IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER PIGEON,	)	SUPREME COURT NO. 67083
Appellant,	)	
vs.	)	**APPEAL**
STATE OF NEVADA,	)	
Respondent.	)	DISTRICT COURT NO. C-290261

APPELLANT'S OPENING BRIEF

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15-07694

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I

JURISDICTIONAL STATEMENT

A. BASIS FOR APPELLATE JURISDICTION

NRAP 4(b); NRS 177.015(3)

B. FILING DATES ESTABLISHING TIMELINESS OF APPEAL

12-23-14: Judgment of Conviction filed[1]

12-15-14: Notice of Appeal filed[2]

C. ASSERTION OF FINAL ORDER OR JUDGMENT

This appeal is from a judgment of conviction.

II

STATEMENT OF ISSUES

ISSUE NO. 1: Whether PIGEON'S 5th and 14th Amendment rights to due process and a fair trial were violated amounting to prejudicial error and requiring reversal of his convictions where he was incompetent to stand trial because he did not have a rational understanding of the proceedings against him.

ISSUE NO. 2: Whether PIGEON's 5th, 6th, and 14th amendment right to counsel and a fair trial were violated amounting to prejudicial error and requiring reversal of his convictions where the court allowed him to represent himself even though he lacked the mental capacity to competently conduct his trial defense unless represented.

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1 PA/4/849.

2 PA/4/846.

ISSUE NO. 3: Whether PIGEON'S 5th and 14th amendment rights to due process and a fair trial were violated amounting to prejudicial error and requiring reversal of his convictions where:

a. the conviction for lewdness was not supported by the evidence because (1) the only evidence supporting that charge was testimony of a police officer from a video tape that he viewed which the police negligently failed to preserve and which the defendant believes would have in fact been exculpatory, and (2) the purported act of masturbation occurred in an area of a convenience store where no person was likely to observe the act and no person did actually observe the act;

b. the conviction for aggravated stalking was not supported by the evidence because the purported victim admitted that PIGEON never threatened her;

c. the conviction for luring children with intent to engage in sexual conduct was not supported by the evidence because PIGEON never attempted to persuade, lure, or transport the purported victim anywhere and had no intention of engaging in sexual contact with her unless her parents expressly consented to a marriage between the purported victim and PIGEON;

d. the conviction for attempted first degree kidnapping was not supported by the evidence because there was no testimony or other evidence that PIGEON took any action toward committing the act of kidnapping, had any present ability to transport the purported victim, or that he intended to detain or imprison her in any way;

e. the conviction for burglary was not supported by the evidence because the testimony indicated that PIGEON entered the convenience store without any felonious intent, but rather, for the sole purpose of watching the purported victim.

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ISSUE NO. 4: Whether PIGEON'S right against double jeopardy was violated amounting to prejudicial error and requiring reversal of his convictions where he was charged and convicted of two counts of failing to register as a sex offender during the same time period which constitutes multiple punishments for the same offense.

ISSUE NO. 5: Whether PIGEON's 8th Amendment right against cruel and unusual punishment was violated amounting to prejudicial error and requiring reversal of his convictions where he was sentenced to life in prison without the possibility of parole for simply following a 12-year-old girl to school on a public bus on three occasions, which sentence is so disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice.

ISSUE NO. 6: Whether PIGEON's 5th and 14th amendment rights to due process of law were violated amounting to prejudicial error and requiring reversal of his convictions where he was found to be an habitual criminal based on three underlying felonies, two of which were already enhanced from misdemeanors, and there was no evidence that PIGEON constituted a serious threat to society.

ISSUE NO. 7: Whether PIGEON'S 5th and 14th amendment rights to due process of law were violated amounting to prejudicial error and requiring reversal of his convictions where the prosecutor erroneously argued to the jury that it would be illegal for PIGEON to marry the alleged victim.

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III

STATEMENT OF THE CASE[3]

A. NATURE OF THE CASE

This is a case about a 51-year-old man suffering from paranoid schizophrenia with delusions of grandeur who was sentenced to life in prison **without possibility of parole** for following a 12-year-old girl[4] on a public bus three mornings and lightly touching her on the arm one time to tell her he thought she was pretty. He was never previously convicted of any crime involving children.[5]

He was tried after a psychologist testified at a competency hearing that in his opinion PIGEON was not able to conduct a meaningful defense or avoid incriminating himself because he did not understand that he had done anything wrong, and he was operating under the delusion that the child in question was in love with him.[6] Despite that testimony, not only was PIGEON referred to trial, he was permitted to represent himself and during the course of the trial did, indeed, incriminate himself. The judge even put the instances where PIGEON incriminated himself, on the record.[7]

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3 "PA" shall at all times herein refer to PIGEON's Appendix filed herewith.
4 PA/3/515.
5 PA/1/38.
6 PA/2/288-290.
7 PA/4/691.

B. COURSE OF PROCEEDINGS

Please see the Appendix table of contents which is sorted chronologically.

C. DISPOSITION BY THE COURT BELOW[8]

COUNT	CHARGE	SENTENCE
1	Attempted 1st Degree Kidnapping	Life w/out
2	Aggravated Stalking	Life w/out
3	Luring Children w/Intent to Engage in Sex	Life w/out
4	Burglary	Life w/out
5	Open Or Gross Lewdness	Life w/out
6	Unlawful Contact With a Child	364 days
7	Prohibited Acts By A Sex Offender	Life w/out
8	Prohibited Acts By A Sex Offender	Life w/out

All counts to run concurrent.

IV

STATEMENT OF RELEVANT FACTS

PIGEON is a 51-year-old[9] father of three children,[10] who suffers from paranoid schizophrenia with delusions of grandeur.[11] Before this horrible mental disease became chronic he obtained a business degree from the University of Notre Dame and an architectural degree from Drexel University.[12] He was also a Captain in the United States Army, honorably discharged.[13] At the time of the events

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8 Taken from the Amended Indictment (PA/2/396) and the Judgment Of Conviction (PA/4/849).

