA 1067. Ms. Case put her underwear and t-shirt on and as she stood up, off the bed, Porter lunged at her with the knife and began to stab her in the abdomen. Id. The knife entered Ms. Case's body so deeply that she felt the Porter's fist hit her stomach. 5 AA 1068. Porter pulled the knife out and stabbed Ms. Case again, pushing the knife full into her as before. Id. After pulling the knife out of Ms. Case's body the second time, Porter attempted to cut the right side of Ms. Case's neck with it. 5 AA 1069. Realizing Porter was trying

to kill her, Ms. Case attempted to kick Porter. 5 AA 1069–70. Porter avoided Ms. Case's kick, so Ms. Case bent her head down and went for his waist, thinking maybe she could tackle him and get him down, however, Porter's arm wound up around Ms. Case's neck and he strangled her to unconsciousness. 5 AA 1070–1071.

When Ms. Case regained consciousness Porter told her to go to the bathroom and wash herself. 5 AA 1072. Porter told Ms. Case to use soap on her vaginal area.[2] 5 AA 1073. After Ms. Case came out of the bathroom, Porter had her sit on the bed and made her clean out her fingernails because she had scratched him when she tried to remove his hands from her throat. 5 AA 1074.

The next thing Ms. Case recalled is that Porter had the cord again. 5 AA 1076. Porter told her to put it around her neck again, but Ms. Case refused. Id. As a result, Porter began whipping Ms. Case with it and beat her around the head with it, till she was bleeding severely. 5 AA 1077.

Porter told Ms. Case to go back into the bathroom and she complied. 5 AA 1078. Porter shut the bathroom door, so Ms. Case locked it. Id. The next thing Ms. Case heard was a bang, and then the smoke alarm going off. 5 AA 1079. Ms. Case knew her apartment was on fire because she heard the smoke alarm and could smell

[2] Ms. Case had to remove the cellophane from her vagina when Porter made her go to the bathroom and wash her vaginal area. Porter told Ms. Case to flush it down the toilet, which she did.

smoke. Id. There also came a point when she heard a door slam, which caused her to unlock the bathroom door and try to open it. 5 AA 1080.

Ms. Case could not open the bathroom door because Porter had slid a nine-drawer dresser up against it, blocking Ms. Case in the bathroom. Id. Ms. Case began banging the bathroom door with her shoulder trying to move the dresser over, but it would not budge. Id.

Ms. Case began to think that if Porter could kick her front door in, she should be able to kick her way out of the bathroom; so, she started kicking the door right beneath the door handle, and the dresser tipped over. 5 AA 1081. When Ms. Case was able to squeeze out of the bathroom door, she saw that her apartment was totally on fire. 5 AA 1081–82. Ms. Case grabbed her sister's cellular telephone and ran outside of the apartment and hid behind a stairwell, afraid Porter might still be around. 5 AA 1082. Ms. Case tried to use the cellular telephone three times, but it would not connect. 5 AA 1083. Ms. Case ran down between the two buildings and saw people, she was trying to get somebody to call 911 but she could not talk very well, however, the fire department did arrive, and Ms. Case was taken to the hospital for treatment. Id.

Facts Pertinent to The Crimes Committed Against Ramona Leyva.

On March 25, 2000, Ramona Leyva resided with her husband in a studio apartment located at 600 Bonanza Rd., Apt. #144, Las Vegas, Nevada. 4 AA 881–

82. At approximately 10:00 p.m. on the night of the 25th, Ramona returned to the apartment after dropping her husband off at work. 4 AA 883–84. Ramona was in the apartment and had gone to the bathroom and heard a loud noise at the front door. 4 AA 884. Ramona looked up and saw Porter. 4 AA 885. Ramona quickly closed the bathroom door, but Porter broke through it and pushed her against the bathroom wall, grabbing her hair and neck. Id.

Porter indicated that Ramona should quiet down by telling her to "shush". 4 AA 887. Porter dragged Ramona by her hair and neck out to the kitchen where he grabbed a knife from her kitchen drawer. 4 AA 887–88. Porter put the knife against Ramona's neck and demanded money from her. Id. Porter moved Ramona around the apartment and continued to demand money from her. Id.

Porter became angry and began to touch Ramona's breasts and buttocks with his hands, over her clothes. 4 AA 888. Porter also touched his penis with his hand, over his pants. 4 AA 888. Porter began removing his clothes and Ms. Leyva told him to get some protection. 4 AA 888. Porter used a rubber glove over his penis before penetrating Ms. Leyva's vagina with his penis. 4 AA 888–89. Porter kept one hand on her throat while he sexually assaulted Ms. Leyva. 4 AA 889. After the sexual assault, Porter took the glove off of his penis and flush it down the toilet. Id.

Porter then took Mrs. Leyva's car keys. 4 AA 890. Porter left the apartment briefly. Id. Porter then re-entered the apartment and picked up Ms. Leyva's

telephone receiver to see if the line worked. Id. After hanging the telephone back, Porter left the residence and stole Ms. Leyva's car. 5 AA 890–91.

After Porter fled in her car, Mrs. Leyva attempted to get some of her neighbors to help her but none of them would answer their doors. 4 AA 891. Mrs. Leyva walked to a fast-food restaurant where she found a Spanish speaking couple to take her to her husband's job. 4 AA 891–92. After she arrived at her husband's job he took her to report the crimes. Id.

Facts Pertinent to The Crimes Committed Against Marlene Livingston.

On April 14, 2000, Marlene Livingston, (DOB 10/12/33), resided at an apartment complex located at 2301 Clifford, Las Vegas, Nevada. 6 AA 1230–31. The complex has 11 apartments, and Marlene lived in Apt. #11, on the second floor. Id.

On April 3, Marlene worked in the afternoon until 9:00 that night. 6 AA 1232. After work, Marlene went home. Id. At the time, Marlene drove a white, 1991 Dodge Dynasty. 6 AA 1233. After Marlene arrived home from work that night, she checked the mail, had received her social security check, and went to Boulder Station to cash it. Id. Marlene had $515.00, after cashing her check. Marlene stayed at Boulder for approximately an hour or so, wherein she bought some Chinese food and played some nickels. 6 AA 1234.

Marlene left Boulder Station and drove home, where she put some of the left over Chinese food on a plate and put it in the microwave, and then went to take her work clothes off. 6 AA 1234–35. As Marlene sat on the edge of her bed, and was looking through her purse, wearing only her bra and pants, when she heard a boom and saw Porter break through her front door, wearing a mask that did not cover his whole face. 6 AA 1235. Marlene also noticed Porter had a knife with a silver blade.6 AA 1236.

