IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVE DELL MCNEILL, Appellant, vs. THE STATE OF NEVADA, Respondent.	NO. 66697

APPELLANT'S REPLY BRIEF

(Appeal from Judgment of Conviction)

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEF.
309 South Third Street, #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

Attorney for Appellant

STEVEN B. WOLFSON
CLARK COUNTY DISTRICT ATTY,
200 Lewis Avenue, 3rd Floor
Las Vegas, Nevada 89155
(702) 455-4711

ADAM LAXALT
Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVE DELL MCNEILL,	)	NO. 66697
	)	
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

APPELLANT'S REPLY BRIEF

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEF.
309 South Third Street, #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

Attorney for Appellant

STEVEN B. WOLFSON
CLARK COUNTY DISTRICT ATTY.
200 Lewis Avenue, 3rd Floor
Las Vegas, Nevada 89155
(702) 455-4711

ADAM LAXALT
Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES

PAGE NO.

Cases

Statutes

Misc. Citations

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVE DELL MCNEILL,	)	No. 66697
	)	
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

APPELLANT'S REPLY BRIEF

CLARIFICATION OF STATE'S FACTS

Between August of 2013 and March of 2014, Mangan was unsuccessful in contacting D at his address of Main and Wyoming but only looked for him once: 02/17/14. III:365.

ARGUMENT

I. DUE PROCESS, SEPERATION OF POWERS, AND OTHER CONSTITUTIONAL PROVISIONS PROHIBIT STATE AGENCY FROM SUPPLEMENTING LEGISLATIVELY CREATED ELEMENTS OF CRIME AND PROHIBIT STATE FROM PROSECUTING INDIVIDUAL ON VIOLATIONS NOT LISTED WITHIN STATUTE: NRS 213.1243.

A. Legislature did not give Board power to legislate in NRS 213.1243

State argues that within NRS 213.1243 the Legislature allowed the Board to act on its behalf by enacting a regulatory scheme. State also notes

that Court said the Nevada Administration Code gave the Board this power. RAB:6-9. But State cites no words within NRS 213.1243 saying the Board was given such authority – not one word. RAB:8-9.

State's failure to address McNeill's argument regarding statutory construction and the plain meaning of the wording of NRS 213.1243 is a concession that district court made an erroneous decision.[1] OB:18-26. *Polk v. State*, 233 P.3d 357, 359 (Nev. 2010).

In not addressing McNeill's statutory construction argument, State does not contest the following:

- NRS 213.1243 and NRS 213.10988 and NRS 213.1245 and NRS 213.12175 are different.
- Legislature did not incorporate NRS 213.1245 (mandatory conditions for parole of sex offender) and NRS 213.10988 (standards for parole

---

[1] State does not address the following legal authorities: *DeStefano v. Berkus,* 121 Nev. 627, 629-631 (2005); *Mangarella v. State*, 117 Nev. 130, 133 (2001) *quoting Charlie Brown Constr. Co. v. Boulder City*, 106 Nev. 497, 502 (1990); *Nay v. State,* 123 Nev. 326, 331 (2007); *Hernandez v. Bennett-Haron,* 287 P.3d 305, 315 (2012); *State v. Javier C.*, 289 P.3d 1194, 1197 (Nev. 2012) *citing Cramer v. State, DMV,* 240 P.3d 8, 12 (Nev. 2010); *Gaines v. State*, 116 Nev. 359, 365 (2000). Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (Thomas/West 2012).

and probation) and NRS 213.12175 (delegation of power to Board in establishing conditions for parolees) within NRS 213.1243.

- The fact Legislature expressed specific conditions for lifetime supervision and did not direct Division and Board to add other conditions shows Legislature's intent to limit requirements or conditions to ones listed in NRS 213.1243.
- Reading NRS 213.1243(9) along with NRS 213.1243(1) and NRS 213.1243(8) shows Legislature intended that the lifetime supervision agreements only contain requirements specifically listed in NRS 213.1243.
- Most of the requirements listed within McNeill's lifetime supervision agreements are not enumerated within NRS 213.1243.
- Within the charging document, only one requirement within the lifetime supervision agreements that McNeill signed is listed in NRS 213.1243: failure to have his residence approved.
- NRS 213.1243 contains mandatory and permissive conditions.
- A person on parole or probation is under a sentence of confinement and thus has limited constitutional rights that Board or Division may restrict.
- McNeill was not on probation or parole.

