

IN THE SUPREME COURT OF THE STATE OF NEVADA

Henry Aparicio,
Appellant

vs.

The State of Nevada,
Respondent,

) Supreme Court Case No.: 80072

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Electronically Filed
Apr 10 2020 10:19 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that there are no persons or entities as described in NRAP 26.1(a) that must be disclosed.

DATED this 10 day of April, 2020.

NEVADA DEFENSE GROUP
Respectfully Submitted By:

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JURISDICTIONAL STATEMENT

The Nevada Supreme Court retains jurisdiction as an appeal from a judgment in a criminal case pursuant to NRS 177.015(3). A timely notice of appeal was filed on November 15, 2019, approximately 16 days after the Judgment of Conviction was filed.

NRAP 17 ROUTING STATEMENT

This matter may be assigned to the Nevada Court of Appeals as an appeal from a judgment of conviction based upon a plea of guilty pursuant to NRAP 17(b)(1).

MEMORANDUM OF POINTS AND AUTHORITIES

I. Statement of the Issues

1. Is Appellant entitled to a new sentencing hearing when the District Court considered over 100 pages of victim impact letters from friends, distant family, co-workers, supervisors, and over 40 other individuals who do not qualify as “victims” under either Nevada statute or the Nevada Constitution?
2. Is Appellant entitled a new sentencing hearing when the District Court considered victim impact letters that were sent directly from the State to the Court (outside of the PSI) as well as poster and video exhibits shown during sentencing?
3. Is Appellant entitled to a new sentencing hearing when the District Court permitted speakers to adversely comment on the Defendant’s exercise of his constitutional rights, disparage the system and recommendation of Parole and Probation, and refer to the pre-trial litigation as an “insult to law enforcement,” “wild lies,” an attempt to “get off scot-free” and a “sick joke”?

II. Statement of the Case

On or about August 1, 2019, Appellant entered a Guilty Plea Agreement whereby Appellant pled guilty to two counts of Driving Under the Influence Resulting in Death and one count felony Reckless Driving (Bates 146). Pursuant to negotiations, the State retained the right to argue on the DUI Death counts, but did not oppose concurrent time with the felony Reckless Driving (Bates 146). Sentencing was scheduled for October 18, 2019 (Bates 263).

On October 11, 2019, a member of the Clark County District Attorney's Office sent a total of 101 pages of victim impact letters directly to the department handling Appellant's sentencing (Bates 157). This included letters from family as well as friends, acquaintances, co-workers, supervisors, parent's friends, and a myriad of other individuals. Defense filed a written Objection on October 17, 2019, listing an objection to *forty-six* individuals that submitted letters, but did not qualify as a "victim" under NRS 176.015 (Bates 258).

Sentencing proceeded on October 18, 2019 (Bates 263). Defense Counsel properly preserved objections not only to the victim impact letters, but also to the introduction of several exhibits, posters, and a video of the

named victims that was shown to the Court before pronouncing Appellant's sentence (Bates 265).

Notably, despite Defense objection, the District Court permitted every single exhibit and speaker proposed by Respondent; the District Court also made clear on the record that these letters, exhibits and testimony were specifically acknowledged and considered by the Court before determining Appellant's sentence (Bates 319).

Mr. Aparicio was ultimately sentenced as follows:

- Count 1, DUI Death: 7-20 years;
- Count 2, DUI Death: to 7-20 years, consecutive with Count 1;
- Count 3, Reckless Driving: 12-48 months, consecutive with Count 2.

Total aggregate sentence: 15-44 years, with 527 days credit for time served (Bates 327).

Appellant respectfully requests this Court find the District Court committed error during sentencing, and remand this matter for a new sentencing hearing before a different department.

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III. Statement of Relevant Facts

On or about June 4, 2018, a preliminary hearing was held in Las Vegas Justice Court, after which Appellant Henry Aparicio was bound over on all charges to the Eighth Judicial District Court (Bates 003). The case was initially presided over by Judge Douglas Smith.

On July 5, 2018, Mr. Aparicio filed a Motion in Limine to Exclude Evidence of Retrograde Extrapolation (Bates 004). The Motion sought to exclude an expert report disclosed by the State because it utilized a retrograde extrapolation formula that took into account only the gender and weight of the subject, which Defense argued to be a violation of this Court's holding in *State v. Dist. Ct. (Armstrong)*, 127 Nev. 927, 267 P.3d 777 (2011). *Armstrong* specifically articulated no less than 15 individual factors that must be considered for a proper retrograde extrapolation analysis (Bates 004). The State filed its Response on July 11, 2018 (Bates 010).

On July 20, 2018, Mr. Aparicio also filed a Petition for Writ of Habeas Corpus and accompanying Appendix (Bates 022). The underlying basis of the Petition argued the State failed to establish by slight or marginal evidence that Mr. Aparicio was in actual physical control of the vehicle (a passenger was also present in the vehicle). Despite a plethora of witnesses being presented at

preliminary hearing, Mr. Aparicio was sitting on the curb when law enforcement arrived, and nobody (not even witnesses who observed the accident) placed Mr. Aparicio behind the wheel of a vehicle. Although the State elicited testimony that Mr. Aparicio asked if he had killed people, cross-examination clarified that he asked this question to the officer *after* the officer had told Mr. Aparicio that he was driving, even though he never admitted to driving because he could not remember.

