

Electronically Filed
Jan 07 2022 04:26 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL L. COTA,

Appellant,

vs.

Case No. 2018-CR-00116
2018-CR-00116BD

THE STATE OF NEVADA,

Respondent,

RECORD ON APPEAL

VOLUME 2

COPIES OF ORIGINAL PLEADINGS
PAGES 232-313

MICHAEL L. COTA
INMATE #1206075
ELY STATE PRISON
P.O. BOX 1989
ELY, NEVADA 89301

IN PROPER PERSON.

THE STATE OF NEVADA

DOUGLAS COUNTY DISTRICT ATTORNEY

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AUG 28 2018

FILED

Case No. 18-CR-0116/ 18-CR-0084

Douglas County
District Court Clerk

2018 AUG 29 PM 4: 15

Dept No. II

BOBBIE R. WILLIAMS
CLERK

BY ANCM DEPUTY

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF DOUGLAS

THE STATE OF NEVADA,

Petitioner,

ORDER SEALING EXHIBITS TO
SENTENCING MEMORANDUM

vs.

MICHAEL LUIS COTA JR.,

Respondents.

IT IS HEREBY ORDERED that the exhibits to the sentencing memorandum are hereby
ordered to be sealed and not be made public except pursuant to further court order.

DATED this 27th day of August, 2018.

THOMAS W. GREGORY
District Court Judge

RECEIVED

SEP - 6 2018

Douglas County
District Court Clerk

FILED

2018 SEP -6 AM 10:56

BOBBIE R. WILLIAMS
CLERK

BY ANOMA
DEPUTY

1 John E. Malone, Esq.
2 State Bar No. 5706
3 209 N. Pratt Ave.
4 Carson City, NV 89701
5 (775) 461-0254

IN THE NINTH JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF DOUGLAS, STATE OF NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

CASE NO. 18-CR-0116/18-CR-0084

DEPT NO. II

MICHAEL LUIS COTA,

Defendant.

MOTION TO FILE UNDER SEAL

The Defendant, MICHAEL LUIS COTA, hereby moves this Court for an Order to file Defendant's Motion to Strike The State's Sentencing Memorandum and Attached Exhibits under seal. The defense's motion to strike references the State's Sentencing Memorandum and Attached Exhibits and to file it openly would violate the provisions of NRS 62H.025.

DATED this 6th day of Sept, 2018.

By: [Signature]

JOHN E. MALONE, ESQ.
Attorney for Defendant, Michael Luis Cota

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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that service of the foregoing MOTION TO STRIKE EXHIBITS was made this date by depositing a true copy of the same for mailing in Carson City, Nevada, and/or hand delivery addressed to each of the following:

Deputy District Attorney
PO Box 218
Minden, NV 89423

DATED this 6th day of Sept, 2018.


Kelly Atkinson

RECEIVED

SEP - 6 2018

Douglas County
District Court Clerk

FILED

2018 SEP -6 PM 12:09

BOBBIE R. WILLIAMS
CLERK

BY ANOMAS
CLERK DEPUTY

1 John E. Malone, Esq.
2 State Bar No. 5706
209 N. Pratt Ave.
3 Carson City, NV 89701
(775) 461-0254

IN THE NINTH JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF DOUGLAS, STATE OF NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

CASE NO. 18-CR-0116/18-CR-0084

DEPT NO. II

MICHAEL LUIS COTA,

Defendant.

ORDER TO FILE UNDER SEAL

PURSUANT to the Motion to File Under Seal and good cause appearing,

IT IS HEREBY ORDERED, that the Motion to Strike the State's Sentencing Memorandum
and Attached Exhibits be filed under seal.

DATED this 6th day of September, 2018.

[Signature]
DISTRICT COURT JUDGE

Respectfully Submitted By:
John E. Malone, Esq.

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SEP - 7 2018

FILED

Case No. 18-CR-0116/18-CR-0084

Douglas County
District Court Clerk

2018 SEP - 7 AM 9:49

Dept No. II

BOBBIE R. WILLIAMS
CLERK

This document does not contain personal information of any person

BY m. dragan

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF DOUGLAS

THE STATE OF NEVADA,

Plaintiff,

vs.

**OPPOSITION TO MOTION TO
STRIKE THE STATE'S
SENTENCING MEMORANDUM
AND ATTACHED EXHIBITS**

MICHAEL LUIS COTA JR.

Defendant.

The State of Nevada, by and through Matthew Johnson, Deputy District Attorney, of the Douglas County District Attorney's Office, opposes defendant Michael Luis Cota Jr.'s (Cota) motion to strike its sentencing memorandum and attached exhibits.

ARGUMENT

Cota has failed to demonstrate that this Court should strike any portion of the State's sentencing memorandum or the documents attached thereto. This Court granted the State's motion to seal the State's sentencing memorandum and the attached records. Therefore, any juvenile justice information contained in those records and governed by NRS 62H.025(1) remains confidential. This Court is 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 is supported solely by palpable and highly suspect evidence. *Denson v. State*, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996). "Few

1 limitations are imposed on a judge's right to consider evidence in imposing a sentence, and
2 courts are generally free to consider information extraneous to the presentencing
3 report." *Denson*, 112 Nev. at 492, 915 at 286. "Possession of the fullest information possible
4 concerning a defendant's life and characteristics is essential to the sentencing judge's task of
5 determining the type and extent of punishment." *Id.* "Further, a sentencing proceeding is not a
6 second trial, and the court is privileged to consider facts and circumstances that would not be
7 admissible at trial." *Id.*; see also NRS 47.020(3)(c) (explaining the scope of Title 4 of NRS
8 with respect to sentencing).

9 Cota's juvenile record is relevant to his character, revealing a pattern of escalating
10 violent behavior.¹ See *Johnson v. State*, 122 Nev. 1344, 1354, 148 P.3d 767, 774 (2006)
11 (explaining that defendant's juvenile record revealing a escalating pattern of violent behavior
12 has significant probative value showing not only his propensity for violence and gang
13 involvement but also his amenability to rehabilitation). Police reports and other documents like
14 those attached to the State's sentencing memorandum are not impalpable or highly suspect
15 evidence. See *Silks v. State*, 92 Nev. 91, 94 n.2, 545 P.2d 1159, 1161 n.2 (1976) ("(W)e believe
16 that other criminal conduct may properly be considered, even though the defendant was never
17 charged with it or convicted of it. Its relevance . . . is apparent.").

18 This Court is not precluded from considering hearsay at sentencing as Cota contends.
19 NRS 47.020(3)(c); Cf. Memorandum at 5. The attached documents are highly relevant to
20 Cota's character and directly relate to the likelihood that he will commit future acts of violence
21 and his suitability for probation. Nevada courts routinely consider acts and/or convictions that
22 occurred less than nine years ago as part of their sentencing determinations. The fact that
23 Cota's acts occurred when he was a juvenile does not prohibit this Court from considering
24 them. The Nevada legislature had this in mind when they authorized this Court to inspect even
25 sealed juvenile records of a person who is less than 21 years of age for the purposes of
26 sentencing. See NRS 62H.170(3). In this case Cota's records have not been sealed and he is

27
28 ¹Contrary to Cota's claim, the State did not include Cota's "complete juvenile record" as part of
his sentencing memorandum. Memorandum at 2.

1 nineteen years old. Cota has failed to demonstrate that the sentencing memorandum and
2 exhibits are "made up of highly suspect and untrustworthy allegations and claims." Cf.
3 Memorandum at 2.

4 Exhibit 8 is not protected by the psychologist-patient privilege. NRS 49.209. The
5 privilege, of course, only protects communications between the psychologist and the patient
6 and the report only appears to contain a single sentence that discloses the actual
7 communications between Cota and a psychologist at all, rather than some other source. See
8 Exhibit 8 at 2, paragraph 3. That psychologist is not the author of Exhibit 8 but one who had
9 evaluated him previously. Cota has failed to demonstrate that the communication is
10 "confidential" within the meaning of NRS 49.207. The previous communication was part of a
11 psychological evaluation that was done while he was under the supervision of the juvenile court
12 and Cota fails to demonstrate that he did not intend it to be disclosed to a third person as part of
13 his supervision. Cota also waived any privilege he could have asserted with respect to
14 communications in the report by failing to object during the more than five years that have
15 elapsed between when the evaluation, which included the communication(s), was provided to
16 his juvenile probation officer, the district attorney's office, and the Juvenile Division of the
17 Ninth Judicial District Court, and when the State attached it to its sentencing memorandum for
18 this Court's review. In the event that this Court determines that any communication in the
19 evaluation is privileged under NRS 49.207, and Cota can still assert his privilege, this Court
20 can certainly strike the sentence or sentences containing those communications and still
21 consider the rest of the evaluation.


22 A violation of NRS 62H.025 is not grounds for striking the State's memorandum or the
23 attached exhibits. This Court has been given the authority by the Nevada Legislature to inspect
24 any juvenile record of a person like Cota who is less than 21 years of age for the purposes of
25 sentencing even when that record is sealed. NRS 62H.170(3). This includes records that are
26 not in possession of the juvenile court. See NRS 62H.100 (defining records). It can certainly
27 consider the unsealed records of Cota that were attached as exhibits to the State's sentencing
28 memorandum.

