ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 72545

KENYA SPLOND
Appellant,

vs.

STATE OF NEVADA
Respondent.

Appeal from a Judgment of Conviction

Eighth Judicial District Court, Clark County

The Honorable Elizabeth Gonzalez, District Court

OPENING BRIEF

T. AUGUSTUS CLAUS, ESQ.
Legal Resource Group, LLC.
Nevada Bar No. 10004
205 N. Stephanie St., Suite D221
Henderson, NV 89074
Telephone: (702) 463-4900
Fax: (702) 463-4800
Attorney for KENYA SPLOND

18-09208

IN THE SUPREME COURT OF THE STATE OF NEVADA

KENYA SPLOND, Appellant, vs. THE STATE OF NEVADA, Respondent.	**Supreme Court No.: 71368** **District Court No.: C-15-307195-1** **Dept. No.: 11**

RULE 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal considerations:

1. Attorney of record for the Appellant: T. Augustus Claus
2. Publicly-held companies or parent corporations: None
3. Law Firm(s) appearing in the Court(s) below:
   District Court: Frank Kocka, Esq.
   Clark County Public Defender's Office
   Legal Resource Group, LLC
   Direct Appeal: Legal Resource Group, LLC

Legal Resource Group, LLC

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I. ROUTING STATEMENT

This is an appeal from a Judgment of Conviction pursuant to a jury verdict. AA 5-6. As required by NRAP 28(a)(5), this case is NOT presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(1).

II. JURISDICTIONAL STATEMENT

This is an appeal from a Judgment of Conviction, pursuant to a jury verdict, filed on February 13th, 2017. AA 6. A timely Notice of Appeal was filed on March 2nd, 2017. AA 6. This Court has jurisdiction pursuant to NRS 177.015(3)-(4).

III. ISSUES PRESENTED FOR REVIEW

A. WHETHER THE DISTRICT COURT ERRED BY NOT REINSTITUTING THE OFFER THAT WAS NEVER CONVEYED TO APPELLANT.

B. WHETHER THE DISTRICT COURT ERRED BY ALLOWING A WITNESS TO INTRODUCE UNCHARGED BAD ACTS AND SPECULATE ABOUT THE LOADED STATUS OF A HANDGUN.

C. WHETHER THE DISTRICT COURT ERRED BY FINDING THAT THERE WAS NO ILLEGAL STOP OF APPELLANT

D. WHETHER THE DISTRICT COURT IMPROPERLY RELIED ON A FLAWED PSI IN SENTENCING APPELLANT

E. WHETHER THE CUMULATIVE EFFECT OF ERRORS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS.

IV. BRIEF PROCEDURAL HISTORY AND RELEVANT FACTS

This is Appellant Kenya Splond's ("Appellant") direct appeal after the sentencing by the District Court. AA 830-844. Appellant was charged by way of criminal indictment on March 5th, 2014. AA 3. Initially, Appellant was represented by Frank Kocka. AA 277-282. After prior counsel Kocka withdrew, it appears that the Clark County Public Defender's Office was appointed for a short time until a conflict was confirmed. AA 280. Current counsel was appointed on April 22nd, 2015 due to a conflict. AA 282-283. After multiple trial settings, trial commenced on March 15th, 2016. AA 1-7.

a. Offer That Was Never Conveyed

Initially, Appellant was represented by Frank Kocka for purposes of negotiating the case. AA 277. Prior counsel Kocka indicated that he was having difficulty getting an offer from the State's Deputies. AA 277. Prior counsel Kocka represented Appellant until April 20th, 2015, when he withdrew because he had not been retained for trial purposes. AA 279-281. At some point before the April 20th, 2015 hearing, prior counsel Kocka indicated that he had received an offer, but "...the offer is not acceptable to my client." AA 280. There was no indication on the record, at that time, what the offer entailed. AA 279-281. Appellant was not canvassed by the Court to confirm that counsel conveyed the offer, whatever it was, or that Appellant did not wish to accept the offer. AA 279-281. The Appellant contended on the first day of jury trial, on March 15th, 2016,

that he had never received the offer from prior counsel Kocka. AA 323. At that time, the State put the previous offer on the record, which was for Appellant to "plead guilty to two robberies with use of a deadly weapon, full right to argue including for consecutive time." AA 323. After the Court confirmed that Appellant contended he did not get the offer earlier than that day at trial, the State made it clear that the offer was revoked while Mr. Kocka was counsel. AA 323-324. At that point, it was confirmed by the State that no offer had been conveyed to Appellant's current counsel. AA 325.

