

SURPEME COURT OF THE STATE OF NEVADA

MICHAEL LUIS COTA,
Appellant,

v.

STATE OF NEVADA,
Respondent.

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ON APPEAL FROM THE NINTH JUDICIAL DISTRICT COURT
Case Nos. 18-CR-0116/0084

RESPONDENT'S ANSWERING BRIEF

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Respondent submits this Answering Brief pursuant to Nevada Rule of Appellate Procedure (NRAP) 28(b).

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to NRS 177.015(3), NRS 177.075, and NRAP 4(b). The Ninth Judicial District Court issued judgments of conviction on October 10, 2018. Appellant Michael Luis Cota (Cota) filed a timely notice of appeal on November 6, 2018.

ISSUES PRESENTED FOR REVIEW

1. Has the appellant demonstrated that the district court relied on highly suspect or impalpable evidence when it issued its sentence?
2. If any of the evidence was highly suspect or impalpable, has the appellant demonstrated that the district court's consideration of it resulted in prejudice?

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On February 13, 2018, Cota and a fourteen-year-old juvenile stole a Spikes Tactical AR-15 rifle, two .40-caliber magazines for a Glock 22 handgun, a single shot pellet rifle, an ammunition can containing various caliber ammunition, and a black "Combat Style" fixed blade knife after breaking into a residence in Gardnerville, Nevada. AA 30. In a recorded interview the juvenile described how the pair drove to the residence in Cota's truck during school hours and climbed through a window before making multiple trips between the home and Cota's truck

carrying the weapons and ammunition. AA 31. Within hours Cota found a buyer for the weapons with the help of a co-conspirator. *Id.* Cota believed the buyer was a member of the “Mexican Mafia.” *Id.* Cota sold the stolen weapons to that buyer on the same day he stole them. *Id.*

Cota was charged by criminal complaint with the crimes of CONSPIRACY TO COMMIT BURGLARY AND/OR LARCENY, a violation of NRS 199.480, a gross misdemeanor, CONSPIRACY TO COMMIT AN OFFENSE INVOLVING STOLEN PROPERTY, a violation of NRS 199.480, a gross misdemeanor, PRINCIPAL TO BURGLARY WITH A DEADLY WEAPON OR A FIREARM, a violation of NRS 205.060(1), (4), NRS 195.020, a category B felony, PRINCIPAL TO GRAND LARCENY OF A FIREARM, a violation of NRS 205.226, NRS 195.020 a category B felony, and PRINCIPAL TO POSSESSION OF STOLEN PROPERTY, a violation of NRS 205.275, NRS 195.020, a category C felony. AA 1-3A.

He was arrested and booked into the Douglas County Jail on those charges on May 1, 2018. On June 1, 2018, the defendant signed a guilty plea agreement indicating his desire to plead guilty to one count of PRINCIPAL TO GRAND LARCENY OF A FIREARM, a violation of NRS 205.226, NRS 195.020, a category B felony. AA 6, 9-14. As part of the guilty plea agreement the State agreed to recommend that Cota be sentenced to a minimum term of not less than 12 months in

state prison and a maximum term of 60 months in state prison. AA 9-10. In the signed guilty plea agreement Cota acknowledged that he understood that, “at the time of sentencing, the parties are free to present arguments, facts, and/or witnesses about whether a lesser sentence, probation, and/or some other substance abuse treatment is appropriate to the extent I am eligible” and “that the State also reserves the right at sentencing to provide the court with relevant information that may not be in the court’s possession” and to “comment on the circumstances of the crime and my criminal history.” AA 10. On June 18, 2018, the defendant’s arraignment in District Court was continued to July 9, 2018. AA 224-233. On that date the defendant entered a guilty plea in accordance with his signed guilty plea agreement and sentencing was set for September 10, 2018. AA 236-258.

