

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

3 Electronically Filed
4 Oct 25 2021 03:15 p.m.
5 Elizabeth A. Brown
6 Clerk of Supreme Court

7 BRETT ALAN LINDER,

CASE NO.: 83163

8 Appellant,

9 vs.

10 THE STATE OF NEVADA,

11 Respondent,

12 **ON APPEAL FROM THE FIFTH JUDICIAL DISTRICT COURT IN AND**
13 **FOR THE COUNTY OF NYE, THE HONORABLE ROBERT LANE,**
14 **PRESIDING**

15 **APPELLANT'S OPENING BRIEF**

16 David H. Neely III, Esq.
17 NV. Bar No. 3891
18 3520 E. Tropicana Ave., Suite D-1
19 Las Vegas, Nevada 89121
20 Attorney for Appellant

Aaron Ford, Esq.
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

Chris Arabia, Esq.
Nye County District Attorney
P.O. Box 39
Pahrump, Nevada 89041
Attorneys for Respondent

TABLE OF CONTENTS

STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS	1
ARGUMENT	1
CONCLUSIONS AND RELIEF SOUGHT	18
ROUTING STATEMENT.....	18
CERTIFICATE OF COUNSEL UNDER NRAP 28A.....	18
CERTIFICATE OF SERVICE BY MAIL	20

1 **INDEX OF CASES AND AUTHORITIES**

2

3 **CASES**

4 Blume v. State, 112 Nev. 472, 915 F.2d 2828 (1996)5

5 Culverson v. State, 95 Nev. 433, 596 P.2d 220, 221-22 (1979)..... 5, 14, 15

6

7 **OTHER AUTHORITIES**

8 Caperton v. A. T. Massey Coal Company, 129 S. Ct. 2252, 173 L.Ed. 2d 1208

9 (2009)15

10 Tumey v. Ohio, 273 U.S. 510 (1927)16

11

12 Withrow v. Larkin, 421 U.S. 35, 95 S. Ct. 1456 (1975)..... 16, 18

1 **STATEMENT OF THE ISSUES**

2 **I.**

3 WHETHER THE SENTENCE IMPOSED BY THE TRIAL COURT
4 VIOLATED THE APPELLANT'S CONSTITUTIONAL PROTECTION
5 AGAINST CRUEL AND UNUSUAL PUNISHMENTS.
6

7 **II.**

8 WHETHER THE TRIAL COURT WAS BIASED AGAINST THE
9 APPELLANT AND SHOULD HAVE RECUSED HIMSELF PRIOR TO
10 SENTENCING THE APPELLANT.
11

12 **STATEMENT OF THE CASE**

13 Appellant's sentence imposed by the Trial Court violated the Appellant's
14 constitutional protection against cruel and unusual punishments. In addition, the
15 Trial Court was biased against the Appellant and should have recused himself prior
16 to Sentencing the Appellant.
17

18 **STATEMENT OF FACTS**

19 On 08/25/2020, an Affidavit and Application for Appointment of Counsel
20 was filed in Justice Court (Appx. 0001),

21 On 08/31/2020, a Criminal Complaint was filed in Justice Court (Appx.
22 0002),

23 On 09/09/2020, Order to Revoke was filed in Justice Court (Appx. 0004),
24

1 On 09/09/2020, a Substitution of Counsel was filed in Justice Court (Appx.
2 0005),

3 On 09/14/2020, an Affidavit and Application for Appointment of Counsel
4 was filed in Justice Court (Appx. 0006),
5

6 On 09/15/2020, a Criminal Complaint was filed in Justice Court (Appx.
7 0007),

8 On 10/16/2020, a Substitute of Counsel was filed in Justice Court (Appx.
9 0009),

10 On 10/28/2020, an Order to Continue was filed in Justice Court (Appx.
11 0011),
12

13 On 12/08/2020, a Stipulation to Continue was filed in Justice Court (Appx.
14 0012),

15 On 12/08/2020, an Order to Continue Preliminary Hearings was filed in
16 Justice Court (Appx. 0013),

17 On 12/08/2020, a Waiver of 15-Day Rule was filed in Justice Court (Appx.
18 0014),
19

20 On 01/9/2021, a Stipulation and Order to Convert Preliminary Hearing to
21 Pre-Triall Hearing was filed in Justice Court (Appx. 0015),

