IN THE COURT OF APPEALS OF THE STATE OF NEVADA

HENRY BIDERMAN APARICIO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 80072-COA

ORDER VACATING SENTENCE AND REMANDING

Henry Biderman Aparicio appeals from a judgment of conviction, pursuant to a guilty plea, of two counts of driving under the influence resulting in death and one count of felony reckless driving. Eighth Judicial District Court, Clark County; Cristina D. Silva, Judge.

After an evening of drinking with his girlfriend, Aparicio rear-ended Christa and Damaso Puentes's vehicle at the intersection of Sahara Avenue and Hualapai Way in Las Vegas.[1] At the time of impact, Christa and Damaso's vehicle was stopped while Aparicio's vehicle was traveling roughly 100 miles per hour. Both Christa and Damaso died from their injuries before or near the time first responders arrived.[2]

Law enforcement officers obtained a search warrant authorizing a draw of Aparicio's blood. Officers took two blood samples from Aparicio, which were taken approximately one hour apart, but not within two hours of the accident. Specifically, the accident occurred at approximately 9:08 p.m.; however, the first blood draw was not taken until

[1]We do not recount the facts except as necessary to our disposition.

[2]Aparicio's girlfriend, Morgan Hurley, was a passenger in his vehicle at the time and also sustained injuries. However, the charges related to Hurley were dismissed pursuant to the plea negotiation.

1:47 a.m. and revealed that Aparicio's blood alcohol level was .204, while the second was taken at 2:47 a.m. and indicated a blood alcohol level of .178.

The State charged Aparicio with two counts of driving under the influence resulting in death, three counts of felony reckless driving, and driving under the influence resulting in substantial bodily harm. After the district court denied various pre-trial motions, including a motion to exclude the State's retrograde-extrapolation blood-alcohol report and Aparicio's request for funds to hire an expert to rebut the State's report, Aparicio pleaded guilty to two counts of driving under the influence resulting in death and one count of felony reckless driving, naming Christa and Damaso as the victims. The State agreed to recommend concurrent time on the reckless driving charge.

Shortly before sentencing, the State provided the district court with approximately 50 victim impact letters that were mostly written by friends, co-workers, and extended family of the deceased victims. Aparicio filed a written objection to the admission of 46 of the victim impact letters, arguing that the individuals who drafted those letters did not qualify as victims under NRS 176.015(5).[3] Aparicio also voiced multiple objections during the sentencing hearing in response to various in-court witnesses' statements because the testimony exceeded the bounds of victim impact information. Aparicio presented mitigating evidence, including that he had no prior criminal record. The district court overruled the objections and sentenced Aparicio to an aggregate term of 15 to 44 years in prison. Having

[3]Although an amended version of NRS 176.015 went into effect in July 2020, we cite to the prior version because it was applied to all proceedings in the district court. Additionally, the sections of the statute that were amended are not relevant to this appeal.

entered a guilty plea, Aparicio now appeals, challenging only the validity of his sentence.

The crux of Aparicio's argument on appeal is that the district court erred when it considered dozens of improper impact letters, because they were written almost entirely by non-victims, and the court relied upon all of the letters when determining his sentence. Accordingly, Aparicio contends that he is entitled to a new sentencing hearing before a different judge. The State argues that the district court properly considered the impact statements, as the authors of each letter were victims under Nevada law, specifically NRS 176.015(5) and Article 1, Section 8A(7) of the Nevada Constitution. The State contends further that even if the district court did err, any such error was harmless. We agree with Aparicio and therefore vacate the sentence and remand for a new sentencing hearing.[4]

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[4]Aparicio also argues that the district court improperly permitted witnesses to make in-court statements that were disparaging to him, the criminal justice system, and the Nevada Division of Parole and Probation, and that the manner in which the letters were submitted to the district court was improper. In light of our disposition, however, we need not address these claims, but we note that it is improper to disparage a criminal defendant for exercising his constitutional rights. *Cf. Griffin v. California*, 380 U.S. 609, 614-15 (1965) (holding that it is improper for a court or prosecutor to comment on a defendant's invocation of his right to remain silent); *see also Dieudonne v. State*, 127 Nev. 1, 10, 245 P.3d 1202, 1208 (2011) (explaining that a trial judge has a duty to ensure that proper courtroom demeanor is maintained).

The district court erred when it accepted and considered many impact statements from non-victims at Aparicio's sentencing hearing

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), relative includes "[a] spouse, parent, grandparent or stepparent," "[a] natural born child, stepchild or adopted child," and siblings. Thus, as relevant here, a victim is "[a] person who has been injured or killed as a *direct* result of the commission of a crime," as well as the spouse, parents, grandparents, siblings, or children of such a person. NRS 176.015(5)(d)(2), (3) (emphasis added); NRS 176.015(5)(b); *see also Castillo v. State*, 110 Nev. 535, 545, 874 P.2d 1252, 1259 (1994), *disapproved of in part by Wood v. State*, 111 Nev. 428, 430, 892 P.2d 944, 946 (1995). This definition is consistent with other Nevada statutes that define victim. *See* NRS 213.005(3) (articulating the same definition of victim as NRS 176.015(5)(d)); *see also Castillo*, 110 Nev. at 545, 874 P.2d at 1259 ("NRS 176.015(5) states that the term 'victim' has the meaning ascribed to it in NRS 213.005.").

