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State v. Nold Appellant's Brief Dckt. 46515

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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 46515-2018**
Plaintiff-Respondent,	)	
	)	**KOOTENAI COUNTY**
	)	**NO. CR-2017-16230**
v.	)	
	)	
RONALD DALE NOLD,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE JOHN T. MITCHELL
District Judge

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STATEMENT OF THE CASE

Nature of the Case

This is an appeal from a fixed-life sentence without the possibility of parole. The criminal conduct here arose from an advertisement posted on Craigslist by law enforcement. Mr. Nold responded to the advertisement and one of the law enforcement officers – pretending to be a 15-year old boy – corresponded with him to arrange a sexual encounter. When Mr. Nold showed up at the meeting place, he was arrested and charged with enticing a child using the internet, and, based on decades-old convictions, he was found to be a persistent violator and ultimately sentenced to a fixed life term.

The basis of this appeal is that, under the applicable legal standards established by this Court, neither the nature of the offense nor the characteristics of Mr. Nold justify a fixed life sentence. In concluding otherwise, the district court abused its discretion when it improperly took it upon itself to interpret a polygraph report to conclude that Mr. Nold had tested "deceptive." The district court then used that conclusion to link Mr. Nold's current offense with criminal conduct occurring nearly thirty years previously, and to support a finding that Mr. Nold had engaged in the same criminal conduct, continuously. The district court also abused its discretion by relying on decades-old probation violations to find that Mr. Nold could never be supervised if released on parole. Because the district court abused its discretion in determining the sentence in Mr. Nold's case, the sentence should be vacated and remanded for resentencing before a different district judge.

Statement of the Facts and Course of Proceedings

In August of 2017, a joint task force of state and federal officers convened in Kootenai County to run an undercover sting operation to identify and arrest individuals predisposed to

entice minors for sex. (PSI, p.39.)[1] One of the officers posted a fictitious dating ad on Craigslist, using a fictitious name, in the "male for male" section, entitled "Boy looking for a dad – m4m." (PSI, p.39.) In the body of the post the officer wrote, "Young, smooth and willing. Looking for a dad to show me the ropes. Must be patient daddy." (PSI, pp.40-41.)

At 65, single, and bi-sexual, Mr. Nold responded to the ad by message; using his true name, he indicated he was much older and had a couple things going for him: he was patient, owned his own business, and indicated he had money to spend on the younger man. (PSI, pp.40, 134.) Mr. Nold said he was interested in an ongoing situation, and offered to work out travel and other fringe benefits; he asked to meet first and have lunch or dinner. (PSI, pp.39-40.) The officer messaged back telling Mr. Nold he sounded "hot," and "the older the better." (PSI, p.4.) The officer then said he was in the area only for the weekend with his parents. (PSI, p.40.) Mr. Nold replied, "Jackpot for you …" (PSI, p.46.)

In a subsequent exchange, the officer messaged Mr. Nold asking, "are you okay with me being 15?" (PSI, p.47.) Mr. Nold questioned the veracity of the poster's age, but the officer repeated that he was 15. (PSI, p.47.) The officer then messaged Mr. Nold that he did not have time to meet that day, but asked Mr. Nold to meet him the following day, after his parents left. (PSI, pp.40, 49.) The following afternoon, the officer contacted Mr. Nold via message, with "daddy?" and asked what he was "into"; Mr. Nold described two acts of oral sex. (PSI, p.47.) Mr. Nold offered to come to the hotel and the officer obtained his description; when Mr. Nold arrived he was arrested. (PSI, pp.40, 65.)

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[1] The Presentence Investigation Report and the Psychosexual Evaluation Report prepared for this case, as well as certain records from Mr. Nold's 1992 Washington case filed by the State as "Additional Sentencing Materials," are contained in a single 148-page electronic document entitled "Corrected Confidential Documents." These documents will be cited collectively using the designation "PSI" and will include the page numbers associated with the 148-page electronic.

