

1 only if dissatisfied with the history set forth in the fast track statement: The State
2 adopts Appellant's procedural history

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4 6. Statement of facts. Briefly set forth the facts material to the issues on
5 appeal only if dissatisfied with the statement set forth in the fast track statement
6 (provide citations for every assertion of fact to the appendix, if any, or to the rough
7 draft transcript): The State accepts Appellant's statement of facts, and further notes
8 that Appellant on August 3, 2021, the Appellant entered a plea of guilty to one count
9 of Possession a Controlled Substance, a Category E Felony, in violation of NRS
10 453.336. (See *Appellant's Exhibit pages 15-17*).¹ The facts of this case arise from an
11 incident on February 4, 2021, where the Appellant was in possession of a Scheduled 1
12 Controlled Substance-Heroin in Winnemucca, Humboldt County, Nevada. On
13 September 21, 2021, the Appellant was then sentenced, by way of a Judgment of
14 Conviction, to a minimum term of nineteen (19) months and a maximum term of
15 forty-eight (48) months in the Nevada Department Corrections, with credit for time
16 served of eighty-four (84) days. (*Id.*) The Respondent alleges that Appellant was
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20 ¹ While the Judgment of Conviction in this case indicates that the Appellant entered a
21 guilty plea to one count of Possession a Controlled Substance, a Category E Felony,
22 in violation of NRS 453.336, which is cited here as factually correct by Respondent,
23 Appellant's signed Plea Agreement dated July 29, 2021, stated that he was to enter a
24 no-contest plea to Possession a Controlled Substance, a Category E Felony, in
25 violation of NRS 453.336. (See *Appellant's Exhibit pages 5-10, 15-17*). (See *Appellant's*
Exhibit pages 15-17). No reason is given for this discrepancy in *Appellant's Fast Track*
Statement, filed on January 27, 2022, or Appellant's Fast Track Appendix, filed on January 27,
2022.

1 sentenced properly by the District Court under Nevada law, and given credit for all
2 pre-sentencing time served in confinement in Humboldt County, Nevada.

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4 7. Issues on appeal. State concisely your response to the principal issue
5 in this appeal. Respondent objects to Appellant's statement of the issue on appeal and
6 notes the issues on appeal as follows:

7 I. Did the District Court act Arbitrarily and Capricious and/or Fail to
8 Consider the Individualized Circumstances of the Appellant before imposing the
9 Sentence in this Case?

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11 ISSUE I: The District Court did not act Arbitrarily and Capricious and/or Fail
12 to Consider the Individualized Circumstances of the Appellant before imposing the
13 Sentence in this Case.

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15 Under Nevada law, this Court has previously ruled that the sentencing judge
16 has wide discretion in imposing a sentence, and that this determination will not be
17 overruled absent a showing of abuse of discretion, *Norwood v. State*, 112 Nev. 438, 915
18 P.2d 177 (1996), *citing Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987).
19 This discretion also exists as to whether or not to grant probation. *See NRS*
20 *176A.100(1)(c)*. Moreover, this Court has held in *Campbell v. Eighth Judicial Dist.*
21 *Court*, 114 Nev. 410, 414, 957 O,2d 1141, 1143 (1998), that the district court is not
22 required to articulate its reasons for imposing a particular sentence.
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25 Furthermore, this Court has noted that it will not interfere with the sentence
imposed by the district court "[s]o long as the record does not demonstrate prejudice

1 resulting from consideration of information or accusations founded on facts
2 supported only by impalpable or highly suspect evidence.” *Silks v. State*, 92 Nev. 91,
3 94, 545 P.2d 1159, 1161 (1976).