- Board directed itself to establish lifetime supervision conditions through NAC 213.290.
- NAC 213.290 contains no guidelines and no conditions for lifetime supervision.

B. State admits issues were properly preserved.

State does not contest McNeill's assertion that he objected and preserved the issues for review on appeal. OB:15-17.

C. If Court concludes Legislature gave Board power to legislate then NRS 213.1243 violates the Separation of Powers.

State claims the Legislature is "vested with the power to delegate authority to administration agencies to facilitate the practical execution of the law it enacts;"[2] and, under NRS 213.1243, Legislature allowed the Board to establish any lifetime supervision conditions. RAB:7-9.

But McNeill argued in prior section that the plain wording of NRS 213.1243 showed that the Legislature did not delegate authority to the Board to establish regulations not already listed within NRS 213.1243; and,

---

[2] McNeill agrees that the legislature has the power to define crimes subject to constitutional limitations. State cites *Egan v. Sheriff*, 88 Nev. 611, 614 (1972), *Schmidt v. State*, 94 Nev. 665 (1978), and *Woofter v. O'Donnell*, 91 Nev. 756 (1975) for this premise.

if the Legislature did so then it would be a violation of the separation of powers.

In discussing *Sheriff v. Luqman*, 101 Nev. 149, 152 (1985), State ignored the fact that the Legislature clearly established the elements of the drug offense crimes and then specifically allowed the pharmacy board to identify controlled substances. In reaching its decision, the *Luqman* Court stated: "Aside from the schedules of drugs set out by statute, NRS 453.146 expressly authorized the state pharmacy board to "administer the provisions of NRS 453.011 to 453.551, inclusive, and ... add substances to or delete or reschedule all substances enumerated in the schedules in [NRS 453.161 to 453.201] by regulation." Thus, the *Luqman* Court found no violation of the separation of powers.

In contrast to *Luqman*, in NRS 213.1243, the Legislature did not include such a broad delegation of authority as it did in the narcotic statutes. Here, Legislature did not give Board the authority to name other lifetime supervision requirements because to do so would allow the Board to define the elements of the crime.

But State contends the Division and Board are only on a fact-finding mission and are not making rogue determinations. RAB:9.

In *State v. Ramos*, 202 P.3d 383, 384 (Wash.App.Ct. 2009), the Washington Court found a violation of the Separation of Powers when Legislature empowered the sheriff to decided sexual offender's category because in doing so the sheriff also determined his sex offender registration requirements – the elements of the crime of failing to abide by registration requirements. Court found the Legislature gave the sheriff insufficient guidance and no methodology to determine a sex offender's classification. When sex offender was charged with a violation of the reporting requirements as decided by sheriff, court reversed, finding the Legislature improperly delegated the elements of the crime.

Here, as in *Ramos,* and as the State admits, the Board enacted its own regulation allowing it to then establish conditions for lifetime supervision that would define the crime. RAB:8-9. The Legislature gave no specific direction to the Division and Board thereby making its decisions more like rogue determinations without any legislative guidelines as occurred in *Ramos.* Thus, the Division and Board defined the requirements as if it was the legislature and then arrested alleged violators like McNeill because it is also law enforcement. To allow the Board to continue to act in this manner violates the Separation of Powers.

D. District court's analysis of NRS 213.1243 renders it ambiguous, vague, and overbroad.

In this case and in others like it, when Division and Board decide which conditions for lifetime supervision to impose and those conditions are not within NRS 213.1243, the Division and Board are deciding what criminal acts amount to a crime. District court's analysis of NRS 213.1243, allowing for additional conditions of lifetime supervision to be determined by Board and Division, renders NRS 213.1243 ambiguous, vague, and overbroad - unconstitutional.

State changes the focus of McNeill's argument by claiming that his lifetime supervision sentence was not impermissibly vague in terms of application. RAB:9-10. State argues McNeill was not denied notice at the time of plea or sentencing. State does not address whether the wording of NRS 213.1243 is vague, ambiguous, and overbroad if allowing the Board and Division to add conditions not listed within NRS 213.1243. *See Ramos*.

