IN THE SUPREME COURT OF THE STATE OF NEVADA

HENRY APARICIO, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 84300

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

DAMIAN SHEETS, ESQ.
Nevada Bar #010755
ALEXIS E. MINICHINI, ESQ.
Nevada Bar #015438
Nevada Defense Group
714 S. Fourth Street
Las Vegas, Nevada 89101
(702) 988-2600

Counsel for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

AARON D. FORD
Nevada Attorney General
Nevada Bar #007704
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

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ROUTING STATEMENT

This matter is presumptively assigned to the Nevada Court of Appeals, as it challenges a judgment of conviction based upon a guilty plea. NRAP 17(b)(1).

STATEMENT OF THE ISSUE

Whether Appellant is entitled to a third sentencing.

STATEMENT OF THE CASE

On June 5, 2018, the State charged Henry Aparicio ("Appellant") by Information as follows: Count 1 and 2: Driving Under the Influence Resulting in Death (Category B Felony – NRS 484C.110, 484C.430, 484C.105); Count 3, 4, and 5: Reckless Driving (Category B Felony – NRS 484B.653); and Count 6: Driving

Under the Influence Resulting in Substantial Bodily Harm (Category B Felony – NRS 484C.110, 484C.430, 484C.105). Respondent's Appendix ("RA") 1-6.[1]

On August 1, 2019, Appellant entered into a guilty plea agreement ("GPA"), pleading guilty to two counts of Driving Under the Influence Resulting in Death and one count of Reckless Driving. 1 Appellant's Appendix ("AA") 146; RA 64. The State retained the right to argue on the Driving Under the Influence Resulting in Death counts but would not oppose concurrent time with the other count. 1 AA 146. An Amended Information was filed the same day.

On October 18, 2019, Appellant was sentenced for Count 1 to seven (7) to twenty (20) years incarceration; for Count 2 to seven (7) to twenty (20) years, consecutive with Count 1; and for Count 3 to twelve (12) to forty-eight (48) months, consecutive with Count 2. 2 AA 327-28. His aggregate sentence was fifteen (15) to forty-four (44) years, with 527 days credit for time served. 2 AA 327-28. The Judgment of Conviction was filed on October 29, 2019. 2 AA 327-28.

He filed his Notice of Appeal on November 15, 2019. RA 65-66. The matter was remanded for resentencing when the Supreme Court found the district court

[1] This is Appellant's second direct appeal, yet he has again failed to include the documents necessary for this Court to evaluate the matter. The State has again transmitted its Respondent's Appendix containing the Information, first Notice of Appeal, Court Minutes from the entry of plea, and the transcript of the preliminary hearing which provides the facts of the case.

erred in considering objected-to nonvictim impact letters without determining if they were relevant and reliable. 2 AA 329-38.

Appellant was resentenced on January 25, 2022 before a different court than his first sentencing. 2 AA 339-414. Prior to the second sentencing, the court indicated that it was not going to consider any of the non-victim letters that were objected to in the first sentencing. After listening to arguments of counsel and statements from victim impact speakers, which consisted of statements from direct relatives of the two victims, the sentencing court noted it considered the previous sentence and did not believe it was unreasonable. 2 AA 412. His second sentence was the same as the first. 2 AA 415-18. The Amended Judgment of Conviction was filed on January 26, 2022. 2 AA 415-18.

Appellant filed a Notice of Appeal on February 24, 2022.

STATEMENT OF THE FACTS

On May 15, 2018, Appellant and his girlfriend, Morgan Hurley, had drinks at Dave and Buster's restaurant in Downtown Summerlin. 1 AA 16-21. Receipts from the tab indicated that the two ordered their first drinks at 5:37 PM. 1 AA 18. By 7:21 PM, the pair had ordered ten (10) shots of Patron Silver, three (3) Caribbean Lit Drinks, and they had not ordered any food. 1 AA 18-21. After Dave and Buster's, the pair went to Casa Del Matador, located in Downtown Summerlin. 1 AA 15. The tab from Casa Del Matador indicated that the pair consumed six (6) more shots of

Tequila. 1 AA 15. The pair also ordered Goat Cheese Jalapeno, but they did not order any other food. 1 AA 15. The tab closed at 8:52 PM and Appellant left the bar. 1 AA 15. At about 9:08 PM, Appellant, while driving under the influence, crashed into the back of Damaso and Christa Puente's car and killed them. RA 11-12, 19.