b. Allowing Witness to Testify About Uncharged Crimes and The Loaded Status of Handgun

Jeffrey Haberman was called by the State to testify about the circumstances surrounding his stolen firearm and in so doing introduced evidence of another crime. AA 538-548. Appellant was not charged with the burglary or home invasion associated with Mr. Haberman's stolen firearm, but a limiting instruction was given to the jury. AA 543-544. However, the State also used Mr. Haberman to opine as to the status of the gun at the time of a picture for which Mr. Haberman had no underlying knowledge (State's Exhibit 28). AA 544-546. The Appellant properly objected at the time of the admission. AA 544. On Cross-examination, Mr. Haberman admitted that he had no knowledge the photograph (State's Exhibit

28), including when it was taken or of any surrounding circumstances of the photograph. AA 544-546.

c. Allowing Evidence From The Stop of Appellant.

As charged by the State, on January 22nd, 2014, the Cricket Wireless store located at 4343 N. Rancho Drive was burgled by a customer asking for a cell phone battery. AA 152. The perpetrator pointed a black firearm at Sam Echeverria and demanded money, which they received in the amount of $386.71. AA 152. On January 28th, 2014, the Metro PCS store located at 6663 Smoke Ranch Road was burgled by a customer asking to buy a cell phone. AA 152. The perpetrator used to gun to demand money from Graciela Angeles, which they received in the amount of $300.00. AA 152. On February 2nd, 2014, the Star Mart Convenience Store located at 5001 N. Rainbow Boulevard was burgled by a customer buying two packs of Newport 100s cigarettes and a pack of Wrigley's chewing gum. AA 152. The perpetrator pointed a gun at Brittany Slathar and demanded money, which Ms. Slathar cleverly denied him by saying that she couldn't open the cash drawer without making a sale. AA 152. While not pleased, the perpetrator ultimately escaped with two packs of cigarettes and chewing gum. AA 152.

After the Star Mart Convenience Store robbery, police were notified of the incident via an alarm company and the cash register silent alarm. AA 152. Slather called 911 and indicated that the male who robbed her had left on Rainbow Blvd.

towards "the bar next door" on foot. AA 152. There were no indications of accomplices or vehicle involvement. AA 153, 157. Based on this information, Officers observed a silver 4-door sedan leaving the area and conducted a traffic stop "for extreme damage to the rear of the vehicle and for leaving the area of the Robbery." AA 158-159. No citation appears to have been issued for the vehicle extreme damage. AA 160. Upon initiation of the traffic stop, officers observed someone under a sheet in the back of the car and ultimately took Appellant into custody. AA 158-159. During the arrest of Appellant, the cigarettes and gum associated with the Star Mart robbery were located, as well as a firearm. AA 158-159. The police never sought or received a search warrant.

d. PSI Used by the Court was Flawed and Inflammtory

After the jury verdict, during the course of preparing for sentencing, Appellant's PSI became an issue. As part of the sentencing process a Presentence Investigation Report (hereinafter "PSI) was prepared for Appellant on May 9th, 2016 (PSI #1) by the Division of Parole and Probation. *See* May 9th, 2016 PSI. A subsequent PSI was created on June 30th, 2016 (PSI #2). See June 30th, 2016 PSI. The differences in PSI #1 and PSI #2 included:

- PSI #1 recommended Count 2 be served concurrent with Count 1. PSI #2 recommended consecutive time.

- PSI #1 recommended Count 7 be served concurrent with Count 6. PSI #2 recommended consecutive time.
- PSI #1 recommended Count 8 be served concurrent with Count 7. PSI #2 recommended consecutive time.
- PSI #1 has a longer (and apparently inaccurate) criminal history, that is corrected in PSI #2.