On July 6, 2018, Deputy Sheriffs working in the jail moved Cota from the B-block to Holding Cell 10 after he began causing a disturbance. AA 31. As he walked by A-block, Cota began yelling “sooey.” *Id.* Cota entered the holding cell, threw down his property bin, and tried to charge the door in the direction of the deputies before it was closed. *Id.* Cota began to punch, kick, and hit his head on the cell door. *Id.* For Cota’s safety and the safety and security of the jail facility deputies decided to place Cota in a restraint chair. *Id.* Before the deputies entered the holding cell, Cota assumed a fighting stance. *Id.* Cota refused commands to get on the ground and maintained an aggressive posture. *Id.* As deputies tried to gain physical

control over Cota and take him to the ground, Cota punched a Douglas County Sheriff's Deputy in the face and hit a second Douglas County Sheriff's Deputy's hand, knocking an electroshock weapon out of his hand. *Id.* After gaining control of Cota he was placed in a restraint chair. *Id.* While he was being secured in the chair, Cota called for "J," the nickname for Jabrontae Warner, the member of the Playboy Bloods criminal street gang who recruited Cota into the gang. *Id.* Warner was in custody in the Douglas County Jail at the time. Cota called for "J" to "turn up" and "beat the fuck out of these cops." *Id.* He told the first Deputy Sheriff he punched "wait till I see you next bro your jaw is gonna get broke." AA 31-32. He then told the Deputy again, "your jaw is getting broke bro," "Bloods bro," "your jaws getting broke." AA 32. Cota then turned to a third Douglas County Deputy Sheriff and told her, "I'm gonna tell 'J' to break your jaw too watch." *Id.* Cota was subsequently charged with two counts of BATTERY BY A PRISONER IN CUSTODY, a violation of NRS 200.481(2)(F), a category B felony. AA 15-16.

On August 1, 2018 the defendant signed a guilty plea indicating his desire to plead guilty to one count of BATTERY BY A PRISONER IN CUSTODY, a violation of NRS 200.481(2)(f), a category B felony, with the parties being free to argue. AA 17, 20-25. In that agreement the defendant acknowledged that he understood that "the State may present arguments, facts, and/or witnesses" in support of its sentencing recommendation and "that the State also reserves the right

at sentencing to provide the court with relevant information that may not be in the court's possession" and to "comment on the circumstances of the crime and my criminal history." AA 20. On August 6, 2018, the defendant entered a guilty plea in accordance with his signed guilty plea agreement and sentencing was set for September 10, 2018. AA 261-276.

Prior to sentencing the State drafted a sentencing memorandum. AA 29-36. On August 29, 2018, the district court issued an order granting the State's motion to file its sentencing memorandum and exhibits under seal. AA 189; Respondent's Appendix (RA) 1.¹ On September 6, 2018, Cota filed a motion to strike the State's sentencing memorandum and exhibits. RA 2-11.² In that motion he alleged that "the exhibits attached to the State's memorandum constitute precisely" the "prejudicial suspect evidence" referred to by this Court in *Silks v. State*, 92 Nev. 91, 93-94, 545 P.2d 1159, 1161 (1976). RA 6. He also alleged that his motion should be granted because the "exhibits have been released in violation of the statutory provisions." RA 7. The State filed an opposition to Cota's motion on September 7, 2018. AA 194-197. A hearing was held on September 10, 2018. AA 279-319. During the

¹ Cota misrepresents the record when he claims that "the district attorney's motion to seal the sentencing memo (Appendix 189) was filed only after defense counsel objected orally to the materials being filed without any protections." OB at 7. The State filed a motion to seal contemporaneously with its sentencing memorandum.

² Respondent filed a motion to file this motion under seal in the Nevada Supreme Court.

hearing, while Cota was discussing juvenile records and the statutory scheme in Chapter 62H, Cota stated, “I’ll concede it does allow a district court judge to go and access them,” and “if you decided to go and access a juvenile file, you’d be allowed to.” AA 290, 296. On September 13, 2018, the district court issued an order denying Cota’s motion. AA 201-208.