The Motion to Exclude Retrograde Extrapolation was heard on July 23, 2018 (Bates 047). At that time, the Court concluded that retrograde extrapolation was “perfectly reasonable” because the State had additional evidence that pertained to the *Armstrong* factors – even though the expert did not when he conducted the retrograde analysis and determined the extrapolated BAC results (Bates 085). Judge Smith found the retrograde extrapolation using Mr. Aparicio’s gender and weight to be completely admissible, and as part of his decision stated on the record that Mr. Aparicio “was doing over 100 miles an hour, killed two people” (Bates 087).

The State filed its Return to the Petition for Writ of Habeas Corpus on July 24, 2018 (Bates 049). The Petition was heard at the first calendar call on August 8, 2018. The writ was denied solely because “it was crystal clear that

the testing of the blood was – would satisfy *Armstrong*. Absolutely crystal clear” (Bates 100). Judge Smith never addressed the actual physical control issue.

Perhaps most significantly, after the Judge Smith ruled the State’s retrograde extrapolation expert was admissible, Defense filed an Ex Parte Motion for Investigative Fees to present a rebuttal expert. The Motion included a financial affidavit that showed Mr. Aparicio was in custody with a negative debt-to-income ratio. However, Judge Smith denied the request for fees, claiming an “insufficient showing of indigency.” Specifically, the Order signed by the Court stated:

THE COURT HEREBY FINDS, pursuant to the Ex Parte Motion, that Defendant provided a total monthly income in the amount of \$1,084, total monthly debts in the amount of \$1,515, and total assets in the amount of \$400,

THE COURT HEREBY ORDERS Defendant’s Ex Parte Motion for Authorization of Employment of Investigator and Payment of Fees is **DENIED** for an insufficient showing of indigency (Bates 102).

On February 6, 2019, after thorough review and consideration of the record, Defense filed a Motion to Disqualify Judge Smith (Bates 059); the Motion and supporting Affidavit was based in part on the evidentiary rulings

that exceeded the bounds of law; statements made on the record that unequivocally indicated a pre-disposition of guilt; and the denial of investigative fees for an “insufficient showing of indigency” after expressly acknowledging (in the same order) a negative debt to income ratio, thereby denying Mr. Aparicio the ability to present his own expert even though Judge Smith had just ruled the State’s expert was admissible.

The State filed an Opposition to the Motion to Disqualify on February 26, 2019, and Defense thereafter filed a Motion to Strike the State’s Opposition for lack of standing (Bates 104; 113). The Motion to Disqualify was heard before Chief Judge Linda Bell on March 19, 2019, where both the State and Defense were permitted argument. The matter was taken under advisement (Bates 121).

However, before a ruling was made on the Motion to Disqualify, Judge Smith announced his early retirement. A few days after the announcement, the Motion to Disqualify was denied as moot. A written Decision and Order was filed on April 5, 2019 (Bates 122).

The same day, Defense filed a Motion for Reconsideration, asking the disqualification still be considered to the limited extent that bias tainted the evidentiary rulings in Mr. Aparicio’s case, and therefore he should be entitled

to a rehearing on the Motions and Petition (Bates 128). Chief Judge Bell stated she lacked jurisdiction to order rehearing of the Motions that were filed, and transferred the case back to the originating department before the newly appointed Judge Cristina Silva (Bates 132).

On July 24, 2019, Defense filed a Motion to Rehear the Motions in Limine, a renewed request for Investigative Fees, and a Motion to Continue Trial (Bates 133; 139). At the upcoming Calendar Call, the State opposed the continuance request; the State indicated trial would last at least 10 days and have approximately 30 witnesses (Bates 145). Defense noted he would be ineffective if forced to proceed to trial under the circumstances (Bates 145). The Court indicated at the bench the trial would not be continued, and the case was set for a status check on trial readiness the very next day (Bates 145).

Left without a viable defense due to the prior rulings by Judge Smith and without being afforded an opportunity to hire or present expert witnesses to rebut the State after the request to continue his trial was denied, Mr. Aparicio had few options left but to accept the State's offered negotiations. He did so at the status check on August 1, 2019 (Bates 146). The matter was set for sentencing on October 18, 2019.

One week prior to sentencing, the State sent to the Court directly via e-mail (with Defense Counsel CC'd) a packet of 101 pages of victim impact statements (Bates 157). On October 17, 2018, Defense filed a written Objection to 46 individuals who had submitted letters but did not qualify as a "victim" under the statutory definition in NRS 176.015 (Bates 258).

Six different objections were made during the sentencing hearing with regards to the presentation of improper evidence or testimony; all were overruled. First, addressing the written objection regarding the letters sent to the Court:

[THE COURT]: Mr. Sheets, I also received your objection to the consideration of victim impact statements. I have reviewed your objection and I'm going to overrule your objection. I understand that you're citing to who can make a statement in court, but Article I, Section 8A of the Nevada Constitution broadly defines victim to anyone who's impacted by the crime, and therefore I'm accepting those victim impact statements and I have read each and every one of them that was submitted to me, as well as the victim impact letters on behalf of the family (Bates 265).