Porter demanded Marlene's money, which she took from her wallet and gave to him. 6 AA 1239. Thereafter, Porter asked Marlene if she had any gold, and she gave him her pinky ring. Id. Porter took the knife that he had and flicked through Marlene's purse with it and saw a $10.00 bill. Id. Porter accused Marlene of lying to him about having more money, which caused her to explain that she had cashed in $10.00 worth of nickels at Boulder Station and then shoved it in her purse. Id.

Porter told Marlene not to look at him, causing her to keep her head down and eyes closed. 6 AA 1240. Marlene told Porter, "Take anything you want, I just want to see my grandkids tomorrow." 6 AA 1241. Thereafter, Marlene heard Porter go around the bed and grab her telephone. 6 AA 1246. Porter then demanded that Marlene stand up. 6 AA 1247. When Marlene complied, Porter told her to bend over. Id. When Marlene moved her pants to the side a little and told Porter that she had a pad on, the intruder sat on the bed, pulled his penis out, and told her they would do

it orally and not to bite him. 6 AA 1247–48. Porter told Marlene that "he liked to fuck old ladies." 6 AA 1248.

Marlene was forced to put her mouth on Porter's (exposed) penis and Porter held the back of her head and pushed it up and down. 6 AA 1248–50. During the assault, Marlene kept her eyes closed. Id. During the act Porter kept telling Marlene not to bite him. 6 AA 1250.

After the sexual assault, Porter asked Marlene if she had a car, a gun, and a husband that was going to come in. 6 AA 1251. Marlene told Porter that she had a white Dynasty, and he demanded her keys, which she took out of her purse and gave to him. Id.

Porter told Marlene to go into her bathroom and wash her mouth out. Id. Porter also stood behind her during this act and forced water into her mouth. 6 AA 1252. Thereafter, Porter told Marlene to stay in the bathroom, where she stayed for approximately 10 to 15 minutes, because she was scared to come out. Id.

Once Marlene left the bathroom she looked outside and saw that her car was gone. Id. Marlene was afraid the intruder might return so she put on her pajama's and then knocked on the landlord's door and told him what had happened. 6 AA 1254. Marlene's landlord subsequently called the police. 6 AA 1255.

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Facts Pertinent to The Crimes Committed Against Clarence And Francis Rumbaugh.

On April 12, 2000, Francis Rumbaugh (DOB 04/11/21) and her husband, Clarence Rumbaugh (DOB 09/19/16), lived at 436 North 12th Street #B, in Clark County, Las Vegas. 6 AA 1422, 1467. The residence had one bedroom, a living room, and bathroom. Id.

During the evening of April 12, at approximately 11:25 p.m., Francis and Clarence were at home eating cake and ice cream, in the living room. 6 AA 1422–23. The front door was open, however the screen door was closed and latched at the time, when Francis heard a loud noise, and somebody burst in. 6 AA 1423. After Porter had burst into the residence Francis began to scream for help and Porter told her to shut up. 6 AA 1424. Porter then shut two windows and the front door. Id. Additionally, Porter picked up the knife Francis had used to cut the cake with and used it to cut the telephone cord. Id. After Porter cut the telephone cord, with the knife still in his hand, he grabbed Francis by the left wrist area and threw her onto the couch. 6 AA 1424–25.

After Porter threw Francis onto the couch, he approached Clarence Rumbaugh and wrestled with him, eventually throwing Mr. Rumbaugh to the floor and demanding the money from his wallet. 6 AA 1429. Mr. Rumbaugh got up off the floor and took his wallet out of his back pocket, but before he could reach into it and

take the money out, Porter reached in and took $81.00 from the wallet. 6 AA 1429–30.

Porter pointed a knife at Mr. and Mrs. Rumbaugh and made them go into their bedroom where he rummaged through their belongings using the tip of the knife. 6 AA 1431–32. The Rumbaugh's had El Cortez cups full of change on their desk and Porter picked up those cups to put the loose change consisting of nickels, dimes, and quarters, in his pockets. 6 AA 1432–34. Afterwards, Porter took another hanky from his pocket and wiped the containers off. 6 AA 1433.

Porter instructed the Rumbaugh's to stay in their bedroom while he fled the residence. 6 AA 1435.

Facts Pertinent to The Crimes Committed Against Leroy Fowler.

On June 6, 2000, Mr. Fowler resided at 1121 East Ogden Avenue, Apt. #9, Las Vegas, Nevada, in a studio apartment. 7 AA 1690. On June 6, at approximately 1:55 a.m., Mr. Fowler was sleeping on his bed. 7 AA 1692.Mr. Fowler awoke to his front door being kicked in. Id.

Mr. Fowler encountered Porter who had a knife in his hand. 7 AA 1697. Mr. Fowler picked up a kitchen chair and began swinging it at Porter. 7 AA 1694–95. Mr. Fowler was making a lot of noise and Porter told him several times to shut up. 7 AA 1696.

Mr. Fowler continued swinging the kitchen chair, at which time Porter turned and ran out of the apartment. Id.

Facts Pertinent to The Crimes Committed Against Joni Hall.

On June 7, 2000, Joni Hall resided in an apartment located at 624 North 13th Street, Las Vegas, Nevada. 8 AA 1930–31. Joni had been living in the apartment for a little over a month. Id. Joni and her child along with another woman and her three children all lived in the apartment. 8 AA 1932.

On June 7, during the early morning hours between 1:30 and 2:00 a.m., Joni arrived home to the apartment and went straight to bed. 8 AA 1933. Joni awoke to a thud type noise and thought that maybe her roommate was hitting the wall or one of the children was hitting the door.8 AA 1934. Joni laid in bed for a couple a seconds before starting to shut her eyes again. 8 AA 1934–35. Joni saw that the bedroom door was opening, and she also saw Porter standing in the doorway putting something over his face and saying, "Oh Yeah." Id. Porter also had a knife in his right hand. 8 AA 1937.

Porter asked Joni if she had money and car keys. 8 AA 1940. Joni told Porter no, and Porter told Joni not to lie to him. Id. At that point Porter told Joni to get up out of bed and forced her to follow him into the living room and kitchen area of the apartment. Id. Porter asked Joni if anybody else was in the apartment and Joni told

him that her child was there, and her roommate and her children were there. 8 AA 1941.

Porter forced Joni to open and close cabinets in the living room and kitchen area of the residence to make sure she wasn't hiding anything. 8 AA 1941–42. Porter also asked Joni what she had to eat and drink in the apartment. 8 AA 1942.

Porter asked Joni for some Kool-Aid to drink, and Joni gave it to him. Id. Porter also took Joni's roommate's cigarettes out of a cabinet. 8 AA 1944. After touching the outer cellophane of the cigarette package, Porter took the cellophane off of the package and burned it in the sink, telling Joni he didn't want evidence of his fingerprints around. 8 AA 1944–45.

