

IN THE SUPREME COURT OF THE STATE OF NEVADA

---

SEAN MCKENDRICK.	)	NO. 79372	Electronically Filed
	)		Feb 20 2020 11:06 a.m.
Appellant,	)		Elizabeth A. Brown
	)		Clerk of Supreme Court
vs.	)		
	)		
THE STATE OF NEVADA,	)		
	)		
Respondent.	)		

---

**APPELLANT'S OPENING BRIEF**

(Appeal from Judgment of Conviction)

DARIN F. IMLAY  
CLARK COUNTY PUBLIC DEF.  
309 South Third Street, #226  
Las Vegas, Nevada 89155-2610  
(702) 455-4685

Attorney for Appellant

STEVEN B. WOLFSON  
CLARK COUNTY DIST. ATTY.  
200 Lewis Avenue, 3<sup>rd</sup> Floor  
Las Vegas, Nevada 89155  
(702) 455-4711

AARON D. FORD  
Attorney General  
100 North Carson Street  
Carson City, Nevada 89701-4717  
(775) 684-1265

Counsel for Respondent

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

---

SEAN MCKENDRICK ,	)	NO. 79372
	)	
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

---

**APPELLANT'S OPENING BRIEF**

DARIN F. IMLAY  
CLARK COUNTY PUBLIC DEF.  
309 South Third Street, #226  
Las Vegas, Nevada 89155-2610  
(702) 455-4685

Attorney for Appellant

STEVEN B. WOLFSON  
CLARK COUNTY DIST. ATTY.  
200 Lewis Avenue, 3<sup>rd</sup> Floor  
Las Vegas, Nevada 89155  
(702) 455-4711

AARON D. FORD  
Attorney General  
100 North Carson Street  
Carson City, Nevada 89701-4717  
(775) 684-1265

Counsel for Respondent

## TABLE OF CONTENTS

	<u>PAGE NO.</u>
TABLE OF AUTHORITIES .....	ii
JURISDICTIONAL STATEMENT .....	1
ROUTING STATEMENT.....	1
ISSUES PRESENTED FOR REVIEW.....	2
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS .....	5
SUMMARY OF THE ARGUMENT.....	6
ARGUMENT .....	6
<b>I.    The sentence imposed amounts to cruel and           unusual punishment.....</b>	6
CONCLUSION .....	8
CERTIFICATE OF COMPLIANCE .....	9
CERTIFICATE OF SERVICE .....	10

## TABLE OF AUTHORITIES

### PAGE NO.

#### Cases

<b><u>Schmidt v. State</u></b> , 94 Nev. 665, 668 (1978).....	6
<b><u>Trop v. Dulles</u></b> , 356 U.S. 86, 101 (1958).....	6

#### Statutes

<b>NRS 200.481</b> .....	7
<b>NRS 207.010</b> .....	7

#### Misc. Citations

<b>Nev. Const. Art. 1, Sect. 8</b> .....	6
<b>NRAP 17</b> .....	1
<b>U.S.C.A. VIII</b> .....	6
<b>U.S.C.A. XIV</b> .....	6

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

SEAN MCKENDRICK,	)	NO. 79372
	)	
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	.)	

---

**APPELLANT’S OPENING BRIEF**

**JURISDICTIONAL STATEMENT**

Appellant Sean McKendrick brings this appeal from a final judgment under Nevada Rule of Appellate Procedure 4(b). The District Court filed the Amended Judgment of Conviction on September 4, 2019. (Appellant’s Appendix, Volume I, pages 78-79). Mr. McKendrick filed a timely Notice of Appeal on August 15, 2019. (I:74).

**ROUTING STATEMENT**

Pursuant to **NRAP 17(a)**, this proceeding invokes the original jurisdiction of the Supreme Court and is not presumptively assigned to the Court of Appeals pursuant to **NRAP 17(b)(1)** because the District Court convicted Mr. McKendrick of one Category A felony. (I:78-79).