22 On 02/16/2021, a Bindover Order in Case No. CR02607 and CR02744 was
23 filed in Justice Court (Appx. 0017),
24

1 On 02/16//2021, a Waiver of Preliminary Hearing Unconditional in Case
2 No. CR02607 and CR02744 was filed in Justice Court (Appx. 0019),

3 On 02/19/2021, an Information in Case No. CR21-0018 and CR21-0020 was
4 filed in District Court (Appx. 0021),

5 On 02/22/2021, a Media Request to Allow Electronic Recording Equipment
6 into the Courtroom was filed in District Court (Appx 0027),

7 On 02/22/2021, an Arraignment Hearing was held in District Court (Appx.
8 0028),

9 On 03/08/2021, a Guilty Plea Agreement in Case No. CR21-0018 and
10 CR21-0020 was filed in District Court (Appx. 0033),

11 On 03/08/2021, an Arraignment Hearing was held in District Court (Appx.
12 0055),

13 On 05/17/2021, a Sentencing Hearing was held in District Court (Appx.
14 0064)

15 On 01/19/2021, a Stipulation and Order to Convert Preliminary Hearing to a
16 Pre-Trial Hearing was filed in Justice Court (Appx. 0079),

17 On 06/21/2021, a Sentencing Hearing was held in District Court (Appx.
18 0080),

19 On 06/23/2021, a Judgment of Conviction in Case CR21-0018 and CR21-
20 0020 was filed in District Court (Appx. 0102),

21 On 06/30/2021, a Notice of Appeal was filed in District Court (Appx. 0108),
22
23
24

1 On 07/01/2021, a Case Appeal Statement in Case No. CR21-0018 and
2 CR21-0020 was filed in District Court (Appx. 0109),

3 On 07/06/2021, an Amended Judgment of Conviction was filed in District
4 Court (Appx. 0115),

5 On 07/19/2021, an Order of Limited Remand for Designation of Counsel
6 was filed in Supreme Court (Appx. 0118),

7 On 07/23/2021, an Order Appointing Counsel in Case No. CR21-0018 and
8 CR21-0020 was filed in District Court (Appx. 0120)

10 **ARGUMENT**

11 **1. WHETHER THE SENTENCE IMPOSED BY THE TRIAL COURT**
12 **VIOLATED THE APPELLANT'S CONSTITUTIONAL PROTECTION**
13 **AGAINST CRUEL AND UNUSUAL PUNISHMENTS.**

14 The Eighth Amendment to the United States Constitution is part of the
15 United States Bill of Rights (ratified December 15, 1791), which prohibits the
16 government from imposing excessive bail, excessive fines, or cruel and unusual
17 punishments, including torture. Along those similar lines, the State of Nevada, in
18 Article 1 of it's Constitution states:
19

20 **Section1. Inalienable Rights. All men are by nature free and equal and have**
21 **certain inalienable rights among which are those of enjoying life and liberty;**
22 **Acquiring, Possessing, and Protecting property and pursuing and obtaining safety**
23 **and happiness.**
24

1 Section 6. Excessive bail and fines; cruel or unusual punishments; detention
2 of witnesses. Excessive bail shall not be require, nor excessive fines imposed, nor
3 shall cruel or unusual punishments be inflicted, nor shall witnesses be
4 unreasonably retained.
5

6 In Blume v. State, 112 Nev. 472, 915 F.2d 2828 (1996), the Nevada
7 Supreme Court stated:

8 A sentence within the statutory limits is not “cruel and unusual punishment
9 unless the statute fixing punishment is unconstitutional or the sentence is so
10 unreasonably disproportionate to the offense as to shock the conscience.”
11

12 (Quoting Culverson v. State, 95 Nev. 433, 596 P.2d 220, 221-22 (1979),)

13 At the Sentencing on 6/21/21, the Trial Court stated, “ Now, we have
14 Sentencing. One case is No. 21-1118, Grand Larceny of a Firearm, Category B
15 felony, one to ten years. The other one is Case 21-0020, Discharging a Firearm,
16 category B felony, one to ten years. Ten Thousand and \$5,000 on two
17 cases.”(Appx. 0087)
18