Second was the objection to showing the Court a video that depicted the named victims that was brought by one of the victim speakers:

MR. SHEETS: It's my understanding that one of the victims has brought a video – or one of the speakers has brought a video of the victim and their life and everything. I think for the record I probably would be objecting to it just because

the statute allows them to speak but not to present exhibits and the like.

THE COURT: Where in the exhibit – where in the statute does it say they cannot present exhibits?

MR. SHEETS: Well, it doesn't say they can't.

THE COURT: Right.

MR. SHEETS: It only says they have a right to come forth and speak.

THE COURT: Right.

MR. SHEETS: And so I would be basically arguing the statute doesn't permit the exhibits just – I mean, I understand where you may go with it –

THE COURT: Yeah.

MR. SHEETS: – but I just – to make a clean record.

THE COURT: Well, I appreciate that and I'm going to overrule the objection. I think that this is incorporating in their statement (Bates 284)

Third, the objection for the speaker's statement that Defendant had "purposely delayed" the proceedings with "wild lies" due to filing pre-trial

Motions:

[SPEAKER]: I say these things, Your Honor, not out of hate or animus towards this person or because the fact that hasn't shown one ounce of remorse throughout this long and drawn out ordeal. An ordeal that has been purposely delayed now for over a year and a half because of wild theories of a third driver or insulting the intelligence of law enforcement officers who have investigated too many crashed like this over the years using proven scientific methods.

Only when he realized that there were no wild lies he could come up with, that the evidence wouldn't refute, did he accept guilty plea. He has known since this crash how guilty he is but he refused to accept responsibility for his actions.

Your Honor, for you to accepting the appalling recommendations from Parole and Probation that show a repugnant disregard for the value of human life.

MR. SHEETS: At this point, Your Honor, I'm going to have to object.

SPEAKER: Wow.

MR. SHEETS: I've let him go for a while but he's -

SPEAKER: Wow.

MR. SHEETS: - the victim is allowed to speak about the impact on them -

SPEAKER: Are you kidding me?

MR. SHEETS: - and not specifically about sentences, Your Honor.

THE COURT: Mr. Sheets, your objection is overruled. They're entitled to express how this crime has impacted them. You may proceed (Bates 289).

Fourth was the objection to additional photographs and exhibits being presented to the Court:

[SPEAKER]: As - I'll just show you a picture, if I may.

THE COURT: Sure.

MR. SHEETS: And, Your Honor, this is - just to make sure the record is clear, we discussed something similar at the bench with exhibits, I - just for the record, there's the objection and maybe after - after the sentencing then we can do an offer of proof on it so the record's clean.

THE COURT: Understood.

THE SPEAKER: Okay.

THE COURT: Thank you.

THE SPEAKER: This is Christa and Damaso.

THE COURT: That's a great picture (Bates 293).

Fifth was another objection to speaker commentary about the recommendation of Parole and Probation:

[SPEAKER]: I truly am crushed and completely appalled actually at the 3 to 10 year recommendation by Parole and Probation. They're telling me that my daughter, Christa's life, is only worth possibly as little as 3 years in prison and the same for Damaso. How is that Parole and Probation has to use a point system that takes every human aspect out of their decision to come up with a recommendation for sentencing?

MR. SHEETS: And, just for the record, the same objection as with the prior one, Your Honor.

THE COURT: Your objection is noted (Bates 310).

Sixth and lastly, was another objection to adverse comments regarding Mr. Aparicio's exercise of his rights with pre-trial litigation:

[SPEAKER]: He has dishonored and wasted the Court's time by not accepting his responsibility for his choices and his actions. For 15 months he did that. How can he be trusted on our roads? He outright lied, even about driving the car.¹ And I know, Your Honor, you weren't on this case from the beginning but there are things I'm going to say that happened in the beginning, in the courtrooms even.

MR. SHEETS: Again, I'm objecting, this is way beyond victim impact, Your Honor.

THE SPEAKER: He outright lied –

THE COURT: I'm going to overrule the objection.

¹ Defense believes this is in reference to the Petition for Writ of Habeas Corpus filed by Defense Counsel that alleged the State failed to establish Mr. Aparicio was in actual physical control of the vehicle.

THE SPEAKER: –about driving the car, the murder weapon he used to kill our beloved Christa and Damaso. He has tried for the past 17 months to get off scot-free, or 15 months I should say, as though some sort of sick joke (Bates 312).

Mr. Aparicio was sentenced as outlined above, with the Judgment of Conviction filed on October 29, 2019 (Bates 327). This appeal follows.

IV. Summary of the Argument

Mr. Aparicio respectfully requests this Court remand the matter for a new sentencing hearing before a different presiding Judge. The law does not permit for unrelated friends, co-workers, supervisors, and other such individuals to provide victim statements to the Court; additionally, the law permits certain individuals to provide written statements through the Pre-Sentence Investigation Report or orally at a sentencing hearing, but neither Nevada statute nor the recent constitutional amendment permits written statements directly to the Court, nor does the law permit poster or video exhibits.

Additionally, the Nevada Constitution's recently enacted Section 8A does not expand the scope of topics that may properly be addressed by victim impact speakers; adverse commentary on the Defendant's invocation of his rights (such as by filing pre-trial evidentiary motions and challenging the

probable cause for his detention), disparaging the system and recommendation of Parole and Probation, and statements which refer to the pre-trial litigation as attempts to “purposely delay [proceedings] now for over a year and a half because of wild theories of a third driver or insulting the intelligence of law enforcement” are blatantly inaccurate and improper.