1. Ambiguity.

State does not address.

2. Vague and overbroad.

In support of a lack of vagueness, State cites *Johnson v. State* 123 Nev. 139, 143-44 (2007) and *Palmer v. State*, 118 Nev. 823 (2002) claiming that this Court had held that when a defendant enters a guilty plea, he is not

entitled to notice of the possible requirements or conditions of lifetime supervision – only notice that he will be placed on lifetime supervision. In dicta, the *Johnson* and *Palmer* Courts noted that the Board will determine specific provisions at a hearing after expiration of the defendant's parole and/or probation.

Palmer and *Johnson* involved analysis of whether a defendant made a knowing and voluntary waiver of his right to trial when pleading to a crime requiring lifetime supervision. Neither case challenged the Board's authority to impose specific conditions as is part of the objection in this case. Here, McNeill argues NRS 213.1243 is unconstitutionally vague if interpreted to allow Board and Division to impose conditions not listed within NRS 213.1243 and vague because he is without notice of the conditions until after completing his probation/parole. *See Ramos.*

State agrees that a statute is unconstitutionally vague if it "(1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited [or] (2) lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement." *Silver v. Eighth Judicial Dist. Court ex rel. County of Clark,* 122 Nev. 289, 293 (2006); *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Sheriff, Washoe County v. Burdg*, 118 Nev. 853 (2002).

State does not specifically address or discuss the facts of the following cases cited by McNeill where court found a criminal statute vague: *Silver; Burdg*, 118 Nev. 853 (2002); *T.R. v. State*, 119 Nev. 646 (2004). *See Polk.*

State also does not address cases or facts involving lack of notice: *Padilla v. Kentucky*, 559 U.S. 356 (2010); *People v. Fonville*, 291 Mich.App. 363 (2011). *See Polk.*

State does not address McNeill's argument that by the court interpreting NRS 213.1243 as allowing Board and Division to create additional conditions not listed in NRS 213.1243, court's interpretation encourages, authorizes, and fails to prevent arbitrary and discriminatory enforcement because of a lack of specific standards. *See Polk.*

NRS 213.1243 contains no standards to stop arbitrary and discriminatory enforcement. Here, because "vagueness so permeates the text...the statute cannot meet [due process] requirements in most applications" if interpreted to allow Board and Division to create new conditions. *See Flamingo Paradise Gaming, LLC v. Chanos,* 125 Nev. 505, 512 (2009).

State does not address McNeill's overbreadth argument. *See Polk.*

///

///

II. EVIDENCE WAS INSUFFICIENT TO CONVICT; COURT VIOLATED SIXTH AND FOURTEENTH AMENDMENTS BY REMOVING ONE ELEMENT FROM JURY'S DECISION-MAKING PROCESS; AND, COURT ERRED IN ADMITTING INCOMPETENT EVIDENCE.

A. Standard of Review for insufficient evidence.

State focuses on *Stephans v. State*, 262 P.3d 727 (Nevada 2011), a case where this Court relied in part on *McDaniel v. Brown*, 558 U.S. -, -, 130 S.Ct. 665 (2010) rather than *NRS 175.201* when deciding a sufficiency of the evidence issue. RAB:16-17. *NRS 175.201* asks the Court to tally up all competent evidence rather than also considering incompetent evidence. In contrast, *Stephans* allows Court to use incompetent evidence, such as evidence in violation of the constitution or evidence not properly admitted.

The problem with the *Stephans* decision is that the *Brown* case was a federal habeas claim rather than a direct appeal and involved additional DNA evidence being introduced during the habeas proceedings through a report contradicting the evidence introduced at trial (newly discovered evidence that was prepared 11 years after the trial). Thus, the holding of *Brown* does not apply in light of NRS 175.201 and because this is a direct appeal rather than a habeas case. *Lockhart v. Nelson*, 488 U.S. 33 (1988) is also a habeas case. Direct appeals allow for a more strenuous review than habeas cases which occur later.

