IN THE SUPREME COURT OF THE STATE OF NEVADA

HENRY APARICIO, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 80072

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

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STATEMENT OF THE ISSUE(S)

1. Whether Appellant is not entitled to a new sentencing hearing.
2. Whether any error was harmless.

STATEMENT OF THE CASE

On June 5, 2018, Henry Aparicio ("Appellant") was charged with the following: Counts 1 and 2– Driving under the Influence Resulting in Death (Category B Felony – NRS 484C.110, 484C.430, 484C.105); Counts 3, 4, and 5– Reckless Driving (Category B Felony – NRS 484B.653); Count 6– Driving under the Influence Resulting in Substantial Bodily Harm (Category B Felony – NRS 484C.110, 484C.430, 484C.105). I Respondent's Appendix ("RA") 2-7.

On July 5, 2018, after the State noticed an expert that would provide testimony on such topic, Appellant filed a Motion in Limine to Exclude Evidence of Retrograde Extrapolation. I AA 4-9. Appellant argued that retrograde extrapolation was improper pursuant to State v. Dist. Ct. (Armstrong), 127 Nev. 927, 267 P.3d 777 (2011). The State filed its Response on July 11, 2018. I AA 10-21.

Appellant subsequently filed a Petition for Writ of Habeas Corpus (Pre-trial) on July 20, 2018, wherein he reiterated the issue regarding the retrograde extrapolation of Appellant's blood and argued that the State failed to establish by slight or marginal evidence that Appellant was in control of the vehicle that caused the victims' deaths. I AA 22-46.

On July 23, 2018, the district court denied Appellant's Motion in Limine to Exclude Evidence of Retrograde Extrapolation. I AA 47-48.

On July 24, 2018, the State filed its Return to Appellant's Petition for Writ of Habeas Corpus (Pre-trial). I AA 49-58. The State argued that it demonstrated by slight or marginal evidence that Appellant was driving the vehicle and the district court properly admitted and relied upon Appellant's two blood samples. I AA 49-58. On August 8, 2018, the district court denied Appellant's Petition finding that the State presented slight even marginal evidence and that the blood testing satisfied Armstrong, 127 Nev. 927, 267 P.3d 777 (2011). I AA 91-101.

On February 6, 2019, Appellant filed a Motion for Disqualification and Affidavit in Support wherein he argued that Judge Smith should be disqualified after denying his request for investigative fees to hire a rebuttal expert or investigator. I AA 59-75. The State filed its Opposition on February 26, 2019 arguing that Appellant failed to present evidence that Judge Smith was impartial or biased. I AA 104-112. On February 27, 2019, Appellant filed a Request to Strike Affidavit in Response to Disqualification and Request to Strike State's Opposition to Motion for Disqualification. I AA 113-120. On March 19, 2019, the district court heard argument on Appellant's Motion and took the matter under advisement. I AA 121. On April 5, 2019, the district court denied the Motion as moot as a result of Judge Smith's retirement. I AA 122-27.

Also, on April 5, 2019, Appellant filed a Motion to Reconsider Decision and Order Filed April 5, 2019 wherein he argued that Judge Smith's rulings were alleged to be tainted with bias. I AA 128-131.

On July 24, 2019, Appellant filed a Motion to Continue Trial and a Motion to Rehear Motion in Limine and Request for Investigative Fees. I AA 133-144. On July 31, 2019, the district court continued the calendar call and set the matter for a status check for the next day. I AA 145.

On August 1, 2019, after negotiations, Appellant pled guilty to Count 1– Driving Under the Influence Resulting in Death, Count 2– Driving Under the

Influence Resulting in Death, and Count 3– Reckless Driving. I RA 64. The Guilty Plea Agreement was filed that same day. I AA 146-153.

Prior to sentencing, the district court received victim impact statements from the State. I AA 157-175; II AA 176-257, 265. Appellant also received access to these statements. I AA 157-175; II AA 176-257, 265. On October 17, 2019, Appellant filed an Objection to Victim Impact Statements. II AA 258-262.

On October 18, 2019, at Appellant's sentencing hearing, the district court heard testimony from one of the victim's mother and father as well as Appellant. II AA 281, 285-318. Subsequently, the district court adjudicated Appellant guilty and sentenced him to the Nevada Department of Corrections (NDOC) as follows: Count 1– seven (7) to twenty (20) years; Count 2– seven (7) to twenty (20) years, to run consecutive to Count 1; Count 3– twelve (12) to forty-eight (48) years, to run consecutive to Count 2. II AA 323, 325. Appellant received an aggregate sentence of fifteen (15) to forty-four (44) years in the NDOC and five hundred twenty-one (521) days credit for time served. II AA 328. The Judgment of Conviction was filed on October 29, 2019. II AA 327-28.

Appellant filed a Notice of Appeal on November 15, 2019. I RA 65-66.