9 PA/1/1.

10 PA/1/12.

11 PA/2/277-278, 279

12 PA/12/321.

13 PA/1/67, 74.

which are the subject of this case, PIGEON was homeless, sometimes sleeping in a storage unit which he rented.[14] He had no car, and either walked or used the public bus system to get around.[15]

On May 15, 2013 according to the alleged victim (Candace), PIGEON got on the same public bus that she rode to school every morning. PIGEON sat on the bottom floor of the bus and she sat on the top. There was no conversation between them. She got off the bus near her school and went into CJ's Mini Mart. PIGEON looked at her when she was in the store but said nothing to her. When she left the store for school she did not notice if he followed her.[16] According to a store employee, PIGEON did not appear to be following Candace.[17] According to a police officer who was not present on May 15th, but watched a store video which was unavailable at trial, the video showed that PIGEON had his hands in his pockets and was pulling at his genitals and his groin area while he was staring in the direction of Candace.[18] PIGEON at all times denied that he masturbated in the store.[19]

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14 PA/1/55, 63, 65.
15 PA/1/8, 11.
16 PA/3/519-521.
17 PA/3/483.
18 PA/3/560-561.
19 PA/1/21, 22, 33, 34, 44, 69.

On May 16, 2013, according to Candace, PIGEON again boarded the same bus she rode to school. He again sat on the bottom floor and she sat on the top.[20] When she left the bus and started for CJ's Mini Mart, PIGEON caught up with her near a parking lot in front of Sonio's Restaurant[21] lightly touched her hand and told her she looked nice.[22] Candace ignored him and went on her way to CJ's Mini Mart.[23] PIGEON followed her and sat down at the slot machines.[24] When she left the store to go to school she did not notice if PIGEON followed her or not.[25] PIGEON's testimony regarding this day is the same as Candace's.[26] According to a store employee, PIGEON was watching Candace the entire time they were in CJ's Mini Mart.[27]

On May 17, 2013, according to Candace, PIGEON boarded the same bus as Candace but this time both were on the bottom floor because the top floor was too crowded for Candace to go up there.[28] When they got to CJ's Mini Mart, PIGEON again told her that she was beautiful. She ignored him and walked away.[29] He

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20 PA/3/524.
21 PA/3/526.
22 PA/4/812-813.
23 PA/3/526.
24 PA/3/527.
25 PA/3/528.
26 PA/4/670.
27 PA/3/484.
28 PA/3/531.
29 PA/3/531.

followed her out of CJ's Mini Mart which "creeped her out."[30] This testimony differed from her recorded statement where she stated that when she left CJ's Mini Mart she was rushing because she was late for school so did not notice if PIGEON followed her out of the store or not.[31] According to the store employee, PIGEON came in the store and was watching Candace. He told her she looked nice. When she left, PIGEON followed her out of the store.[32]

V

SUMMARY OF ARGUMENT

PIGEON was completely overcharged and over sentenced. He was sentenced to life **without possibility of parole** for merely following a 12-year-old girl on three occasions and lightly touching her on the hand once, to get her attention to tell her that he thought she looked nice. PIGEON and the girl were at all times in public in the presence of other persons. He never made any attempt or suggestion that she accompany him to another place. He didn't even have any means of transporting her to another place as he was homeless and had no car. He simply followed where she went, always in public. That is all he did. The sentence is so out of proportion to the crime as to shock the conscience of any rational person.

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30 PA/3/532.
31 PA/4/812.
32 PA/3/485-492.

He was convicted under the large habitual because of two prior felonies for lewdness which were originally misdemeanors that were enhanced to felonies. Neither involved children.[33] One was for touching a waitress on the back at Treasure Island. A second was for having his hand in his pocket at Bellagio.[34] A third felony was for forging his parents' names on some checks in 2000 – 13 years ago.[35]

The man is a paranoid schizophrenic with delusions of grandeur who believed that the girl in question loved him and that the two of them would eventually obtain her parents' consent to marry. This is what he believes, and that was the defense he presented at his trial. He should not have been deemed competent to stand trial, let alone to represent himself completely unassisted by counsel. This was really a travesty of justice, and PIGEON should at a minimum be afforded a new trial where he is required to have counsel to represent him. Precedent to that, he should be ordered to intensive psychological testing to determine if he is even competent to stand trial and assist with his defense given his severe mental illness. This should be done by someone other than Lakes Crossing whose stated purpose is to find competency.

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33 PA/3/413-415.
34 PA/4/661.
35 PA/3/415.

VI

ARGUMENT

A. PIGEON NOT COMPETENT TO STAND TRIAL

(Standard of Review: Clear Error[36])

Under a clear error standard, an appellate court must accept the lower court's findings of fact unless upon review the appellate court is left with the definite and firm conviction that a mistake has been committed.[37] In this case, the competency court held a hearing, but made no findings of fact regarding her competency decision.[38]

It is clear that "the criminal trial of an incompetent defendant violates due process."[39] In order to be placed on trial a defendant must understand the essential elements of "a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so."[40] Moreover, a defendant may not be placed on trial for a criminal offense unless he "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and . . . a rational as well as factual understanding of the

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36 *United States v. Friedman,* 366 F.3d 975, 980 (9th Cir. 2004).
37 *Sawyer v. Whitley,* 505 U.S. 333, 346 n.14 (1992).
38 PA/2/312.
39 *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996).
40 *Riggins v. Nevada*, 504 U.S. 127, 139-40 (1992).

proceedings against him."[41]

It is important to note at the outset that PIGEON is mentally ill. Two psychologists agree on this – one hired by the defense, and one from Lakes Crossing. But, PIGEON does not believe he has any mental illness. He is like the schizophrenic in the movie A Beautiful Mind who was seriously ill but because of the illness and delusions which were very real to him, did not believe that he was ill. He could not understand how he could be so brilliant and still be mentally ill. In his mind, he was the smartest man in the room, and everyone else was out of step. He believed the world that his sick mind conjured for him, was real. The sad truth is that he WAS brilliant. He WAS a genius. Schizophrenia and genius are not mutually exclusive. They can, and often do, co-exist in the same person. So, it is important to realize that in this case, PIGEON actually believed that Candace was in love with him. He actually believed that he could go to her parents and that they would agree for the two of them to get married. This was his reality. This is what he believed, and what he believes to this day. He does not believe he is mentally ill because he constantly harkens back to a time before the mental illness took over when he obtained two college degrees and attained the rank of Captain in the Army. He cannot comprehend how he could have accomplished those goals if

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41 *Dusky v. United States*, 362 U.S. 402, 402 (1960); *State v. McNeil*, 405 N.J. Super. 39, 47-48 (App.Div. 2009).

he had been mentally ill. The sad truth is that he probably accomplished them before the disease manifested.