There were no additional charges that were filed against Appellant from the writing of PSI #1 to PSI #2. There were no new facts that came to light and no new information was available. However, Appellant did object to the contents of PSI #1, both in terms of prior criminal history and gang affiliation, successfully removing some of that information. *See generally* PSI #1 and PSI #2. Appellant sent a subpoena to P&P requesting, in essence, to answer the question "Why the increased recommended penalty?" P&P responded to the request for documents by sending only the PSI scoring sheet, which had been created on October 27th, 2016 (neither the date of PSI #1 or #2), with no additional information supporting the changed sentencing recommendation from PSI #1 to PSI #2. AA 214-217. Moreover, PSI #2 appeared to acknowledge that Appellant's gang affiliation was incorrect in PSI #1, but it was still included:

> "Mr. Splond denied any gang involvement; however, according to information obtained from the Las Vegas Metropolitan Police Department, the defendant is a

member of the "Rollin 60s Crips". A **booking photograph of Mr. Splond at time of classification as a gang member is the defendant brother."**

PSI #2, at 3 (emphasis added).

V. LEGAL ARGUMENT

A. THE DISTRICT COURT ERRED BY NOT REINSTITUTING THE OFFER THAT WAS NEVER CONVEYED TO APPELLANT.

"[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." Missouri v. Frye, 566 U.S. 133, 145, 132 S.Ct. 1399, 1408, 185 L.Ed.2d 379 (2012). "When defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires." Id. As the Supreme Court held in Lafler v. Cooper, the Sixth Amendment is not restricted to ensuring only the right to a fair trial, but is applicable to all critical stages of criminal proceedings where the right to effective assistance of counsel is implicated. 566 U.S. 156, 165, 132 S. Ct. 1376, 1385, 182 L. Ed. 2d 398 (2012) As the Court noted "[t]he constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice." Id (change added).

Here, Appellant's Counsel appears to have failed to relay an offer, either effectively or at all. AA 323. The District Court failed to compel the State re-offer the plea deal to Appellant. AA 323-325. The record indicates that once the issue was raised with the Court, the State made it clear that no negotiation was still available to be taken and thus the defendant could not avail himself of the deal. Id.

As the United States Supreme Court noted in Lafler, to argue that a trial wipes away any taint of unconstitutional errors "ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials." 566 U.S. at 169-70 (*citing* Frye, 566 U.S. at 1386). Where, as here, an error that affects a plea deal "leading to a trial and a more severe sentence, there is the question of what constitutes an appropriate remedy." Cf. Id. at 170. "Sixth Amendment remedies should be 'tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." Id., 1388 (*citing* United States v. Morrison, 449 U.S. 361, 364, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981)). The remedy "must 'neutralize the taint' of a constitutional violation [citation] while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution." Id., 170 (citations omitted).

Here, there is no theoretical prejudice, as but for the alleged error, the Appellant would have acted to secure a lesser sentence. *See* Wyeth v. Rowatt, 126 Nev. 446, 466, 244 P.3d 765, 779 (2010) ("To establish that an error is prejudicial, the movant must show that the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached."). Therefore, to remove the taint of the constitutional violation, Appellant's conviction should be reversed. Cf. Laflar, 566 U.S. at 175.

B. THE DISTRICT COURT ERRED BY ALLOWING THE TESTIMONY OF HABERMAN FOR THE GUN AND UNCHARGED CRIME.

The Fourteenth Amendment to the United States Constitution provides that, "No State shall ... deprive any person of life, liberty, or property, without due process of law ...." U.S. Const. amend XIV. NRS 48.045(2) also prohibits the use of evidence of "other crimes, wrongs or acts ... to prove the character of a person in order to show that the person acted in conformity therewith." Such evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Id. However, "[T]he use of uncharged bad act evidence to convict a defendant is heavily disfavored in our criminal justice system because bad acts are often irrelevant and prejudicial and force the accused to defend against vague and unsubstantiated charges." Tavares v. State, 117 Nev. 725, 730, 30 P.3d 1128, 1131

(2001) (*citing* Walker v. State, 116 Nev. 442, 445, 997 P.2d 803, 806 (2000). Thus, "'[a] presumption of inadmissibility attaches to all prior bad act evidence.'" Bigpond v. State, 128 Nev. Adv. Rep. 10, 270 P.3d 1244, 1249 (2012) (*quoting* Rosky v. State, 121 Nev. 184, 195, 111 P.3d 690, 697 (2005)). "[T]o overcome the presumption of inadmissibility, the prosecutor must request a hearing and establish that: (1) the prior bad act is relevant to the crime charged and for a purpose other than proving the defendant's propensity, (2) the act is proven by clear and convincing evidence, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." Newman v. State, 129 Nev. Adv. Rep. 24, 298 P.3d 1171, 1178 (2013) (*quoting* Bigpond, 128 Nev. Adv. Rep. 10, 270 P.3d at 1250). Additionally, the district court "should give the jury a specific instruction explaining the purposes for which the evidence is admitted immediately prior to its admission and should give a general instruction at the end of the trial reminding the jurors that certain evidence may be used only for limited purposes." Newman, 129 Nev. Adv. Rep. 24, 298 P.3d at 1178 (*quoting* Tavares, 117 Nev. at 733, 30 P.3d at 1133). "[I]mproper reference to criminal history is a violation of due process since it affects the presumption of innocence; the reviewing court therefore must determine whether the error was harmless beyond a reasonable doubt." Manning v. Warden, 99 Nev. 82, 87, 659 P.2d 847, 850 (1983) (*citing* Chapman v. California, 386 U.S. 18, 24 (1967). The Nevada Supreme Court

