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 REPLY BRIEF

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I. Standard of Review

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).

II. Respondent Has Failed to Adequately Respond to Stapp's Issues on Appeal and Has Missed the Crux of the Issues Presented

For his first issue, Stapp presents a salient claim that the district court denied him a proper **consideration** for probation by failing to either consider or to give due weight to Stapp's Risk Assessment. Opening Brief at 6-10. For his second issue, Stapp presents another salient claim that the district court failed to either **consider** or **give due weight** to the mitigating evidence contained in the Risk Assessment in

making its sentencing decision. Opening Brief at 10-12. The district court's own words demonstrate that it was either unaware of the Risk Assessment's low risk evaluation or that it disregarded the expert assessments therein because it disagreed with them. AP 085-086.

Stapp contends that NRS 176.139 and 176A.110 "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." Opening Brief at 8. Stapp further submits that the district court's own admission demonstrates its failure to consider the mitigating evidence within the Risk Assessment. *Id*. at 10.

The State has not answered these issues but has instead responded to its own mischaracterizations of the issues presented within the Opening Brief, to-wit: the State says that Stapp is arguing that the district court was "**obligated** by the Psychosexual Risk Assessment to grant probation," Answering Brief at 7-11 (emphasis added), and that "Stapp's professed remorse or the Risk Assessment **required** the District Court to grant probation," *id.* at 11-12 (emphasis added). The State's misinterpretation of Stapp's appeal issues is foreign to the issues penned within the Opening Brief and serves to avoid the actual questions presented in this appeal which claim no entitlement to anything save a proper consideration for

probation and a proper consideration of mitigating evidence when rendering a sentencing decision.

In briefing his issues, Stapp pinpointed his arguments by contrasting what the law does **not** require versus what the law **does** require, making clear that his complaint lies in a violation of the latter. Stapp proffered:

> **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.

Opening Brief at 8 (emphasis added).

Notwithstanding Stapp's argument that probation is **not** mandated upon receiving a favorable psychosexual assessment, the State's Answering Brief converts Stapp's argument into a fallacy that probation **is** mandated:

> Nothing in Nevada's statutory scheme requires a sentencing judge to grant probation where the defendant is not assessed as a high risk to reoffend. 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 fact of the offense, and the impact on the victim.

Answering Brief at 9.

The Opening Brief asserts that **either** "the district court denied Stapp's request for probation without having examined the Assessment or portions of it," **or** it

"considered the Assessment, but disagreed with it or otherwise did not trust it." *Id*. at 8. The State retorts that Stapp is wrong because "[t]he record reflects that the district court did not abuse its discretion in not **relying exclusively** on the risk assessment tool." Answering Brief at 10 (emphasis added). This *non sequitur* has no bearing on Stapp's argument, which has nothing to do with the sentencing court's degree of reliance upon the Assessment and everything to do with whether the sentencing court even considered it **at all**, or impermissibly **disagreed** with its expert conclusions. The State fails to address this crucial dispositive point.

And again, the State skews Stapp's argument as being that "the district court 'refused' to consider mitigating evidence at sentencing **because** it denied probation and expressed concern that Stapp might re-offend." Answering Brief at 11 (emphasis added). Here, the State attempts to twist Stapp's claim into one of entitlement to probation. The error challenged on appeal does not lie in the district court's failure to grant probation, but in its "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." Opening Brief at 10. Contrary to Respondent's assertion, nowhere has Stapp argued a right to probation or a right to a lesser sentence. What he **does** argue is a right to have the sentencing court properly consider him for probation and properly consider mitigating evidence in its decision.

The State's Answering Brief simply fails to address Stapp's issues on appeal, and to any extent the State touches upon peripheral matters, such fails to address the core questions in this appeal. The misconstruction of Stapp's issues does not defeat them, and in fact confesses the State's error to them. *See Polk v. State*, 126 Nev. 180, 184, 233 P.3d 357, 360 (2010)(failure to directly answer an appeal issue by the State is a confession of error thereon). The State's tactic of responding to a twisted rendition of the issues is employed throughout the Answering Brief, demonstrating a disregard for the diligence, professionalism and competence which are affirmatively imposed upon counsel by NRAP 28. *Miller v. Wilfong*, 121 Nev. 619, 625, 119 P.3d 727, 731 (2005).

III. The State Has Failed to Show That the Sentencing Court Did Not Rely Upon Highly Impalpable or Suspect Evidence

In his third issue on appeal, Stapp challenges the sentencing court's reliance upon highly suspect and impalpable comments proffered by the prosecutor in its argument. Opening Brief at 11-13. The State stresses that Stapp did not object to the factual synopsis contained in the PSI, Answering Brief at 2; however, the prosecutorial statements about which Stapp complains are not to be found within the pages of the PSI, or **anywhere,** for that matter. As such, the factual content of the PSI is irrelevant to this issue, and the prosecutor's unsubstantiated comments are seen to constitute reversible "impalpable or highly suspect evidence." *Gomez v. State*, 130 Nev. 404, 407, 324 P.3d 1226, 1227 (2014)(en banc).