Most importantly, there is little question that these improper exhibits and testimony substantially factored into the ultimate sentence, as the Court specifically noted that it read and considered everything presented before rendering Mr. Aparicio’s final sentence.

ARGUMENT

While Appellant’s Counsel recognizes the strong emotional tension that comes inherent in criminal cases involving death, it is for this reason that rules which minimize that emotional influence must be strictly adhered to, with an even stronger force, to prevent these emotional passions from encroaching on the Defendant’s rights. Appellant submits that in this instance of Mr. Aparicio’s sentencing, emotions overruled law, and he is entitled to a new sentencing hearing.

Appellant’s sentencing hearing presented six objections that can be sorted into the following three classifications: first, who is a “victim” that can submit victim impact statements to the court; second, in what form and procedure can a victim impact statement be submitted; and third, what topics can speakers lawfully address in a victim impact statement.

A. Definition of a “Victim”

Appellant’s sentencing hearing presents a unique issue with regards to the recent amendment to the Nevada State Constitution, and how this language comports or conflicts with existing statutory law; however, the two provisions can be read together in harmony and in a manner that neither limits the Defendant’s rights nor the Victim’s rights. Prior to the constitutional amendment, presentation of victim impact speakers were governed by NRS 176.015, which states, in pertinent part:

3. After hearing any statements presented pursuant to subsection 2 and before imposing sentence, the court shall afford the victim an opportunity to:

(a) Appear personally, by counsel or by personal representative; and

(b) Reasonably express any views concerning the crime, the person responsible, the impact of the crime on the victim and the need for restitution.

...

(d) “Victim” includes:

- (1) A person, including a governmental entity, against whom a crime has been committed;
- (2) A person who has been injured or killed as a direct result of the commission of a crime; and
- (3) A relative of a person described in subparagraph (1) or (2).

The recently enacted constitutional amendment, Nevada Constitution, Art. I § 8A, also known as “Marsy’s Law,” states in pertinent part:

- 1. Each person who is the victim of a crime is entitled to the following rights:
 - (h) To be reasonably heard, upon request, at any public proceeding, including any delinquency proceeding, in any court involving release or sentencing, and at any parole proceeding.
 - ...
 - (j) To provide information to any public officer or employee conducting a presentence investigation concerning the impact of the offense on the victim and the victim’s family and any sentencing recommendations before the sentencing of the defendant.
 - ...
- 7. As used in this section, “victim” means any person directly and proximately harmed by the commission of a criminal offense under any law of this State. If the victim is less than 18 years of age, incompetent, incapacitated or deceased, the term includes the legal guardian of the victim or a representative of the victim’s estate, member of the victim’s family or any other person who is appointed by the court to act on the victim’s behalf, except that the court shall not appoint the defendant as such a person.

In this case, numerous statements were submitted and considered by the District Court prior to announcing sentence. Statements were submitted by friends, co-workers, work supervisors, and cousins and other family members who do not qualify as “relatives” under NRS 176.015(5)(b). None of these individuals would qualify as a “victim” under Nevada statute, leaving only potential qualification under the recently enacted constitutional amendment.

While the constitutional definition is significantly more vague than the statutory definition, the context of Art. I, § 8A, as well as other states that have enacted similar laws, make it apparent that a “victim” for purposes of the rights in the constitutional amendments means a *direct* victim of the offense, certain immediate family members, and the victim’s personal representative.

Only eight states, including Nevada, have enacted the constitutional amendment known as “Marsy’s Law.” Given the relative novelty of the amendments, which first passed in California, few cases have been published regarding interpretation of ambiguous provisions. However, three states – California, Montana, and Ohio – have addressed the definition of a “victim” under Marsy’s Law.

The most recent analysis comes from Ohio. Specifically, the Ohio Appellate Court held that a business entity, rather than a natural person, could be a “victim” under Marsy’s law because it had suffered *direct* economic loss due to the defendant’s criminal conduct. Notably, the definition of “victim” in Ohio’s Marsy’s Law is very similar to the definition enacted in Nevada:

On February 5, 2018, the amendment to Article I, Section 10a of the Ohio Constitution, known as Marsy’s Law, became effective. The amendment expands the rights afforded to victims of crimes.... Importantly, Marsy’s Law defines the term “victim” as “a person against whom the criminal offense or delinquent act is committed or who is directly and proximately harmed by the commission of the offense or act.” Ohio Constitution, Article I, Section 10a(D).

Applying the definition of victim found in Marsy’s Law, we agree with the trial court and find that Pack Rat meets the definition of victim for purposes of restitution. In this case, Ms. Jones used the credit card she had stolen from her employer to deceive Pack Rat into delivering its product to Ms. Jones. While Ms. Jones’s employer was a victim of her crime, so was Pack Rat, which suffered actual harm; i.e., economic loss, as a proximate result of Ms. Jones’s criminal conduct. *State v. Jones*, 2020-Ohio-81 (Jan. 15, 2020).