Porter forced Joni to walk back into her bedroom and he began going through Joni's things. 8 AA 1945. Porter told Joni that he was going to "get some pussy from a scaredy white girl." 8 AA 1946. Porter told Joni to lay down on the end of her bed and take off her pants. Id. Porter then told Joni that he was just joking with her, that he wasn't like that, and that he wasn't going to do that to her. Id.

A neighbor from upstairs made a loud noise which caused Porter to become nervous. Id. Porter told Joni to turn off her kitchen and bathroom lights and then peaked out the kitchen blinds to see if anybody was coming downstairs. Id.

Porter found some Saran Wrap in the kitchen and forced Joni to tear off a piece of it. 8 AA 1947–48. Porter told Joni he was going to get some pussy from a

white girl and told Joni to lay down on the floor, in front of the couch, in the living room. Porter walked towards Joni with the knife in one hand and the Saran Wrap in the other. Id.

Porter unbuckled his belt and pulled down his pants and got down on the floor with Joni. 8 AA 1948–49. Porter put the knife up near Joni's head and told her if she screamed or made any noise, he would kill her. 8 AA 1949. Porter put the Saran Wrap on his penis with the other hand and then put his penis in Joni's vagina for approximately one minute. 8 AA 1949–50. Porter then got up, went into the bathroom, and flushed the toilet. 8 AA 1950–51. Joni did not see the Saran Wrap again after Porter came out of the bathroom. Id.

Porter told Joni that he was going to take her television and told her to bring a stroller that she had in the bedroom out into the front room. 8 AA 1951–52. Porter put the television in the stroller and took Joni's Walkman as well. 8 AA 1954.

After Porter left the apartment Joni went and woke up her roommate and told her to go the call the police because they had been robbed and Joni had been raped. 8 AA 1955.

Facts Pertinent to The Crimes Committed Against Laura Zazueta, Guadalupe Lopez, And Beatriz Zazueta

Laura Zazueta, her sister Beatriz, her brother-in-law Guadalupe, and her nephews Carlitto, 2 years of age, and Andras, 4 years of age, lived at 2850 East Cedar Avenue, Apt. H-229. 5 AA 998-999. On the night of June 8, 2000, Laura

went out with her boyfriend and then he took her home and left the apartment at approximately 11 or 12 p.m. 5 AA 1000–1001. At the time Laura got home none of her roommates were awake and she went directly to bed and went to sleep. Id. At some point Laura woke up because she heard a noise and found Porter in her bedroom. 5 AA 1001.

In both English and Spanish Porter told Laura to give him the money she had. 5 AA 1002. Laura gave Porter approximately $200.00 that she had in a chest of drawers, in her bedroom. 5 AA 1004. Laura became nervous and was forced to her sister's room, while Porter followed behind her pointing the gun at her. Id. When she got to her sister's room, her sister and brother-in-law woke up, causing Porter to demand more money from all of them and pointed the gun at all of them. 5 AA 1005.

Laura's brother-in-law told Porter that he did not have any money which caused Porter to become upset and place the gun against Guadalupe's forehead. 5 AA 1006. Guadalupe grabbed the gun and a struggle ensued causing the gun to fire approximately four times. Id. At that time, Laura dropped to the floor of the bedroom as her sister embraced the child. Id.

Porter and Guadalupe struggled with each other out of the bedroom and into the living room and Laura watched as the intruder got away by jumping from the couch through a window. 5 AA 1006–07.

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SUMMARY OF THE ARGUMENT

This Court should affirm Porter's Judgment of Conviction.

First, Porter's speedy trial rights were not violated. Porter's trial was continued, largely by Porter, for numerous motions, failed negotiations, and requests for alternative counsel. Any additional delays were the result of the Covid-19 pandemic.

Second, Porter argues his sentence violates the U.S. Constitution and the Nevada Constitution. However, Porter's sentence does not shock the conscious and was within the statutory parameters. Therefore, Porter's sentence is not illegal and does not constitute cruel and usual punishment.

Third, Porter alleges the district court erred in failing to apply NRS 176.017 during sentencing. Porter committed these crimes between February 1, 2000, through June 9, 2000. NRS 176.017 was enacted with an effective date of October 1, 2015. NRS 176.017 was not in effect at the time Porter committed the instant offenses and therefore does not apply at his sentencing. Further, Porter's claim that the district court did not consider the differences between juvenile and adult offenders is belied by the record.

Finally, Porter has not demonstrated cumulative error to warrant reversal of his conviction. Without any error to cumulate, and with overwhelming evidence to convict Porter on each count, this claim fails.

Therefore, Porter's Judgment of Conviction should be affirmed.

ARGUMENT

I. PORTER'S SPEEDY TRIAL RIGHTS WERE NOT VIOLATED.

Porter claims that he was deprived of his right to a speedy trial. AOB at 20. Specifically, Porter argues that the time between his arrest and the imposition of sentencing violated his speedy trial rights. Id. However, this argument is meritless. In addition, despite challenging the district court's decision, Porter failures to provide an adequate record preventing this Court from sufficiently analyzing his claim.

A. The District Court Did Not Abuse Its Discretion by Denying To Dismiss Porter's Case For A Violation Of His Speedy Trial Rights.

Porter argues that his case should have been dismissed for violation of his right to a speedy trial right. AOB at 20.

A district court's decision regarding a trial continuance and concerning a motion to dismiss for speedy trial violation are both traditionally evaluated for an abuse of discretion. See e.g. Wesley v. State, 112 Nev. 503, 511, 916 P.2d 793, 799 (1996) ("[t]he decision to grant or deny *15 trial continuances is within the sound discretion of the district court and will not be disturbed absent a clear abuse of discretion"); State v. Inzunza, 135 Nev. 513, 516, 454 P.3d 727, 730 (2019) (reviewing a district court's denial of "a motion to dismiss an indictment based on a

speedy trial violation for an abuse of discretion"). Porter filed two motions to dismiss for speedy trial violations and both were properly denied by the district court.

NRS 178.556 provides that a district court may dismiss an action not brought to trial within 60 days unless trial is "postponed upon [Appellant's] application..." Pursuant to NRS 178.556, dismissal of an action for delay not attributable to the Appellant is discretionary by the trial court.

The right to a speedy trial in Nevada is legislatively given. The '60-day rule' therein prescribed has flexibility. If the defendant is responsible for the delay of trial beyond the 60-day limit, he may not complain. The trial court may give due consideration to the condition of its calendar, other pending cases, public expense, the health of the judge, and the rights of codefendants." Oberle v. Fogliani, 82 Nev. 428, at 430, 420 P.2d 251 (1966).

"The right to a speedy trial, whether within the statutory 60 days or within a reasonable time, may be waived and is not jurisdictional." Bates v. State, 84 Nev. 43, 46, 436 P.2d 27 (1968).

