SUPREME COURT OF THE STATE OF NEVADA

MICHAEL LUIS COTA Appellant, vs. STATE OF NEVADA, Respondent.	)	DOCKET NOS. 77414 77415

APPELLANT'S OPENING BRIEF
Ninth Judicial District Court
The Honorable Thomas Gregory

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NRAP 26.1 DISCLOSURE

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:

Appellant Michael Cota is an individual person with no affiliations to any corporations or publicly held company.

Attorney John Malone is the principal of the law office of John Malone and appears on behalf of appellant.

JURISDICTIONAL STATEMENT

These consolidated appeals are from judgments of conviction entered pursuant to guilty pleas for grand larceny of a firearm (NRS 205.226 and 195.020, category B) and battery by a prisoner in custody (NRS 200.481(f), category B). Appellant was sentenced to 16 to 72 months and 24 to 72 months, consecutive. Appellant appeals. Jurisdiction is proper pursuant to NRS 177.015.

ROUTING STATEMENT

This appeal is not presumptively assigned to the court of appeals because it is a postconviction appeal that involves convictions for category B felonies. NRAP 17(b)(2)(A). Appellant submits, however, that assignment to the court of appeals would be satisfactory for resolution.

STATEMENT OF THE ISSUES

The district court committed reversible error at sentencing by admitting and considering Cota's entire juvenile record, including suspect and impalpable evidence.

A. The district attorney violated the law governing confidentiality of juvenile records and therefore should have been precluded from submitting the exhibits to the district court, and the district court abused its discretion by admitting them.

B. This court's line of case authority regarding consideration of juvenile records at sentencing must be reconsidered in light of the statutory provisions.

C. The evidence therefore relied on was highly suspect and impalpable.

STATEMENT OF FACTS

Michael Cota was 19 years old at the time of the instant offenses. *Presentence Investigation Reports, p.2*.[1] He had had one adult misdemeanor conviction. Cota and Aiden Gordon were identified as suspects in the burglary of a home from which they allegedly took an AR-15 rifle, 2 Glock 22.40 caliber magazines, and three knives. *PSI, August 21, 2018, pp.4-6*. During their

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[1]Appellant will file contemporaneously with this brief a motion for transmission of the presentence investigation reports pursuant to NRS 176.156.

investigation, police saw a photo on Cota's Facebook page with Aiden Gordon holding an AR-15 rifle. When the police interviewed Gordon, he told them he and Cota had gotten into the house through a window, taken the items, and then sought Robert Brown to help them sell the gun. *PSI August 21, 2018. p.5*. Cota confirmed that he had driven to the house with Gordon but said he waited at the door while Gordon got the items. *Id.*

After his arrest on the burglary, while he was housed at the jail, Cota complained of an injured ankle and asked to go to the hospital to have it checked. When told a jail nurse would check it instead, he got angry and belligerent. *PSI August 22, 2018, p.4*. He was therefore moved to holding cell #10 for security. He continued to act out, and deputies decided to restrain him in a chair to prevent him from injuring himself or others. *Id*. He resisted and attacked one of the deputies, punching him in the head. Deputies tased Cota and put him in the chair. He continued to yell and issue threats. *Id.*

Pursuant to negotiations, Cota pleaded guilty to larceny of a firearm and agreed to testify against Robert Brown. *Appendix 9-14*. He then pleaded guilty to battery by a prisoner. *Appendix 20-24*.

The Division of Parole and Probation prepared the presentence investigation reports, listed the one adult misdemeanor conviction, reported the circumstances of the offenses, noted that Cota had been on juvenile probation from 2010 to 2015

and was transferred to Nevada Youth Parole, and recommended consecutive terms of 16 to 72 months for the larceny and 24 to 72 months for the battery. *PSI August 21, 2018, p.3*. The Division stated that "[m]ost of the defendant's [juvenile] charges were minor but primarily dealt with not following rules at school and instigating fights." *Id*. The Division then listed the charges: two for battery, one provoking assault, one probation violation, and one destruction of property. *Id*.

