

No. 80072

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IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed  
Jun 22 2021 04:59 p.m.

HENRY BIDERMAN APARICIO,  
Appellant,

Elizabeth A. Brown  
Clerk of Supreme Court

v.

THE STATE OF NEVADA,  
Respondent.

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On Appeal from the Eighth Judicial District Court of the State of  
Nevada in and for the County of Clark  
No. C-18-332496-1

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**BRIEF OF AMICUS CURIAE  
OFFICE OF THE ATTORNEY GENERAL  
IN SUPPORT OF RESPONDENT STATE OF NEVADA**

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## **STATEMENT OF INTEREST**

The Nevada Attorney General is the top law enforcement officer in the State of Nevada. As such, the Attorney General's Office has a unique interest in, and insight into, criminal law and procedures in the State. The Office of the Attorney General respectfully submits this brief in response to this Court's stated desire for an amicus brief outlining the Office's stance on the criminal justice issues to be decided in this matter.

## INTRODUCTION

In 2018, the People of Nevada spoke. Crime victim rights are important. So much so that a statutory right to be heard at sentencing was not enough. The People wanted those rights enshrined in the Nevada Constitution. Even so, after conviction—whether the result of a guilty plea or a jury verdict—defendants do not forfeit their due process rights, including the right to fair sentencing proceedings.

Ensuring a defendant receives a fair sentencing determination is best protected—not by limiting the information available to a sentencing court—but by providing robust protection for a defendant’s right to present their own evidence in mitigation and through a statement in allocution.

This case presents an opportunity for this Court to draw clear lines regarding the interplay between newly established crime victim rights in Article I, § 8A (commonly referred to as “Marsy’s Law”) and established principles of due process in sentencing proceedings. This Court can and should establish these guidelines while still maintaining the principle that trial courts serve as gatekeepers, with broad discretion to consider relevant and reliable evidence before imposing a sentence.

Article I, § 8A and NRS 176.015 serve as a floor for sentencing evidence, defining the bare minimum that a sentencing court must allow when considering evidence from “victims.” In contrast, the due process considerations of fundamental fairness serve as a ceiling for such evidence, protecting the defendant’s right to a fair

sentencing hearing by prohibiting sentencing courts from considering highly suspect or impalpable evidence. Between those extremes lies the sentencing court's broad discretion to admit relevant and reliable evidence, including the discretion to receive information from those impacted by an offense, even if they do not necessarily meet technical definitions of a "victim" under Article I, § 8A and NRS 176.015.

This view lets the adversarial process do its work at sentencing, helping the district court understand the defendant as an individual and determine the moral culpability for the criminal behavior at issue. It also balances a defendant's ability to personalize himself through the presentation of a statement in allocution and mitigating evidence with the presentation of other evidence, such as victim impact evidence, giving the trial court a complete understanding of the impact of a defendant's criminal behavior.

## ARGUMENT

### **I. Nevada Courts' Admission of Victim Impact Evidence Is Governed by Marsy's Law and NRS 176.015(3)—Which Impose a Minimum Floor—and a Defendant's Right to Due Process—Which Establishes a Ceiling.**

Well-accepted principles guide this Court's resolution of this case, supporting trial courts' broad discretion to admit relevant and reliable evidence at sentencing, within the confines of victim's rights and defendant's due process rights. As gatekeepers, trial courts retain broad discretion to admit and consider additional evidence before imposing a sentence. This Court does not interfere with this

discretion and reverse a sentence unless the trial court relied upon impalpable or highly suspect evidence. *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

Victim's rights have a long history in Nevada, reflecting the People's desire to empower victims at sentencing. In 1989, the Legislature amended NRS 176.015 to give victims of crime a statutory right to be heard at sentencing. 1989 Nev. Stat., ch. 623, §1 at 1425. It slightly broadened that protection in 1995, while clarifying that the trial court retains the discretion to continue receiving relevant and reliable evidence at sentencing. 1996 Nev. Stat., ch. 223, §1 at 371.

Twenty-five years later, the People voted to amend the State Constitution, giving victims of crime a constitutionally protected right to be heard at sentencing. Art. I, §8A(1)(h). The plain meaning of these two provisions establishes a minimum floor for the trial court as to who must be allowed to present evidence of a crime's impact before the court imposes a sentence. This right, built on a ruling by this Court, recognized the same premise with respect to NRS 176.015(3). *See Wood v. State*, 111 Nev. 428, 892 P.2d 944 (1995) ("Accordingly, we hold that NRS 176.015(3) grants certain victims of crime the right to express their views before sentencing.").

