IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW DAVID FUGATE,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Docket No. 69925

Dist. Ct. CR150134

FAST TRACK STATEMENT

ROUTING STATEMENT: This case proceeded to jury trial. This case should remain at the Nevada Supreme Court. There are constitutional questions involved in this fast track appellate litigation. The issue presented is whether the statutory scheme for violation of lifetime supervision requirements is unconstitutional when that scheme fails to define the key term "secluded environment" and allows for disparate prosecution. NRS 123.1243 provides criminal liability of an additional felony if a sex offender is in a secluded environment with a person under the age of eighteen but fails to define the term.

The case also involves the question of whether the sentencing court must recuse

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itself when conducting a joint sentencing case for two cases and a breach of the plea bargain arises in the other case. See Docket 69926 for further argument on the breach of the plea bargain issue.

1. **MATTHEW DAVID FUGATE** : (Hereinafter: "Mr. Fugate").

2. & 3: KARLA K. BUTKO, Esq. P. O. Box 1249, Verdi, NV 89439; (775) 786-7118; and JOHN OHLSON, Esq., 6140 Plumas Street, Suite 200, Reno, NV 89519; (775) 322-3223.

4. Second Judicial District Court, Washoe County.

5. The Honorable Elliott Sattler.

6. Length of trial: Two days

7. Conviction(s) appealed from: Count I: Violation of Lifetime Supervision by a Sex Offender, a felony violation of NRS 213.1243. 2AA 278, 303; 3AA 718-719.

8. Sentence for each count: Count I: A term of 72 months in the Nevada Department of Prisons with parole eligibility at 28 months; this sentence was ordered to run consecutively to Case No. CR15-0391.

9. February 4, 2016. 3AA 718-719.

10. February 4, 2016. 3AA 718-719.

11. N/A.

12. N/A.

13. March 1, 2016. 3AA 720.

14. NRS 177.015.

15. NRS 4 (b).

16. Judgment after verdict of guilt by a jury. 2AA 303.

17. *Matthew David Fugate v. The State of Nevada*, Docket 69926, related case.

18. Second Judicial District Court: CR15-0134. Related case CR15-0391.

19. None.

20. Procedural history:

Appellant, Matthew David Fugate, proceed to jury trial on two counts of Violation of Lifetime Supervision by Sex Offender, felony violations of NRS 213.1243. The jury acquitted Mr. Fugate of Count II, the felony violation which alleged he possessed a telephone which could access the internet but convicted Mr. Fugate of Count I, which alleged that Mr. Fugate had contact with a minor under

the age of 18 years in a secluded environment. 1AA 303. In a related case, Mr. Fugate entered a plea of guilty to two counts of Attempted Lewdness with a Minor under the Age of Fourteen, felony violations of NRS 193.330, being an attempt to violate NRS 201.230. Mr. Fugate was sentenced to the maximum possible prison term on this case and the sentences in both cases were all ordered to be served consecutively. 3A 718-179; Docket 69926. A timely notice of appeal was filed. 3AA 720.

21. Statement of facts:

Mr. Fugate was stopped by Storey County Sheriff's Deputy Anthony Francone on October 21, 2012, for a minor traffic infraction, when his vehicle exited a parking lot of a gas station near the USA Parkway exit of Interstate 80 by going out the entrance. Deputy Francone received a hit from the "DONS" system. Mr. Fugate was driving and inside the car was a juvenile male. Deputy Francone contacted Meegan Beach-Dynes, the mother of the juvenile–Tyelar, who stated she was already en route to that location to be with Mr. Fugate and Tyelar. They were all going to go out there together but her husband, Don, was not ready yet. 2AA

397, 430, 439, 442. She intended to be only a few minutes after them in her arrival. 2AA 399. Deputy Francone released the child to his mother. 2AA 442. The deputy contacted the Department of Parole & Probation and advised them of the fact that Mr. Fugate was in a vehicle with a minor. Deputy Francone warned Mr. Fugate about his driving and left. 2AA 442-443, 459, 462. Deputy Francone admitted that there were usually people in this area flying airplanes and riding dirt bikes and quads. The normal number of people out there ranged between 7-10 but never more than 20. 2AA 452-453. Even RV vehicles would park out there.

Tyelar stated that he went with Mr. Fugate in the car and that they were going to meet a few other people who were already out in the USA Parkway area and go "quadding" with them. 2AA 406-07. Tyelar explained that he had gone into the convenience store and bought drinks. Tyelar stated the area where they ride quads is busy and that he had seen police patrolling the area when they had been there before. 2AA 240, 424, 426.

