IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 84612

APRIL PARKS

Appellant,

v.

THE STATE OF NEVADA

Respondent.

Appeal from Amended Judgment of Conviction
Eighth Judicial District Court, Clark County
The Honorable Tierra Jones, District Court Judge
District Court Case No. C-17-321808-1

APPELLANT'S OPENING BRIEF

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I.

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

NONE

Attorney of Record for April Parks:

/s/ James A. Oronoz

II.

TABLE OF CONTENTS

III.

TABLE OF AUTHORITIES

Statutes

Rules

IV.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal from the Amended Judgment of Conviction (Plea of Guilty- Alford) entered in the district court, based upon reasonable constitutional grounds, pursuant to Nev. Rev. Stat. 177.015(4).

V.

ROUTING STATEMENT

Pursuant to NRAP 17(b)(1), this case is presumptively assigned to the Nevada Court of Appeals, as it is a post-conviction appeal arising from Category B felonies.

VI.

STATEMENT OF THE CASE

This is an appeal from the district court's Amended Judgment of Conviction (Plea of Guilty – Alford) filed on February 4, 2019.

VII.

STATEMENT OF THE ISSUES

A. Whether Parks maintains the right to appeal the district court's restitution order, despite failure to timely object, because plain error has affected her substantial rights.

B. Whether the trial court abused its discretion by ordering $554,397.71 in restitution without establishing a sufficient basis for that amount and by failing to use reliable and accurate information in its calculation.

C. Whether Parks' prison term constitutes cruel and unusual punishment because it is so grossly disproportional to the offenses she committed as to shock the conscience.

VIII.

RELEVANT PROCEDURAL HISTORY

On March 8, 2017, the State of Nevada ("State") filed a multi-defendant Indictment charging April Parks ("Parks") with more than two-hundred felony counts including racketeering, theft, exploitation of an older person, perjury, and offering false instrument for filing or record. Parks allegedly committed these crimes between December 21, 2011 and July 6, 2016.

On November 5, 2018, Parks entered a Guilty Plea Agreement pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) to five charges: two (2) counts of Exploitation of an Older/Vulnerable Person, two (2) counts of Theft, and one (1) count of Perjury. The sentence imposed for this case would run concurrent to the sentence in a companion case charging one (1) count of Exploitation of an Older Person.

On January 10, 2019, Parks was sentenced to an aggregated time of 192 - 480 months prison and $559,205.32 in restitution, to be paid jointly and severally with two co-defendants. An Amended Judgment of Conviction, filed February 4, 2019, adjusted the restitution amount to $554,397.71 because a victim was originally named twice. On March 25, 2019, Park's counsel, Anthony M. Goldstein, withdrew.

On December 27, 2019, Parks filed a Petition for Writ of Habeas Corpus (Post-Conviction). On September 30, 2020, she filed a Supplemental Petition alleging due process violations and ineffective assistance of counsel depriving Parks of her right to a direct appeal. On February 22, 2021, after hearing argument, the district court denied the first two grounds of Park's petition. On March 18, 2021, it held an evidentiary hearing for the third and final appeal-deprivation claim. The court denied Park's petition on April 12, 2021.

On September 7, 2021, Parks filed an appeal from the district court's denial of her Petition for Writ of Habeas Corpus in the Supreme Court of Nevada. She alleged two grounds of ineffective assistance of counsel and one violation of her constitutional right to a direct appeal. On March 4, 2022, the Court of Appeals of Nevada filed an Order affirming the first two claims but reversing and remanding the third.

On April 22, 2022, Parks filed a Notice of Appeal from her February 4, 2019 Amended Judgment of Conviction to the Supreme Court of Nevada.

IX.

STATEMENT OF FACTS

In support of Parks' Alford Plea, the State alleged that she operated her company, "A Private Professional Guardian, LLC" ("AAPG") as a criminal enterprise to commit the "numerous" crimes alleged in the Indictment. AA II 393. In entering the plea, she agreed to pay restitution and chose to retain the right to argument instead of a stipulated sentence of eight (8) to twenty (20) years. AA II 376.

