**No. 80072**

IN THE NEVADA SUPREME COURT



**Henry Biderman Aparicio,**

Appellant,

**v.**

**State of Nevada, et al.,**

Respondents.

On Petition for Review from Court of Appeals Order Reversing Eighth Judicial District Court

# Brief of Amicus Curiae Nevada Attorneys for Criminal Justice in Support of Appellant Henry Biderman Aparicio, Supporting Affirmance of the Court of Appeals

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## NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in Nev. Rule. App. P. 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.

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2. Charles R. Goodwin, Las Vegas Defense Group

*/s/ Randolph M. Fiedler*
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## IDENTITY OF AMICUS CURIAE

Nevada Attorneys for Criminal Justice is a state-wide non-profit organization of criminal defense attorneys in Nevada. Nevada Attorneys for Criminal Justice has an interest in this case because it affects the rights of criminal defendants at the sentencing stage of proceedings. On April 16, 2021, this Court invited Nevada Attorneys for Criminal Justice to file an amicus curiae brief "addressing the questions raised on review regarding the district court's ability to review letters received prior to, or at the time of, the sentencing hearing." See Order (Apr. 16, 2021); see also NRAP 29(a).

## I. ARGUMENT

At the time of the founding, "the American system of public prosecution was fairly well established . . . ."[1] Traditionally crime was "addressed entirely in terms of an offense against the state." *Id.* Punishment, on this view focused on the effect on the defendant. *See, e.g.*, *State v. Boston*, 131 Nev. 981, 986, 363 P.2d 456, 457 (2015) (reciting legitimate goals of punishment). By the 1970s, this traditional approach was brought into question when groups became "concerned about the treatment of victims in the nation's criminal justice system."[2] Reforms followed, including allowing victim impact statements. *Id.* at 613.

Victim impact statements served many purposes. They remedied a perception that the criminal justice system was impassive to victim needs, *id.*; they provided information about the extent of the harm and a chance for therapeutic healing. *Id.* at 619, 622. The statements allowed the victim to speak to the defendant. *Id.* at 623–24. Finally, by

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[1] Juan Carden, *The Crime Victim in the Prosecutorial Process*, 9 Harv. J. L. Pub. Pol'y 357, 371 (1986).

[2] Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 Ohio St. J. Crim. L. 611, 612 (2009).

giving victims a chance to speak, these statements improved the perception of fairness of our criminal justice system. *Id.* at 624–25. Notably, the fact of the statements—not their content—is what serves these purposes. Evidentiary significance, for the most part, does not affect the goals the statements serve. Reforms, thus, focused on ensuring a forum for victims, without directing how the court used the information. Nevada's legislative history is consistent with this broader national trend.

So, in 1989, when the legislature first adopted NRS 176.015(3), proponents emphasized giving victims an opportunity to speak. *See* 1989 Nev. Stat. 1425 (A.B. 746). One proponent explained, "Unless victims were permitted to speak, only half the truth would be heard." Min. Assemb. Comm. Judiciary, Page 9 (65th Sess. May 18, 1989). Excluding victim statements "impeded the grief process, recovery, and in many cases created more emotional distress which in turn created more physical problems." *Id.* at 9–10. Allowing the victim to speak served an "invaluable" "therapeutic" purpose. *Id.* at 10.

In 1995, the legislature expanded the definition of "victim" and added NRS 176.015(6), noting the section "does not restrict the

authority of the court to consider any reliable and relevant evidence at the time of sentencing." *See* 1995 Nev. Stat. 371–72 (A.B. 186). There, again, the emphasis was on ensuring victims' voices would be heard by allowing a broader definition of "victim" and providing that a victim's representative could speak if the victim themselves could not.[3]

In both instances, the Nevada Legislature provided a forum for victims to speak and be heard by the court before sentencing, without regard to evidentiary admissibility. *See* NRS 176.015(3). This is consistent with the purposes of victim impact statements: ensuring victims will be heard. These policy reasons do not, however, apply to non-victims. Instead, NRS 176.015 requires any sentencing evidence—including non-victim testimony—be "relevant" and "reliable." This, too, is consistent with the purposes of victim impact statements. Where the

[3] *See, e.g.*, Min Assembly, Comm. Judiciary Page 9–10 (67th Sess. Mar. 14, 1995); *see also* Min. Sen. Comm. Judiciary Page 11 (67th Sess. Apr. 5, 1995) ("often victims are unable to attend sentencing hearings or speak due to financial considerations, physical barriers that some injury victims cannot overcome, or emotional trauma as a result of victimization.").

criminal justice system must respect the right of victims to be heard, no equivalent right exists for non-victims.