The other case State cites, *U.S. v. Sarmiento-Perez*, 667 F.2d 1239, 1240 (5th Cir. 1982), discusses whether double jeopardy prevents retrial when incompetent evidence is introduced and the court reverses based on insufficiency of the evidence. This Court addressed the same argument in *Bryant v. State*, 114 Nev. 626 (1998). The *Bryant* Court disregarded the incompetent evidence the State presented for fair market value of used tools – as required by NRS 175.201 – and then found the evidence insufficient to convict. But, the *Bryant* Court held the case could be retried.

B. No evidence and no jury decision on whether McNeill was a convicted sex offender ordered to lifetime supervision.

1. No evidence.

State argues that it was not required to present any evidence that McNeill had a prior sex offense conviction with a lifetime supervision tail because the Defense stipulated to his prior conviction.

State does not respond to *State v. Williamson*, 343 P.3d 1, 15 (Ariz. App. 2015) and *State v. Carreon*, 210 Ariz. 54, 64 (2005) and *State v. Allen,* 220 P.3d 245, 247 (Ariz. 2009), except to say Appellate Counsel is not bringing this argument in good faith and to claim Counsel is playing games. RAB:12;14. By ignoring the points and authorities Counsel presented in support of McNeill's argument, State concedes that McNeill is right. *See Polk.*

State needed to present certified copies of the conviction in C204263 during trial but outside presence of jury and not subject to jury review. State did not. And, Court gave jury no instructions regarding the stipulation upon completion of the trial directing the jury that they were free to accept or ignore any stipulation. Jury Instruction #10 merely told jury they could consider facts agreed to by counsel. I:160.

2. No verdict - violation of due process and right to jury trial.

State does not address whether a violation of the Sixth and Fourteenth Amendments occurred when district court removed one element of the crime from the jury's decision. *See Polk.*

C. No competent evidence regarding lifetime supervision agreements.

State argues it is not required to present competent evidence to the jury because *Stephans v. State*, 262 P.3d 727, 734 (Nev. 2011) allows Court to use incompetent evidence to support a finding of beyond a reasonable doubt. RAB:17-18. By failing to address McNeill's evidentiary objections to the admission of the three lifetime supervision agreements, State concedes that the agreements were not properly admitted. *See Polk.*

1. Serious record keeping problems.

State does not address. *See Polk.* Thus, State does not dispute any of the record keeping problems McNeill discussed.

2. Lack of foundation and authenticity.

State does not address. *See Polk.* Again, State does not dispute the fact that it failed to establish a foundation and to authenticate the lifetime supervision agreements.

3. Incompetent evidence.

State summarily claims agreements were properly admitted without any factual analysis to support its argument. But by focusing on *Stephens* rather then presenting facts, State indirectly admits the agreements were not authenticated, lacked foundation, and that the Division's record keeping procedures are incompetent because witnesses/signatories are not identifiable on forms and the documents are not signed. Here, as in *Bryant*, is warranted.

D. No evidence that McNeill violated NRS 213.1243 conditions.

1. Failing to have his residence approved.

In charging documents, State accused McNeill of violating one requirement promulgated by Legislature in NRS 213.1243: failure to report/obtain approval for residence between 12/14/12 and 03/10/14.

In its Answering Brief, State does not point to any evidence presented at the trial to show McNeill violated this requirement. RAB:18-19. Thus,

State agrees with McNeill that State failed to prove beyond a reasonable doubt that McNeill failed to have his residence approved.

> ***2. "Refusing to submit to a urinalysis, failing to report..., failing to cooperate with his supervising officer, failing to maintain fulltime employment, failing to abide by a curfew, and/or terminated from his sex offender counseling."***

State summarily argues that McNeill violated curfew, was not paying his fees (not listed as a violation), was unemployed, did not attend further counseling, and refused to submit to a urinalysis. RAB:18. State does not address the cease and desist letter and how it affected the alleged violations based on NRS 176.0931 allowing a person on lifetime supervision to petition for removal from the program.

State appears to concede that McNeill did not violate requirements prior to April of 2013 before Mangan became his reporting officer – except for counseling.

With regard to the counseling, he was terminated in December of 2012 after being in the program since 2008 and could not re-enter. Therefore, Mangan's request for McNeill to attend further counseling was impossible under the circumstances.