has determined that "'the test for determining a reference to criminal history is whether a juror could reasonably infer from the facts presented that the accused had engaged in prior criminal activity.'" Homick v. State, 108 Nev. 127, 140, 825 P.2d 600, 608 (1992) (*quoting* Manning, 99 Nev. at 86, 659 P.2d at 850).

Jeffrey Haberman was called by the State to his firearm was stolen and that the Appellant did not have permission to have it, but elicited testimony beyond that implicating another uncharged crime. AA 538-548. Appellant was not charged with the burglary or home invasion associated with Mr. Haberman's stolen firearm, but a limiting instruction was given to the jury. AA 551-552. However, the State also used Mr. Haberman to opine as to the status of the gun at the time of a picture for which Mr. Haberman had no underlying knowledge (State's Exhibit 28). AA 543-544. Thus, Haberman testified that Appellant committed the act of home invasion and that the weapon was loaded in a photograph when he had no knowledge to so testify. Appellant was never charged with home invasion or any similar crime and Haberman's testimony amounted to an uncharged bad act. As indicated, the State failed to place Appellant on notice, but specifically sought the harmful testimony from Haberman. Additionally, the State failed to request a hearing at which it sought to overcome the presumption of inadmissibility. Therefore, the State committed misconduct and deprived Appellant of his right to due process.

Additionally, the State used Mr. Haberman to admit photographs for which he had no foundational knowledge and only served to inflame the jury by increasing the dangerousness of the offense (by the use of a loaded weapon). The evidence was a trifecta of being irrelevant and improperly admitted and prejudicial. NRS 48.015 provides "..."relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015 (2018). NRS 52.015 requires that "...authentication or identification as a condition precedent to admissibility is satisfied by evidence or other showing sufficient to support a finding that the matter in question is what its proponent claims." Here, the fact that the gun may have been loaded at the time of the photograph provided no relevance to the charges at issue. Moreover, Mr. Haberman was clearly unable to provide the authentication required by NRS 52.015. Finally, the admission of the photo was prejudicial to Appellant for the reasons stated above and only served to inflame the jury concerning the dangerousness of Appellant. While autopsy photograph admission is generally upheld absent an abuse of discretion[1], this case is more analogous to unauthenticated video. This Court will generally "review a district court's decision to admit or exclude evidence for an abuse of discretion."

[1] *See, e.g.*, Browne v. State, 113 Nev. 305, 314, 933 P.2d 187, 192, *cert. denied*, 522 U.S. 877, 118 S.Ct. 198, 139 L.Ed.2d 136 (1997); Wesley v. State, 112 Nev. 503, 512–13, 916 P.2d 793, 800 (1996), *cert. denied*, 520 U.S. 1126, 117 S.Ct. 1268, 137 L.Ed.2d 346 (1997).

Mclellan v. State, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). Here, the district court abused its discretion because the photographs were not properly authenticated prior to their admission. *See* NRS 52.015(1); *see also* Commonwealth v. Koch, 39 A.3d 996, 1005 (Pa.Super.Ct.2011). Additionally, the district court's error was not harmless because the photograph did not "contained factual information or references unique to the parties involved," Koch, 39 A.3d at 1004; *see also* Rodriguez v. State, 128 Nev. ——, ——, 273 P.3d 845, 849 (2012) (*citing approvingly to Koch*), thus provided insufficient evidence to establish the identity of the author and support their authenticity, *see* State v. Thompson, 777 N.W.2d 617, 625–26 (N.D.2010). *See, e.g.*, Zana v. State, 125 Nev. 541, 545 n. 3, 216 P.3d 244, 247 n. 3 (2009) (reviewing the erroneous admission of evidence for harmless error). Therefore, Appellant is entitled to relief on this ground.