The State filed an Indictment charging Mr. Nold with enticing a child over the internet (R., p.65), and later added a Part II, alleging that Mr. Nold was a repeat sex offender based on previous convictions in Washington and Oregon for sexual conduct with minors that occurred prior to 1989.[2] (R., pp.39-44.) Pursuant to the terms of a plea agreement, the State amended the sentencing enhancement; instead of alleging Mr. Nold to be a repeat sex offender, the State alleged he was a persistent violator. (Tr., p.56, Ls.18-23; R., pp.58-60.) Mr. Nold also agreed to a minimum sentence of five years fixed, executed, with the State being free to argue for a greater sentence. (Tr., p.50, L.5 – p.56, L.23.) On those terms, Mr. Nold entered an *Alford*[3] plea to the enticement charge and he admitted being a persistent violator. (Tr., p.58, L.11 – p.59, L.4.)

Mr. Nold then submitted to a presentence investigation and a psychosexual evaluation. (*See* PSI, pp.6-68, 127-148.) The State filed an additional 53-page document consisting of records from Mr. Nold's 1992 Oregon case, specifically, his sex offender evaluations, treatment, probation records. (*see* PSI, pp.69-124.) Within the Oregon records are disclosures by Mr. Nold detailing his sexual behaviors toward numerous underage males during the 1970's and 1980's, when Mr. Nold was a high school teacher and coach. (*See* PSI, pp.69-124.) However, nothing within those documents, the presentence report, the psychosexual evaluation, or any other document, shows any sexual behavior with minors occurring after 1989. (*See generally* PSI, pp.6-124.)

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[2] The 1989 Washington case involved conduct with minors occurring in 1989, resulting in convictions for indecent liberties with children and child molestation. (PSI, pp.9, 13.) The 1993 Oregon case involved a later disclosure of sexual encounters with a student in the spring of 1986, resulting in convictions for sodomy. (PSI, p.85.) Mr. Nold had identified this victim previously to his therapist in connection with his sex offender treatment ordered in the Washington case. (PSI, p.85.)

[3] *North Carolina v. Alford*, 397 U.S. 790 (1970).

The record before the district court showed that, following his sex offense convictions in 1989, Mr. Nold underwent extensive sex offender therapy to address his illegal sexual behaviors with minors, and he underwent victim therapy to address his own victimization as a child. (PSI, pp.93-113.) Following those disclosures and convictions, Mr. Nold changed vocations, rebuilt his life, and, notwithstanding his status as a registered sex offender, he worked decades to become a successful businessman, deeply involved in his community's philanthropic activities. (PSI, pp.11-18.) During the year following his arrest for the instant offense, no other sexually inappropriate acts were alleged or disclosed. (*See generally* PSI.)

At the sentencing hearing, the State asked the district court to impose a sentence of twenty-five years to life. (Tr., p.15, Ls.1-2.) Mr. Nold requested a fixed term of seven years, with five years fixed. (Tr., p.17, Ls.19-22.) The district court engaged in a lengthy explanation of its sentencing decision, including that it believed, based in part on its reading of the polygraph report, that Mr. Nold had been continuously abusing minors for the past decades, and that he could not and would not stop. (Tr., p.36, Ls.21-25.) The district court then imposed a fixed life sentence, with no possibility for parole. (Tr., p.35, Ls.14-18; R., p.86.) Mr. Nold timely appealed. (R., p.89.)

ISSUE

Did the district court abuse its discretion when it sentenced Mr. Nold to a fixed life term?

ARGUMENT

The District Court Abused Its Discretion When It Sentenced Mr. Nold To A Fixed Life Term

A. Introduction

A fixed-life sentence is the harshest penalty that may be imposed for any crime, save for the death sentence. *State v. Eubank*, 114 Idaho 635, 638 (Ct. App. 1988).

> Absent an executive commutation (an event which the judiciary can neither predict nor assume), a defendant given a fixed life sentence will be imprisoned until he [or she] dies. Thus, after receiving such a sentence, the defendant will never have the opportunity to demonstrate good behavior, successful rehabilitation or other mitigating factors that may persuade the parole commission that the defendant may be safely released into the community.

State v. Windom, 150 Idaho 873, 877-78 (2017) (internal citations omitted). Because of these considerations, the Idaho Supreme Court employs on review "a standard unique to fixed life sentences." *Id.*

The Idaho Supreme Court has stated:

> A fixed life sentence should not be regarded as a judicial hedge against uncertainty. To the contrary, a fixed life term should be regarded as a sentence requiring a high degree of certainty—certainty that the nature of the crime demands incarceration until the perpetrator dies in prison, or certainty that the perpetrator never, at any time in his life, could be safely released.