The Supreme Court of Montana addressed the definition of a “victim” as well when ruling on the constitutionality of Montana’s Marsy’s Law enactment. The Court held:

The definition of “victim,” CI-116(4)(b), includes the victim, who has suffered direct or threatened harm, and his or her “spouse, parent, grandparent, child, sibling, grandchild, or guardian.” Victim also includes someone with a “relationship to the victim that is substantially similar” to the relationship of a spouse, parent, grandparent, child, sibling, grandchild, or guardian. *Mont. Ass'n of Counties ("MACo") v. State*, OP 17-0358, 2017 MT 267 (Nov. 1, 2017).

Lastly, the state which has addressed the issue in the greatest depth is California, the proverbial birthplace of Marsy’s Law. California’s definition of “victim” in Article I, § 28 of the California Constitution states:

(e) As used in this section, a “victim” is a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act. The term “victim” also includes the person’s spouse, parents, children, siblings, or guardian, and includes a lawful representative of a crime victim who is deceased, a minor, or physically or psychologically incapacitated. The term “victim” does not include a person in custody for an offense, the accused, or a person whom the court finds would not act in the best interests of a minor victim.

The Supreme Court of California interpreted this provision to mean “direct” victims, the noted relations, and personal representatives of a deceased direct victim. Specifically, the case *People v. Runyan*, 54 Cal.4th 849, 279 P.3d 1143 (2012), which is also a DUI Death case, addresses the concept

of a “victim” for purposes of determining who is “a person who suffers direct or threatened physical, psychological, or financial harm”:

Defendant, driving while intoxicated, killed another driver instantly in a freeway collision... We granted review to decide if, when, and to whom one convicted of a felony is required by the California Constitution and statutes to pay restitution to the estate or personal representative of a victim of the crime who has died.

...
The case law has ascribed a precise meaning to the phrase “direct victim,” as that phrase has appeared in several restitution statutes. Thus, it is established that a statute “permitting restitution to entities that are ‘direct’ victims of crime [limits] restitution to ‘entities *against which* the [defendant’s] crimes had been committed’ — that is, entities that are the ‘immediate objects of the [defendant’s] offenses.’ [Citation.]”

In *Martinez*, we held that the Department of Toxic Substance Control was not the “immediate object” of the defendant’s offense in that case — attempted manufacture of methamphetamine, a controlled substance — (Health & Saf. Code, § 11379.6, subd. (a)) — and thus was not a “direct” victim entitled to restitution under section 1202.4 for its mandatory costs of cleaning up the defendant’s illegal drug laboratory.

And in *Birkett*, we concluded that automobile insurers were not entities against which the defendant’s vehicle theft and “chop shop” crimes were committed, and thus were not “direct” victims entitled to restitution, under similar language in former section 1203.04, for amounts the insurers paid to reimburse their policyholders for their losses.

Similarly here, Bengé's estate is not a "direct victim" of the fatal collision that killed Bengé. As defendant observes, the estate is not an entity against which defendant committed his alcohol-related offenses of vehicular homicide and injurious driving, and it was not the immediate object of those offenses. *Id.* (emphasis in original) (citations omitted).

Ultimately, the Supreme Court of California held that the decedent's estate itself may not recover restitution under Marsy's Law, but the personal representative of the decedent can.

All three states which have addressed the scope of a "victim" under their respective Marsy's Law amendments have one thing in common: all have clarified the scope of "victim" to be similar to Nevada's statutory definition found in NRS 176.015, in that "victim" includes the "direct victim" as well as certain immediate relatives. Nothing in Nevada's definition of "victim" in Art. I, § 8A would indicate expanding beyond this reasonable scope. Further, nothing would expand a "victim" to the degree purported by the District Court in this case, which would include *anyone* who knows the direct victim, no matter how remote, attenuated or estranged the relationship (in this case, the named victim's parent's friends submitted letters who did not even know the victim).

Nevada's constitutional language defines "victim" (over 18) as "any person directly and proximately harmed by the commission of a criminal offense under any law of this State" (emphasis added). This definition is

facially more narrow than the comparative provisions in California, Montana and Ohio, as those states specifically include listed relatives, whereas Nevada's amendment only includes the "direct victim" language.

On its face, the constitutional definition of "victim" is more limiting than the statutory definition, as its plain language referring to a person "directly and proximately harmed" by a crime would incorporate only subsections (1) and (2) of the statutory definition in NRS 176.015, to the exclusion of "relatives" in subsection (3); however, as certain relatives are still identified as victim speakers by statute, the constitutional amendment does not have the effect of limiting any victim's rights; nonetheless, nothing in the constitutional provision can be read to *expand* the definition of a "victim" beyond that in NRS 176.015.

The axiom of construction whereby plain words are assigned their plain meaning strictly applies to constitutional interpretation. "Where the law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction." *Ex parte Shelor*, 33 Nev. 361, 369 (1910). When unambiguous, express words control. *Id.*

This rule is applicable with special force to written constitutions, in which the people will be presumed to have

expressed themselves in careful, measured terms, corresponding with the immense importance of the powers delegated, leaving as little as possible to implication. It is scarcely conceivable that a case can arise where a court would be justified in declaring any portion of a written constitution nugatory because of ambiguity. *Ex parte Shelor*, 33 Nev. 361 at 369.

