IN THE SUPREME COURT OF THE STATE OF NEVADA

HENRY BIDERMAN APARICIO, No. 80072

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.
_____/

BRIEF OF THE WASHOE COUNTY PUBLIC DEFENDER'S OFFICE AS AMICUS CURIAE

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Amicus Curiae

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STATEMENT OF INTEREST

The Washoe County Public Defender's Office is a duly constituted county public defender's office created pursuant to NRS 260.010, *et seq.* Since its inception on July 1, 1969, it has provided legal representation to indigent persons charged with crimes in Washoe County, Nevada, including on appellate review. On April 16, 2021, this Court, by order, invited the Washoe County Public Defender's Office to participate as amicus curiae in this appeal and to file a brief "addressing the questions raised on review regarding a district court's ability to review letters received prior to, or at the time of, the sentencing hearing." Order Directing Supplemental Briefing and Inviting Amicus Briefing at 2.

QUESTION PRESENTED

The questions stated in the Petition for Review (Petition) can be restated as one question:

> Whether the Court of Appeals' decision below—regarding the district court's ability to review and consider letters received prior to, or at the time of, the sentencing hearing—conflicts with or misapplies Nevada Supreme Court precedent, NRS 176.015, or Article 1, § 8A(7) of the Nevada Constitution (Marsy's Law).[1]

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[1] The Petition identifies another issue: Whether the Court of Appeals' decision should be reviewed by this Court. Because this Court has

DISCUSSION

1.—caselaw

In Nevada, a sentencing court "is privileged to consider facts and circumstances which would clearly not be admissible at trial." *Norwood v. State*, 112 Nev. 438, 440, 915 P.2d 277, 278 (1996) (citing *Silks v. State*, 92 Nev. 91, 93-94, 545 P.2d 1159, 2261 (1976)). But that power is neither plenary nor limitless. *Parish v. State*, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000). And "this court will ... interfere[] with the sentence imposed" if the record "demonstrate[s] prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." *Silks v. State*, 92 Nev. at 94, 545 P.2d at 1161. At sentencing "all factors bearing on a defendant's sentence must have a basis in the record." *Norwood v. State*, 112 Nev. at 440 n.2, 915 P.2d at 279 n.2. A sentencing court may, however, disclaim reliance on any matter submitted for consideration during sentencing. *Buschauer v. State*, 106 Nev. 890, 894, 804 P.2d 1046, 1049 (1990); *Sasser v. State*, 130 Nev.

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accepted review, this issue is moot.

387, 394, 324 P.3d 1221, 1225 (2014); *Blankenship v. State*, 132 Nev. 500, 511, 375 P.3d 407, 414 (2016).

2.—statutes

A sentencing court is obligated by statute to consider victim impact statements at sentencing. See NRS 176.015(3)(a). A statutorily defined victim is allowed to "[r]easonably 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)(b). The Legislature has defined the term "victim" to include only those persons "against whom a crime has been committed"; or who have "been injured or killed as a direct result of the commission of a crime"; or a "relative" of such persons. NRS 213.005(3)(a), (b), and (c). And NRS 213.005(c) (1)-(4) delimits the class of "relatives" to a spouse, parent, grandparent, stepparent, natural born child, stepchild, adopted child, grandchild, brother, sister, half-brother, half-sister, or parent of a spouse. Absent from this set are, for example, uncles, aunts, and cousins.[2]

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[2] Both NRS 176.015(5)(d) and NRS 213.005(3) use the word "includes" before identifying their respective set of included members. "While the word 'includes' may be used to broaden a specific term, it may also be used as a word of limitation." *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.*, 138 Cal. Rptr. 509, 512 (Cal. App. 1977)

A sentencing court may, pursuant to NRS 176.015(6), "consider any reliable and relevant evidence at sentencing." To give meaning to the terms "relevant" and "reliable" used here we can say that a person speaking as to their observations of a *victim's* reaction or response to a crime is "reliable" if they are speaking from personal knowledge. And we can say such testimony is "relevant" when it is describing or corroborating[3] the *victim's* reaction or response to a crime. This is consistent with NRS 176.015(6)'s legislative history—AB 186, 68th Reg.