State v. Windom, 150 Idaho at 878 (noting the adoption of the standard articulated by the Court of Appeals in *Eubank*). As originally articulated in *Eubank*,

> a fixed life sentence may be deemed reasonable *if* the offense is so egregious that it demands an exceptionally severe measure of retribution and deterrence, or *if* the offender so utterly lacks rehabilitative potential that imprisonment until death is the only feasible means of protecting society.

Eubank, 114 Idaho 635.

As set forth below, the standard for imposing a fixed life sentence was not met in this case because neither of the two alternative circumstances was present: the characteristics of the offense are not so egregious as to demand incarceration until death, nor does the record provide the factual basis to enable the district court to find, with the requisite degree of certainty, that Mr. Nold could never be safely returned to society.

B. Standard Of Review

A sentence handed down by the trial court is reviewed under the abuse of discretion standard. *State v. Fisher*, 162 Idaho 465, 467-68 (2017). Under that standard of review, the appellate court asks whether the trial court (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason. *State v. Le Veqe*, 164 Idaho 110, 116 (2018).

As set discussed below, Mr. Nold asserts that the district court abused its discretion under the third and fourth prongs of the abuse-of-discretion standard.

C. The District Court Abused Its Discretion When It Imposed A Fixed Life Sentence

Mr. Nold asserts that the high degree of certainty required to impose a sentence of fixed life imprisonment was not met, and that the district court abused its discretion in the following ways.

1. The Characteristics Of Mr. Nold's Offense Do Not Justify A Fixed Life Sentence

Mr. Nold's conduct, as found by the district court, of exchanging messages with a purported 15-year old and arranging to have sex, while reprehensible, is not so egregious that Mr. Nold should die in prison. Mr. Nold's offense was orchestrated by law enforcement officials

and carried out with those officials, alone; there was no individual victim involved. Additionally, the conduct for which Mr. Nold was convicted does not resemble the egregious crimes in other cases where fixed life sentences have been affirmed. *See e.g., Windom*, (first degree murder); *State v. Adamcik*, 152 Idaho 445 (2013) (first degree murder); *State v. Cannady,* 137 Idaho 67 (2001) (lewd conduct with a minor.) Although the Idaho appellate courts have affirmed fixed life sentences in lewd conduct cases – a crime punishable by life imprisonment – the Idaho Supreme Court has declined to uphold such a sentence where behavior involved in the particular case "did not involve penetration of any type" and where there were no "allegations of force." *See State v. Jackson*, 130 Idaho 293 (1997).

In addition, the Idaho legislature has established that the maximum penalty for this particular offense is fifteen years I.C. § 18-1509A(2). Even had Mr. Nold's conduct been charged as an attempt to commit a lewd act with an actual minor, the maximum punishment would still have been fifteen years. *See* I.C. § 18-306(1). Thus, the particular offense in this case is not sufficiently egregious that it demands a sentence of imprisonment until death.

Additionally, it appears the district court was sentencing Mr. Nold for *past* crimes, even though those crimes are not characteristics of the instant offense, and therefore cannot properly be used to justify a fixed life sentence under the "nature of offense" part of the standard. However, the district court appears to have done just that. The district court stated, "the horrible things that you have done to many, many people over the course of the years has a ripple effect that will last for months, years, maybe even decades and centuries," (Tr., p.27, Ls.2-5), and made clear that it was sentencing Mr. Nold to die in prison because of "what you've *done over the last 45 years,* including this last act last year, while this act last year didn't have an effect on a human being, what you did to others to be a habitual offender …" (Tr., p.27, Ls.14-18 (emphasis

added).) The district court went on to emphasis the number of victims, stating "you admit[ed] to having over seventy victims … The pain that you caused in each of their lives – these are minors that you [disclosed] … all different minors." (Tr., p.28, Ls.10-19.) The court stated that in it was his opinion, Mr. Nold had done damage to "scores and perhaps hundreds of other human beings." (Tr., p.35, Ls.2-10.)