Likewise, Article 1, Section 8A(7) of the Nevada Constitution (known as Marsy's Law) defines victim as "any person *directly and proximately* harmed by the commission of a criminal offense under any law of this State." (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." Nev. Const. art. 1, § 8A (emphasis added). Thus, both the constitutional and statutory definitions of victim are similar in scope, and

therefore, appear to be in harmony.[5] In particular, they both recognize that a victim is the person (or persons) who is legally injured or harmed as a direct result of the defendant's criminal conduct—i.e., the person who was the target or object of the offense, or one who was directly harmed as a result of the criminal act—as well as certain close family members.

Here, the prosecutor sent approximately 50 impact letters to the district court and characterized all of them as victim impact statements. Of those 50 letters, fewer than five were authored by persons who qualify as victims under Nevada law. *See* NRS 176.015(5)(b), (d). Although some of the letters were submitted by family members who qualify as victims, many were not family members who qualify as victims under the law, such as cousins, aunts, and uncles. *See id.* The majority of the letters were submitted by friends, colleagues, or former colleagues, with the remainder coming from the parents of friends, friends of siblings, or friends of parents. One letter, in fact, came from a person who had never even met Christa or

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[5]Unlike NRS 176.015, Marsy's Law fails to define the scope of family member. Nevertheless, there is no indication that the Legislature or the electorate intended to expand the definition of victim to include friends, coworkers, and all manner of family members. Indeed, it appears that the Legislature's intent was to expand and solidify victims' rights by including a bill of rights in the constitution, which did not include a definition of victim. Specifically, the Senate Joint Resolution, which ultimately became Marsy's Law, was titled "Proposing to amend the Nevada Constitution to *expand the rights guaranteed to victims* of *crime* by adopting a victims' bill of rights." S.J. Res. 17, 78th Sess. (Nev. 2015) (emphasis added). And the parties have presented no evidence that the Legislature intended to broaden the definition of victim or go beyond the title's stated purpose—that is, expand victims' rights. Therefore, the two provisions can be harmonized without undue tension. *Cf. We the People Nev. v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1171 (2008) ("[W]hen possible, the interpretation of a statute or constitutional provision will be harmonized with other statutes or provisions to avoid unreasonable or absurd results.").

Damaso Puentes.[6] Thus, the record indicates that almost all of the impact statements that the district court received and considered came from *non-victims*.

Although not directly argued by the State or articulated by the district court, we note that NRS 176.015 does not restrict the district court's inherent sentencing authority. *Wood v. State*, 111 Nev. 428, 430, 892 P.2d 944, 946 (1995) (providing that NRS 176.015 "does not limit in any manner a sentencing court's existing discretion to receive other admissible evidence"). In particular, the statute states that "[t]his section does not restrict the authority of the court to consider *any reliable and relevant evidence* at the time of sentencing." NRS 176.015(6) (emphasis added). Therefore, that the district court considered letters from non-victims was not, in and of itself, a reversible error. However, based on the record before this court, we conclude that the district court did indeed err because it treated the *non-victim* impact letters the same as victim impact letters, and because the non-victim impact letters were, in part, neither relevant nor reliable.

As to relevance, the *non-victim* letters largely referenced the crimes' effect on the non-victims themselves, as opposed to the impact of the crimes on the actual victims, including relatives who qualify as family member victims, such as Damaso's and Christa's parents. Furthermore, the non-victim letters all requested that a specific sentence be imposed on Aparicio. Although a *victim* may reasonably express any views concerning the crime, the person responsible, the impact of the crime on the victim, and

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[6]Although this letter may still have contained permissible information, *see* NRS 176.015(6), it was nevertheless from a *non-victim* as defined by law, and nothing in the record suggests that its contents were relevant or reliable.

the need for restitution, *see* NRS 176.015(3)(b), the same cannot be said of non-victims, *see Randell v. State*, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993) (providing that a *victim* may express an opinion regarding a defendant's sentence). Thus, a *non-victim's* opinion regarding a defendant's sentence is simply irrelevant because it is not permitted under the statutory regime, nor does it have any bearing on material facts related to the defendant's ultimate penalty, and even the dissent does not explain how these opinions are relevant. *Cf. State v. Brumwell*, 249 P.3d 965, 972 (Or. 2011) ("Evidence is relevant and thus admissible in the penalty phase if the evidence increases or decreases, even slightly, the probability of the existence of facts material to those penalty-phase questions."); *see also* NRS 48.015 (defining relevant evidence).

Regarding reliability, the *non-victim* letters were hearsay and of unknown provenance. *See* 24 C.J.S. *Criminal Procedure and Rights of Accused* § 2266 (2016) (explaining that hearsay is admissible during sentencing, "so long as the evidence has sufficient indicia of reliability to support its probable accuracy"); *see also* NRS 47.020(3)(c) (recognizing that the rules of evidence are generally inapplicable during sentencing). Here, there is nothing about the individual *non-victim* letters that inherently establishes their veracity, nor did the State or the district court articulate on the record how or why all the information contained therein was accurate and reliable. Rather, the State sent the victim *and* non-victim letters directly to the district court and presented them as a group with no individual foundation established.[7] Thus, no determination of reliability of