Prior to sentencing, on August 23, 2018, the State filed a sentencing memorandum intended to demonstrate to the court why Cota should not be granted probation because he is such a terrible person. *Appendix 29-188*. The State attached Cota's complete juvenile record. – with no court order (see NRS 62H.030(2)), no indication that it had been ordered released by the juvenile court, and no attempt to seal it from public disclosure.[2]

The exhibits included reports about Cota from elementary school incidents (Exhibits 1-6), summaries of reports from Willow Springs (Exhibits 7-9), what appears to be a psychological report from a youth center in Utah that suddenly and without verification and support makes references to allegations of sexual conduct

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[2] The district attorney's motion to seal the sentencing memo (*App*endix *189*) was filed only after defense counsel objected orally to the materials being filed without any protections.

that appear nowhere else in the documents (Exhibit 8), notes from juvenile probation officers, several Douglas County Sheriff reports labeled "sexual assault" which actually describe simple batteries between boys – though the last is in fact the report on Mr. Cota's battery on a prisoner charge from the Douglas County jail (Exhibits 10, 12, 16), and other utterly mistaken irrelevant and suspect material.

Cota moved to strike the exhibits on the grounds that disclosure of the documents violates NRS 62H.010 *et seq.*, and that they constitute suspect and impalpable evidence.[3] *Id.* The district court held a hearing, heard argument, and denied the motion to strike. This was error.

ARGUMENT

The district court committed reversible error at sentencing by admitting and considering Cota's entire juvenile record, including suspect and impalpable evidence.

A. The district attorney violated the law governing confidentiality of juvenile records and therefore should have been precluded from submitting the exhibits to the district court, and the district court abused its discretion by admitting them.

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[3] The motion to strike was filed under seal (*Appendix 192*), and the State's sentencing memorandum was also ultimately sealed. The unsealed sentencing memorandum that the State initially filed is included in the appendix at pp. 29-188. Mr. Cota is filing contemporaneously a motion for the district court clerk to transmit the sealed motion and memorandum separately pursuant to NRAP 10(b) and SRCR 7.

Juvenile records are presumed to be kept confidential.[4] *See generally* NRS chapter 62H. "Juvenile delinquency records have historically enjoyed general confidentiality in this state." *State v, Eighth Judicial Dist. Ct*., 129 Nev. ___, ___, 306 P.3d 369, 378 (2013). The unlimited admission at sentencing of Michael Cota's entire juvenile court record and personal history violated both the provisions of NRS chapter 62H, which provides that juvenile records are presumed confidential, and this court's jurisprudence regarding the principles of juvenile justice and prohibiting the use of suspect and highly impalpable evidence. *See, e.g., Seven Minors, Matter of*, 99 Nev. 427, 664 P.2d 947 (1983) *disapproved on other grounds as stated in In re William S.*, 122 Nev. 432, 442 n. 23, 132 P.3d 1015, 1021 n. 23 (2006) (recognizing the historical philosophy of the juvenile justice system as "a child-centered institution based on theories taken from the positive school of criminology and especially on the deterministic principle that youthful law violators are not morally or criminally responsible for their behavior but, rather, are victims of their environment--an environment which can be ameliorated

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[4] Because Michael Cota has not yet reached the age of 21, his records have not yet been sealed pursuant to statute. NRS 62H.140 ("Except as otherwise provided in NRS 62H.130 and 62H.150, when a child reaches 21 years of age, all records relating to the child must be sealed automatically.").

and modified much in the way that a physician modifies the milieu interieur of a sick patient.").

"Juvenile justice information is confidential and may only be released in accordance with the provisions of this section or as expressly authorized by other federal or state law." NRS 62H.025(1). The only situations in which a court order is not required are listed in NRS 62H.030:

> (a) Records of traffic violations which are being forwarded to the Department of Motor Vehicles;
> (b) Records which have not been sealed and which are required by the Division of Parole and Probation for preparation of presentence investigations and reports pursuant to NRS 176.135 or general investigations and reports pursuant to NRS 176.151;
> (c) Records which have not been sealed and which are to be used, pursuant to chapter 179D of NRS, by:
> (1) The Central Repository;
> (2) The Division of Parole and Probation; or
> (3) A person who is conducting an assessment of the risk of recidivism of an adult or juvenile sex offender;
> (d) Information maintained in the standardized system established pursuant to NRS 62H.200; and
> (e) Information that must be collected by the Division of Child and Family Services pursuant to NRS 62H.220.

Nothing in the statute suggests that the district attorney may have unfettered access to all juvenile records – even for purposes of sentencing - without a court order or without court oversight.

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NRS 62H.030 governs the maintenance and inspection of juvenile records:

> 1. The juvenile court shall make and keep records of all cases brought before the juvenile court.
> 2. Except as otherwise provided in this section and NRS 217.110, records of any case brought before the juvenile court may be opened to inspection only by court order to persons who have a legitimate interest in the records.

(Emphasis added.)