None of Parks' 270 charges alleged any kind of physical abuse or negligent treatment. AA II 418. They primarily involved billing. AA II 433. Although charged with Exploitation of an Older/Vulnerable Person, under NRS 200.5092 and 200.5099 the term "exploitation" refers solely to financial exploitation. AA II 419 (citing *Vallery v. State*, 118 Nev. 357, 46 P.3d 66 (2002)).

The State asserted that Parks and Simmons "exploited by largely a billing scam," allegedly overbilling for visits, social security visits, shopping trips, court filings and banking visits, and unnecessary services. AA III 458; AA II 370. The State identified and described seven of APPG's overbilling "schemes," including the total loss allegedly resulting from each scheme and the number of victims

impacted. AA II 393 - AA 399. The State did not, however, identify specific victims of these schemes or allocate specified amounts of loss to any individuals. AA II 393 - AA 399. For example, in the "Christmas gift scam," Parks supposedly purchased low-cost gifts for wards and then charged exorbitant visitation or delivery fees for the items. This scheme allegedly resulted in a $1,507.50 loss to 48 victims. AA II 396. In another, the "mortuary and toilet paper scam," on one occasion, Parks' co-defendant apparently billed $1,600 to 12 individuals for picking up cremated remains or delivering toilet paper. AA II 396.

The State's allegations of Parks' malfeasance went far beyond the crimes she pleaded to. It asserted that Parks and her codefendants, Mark Simmons and Gary Taylor, victimized more than 150 elderly individuals, only some of whom actually needed guardianship. AA II 406. The State also accused Parks of having abandoned wards and acted in a "ghoulish" manner by hoarding the cremated remains of some clients in a storage unit. AA II 453-454, 475. She was not charged with crimes related to either. The defense provided reasonable explanations for why Parks had become unable to care for her wards and why she retained the ashes of some clients. AA II 477-478. It has also provided evidence that, contrary to the State's assertion that some of Park's guardianships were unnecessary, "every single request for guardianship was supported by the diagnosis of a medical provider" who substantiated the need for the guardianship. AA V 896.

As the face of APPG, Parks was vilified by both the State and the media. AA II 429. The defense acknowledged that Parks, as Managing Member of APPG, had failed in her duties to supervise her employees. AA II 434. However, both the defense and the State highlighted that Simmons was not just intricately involved in the company, but in billing, specifically. AA III 459, 462, 480; AA II 428-429. A former APPG employee compared him to "air traffic control" because he maintained files, managed the billing, and stayed on top of the banking." AA I 189-190. The State concurred, saying Simmons "was the one calling the shots" when it came to billing and instructed everyone to practice "duplicate billing." AA III 457-458. Although Simmons was "fully…involved in all the billing scams" that Parks was, he was shielded from the same level of culpability and notoriety because he was not the figurehead of the organization. AA III 464.

On the Division of Parole and Probation's Presentence Investigation Report ("PSI Report"), Parks received a probation success probability score of sixty-six (66) – for which probation is generally recommended – but it recommended parole eligibility for Parks after sixty-four (64) months served. The State argued for the "maximum" sentence, with all counts running consecutive to each other. AA III 455. Calling its restitution figure of $559,205.32 "an extremely large sum of money," the State used this amount to justify a harsher sentencing request. AA II 412. In its Sentencing Memo, the State declared, "…the appropriate sentence for a

person who steals $559,205.32 from elderly victims … is the maximum sentence." AA II 407.

At the Sentencing Hearing, nine people gave victim impact statements. Throughout the course of these speakers, Parks was called a "devil in disguise," "Hitler," a "Lilith," a "predator of the worst kind," a "racist predator," a "sociopath," and a "master of manipulation," among other things. AA III 521, 528, 532, 544, 552, 555, 556. No one requested less than maximum time for Parks and her co-defendants.

