

IN THE SUPREME COURT OF THE STATE OF NEVADA

HENRY BIDERMAN APARICIO,)
)
 Appellant,)
 vs.) 80072
)
 THE STATE OF NEVADA,)
)
 Respondent,)
)

Electronically Filed
May 20 2021 11:05 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

**BRIEF OF AMICUS CURIAE CLARK COUNTY PUBLIC
DEFENDER IN SUPPORT OF APPELLANT HENRY BIDERMAN
APARICIO'S SUPPLEMENTAL BRIEF**

DARIN F. IMLAY
Clark County Public Defender
Nevada Bar No: 5674
*DEBORAH L. WESTBROOK
Chief Deputy Public Defender
Nevada Bar No: 9285
309 S. Third Street, Suite #226
Las Vegas, NV 89155-2601
Telephone: (702) 455-4685
*Counsel for Amicus Curiae

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in Nevada Rule of Appellate Procedure 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Clark County Public Defender

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By: /s/ Deborah L. Westbrook
DEBORAH L. WESTBROOK, #9285
Chief Deputy Public Defender
Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

IDENTITY OF AMICUS CURIAE & STATEMENT OF INTEREST..1

ARGUMENT.....1

CONCLUSION.....10

CERTIFICATE OF COMPLIANCE.....12

CERTIFICATE OF SERVICE.....13

TABLE OF AUTHORITIES

Cases

<u>McGervey v. State</u> , 114 Nev. 460, 958 P.2d 1203 (1998).....	2
<u>Powell v. Liberty Mut. Fire Ins. Co.</u> , 127 Nev. 156, 252 P.3d 668 (2011).	10

Misc. Citations

Antonin Scalia & Brian A. Garner, <i>Reading Law: The Interpretation of Legal Texts</i> (2012).....	4, 5, 9
Black’s Law Dictionary 535 (7th ed. 1999).....	10
Nev. Const. art I, § 8A	1, 2, 3, 5, 6, 8

Statutes

NRS 176.015	1, 2, 3, 4, 9, 10
-------------------	-------------------

IDENTITY OF AMICUS CURIAE & STATEMENT OF INTEREST

The Clark County Public Defender’s Office (CCPD) is the largest provider of indigent defense services in Nevada. On April 16, 2021, this Court invited CCPD to submit an amicus brief addressing the questions presented by the State in its petition for review of the Court of Appeals’ Order in this case. One question asked whether “the Nevada Court of Appeals’ decision conflicts with Article 1, § 8A(7) of the Nevada Constitution, also known as Marsy’s Law and NRS 176.015.” As set forth herein, the answer to that question is a resounding “no.”

ARGUMENT

When Henry Biderman Aparicio was sentenced, the State offered the district court approximately 50 “victim impact letters”, the bulk of which were “written by friends, co-workers, and extended family of the deceased victims.” Order at 2. Aparicio objected to 46 of the letters on the basis that the authors were not “victims.” *Id.* Instead of analyzing each letter individually to determine whether each author was a “victim” under Nevada Law, the district court collectively found that *all* of the authors were “victims” under Marsy’s Law, based on its erroneous belief that “Article 1, Section 8A of the Nevada Constitution broadly defines victim [as] *anyone*

who's impacted by the crime.” Order at 10 (emphasis added) (alteration in original).

As a majority of the Court of Appeals found, the district court misconstrued Marsy’s Law, which defines “victim” more narrowly, as persons “*directly and proximately harmed* by the commission of a criminal offense.” Order at 10 (citing Nev. Const. art. 1 § 8A(7)) (emphasis added). Because the district court utilized the wrong definition of “victim”, the court incorrectly believed it was *required* to consider the contents of each letter in pronouncing Aparicio’s sentence. See Order at 11. This was an abuse of discretion. See McGervey v. State, 114 Nev. 460, 958 P.2d 1203 (1998) (abuse of discretion to misconstrue language of Nevada’s former habitual criminal statute and impose life sentence instead of ten-to-twenty years).

Although the district court’s error¹ is obvious from the record—it used a definition of “victim” that appears nowhere in *either* Marsy’s Law *or* NRS 176.015—the State contends that the Court of Appeals’ ruling “misapplied and deviated from Article 1, § 8(A) of the Nevada Constitution (commonly referred to as Marsy’s Law), [and] NRS 176.015.” Petition at 9. But the State fails to show *how* the Court of Appeals deviated from either law by

¹ The State acknowledges that “perhaps the district court was incorrect in its basis for reviewing the letters.” Petition at 16-17.

limiting the court's *mandatory* consideration of "victim impact" statements at sentencing to persons who met the definition of "victim" under each law.

Pursuant to NRS 176.015(3) and Article 1, § 8(A) of the Nevada Constitution, district courts are *required* to consider certain statements by "victims" before imposing a sentence on the defendant. In this regard, NRS 176.015(3) mandates that,

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.