C. THE DISTRICT COURT ERRED BY FAILING TO SUPPRESS EVIDENCE FROM A IMPROPER STOP.

Even investigatory stops by police must be based on something related to what they are seeking. In the case at bar, there is no indication of any facts, other than being in the vicinity of the robbery that gave police any basis for an investigatory stop. During the hearing conducted by the District Court on suppression, the officer could not articulate any specific facts to justify the initial traffic stop. AA 395-426.

This court will uphold the district court's decision regarding suppression unless this court is "left with the definite and firm conviction that a mistake has been committed." United States v. Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948), *quoted in* State v. Harnisch, 113 Nev. 214, 219, 931 P.2d 1359, 1363 (1997). " '[F]indings of fact in a suppression hearing will not be disturbed on appeal if supported by substantial evidence.' " Harnisch, 113 Nev. at 219, 931 P.2d at 1363 (*quoting* State v. Miller, 110 Nev. 690, 694, 877 P.2d 1044, 1047 (1994)). "Substantial evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion." Bopp v. Lino, 110 Nev. 1246, 1249, 885 P.2d 559, 561 (1994).

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated," and that "no Warrants shall issue, but upon probable cause." Article I, Section 18 of the Nevada Constitution similarly provides, "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause .... " Under these provisions of our federal and state constitutions, warrantless searches "are per se unreasonable ... subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 19

L.Ed.2d 576 (1967); Hughes v. State, 116 Nev. 975, 979, 12 P.3d 948, 951 (2000). One such exception is the "automobile exception." However, even an automobile stop requires probable cause. *See generally* State v. Lloyd, 129 Nev. Adv. Op. 79, 3 312 P.3d 467 (2013).

While probable cause could be found if the suspect was" ... reasonably within the area of the robbed office and met a reasonable description of the robber", the driver of the vehicle was female and there were no indications of an accomplice or a vehicle. Johnson v. State, 86 Nev. 52, 54, 464 P.2d 465, 466 (1970), *see also* Franklin v. State, 96 Nev. 417 (1980). Conversely, not even reasonable suspicion is found for situations like this, where for instance, a person standing in a "high drug area" is conversing with others and doesn't wish to speak with police. An individual's presence in an area of expected criminal activity, by itself, is not enough to support a reasonable, particularized suspicion that the person is committing a crime. Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979); *see also* Illinois v. Wardlow, 528 U.S. 119, 124, 120 S. Ct. 673, 676, 145 L. Ed. 2d 570 (2000).

As a general matter, if the state obtains evidence in violation of a suspect's constitutional rights, the evidence must be excluded from trial. *See* Mapp v. Ohio, 367 U.S. 643 (1961); State v. Carter, 322 N.C. 709, 370 S.E.2d 553 (1988). While not automatic, the exclusionary rule operates as a judicially created remedy

designed to safeguard against future violations Fourth Amendment rights through the rule's general deterrent effect. *See* U.S. v. Leon, 468 U.S. 897; U.S. v. Calandra, 414 U.S. 338; Arizona v. Evans, 514 U.S. 1 (1995). Here the conduct complained of was by the arresting officer himself and the application of the exclusionary rule is strongest under any analysis. Moreover, the Officer's subjective intentions are not in question, but his objective reasons for stopping the vehicle. As he provided no objective reasons for stopping the Appellant's vehicle, except for a desire to search vehicles close to the robbery, the Court's ruling was not supported by substantial evidence and should be overturned. If the stop was improper, then the evidence seized as a result of the stop should have been suppressed. Accordingly, Appellant should be granted a new trial using only evidence lawfully obtained.

D. THE COURT RELIED ON A FLAWED PRESENTENCING INVESTIGATION REPORT IN SENTENCING APPELLANT.

A sentencing judge may consider a "... wide, largely unlimited variety of information to insure that the punishment fits not only the crime, but also the individual defendant." Martinez v. State, 114 Nev. 735, 738 (Nev. 1998). On the other hand, the Court is not permitted to consider impalpable and highly suspect evidence. Goodson v. State, 98 Nev. 493, 495-96, 654 P.2d 1006, 1007(1982). Material information is "unreliable" if it "lacks 'some minimal indicium of

reliability beyond mere allegation." United States v. Ibarra, 737 F.2d 825, 827 (9th Cir. 1984) *quoting* United States v. Baylin, 696 F.2d 1030, 1040 (3rd Cir. 1982). Moreover, while a district court has wide latitude in considering evidence, "...the district court must refrain from punishing a defendant for prior uncharged crimes." Denson v. State, 112 Nev. 489, 494 (Nev. 1996); *citing* Sheriff v. Morfin, 107 Nev. 557, 561, 816 P.2d 453, 455 (1991); *see also* Riker v. State, 111 Nev. 1316, 1326-27, 905 P.2d 706, 712-13 (1995).