[7]Our dissenting colleague suggests that we are excluding all hearsay evidence at sentencing and improperly applying the rules of evidence in the context of sentencing. This is incorrect. As noted above, we recognize that the rules of evidence do not apply to sentencing and that hearsay is

the letters was conducted on an individual basis, nor as to the content of each letter. Furthermore, although not required, none of the non-victim letters was in the form of affidavits or declarations. *See* NRS 53.010-.045. Accordingly, the record does not demonstrate that all of the *non-victim* letters were sufficiently reliable in their entirety as a group or individually. Consequently, the district court erred when it considered *non-victim* impact letters in their entirety because their reliability was never established, and part of their content, such as sentencing recommendations, was not relevant and thus not proper for the district court to consider.[8]

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admissible; however, a sentencing court is still bound to consider only relevant and reliable information, *see* NRS 176.015(6), and here, the district court considered voluminous amounts of information from non-victims that was never determined to be relevant or reliable. *See also Buschauer v. State*, 106 Nev. 890, 894, 804 P.2d 1046, 1049 (1990) (stating that hearsay is admissible at sentencing but identifying the source of a hearsay statement in a victim impact statement is important [in determining its reliability]).

[8]The dissent argues that our order somehow endeavors to limit victim rights. Thus, we feel compelled to emphasize that Nevada law guarantees victims of crime certain undeniable rights and nothing in this order ought to be read as a constraint on those rights. As we have underscored numerous times herein, the letters at issue in this case were written and submitted by *non-victims*, which the dissent consistently ignores. The dissent also conveniently dismisses the non-victim status of the drafters of the letters, positing that NRS 176.015—namely, subsections (5) and (6)—permits district courts to consider almost anything at sentencing. But such a broad interpretation of the statute produces an absurd result, as it would allow almost anyone to qualify as a victim, entitling all to opine on the crime's impact and recommend what the defendant's sentence should be. As explained in the body of this order, as well as the footnote *infra*, the scope of the statute, while broad, is not that broad. Moreover, the dissent's discussion of restitution is equally spurious. Setting aside the fact that the issue of restitution was not even raised in this appeal, the dissent's contention that this order has the effect of barring hearsay from restitution requests or hearings is wholly meritless. First, as mentioned above, we fully

Having concluded that the court erred in its consideration of the non-victim letters without determining relevancy or reliability, we acknowledge and agree with the dissent that the district court has broad discretion to consider relevant and reliable information even from non-victims pursuant to subsection 6 of NRS 176.015. And, we emphasize that nothing in our order should be construed to suggest that we are precluding any one individual, or even many individuals from a similar group, who are *non-victims*, from offering statements at sentencing on behalf of a victim as long as the district court determines the information is relevant and reliable. *See Wood*, 111 Nev. at 430, 892 P.2d at 945. For the dissent to suggest that the majority order states otherwise is an egregious misrepresentation of this order and serves no purpose in resolving this appeal.

Harmless Error

This court will not vacate a judgment of conviction or sentencing decision unless the error affected the defendant's substantial rights. *See* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."). Accordingly, the State urges this court to affirm Aparicio's sentence, arguing that "[a]ny error due to the district court considering the victim impact statements . . . would be harmless."

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agree that hearsay is *admissible* during sentencing so long as it is relevant and reliable. Second, the dissent's hypothetical, which references medical bills and funeral home invoices, is unavailing because such documents are likely business records that are exempt from the general hearsay rule and are therefore reliable. *See* NRS 51.135. Last, the dissent's restitution argument also fails because third parties, such as funeral homes, cannot request restitution, but the victims can if they incur funeral expenses. *See* NRS 176.015(3)(b).

When determining whether a sentencing error is harmless, reviewing courts look to the record "to determine whether the district court would have imposed the same sentence absent the erroneous factor." *United States v. Collins*, 109 F.3d 1413, 1422 (9th Cir. 1997) (internal quotation marks omitted). Generally, a reviewing court will not interfere with the sentence imposed by the district court "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

In this case, the district court erred in a manner that cannot be considered harmless. First, the district court misconstrued a portion of Marsy's Law. Specifically, the district court concluded, "Article 1, Section 8A of the Nevada Constitution broadly defines victim [as] anyone who's impacted by the crime." But Article 1, Section 8A's definition of victim is not so broadly defined, and applies only to persons who were "directly and proximately harmed by the commission of a criminal offense," Nev. Const. art. 1, § 8A(7), not "anyone who's impacted by the crime."[9]

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[9]The dissent argues that because NRS 176.015 and Marsy's Law use the word "include," any definitions contained therein must be read expansively as a non-exhaustive list. Although "include" can be read as a word of enlargement, this is not a bright-line rule and the word's application depends on the context in which it is used. *See, e.g., Nelson v. Kendrick*, 466 N.W.2d 402, 404 (Mich. 1991) (holding that "the word 'include' may be construed as a word of enlargement or limitation and is not in and of itself determinative of how it is intended to be used"); *see also Ex parte Martinez*, 132 P.2d 901, 903 (Cal. 1942) ("[T]hat the act provides its own definitions . . . the word 'includes' is a word of limitation."). Because NRS 176.015(5) provides specific and detailed definitions of "victim" and "relative," the word "include," in this context, is best construed as a word of limitation. *See Martinez*, 132 P.2d at 903. Moreover, for the reasons discussed above in footnote 5, we read Marsy's Law as similarly constrained.

