IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN FRANCIS DUNHAM
Appellant
vs.
THE STATE OF NEVADA
Respondent

Supreme Court No. 73143
District Court Case No. 16-CR-0159

APPELLANT'S OPENING BRIEF

An Appeal from a Judgment of Conviction in the Ninth Judicial District Court,
County of Douglas, State of Nevada

Submitted By:
Kristine L. Brown
Bar Number 3026
The Law Office of Kristine L. Brown
1190 High School Street, Suite A
Gardnerville, NV 89410
775-783-8642
Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN FRANCIS DUNHAM
Appellant
vs.
THE STATE OF NEVADA
Respondent

Supreme Court No. 73143
District Court Case No. 16-CR-0159

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.

1. There are no parent corporations or publicly held companies that own 10% or more of the party's stock.
2. No other attorneys have represented Mr. Dunham in other proceedings in this matter.
3. No litigant is using a pseudonym.

Kristine L. Brown, 3026,
Attorney of record for Appellant.

NRAP 28 (2): Table of Contents

NRAP 28(3): Table of Authorities.

Constitution

Court Rules

Statutes

NRAP 28 (4): Jurisdictional Statement.

NRS 177.015(3) grants the Supreme Court or Court of Appeals jurisdiction for review in that it is an appeal from a final judgment or verdict in a criminal case. The Judgment of Conviction was entered on April 19, 2017. Record on Appeal (ROA), Vol. I, p. 37-39. The Notice of Appeal was filed on May 15, 2017. ROA, Vol. I, p. 40. The appeal was filed within the thirty day time frame required pursuant to NRAP 4(b)(1)(a).

NRAP 28 (5): Routing Statement.

This case is presumptively assigned to the Nevada Supreme Court in that it is a direct appeal from a judgment of conviction based on a jury verdict on a category B felony. NRAP 17(a)(1) and (b)(1).

NRAP 28 (6): Statement of Issues Presented for Review.

The issues presented on appeal are:

1. Whether the court abused its discretion in failing to give the jury instruction proffered by the defendant defining the term "reside" as it is used in NRS 205.067, the statute which defines home invasion.
2. Whether the court erred in imposing a prison sentence of a maximum term of 96 months in prison with a minimum parole eligibility date of 38 months.

NRAP 28(7): Statement of the Case.

On November 18, 2016, an Information was filed charging John Dunham with Invasion of the Home, a violation of NRS 205.067, a category B felony for entry into a residence on October 25, 2016. Record on Appeal (ROA), Vol. I, p. 1-4. On December 16, 2016, a separate Information was filed charging Burglary, a violation of NRS 205.060, a category B felony arising out of the same facts. ROA, Vol I, p. 5-7. The charges were later joined in a single Information alleging both counts. ROA, Vol I, p. 8-9. Mr. Dunham pled "not guilty" to both charges and trial was scheduled for February 13, 2017. ROA, Vol I, p. 43, 45, 58.

The matter proceeded to jury trial on the scheduled date. ROA, Vol I, p. 64-168, Vol II, p. 1-233, Vol. III, p. 1-67. On February 15, 2017, the jury returned a verdict of Guilty on the charge of Home Invasion and Not Guilty on the charge of Burglary. ROA, Vol I, p. 15-18. On April 14, 2017, Mr. Dunham appeared with counsel for sentencing. ROA, Vol III, p. 68-130. He was sentenced to a term of imprisonment in the Nevada Department of Corrections for a maximum term of 96 (ninety six) months with a parole eligibility of 38 (thirty eight) months. ROA, Vol I, p. 37-39. The Judgment of Conviction was entered April 19, 2017. ROA, Vol I, p.

37. An appeal from that Judgment was filed on May 15, 2017. ROA, Vol. I, p. 40-41.

NRAP 28(8): Statement of Facts.

Patricia Scripko and John Dunham were married in Boston in November, 2012 while Ms. Scripko was completing her residency program. ROA, Vol. II, p. 64-65. The couple moved to Salinas, California in July, 2014 where Ms. Scripko became employed as a neurologist at Salinas Valley Memorial Hospital. ROA, Vol. II, p. 62, 67. They leased an apartment at 1 Surf Way in Monterey, California, about 20 miles from the hospital. ROA, Vol. II, p. 67, 74.