Looking at the totality of the circumstances in this case, as set forth *supra Section IA2*, it is clear that Porter himself is responsible for any delay in bringing this case to trial. It was Porter who incessantly requested continuances, it was Porter who filed countless Pretrial Motions and Petitions through his attorneys and pro per, it was Porter who was incarcerated in NDOC on a related charged while this

prosecution was pending, and it was Porter, who created the impasses with his multiple attorneys necessitating new attorneys to be appointed and to get up to speed on the case to prepare for trial. It was Porter through his attorneys that agreed to continue the proceedings. Wilson v. State, 121 Nev. 345, 364, 114 P.3d 285, 298, 2005 (Nev. 2005)(citing Snyder v. Sumner, 960 F.2d 1448, 1454 (9th Cir. 1992) ("Because Snyder himself requested the continuance, he cannot dispute that this first delay is to be attributed to him. By requesting the continuance, he waived his right to a speedy trial."). As a result, largely the delays outlined are attributed to Porter, not the State. NRS 178.556.

At Porter's previous motion to dismiss in the trial court for failure to speedy trial violations the trial court found that:

> THE COURT: All right. But here's the thing. You waived your right to a speedy trial on May 2nd of 2001…. This matter has been on several times… in fact, every time you've attempted to fire your attorneys, the State has been objecting to it because they wanted to keep this case moving. So you've made your record…he waived his right to a speedy trial, as the Court indicated in 2001.
>
> THE COURT: I have looked through the previous record. I have found the amount of continuances; I have found the amount of times that you have failed to get along with each and every attorney that you have been given. I was even here when you made all the representations against Mr. Gill. So Defendant's motion to dismiss is denied.[3]

[3] See *supra*, footnote 1.

The court in Bates v. State, 84 Nev. 43, at 46, 436 P.2d 27 (1968), said, "All the procedural delays complained of were either ordered for good cause or were directly or indirectly occasioned by the motions, stipulations, waivers, tactics, acquiescence and conduct of the appellant, as well as his incarceration on a federal charge. He cannot now complain that his right to a speedy trial has been violated."

Therefore, the district court did not abuse its discretion when it found that Porter's right to a speedy trial was not violated because Porter properly waived that right when he was arraigned in 2001.

B. Porter's Constitutional Right to Speedy Trial Was Not Violated.

The Sixth Amendment to the Constitution guarantees that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. The United States Supreme Court held in Smith v. Hooey, 393 U.S. 374, 89 S.Ct. 575 (1969) that a state is under an affirmative obligation by virtue of the Sixth Amendment, as interpreted in Klopfer v. North Carolina, 386 U.S. 213, 87 S.Ct. 988 (1967), to make every good faith effort to bring the accused to trial. The United States Supreme Court also held that both the accused and society have an interest in having a speedy trial. Barker v. Wingo, 407 U.S. 514, 519, 92 S.Ct. 2182, 2186 (1972). The Court recognized that the three basic interests of an accused are "(1) to prevent undue and oppressive incarceration prior to trial, (2) to minimize anxiety and concern accompanying public accusation and (3) to limit the

possibilities that long delay will impair the ability of an accused to defend himself." Smith, 393 U.S. at 378. See also United States v. Ewell, 383 U.S. 116, 120, 86 S.Ct. 773, 776 (1966); Klopfer v. North Carolina, 386 U.S. at 221-26; Dickey v. Florida, 398 U.S. 30, 37-38, 90 S.Ct. 1564, 1568-69 (1970). Therefore, "one of the major purposes of the provision is to guard against inordinate delay between public charge and trial, which, wholly aside from possible prejudice to a defense on the merits, may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family, and his friends." Barker, 407 U.S. at 537.

The United States Supreme Court explained that society has an interest as well because the inability of courts to provide a prompt trial can cause a backlog of cases which enable defendants to negotiate guilty pleas to lesser offenses and "otherwise manipulate the system." Id. at 519. If an accused is incarcerated prior to trial, lengthy detentions can be costly. Id. at 520. On the other hand, if an accused is released prior to trial, lengthy periods of time provide an opportunity for the accused to commit other crimes or jump bail and escape. Id. at 519-520. Finally, delay between arrest and punishment may have a detrimental effect on rehabilitation. Id. at 520.

Despite these various interests, the Court recognized that pretrial delay is often "both inevitable and wholly justifiable." Doggett v. United States, 505 U.S. 647, 656, 112 S.Ct. 2686, 2693 (1992). "The essential ingredient is orderly expedition and not mere speed." Smith v. United States, 360 U.S. 1, 10, 79 S.Ct. 991, 997 (1959). For instance, the government may need time to collect witnesses, oppose pretrial motions, or track down the accused. Doggett, 505 U.S. at 656. Thus, "in large measure because of many procedural safeguards provided an accused, the ordinary procedures for criminal prosecution are designed to move at a deliberate pace. A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself." United States v. Ewell, 383 U.S. 116, 120, 86 S.Ct 773, 776 (1966). A denial of the Sixth Amendment right to a speedy trial requires that the charges against an accused be dismissed. The United States Supreme Court has cautioned that because of the seriousness of the remedy involved, "where a defendant who may be guilty of a serious crime will go free, without having been tried, the right to a speedy trial should always be in balance, and not inconsistent, with the rights of public justice." Barker, 407 U.S. at 522.

The seminal case involving Sixth Amendment speedy trial right claims is Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182 (1972). The United States Supreme Court held that a defendant's constitutional right to a speedy trial cannot be

established by any inflexible rule but can be determined by balancing certain factors including length of delay, reason for delay, the defendant's assertion of his speedy trial right, and prejudice to the defendant. Id. at 530. These factors, however; "have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." Id. at 533. In that case, there was more than a five (5) year delay between Porter's arrest and trial because, in part, the prosecution wanted to try Porter's accomplice first so Porter's testimony could be used at trial. Id. at 533-534. The Court held that Porter's Sixth Amendment right was not violated even though there had been a lengthy and unjustified delay because there was no showing of prejudice and Porter did not assert his right to a speedy trial. Id. at 534-35.

The Barker factors must be considered collectively as no single element is necessary or sufficient. Moore v. Arizona, 414 U.S. 25, 26, (1973). To warrant relief, "failure to accord a speedy trial must be shown to have resulted in prejudice attributable to the delay." Anderson v. State, 86 Nev. 829, 833 (1970). The analysis is fact-specific and subject to the peculiar circumstances of the case. Cager v. State, 124 Nev. 1455 (2008). "[T]he conduct of both the prosecution and the defendant are weighed." Barker, 407 U.S. at 530. Here, the collective consideration of the Barker factors shows that Porter's speedy trial rights were not violated.

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1. Length of the Delay.