Roger Jacobs, a retired Parole & Probation officer supervised Mr. Fugate on lifetime supervision for about a year. During this time, he met with Mr. Fugate on

about 17 occasions. Officer Jacobs talked with Mr. Fugate after the October 21, 2012, incident of being in a vehicle with a minor but did not make an arrest of any type. Mr. Fugate said he was sorry and that he forgot he could not be with Tyelar without an adult present. Officer Jacobs exercised his discretion and issued a verbal warning only. 2AA 480-485, 493.

Dawn Avilla, a Parole &Probation Officer, testified that she started supervision Mr. Fugate in May of 2013. During April, 2014, she noted that Mr. Fugate had a cell phone. She searched the phone but did not confiscate the phone. Mr. Fugate needed the phone for his job as a truck driver between the Reno area and Sacramento, California. 2AA 495, 498, 518. Officer Avilla testified that there were text messages and e-mails which had been deleted and that Apps named "Jacked" and "Meetup" were on the phone. 2AA 516. A month later, Officer Avilla asked Mr. Fugate for the cell phone and Mr. Fugate had a new phone which was different. Mr. Fugate explained that his prior phone was run over by a forklift at work. 2AA 520, 522.

Timothy Makinson, Mr. Fugate's supervisor from Creative Transportation

Solutions, indicated that Mr. Fugate had not reported that his cell phone was damaged at work but explained that Mr. Fugate also used a cell phone in Sacramento when picking up and dropping off truck deliveries. 3AA 536, 540.

Officer Avilla explained that Mr. Fugate had 10 other supervising officers since he was placed on lifetime supervision. Officer Avilla could not speak for all officers in the past but was not sure if a prior officer had given Mr. Fugate permission to have internet services. 2AA 527-29.

The Court admitted the following exhibits during the trial: Exhibit 1: Parole Board Conditions of Lifetime Supervision; Exhibit 2: Lifetime Supervision Agreement 2009; Exhibit 3: Lifetime Supervision Agreement 2010; Lifetime Supervision Agreement 2014 and Exhibit 5: Judgment of Conviction.

During closing argument, the State repeatedly argued that Mr. Fugate did not speak up, did not say "I have permission, another PO gave me permission..." 3AA 583. The State went so far as to say, "I mean, the poor guy, his mouth is glued shut, he can't tell when he's in a secluded area, and after being confronted with it his phone goes missing. He must be the most unlucky sex offender in Washoe

County". 3AA 605.

The judgment of conviction from the 2003 conviction was admitted as evidence to this jury. There were no cautionary jury instructions giver regarding that document. The judgment of conviction clearly demonstrated that Mr. Fugate had been to prison before and was sentenced to ten years in prison. 3AA 605, 737.

The jury returned with two questions. The first question was: "On each count must we have a unanimous decision?" The jury was advised: "Your decision on each count must be unanimous." 2AA 613, 615.

The second question by the jury was: "With regards to Instruction No. 19, element 3, are we able to consider all parts of evidence, Document Exhibit No. 3, specifically items No. 18 and Item No. 24 sub (b), are we allowed to consider both?" 3AA 615-616. In response to this question, the jury was advised: "In response to the jury question, please refer to Jury Instruction NO. 7". 6AA 618.

The jury returned its verdict of acquittal on Count II, the telephone/internet violation but convicted Mr. Fugate of Count I, the allegation of being with a minor in a secluded area violation. 3AA 620.

The case proceeded to sentencing on February 4, 2016. The maximum possible sentence was imposed by Judge Sattler, 28-72 months in prison. 3AA 718-719. A timely notice of appeal was filed. 2AA 720.

Mr. Fugate's mother Karen Seder addressed the Court. His 87 year old grandmother, Carolyn Burgess, was in court. 3AA 683-687. They expressed that Mr. Fugate was kind, giving, supportive of his family, and asked the court to impose concurrent sentences. There were letters of support filed for Mr. Fugate, including, Karen Seder (Mother), Carolyn Burgess (Grandmother), Barbara Berry, Carol Cotton, Tim Wish, Tammie Wish (Sister), Melissa Freeman, Heather White, Richard Popovich, Scott Freeman, Valerie Popovich, Jamie Thorn, and John Whittaker. 2AA 309-341, 3AA680.

