IN THE SUPREME COURT OF THE STATE OF NEVADA

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JAMES ROBERT STAPP, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	No. 83886 District Court Case No. CR20-4057

On Appeal From The Second Judicial District Court Of The State Of Nevada
The Honorable Connie Steinheimer, District Court Judge

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page No.**

STATUTES

RULES

CONSTITUTIONS

I. STATEMENT OF JURISDICTION

This is an appeal from a judgment of conviction filed in the Second Judicial District Court on November 4, 2021. The Notice of Appeal was timely filed on December 2, 2021. Jurisdiction is therefore vested with the Court pursuant to NRAP 4(b) and NRS 177.015(3).

II. ROUTING STATEMENT

This matter is presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(1) because the conviction was based upon a plea of guilty.

III. STATEMENT OF THE LEGAL ISSUES PRESENTED

This appeal asks whether a sentencing court's failure to consider, or otherwise heed the conclusions of a psychosexual risk assessment pursuant to NRS 176.139 deprives a probation-eligible defendant of a due and proper consideration for probation and/or sees the district court failing to consider mitigating evidence on behalf of the defendant when determining the sentence.

This appeal also asks whether the district court's reliance upon the State's ambush of inflammatory accusations based upon highly suspect and impalpable evidence requires the sentence to be revisited.

IV. STATEMENT OF THE CASE

Appellant Stapp ("Stapp") was initially charged with five (5) counts of Lewdness with a Child Under the Age of 14 Years. Pursuant to plea negotiations,

Stapp pled guilty to two (2) counts of Attempt Lewdness with a Child Under the Age of 14 Years and was sentenced on November 4, 2021. The Judgment of Conviction issued the same date. The Notice of Appeal was filed on December 2, 2021.

V. STATEMENT OF THE FACTS

In December 2020 Stapp was charged by Criminal Complaint with five (5) counts of Lewdness with a Child Under the Age of 14 Years. Appellant's Appendix at 001-004.[1] Stapp agreed to enter a plea of guilty to two (2) counts of Attempted Lewdness With a Child Under the Age of 14 Years, AP 005-006, in exchange for the State's agreement to argue for concurrent sentences should he be found a high risk to reoffend by his Psychosexual Risk Assessment ("Assessment"), AP 008, 018.

During the plea colloquy the district court advised Stapp that "you may not receive probation unless there is an evaluation that finds you are not a high risk to re-offend pursuant to NRS 176.139." AP 024. The district court then accepted Stapp's guilty plea and instructed him to assist the Division in its preparation of his Presentence Investigation Report ("PSR"). AP 026.

Upon completion, the Assessment concluded that three (3) different accepted standards of assessment determined Stapp to not pose a high risk to reoffend. PSR,

[1] References to the appendix will hereafter be designated "AP" followed by the Bates numbered page location.

Assessment.[2] In fact, the three (3) assessment tools in tandem rated Stapp to be in the "Below Average" category for reoffending as compared to other sexual offenders. PSR, Attachment at 13. The author provided a table which outlined a prediction of Stapp's recidivism as being quite low. PSR, Attachment at 13.

The Assessment provided specific recommendations for ensuring a successful probation period. PSR, Attachment at 14. The Division also provided specific statutory conditions which would apply to any term of probation. PSR at 8-12.

The PSR noted Stapp's extreme regret for the offense and awareness of the anxiety and guilt he had caused the victim. PSR at 7. The Assessment noted Stapp's contriteness for his actions and reflection on how his offense occurred. PSR, Attachment at 4. The author quoted Stapp: "I deeply, deeply regret the trauma I inflicted on the boy and, had I to do it over, would not have allowed myself to be in such proximity for long periods of time." PSR, Attachment at 4.

Prior to sentencing Stapp submitted eight (8) letters of support, AP 030-039, and two (2) treatment evaluations from VA-associated psychologists, 041-043. The State submitted impact letters from the victim and the victim's mother, AP 047-048, 052-053, and the Division submitted the PSR with the Assessment attached. PSR.

[2] The PSR and attached Assessment are submitted under seal pursuant to NRAP 30(b)(6).

Sentencing occurred on November 4, 2021, AP 055-089, which the district court began by indicating it had reviewed the above documents. AP 057-058. Stapp's counsel asked for probation, AP 059, arguing, inter alia, that the Assessment found him to not be a high risk, AP 060-061.