Under the Stockmeier opinion, a defendant must object to his PSI at the time of sentencing. Stockmeier v. State, Bd. of Parole Comm'rs, 127 Nev. 243, 249, 255 P.3d 209, 213 (2011). Stockmeier requires that the defendant not only object to disputed factual statements that affect his sentence, but he must also object to "...any significant inaccuracy [which] could follow a defendant into the prison system and be used to determine his classification, placement in certain programs, and eligibility for parole..." Stockmeier, 255 P.3d 209, 214 (Nev. 2011). Stockmeier concludes that "...thus, the defendant must promptly seek to correct any alleged inaccuracies to prevent the Department of Corrections from relying on a PSI that could not later be changed." Stockmeier, at 214 (Nev. 2011); *See* NRS 176.159(1); *see also* United States Dept. of Justice v. Julian, 486 U.S. 1, 5–6, 108 S.Ct. 1606, 100 L.Ed.2d 1 (1988). However, the Stockmeier opinion also makes it clear that the Division of Parole and Probation has statutory duties in regards to the

defendant's PSI, demarked by the citation "*See generally* NRS 176.133–.159; NRS 213.1071–.1078; NRS 213.1092–.10988." Stockmeier, at 213 (Nev. 2011). Contained within the Nevada Supreme Court's citations in Stockmeier is the requirement that:

> "The Chief Parole and Probation Officer shall adopt by regulation standards to assist him or her in formulating a recommendation regarding the granting of probation or the revocation of parole or probation to a convicted person who is otherwise eligible for or on probation or parole. **The standards must be based upon objective criteria for determining the person's probability of success on parole or probation.**"

NRS 213.10988 (2018) (emphasis added). This statutory duty is reflected in NAC 213.590 and in the Probation Success Probability form adopted by the Division of Parole and probation. *See* NAC 213.590 (2018). The numerical scoring from the Probation Success Probability form is then used on the Sentence Recommendation Selection Scale ("SRSS") form, resulting in a term of incarceration or recommendation of probation. *See* NAC 213.600. While the form itself provides for scoring deviation, that deviation must be explained from results reached by using the **objective** standards provided for under NAC 213.590.

Because Appellant's sentence was increased *after* mistaken or highly suspect information was removed he was denied due process under the Fourteenth Amendment. Moreover, the Division of Parole and Probation had no records

supporting the change, effectively denying a defendant's counsel access to the Divisions scoring documents and supporting documentation, violating Appellant's Sixth Amendment right to effective assistance of counsel at sentencing. No materials were forthcoming from P&P to explain the increased sentence recommended by P&P despite the decrease in dangerousness of Appellant's prior erroneous criminal background. As such, P&P's recommendations were inflammatory and arbitrary.

"The sentencing judge has wide discretion in imposing a sentence, and that determination will not be overruled absent a showing of abuse of discretion." Norwood v. State, 112 Nev. 438, 440, 915 P.2d 277, 278 (1996) (*citing* Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). "A sentencing court is privileged to consider facts and circumstances which would clearly not be admissible at trial." Norwood,112 Nev. at 440, 915 P.2d at 278 (1996) (*citing* Silks v. State, 92 Nev. 91, 93–94, 545 P.2d 1159, 1161 (1976)). "Absent an abuse of discretion, the district court's determination will not be disturbed on appeal." Randell v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993) (*citing* Deveroux v. State, 96 Nev. 388, 610 P.2d 722 (1980). Where an arbitrary or prejudicial factors remains, the sentence must be reversed. Hollaway v. State, 116 Nev. 732, 742-43, 6 P.3d 987, 994 (2000).