After April of 2013, State claims McNeill was noncompliant with curfew because Mangan did not find him in the area he was living on the

streets. There was no evidence that McNeill was found somewhere else, she simply did not locate him. II:354.

Although McNeill refused to report weekly and refused to give one urine sample, he subsequently sent in a cease and desist letter which the Division and Board did not take seriously, instead seeking an arrest warrant.

Thus, conviction must be reversed because State did not present sufficient evidence for a violation of NRS 213.1243 and may not rely on his statements to prove crime.

III. ERRONEOUS JURY INSTRUCTIONS.

A. Incorrect jury instructions defining crime.

1. Jury Instruction #6 – sex offender registration.

State claims review of Jury Instruction #6 is precluded because McNeill did not object. RAB:19-20. State indirectly agrees Jury Instruction #6 is an incorrect or incomplete statement of the law as explained in NRS 179A.470 but argues McNeill was not prejudiced.

"An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Jackson v. State*, 117 Nev. 116, 120 (2001). By giving an instruction for a crime McNeill was not charged with the court's decision was arbitrary.

The error in giving Jury Instruction #6 was plain because McNeill was not charged with violating NRS 179D.470. See I:126. NRS 178.602. McNeill was prejudiced because in Jury Instruction #3 he was accused of not having his residence approved and Jury Instruction #6 suggested he needed to report his residence every 30 days even though that was not a requirement under Count 1. I:153.

2. Incomplete instructions on lifetime supervision – NRS 213.1243.

Jury instructions given were incorrect and incomplete because court failed to instruct on specific conditions within NRS 213.1243 as proposed by McNeill. Court rejected all defense proposed jury instructions based on NRS 213.1243.

Court rejected following Defense proposed jury instructions:

- #10 - addressing NRS 213.1243(3) - explaining residency condition. I:136.
- #11 based on NRS 213.1243(5) – further explanation of residency requirement. I:137.
- #12 following NRS 213.1243(6) - explaining electronic monitoring. I:138.
- #13 addressing NRS 213.1243(10) – no contact with victim/witnesses. I:139.

- #8 explaining only legislature could define lifetime supervision conditions. I:134.
- #9 stating which jury instructions addressed lifetime supervision conditions. I:135.
- #14 directing jury to find McNeill not guilty if State failed to prove beyond a reasonable doubt that he violated conditions listed within NRS 213.1243. I:140.
- #19 informing jury that court found State failed to meet its burden of proof. I:141.

But State argues the jury instructions were properly rejected as misstatements of the law as addressed in Issue I. RAB:20-21. McNeill contends, as addressed in Issue I, that the jury should have been instructed on the requirements within NRS 213.1243.

C. Court abused discretion when failing sua sponte to correct mere presence instruction.

State incorrectly argues McNeill did not point to a portion of the record showing the court recognized McNeill wanted a corpus delecti instruction. State is incorrect because McNeill pointed out that Court said: "...if it were written as the mere fact that certain dialogue was had in...Zana's office doesn't itself mean that the defendant is guilty of the

crimes charge. But we just simply don't give instructions along that line." III:451.

State further claims court cannot instruct on a defense theory that is not requested. But McNeill did request a jury instruction which court correlated with a corpus delecti instruction and then said she would not give such an instruction.

State does not respond to McNeill's arguments regarding CALCRIM No. 359, *People v. Rosales*, 222 Cal.App.4th 1254, 1258-1261 (2014), *In re T.B.*, 11 A.3d 500, 504-505 (Pa. Super 2010), *Azbill v. State,* 84 Nev. 345, 351 (1968), and *Crawford v. State*, 121 Nev. 744 754-55 (2005).

McNeill was prejudiced because the State relied on McNeill's statements to Mangan and Zana at his monthly meetings to convict him.

D. Failure to explain how to evaluate circumstantial evidence and evidence allowing for two reasonable conclusions amounts to inaccurate statement of law.