1 The State did not violate any subsection of NRS 62H.025 including subsection 5. First,
2 a violation of NRS 62H.025(5) only occurs when a person is "provided with juvenile justice
3 information pursuant to [NRS 62H.025]." (Emphasis added). Exhibits 1-13 could not have
4 been released to the State "pursuant to [NRS 62H.025]." NRS 62H.025(5). At the time the
5 State obtained Exhibits 1-13, NRS 62H.025 only governed "written request[s]," for juvenile
6 justice information. 2013 Nev. Stats. ch. 155, at 519 amended on July 1, 2015 by 2015 Nev.
7 Stats. ch. 297, at 1495. No written request was made to obtain Exhibits 1-13. Only after those
8 exhibits were obtained was the written request requirement dropped by the Nevada legislature.
9 *Id.* Therefore, even if Exhibits 1-13 contain "juvenile justice information" within the meaning
10 of NRS 62H.025(6)(b), they were not "provided [to the State] pursuant to [NRS 62H.025]," and
11 subsection 5 is inapplicable to those exhibits. Second, NRS 62H.025 only governs the release
12 of juvenile justice information by a juvenile justice agency. Most of the documents obtained
13 by the State were not provided by a "juvenile justice agency." Exhibits 1-6, 10-12, and 14-16
14 were released by the Douglas County Sheriff's Office, not a juvenile justice agency. Third,
15 NRS 62H.025 did not even exist when Exhibits 1 to 7 were obtained by the State. Because
16 Cota fails to demonstrate that any document attached to the State's sentencing memorandum
17 was provided to the State "pursuant to [NRS 62H.025]," his allegation that the State violated
18 any subsection of NRS 62H.025 is meritless. NRS 62H.025(5).

19 This Court should not strike any portion of the State's sentencing memorandum and the
20 attached exhibits. Cota's motion should be denied.

21 DATED this 5 day of September, 2018.

22 MARK B. JACKSON
23 DISTRICT ATTORNEY

24 By: 
25 MATTHEW JOHNSON
26 Deputy District Attorney
27 P.O. Box 218
28 Minden, Nevada 89423
(775) 782-9800

Case No. 18-CR-0116/18-CR-0084

Dept No. II

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IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF DOUGLAS

THE STATE OF NEVADA,

Plaintiff,

vs.

CERTIFICATE OF SERVICE

MICHAEL LUIS COTA JR.

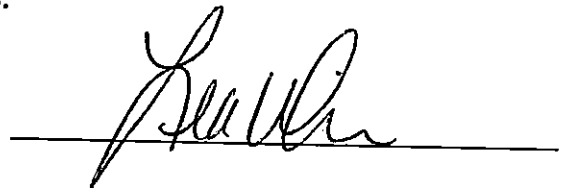
Defendant.

Pursuant to NRCP 5(b), I certify that I am an employee of the District Attorney's Office for Douglas County, Nevada, and that on this day I deposited for delivery a copy of the Opposition to Motion to Strike State's Sentencing Memorandum, addressed to:

John E. Malone,
209 North Pratt Avenue
Carson City, NV 89701

- ☒ U.S. Mail
☐ Reno/Carson Messenger
☐ Hand Delivery
☐ Email

DATED this 7th day of September, 2018.



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2018 SEP 10 PM 2:53

BODDIE R. WILLIAMS

BY ANDREA DEPUTY

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SEP 10 2018

Douglas County
District Court Clerk

Case No. 18-CR-0084/18-CR-0116

Dept. No. II

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF DOUGLAS

THE STATE OF NEVADA,

Plaintiff,

vs.

ORDER SETTING HEARING

MICHAEL L. COTA,

Defendant.

The above-entitled matter is set for:

(XX) Continued Sentencing Hearing

TO COMMENCE on Monday, October 8, 2018 at the hour of 9:00 a.m.

DATED this 10th day of September, 2018.

THOMAS W. GREGORY
DISTRICT JUDGE

Copies served by hand delivery/mail on September 10th, 2018,
addressed to: Douglas County District Attorney's Office (Hand
Delivery), John Malone, Esq., 209 North Pratt Street, Carson City,
Nevada 89701 (Mail); Douglas County Jail (Hand Delivery);
Division of Parole and Probation (Hand Delivery)

Erin C. Plante
Erin C. Plante

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Case No. 18-CR-0116/18-CR-0084

Dept. No. II

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BY ~~ANOMIA~~ DEPUTY

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF DOUGLAS

THE STATE OF NEVADA,

Plaintiff,

vs.

DISCLOSURE

MICHAEL LUIS COTA JR.,

Defendant.

Both of these criminal matters are scheduled for sentencing. The State recently filed a sentencing memorandum and exhibits referencing conduct of Defendant as a juvenile. Some of the referenced conduct occurred during the Court's prior employment with the Douglas County District Attorney's Office. The undersigned does not recollect having prosecuted Defendant for the delinquent offenses referred to in the State's exhibits. Out of an abundance of caution, the State is directed to review the State's juvenile files to determine what role, if any, the

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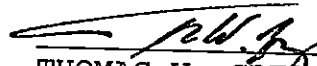
1 undersigned played in those cases and to inform Defendant's
2 counsel of the findings.

3 IT IS SO ORDERED.

4 DATED this 13th day of September, 2018.

5

6


THOMAS W. GREGORY
DISTRICT JUDGE

7

8 Copies served by hand delivery/mail on September 13th, 2018,
9 addressed to:

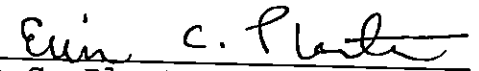
10 Douglas County District Attorney's Office (Hand Delivery)
11 P.O. Box 218
12 Minden, Nevada 89423

13 John Malone, Esq. (Mail)
14 209 North Pratt Street
15 Carson City, Nevada 89701

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Erin C. Plante

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FILED

18CR0116

2018 SEP 25 PM 4:14

Case No. 18-CR-00084-18-CR-00116

Department No. 18-00084-18-CR-00116
BOBBIE R. WILLIAMS
CLERK

BY ANOMIA DEPUTY

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SEP 25 2018
Douglas County
District Court Clerk

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF DOUGLAS

THE HONORABLE THOMAS W. GREGORY

-oOo-

STATE OF NEVADA,)
)
Plaintiff,)
)
vs.)
)
MICHAEL L. COTA JR.,)
)
Defendant.)
_____)

TRANSCRIPT OF PROCEEDINGS

SENTENCING HEARING

MONDAY, SEPTEMBER 10, 2018

MINDEN, NEVADA

For the State: Matthew Johnson,
Deputy District Attorney

For the Defendant: John Malone, Public Defender

Reported by: Michel Loomis, RPR
Nevada CCR #228, California CSR #6863

CAPITOL REPORTERS (775) 882-5322

1 MINDEN, NEVADA, MONDAY, SEPTEMBER 10, 2018, A.M. SESSION

2 -oOo-

3
4 THE COURT: The Court next calls the State of
5 Nevada versus Michael Louis Cota. That there are two cases
6 involving Mr. Cota. They are case numbers 18-CR-00116 and
7 18-CR-00084.

8 Show the appearance of Matthew Johnson on behalf
9 of the State.

10 Good morning, Mr. Johnson.

11 MR. JOHNSON: Good morning, Your Honor.

12 THE COURT: John Malone is appearing on behalf of
13 the Defendant.

14 Good morning, Mr. Malone.

15 MR. MALONE: Good morning, Your Honor.

16 THE COURT: And also appearing in lawful custody
17 is Mr. Cota.

18 Good morning, Mr. Cota.

19 THE DEFENDANT: Good morning, sir.

20 THE COURT: We're here today for a sentencing
21 hearing on both of these cases. The Court has received a
22 motion from the Defense to strike the State's sentencing
23 memorandum and its exhibits.

24 The State filed an opposition to that motion, I

CAPITOL REPORTERS (775) 882-5322

1 believe, on the 7th. And I'd like to know if that motion is
2 ready to be heard here today.

3 Mr. Malone, were you going to be filing a reply?

4 MR. MALONE: No, Your Honor, we won't be filing a
5 reply, but I think that there are some structural problems
6 with hearing that motion. We have a packed courtroom,
7 obviously.

8 In order to address the issues in the courtroom,
9 I would think that we're -- the Defense's position is that the
10 records that are meant to be introduced can't be disseminated,
11 they cannot be -- they're confidential, they can't be released
12 and we would just be multiplying the error here.

13 THE COURT: So, the motion precedes going forward
14 with sentencing. Assuming that the motion is decided today,
15 it sounds like you're ready to have the argument today on the
16 motion.

17 MR. MALONE: Well, I don't know how we can have
18 the argument in an open courtroom.

19 THE COURT: Okay. Mr. Johnson, do you have a
20 response to that?

21 MR. JOHNSON: Your Honor, my understanding is
22 that this Court sealed the sentencing memorandum and exhibits.
23 As far as the arguments, I don't -- I don't know whether we
24 have to discuss anything that is has been sealed by this Court

1 or not. So, I think it would be up to this Court.

