

IN THE SUPREME COURT OF THE STATE OF NEVADA

HENRY BIDERMAN APARICIO,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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Elizabeth A. Brown
Clerk of Supreme Court

CASE NO: 80072

PETITION FOR REVIEW

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, ALEXANDER CHEN, and petitions this Court for rehearing in the above-captioned appeal.

This petition is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 3rd day of March, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Alexander Chen*

ALEXANDER CHEN
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RESPONDENT'S PETITION FOR SUPREME COURT REVIEW

Pursuant to NRAP 40B, Respondent State of Nevada petitions for Supreme Court review of the Court of Appeals' *Order Vacating Sentence and Remanding* entered on December 31, 2020.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Nevada Court of Appeals' decision regarding a district court's ability to review victim impact letters conflicts with Nevada Supreme Court precedent which concludes that a sentencing court: has wide discretion in rendering its sentence, may consider other admissible evidence, such decision is given great deference, and such decision should only be reversed if the court abused its discretion or it was manifest error. Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987); Wood v. State, 111 Nev. 428, 892 P.2d 944 (1995); Vega v. State, 126 Nev. 332, 342, 236 P.3d 632, 638 (2010). Additionally, 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. Moreover, whether the Court misapplied Randell v. State, 109 5, 8, 846 P.2d 278, 280 (1993), when it concluded that a non-victim is prohibited from giving an opinion at sentencing.
2. Whether the Nevada Court of Appeals' decision should be reviewed because it has a statewide impact on victims' rights.

STATEMENT OF FACTS

On May 15, 2018, Henry Biderman Aparicio ("Appellant") and his girlfriend started their evening by having 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 walked over to the red car which had caused the collision. I RA 12-13. McCauley saw a group of people holding Appellant down 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 when it happened, Bilali-Azzat stopped to see if she could help in the aftermath. I RA 27. She approached the Puentes in their white car which at that time 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, others tried to extract Christa. 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 later declared 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, Fire Department personnel, 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 the 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 personnel 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 to draw Appellant's blood. I RA 20-21. Subsequently, Officer 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. 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 Appellant asked if he had killed two (2) 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.

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.

On June 5, 2018, 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 RA 2-7.

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.

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.

II AA 265.

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 stated 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.

On December 31, 2020, the Nevada Court of Appeals issued an ORDER VACATING SENTENCE AND REMANDING. The Nevada Court of Appeals, in

a two to one split decision (Judge Tao, dissenting), concluded that the district court erred in considering letters submitted to it on behalf of the victims' families and friends.

ARGUMENT

In issuing its ORDER VACATING SENTENCE AND REMANDING, the Nevada Court of Appeals misapplied and deviated from Article 1, § 8(A) of the Nevada Constitution (commonly referred to as Marsy's Law), NRS 176.015, and the prior cases that have determined and allowed the district court to be the gatekeeper of information that may be used at sentencing. In a severe misapplication of the law, Respondent, the State of Nevada, is seeking this Court's review of the matter pursuant to NRAP 40B.

"Supreme Court review is not a matter of right but of judicial discretion." NRAP 40B(a). Pursuant to that rule, so of the factors this Court considers when determining whether to review a Nevada Court of Appeals decision includes: "(1) Whether the question presented is one of first impression of general statewide significance; (2) Whether the decision of the Court of Appeals conflicts with a prior decision of the Court of Appeals, the Supreme Court, or the United States Supreme Court; or (3) Whether the case involves fundamental issues of statewide public importance." NRAP 40B(a). Aggrieved parties bear the burden of "succinctly stat[ing] the precise basis on which [they] seek[] review by the Supreme Court."

NRAP 40B(d). Here, as discussed below, the State asserts that it has met each of the three (3) factors warranting this Court's review.