In the Amended Judgment of Conviction, the district court ordered $554,397.71 in total restitution and assigned specific amounts to thirty-eight (38) named victims to be paid jointly and severally by Parks and her two co-defendants. AA II 369-370. The identified victims are as follows: $3,820.14 to Clyde Bowman, $5,134.40 to Delmond Foster, $6,346.30 to Delores Smith, $4,528.00 to Harold Lockwood, $6,032.50 to James Poya, $4,766.37, to Janice Mitchell, $5,766.75 to Juanita Graham, $11,582.40 to Marlene Homer, $2,705.39 to Mary Vitek, $4,533.20 to Norbert Wilkening, $167,204.49 to Dorothy Trumbich, $1,413.60 to Adolfo Gonzalez, $3,804.49 to Carolyn Rickenbaugh, $2,830.50 to Gloria Schneringer, $2,622.62 to Kenneth Edwards, $5,806.97 to Roy Franklin, $6,262.48 to Marilyn Scholl, $10,708.45 to Marie Long, $2,074.80 to Rennie North, $5,563.60 to Patricia Smoak, $2,016.30 to Rudy North, $13,180.67 to Ruth

Braslow, $4,183.08 to Walter Wright, $9,470.80 to William Brady, $4,807.61 to William Flewellen, $3,699.28 to Yoshiko Kindaichi, $15,068.18 to Norman Weinstock, $6,920.00 to Maria Cooper, $4,290.00, to Kenneth Cristopherson, $5,396.40 to Joseph Massa, $2,497.20 to Blanca Ginorio, $8,149.70 to Daniel Currie, $4,311.20 to Rita Lamppa, $895.00 to Barbara Neely, $3,819.60 to Audrey Weber, $32,006.72 to Baxter Burns, $3,445.26 to Linda Phillips, $25,278.57 to Mary Woods and/or John and Sally Den. AA II 369-370.

No other victims are referenced or identified in the Amended Judgment of Conviction. The aggregated amount of enumerated losses attributable to the named victims is $412,943.02. Thus, the remaining $141,454.69 was not associated with any victims.

X.

SUMMARY OF THE ARGUMENT

Although Parks failed to timely object to the district court's restitution order, she maintains the right to appeal the issue because plain error affected her substantial rights in a manner that caused actual prejudice. In violation of due process and state law, the district court ordered a restitution award of $141,454.69 more than the amount necessary to compensate victims for losses arising from Parks' charged crimes. This plain error caused actual prejudice and a grossly unfair outcome, in part because it significantly increased the length of time repayment

would take, but also because the State had used this inflated restitution award to persuade the court that Parks deserved the maximum prison term. In this way, plain error arguably affected Parks' "substantial rights" by effectively imposing a fine and resulting in a longer prison term.

The trial court abused its discretion by ordering $554,397.71 in restitution without establishing a sufficient basis for that amount and by failing to use reliable and accurate information in its calculation. While $412,943.02 was allocated in precise amounts to specific victims, as required by law, no justification was offered for the remaining $141,454.69. In addition, inaccurate and unreliable information was either knowingly or negligently relied upon by the State in calculating the enumerated victims' losses. More than once, documented repayments Parks had previously made to victims were disregarded when restitution awards were calculated. Reliance on such inaccurate data tainted the State's restitution recommendation. Because the district court relied upon – indeed adopted – this recommendation based on impalpable or highly suspect evidence in its sentencing decision, prejudice to Parks resulted. Thus, the district court abused its discretion.

The prison term imposed was so grossly disproportionate to the offenses charged that it constitutes cruel and unusual punishment in violation of federal and state law. Proportionality review requires a fact-specific inquiry informed by objective factors. Parks pleaded guilty to solely non-violent crimes, and she has no

criminal or incarceration history. Her age is such that the prison term imposed may effectively be a life sentence. Because this threshold comparison suggests that the sentence is grossly disproportionate, it must be considered in comparison to other defendants convicted for comparable crimes, within and outside of the jurisdiction. Parks' sentence was found to be significantly higher than most theft-related cases. Considering these objective factors together, Parks received an unusually severe punishment tantamount to a life sentence for a non-violent first-time offender. Thus, this sentence is so grossly disproportional to the crimes committed as to shock the conscience.