NRS 176.015(3) (emphasis added).

Likewise, Marsy's Law guarantees "[e]ach person who is the victim of a crime" the constitutional rights "[t]o be reasonably heard, upon request, at any public proceeding ... in any court involving release or sentencing" and "[t]o provide information . . . concerning the impact of the offense on the victim and the victim's family and any sentencing recommendations before sentencing the defendant." Nev. Const. art. 1, § 8(A)(1)(h) and (j).

Importantly, however, the statutory and constitutional *right* to give victim impact statements (and the district court's concomitant *obligation* to consider such statements at sentencing) is limited to individuals who meet the statutory and constitutional definitions of "victim". A district court is *not*

legally obligated to consider statements made by non-victims at sentencing. Instead, the district court has *discretion* to consider non-victim statements that constitute “reliable and relevant evidence” under NRS 176.015(6). And as a majority of the Court of Appeals correctly observed, the district court’s “error” in this case was believing it was *required* to consider all 50 letters based on an erroneous definition of “victim” that appears nowhere in Nevada law. See Order at 11.

Like the district court, the dissent claims that “[b]oth NRS 176.[015] and Marsy’s Law permit *people affected by any crime* to communicate with district courts prior to criminal sentencings.” Order at 16 (Tao, J., dissenting) (emphasis added). Based on the use of the word “include” in both definitions of “victim”, the dissent contends that the word “victim” must be interpreted expansively to encompass individuals who would not otherwise qualify under those definitions. Order at 16-17 (Tao, J., dissenting). Although the dissent’s argument is purportedly based on the “plain language” of both NRS 176.015 and Marsy’s Law, by focusing on a single word within each definition, the dissent overlooks the fundamental principal that “[t]he text must be construed as a whole.” Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012). “Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which

calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.” Id.

To support its expansive interpretation of “victim” in Marsy’s Law, the dissent cites only a portion of that definition—the part containing the word “includes.” Order at 16 & 24 (Tao, J., dissenting). Yet, the full, two-part definition of “victim” reads as follows:

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.*

Nev. Const. art I, § 8A(7) (emphasis added). Under Marsy’s Law, the term “victim” has a distinct meaning that can *only* be expanded to include other individuals *if* the actual victim is underage, incompetent, incapacitated or deceased, thereby requiring the court to appoint a representative to act on the victim’s behalf. See Nev. Const. art I, § 8A(7).

Although the dissent is correct that the term “includes” is usually a permissive term when it precedes a list, this is not a hard and fast rule. See Scalia & Garner at 226 (“[w]hen a definitional section says that a word ‘includes’ certain things, that is *usually* taken to mean that it may include

other things as well.”) (emphasis added). By contrast, when “a definitional section says that a word ‘means’ something, the clear import is that this is its *only* meaning.” *Id.* (emphasis in original). And the primary definition of “victim” in Marsy’s Law indicates that the term “means” something specific. See Nev. Const. art I, § 8A(7).

Although the dissent contends that the negative-implication canon (*expressio unius est exclusio alterius*) does not apply to the definition of “victim” in Marsy’s Law, Order at 23-24 (Tao, J., dissenting), context indicates that it does. The secondary definition of “victim” applies only if the person “directly and proximately harmed” by the defendant’s crime is unable to represent his or her own legal interests. Additionally, each of the enumerated persons “included” in the secondary definition is the type of person who would typically be permitted to “act on the victim’s behalf.” Nev. Const. art I, § 8A(7) (including the victim’s “legal guardian”, “a representative of the victim’s estate” and members of the victim’s “family”). Finally, the phrase, “or any other person who is appointed by the court to act on the victim’s behalf” indicates a further limitation on the types of person “included” in this definition—they must, in fact, be appointed to represent the victim’s interests. *Id.* Thus, examining the text as a whole, it is clear that the definition of “victim” in Marsy’s Law does not include “every Nevadan

impacted by crime”; instead, it means persons “directly and proximately harmed” by the defendant’s crime and, under certain circumstances, their legal representative(s). C.f. Order at 16 (Tao, J., dissenting).

As the majority recognized, Marsy’s Law was designed to “expand and solidify victims’ rights”, not expand the definition of “victim” under the law. Order at 5, fn.5. Indeed, interpreting “victim” in the open-ended manner advocated by the dissent would lead to absurd results. A person who watches a news story about a violent murder in their neighborhood who now feels frightened to leave home is certainly “impacted by” or “affected by” that crime. Under the dissent’s analysis, that person would now be included in the definition of “victim” under Marsy’s Law and constitutionally entitled:

- To be treated with fairness, respect for privacy and dignity, and to be free from intimidation, harassment and abuse throughout the criminal or juvenile justice process;
- To receive protection from the defendant and those acting on defendant’s behalf;
- To have their own personal safety (and their family’s safety) considered at any bail hearing;
- To confer with the prosecuting agency about the case, upon request;
- To notice, upon request, and presence at all public proceedings where the defendant and prosecutor are entitled to appear;
- To be heard, upon request, at any public proceeding involving the defendant’s release, sentencing or parole;
- To a timely disposition of defendant’s case;
- To provide victim impact information for the defendant’s PSI report, including sentencing recommendations;