With that preamble, we turn to the facts of this case.

Dr. Bradley from Lakes Crossing testified that PIGEON stayed at Lakes Crossing in 2009 for five weeks and in 2011 for one year.[42] He diagnosed PIGEON as a chronic paranoid schizophrenic with narcissistic personality with delusions of grandeur.[43] PIGEON was discharged from Lakes Crossing in 2012 **as competent on two anti-psychotic medications**; a combination of Rispedal and Zyprexa.[44] In 2013, Dr. Bradley noted that PIGEON refused to take his medications.[45] During the competency hearing for this case, Dr. Bradley found PIGEON competent to stand trial even though he was not taking his medications which he had previously found in 2012 that PIGEON needed, to be competent. Dr. Bradley further testified that in determining PIGEON's competency to stand trial in this case, he never discussed with him whether PIGEON believed that Candace was in love with him, the history of interactions between PIGEON and Candace, conversations between PIGEON and Candace, PIGEON's plan to ask Candace's parents for permission to marry her, or how PIGEON intended to defend the case.[46]

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42 PA/2/201, 275-276.
43 PA/2/277-278.
44 PA/2/285.
45 PA/2/280.
46 PA/2/283.

Dr. Harder, the defense psychologist, noted that the mission statement of Lakes Crossing is to restore people to competency. Dr. Harder agreed with Dr. Bradley that PIGEON was suffering from paranoid schizophrenia with delusions of grandeur.[47] He testified that PIGEON was in love with Candace and wanted to marry her. PIGEON planned to defend himself by informing the jury that Candace was in love with him.[48] Dr. Harder concluded that in his opinion, PIGEON would have a difficult time not incriminating himself or saying things that would be damaging to his case.[49] He testified that PIGEON was oblivious to the fact that he had committed a crime. He described it as a fixed delusion which could interfere with PIGEON's ability to aid counsel in his defense.[50] Dr. Bradley (Lakes Crossing) described a fixed delusion as one where a person entering a home believed that he owned the home and so could not be found guilty of home invasion.[51] This is the type of delusion that PIGEON suffers from. Dr. Harder felt that PIGEON was capable of understanding the court process but that his delusions would keep him from understanding that what he did was wrong or how to keep from incriminating himself.[52] He said that PIGEON was suffering from erotomenia delusion which is a diagnosis for people who believe that someone is in

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47 PA/2/290.
48 PA/2/288-289.
49 PA/2/290.
50 PA/2/292-293.
51 PA/2/283.
52 PA/2/294.

love with them, who is in fact not in love with them.[53]

PIGEON's attorney at the competency hearing stated that PIGEON wanted to let everyone know that he is the smartest man in the room and that is why a 12-year-old girl fell in love with him.[54] PIGEON then himself stated at the competency hearing that "we enjoyed one another's company seemingly due to body language, due to nearness, upbeat small talk and also facial expressions."[55] All this despite Candace's testimony that they never talked to each other, let alone engaged in "upbeat small talk."

True to Dr. Harder's prediction, PIGEON did, in fact, incriminate himself. The following are PIGEON's own words at the trial:

Q. And what initially interested you in following her?
A. She seemed attracted to me. I mentioned in the interview yesterday, facial expressions, body language, and she glanced at me often. She didn't seem to mind my company.
Q. Did you know how old she was or did you learn that later?
A. I knew that she was probably a junior high student.
Q. And is that because you knew she went to Hyde Park, which is a junior high school?
A. Yeah. I didn't discover that until later though.
Q. So did you think that she was around the age of 12?
A. Yes. 12 or 13, I figured.
Q. Okay. When she asked you that one day kind of the – by Sonio's to leave her alone, how did you interpret that?

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53 PA/2/297.
54 PA/2/300.
55 PA/2/300-303.

A. I actually was somewhat shocked because she seemed to like my attention. I felt kind of bad about it. I followed her to make sure she wasn't going away nuts or anything.[56]

Q. With her parental permission, you were saying, you did want to marry and have sex with her. Is that right?

A. That's correct.

Q. Okay.

A. Only with permission and of course, marriage.[57]

Q. Why did you take the bus route from central station to Charleston and Valley View?

A. Well, I always – I rode the bus with her on purpose. It was to be with her.

Q. Where were you going?

A. I walked her to school.

Q. Were you only following Candace?

A. Yes.

Q. Do you still love Candace?

A. Yes, I do.

Q. Were you happy to see her again in Court?

A. Yes, I was.

Q. Do you hope to see Candace again someday?

A. ...I mean, I would really – I really do hope to see her again. However, I'd have to have permission for that.

Q. Do you want to pursue a relationship with Candace or another teenager in the future?

A. Only with Candace. Otherwise I don't want to chase any more teenagers. Except for maybe an 18 or 19 year old. Perhaps a student at UNLV.

Q. ...What would you think of a man that would approve of a 50 year old following a teenager?

A. Well, ideally you talk to them and not follow them. Or walk with them instead. I'd say it's okay some of the time as long as she doesn't say anything about it....But, I'd say it would depend on the circumstances.[58]

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56 PA/4/665-666.

