

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

JAMES ROBERT STAPP,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

No. 83886

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**RESPONDENT'S ANSWERING BRIEF**

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**RESPONDENT'S ANSWERING BRIEF**

**I. STATEMENT OF THE CASE**

This is an appeal from a judgment of conviction following James Stapp's (hereinafter "Stapp") guilty plea to two counts of Attempted Lewdness With a Child Less Than 14 Years of Age. Appellant's Appendix, hereafter "AA", 89-90. On both counts, he was sentenced to eight to twenty years. *Id.* The sentences for both counts were run concurrent to one another. *Id.* This appeal followed.

**II. ROUTING STATEMENT**

Because this is an appeal from a conviction following a guilty plea, this appeal is presumptively assigned to the Court of Appeals. NRAP 17(b)(1).

### III. STATEMENT OF THE FACTS

Because this conviction is a result of a guilty plea, the facts available in the record are limited. At sentencing, Stapp did not object to the factual synopsis contained in the presentence investigation report (PSI), which he has moved to transmit for this Court's reference.

Stapp befriended the 12-year-old victim's mother and her children, financially assisting in their move to Reno, and residing with the family, at first in an apartment. PSI, 5-6. After gaining the family's trust, Stapp began grooming the victim. *Id.* Stapp made the boy sleep with him, at first with clothes on. *Id.* He would place his chin on the victim's head, one arm around the victim's chest, and used the other arm to squeeze the victim's buttocks. *Id.* This happened almost every night, unless the victim specifically told Stapp he did not want him to touch him. *Id.* Eventually, Stapp made the victim sleep naked, and would touch the victim's penis as they lay in bed together. *Id.* Stapp would "cuddle" the child, pressing his body against him. *Id.* He also watched the victim in the tub. *Id.* Stapp asked the child to wear very loose shorts to facilitate touching the victim's buttocks and penis. *Id.* To facilitate the sexual abuse, Stapp also gave the child an unknown sleeping medication. *Id.* In an attempt to avoid Stapp's sexual advances, the victim would put a pillow between them, which

angered Stapp. *Id.* After touching him, Stapp would bribe the victim with games. *Id.*

When the victim's mother would visit, Stapp would not allow them to be alone together. *Id.* The child resorted to disclosing some of the abuse via word document that his mother could access when she visited. *Id.* At this point, the victim's grades were failing, and he was having trouble sleeping. *Id.* Eventually, the victim's mother disclosed the abuse to law enforcement, and an investigation followed. *Id.* Even after he was informed that he was under criminal investigation, Stapp did not stop his efforts to manipulate the victim, buying him a computer and instructing the victim to intercept the package. *Id.* Stapp also instructed the victim to tell his mother a false story about how he got the computer. *Id.* Additionally, Stapp also continued to contact the victim via a cell phone that he believed belonged to the victim and attempted to set up a secret meeting with the child. *Id.* Stapp arranged to pick the victim up at a store, and he was arrested by police when he arrived at the agreed-upon location. *Id.*

In his own written statement to the Division, Stapp explained that he "rescued" the victim and his family from a situation of physical and sexual abuse. The victim was 7 years old. *Id.* He explained that he "took advantage of the proximity" and "yielded to my baser instincts." *Id.* It was

not the first time Stapp, a 73-year-old university professor, had engaged in sexual abuse of a child. *Id.* In 1982, he was charged with felony Criminal Sexual Conduct: First Degree Penetration and felony Intrafamilial Sexual Abuse. *Id.* By Stapp's own admission, the victim was his own adopted son. He pled to misdemeanor Intrafamilial Sexual Abuse and was sentenced to probation. *Id.*

Despite his history of sexually abusing his own son, in his statement, Stapp lauded himself, explaining that "I have spent 74 years of my life living with integrity, honesty, and responsibility." *Id.* In advocating for probation, he wrote "I am not now nor have I ever been a threat in any community in which I've resided." *Id.* He told the Court that "my oldest son, his wife, and my two grandsons live 5 blocks away and provide both regular family contact and support when needed." *Id.* In his psychosexual risk assessment, attached to the PSI, he told the interviewer that he had had a "rich life full of experiences" and that abusing the victim in this case was just "one piece of it." Psychosexual Risk Assessment, 5. He admitted to viewing child pornography on the internet, after he was convicted of sexually abusing his own 6-year-old son. *Id.*, 5, 7. Stapp was a professor in Colorado at the time the child pornography was discovered, and Colorado law enforcement investigated the matter, but ultimately no charges were

filed. *Id.* The ACUTE-2007 instrument reflected that Stapp was a moderate risk to re-offend. *Id.*, 11. The STABLE-2007 risk assessment tool reflected that he was in the moderate-density range for criminogenic need due to his emotional identification with children, the fact that he had taken multiple children into his care, and because he is sexually attracted to male children. *Id.*, 12-13. The evaluator reported that based on his scores on the Static 99R, the ACUTE 2007, and the STABLE 2007, Stapp did not possess a high risk of re-offense pursuant to NRS 176A.110. *Id.*, 13.