2 I think that the opposition and the motion stand
3 on its own. This Court can take it without argument. I'm
4 happy to make argument in addition to what's already been
5 provided on paper.

6 THE COURT: So, Mr. Malone, I think what you're
7 saying, is you -- in making argument, you would be getting
8 into some of the facts that are sealed documents; is that
9 accurate?

10 MR. MALONE: Your Honor, I think I would be
11 dancing on my toes.

12 THE COURT: Okay.

13 MR. MALONE: In an attempt to work around things.
14 I -- this is a new situation for me where this kind of --

15 THE COURT: Okay.

16 MR. MALONE: -- sentencing memorandum has been
17 attempted to be introduced.

18 THE COURT: Mr. Malone, let me ask you this, if
19 the Court hears argument today and makes a decision on the
20 motion, would you then be prepared to go forward with
21 sentencing today?

22 MR. MALONE: No.

23 THE COURT: What's that?

24 MR. MALONE: No.

1 THE COURT: Why is that?

2 MR. MALONE: Your Honor, back in August, we did
3 request a psychological evaluation be prepared by Dr.
4 McEllistrem. We then learned, several weeks later, that he
5 felt he had a conflict on that. And so we did file a motion
6 for funds to have a psychological examination prepared by Dr.
7 Piasecki.

8 It's my understanding that she's scheduled to
9 interview Mr. Cota on the 13th and she would have a report
10 prepared very shortly after that. I think given the exposure
11 presented by the State's sentencing memorandum, the necessity
12 for that evaluation is more important than ever.

13 THE COURT: All right. What I'm going to do is
14 trail this matter. We have a courtroom full of other folks
15 and other cases. I don't see any reason why we cannot have
16 argument today on the motion, particularly if we stick to the
17 legal aspects, which it primarily is.

18 It's primarily an argument on the law. Both
19 sides have briefed it. I've had an opportunity to read the
20 briefs. There's really no need to present additional
21 argument, although I'll give you that opportunity to do that.
22 But I believe we can do that in open Court but it's my
23 preference that we get some other cases handled.

24 MR. MALONE: Thank you.

1 THE COURT: So, we'll go ahead and trail this
2 matter, Mr. Cota, we'll call you back in a few minutes.

3 THE DEFENDANT: Okay.

4 (Proceedings recessed.)

5 THE COURT: The Court recalls the cases of the
6 State of Nevada versus Michael Louis Cota, Case Number
7 18-CR-116 and 18-CR-0084.

8 Show the appearance of Matthew Johnson on behalf
9 of the State. John Malone is appearing on behalf of Mr. Cota.
10 Mr. Cota is appearing here today in lawful custody.

11 The Court trailed the matter to the end of the
12 calendar so that we could have argument regarding the motion
13 that had been filed by the Defense to strike the State's
14 sentencing memorandum and attached exhibits.

15 Mr. Malone previously indicated he did not
16 anticipate filing a reply in the case, however, would like to
17 make argument. I'll give the parties an opportunity to do so
18 at this time.

19 I have fully read and considered the -- both the
20 motion and the opposition. Appreciate the efforts made by
21 both counsel in that regard. So, there's really no need to
22 repeat your arguments there. If you'd like to summarize them
23 you may. And if you would like to add any other arguments you
24 may also do that.

1 I'll begin with Mr. Malone because it was his
2 motion and then, Mr. Malone, you'll get a chance to give any
3 response once Mr. Johnson goes.

4 Go ahead, Mr. Malone.

5 MR. MALONE: Thank you, Your Honor. And, Your
6 Honor, I'd like to make a motion for the record that there are
7 at least three civilians in the courtroom including one
8 incarcerated Defendant.

9 THE COURT: You're asking to close the courtroom?

10 MR. MALONE: I would be.

11 THE COURT: What is the basis for the request?

12 MR. MALONE: Your Honor, because we're -- I'm
13 going to be discussing an area a sensitive area that involves
14 a release of juvenile records. Even Mr. Cota's -- I shouldn't
15 have said juvenile records because that's actually
16 confidential as well, whether or not a person has a juvenile
17 history.

18 THE COURT: Mr. Johnson, do you have a response
19 to the request to close the courtroom?

20 MR. JOHNSON: Your Honor, I think, as this Court
21 indicated, you can speak about the legal issue before this
22 Court that's the center of the motion to strike without
23 discussing any of the attached documents that are referred to
24 in the sentencing memorandum.

1 However, if this Court would prefer to close the
2 courtroom, we don't have any opposition to that. I don't
3 think it's necessary or required by the law, however, we're
4 not opposed to that if this Court has any doubts about that.

5 THE COURT: The Court has considered the request
6 to close the courtroom. The request is denied. This is a
7 criminal proceeding, it will be held in open Court.

8 I understand, I believe Mr. Malone what your
9 position is. There have been -- the motion itself -- or the
10 sentencing memorandum itself and the documents have been
11 sealed as has your response.

12 What is left now for the Court's consideration is
13 purely legal argument and I believe there's no reason to close
14 the courtroom for that purpose.

15 So, Mr. Malone, you may provide the Court with
16 any additional argument you would like at this time.

17 MR. MALONE: Your Honor, although the sentencing
18 memo is sealed at this point in time, the fact of the matter
19 is that the order -- the motion to seal was filed
20 contemporaneously with the sentencing memorandum. The order
21 to seal wasn't signed until sometime later.

22 So, there was a period of time where those
23 records were open -- open files. Anyone would access them.
24 Anyone could copy them. Anyone could take those copies out of

1 the courtroom. They could leave them on a bus bench. They
2 could post them on the internet. They could do all kinds of
3 different things.

4 I think that that situation really illustrates
5 why this sentencing memorandum is out of order and isn't
6 something that this Court should accept. By accepting it, you
7 would encourage it to occur in the future, for people that
8 have -- whenever the State wishes to do so.

9 One of the things that I want to talk about but
10 I'm reluctant to do in a courtroom where we do have civilian
11 witnesses but I think I'm forced to, is there is a
12 psychological report in there dated about five years ago. The
13 Court has that document, I believe; correct?

14 THE COURT: Yes.

15 MR. MALONE: Okay. It's nine pages long. On the
16 top of eight of those pages, it lists confidential
17 consultation.

18 THE COURT: You can proceed, Mr. Malone. I'm
19 just thumbing through it.

20 MR. MALONE: Thank you.

21 THE COURT: I'm familiar with it.

22 MR. MALONE: So, the front piece does not, in
23 fact, say confidential consultation but in the top right
24 corner of every other page, it does list that. The front

1 piece does say that the purpose of this evaluation is to help
2 with treatment coordination and discharge planning. It's not
3 a sentencing document. It's not a document that was
4 introduced or the allegations in here did not result in any
5 charges against Mr. Cota. They're allegations and you can't
6 tell from this document when they occurred. They're not
7 dated. They're reports from Nevada that were accessed by a
8 treatment provider in Utah.

9 The allegations are not examined, they did not
10 result in any charges. How do we know that? We know that by
11 the standard report that the Division did. It lists five
12 different juvenile charges that Mr. Cota was charged with as a
13 juvenile. Not one of them, not one of them includes the
14 factual situations listed in this confidential psychological
15 report or assessment of risk.

16 And guess what. We know that this is a
17 five-year-old report. Five years ago. Five years ago, in a
18 different state, in a treatment facility that he was sent to,
19 by the Division, for his treatment and for his assessment and
20 in hopes to fix things. And we don't have any other
21 occurrences since then that would implicate this report.

22 So, what we have a suspect information before the
23 Court. We have a departure from the regular order. The
24 regular order is expressed on page 3 of these Presentence

1 Reports, where it does list juvenile history, which is
2 allowable under the statute.

3 We're looking at unsealed records and generally,
4 this is what we see. We see a list of charges prepared by the
5 Division, who has access to those reports.

6 We don't see this. We don't see an inch of
7 documents filed before the Court by the District Attorney, who
8 got them who knows how. I'm assuming they got them out of
9 their own files, which should have been protected. They
10 should have been stored and not accessible by people in that
11 office.

12 So, the fact that they have them is one -- one
13 issue. One thing that Mr. Johnson does and is his argument,
14 is say, well, 62H.102(5) doesn't apply because we didn't get
15 them from a juvenile facility. Well, he's missing the point.
16 The point is not how he got them, how his office got them, how
17 anybody in his office got them, the point is what he did with
18 them.

19 If you look at 62H.025 it says that the child's
20 attorney can access those documents, be provided them. I'm
21 not the child's attorney. I don't think I should have these.
22 I'm the adult attorney. It's obvious from that -- that
23 statutory scheme, which I'll point out to the Court, has been
24 amended in just about every legislative session in recent

1 memory, that it doesn't allow an adult -- it doesn't
2 specifically allow an adult attorney to have those documents.

