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Electronically Filed  
Jun 18 2019 01:25 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

9 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

10 JAMES HOWARD HAYES, JR.,

Case No. : 78590

11 Appellant,

12 vs.

13 **FAST TRACK STATEMENT**

14 STATE OF NEVADA,

15 Respondent.  
16

17 1. **Name of party filing this fast track statement:** JAMES  
18 HOWARD HAYES, JR.

19 2. **Name, law firm, address, and telephone number of attorney**  
20 **submitting this fast track statement:** Michael Sanft, Esq., SANFT LAW,  
21 2880 West Sahara Avenue, Las Vegas, Nevada 89102; (702) 497-8008.  
22

23 3. **Name, law firm, address, and telephone number of appellate**  
24 **counsel if different from trial counsel:** n/a  
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1           4.     **Judicial district, county, and district court docket number of**  
2 **lower court proceedings:** Eighth Judicial District, Clark County, Docket No.  
3 C-16-315718-1  
4

5           5.     **Name of judge issuing decision, judgment, or order appealed**  
6 **from:** The Honorable William Kephart.  
7

8           6.     **Length of trial.** If this action proceeded to trial in the district  
9 court, how many days did the trial last? Appellant pled guilty pursuant to the  
10 Alford decision. There was no trial.  
11

12           7.     **Conviction(s) appealed from:** Count 1- Attempt Grand Larceny

13           8.     **Sentence for each count:** Appellant was sentenced under the  
14 small Habitual Statute to 60 to 174 months.  
15

16           9.     **Date district court announced decision, sentence, or order**  
17 **appealed from:** March 6, 2019.  
18

19           10.    **Date of entry of written judgment or order appealed from:**  
20 March 12, 2019.  
21

22                   (a)    If no written judgment or order was filed in the district  
23 court, explain the basis for seeking appellate review: n/a

24           11.    **If this appeal is from an order granting or denying a petition**  
25 **for a writ of habeas corpus, indicate the date written notice of entry of**  
26 **judgment or order was served by the court:** n/a  
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(a) Specify whether service was by delivery or by mail: n/a

**12. If the time for filing the notice of appeal was tolled by a post-judgment motion,**

(a) specify the type of motion and the date of filing of the motion:n/a

(b) date of entry of written order resolving motion: n/a

**13. Date notice of appeal filed:** April 29, 2019

**14. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., or other:** NRAP 4(b), NRAP 3C(e).

**15. Specify statute, rule or other authority which grants this court jurisdiction to review the judgment or order appealed from:** NRS 177.015(3).

**16. Specify the nature of disposition below, e.g., judgment after bench trial, judgment after jury verdict, judgment upon guilty plea, etc.:** Judgment upon guilty plea.

**17. Pending and prior proceedings in this court.** List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal (e.g., separate appeals by co-defendants, appeal after post-conviction proceedings): None.

1           **18. Pending and prior proceedings in other courts.** List the case  
2 name, number and court of all pending and prior proceedings in other courts  
3 which are related to this appeal (e.g., habeas corpus proceedings in state or  
4 federal court, bifurcated proceedings against co-defendants): State of Nevada  
5 v. James Hayes, C-19-338412-1, Eighth Judicial District Court, Department  
6  
7 19.

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9           **19. Proceedings raising same issues.** List the case name and docket  
10 number of all appeals or original proceedings presently pending before this  
11 court, of which you are aware, which raise the same issues you intend to raise  
12 in this appeal: None.

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14           **20. Procedural history.** Briefly describe the procedural history of the  
15 case (provide citations for every assertion of fact to the appendix, if any, or to  
16 the rough draft transcript): Information, filed June 17, 2016 (A001-A003);  
17 Guilty Plea Agreement, dated November 7, 2018 (A004-A012); Judgment of  
18 Conviction, dated March 12, 2019 (A013); and Notice of Appeal filed pro se  
19 on March 28, 2019 (A014-A18).

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22           **21. Statement of facts.** Briefly set forth the facts material to the issues  
23 on appeal: Appellant entered into a guilty plea agreement pursuant to *North*  
24 *Carolina v. Alford* for one count of Attempt Grand Larceny, a category D  
25 felony (A004-A012). The State agreed to not oppose probation with the only  
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1 condition that Appellant serve thirty days in the Clark County Detention  
2 Center with thirty days credit for time served (A004). Appellant further  
3 waived his right to a direct appeal of his conviction and the assistance of an  
4 attorney, “unless specifically reserved in writing and agreed upon as provided  
5 in NRS 174.035(3)”(A008).  
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7  
8 Before sentencing and after he was released on parole, Appellant was  
9 arrested and charged with a new incident involving Burglary and Unlawful  
10 Use of Hotel Key in Case No. C-19-338412-1 (A019-A021). The new case  
11 allowed the State under the terms of the guilty plea agreement to argue for any  
12 lawful sentence, including for the habitual criminal (A005). The Court  
13 sentenced Appellant under the small habitual statute to five (5) to fourteen and  
14 a half (14.5) years in prison (A013). Appellant then filed an appeal pro se  
15 (A014-A018).  
16  
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18 **22. Issues on appeal.** State concisely the principal issue(s) in this  
19 appeal: The principal issue is cruel and unusual punishment. Appellant was  
20 judged too harshly, even if he committed the same type of crimes shortly after  
21 being released from prison and while he awaited sentencing. Even though he  
22 legally qualified to sentencing under the habitual statute, the sentence  
23 constitutes cruel and unusual punishment.  
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1           **23. Legal argument, including authorities:** The Eighth Amendment  
2 to the United States Constitution provides, “Excessive bail shall not be  
3 required, nor excessive fines imposed, nor cruel and unusual punishments  
4 inflicted.” U.S. Const. amend. VIII; *McConnell v. State*, 120 Nev. 1043, 1063,  
5 102 P.3d 606, 620 (2004). Similarly, article 1, section 6 of the Nevada  
6 Constitution provides: “Excessive bail shall not be required, nor excessive  
7 fines imposed, nor shall cruel or unusual punishments be inflicted ....” Nev.  
8 Const. art. 1, § 6.