57 PA/4/668.

58 PA/4/670-671.

PIGEON also let the jury know that he had been in jail before and that he was previously convicted of sex offenses. During opening statement, PIGEON stated that "I've been in Las Vegas for 15 years. I do have some prior lewdness charges, but they are very minor I thought. Mostly good natured."[59] He also mentioned that, "I do draw extensively while I'm locked up."[60] He further stated during trial as follows:

> Briefly, we mentioned I have prior charges at the beginning of this – at the opening arguments of this trial. Those were in 2002, 2006, 2009, and then again in 2012. I will say all of those if they were my first charges would have been misdemeanors. So they're all misdemeanor lewdness charges. One of them, as I mentioned earlier, was for touching a waitress in the back at Treasure Island Casino. That one was reduced to a misdemeanor. Another one was for having my hand in my pocket. And then there are two more that are, I think, were very mild. I don't think it was that serious an issue. However, I did spend time in prison. Two years, the once, which I spent mostly in the County Jail. And another time I spent two years and nine months; six months in County Jail and two years and three months in the prison system at both High Desert and Lovelock for that crime.[61]

The trial judge commented on this.[62]

In this case, the competency court made no findings of fact regarding competency. She took the matter under submission, then entered a one-sentence ruling that PIGEON was competent.[63] A different judge who did not have access

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59 PA/3/476.
60 PA/4/659.
61 PA/4/661.
62 PA/4/691.
63 PA/2/312.

to the transcript of the competency hearing, tried the case. PIGEON should never have been permitted to stand trial until he had been on his anti-psychotic medications, which Dr. Bradley of Lakes Crossing had stated in 2012 was a prerequisite to competency for PIGEON. Based on the testimony at the competency hearing, there is no rational basis for the court's finding that PIGEON was competent without his medication, and the court made no record of the reasoning behind its finding of competency. Based on the foregoing, the matter should be remanded for a new trial after a finding of competency by an independent psychologist appointed by the court (not from Lakes Crossing).

B. PIGEON NOT COMPETENT TO REPRESENT HIMSELF

(Standard of Review: de novo[64])

The validity of a *Faretta* waiver is a mixed question of law and fact reviewed de novo. De novo review means that the appellate court views the case from the same position as the district court.[65] The appellate court must consider the matter anew, the same as if it had not been heard before, and as if no decision previously had been rendered.[66]

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64 *United States v. Erskine,* 355 F.3d 1161, 1166 (9th Cir. 2004).

65 *League of Wilderness Defenders v. Forsgren,* 309 F.3d 1181, 1183 (9th Cir. 2002).

66 *Ness v. Commissioner,* 954 F.2d 1495, 1497 (9th Cir. 1992).

In this case, the ultimate insult was that even though two psychologists agreed that PIGEON suffered from paranoid schizophrenia with delusions of grandeur, he was permitted to represent himself at trial![67] As stated above, there was a plethora of testimony from the psychologists that while PIGEON understood the court process, he did not understand that what he had done was wrong, and had no idea how to competently represent himself without self incrimination. That is exactly what happened in this case. He was unable to present a viable defense. He admitted he had previously been imprisoned for sex offenses. He testified that he was in love with Candace and believed that she loved him. He told the jury that he would like to see her again. He told the jury that he would still pursue marriage with this 12-year-old girl with her parents' consent.

This unmedicated man suffering from paranoid schizophrenia should never have been permitted to try to defend himself without assistance of counsel, especially given the seriousness of the charges and potential sentence. That it occurred is a travesty of justice, and deprived him of all semblance of a fair trial, in violation of his 5th and 14th Amendment rights to due process of law. The proof is in the pudding when one looks at the multiple life sentences he received without possibility of parole for simply following a 12-year-old girl on three occasions.

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67 PA/2/324.

The United States Supreme Court has held that a trial court may insist on representation for a defendant who is competent to stand trial but who is suffering from severe mental illness to the point where he is not competent to perform the more arduous task of representing himself.

> We now turn to the question presented. We assume that a criminal defendant has sufficient mental competence to stand trial (*i.e.*, the defendant meets *Dusky*'s standard) and that the defendant insists on representing himself during that trial. We ask whether the Constitution permits a State to limit that defendant's self-representation right by insisting upon representation by counsel at trial--on the ground that the defendant lacks the mental capacity to conduct his trial defense unless represented. Several considerations taken together lead us to conclude that the answer to this question is yes.[68]

The *Edwards* court went on to state that, "... insofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial....Even at the trial level . . . the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer. See also *Sell* v. *United States*, 539 U.S. 166, 180, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003).[69] As the Ninth Circuit noted, "The [*Edwards*] Court concluded that the constitutional guarantee of a fair trial permits a district court to override a *Faretta* request for defendants whose

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68 *Indiana v. Edwards*, 554 U.S. 164, 174 (U.S. 2008).

69 *Edwards, supra,* at 176-177.

mental disorder prevented them from presenting any meaningful defense."[70]

Indeed, courts have recognized that a trial judge has a continuing duty to ensure the defendant is afforded a fair trial and to appoint counsel for the defendant during trial if the court determines the defendant is no longer competent to present his or her own defense.[71] In the case at bar, the trial judge had misgivings throughout the trial about PIGEON's competence, and noted those for the record as mentioned above.

PIGEON contends that he was not competent to stand trial without being on his anti-psychotic medication, but even if he was competent to stand trial within the meaning of *Dusky*, he was certainly not competent to represent himself. Accordingly, the matter should be remanded for a new trial where he is represented by counsel.