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5 A sentencing court is often privileged to consider facts and circumstances
6 which would clearly not be admissible at trial, *Silks v. State*, 92 Nev. 91, 93-94, 545
7 P.2d 1159, 1161 (1976), and that it is a well-established law in Nevada that the
8 legislature, within Constitutional limits, is empowered to define crimes and determine
9 punishments and that the courts are not to encroach upon this domain lightly. *Schmidt*
10 *v. State*, 94 Nev. 695, 697, 584 P.2d 695, 697 (1978). *See also Egan v. Sheriff*, 88 Nev.
11 611, 503 P. 2d 16 (1972); *Deveroux v. State*, 96 Nev. 388, 610 P.2d 722, 723 (1980). *See*
12 *also State v. Sala*, 63 Nev. 270, 169 P.2d 524 (1946). The degree to which a judge
13 considers age and the absence of a prior record of offenses is within his discretionary
14 authority. *Deveroux supra* 610 P.2d at 723-724, and *Sheriff v. Williams*, 96 Nev. 22, 604
15 P.2d 800 (1980). There is also a general presumption in Nevada favoring the validity
16 of statutes which dictates a recognition of their constitutionality, unless a violation of
17 Constitutional principles is clearly apparent. *Schmidt, supra* 584 P.2d at 697. Similar to
18 *Norwood, supra*, the Court in *Deveroux supra*, noted that the trial judge has wide
19 discretion in imposing a prison term and, in the absence of a showing of abuse of
20 such discretion, this Court will not disturb the sentence. *Deveroux supra* 610 P.2d at 723. *See also*
21 *State v. Sala*, 63 Nev. 270, 169 P.2d 524 (1946). The degree to which a judge considers
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1 age and the absence of a prior record of offenses is within his discretionary authority.
2 *Deveroux supra* 610 P.2d at 723.

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4 Finally, this Court has held that a sentence of imprisonment which is within the
5 limits of a valid statute, regardless of its severity, is normally not considered cruel and
6 unusual punishment in the Constitutional sense. *Schmidt supra* 584 P.2d at 697. *United*
7 *States v. Johnson*, 507 F.2d 826 (7th Cir. 1974), *Cert. denied*, 421 U.S. 949, 95 S.Ct. 1682,
8 44 L.Ed.2d 103 (1975), and that a sentencing proceeding is not a second trial and the
9 court is privileged to consider facts and circumstances that would not be admissible at
10 trial. *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). *See also Harmelin v.*
11 *Michigan*, 501 U.S. 957 (1991) (plurality decision) (Eight Amendment does not require
12 strict proportionality between the crime and sentence; it forbids only an extreme
13 sentence is that grossly disproportionate to the crime).

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16 In the present case, the District Court here was within its authority, based on
17 all the facts and circumstances presented to it at sentencing surrounding the Appellant
18 and his criminal conduct, which was clear on the record at sentencing, to sentence the
19 Appellant to a minimum term of nineteen (19) months and a maximum term of forty-
20 eight (48) months in the Nevada Department Corrections, with credit for time served
21 of eighty-four (84) days. (*See Appellant's Appendix Pages 16-17, 37-38*).

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23 Appellant does not deny the fact that both the Appellant and Respondent
24 agreed at the sentencing in this matter before the District Court, that this case did not
25 require mandatory probation under *NRS 176.211(1)*; *NRS 193.130(2)(e)* & *NRS*

1 176A.100(1)(b), since the Presentence Report in this case, prepared by the Nevada
2 Department of Public Safety, Division of Probation, indicated that the Appellant had
3 two prior felony convictions for drug-related offenses. (See *Appellant's Appendix Pages*
4 *30-32*). Additionally, as District Court pointed out here at sentencing, that in February
5 of 2016, less than five years ago at the time his sentencing, Appellant's sentence for
6 one drug offense was deferred, that he was placed into drug court at that time, but
7 had his probation revoked and was then sentenced to twelve (12) to thirty-two (32)
8 months in the Nevada Department of Corrections, where he was later paroled by May
9 of 2017, but that parole was later revoked and Appellant ended up serving five
10 months in the Nevada Department of Corrections. (See *Appellant's Appendix Pages 30-*
11 *32 & pages 37-38*). As to Appellant's second drug conviction and prison term, this fact
12 was also acknowledged by the Court, the Respondent, as well as being contained in
13 the Presentence Report itself that was before the Court. (See *Appellant's Appendix Pages*
14 *30-32, & page 38*).