The Nevada Constitution Art. I, § 8A defines a victim as a person who has been “directly and proximately harmed” by the commission of a crime. While friends and co-workers may arguably be “proximately” or indirectly harmed, these individuals do not suffer “direct” harm that would bring them within the constitutional parameters. Those “directly harmed” are “entities against which the [defendant's] crimes had been committed — that is, entities that are the ‘immediate objects of the [defendant's] offenses.’” *People v. Runyan*, 54 Cal.4th 849, 279 P.3d 1143 (2012).

Adopting the scope of victims in NRS 176.015 to apply to Nevada’s Marsy’s Law amendment preserves both the rights of victims under the amendment, as well as the rights of defendants by maintaining a legitimate and reasonable definition of who can be named as a “victim” of an offense.

In this case, the District Court’s assessment of who is a “victim” was fundamentally flawed. Specifically, the District Court stated: “I understand that you’re citing to who can make a statement in court, but Article I, Section

8A of the Nevada Constitution *broadly defines victim to anyone who's impacted by the crime*, and therefore I'm accepting those victim impact statements and I have read each and every one of them..." (Bates 265) (emphasis added).

The District Court's reasoning is an inaccurate reading of the language in Art. I, § 8A. The constitution does not define a victim as "anyone who's impacted by a crime" – it contains a very clear qualifier by defining victim as a person who was "directly and proximately harmed" by a crime. The District Court's reasoning would truly permit *anyone* to assert any of the rights contained in Art. I, § 8A, which was not intended in the passage of Marsy's Law and would be patently unreasonable with absurd consequences.

The definition of "victim" in Art. I, § 8A applies to every right articulated in the constitutional provision, not just giving impact statements; "victims" can recover monetary restitution, assert a right to privacy, and bring an action to compel public officers to carry out a duty under the provision. Under the District Court's ruling, the decedent's acquaintances, co-workers, landlords, estranged distant relatives, and employment supervisors now have a right to seek monetary restitution, and in fact have standing to bring a public action to obtain monetary restitution. This was not the intent of enacting Marsy's Law,

and defining a “victim” to mean “anyone who’s impacted by the crime” is unprecedented and grossly overexpansive.

As noted previously, in this case the victim impact statements were submitted by distant relatives, friends, acquaintances, co-workers, supervisors, even the victim’s parent’s friends, etc. Defense filed an objection to no less than *forty-six* individuals who would not qualify as a “victim.”

Improper victim impact statements warrant a new sentencing hearing when the statements affected the Defendant’s substantial rights and there is reason to believe the Court considered them when pronouncing sentence such that the sentencing hearing is fundamentally unfair.

However, while the statute is broad in terms of what a victim can express, it is not without limitations.

...

There is no indication in the record that the district court based its sentencing decision on the unsworn victim impact statements. In sentencing Dieudonne, Judge Smith expressed that Dieudonne's criminal history was the primary reason for his decision and made no reference to the victim impact statements.

...

Dieudonne contends that prejudice affecting his substantial rights resulted from the improper victim impact statements. While we agree that the victim impact statements contained instances of harsh and inappropriate language, we conclude that this language does not render the proceeding fundamentally unfair. *Dieudonne v. State*, 127 Nev. 1, 9, 245 P.3d 1202, 1208 (2011).

Because the District Court permitted and considered victim impact statements from almost 50 individuals who do not statutorily or constitutionally qualify as a “victim,” Appellant deserves a new sentencing hearing. There is no question that the District Court “based its sentencing decision” on the improper victim impact statements, as the District Court stated on the record that it had read and considered everything presented to it. Additionally, the sheer number of improper statements admitted – the improper statements vastly outweigh the proper ones – render the proceedings fundamentally unfair.²

B. Form of Victim Impact Statements

In this case, victim impact statements were submitted directly to the District Court prior to sentencing. Appellant submits this is improper and in violation of established procedures for presenting victim impact statements,

² It is noteworthy that not only did the District Court sentence Mr. Aparicio to *more than double* the recommendation by Parole and Probation on *each* count, the Court also deviated upward from the plea negotiations by assessing a consecutive sentence for Reckless Driving, even though by negotiation the State did not oppose concurrent time.

which was not changed with the passage of Nevada's constitutional amendment.

While Art. I, § 8A articulates certain rights that may be asserted, it did not address the procedure for doing so, which remains controlled by existing statutory and case law. This process was unambiguously set forth in *Buschauer v. State*, 106 Nev. 890, 893, 804 P.2d 1046, 1048 (1990):

Buschauer further contends that NRS 176.015(3) violates due process because it does not require notice, oath, and cross-examination in connection with the impact statement. Preliminarily, we note that an impact statement may be introduced at sentencing in two ways. First, where a victim cannot or does not wish to appear in court, the statement may be placed in written form in the presentence report pursuant to NRS 176.145. Second, the victim may give an oral statement at the sentencing hearing pursuant to NRS 176.015(3). When, as here, the second of the two alternatives is used, we must balance the dictates of due process with the legitimate interests of the victim, as expressed by the legislature. We conclude that the scope of due process protections depends on the scope of the impact statement. First we address the situation where the impact statement will refer only to three subjects: the facts of the crime, the impact on the victim, and the need for restitution. *Id.* (emphasis added).