To trigger a speedy trial analysis, "an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from presumptively prejudicial delay." Doggett, 505 U.S. at 651. If this hurdle is overcome, a court applies the four-part test. There is no fixed time that indicates when the right to a speedy trial has been violated, and the right is assessed in relation to the circumstances of each case. Barker, at 521, 92 S.Ct. at 2182. A one-year delay between indictment and trial is presumptively prejudicial. Inzunza, 135 Nev. at 516-17, 454 P.3d at 731. A finding of "presumptive prejudice" does not imply that the delay will be found to have actually prejudiced the defendant; rather, "it simply marks the point at which courts deem the delay unreasonable enough to trigger the Barker enquiry." Id. at 652, 112 S.Ct. at 2691, n.1.

Here, the delay was longer than a year because Porter was arraigned on May 2, 2001, and Porter's first trial on the severed charges was held on May 8, 2009, and Porter's second trial on the remaining charges was held on August 29, 2022. 1 AA 127–28; 2 AA 376. While the length itself may be considered "presumptively prejudicial," it is not the determinative factor.

2. Reason for the Delay.

The second factor analyzes whether the government is responsible for the delay and is the "focal inquiry" in a speedy trial challenge. Inzunza, at 517, 454 P.3d

at 731 (citing United States v. Alexander, 817 F.3d 1178, 1182 (9th Cir. 2016). The Barker Court made clear that the reason for delay matters. Barker, 407 U.S. at 531. Delay for "a valid reason, such as a missing witness, should serve to justify appropriate delay." Id.

Different reasons for delays merit different weights when considering an alleged speedy trial right violation. Barker, 407 U.S. at 531, 92 S.Ct. at 2192. Deliberate delays to hamper defense should be weighed heavily against the government. Id. However, neutral reasons such as negligence or overcrowded courts should be weighted less heavily, while valid reasons such as a missing witness should serve to justify appropriate delay. Id. For instance, this Court held that the COVID-19 pandemic is a "neutral and justifiable reason for delay. Belcher v. State, 508 P.3d 410, WL 1261300, 5 (2022) (unpublished opinion).

Additionally, this Court has found against defendants when they are at least a partial cause of the delay. In Middleton v. State, 114 Nev. 1089, 1109, 968 P.2d 296, 310 (1998) this Court considered a claim that a delay of thirty (30) months between the defendant's arrest and his trial violated the defendant's right to speedy trial. The Court concluded that the right to speedy trial was not violated because the reason for the delay was partially due to the defendant's extensive pretrial litigation. Id. In Furbay, this Court found that this factor weighed overwhelmingly in favor of the State when the defendant was responsible for five of the trial continuances; two of

the continuances were due to failed negotiations; one continuance was due to State's failure to locate a witness; and one was due to the prosecutor attending a seminar. Furbay, 116 Nev. at 484-85, 998 P.2d at 555-56. While the Court found the prosecutor's seminar attendance was an unacceptable delay, the other delays were proper and therefore the defendant's speedy trial right was not violated. Id.

Porter's case was delayed for various reasons that were either neutral or justifiable. For instance, two (2) continuances were due to State's unavoidable conflict in their trial schedules, one (1) was due to the judge being out of the jurisdiction, two (2) continuances were due to the COVID-19 pandemic, and four (4) were agreed continuances by both the State and Porter.[4]

Additionally, other continuances were caused by the defense: three (3) continuances were due to unavoidable conflicts in Porter's trial counsel's schedule; eleven (11) requests for a continuance by Porter's counsel for various reason such as to meet with Porter, unprepared for trial, need for additional time to prepare pretrial motions; three (3) continuances due to Porter's uncooperative behavior with trial counsels; one (1) continuance due to the appointment of a new attorney; two (2) continuances to further investigate legal matters in Chicago, locate witnesses, and attain discovery; one (1) continuance due to Porter's desire to represent himself; and one (1) continuance due to Porter's Motion for Mandatory Disqualification or

[4] See *supra*, footnote 1.

Recusal of the district court judge.[5] In addition, seven (7) continuances were due to failed negotiations. Furthermore, Porter filed numerous pro per Pretrial Motions and Petition's that resulted in several continuances. Thus, unlike Doggett and Inzunza, Porter has demonstrated no fault on the part of the State. Therefore, because the delays in this case were neutral, justifiable, or largely the fault of Porter, Porter 's speedy trial rights were not violated and his argument is without merit.

Porter highlights a September 19, 2007, transcript from a hearing to illustrate the amount of time Porter was in custody prior to his first trial. AOB at 24. However, Porter purposefully excludes the circumstances which caused the delay in Porter's first trial. The 2007 hearing took place after Porter filed numerous Pretrial Motions and Petitions in which he ultimately derived benefits from such as the dismissal of four charges and the granting of a Jackson v. Denno, 378 U. S. 368 (1964) Evidentiary Hearing. Porter's trial was delayed, when various continuances were requested by Porter to file Pretrial Motions, Petitions, and Reply's to State's Oppositions. Furthermore, the Jackson v. Denno hearing requested by Porter, was continued twice by Porter and once by the State in order to perform an independent evaluation of Porter after Porter's counsel provided the State with a medical evaluation done on Porter. The Jackson v. Denno hearing required 29 months to

[5] See *supra*, footnote 1.

complete due to the numerous charges in this case, scheduling conflicts by both the State and Porter and the need for written argument. In addition, after the 2007 hearing, Porter continued to file various Motions including a Motion to Sever Charges in 2008 which was granted. After the district court granted Porter's Motion to Sever Charges, Porter's first trial on the severed charges was held exactly one year later. Therefore, it is important for this Court to consider the complete record of this case before solely relying on the transcript Porter highlights in his Opening Brief. However, this Court is unable to review the whole record because Porter conveniently failed to provide it to this court. Porter attempts to persuade this Court into believing it took the State twenty-two years for Porter to be tried in this case. However, Porter is largely the cause of the delay due to his extensive pretrial litigation.

Thus, as to the length of the delay, this factor weighs overwhelmingly in favor of the State when the reasons for delay were neutral, justifiable, or largely caused by Porter. As such, this claim should be denied.

3. Porter's Assertion of his Speedy Trial Rights.

In examining the third Barker factor, the Porter's assertion of his right, it is clear there was no violation. On May 2, 2001, Porter was arraigned, pled not guilty, and waived his right to a speedy trial. 1 RA 001-007. Porter subsequently asserted his right to a speedy trial as the years went on.

Porter's assertions of his right to a speedy trial were contradicted by his tactical decision to sever charges, requests for continuances for failed negotiations and unavoidable conflicts, pro per Motions to Dismiss counsel, failure to cooperate with his counsel, requests to represent himself, requests for the district court to hear various pro per Motions and Petitions, requests for additional time to file Reply's, requests for further discovery and investigations, and two newly appointment attorney's.