1. Defense proposed circumstantial evidence instruction.

State does not address McNeill's argument that it was error for court to reject his proposed jury instruction because it was a correct statement of the law based on CALCRIM 224 and *Buchanan v. State*, 119 Nev. 201, 217 (2003). The circumstantial evidence instruction given by the court allowed jury to reach a decision contrary to *Buchanan. See Polk.*

2. Defense proposed instruction on evidence susceptible to two reasonable interpretations.

State does not address CALJIC 2.01 or NRS 175.161 or *People v. Bean*, 46 Cal.3d 919, 932-33 (1988) or the fact that the decisions in *Bails v. State*, 92 Nev. 95 (1976) and *Mason v. State*, 118 Nev. 554 (2002) did not take into account appellate review problems that arise when instruction is not given.

State summarily argued that *Bails, Mason*, and other cases say it is not error for district court to deny giving this instruction without addressing McNeill's arguments regarding appellate review problems.

E. Reversible error.

The errors in this case were not harmless because court instructed jury on a crime McNeill was not charged with in Instruction #6, court rejected all proposed jury instructions on NRS 213.1243, court rejected proposed jury instructions directing jury to find McNeill not guilty if he did not violate a condition listed within NRS 213.1243, court did not sua sponte give a corpus delecti instruction, and court refused to give McNeill's proposed circumstantial evidence jury instructions. But for the errors, it is likely that the jury would not have found McNeill guilty.

As noted in Opening Brief, in *Crawford v. State*, 121 Nev. 744, 753-54 (2004), Court held: [D]istrict court may not refuse a proposed instruction on the ground that the legal principle it provides may be inferred from other instructions. Jurors should neither be expected to be legal experts nor make legal inferences with respect to the meaning of the law; rather, they should be provided with applicable legal principles by accurate, clear, and complete instructions specifically tailored to the facts and circumstances of the case."

State does not address *Brooks v. State*, 124 Nev. 203, 211 (2008), *People v. Rogers*, 39 Cal.4th 826, 885 (2006), and *Carter v. State*, 121 Nev. 759 (2005).

IV. COURT ERRED IN DENYING MOTION FOR ARREST OF JUDGMENT AND/OR MOTION FOR JUDGMENT OF ACQUITTAL.

State argues that based on analysis presented in Answering Brief Issues, I, II, and III, district court did not err in denying McNeill's Motion for Arrest of Judgment/Motion for Judgment of Acquittal. RAB:25-26. McNeill asks Court to review Issues I, II, and III in his Opening Brief which show the district court reached an erroneous decision.

State does not address district court's concern that a special verdict would have been beneficial because a vast majority of the violations were from Board's additional conditions. III:591-2.

State does not address McNeill's motion for a directed or advisory verdict at the close of the trial. *See Polk.*

V. NRS 213.1243 IS UNCONSTITUTIONAL BECAUSE IT VIOLATES PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

State focused on the district court's ability to impose a sentence within the sentencing range. RAB:26-28.

But McNeill argued that the sentencing range within NRS 213.1243 shocks the conscious because one violation of one condition equals possible six years in prison.

State claims McNeill may not make this argument because either the statute is constitutional OR the sentence disproportionate, citing *Blume v. State,* 112 Nev. 472 (1996). When McNeill argues the possible sentence range for one violation of one condition shocks the conscious, he is arguing both. See *Lloyd v. State*, 94 Nev. 167, 170 (1978)(cruel and unusual when sentence imposed is disproportionate to crime and shocking to the conscience); *Naovarath v. State*, 105 Nev. 525, 529-530 (1989); *Solem v. Helm,* 463 U.S. 277 (1983).

Legislature must use power to prescribe penalties with care and not enact penalties "so disproportionate to the crime for which it is inflicted that

it shocks the conscience and offends fundamental notions of dignity." *In re Lynch*, 8 Cal.3d 410, 424 (1972).

Here, the nature of the offense was basically a reporting violation. The offense was nonviolent, minor, and resulted in no injuries to anyone. Thus, sentence is disproportionate to the crime and violates prohibition against cruel and unusual punishment.

State did not address any of the cases cited above even though all were addressed in McNeill's Opening Brief.

VI. PREJUDICIAL ERROR OCCURRED WHEN WITNESSES TESTIFIED DEFENDANT WAS INCARCERATED PRIOR TO BEING PLACED ON LIFETIME SUPERVISION, COMPARED LIFETIME SUPERVISION TO PAROLE, CALLED HIM A SEX OFFENDER, AND SAID HIS WAS ONE OF THE MOST EGREGIOUS CRIMES.