19 “We’re going to hear from Mr. Fritz, what he thinks an appropriate
20 sentence is based on your criminal history, the facts of this case. And after Mr.
21 Fritz, we’re going to hear from you about what you think the sentence should be
22 and why. You don’t have to say anything if you don’t want to; it’s up to you. And
23 then we’ll hear from the State.” (Appx. 0087-0088)
24

Appellant replies, “Yes, Your Honor.” (Appx. 0088)

1 Trial Counsel addresses the Trial Court, "Your Honor thank you. Just so
2 now his PSI should reflect that he does not have any felony convictions. I think
3 that is important. That's why we continued the last hearing for today." (Appx.
4 0088)

5
6 "Just some housekeeping matters too, Your Honor. Part of this negotiation
7 was my client pled to two cases down at the Justice Court level. Those were two
8 Domestic Battery cases. We cleaned those up on or about May 26th of this year in
9 front of Judge Jaspersen." (Appx. 0088)

10
11 "Those cases, he was sentenced, if you will, to credit time served basically
12 six months on each. I will talk about his credit for time served here in a second. So
13 that has been cleaned up. He has taken responsibility for those actions, and we do
14 have that behind us." (Appx. 0088)

15
16 "Also, you see in the PSI he has an outstanding case in Clark County. I can
17 tell you last week, Your Honor, I had a really nice discussion with the PD
18 handling that case in Clark County. It's my understanding that case is no longer in
19 warrant. They did remand on that case. They are working on it. They are looking
20 to hear from me later today as to what happened this morning." (Appx. 0088-0089)

21
22 "So we have gotten things moving. Justice Court level, cleaning that up
23 where he's addressing the outstanding issues through the PD's Office in Clark
24 County on the pending case there. Also, he has two pending cases in Tonopah.
These are set for status check July 6th of this year. It's my understanding they are

1 going to be dismissed after sentencing in this case. So that gives, I think, the Court
2 – I think it's important to give you a little history of all of the things going on with
3 him.” (Appx. 0089)

4 “Your Honor, this is a case of which drugs are the problem. I think you
5 even see in the PSI report he started using drugs at the age of 12 years old. So
6 there's no question that drugs are the problem here.”(Appx. 0089)

8 “You know, usually when we ask for somebody to be placed on probation,
9 the question is well, are they supervisable or not? Can we keep track of them
10 when they're outside? Are they going to do what they're supposed to do, or are
11 they just going to go out there and cause more problems? Well, I think. It touches
12 on what we talked about here already this morning, Your Honor, is that he is
13 supervisable. He has been honorably discharged from probation before, out of the
14 probation office here in Nye County. We've also seen that he was sentenced, to
15 my understanding, to Boot Camp, the regimental treatment program, the Boot
16 Camp Program; he successfully completed that.”(Appx. 0089-0090)

18 “He gets on drugs again. Well, there's no excuse or reason why he got on
19 them, but he was on them. And that caused quite a number of things. Having a
20 parent in very ill health, who I understand unfortunately has now passed away. A
21 very volatile relationship, a domestic relationship. And you can see from what
22 happened in Justice Court; and as I said, he's taken responsibility for. And then so
23 what do we do?”(Appx. 0090)
24

1 “He’s been in custody according to my math – and I checked this out with
2 the State; they didn’t conform it – but I have him in custody about 286 days
3 already. I do my math from September the 8th of last year; he’s been in
4 continuously since then. And part of the negotiations were that this case and the
5 Justice Court cases run concurrent, with the Court’s permission of course, and the
6 two counts run concurrent here.”(Appx. 0090)

8 “And I say that, because spending over nine months in jail, I like to think
9 has gotten somebody’s attention. I like to think he’s seen the ways were wrong.
10 And so what we’re going to ask for is a probationary term. One with Drug Court
11 as a condition. He needs help. We don’t want to just simply warehouse him in
12 Nevada State Prison for a while, send him back out, and he’s right back to where
13 he is. I believe we place him on probation. Place him in the Drug Court Program.
14 He can still be an active and productive member of society while getting help, and
15 I think that’s important.”(Appx. 0090-0091)