Mr. Ohlson argued for concurrent sentences and sought the Court's agreement to abide by the terms of the plea bargain in CR15-0391. 3AA 688-689, 699-700. The State breached the plea bargain, but nonetheless the two sentencing hearings went forth in front of Judge Sattler, where Judge Sattler rejected the plea bargain and issued maximum consecutive sentences. 3AA 690-694, 718-719. Mr.

Stege argued for the maximum sentence and argued that even though P & P recommended 19-48 months, their work on the case had been subpar and he had to do their job. 3AA 695-697. The Judgment of Conviction was filed on February 4, 2016. The timely notice of appeal was filed on March 1, 2016. 3AA 720.

22. Issues on Appeal:

1. REPEATED INSTANCES OF PROVIDING THE JURY WITH THE NATURE OF THE PRIOR JUDGMENT OF CONVICTION AS WELL AS INFORMATION THAT THE DEFENDANT HAD BEEN TO PRISON DEPRIVED THE DEFENDANT OF A FAIR TRIAL AND HIS RIGHT TO DUE PROCESS UNDER THE 5th AND 14th AMENDMENTS.

2. IMPROPER COMMENTS BY THE STATE ON THE DEFENDANT'S SILENCE BY HIS FAILURE TO MAKE A STATEMENT IN HIS OWN DEFENSE VIOLATED THE 5th & 14th AMENDMENTS.

3. NRS 213.1234 IS UNCONSTITUTIONALLY VAGUE IN THAT IT FAILS TO DEFINE A KEY TERM, "SECLUDED ENVIRONMENT".

4. THE JURY WAS IMPROPERLY INSTRUCTED ON THE TERM "SECLUDED ENVIRONMENT".

5. CUMULATIVE ERRORS WARRANT REVERSAL.

6. THE DISTRICT COURT ABUSED ITS DISCRETION AT SENTENCING.

23. Legal Argument.

1. REPEATED INSTANCES OF PROVIDING THE JURY WITH THE NATURE OF THE PRIOR JUDGMENT OF CONVICTION AS WELL AS INFORMATION THAT THE DEFENDANT HAD BEEN TO PRISON DEPRIVED THE DEFENDANT OF A FAIR TRIAL AND HIS RIGHT TO DUE PROCESS UNDER THE 5th AND 14th AMENDMENTS.

This jury was repeatedly advised that Mr. Fugate had been convicted of Attempted Lewdness with a Child Under the Age of Fourteen. The Jury Instructions, which included the charge being read to the jury, told this jury twice: "the defendant....having been previously convicted of a sexual offense, to wit: Attempted Lewdness with a Child Under the Age of Fourteen...." 2AA 278. The Jury was told in Jury Instruction #22, "As used in these instructions a sex offender means any person who has been or is convicted of a sexual offense. The crime of Attempted Lewdness with a Child under the Age of Fourteen is a sexual offense." 2AA 297. The jury was further provided with a copy of the Judgment of Conviction for attempted lewdness, purportedly to prove venue, which was unnecessary as venue had already been determined by the court. 2AA 255. The judgment of conviction let this jury know that this defendant had been sent to prison and served up to ten years in prison. 3AA 737.

It was constitutional error in violation of the 5th Amendment right to a fair trial to admit such unnecessarily prejudicial evidence to this jury, not only one time but three separate ways. This Court may consider *sua sponte* plain error which affects the defendant's substantial rights, if the error either: (1) had a prejudicial impact on the verdict when viewed in context of the trial as a whole, or (2) seriously affects the integrity or public reputation of the judicial proceedings. *Rowland v. State*, 118 Nev. 31, 38, 39 P.3d 114, 118-19 (2002).

The trial court's error in admitting records of defendant's prior convictions was not harmless in a prosecution for violation of conditions of lifetime supervision case. The issue in this case was not whether Mr. Fugate had not been convicted of a sexual offense; the fact was readily admitted to by Mr. Fugate. Rather, the sole issue in this case was whether the area constituted a "secluded environment."

The United States Supreme Court concluded in *Old Chief v. United States,* 519 U.S. 172 (1997) that a federal district court abused its discretion in permitting the Government to admit a defendant's prior conviction into evidence where the defendant had offered to stipulate to his ex-felon status. This case is just the same,

only more problematic. The jury was advised not only of his conviction of a prior felony, but of the precise nature of the prior sexual offense and was additionally advised that Mr. Fugate had received a prison term. *Edwards v. State*, 122 Nev. 378, 132 P.3d 581 (2006).