Relevance and reliability are terms of art. NRS 48.015 defines relevance as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Reliability implies "the knowledge underlying [evidence] has a reliable basis in the knowledge and experience of the relevant discipline." *Khoury v. Seastrand*, 132 Nev. 520, 535, 377 P.3d 81, 91 (2016). Thus, any non-victim testimony must relate to a sentencing determination; and, the non-victim must have a foundational knowledge for it.

Non-victim testimony is not granted the same liberty that is given to victims. This Court has held NRS 176.015(3) is to be construed broadly, and a victim may speak on a wide-ranging set of topics. *Randell v. State*, 109 Nev. 5, 7, 846 P.2d 278, 279 (1993); *Buschauer v. State*, 106 Nev. 890, 892–93, 804 P.2d 1046, 1047–48 (1990). However, as it pertains to non-victims, the evidence must be relevant and reliable. NRS 176.015(6). Specifically, this Court has noted that NRS

176.015 "does not limit in any manner a sentencing court's existing discretion to receive other admissible evidence." *Wood v. State*, 111 Nev. 428, 430, 892 P.2d 944, 946 (1995). Admissibility is key.

Non-victim testimony must be relevant and reliable. NRS 176.015(6). However, there is nothing inherent in non-victim testimony that makes it either.

### A. Non-victim testimony is not inherently relevant.

Non-victim testimony is not relevant if it does not directly pertain to the four legitimate goals of penal sanctions: retribution, deterrence, incapacitation, and rehabilitation. *See Boston*, 131 Nev. at 986, 363 P.3d at 456 (referencing legitimate goals of penal sanctions). Relevance in Nevada is defined in NRS 48.015 as, "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Similarly, the Bouvier Law Dictionary defines relevance as:

> Potential for use in resolving the matter in issue. Relevance is the likelihood that some evidence or issue applies to the questions that must be answered in a given case . . . . Evidence that might reasonably assist a finder of fact in answering a

> question in the case is inherently relevant to the case.

*Relevant. Bouvier Law Dictionary* (Desk ed. 2012). A fact is relevant if it helps the sentencing judge answer one of the questions relevant to sentencing. In the context of non-victim testimony, the questions the sentencing court is attempting to answer is simple: are the legitimate goals of penal sanctions—retribution, deterrence, incapacitation, and rehabilitation—being satisfied. To be relevant under NRS 176.015(6), it must relate to one of the goals of penal sanctions. Personal letters from non-victims generally do not address these goals and are thus irrelevant.

The majority of the State's argument rests on the expansiveness granted to NRS 176.015(3) by *Randell*, 109 Nev. 5, 846 P.2d 278, and *Wood*, 111 Nev. 428, 892 P.2d 944. However, it is difficult to tell if the State is arguing all non-victim evidence is relevant and reliable; or, if all people who submitted letters should be reclassified as victims. Whichever way it is read, the State is asking this Court to either make NRS 176.015(3) or (6) redundant, by making all the testimony admissible under NRS 176.015(6); or, to reclassify the definition of victim in NRS 176.015(3) to include all individuals who wish to opine on the

defendant, the crime, the impact on themselves, and restitution. There is no mention as to why or how the information is relevant. In essence, the State is asking this Court to legislate from the bench and rewrite the law, because, in the State's view, the current order, "...cannot be an acceptable outcome." State's Petition for Review, at 13.

Non-victim testimony is only relevant if it pertains to the four accepted goals of penal sanctions. To entertain other testimony runs afoul of NRS 176.015(6), which requires non-victim testimony be relevant. Letters concerning the thoughts and feelings of those not defined as victims are not relevant and should not be admitted.