Patricia Scripko purchased a condominium at 311 Olympic Court in Stateline, Nevada in October, 2015. The condominium was purchased in her name alone. ROA, Vol. II, p. 76. She had planned to make the condominium her primary residence and to secure employment in Nevada. ROA, Vol. II, p. 160-161. Those plans fell through, however, and in July 2016, she signed a two year contract at Salinas Valley Memorial Hospital. ROA, Vol. II, p. 140.

During November, 2015, a month after the condominium was purchased, the pipes froze causing considerable damage. ROA, Vol II, p. 140. The couple hired Gary LaChasse to do repairs and some other

remodeling. ROA, Vol. II, p. 165-167. The construction lasted from January through May, 2016. ROA, Vol. II, p. 166. During the construction, Mr. Dunham visited the condominium frequently and would stay a week or more at a time. ROA, Vol. II, p. 181. Ms. Scripko occasionally visited on the weekends. ROA, Vol. II, p. 142, 182.

In June, 2016, Mr. Dunham and Ms. Scripko separated. ROA, Vol. II, p. 64. Ms. Scripko remained in Monterey and Mr. Dunham spent the summer at the condominium with two of his children from a previous marriage. ROA, Vol. II, p. 143.

On August 23, 2017, Mr. Dunham was served in open court with a protective order. Ms. Scripko was also present in the courtroom when the order was served. ROA, Vol. II, p.78, 80, ROA, Vol. III, p.130. The order restrained Mr. Dunham from contacting Ms. Scripko and excluded him from the condominium in Stateline and the apartment in Monterey. Id.

At trial, Ms. Scripko testified that she did not go to the condominium in Stateline from August 23, 2016 through October 21, 2016 because she believed Mr. Dunham was staying at the condominium and she did not want a confrontation. ROA, Vol. II, p. 159. Prior to her visit on October 21st, Ms. Skripko had decided to rent out the condominium and had contacted Gary LaChasse to arrange for repairs recommended by the realtor. ROA, Vol. II,

p. 143. Between October 23, 2016 and the trial in February 2017, Ms. Scripko had not stayed in the condominium, although she had visited it on a few occasions. ROA, Vol. II, p.136.

Before his arrest on October 26, 2016 for the charged incident, Mr. Dunham was contacted twice by law enforcement at the condominium. On August 31, 2016, Deputy Sandoval responded to a call concerning a possible violation of a restraining order at 311 Olympic Court. ROA, Vol. II, p. 20. As he approached the condominium, he saw Mr. Dunham standing in the kitchen. Mr. Dunham came to the door and identified himself to the deputy. ROA, Vol. II, p. 21. The deputy confirmed, through dispatch, that the protection order was still valid. Id. Mr. Dunham was advised he could not be at that address and Mr. Dunham acknowledged he understood. ROA, Vol. II, p. 21-22.

In October, 2016, Ms. Scripko made arrangements with Mr. LaChasse to meet him at the condominium and go over the work that needed to be done to prepare the unit to be rented. She let him know she would be arriving on October 21st. ROA, Vol. II, p. 123-124. Mr. LaChasse had a chance meeting with Mr. Dunham a few days before Ms. Skripko's scheduled arrival date and advised Mr. Dunham that Ms. Scripko was

coming to Stateline for the weekend. ROA, Vol. II, p. 168-170. Mr. Dunham said he was aware of the visit and was leaving town. ROA, Vol. II, p. 170.

When she was about an hour away from Stateline, Ms. Scripko called Douglas County Dispatch and asked if a deputy could check the residence before her arrival. ROA, Vol. II, p.123. Deputy Karosich and Deputy Flagg responded to the call at around 3:30 p.m. ROA, Vol. I, p. 83-85. After confirming through dispatch that they had permission to enter the residence, the deputies entered the condominium. ROA, Vol. I, p. 88. In a bedroom on the lowest level of the condominium, they located Mr. Dunham partially under a bed. ROA, Vol. I, p. 92, 99-101. Mr. Dunham had a shotgun beneath him, although only the stock was visible. ROA, Vol. I, p. 101. The shotgun was unloaded. ROA, Vol. I, p. 119. There was also a box of ammunition near Mr. Dunham's shoulder. ROA, Vol. I, p. 123. Near the head of the bed was an open panel to a crawl space. ROA, Vol. I, p. 113.

Mr. Dunham was taken into custody. ROA, Vol. I, p. 158. Deputy Flagg testified that Mr. Dunham was intoxicated at the time of his arrest. Id. A later breath test revealed he had a blood alcohol content of .264. ROA, Vol. I, p.159.