Second, and most important, the district court fully considered the entirety of the non-victims' statements in rendering its sentencing decision, which, as explained above, were not relevant in their entirety, and were never determined to be reliable, because the court mistakenly believed it was required to consider all of the submitted letters under Marsy's Law, thus, reading the provisions of the law as a mandate. Under certain circumstances, the consideration of such letters would likely be harmless, such as if the district court had received and considered only a few non-victim letters with only limited improper content. Here, however, the district court considered and specifically relied upon *dozens of non-victim letters*, each of which contained some improper content. The contemplation of and reliance on those letters does not appear harmless, especially when the writers of each and every letter insisted that Aparicio be sentenced to consecutive, maximum terms, which he almost was.[10] Further, the district court made clear that it fully considered each of those impact statements, explaining that "I'm accepting those victim impact statements and I have read each and every one of them that was submitted to me." Additionally, "I accept everything and considered that in rendering my sentence here today."

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[10]Aparicio's DUI counts carried a maximum sentence of 20 years each, *see* NRS 484C.430, which the district court imposed in consecutive terms. Under NRS 193.130(1), the maximum-minimum that the district court could have imposed related to those counts was 8 years for each offense. Here, the district court imposed minimum sentences of 7 years—one year short of the maximum-minimum. Regarding the reckless driving charge, NRS 484B.653(9), Aparicio received 4 years with a minimum sentence of 1 year, where the maximum was 6 years with a maximum-minimum of approximately 2 and one-half years. Thus, Aparicio's maximum sentence totals 44 years—2 years short of the absolute maximum—with a minimum sentence of 15 years, which is 3 and one-half years shy of the maximum-minimum permitted by statute.

Because the district court misconstrued Marsy's Law, it appears that the court believed it was compelled to consider the impact letters from the non-victims, without exercising discretion, by stating specifically that "Article 1, Section 8A of the Nevada Constitution broadly defines victim [as] anyone who's impacted by the crime, and *therefore* I'm accepting those victim impact statements." (Emphasis added.) This statement further supports the inference that the district court misinterpreted Marsy's Law, reading it as a mandate. *Cf. Clark v. State*, 109 Nev. 426, 429, 851 P.2d 426, 428 (1993) (remanding for resentencing where it appeared the trial court believed it was required to adjudicate a defendant as a habitual offender, although the adjudication was discretionary).

As explained above, however, the definition in Marsy's Law is much narrower than the district court's interpretation and limited to persons who were directly and proximately harmed because of the defendant's criminal conduct, not to anyone impacted by a crime.[11] Moreover, in considering the large number of non-victim letters, the district

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[11]The State argued, incorrectly, that Marsy's Law was written in the disjunctive and suggests that Marsy's Law is somehow broader than NRS 176.015 in this regard because, under Marsy's Law, a victim is any person directly *or* proximately harmed by the commission of a crime, whereas NRS 176.015(5)(d)(2) indicates that the person must have been injured or killed "as a direct result of the commission of a crime." In other words, the State argues that under Marsy's Law it is either direct *or* proximate harm, when the actual language is directly *and* proximately, which is less expansive. Regardless, we conclude that this is a distinction without a meaningful difference as the two terms are often used interchangeably, making the use here something of a legal doublet. *See, e.g., Cause-Proximate Cause, Black's Law Dictionary* (11th ed. 2019) (defining proximate cause as "[a] cause that directly produces an event . . . [a]lso termed (in both senses) direct cause; direct and proximate cause").

court did not distinguish on the record which evidence was relevant and reliable, nor did it state with any specificity what it was actually considering in rendering its sentence. *See Buschauer*, 106 Nev. at 894, 804 P.2d at 1049 (explaining that the sentencing hearing would have to be continued [or reversed and remanded] if improper victim impact information was presented unless the district court disclaimed any reliance on the improper information). Instead, the district court concluded, without any discussion, that it was accepting and considering everything, appearing to forfeit its discretion in considering which letters were in fact from victims as defined by law or from non-victims but nevertheless were relevant and reliable. *Cf. Castillo*, 110 Nev. at 545, 874 P.2d at 1259 (affirming the district court's sentence where it was not clear the court considered a non-victim's statements); *see also Clark*, 109 Nev. at 429, 851 P.2d at 428. Such a vague conclusion makes it impracticable for this court to know, with any degree of certitude, whether or not the district court's sentencing decision was based upon relevant and reliable evidence or on impalpable or highly suspect evidence. *Silks*, 92 Nev. at 94, 545 P.2d at 1161. When this uncertainty is coupled with the fact that the district court, at least in part, based its decision on a mistaken interpretation of the law, we cannot conclude that these errors were harmless and did not affect Aparicio's substantial rights.