17 “And again, he’s proven he can get through one of these regimental
18 programs, whether it be Drug Court or the Boot Camp Program, and I think this
19 would be best in my client’s situation. As I said, a unique way of putting one – I
20 know the Court can always give to someone up to 364 days as a condition of
21 probation. Well, here, we don’t have 364, but we’ve got 286, and I think that has
22 gotten his attention.” (Appx. 0091)

1 "If we do that, place him on probation, put a high suspended sentence
2 hanging over his head so that he knows he has a hammer over his head that if he
3 goes out there and starts using again, and if he goes out there and starts
4 committing crimes again, if he goes out there and he's not supervisable, well,
5 we're going to be back before Your Honor on a probation violation and
6 presumably he's going to State Prison at that time. So we're asking for a chance,
7 another chance, and that's where we are, Your Honor. (Appx. 0091-0092)
8

9 The Trial Court replies, "Thank you, sir. Mr. Linder, is there anything you
10 would like to say?"(Appx. 0092)
11

12 The Appellant responds, "I wrote a little bit, Your Honor. First Off -(Appx.
13 0092)
14

15 Trial Counsel addresses the Trial Court, "Would you like him to stand up,
16 Your Honor, and address the Court?" (Appx. 0092)
17

18 Trial Court replies, "Yes." Appx. 0092)
19

20 Appellant states, " First off, I appreciate the chance to speak today. I have a
21 lot of things that I've wanted to say over the past few months, many apologies I
22 wanted to give. Obviously, I can't give them all here. I'm not proud to be back in
23 front of you again in these chains. Obviously, you sent me off for success, and I
24 succeeded for a while. And then it kind of - it got bad for me out there on the
streets."(Appx. 0092)

1 "There's no excuse for some of the decisions I've made. Many of the things
2 I was accused of were false, but that's by no means am I not taking responsibility
3 for the things that I have done. I understand that I've made some serious poor
4 choices. I was doing well. I completed Boot Camp. I completed Drug Court,
5 probation successfully. Thanks to the supervision on probation, I had so many
6 people proud. I was a law-abiding citizen. I proved probation does help for people
7 to do better, be better, become better, and have great success with it."(Appx.
8 0092-0093)
9

10 "... was a great job. I paid off my mom's house, had a beautiful girlfriend, a
11 brand-new car, proud mother, and a credible reputation. After completing all of
12 these programs, I continued my success for over two years. And then the worst
13 thing that could happen to someone like me happened. My mother was diagnosed
14 with a brain tumor, along with brain cancer after a stroke at work. She was the
15 manager at all of the Horizon's, and most importantly, she was everyone's friend.
16 She had the most beautiful heart; my favorite person in the whole world."(Appx.
17 0093)
18
19

20 "It destroyed me. I quit my job. I picked up drugs. I basically picked up my
21 whole life back up from where I left it, which was in the dirt. I reached – I should
22 have reached out for help, but instead I did the opposite. I started looking to anger
23 for help, for ways of coping. I'm sorry to my mother. I know she's looking down
24 waiting for me to do better."(Appx. 0093-0094)

1 “My next apology is to one of my victims, my best friend, my ex-girlfriend.
2 My first mistake was turning my pain on to her. I’m sorry to Miranda for all of the
3 bad that destroyed us and you. I lost everything and everyone in three months. It
4 was a record time – including my freedom, sobriety, and my motivation. I wanted
5 it to all be over. I just wanted to go where my mother was.” (Appx. 0094)
6

7 “When I got arrested, I knew God wasn’t done with me yet. I began coping
8 and healing from this pain. I know that my mom and God both want me to be
9 better, make them proud, and not just rot away. Your Honor, I understand how
10 badly I’ve handled this crisis, and for that I apologize to you and to the courts. I
11 pray that you see that I truly regret my mistakes, that you put my life back on
12 track once before, and I humbly ask just for one more chance to show the courts,
13 the public, and myself that I can rise and overcome this hiccup.”(Appx. 0095)
14

15 “I’ve learned that things in life can be a great thing, but my actions and
16 reactions are what control everything, and I have the right to control it as long as I
17 don’t fail myself. I do not want to go to prison and affiliate with people that could
18 just teach me to be a smarter criminal. I want one more chance, Your Honor, to be
19 put under supervision and probation and to get my life back to something worth
20 being proud of. I have a ton of potential, and I’ve learned a lot from this hard time.
21 I’ve wasted it long enough. Please just let me show you and everyone else the
22 good I can do, Your Honor.”(Appx. 0094-0095)
23