C. VERDICT NOT SUPPORTED BY THE EVIDENCE

(Standard of Review: de novo)

Claims of convictions which are supported by insufficient evidence are reviewed de novo.[72] "The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to

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70 *United States v. Johnson*, 610 F.3d 1138, 1144-1145, (9th Cir. Cal. 2010).
71 *State v. Dahl,* 776 N.W.2d 37, 45 (N.D. 2009).
72 *United States v. Shipsey,* 363 F.3d 962, 971 n.8 (9th Cir. 2004).

constitute the crime with which he is charged".[73]

1. LEWDNESS CHARGE

PIGEON was convicted of gross lewdness for allegedly masturbating with his hand inside his pocket on one occasion at the CJ's Mini Mart. No one at the mini mart observed him doing this.[74] The entire claim is based on a police officer's testimony that he watched a video from the Mini Mart in which he observed PIGEON with his hands in his pocket and it appeared to him that PIGEON was masturbating.[75] He had that video copied but did not check to see if the video was readable until after it had already been dubbed over by the mini mart people.[76] So, at trial, there was no actual video for the jury to review. PIGEON asserts that the testimony should never have been allowed and he did object to that at trial.[77] PIGEON asserts that the actual video would have been exculpatory. The video was the best evidence of what was purportedly depicted therein, it was within the sole province of the police and district attorney to obtain and preserve that evidence, and since they were negligent in doing so, testimony about it should not have been admitted.

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73 *Apprendi v. New Jersey*, 530 U.S. 466, 477 (U.S. 2000).
74 PA/3/495, 521.
75 PA/3/556-557, 560-561, 569-570, 572.
76 PA/3/556-557.
77 PA/3/557-559.

a) Testimony Should Have Been Excluded

NRS 52.235 provides that "[t]o prove the content of a writing, recording or photograph, the original writing, recording or photograph is required, except as otherwise provided in this Title." Generally the state may produce other evidence of a lost video where the state was not the one that lost it. However, where the state has lost or destroyed the evidence, the United States Supreme Court has held that the secondary evidence of the lost or destroyed evidence (police testimony in this case) must be suppressed if the state either lost or destroyed the evidence in bad faith or the evidence possessed an exculpatory value that was apparent before the evidence was destroyed and is of such a nature that the defendant would not be able to obtain comparable evidence by other reasonably available means.[78] The Second Circuit explained that following that logic, in order for the defendant to prevail on having such evidence excluded, he must first show that the evidence has been lost and that the loss is chargeable to the State.[79]

In this case, PIGEON has at all times asserted that he was not masturbating in the store. He believes that the actual video would have born that out, and was therefore exculpatory. There is no other way that he can disprove the state's claim except through the actual video. And, finally, the state is the entity that obtained

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[78] *Arizona v. Youngblood,* 488 U.S. 51, 57 (1988); *California v. Trombetta,* 467 U.S. 479, 489 (1984).

[79] *State v. Nelson,* 219 Ore.App. 443, 453 (Or.Ct.App. 2008).

the video and is the entity that either lost or destroyed it. The officer's testimony regarding the video should never have been admitted, and without that testimony there was no evidence of lewdness, since no one actually in the mini mart observed PIGEON doing anything which could be considered lewd.

b) Lewdness Was Not Proven

Even if the police officer's testimony of what he saw on the video was properly admitted and PIGEON was rubbing his penis with his hand inside his pants at the mini mart, that does not prove lewdness within the meaning of the charging documents and the jury instruction which was given in this case.

The amended indictment in this case, charges PIGEON with gross lewdness as follows:

> ...did on or about May 15, 2013, then and there willfully, and unlawfully and feloniously commit an act of open or gross lewdness by masturbating his penis **while in the presence of** Candace Carpenter and/or other employees or patrons of CJ's Mini Mart..."[80] (Emphasis added)

The jury instruction states:

> ...gross is defined as being indecent, obscene or vulgar. Lewdness is defined as any act of a sexual nature **which the actor knows is likely to be observed** by the victim who would be affronted by the act.[81] (Emphasis added)

In closing arguments, the district attorney advised the jury as follows:

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80 PA/1/182.

81 PA/4/747.

> Open is used to modify the term lewdness. It includes acts which are committed in a private place or **which are committed in an open, as opposed to secret, manner.** It includes an act done in an open fashion, clearly intending that the act could be offensive to the victim. The term gross is defined as being indecent, obscene, or vulgar. Lewdness is any act of a sexual nature, **which the actor knows is likely to be observed by the victim,** who would be affronted by the act.[82] (Emphasis added)

In this case, PIGEON was back behind some store shelving when he was supposedly masturbating. No one inside the mini mart observed him masturbating. And, PIGEON at all times denied that he ever masturbated or even touched his penis while in the mini mart.[83]

For the foregoing reasons, the lewdness charge should be dismissed.

2. AGGRAVATED STALKING CHARGE

It is important to note at the outset that PIGEON was charged and convicted not of simple stalking, but of aggravated stalking. Regular stalking is a simple misdemeanor. In order to rise to the level of aggravated stalking, the stalker must threaten the victim with the intent to cause the person to be placed in reasonable fear of death or substantial bodily harm.[84]

This Court has held that it was error for a court to fail to instruct the jury that a necessary element of aggravated stalking is that the defendant must have

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82 PA/4/677-678.

83 PA/1/21, 22, 33, 39, 44, 69.

84 NRS 200.575.

threatened the victim.[85] In this case, the court properly instructed the jury, but the jury failed to follow that instruction. Certainly, if it is error for a court to neglect to properly instruct a jury, it is also error for a jury to fail to follow the instruction.

In this case, the jury found PIGEON guilty of aggravated stalking, despite the fact that **THERE WAS ABSOLUTELY NO TESTIMONY OR EVIDENCE PRESENTED DURING TRIAL THAT PIGEON EVER THREATENED CANDACE IN ANY WAY.**[86] His only verbal interaction with Candace was to tell her that she looked pretty. That is all he did.

This is clearly a case where the jury felt that PIGEON was guilty of stalking and just kind of glossed over the "aggravated" part. PIGEON **was** guilty of stalking Candace, but that is not what was charged and that is not what PIGEON was convicted of. That conviction cannot stand where the stalking part is born out by the evidence by the "aggravated" part is not. The conviction for aggravated stalking must be reversed.