STATEMENT OF THE FACTS

On May 15, 2018, Appellant and his girlfriend, Morgan Hurley, had drinks at Dave and Buster's restaurant in Downtown Summerlin. I AA 16-21. Receipts from

the tab indicated that the two ordered their first drinks at 5:37 PM. I AA 18. By 7:21 PM, the pair had ordered ten (10) shots of Patron Silver, three (3) Caribbean Lit Drinks, and they had not ordered any food. I AA 18-21. After Dave and Buster's, the pair went to Casa Del Matador, located in Downtown Summerlin. I AA 15. The tab from Casa Del Matador indicated that the pair consumed six (6) more shots of Tequila. I AA 15. The pair also ordered Goat Cheese Jalapeno, but they did not order any other food. I AA 15. The tab closed at 8:52 PM and Appellant left the bar. I AA 15. At about 9:08 PM, Appellant, while driving under the influence, crashed into the back of Damaso and Christa Puente's car and killed them. I RA 11-12, 19.

Brandon McCauley, a witness to the crash, testified that he had been driving home at around 9:00 PM after shopping at Downtown Summerlin when he reached a red light at the intersection of Hualapai and Sahara. I RA 11. As he was preparing to stop for the red light, he saw a red car speed past him. I RA 11-12. McCauley testified that the red car did not stop for the red light but instead slammed into the back of a white car, the Puentes' car, which had been stopped for the red light. I RA 12. Both the Puentes' white car and the red car spun out into the intersection. I RA 12. Shortly after the collision, McCauley went to the red car which had caused the collision where he saw a group of people holding down Appellant over the red car. I RA 12-13. McCauley recalled that Appellant appeared intoxicated and that he

assumed Appellant was the driver of the red car since he was being apprehended by the group of people at the scene. I RA 15.

Khadija Bilali-Azzat, a registered nurse, testified that she was also at the intersection that night. I RA 27. Although she did not see the accident as it happened, Bilali-Azzat stopped to see if she could help in the aftermath before medical personnel arrived. I RA 27. She approached the Puentes in their white car which was surrounded by people. I RA 28. Bilali-Azzat and those surrounding the vehicle attempted to get the Puentes out of the car. I RA 28. They were able to get Damaso out of the car by breaking the glass and opening the door. I RA 28. Bilali-Azzat determined Damaso had no pulse and began CPR. I RA 28. In the meantime, other people tried to get Christa out. I RA 28. About five (5) minutes later the fire department arrived. I RA 28. It was later determined that while Christa had a pulse for a couple of minutes, Damaso did not. I RA 19. Both passengers were determined deceased. I RA 19.

Las Vegas Metropolitan Police Department Officer Richard Sonetti eventually responded to the scene of the accident. I RA 16. When he arrived at the scene, he saw a white Prius, the Fire Department, a red Mercedes, and a group of people around the white Prius. I RA 16. When he got to the red vehicle, he saw a white female, later identified as Morgan Hurley, hunched over on the passenger side of he vehicle in between the seat and the dash on the lower floorboard. I RA 16, 35.

At that time, there was a man rendering aid to her; Hurley was unconscious but still breathing. I RA 16. Once medical arrived for Hurley, she was transported to the hospital. I RA 16. While tending to Hurley, Officer Sonetti saw Appellant slumped over crying on the curb by the vehicle. I RA 16. Officer Sonetti asked Appellant if he needed any aid; Appellant responded that he did not need help, but just needed Officer Sonetti to save the woman in the vehicle. I RA 16.

Appellant was then transported to UMC trauma for a medical evaluation, where Officer Corey Staheli made contact with Appellant to conduct an interview. I RA 24. Officer Staheli conducted a horizontal gaze nystagmus test, which Appellant failed. I RA 24-25. Officer Staheli also detected the odor of an unknown alcoholic beverage on Appellant's breath as well as dried blood on his lip and nose. I RA 25.

Sometime thereafter, Appellant was transported to the Clark County Detention Center. I RA 22. Officers obtained a warrant for Appellant's blood draw. I RA 20-21. Subsequently, Office Matthew Ware responded to assist in Appellant's blood draw and Katylynn Garduno, an advanced emergency medical technician, drew Appellant's blood. I RA 20-21. Garduno testified that the first blood draw was taken at 0147 in the morning and a second was taken at 0247 in the morning. I RA 21. The results of such blood draw indicated that Appellant's blood alcohol level

was at .204 for the first draw, and at .178 for the second.[1] I RA 40-42. Garduno also testified that she heard Appellant ask one of the officers if Appellant had run the red light:

> Q: Did the defendant make any statements to you about the collision?
> A: He didn't make it directly to me, but he did ask the officer if he had ran the red light.

I RA 21. Officer Ware also testified that the defendant asked if he had killed two people. I RA 23.