None of the rights granted to victims may be allowed to impinge on a defendant's right to a fair sentencing hearing, however. A defendant must retain this right to fundamental fairness in order to satisfy due process. This Court's interpretation of Art. I, § 8A and NRS 176.015 must thus be informed by the need

to balance a victim's rights against a defendant's right to due process. Should a trial court fail to strike a proper balance, it risks creating unnecessary tension between these competing rights and potentially violating the rights of the parties. Fortunately, this Court can provide straightforward, non-controversial guidance to trial courts regarding how to find the right balance.

## **II. This Court Should Instruct the Trial Courts to Counterbalance Consideration of Victim Impact Evidence Against the Defendant's Evidence in Mitigation and a Statement in Allocution.**

This Court should continue to recognize and encourage the gatekeeping role of trial courts in assessing the moral culpability of a defendant, without excluding relevant and reliable evidence from either side of the case. In assessing the relevance and reliability of the evidence offered, a trial court should specifically seek to (1) obtain a holistic view of the defendant, while also (2) understanding the full impact of the criminal conduct at issue. These considerations should guide the court in deciding what evidence to admit. Proper functioning of the adversarial system in sentencing depends on the robust sharing of relevant and reliable information from both sides. Exclusion of relevant and reliable evidence hinders it.

While a sentencing hearing is not thought of as a second trial, a defendant remains entitled to a fair sentencing hearing that satisfies the requirements of due process. A defendant's right to due process under Article I, § 8 of the Nevada Constitution does not disappear after he enters a plea or the jury imposes a verdict.



This Court need not, and should not, seek to protect that right by narrowing the scope of what evidence can, and should, be available to the trial court regarding the direct societal impact of criminal conduct. Rather, this Court can best protect a defendant's right to a fair sentencing hearing through robust protection of the defendant's right to present his own mitigating evidence and to make a statement in allocution. NRS 176.015(2)(b)(1).

The idea of courts receiving evidence on the societal impact of a criminal's behavior is nothing new. This Court has long recognized the broad authority of a judge to admit and consider such evidence when imposing a sentence. *Silks*, 92 Nev. at 94, 545 P.2d at 1161. The recent addition of crime victim rights to the Nevada Constitution does not change this. It merely adds new pieces of information for the trial court's consideration. The court must now recognize public sentiment that the criminal justice system has historically deprived victims of an adequate voice when punishment is decided for criminal conduct.

The adversarial system finds its foundation in giving interested parties the full and fair opportunity to present evidence on differing points of view. This ambitious goal is preserved when the law ensures a sentencing court has the tools it needs to develop a complete view of the defendant as a person, as well a complete understanding of the negative impact of defendant's criminal conduct on society.

This includes those people directly affected by a crime that don't meet technical definitions for who is a victim under Art. I, § 8A and NRS 176.015.

### **CONCLUSION**

This case presents this Court with the opportunity to use well-established principles of constitutional interpretation and existing principles of criminal law to reach a straightforward, practical resolution to the legal issue presented in this case. The interpretation of newly established rights in Article I, §8A must be informed by the interplay between those rights and a defendant's right to due process under Article I, §8.

By reinforcing the existence of discretionary space between the floor created by crime victim rights in Article I, §8A and NRS 176.015(3), and the ceiling established by a defendant's right to due process under Article I, §8, this Court will leave trial courts equipped to appropriately balance the rights of both parties. On the one hand, the defendant is given the right to present mitigating evidence and a statement in allocution, and on the other, adversely affected persons may present victim impact evidence, even if those individuals directly impacted by a crime do not meet technical definitions of "victims" under Article I, §8A and NRS 176.015(3).

Trial courts need these tools to act as in their capacity as gatekeepers, considering relevant and reliable evidence that aids them in developing an

individualized picture of a defendant and understanding the impact of the defendant's criminal conduct on a case-specific basis. When the law allows for broad and open discussion of relevant and reliable information from both sides of the aisle, the adversarial process that is the hallmark of the American criminal justice system is at its best.

Dated this 22nd day of June, 2021.

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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:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 pt. font and Times New Roman; or

This brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

2. I further certify that this brief complies with the page- or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

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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 this 22nd day of June, 2021.

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing in accordance with this Court's electronic filing system and consistent with NEFCR 9 on June 22, 2021.

Participants in the case who are registered with this Court's electronic filing system will receive notice that the document has been filed and is available on the court's electronic filing system.

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