## **ISSUES PRESENTED FOR REVIEW**

I. The sentence imposed amounts to cruel and unusual punishment.

### **STATEMENT OF THE CASE**

On February 19, 2019, the State of Nevada represented by the District Attorney's office went before the Grand Jury and received an Indictment against Mr. Sean McKendrick for two counts of Battery by Prisoner, one count of Attempt Murder, and one count of Attempt Battery Substantial Bodily Harm. (I:1-3). On February 27, 2019, Mr. McKendrick appeared before the District Court where he pleaded not guilty; however, as the case was nearly resolved prior to the State going to the Grand Jury, defense counsel requested a status check as well as a jury trial date. (I:81). On March 27, 2019, Mr. McKendrick pleaded guilty to one count of Battery by Prisoner while the State retained the right to argue at sentencing. (I:39-47). Sentencing was set for May 13, 2019 and the judge reduced the bail to \$10,000 without objection by the State. (I:83). Shortly thereafter Mr. McKendrick posted bond. (I:53).

On the date for sentencing, Mr. McKendrick was not present. (I:119). Defense counsel objected to any bench warrant as she had previously contacted the District Court and the State that Mr. Kendrick had contacted counsel that he was intending to hire private counsel who should be present.

(I:119-120). The State requested a bench warrant and the Court granted its request and issued a bench warrant. (I:56).

Mr. McKendrick was arrested on June 26, 2019. (I:62). Mr. McKendrick appeared before the District Court on July 1, 2019. (I:84). At that time, defense counsel was made aware of the State's intent to seek habitual criminal treatment and the sentencing was set in two weeks. (I:60-61, 84).

On the date of the actual sentencing, the State requested that Mr. McKendrick be treated as a large habitual criminal and be sentenced to ten years to life in prison. (I:106). The State argues that Mr. McKendrick should be treated as a large habitual criminal based in part on his criminal history. (I:107-108, 111). The State argues that Mr. McKendrick has been committing crimes since he was nineteen years old, all of which has been escalating in seriousness since then. (I:111). The State also argued that Mr. McKendrick's actions in this case merit the punishment sought as they were violent in nature, which is consistent with Mr. McKendrick's history of violence and specifically toward law enforcement. (I:108-109). Additionally, the State argues the case for which Mr. McKendrick was placed on house arrest was another indicator of violent tendencies as well as the "new" case he was recently arrested for as he resisted arrest and ran into

traffic after being handcuffed. (I:110-111). The State ultimately argued that Mr. McKendrick should be given a life Gail because he needs something to motivate him to change and protect the community. (I:112-113).

The defense requested simply that the Court not treat Mr. McKendrick as a habitual criminal. (I:116). Counsel argued that the Office of Parole and Probation recommended a sentence of twelve to forty-eight months and that a non-habitual sentence is more appropriate based on a couple of factors: 1. The facts here did not indicate Mr. McKendrick was intending to kill or harm the officers, but showed he panicked and was attempting to flee; 2. Mr. McKendrick clearly has a drug problem that caused him to react the way he did when being arrested by the house arrest officers; 3. Mr. McKendrick has clear mental health issues stemming from his prior incarcerations which can explain why he would react as he did when being threatened with being arrested again; 4. Finally, the Nevada legislature recently changed the law as to what it meant to be a habitual criminal, which if it were enacted at the time of sentencing, Mr. McKendrick would not qualify for small or large habitual treatment. (I:116-19).

The District Court ultimately stated it agreed with the State and that the defendant was delusional if he believed he could get probation. (I:115, 121-22). The Court stated it believed that Mr. McKendrick had both drug



and mental health problems; however, the Court stated neither were an excuse for his actions and that his violent history merits a lifetime of supervision to encourage better behavior in the future. (I:121-22).

### **STATEMENT OF THE FACTS**

On January 29, 2019, house arrest officer Daniel Coyne and Daniel Webb went to the address where Mr. McKendrick was on house arrest based on a call from Mr. McKendrick's sister to Officer Ariaza, the officer assigned to supervise Mr. McKendrick. (I:14:5-15:2, 17:23-25). Upon arrival, the officers believed Mr. McKendrick was acting strangely so they attempted to arrest him. (I:18:2-8). After one of his hands were in cuffs, according to the officers, Mr. McKendrick began acting violently and twisted out of the officer's grasp and began hitting in pushing the officers. (I:19:1-22). During this struggle, Officer Webb was thrust backward into a small table near the door which broke when he landed on it. (I:31:7-11). Mr. McKendrick then ran toward the open door and put onto the balcony near the stairs. (I:20:4-16). Then Mr. McKendrick charged at Officer Webb, pushing him back into the railing where his right foot slipped down a couple stairs, but he was able to right himself quickly as Officer Coyne came up behind Mr. McKendrick and placed him in a chokehold until he became unconscious. (I:32:4-8, 33:19).

