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 TO SUPPLEMENTAL BRIEF**

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MEMORANDUM OF POINTS AND AUTHORITIES

Respondent's Supplemental Answering Brief brings to mind an old adage: you can't always please everyone. Whenever a rule is set or a law is applied, there will always be those on the fringes, or those few who maybe "should" be covered by a law but are not; there will always be exceptions. But this natural consequences of having rules and laws, which often bear the unenviable task of drawing a line in the sand, cannot itself be used as a basis to have no rules at all.

Just as the creation of a drinking age leads to "unfair" results for a few mature 20 year-olds, there will always be a hypothetical universe wherein someone is not satisfied with the application of law in some variety, but the existence of these hypothetical scenarios does not negate the underlying need to draw the boundary in the first instance.

Respondent's use of hypothetical scenarios in its brief is particularly voluminous: "Perhaps this victim was not the kind that was originally contemplated when Marsy's Law was created, but one could make a plausible argument…" (State's Supplemental Answering Brief, hereinafter SSAB, 4); "Take for instance a case involving the death of a victim…" (SSAB, 7); "This Court should also reflect on the example previously given of the same-sex

partner…" (SSAB, 9); "Although this is only a hypothetical, this Court should take into consideration this possibility…" (SSAB, 10). Respectfully, hypothetical "what-if" scenarios will always exist, but the mere use of hypotheticals is devoid of legal analysis.

Respondent is taking the position of a critic against Appellant's offered interpretation of Marsy's Law based on its plain language, yet offers no alternative interpretation of its own. Respondent recognizes that "Marsy's Law does specify a class of individuals that are meant to receive its protections, so it would be error for the State or even this Court to legislatively expand its definition to 'non-victims'" (SSAB 5). However, Respondent then defines a victim as "anyone who has been impacted by a crime" (SSAB 2). Respondent fails to acknowledge the critical premise that *a person who is <u>only</u> proximately harmed, but not directly harmed, is a non-victim under the plain language of Marsy's Law*.

This distinction is necessary because the scope of individuals who are only proximately impacted by an offense is limitless. Criminal actions are brought by the State of Nevada on behalf of the People of Nevada – every crime has a "proximate" impact on every citizen in the state. It has a "proximate" effect on people nationwide who see it on television, or in the newspaper, or on the

internet. The legal requirement for direct harm caused by the offense acts as a reasonably inclusive definition, encompassing *true victims* while preserving the rights of the defandant; it too is a necessary line in the sand.

By continuing to argue that a victim under Marsy's Law "allows for broad consideration as to anyone who has been affected by crime" (SSAB 2), Respondent is eliminating the victim / non-victim distinction because everyone can qualify as a victim. Thus, Respondent asks this Court not to apply the plain language of Marsy's Law, yet presents no viable alternative solution that is not self-contradictory: it concedes that a classification exists, but proposes a definition that eliminates the classification altogether.

The remainder of Respondent's analysis suffers from similar logical flaws. For example, "the letters from non-victims must be deemed if nothing else relevant to conveying a point of view." Again, just like defining a victim as "anyone impacted," blanketly accepting as relevant any statement conveying a point of view is like defining impact as "anyone speaking." Virtually every time someone speaks, he or she conveys a point of view – to define relevance so broadly as conveying a point of view would place no limit on what anyone can express. A person who listens to a news report about a criminal case on television in another country may have a point of view to express, but the law

should not mandate the court consider it. Indeed, as applied to this case, Respondent says the non-victim letters were admissible because they "merely expressed a point of view in favor of the victim's families." However, because *every* impact letter submitted will express a point of view, regardless of who submits it, this definition is overly broad as functionally limitless.

Interestingly, the amicus curiae brief submitted by the Office of the Attorney General is significantly more reasonable in its approach, but still suffers a similar defect in that it would provide for limitless "rights" to an overly broad group of individuals that do not qualify as a "victim."