The State, in turn, commenced its argument for maximum prison terms labeling Stapp a "predator." AP 063. The prosecutor alleged that Stapp had met the victim's mother in a chat room believing her "to be a young male," AP 063, asserted that Stapp had lived alone with the victim in a trailer, AP 064 and claimed that the victim had told an investigator he was disgusted with both Stapp's actions and manipulation, AP 066 – three "facts" which were unsupported by any evidence and completely untrue.

The prosecutor described a "grooming" scenario in which Stapp "would provide [the victim] with toys or games after he inappropriately touched him" – another untrue "fact" unsupported by any evidence. AP 066. The prosecutor concluded its argument by incorrectly declaring the victim to be "autistic." AP 069.

The victim's mother read the impact statements previously filed into the case, AP 077-084, after which the district court imposed sentence, AP 084-085. Citing the interests of accountability, deterrence, punishment and rehabilitation, the district court told Stapp, "you didn't give me any insight of how that happened today or in the case of [the victim]. And I have no insight, based on any of the reports of how it

could really not happen again." AP 085. Moments later, the sentencing court reiterated, "I don't see anything in this case that will assure me that it will not happen again." AP 086.

Aside from stating it had read the Assessment and inquiring whether Stapp had any objections to paying for it, AP 058, 075, the district court made no mention of fact of the Assessment or its content and conclusions which demonstrated Stapp's remorse, insight, and below average risk of reoffending.

The district court sentenced Stapp to concurrent counts of the maximum allowable sentence for the offense, declining his request for probation. AP 086.

VI. SUMMARY OF ARGUMENT

The district court either failed to adequately examine the Assessment, or it simply refused to heed the Assessment's conclusions because it did not agree with them. This error resulted in the district court's decision to deny probation, and affected the sentence imposed. These actions deprived Stapp of due and proper consideration to his request for probation and violated the sentencer's duty to consider all mitigating evidence in arriving at a sentencing decision.

Additionally, the district court relied upon accusations which were presented by the prosecutor through an ambush of inflammatory, highly suspect and impalpable accusations which drew a picture of Stapp as a predator of young men who seeks out, sequesters and grooms autistic children, among other things.

VII. STANDARD OF REVIEW

Stapp presents three (3) errors which tainted the sentencing court's imposition of sentence. The basis for a district court's imposition of sentence and decision on probation is reviewed for an abuse of discretion. *Martinez v. State*, 114 Nev. 735, 738, 961 P.2d 143, 145 (1998)(sentence); *Igbinovia v. State*, 111 Nev. 699, 707, 895 P.2d 1304, 1309 (1995)(probation). This standard also applies where it is claimed that constitutional rights were violated in the process. *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009).

A court abuses its discretion by failing to appropriately consider and weigh all required factors in a decision, *Las Vegas Review Journal v. City of Henderson*, 137 Nev. Adv. Rep. 81, 500 P.3d 1271, 1278 (2021), or relies upon prejudicial matters in imposing a sentence, *Brake v. State*, 113 Nev. 579, 584, 939 P.2d 1029, 1033 (1997).

VIII. ARGUMENTS

Implementing the above standards of review, the Court should address the following arguments on appeal:

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A. The District Court Denied Stapp a Proper Consideration for Probation By Failing to Heed Or Give Due Weight to Stapp's Risk Assessment, In Violation of Nevada Law and the Fourteenth Amendment to the United States Constitution

Stapp was eligible for probation for his conviction for Attempted Lewdness With a Child Under the Age of 14 Years, NRS 176A.100(1)(c), **if** he received certification to not be a high risk to reoffend from a psychosexual evaluation, NRS 176A.110(1)(a). He was so certified, and his counsel specifically requested probation at sentencing.

Stapp's Assessment was generated and attached to the PSR in accordance with NRS 176.139. As the author of the Assessment properly synthesized the three (3) standards of assessment to determine Stapp's risk to be "Below Average," the district court was obligated to accept the Assessment on its face. *Blackburn v. State*, 129 Nev. 92, 99, 294 P.3d 422, 427 (2013).