3. LURING CHILDREN CHARGE

PIGEON was convicted of luring Candace with the intent to engage in sexual conduct.

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85 *Rossana v. State,* 113 Nev. 375 (1997).

86 See discussion above under "Relevant Facts" where Candace's testimony is discussed with cites to the record.

First of all, he never "lured" her anywhere. He simply followed her and talked to her twice. PIGEON never even thought of luring Candace anywhere.

Q. Okay, all right. Um, she ever been over to your place?
A. No.
Q. Okay. You ever been to hers?
A. No.[87]
Q. You ever think about kidnapping anybody?
A. No.
Q. No?
A. No.
Q. Not even a little bit?
A. I don't even have a car. How am I gonna kidnap.
Q. Like, maybe, like grab 'em and just...
A. No.
Q. ...take 'em in the bathroom at the park or something like that?
A. No.
Q. Nothing like that crosses your mind?
A. No.
Q. What about, like, a – just an opportunity. Maybe you were at that park and just – you want – that girl?
A. No. I don't do that.[88]

PIGEON simply followed Candace. He never even talked to her except to tell her that she looked nice.

Secondly, realizing that PIGEON never lured Candace anywhere, the state focused on the sexual part, but even then had to really stretch. It claimed that because PIGEON said he wanted to have sex with her if they were married, that he had the intention of having sex with her regardless of whether they were married or not. That is not true, and is not supported by the evidence in this case. What

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87 PA/1/16.
88 PA/1/57-58.

PIGEON has always admitted was that he was in love with Candace and wanted to obtain her parents' permission to marry her.[89]

> A. I think she's attractive. Maybe in a few years I wouldn't mind marrying her.[90]
> A. Well, eventually maybe sex with parental permission and marriage.
> Q. Okay. If her parents said she's good now, would you do it?
> A. Yes.
> Q. Okay. Do you think they would?
> A. I think so.
> Q. If they met you?
> A. Yes. I mean, it's not, like, a bum or anything. I have an education.[91]
> Q. Okay. You said before that if you had parental permission you would have sex with her?
> A. Marry, yes. And have sex.
> Q. You'd marry her?
> A. Yes.
> Q. And have sex?
> A. Yes.[92]
> Q. Okay. But you – but see, you're – you're confusing me because you're saying that with parental permission you'd have sex with her, but she's still young.
> A. Yeah. But...
> Q. But you keep saying she's young.
> A. But if there's marriage – it would be with the intention of marrying her.
> Q. Okay. So what if it was with the intention of marrying her and having sex with her in the park if she wanted to have sex?
> A. I wouldn't have sex with her in the park.[93]

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89 PA/1/22.
90 PA/1/23.
91 PA/1/29.
92 PA/1/46.
93 PA/1/47.

Naturally, if they were married, he would expect to have sex with her.[94] But, PIGEON has at all times maintained that he had no intention of trying to have any type of sexual involvement with Candace unless they were married. While the thought that he could get a 12-year-old girl to marry him was delusional as discussed above, it was not criminal.

4. ATTEMPTED 1ST DEGREE KIDNAPPING CHARGE

It is incredible that the state even charged PIGEON with attempted kidnapping, let alone that he was convicted of it. The attempt instruction in this case provided that the defendant had to (1) have the intent to commit the crime, (2) perform some act toward its commission, and (3) fail to consummate the intended act.[95] There was absolutely no evidence that PIGEON intended to kidnap Candace or that he did anything toward accomplishing such an act. As he pointed out, the man was homeless and didn't have a car or any other means of transportation, save the public transportation system.

This Court held in *Burkhart v. State,*[96] that where all contacts with a minor took place in a public place, the defendant had no means of transporting the minor, and there was no testimony which would have allowed a jury to infer what the defendant intended to do with the child, that "[n]o rational juror could have

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94 PA/1/29, 46.

95 PA/4/742.

96 *Burkhart v. State,* 107 Nev. 797, 799 (1991).

inferred from this evidence that appellant seized Mathew with the specific intent to detain him against his will. Any inference as to appellant's specific intent must have been based on unbridled speculation." In this case there was even less evidence of an intent to kidnap. Unlike the situation in Burkhart, it is undisputed that PIGEON never "seized" Candace or took any other act which could even remotely be deemed an act in furtherance of kidnapping her.

This Court has held many times that for an attempt conviction to lie, there must be an overt act which goes beyond mere preparation to commit the crime.[97] Evidently, the state is claiming that PIGEON's momentary touching of Candace's hand to tell her he thought she looked pretty that day, constituted an attempt to kidnap her. This Court has rejected such speculative conclusions. "The legislature did not intend that every momentary physical contact should constitute a seizure for the purpose of defining a felony carrying a possible penalty of up to seven and one-half years."[98]

There was no kidnapping here and there was no intent or attempt to kidnap Candace.[99] The conviction should be reversed.

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97 *State v. Verganadis,* 50 Nev. 1 (1926); *Moffett v. State,* 96 Nev. 822 (1980); *Tanksley v. State,* 113 Nev. 997 (1997).

98 *Burkhart, supra,* at 799.

99 PA/4/670, 680-682.

5. BURGLARY

PIGEON was convicted of burglary which was charged in the indictment as follows:

> ...did on May 15, 2013, May 16, 2013 and/or May 17, 2013 then and there willfully, unlawfully, and feloniously enter, with intent to commit Battery and/or Kidnapping, and/or Luring a Minor, that certain building occupied by CJ's Mini Mart....[100]

The state argued in closing that it charged PIGEON with burglary because he entered the mini mart with the intent to grab Candace,[101] kidnap her,[102] and lure her.[103] That is nothing but fantasy. PIGEON entered the store to watch Candace. That is all he intended, and that is all he did. There is absolutely no evidence of any other intent. The kidnapping and luring counts are discussed above. As to the battery claim, PIGEON was in the store with Candace on three different occasions but at no time in those three encounters did he exhibit any intent nor did he attempt to so much as touch Candace even when he was standing right next to her and told her she looked nice that day. The only time he touched her was outside the mini mart on one occasion when he put his hand momentarily on her arm.