Parks submits the district court erred in ordering this restitution amount and prison sentence and respectfully requests this Honorable Court grant this appeal.

XI.

ARGUMENT

1. DESPITE PARKS' FAILURE TO TIMELY OBJECT TO THE DISTRICT COURT'S RESTITUTION ORDER, SHE MAINTAINS THE RIGHT TO APPEAL THE ISSUE BECAUSE PLAIN ERROR AFFECTED HER SUBSTANTIAL RIGHTS

Failure to timely object in district court generally precludes appellate review of the issue unless the appellant demonstrates that plain error affected their "substantial rights." *Santoyo v. State*, 458 P.3d 1075 (Nev. App. 2020) (citing *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018). An error is "plain" if it is apparent from a "casual inspection of the record." *Gholson v. State*, 135 Nev.

646 (Nev. App. 2019) (quoting *Williams v. Zellhoefer*, 89 Nev. 579, 580, 517 P.2d 789, 789 (1973). Such errors affect a defendant's substantial rights when they cause "actual prejudice" or a "miscarriage of justice," defined as a "grossly unfair outcome." *Jeremias v. State*, 134 Nev. 46, 412 P.3d 43, 49 (2018).

The Due Process Clause requires that restitution be awarded only to victims of the charged offense(s) in a "just" amount "supported by a factual basis within the record." *Burt v. State*, 445 S.W.3d 752, 758 (Tex. Crim. App. 2014). In addition, NRS 176.033 (1)(c) requires the district court to "set an amount of restitution for each victim of the offense." Restitution cannot be set in "uncertain terms." *Botts v. State*, 109 Nev. 567, 569, 854 P.2d 856, 857 (1993). The purpose of restitution is to compensate the victim for costs arising from a defendants' criminal act. *Martinez v. State of Nevada*, 120 Nev. 200, 202–203, 88 P.3d 825, 827 (2004). It must only be used to reimburse victims for injury or expense directly resulting from the crime. *Id*. at 11. Defendants may only be ordered to pay restitution for offenses to which they have admitted, been found guilty, or have agreed to pay restitution. *Erickson v. State*, 107 Nev. 864, 866, 821 P.2d 1042, 1043 (1991). Thus, under both due process and State law, a trial court must only award restitution (1) in specific amounts, (2) to identified victims, (3) to repay them for costs incurred by the defendant.

The Tenth Circuit reversed a district court's restitution order that exceeded the actual loss caused by the defendant's conduct because it was "an illegal sentence constituting plain error." *United States v. James*, 564 F.3d 1237, 1243 (10th Cir. 2009) (citing *United States v. Smith*, 156 F.3d 1046, 1057 (10th Cir. 1998). A sentencing court must make a "reasonable determination of appropriate restitution rooted in a calculation of actual loss" as supported by evidence in the record. *Id*. at 1242, 1247 (internal citations omitted). Because Nevada law similarly mandates that restitution be factually supported and used only for compensation, this case is instructive for our purposes.

Here, the $141,454.69 excess awarded, without any explanation or support, also constitutes plain error. Although initially charged with numerous other crimes, Parks only pleaded guilty to the charges in the Amended Indictment. The State identified the victims of these crimes and allocated specific amounts of restitution to each. Because the total restitution amount ordered by the district court far exceeded the aggregated amount of these victims' losses, the $141,454.69 contravenes applicable law, regardless of its rationale. Furthermore, this amount – about thirty-four percent (34%) greater than enumerated losses – is readily apparent with a "casual inspection of the record" and a calculator.