24 The Trial Court replies, “Thank you.”(Appx. 0095)

1 After hearing from the State, the Trial Court addresses the Appellant, "For
2 the last 20 years that I've been Judge, I've told people frequently in court – it's a
3 common hearing – that 90 percent of society are good people who don't do
4 anything wrong; 10 percent are people we see in court all of the time. Of that 10
5 percent, 9 percent of people are addicted to drugs and stealing from their
6 neighbors and doing stuff like that, and we're constantly working to try and figure
7 out how to get them off drugs and straighten their lives out and hope they don't
8 commit crimes anymore." (Appx. 0098)

10 "There's a small segment of society of the population that are what we call
11 psychopaths, criminals that repeatedly keep doing crimes and hurting other
12 people. Most of those would never dream of hurting other people – sexually
13 assaulting a woman, molesting a child, hitting somebody in the face, et cetera –
14 we would never dream of doing that, most of the normal people. There's a small
15 segment of our society that for some reason doesn't think normal and they don't
16 mind doings what they need to do to hurt other people, and so forth." (Appx. 0099)

18 "Starting in 2014, you had Conspiracy To Commit Burglary, Burglary,
19 Drug charges, another Burglary, another Burglary, more Drug charges, FTAs,
20 other crimes – Speeding, Paraphernalia, and so forth – Domestic Battery with an
21 Enhancement for a Deadly Weapon Against an Older Person, Harassment, Simple
22 Battery, Battery on an Older Person, Domestic Battery, Grand Larceny of a Gun
23 by Prohibited Person, Discharging a Gun, Burglary while in Possession of a Gun,
24

1 Deadly Gun, Owning/Possession of Gun by Prohibited Person, violated
2 Stalking/Harassment, violated Stalking/Harassment, Child Abuse, Conspiracy,
3 Battery, Grand Larceny, Burglary, Unlawful Use, Battery two counts, et
4 cetera.”(Appx. 0099-0100)

5
6 “Now, obviously what that tells any normal person is you’re psychopath.
7 You don’t mind going out and hurting other people – older people, younger
8 people, whatever – you’re going to do whatever you think you want to do to make
9 yourself happy.”(Appx. 0100)

10 “We’ve tried Drug Court with you. We’ve tried Boot Camp with you.
11 Nothing works, As soon as I let you out, you’re going to go out and hurt other
12 people again, because there’s something in your brain that doesn’t click right that
13 say’s, “Hey, that’s not normal. I shouldn’t do that.” You’re a dangerous
14 person.”(Appx. 0100)

15
16 “Forty-eight to 120 on each count, consecutive to each other, with credit for
17 time served calculated by Mr. Fritz of 286. We’ll recalculate that. And we’ll keep
18 you away from people as long as we can to try and keep them protected from you.
19 Any other matters that we need to do?” (Appx. 0100)

20
21 Trial Counsel inquires, “Just real quick, Your Honor. The Third case is to
22 be dismissed?”(Appx. 0100)

23 Trial Court replies, “Yes, sir.”(Appx. 0100)

24 Trial Counsel asks, “And you said that was consecutive?”(Appx. 0100)

1 The Trial Court replies, "The two are consecutive, yes."(Appx. 0101)

2 Trial Counsel responds, "Okay. I would just point out the State didn't have
3 any – I know it's in the discretion of the Judge –."(Appx. 0101)

4 Trial Court replies, "Because he's so dangerous to other human beings, we
5 want to keep him in as long as we can."(Appx. 0101)

6 Trial Counsel responds, " – and I just want to point out that the State though
7 is not arguing for that, and they had no opposition to concurrent time."(Appx.
8 0101)

9 Trial Court replies, "Noted for the record."(Appx. 0101)

10 The State adds, "That is correct."(Appx. 0101)

11 The Trial Court ignored the recommendations of Trial Counsel when it
12 Sentenced the Appellant to 48 months to 120 months on each Count, consecutive
13 to each other, with credit of 286 days credit for time served. This sentence is so
14 unreasonably disproportionate to the offense as to shock the conscience as
15 described in Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979).
16