A. THE NEVADA COURT OF APPEALS' DECISION REGARDING VICTIM IMPACT LETTERS CONFLICTS WITH THE DECISIONS OF THIS COURT AND IS A MATTER OF FIRST IMPRESSION

The Nevada Court of Appeals decision in this case conflicts with this Court's precedent as well as Nevada law and, thus, is a matter of first impression. NRAP 40B(a). Indeed, in rendering its decision, the Nevada Court of Appeals violated this Court's longstanding principle that a sentencing judge has wide discretion in rendering its sentence, and that this Court should only reverse if the judge abused her discretion. Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). Nevada law also states the sentencing court's decision should be given great deference, and it should not be reversed absent manifest error. Vega v. State, 126 Nev. 332, 342, 236 P.3d 632, 638 (2010).

In this case, the district court overruled Appellant's objection that forty-six (46) of the victim impact letters submitted did not meet the statutory definition of a victim under Marsy's Law, and should thus be stricken. The district court, in overruling the objection, indicated that it was allowing for the admission of the letters because of the broad definition of a victim, and that it had read each and every letter. II AA 265. Upon the remaining arguments of counsel, and listening to

testimony from the deceased victims' parents, the district court rendered a legal sentence that was within the permissible statutory guidelines. II AA 323, 325.

Based upon these facts, there is nothing that indicates the district court erred in at a minimum reviewing each letter. It was up to the district court to decide what, if any, weight to give the letters. Yet without anything more, the Nevada Court of Appeals has determined that the mere reading of the letters was an abuse of discretion absent the district court individually identifying each and every piece of information that it relied on and what weight such information was given when rendering its sentence. This is an absolute deviation from the established rule that a court's sentence is inherently valid and will be affirmed "so long as it is within the statutory range and not founded on impalpable or highly suspect evidence." Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

Additionally, the Nevada Court of Appeals has misapprehended Article 1, § 8A(7) of the Nevada Constitution and NRS 176.015 and concluded that such provisions are restrictive in nature rather than guaranteeing that certain rights must be provided to the victims of those directly and proximately affected by the crime. The Nevada Court of Appeals' Order has used the term "victim" to restrict information that the sentencing court may consider from individuals that fall outside the definition.

The first assignment of error that the Nevada Court of Appeals cited was that the district court erred when it accepted and considered impact statements from non-victims. Order Vacating Sentence and Remanding, Docket No. 80072, filed Dec. 31, 2020, at 4 (hereinafter “Order”). The Court initially, and correctly, explained that both Marsy’s Law and NRS 176.015 define the category of “victims” that are protected by the laws. The Court also initially correctly pointed out that when the victims are deceased, such as in this case where the victims will never be able to afford themselves of the protections granted to victims, then a member of the victim’s family may assert the rights of the victim. NEV. CONST. ART. 1, § 8A(7). Similarly, the Court stated that NRS 176.015 expands the definition of a victim to specifically identified individuals when the actual victims are deceased.

While the Court correctly cited that certain individuals are defined as victims who must be heard prior to sentencing, the Court incorrectly applied the converse for all individuals that do not fall under the definition of a victim. The Nevada Court of Appeals has now determined that if a person is not a “victim,” then his or her input is automatically presumed to be inadmissible unless and until the district court makes a finding as to why a non-victim’s input is both relevant and reliable.

Although the Court recognized that NRS 176.015(6) states: “[T]his section does not restrict the authority of the court to consider any reliable and relevant

evidence at the time of sentencing,” it without justification concluded that these letters were not relevant and reliable.

Factually, the Court lumped in the forty-six (46) objected to letters as presumptively inadmissible since the authors did not meet the definition of a victim under Marsy’s Law or NRS 176.015. In doing so, it completely ignored the fact that several of the letters came from people who were directly impacted by Appellant’s actions and the resulting death of the two (2) individuals. The Order overlooks and mitigates cousins, aunts, uncles, colleagues, friends, and more whose lives were enriched by the victims but whose words now are subject to uncanny skepticism and scrutiny. This cannot be an acceptable outcome, but the Court’s Order does exactly that.