This plain error did yield actual prejudice and a grossly unfair outcome. Parks will now spend many years of her life paying "restitution" for unknown

losses incurred by non-existent victims. Punitive, rather than compensatory in nature, this is more accurately called a "fine." In addition, because the State used this "extremely large amount" of restitution to justify the "maximum" prison sentence, this error also arguably affected the length of Parks' incarceration. By this logic, a larger restitution figure reflects greater harm caused by the defendant, thus necessitating harsher punishment. Because artificially inflating the restitution award does not change the actual amount of harm the defendant caused, though, any impact it has on the length of the prison sentence is grossly unfair. Whether the State's argument influenced the district court's decision cannot be proven, but the court clearly found the State persuasive as it adopted the restitution amount the State provided and ordered a much longer sentence than what PSI Report recommended.

Thus, Parks' substantial rights were affected by this plain error and she has maintained her right to raise this issue on appeal.

2. THE TRIAL COURT ABUSED ITS DISCRETION BY ORDERING $554,397.71 IN RESTITUTION WITHOUT ESTABLISHING A SUFFICIENT BASIS FOR THAT AMOUNT AND BY FAILING TO USE RELIABLE AND ACCURATE INFORMATION IN ITS CALCULATION

A. <u>Standard of Review</u>

The standard of review for sentencing decisions is abuse of discretion. *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009). Under NRS

176.033(1)(c), restitution is a sentencing determination. *Martinez*, 115 Nev. at 12. Courts will not interfere with sentences imposed 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." *Lloyd v. State*, 94 Nev. 167, 576 P.2d 740 (1978); *Silks v. State*, 92 Nev. 91, 545 P.2d 1159 (1976). Courts have found sentencing recommendations to be based on impalpable or highly suspect evidence when reliance on subjective scoring, scoring errors, or factual errors "tainted" PSI recommendations. *Narcho v. State*, 459 P.3d 884 (Nev. App. 2020); *Blankenship v. State*, 132 Nev. 500, 375 P.3d 407, 409 (2016). Such errors might include a misrepresentation of the defendant's criminal history, a miscalculation of their time served, or a misrepresentation of their gang affiliations. *Narcho*, 459 P.3d 884 (Tao, J., dissenting). Prejudice resulted when courts relied on these tainted recommendations in making sentencing decisions. *Blankenship*, 375 P.3d at 409.

Due Process places limitations on courts, requiring that they award restitution only (1) for offenses for which the defendant is criminally responsible, (2) for victims of the defendant's charged offense(s), and (3) in just amounts supported by a factual basis within the record. *Burt*, 445 S.W.3d at 758. Defendants have a constitutional right to sentencing based on accurate information. *United States v. Tucker*, 404 U.S. 443, 447, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972). More

specifically, sentencing courts must use reliable and accurate information in calculating restitution. *Martinez*, 115 Nev. at 13. Defendants have a right to present evidence challenging the amount of restitution sought. *Id*.

Parks alleges that the validity of her restitution order fails in two ways: (1) The $141,454.69 in excess of enumerated victim losses is baseless and predicated upon impalpable and highly suspect evidence, and (2) the remaining $412,943.02 is also erroneously inflated because the court used inaccurate and unreliable information in calculating restitution.

B. <u>The Unexplained Excess of $141,454.69</u>

As discussed above, the record provides no rationale or justification for ordering $554,397.71 in restitution when the losses incurred by victims of Parks' charged crimes totaled only $412,943.02. In fact, when defense pointed out the $141,454.69 discrepancy in a prior petition, the State offered no explanation in response; it simply said that the Order had not been objected to. AA V 960.

The lack of sufficient – or any – basis provided for the excess indicates that this restitution amount was ordered for impermissible reasons and in a manner inconsistent with Due Process. Because the excess $141,454.69 was awarded for purposes other than compensating victims of Parks' charged crimes for substantiated losses, it is unclear what information or accusations informed this

decision. Arguably, it is aimed to punish Parks for uncharged crimes and malfeasance, and/or to compensate victims of those criminal or unethical acts.

