IN THE SUPREME COURT OF THE STATE OF NEVADA

Henry Aparicio, Appellant	)	Supreme Court Case No.: 80072
vs.	)	
The State of Nevada, Respondent,	)	**APPELLANT'S REPLY BRIEF**

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Docket 80072 Document 2020-18098

MEMORANDUM OF POINTS AND AUTHORITIES

The State first responds that the victim impact statements submitted to the District Court were proper because the submitting parties were "proximately" harmed by the criminal offense. "The definition of 'victim' under Marsy's Law is broad and includes at the very least individuals that are 'proximately' harmed… It is clear that each individual that submitted victim impact statements were indeed at the very least proximately harmed by the Puentes' death as discussed in their letters" (State's Answering Brief (SAB) 9, 16). However, this conclusion is based on a direct misreading of the language contained in the constitutional amendment known as Marsy's Law.

The State bases this conclusion on its analysis that a victim is defined as anyone "directly **or** proximately harmed" by the commission of a criminal offense (SAB 15, 16); therefore, because the individuals who submitted letters were "at the very least proximately harmed" by the offense, the State concludes these impact statements were valid. However, Marsy's Law defines a Victim as a person who has been "directly **and** proximately harmed" by the commission of a criminal offense. Nevada Constitution, Art. I § 8A(7). Therefore, although the State does not formally concede that letters were submitted by non-victims, the argument that these individuals were only proximately harmed by the

offense would facially remove them from the scope of the constitutional definition. There can be no reasonable claim that the victim's parent's friends were "directly" harmed by the offense, and thus those individuals do not qualify as a "victim" under Marsy's Law.

The State next argues that even though a victim is permitted to provide an impact statement, similar statements submitted by non-victims are nonetheless acceptable because "there is no prohibition" on such statements and the District Court may "still consider their statements as extraneous information" (SAB 18, 19). Respectfully, the State's argument would turn a sentencing hearing into a free-for-all. If non-victims can present statements, can the Defendant's spouse testify before the District Court about how much incarceration will financially impact their family, or can the Defendant's children testify about how much their lives will be forever altered if their father is sent to prison? The State's position would truly place no limit whatsoever on the information that can be presented to the District Court under the label of "extraneous information," and this Court should decline to accept such a far-reaching result.

The State also sets forth a very similar response with regards to the form of the victim impact statement, arguing that demonstrative exhibits (and any

other form of presentation to the court) are permissible because there is no specific exclusion. "[W]hile Appellant argues that there is no Nevada statute or direct authority that authorizes direct submission of victim impact statements to the district court, there is also no such authority that bars such action" (SAB 21).

The State's position on both of these issues regarding the source and form of the impact statement is simply that if it's not prohibited, it's permissible. This is untenable for a number of reasons. When a law sets forth a specific action that is permitted, it need not also set forth the inverse corollary of every potential action that is excluded, which would be infinite. This is reflected in the well-recognized canon of interpretation that has been utilized in Nevada since the late 19th century, *expressio unius est exclusio alterius*, or "mention of one thing or person is in law an exclusion of all other things or persons." *Butler v. State*, 120 Nev. 879, 902, 102 P.3d 71, 87 (2004). When "there is nothing in the law authorizing a departure from this rule of construction it must be followed." *Va. & T. R.R. v. Elliott*, 5 Nev. 358, 364 (1870). The Nevada Supreme Court described this maxim succinctly in *Ex parte Arascada*, 44 Nev. 30, 35, 189 P. 619, 620-21 (1920):

> [T]he maxim, "expressio unius est exclusio alterius" [] is a well-recognized rule of statutory construction and one based upon the very soundest of reasoning; for it is fair to assume that, when the legislature enumerates certain instances in which an act or thing may be done, or when certain privileges may be enjoyed, it names all that it contemplates; otherwise what is the necessity of specifying any? The rule invoked is so thoroughly recognized, not only by the courts generally, but by our own court, that it would be puerile to dwell upon the question presented, further than to quote from the decisions of our own court. The identical question before us was determined by this court in *Lake v. Lake*, when it said: "It is settled that affirmative words in a constitution, that courts shall have the jurisdiction stated, naturally include a negative that they shall have no other."
>
> The language of Beatty, C. J., in *State v. Hallock*, might have been used with propriety had the question now before us been under consideration by the court. He said:
>
> "It is true that the constitution does not expressly inhibit the power which the legislature has assumed to exercise, but an express inhibition is not necessary. The affirmation of a distinct policy upon any specific point in a state constitution implies the negation of any power in the legislature to establish a different policy. 'Every positive direction contains an implication against anything contrary to it which would frustrate or disappoint the purpose of that provision. The frame of the government, the grant of legislative power itself, the organization of the executive authority, the erection of the principal courts of justice, create implied limitations upon the lawmaking authority as strong as though a negative was expressed in each instance.' …" *Id.* (internal citations omitted).

