

IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW DAVID FUGATE,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

No. 69925

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RESPONDENT'S SUPPLEMENTAL BRIEF

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RESPONDENT'S SUPPLEMENTAL BRIEF

This is an appeal from a judgment of conviction following a trial in which Appellant Fugate was convicted of violating the conditions of lifetime supervision. During oral argument, this Court brought up an unpleaded claim for relief. Following argument, the Court ordered additional briefing addressing the application of *McNeill v. State*, 132 Nev. Adv. Op. 54, 375 P.3d 1022 (2016).

The Washoe County District Attorney elects to concede that *McNeill* is controlling law and that there are no exceptions that would apply to this case. Retroactivity is not an issue as the instant conviction was not yet final when *McNeill* was decided. If there is to be a change in the law, it would be in the Legislature. That being said, there is some question of the remedy. Fugate

contends that the “evidence” was insufficient. That has been briefed and it is incorrect. Instead, the defect is in the charging instrument, not the evidence. If the evidence was indeed insufficient, then the remedy would essentially be an acquittal and double jeopardy principles would bar further proceedings. However, where the problem is the insufficiency of the charging instrument, not insufficiency of the evidence, the remedy is to reverse, without the preclusive affect of a finding of insufficient evidence. Once that happens, the State can determine if there is some other viable charge, in light of *McNeill, supra*. If there is, and it is not barred by the statute of limitations, then the State could file that charge. If there is not, then nothing more will occur. That option seems most likely at this stage, but the State should at least have the opportunity to further investigate the facts, the governing law, statutes of limitations and other factors.

The State agrees that the conviction should be vacated, but the Court should decline to rule that the evidence was insufficient.

DATED: March 16, 2017.

CHRISTOPHER J. HICKS  
DISTRICT ATTORNEY

By: TERRENCE P. McCARTHY  
Chief Appellate Deputy

## CERTIFICATE OF COMPLIANCE

1. I hereby certify that this supplemental 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 supplemental brief has been prepared in a proportionally spaced typeface using Corel WordPerfect X3 in 14 Georgia font. However, WordPerfect's double-spacing is smaller than that of Word, so in an effort to comply with the formatting requirements, this WordPerfect document has a spacing of 2.45. I believe that this change in spacing matches the double spacing of a Word document.

2. I further certify that this supplemental brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the supplemental brief exempted by NRAP 32(a)(7)(c), it does not exceed 30 pages.

3. Finally, I hereby certify that I have read this supplemental 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 supplemental brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the supplemental brief regarding matters in the record to be supported by

appropriate references 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 supplemental brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: March 16, 2017.

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**CERTIFICATE OF MAILING**

Pursuant to NRAP Rule 25, I hereby certify that I am an employee of the Washoe County District Attorney's Office and that on March 16, 2017, I deposited for mailing at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

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