First, Stapp challenged the prosecutor's statement that Stapp had met the victim's mother in a chat room believing her "to be a young male." AP 063. The State remains silent on this contrived allegation because nothing in the PSI supports, much less suggests it. PSI. *See* PSI, attached Risk Assessment at 4 (of the victim's mother, Stapp simply "met her in a 'book club' online" – nothing else). The State has therefore confessed its error that the prosecutor's concocted allegation was "impalpable or highly suspect evidence." *Gomez*, 130 Nev. at 407, 324 P.3d at 1227.

Stapp next challenges the prosecutor's allegation that he had lived alone with the victim. AP 064. Devoid of any reference to the record, the State counters with the unsubstantiated assertion that "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." Answering Brief at 6. Substantiation cannot be conjured by repeating in appellate briefing that which the prosecutor misrepresented in the district court.

The PSI clearly states that the victim's mother told police that she, her children and Stapp all lived together until "[a]fter an incident involving violence between her children, the victim's mother moved out and into an apartment in the same complex with one of her daughters. Her **other daughter and the victim** remained in the apartment with the defendant." PSI at 5 (emphasis added). Stapp never lived alone with the victim. The State not only misstates this fact, but incredibly suggests that

Stapp "arranged" violence between two sisters in order to cause the mother to separate them. The prosecutor's statement at sentencing was therefore "impalpable or highly suspect evidence." *Gomez*, 130 Nev. at 407, 324 P.3d at 1227.

Stapp also challenged the prosecutor's volatile declaration that the victim was autistic – an allegation which added much weight to its argument that Stapp is a "predator." AP 069. The State is silent about this contrived allegation because nothing in the PSI supports, much less suggests it, either. *See* PSI, generally (nothing about autism, anywhere). The State has therefore confessed its error that the prosecutor's concocted allegation of autism was "impalpable or highly suspect evidence." *Gomez*, 130 Nev. at 407, 324 P.3d at 1227.

There was nothing harmless about these misrepresentations, as each one gave credence to the State's "predator" argument, i.e., predators look for young males online, predators live with young boys alone in seclusion, and predators take advantage of autistic boys. While Respondent makes much ado about the propriety of labeling Stapp a" predator," it misses the point that a prosecutor may not bolster its "predator" theory with contrived and false allegations. All in all, the prosecutor's fabricated assertions violated due process, which requires that a defendant be sentenced on the basis of accurate information, *Roberts v. United States*, 445 U.S. 552, 556 (1980), and which is vital for imposing a "rational sentence in the typical criminal case," *Gregg v. Georgia*, 428 U.S. 153, 190 (1976).

Respondent submits that the record does not demonstrate that the court's sentencing decision was premised upon the contested aspects of the prosecutor's argument. Answering Brief at 13. This Court has long held that a sentencing court abuses its discretion when it considers impalpable or highly suspect evidence in its decision process. *Blankenship v. State*, 132 Nev. 500, 510, 375 P.3d 407, 413 (2016)(citing *Goodson v. State*, 98 Nev. 493, 495-96, 654 P.2d 1006, 1007 (1982)). A declaration which is "essentially a bald assertion, unsupported by any evidence whatsoever" falls under this category. *Goodson*, 98 Nev. at 496, 654 P.2d at 1007. A sentencing court's decision is prejudiced when based upon such information. *Id*.

While judges may have experience with "separating the wheat from the chaff," Answering Brief at 13 (citing *Randell v. State*, 109 Nev. 5, 846 P.2d 278 (1993)), sentencing is nevertheless a difficult task in which accurate information about a defendant's character and propensities is crucial for permitting the sentencing court to accomplish this separation in "an informed manner," *Gregg*, 428 U.S. at 189-190. The Court should decline the State's invitation to sanction the presentation of impalpable and suspect allegations at sentencing under the reasoning that judges are capable of knowing when prosecutors are making things up.

Nevertheless, the district court sentenced Stapp having just been informed that he was a predator who took advantage of an autistic child in manipulated seclusion. It cannot seriously be suggested that this was not prejudicial. With the prosecutor's

words fresh in its mind, the district court declared that it was **aware** of Stapp's actions and was holding him **accountable** for them. AP 085-086. It did not disclaim reliance upon what the prosecutor had just said. *Blankenship*, 132 Nev. at 511, 375 P.3d at 414. *See also Sasser v. State,* 130 Nev. 387, 393, 324 P.3d 1221, 1225 (2014)("I'm not going to consider it"). Requisite prejudice is demonstrated by Stapp's maximum sentence on each individual count, without probation. *Blankenship*, 132 Nev. at 504, 375 P.3d at 409.

CONCLUSION

For the reasons set forth above and within the Appellant's Opening Brief, the district court erred and abused its discretion in sentencing Stapp.

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 20th day of June, 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 2,455 words. NRAP 32(a)(7)(A)(i), (ii).

Finally, I hereby certify that I have read this reply 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 20th day of June, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing APPELLANT'S REPLY BRIEF was filed electronically with the Nevada Supreme Court on the 20th day of June, 2022. Electronic Service of the foregoing documents is made in accordance with the Master Service List as follows:

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