The Court also misapplied Randell v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993) for the proposition that victims and non-victims have separate rights under the law. Order at 7. The defendant in Randell argued that his sentence should be overturned because the statute did not specifically authorize a victim to express an opinion about the sentence he should receive. Id., at 7-8, 846 P.2d 278-280. However, in Randell, this Court concluded that it was not error for the victim to express a view regarding the sentence that the defendant should receive, even if it was not specifically permitted by statute. Id. The Nevada Court of Appeals then in

turn takes the holding in Randell and creates a converse proposition that a non-victim is then prohibited from giving an opinion. Order at 7. While this may or may not be true depending on the situation, nothing in the Randell case says that a non-victim's opinion is automatically irrelevant and inadmissible. Similarly, the Court's Order applied the same errant logic to this case when it determined that because Marsy's Law and NRS 176.015 do not specifically permit non-victim opinions, then they must be presumptively precluded. This is the exact same type of flawed analysis that this Court rejected in Randell.

In fact, if anything, the Court in Randell identified how district courts are capable of not being subjected to overwhelming influence of a victim. Id. at 8, 846 P.2d at 280. Yet now, the Nevada Court of Appeals deviates from Randell and assumes that the district court was incapable of giving the appropriate amount of consideration to the various letters submitted. Simply because the district court uttered the words "I've considered everything" does not imply that an undue and unreasonable amount of weight was placed on the letters submitted.

In its ruling, the Nevada Court of Appeals suddenly, and without authority, restricted the district court's inherent ability to consider information when rendering a fair and just sentence. The Court stated that it noted NRS 176.015 does not restrict the district court's inherent sentencing authority, but its decision did exactly that.

The Order completely ignores that statute and Wood v. State, 111 Nev. 428, 892 P.2d 944 (1995), which affirms the principle that the sentencing court at its discretion may consider other admissible evidence. Order at 9. Wood dealt again with the idea of whether someone is prohibited from speaking simply because that person was not delineated by statute. Wood is yet another example of a case that determined it was not error to allow a parent of a sexual molestation to testify simply because the parent did not fall under the definition of a victim, and that the statute only specified parents speaking when the victim was deceased. Id. at 429-430, 892 P.2d at 945. By disallowing the letters in their entirety, the Nevada Court of Appeals is assuming that crime only impacts those specified under the statute and that the widespread implications should be given little to no consideration. Not only is the Court ignoring the impact, but it is essentially warning the district courts to refrain from considering any individual who does not qualify as a “victim” under Marsy’s Law or statute. Otherwise, the district courts risk a defendant’s sentence being vacated because consideration of the information was an abuse of discretion.

The Nevada Court of Appeals, in setting a new evidentiary standard for what is relevant and admissible, deviated from existing law. It ignores the general rule: that a sentencing is not a second trial, and that the district court may consider things that would not have been admissible at trial. See Silks v. State, 92 Nev. 91, 545 P.2d

1159 (1976). Although the Court stated that it was not changing the evidentiary standard at sentencing hearings, there is no alternative way to read the Order. There is especially no way for the well-meaning practitioner and sentencing court, that seeks finality and closure, to understand when evidentiary requirements must be met to satisfy the Court's general aversion to a non-victim providing the district court with information.

The Nevada Court of Appeals has hung its hat on the fact that the State or the district court did not articulate how the information contained in the letters was relevant and reliable. Again, this is a brand-new consideration of evidence for sentencing that deviates from established Nevada law. Is it the Court's intent then, to have everything in a Pre-Sentence Investigation Report deemed unreliable hearsay? Are letters on behalf of a defendant now subject to verification of the facts contained therein? Although the Court, in a footnote, stated that hearsay is admissible at sentencing, the Order deviated from that basic premise because it gave no guidance on where the division between relevant and reliable evidence versus unacceptable evidence lies.