While investigating the electronic data from the vehicles, Detective Kenneth Salisbury managed to recover five (5) seconds of pre-crash electronic data from the Puentes' white Prius. I RA 31. Three (3) of those five (5) seconds showed that the Prius was stopped and then experienced a max change in velocity up to 58.4 miles per hour. I RA 31. Thus, in a matter of milliseconds, the Puentes' vehicle was expedited from zero (0) to 58.4 miles per hour. I RA 31. Detective Salisbury determined that the speed of the red Mercedes was ninety-six (96) to one hundred two (102) miles per hour at the time of the impact. I RA 31. Indeed, further speed analysis indicated that Appellant was driving 100.156 miles per hour when he crashed into the Puentes' vehicle. I RA 38.

[1] If Appellant objects to these representations, the State respectfully requests leave to file a motion requesting that the district court directly transmit the exhibit containing this information to this Court pursuant to NRAP 10(c).

Investigators also found various pieces of physical evidence in the red Mercedes. I RA 37. Detective Karl Atkinson found a woman's purse on the front passenger floorboard of the red Mercedes. I RA 35. The purse contained numerous pieces of identification for Morgan Hurley. I RA 35. Detective Atkinson also found blood on the driver's side door as well as on the exterior of the driver's side of the vehicle proceeding along the outside of the vehicle and leading towards the passenger side of the vehicle. I RA 36. Detective Atkinson also found blood on the passenger door. I RA 36. A bloody rag on the driver's seat and blood on the driver's side airbag was also discovered. I RA 36. Detective Atkinson testified that the backs of the front seats did not contain any blood and that the rear seats of the vehicle appeared to be unoccupied at the time of the crash. I RA 36.

SUMMARY OF THE ARGUMENT

Appellant is not entitled to a new sentencing hearing. First, the district court appropriately considered the victim impact statements submitted. The definition of "victim" under Marsy's Law is broad and includes at the very least individuals that are "proximately" harmed, i.e. the individuals that submitted victim impact statements in this case. Regardless, there is no prohibition for individuals that do not constitute victims to submit statements to the district court. Second, the form of the victim impact statements was not improper. While there is no Nevada law that permits victim impact statements to be directly submitted to the district court, there

is also no authority that prohibits such practice; the same can be said for demonstrative exhibits. Indeed, it is a common practice among district courts to directly receive victim impact statements as well as character letters on behalf of defendants. Regardless, the district court has wide discretion when considering evidence and a judge is presumed to follow the law. Third, there is no indication that the district court relied on impalpable or highly suspect evidence. Indeed, the record indicates that the district court relied on Appellant's Presentence Investigation Report, the statements of the victims' family, and the egregious facts of this case to determine Appellant's sentence. There is no indication that the district court relied on improper victim impact testimony. Fourth, any error would have been harmless. The sentence Appellant received is justified by the facts of this case regardless of the victim impact statements submitted or comments made. Therefore, the State respectfully requests that Appellant's Judgment of Conviction be confirmed.

ARGUMENT

I. APPELLANT IS NOT ENTITLED TO A NEW SENTENCING HEARING

Appellant argues that he is entitled to a new sentencing hearing for three reasons. Appellant's Opening Brief ("AOB") at 19-41. First, he complains the district court erred when it considered victim impact statements from individuals that do not fall under the constitutional or statutory definition of "victim." AOB at 20-31. Second, he argues that the district court should not have considered victim

impact statements sent directly to the district court or the poster and video exhibits presented at Appellant's sentencing hearing. AOB at 31-37. Third, he asserts that the district court should not have permitted the victim impact speakers to make comments regarding Appellant's exercise of his constitutional rights, the Department of Parole and Probation's sentence recommendation, and the merits of Appellant's pre-trial litigation. AOB at 37-41. However, each of these arguments are meritless. Accordingly, Appellant is not entitled to a new sentencing hearing.

A sentencing judge is permitted broad discretion in imposing a sentence, and absent an abuse of discretion, the court's determination will not be disturbed on appeal. Randell v. State, 109 Nev. 5, 8 (1993) (citing Deveroux v. State, 96 Nev. 388 (1980)). This Court has granted district courts "wide discretion" in sentencing decisions, which are not to be disturbed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." Allred v. State, 120 Nev. 410, 413, 92 P.3d 1246, 1253 (2004) (quoting Silks v. State, 92 Nev. 91, 94, 545 P.2d, 1159, 1161 (1976)). Instead, the Nevada Supreme Court will only reverse sentences "supported solely by impalpable and highly suspect evidence." Silks, 92 Nev. at 94, 545 P.2d at 1161 (emphasis in original).

A sentencing judge may consider a variety of information to ensure "the punishment fits not only the crime, but also the individual defendant." Martinez v.