## **SUMMARY OF THE ARGUMENT**

The District Court's sentence of ten years to life in prison amounted to cruel and unusual punishment. Although the current state of the law allows a court to sentence someone with three prior felony convictions to ten to life, the application in this case shocks the conscious as Mr. McKendrick had not committed murder and had not even been charged with causing substantial bodily harm. Additionally, the legislature had recently changed what it will mean to be a habitual criminal (as of 2020), which is a clear indication that people like Mr. McKendrick should not be sentenced as he was in this case.

## **ARGUMENT**

### **I. The sentence imposed amounts to cruel and unusual punishment.**

The U.S. and Nevada Constitutions prohibit "cruel and unusual punishment." U.S.C.A. VIII, XIV; Nev. Const. Art. 1, Sect. 8. Whether a particular sentence amounts to 'cruel and unusual' punishment is determined based on "evolving standards of decency that mark the progress of a maturing society." **Trop v. Dulles**, 356 U.S. 86, 101 (1958) (plurality). While legislatively enacted statutes are presumptively valid, a sentence is unconstitutional "if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends the fundamental notions of human dignity..." **Schmidt v. State**, 94 Nev. 665, 668 (1978).

The trial court sentenced Mr. McKendrick to life in prison with a minimum mandatory sentence of ten years before parole eligibility. Condemning a man to spend the rest of his natural life in prison – the same sentence a First Degree Murderer would receive – for conduct that did not cause substantial physical harm, offends fundamental notions of human dignity.

Nevada law allows courts, presently, to sentence people with two or more prior felony convictions to five to twenty years in prison. **N.R.S. 207.010.** It also allows courts to sentence those with three prior felony convictions to ten to twenty-five years, ten to life, and life without the possibility of parole. Mr. McKendrick had three prior felony convictions, had never been treated as what is considered a “small” habitual criminal, and did not kill or maim anyone involved in this case. Despite that, the district court mocked Mr. McKendrick’s request for probation and sentenced him to ten to life. It is shocking to the conscious that a court could sentence someone to life (either in prison or on parole) when he had just three felony convictions and had not killed anyone. This is against what Nevada currently believes to be appropriate as the legislature recently decided to change the law, which if it had been in affect at the time of his sentencing, the most time the court could have given Mr. McKendrick was two to six

years under **NRS 200.481(2)(f)**; while the Office of Parole and Probation, knowing Mr. McKendrick's history only recommended twelve to forty-eight months. Granted that was before habitual notice was filed or Mr. McKendrick failed to appear at his first sentencing date, those factors alone do not merit life in prison. This Court should strike Mr. McKendrick's sentence as cruel and unusual punishment under the Federal and State constitutions.

### **CONCLUSION**

Based on the foregoing argument, Mr. McKendrick asks that his sentence be vacated and his case remanded for a fair and constitutional sentencing.

Respectfully submitted,

DARIN IMLAY  
CLARK COUNTY PUBLIC DEFENDER

By: /s/ Kara M. Simmons  
KARA M. SIMMONS, #14621  
Deputy Public Defender

## 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 Times New Roman in 14 size font.

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 **8 pages** which does not exceed the **30 page** limit.

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 20 day of February, 2020.

DARIN IMLAY  
CLARK COUNTY PUBLIC DEFENDER

By /s/ Kara M. Simmons  
KARA M. SIMMONS, #14621  
Deputy Public Defender  
309 South Third Street, Suite #226  
Las Vegas, Nevada 89155-2610  
(702) 455-4685

### **CERTIFICATE OF SERVICE**

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 20 day of February, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD  
ALEXANDER CHEN

KARA M. SIMMONS  
HOWARD S. BROOKS

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

SEAN MICHAEL MCKENDRICK  
NDOC No. 84624  
c/o Ely State Prison  
P.O Box 1989  
Ely, NV 89301

BY /s/ Carrie M. Connolly  
Employee, Clark County Public Defender's Office