Cota was given an additional month to prepare for the sentencing hearing. On October 8, 2018, the district court held a sentencing hearing on both of Cota’s cases. AA 322-416. Cota agreed to proceed on both cases together. AA 325. In 18-CR-0084, the grand larceny case, the State followed its previously negotiated plea agreement and recommended that Cota be sentenced to 12 to 30 months in prison. AA 391. The Division of Parole and Probation, who told the Court they did not have a copy of the State’s sentencing memorandum or the attached exhibits when they made their recommendation, recommended that Cota be sentenced to 16 to 72 months in prison. *See* Presentence Investigation Report.³ Cota requested that he be sent to a “boot camp program” at the High Desert prison. AA 389. The district court followed the recommendation of the Division and sentenced the defendant to 16 to 72 months in prison. AA 409. In 18-CR-0116, the battery by a prisoner case, the State recommended a consecutive sentence of 28 to 72 months in prison. AA 391.

³This Court ordered the Presentence Investigation Reports to be transmitted by the District Court in a sealed envelope on June 18, 2019.

The Division of Parole and Probation, who told the Court they did not have a copy of the State's sentencing memorandum or the attached exhibits when they made their recommendation, recommended that Cota be sentenced to 24 to 72 months in prison. *See* Presentence Investigation Report. Cota requested that his sentencing be continued until after he completed the boot camp program at the High Desert prison. AA 389. The district court followed the recommendation of the Division and sentenced the defendant to a consecutive term of 24 to 72 months in prison. AA 413.

Now, on appeal, Cota alleges that “[t]he district court committed reversible error at sentencing by admitting and considering Cota’s entire juvenile record, including suspect and impalpable evidence.” OB at 5. Cota alleges that the evidence is suspect and impalpable because of his belief that it included confidential juvenile records. OB at 8. He asks this Court to overrule its decisions permitting sentencing courts to consider such records. OB at 8 and 13.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion by considering the State’s sentencing memorandum and the attached exhibits, before following the recommendation of the Division of Parole and Probation and ordering the defendant to serve consecutive terms of 16 to 72 months and 24 to 72 months in the Nevada state prison. The district court did not rely solely on the evidence challenged by

Cota. The evidence was not palpable or highly suspect. No prejudice resulted from the consideration of it.

STANDARD OF REVIEW

This Court reviews the district court's sentencing determination for an abuse of discretion. "The sentencing judge is accorded wide discretion in imposing a sentence; absent an abuse of discretion, this court will not disturb the district court's determination on appeal." *Martinez v. State*, 114 Nev. 735, 737–38, 961 P.2d 143, 145 (1998). This Court "will refrain from interfering with the sentence imposed '[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by palpable or highly suspect evidence.'" *Allred v. State*, 120 Nev. 410, 420, 92 P.3d 1246, 1253 (2004) (quoting *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976)).

ARGUMENT

"The sentencing proceeding is not a second trial and the court is privileged to consider facts and circumstances which clearly would not be admissible at trial." *Silks v. State*, 92 Nev. 91, 93–94, 545 P.2d 1159, 1161 (1976). The record does not demonstrate that the district court considered information or accusations founded on facts supported only by palpable or highly suspect evidence. *See Allred v. State*, 120 Nev. 410, 420, 92 P.3d 1246, 1253 (2004). And, even if it did, Cota has failed to demonstrate prejudice resulting from consideration of such evidence. *Id.*

I. No Portion of the Sealed Sentencing Memorandum and Attached Exhibits was Impalpable or Highly Suspect Evidence.

The district court granted the State's motion to seal its sentencing memorandum and the attached exhibits. RA at 1. Therefore, those sealed records remain confidential.⁴ *Id.* The district court was not restricted from considering any reliable and relevant evidence at the time of sentencing, NRS 176.015, and its exercise of discretion at sentencing will not be reversed unless its sentencing decision was supported solely by impalpable and highly suspect evidence. *Denson v. State*, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996). "Few limitations are imposed on a judge's right to consider evidence in imposing a sentence, and courts are generally free to consider information extraneous to the presentencing report." *Denson*, 112 Nev. at 492, 915 at 286. "Possession of the fullest information possible concerning a defendant's life and characteristics is essential to the sentencing judge's task of determining the type and extent of punishment." *Id.* "Further, a sentencing proceeding is not a second trial, and the court is privileged to consider facts and circumstances that would not be admissible at trial." *Id.*; *see*

⁴ Cota speculates that it was possible for a citizen to make a public records request and obtain a copy of the State's sentencing memorandum or the attached exhibits during the short period of time that elapsed between the filing of the State's motion to seal the memorandum and exhibits and the order granting the State's motion. But he fails to explain how such a possibility could have affected the district court's sentencing determination.

also NRS 47.020(3)(c) (explaining the scope of Title 4 of NRS with respect to sentencing).