State, 114 Nev. 735, 738 (1998). If there is a sufficient factual basis for the information considered in sentencing a defendant, a district court may rely on that information. Gomez v. State, 130 Nev. 404, 406 (2014). A court may consider information that would be inadmissible at trial as well as information extraneous to a PSI. See Silks, 92 Nev. at 93-94, 545 P.2d at 1161-62; Denson v. State, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996). Further, a court "may consider conduct of which defendant has been acquitted, so long as that conduct has been proved by preponderance of evidence." U.S. v. Watts, 519 U.S. 148, 156 (1997). The Nevada Supreme Court has stated that "[a] sentence within the statutory limits is not cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience." Allred, 120 Nev. at 420, 92 P.3d at 1253 (internal quotations omitted).

A. The District Court Appropriately Considered the Victim Impact Statements Submitted

Appellant first argues that it was inappropriate for the district court to consider the victim impact statements submitted because some of the individuals that wrote such statements do not fall within the statutory or constitutional definitions of "victim." AOB at 20-31.

Statutory construction is a question of law subject to de novo review. State v. Sargent, 122 Nev. 210, 213, 128 P.3d 1052, 1054 (2006); City of Reno v. Reno Gazette-Journal, 119 Nev. 55, 58, 119 Nev. 55, 63 P.3d 1147, 1148 (2003). This

Court has repeatedly held that "if the language of a statute is clear on its face, we will ascribe to the statute its plain meaning and not look beyond its language." Koller v. State, 122 Nev. 223, 226, 130 P.3d 653, 655 (2006) (footnote and internal quotation marks omitted); Accord, Potter v. Potter, 121 Nev. 613, 616, 119 P.3d 1246, 1248 (2005) ("When the language of a statute is clear and unambiguous, its apparent intent must be given effect"); State Dept. of Human Resources, Welfare Div. v. Estate of Ulmer, 120 Nev. 108, 113, 87 P.3d 1045, 1049 (2004) (It is well established that when the language of a statute is plain and unambiguous a court should give that language its ordinary meaning and not go beyond it); Beazer Homes Nevada, Inc. v. Eighth Judicial District Court, 120 Nev. 575, 579-80, 97 P.3d 1132, 1135 (2004) (if the plain meaning of a statute is clear on its face the this court will not go beyond the language of the statute to determine its meaning); State v. Catanio, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004) (We must attribute the plain meaning to a statute that is not ambiguous); Diamond v. Swick, 117 Nev. 671, 675, 28 P.3d 1087, 1089 (2001) ("This court has consistently held that when there is no ambiguity in a statute, there is no opportunity for judicial construction, and the law must be followed unless it yields an absurd result. In construing a statute, this court must give effect to the literal meaning of the words."); City Council of City of Reno v. Reno Newspapers, Inc., 105 Nev. 886, 893, 784 P.2d 974, 977 (1989) (When the language

of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it).

NRS 176.015(3) authorizes victims of crime to speak at a defendant's sentencing hearing:

> After hearing any statements presented pursuant to subsection 2 and 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(5)(d) defines a "victim" as:

> (1) A person, including a governmental entity, against whom a crime has been committed;
> (2) A person who has been injured or killed as a direct result of the commission of a crime; and
> (3) A relative of a person described in subparagraph (1) or (2).

Article I, Section 8A of the Nevada Constitution, otherwise known as Marsy's Law, was ratified by Nevada voters in 2018. Such amendment discusses the right victims have to speak at a defendant's sentencing hearing and submit a victim impact statement:

> (h) To be reasonably heard, upon request, at any public proceeding, including any delinquency proceeding, in any court involving release or sentencing, and at any parole proceeding.
> (j) To provide information to any public officer or employee conducting a presentence investigation concerning the impact of the offense on the victim and the victim's family and any sentencing recommendations before the sentencing of the defendant.

This Section defines the term "victim" as:

> 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.

(emphasis added).

While the district court received victim impact statements from the Puentes' friends and family, Daniel and Diane Malone, Christa Puentes' parents, were the only individuals that provided victim impact testimony at Appellant's sentencing hearing. II AA 286-318. Appellant filed a written objection to those victim impact statements directly submitted to the district court. The district court overruled Appellant's objection stating:

> THE COURT: […] Mr. Sheets, I also received your objection to the consideration of victim impact statements. I have reviewed your objection and I'm going to overrule your objection. I understand that you're citing to who can make a statement in court, but Article 1, Section 8A of the Nevada Constitution broadly defines victim to anyone who's impacted by the crime, and therefore I'm accepting those victim impact statements and I have read each and every one of them that was submitted to me, as well as the victim impact letters on behalf of the family. All right. So with that I want to go ahead and get started with the standard questions I have for sentencing.