Mr. LaChasse arrived at the condominium at around 4:00 p.m. ROA, Vol. II, p. 171. When he arrived, the officers were still inside the residence.

Id. After Mr. Dunham was escorted out, Mr. LaChasse changed the lock on the door as Ms. Scripko had requested. ROA, Vol. II, p.171, 180. Ms. Scripko arrived ten to fifteen minutes after the deputies had left. ROA, Vol. II, p. 172. Mr. Lachasse gave her a key to the new lock and kept one for himself. ROA, Vol. II, p. 174. Prior to leaving, Mr. LaChasse closed and locked the sliding window in the kitchen near the front door. ROA, Vol. II, p. 172-174.

Ms. Scripko stayed at the condominium from Friday, October 21st until Sunday, October 23rd. When she left the condominium, the door was locked and the window was undamaged and secured. ROA, Vol. II, p. 159.

On October 25, 2016, Mr. Dunham appeared in court and was released from custody. He was served with a copy of the release conditions that prohibited him from going to Summit Village or Tahoe Village where the condominium was located. ROA, Vol. III, p. 132, ROA, Vol. II, p. 136-137. After his release, he met with Chief Doug Albertson of the Department of Alternative Sentencing. ROA, Vol. II, p.190-193. Mr. Dunham signed the rules of alternative sentencing that included the prohibition against going on the premises of Summit Village or Tahoe Village. ROA, Vol. III, p. 131, ROA, Vol. II, p. 191-193.

On the morning of October 26, 2016, Mr. LaChasse went to the condominium to install some doors. ROA, Vol. II, p. 175. When he arrived, he saw the screen was off the kitchen window and the window itself was broken. ROA, Vol. II, p. 175-176. He also found the door was unlocked. ROA, Vol. II, p. 176-177. Once inside, he and his helper, Ernie Levario, heard music coming from the loft. Id. At Mr. LaChasse request, Mr. Lavario went up the steps far enough to see that there was a man asleep in the loft. ROA, Vol. II, p. 176-178. Mr. LaChasse and Mr. Lavario left the condominium and called the sheriff's office and Ms. Scripko. ROA, Vol. II, p. 178.

Deputy Eissinger and Deputy Kumagai responded to the condominium. ROA, Vol. II, p. 200. Deputy Eissinger entered the residence and called out for "John" several times. Soon, he saw Mr. Dunham coming down the stairs from the loft. ROA, Vol. II, p. 204. Mr. Dunham appeared to be stumbling and was not coherent. ROA, Vol. II, p. 205. He placed Mr. Dunham in handcuffs. Id. Deputy Eissinger asked Mr. Dunham if he had taken any narcotics or prescription medication. Mr. Dunham responded that he had. ROA, Vol. II, p. 210-211. Deputy Kumagai found an empty prescription bottle in the loft. ROA, Vol. II, p. 211, 217. Prior to driving Mr. Dunham to the jail, Deputy Eissinger drove Mr. Dunham to the hospital and

waited several hours until he was medically cleared. ROA, Vol. II, p.211, 218. Based on this arrest, Mr. Dunham was charged with Burglary and Home Invasion. ROA, Vol. I, p. 8-9.

NRAP 28(9): Summary of the Arguments.

I. The court abused its discretion in declining to give an instruction defining the term "reside" as it is used in NRS 205.067. Since the defense theory of the case was that the victim of the crime did not reside at the residence, the court had an affirmative duty to give an instruction defining the word. Even if the defense proposed instruction was poorly drafted, but nonetheless proposed a defense theory of the case instruction that should be given; the State could have requested additional, clarifying language more fully explicating the principles of law applicable to the jury's deliberations. The district court was responsible for not only assuring that the substance of the defendant's requested instruction was provided to the jury, but that the jury was otherwise fully and correctly instructed.

II. The sentence of ninety six months incarceration with a minimum parole eligibility of thirty six months violated the constitutional prohibition against cruel and unusual punishment in that it was grossly disproportionate to the severity of the crime. Based on Mr. Dunham's lack of criminal history, his family support, his desire and amenability to treatment and the unique

facts of the case, Mr. Dunham would have been a good candidate for probation as was recommended by the Division of Parole and Probation. The sentence imposed was grossly out of proportion to the severity of the crime and even exceeded the sentence recommended by the state.

NRAP 28(10): Argument.

