

IN THE SUPREME COURT OF THE STATE OF NEVADA

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SEAN MCKENDRICK,  
  
Appellant,

vs.

THE STATE OF NEVADA,  
  
Respondent.

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**APPELLANT'S REPLY BRIEF**

(Appeal from Judgment of Conviction)

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**APPELLANT’S REPLY BRIEF**

**ARGUMENT**

The Respondent argues in its Answering Brief that Mr. McKendrick’s claims are belied by the record as he was or should have been aware that if he failed to appear and/or was arrested on a new case, then the State would be allowed to argue for habitual treatment. Respondent’s Answering Brief (“RAB”) 6. The State argues that this was an “agreed-upon sentence,” which is factually incorrect. Unfortunately, for some time now, the State has held the power to add whatever terms it deems necessary to be “standard” and that must apply to all even though they are not specifically negotiated between the parties, such as the clause the State refers to in this case. This “standard” paragraph appears in every, single Guilty Plea Agreement made

by the District Attorney's Office, even if a client is pleading to a gross misdemeanor or has no prior felony history and therefore the State could never seek habitual treatment for that defendant. These "standard" clauses are forced upon all defendants and their existence does not mean a defendant agrees to be sentenced as a habitual offender. This clause only allows a prosecutor to argue for habitual treatment. Whether or not he was treated as a habitual offender was left in the discretion of the sentencing judge. Therefore, the claim is not belied as there is a factual dispute and simply agreeing the State may ask for habitual treatment does not mean the sentence given to Mr. McKendrick was constitutional.

The State also argues that Mr. McKendrick was sentenced within the parameters of NRS 207.010; therefore, Mr. McKendrick was properly sentenced. RAB 8. The State frames Mr. McKendrick's argument as meaning that only murder cases should lead to life imprisonment. That may be true, but that is not Mr. McKendrick's argument. The comparison is to put into perspective the factual allegations here and determine if the sentence imposed by Judge Bluth was unconstitutional. The case law is clear that even if a defendant is sentenced pursuant to a valid statute, the sentence may still be unconstitutional if it "shocks the conscience and offends fundamental notions of human dignity." **Schmidt v. State**, 94 Nev. 665, 668 (1978).

The factual allegations in this case are important because no one was substantially harmed, injured, or killed. There is no denying there was a physical altercation on the date of the incident, but did what happened and what Mr. McKendrick did that day merit a minimum of ten years and a maximum of life in prison? No.

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). The standard for what constitutes a habitual offender has changed in Nevada. Unfortunately, that law has yet to be enacted. But this Court can consider the changing law when determining if the sentence imposed was unconstitutional. The fact that the law is changing is a clear indication that Nevada has decided what it takes to be a habitual criminal, and Mr. McKendrick does not meet that standard. The State argues that Mr. McKendrick has shown he is a habitual criminal because he has prior convictions and is still appearing before courts when he should be rehabilitated or deterred from committing crimes based on his past incarcerations. RAB 8. Common sense and common practice show this is a faulty argument. Those familiar with criminal cases and criminal defendants know that there are underlying reasons as to why it may be harder to get out

of the recidivism cycle for some, like Mr. McKendrick. Especially those who have been institutionalized from a young age and suffer from substance abuse addictions, like Mr. McKendrick. Even ignoring those factors, which were brought to the District Court's attention during sentencing, Mr. McKendrick's history alone does not mandate that he serve life in prison. The question remains: was the sentence constitutional? The answer is no.

When the facts, Mr. McKendrick's criminal history, what was said by the District Court during his sentencing, the ultimate sentence imposed, and the upcoming changes to what it means to be habitual offender in Nevada are all taken into consideration the result is that the sentence is shocking to the conscience and offensive to fundamental notions of human dignity.

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## CONCLUSION

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

Respectfully submitted,

DARIN IMLAY  
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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 Times New Roman in 14 size font.

2. I further certify that this brief complies 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 either:

Proportionately spaced, has a typeface of 14 points or more and contains 5 pages which does not exceed the 15 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 15 day of May, 2020.

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### **CERTIFICATE OF SERVICE**

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 15 day of May, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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

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