3 I'll concede it does allow a District Court Judge
4 to go and access them. It does, it's not normally done.

5 I mean, if we had this in every sentencing for
6 anybody under the age of 21 and maybe Mr. Johnson would want
7 to go and unseal records for people over the age of 21 because
8 it's salacious, it's destructive, it's upsetting and it's the
9 sort of thing that are sealed for a reason.

10 One of the points of the Juvenile Justice System
11 is to take young people, young people that are having problems
12 perhaps, and rehabilitate them before other things happen.

13 What's interesting to me and what I said on --
14 last week or came to mind was, I have two young clients right
15 now. One's currently in the Juvenile Justice System. His
16 father died when he was ten. And then, we see this bad
17 behavior start. It was basically marijuana possession, things
18 like that.

19 Mr. Cota's dad, interestingly, was sentenced to
20 prison when he was ten. So, what we have are traumatic events
21 happening to young men who throw them off, who throw them off
22 their center, who, we believe -- by funding the Juvenile
23 Justice System, we believe, we have faith that we can help
24 them, that we can turn them on the right path.

1 And to do so, what we have is a system that does
2 provide degrees of confidentiality and makes the decision that
3 what we're going to do is put more emphasis on rehabilitation
4 than punishment in the Juvenile System.

5 One of those aspects is, when you go in -- when
6 your Juvenile Probation Officer, when somebody in a treat --
7 in a juvenile facility wants to talk to a psychologist, wants
8 to go and get what is deemed a treatment plan, a coordination
9 discharge summary, for coordination planning, we want those
10 people to -- we want those young people to talk to them. We
11 want them to talk to them freely.

12 We don't want them thinking, gee, you know,
13 what's going to happen later on? When I'm 19 years overruled
14 and I've stolen a firearm from a house and when I've gotten
15 into a fight in the jail with a -- with a -- with a sheriff's
16 deputy, is this stuff going to be strewn all over the place?
17 Is it going to be accessible by everybody for, at least, a
18 period of time? It's not proper.

19 I don't think the Court should go down the road
20 of allowing this sort of salacious, damaging and inappropriate
21 material to be put forth in open Court like we're doing right
22 now. I have to do this to go and defend Mr. Cota, which
23 shouldn't be happening. It shouldn't be happening. And when
24 you look at the statutes -- the applicable statutes, the first

1 line, juvenile records are confidential.

2 This isn't confidential. There's a period of
3 time when they were accessible by anybody. And it should --
4 my motion to strike should be granted. Thank you.

5 THE COURT: Mr. Malone, I think it -- I have
6 found when the Court makes a decision that really the more
7 information I have the better. The more informed the Court is
8 the better.

9 You, yourself, in making argument right now,
10 talked about Mr. Cota's upbringing here and with his dad.
11 Those are things, I'm guessing, you know, you would see in
12 those juvenile records. But it seems like what -- you don't
13 want the Court to -- you kind of want to say, Court, you can't
14 consider his upbringing. You can't consider -- and I take it
15 that there might be things in there that you'll argue in favor
16 of him at sentencing or give explanation as to his conduct.

17 Why do you want to keep that stuff from the
18 Court? I mean, what -- that's the part of your argument I
19 think I struggled with -- the most with. You're purposely
20 wanting to keep information from the Court that would be
21 relevant to sentencing. Maybe some parts of it relevant for
22 what the State's saying, but some also for what Mr. Cota is
23 saying.

24 In every sentencing hearing we do, we're given a

1 Presentence Report that gives me all kinds of information
2 about a Defendant's background. Why is that? It's because
3 the information is relevant to the Court for the purpose of
4 sentencing.

5 So, talk to me a little bit about that. Why are
6 you trying to restrict what the Court can learn about Mr. Cota
7 and his upbringing?

8 MR. MALONE: Your Honor, I don't have access to
9 Mr. Cota's complete juvenile file, nor should I. And the
10 statute prevents it. I did have a conversation with Mr.
11 Johnson when he filed this and when I filed my motion to
12 strike.

13 One of the things he told me was that this isn't
14 his complete record. This is cherry picking. I don't think
15 that he cherry-picked things that helped my client. I think
16 he cherry-picked the worst. So, what you're not get -- you're
17 not getting information. You're not -- you're getting
18 distorted information by a adverse party at a sentencing
19 argument for a young man. He's still 19. They picked out the
20 worst things they can in his life that they could find in
21 whatever records they have access to.

22 I am firmly convinced that what he did was just
23 look at his -- the juvenile records that he accessed in his
24 file. He has said some things -- that he accessed some of

1 them from arrest records in the sheriff's office. Those
2 shouldn't be accessible by the general public either or by
3 anybody.

4 So, I think that you have a good point. I
5 respect that point. I think information, if you have -- you
6 stated the more information the better. I think the more
7 information I have about a criminal defendant, the better able
8 I am to make a decision regarding sentencing. You don't have
9 that here. You have a biased record. You have a biased
10 record.

11 THE COURT: But don't you get a full opportunity
12 at sentencing, just like the State does, to present the
13 information you want me to hear. Okay. So, you say I'm
14 getting, maybe, one aspect of it. Isn't your job to present
15 me with the other aspect?

16 MR. MALONE: I can't.

17 THE COURT: Why not?

18 MR. MALONE: The records are -- the records are
19 not available to me. They're confidential.

20 THE COURT: Have you asked to see the records?

21 MR. MALONE: Your Honor, I don't believe that I'm
22 allowed under the statute. I don't believe I'm allowed under
23 the statute. What -- generally, the more information the
24 better. That's a great general rule. But we have, really,

1 attention -- or, actually, a real wall between the criminal
2 justice system's access to everything and the desire by the
3 legislature and the rule -- the -- the enactment of laws that
4 keep these records confidential. And there are great reasons
5 to do that. They've made decisions to do that.

6 The system has changed over the years. It used
7 to be that all Juvenile Justice Court hearings were sealed or
8 private. That's changed. That's changed to allow victim
9 witness testimony, et cetera.

10 But still, 62H.025 starts out with juvenile --
11 records of Juvenile Justice are confidential. And they're, in
12 fact, confidential from adult criminal defense attorneys. It
13 specifically says the child's attorney may have access.

14 So, absent the rules set forth in 62H, I think
15 that the Court's proposition might have some ability to go
16 forward but given the fact that what the legislature has done
17 is said that these are confidential, I don't think it -- I
18 think that you are, in fact, precluded or precluded in open
19 sentencing. The fact of the matter is that 62H.025 does say
20 that a Judge can review them.

21 So, you are in a -- you're in a zone of safety.
22 I'm not. I'm not supposed to have these documents!

23 THE COURT: Is your argument more that the
24 documents shouldn't be known by the public that -- that, what

1 you just said, made it kind of sound like you would be okay
2 with the Court looking -- looking at the documents, as long as
3 it was the Court only that was looking at the documents.

4 MR. MALONE: Actually, I think it's more complex
5 than that. I think that, from the way I read the statute, is
6 that if you decided to go and access a juvenile file, you'd be
7 allowed to. I don't believe the District Attorney can. His
8 access to the juvenile records is limited for the purpose of
9 initiating a charge.

10 So, he has limited access. This is not the
11 initiation of a charge. This is a sentencing. This is
12 information for sentencing. So, it's not an acceptable use of
13 these records under 62H, clearly not.

14 THE COURT: Let me ask you this also. In -- you
15 indicated how the Division, and they've done so here, when
16 they're preparing the presentence report, they get
17 dispositions from the Juvenile Court and they list those
18 things. And so, I have that information, that he has those
19 dispositions in the criminal case.

20 You're arguing that I shouldn't look at records
21 from those dispositions. It might further help me understand,
22 instead of just seeing an entry for a disposition, the State's
23 trying to give inform -- more information about that
24 disposition.

1 And, again, I'm having a hard time with the idea
2 that I can be told that there is a disposition, but then I
3 have to be precluded from looking at or hearing about -- more
4 information about that disposition.

5 Do you have any further thoughts on that?

6 MR. MALONE: I do. The State added much more
7 information than those five different juvenile dispositions.

8 THE COURT: So, are you okay with -- is it a
9 different argument for the dispositions that the Division has
10 listed in their Presentence Report than an uncharged conduct?

11 MR. MALONE: No. No, because the statute says
12 that records of Juvenile Justice are confidential and then it
13 lists, as you've seen, numerous -- and as we listed, one by
14 one in our brief, we listed every single exception.

15 So, this is not included in that exception. It's
16 also -- I don't -- I've done thousands and thousands of
17 sentencings. I've never seen this kind of sentencing brief,
18 never. And there's a reason why it's not allowed, it hasn't
19 been allowed and it shouldn't be allowed.

20 I already made the point that this is
21 cherry-picked by Mr. Johnson's own admission, he cherry-picked
22 things and didn't put in the entire record. That's why you
23 would have something like this. This evaluation is stunning
24 in the way that it condemns Mr. Cota. It -- it paints him --

1 well, you've read it. I don't even want to talk about it in
2 Court where we have people in here. This is some of the worst
3 sort of allegation that you would see against another human
4 being or a criminal defendant. That's why it shouldn't be in
5 here.