This Court has held that the prosecutor should refrain from making inflammatory arguments during sentencing. Id., at 742-43, 6 P.3d at 994 (*citing* Quillen v. State, 112 Nev. 1369, 1382, 929 P.2d 893, 901 (1996)). It is submitted to this Court that if the State is so constrained, another arm of the State, like Parole and Probation, cannot make inflammatory or impalpable statements. Argument must made by facts and inferences supported by the record. Thomas, 120 Nev. at 48, 83 P.3d at 825 (*citing* Williams v. State, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987)).

At sentencing, the State, through P&P, made numerous inflammatory arguments and acknowledged that it was using possibly erroneous facts to recommend consecutive sentences for Appellant. AA 840-841, 836-837. Moreover, P&P previously acknowledged that there was no explainable basis for the differences in the PSI recommendations and certainly nothing that comported with its statutory duties. AA 825-827.

While such statements, as contained in P&P's report, play well to inflame the senses, the State should not make statements which encourage the imposing of "a sentence under the influence of passion[.]" Id. at 743, 6 P.3d at 994 (citing Quillen, *supra*).

"The sentencing judge has wide discretion in imposing a sentence, and that determination will not be overruled absent a showing of abuse of discretion."

Norwood v. State, 112 Nev. 438, 440, 915 P.2d 277, 278 (1996) (*citing* Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). However, the State's misconduct so infected the proceedings, Appellant's due process rights were violated. The Court's arbitrary imposition of the sentence deprived Appellant of his constitutional right to a fair trial under the Fourteenth Amendment. See Duckett v. State, 104 Nev. 6, 10, 752 P.2d 752, 754 (1988) (*citing* Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987), *modified on other grounds by,* 833 F.2d 250 (11th Cir. 1987)). Therefore, this Court should remand to the district court for resentencing.

E. THE CUMULATIVE EFFECT OF ERRORS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS.

When reviewing for cumulative error, this Court determines whether "[t]he cumulative effect of error may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." Valdez v. State, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008) (*citing* Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). This Court considers "(1) whether the issue of guilt was close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Id., 196 P.3d at 1195 (*citing* Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000). "We have stated that if the cumulative effect of

errors committed at trial denies the appellant his right to a fair trial, this court will reverse the conviction." DeChant v. State, 116 Nev. 918, 927, 10 P.3d 108, 114 (2000) (*citing* Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985)).

The magnitude of error committed by the District Court in sentencing Appellant, as well as the other improprieties in the record, amounted to violations of Appellant's constitutional rights. The cumulative effect of these errors amounted to a violation of Appellant's constitutional right to a fair trial, and his right to be free from cruel and unusual punishment by the imposition of a sentence that was not imposed by passion or prejudice.

VI. CONCLUSION

As argued above, Appellant's conviction and sentence must be overturned, and Appellant sent back to the district court for a new trial or in the alternative a new sentencing.

LEGAL RESOURCE GROUP, LLC

T. Augustus Claus
Nevada Bar No. 10004
205 N. Stephanie St., Suite D221
Henderson, NV 89074
Telephone: (702) 463-4900
Fax: (702) 463-4800
Attorney for Appellant

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 Microsoft Word 2010 in font size 14 and a type style of Times New Roman.

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 does not exceed 30 pages or 15,000 words and 1300 lines of text, in that the brief contains approximately 6640 words and less than 550 lines of text.

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 on this 7th day of March, 2018.

LEGAL RESOURCE GROUP, LLC

T. AUGUSTUS CLAUS, ESQ.
Nevada Bar No. 10004
Legal Resource Group, LLC
205 N. Stephanie St., Suite D221
Henderson, NV 89074
702-463-4900
Attorney for Appellant

CERTIFICATE OF SERVICE

Pursuant to NRAP 4(b) and NRAP 25, I hereby certify that I am an employee of **LEGAL RESOURCE GROUP, LLC.**, and that on the 5th day of March, 2018, I caused the foregoing **Opening Brief for Appellant Kenya Splond** to be served as follows:

[X] by placing a true and correct copy of the same to be deposited for mailing in the U.S. Mail at Las Vegas, Nevada, enclosed in a sealed envelope upon which first class postage was fully prepaid; and/or

[ ] pursuant to EDCR 7.26, by sending it via facsimile; and/or

[ ] by hand delivery via runner

to the attorneys listed below:

DISTRICT ATTORNEY'S OFFICE
Clark County District Attorney
200 South Lewis Avenue
Las Vegas, Nevada 89101

ADAM PAUL LAXALT
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701

An Employee of the Legal Resource Group, LLC.