I. The court abused its discretion in declining to give an instruction defining the term "reside" as it is used in NRS 205.067. Since the defense theory of the case was that the victim of the crime did not reside at the residence, the court had an affirmative duty to give an instruction defining the word.

Mr. Dunham was charged in Count One of the Second Amended Information with the crime of Home Invasion, a violation of NRS 205.067, a category B felony. The Home Invasion statute provides:

> "A person who, by day or night, forcibly enters an inhabited dwelling without permission of the owner, resident or lawful occupant, whether or not a person is present at the time of the entry, is guilty of invasion of the home."

NRS 205.067(1).

The statute goes on to define an "inhabited dwelling" as follows:

> " 'Inhabited dwelling' means any structure, building, house, room, apartment, tenement, tent, conveyance, vessel, boat,

> vehicle, house trailer, travel trailer, motor home or railroad car in which the owner or other lawful occupant resides."

NRS 205.067 (5)(b).

At trial, the defense offered a jury instruction concerning the term "resides". ROA, Vol. I, p. 14. The instruction sought to define, clarify and emphasize the term for the jury. The instruction read as follows:

> "Reside means to dwell permanently or continuously. It expresses an idea that a person keeps or returns to a particular dwelling place as his fixed, settled or legal abode. The plain meaning of reside implies a continuous arrangement."

Id.

The court rejected the instruction over defense counsel's objection. In doing so, the court stated:

> "Instruction 35 is a definition of reside, and the court concludes the jury can use the plain meaning of that term. It is not a word that needs to be defined for them. Ms. Brown may argue definition of reside at the time that she argues her closing argument, but I'm not going to give a definition of reside. There's not a Nevada case which defines reside. It is not defined by a statute and, therefore, the jury will use their common sense and determine the plain meaning of that word without the court defining it for them."

ROA, Vol. III, p. 3.

A judge has broad discretion to settle jury instructions, and the district court's decision will be reviewed for an abuse of that discretion or judicial error. *Olivera v. State, 2016 Nev. App. LEXIS 238 (2016) (citing Crawford v.*

State, 121 Nev. 746, 748, 121 P.3d 582, 585 (2005)). An abuse of discretion is found if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason. *Crawford, 121 Nev. at 748, 121 P.3d at 585.* Even if the court errs by refusing to give an instruction, the error will be harmless if the reviewing court is convinced beyond reasonable doubt that the jury's verdict was not attributable to that error. *Crawford, 121 Nev. at 756, 121 P.3d at 590.*

Although the court is not required to define every word in a statute in the instructions, the court must instruct the jury on the necessary elements of the charge crime and failure to do so is reversible error. *Olivera, supra; Rossana v. State, 113 Nev. 37, 934 p.2d 1045 (1997); Dawes v. State, 110 Nev. 1141, 881 P.2d 670 (1994).* Furthermore, the Nevada Supreme Court has consistently held that the defense has the right to have the jury instructed on its theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be. *Crawford, 121 Nev. at 751, 121 P.3d at 586. (citing Vallery v. State, 118 Nev. 357, 372 46 P.3d 66, 76-77(2002)).* The jury is entitled to receive a jury instruction that gives a full explanation of the defense theory of the case. *Crawford, 121 Nev. at 753, 121 P.3d at 588.* Jurors should not be expected to be legal experts nor make legal inferences with respect to the law. They should, instead, be provided with

applicable legal principals by accurate, clear and complete instructions. *Crawford, 121 Nev. at 754, 121 P.3d at 588.*

Even if the instruction requested by the defense is poorly drafted or might be considered misleading or incomplete, the court has a duty to include an instruction that incorporates the defense theory of the case. As stated in *Crawford:*

> "Rather, where a defendant's proposed instruction is poorly drafted, but nonetheless proposes a defense theory of the case instruction that should be given; the State may request additional, clarifying language more fully explicating the principles of law applicable to the jury's deliberations. And in the final analysis, the district court is ultimately responsible for not only assuring that the substance of the defendant's requested instruction is provided to the jury, but that the jury is otherwise fully and correctly instructed. In this, the district court may either assist the parties in crafting the required instructions or may complete the instructions sua sponte."

Crawford, 121 Nev. at 755, 121 P.3d at 589.