Cota's juvenile record was relevant to his character, revealing a pattern of escalating violent behavior. *See Johnson v. State*, 122 Nev. 1344, 1354, 148 P.3d 767, 774 (2006) (explaining that defendant's juvenile record revealing an escalating pattern of violent behavior has significant probative value showing not only his propensity for violence and gang involvement but also his amenability to rehabilitation). Police reports and other documents like those attached to the State's sentencing memorandum are not impalpable or highly suspect evidence. *See Silks v. State*, 92 Nev. 91, 94 n.2, 545 P.2d 1159, 1161 n.2 (1976) (“(W)e believe that other criminal conduct may properly be considered, even though the defendant was never charged with it or convicted of it. Its relevance . . . is apparent.”).

Cota has failed to demonstrate that the district court did not have the training to review the documents attached to the State's sentencing memorandum. *Cf.* OB at 17 (alleging that the “documents were not prepared for review by untrained readers”). The sentencing court was not precluded from considering hearsay at sentencing as Cota contends. NRS 47.020(3)(c); *cf.* OB at 17. The documents attached to the sentencing memorandum are highly relevant to Cota's character and directly relate to the act of violence he pleaded guilty to. Nevada sentencing courts regularly consider acts and/or convictions that occurred less than nine years ago as

part of their sentencing determinations. The fact that Cota's acts occurred when he was a juvenile does not prohibit a sentencing court from considering them. The Nevada legislature had this in mind when they authorized the district court to inspect even sealed juvenile records of a person who is less than 21 years of age for the purposes of sentencing. *See* NRS 62H.170(3). Cota has failed to demonstrate that the sentencing memorandum and exhibits are made up of "suspect and impalpable evidence." *Cf.* OB at 8.

Cota seeks to elevate form over substance by arguing that there was some mistake in the process by which the district court received the sentencing memorandum and attached exhibits. He suggests, without a legal basis, that the district court was required to prohibit the admission of such evidence.⁵ Cota fails to demonstrate that any provision of NRS Chapter 62H entitles him to a new sentencing hearing. Cota does not cite any provision of that chapter of the Nevada Revised Statutes that prohibits the district court from considering the State's sentencing memorandum or the exhibits attached thereto.

⁵ Cota falsely claims that his "entire juvenile court record and personal history" was admitted at sentencing. OB at 9. It was not. AA 29-190. Cota also falsely claims that this Court's approach to juvenile justice aligns with a historical philosophy of the juvenile justice system that existed between 1899 until approximately the middle of this century. OB at 9 (citing *Matter of Seven Minors*, 99 Nev. 427, 431, 664 P.2d 947, 950 (1983)). That approach, however, was determined by this Court as, "ill-suited to the task of dealing with juvenile crime" over 36 years ago. *Id.*

Cota cites NRS 62H.030,⁶ but that provision does not prohibit the district court from considering the State’s sentencing memorandum or the exhibits attached thereto. Cota cites NRS 62H.025,⁷ but that provision also does not prohibit the district court from considering the State’s sentencing memorandum or the exhibits attached thereto. To the contrary, NRS 62H.170(3) permits any court of this State to inspect, even records that are sealed, if the records relate to a person who is less than 21 years of age and who is to be sentenced by the court in a criminal proceeding. At the time of sentencing, Cota was less than 21 years of age, was being sentenced by the court in a criminal proceeding, and the district court determined in an order dated September 13, 2018, that it was appropriate for it to inspect certain records of the defendant which were attached to the State’s sentencing memorandum. AA 201-208. Cota himself admits that “this [C]ourt has for years reaffirmed that a sentencing

⁶Any argument with respect to NRS 62H.030 was not raised in the district court and this Court should not consider it on appeal. *Cf.* RA 2-11; *see Herman v. State*, 122 Nev. 199, 204, 128 P.3d 469, 472 (2006) (“We generally do not consider issues raised for the first time on direct appeal”), *abrogated on other grounds by Nunnery v. State*, 127 Nev. 749, 263 P.3d 235 (2011).

