IN THE SUPREME COURT OF THE STATE OF NEVADA

FERNANDO BRIONES, No. 66944

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

_____/

FAST TRACK RESPONSE

1. Name of party filing this Fast Track Response: The State of Nevada.

2. Name, address and phone number of attorney submitting this Fast Track Response: Jennifer P. Noble, Deputy District Attorney, Washoe County District Attorney's Office, P.O. Box 11130, Reno, Nevada 89520; (775) 328-3200.

3. Name, address and phone number of appellate counsel if different from trial counsel: See Number 2 above.

4. Proceedings raising same issue: None.

5. Procedural history: The State accepts appellant's account.

6. Statement of facts: The State accepts appellant's account.

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7. Issues on appeal:

Whether this Court should review the district court's sentence where Briones does not allege that the district court relied on impalpable or highly suspect evidence, that the relevant statutes are unconstitutional, or that his sentence shocks the conscience.

8. Legal argument:

A. The Sentence Was Not An Abuse of the Judge's Discretion.

This is an appeal from a judgment of conviction, pursuant to a guilty plea to one count of felony burglary. As part of the plea, the State agreed not to pursue other felony charges. Joint Appendix, hereafter JA, p. 6. Otherwise, the parties were free to argue. *Id.* Briones argues the district court abused its discretion by sentencing him to 48-120 months in the Nevada State Prison, the maximum allowable by statute. Fast Track Statement, *hereafter* FTS, p. 7. He argues that the sentence was the result of the judge's reliance on a faulty recommendation from the Division of Parole and Probation. *Id.*, pp. 8-9. The claim lacks merit.

This Court has consistently afforded the district court wide discretion in its sentencing decision. *See Houk v. State*, 103 Nev. 659, 747 P.2d 1376 (1987). The Court will refrain from interfering with the sentence imposed

"[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." *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). Moreover, a sentence within the statutory limits is not cruel and unusual punishment where the statute itself is constitutional, and the sentence is not so unreasonably disproportionate as to shock the conscience. *See Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996)(quoting *Culverson v. State*, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)).

At sentencing, Briones took issue with the Division of Parole and Probation's recommendation of 48-120 months, arguing that this recommendation was not based upon the Division's own scoring criterion. Specifically, through counsel, he pointed out that the raw score in his case was 21, but that his total score was 41. JA, pp. 68-75. Citing NRS 213.10988, he argued that the Division's justification for this–the concept of progressive sentencing–was an unacceptably subjective basis for the recommendation that exceeded the agency's statutory authority. *Id.* Specifically, he argued that the Division's recommendation was "willy-nilly" and should be disregarded by the Court. *Id.*, p. 78. This recommendation

was contained within a report that also observed that Briones had six prior felony convictions, had been paroled 10 times, and had been revoked 10 times. *See* Presentence Investigation Report, p. 3.

The judge was not persuaded by Briones' argument, and observed that nothing in NRS 213.10988 required that the Division's recommendation be devoid of all subjective analysis. *Id.*, p. 78. The judge queried:

> The Court: ...what's willy-nilly about a recommendation for a maximum sentence for a person who has basically been in and out of the criminal justice system since 1997, apparently has failed, as I calculate it, almost every period of community supervision that he's ever been given[...] and as you represent, lucky us, he was driven to the state of Nevada and dropped off in Reno and within 26 days has committed yet another felony offense, his seventh felony offense...

JA, p. 79.

Despite rejecting Briones' argument that the raw score should be the sole factor in the Division's recommendation, the judge made clear that he was not bound at all by the division's recommendation. *Id.*, p. 74. Prior to sentencing Briones, the judge observed that his prior burglary conviction could have made Briones eligible for a non-probatable, enhanced burglary pursuant to NRS 205.060. *Id.*, p. 88. He informed Briones that his attorney had done an excellent job, because the habitual criminal

enhancement was not contemplated by the negotiations, despite his eligibility. *Id.*, pp. 88-90. These observations do not mean that the court's decision was improperly influenced by a habitual criminal "meme," as Briones suggests. FTS, p. 11.

The judge made the basis for his sentencing decision abundantly clear:

> The Court believes that the maximum sentence is appropriate in this case based on the defendant's prior criminal history, based on his repeated refusal to accommodate himself to a law-abiding lifestyle, based on the fact that he was released from the California Department of Corrections and less than one month later he is in the city of Reno victimizing numerous people in this community. So it's not based on what the Division of Parole and Probation does or doesn't recommend, it is based on my independent determination that that is the appropriate sentence in Mr. Briones's case.

JA, p. 91.

The district court imposed a sentence within the statutory limits. It is true, as Briones observes, that it mirrored the Division's recommendation–because it was the maximum sentence available under the law. But this Court should decline to second-guess the judge's reasoned decision based upon Briones' suggestion that it was secretly, solely based upon the Division's recommendation. FTS, p. 10. The decision of the district court should be affirmed.

9. Preservation of issues: The State agrees with appellant.

DATED: January 27, 2015.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: JENNIFER P. NOBLE
Appellate Deputy

VERIFICATION

1. I hereby certify that this fast track response 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 fast track response has been prepared in a proportionally spaced typeface using Corel WordPerfect X3 in 14 Georgia font. However, WordPerfect's double-spacing is smaller than that of Word, so in an effort to comply with the formatting requirements, this WordPerfect document has a spacing of 2.45. I believe that this change in spacing matches the double spacing of a Word document.

2. I further certify that this fast track response complies with the page- or type-volume limitations of NRAP 3C(h)(2) because it does not exceed 10 pages.

3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track

response is true and complete to the best of my knowledge, information and belief.

DATED: January 27, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on January 27, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

John Reese Petty
Chief Appellate Deputy
Washoe County Public Defender's Office

Shelly Muckel
Washoe County District Attorney's Office