NRS 48.035(1) provides that "although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury."

The unfair prejudice which results when a jury hears that a defendant has been convicted of attempted lewdness with a child under fourteen and sent to prison cannot be understated. Procedurally, the jury should have been advised of only the fact that Mr. Fugate had been convicted of a sexual offense. Mr. Fugate did not testify at trial. The nature of his prior conviction was not used for impeachment value. The probative value of the actual records of his prior conviction was minimal at best and outweighed by the prejudice to be suffered.

2. IMPROPER COMMENTS BY THE STATE ON THE DEFENDANT'S

SILENCE BY HIS FAILURE TO MAKE A STATEMENT IN HIS OWN DEFENSE VIOLATED THE 5th & 14th AMENDMENTS.

The closing argument by defense counsel reminded the jury that the Defendant did not have to prove anything. Mr. Ohlson objected to the State's argument that Mr. Fugate was "not denying it". 3AA 601. Even after objection, the State continued its unconstitutional attack by telling this jury that Mr. Fugate's mouth must have "been glued shut." The State's closing argument was intentionally improper and unconstitutional.

It is well settled that the prosecution is forbidden at trial to comment upon an accused's election to remain silent following his arrest and after he has been advised of his rights. *Gaxiola v. State,* 121 Nev. 638, 655, 119 P.3d 1225, 1237 (2005).

In *Doyle v. Ohio*, 426 U.S. 610 (1976), the United States Supreme Court concluded that a prosecutor violated a defendant's right to remain silent by cross-examining the defendant as to why he did not tell the police upon being arrested that he had been set up. The Court wrote, "Silence in the wake of [*Miranda*] warnings may be nothing more than the arrestee's exercise of these

Miranda rights." Id at 617. "In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." Id at 618.

This Court held that it is generally improper for a prosecutor to comment on the defendant's failure to call witnesses because that shifts the burden of proof to the defense. *Whitney v. State*, 112 Nev. 499, 502, 915 P.2d 881, 882 (1996). The State has the exclusive burden of proving the defendant guilty beyond a reasonable doubt.

The State's questions and comments at trial regarding Mr. Fugate's failure to provide a statement to his parole officers were more than mere passing references. Mr. Fugate did not testify at this trial. The State's improper comments shifted the burden of proof and required that Mr. Fugate prove to the jury why he did not give statements either to them or to his supervision parole officer. Such a shift unconstitutionally diminished the State's burden of proof and was improper. A new trial is warranted.

3. NRS 213.1234 IS UNCONSTITUTIONALLY VAGUE IN THAT IT FAILS TO DEFINE A KEY TERM, "SECLUDED ENVIRONMENT".

NRS 176A.410 provides that a sex offender shall not have contact with a person less than 18 years of age in a secluded environment unless another adult who has never been convicted of a sexual offense is present and permission has been obtained from the parole and probation officer assigned to the defendant in advance of each such contact. The definitions in NRS 176A do not define secluded area.

NRS 213.1243 does not define secluded environment. NRS 213.1245 (k) does not define secluded environment but holds a sex offender shall not have contact with a person less than 18 years of age in a *secluded environment* unless another adult who has never been convicted of an offense listed in NRS 179D.097 is present and permission has been obtained from the parole and probation officer assigned to the parolee in advance of each such contact.

The definitions for NRS Chapter 213 do not define secluded environment. The area at issue in this case was well-used by the public. Deputy Francone testified that there would usually be 7-10 people out riding quads, dirt bikes or flying

airplanes at this location. The area at issue is just off of the USA Parkway exit of Interstate 80 and near a truck stop. Mr. Fugate was waiting for the arrival of Tyelar's parents as well as other quad riders. Tyelar admitted they were not going to be alone but were going to be with other people.

A statute is unconstitutionally vague and subject to facial attack if it (1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited or if it (2) lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement. *Silvar v. Eighth Judicial Dist. Court ex rel. County of Clark*, 122 Nev. 289, 293, 129 P.3d 682, 685 (2006). Of the two challenges, the second is the most important because it is "concerned with guiding the enforcers of statutes." Indeed, "absent adequate guidelines, a criminal statute may permit a standardless sweep, which would allow the police, prosecutors, and juries to 'pursue their personal predilections.' " *Id.*

This jury heard ample evidence of the discretion that was available on whether to pursue this criminal charge or not. Officer Jacobs did not arrest Mr. Fugate in 2012. Deputy Francone did not arrest Mr. Fugate in 2012. Officer Avilla did not arrest Mr. Fugate when she took over as his parole officer.