State claims McNeill was not prejudiced by Officer Mangan telling the jury McNeill had previously been incarcerated and comparing lifetime supervision to parole (III:346-47), State and witnesses calling him a sex offender, and State argues McNeill did not object to Sergeant Zana testifying that McNeill's prior conviction as "one of the 23 most egregious offense." (III:368). RAB:28-32. State attempts to distinguish *Witherow v. State*, 104 Nev. 721, 724 (1988) by arguing that because the fact that McNeill was a sex offender was an element of the crime, which he

stipulated to, no error occurred; and, any error was cured by court's curative instruction. II:261-62.

But the reason for the stipulation was to eliminate prejudicial reference to his past criminal history not to allow State to continually bring it up to the jury. It did not give State free reign to repeatedly call him a sex offender in Opening Statements and through its witnesses. By Mangan testifying that he was previously incarcerated and on a type of supervision that was similar to parole and Zana comparing McNeill's prior conviction to one of the 23 most egregious cases, State did exactly what the stipulation was meant to cure: prejudicial impact regarding McNeill's prior sex offense. The curative instruction did not avoid error because of the cumulative effect of error.

As noted in Opening Brief, when a defendant offers to stipulate to his prior conviction, prejudicial error occurs if State refuses to accept stipulation and introduces records of his conviction at trial. *Edwards v. State*, 122 Nev. 378 (2006); *also see Old Chief v. United States*, 519 U.S. 172 (1997). Here, same result occurred even though State accepted stipulation because State introduced prior criminal activity through its witnesses.

Thus, court abused its discretion in the denial of motion for mistrial. *Ledbetter v. State*, 122 Nev. 252, 264 (2006).

VII. DUE PROCESS VIOLATED BY COURT FAILING TO REQUIRE STATE TO REVEAL CRIMINAL HISTORY OF WITNESSES OR INCONSISTENT STATEMENTS.

1. Discovery Requests.

> 5. Any inconsistent statements made by any material witness in the case...[including] any inconsistent statements made to any employee or representative of the District Attorney's Office.
>
> 6. Any information on any criminal history of any material witness in the case, to include any juvenile, misdemeanors, or any other information that would go to the issue of credibility and bias, whether or not the information is admissible by the rules of evidence. I:100.

See Motion at I:096-101. *State opposed in part.* I:102-110.

2. Inconsistent statements.

State argues that inconsistent statements are not discoverable. RAB:34. Not so. In *Lay v. State*, 116 Nev. 1185 (2000), Court reversed a conviction when State failed to reveal inconsistent statements made by a material witness and prosecutor learned of the statements during pre-trial meetings.

///

///

3. Criminal history of witnesses.

State argues district court was correct in refusing to order State to disclose the criminal history of the probation officer because it was a waste of tax payers money. State further contends that such a request is overbroad. RAB:35-36.

But the criminal history of a witness falls within the definition of impeachment evidence that the government must disclose pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). *United States v. Blanco*, 392 F.3d 382 (2004); *Mickey v. Ryan* , 711 F.3d 998 (9th Cir. 2013) (conviction reversed based on a *Brady* violation when the court refused full disclosure of a police officer's personal file and information suppressed involved impeachment evidence).

4. State does not address most of the cases cited by McNeill in this section.

State does not address the facts in the following cases: *Bennett v. State*, 119 Nev. 589, 603 (2003); *Davis v. Alaska*, 415 U.S. 318 (1974))(impeachment with juvenile history); *Benn v. Lambert*, 283 F.3d 1040, 1052-53 (new trial warranted when government withheld several pieces of critical impeachment evidence); *Mazzan v. Warden*, 116 Nev. 48, 67

(2000)(new trial granted when government withheld police report); *Lobato v. State*, 96 P.3d 765 (2004); *Stinnet v. State*, 606 Nev. 192 (1990).

VIII. COURT ERRED IN ALLOWING STATE'S EXPERT TO TESTIFY.

State contends Marcia Lee only testified as a lay witness and that McNeill did not object to her testimony while she was on the witness stand, except for a relevancy objection. RAB:36-38.