The victim's mother read his impact statement at sentencing. AA, 78-80. The victim wrote that he could not trust anyone anymore and did not talk to people "because I don't want people to know grandpa did this." *Id.* The child wished he was a girl, so that Stapp might not have abused him. *Id.* The victim thought about killing himself and wrote "I feel like this is all my fault and it makes me sad. I just want it to go away." *Id.*

#### IV. STATEMENT OF THE ISSUES

- A. Whether the district court's denial of probation demonstrates that it violated Stapp's rights by "failing to heed" the risk assessment tool.
- B. Whether the sentence imposed establishes that the district court failed to consider mitigating evidence presented by Stapp.
- C. Whether the district court relied upon highly impalpable or suspect evidence at sentencing.

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## V. SUMMARY OF ARGUMENT

Stapp was a 73-year-old university professor when he invited the victim's mother to bring her children to Reno. The family was in an abusive situation, and Stapp used his financial resources to house and support them. Stapp arranged things so that he lived alone with the victim, a young boy who called him "grandpa," and the victim's mother lived in a separate dwelling with her daughters. He used his unfettered access to the child to repeatedly molest him. Even after Stapp was aware that police were investigating him, he continued to try to contact the victim, even arranging a secret meeting with him. This was not the first time Stapp sexually abused a child. In the 1980s, he was convicted of sexually abusing his own adopted son. In the early 2000s, he was caught possessing child pornography. None of these facts are contested by Stapp.

The psychosexual risk assessment in this case reflected that Stapp was not a high risk to re-offend. The gravamen of all three arguments on appeal is that the district court abused its discretion at sentencing because it opted for prison over probation. The undercurrent of his contentions is that based on the risk assessment result, the district court was obligated to grant probation—but this is not the state of the law. The record reflects that the district court articulated its reasons for imprisoning Stapp, including

punishment, deterrence, impact on the victim, Stapp's demeanor at sentencing, and community safety. There was no abuse of discretion, and the sentence should be upheld.

## VI. ARGUMENT

### A. Standard of Review

The district court has wide discretion in its sentencing decision. *See Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). Generally, this court will not interfere with a sentence imposed by the district court that falls within the parameters of relevant sentencing statutes “[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.” *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

### B. Discussion

1. The District Court Was Not Obligated by the Psychosexual Risk Assessment to Grant Probation.

In sentencing Stapp, the district court expressed the following:

The purpose of sentencing here is multifold. It is important for the court to hold you accountable for your actions. It is important for the community that a person who commits similarly-situated actions knows that there is a punishment. And the court should think in terms of rehabilitation.

When I balance all of those aspects of this case, I hint by your comment that you let your guard down, and you let boundaries slip.

Yes, you did. Yes, you didn't give me any insight of how that happened today or in the case of Dracen. And I have no insight, based on any of the reports of how it could really not happen again, especially in light of your prior criminal history.

I am cognizant of the support you have in the community. But I'm also cognizant of your actions. The pain that your victims feeling is one that the court cannot overlook. Nor should anyone overlook that. As the victim impact statements were being read, I turned and looked at you. And I saw no difference from when you read your statement, too. I don't see anything in this case that will assure me that it will not happen again.

AA, 85-86.

Following these comments, the district court imposed sentence.

Stapp correctly observes that the psychosexual risk assessment reflected that he did not score as a high risk to re-offend. Opening Brief, 7. He aligns on the district court's comment that it had no insight as to how "it could really not happen again." *Id.* Stapp contends that when coupled with the district court's denial of probation, this comment demonstrates that the district court did not give the assessment "its due weight." *Id.* He then appears to argue that this Court should require district courts to grant probation whenever a sex offender is not assessed as a high risk to re-offend. *Id.*, 8. Stapp argues that "the role of a judge is to review the decisions of qualified professionals, and not to make those decisions themselves." *Id.*, 8. He cites other decisions that reflect that judges cannot

assume the role of mental health professionals. But that is not what happened in this case.

Nothing in Nevada's statutory scheme requires a sentencing judge to grant probation where the defendant is not assessed as a high risk to re-offend. The risk assessment itself is not outcome-determinative.

Otherwise, there would be no need for a judge to consider a defendant's statement, criminal history, the facts of the offense, and the impact on the victim.