This is further evinced by the district court's choice not to follow the guilty plea agreement, which included a recommendation from the State for a concurrent sentence on the reckless driving charge that involved not a third victim, but the same two victims and conduct as the DUI charges. Further, the sentence imposed was a substantial deviation from the Division of Parole and Probation's (Division) sentencing recommendation of 3 to 10 years for each DUI offense. The deviation would ordinarily be inconsequential. *See Renard v. State*, 94 Nev. 368, 370, 580 P.2d 470, 471

(1978) (explaining that courts may exceed such recommendations). However, in light of the district court's acceptance and consideration of voluminous amounts of improper impact statements from non-victims, the deviation from the Division's recommendation is additional evidence that the district court may have been improperly influenced by the non-victims' impact letters, rendering the errors prejudicial. *See* NRS 176.145(1)(g), (2) (2017) (describing the contents of a presentence investigation report and the required recommendation).[12]

Critical to our system of criminal justice is the importance of protecting victim rights during sentencing, and the passage of Marsy's Law, which supports such protection, gives victims a voice during that process. Nothing in this order should be read to suggest otherwise. When considering *non-victim* statements, however, the district court must still determine the relevancy and reliability of those statements in order to preserve the integrity of the sentencing process. Therefore, based on the record before us, we must remand this case even when considering the

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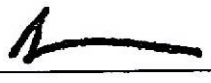
[12]In 2019, the Legislature amended this statute, effective July 1, 2020, eliminating the Division's obligation to recommend a minimum and maximum sentence. *See* 2019 Nev. Stat., ch. 633, § 13, at 4385. Because Aparicio's crimes, guilty plea, and sentencing occurred before July 2020, we reference the prior version of NRS 176.145(1)(g), which instructs the Division to make "[a] recommendation of a minimum term and a maximum term of imprisonment or other term of imprisonment authorized by statute, or a fine, or both." Notably, data indicates that district courts follow the PSI sentencing recommendation 75 percent of the time. Nevada Advisory Commission on the Administration of Justice – Justice Reinvestment Initiative, *Final Report* 14 (2019), https://www.leg.state.nv.us/App/InterimCommittee/REL/Document/13671. Thus, this further demonstrates the importance of the PSI and that the district court potentially gave the sentencing recommendations in the improper impact letters undue weight.

horrifying effects of the crimes committed, and the inevitable pain and distress that will be suffered by the surviving family members to again participate in a sentencing hearing,[13] because it is not clear that the district court would have imposed the same sentence absent these errors. *Cf. Collins*, 109 F.3d at 1422. Thus, when taken together, we conclude that the district court's errors affected Aparicio's substantial rights and were therefore not harmless.[14] Accordingly, we

VACATE Aparicio's sentence and ORDER this matter REMANDED to the district court for resentencing before a different judge.

_____, C.J.
Gibbons



_____, J.
Bulla

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[13]The need and desirability for the presentation of victim impact information was vividly explained by the President's Task Force on Victims of Crime when it issued its final report in 1982. *See* President's Task Force on Victims of Crime, *Final Report* (1982), https://www.ncjrs.gov/pdffiles1/ovc/87299.pdf. Then Clark County District Attorney Bob Miller was a member of the task force. *Id.* The chair of the task force noted in her statement in the final report that the criminal justice system is supposed to be fair and protect those who obey the law and punish those who break the law, asserting that the system had gone off track and was a national disgrace in its neglect of victims. *See id.* at vi-vii. In its report, the task force made 75 recommendations, ten of which were directed to the judiciary. *Id.* at 72-82. Recommendation 6 is pertinent to this case: "Judges should allow for, and give appropriate weight to, input at sentencing [which includes victim impact statements] from *victims* of violent crime." *Id.* at 76-78 (emphasis added). Marsy's Law and the provisions in NRS 176.015(3) are the progeny of this important recommendation from a groundbreaking report.

[14]Insofar as the parties raise arguments not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

TAO, J., dissenting:

The majority recites a litany of complaints about 46 of the victim-impact letters sent to the district court, dismissing some of them as "inadmissible hearsay," criticizing others as coming from friends and distant family members rather than immediate family, and deeming others "unreliable" because the writers knew some surviving family members but "never even met" the deceased victims. By concluding that the district court erred in considering them, the majority reads NRS 176.015 and Marsy's Law as polar opposites of what they were written to be: not a minimum floor guaranteeing basic rights to every Nevadan impacted by crime, but rather a very low ceiling tightly restricting what district courts can do to help victims obtain justice.

Both NRS 176.015 and Marsy's Law actually say that as a bare minimum sentencing courts must start with what the text lays out, but are free to go much further and consider much more, including all 50 of the very letters at stake here. Here is what the text actually says. Both NRS 176.105 and Marsy's Law permit people affected by any crime to communicate with district courts prior to criminal sentencings. Both expressly define the term victim to "include" those directly affected by the crime, and both also permit relatives of such victims to communicate, defining relatives to "include" certain immediate family members. *See* NRS 176.015(5)(b)(1) - (4) ("relative includes . . ."); 176.015(5)(d)(2) ("victim includes . . ."); Nev. Const. art. I, § 23(7) ("the term includes . . ."). Under settled principles of statutory interpretation, "[t]he use of the word 'includes' suggests the list is non-exhaustive rather than exclusive." *United States v. Wyatt*, 408 F.3d 1257, 1261 (9th Cir. 2005).

So both the Constitution and the statute contemplate that certain listed victims and their relatives may communicate with the court,

but they do not exclude other people from doing so as well. This plain meaning is made even more explicit in NRS 176.015(6), which provides that:

> 6. This section does not restrict the authority of the court to consider any reliable and relevant evidence at the time of sentencing.