(some internal quotation marks omitted). Here, "includes" operates as a word of limitation. Had the Legislature wished to broaden the set, and at the same time defeat three cannons of construction—*expressio unius est exclusio alterius* ("to express one thing is to exclude the other"), *noscitur a sociis* ("it is known by its associates"), and *ejusdem generis* ("of the same class or nature")—it could have used the cautious phrase "including but not limited to." Bryan A. Garner, Garner's Dictionary of Legal Usage 439-40 (3rd ed. 2011). Neither statute defeats these linguistic cannons, particularly *noscitur a sociis* and *ejusdem generis*, which "establish a presumption that particular words of a statute should be interpreted according to the company they keep and not viewed in isolation." Frank B. Cross, The Theory and Practice of Statutory Interpretation 88 (Stanford University Press 2009).

[3] For example, a victim may wish to present expert testimony in support of a restitution claim. *Cf. Stephans v. State*, 127 Nev. 712, 716, 262 P.3d 727, 731 (2011) (stating that "[a]n owner of property may testify to its value, at least so long as the owner has personal knowledge, or *the ability to provide expert proof*, of value.") (italics added, citations omitted). Of course, any proposed evidence is always subject to considerations of cumulativeness, time consumption, confusion of issues, and prejudice.

Sess. (1995),[4] which in turn is consistent with this Court's precedent. See *Minutes, Senate Committee on Judiciary*, April 5, 1995, pgs. 20-21 (providing committee with an advance-sheet copy of *Wood v. State*, 111 Nev. 428, 892 P.2d 944 (1995), and noting that subsection 6 "was prescient" in that it confirms "the sentencing court will be allowed to continue to consider relevant evidence."). In *Wood* the sentencing court allowed a victim's mother to testify "about the impact of the abuse *on her son and family*." The presentence investigation report also contained the mother's written statement. *Id.* at 429, 892 P.2d at 945 (italics added). This Court found the evidence to be proper stating, that while NRS 176.015 "grants certain victims of crime the right to express their views before sentencing" it does not "limit in any manner a sentencing court's existing discretion to receive other *admissible* evidence." *Id.* at 430, 892 P.2d at 946 (italics added).[5] At the same time, this Court disapproved *Castillo v. State*, 110 Nev. 535, 544-45, 874 P.2d 1252, 1258-59 (1994) to the extent it had suggested that a victim's ex-

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[4] See http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1995/AB186,1995.pdf .

[5] A point also made by the majority in *Aparicio v. State*, 478 P.3d 410, *3 (Nev. Ct. App. 2020) (unpublished).

husband should not have been allowed to describe the impact of the crime *on the victim*. *Wood* teaches that in addition to a victim's statement at sentencing, a district court may consider non-victim statements that are tied to the victim and the victim's experience. Nothing in the caselaw or statutes license a non-victim to present statements or other evidence that is extraneous to the victim.

3.—Art. 1, § 8A

"Unless ambiguous, the language of a constitutional provision is applied in accordance with its plain meaning." *Nevadans for Nevada v. Beers*, 122 Nev. 930, 942, 142 P.3d 339, 347 (2006) (footnote omitted). Article 1, § 8A(1) of the Nevada Constitution states that "[e]ach person who is a victim of a crime is entitled to" numerous identified "rights." Section 8A(7) defines "victim" as "any person *directly and proximately harmed* by the commission of a criminal offense under the law of this State." (Italics added.) This general definition requires the existence of direct and legal actual *harm* in order to be considered a victim entitled to certain rights under the Constitution. Stated differently, absent

direct and legal harm caused by the commission of a criminal offense, there is no victim.[6]

Section 8A(7) adds, "*[i]f* the victim is less than 18 years of age, incompetent, incapacitated or deceased, [*then*] the term includes the legal guardian of the victim or a representative of the victim's estate, members of the victim's family or any other person who is appointed by the court to act on the victim's behalf ... ." Notably, this if-then construction only applies where the victim—*i.e.*, someone who has been directly and legally harmed by the commission of a criminal offense—is less than 18 years of age, incompetent, incapacitated or deceased. And, even then, the legal guardian, representative, family member, or court appointed "other person" is designated to speak or act for that victim, and not for themselves. Thus, this second clause does not expand or enlarge the term "victim" beyond the limited scope and purpose identified within the clause.