The statutory scheme therefore expressly anticipates that juvenile information will be made available to appropriate entities by the juvenile court in accordance with the statutory provisions – not pulled out of an office file cabinet, randomly attached to a sentencing memo, and publicly filed as if it were a bill for restitution or a victim impact statement. *See, e.g.*, *Burnside v. State*, 131 Nev., Adv. Op. 40, 352 P.3d 627, 648 (2015). The statutory expectation is that the juvenile court is the gatekeeper and will review the requested material and determine what can be appropriately released for a given purpose and what cannot. This did not happen here. The State did not obtain a court-ordered release of the exhibits, the initial filing was not under seal, no notice was given to defense counsel, no hearing was held, no opportunity was provided to present any contrary or even limiting argument to the juvenile court.

Defense counsel has no access to the records, but apparently, the district attorney's office has the records in its possession because it prosecuted Mr. Cota as

a child. It appears that the district attorney simply went to the file cabinet in the office and pulled out whatever documents it wanted to choose and attached them to the sentencing memo.

Not only were the exhibits filed in the district court without having been sealed, the sentencing memo itself lists detailed descriptions of what is in the exhibits – in effect, just reading the memo reveals all the information intended to be confidential. Mr. Cota acknowledges that the State did file a motion to file the documents under seal. However, the State in fact initially filed the entire memorandum package unsealed. *Appendix 22-188*. Any person could have walked into the courthouse, requested the file, and read everything in Mr. Cota's through in his entire history. The file could also have been copied by anyone with no controls or court oversight. The documents were effectively disclosed.

Finally, it appears the prosecutor committed a crime:

> Except as otherwise provided in this subsection, any person who is provided with juvenile justice information pursuant to this section and who further disseminates the information or makes the information public is guilty of a gross misdemeanor. This subsection does not apply to:
>
> (a) A district attorney who uses the information solely for the purpose of <u>initiating</u> legal proceedings

NRS 62H.025(5) (emphasis added). The State disseminated the information. The district attorney did not initiate legal proceedings using Cota's juvenile records; he was merely finalizing the proceedings. The documents were prepared

for review by a juvenile system that is presumed to be confidential and is geared toward helping the child. The courtrooms are historically closed, the records are closed, the public is generally not allowed in, the press is not allowed in[5], the names of juveniles are not released. The exhibits to the sentencing memo were prepared under the aegis of a system that was ostensibly helping Mr. Cota – not simply trying to imprison him.

B. This court's line of case authority regarding consideration of juvenile records at sentencing must be reconsidered in light of the statutory provisions.

Certainly, this court has for years reaffirmed that a sentencing court may consider a broad spectrum of evidence, including that which would not be otherwise admissible at trial, and including "juvenile records." *See Silks v. State,* 92 Nev. 91, 545 P.2d 1159 (1976); *Thomas v. State*, 88 Nev. 382, 498 P.2d 1314 (1972). However, this approval must not be read to vitiate the clear intent of the statutes.

Cota asks this court to reconsider its historically unexamined reliance on *Thomas v. State*, 88 Nev. 382, 498 P.2d 1314 (1972). In *Thomas* the court

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[5] Cota objected as well at the hearing that the courtroom was "packed" and that the failure to provide privacy regarding the arguments further violated Cota's rights.

suggested that once a juvenile is certified as an adult, the juvenile court's certification order gives the sentencing court the right to consider the defendant's juvenile record. The courts have relied on and cited *Thomas* ever since – without any further analysis - for what appears to have become an essentially blanket proposition that the sentencing court has the absolute right to consider anything and everything in a defendant's juvenile record without limitation. Cota submits first, that as discussed above, nothing in *Thomas* gives the district attorney the right to freely access whatever juvenile records it chooses without any court oversight to present at sentencing, the district court attorney is still required to go through the juvenile court for permission; and second, that *Thomas* did not create an unlimited right on the part of the sentencing court to review and consider everything in a juvenile file regardless of its content or reliability.

The *Thomas* case was addressing the authority of the Division of Parole and Probation to include juvenile convictions in preparing the presentence investigation report. The Division's authority is granted by NRS 176.145, which allows the Division to submit "prior criminal convictions" and "unresolved criminal cases involving the defendant." And in this case, those limited convictions and charges are what the Division listed in the PSI. *Thomas* does not provide a detailed analysis of how the statutory protections for juveniles are intended to operate at sentencing.

In this case, the State submitted not only juvenile convictions and charges, but citations from his elementary school dating back to 2009, when Michael Cota was 10 years old. In these reports, Cota was acting out at school and at home. Some reports date back to middle school. Other exhibits include a note directed at "To whom it may concern" at a youth center in Utah, signed by a "CSW Intern" regarding Michael's conduct at Willow Springs; a psychological report from a center in Utah dated 2013, when Cota was 14 (Exhibit 8); an unidentified report from an unidentified place dated 2013 (Exhibit 9); and other documents that lack foundation.