A statute is void for vagueness if it fails to define the criminal offense with sufficient definiteness that a person of ordinary intelligence cannot understand what conduct is prohibited and if it lacks specific standards, encouraging arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The Supreme Court has also held that a facial-vagueness challenge is appropriate when the statute implicates constitutionally protected conduct or if the statute "is impermissibly vague in all of its applications." *Sheriff v. Martin*, 99 Nev. 336, 340, 662 P.2d 634, 637 (1983).

The overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of constitutionally protected conduct. *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494 (1982). See also See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567-68 (1991); *United States v. Williams*, 553 U.S. 285, at 293 (2008), ("it is impossible to determine whether a statute reaches too far without first knowing what the statute covers"); *Skilling v. United States*, 561 U.S. 358 (2010); *United States v. Harriss*, 347 U.S. 612, 618 (1954)); and *State v. Castaneda*, 126 Nev. ___, ___, 245 P.3d 550, 553-54 (2010).

The applicable NRSs do not define what "secluded environment" means judicially. Thus, each juror would have their own opinion of the definition of that term, and would acquit or convict at their own volition without the guidance of law.

According to www.dictionary.com/browse/secluded, the definition for secluded is: "sheltered or screened from general activity, view." The definition from http://www.merriam-webster.com/dictionary/secluded is: "hidden from view: private and not used or seen by many people ; placed apart from other people."

The area at issue is off of the busy Interstate 80 roadway and was filled with activity. It was not "sheltered" or "hidden," and was thus not "secluded." There was insufficient evidence presented to the jury to sustain a conviction on this ill-defined statutory scheme.

Insufficiency of the evidence occurs where the prosecution has not produced "a minimum threshold of evidence" upon which a conviction may be based. *State v. Walker*, 109 Nev. 683, 685, 857 P.2d 1, 2 (1993). It occurs when, even if the evidence presented at trial were believed by the jury, it would still be insufficient to sustain a conviction, as it could not convince a reasonable and fair-minded jury of guilt beyond a reasonable doubt. *Id.* Indeed, when there is truly insufficient evidence to convict, a defendant must be acquitted. *Evans v. State*, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996). This conviction should be vacated by this Court as based upon a vague, overbroad, ill-defined statute when the area at issue meets none of the dictionary definitions for "secluded."

4. THE JURY WAS IMPROPERLY INSTRUCTED ON THE TERM "SECLUDED ENVIRONMENT".

If a jury instruction error is structural and results from a constitutional deprivation that so infects the entire framework of the trial that the result is no longer reliable. See *Arizona v. Fulminante*, 499 U.S. 279, 309-11 (1991).A jury instruction error is harmless when it is clear beyond a reasonable doubt that the error would not contribute to a rational jury's decision. *Wegner v. State*, 116 Nev. 1149, 1155, 14 P.3d 25, 30 (2000).

Jurors should not be expected to be legal experts. Jurors should not have to make legal inferences with respect to the meaning of the law. The jury should be provided with applicable legal principles by accurate, clear, and complete instructions specifically tailored to the facts and circumstances of the case. The definition of "secluded environment" provided to this jury constituted constitutional error.

Jury Instruction 23 provided:

> "The term "secluded environment" includes any place that provides a person an opportunity to remove the child from within the general public's view to a location where any contact is less likely to be detected by the public. A place need not be screened, hidden or remote if some other aspect of the place lowers the likelihood of detection. All the term

requires is that the place provides a means by which to exclude the child and reduce the risk of detection." Emphasis added.

This instruction allows for prosecution of virtually any possible place. Indeed, this instruction does not even require that the area actually be secluded; it only requires that the area permit "an opportunity to remove" the minor to a secluded area. The statutory scheme clearly does not contemplate criminal sanctions for an "opportunity." This instruction converts the statute into a strict liability offense wherein a sex offender may never realistically be around a person under 18 without criminal exposure.

The jury's questions demonstrate the confusion. The jury asked

"With regards to Instruction No. 19, element 3, are we able to consider all parts of evidence, Document Exhibit No. 3, specifically items No. 18 and Item No. 24 sub (b), are we allowed to consider both?" 3AA 615-616. In response to this question, the jury was advised: "In response to the jury question, please refer to Jury Instruction NO. 7". 6AA 618. Trial counsel John Ohlson reminded the Court at sentencing that

he believed the answer to this question caused the verdict to come in as guilty for his client.