Buschauer sets forth two specific mechanisms by which victim impact statements can be submitted to the Court: written statements through the Pre-Sentence Investigation Report ("PSI") or orally at the sentencing hearing. The constitutional amendment does not add or alter this procedure, as it

specifically permits victims to either “provide information to any public officer or employee conducting a presentence investigation” or “be reasonably heard, upon request, at any public proceeding...” This mimics and directly comports with the two options identified in *Buschauer*.

Nothing in *Buschauer*, Nevada statute or the Nevada Constitution permits the State to send victim impact letters directly to the Court. There is a very specific mechanism by which to present written statements – through the PSI – in addition to a right to be heard and present oral statements in person (or through a personal representative). The Nevada Supreme Court provided a list of two discrete routes to present victim impact statements, and when interpreting statute, lists are presumed to be exhaustive unless specified otherwise as illustrative or non-exhaustive language. *Dep't of Taxation v. DaimlerChrysler Servs. N. Am., LLC*, 121 Nev. 541, 548, 119 P.3d 135, 139 (2005); *Horizons at Seven Hills Homeowners Ass'n v. Ikon Holdings, Ltd. Liab. Co.*, 373 P.3d 66, 71 (Nev. 2016); *Bigpond v. State*, 128 Nev. 108, 115, 270 P.3d 1244, 1248 (2012) (“This construction is consistent with the use of the expression ‘such as,’ which indicates that the list of “other purposes” is illustrative rather than exhaustive”).

Sending victim impact letters to the Court directly, outside of the record and subject to the Court's immediate review, is fraught with potential dangers. The topics that may be addressed in victim impact statements are not unlimited ("while the statute is broad in terms of what a victim can express, it is not without limitations"); permitting the Court to review all letters directly, without the knowledge or consent of the Defense, creates a substantial likelihood that the Court will consider any improper statements submitted to it. Appellant maintains that is precisely what occurred in this case.

The procedures for submitting victim impact letters exist for a reason, and strike a workable balance between the interest of the victim to be heard and the interest of the defendant to a fair sentence after the consideration of lawful evidence. In the instant matter, the letters submitted to the Court directly were outside the scope of written statements that can be submitted through a PSI per NRS 176.145. The statute is explicitly concerned with the effect of the crime *on the direct victim*. Per NRS 176.145(1)(c), the PSI must contain "Information concerning the effect that the offense committed by the defendant has had upon the victim, including, without limitation, any physical or psychological harm or financial loss suffered by the victim, to the extent that such information is available from the victim or other sources." This has

been subsequently affirmed in case law, with a slight expansion to permit the impact on direct family members of the victim. See, *Castillo v. State*, 110 Nev. 535, 545, 874 P.2d 1252, 1259 (1994), overruled on other grounds in *Wood v. State*, 111 Nev. 428, 892 P.2d 944 (1995).

This was directly carried over into the Marsy's Law provision. Art. I, § 8A(j) permits victims "[t]o provide information to any public officer or employee conducting a presentence investigation concerning the impact of the offense on the victim and the victim's family and any sentencing recommendations before the sentencing of the defendant." Not only does this constitutional provision render much of the impact letters in Mr. Aparicio's case to be facially improper, but it further supports the definition of "victim" articulated in § A, *supra*. By permitting a discussion of impact on "the victim and the victim's family," the term "victim" cannot be read to encompass friends, co-workers, supervisors, and the other individuals that the District Court held at Mr. Aparicio's sentencing to fit within the new constitutional definition of "victim."

Regardless of the scope of who can present written letters through the PSI or what such letters can discuss, the Department of Parole and Probation plays an important role in filtering improper statements *before* they are

presented to the Court. Bypassing the PSI process entirely as a means of submitting victim impact statements not only facially violates existing Nevada law, but it opens the door to the Court's consideration of improper topics and discussions, such as those addressed *infra*.

Additional questions also arose during Appellant's sentencing of whether demonstrative exhibits, such as videos, may be presented to the Court. Respectfully, Appellant maintains that videos depicting the victims are not victim impact statements at all, and serve no purpose other than to arouse prejudicial emotional passions immediately before sentencing. In this sense as well, *Buschauer* is instructive. It provides that victim impact statements may be written, or they may be oral. Art. I, § 8A provides an opportunity "to be heard" and to present information to the public officer drafting the PSI. Videos and poster exhibits are not proper for victim impact testimony.

For these reasons, the presentation of victim impact statements must be limited to the "two ways" articulated in *Buschauer* – in writing through the PSI, where statements can be properly evaluated by the Defense and Parole and Probation before being presented to the Court, or orally at a sentencing hearing where the speaker is sworn and subject to cross-examination. As applied to this case, over a *hundred pages* of written victim impact statements

were presented directly to and considered by the Court, which Appellant maintains is improper. This further highlights the precise problems that can arise when these letters are sent (without notice, filter or evaluation) directly to the Court.

C. Topics Discussed by Victim Impact Speakers

“Though a judge is allowed wide discretion in sentencing, if the judge relies upon prejudicial matters, such reliance constitutes an abuse of discretion that necessitates a resentencing hearing before a different judge.” *Castillo v. State*, 110 Nev. 535, 545, 874 P.2d 1252, 1259 (1994); *Goodson v. State*, 98 Nev. 493, 495-96, 654 P.2d 1006, 1007 (1982). “[W]hile the statute is broad in terms of what a victim can express, it is not without limitations.” *Dieudonne v. State*, 127 Nev. 1, 9, 245 P.3d 1202, 1208 (2011).