⁷Cota uses the term “juvenile records” and “juvenile justice information” as though they are synonymous. NRS 62H.025, however, only involves “juvenile justice information,” as defined by NRS 62H.025(6)(b), which is released by a “juvenile justice agency,” as defined by NRS 62H.025(6)(a). Cota fails to explain how any of the exhibits meet the definition of “juvenile justice information” provided in NRS 62H.025(6)(b) or why he believes those exhibits were released by a “juvenile justice agency,” as defined by NRS 62H.025(6)(a).

court may consider a broad spectrum of evidence, including that which would not be otherwise admissible at trial, and including ‘juvenile records.’” OB at 13. And he conceded to the district court below that it could access Cota’s juvenile records. AA 290, 296. His opening brief is devoid of compelling reasons for this court to depart from *stare decisis*. “Mere disagreement does not suffice.” *Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008).⁸

As he did below, Cota has failed to demonstrate that any portion of the sealed sentencing memorandum and the attached exhibits is impalpable or highly suspect evidence. To the contrary, the evidence was both reliable and relevant and the district court did not abuse its discretion by considering it.

II. No Portion of the Sealed Sentencing Memorandum and Attached Exhibits Which the District Court Considered Resulted in Prejudice.

Even if this Court determined that some document considered by the district court amounted to impalpable or highly suspect evidence, Cota has failed to meet his burden of demonstrating that the consideration of that evidence resulted in prejudice. *See Allred*, 120 Nev. at 420, 92 P.3d at 1253. The Division of Parole and Probation made the same sentencing recommendation as the district court and it told

⁸If the court is considering departing from its own precedent it should order supplemental briefing.

the Court that it did not have a copy of the State's sentencing memorandum or the attached exhibits when it made its sentencing recommendation. AA 401.⁹

No prejudice resulted from the district court's consideration of any of the Exhibits. With respect to the district court's consideration of Exhibit 8, Cota was given the opportunity to have his own expert perform an evaluation and opine on Dr. David H. Gambles' methods and assessment of Cota. AA 212.¹⁰ According to Dr. Gamble, the tools he used to evaluate Cota were appropriate for his age and the other variables known to him. AA 100-102. With respect to Exhibits 1, 4, 5, 6, 12, and 16, Cota erroneously claims those exhibits are labeled "Sexual Assault." OB at 16-17. They are not. AA 37-188. The cover sheet states that the nature of the calls were "Assault/Sexual." *Id.* The report clearly labels the Offense Code as "ASIM Assault, Simple" or "APOW Assault, Police, Othr Weap," with the Classification as "Battery/NRS 200.481," "NRS 200.481 – Battery," "Battery NRS 200.481," or "NRS 200.481.2 Battery by a Prisoner," for Exhibits 1, 4, 5, 6, 12, and 16. *Id.* No one was confused by the terminology the Douglas County Sheriff's Office uses to organize its police reports. Certainly not the district court judge who sentenced Cota

⁹The Presentence Investigation Reports were prepared before the Sentencing Memorandum was even filed.

¹⁰Cota also misquotes page 2 of Exhibit 8. *Compare* OB at 17 with AA 96. It does not say "admitted to liking" 10-year old girls. *Id.*

who had previously reviewed thousands of similarly labeled police reports over the course of his career.

Because Cota has failed to demonstrate that he was prejudiced by the admission of the sentencing memorandum or any of the attached exhibits, his claims fail.

CONCLUSION

This Court should affirm the district court's judgment of conviction.

Dated: July 25, 2019.

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By: /s/ Matthew S. Johnson
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ATTORNEY'S 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 in Times New Roman 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 15 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.

Dated: July 25, 2019.

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