9  
10           The Eighth Amendment of the United States Constitution forbids an  
11 extreme sentence that is grossly disproportionate to the crime. *Chavez v. State*,  
12 125 Nev. Adv. Rep. 29, 213 P.3d 476, 489 (2009) (citing *Harmelin v.*  
13 *Michigan*, 501 U.S. 957, 1000-01 (1991) (plurality opinion)). Regardless of its  
14 severity, a sentence that is within the statutory limits is cruel and unusual  
15 punishment if the statute fixing punishment is unconstitutional or the sentence  
16 is so unreasonably disproportionate to the offense as to ““shock the  
17 conscience.”” *Id.*, 213 P.3d at 489 (quoting *Blume v. State*, 112 Nev. 472, 475,  
18 915 P.2d 282, 284 (1996)). This Court affords the district court wide discretion  
19 in its sentencing decision. *Id.*, 213 P.3d at 490. Therefore, this Court will  
20 refrain from interfering with the sentence imposed “[s]o long as the record  
21 does not demonstrate prejudice resulting from consideration of information or  
22 accusations founded on facts supported only by impalpable or highly suspect  
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evidence.” Id., 213 P.3d at 490 (quoting *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976)).

Here, the sentence imposed upon Appellant by the district court constitutes cruel and unusual punishment, because it was grossly disproportionate to the crime, and, therefore, shocks Appellant’s conscience. While the sentence at issue fell within the statutorily established range of punishment, the lengthy prison sentence imposed upon Appellant by the district was grossly disproportionate to the crime. Admittedly, even though Appellant was just released from prison, and committed the same type of burglary as what he was awaiting sentencing on, these facts do not justify the district court’s decision to subject Appellant to habitual criminal treatment. The district court abused its discretion by imposing on Appellant a sentence that was so unreasonably disproportionate to the offense.

24. **Preservation of issues.** State concisely how each enumerated issue on appeal was preserved during trial. If the issue was not preserved, explain why this court should review the issue: There was no trial.

25. **Issues of first impression or of public interest.** Does this appeal present a substantial legal issue of first impression in this jurisdiction or one affecting an important public interest: If so, explain: No.

1 **VERIFICATION**

2 I hereby certify that this fast track statement complies with the  
3 formatting requirements of NRAP 32(a)(4) including at least a one inch  
4 margin on all sides and consecutive numbering of pages, the typeface  
5 requirements of NRAP 32(a)(5) and the type style requirements of NRAP  
6 32(a)(6) because this fast track statement has been prepared in a  
7 proportionally spaced typeface using Microsoft Word for Macintosh in Times  
8 New Roman 14 point font.  
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11 I further certify that this fast track statement complies with the page- or  
12 type-volume limitations of NRAP 3C(h)(2) because it does not exceed 10  
13 pages.  
14

15 Finally, I recognize that under NRAP 3C I am responsible for timely  
16 filing a fast track statement and that the Supreme Court of Nevada may  
17 impose sanctions for failing to timely file a fast track statement, or failing to  
18 raise material issues or arguments in the fast track statement. I therefore  
19 certify that the information provided in this fast track statement is true and  
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1 complete to the best of my knowledge, information, and belief.

2 DATED this 18th day of June, 2019.

3 SANFT LAW

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## CERTIFICATE OF COMPLIANCE

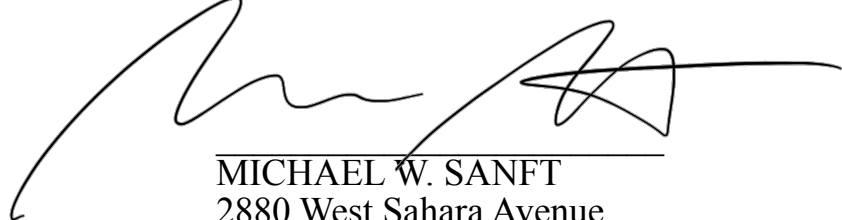
1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

2. I further certify that this brief does comply with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 1,213 words.

3. Finally, I hereby certify that I have read this appellate brief, but to the best of my knowledge, information, and belief, cannot certify that 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 18th day of June, 2019.

SANFT LAW

A handwritten signature in black ink, appearing to read 'Michael W. Sanft', is written over a horizontal line.

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whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeal under NRAP 17, and citing the subparagraph(s) of the Rule under which the matter falls ....

The foregoing Appellant's Fast Track Statement should be assigned to the Court of Appeals, because this matter involves a direct appeal from a judgment of conviction based on a plea of guilty.

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