### B. Non-victim testimony is not inherently reliable.

Reliability refers to "foundation" and having "basis in the knowledge of experience." *Khoury v. Seastrand*, 132 Nev. at 535, 377 P.3d at 91. Thus, in the sentencing context, any evidence other than that exempted in NRS 176.015(3) must have a foundation for and a basis of knowledge of experience in the four legitimate goals of penal sanctions.

The State never once attempts to define what is relevant and reliable in the sentencing context. Instead, its argument requests that this Court hold everything can come in, waving away whole sections of the law. The non-victim statements lacked any foundation regarding the four goals of penal sanctions. Accordingly, they should have been excluded.

### C. Reversal was appropriate.

When determining if sentencing error requires reversal, this Court asks whether the error "constituted impalpable or highly suspect evidence" and "whether prejudice resulted from the district court's consideration of information founded upon such evidence." *See, e.g.*, *Blankenship v. State*, 132 Nev. 500, 508, 375 P.3d 407, 412 (2016); *see also Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (Nev. 1976). But the Court has also recognized that certain kinds of evidence can be prejudicial even if not "impalpable and highly suspect." *See Todd v. State*, 113 Nev. 18, 26, 931 P.2d 721, 725 (1997) (proscribing consideration of confidential and privileged information, and attorney impressions); *see also Thomas v. State*, 99 Nev. 757, 758, 670 P.2d 111, 112 (1983).

Thus, this Court's cases establish two kinds of sentencing error. In the first, this Court first evaluates whether "impalpable or highly suspect evidence" was considered, and then weighs the prejudicial effect of that evidence. *See, e.g.*, *Goodson v. State*, 98 Nev. 493, 496, 654 P.2d 1006, 1007 (1982); *Deveroux v. State*, 96 Nev. 388, 389–90, 610 P.2d 722, 723 (1980). In the second, consideration of information is prejudicial regardless of its weight, such as confidential or constitutionally protected information. *See, e.g.*, *Todd*, 113 Nev. at 26, 931 P.2d at 725; *Thomas*, 99 Nev. at 758, 670 P.2d at 112.

The error here is of the second variety because the district court's misstatement of law broadly affected its analysis. *Aparicio v. State*, No. 80072-COA, 2020 WL 7868457, at *2–4 (Nev. Ct. App. Dec. 31, 2020). This was an abuse of discretion. *See Koon v. United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law."). And, like *Todd* and *Thomas*, the harm caused by this abuse of discretion does not lend itself to weighing. The district court's misstatement of law allowed it to consider all non-victim letters as victim impact statements. But, as discussed above, victim impact

statements under NRS 176.015(3) are exempt from requirements of relevance and reliability. An appellate court is ill equipped to, in the first instance, determine whether this evidence was relevant and reliable, and then weigh (again, in the first instance), how prejudicial the irrelevant or unreliable evidence was, as the Court of Appeals noted. *Aparicio*, 2020 WL 7868457, at *5.

However, even if this error is in the first category, this Court must still affirm because the evidence was prejudicial. As the Court of Appeals explained, the district court believed it was mandated to consider and rely upon "dozens of non-victim letters, each of which contained some improper content." *Id.* at *4–5. The district court appeared "to forfeit its discretion." *Id.* at 5. And in considering this improper evidence, the district court both departed from the plea agreement and from the Parole and Probation's recommendation. *Id.* at 5.

## II. CONCLUSION

Amicus Curiae respectfully request that this Court affirm the Court of Appeals decision.

/ / /

Dated May 24, 2021.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. I hereby 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:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook, 14-point font: or

[ ] This brief has been prepared in a monospaced typeface using Word Perfect with Times New Roman, 14-point font.

2. I further certify that this brief complies with the page- or type-volume limitations of this Court's April 16, 2021 Order because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is either:

[ ] Proportionately spaced. Has a typeface of 14 points or more and contains [ ] words; or

[ X] Does not exceed 10 pages.

3. Finally, 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(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated May 24, 2021.

Respectfully submitted,

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## CERTIFICATE OF ELECTRONIC SERVICE

I certify that on the 24th day of May 2021, I electronically served a copy of the foregoing Brief of Amicus Curiae Nevada Attorneys for Criminal Justice in Support of Appellant Henry Biderman Aparicio, Supporting Affirmance of the Court of Appeals, upon all counsel of record.

Dated May 24, 2021.

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