

IN THE SUPREME COURT OF THE STATE OF NEVADA

Henry Aparicio, Appellant)	Supreme Court Case No.: 80072
)	Electronically Filed
)	May 17 2021 07:15 a.m.
vs.)	Elizabeth A. Brown
)	Clerk of Supreme Court
The State of Nevada, Respondent,)	
)	APPELLANT'S SUPPLEMENTAL
)	BRIEF
)	

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JURISDICTIONAL STATEMENT

This Supplemental Brief is filed pursuant to this Court's Order Directing Supplemental Briefing and Inviting Amicus Briefing filed April 16, 2021.

MEMORANDUM OF POINTS AND AUTHORITIES

In its Petition for Review, the State challenged whether the Nevada Court of Appeals' decision regarding a district court's ability to review victim impact letters conflicted with Nevada Supreme Court precedent or Marsy's Law.¹ On April 16, 2021, this Court requested supplemental briefing regarding a district court's ability to review letters received prior to, or at the time of, the sentencing hearing. This supplemental brief follows.

Appellant's conclusion to this question is twofold: First, the district court shall freely, and without limitation, review letters or victim impact statements that are submitted by individuals who fit within the Constitutional *or* statutory definition of "victim." Second, the district court may review letters or victim impact statements submitted by individuals who do *not* fit within the Constitutional or statutory definition of "victim" so long as those statements are deemed to be reliable and relevant, as determined within the discretion of the district court.

¹ Appellant will not include references to the underlying facts of the case in this brief, as Appellant does not believe such facts are relevant to resolution of the legal issues presented; however, Appellant will note that the State's Petition for Review dedicated nearly 50% of its content to recitation of the facts of the case.

As a fundamental premise, the district court does not abuse its discretion (nor does this Court impede on its precedential deference to a district court's sentencing decision) by categorizing statements into those submitted by victims, versus those submitted by non-victims. The distinction between victims and non-victims is inherent in Marsy's Law itself, and has been well recognized as valid in statutory and case law. By explicitly defining "victim," both Marsy's Law and Nevada statute create the distinction between those who fit within this definition, and those who do not.

Although proverbially labelled as the "Victim's Bill of Rights," the Marsy's Law definition of "victim" is actually narrower than the corresponding definition in Nevada Revised Statute because Marsy's Law requires a victim to be directly *and* proximately harmed by criminal conduct, whereas NRS 176.015(d) includes a list of certain individuals who qualify as victims despite only be proximately harmed by criminal conduct, such as close family members. See, NEV. CONST. ART. I § 8A(7).

Legislative history regarding Marsy's Law is clear that the Constitutional amendment was designed to be a "floor," rather than a "ceiling" of victim's rights, and the recognition of non-victims as a separate category of individuals does not infringe on this legislative intent. Marsy's Law includes numerous

other rights now afforded to victims, including expanded rights to be noticed, to be heard, and to be entitled to monetary compensation. Recognition of non-victims as a separate category of individuals does not infringe on these newly afforded rights provided to victims in any way; it further does not conflict with the legislative intent or intended purpose of passing Marsy's Law because categorizing non-victims does not diminish the constitutional rights afforded to those who do qualify as a victim.

The State argues that Marsy's Law should apply to non-victims as well as victims because it was designed to be a "floor" rather than "ceiling." However, this Court must acknowledge that "victim" is defined within Marsy's Law itself, and it would violate the plain language of Marsy's Law to apply its benefits outside the parameters it contains. The State's argument is, in essence, that the definition of "victim" in Marsy's Law is too narrowly defined, and the benefits of Marsy's Law should also be conferred on non-victims who do not fit within this definition. However, it is the purview of this Court to pass on the legality of laws passed, not their wisdom. See, *Dayton Gold & Silver Mining Co. v. Seawell*, 11 Nev. 394, 400 (1876) ("Before we discuss the main questions presented for our decision, it is proper to state that we have nothing to do with the wisdom, policy, justice, or expediency of the law. These are matters of which

the legislative and executive departments of the state government are the sole judges; and even if we differed in opinion with them upon any of these grounds, we could not, for such reason, declare the act invalid”).

This Court is bound to apply the plain language of Marsy’s Law as written, and Marsy’s Law defines “victim” as those directly *and* proximately harmed by an offense. Additionally, Marsy’s Law is itself titled “Rights of victims of crime.” By its plain language, the rights in Marsy’s Law apply only to those who fit within its internal definition of “victim,” and not to those who are non-victims. As noted above, declining to expand the rights of Marsy’s Law to non-victims does not infringe on the “floor” of rights contained for those who *do* qualify as victims, as the legislature intended.