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18 Furthermore, Appellant cites a scant recitation of "individualized circumstances
19 in mitigation" that even if they could be argued to warrant probation, which the
20 District Court rejected, a critical issue here that is missing is that Appellant's
21 presentence *Application for Assignment to Program of Treatment for Alcohol or other Substance*
22 *Abuse, Pursuant to NRS 176A.230-176A.245, filed on June 30, 2021*, does not even have
23 the required clinical assessment attached to it that would even indicate that he has a
24 substance use disorder to even warrant or justify any type of a deferral of his prison
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1 sentence pursuant to *NRS 176A.240(2)(a)(1) or NRS 176A.240(2)(a)(2)*, nor was one
2 introduced and entered into evidence at the sentencing hearing in this matter. (*See*
3 Appellant's Appendix, pages 11-14 & pages 33-37).

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5 Additionally, even if the District Court had sentenced the Appellant to the
6 above sentence originally on November 16, 2021, this sentence would be not be
7 illegal, as Appellant has failed to allege that the District Court supported its sentence
8 solely by impalpable and highly suspect evidence. *See U.S. v. Lai*, 944 F.2d. 1434, 1441
9 (9th Cir.1991) ([t]he district court may not consider improper, inaccurate, or mistaken
10 information, nor may it make groundless inferences in imposing sentence), which is
11 entirely consistent with this Court in *Denson v. State*, 112 Nev. 489, 915 P.2d
12 284,(1996)([t]his Court "will reverse a sentence if it is supported solely by impalpable
13 and highly suspect evidence") (*Emphasis original*). *Denson, supra* 112 Nev. at 492, 915
14 P.2d. at 286.


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17 Moreover, the sentence in this case was within the District Court's sound
18 discretion, as allowed under *Norwood v. State, supra*, and *Silks v. State, supra*, nor was the
19 sentence imposed here contrary to the Due Process Clause of the Fifth Amendment
20 of the United States Constitution to be considered cruel and unusual punishment
21 under *Schmidt, supra* 584 P.2d at 697 and *United States v. Johnson*, 507 F.2d 826 (7th Cir.
22 1974), Cert. den. 421 U.S. 949, 95 S.Ct. 1682, 44 L.Ed.2d 103 (1975).

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25 In summary, the District Court fashioned an appropriate and legal sentence for
the Appellant, when it imposed a term of a minimum term of nineteen (19) months

1 and a maximum term of forty-eight (48) months in the Nevada Department
2 Corrections, with credit for time served of eighty-four (84) days, after his legal
3 conviction for one count of Possession a Controlled Substance, a Category E Felony,
4 in violation of NRS 453.336. where the legislature imposed a maximum term of
5 imprisonment of not less than 1 year and a maximum term of not more than 4 years
6 for each count of Possession a Controlled Substance, a Category E Felony, in
7 violation of NRS 453.336, under NRS 453.336 (2)(A) and NRS 193.120 (2)(e), and
8 where the imposed term of imprisonment in this case was within the statutory limits
9 for the offense that the Appellant actually pled guilty to. (*See also Appellant's Exhibit*
10 *pages 15-17*).

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13 8. Preservation of issues. State concisely your response to appellant's
14 position concerning the preservation of issues on appeal: Not Applicable.
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16 Dated this 13 day of February, 2022.

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19 By 
20 MICHAEL MACDONALD
21 District Attorney
22 P.O. Box 909
23 Winnemucca, Nevada 89446
24 (775) 623-6360
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- Dated this the 13 day of February, 2022.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) I certify that I am an employee of the Humboldt County District Attorney's Office, and that on the 14 day of February, 2022, I mailed/delivered a copy of the **FAST TRACK RESPONSE** to:

Matt Stermitz
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