Both the State and victims alleged that Parks committed "numerous" other crimes for which she was either never charged or that were dropped before she pleaded. *See* AA II 393; AA III 494-556. Beyond criminal activity, though, they clearly believed Parks was simply a bad person, as evidenced by the many colorful names she was called during victim impact statements. The State also alleged that she had shown no remorse despite "ruining the lives of countless victims and causing immeasurable strife in society." AA II 414. After listening to the victim statements at the sentencing hearing, the judge told Parks that her behavior was "absolutely shocking," citing accusations that victims had made of wards under Parks' care having scotch-taped shoes and being charged for getting Christmas gifts. AA III 563.

In the absence of any apparent evidence justifying the inclusion of this $141,454.69, one can only speculate as to what information or accusations were relied upon in making this determination. It would be reasonable to conclude that the vitriol and contempt with which Parks is met by every other party involved in this case has influenced the size of this reward. Regardless of the exact rationale, the reliability and veracity of any underlying facts are highly questionable given the biased and subjective nature of potential sources. As in other cases where

appellate courts found sentencing decisions to be based on impalpable or highly suspect facts, the State's sentencing recommendations in this instance were clearly tainted by subjectivity, ambiguity, and erroneous facts. Because the court relied upon this recommendation in making its decision, prejudice resulted.

C. <u>The Inflated Remainder of $412,943.02</u>

The $412,943.02 in aggregated losses of enumerated victims is also bloated because the court used inaccurate and unreliable information in calculating restitution.

In *Nied v. State*, 138 Nev. Adv. Op. 30, 509 P.3d 36 (2022), the defendant entered a guilty plea in which he agreed to pay restitution. He appealed the restitution decision, asserting that evidence presented at the sentencing hearing did not support the amount ordered. *Id* at 40. He argued that restitution for the victim's medical costs should be determined not by the amount initially billed, but the amount accepted by the provider as payment in full. *Id* at 39. The court agreed, emphasizing that "restitution is intended to compensate the victim for costs and losses caused by the defendant"; nothing more. *Id* at 38. It held that the district court had abused its discretion in using costs not supported by the State's evidence to calculate restitution. *Id* at 40. Although the victim had "clearly suffered serious and extensive injuries that resulted in significant medical costs," the court vacated the award and remanded the case. *Id* at 40.

In this case, Parks also appeals a restitution award exceeding the losses she caused victims, as evidenced by the record. Here too, the Order was only partially supported and relied upon evidence that did not accurately reflect the victims' actual losses. In its Petition for Writ of Habeas Corpus, the defense provided two such examples. AA V 897-898. First, the Amended Judgment of Conviction assigned the victim Ms. Trumbich $167,204.49 in restitution; the exact amount testified to in the Grand Jury hearing. AA I 96. Although additional testimony asserted that Parks had repaid $50,000 to Trumbich's estate prior to this case, this repayment was not reflected in her restitution award. AA V 897-898. *See* AA I 95-AA I 97. In another instance, evidence that a $8,529.84 return had already been received by victim Baxter Burns was not used to offset his original restitution amount of $32,006.72. AA V 898. Thus, these victims are effectively being enriched, not compensated by this award.

Although certainly not an exhaustive list, had the court used accurate information when calculating awards for even these two victims, the restitution order would have decreased by $58,529.84. *Id*. When also taking into account the unsubstantiated excess of $141,454.69, the total restitution amount in this case could not justifiably exceed $354,413.18. Given the repeated use of erroneous information, the accuracy of every victim's restitution assignment can fairly be called into question.

As in *Nied*, victims in this case allege significant harm and repercussions resulting from Parks' actions. Even so, restitution can only be used to compensate victims for verifiable loss or costs caused by the defendant. Because the court relied upon unsupported and inaccurate information in calculating Parks' restitution, as did the *Nied* court, it too has abused its discretion.