While Porter asserted his speedy trial rights, his refusal to cooperate with counsel and filing extensive pro per Motions and Petitions prevented the district court from being able to honor his request. In addition, a Pre-Trial Habeas Corpus Petition must be accompanied by a waiver of the 60-day rule. NRS 34.700(2)(b)(1). Therefore, Porter continued to waive his speedy trial right when he filed three Pre-Trial Habeas Corpus Petitions, the last being filed on August 12, 2019. Any additional delay was the result of the Covid-19 pandemic, which was a neutral and justifiable cause for delay. Thus, this factor does not weigh in Porter's favor.

4. Prejudice to Porter.

In examining the fourth and final Barker factor, the prejudice suffered by Porter, the record demonstrates that Porter was in no way harmed by the delay. To warrant relief, "failure to accord a speedy trial must be shown to have resulted in prejudice attributable to the delay." Anderson v. State, 86 Nev. 829, 833 (1970).

Here, Porter was not prejudiced by the delays caused by his own behavior. Prejudice is assessed in light of the interests that the speedy-trial right was designed to protect: "to prevent oppressive pretrial incarceration," "to minimize anxiety and concern of the accused," and "to limit the possibility that the defense will be impaired." Barker, 407 U.S. at 532, 92 S. Ct. 2182.

Porter alleges that he was prejudiced because multiple witnesses were deceased, and multiple witnesses were no longer able to be located. AOB at 28. However, Porter failed to provide a shred of factual support to illustrate how he was prejudiced. Rather, Porter received the benefit of continuance that he repeatedly sought – his charges were severed, and he was offered various negotiations on the remaining felony charges. Without evidentiary support in the record to substantiate this claim, Porter's claim is a bare and naked assumption used to garner sympathy from the Court.

Furthermore, while Porter faced pre-trial incarceration, there was no prejudice from his pre-trial incarceration as Porter spent time in custody pursuant to being found guilty on severed charges in this case. In 2008, Porter received the benefit of his Motion to Sever, and three counts were severed from the large group of charges. 1 AA 125–126. On May 8, 2009, a jury found Porter guilty of Second-Degree Murder with Use Of A Deadly Weapon. 1 AA 127–128. On September 30, 2009, Porter was sentenced 1 AA 129–135. Therefore, Porter was incarcerated pursuant to

his murder conviction while awaiting trial in the remaining charges. In addition, Porter was granted eight thousand one hundred and twelve (8,112) days credit imposed on his second conviction. 11 AA 2546–56. Accordingly, Porter's incarceration does not amount to prejudice.

Based on the balancing of the four Barker factors, Porter's constitutional right was not violated. Porter's trial was delayed, all largely due to his behavior and requests. Further, he is unable to show how he was prejudiced. Therefore, the district court did not violate Porter's constitutional right to a speedy trial.

II. THE SENTENCE IMPOSED DOES NOT VIOLATE THE UNITED STATES CONSTITUTION NOR THE NEVADA CONSTITUTION.

Porter alleges his sentence is illegal because it is the functional equivalent of life without the possibility of parole in violation of the Eighth Amendment's Prohibition against cruel and unusual punishment and in violation of Nevada Law. AOB at 29. Furthermore, Porter alleges that the "sentence imposed by the court constituted cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and the Equivalent Provision in the Nevada Constitution." AOB at 39. Porter's claims fail.

A. The Sentence Imposed Does Not Violate the Eighth Amendment nor Nevada Law.

Porter contends that the district court erred by imposing an aggregate sentence requiring Porter to serve approximately 126 years because it is the functional

equivalent of a sentence of life without the possibility of parole. AOB at 29–36. This argument does not warrant relief.

First, Porter did not object or make a record concerning his imposed sentence during his sentencing hearing. Therefore, this claim is waived unless Porter can show plain error. See Riddle v. State, 96 Nev. 589, 590-590, 613 P.2d 1031 (1980) (applying plain error review to an implicit bias argument based on the judge's remarks during trial because a contemporaneous objection was not made); Oade v. State, 114 Nev. 619, 621-22, 960 P.2d 336, 338 (1998) ("[j]udicial misconduct must be preserved for appellate review; failure to object or assign misconduct will generally preclude review by this court."). Under plain error review, Porter must demonstrate that the imposed sentence affected his substantial rights, by causing actual prejudice or a miscarriage of justice. See e.g., Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). At most, the error alleged is trivial as the cases Porter uses to support his claim do not apply to the instant case.

Porter's claim must be denied because neither Graham nor Miller apply to Porter's term-of-years sentence.

In Graham, the United States Supreme Court held that:

> for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole. This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment. Because

> 'the age of 18 is the point where society draws the line for many purposes between childhood and adulthood,' those who were below that age when the offense was committed may not be sentenced to life without parole for a nonhomicide crime.

Graham, 560 U.S. at 74-75, 130 S. Ct. at 2030, quoting Roper v. Simmons, 543 U.S. 551, 574, 125 S. Ct. 1183 (2005). Two years later, in a 5-4 decision, the United States Supreme Court held that the Eighth Amendment also "forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." Miller, 567 U.S. at 470, 132 S.Ct. at 2469, citing Graham, 560 U.S. at 75, 130 S.Ct. at 2030.

If the Graham Court intended to broaden the class of offenders within the scope of its decision, it would have held that the Eighth Amendment prohibits any juvenile offender from receiving the functional equivalent of a life sentence without the possibility of parole for non-homicide offenses. But the Supreme Court explicitly limited the scope and breadth of Graham by stating that its decision "concern[ed] only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense." Graham, 560 U.S. at 63, 130 S.Ct. at 2023.

The distinction from an aggregate term-of-years sentence is important because the Court analogized life without parole sentences to the death penalty, noting that "life without parole sentences share some characteristics with death sentences that are shared by no other sentence." Id. at 69, 130 S.Ct. at 2027. Miller did not disturb

Graham's limited holding. In fact, the Court acknowledged that Graham's holding was limited to a categorical ban against sentences of life-without-parole for juveniles before going on to extend Graham to mandatory life-without-parole sentences for homicide crimes. Miller, 567 U.S. at 469, 471, 132 S.Ct. at 2463, 2465.

Notably, Miller did not prohibit a juvenile from being sentenced to life without the possibility of parole; rather, the only requirement is that the sentencing authority have discretion to impose a different punishment. Id. 567 U.S. at 479, 132 S.Ct. at 2469. Thus, there is nothing inherently unconstitutional about a juvenile ultimately spending his life incarcerated. The key factor as articulated in Miller is the discretion involved at sentencing.

Under the plain language of Graham, three factors must be present for Graham to apply: (1) the offender was a juvenile when he committed his offense; (2) the sentence imposed applied to a singular non-homicide offense; and, (3) the offender was sentenced to life without the possibility of parole. Graham, 560 U.S. at 63, 130 S.Ct. at 2023. While the first Graham factor is satisfied in this case, the latter two are not. The defendant in Graham was sentenced for a single conviction, armed burglary with assault or battery; Porter was sentenced for twenty-nine (29) felony convictions relating to eleven different victims. The defendant in Graham received a sentence of life without the possibility of parole; all of Porter's individual

sentences had the possibility of parole. Accordingly, Graham on its face does not apply.