6 And the fact of the matter is that is stale.
7 It's five years old and we don't have anything -- we've never
8 had -- he has never been charged with anything like the
9 allegations that are listed in this report.

10 THE COURT: Well, isn't it up to the Court,
11 though, at sentencing, to decide what weight to give it. I
12 mean, the fact that it's stale, if that's accurate, that might
13 be a reason for the Court not to give it much weight but that
14 doesn't really go to admissibility.

15 The other thing is, again, you get full
16 opportunity at sentencing and what you've said a moment ago,
17 is you've asked for funds to hire an expert to evaluate Mr.
18 Cota and to give me a not stale evaluation.

19 Why shouldn't the State give -- get to give me
20 the information they have and you get to give me the
21 information you have, so I can make a full assessment?

22 MR. MALONE: Because the statute says that they
23 can't. It says the Juvenile Justice rec -- records of
24 Juvenile Justice adjudications are confidential, period. It

1 doesn't say you can bring this information in at sentencing
2 and that you can cherry-pick the record and that you can bring
3 psychological records in.

4 I'm limited even -- even though I retained a
5 psychological expert to do a report on Mr. Cota now, as a
6 19-year-old, before this Court, even though I do that, can I
7 release these? I don't think I can. Those -- those are the
8 -- it's a Pandora's box that we open up by doing this. Not to
9 mention the fact that it's uncontroverted that these records
10 were disclosed to the public. They had access to it.

11 Mr. Johnson can't tell you, with candor, that he
12 knows no one accessed them. There ought to be a sanction for
13 that. In fact, the statute actually does list a sanction. It
14 makes it a gross misdemeanor to release this information.

15 So, we have a comprehensive statute that I think
16 covers everyone that sets forth a program that's supposed to
17 be followed. It wasn't followed here and there's a reason why
18 in over -- you know, I know Your Honor has done probably 3,000
19 sentencings of felony matters or gross misdemeanor matters and
20 you don't see this. There's a reason for that. It's out of
21 the order. It doesn't -- it gives the Court information that,
22 really, is in an unprocessed, unproven form. Okay?

23 Because what we're talking about here are
24 allegations, not criminal convictions. And we're looking at

1 five different charges. So, we're making a departure from
2 what has been the established order, consistent with the
3 legislature's statute. And if Mr. Johnson can show me where
4 he's allowed to do this under the statute, fine but he can't.
5 He can't. There's no exception here. The only exception that
6 might -- that does, arguably, apply is the District Court
7 Judge's ability to access juvenile files.

8 The case law is not favorable to my position at
9 this point in time. But every one of those cases including
10 one of those cases, the Supreme Court was dealing with a
11 situation in which no objection was made. No objection. This
12 is the objection. This should stop it.

13 The Johnson case involved a capital offense where
14 a three-Judge panel was debating the sentence for a defendant
15 who had been convicted by a jury.

16 So, that falls straight under the current,
17 established parameters here, where judges can look at it. But
18 it's a different thing and their trial counsel didn't object.
19 Well, trial counsel is objecting here. So, it's different
20 from the existing case law.

21 THE COURT: Mr. Malone, thank you.

22 MR. MALONE: Thank you.

23 THE COURT: I fully understand your position.

24 Unrelated but kind of related is when should we

1 proceed with sentencing? Whatever I decide here today, I took
2 it from your earlier comments that you wanted to get the
3 evaluation of Mr. Cota accomplished before you proceed to
4 sentencing. Do you have an idea of time frame?

5 MR. MALONE: About 30 days from now.

6 THE COURT: All right. And, of course, I'll hear
7 from Mr. Johnson.

8 I take it that that's a motion to continue the
9 sentencing; is that accurate?

10 MR. MALONE: Yes, Your Honor.

11 THE COURT: Okay. I just wanted Mr. Johnson to
12 have a full ability to respond to that as well.

13 So, Mr. Johnson, if you could start by talking to
14 me, first, about the motion to strike and then give me your
15 thoughts on continuing the trial date so that they can finish
16 the evaluation. Go ahead.

17 MR. JOHNSON: Sure, Your Honor. First, I just
18 wanted to start with the most important question before this
19 Court which is the center of the motion to strike is can this
20 Court consider any or all of the information that's in the
21 sentencing memorandum and the exhibits attached thereto.

22 And the law is clear that this Court, as long as
23 it's not highly improbable and highly suspect evidence, it's
24 relevant that this Court has the ability and expressly is

1 allowed to consider it.

2 And, in fact, I don't believe Mr. Malone was
3 trying to say this but there was some talk about sealed
4 records. None of the records that -- by this Court are
5 sealed. So, none of them are sealed and even if they were, I
6 provided the statute -- the relevant statute NRS 62H.170(3),
7 that until he's up to 21 years old all of these -- all -- the
8 legislature expressly provided for the ability to for this
9 Court to consider those records at sentencing, even if they're
10 sealed.

11 In this case, they're not sealed, which is even a
12 lower level, but there's nothing wrong and this Court
13 expressly allowed to consider all of those records at
14 sentencing.

15 MR. MALONE: Your Honor, I'll agree that they're
16 not sealed, he's not of the age of 21. They are, in fact,
17 confidential.

18 THE COURT: Thank you, Mr. Malone.

19 MR. JOHNSON: As far as the confidentiality, as
20 you know, I filed a motion to seal both the sentencing and the
21 exhibits and my understanding is that this Court sealed both
22 of those records. They remain confidential.

23 I believe Mr. Malone is under a misapprehension
24 about both what the statute NRS 62H.025 provides and what he

1 can actually do as the attorney for Mr. Cota. And there is
2 two ways that he can access the exact same information that we
3 as the District Attorney's office can access.

4 First of all, under subsection E of 62.025
5 Section 2, Section E, it does say a District Attorney --
6 sorry, F -- an attorney representing the child. And I believe
7 that Mr. Malone misreads the statute.

8 It's not -- it doesn't mean that once the -- once
9 the person is no longer a child, it can only apply to the
10 attorney that was representing him at the time. That would
11 make little sense in light of what the statute is supposed to
12 do, apply to, not the actual proceeding, but later on when
13 you're looking at juvenile records.

14 And here, he is the attorney for the child, the
15 person that, at the time, all of these records relate to and
16 so F -- subsection F expressly provides a mechanism by which
17 Mr. Malone can access those records from a Juvenile Justice
18 agency. That's the first way he could do it. He could
19 directly request them.

20 The second way he could do it would be -- the
21 definition of a Juvenile Justice agency doesn't include the
22 Juvenile Court, the 9th Judicial District Court nor does it
23 include the Douglas County Sheriff's Office. Those aren't
24 Juvenile Justice agencies and this statute only provides --

1 look at subsection two -- this is the mechanism by which a
2 Juvenile Justice agency may release Juvenile Justice
3 information.

4 The statute only has to do with -- with
5 information going from the Juvenile Justice agency to someone
6 -- someone listed here. It has nothing to do with Mr.
7 Malone's ability to request, directly from the Juvenile Court,
8 any record that is Juvenile Justice information. You can
9 directly request from the Court and obtain all of the
10 information that we received, which was given to us
11 simultaneously with it being filed in the Juvenile Justice
12 Court. So, all of those documents that we received, Mr.
13 Malone has access to it and he only has to make it a request
14 for it. So, if he hasn't done that, that's his own decision.

15 So, he has two different ways he could do it. He
16 could, pursuant to subsection F, access all of this
17 information or he could directly request it from either the
18 Douglas County Sheriff's Office, in the event that those
19 documents are attached, or from the Juvenile Court for the 9th
20 Judicial District Court.

21 So, he has plenty of ways he can get this
22 information. And so, he's -- he just hasn't -- has decided
23 not to do it. And he can still request those. And there's
24 nothing preventing him from under the law from accessing the

1 same things that we can access.

2 And so, as far as that goes, he's not at any
3 disadvantage nor is his client at any disadvantage, except to
4 the extent that he hasn't requested them.

5 So, that handles that. As I believe, I just
6 heard him say several times, this Court has the ability to
7 consider these documents. And so, whatever the mechanism was
8 by which this Court received them, there's nothing -- no
9 reason to strike any of it because this Court has the ability
10 to consider all of those.

11 They are relevant, I haven't heard any argument
12 that they're not relevant. I've heard one argument about them
13 being stale but we have an individual whose 19 years old.
14 He's only been an adult for less than two years.

15 The majority of the information about Mr. Cota,
16 which will help this Court to decide what the appropriate
17 sentence is, is before he became an adult. And that's why
18 it's appropriate there. As I put in my memorandum, District
19 Courts routinely consider information that is more than five
20 years old and even more than ten years old, in making its
21 decision and there's nothing in any of the documents that I
22 provided to the Court that makes it so stale that it's not
23 appropriate for this Court to consider it. And as you said,
24 this Court decides the weight to give to any of the documents

1 that are attached to the sentencing memorandum.