Finally, the Court took issue with the fact that the district court at sentencing overruled Appellant's objection because it mistakenly believed that Marsy's Law required it to consider the letters. Order at 11. Perhaps the district court was incorrect

in its basis for reviewing the letters, but the error if any should have been considered harmless. Absolutely nothing in the record identifies any piece of suspect or questionable information that the district court relied on in rendering its sentence.

To the extent that any letter expressed Appellant's lack of remorse, again the Nevada Court of Appeals should have considered Randell and the cases like it that have acknowledged the court's ability to separate and not be unduly persuaded by these comments. The bulk of the letters described pain at the loss of a friend, cousin, colleague, uncle, aunt, daughter, and son. The pain and impact a crime has, as unfortunate as it may be, should be permissible at a sentencing hearing. The Court's Order deviates from this basic principle, and it does so by deviating from the plain language of Marsy's Law, NRS 176.015, and the cases by this Court.

The Nevada Court of Appeals cites NRS 176.015(6) in its reliance that the district court may only consider "reliable and relevant evidence at the time of sentencing." Order at 6. However, the Court states nothing about what information was not reliable and relevant about the letters submitted. The Court used an example of a letter that indicated that the author had never met the deceased victims, but does that in any way negate the relevancy and reliability of how the author witnessed the actual pain of one of the victim's mothers as they visited her gravesite together? In having a problem with this one (1) letter, the Nevada Court of Appeals takes it even

further by also minimizing the voices of other individuals who wrote letters simply because they held a lesser status than a victim. Apparently the pain they expressed in their letters is now to be viewed as less relevant and less reliable merely because they lack an official title as a victim. This cannot be the effect of Nevada law and, more specifically, Marsy's Law.

**B. THE NEVADA COURT OF APPEALS' DECISION INVOLVES
A FUNDAMENTAL ISSUE OF STATEWIDE IMPORTANCE**

Not only did the Nevada Court of Appeals' decision run afoul of this Court's precedent, but in doing so it mishandled an issue of statewide importance that will have broad sweeping effect. NRAP 40B(a). As a preliminary matter, the authors of the letters at issue all indicated their relationship, no matter how far removed, to the deceased victims. In declaring such letters error, the Nevada Court of Appeals has effectively stripped the notion of victim-impact and limited it to what the victim can personally and individually tell the court. This of course does not take into consideration a victim or parent who may be unable to fully express him or herself during the sentencing hearing because of the many emotions involved. Many of these letters described the pain of the parents, who absolutely qualify as victims under the law. Therefore, it should have been for the sentencing court to decide what if any weight to give the information that was provided as this Court's precedent provides. In spite of this, the Nevada Court of Appeals still holds that it was

presumptively an abuse of discretion for the sentencing court to have even considered the letters.

Despite the plain language of both written laws, this Court now has decided that if a person does not meet the threshold definition of a victim, then that person's right to be heard should be severely restricted. Despite all indications that the laws are meant to set a threshold for victim rights, this Court in turn snubs any information that comes from an individual who lacks a certain title. In doing so, this Court failed to recognize the widespread impact crime can have not only on the victims themselves, but to every person around them.

Regardless of the legal conflict discussed *supra*, a sua sponte holding such as this would have broad-reaching devastating effect. Not only would such a decision silence the voices of victims who are no longer able to share the impact of the crime he or she endured, but also would silence the voters of Nevada who twice approved a constitutional protection for victims of crime.

WHEREFORE, the State respectfully requests that Respondent's petition be granted and the Court review the Order.

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Dated this 3rd day of March, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
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BY */s/ Alexander Chen*

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CERTIFICATE OF COMPLIANCE

- 1. I hereby certify** that this petition for review or answer 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
- 2. I further certify** that this petition complies with the type-volume limitations of NRAP 40, 40A and 40B because it is proportionately spaced, has a typeface of 14 points and contains 4,500 words.

Dated this 3rd day of March, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on March 3, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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