The burglary count should be dismissed.

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100 PA/2/398.
101 PA/4/677.
102 PA/4/677.
103 PA/4//677-678.

D. DOUBLE JEOPARDY/REDUNDANCY ISSUE

(Standard of Review: de novo)

Double jeopardy claims are reviewed de novo.[104]

The Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense.[105]

In this case, PIGEON was required to register as a sex offender for two prior lewdness charges. He was living and registered at 200 South Eighth Street until January 5, 2013. After that, he left and failed to register a new address within the required 48 hours.[106] He had not registered from January 5, 2013 when he left that residence until the date he was picked up for the charges in this case. So, he was at all times from January 5, 2013 until May 17, 2013 unregistered. Yet, he was not charged with one count of failing to register; he was arbitrarily charged with two. He was charged in Count 7 with failing to register on January 7, 2013.[107] And, then he was charged in Count 8 for failing to register between April 22, 2013 and May 17, 2013.[108] It was one continuous crime. He was charged twice for the same

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104 *United States v. Patterson,* 292 F.3d 615, 622 (9th Cir. 2002).

105 *Williams v. State,* 118 Nev. 536, 548 (2002); *Byars v. State,* 336 P.3d 939, 948 (Nev. 2014).

106 PA/4/700-701, 703, 707-708.

107 PA/2/399.

108 PA/2/399.

crime. PIGEON objected to this.[109]

This Court stated that, [w]hile often discussed along with double jeopardy, a claim that convictions are redundant stems from the legislation itself and the conclusion that it was not the legislative intent to separately punish multiple acts that occur close in time and make up one course of criminal conduct. We have declared convictions redundant when the facts forming the basis for two crimes overlap, when the statutory language indicates one rather than multiple criminal violations was contemplated, and when legislative history shows that an ambiguous statute was intended to assess one punishment. "'When a defendant receives multiple convictions based on a single act, this court will reverse "redundant convictions that do not comport with legislative intent."'" After the facts are ascertained, an examination of whether multiple convictions are improperly redundant begins with an examination of the statute.[110]

> The statute in question here is NRS 179D.470 which provides that:
>
> If a sex offender changes the address at which he or she resides...the sex offender shall, not later than 48 hours after such a change in status, provide notice of the change in status....

Whether one analyzes this issue under a Double Jeopardy analysis or a redundancy analysis, the outcome is the same. PIGEON was twice convicted of the same crime – for failing to register as a sex offender between January 7, 2013

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109 PA/4/712.

110 *Wilson v. State,* 121 Nev. 345, 355-356 (2005).

and May 17, 2013. One of the convictions must be reversed.

E. CRUEL AND UNUSUAL PUNISHMENT

(Standard of Review: de novo[111])

The Eight Amendment to the Constitution provides that excessive bails shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. In this case, PIGEON has been sentenced to seven life sentences without possibility of parole for following a 12-year-old girl on three separate occasions, speaking to her one time to tell her she was pretty, and lightly touching her on the hand. The sentence is outrageous and completely shocking given the offense. While this sentence was within statutory guidelines under the large habitual rules, "...the bare fact that a sentence is within the maximum prescribed by the legislature does not prevent if from violating the constitutional ban against cruel and unusual punishment."[112]

The United States Supreme Court has directed that "a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[113]

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111 *United States v. Leon H.,* 365 F.3d 750, 752 (9th Cir. 2004).

112 *Faulkner v. State,* 445 P.2d 815, 818 (Alaska 1968).

113 *Solem v. Helm,* 463 U.S. 277, 292 (1983).

PIGEON's offense in this case was minor. He stalked a 12-year-old girl and told her he thought she was pretty. In Nevada, there are only four crimes for which life without possibility of parole may be imposed, to wit: first degree murder (NRS 200.030), kidnapping in the first degree (NRS 200.310), sexual assault (NRS 200.366), and battery resulting in substantial bodily harm (NRS 200.400). Crimes for which life without possibility of parole is not within the sentencing guidelines include:

Second Degree Murder
Mayhem
Second Degree Kidnapping
Robbery
Administration of Poison
Slavery
Mutilation of Female Genitalia
Child Pornography

In this case, the judge did not even follow the state's recommendation in sentencing. Instead, the judge sentenced PIGEON to life without possibility of parole because he felt that it was the only way to protect the children of Nevada from PIGEON.

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> THE COURT: Question I have, is it with or without the possibility of parole? And the only way I can protect our children from you, Mr. Pigeon, is sentence you to life without the possibility of parole.[114]
> THE DEFENDANT: I would like to add that the sentence without parole is a bit extreme. Even Mr. Schifalacqua didn't ask for life without parole.
> THE COURT: It's not his charge, it's my charge. I've got to determine whether you're a threat to society. And I believe –
> THE DEFENDANT: I've never –
> THE COURT: -- that we are lucky to have caught this when we did so that little girl wasn't violated. I saw your bedroom in that storage unit. I'm sure that's where you were headed. Thank you.[115]

The court's conclusion was unfounded. PIGEON did nothing to Candace. He was never previously arrested in connection with any offense involving children. There was no evidence of child pornography or other child-related sex paraphernalia in PIGEON's storage locker.[116] The storage locker was on the other side of town (at Cheyenne and Rancho[117]) from where PIGEON saw Candace, and he had no means of transporting her anywhere.

The problem here is that the judge was no doubt somewhat prejudiced against PIGEON because he was representing himself – and saying crazy things. After all, this was not the same judge who conducted the competency hearing. He did not know that PIGEON was suffering from severe mental illness. All he knew was that another judge had found PIGEON to be competent. So, as far as the trial

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114 PA/4/824.
115 PA/4/825-826.
116 See Exhibits 18-32 which are pictures of the storage locker. PA/3/599-612.
117 PA/3/567.

court was concerned, PIGEON was a mentally competent man who wanted to marry a 12-year-old girl that he believed was in love with him. He did not understand that PIGEON was delusional, and that his illness was making him believe these things. The court simply did not have all the facts when it sentenced PIGEON to life in prison without the possibility of parole.