It is clear that the State's position – that "no prohibition" equals permission – is contrary to centuries of established case law and constitutional

interpretation. What is the point of granting a particular right to provide an impact statement specifically to victims if "individuals other than victims" can enjoy the same privilege? When Marsy's Law sets forth an affirmative definition of a "victim" detailing who may provide impact statements to the District Court, the law inherently "contains an implication against anything contrary to it which would frustrate or disappoint the purpose of that provision." *Id.*

Similarly, Nevada case law has set forth two specific ways that such a statement can be introduced to the Court: "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)." *Buschauer v. State*, 106 Nev. 890, 893, 804 P.2d 1046, 1048 (1990). The State misinterprets *Buschauer* to conclude that the two specific statutory ways to introduce a victim impact statement are not exclusive because the Nevada Supreme Court said an impact statement "may" be introduced at sentencing.

However, a facial reading of *Buschauer* is clear that "may" refers to the introduction of a victim impact statement in general; in other words, a victim is not *required* to provide an impact statement, but if he or she chooses or to do,

it must be in one of the two ways provided by law. *Expressio unius est exclusio alterius.* Per both statute and case law, an impact statement may be submitted in writing via the presentence investigation report, or orally at the sentencing hearing. The Nevada Supreme Court set forth two specific procedures for a victim to submit a statement, and that is inherently to the exclusion of others.

While the State argues that no error could have occurred because the "judge is presumed to follow the law and would not consider inadmissible evidence," respectfully, if the judge were never wrong, there would be no appeals. The record very strongly indicates that evidence submitted to the District Court prior to and during Appellant's sentencing hearing was improper in source, substance, and form. Thus, the only remaining question is whether the District Court relied on this improper, i.e. "impalpable and highly suspect," evidence. The record establishes the District Court did affirmatively rely on this information when determining Appellant's sentence.

The State attempts to draw a distinction between what the District Court "considered" and what it "relied" upon when imposing Appellant's sentence. This distinction is nonsensical and highly speculative absent an extraordinarily clear record. However, in the instant case, this Court need not address this purely semantic distinction because the District Court did in fact provide a very

clear record. On more than one occasion, the District Court affirmatively stated that what it "considered" did in fact play a role in the determination of Appellant's sentence.

> 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…And I too am required to consider the whole defendant and the victims, as well as the conduct of the defendant when considering what an appropriate sentence is. And that's what I've done (Bates 265; 320).
>
> And just for the record, there was an objection made to some of the exhibits and letters that were received and speakers, I have overruled those objections. As I stated, I believe the Nevada Constitution defines victims broadly and therefore I accept everything and considered that in rendering my sentence here today (Bates 324).

The District Court affirmed on the record that the numerous improper victim impact statements were "accepted" and considered "in rendering my sentence here today." There can truly be no clearer record that the District Court did in fact rely on these improper statements when determining Appellant's sentence. For this reason, the numerous errors that occurred both prior to and during Appellant's sentencing hearing had a direct impact on his final sentence, and therefore, cannot be considered harmless.

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 Reply Brief are true and correct to the best of my knowledge.

Dated this 12 day of May, 2020.

NEVADA DEFENSE GROUP
Respectfully Submitted By:

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.

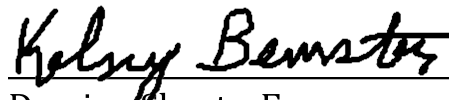
2. I further certify that this brief complies with the page-or-type-volume limitations of NRAP 32(a)(7)(A)(ii) because it is proportionally spaced, has a monospaced typeface of 14 points or more and contains 2,128 words.

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 matte 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 12 day of May, 2020.

NEVADA DEFENSE GROUP
Respectfully Submitted By:



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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I hereby certify that on the 12 day of May, 2020, I served a true and correct copy of the Opening Brief to the last known address set forth below:

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