Notably, section (6) is not limited to evidence provided by victims or relatives; evidence from victims and their relatives is already covered by sections 5(b) and 5(d), and statutes must be read so that their provisions aren't rendered "nugatory or mere surplusage." *Indep. Am. Party v. Lau,* 110 Nev. 1151, 1154, 880 P.2d 1391, 1392 (1994); *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 176 (2012). Thus, section (6) adds to sections 5(b) and 5(d), meaning that it permits a court to consider "any" other evidence that it deems relevant and reliable in addition to everything individually specified elsewhere in the statute. Courts have "repeatedly explained that when [legislatures] use[] the word 'any' without language limiting the breadth of the word, 'any' means all." *Regions Bank v. Legal Outsource PA*, 936 F.3d 1184, 1194 (11th Cir. 2019) (internal quotations marks omitted), quoting *CBS Inc. v. PrimeTime24 Joint Venture*, 245 F.3d 1217, 1223 (11th Cir. 2001). *See generally* Fed. R. Evid. 807 (the catch-all provision for hearsay); *see also Webb, ex rel. Webb v. Clark Cty. Sch. Dist.*, 125 Nev. 611, 619, 218 P.3d 1239, 1245 (2009) ("NRCP 8(c)'s enumerated defenses that must be pleaded is a catchall provision that includes 'any other matter constituting an avoidance or affirmative defense.'"). Section (6) therefore permits courts to consider "any" (meaning "all") such additional evidence from any source or person. Under NRS 176.015(3)(b), when those people wish to communicate, they are

free to express "any" (meaning "all") views regarding the impact of the crime or the defendant.

Taken together, NRS 176.015(5)(b), 176.015(5)(d), Nev. Const. art. I, sec. 23(7), and NRS 176.015(6), collectively say that sentencing courts may consider evidence from three distinct kinds of people: victims of the crime under NRS 176.015(5)(d)(2), defined to "include" those victims listed but not to exclude others; relatives of such victims under NRS 176.015(5)(d), defined to "include" those relatives listed but not to exclude others; and people who are neither victims nor their relatives but possess information "reliable and relevant" to the court's sentencing discretion under NRS 176.015(6) and Nev. Const. art. I, sec. 23(7).

This is a floor, not a ceiling. It permits courts to do more for victims, not less. But the majority reads both NRS 176.015 and Marsy's Law to mean the exact opposite: that nobody but the victims and relatives expressly itemized in the statute may communicate with a sentencing court, and if anyone else wishes to communicate, what they're allowed to say is very narrow and guarded by the Nevada Rules of Evidence and especially its prohibition against hearsay. By doing so, the majority reads them not as laws that broaden the power of a sentencing court to consider how crimes affect those who live in our community, but instead to restrict what courts used to be able to do. This is not only textually wrong, but places into jeopardy dozens, perhaps hundreds or even thousands, of criminal sentences imposed across the State since 1990 in which victims sought justice from our courts. The casualty of all of this is that Marsy's Law—a constitutional provision enacted by an overwhelming majority of voters in 2018 for the express purpose of expanding the rights of victims of crimes—becomes something that somehow restricts rights that crime victims

already had before 2018 but now have been taken away. I respectfully dissent.

I.

Aparicio got so drunk that his BAC was measured as high as .204, considerably more than twice the legal limit of .08, and then drove his car at roughly 100 miles per hour into another car legally stopped at a red light, killing both occupants. After pleading guilty, 50 family members and friends sent written letters to the prosecutor describing the impact of the crime, which the prosecutor then provided to the sentencing judge. Some of the letters were from people who weren't family members themselves, but knew the surviving family members and vividly described their pain in the wake of the deaths. Some came from friends, neighbors, and co-workers of the victims, and some from distant relatives like uncles and aunts not specifically listed as "relatives" in NRS 176.015.

Aparicio objected to 46 of the letters. The district court overruled the objection, read the letters, and sentenced Aparicio. The majority now reverses, reasoning that because many of the letters came from people not specifically listed and contained subject matter not explicitly set forth in NRS 176.015(5), the sentencing judge could not consider them.

II.

The rise of victims' rights is one of the signal accomplishments in criminal law over the last half-century. Prior to the 1970's, criminal sentences took little to no account of the impact of the crime upon its victims. Beginning in the 1970's, after a series of infamous and widely publicized judicial decisions in which violent offenders were given unusually lenient sentences without any input from victims and sometimes over their express objections, legislatures around the country began to

amend the sentencing process in order to carve out a more prominent role for victims. *See* Carrington & Nicholson, *The Victims' Movement: An Idea Whose Time Has Come*, 11 PEPPERDINE L.REV. 1, 4-8 (1984) (describing early victories of the victims' rights movement, including passage of the Omnibus Victim and Witness Protection Act of 1982, 96 Stat. 1248, which mandated the inclusion of victim impact statements in federal presentence reports); MacDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM.CRIM. L.REV. 649, 670-71 (1975-1976) (describing early "innovative" attempts to integrate victims into the sentencing process). *Cf. Kelly v. California*, 555 U.S. 1020 (2008) (Stevens, J., dissenting from denial of petition for writ of certiorari) (summarizing history of various victims' rights laws).

The Nevada Legislature was a bit late to the game but eventually followed suit, adding language to NRS 176.015 in 1989 (effective 1990) that, for the first time, ensured that victims would have some mechanism to be heard by the courts prior to the imposition of sentence upon their attackers. *See* AB 746 (1989). This statute was subsequently amended and expanded multiple times over ensuing years, in 1991, 1995, 1997, 2001, 2009, and 2017. Most recently, victims' rights have been enshrined in our state's Constitution through "Marsy's Law," approved in 2018 by an overwhelming majority of Nevada voters (61%). The Nevada Constitution now guarantees that victims of crimes are entitled "[t]o be reasonably heard, upon request, at any public proceeding . . .in any court involving . . . sentencing . . . ." Nev. Const. § 8A(h).