The sentence is a travesty as was the entire trial. The matter should be remanded for new sentencing which comports with the crimes actually committed.

F. ERRONEOUS HABITUAL DETERMINATION

(Standard of Review: de novo[118])

As stated above, PIGEON was previously convicted of gross lewdness which were originally misdemeanors but which were raised to felonies.

> THE COURT: Okay. Here is a conviction, C269318, open or gross lewdness, Category D felony, occurring on October 31st, 2012....It is certified raised. Okay. The second one they handed me is C216699...open or gross lewdness, a Category D felony...And that's a felony raised....
> THE DEFENDANT: Yes. Both of those were raised from misdemeanors.
> THE COURT: And then a Texas case, October 3rd, 2000....It is a forgery.
> THE DEFENDANT: Those are forgeries of my parent's checks.[119]

So, two of the priors upon which the habitual was based were actually misdemeanors which were raised or enhanced to felonies. It was error to apply the

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118 *United States v. Leon H.*, 365 F.3d 750, 752 (9th Cir. 2004).

119 PA/2/415.

habitual statute, itself an enhancement provision, to these already enhanced misdemeanors.

> Case was remanded where the sentence imposed for the offense of robbery with the use of a deadly weapon, victim over age 65, appeared to have been enhanced consecutively by NRS 193.165, use of a deadly weapon, or NRS 193.167, victim over age 65, and this section, **habitual** criminal. The sentencing court may enhance each primary offense pursuant to one enhancement statute; however, imposition of consecutive enhancements applied to a primary offense is inconsistent with the application of the **habitual** offender statute and the permissible uses of enhancement under NRS 193.165 and NRS 193.167. [120]

Moreover, the habitual criminality statute exists to enable the criminal justice system to deal determinedly with career criminals who pose a serious threat to public safety.[121] It may be an abuse of discretion for the court to enter a habitual criminal adjudication when the convictions used to support the adjudication are nonviolent and remote in time.[122] The convictions which supported the habitual determination in this case were all non-violent. The forgery charge was over ten years old. The others involved allegedly touching a cocktail waitress on the back and lewdness at a casino involving PIGEON's hands in his pockets.

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120 *Barrett v. State*, 105 Nev. 361 (1989).

121 *Sessions v. State,* 106 Nev. 186 (1990).

122 *Sessions, supra,* at 191.

> Even if Tanksley is considered a career criminal, he does not appear to be a violent criminal who poses a "threat to public safety." Tanksley obviously suffers from serious mental illness and most likely belongs in a mental hospital, not prison; therefore, sentencing him as a habitual criminal does not serve the interests of justice and was an abuse of discretion.[123]

The habitual determination was an abuse of discretion and should be reversed.

G. PROSECUTORIAL MISCONDUCT

(Standard of Review: de novo[124])

Prosecutorial misconduct results when a prosecutor's statements so infect the proceedings with unfairness as to make the results a denial of due process.[125] The state's whole case centered on PIGEON's desire to marry and have sex with Candace, a 12-year-old girl.

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123 *Tanksley v. State,* 113 Nev. 997, 1007-1008 (1997, dissent).

124 *United States v. Bridges,* 344 F.3d 1010, 1014 (9th Cir. 2003).

125 *Browning v. State,* 124 Nev. 517, 533 (2008).

In this case, in closing argument, the prosecutor stated:

> The crime of attempt first degree kidnapping. In order for there to be an attempt, you have to find that he had the intent to commit the crime; that he took some act towards the commission of that crime, and he failed to actually complete the crime. Which is why it's an attempt first degree kidnapping versus an actual kidnapping. The elements of kidnapping are that every person who leads, takes, entices, or carries away or detains any minor...with the intent to keep, imprison, or confine him from his parents or guardians. He obviously intended to take her away from her guardians because he wanted to have sex with her. With the intent to perpetrate upon the person of the minor any unlawful act is guilty of kidnapping. **As the Judge just instructed you, it would have been illegal for Christopher Pigeon, a 50 year old man, to marry Candace Carpenter, a 12 year old little girl.**[126] (Emphasis added)

That is not true. NRS 122.025 provides that a person under 12 years of age may be married with the consent of her parents or legal guardian and a district court.

The matter should be remanded for a new trial because the prosecutor led the jury to believe that PIGEON's intent to get to know Candace with marriage as the goal, was illegal, when that intent was not.

VII

CONCLUSION

PIGEON's convictions should be reversed because he was not competent to stand trial without being medicated, even with medication, his mental illness is so severe that he could not receive a fair trial unless represented by counsel, the

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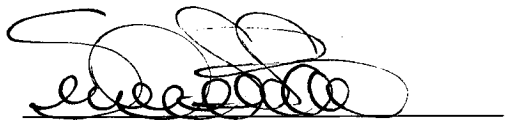
126 PA/4/673-674.

evidence did not support the convictions, the failure to register convictions are redundant and/or violate the double jeopardy clause of the Constitution, the habitual finding was an abuse of discretion, the punishment is completely out of proportion to crimes, and prosecutorial misconduct so infected the proceedings as to render the verdict suspect.

Respectfully submitted,

Dated this 9th day of March, 2015.



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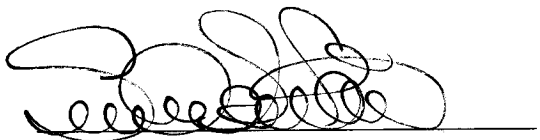
VIII

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this opening 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 N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript of 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. I further 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 Word 14.4.3 For Mac with Times New Roman 14-point. I further certify that this opening brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because it either does not exceed 30 pages or it contains no more than 14,000 words.

DATED: March 9, 2015



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