Brandon McCauley, a witness to the crash, testified that he had been driving home at around 9:00 PM after shopping at Downtown Summerlin when he reached a red light at the intersection of Hualapai and Sahara. RA 11. As he was preparing to stop for the red light, he saw a red car speed past him. RA 11-12. McCauley testified that the red car did not stop for the red light but instead slammed into the back of a white car, the Puentes' car, which had been stopped for the red light. RA 12. Both the Puentes' white car and the red car spun out into the intersection. RA 12. Shortly after the collision, McCauley went to the red car which had caused the collision where he saw a group of people holding down Appellant over the red car. RA 12-13. McCauley recalled that Appellant appeared intoxicated and that he assumed Appellant was the driver of the red car since he was being apprehended by the group of people at the scene. RA 15.

Khadija Bilali-Azzat, a registered nurse, testified that she was also at the intersection that night. RA 27. Although she did not see the accident as it happened, Bilali-Azzat stopped to see if she could help in the aftermath before medical personnel arrived. RA 27. She approached the Puentes in their white car which was

surrounded by people. RA 28. Bilali-Azzat and those surrounding the vehicle attempted to get the Puentes out of the car. RA 28. They were able to get Damaso out of the car by breaking the glass and opening the door. RA 28. Bilali-Azzat determined Damaso had no pulse and began CPR. RA 28. In the meantime, other people tried to get Christa out. RA 28. About five (5) minutes later the fire department arrived. RA 28. It was later determined that while Christa had a pulse for a couple of minutes, Damaso did not. RA 19. Both passengers were pronounced deceased. RA 19.

Las Vegas Metropolitan Police Department Officer Richard Sonetti eventually responded to the scene of the accident. RA 16. When he arrived at the scene, he saw a white Prius, the Fire Department, a red Mercedes, and a group of people around the white Prius. RA 16. When he got to the red vehicle, he saw a white female, later identified as Morgan Hurley, hunched over on the passenger side of the vehicle in between the seat and the dash on the lower floorboard. RA 16, 35. At that time, there was a man rendering aid to her; Hurley was unconscious but still breathing. RA 16. Once medical arrived for Hurley, she was transported to the hospital. RA 16. While tending to Hurley, Officer Sonetti saw Appellant slumped over crying on the curb by the vehicle. RA 16. Officer Sonetti asked Appellant if he needed any aid; Appellant responded that he did not need help, but just needed Officer Sonetti to save the woman in the vehicle. RA 16.

Appellant was then transported to UMC trauma for a medical evaluation, where Officer Corey Staheli made contact with Appellant to conduct an interview. RA 24. Officer Staheli conducted a horizontal gaze nystagmus test, which Appellant failed. RA 24-25. Officer Staheli also detected the odor of an unknown alcoholic beverage on Appellant's breath as well as dried blood on his lip and nose. RA 25.

Sometime thereafter, Appellant was transported to the Clark County Detention Center. RA 22. Officers obtained a warrant for Appellant's blood draw. RA 20-21. Subsequently, Office Matthew Ware responded to assist in Appellant's blood draw and Katylynn Garduno, an advanced emergency medical technician, drew Appellant's blood. RA 20-21. Garduno testified that the first blood draw was taken at 0147 in the morning and a second was taken at 0247 in the morning. RA 21. The results of such blood draw indicated that Appellant's blood alcohol level was at .204 for the first draw, and at .178 for the second. RA 40-42. Garduno also heard Appellant ask one of the officers if Appellant had run the red light. RA 21. Officer Ware also testified that the defendant asked if he had killed two people. RA 23.

While investigating the electronic data from the vehicles, Detective Kenneth Salisbury managed to recover five (5) seconds of pre-crash electronic data from the Puentes' white Prius. RA 31. Three (3) of those five (5) seconds showed that the Prius was stopped and then experienced a max change in velocity up to 58.4 miles per hour. RA 31. Thus, in a matter of milliseconds, the Puentes' vehicle was

expedited from zero (0) to 58.4 miles per hour. RA 31. Detective Salisbury determined that the speed of the red Mercedes was ninety-six (96) to one hundred two (102) miles per hour at the time of the impact. RA 31. Indeed, further speed analysis indicated that Appellant was driving 100.156 miles per hour when he crashed into the Puentes' vehicle. RA 38.

Investigators also found various pieces of physical evidence in the red Mercedes. RA 37. Detective Karl Atkinson found a woman's purse on the front passenger floorboard of the red Mercedes. RA 35. The purse contained numerous pieces of identification for Morgan Hurley. RA 35. Detective Atkinson also found blood on the driver's side door as well as on the exterior of the driver's side of the vehicle proceeding along the outside of the vehicle and leading towards the passenger side of the vehicle. RA 36. Detective Atkinson also found blood on the passenger door. RA 36. A bloody rag on the driver's seat and blood on the driver's side airbag was also discovered. RA 36. Detective Atkinson testified that the backs of the front seats did not contain any blood and that the rear seats of the vehicle appeared to be unoccupied at the time of the crash. RA 36.