2 As I put in my memorandum, and I don't want to
3 rehash the memorandum, Your Honor, it's been the law for
4 44 years. It's in footnote two of the Silks case that other
5 criminal conduct may be properly considered, even though the
6 Defendant was never charged with it or convicted of it. Its
7 relevance is apparent. And with that, we'd rest and just
8 submit it on the opposition.

9 THE COURT: Mr. Johnson, before I hear again from
10 Mr. Malone, he also has, today, verbally, requested a
11 continuance for 30 days to get a psychological evaluation.

12 Has that already been set up, Mr. Malone? Where
13 are you at with the process?

14 MR. MALONE: Yes, Your Honor. But I think I
15 talked about this earlier. We had requested Dr. Joe
16 McEllistrem to do the psychological evaluation because, I
17 believe, that's a contractual -- it's contractual arrangement
18 with the county. Anyway, it wouldn't have -- it wouldn't have
19 required me to request additional funds. So, we proceeded
20 with that plan when he -- when we -- back in August.

21 And then, I think I learned two weeks ago, that
22 Dr. Joe would not be able to do the evaluation. That he felt
23 he had a conflict. And so, then, we explored other avenues
24 and didn't file the motion for funds to be able to have that

1 evaluation done.

2 So, it's -- I apologize to the Court for there
3 being a delay. It wasn't counsel's fault. It -- we tried to
4 proceed in the most efficacious way, prior to Dr. Joe going
5 and saying he wouldn't be able to do it.

6 THE COURT: But you thought 30 days --

7 MR. MALONE: Oh --

8 THE COURT: -- would be sufficient? Has the
9 evaluation with the doctor already been set or --

10 MR. MALONE: Your Honor, my understanding from
11 the doctor was she would interview him on the 13th. But I
12 don't -- that was just an e-mail that was sort of basic. I
13 believe I can interview him -- or I plan to be able to
14 interview him on the 13th. And I think that was before we
15 even got the Court's signed order or were made aware of the
16 Court's signed order.

17 THE COURT: Okay.

18 MR. MALONE: I think you signed the order. Yeah.

19 THE COURT: Yes.

20 MR. MALONE: So, that's where we're at right now.
21 I just want to have cushion. I don't want to come in here
22 without the eval because there's some delay.

23 Dr. Piasecki is based at UNR, so she does have to
24 travel and set up her schedule to go -- come in and interview.

1 THE COURT: Is 30 days sufficient?

2 MR. MALONE: I think so.

3 THE COURT: Okay.

4 MR. MALONE: I would ask also for the Court to
5 allow me to present these documents to Dr. Piasecki if -- if
6 you are going to allow these documents to remain as portions
7 of the case.

8 I also -- I didn't know that the press was here.
9 I don't know this gentleman. I'm sure the Court does. But I
10 would ask the Court to issue a gag order, so this doesn't make
11 it into the local papers. That certainly is something that
12 shouldn't happen. And, certainly, at this point of the case
13 and the process here.

14 THE COURT: Well, all that has happened here
15 today is argument of law. Whether juvenile records can be
16 released and/or considered by the Court. I'm comfortable that
17 that is an argument that can be held and should be held in
18 open Court.

19 The Court will be taking, under submission, the
20 motion and I will generate a written order. And I understand,
21 from your comments just now, that you need the Court to make
22 that assessment so that you can, then, also decide whether to
23 give the documents to Dr. Piasecki; is that correct.

24 MR. MALONE: That's correct.

1 THE COURT: And do you believe the documents
2 would be helpful to Dr. Piasecki in generating her assessment?

3 MR. MALONE: No. I think that, actually, she
4 probably shouldn't have them but if the Court's going to have
5 them and use them as part of your sentencing determination,
6 then I think I would be remiss in not having her access them.
7 She, of course --

8 THE COURT: Why -- why would they not -- the law
9 aside, as far as confidential and whatnot, why wouldn't those
10 types of reports be helpful to a mental health expert?

11 MR. MALONE: Well, number one, I -- I -- there
12 are a couple things. Would they be helpful, sure. They're
13 not going to be unhelpful necessarily. I believe in -- and
14 the Court's asking me to make an argument putting the law
15 aside. So, I wasn't doing that. I think I have to be -- as
16 an officer of the Court, I think I have to follow the
17 applicable law, which, I think, would prevent me from
18 releasing them to her.

19 THE COURT: Well, my question, I guess, is, if I
20 decide that the Court can consider these documents, then your
21 request is that your expert be allowed to review them. And
22 so, that suggests that you find some relevance in the
23 documents. It would be helpful to Dr. Piasecki. That's all
24 I'm asking.

1 MR. MALONE: Not necessarily. But I do think
2 that what Dr. Piasecki's -- one of the things that I would ask
3 Dr. Piasecki to do is to assess the relevance of these
4 documents at the sentencing hearing of a 19-year old, with the
5 information that she would be presented with.

6 THE COURT: So --

7 MR. MALONE: So, it's not necessarily to say that
8 they would be helpful for her to come up with some sort of
9 treatment protocol, some sort of predictive analysis of what
10 his future behavior would be or punishment but it would be to
11 undermine the State's argument greatly.

12 THE COURT: Okay.

13 MR. MALONE: And I did. If I've now dealt with
14 some of the Court's -- I don't know if the Court has other
15 questions.

16 THE COURT: No.

17 MR. MALONE: But I have some other -- Your Honor,
18 the statute in 62H.025F says, "child's attorney." We know --
19 we can just look at legislative analysis. Every word -- that
20 word differentiates an attorney for an adult. It doesn't say
21 -- a blanket definition would be attorney. It doesn't say
22 that. The legislature chose to say "child's attorney."
23 "Child's attorney." So, the Court should take that into
24 account. It's pretty clear what they're doing there. The

1 attorney for a child in the juvenile proceeding is different
2 than an attorney that's assigned to defend an adult in a
3 criminal proceeding.

4 Also, regarding proceedings -- in juvenile
5 proceedings, people are not convicted in the Juvenile Court.
6 They're not convicted. So, we're not talking about criminal
7 convictions coming in. What we're talking about is a
8 different animal. And we have a completely different system
9 and we have a completely different way of looking at the
10 proceedings. So, we're not talking about juvenile convictions
11 here. We're talk -- and we're -- we're even talking about
12 uncharged acts.

13 I can't tell from these records, which of these
14 five charges are contained in here. I mean, we have -- we
15 have -- you know, we have reports in here, I think, that I put
16 in my brief. They're -- they're mislabeled. When you look at
17 some of the sheriff's office reports, they're listed at the
18 top of the page and you'll see that the offense is listed as
19 an offense that's clearly different than what was
20 investigated.

21 We have instances of kicking. One of the charges
22 or the allegations or the acts that is listed in the report
23 was kicking another boy in the heels on a -- on the
24 schoolyard. Kicking in the heels. I mean, that sounds like

1 what we used to call giving somebody a flat.

2 THE COURT: Mr. Malone, you're kind of getting
3 into the facts.

4 MR. MALONE: I'll be -- I think -- and I agree
5 with the Court. I'm done. I wanted to make sure that there
6 was a distinction. The legislature has made a distinction
7 between an attorney and a child's attorney and I think that's
8 important, period. I also think that the Court -- Mr. Johnson
9 did not address the situation where he had the documents filed
10 for a period of time when they were not sealed.

11 But that's clear from the Court's -- from the
12 date stamps, time stamps on both the sentencing memorandum and
13 on the Court's sealing order. You have to look at the order,
14 not the time that the motion to seal was done.

15 In my -- in anything I filed, in this issue right
16 now, has required me to come back and forth to the Court
17 several times. You'll see that in my billing sheets. Because
18 I didn't file anything regarding the -- my motions until I had
19 that order sealing.

20 So, that was necessary to protect the record and
21 protect those confidential documents from being accessed by
22 the general public.

23 THE COURT: All right. Thank you, Mr. Malone.

24 Mr. Johnson, back to you.

1 MR. JOHNSON: I apologize, Your Honor. I have
2 two points and I only -- I only addressed one of those.

3 THE COURT: Yes. And if you take -- address the
4 continuance as well.

5 MR. JOHNSON: Your Honor, my understanding is
6 that, I guess, there was a motion filed ex parte requesting
7 funds for an evaluator. The only thing that I -- I don't have
8 information about and Mr. Malone's the one -- had the
9 information about is, I believe, there's been eight weeks that
10 have been available for an evaluation to be done of the
11 Defendant.

12 We were prepared to go forward with sentencing
13 today. I have my witness -- witness here, ready to testify.
14 And I don't know whether Dr. McEllistrem was contacted on week
15 seven or week one and why there's such a delay in finding out
16 that, apparently, Dr. McEllistrem can't do the evaluation,
17 that someone else couldn't have been obtained. I don't even
18 know the exact date that the ex parte motion for funds was
19 made and what -- what the series of events.

20 So, my only objection would be whether it -- it's
21 appropriate for the amount of delay. We've already had the
22 Defendant in custody for some time and we'd like to proceed
23 with sentencing as quickly as possible.