Here, the record reflects that the district court's denial of probation was based on a variety of important and appropriate considerations: punishment for the individual defendant, deterrence, rehabilitation, and the impact of the crime on Stapp's victim. AA, 85-86. It also considered Stapp's demeanor as the victim impact statement was read. *Id.* The district court also considered Stapp's statement that he let boundaries slip. It was in this context that the judge commented "you didn't give me any insight of how that happened today or in the case of Dracen." *Id.*

The district court did not violate the law, or abuse its discretion, in denying probation based in part on its concern that Stapp would re-offend. Rather, despite the psychosexual risk assessment category, the judge's concern about future victims was well-placed. By Stapp's own admission,

he had molested his own son, completed probation, and then enjoyed child pornography before eventually abusing the victim, a particularly vulnerable child fleeing abuse by another person. Stapp also assured the court that his “support system” included his two grandsons, located a short distance away from him. PSI.

Stapp touted himself as a person of integrity, and told the district court that he was not a threat to any community in which he had resided, but his history suggested otherwise. He sexually abused his son in Minnesota, viewed child pornography in Colorado, and then moved to Nevada, where he abused another child. As a university professor and person of intellectual and economic privilege, Stapp ostensibly had access to mental health resources, as well as a full understanding that his desire to have sex with children is criminal and damaging to his victims. Yet he chose to re-offend, and then kept contacting the child even after he had been caught. These factors all support a well-founded concern that “grandpa” represents a continuing threat to any community in which he resides.

The record reflects that the district court did not abuse its discretion in not relying exclusively on the risk assessment tool. Rather, it appropriately also considered the individual characteristics and history of

this defendant, as well as the criminal justice goals of punishment, deterrence, rehabilitation, and community safety.

2. Neither Stapp's Professed Remorse or the Risk Assessment Required the District Court to Grant Probation.

Stapp argues that the district court "refused" to consider mitigating evidence at sentencing because it denied probation and expressed concern that Stapp might re-offend. OB, 10. There is no support for this contention in the record. Stapp argues that the risk assessment gave "insight into the reasons for his offense," but the State can find no such insight. Although the assessment used accepted standards of assessment and concluded that Stapp was not a high risk, none of its contents provided insight into why Stapp, having already molested his own child, opted to victimize another child. Essentially, Stapp's argument is again that the district court was legally obligated to sentence him to probation rather than prison because he expressed remorse, and because the assessment did not reflect that Stapp was a high risk to re-offend. But nothing in Nevada law required the district to ignore the victim impact statement, Stapp's prior history of sexually abusing his son, or his affinity for child pornography. To the contrary, the record reflects that the district court considered appropriate goals of the criminal justice system, and simply found that probation was not appropriate. It did not abuse its discretion by failing to rely upon the

risk assessment alone when assessing Stapp's future dangerousness, and that factor was not the only consideration, as evidenced by the district court's statements at sentencing.

3. The District Court Did Not Rely Upon Highly Impalpable or Suspect Evidence at Sentencing.

Stapp suggests that by calling him a "predator," the prosecutor somehow acted inappropriately. OB, 11. But that is exactly what Stapp is. He is a highly educated pedophile with a history of sexually abusing at least one other boy—his own son. He chose a family in distress and exploited his access to a young, vulnerable boy, resulting in incalculable damage to the victim, who considered gender reassignment to avoid future abuse, as well as suicide. These facts are uncontroverted and uncontested. Additionally, Stapp takes issue with the prosecutor's statement that Stapp initially met the victim's mother in an internet chat room, believing her to be a young male. He also declares that the prosecutor's description of the grooming process in this case and reference to the victim being "autistic," as an "ambush." Notably, there was no objection at sentencing to the prosecutor's statements. Moreover, the guilty plea memorandum signed by Stapp explicitly informed him that the State reserved the right to "present arguments, facts, and/or witnesses at sentencing in support of the plea agreement." AA, 8.

Moreover, nothing in the record supports Stapp's inference that the district court's sentencing decision was premised upon these aspects of the prosecutor's argument. "[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 an appropriate sentence." *Randell v. State*, 109 Nev. 5, 846 P.2d 278 (1993), quoting *People v. Mockel*, 226 Cal.App.3d 581, 276 Cal. Rptr. 559, 563 (1990). To the contrary, the prosecutor's statements at issue were part of her larger argument that Stapp deserved the maximum sentence in this case. AA, 69. But the district court ran the sentences for each count concurrent to one another. The district court did not abuse its discretion.

## VII. CONCLUSION

Based on the foregoing, the State respectfully asserts that the appeal should be denied.

DATED: May 23, 2022.

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DISTRICT ATTORNEY

By: Jennifer Noble  
Chief Appellate Deputy



## **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 2013 in Georgia 14.

2. I further certify that this brief complies with the page limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 30 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

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the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: May 23, 2022.

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I hereby certify that this document was filed electronically with the Nevada Supreme Court on May 23, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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