While NRS 176.015 defines the term "victim" more narrowly, the district court is correct that Article I, Section 8A defines "victim" more broadly as "*any*

person *directly* or *proximately* harmed by the commission of a criminal offense" (emphasis added). Black's Law Dictionary defines the term directly as "in a straightforward manner," "in a straight line or course," and "immediately." DIRECTLY, Black's Law Dictionary (11th ed. 2019). Additionally, it defines the term "proximate" as: "immediately before or after" and "very near or close in time or space." PROXIMATE, Black's Law Dictionary (11th ed. 2019). It is clear that each individual that submitted victim impact statements were indeed at the very least proximately harmed by the Puentes' death as discussed in their letters.

Even if the Court were to determine that the plain language is not clear, the other states that have passed Marsy's law do not provide this Court with significant guidance. As of 2020, ten (10) states, including Nevada, have passed some version of Marsy's law; these states include California, Florida, Georgia, Illinois, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, and South Dakota. State Efforts, Marsy's Law for All (2020), https://www.marsyslaw.us/states (last visited Apr 24, 2020).

Appellant claims that there are three (3) states that have addressed the definition of "victim" under Marsy's law. However, two of the cases Appellant cites discuss such term in the context of restitution payment, which is a completely separate provision of Marsy's law from the victim impact provision relied on in the instant case. First, Appellant cites State v. Jones, unpublished, 2020 WL 224602 *2,

2020-Ohio-81 (Ohio Jan. 15, 2020), where the Ohio Supreme Court concluded that a storage container company was a victim for purposes of receiving restitution under Ohio's Marsy's Law.

Second, Appellant cites People v. Runyan, 54 Cal. 4th 849, 864-65, 279 P.3d 1143, 1152-53 (2012), where the California Supreme Court determined that while categories of "victims" should be broadly and liberally construed under Marsy's Law, the decedent's estate could not be paid restitution separate and apart from the victim as the estate was not a direct victim of the crime.

Appellant also cites Montana Association of Counties v. State by and through Fox, 389 Mont. 183, 404 P.3d 733 (2017), to support his argument. Montana's version of Marsy's law defined the term "victim" as Appellant describes:

> The definition of "victim," CI-116(4)(b), includes the victim, who has suffered direct or threatened harm, and his or her "spouse, parent, grandparent, child, sibling, grandchild, or guardian." Victim also includes someone with a "relationship to the victim that is substantially similar" to the relationship of a spouse, parent, grandparent, child, sibling, grandchild, or guardian. Finally, "victim" does not include the accused or someone the "court believes would not act in the best interests of a minor or of a victim who is deceased, incompetent, or incarcerated."

Id. at 187, 404 P.3d at 736. However, in such case, the Montana Supreme Court explicitly stated that it would not address the merits of Montana's Marsy's Law, but instead voided the law because of the voting procedure utilized for its enactment. In other words, this case does nothing more than provide another State's version of

Marsy's Law that was ultimately voided. Regardless, the language of Montana's constitutional amendment differs from Nevada's language which merely describes a victim as an individual that is *directly* or *proximately* harmed. Nev. Const., art. 1, § 8A.

Notwithstanding the three cases cited, an examination of the plain language of both NRS 176.015 and Article, Section 8A of the Nevada Constitution reveals that there is no prohibition on individuals other than victims directly submitting victim impact statements to the district court. Indeed, this Court has long held that a district court has "wide discretion" to consider extraneous evidence as long as the ultimate sentence is not based solely on impalpable or highly suspect evidence. Allred, 120 Nev. at 413, 92 P.3d at 1253 (quoting Silks, 92 Nev. at 94, 545 P.2d, at 1161. Notably, this Court has even upheld a district court's decision to allow a victim's sister-in-law to testify, even if she did not fall under the definition of "victim." Paet v. State, unpublished, 2016 WL 7322786, No. 70037 (Dec. 15, 2016). Relying on NRS 176.015, this Court stated:

> Even if the victim's sister-in-law did not have a right under NRS 176.015(3) to make a victim impact statement because she did not meet the definition of "victim" or "relative" set forth in NRS 176.015(5), the district court nonetheless could allow her to testify. See NRS 176.015(6) ("This section does not restrict the authority of the court to consider any reliable and relevant evidence at the time of sentencing."); Wood v. State, 111 Nev. 428, 430, 892 P.2d 944, 945–46 (1995) (explaining that NRS 176.015 does not act as a statutory limit on the evidence that a district court may receive in sentencing and the court has discretion to consider other admissible evidence). And more

> importantly for purposes of our review, the district court expressly stated that nothing the sister-in-law said played a part in its decision as to the appropriate sentence.

Id.