The answer to this jury question, coupled with Jury Instruction # 23, deprived Mr. Fugate of a fair trial by improperly converting the statute to an "opportunity" strict-liability scheme. A new trial is warranted.

5. CUMULATIVE ERRORS WARRANT REVERSAL.

If the cumulative effect of errors committed at trial denies the appellant his right to a fair trial, this court will reverse the conviction. *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). Relevant factors to consider in deciding whether error is harmless or prejudicial include whether "the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged." *Id.*; *Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000). The serious nature of the errors and the constitutional magnitude of those errors warrant a new trial to protect Mr. Fugate's 5th Amendment rights of due process and a fair trial.

The various errors found in this case mandate reversal.

6. THE DISTRICT COURT ABUSED ITS DISCRETION AT SENTENCING

A judge shall disqualify himself or herself in a proceeding in which the

judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning a party... NCJC Canon 3E(1) .

Recusal is required whenever the judge's impartiality could reasonably be questioned. The United States Supreme Court held long ago that due process requires a fair trial in fair tribunal. *In Re Murchison*, 349 U.S. 133, 136 (1955); 5th & 14th Amendments. The test for whether a judge's impartiality might reasonably be questioned is objective and presents a question of law such that this Court will exercise its independent judgment of the undisputed facts. *PETA v. Bobby Berosini, Ltd.*, 111 Nev. 431, 436-437, 894 P.2d 337, 340-1 (1995), overruled on other grounds by *Towbin Dodge, LLC v. Dist. Ct.*, 121 Nev. 251, 112 P.3d 1063 (2005). See also NRS 1.230(1).

The Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard for a judicial bias claim. *Bracy v. Gramley*, 520 U.S. 899, 904 (1977). The Constitution requires recusal where the probability of actual bias on the part of the judge is too high to be constitutionally tolerable. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Mr. Fugate need not prove actual bias of Judge Sattler, just an intolerable risk of bias. Due process mandates a rule that may sometimes require recusal of judges who have no actual bias and

would do their best to weigh the scales of justice equally if there exists a probability of unfairness. The psychological tendencies and human weakness, as well as circumstances and relationships must be considered. *Murchison*, supra.

Mr. Fugate has shown not only the specter of intolerable risk, but the existence of actual bias which warrants a new sentencing hearing based on a due process violation. *McKenna v. State*, 114 Nev. 1044, 968 P.2d 739 (1998). Many of the accusations made by the State during its sentencing argument were founded on facts supported only by impalpable or highly suspect evidence. *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). Mr. Fugate felt compelled to advise the Court that he did not even know the victims when the State was arguing that he caused them harm. Mr. Fugate was not removed from three programs in the past, he was in counseling with Stephen Ing, Ph.D. A new sentencing proceeding before a fair tribunal, reassignment for a new sentencing proceeding is mandated by the facts of this case.

The Eighth Amendment of the United States Constitution forbids an extreme sentence that is grossly disproportionate to the crime. This court should review sentences for excessiveness.

The Federal and Nevada Constitutions provide that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const.

amend. XIV, § 1; Nev. Const. art. 1, § 8(5). In the federal system, a substantively reasonable sentence is one that is "sufficient, but not greater than necessary" to accomplish § 3553(a)(2)'s sentencing goals. 18 U.S.C. § 3553(a); *see, e.g., United States v. Vasquez-Landaver*, 527 F.3d 798, 804-05 (9th Cir. 2008).

This sentence was in excess of that needed for society's interests. The District Court's sentencing analysis was not 'reasoned' as required by the law (NRS 193.165) and relied upon suspect evidence. See *United States v. Rita,* 551 U.S. 338, 127 S. Ct. 2456, 2468-69 (2007) and *Gall v. United States*, 128 S. Ct. 586 (2007). This Court should review the reasonableness of Appellant's sentence. See *United States v. Cantrell*, 433 F.3d 1269, 1279 (9th Cir. 2006). Sentencing schemes in Nevada are not blind to rehabilitative interests and the Court is required to consider the need for the sentence imposed to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. The Court should consider how to protect the public but still provide the defendant with needed educational or vocational training and mental health treatment in the most effective manner.