In this case, it was obvious that the defense theory of the case was that Ms. Scripko was not residing at, and had never resided at the condominium in Stateline. Therefore, it was not an "inhabited dwelling" within the meaning of the statute. Although she had purchased the condominium with the intent to move to Nevada and live there, those plans had been abandoned. As is set out in the statement of facts, a substantial amount of

her testimony centered around her physical presence, or lack thereof, at the condominium and her intent to treat the property as a rental and not her home or dwelling place.

In settling the instructions, the judge had concluded the term "reside" did not need to be defined, although it is an interregnal part of the definition of the crime. He stated defense counsel could argue the meaning to the jury. This was done. ROA, Vol. III, p. 46-47. But without an instruction on the law, there was no instruction to anchor on. Defense counsel was left with what could viewed as her own opinion:

"What does the term reside mean? We don't have a legal definition of it, but you can use a general—the general definition of it. It means to live there."

ROA, Vol. III, p. 46.

There is no Nevada case defining the word "reside" in the context of the Home Invasion statute. The language of the defense instruction was taken from the case *Petrowsky v. Krause, 223 Wis. 2d 32, 588 N.W. 2d 318 (1998).* In that case, the court found that the term "reside" as used in the domestic violence statute required a continuous living arrangement. *Petrowsky at 223 Wis. 2d 37, 588 N.W. 2d 320.* In other contexts, courts have

also concluded that the word "reside" by its plain definition requires some ongoing presence. *Collins v. Auto Owners Ins. Co. 2017 Ohio App. LEXIS 866 (2017)* (The plain and ordinary meaning of reside is to dwell permanently or continuously); *State v. Cloyd, 238 S.W.3d 183 (Mo. App. 2007).* In *Cloyd* the court found that the term "reside" generally means:

> "To settle oneself or a thing in a place, to be stationed, to remain or stay, to dwell permanently or continuously, to have a settled abode for a time, to have one's residence or domicile; specifically, to be in the residence, to have an abiding place, to be present as an element, to inhere as a quality, to be vested as a right."

Id at 186.

The state felt the instruction on the term "reside" was significant enough to address in a written objection to the defense instruction. ROA, Vol. I, p. 10-12. In opposing the instruction, the state noted the term "reside" can have different meanings in different contexts, but offered no constructive suggestion of what it meant in the context of the Home Invasion statute. The legislature obviously used it to distinguish an inhabited structure from one that is uninhabited. In fact, in the NRS 205.0813, which defines a lesser crime of Housebreaking, the terms "uninhabited or vacant dwelling" are used. Obviously the term "resides" has significance in determining if in fact a crime had been committed. It is an element of the offense, and yet the

court by not defining the word left the jury to establish the meaning of the element themselves. As was noted in *Crawford*, where a defenses proposes a defense theory of the case instruction that should be given, the State may request additional, clarifying language more fully explaining the principles of law applicable to the jury's deliberations. The district court may either assist the parties in crafting the required instruction or may complete the instruction sua sponte. In the end the district court is ultimately responsible for not only assuring that the substance of the defendant's requested instruction is provided to the jury, but that the jury is otherwise fully and correctly instructed.

In the present case, the district court abused its discretion by abandoning that obligation. The jury was left to determine the meaning of the word without proper guidance from the court. At this point, it is unknown what meaning, if any the jury gave to the word. Therefore the error was not harmless.

II. The sentence of ninety six months incarceration with a minimum parole eligibility of thirty six months violated the constitutional prohibition against cruel and unusual punishment in that it was grossly disproportionate to the severity of the crime.

The Eighth Amendment to the United States Constitution prohibits the infliction of cruel and unusual punishment, and therefore, "forbids . . .

extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin v. Michigan, 501 U.S. 957, 1001, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) (quoting Solem v. Helm, 463 U.S. 277, 288, 303, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983)); U.S Const. amend. VIII.* The Nevada constitution contains a similar prohibition. *Article 1, Section 6 of the Nevada Constitution.* The Nevada Supreme Court has held that sentence within the statutory limits is cruel and unusual punishment if the sentence is so unreasonably disproportionate to the offense as to shock the conscience. *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, 222 (1979)).*A punishment is unconstitutionally excessive "if it (1) makes no measurable contribution to goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." *Pickard v. State, 94 Nev. 681, 684, 585 P.2d 1342, 1344 (1978).*

The court reviews constitutional issues de novo. *Jackson v. State 128 Nev. 598, 603, 291 P.3d 1274, 1277 (2012).*