24 But I don't have enough information to say

1 whether there's a good reason for the amount of delay that's
2 happened before this evaluation. I'll accept that,
3 apparently, September 13th, if I heard it right, is when this
4 evaluation will take place. But I hate to have another
5 30 days, come in here and say we haven't got an evaluation yet
6 because we'd like to proceed to sentencing.

7 THE COURT: The Court finds that there is good
8 cause to continue the sentencing. Mr. Cota entered a guilty
9 plea back on June 9th -- or excuse me, July 9th and Mr. Malone
10 has provided the Court with sufficient cause to continue,
11 namely, that he attempted to get an evaluation through Dr.
12 McEllistrem and when that did not work, he then applied for
13 funds to attempt to employ another expert. And the Court
14 finds that the Defense has been diligent in that regard.

15 Yes?

16 MR. MALONE: Your Honor, I'd like to point out
17 that Mr. Cota does have two charges. I was assigned to the
18 charge, initially, back in July and then we did have an
19 arraignment. He was arraigned on August 6th on the battery by
20 a prisoner charge that I think changed the case in some ways.
21 He was facing more punishment. And I -- I'll be very honest
22 back in -- when I received the first case, there were some
23 issue -- if we can approach, Your Honor?

24 THE COURT: Well, I don't think you need to. I'm

1 find --

2 MR. MALONE: Okay.

3 THE COURT: -- I'm finding that you've shown good
4 cause for the continuance. I'll also say, as another basis
5 for the continuance, that the State filed their sentencing
6 memorandum on August 28th and Mr. Malone then filed his motion
7 to strike. The State filed their opposition just on
8 September 7th. It's an interesting issue. The Court wants to
9 spend time on deciding. And so, that too is a basis for the
10 continuance.

11 The Court does acknowledge that that is an
12 inconvenience for folks who came here to hear or be part of
13 the sentencing. However, paramount to the sentencing is that
14 the Court be prepared to go forward with sentencing. And so
15 this matter is going to be continued.

16 Mr. Malone has requested one month. That would
17 take us out to October 8th.

18 Mr. Johnson, you indicated you have a witness
19 present and I'm wondering if it might be best to hear this
20 matter on a non-law and motion day. Did you -- how long do
21 you anticipate the witness testimony to be?

22 MR. JOHNSON: Your Honor, I imagine the witness's
23 testimony will be about 15 to 20 minutes, as far as direct and
24 then I have a number, like, a -- snippets of several calls and

1 a body cam video, which are approximately, altogether, I want
2 to say, maybe, 20 minutes.

3 THE COURT: Okay. And today were any victims --
4 did any victims appear today to provide victim impact
5 testimony?

6 MR. JOHNSON: I don't believe they showed up
7 today. They had a scheduling conflict. I'll be sure to
8 notify them about the new sentencing date.

9 THE COURT: All right. Well, from what it sounds
10 like -- Mr. Malone, let me hear on your end. Are you
11 anticipating this to be a longer than normal sentencing or is
12 it something we could accomplish on a normal law and motion
13 day?

14 MR. MALONE: My anticipation, at this time,
15 Your Honor, would be that I would just proceed on Dr.
16 Piasecki's written report and not have her testify.

17 THE COURT: Okay.

18 MR. MALONE: But that could change. And it would
19 definitely change the calendar but I would -- I think I would
20 be able to inform the Court of that change with plenty of
21 time.

22 THE COURT: Okay. So, I'm going to go ahead, for
23 now, set it on a law and motion day. Four weeks out would be
24 October 8th. Mr. Malone, are you available on that date?

1 MR. MALONE: Your Honor, can I go in the back of
2 the courtroom?

3 THE COURT: Yes, take your time.

4 MR. MALONE: And grab my calendar? October 8th.
5 That looks fine, Your Honor.

6 THE COURT: Mr. Johnson, would October 8th be
7 okay for the State?

8 MR. JOHNSON: Yes, Your Honor.

9 THE COURT: And your witness?

10 MR. JOHNSON: Yes, Your Honor. Well, yes, Your
11 Honor.

12 THE COURT: Okay. All right. Sentencing on both
13 of these matters is continued till October 8th at nine o'clock
14 in the morning. The Court understands the parties will be
15 waiting for the Court's order regarding the motion and so I
16 will address that as soon as possible and get that out to the
17 parties.

18 In the event that the Court -- I'm just trying to
19 think of all issues. I want to make sure when we come back
20 next time that there isn't further continuance.

21 Mr. Malone asks that if the Court rules in the
22 State's favor on the pending motion that he would like the
23 doctor, Dr. Piasecki to be given copies of the exhibits.

24 Mr. Johnson, what is the State's position in that

1 regard?

2 MR. JOHNSON: Your Honor, I think this Court can,
3 as part of its -- its order granting funds, it can also order
4 that any or all of the documents that this Court has already
5 received be provided to Dr. Piasecki.

6 And therefore, any concern that Mr. Malone has
7 about him providing them, this Court can provide the documents
8 or order Mr. Malone to provide those documents. So, we don't
9 have any objection to that.

10 THE COURT: Okay. And I don't mean to give any
11 indication which way I'm going on the motion. I'm just trying
12 to think of what -- what other issues we might have out there.

13 Mr. Malone anything else that you can think of
14 that we should address here today?

15 MR. MALONE: No, Your Honor.

16 THE COURT: Mr. Johnson, how about you?

17 MR. JOHNSON: I just have one more thing. I just
18 request that this Court order that, once the evaluation is
19 completed, that a copy of the order be provided for the State,
20 as soon possible and not on the eve of sentencing, so we can
21 take a look at it and address it in any way we need to. So,
22 it gives us some advance notice.

23 THE COURT: So, Mr. Malone, if it's going to be
24 used by the Defense, I would expect you to give a copy of that

1 to the State in advance of sentencing.

2 MR. MALONE: I plan on filing it.

3 THE COURT: All right. Very good.

4 All right. Well, thank you both for the
5 arguments and your legal briefs. Again, it's an interesting
6 issue and the Court plans on spending some time with it.
7 Thank you both.

8 MR. MALONE: Thank you, Your Honor.

9 (Proceedings concluded.)
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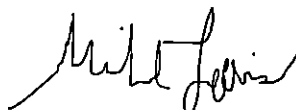
1 STATE OF NEVADA)
2 COUNTY OF DOUGLAS)
3

4 I, Michel Loomis, Certified Shorthand Reporter of
5 the Ninth Judicial District Court of the State of Nevada, in
6 and for the County of Douglas, do hereby certify:

7 That I was present in Department No. II of the
8 above-entitled Court and took stenotype notes of the
9 proceedings entitled herein, and thereafter transcribed the
10 same into typewriting as herein appears;

11 That the foregoing transcript is a full, true and
12 correct transcription of my stenotype notes of said
13 proceedings.

14 DATED: At Carson City, Nevada, this 22nd day of
15 September, 2018.

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18 Michel Loomis, CCR No. 228
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1 John E. Malone, Esq.
2 State Bar No. 715
209 N. Pratt Ave.
3 Carson City, NV 89701
(775) 461-0254
4 Attorney for Defendant

5 IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

6 IN AND FOR THE COUNTY OF DOUGLAS :

7 STATE OF NEVADA,

8 Plaintiff,

9 vs.

10 MICHAEL LUIS COTA,

11 Defendant.

Case Number: 18-CR-0084/18-CR-0116


Dept Number: II

12
13 **DEFENDANT'S SUBMISSION OF DOCUMENTATION**
14 **IN MITIGATION OF SENTENCING**

15 COMES NOW Defendant, MICHAEL LUIS COTA, by and through his attorney of record
16 John E. Malone, Esq., who herein submits the following documents for mitigation purposes at his
17 sentencing, presently set for Monday, October 8, 2018, at 9:00 a.m.:

- 18 1. Risk Assessment by Melissa Piasecki, M.D. dated October 3, 2018.

19 DATED this 4th day of October, 2018.

20
21 
22 JOHN E. MALONE, ESQ.
Attorney for Defendant,
Michael Luis Cota
23
24

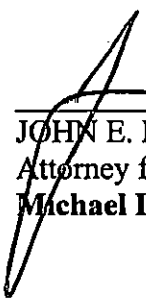
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AFFIRMATION

Pursuant to NRS 239.B.030

The undersigned does hereby affirm that that the preceding document does not contain the
social security number of any person.

DATED this 4th day of October, 2018.



JOHN E. MALONE, ESQ.
Attorney for Defendant,
Michael Luis Cota

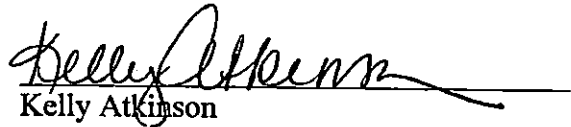
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5 (b) I hereby certify that on this date I sent via first class mail, facsimile, and/or hand delivery in Carson City, a true and correct copy of the foregoing DEFENDANT'S SUBMISSION OF DOCUMENTATION IN MITIGATION OF SENTENCING to the following:

Deputy District Attorney
PO Box 218
Minden, NV 89423

DATED this 4th day of October, 2018.


Kelly Atkinson

MELISSA PIASECKI, M.D.