Here, the majority's reading ignores the plain text of the law. The Constitution demands that courts read statutes in a way that respects the Legislature's constitutional law-making power, which means reading the text as the Legislature wrote it. When a court interprets a statute, "[t]he

legislature's intent should be given full effect." *Freeman v. Davidson*, 105 Nev. 13, 16, 768 P.2d 885, 887 (1989). "It is the prerogative of the Legislature, not this court, to change or rewrite a statute." *Holiday Ret. Corp. v. State of Nev., Div. of Indus. Relations*, 128 Nev. 150, 154, 274 P.3d 759, 761 (2012). "When a statute is clear, unambiguous, not in conflict with other statutes and is constitutional, the judicial branch may not refuse to enforce the statute on public policy grounds. That decision is within the sole purview of the legislative branch." *Beazer Homes Nev. Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 578 n. 4, 97 P.3d 1132, 1134 n. 4 (2004). No matter how much we may dislike a statute as the Legislature wrote it, doing anything but honoring its intention while ignoring our own preference is tantamount to "engag[ing] in judicial legislation and rewrit[ing] the statute substantially." *City of Las Vegas v. Eighth Judicial Dist. Court*, 118 Nev. 859, 867, 59 P.3d 477, 483 (2002), *abrogated on other grounds by State v. Castaneda*, 126 Nev. 478, 245 P.3d 550 (2010). It's replacing a statute that the Legislature wrote with a new approach that nobody but judges ever voted to approve, without committee hearings, without legislative evidence, without public comment or debate, without negotiating with 63 other members of the legislature representing the diverse populace of this state, and without the signature or veto of the Governor.

III.

NRS 176.015 is a long statute that governs how district courts may impose criminal sentences on defendants, setting forth a set of procedures that apply to every sentencing hearing whether a victim seeks to speak or not. Only a few lines of it relate to the rights of victims of crime, and those lines are very simple:

> 3. After hearing any statements presented pursuant to subsection 2 and before imposing

sentence, the court shall afford the victim an opportunity to:

(a) Appear personally, by counsel or by personal representative; and

(b) Reasonably express any views concerning the crime, the person responsible, the impact of the crime on the victim and the need for restitution.

5.

....

(b) "Relative" of a person includes:

(1) A spouse, parent, grandparent or stepparent;

(2) A natural born child, stepchild or adopted child;

(3) A grandchild, brother, sister, half brother or half sister; or

(4) A parent of a spouse.

(d) "Victim" includes:

(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).

6. This section does not restrict the authority of the court to consider any reliable and relevant evidence at the time of sentencing.

When reading a statute, we start with its words, given them their plain and ordinary meaning unless it appears clear that the Legislature used them differently. *See* Scalia & Garner, *Reading Law: The*

Interpretation of Legal Texts 56 (2012) ("[t]he words of a governing text are of paramount concern"). If those plain words are unambiguous, we go no further.

The crux of this appeal comes down to this. When a statute provides a list of some sort—whether of people, places or things—there are two alternative ways to read it: either as exclusive or as permissive. The interpretive doctrine that reads a statutory list as a closed and exclusive is known as *expressio unius est exclusio alterius*, which means that the statute excludes all that it does not expressly include:

> the interpretive canon *expressio unius est exclusio alterius* expressing one item of [an] associated group or series excludes another left unmentioned. If a sign at the entrance to a zoo says "come see the elephant, lion, hippo, and giraffe," and a temporary sign is added saying "the giraffe is sick," you would reasonably assume that the others are in good health. The force of any negative implication, however, depends on context. The *expressio unius* canon applies only when circumstances support[ ] a sensible inference that the term left out must have been meant to be excluded.

NLRB v. SW General, Inc., 137 S.Ct. 929, 940 (2017) (internal quotation marks and citations omitted). This interpretive approach does not apply to statutes whose language indicates that a particular list was intended to be non-mandatory and non-exclusive. *Id.* "We have long held that the *expressio unius* canon does not apply unless it is fair to suppose that [the Legislature] considered the unnamed possibility and meant to say no to it, and that the canon can be overcome by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion."

Marx v. General Revenue Corp., 568 U.S. 371, 381 (2013) (internal quotations marks and citations omitted).

Here, the plain text of NRS 176.015 makes clear that this exclusive approach was not what the Legislature enacted. The statute lists certain victims and certain relatives permitted to speak, but prefaces the list with the word "includes," and "[t]he use of the word 'includes' suggests the list is non-exhaustive rather than exclusive." *Wyatt*, 408 F.3d at 1261 (9th Cir. 2005). Section 5(b) says that "relative includes" the listed people, which in its natural meaning conveys that the term encompasses what follows but does not exclude others not expressly identified. Section 5(d) says the same thing about victims: "victim includes" the people listed, but can encompass more. Marsy's Law has the same language, "[i]f the victim is less than 18 years of age, incompetent, incapacitated or deceased, the term *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. . . ." Nev. Const. art. I, § 23(7) (emphasis added).