While the Paet Court was relying on NRS 176.015's definition of "victim" rather than the definition under Marsy's Law like the district court in the instant case, Paet demonstrates the wide discretion a district court has when rendering a sentence. Thus, even if the Puentes' friends did not constitute "victims," and accordingly did not have a right to be heard, it was not error for the district court to still consider their statements as extraneous information. See Silks, 92 Nev. at 93-94, 545 P.2d at 1161-62; Denson, 112 Nev. at 492, 915 P.2d at 286.

B. The Form of the Victim Impact Statements Complied with Nevada Law

Appellant also complains that it was inappropriate for the district court to consider the victim impact statements it received outside of the Presentence Investigation Report. AOB at 31-36. Additionally, he argues that it was inappropriate for the court to consider "demonstrative exhibits," such as videos at Appellant's sentencing. AOB at 36-37. Such arguments are meritless.

First, Appellant cites to Buschauer v. State, 106 Nev. 890, 804 P.2d 1046 (1990), to support the proposition that there are only two ways in which victim impact statements may be submitted to the district court. In Buschauer, the defendant's mother-in-law presented an oral victim impact statement to the district

court at his sentencing hearing pursuant to NRS 176.015(3). Id. at 891, 804 P.2d at 1046. The content of such statement went beyond the impact of defendant's crime and discussed other bad acts the defendant committed. Id. at 891-92, 804 P.2d at 1046. As such, the defendant argued on appeal that his mother-in-law's statement went beyond what is authorized under NRS 176.015(3) and that the statute violated his due process rights because there was a lack of notice, oath, and cross examination. Id. at 892, 804 P.2d at 1046. The Court ultimately concluded that his mother-in-law's statements were authorized. Id. at 893, 804 P.2d at 1046. While examining whether NRS 176.015(3) violated the defendant's due process rights, the Court explained:

> [A]n impact statement *may* be introduced at sentencing in two ways. First, where a victim cannot or does not wish to appear in court, the statement may be placed in written form in the presentence report pursuant to NRS 176.145. Second, the victim may give an oral statement at the sentencing hearing pursuant to NRS 176.015(3).

Id. at 893, 804 P.2d at 1048 (emphasis added). The Court then proceeded to discuss that the contents of the statement determine whether due process protections are violated. Id. at 893-94, 804 P.2d at 1048.

Appellant misleadingly argues that because the Buschauer Court listed the only two ways in which victim impact statements may be submitted, those are the *only* two ways to submit. AOB at 33. The Buschauer Court did not state that a victim impact statement *must* be submitted in the above two ways, but instead used the

word *may* to indicate that such statements *may* be submitted in one of those two ways. Regardless, while Appellant argues that there is no Nevada statute or constitutional authority that authorizes direct submission of victim impact statements to the district court, there is also no such authority that bars such action.

Further, this Court has indicated that a sentencing court must take into account a balance between the interests of the victim and that of the defendant, this Court has also clarified that

> the district court is permitted to consider facts and circumstances which clearly would not be admissible at trial so long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence.

Buschauer, 106 Nev. at 893, 804 P.2d at 1048; Wood v. State, 111 Nev. 428, 430, 892 P.2d 944, 945 (1995). Further, this Court has explained that there are minimal limitations on the district court's ability to consider evidence when rendering a sentence and it may look beyond information contained in the presentence investigation report. Denson, 112 Nev. at 492, 915 P.2d at 286.

Particularly, in Wood, 111 Nev. at 428, 892 P.2d at 946, this Court explained that the right for certain victims to provide their views concerning a crime is expansive rather than limiting. Indeed, the Court stated:

> NRS 176.015(3) is similar in scope to statutes enacted in Arizona and California. Courts in both states take expansive views of their victim impact statutes, concluding that they are designed to grant victims expanded rights, rather than to limit the rights of victims. Randell v.

> State, 109 Nev. 5, 7, 846 P.2d 278, 280 (1993) (citations omitted). NRS 176.015 creates in certain defined "victims" the undeniable right to appear and express their views concerning the crime, the person responsible, and the impact on the victim. In granting this right, NRS 176.015 does not restrict the existing discretion held by a sentencing judge to consider other evidence.

Id. (internal quotation marks omitted). In other words, the Court explained that while NRS 176.015(3) provides certain victims the opportunity to express their views at sentencing, the district court is not limited from considering other admissible evidence. Id. In making such ruling, the Court also concluded that "to the extent that any language in Castillo v. State, 110 535, 874 P.2d 1252 (1994), can be interpreted to the contrary, it is disapproved."[2] Id.

Even if the individuals that submitted victim impact statements failed to fall within the definition of "victim," a point the State does not concede, it was within the district court's discretion to still consider the statements. In fact, such practice is common in the district court where it directly receives not only victim impact statements, but also directly receives character letters on behalf of defendants.

To the extent Appellant has a concern that statements are sent directly to the district court and bypass the Department of Parole and Probation's "filtering" procedures, any danger is mitigated by the fact that a judge is presumed to follow the law and would not consider inadmissible evidence. Randell v. State, 109 Nev. 5,

[2] Appellant fails to mention that Castillo was distinguished by Wood for an issue presented by this case.