The Assessment in this case discussed Stapp's remorse and insights into his offense and concluded that he was not a high risk to reoffend based upon three (3) different assessment tools. Nevertheless, the district court denied probation due to it having "no insight, based on any of the reports of how it could really not happen again." AP 085. This statement demonstrates the district court's failure to examine the Assessment or relevant portions thereof and/or its failure to give the Assessment its due weight as seen through the sentencer's doubt and disagreement with it.

First, the district court denied Stapp's request for probation without having examined the Assessment or portions of it which demonstrated Stapp to be remorseful, insightful and not likely to reoffend. Although NRS 176.139 and NRS 176A.110 do not mandate granting probation where a defendant is found to not be a high risk to reoffend, the statutes nevertheless contemplate that sentencers will duly consider the content and professional evaluations proffered within psychosexual evaluations as a critical component of the probation decision. Permitting district courts to disregard or disagree with the evaluations would render these statutes nugatory and meaningless. *See e.g., State, Bd. of Parole Comm'rs v. Dist. Court*, 135 Nev. Adv. Rep. 53, 451 P.3d 73, 79 (2019)(statutes are to be complied with according to the legislative purpose and are not to be rendered nugatory).

Here, the district court's attestation to having no insight on Stapp's odds of recidivism spotlight its failure to consider the Assessment's conclusion that the odds of such were "Below Average."[3]

Second, the district court considered the Assessment, but disagreed with it or otherwise did not trust it. The role of a judge is to review the decisions of qualified professionals, and not to make those decisions themselves. *United States v. Charters*, 863 F.2d 302, 309 (4th Cir. 1988). Judges may not assume the role of psychologists,

[3] The district court's inadequate attention to the Assessment is further evinced by its failure to inquire into the qualification of the evaluator prior to accepting it, as required by *Blackburn*. *Id*., 129 Nev. at 98, 294 P.3d at 427.

even where they may sense professional error. *Parham v. J.R.*, 442 U.S. 584, 609 (1979). *See also Koch v. Koch*, 424 N.J. Super. 542, 551, 38 A.3d 703, 708 (2011)(judge may not assume the role of psychiatrist or psychologist, and may reject their expert opinions only upon thorough assessment and proper examination).

The stringent requirements of psychosexual evaluations within NRS 176.139 demonstrate the legislative intent that sentencing courts are to give full credence to the conclusions of the professionals who author them. The district court's statement that the Assessment provided no insight into Stapp's liklihood of recidivism demonstrates the district court's substitution of its own conclusions for those of the experts whose "insight" was that Stapp is a "Below Average" risk of reoffending.

The district court's errors herein constituted an abuse of discretion, at odds with Nevada's probation and sentencing laws and the Fourteenth Amendment's Due Process Clause. *See e.g., Betterman v. Montana*, 578 U.S. 437, 448 (2016)(a defendant "retains an interest in a sentencing proceeding that is fundamentally fair" for due process purposes).

B. The District Court Failed to Consider or Give Due Weight to Mitigating Evidence Within Stapp's Risk Assessment While Selecting the Sentence, in Violation of Nevada Law and the Fourteenth Amendment to The United States Constitution

Stapp's Assessment was generated and attached to the PSR in accordance with NRS 176.139. The author of the Assessment determined Stapp's risk to be "Below

Average," and discussed Stapp's remorse and insights into his offense. Nevertheless, the district court imposed sentence on the basis that the Assessment provided it "no insight, based on any of the reports of how it could really not happen again." AP 085. This statement demonstrates the district court's failure to examine the Assessment and/or its failure to give the Assessment due weight as seen through the sentencer's doubt and disagreement with it. Incorporate as if set forth herein Argument A above.

A sentencing court "may not refuse to consider or be precluded from considering any relevant mitigating evidence." *Wilson v. State*, 105 Nev. 110, 115, 771 P.2d 583, 586 (1986)(citing *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986)). "Mitigating evidence" which a court must consider in sentencing is any fact which draws an inference that might serve as a basis for a sentence less than the maximum. *Skipper,* 476 U.S. at 4-5.

The requirement that a sentencer consider all mitigating evidence goes hand in hand with the principle that "possession of the fullest information possible regarding the defendant's life and characteristics is essential to the selection of the proper sentence." *Brown v. State*, 110 Nev. 846, 851, 877 P.2d 1071, 1074 (1994)(citing *Lockett v. Ohio*, 438 U.S. 586, 603 (1978)).