4.

There is nothing in the *Aparicio* majority decision that conflicts with or misapplies either this Court's precedent, NRS 176.015, or

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[6] Article 1, § 8A does not identify rights belonging to non-victims.

Article 1, § 8A(7) of the Nevada Constitution. Indeed, the majority reviewed the sentencing record under a standard of abuse of discretion. It approved the district court's consideration of true victim impact statements under NRS 176.015 and the Constitution. And it properly noted that the district court had misconstrued governing law when it concluded it was obligated to consider and did consider (*i.e.*, did not disclaim reliance on) undifferentiated non-victim letters in its sentencing decision without making any determination of the relevancy or reliability of those statements. *Aparicio v. State*, 478 P.3d 410 at *3-*6. Contrary to an assertion made in the Petition at 2, the majority *did not* categorically "conclude[] that a non-victim is prohibited from giving an opinion at sentencing." Instead, it recognized a gatekeeping function belonging to the district court: "When considering *non-victim* statements ... the district court must still determine the relevancy and reliability of those statements in order to preserve the integrity of the sentencing process." *Id.* at *6 (italics in the original).

In order to fall within the ambit of judges who use their "legal training" and "extensive experience" to "separate[e] the wheat from the chaff" at sentencing hearings, *Randell v. State*, 109 Nev. 5, 7-8, 846

P.2d 278, 280 (1993), a district court judge must actually exercise sentencing discretion. *Patterson v. State*, 129 Nev. 168, 176-77, 298 P.3d 433, 439 (2013) (stating "[t]his court has previously noted that an abuse of discretion occurs whenever a court fails to give due consideration to the issues at hand."). Here the district court's blanket acceptance and use of a multitude of non-victim statements constituted an abuse of discretion necessitating a remand for a new sentencing hearing. *Cf. Goodson v. State*, 98 Nev. 493, 496, 654 P.2d 1006, 1007 (1982) (vacating and remanding for new sentencing hearing stating "we have no doubt Ms. Goodson's sentence was improperly prejudiced by the unsupported representation that she was trafficking in narcotics"); *Todd v. State*, 113 Nev. 18, 25-26, 931 P.2d 721, 725-26 (1997) (vacating and remanding for new sentencing hearing where district court considered confidential and privileged material as well as the attorney's impressions regarding that confidential and privileged information); *Norwood v. State*, 112 Nev. at 440, 915 P.2d at 278-79 (vacating and remanding for new sentencing hearing stating "the district judge's statements in context demonstrate that his decision was infected by his beliefs regarding Norwood's gang affiliation. The district court's

unsubstantiated assertion appears to have affected the sentence, thus resulting in prejudice to Norwood. We therefore conclude that Norwood is entitled to a new penalty hearing.").

CONCLUSION

The Court of Appeals' majority decision in *Aparicio* is well-reasoned, is true to Supreme Court precedent, is true to NRS 176.015, and is true to Nevada's constitutional language. As such, this Court should affirm the majority's decision. This Court can, of course, use this opportunity to issue its own opinion on the scope and content of the term "victim" as used in Article 1, § 8A(7) of the Nevada Constitution. And, in our view, a good place to start is with the majority's decision presently under review.

DATED this 21st day of May 2021.

JOHN L. ARRASCADA
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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 Century in 14-point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, even including the parts of the brief though exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains a total of 2,080 words. NRAP 32(a)(7)(A)(i), (ii).

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 of the transcript or appendix where the matter relied upon 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 21st day of May 2021.

/s/ John Reese Petty
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 21st day of May 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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