SUMMARY OF THE ARGUMENT

Appellant is not entitled to a third sentencing based on errors occurring at the first.

ARGUMENT

In this direct appeal of his Amended Judgment of Conviction, Petitioner challenges the definition of "victim," the form of the victim impact statements, the topics discussed by the victim impact speakers, and the district court's consideration of the prior, reversed, sentence. AOB at 20-42.

Nearly all of Appellant's complaints refer to the first sentencing, not the second. The vast majority of the opening brief in this appeal of Appellant's second sentence was directly copied from the opening brief in the first appeal. Since the first sentence was overturned on appeal, it is no longer germane. Appellant provides no cogent argument to explain the relevance of his earlier arguments when those have been resolved.

Many of the assertions are not supported by citations to the record. NRAP 28(a)(5). A party seeking review bears the responsibility "to cogently argue, and present relevant authority" to support his assertions. Edwards v. Emperor's Garden Restaurant, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006); Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (defendant's failure to present legal authority resulted in no reason for the district court to consider defendant's claim); Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (an arguing party must support his arguments with relevant authority and cogent argument; "issues not so presented need not be addressed");

Randall v. Salvation Army, 100 Nev. 466, 470-71, 686 P.2d 241, 244 (1984) (court may decline consideration of issues lacking citation to relevant legal authority); Holland Livestock v. B & C Enterprises, 92 Nev. 473, 533 P.2d 950 (1976) (issues lacking citation to relevant legal authority do not warrant review on the merits).

District courts have "wide discretion" in sentencing decisions, and "[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," their decisions will not be disturbed. Allred v. State, 120 Nev. 410, 420, 92 P.2d 1246, 1253 (2004) (quoting Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976)). Courts can consider "any reliable and relevant evidence at the time of sentencing." NRS 176.015(6). The Nevada Supreme Court will not vacate a judgment of conviction or sentencing decision unless the error affected the defendant's substantial rights. NRS 178.598. An abuse of discretion occurs when "no reasonable judge could reach a similar conclusion under the same circumstances." Leavitt v. Siems, 130 Nev. 503, 309, 330 P.3d 1, 5 (2014).

A. Definition of "Victim"

This section is verbatim the same as in the first Opening Brief. Compare AOB at 21-32 with Aparicio v. State, (Appellant's Opening Brief, filed April 10, 2020) Docket No. 80072, at 20-31. Appellant makes no argument, cogent or otherwise, as

to why occurrences in the first sentencing should be considered in an appeal of the *second*.

> NRS 176.015(5)(d) defines "victim" as "(1) A person, including a governmental entity, against whom a crime has been committed; (2) A person who has been injured or killed as a direct result of the commission of a crime; and (3) A relative of a person described in subparagraph (1) or (2)." Under NRS 176.015(5)(b)(l)-(4), a "relative" includes "[a] spouse, parent, grandparent or stepparent," "[a] natural born child, stepchild or adopted child," "[a] grandchild, brother, sister, half brother or half sister," and "[a] parent of a spouse."
>
> Under Marsy's Law, "victim" is defined as "any person directly and proximately harmed by the commission of a criminal offense under any law of this State." Nev. Const. art. 1, § 8A(7) (emphasis added). The clause states further that "[i]f the victim is ... deceased, the term [victim also] includes the legal guardian of the victim or a representative of the victim's estate, member of the victim's family or any other person who is appointed by the court to act on the victim's behalf." Id. (emphasis added).

Aparicio v. State, 137 Nev. Adv. Op. 62, 496 P.3d 592, 595 (2021)

At the second sentencing, the judge considered letters from two of the brothers and the grandmother of one of Appellant's victims. 2 AA 368. The judge said, "Those were the three that I found to be victim letters that complied with the statutes and were actual family members." 2 AA 368. The sentencing court felt no need to consider the other letters submitted: "I feel like the three letters that I've reviewed are sufficient." 2 AA 368.

The victim impact speakers were the father and mother of Christa Puente, one of the victims, and the father of Damaso Puente, the other. Christa's father read a letter from her brother, 2 AA 370-76, as well as his own letter, 2 AA 377-80.

Damaso's father spoke. 2 AA 381. Christa's mother read a letter from her sister, 2 AA 382-88, as well as spoke on her own behalf, 2 AA 389-411.

These are victims as defined by NRS 176.015(3)(d)(3), by Marsy's Law, and by this Court in this case. Trial counsel did not object to the definition of any of the letters or the speakers as victims. Appellant offers no argument as to why these people were not victims under the statute.