An expert is a witness who has "scientific, technical or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue. . ." NRS 50.025; NRS 50.275. Here, Lee testified that she had specialized knowledge because she was a licensed therapist, a sex counselor for 20 years, and was McNeill's therapist. III:434-36. Thus, State did not present her as a lay witness but as an expert.

McNeill's objection was prior to Lee's testimony is at II:262-65 and III:372-74.

Lee expressed her expert opinion when testifying that she was a sex counselor and McNeill made little or no progress in treatment based on the subjective factors she observed regarding his behavior and progress. III:438-9. Because of that, she terminated him from treatment. III:438-39. In making these statements she gave an expert opinion even though court stated she could not give an opinion.

McNeill was prejudiced because Lee gave an expert opinion but he was unable to challenge her because State said she was not an expert. Court abused its discretion and denied McNeill due process by allowing Lee's testimony without requiring State to follow NRS 173.234(2).

IX. CUMMULATIVE ERROR WARRANTS REVERSAL.

Even if Court believes no single error is sufficient for reversal, Court may reverse on cumulative effect of error denying defendant due process. *Valdez v. State*, 124 Nev. 1172, 1195-98 (2008). As noted within each issue, the evidence was not overwhelming, there were serious errors involving jury instructions, incompetent evidence was introduced when State failed to authenticate and lay a foundation for the lifetime supervision agreements, district court incorrectly held that the Division and Board could add additional terms to lifetime supervision, and all other issues addressed in brief show cumulative error.

X. STRUCTURAL ERROR BASED ON *BATSON* CHALLENGE BY STATE STRIKING ALL WHITE MALES REQUIRES REVERSAL.

State argues prosecutor removed each white male for a valid reason.

- Maude because he previously had dispute with police officers in New York and most of the witnesses in this case were law enforcement. III:304.

- Benson - previously arrested and no kids. II:304. Prosecutor believed that people without children have no real responsibilities. II:305.
- Burgess – no children and took law class in college. II:305.
- Burris – he was an attorney and seemed to have a bias against prosecution. II:305.

State does not address McNeill's argument that the prosecutor's responses were pre-textual because other jurors who also had no children remained: Lagomarsino and Vilchez. II:275;305. Moreover, Justin Walker recently was arrested for impaired driving, had no kids, and was not married and he was left on the jury while Benson was removed for a drug crime. II:283. Also, Bakkedahl, Hamilton, and Rivera had previous criminal activity or arrests. II:281-83. McNeill noted people who had criminal histories or encounters with law enforcement that were not white males remained on jury. II:305. McNeill further noted Burris said he would follow the law. II:305.

Instead, State summarily claims it only used the peremptory challenges on people with multiple concerning factors but does distinguish the above mentioned jurors individually. However, Justin Walker had multiple concerning factors and State did not strike him.

State did not address *Diomampo v. State,* 124 Nev. 414, 423 (2008) where Court reversed a conviction when prosecutor claimed he struck one minority because man had difficulty understanding English language but did not remove a non-minority for same reason. *Id.* at 413-5. Another minority juror was removed by prosecutor because he thought prospective juror would have difficulty working with women on jury because he was adamant about his divorce. *Id.* at 425. However, record did not show that particular juror was adamant about his divorce. *Diomampo* Court found the reasons given by the prosecutor pre-textual and reversed the convictions.

CONCLUSION

In view of the above, McNeill asks Court reverse and dismiss his conviction.

Respectfully submitted,

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: */s/ Sharon G. Dickinson*
SHARON G. DICKINSON, #3710
Deputy Public Defender
309 South Third Street, #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

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 5,470 words.

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 28th day of October, 2015.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By */s/ Sharon G. Dickinson*
SHARON G. DICKINSON, #3710
Deputy Public Defender
309 South Third Street, Suite #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 28th day of October, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM LAXALT
STEVEN S. OWENS
SHARON G. DICKINSON
HOWARD S. BROOKS

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

STEVE DELL MCNEILL
NDOC No. 84046
c/o High Desert State Prison
P.O. Box 650
Indian Springs, NV 89018

BY */s/ Carrie M. Connolly*
Employee, Clark County Public
Defender's Office