17 Trial Counsel was correct when he recommended probation with Drug
18 Court as a condition and the two counts run concurrent with 286 days credit for
19 time served. The Trial Court failed to consider his history of substance abuse
20 which began at a young age and which he has struggled with his entire life. Trial
21 Counsel asked the Trial Court for help with his drug issues and suggested putting
22 him in Drug Court. The Trial Court's failure to consider his history of substance
23
24

1 abuse at Sentencing and his failure to answer his call for help with his drug
2 addiction resulted in a sentence that is so unreasonably disproportionate to the
3 offense as to shock the conscience as described in Culverson v. State, 95 Nev.
4 433, 435, 596 P.2d 220, 221-22, (1979).

6 2. WHETHER THE TRIAL COURT WAS BIASED AGAINST THE
7 APPELLANT AND SHOULD HAVE RECUSED HIMSELF PRIOR TO
8 SENTENCING THE APPELLANT

9 In Caperton v. A. T. Massey Coal Company, 129 S. Ct. 2252, 173 L.Ed. 2d
10 1208 (2009), the United States Supreme Court held, “In all circumstances of this
11 case, due process requires recusal.

12
13 The Due Process Clause incorporated the common-law rule requiring
14 recusal when a judge has a “direct, personal, substantial, pecuniary interest” in a
15 case, Turner v. Ohio, 273 U.S. 510, 523, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio Law
16 Abs. 185, 25 Ohio L. Rep. 236, but this Court has also identified additional
17 circumstances which, as an objective matter, require recusal where “the
18 probability of actual bias on the part of the judge or decision maker is too high to
19 be constitutionally tolerable,” Withrow v. Larkin, 412 U.S. 35, 47, 95 S. Ct. 1456,
20 42 L.Ed. 2d 712.

21
22 At Sentencing, the Trial Court stated to the Appellant, “There’s a small
23 segment of society of the population that are what we call psychopaths or
24 sociopaths, criminals that repeatedly keep doing crimes and hurting other people.

1 Most of those would never dream of hurting other people – sexually assaulting a
2 woman, molesting a child, hitting somebody in the face, et cetera – we would
3 never dream of doing that, most of the normal people. There’s a small segment of
4 our society that for some reason doesn’t think normal and they don’t mind doing
5 what they need to do to hurt other people, and so forth.”(Appx. 0099)

7 “Starting in 2014, you had Conspiracy to Commit Burglary, Burglary, Drug
8 charges, another Burglary, another Burglary, more Drug charges, FTAs, other
9 crimes – Speeding, Paraphernalia, and so forth – Domestic Battery with an
10 Enhancement for a Deadly Weapon Against an Older Person, Harassment, Simple
11 Battery, Battery on an Older Person, Domestic Battery, Grand Larceny of a Gun,
12 Attempted Murder, Possession of a Gun by Prohibited Person, Discharging a Gun,
13 Burglary While in Possession of a Gun, Deadly Gun, Owning/Possession of Gun
14 by Prohibited Person, violated Stalking/Harassment, Violated
15 Stalking/Harassment, Child abuse, Conspiracy, Battery, Grand Larceny, Burglary,
16 Unlawful Use, Battery two counts, et cetera. (Appx. 0099-0101)

18 “Now, obviously what that tells any normal person is you’re a psychopath.
19 You don’t mind going out and hurting other people – older people, younger
20 people, whatever – you’re going to do whatever you think you want to do to make
21 yourself happy.”(Appx.0100)

23 “We’ve tried Drug Court with you. We’ve tried Boot Camp with you.
24 Nothing works. As soon as I let you out, you’re going to go out and hurt other

1 people again, because there's something in your brain that doesn't click right that
2 says, "Hey, that's not normal. I shouldn't do that." You're a dangerous
3 person."(Appx. 0100-0101)

4
5 Forty-eight to 120 on each count, consecutive to each other, with credit for
6 time served calculated by Mr. Fritz of 286. We'll recalculate that. And we'll keep
7 you away from people as long as we can to try and keep them protected from
8 you."(Appx. 0100)