Indeed, if the *Thomas* decision truly means there are no limits on what the court can review,[6] then what is the purpose of the statutes?

C. The evidence therefore relied on was highly suspect and impalpable

This court relies on *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976), for the proposition that the sentencing court can rely on almost anything at sentencing regardless of its legal admissibility unless it is "suspect or highly impalpable." "So long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by

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[6]*Cf. Todd v. State*, 113 Nev. 18, 931 P.2d 721 (1997).

impalpable or highly suspect evidence, this court will refrain from interfering with the sentence imposed." *Id.* But at what point does evidence become suspect or highly impalpable? Apart from the foundational issues with the documents as described above, many of them are mislabeled, include inconsistent materials, and cannot be held to be legally reliable.

For example, Mr. Cota has no explanation for the way the exhibits have been compiled. Exhibit 1 is a Douglas County Sheriff's Incident Report that purports to be from 2009 when Cota kicked a 13-year-old girl. It is for some reason labeled "Sexual Assault." And it somehow is also dated 4/4/18 and 8/10/18 and includes on page 5 of 8 a report of picking Cota up on a felony warrant for failure to appear and a trespass warning from April 4, 2018, on page 6 of 8.

Exhibit 4, dated 2010, is for some reason also labeled "Sexual Assault," although it in fact involves a punching incident between two boys at recess. Exhibit 5 is another "Sexual Assault," from 2011 when 12-year-old Cota and some boys at a park got into a struggle at the playground on the slide. Exhibit 6 is yet again another "Sexual Assault" from 2011 again in fact involving nothing more than disruptions with other kids at school. Cota got suspended.

Exhibit 12 is still another "Sexual Assault" in which the actual issue addressed was an incident between two boys at the skate park with a skateboard. The final "Sexual Assault" report is Exhibit 16, which in fact details the

circumstances of the current conviction for battery by a prisoner offense in the Douglas County jail.

Many of the documents attached to the State's memo are nothing more than raw data without analysis and without explanation. The documents were not prepared for review by untrained readers. Allegations are unsupported hearsay upon hearsay; references are made to concerns or conduct that have no established basis in the rest of the record. Many of the documents are also stale, having been created years ago when Mr. Cota was 10 to 12 years old and acting out in elementary and middle school. They are either irrelevant and/or excessively prejudicial. For example, one entry suggests – without factual analysis or background - that at some age around age 12 to 14 Mr. Cota "admitted to liking" 10-year old girls. *Exhibit 8, p. 2.* This observation first means nothing on its face – but more importantly, it means nothing for purposes of adult sentencing on a larceny or a battery charge. At worst, it could suggest something untoward, though equally irrelevant, and is clearly intended only to prejudice the sentencing court.

Indeed, in the sentencing memo, the State makes much of Mr. Cota's alleged "sexual" interests, and in fact goes so far as to propose that he is expected to become a sex offender in the future. *Appendix, p. 29.* No matter that the evaluation relied on by the State to make those assertions was done over 5 years ago, no matter that the recent evaluation submitted by Mr. Cota's counsel contradicts both the methodology

and the conclusions (*Appendix 214*), the submission of such allegations in a sentencing for larceny and battery on a police deputy is outrageously prejudicial and improper.

CONCLUSION

The Nevada legislature has enacted specific provisions to preserve the confidentiality of juvenile records so that any use of those records in subsequent criminal proceedings is limited. The State and the court violated those provisions and should not have been entitled to rely on the records for any purpose. Due process requires that when a court sentences the defendant, it do so based on valid and reliable evidence. If this court places no restrictions whatsoever on what documents a sentencing court can consider, then the statutes have no meaning. Michael Cota requests this court reverse his sentences, preclude or limit the use of his juvenile records, and remand for a new sentencing hearing before a different judge.

DATED this 4th day of June, 2019.

By: ___/s/ John E. Malone____

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CERTIFICATE OF COMPLIANCE
(NRAP 32)

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 Word's Times New Roman in 14-point font.

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

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.

/ / /

I affirm that this brief does not contain the social security number of any person.

DATED this 4th day of June, 2019.

By: ___/s/ John E. Malone____
John E. Malone
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 4th day of June, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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DATED this 4th day of June, 2019.

SIGNED: /s/ Kelly Atkinson

Employee of the Law Office of John Malone