Mr. Dunham was convicted of a single count of home invasion and was sentenced to a maximum term of ninety six (96) months with the Nevada Department of Corrections with a minimum parole eligibility of thirty eight (38) month. ROA, Vol. I, p. 37-39. This sentence constitutes

cruel and unusual punishment in that it is grossly out of proportion to the severity of the crime. Although the sentence was not the maximum that could be imposed, it was in the upper range of the sentence. The Department of Parole and Probation had recommended a sentence of a maximum of forty eight (48) months imprisonment and a minimum parole eligibility of twelve (12) months, that the sentence be suspended and that Mr. Dunham be placed on supervised probation. ROA, Vol. I, p. 26. The State recommended a sentence of a maximum of forty eight (72) months imprisonment and a minimum parole eligibility of twelve (14) months. ROA, Vol. III, p 37. The sentence Mr. Dunham received greatly exceeded those recommendations.

Prior to his conviction in the present case, Mr. Dunham had one misdemeanor conviction in 2011. ROA, Vol. I, p. 22. Mr. Dunham admitted that alcohol had controlled his life and advised the court that he had been attending Alcoholics Anonymous while in jail. ROA, Vol. I, p. 30. At the time of his arrest, Mr. Dunham was determined to have been under the influence of prescription medication. ROA, Vol. II, p. 205, 211, 218. Letters were submitted showing he had family support. ROA, Vol. I, p. 34-35. Even his former wife described him as an excellent father. She also spoke of his alcohol problem and the need for treatment. ROA, Vol. I, p. 33. Based on his

social history it was shown that Mr. Dunham could have benefitted from a term of probation.

The facts of the case were also not so aggravated as to justify a sentence of ninety six months. The condominium where the crime occurred was purchased during the course of the marriage. ROA, Vol. II, p. 76. Mr. Dunham had been the primary resident at the condominium. ROA, Vol. II, p. 143, 181. Though excluded from the residence by court order, he was still married to Ms. Scripko and his ownership interest in the property had not been determined or extinguished. ROA, Vol. II p. 63, 78, 80.

Ms. Scripko was not living at or present at the condominium when Mr. Dunham entered. ROA, Vol. II, p. 159. A few days before Ms. Scripko's visit to the condominium on October 21st, Mr. Dunham had been advised by Mr. LaChance that Ms. Scripko was coming for "the weekend". Therefore, Mr. Dunham had no expectation that she would be there the following Wednesday.

Mr. Dunham, broke the window to gain entry to the condominium, but there was no other damage. There was no evidence he committed another crime while in the condominium. The jury found him "Not Guilty" of the burglary charge, finding insufficient evidence that he intended to commit a crime. ROA, Vol. I, p. 17. He was discovered asleep in the condominium the

next morning and was arrested without incident. ROA, Vol. II, p. 176-178, 205.

Based on Mr. Dunham's lack of criminal history, his family support, his desire and amenability to treatment and the unique facts of the case, Mr. Dunham would have been a good candidate for probation as was recommended by the Division of Parole and Probation. The sentence imposed was grossly out of proportion to the severity of the crime and even exceeded that recommended by the state. As such, Mr. Dunham's sentence violates the constitutional prohibition against cruel and unusual punishment.

NRAP 28(11): Conclusion.

Based on the foregoing, the appellant asks that this court vacate the judgment of conviction and remand the case to the district court for a new trial, or at a minimum, a new sentencing hearing.

Dated this 27th day of September, 2017.

Kristine L. Brown
Bar No. 3026
1190 High School Street
Suite A
Gardnerville, Nv. 89410
775-783-8642
Attorney for Appellant

NRAP 28(12): 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, 2010, in 14 point font in Times New Roman style.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 3E(e)(2) because it is:

Proportionately spaced, has a typeface of 14 points or more, and contains 4,711 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 26th day of September, 2017.

Kristine L. Brown
Bar No. 3026
1190 High School Street, Suite A
Gardnerville, Nv. 89410
775-783-8642
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that I am an employee of The Law Office of Kristine L. Brown, LLC, and that on today's date, I hand delivered a true and correct copy of the Appellant's Opening Brief, Joint Appendix Volume I, II, III and a CD containing a copy of the Joint Appendix to:

The Douglas County District Attorney's Office
1038 Buckeye Road
Minden, Nevada 89423

And mailed a true and correct copy of the Appellant's Opening Brief to

John Dunham
Inmate # 1176739
SDCC
PO Box 208
Indian Springs, NV 89070

Dated this 26th day of September, 2017.

Kristine L. Brown