9 The Trial Court exhibited a clear bias against Appellant at the Sentencing,
10 when he described him as a psychopath who doesn't mind going out and hurting
11 other people, older people, younger people, whatever. In addition, he told him he
12 has a something in his brain doesn't click right that say's," Hey that's not normal.
13 I shouldn't do that. You're a dangerous person." This bias led the Trial Court to
14 sentence the Appellant to 48 to 120 months on each count, consecutive to each
15 other, with 286 days credit for time served, instead of following the
16 recommendations of Trial Counsel. The Trial Court had a duty to recuse himself
17 from the Appellant's case prior to the Sentencing. This was an instance which, as
18 an objective matter, required recusal where the probability of actual bias on the
19 part of the Judge or decision maker is too high to be constitutionally tolerable
20 pursuant to Withrow v. Larkin, 412 U.S. 35, 47. 95 S. Ct. 1456, 42 L.Ed. 2d 712.
21
22
23
24

1 **CONCLUSIONS AND RELIEF SOUGHT**

2 In conclusion, Appellant contends that the Trial Court was biased, his
3 sentences in both cases were cruel and unusual punishment and his convictions for
4 should be reversed. If the Court fails to reverse Appellant's convictions, for the
5 foregoing reasons, the above convictions of Appellant should be set aside and the
6 case remanded back to the Fifth Judicial District Court for a new sentencing.
7

8 **ROUTING STATEMENT**

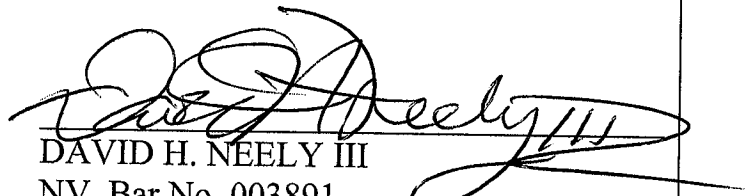
9 Appellant believes that the case should be assigned to the Court of Appeals
10 pursuant to NRAP 17, there being no issue warranting retaining the case.
11

12 **CERTIFICATE OF COUNSEL UNDER NRAP 28A**

13 I hereby certify that I have read this Appellant's Opening Brief, and to the
14 best of my knowledge, information, and belief, it is not frivolous or interposed for
15 any improper purpose, such as to harass or to cause unnecessary delay or needless
16 increase in the cost of litigation. I further certify that this Brief complies with all
17 applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which
18 requires every assertion in the Brief regarding matters in the record be supported
19 by a reference to the page and volume number of the appendix where the matter
20 relied on is to be found. I understand that I may be subject to sanctions in the
21 event that the accompanying Brief is not in conformity with the requirements of
22 the Nevada Rules of Appellate Procedure.
23
24

1 I hereby certify that this Appellant's Opening Brief complies with the
2 formatting requirements of Rule 32(a)(4)-(6) because this Appellant's Opening
3 Brief has been prepared using Microsoft Word 2016 in Times New Roman 14. I
4 further certify that this Appellant's Opening Brief complies with the page
5 limitations stated in Rule 32(a)(7) by being less than 30 pages in length and is less
6 than 14,000 words.
7

8 **SUBMITTED** this 25 day of October, 2021.
9

10 
11 DAVID H. NEELY III
12 NV. Bar No. 003891
13 3520 E. Tropicana Ave., Suite D-1
14 Las Vegas, Nevada 89121
15 Attorney for Appellant
16
17
18
19
20
21
22
23
24

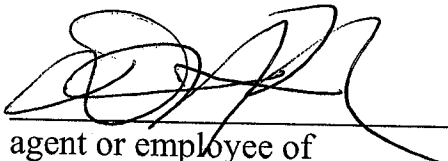
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

CERTIFICATE OF SERVICE BY MAIL

I HEREBY CERTIFY that I am an agent or employee of the above attorney, and that on the 25 day of October, 2021, I served the above and foregoing **APPELLANT'S OPENING BRIEF** by depositing a copy in the United States mails, postage prepaid, addressed to the f or parties at their last known addresses as indicated below:

Chris Arabia, Esq.
Nye County District Attorney
P. O. Box 39
Pahrump, NV 89041

Aaron Ford, Esq.
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
Attorneys for Respondents


agent or employee of
DAVID H. NEELY, III, ESQ.