The recommendation from the Department of Parole & Probation, when they put this offense and this defendant through their matrix, netted a recommendation of 19-48 months in prison. Yet, Judge Sattler, in his frustration with the State,

imposed the maximum prison term. His actions constituted an abuse of discretion. A new sentencing proceeding is warranted and should be held before an unbiased judge who will evaluate the mitigation evidence as well as the crime when imposing sentence upon Mr. Fugate.

24. Preservation of issues: Preserved by record at district court.

25. Issues of first impression or public interest: Yes. Does the failure to define the term "secluded environment" render NRS 213.1243 unconstitutional?

Respectfully submitted this 18th day of May, 2016.

By: _____

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CERTIFICATE OF COMPLIANCE WITH NRAP 3(C) (h) BY COUNSEL

COMES NOW, Appellant, by and through KARLA K. BUTKO, Esq., privately retained counsel, and JOHN OHLSON, Esq. as prepared and submitted by KARLA K. BUTKO, Esq., and JOHN OHLSON, Esq. and hereby advises this Court that the Fast Track Statement submitted and filed by Appellant herein complies with NRAP 3 (c) (h).

I hereby certify that I have read the submitted Fast Track Statement, entitled, CFast Track StatementC and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. The proposed Fast Track Statement was prepared in Word Perfect X 4, Times New Roman, 14 pt. font, with 2.45 line spacing to mimic Word, proportionally spaced type, and consists of 25 typed pages, without certification pages, and of 5422 words, 578 lines, excluding in the count the certification and compliance pages.

I further certify that this brief complies with all applicable Nevada Rule of appellate Procedure, in particular N.R.A.P. 3 (c) (h), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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 May, 2016.

KARLA K. BUTKO, ESQ.
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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Karla K. Butko, Ltd., P. O. Box 1249, Verdi, NV 89439, and that on this date I caused the foregoing document to be delivered to all parties to this action by

_____ placing a true copy thereof in a sealed, stamped envelope with the United States Postal Service at Reno, Nevada.

_____ personal delivery

_____ Federal Express or other overnight delivery

__X__ Reno/Carson Messenger Service

addressed as follows:

CHRIS HICKS, ESQ.
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ATTN: Terrence P. McCarthy, Esq.
Terrence P. McCarthy, Esq.

DATED this 18th day of May, 2016.

KARLA K. BUTKO, Esq.

IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW DAVID FUGATE,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Docket No. 69925

Dist. Ct. Case No. CR150134

DISCLOSURE STATEMENT BY COUNSEL

1. **Name of appellant filing this case disclosure statement:**

MATTHEW DAVID FUGATE

2. **Name/ associations of KARLA K. BUTKO, ESQ.**

KARLA K. BUTKO, ESQ., is an employee of KARLA K. BUTKO, LTD. KARLA K. BUTKO, LTD. is a Nevada professional corporation duly licensed to conduct business in the State of Nevada and is owned entirely by Karla K. Butko. JOHN OHLSON, Esq., is co-counsel on the appeal and was trial counsel. At this point in time, there is no reasonable belief that other counsel will appear on behalf of Mr. Fugate in this appellate litigation.

3. **Identity of all parties to the proceedings in the district court:** Chris Hicks, Esq., District

Attorney for Washoe County represented the State of Nevada by and through Amos Stege, Esq., District Attorney for the Washoe County District Attorney's Office at the trial stage; Terrence P. McCarthy, Chief Appellate District Attorney for the post-conviction and appellate stage of the case; John Ohlson, Esq., remains appointed counsel on the case and Karla K. Butko was retained by Mr. Fugate's family to be co-counsel in the appellate litigation.

4. MATTHEW DAVID FUGATE, Appellant, has no other names and is not using a pseudonym.

5. There was no victim, this is a status offense.

Dated this 18 day of May, 2016.

KARLA K. BUTKO, ESQ.
State Bar No. 3307
P. O. Box 1249
Verdi, NV 89439
(775) 786-7118

CERTIFICATE OF SERVICE

I, Karla K. Butko, Esq., hereby certify that on this date I caused to be personally delivered by Reno Carson Messenger Service, the foregoing document, addressed to the following:

Richard A. Gammick
District Attorney for Washoe County
1 South Sierra Street, Fourth Floor
Reno, NV 89501
ATTN: Appellate Division
Terrence P. McCarthy, Esq.

DATED this 13th day of May, 2016.

KARLA K. BUTKO, ESQ.