The recent constitutional amendments do not address topics which can be discussed by victim impact speakers in court; it only provides for the right “to be heard” at the public proceeding, or the right to speak to a public officer conducting a PSI regarding “the impact of the offense on the victim and the victim’s family.” Without further discussion in the constitutional amendment, the parameters set forth in NRS 176.015(3)(b) continue to apply. Specifically,

victim impact speakers may discuss “any views concerning the crime, the person responsible, the impact of the crime on the victim and the need for restitution.”

Though what is permissible discussion has no hard and fast rules, the Nevada Supreme Court recognized a balancing interest that must be had; as the speaker’s discussion goes beyond the scope of what is articulated in the statute, the Defendant’s due process rights correspondingly increase in strength. See, *Buschauer v. State*, 106 Nev. 890, 893, 804 P.2d 1046, 1048 (1990) (“We conclude that the scope of due process protections depends on the scope of the impact statement”).

In this case, the District Court overruled *all* Defense objections, not just to the 100+ pages of improper victim impact letters or the form of the letters, but also to every discussion by the speakers that deviated from legally permissible topics. The District Court allowed the speakers adversely comment on the Defendant’s exercise of his constitutional rights; allowed the speakers to disparage Parole and Probation for its process and sentencing recommendation; and allowed the speakers to make accusations and opinions about the merits of pre-trial litigation.

One speaker told the District Court that Appellant “purposely delayed” the proceedings “because of wild theories of a third driver or insulting the intelligence of law enforcement officers who have investigated too many crashed like this over the years using proven scientific methods.” Mr. Aparicio did not allege a third driver or insult law enforcement. He exercised his constitutional rights to challenge his detention because the State failed to establish he was in actual physical control of the vehicle, and the “proven scientific methods” challenged is likely in reference to the challenged retrograde extrapolation analysis based solely on Appellant’s gender and weight. Adverse comments on an accused’s exercise of his constitutional right to a full defense is not proper for victim impact testimony.

The same speaker was then permitted to further comment on the plea. “Only when he realized that there were no wild lies he could come up with, that the evidence wouldn’t refute, did he accept guilty plea. He has known since this crash how guilty he is but he refused to accept responsibility for his actions.” Adverse comments on an accused’s exercise of his constitutional right to go to trial or accept a negotiation is not proper for victim impact testimony.

Another speaker was allowed to discuss negative personal opinions about Parole and Probation for its sentencing recommendation and evaluation matrix, claiming that Parole and Probation “show a repugnant disregard for the value of human life... They’re telling me that my daughter, Christa’s life, is only worth possibly as little as 3 years in prison and the same for Damaso. How is that Parole and Probation has to use a point system that takes every human aspect out of their decision to come up with a recommendation for sentencing?” Negative opinions about the required assessment by Parole and Probation is not proper for victim impact testimony.

The last speaker was permitted to say that, by filing Motions and engaging in pre-trial litigation before taking a plea, that Appellant “dishonored and wasted the Court’s time” by trying “to get off scot-free” as “some sort of sick joke.” The Defense has a full and unfettered right to challenge the evidentiary rulings decided made him, particularly when the rulings were made by an arguably biased judge, which included a ruling that precluded Appellant from obtaining a rebuttal expert that became necessary for his defense. Referring to the exercise of this right as “dishonoring” the Court or a “sick joke” is not proper victim impact testimony.

As with the improper victim impact letters, here there is no question that the District Court relied on this improper testimony when determining Mr. Aparicio's sentence; the District Court affirmed as much on the record. At the conclusion of argument, the District Court began announcing sentence with the following:

THE COURT: All right. Mr. Aparicio, this is the time for sentencing and I have considered all of the information presented, not only in the PSI but also your statement here in court. I have certainly considered the statements of the family. I've read every letter that was submitted to me as well as the video and the pictures that were presented here in court today. (Bates 319).

By relying on improper letters, improper exhibits *and* improper testimony, "such reliance constitutes an abuse of discretion that necessitates a resentencing hearing before a different judge." *Castillo v. State*, 110 Nev. 535, 545, 874 P.2d 1252, 1259 (1994). Therefore, Mr. Aparicio is entitled a new sentencing hearing.

CONCLUSION

For these reasons, Appellant respectfully requests the matter remanded for a new sentencing hearing before a different Judge.

VERIFICATION OF KELSEY BERNSTEIN, ESQ.

1. I am an attorney at law, admitted to practice in the State of Nevada.
2. I am the attorney handling this matter on behalf of Appellant.
3. The factual contentions contained within the Opening Brief are true and correct to the best of my knowledge.

Dated this 10 day of April, 2020.

NEVADA DEFENSE GROUP
Respectfully Submitted By:

Kelsey Bernstein
KELSEY BERNSTEIN, ESQ.
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 with 14 point, double spaced Cambria font.

2. I further certify that this brief complies with the page-or-type-volume limitations of NRAP 32(a)(7)(A)(ii) because it is proportionally spaced, has a monospaced typeface of 14 points or more and contains 8,559 words.

3. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(c), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 10 day of April, 2020.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I hereby certify that on the 10 day of April, 2020, I served a true and correct copy of the Opening

Brief to the last known address set forth below:

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