7-8, 846 P.2d 278, 280 (1993) ("[J]udges spend much of their professional lives separating the wheat from the chaff and have extensive experience in sentencing, along with the legal training necessary to determine and appropriate sentence") (internal citation omitted); Colwell v. State, 118 Nev. 807, 814, 59 P.3d 463, 468 (2002), cert. den, 540 U.S. 918, 124 S.Ct. 462 (2003) ("we presume that he sentencing judges understood and met their responsibilities"); Jones v. State, 107 Nev. 632, 636, 817 P.2d 1179, 1181 (1991) ("[T]rial judges are presumed to know the law and apply it in making their decisions"). Accordingly, Appellant's additional argument that demonstrative exhibits, such as the videos and posters presented in this case, should not be presented at sentencing hearings is also meritless. AOB at 36-37.

C. The District Court Did Not Rely on Any Improper Comments

Appellant argues that the district court erred when it allowed the victim speakers to make comments about: (1) Appellant's exercise of his constitutional rights, (2) the Department of Parole and Probation's process and sentencing recommendation, and (3) the merits of the pre-trial litigation in this case. AOB at 38. However, his arguments are meritless. As stated *supra*, this Court has explained that not only do judges have the experience to determine what evidence it may consider, but they are also "capable of listening to the victim's feelings without being

subjected to an overwhelming influence by the victim in making its sentencing decision." Randell, 109 Nev. at 7-8, 846 P.2d at 280.

First, Appellant complains Christa's father's, Daniel Malone, statement regarding pretrial litigation wherein he stated:

> THE SPEAKER: Only when he realized that there were no wild lies he could come up with, that the evidence wouldn't refute, did he accept a guilty plea. He has known since this crash how guilty he is but he refused to accept accountability for his actions.

II AA 289. Second, he argues that it was inappropriate for Christa's mother, Diane Malone, to state:

> THE SPEAKER: I truly am crushed and completely appalled actually at the 3 to 10 year recommendation by Parole and Probation. They're telling me that my daughter, Christa's life, is only worth possibly as little as 3 years in prison and the same for Damaso.
>
> How is it that Parole and Probation has to use a point system that takes every human aspect out of their decision to come up with a recommendation for sentencing?

II AA 310. Third, Appellant objected to Diane Malone's statement when she stated:

> THE SPEAKER: He has dishonored and wasted the Court's time by not accepting his responsibility for his choices and his actions. For 15 months he did that. How can he be trusted to be on our roads? He outright lied, even about driving the car.
>
> And I know, Your Honor, you weren't on this case from the beginning but there are things I'm going to say that happened in the beginning, in the courtrooms even.
>
> MR. SHEETS: Again, I'm objecting, this is way beyond impact, Your Honor.
>
> THE SPEAKER: He had outright lied --
>
> THE COURT: I'm going to overrule the objection.
>
> THE SPEAKER: -- about driving the car, the murder weapon he used to kill our beloved Christa and Damaso. He has tried for the past 17

> months to get off scot-free, or 15 months I should say, as though as some sort of sick joke. Up till today he's shown no remorse and no regard for anybody's life but his own. He's destroyed so many lives and up to today with no remorse.

II AA 312.

There is nothing in the record to indicate that the district court relied on these statements or any "impalpable or highly suspect evidence" when rendering Appellant's sentence. Silks, 92 Nev. at 94, 545 P.2d at 1161. Indeed, the district court explained that it relied on Appellant's Presentence Investigation Report, the statements of the victims' family, and the egregious facts of this case to determine Appellant's sentence:

> THE COURT: All right. Mr. Aparicio, this is the time for sentencing and *I have considered all of the information presented, not only in the PSI but also your statement here in court*. *I have certainly considered the statements of the family*. I've read every letter that was submitted to me and as well as the video and the pictures that were presented here in court today.
>
> Mr. Sheets touched on a sentencing structure that I'm familiar with. In my former life I worked in the federal system and there, as Mr. Sheets talked about it, it sets forth a number of factors to be considered and this has been approved by the Supreme Court of the United States, so I'm sure it's equally applicable in the State of Nevada.
>
> Those factors include the nature and circumstances of the offense and the history and characteristics of the defendant, the need for the sentence imposed to reflect the seriousness of the offense, and to promote respect for the law, and to provide just punishment for the offense, to afford adequate deterrence to criminal conduct, and to protect the family from further crimes of the defendant.
>
> It also requires that I consider a sentence that will provide the defendant with needed educational or vocational training, medical care, or correctional treatment in the most effective manner, and also requires that I also consider potential sentencing disparities amongst defendants

with similar records who have been found similar -- found guilty of similar crimes, in this instance you pleaded guilty.