Although the State misconstrues the decision of the Court of Appeals to infer a “prohibition” for non-victims, a closer review of the Court of Appeals decision strikes a fair compromise that recognizes the rights afforded to victims while applying basic evidentiary safeguards to protect the due process rights of the accused, which still apply at sentencing. See generally, *Friedman v. State*, 133 Nev. 1010, 387 P.3d 219 (2017) (in Nevada, “the sentencing hearing provides a full adversarial proceeding and ample due process protections”).

The State's converse position that the district court is *required* to consider the statements of non-victims and victims equally leads to patently absurd results. In fact, during oral argument before the Court of Appeals, that appeared to be the primary source of questioning for the State – what about cases with high levels of media publicity? Can people who live out of the state, or even across the world, send letters in to the Court about how seeing a case on television or in the news affected them? Does that not turn cases into a publicized popularity contest, or lead down the slope of the judiciary becoming courts of public opinion?

In summation, the plain language of Marsy's law requires courts to apply the rights and benefits therein to victims, but not to non-victims; this does not conflict with Marsy's Law or its express purpose as the *Victim's* Bill of Rights and avoids the absurd consequences of the State's proffered interpretation. While Marsy's Law applies explicitly to victims, it is silent with regards to non-victims, and thus it would be improper judicial overreach to expand the plain language of Marsy's Law beyond its internal parameters. By definition, Marsy's Law applies *only* to "victims" as defined therein, and therefore Marsy's Law itself cannot be used as the platform to provide those rights to individuals who do not qualify under the Constitutional definition.

However, recognition of rights as they apply to victims does not conversely *prohibit* any rights for those who do not qualify as victims. Although Marsy’s Law is silent on what rights may apply to non-victims, Nevada Statute fills the gap by affording several rights to non-victims – including the right to present letters or victim impact statements. NRS 176.015(6) “does not restrict the authority of the court to consider any reliable and relevant evidence at the time of sentencing.” The rights of non-victims are governed by statute rather than Marsy’s Law, and simply require additional safeguards that apply to *all* evidence generally, namely reliability and relevance.²

NRS Chapter 48, titled “Admissibility Generally,” explicitly excludes evidence which is irrelevant. See, NRS 48.025(2) (“Evidence which is not relevant is not admissible”). The statute does not apply to specific stages in the proceeding, nor does its application halt after conviction. All evidence, including that presented at sentencing, must be relevant by statute.³ Second,

² Case law provides that sentencing cannot be based on “impalpable or highly suspect evidence,” *Goodson v. State*, 98 Nev. 493, 495-96, 654 P.2d 1006, 1007 (1982), and this fully comports with the statutory requirements of reliability and relevance; presumably, evidence which is impalpable or highly suspect would not be relevant and/or reliable.

³ Although not all rules of evidence apply at sentencing, see NRS 47.020(3)(c), statute specifically requires non-victim statements presented at the sentencing determination be relevant and reliable.

the evidence at sentencing must have an indicia of reliability to avoid unfair prejudice to the defendant. See, NRS 48.035(1). Evidence presented which is false or otherwise unreliable at sentencing, if accepted *carte blanche* by the district court, can result in *extreme* prejudice to the defendant, including but not limited to an excessive or unjust sentence.

The statutory requirement for reliability and relevance does not restrict impact statements submitted by victims pursuant to Marsy's Law or Nevada statute per NRS 176.015(5)(d); if a victim impact statement comports with Marsy's Law but is otherwise deemed irrelevant, it may still be admitted to the district court under general supremacy principles, which hold that constitutional provisions must supersede any conflicting statutes. "The Nevada Constitution is the 'supreme law of the state,' which 'control[s] over any conflicting statutory provisions.'" *Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. 484, 488, 327 P.3d 518, 521 (2014); *Clean Water Coal. v. The M Resort, L.L.C.*, 127 Nev. 301, 309, 255 P.3d 247, 253 (2011) (quoting *Goldman v. Bryan*, 106 Nev. 30, 37, 787 P.2d 372, 377 (1990)). Thus, Marsy's Law would supersede and override any statutory conflict with regards to relevance or reliability with regards to victim statements, but because Marsy's Law explicitly does not apply

to non-victims, the statements of non-victims are still subject to these statutory safeguards.

Whether the statement of a non-victim should be considered by the district court prior to sentencing is a matter of discretion, and there are several factors the district court may consider in determining whether the statement is relevant and reliable, including: the strength or weakness of any relation between the non-victim and the victim or defendant; whether the statement is based on hearsay; the non-victim's motives or any direct interest in the case; the level of proximate harm, if any, to the non-victim; or any other factor which may cause the district court to believe the statement is otherwise palpable or highly suspect.