B. Form of Victim Impact Statements

Again, this section merely duplicates the first Opening Brief. Compare AOB at 32-38 with Aparicio v. State, (Appellant's Opening Brief, filed April 10, 2020) Docket No. 80072, at 31-37. Appellant makes no argument, cogent or otherwise, as to why occurrences in the first sentencing should be considered in an appeal of the *second*.

At the second sentencing, the impact of the crimes on the surviving family members was presented to the court in two forms: through written letters and through speakers. These forms are contemplated in NRS 176.015(3)(a), which permit a victim to "appear personally, by counsel or by personal representative." Nowhere in the statute is the form of the appearance constrained, nor does the statute require the Department of Parole and Probation to serve as a filtering device. The Department's obligation to include victim impact statements under NRS 176.145(1)(c) is limited to "the extent that such information is available from the victim or other sources."

In other words, if the victim does not provide the information to the Department, the Department is not responsible for obtaining the information.

Though a video clip was contemplated at the second hearing, it was never played and the judge did not see it. 2 AA 346, 411. Though trial counsel objected to the video that was not introduced, he did not otherwise object to the form of the victim impact statements. Appellant offers no argument as to the form of the statements.

C. Topics Discussed by Victim Impact Speakers

Yet again, this section merely duplicates the first Opening Brief. Compare AOB at 38-42 with Aparicio v. State, (Appellant's Opening Brief, filed April 10, 2020) Docket No. 80072, at 37-41. Appellant makes no argument, cogent or otherwise, as to why occurrences in the first sentencing should be considered in an appeal of the *second*.

With two exceptions, the victim impact speakers only expressed their views on "the crime, the person responsible, the impact of the crime on the victim and the need for restitution" as contemplated by NRS 176.015(3)(b). When Christa's mother mentioned Appellant tried to intimidate her by staring her down in the courtroom, defense counsel objected. 2 AA 403. The objection was sustained. This remark was not raised in this appeal.

The second exception to the topics under NRS 176.015(3)(b) occurred when Christa's mother said the justice system failed the victims. 2 AA 407. The court granted the victim's mother a little leeway. 2 AA 407. This remark was not raised in this appeal. Appellant offers no argument as to the topics discussed.

D. Consideration of the Original Sentence

Appellant alleges that because the first sentence was reversed, it was unsuitable for the second sentencing judge to know what was previously sentenced. AOB at 42.

> Thus it would follow that the District Court erred when, at Mr. Aparicio's resentencing, it considered the prior sentence because the prior sentence had already been found by this Court to be based, in part, on an erroneous interpretation of Marsy's Law and ultimately an abuse of discretion.

AOB at 42.

He provides no legal authority to support an assertion that a subsequent judge must be completely walled off from any prior happenings in the case.

Trial counsel did not object at sentencing to the court's judicial notice of the previous sentence, thus preventing that court from addressing the issue. Arguments not raised below are waived and should not be considered on appeal. See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) (holding that this court need not consider arguments raised on appeal that were not presented to the district court

in the first instance), overruled on other grounds by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004).

Appellant complains the judge issued a "blanket statement of sufficiency" when the court determined the three letters from defined victims sufficed, eliminating any need to determine if the other letters were also admissible because they were relevant and reliable. AOB at 43. He claims the judge "did not conduct the proper analysis into the victim impact letters provided." AOB at 43.

This Court explained that only if letters are received from people not defined as victims under Marsy's law do they then need to be evaluated to see if they are "relevant and reliable." 2 AA 335. The entire point of Marsy's law is that victims of crime have a right to be heard. Their letters must be considered so the victims of Appellant's crimes can have a voice. Further, the court is only required to consider the relevance and reliability of letters when defense counsel objects. 2 AA 334. Counsel here appropriately did not object to the letters from people who were defined as victims under the statute.

Appellant is not entitled to a third sentencing when the second sentencing court considered unobjected-to letters from statutorily defined victims.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court AFFIRM Appellant's Amended Judgment of Conviction.

Dated this 24th day of August, 2022.

Respectfully submitted,

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

BY */s/ John T. Afshar*
JOHN T. AFSHAR
Deputy District Attorney
Nevada Bar #014408
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

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 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 3,313 words and 14 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 the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 24th day of August, 2022.

Respectfully submitted

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

BY */s/ John T. Afshar*
JOHN T. AFSHAR
Deputy District Attorney
Nevada Bar #014408
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 24th day of August, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

DAMIAN SHEETS, ESQ.
ALEXIS E. MINICHINI, ESQ.
Counsel for Appellate

JOHN T. AFSHAR
Deputy District Attorney

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

JTA/Suzanne Rorhus/jh