So I do carry those with me as I sentence every defendant. I also look to Nevada law to talk about, you know, what is appropriate. They talk about the judge having wide discretion and everything from sentencing concurrently to consecutively. *And I too am required to consider the whole defendant and the victims, as well as the conduct of the defendant when considering what an appropriate sentence is. And that's what I've done.*

So I'm going to note that without a doubt the families, and I say families because it's not just one family, it's not just two families, it's actually four families that have been impacted by your reckless disregard for life.

The accident, which to call it an accident is an understatement, is just unimaginable. When I was presented with these photos this morning I didn't even -- I couldn't tell what kind of vehicle the victims were in when they were hit by the car you were driving. *That's how egregious your conduct was.*

And so when I look at you and I consider the fact that you don't have any criminal convictions, which certainly adheres to your benefit, you did serve our military, which I thank you for. You know, I think that's something that isn't emphasized enough in society today.

But at the same time you had trouble when you were you in the military. *Your behavior and your poor choices started while you were in the military. When I look at what the offense was, to include the forgery of a military ID, I can't think of anything that could be potentially more dangerous for our country that could lead to any number of really bad things that could happen.*

You're obviously an intelligent young man. You're articulate. You have a family who loves and supports you.

And so I thank the family for being here today.

But you have to pay for the choices that you made and the choices that you made that night weren't just, I'm going to get into a car and drive drunk, I'm going to go to one bar, I'm going to drink countless drinks, and they weren't just, you know, a glass of wine; right, they were drinks that were very strong, with multiple, if I remember correctly, there were multiple types of alcohol, in at least one or two of the drinks, and I remember reading correctly, the types of drinks that were ordered at Dave & Buster's. And then you actively chose to go to the next place and continue to drink and drink more.

> There's -- *when I consider all of that, I do believe that a sentence at the high end of the guidelines is appropriate.*
>
> *I am empathetic to the victims and their frustration at Parole and Probations justification of the 3 to 10 year sentence.*
>
> I will tell you this, there is no right or wrong answer when it comes to the death of somebody. You know, justice is defined any number of ways. But trying to make someone whole is really what justice is supposed to do. But we can never do that for you. *And I can tell you that Parole and Probation wouldn't be able to do that for you no matter what system they use to calculate the sentence that they recommend.*
>
> So let's go through with the sentencing[…]

II AA 319-322 (emphasis added).

While the record indicates that the district court *considered* all of the evidence presented, it is clear that the district court *relied* on admissible evidence to render Appellant's sentence. Indeed, it appears from the record that the district court did not rely on any of the improper comments made by the two victim witnesses for which Appellant now takes issue. II AA 289, 310, 312, 319-22. Notably, the district court even explained that while it recognized the speaker's comments regarding the Department of Parole and Probation, it did not rely on this comment to render its sentence. II AA 321-22. As such, the record does not indicate that the district court relied on any improper comments.

D. Any Error Would Have Been Harmless

Any error due to the district court considering the victim impact statements submitted and the evidence it considered to render Appellant's sentence would be harmless. See NRS 178.598 (Any "error, defect, irregularity or variance which does

not affect substantial rights shall be disregarded"); Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008) (noting that nonconstitutional trial error is reviewed for harmlessness based on whether it had substantial and injurious effect or influence in determining the jury's verdict). On the other hand, constitutional error is evaluated by the test laid forth in Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828 (1967). The test under Chapman for constitutional trial error is "whether it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" Tavares v. State, 117 Nev. 725, 732 n.14, 30 P.3d 1128, 1132 n.14 (2001).

Under any standard, any error would not warrant reversal. Appellant's sentence was justified by the egregious facts of this case without reference to any improper victim impact statements or comments. Indeed, the facts indicate that Appellant made the grave decision to drive while under the influence of alcohol, hitting speeds over one hundred (100) mph, and ultimately taking the lives of two innocent victims, Damaso and Christa Puente. I RA 11-12, 19, 38. The district court took into account Appellant's reckless disregard for human life as well as Appellant's past criminal actions to render his sentence. To the extent that Appellant claims the district court relied on any improper evidence, the record is silent and, as stated *supra*, the district court is presumed to follow the law. Randell, 109 Nev. at 7-8, 846 P.2d at 280; Colwell, 118 Nev. at 814, 59 P.3d at 468, cert. den, 540 U.S.

918, 124 S.Ct. 462; Jones, 107 Nev. at 636, 817 P.2d at 1181. As is clear from the record, the district court did just that.

CONCLUSION

For the foregoing reasons, the State respectfully asks that this Court AFFIRM the Judgment of Conviction.

Dated this 7th day of May, 2020.

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman 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 proportionately spaced, has a typeface of 14 points of more, contains 7,476 words and 29 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 this 7th day of May, 2020.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 7th day of May, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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