The limited scope of Graham is grounded in statistics, which the Court used to conclude that there was a "national consensus" against juvenile life without parole sentences. Graham, 560 U.S. at 67, 130 S.Ct. at 2026. The Court indicated that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." Id. at 62, 130 S.Ct. at 2023, internal citations omitted. The Court went on to discuss the various state laws related to the imposition of life without parole sentences on non-homicide juvenile offenders, including actual sentencing practices in jurisdictions where the legislature statutorily permitted the sentence. Id.

The statistics the Court looked at only included life without parole sentences. The Court did not consider statistics on the imposition of lengthy fixed-term sentences on juvenile offenders as seen in the instant case. Nor did the Court consider consecutive fixed-term sentences for multiple crimes which in the aggregate may amount to the functional equivalent of life without parole. Justices Thomas and Alito pointed out the lack of similar evidence against imposing multiple fixed-term sentences in their respective opinions. Id. at 113 FN 11, 130 S.Ct. at 2052 FN11 (Thomas, J., dissenting) (noting that the majority opinion did not consider statistics or sentences involving juveniles sentences to length term-of-years such as 70 or 80

years' imprisonment); Id. at 124, 130 S.Ct. at 2058 (Alito, J., dissenting) (noting that "[n]othing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole. Indeed, petitioner conceded at oral argument that a sentence of as much as 40 years without the possibility of parole 'probably' would be constitutional.").

The fact that the Supreme Court failed to consider such statistics in deciding whether to expand the Eighth Amendment can only lead to one conclusion – the Court did not intend for its decision to encompass lengthy term-of-year sentences. The Sixth Circuit wisely declined to expand Graham for this very reason:

> The Court, however, did not analyze sentencing laws or actual sentencing practices regarding consecutive, fixed-term sentences for juvenile nonhomicide offenders. This demonstrates that the Court did not even consider the constitutionality of such sentences, let alone clearly established law that they can violate the Eighth Amendment's prohibition on cruel and unusual punishments.

Bunch v. Smith, 685 F.3d 546, 552 (6th Cir. 2012), cert. denied, ___ U.S. ___, 133 S.Ct. 1996 (2013). The fact that the United States Supreme Court declined to review Bunch suggests that it agrees with the Sixth Circuit's decision to decline to expand Graham.

Nor is the Sixth Circuit alone in refusing to expand Graham beyond its plain language. The Supreme Court of Louisiana faced the question of whether Graham "applies in a case in which the juvenile offender committed multiple offenses

resulting in cumulative sentences matching or exceeding his life expectancy without the opportunity of securing early release from confinement." State v. Brown, 118 So.3d 332, 332 (2013). The Court found Graham inapplicable because:

> ... we see nothing in Graham that even applies to sentences for multiple convictions, as Graham conducted no analysis of sentences for multiple convictions and provides no guidance on how to handle such sentences.... In our view, Graham does not prohibit consecutive term of year sentences for multiple offenses committed when a defendant was under the age of 18, even if they might exceed a defendant's lifetime, and absent any further guidance from the United States Supreme Court, we defer to the legislature which has the constitutional authority to authorize such sentences.

Brown, 118 So.3d at 341-42.

Bunch and Brown applied Graham as written, which is what the district court did in Porter's case. Porter's sentence is a consecutive, fixed-term of years, not life without the possibility of parole. No language in Graham suggests that its narrow holding would apply to the sentences imposed on Porter. Therefore, Porter's claim should be rejected because Graham does not apply to term-of-years sentences.

Here, Porter's consecutive sentences were graduated and proportional to the heinous crimes he committed. Porter's individual sentences comply with both Graham and Miller. Porter has a meaningful opportunity to be released on each sentence during his lifetime. Porter's was sentenced on November 3, 2022 and six months later he had a parole hearing. Thus, Porter fails to demonstrate that he has

not been eligible for parole.[6] The fact that Porter committed so many distinct crimes should not enure to his benefit. Rather, Porter's situation is similar to the situation contemplated in Graham: "Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives." Id. 560 U.S. at 75, 130 S.Ct. at 2030. Thus, Porter's individual counts under Graham are standalone sentences that do not violate the Eighth Amendment. Therefore, Porter's claim should be denied.

B. Porter's Sentence Does Not Constitute Cruel and Unusual Punishment.

Porter alleges that the sentence imposed "violates the cruel and unusual punishment clause of the Eighth Amendment to the U.S. Constitution and Article One Section Six of the Nevada Constitution." AOB at 39. Porter failed to object to his imposed sentence at sentencing, thus the claim is waived from appellate review and may only be reviewed for plain error. See Riddle v. State, 96 Nev. 589, 590-590, 613 P.2d 1031 (1980).

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

[6] NDOC records indicate that Porter has had a parole board hearing on May 11, 2023.

punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience."' Allred, 120 Nev. at 420, 92 P.2d at 1253(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)). "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).

A sentence is presumptively just when it is within the parameters established by statute. This Court held in Schmidt v. State, 94 Nev. 665, 584 P.2d 695 (1978), "it is frequently stated that a sentence of imprisonment which is within the limits of a valid statute, regardless of its severity, is normally not considered cruel and unusual

punishment in the constitutional sense." Id. at 668, 584 P.2d at 697 (citations omitted). A defendant must provide some indication that the sentence is "a punishment ... so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." Id.

To the extent that Porter is arguing that the sentence is excessive, the Nevada Supreme Court does not review non-death cases for excessiveness. Harte v. State, 132 Nev. 410, 415, 373 P.3d 98, 102 (2016).

Porter claims that the sentence imposed by the district court constituted cruel and unusual punishment. because "none of the counts on appeal resulted in the death of a victim" and "it is extremely harsh for non-homicide offenses." AOB at 39–48. Porter does not dispute that he was sentenced within statutory limits. Nor does Porter challenge any of the twenty-nine counts he was found guilty on. Porters sole argument is that the district court imposed a harsh sentence. However, Porter's claim is misguided as the district court properly sentenced Porter on all twenty-nine (29) counts within the permitted statutes.

Porter's sentences were individually permissible because each included the possibility of parole and the sentences were permitted by statute. The fact that Porter was simultaneously convicted and sentenced for various offenses does not warrant a reduction in the severity of punishment for each individual crime. Viewing Porter's sentence in the aggregate would be akin to the concept of "sentencing packaging"

which this Court has already rejected. See Wilson v. State, 123 Nev. 587, 170 P.3d 975 (2007).

Accordingly, Porter fails to demonstrate that the district court abused its discretion as the sentence imposed does not "shock the conscience" and is well within the statutory limits. Therefore, Porter's Judgment of Conviction should not be vacated as the sentence imposed does not constitute cruel and unusual punishment.