It appears from these comments that the district judge believed that, because Mr. Nold had admitted being a habitual offender subject to enhanced punishment under I.C. § 19-2514, it could exact retribution for the harm to his victims of those prior crimes. However, persistent violator status is *not* an additional charge, but simply replaces the ordinary sentencing range for the underlying conviction, based on the characteristics of the defendant – i.e., his previous convictions. *State v. Helmes*, 143 Idaho 79, 81 (Ct. App. 2006). Whether the gravity of the offense demands a fixed life sentence focuses on the characteristics of the offense in the "particular case." *State v. Jackson*, 130 Idaho 293, 295 (1997). Contrary to the district court's belief, however, Mr. Nold's prior offenses are not characteristics of the instant offense, and therefore cannot serve as justification for imposing a fixed life sentence under this part of the standard. Nor, as set forth below, is a fixed life sentence justified under the standard's alternative basis – that the district court find, with a high degree of certainty, that Mr. Nold could never be safely returned to the community.

2. The District Court Abused Its Discretion In Finding That A Fixed Life Sentence Is The Only Feasible Means Of Protecting Society

The record does not support the district court's findings under the standard's second possible justification, that "the offender so utterly lacks rehabilitative potential that imprisonment until death is the only feasible means of protecting society." *See Eubank*, 114 Idaho at 638. The

evidence presented and relied upon by the district court judge in this case did not provide the requisite "high degree of certainty." *Id.*

a. The District Court's Finding That Mr. Nold Had Continued His Sexual Behaviors With Minors Based On An Uninterpreted Polygraph Is Erroneous And Unreasonable

Mr. Nold plainly has previous convictions and has also made disclosures relating to his sexual contacts with underage males *prior* to 1989, when he was arrested and first charged. In the nearly three decades since, there has been no evidence of alleged or reported inappropriate sexual behavior towards minors occurring *after* that time. On the contrary, the record shows that, following those disclosures and convictions, Mr. Nold underwent extensive sexual offender therapy and on the recommendations of his therapist, sought treatment for his own abuse as a child. (PSI, pp.93-103.) Mr. Nold changed vocations, rebuilt his life, and, notwithstanding his status as a registered sex offender, he worked decades to become a successful businessman, spending his time and life savings in his community's philanthropic activities. (PSI, pp.12-13; Tr., p.20, Ls.1-22.) However, at sentencing, the district court found that Mr. Nold had never stopped abusing minors and found he had continued engaging the same conduct after that time. (Tr., p.30, Ls.14-16.)

> In my estimation, there is every reason to believe that, in spite of your convictions for sex crimes, your behavior hasn't stopped, and that's due to two facts. First is that fact that you would so willingly in this present case try to have sex with somebody that I think you thought was 15. *Second is the fact that you tested deceptive when you took a polygraph for this case* as to the question, ["] In the last ten years have you ever had sexual contact with a minor.["] You tested as being deceptive, so those are the two facts that make me believe that you never have stopped.

(Tr., p.30, Ls.14-25 (emphasis added).)

The district court's finding that Mr. Nold "tested deceptive" is not supported by the record. The court had before it a three-page Report of Polygraph prepared by the examiner who administered the polygraph examination on the day of Mr. Nold's arrest. (*See* PSI, pp.66-68.) However, that report does *not* state that Mr. Nold had been deceptive. The examiner reported on two questions he says he asked Mr. Nold: "In the last ten years, have you ever had physical sexual contact with a minor" or "touched a child for sexual purposes?" and that Mr. Nold answered "no" to both. (PSI, p.68.) The examiner then reported that, "after careful analysis of the recorded data, using the empirical Scoring System," it was his "opinion that there were Significant Reactions noted for the relevant questions asked." (PSI, p.68.)

Although the examiner opined that Mr. Nold had "significant reactions" to two questions, nowhere in the report does he equate "significant reactions" to dishonesty. (*See generally* PSI, pp.65-68.) Nor does his report contain any type of key or guide that equates "significant reactions" with "deceptive." The district court – even if familiar with the function of a polygraph exam – is not qualified as an expert to interpret or provide an opinion regarding whether or not the testing shows deception. In short, a polygraph is a scientific test and the district court is not qualified as an expert to interpret its results.

Moreover, while it is true that a court at sentencing may, with due caution, take into account a wide array of information *relevant* to the sentencing decision, including other misconduct and uncharged crimes of the defendant, *State v. Flowers*, 150 Idaho 568, 574 (2011); *State v. Murillo*, 135 Idaho 811, 815 (Ct. App. 2001), the court may not consider wholly unreliable or irrelevant information to justify a sentence. "Even though a general area of scientific knowledge is determined to be reliable, if the results of a scientific test or comparison are not self-evident, the test itself lacks relevance unless there is also reliable

expert interpretation of its results." *People v. Wilkerson*, 114 P.3d 874, 876-77 (Colo. En Banc 2005).