The district court refused to consider the mitigating evidence within the Assessment demonstrating Stapp's remorse, insight into the reasons for his offense,

and the expert conclusion that he is a "Below Average" risk of reoffending. In doing so, it impermissibly closed its mind to this evidence. *Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998).

The district court's errors herein constituted an abuse of discretion, at odds with Nevada's sentencing laws and the Fourteenth Amendment's Due Process Clause. *See e.g., Betterman*, 578 U.S. at 448 (a defendant "retains an interest in a sentencing proceeding that is fundamentally fair" for due process purposes).

C. The District Court Relied Upon the Prosecutor's Ambush Remarks Which Were Inflammatory, Highly Suspect and Impalpable, In Violation of Nevada Law and the Fourteenth Amendment to the United States Constitution

The prosecutor called Stapp a "predator," AP 063, alleged that Stapp had met the victim's mother in a chat room believing her "to be a young male," AP 063, asserted that Stapp had lived alone with the victim in a trailer, AP 064 and claimed that the victim had told an investigator he was disgusted with both Stapp's actions and manipulation, AP 066.

The prosecutor went on to describe a "grooming" scenario where Stapp "would provide [the victim] with toys or games after he inappropriately touched him," AP 066, and concluded its argument by declaring the victim to be "autistic," AP 069.

The district court relied upon this ambush of inflammatory, highly suspect and impalpable accusations which drew a picture of Stapp as a predator of young men

who seeks out, sequesters and grooms autistic children[4] – all being fabrications which are unsupported by the evidence.

A court "cannot base its sentencing decision on information or accusations that are founded on '"impalpable or highly suspect evidence."'" *Gomez v. State*, 130 Nev. 404, 407, 324 P.3d 1226, 1227 (2014)(en banc)(quoting *Stockmeier v. State*, 127 Nev. 243, 248, 255 P.3d 209, 212 (2011)(quoting *Goodson v. State*, 98 Nev. 493, 495-96, 654 P.2d 1006, 1007 (1982)). A district court errs when it relies on such evidence which is objectionable and adversely affects the sentence imposed. *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

The district court's reliance on the prosecutor's deceptive and inflammatory hyperbole constituted an abuse of discretion, at odds with Nevada's sentencing laws and the Fourteenth Amendment's Due Process Clause. *See e.g., Betterman*, 578 U.S. at 448 (a defendant "retains an interest in a sentencing proceeding that is fundamentally fair" for due process purposes); *Payne v. Tennessee*, 501 U.S. 808, 836 (1991)(due process protects against "inflammatory" statements regarding victims at sentencing).

Actual prejudice is demonstrated by Stapp's maximum sentence on each individual count, without probation. *See e.g., Blankenship v. State*, 132 Nev. 500,

[4] The sentencing court cited Stapp's criminal history and declared, "I'm also cognizant of your actions." AP 085-086.

504, 375 P.3d 407, 409 (2016)(evidence of prejudice to the sentence exists where court does not expressly disclaim reliance on the potential errors); *Ramirez v. State*, 2019 Nev. Unpub. LEXIS 632 *18, 441 P.3d 1089, No. 73074 (May 31, 2019)(unpublished disposition)(prejudice shown where erroneous matter is included within sentencing court's list of considered factors).

IX. CONCLUSION

The district court abused its discretion by denying Stapp a proper and adequate consideration for probation, by failing to consider the mitigating evidence contained within the Assessment while deciding Stapp's sentence, and by imposing the sentence based upon highly suspect and impalpable accusations from the prosecutor.

Appellant Stapp therefore requests that the judgment of conviction be vacated, that the matter be remanded for resentencing, and that the Court do that which is necessary and just herein to remedy the errors above.

Dated this 22nd day of April, 2022.

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CERTIFICATE OF COMPLIANCE

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 Times New Roman in 14-point font.

I further certify that this brief complies with the page- or type- volume limitations of NRAP 32(a)(7) because, including the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains a total of 3,244 words. NRAP 32(a)(7)(A)(i), (ii).

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 NRAPs, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be support by a reference to the page of the transcript or appendix where the matter relied upon is to be found.

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 22nd day of April, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing APPELLANT'S OPENING BRIEF and APPELLANT'S APPENDIX were filed electronically with the Nevada Supreme Court on the 22nd day of April, 2022. Electronic Service of the foregoing documents is made in accordance with the Master Service List as follows:

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