IN THE COURT OF APPEALS OF THE STATE OF NEVADA

HENRY BIDERMAN APARICIO, Appellant, v. THE STATE OF NEVADA Respondent.	Electronically Filed Jan 07 2021 11:45 a.m. Elizabeth A. Brown Clerk of Supreme Court CASE NO: 80072-COA

PETITION FOR REHEARING

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 7th day of January, 2021.

Respectfully submitted,

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

BY */s/ Alexander Chen*
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
Office of the Clark County District Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

On December 31, 2020, this Court issued an ORDER VACATING SENTENCE AND REMANDING based on a sentencing that sent Appellant Henry Aparicio to prison for causing the deaths of two (2) individuals who were waiting at a red light when their vehicle was struck by Appellant. Appellant was intoxicated and driving at a speed of roughly one hundred (100) miles per hour when his vehicle collided into the victims' car. This Court, in a two to one split decision (Justice Tao dissenting), held that the district court erred in considering letters submitted to it on behalf of the victims' families and friends.

In issuing its Order, this Court has misapplied and deviated from Article 1, Section 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 rehearing in this matter pursuant to NRAP 40(c)(2).

As a preliminary matter, this Court did not follow the principle that the 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). The sentencing court's decision should also 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 letters 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. 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.

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, this Court 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).

This Court misapprehends Article 1, Section 8A(7) of the Nevada

Constitution and NRS 176.015 when it concludes that the 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. This Court's 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 this Court cites is that the district court erred when it accepted and considered impact statements from non-victims. (Order, p. 4). This Court initially, and correctly, explains that both Marsy's Law and NRS 176.015 define the category of "victims" that are protected by the laws. This Court also initially correctly points 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. Article 1, Section 8A(7). Similarly, this Court points out that NRS 176.015 expands the definition of a victim to specifically identified individuals when the actual victims are deceased.

While this Court correctly cited that certain individuals are defined as victims who must be heard prior to sentencing, this Court incorrectly applies the converse for all individuals that do not fall under the definition of a victim. This Court 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 this Court recognizes 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 determines that these letters were not relevant and reliable.

Factually, this Court lumps 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, this Court completely ignored the fact that several of the letters came from people who were directly impacted by the Appellant's actions and the resulting death of the two (2) individuals. This 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 this Court's Order does exactly that.

This Court 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, p. 6). This Court states nothing about what information was not reliable and relevant about the letters submitted. This Court uses an example of a letter that indicates 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 letter, this Court 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.

Moreover, the letters all indicated their relationship, no matter how far removed, to the deceased victims. In declaring these letters error, this Court effectively has 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. Yet, this Court still holds that it was presumptively an abuse of discretion for the sentencing court to have even considered the letters.

This Court also misapplies 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, p. 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, the Nevada Supreme 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. This Court 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, p. 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, this Court's Order applies the same errant logic to this case when it determines 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 the Supreme Court rejected in Randell.

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.

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, this Court 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, this Court suddenly, and without authority, restricts the district court's inherent ability to consider information when rendering a fair and just sentence. This Court states that it notes NRS 176.015 does not restrict the district court's inherent sentencing authority, but this decision does exactly that. This 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 p. 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, this Court 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 this 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.

This Court, 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 this Court states that it is 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 this Court's general aversion to a non-victim providing the district court with information.

This Court hangs 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 this 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 this Court in a footnote states that hearsay is admissible at sentencing, this Order deviates from that basic premise because it has given no guidance on where the division between relevant and reliable evidence versus unacceptable evidence lies.

Finally, this Court takes 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, p.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 this Court 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. This 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 the Nevada Supreme Court.

WHEREFORE, the State respectfully requests that rehearing be granted and the Order be amended.

Dated this 7th day of January, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney

BY */s/ Alexander Chen*

ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155
(702) 671-2500

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this petition for rehearing 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 page and type-volume limitations of NRAP 40 or 40A because it is proportionately spaced, has a typeface of 14 points or more, contains 2,289 words and does not exceed 10 pages.

Dated this 7th day of January, 2021.

Respectfully submitted,

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

BY */s/ Alexander Chen*
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 89155-2212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on January 7, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

KELSEY L. BERNSTEIN, ESQ.
DAMIAN R. SHEETS, ESQ.
Counsels for Appellant

ALEXANDER CHEN
Chief Deputy District Attorney

/s/ J. Garcia
Employee, Clark County
District Attorney's Office

AC//jg