> Polygraph test results are no more than a set of lines and squiggles on the polygraph read-out which record the physiological reactions of the subject when answering questions put to him by the examiner. Unlike a vocabulary test or mathematics examination, the results of which a lay person might be able to evaluate independently, the polygraph read-out is meaningless to the general public. *Only through a polygrapher's interpretation can the results be in any real way available to a jury*.

State v. Finn, 417 A.2.d 554, 555 (1980) (emphasis added).

The district court is not a polygrapher, and therefore its conclusion that Mr. Nold "tested deceptive" – a conclusion *not* made by the polygrapher – was improperly used to support the imposition of a fixed life sentence. (*See generally*, PSI, pp.65-68.) The district court's finding of deception was the "evidence" it used to validate its otherwise wholly unsupported opinion that Mr. Nold had continuously been abusing children after 1989, and that he would not and could not stop. (Tr., p.36, Ls.21-25.) It is that improper finding that linked Mr. Nold's previous conduct of nearly thirty years ago to his present offense, to justify sentencing him to prison for the rest of his life. In making this unsupported finding, and then relying on it to reach its decision, the district court failed to follow applicable legal standards which require that sentences be based on relevant evidence, and that a fixed life sentence be imposed only where there is a high degree of certainty that the offender is beyond rehabilitation. Likewise, in relying on its interpretation of the polygraph report to validate an otherwise unsupported belief, the district court arrived at its sentencing decision through failure of reason, again demonstrating an abuse of the district court's sentencing discretion. The district court's sentencing decision should be vacated.

b. The District Court's Finding That Mr. Nold Could Never Be Supervised On Parole Because He Violated The Conditions Of His Probation In 1995 Demonstrates A Failure Of The District Court To Exercise Reason

The district court also failed to exercise reason when it predicted that Mr. Nold would never be capable of supervision based on the report of two probation violations that occurred in 1993. Addressing Mr. Nold's prospects for the future, the district court stated:

> you've given me zero confidence that even if you make parole that you would abide by the terms and conditions of sex offender parole. You've demonstrated twice in the past that you will – you will do that – that you will violate those rules when you know you are being watched, so I have zero confidence in your ability to be supervised out in the community.

(Tr., pp.34, 20-24.)

The district court's reliance on the decades-old incidents – neither of which involved any sexual act involving minors, and neither of which was deemed serious enough to justify revoking probation (see PSI, pp.114-24) – does not justify the district court's conclusion that Mr. Nold could never be supervised again. The district court also ignored the fact that, following his imprisonment, Mr. Nold completed his parole without incident and was released from supervision in 2005, with no new allegations of misconduct. (*See* PSI, p.66.) Nevertheless, the district court found,

> There is no reason for me to believe that your behavior would ever change if you were ever to be place back into society either on probation or – according to this [plea agreement] it has to be – it would have to be paroled, and I come to that conclusion for two reasons.

(Tr., p.31, Ls.1-5.)

The district court continued:

> First, you violated your probation in Oregon twice from a sex offense standpoint.[4] The third time was when you went to prison, and that was for violating due to the grand theft here in Idaho. …

(Tr., p.31, Ls.6-9.)

Regarding the Oregon probation, the district judge cited to the portion of a report indicating that Mr. Nold told his probation officer that he was at his workplace, but his girlfriend promptly confirmed that he had been home with her, and that a neighbor with her small child had also been present in the home at the same time; according to the report, the neighbor had stopped by with her child to visit the girlfriend, not knowing the Mr. Nold had not left yet for work. (PSI, pp.120-21.) According the district court, this report was relevant to demonstrate Mr. Nold's flagrant deception at the time. (Tr., p.31, Ls.15–22.)

The second Oregon probation violation report relied on by the district court, also in 1995, alleged Mr. Nold had failed to tell his probation officer about a houseguest. (Tr., p.33, L.18 – p.34, L.24; PSI, p.117.) According to the report, a 19-year old male – a former student – answered the door when Oregon correctional officers came for a house check on Mr. Nold. (PSI, p.117.) Mr. Nold was not home, and the male shut the door and fled out a back window, later claiming he was fearful of police. (PSI, p.117.) Nothing in the correctional officer's report indicates that either the male visitor or Mr. Nold were engaged in wrongdoing. (*See generally* PSI, p.117.) Rather, the probation report states that the court should be "concerned" about Mr. Nold's behavior, given the male's youthful appearance and Mr. Nold's history. (PSI, p.118.)