3. PARKS' PRISON TERM CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT BECAUSE IT IS SO GROSSLY DISPROPORTIONAL TO THE OFFENSES SHE COMMITTED AS TO SHOCK THE CONSCIENCE

The Eighth Amendment of the United States Constitution and Article 1 of the Nevada Constitution both prohibit the infliction of "cruel and unusual punishment." U.S. Const. amend. VIII.; Nev. Const. art. I, § 6. This prohibition encompasses the imposition of an "extreme sentence" that is "grossly disproportionate" to the crime committed. *Harmelin v. Michigan*, 501 U.S. 957, 1001, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) (plurality opinion) (quoting *Solem v. Helm*, 463 U.S. 277, 288, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983)); *Allred v. State*, 120 Nev. 410, 421 n.14, 92 P.3d 1246 (2004). A sentence within statutory limits does not violate the proscription against "cruel and unusual punishment" unless the statute itself is unconstitutional or the sentence is "so unreasonably disproportionate to the offense as to shock the conscience." *Pitmon v. State*, 131 Nev. 123, 352 P.3d 655, 657 (Nev. App. 2015) (citing *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (internal quotations omitted)); see *Harmelin*,

501 U.S. at 1000–01 (plurality opinion). As-applied challenges to the length of term-of-years sentences require that all circumstances of a given case are considered when determining whether the sentence is "unconstitutionally excessive." *Graham v. Fla.*, 560 U.S. 48, 59, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), *as modified* (July 6, 2010). Although these cases are often reviewed in the context of existing recidivism statutes, the common principles of proportionality review have also been applied to cases not involving recidivist sentencing. See *Harmelin*, 501 U.S. 957; *Ewing v. California*, 538 U.S. 11, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003), *Lockyer v. Andrade*, 538 U.S. 63, 72, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003); *Ramirez v. Castro*, 365 F.3d 755, 775 (9th Cir. 2004), *as amended* (Apr. 27, 2004).

"Grossly disproportionate" determinations weigh the gravity of the offense against the harshness of the penalty. *Ewing*, 538 U.S. at 12. These threshold comparisons involve fact-specific inquiries in which the "unique, objective factual circumstances" of a given case are considered. *Ramirez*, 365 F.3d at 775. No one factor is dispositive. *Harmelin*, 501 U.S. at 965. Per the Ninth Circuit, proportionality review should be informed by "objective factors to the maximum possible extent," the most critical of which are: (1) the non-violent nature of this and any past crimes, (2) minimal criminal history, and (3) minimal past incarceration. *Ramirez*, 365 F.3d at 775.

If the threshold comparison of the offense to the penalty suggests gross disproportionality, the court should then compare the defendant's sentence with those imposed for the same crime for offenders within and outside of the jurisdiction. *Graham*, 560 U.S. at 59–60. If this analysis confirms the inference of gross disproportionality, the sentence is "cruel and unusual." *Id*.

In *Ramirez*, the defendant was sentenced to twenty-five (25) years to life, as mandated under California's "Three Strikes Law," for stealing a VCR. 365 F.3d at 775. His prior criminal history consisted of only two 1991 convictions for second-degree robbery. Although qualifying as "serious" within the meaning of Three Strikes, they did not involve violence. The Ninth Circuit analyzed and emphasized the case's critical objective factors: (1) the non-violent nature of Ramirez's crimes and arrest, (2) his minimal criminal history, and (3) his minimal incarceration history. *Ramirez*, 365 F.3d at 775. Based on this threshold comparison, the court determined that Ramirez's severe sentence did violate the "gross disproportionality principle." *Id*. It found the California Court of Appeals' application of gross disproportionality precedent "objectively unreasonable" because it omitted these three "most basic, objective Supreme Court factors in its analysis." *Id*.

The Ninth Circuit held the opposite in *Rios v. Garcia*, 390 F.3d 1082, 1086 (9th Cir. 2004), which turned on the same three objective factors. The defendant had stolen watches worth less than eighty dollars ($80) combined. *Id.* at 1082.