The position of the Attorney General is that the Court should not limit the information that can be provided to the district court, but simply ensure that the defendant maintains the right to present evidence in mitigation and through a statement in allocution. Appellant agrees the latter half of this position is correct, but as a whole, it is incomplete. The right of a defendant to present mitigation must be preserved, but the rights of the defendant are not at issue here.

The rights and needs of parties at sentencing cannot be so easily categorized into "defendant rights" and "victim rights." There is inherently going to be overlap, and conflict; a "victim" cannot become excessively defined

in scope while attempting to simply justify that expansion by claiming the defense is still maintaining its own protections.

The Attorney General's Office reasserts Respondent's position that the Court of Appeals decision "narrow[s] the scope of what evidence can, and should be available to the trial court" (Amicus Curiae of Office of the Attorney General 6). This is not the case. The Court of Appeals' decision did not "narrow" the scope of victim's rights by applying the plain language of Marsy's Law and still allowing those who don't qualify under the plain language to still potentially present impact statements under NRS 176.015.

Returning to the State's Supplemental Answering Brief, Respondent next contends "[t]he situation here was not one where the district court allowed every individual who write a letter unlimited time in court to provide oral testimony against Appellant. The letters were a de minimis opportunity for the individuals to be considered and heard" (SSAB 4). Respondent includes no citation to the record in support of its factual contention, and Appellant can find none. The situation here was one where the district court *did* allow every individual who wished to speak unlimited time (as Appellant can find no reference where anyone's time or content was limited, even over Defense's objection), and it *did* allow an opportunity for the letters to be fully considered

and heard ("I'm accepting those victim impact statements and I have read each and every one of them that was submitted to me").

Respondent then quizzically argues to this Court that the District Court simply did not really mean what it said – "Although the district court uttered these words, it did so in the context of considering all information that was presented to it" (SSAB, 11). While Respondent is attempting to minimize the prejudice to Appellant in creative ways, the record is clear that all statements submitted, whether proper or improper, were equally considered because the district court believed it was *obligated* to consider them under Marsy's Law.[1] Indeed, even Respondent concedes, "However, in this case, it just so happens that he letters were given consideration" (SSAB 5).

Lastly, Respondent argues that even though the letters were considered by the district court, the error is effectively harmless because they would have been considered under NRS 176.015, even if not required to be considered under Marsy's Law; citing *Wyatt v. State*, 86 Nev. 294 (1970), Respondent argues the district court achieved the right result (consideration of the letters),

[1] Appellant maintains the district court acting under the mistaken belief that it was obligated to consider the statements under Marsy's Law, and thus lacked discretion, is in itself a form of abuse of discretion by omission.

even if based on an improper ground (namely, under Marsy's Law instead of Nevada statute).

However, Respondent's analysis suffers from a fatal flaw: it asks the Nevada Supreme Court to sit as the trier of fact and factually determine if the letters are proper to consider as reliable and relevant evidence presented by non-victims under NRS 176.015. While acknowledging that multiple statements were submitted by individuals not directly harmed, Respondent *assumes* the error was harmless – and the result is correct – because the statements *could* have been admitted by statute. However, the district court did not make that determination because it believed it was *obligated* to consider them under Marsy's Law. In summation, the letters have never been analyzed for admission pursuant to NRS 176.015 in the district court. Therefore, in order to conclude that the district court reached the "right result," the only judicial body that will have made that finding would be the Nevada Supreme Court, and the Supreme Court cannot consider an issue for the first time on appeal. *See, Rimer v. State*, 131 Nev. 307, 328 n.3, P.3d 697, 713 n.3 (2015). For this reason, this matter must be remanded for a new sentencing hearing.

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

Dated this 30 day of June, 2021.

NEVADA DEFENSE GROUP
Respectfully Submitted By:

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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 1,947 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 30 day of June, 2021.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I hereby certify that on the 30 day of June, 2021, I served a true and correct copy of the Opening Brief to the last known address set forth below:

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