[4] It is unclear what the district court meant by "from a sex offense standpoint." The probation report referenced by the district court contains no allegation of any new sex offenses. (*See* PSI, pp.114-124.) Moreover, and as maintained by Mr. Nold throughout these proceedings, there have been no reports or allegations that, after his conviction in 1989, Mr. Nold has had *any* improper conduct with minors.

The district court's stated "second reason" for concluding that Mr. Nold's could never be returned to society was his current psychosexual evaluation. (Tr., p.34, L.25 – p.36, L.2; PSI, p.136.) However, that evaluation assessed Mr. Nold as an "average risk" to reoffend and concludes also that Mr. Nold "can be amenable to sex offender treatment." (R., pp.136, 140.) This assessment does *not* contribute to a high degree of certainty that Mr. Nold is beyond rehabilitation and can never be safely returned to the community.

The district court stated that,

> what I do know is that your behavior has to stop, and what I do know is that you can't or won't stop, and that's evidenced by what you did last August here in Kootenai County.

(Tr., p.35, Ls.6-10.)

> Rehabilitation is not really an issue in this sentence, given your recalcitrance to be rehabilitated, as shown by what you did about this time last year *and historically really since you were a student teacher, essentially all of your life.* You have shown that you can't be rehabilitated in the sex offense arena, so those are the reasons for that sentence.

(Tr., p.36, Ls.17-24 (emphasis added).)

These statements make clear that the district court based its sentencing decision on (1) the continuing harm it believed Mr. Nold caused his *former* victims for his *former* crimes disclosed in mid-1990's; and (2) together the its own finding derived from its own analysis of the polygraph report, that, *after* his convictions for offenses in the 1980's, Mr. Nold continued to engage in the same acts of sexual misconduct with minors.

D. The Sentencing Error Requires Remand Before A Different Sentencing Judge

Mr. Nold's sentence should be vacated and his case remanded for resentencing before a different sentencing judge. When a discretionary ruling has been tainted by a legal or factual error, the appropriate remedy is to vacate the decision and remand the matter for a new, error-

free discretionary determination by the trial court. *See State v. Le Veque*, 164 Idaho 110, 116 (2018); *State v. Van Komen*, 160 Idaho 534, 540 (2016); *Andrus v. State,* 164 Idaho 565, 570 (Ct. App. 2019); *State v. Ish*, 161 Idaho 823, 826 (Ct. App.2014). While the Court of Appeals has, in earlier cases, avoided remand where the record demonstrated, beyond a reasonable doubt, that the error did not contribute to the decision, *see State v. Medrain*, 143 Idaho 329, 333 (2006), and *State v. Upton*, 127 Idaho 274, 276 (Ct. App. 1995), remand cannot be avoided in here. The district court was emphatic regarding its underlying reasons for imposing the life-without-parole sentence in this case, and those underlying reasons are tainted by error. Under the standard adopted by this Court for a district court to impose the state's harshest penalty, other than death, the district court is required to have acted with a "high degree of certainty." As this Court has stated on numerous occasions, it will not substitute its own alternative views regarding an appropriate sentence for those of the sentencing court, and will uphold the sentence *absent* a showing of an abuse of discretion. *See State v. Fisher*, 162 Idaho 465, 468 (2017).

By this same reasoning, where a defendant demonstrates an abuse of the district court's sentencing discretion, this Court should not reweigh the evidence nor supplant the district court's erroneous findings with its own, alternative views in order to affirm a *tainted* sentencing decision. Rather, under the established precedent of this Court, the discretionary decision should be vacated, and Mr. Nold's case should be remanded to the district court for resentencing before a different district court judge. *See Le Veque*, 164 Idaho 116 (case must be assigned to a different sentencing judge); and *Van Komen*, 160 Idaho at 540 (case must be assigned to different sentencing judge).

CONCLUSION

Mr. Nold respectfully asks this Court to vacate his sentence and remand his case to the district court for resentencing before a different district court judge.

DATED this 24th day of April, 2019.

/s/ Kimberly A. Coster
KIMBERLY A. COSTER
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of April, 2019, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

KAC/eas