III. THE DISTRICT COURT WAS NOT REQUIRED TO APPLY NRS 176.017 DURING PORTER'S SENTENCING.

Porter requests that this Court grant him a new sentencing hearing because he was sixteen (16) years old at the time he committed these offenses. AOB at 36. Specifically, Porter argues that the district court erred by not applying NRS 176.017 during Porter's sentencing. Porter failed to raise any objection at sentencing. Thus, this claim is waived from appellate review and may only be reviewed for plain error. Since NRS 176.017 does not apply to Porter's case, Porter fails to establish any error occurred or any error was plain.

Porter bases his request on NRS 176.017, which states:

> 1. If a person is convicted as an adult for an offense that the person committed when he or she was less than 18 years of age, in addition to any other factor that the court is required to consider before imposing a sentence upon such a person, the court shall consider the differences between juvenile and adult offenders, including, without limitation, the diminished culpability of juveniles as compared to that of adults and the typical characteristics of youth.

> 2. Notwithstanding any other provision of law, after considering the factors set forth in subsection 1, the court may, in its discretion, reduce any mandatory minimum period of incarceration that the person is required to serve by not more than 35 percent if the court determines that such a reduction is warranted given the age of the person and his or her prospects for rehabilitation.

NRS 176.017(1) requires that a district court "consider the differences between juvenile and adult offenders, including, without limitation, the diminished culpability of juveniles as compared to that of adults and the typical characteristics of youth."

Porter alleges the district court illegally imposed a sentence without considering the difference between juvenile and adult offenders as required under NRS 176.017. AOB at 36. However, Porter's reliance on this statute is erroneous. Further, any argument that the district court did not consider the differences between juvenile and adult offenders is belied by the record.

Porter's claim is without merit because NRS 176.017 does not apply retroactively. It is well established that, under Nevada law, the proper penalty for a criminal conviction is the penalty in effect at the time of the commission of the offense and not the penalty in effect at the time of sentencing. State v. Second Judicial Dist. Ct. ex rel. Cnty of Washoe, 124 Nev. 564, 567, 188 P.3d 1079, 1081 (2008). The Nevada Supreme Court has held that statutes are otherwise presumed to operate prospectively "unless they are so strong, clear and imperative that they can have no other meaning or unless the intent of the [L]egislature cannot be otherwise

satisfied." Holloway v. Barrett, 87 Nev. 385, 390, 487 P.2d 501, 504 (1971). Further, "Courts will not apply statutes retrospectively unless the statute clearly expresses a legislative intent that they do so." Allstate Ins. Co. v. Furgerson, 104 Nev. 772, 776, 766 P.2d 904, 907 (1988).

NRS 176.017 was amended October 1, 2017, after Porter committed his offenses, but prior to his sentencing. Under the 2015 version of NRS 176.017, the district court was required to considerer "the differences between juvenile and adult offenders, including, without limitation, the diminished culpability of juveniles as compared to that of adults and the typical characteristics of youth." Under the 2017 version of NRS 176.017, but not the 2015 version, the district court was permitted, but not required, to "reduce any mandatory minimum period of incarceration that the person is required to serve by not more than 35 percent if the court determines that such a reduction is warranted given the age of the person and his or her prospects for rehabilitation." The law in effect when Porter committed his offenses did not permit a reduction and therefore NRS 176.017 is inapplicable in the instant case.

Even assuming, *arguendo*, that the retroactive application of NRS 176.017 is applicable here, the statute does not impose any obligation upon counsel but, rather, permits the Court to impose a reduced sentence if, in its discretion, it believes a lesser sentence is warranted. NRS 176.017(2). Based on the charges that were a direct file as an adult, the egregious facts and circumstances of this case as well as Porter's

prior juvenile criminal history, Porter was certainly not deserving of any reduction in his stipulated prison sentence.

NRS 176.017(1) requires that a district court "consider the differences between juvenile and adult offenders, including, without limitation, the diminished culpability of juveniles as compared to that of adults and the typical characteristics of youth." Here, the district court reviewed the Presentence Investigation Report (hereinafter "PSI") and Porter's sentencing memorandum and was fully aware, during sentencing, of Porter's age at the time he committed the crimes. 11 AA 2489. Beyond the sentencing memorandum, Porter's counsel argued during sentencing that the court should consider the fact that Porter was a juvenile at the time the crimes were committed when determining his sentence. 11 AA 2490. Thus, the record clearly belies Porter's claims, and Porter does not provide any evidence suggesting that the Court ignored Porter's age or otherwise failed to consider the guidelines set forth in NRS 176.017. Thus, this Court should deny Porter's claim.

Further, Porter's claim is insufficient pursuant to Passanisi and Edwards to warrant a modification of Porter's sentence. Porter's sentence is facially legal because Porter was sentenced within the sentencing range for sexual assault, arson, kidnapping, attempt murder, burglary, and robbery related to eight events over a four-month period. Therefore, Porter's claim must be denied.

Thus, because NRS 176.017 is inapplicable in the instant case and the district court considered the difference between juvenile and adult offenders before imposing a sentence, this Court should deny this claim.

IV. THERE IS NO CUMULATIVE ERROR.

Porter requests this Court to reverse his conviction because the errors alleged in this appeal amount to cumulative error. AOB at 49. This Court has held that it will reverse a conviction if "the cumulative effect of errors committed at trial denies the appellant his right to a fair trial." Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). "[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors." United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990). Because Porter's claims are not errors for the reasons discussed *infra*, there is no cumulative error.

However, even if this Court finds that the district court erred for all the reasons that Porter alleges, his claim of cumulative error is without merit. "Relevant factors to consider in evaluating a claim of cumulative error are (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, 855 (2000). Furthermore, any errors that occurred at trial were minimal in quantity and character, and 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).

As discussed in Sections I through III. *infra*, Porter has not shown any errors that, even if aggregated, would establish a reasonable likelihood of a different, more beneficial result at trial or on appeal. Assuming arguendo that some or all Porter's allegations have merit, he has failed to establish that, when aggregated, the errors deprived him of a reasonable likelihood of a better outcome. The evidence of Porter's guilt was overwhelming. Thus, the issue of guilt is not close. It must also be noted that two (2) separate juries found Porter guilty of his charges after two (2) trials that were over a decade apart. Given the amount of evidence proving Porter's guilt, the quantity and character of the errors, if any, and the gravity of the crime, any alleged errors did not deprive Porter of his right to a fair trial. Therefore, Porter's claim of cumulative error must be denied.

CONCLUSION

For the aforementioned reasons, the State respectfully requests that the Judgment of Conviction be AFFIRMED.

Dated this 4th day of January, 2024.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 pointsand contains 13,310 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 4th day of January, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on January 4, 2024. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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