FORENSIC PSYCHIATRY

561 KEYSTONE AVE. #104

RENO, NV 89503

775 722-1077 FAX 866 500-7716

piaseckimd@gmail.com

BOARD CERTIFIED IN PSYCHIATRY AND FORENSIC PSYCHIATRY

John E. Malone, Esq.
209 Pratt Ave.
Carson City, NV 89701

October 3, 2018

Re: Michael Luis Cota
Case No. 18-CR-0084
DOB: 2.2.99
Dear Mr. Malone:

At your request, I have completed an evaluation of your client, Mr. Cota with regards to his treatment needs and risk of re-offense.

To complete this evaluation, I met with Mr. Cota on 9.28.18 and I spoke with his mother by phone on 9.29.18. I also reviewed documents: Information 5.29.18, Presentencing Investigation Reports 8.21.18 and 8.22.18, 2012 records from Copper Hills Youth Center and discovery materials from Douglas County Sheriff's Office.

Summary: Mr. Cota is a 19-year-old single man who pleaded guilty to Battery by a Prisoner in Custody and Principal to Grand Larceny of a Firearm.

Medical History: Mr. Cota has a history of a head injury when he was struck in the head with a pole at age fifteen. He stated that the pole penetrated his skull and that he had more problems with behavior control following this injury.

Mental Health History: Mr. Cota reported multiple mental health assessments and treatments. He was diagnosed with ADHD and speech impairments in first grade. He was prescribed medication for mental health problems starting around age thirteen, when he was first hospitalized. He received outpatient, inpatient and residential treatment for mood disorder diagnoses from ages thirteen to eighteen. In Reno, he was hospitalized at West Hills Hospital and Willow Springs Residential Treatment Center. He was transferred to a residential program in Utah in 2012 after concerns were raised regarding sexual misconduct with another child. He received outpatient care at the Children's Cabinet and Douglas Mental Health.

Mr. Cota said that when he was around thirteen years old, he began to self-harm by cutting. He clarified that he did not use a sharp instrument but instead used plastic that he rubbed to cause abrasion and scarring on his skin. The pain that was associated with self-harm made him feel calmer. Later, the pain associated with tattooing gave him similar effect. He stated "I felt better with the needle, I just felt better." He also described suicide gestures in which he had

thoughts of dying.

Mr. Cota and his mother did not recall any benefit from medications and believed most medications were too sedating.

At the time of my assessment, Mr. Cota reported intact appetite and sleep patterns. He described feelings of anger and isolation as well as a tentative belief that other inmates are talking about him.

Substance History: Mr. Cota reported that he first used alcohol at age eleven. He reported a pattern of binge drinking at parties with frequent blackouts from drinking. Mr. Cota reported he first used marijuana at age eight when his father first offered it to him at a party.

At age sixteen, Mr. Cota began to smoke methamphetamine. In April, 2018, his father introduced him to intravenous use by mixing the drug and putting a needle into his arm. He recently progressed to regular intravenous use, with three or four uses a day. He had periods of continuous use, with little sleep, for three to four day periods. He denied psychotic symptoms during methamphetamine use.

Mr. Cota reported no history of prescription drug abuse, hallucinogens or gambling problems. He used inhalants when he was around eleven years old.

Developmental and Occupational History: Mr. Cota reported that he was born in Idaho and raised in Idaho and northern Nevada. His parents did not marry and his mother left Idaho with him and his sisters in 2003. He reported witnessing domestic violence at multiple points during his childhood. His father struggled with substance use and spent time in prison. Mr. Cota said that he wanted to spend time with his father and his mother would allow his father back into the home which led to cycles of domestic violence. Mr. Cota recalled his father pushing his mother onto the rim of the bathtub leading to a serious injury and significant bleeding.

Mr. Cota attended school up to the ninth grade. He said he was in special education for emotional and behavioral problems. He left school because of residential placements. He does not have a GED. Mr. Cota worked at a number of unskilled jobs for six month periods.

Mr. Cota has an infant son but is no longer in contact with the child's mother. He was married one time. The PSI indicates that his son lives with Mr. Cota's mother.

Legal History: Mr. Cota has a history of one misdemeanor conviction according to the PSI. He has a history of juvenile youth camp, probation and parole throughout his teens.

Mental Status Exam: Prior to the assessment, I informed Mr. Cota that I was asked to complete an assessment and a report for his attorney's use in court. I described the limits of confidentiality and of my role. Mr. Cota appeared to understand these considerations and agreed to the interview.

Mr. Cota presented as a young man in standard jail attire. His appearance was notable for

facial and forearm tattoos, including a crown above his left eye.

He was pleasant and cooperative throughout. His speech was spontaneous and conversational, with normal rate and tone. Mr. Cota's thought processes were tight and logical. He denied suicidal thoughts or violent thoughts. He had vague thoughts that others were talking about him. He also described vague hallucinations but was not certain of whether or not he heard voices or his own thoughts.

He described his mood as "happy" and rated it at 7 out of 10, with 10 being the best. Mr. Cota was able to register and recall three unrelated words, and he was oriented to the day, month and year. Mr. Cota was future oriented with the desire to return to the community.

Mr. Cota's report of events: Mr. Cota reported that he used methamphetamine extensively in the period prior to the gun offense. He noted that he stole the guns for money to buy methamphetamine.

Findings:

1. Mr. Cota has a methamphetamine use disorder. Mr. Cota demonstrated limited insight into the negative effects of substance use on his behavior and health and his need for treatment. Chronic use of methamphetamine has neurotoxic effects. Mr. Cota's pattern of use is consistent with the patterns associated with drug-induced changes to executive functioning. As a result of chronic methamphetamine use, impulse control, judgment, problem solving and cognitive flexibility are compromised. These brain changes tend to normalize after two years of abstinence.
2. Mr. Cota has a history of mental health diagnoses and treatment. He and his mother describe impulse control, inappropriate anger and self-harm. He experienced extreme emotional dysregulation and used self-harm as a maladaptive coping strategy. Mr. Cota described some vague symptoms at the time of my assessment but did not describe symptoms consistent with a current mood or psychotic disorder.
3. Mr. Cota described significant childhood exposure to violence. He witnessed his father beating his mother and felt responsible for his father being in the home. Mr. Cota still struggles with boundaries and conflicting feelings related to his father. His recent escalation to IV drug use facilitated by his father suggests that his father remains a powerful influence on him.
4. Mr. Cota stated he needs help developing coping skills and communication skills in order to manage emotions and relationships. He expressed a desire to work with mental health professionals to gain these skills.
5. There is no evidence that Mr. Cota currently has any recent behaviors suggesting sexual misconduct. Results from prior testing with the J-SOAP were valid for the six month period following the 2013 assessment. The use of the SORAG in 2013 was not valid for a younger adolescent. Guidelines for the use of the SORAG specify that it may be used with individuals who allegedly offended at age sixteen or older.

5. Mr. Cota is in need of evidence-based treatment for emotional dysregulation and substance use. His history of trauma and loss is a factor in his substance use and his relationship with his father is a complicating factor. If sentenced to prison, Mr. Cota should receive intensive cognitive behavioral therapy to address distorted thoughts and unhealthy relationships. He should also receive treatment that allows him to gain behavioral skills for emotional regulation, coping, communication and parenting. Mr. Cota should receive educational support for a GED and a high school diploma. When he transitions to the community, he should have intensive support and monitoring to stay free of substances.

Please contact me if you have any questions about this report.

Sincerely,

A handwritten signature in black ink, appearing to read 'Melissa Piasecki', with a stylized, flowing script.

Melissa Piasecki, M.D.

1 Case No. 18-CR-0116

2 Dept. No. II

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BY W. B. J. J.

6 IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF DOUGLAS

9 THE STATE OF NEVADA,

10 Plaintiff,

11 vs.

JUDGMENT OF CONVICTION

12 MICHAEL LUIS COTA,

13 Defendant.

14
15 On the 6th day of August, 2018, Defendant entered a plea of
16 guilty to the following offense contained within the Information:
17 BATTERY BY A PRISONER IN CUSTODY, a violation of
18 NRS 200.481(2)(f), a category B felony.


19 On the 8th day of October, 2018, Defendant appeared for
20 sentencing. Finding no legal cause why judgment should not be
21 pronounced, judgment was rendered as follows: BATTERY BY A
22 PRISONER IN CUSTODY, a violation of NRS 200.481(2)(f), a category
23 B felony, imprisonment in the state prison for a maximum term of
24 seventy-two (72) months and a minimum term of twenty-four (24)
25 months to run consecutive to the Ninth Judicial District Court
26 Case Number 18-CR-0084. Defendant is granted zero (0) days credit
27 for time served.

28 Defendant shall pay statutory fees and assessments of \$25.00

1 (NRS 176.062), and \$3.00 (NRS 176.0623).

2 This judgment constitutes a lien in like manner as a judgment
3 rendered in a civil action. NRS 176.275.

4 DATED this 10th day of October, 2018.

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7 THOMAS W. GREGORY
8 DISTRICT JUDGE
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