- To notice, upon request, of the defendant's conviction, sentence, place/time of incarceration, scheduled release date, and defendant's release or escape from custody;
- To full and timely restitution;
- To the return of legal property when no longer needed as evidence;
- To be informed of and to participate in all postconviction proceedings, including parole hearings, and to be notified, upon request, of parole or release;
- To have their own personal safety, and that of their family, considered before any parole or postjudgment release decision is made;
- To have all monetary payments, money, and property collected from the defendant be applied first to their restitution award; and
- To be specifically informed of all these rights.

Nev. Const. art. I, § 8A(1).

The vast majority of these rights make no sense unless applied to persons "directly and proximately" impacted by the defendant's crime, or to a legal representative of such persons. People falling outside those categories will not be involved "throughout the legal process," nor will they have a need for restitution, for the return of property in evidence, to refuse interview or deposition requests, to confer with the prosecution throughout the case, to appear at all legal proceedings and be heard whenever the defendant's release is contemplated, or to be protected from the defendant and persons acting on defendant's behalf. Importantly, victims have "standing to assert the rights enumerated in [Marsy's Law] in any court with jurisdiction over the case." Nev. Const. art. I, §8A(2). Allowing individuals who are only vicariously "impacted by" or "affected by" crimes to command

such rights would render Marsy's Law completely unworkable, diluting the important constitutional rights that are conferred upon true victims of crime.

Similarly, the definition of "victim" in NRS 176.015(5)(d) cannot be construed to encompass everyone tangentially "impacted by" or "affected by" a defendant's crime, simply because the definition "includes" categories of people. As the majority recognized, this would produce an absurd result, allowing "almost anyone to qualify as a victim, entitling all to opine on the crime's impact and recommend what the defendant's sentence should be." Order at 8, n. 8. Rather, the definition of "victim" in subsection 5(d) must be considered in light of other language in the same statute, because "[t]he text must be construed as a whole." Scalia & Garner at 167.

Presumably, if the word "victim" truly meant everyone "impacted by" or "affected by" the defendant's crime, then subsection 4 of NRS 176.015 would have required the prosecutor to give reasonable notice of the sentencing hearing to everyone "impacted by" or "affected by" the crime, instead of limiting that right to the following clearly-defined persons:

- (a) The person against whom the crime was committed;
- (b) A person who was injured as a direct result of the commission of the crime;
- (c) The surviving spouse, parents or children of a person who was killed as a direct result of the commission of the crime; and
- (d) *Any other relative or victim* who requests in writing to be notified of the hearing.

NRS 176.015(4) (emphasis added). Further, the canon of *ejusdem generis*² supports a more limited understanding of the words “victim” and “relative” in NRS 176.015(5) that would include only the types of people listed in NRS 176.015(4)(a)-(c), and not everyone “impacted by” or “affected by” the crime. Finally, the catch-all provision in section 6 makes it unnecessary to interpret “victim” in the unduly broad manner advocated by the dissent because section 6 gives district courts discretion to consider statements of non-victims on behalf of “orphans, foster parents, best friends, long-term companions, elderly widows and widowers, and other non-traditional family members,” as long as those statements are “reliable and relevant.” Compare Order at 44 (Tao., J, dissenting), with NRS 176.015(6).

CONCLUSION

Because the district court applied the wrong definition of “victim” and believed it was *required* to consider letters that it had discretion to disregard, Aparicio’s sentence should be vacated and a new sentencing hearing held.

² “*Ejusdem generis* is ‘[a] canon of construction that when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed.’ Powell v. Liberty Mut. Fire Ins. Co., 127 Nev. 156, 163, 252 P.3d 668, 673 (2011) (quoting Black’s Law Dictionary 535 (7th ed. 1999)).

DATED this 20th day of May, 2021.

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By /s/ Deborah L. Westbrook
DEBORAH L. WESTBROOK, #9285
Chief Deputy Public Defender
309 So. Third Street, Suite #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

CERTIFICATE OF COMPLIANCE

1. I hereby certify that the amicus curiae brief complies with the formatting requirements of NRAP 21(d), NRAP 32(a)(4) and NRAP 32(c)(2), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

The Amicus Curiae brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 size font and does not exceed 10 pages.

DATED this 20th day of May, 2021.

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By: /s/ Deborah L. Westbrook
DEBORAH L. WESTBROOK, #9285
Chief Deputy Public Defender

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 20th day of May, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service

List as follows:

AARON D. FORD
ALEXANDER CHEN

DEBORAH L. WESTBROOK

BY /s/ Carrie M. Connolly
Employee, Clark County Public
Defender's Office