In its Petition for Review, the State notes several other concerns, including how the Court of Appeal's decision affects the district court's wide discretion in determining a sentence; the grounds or standard for reversal; and "whether the Court [of Appeals] misapplied *Randell v. State*, when it concluded

that a non-victim is prohibited from giving an opinion at sentencing” (Petition for Review, 2) (citation omitted).⁴

While it is true that the district court does retain wide discretion at sentencing, *Tanksley v. State*, 113 Nev. 844, 848, 944 P.2d 240, 242 (1997), it is equally true that such discretion is not unlimited. *Dieudonne v. State*, 127 Nev. 1, 9, 245 P.3d 1202, 1208 (2011). Although the State is concerned with the district court’s level of discretion, the irony is that Marsy’s Law actually *restricts* a significant aspect of the court’s discretion at sentencing because it provides that certain individuals (defined as victims) *must* be heard, even if this statement is irrelevant, unreliable, impalpable or highly suspect.

With regards to non-victims, the application and enforcement of existing statutory safeguards does not diminish the district court’s discretion in any way. The district court was already required to conduct an analysis to determine whether the statements of non-victims under the statutory definition could nonetheless be admitted pursuant to NRS 176.015(6), requiring relevance and reliability. The decision by the Court of Appeals does

⁴ The State’s Petition for Review also includes questions for review which have already been addressed, including the consideration of “admissible” evidence and whether the Court of Appeals’ decision conflicts with Marsy’s Law.

not restrict the discretion of the district court any more than it was restricted when the statute was first passed because these basic safeguards (relevance and reliability) *only* apply to individuals whose statements are being introduced through subsection (6), and thus do not qualify as a victim under either the Constitutional or statutory definition.

With regards to the standard for reversal, Appellant maintains the decision of the district court to consider non-victim statements prior to sentencing would still be subject to the same level of deference, permitting reversal only upon a showing of manifest error or an abuse of discretion. *Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987).

Lastly, the State contends that the Court of Appeal's decision "misapplied *Randell v. State*, when it concluded that a non-victim is prohibited from giving an opinion at sentencing." As an initial matter, the State is mistaken in its assertion that the Court of Appeals "concluded that a non-victim is prohibited from giving an opinion at sentencing." The Court of Appeals made no such conclusion; the application of existing statutory safeguards governing admissibility, such as relevance and reliability, may act to exclude *some* non-victim statements if they are not relevant or reliable, but the Court did not rule in a manner to create a blanket exclusion or prohibition for non-victims.

Furthermore, the Court of Appeal's decision does not misapply or conflict with *Randell v. State*, 109 Nev. 5, 846 P.2d 278 (1993). In *Randell*, the defendant challenged his sentence after the son of a murder victim was permitted to testify about a desired sentence. *Id.* at 6. In affirming the conviction and sentence, *Randell* reiterated two well-recognized concepts – that a district court has wide discretion over sentencing, and that sentence will not be disturbed absent an abuse of discretion. Neither of those concepts conflict with the Court of Appeals' decision in this case.

Additionally, the Court of Appeals could not have misapplied *Randell* when it purportedly “prohibited” non-victims from testifying, because *Randell* did not address non-victim speakers. The son of the murder victim was identified as a victim per the definition in NRS 176.015: “During the sentencing hearing, the district court permitted *a victim* to address his desires about sentencing.” *Id.* (emphasis added). Any decision by the Court of Appeals with regards to non-victim speakers cannot conflict with *Randell* because the only speaker at issue in that case qualified as a victim; as noted above, the only other legal concepts identified in *Randell* regarding discretion and the burden on appeal remain unchanged.

CONCLUSION

In summation, whether or not the district court can consider letters or statements at sentencing first depends on the status of the speaker – for individuals that qualify as “victims” under either the statutory or Constitutional definition in Marsy’s Law, the Court must permit them to be heard in written or oral form. For those who do not qualify as victims under either statutory or Constitutional definitions, the Court may, in its discretion, still nonetheless consider letters or statements so long as the statements are reliable and relevant.

Whether the statement is reliable and relevant is ultimately left to the district court’s discretion, and the district court may consider factors such as the strength or weakness of any relation between the non-victim and the victim or defendant; whether the statement is based on hearsay; the non-victim’s motives or any direct interest in the case; the level of proximate harm, if any, to the non-victim; or any other factor which may cause the district court to believe the statement is otherwise impalpable or highly suspect.

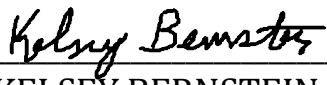
In any event, the district court still retains wide discretion during sentencing proceedings, and a sentence will only be disturbed on appeal upon a showing of manifest error or abuse of discretion.

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

Dated this 17 day of May, 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 2,864 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 17 day of May, 2021.

NEVADA DEFENSE GROUP
Respectfully Submitted By:

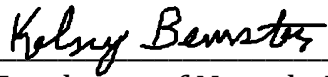


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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I hereby certify that on the 17 day of
May, 2021, I served a true and correct copy of the Opening Brief
to the last known address set forth below:

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Employee of Nevada Defense Group