Because he had two robbery-related priors, Rios was charged under California's "Three Strikes Law" for this petty theft and sentenced to twenty-five (25) years to life. *Id.* The court distinguished his case from *Ramirez* based on the same three objective factors. It noted that, before being arrested, Rios had struggled with the loss prevention officer and tried to avoid being caught. *Id*. at 1086. In addition, his prior robberies involved the threat of violence "because his cohort used a knife." *Id*. He also had a lengthy criminal history and has been incarcerated several times. *Id.*

Here, Parks was also charged with theft-related crimes. Regarding the critical objective factors, Parks (1) was neither charged with nor pleaded guilty to crimes involving even the threat of violence, (2) she has no criminal history, and (3) she has never previously been incarcerated. These are the three factors upon which the *Rios* case turned; the only ways in which the *Rios* court distinguished that case from *Ramirez* to arrive at the opposite conclusion. On every factor, Parks aligns with the *Ramirez* court which found gross disproportionality between the offense committed and the sentence given.

Another important aspect of the circumstances of this case is Parks' age. She was almost fifty-four (54) years old at the time of sentencing. While Parks will obtain parole eligibility after sixteen (16) years, she does not have a fundamental right to parole and it is not guaranteed. *Owens v. Baca*, 462 P.3d 259 (Nev. App.

2020). Considering the 668 days she received in credit for time served, in the best-case scenario, Parks will be almost seventy (70) years old when she is released. If denied parole, she could be imprisoned until she is more than ninety (90) years old. Given that the lifespan of the average American is about seventy-nine (79) years, this could effectively be a life sentence. Considering the objective factual circumstances of the case as a whole, this defendant who is charged only with theft-related non-violent crimes and who has no criminal or incarceration history, received what could amount to a life sentence.

Because this threshold comparison of the gravity of the offense to the severity of the sentence "leads to an inference of gross disproportionality," the court should compare this sentence with those received within and outside of their jurisdiction for similar crimes. *Graham*, 560 U.S. at 59–60. As discussed in a prior petition, Parks' sentence differed dramatically from and was substantially more severe than those imposed in similar theft-related cases. To illustrate the comparative severity of her sentence, in *United States v. Hoyt*, No. CR-98-529 (D.Or. 2001), aff'd, 47 Fed. Appx. 834, 836-37 (9th Cir. 2002), the defendant's crime had been described as "the most egregious white collar crime committed in the State of Oregon." *Id*. at 836-37. His fraud affected more than 4,000 people "and had actual and intended losses exceeding $200 million." *Id*. He was ordered to pay more than $100 million in restitution and sentenced to 235 months incarceration.

Id. Although the impact of Parks' crimes pale in comparison, Hoyt received less than half of the forty (40) years Parks faces for her theft-related crimes.

That Parks received a minimum of sixteen (16) years up to what could effectively be a life sentence for "largely a billing fraud case" does indeed "shock the conscience." This is especially true given that the State knew Parks was not in charge of billing at APPG; Simmons not only managed but directed others in billing practices. The gross disproportionality of this sentence is evident when considering her lack of violent or criminal history and becomes even more flagrant when compared to sentences imposed for similar and worse crimes committed by others.

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XII.

CONCLUSION

For the reasons provided, Parks requests that this Court vacate her sentence and remand her case to the district court for a new sentencing hearing.

Respectfully submitted this 31st day of October 2022.

By: /s/ *James A. Oronoz*

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XIII.

CERTIFICATE OF COMPLIANCE

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 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 on is to be found. I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4)-(6) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word, a word-processing program, in 14 point Times New Roman.

I further certify that this brief complies with the type volume limitations of NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points or more and contains 5,411 words. I understand that I may be subject to sanctions in the event that the accompanying brief in not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 31st day of October 2022.

Respectfully submitted,

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XIV.

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on October 31st, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON FORD
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Clark County District Attorney

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