That would be enough, but it gets even more express. NRS 176.015(6) goes so far as to openly say that the statute is not exclusive: "This section does not restrict the authority of the court to consider any reliable and relevant evidence at the time of sentencing." By its plain terms, section (6) is a negative provision that clarifies what the statute does not do; it says that the statute does nothing to restrict the court's power to consider "any" evidence falling entirely outside of the four corners of the statute. Courts have "repeatedly explained that when [legislatures] use[] the word 'any' without language limiting the breadth of the word, 'any' means all." *Regions Bank*, 936 F.3d at 1194 (internal quotations marks omitted), quoting *PrimeTime24 Joint Venture*, 245 F.3d at 1223. *See generally* Fed.

R. Evid. 807 (the catch-all provision for hearsay); *see also Webb, ex rel. Webb*, 125 Nev. at 619, 218 P.3d at 1245 ("NRCP 8(c)'s enumerated defenses that must be pleaded is a catchall provision that includes 'any other matter constituting an avoidance or affirmative defense.'"). In other words, it says that the statute is not a closed list but a minimum guarantee.

Likewise, the statute describes the subject matter that victims can address in equally broad terms: victims can reasonably express "any" views concerning the crime, the defendant, or the impact of the crime. NRS 176.015(3)(b). "Any" means "all."

Thus, every provision of the statute that relates to victim-impact testimony is clearly written in broad, non-exclusive terms. The Legislature chose these words, and we must give them effect as written. But we can also measure the statute by what it omits. When the Nevada Legislature wants to make a statute exclusive, it uses very different language to achieve that result. For example, Nevada's workers' compensation statute provides for an exclusive remedy because it says so right there in the text: NRS 616A.020 is titled "Rights and remedies exclusive" and its body specifies that "the rights and remedies provided . . . shall be exclusive." NRS 616A.020(1). In contrast, the Legislature used no such words anywhere in NRS 176.015, and "a material variation in terms suggests a variation in meaning." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012).

Applying these rules and reading the plain textual language as the Legislature wrote it, the statute seems pretty clear to me: section (3) guarantees what victims have the right to do, and section (5) describes some (but not all) of the people who possess that right. Section 5(d) identifies victims to "include" (but not be limited to) people injured or killed as a direct result of the crime (section 5(d)(2)) as well as their relatives (section

(5)(d)(3)), defined to "include" (but not be limited to) spouses, parents, grandparents, stepparents, children, siblings, or a spouse of a parent (section 5(b)(1) - (4))). Section 3(a) states that victims may communicate in person or through an attorney or other representative. Section 3(b) lists topics that they have the right to address, including "any" (meaning "all") views relating the crime, the person responsible, and the impact of the crime on the victims, and the need for restitution. Section (4) requires the prosecutor to give reasonable notice to the defendant if any victims wish to use this mechanism. Finally, section (6) states that "[t]his section does not restrict the authority of the court to consider any reliable and relevant evidence at the time of sentencing."

By its terms, the scheme provides a minimum guarantee of rights that does not preclude or eliminate other additional rights, with section (6) expressly specifying that district courts consider more evidence (indeed, "any" additional evidence, meaning "all") than the statute guarantees. The statute identifies certain victims entitled to those rights but its broad language unequivocally allows district courts the discretion to hear as well from other people impacted by the crime whether listed in the statute or not. Overall, it sets a minimum floor to what a sentencing court is required to consider, rather than an outer boundary to what a sentencing court is permitted to consider.

Thus, a fair reading of the text of both NRS 176.015 and Marsy's Law make clear that they were designed to be broad and open-ended, not narrow and exclusive. This interpretation is further supported by the historical context behind both.

IV.

NRS 176.015 created victims' rights for the first time during the 1989 Legislative session, and it read in its entirety as follows (additions to the statutory language added in 1989 in italics and brackets):

> 176.015 1. Sentence **[shall]** ***must*** be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail.
>
> 2. Before imposing sentence the court shall **[**afford**]** *:*
>
> *(a) Afford* counsel an opportunity to speak on behalf of the defendant **[and shall address]** *; and*
>
> *(b) Address* the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment.
>
> ***3. Before imposing sentence the court shall afford the victim an opportunity to:***
>
> ***(a) Appear personally or by counsel; and***
>
> ***(b) Reasonably express any views concerning the crime, the person responsible, the impact of the crime on the victim and the need for restitution.***
>
> ***4. The prosecutor shall give to the victim reasonable notice of the hearing to impose sentence. Any defect in notice or failure of the victim to appear are not grounds for an appeal or the granting of a writ of habeas corpus or petition for post-conviction relief.***

> ***5. For the purposes of this section, "victim" has the meaning ascribed to it in NRS 213.005.***

See AB 746 (1989). A year later, in 1990, the Nevada Supreme Court interpreted this language as narrowly limited to permitting victims to contact the court in only two ways: either live in-person victim testimony or, alternatively, by sending letters not to the prosecutor or to the court, but rather to the State Division of Parole and Probation, to be indirectly summarized in a Pre-Sentence Investigation (PSI) report submitted to the court. *Buschauer v. State*, 106 Nev. 890, 804 P.2d 1046 (1990). Unhappy with this interpretation, the Legislature amended the statute in 1991 and then again in 1995 to read as follows:

> 176.015 1. Sentence must be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail.
>
> 2. Before imposing sentence the court shall:
>
> (a) Afford counsel an opportunity to speak on behalf of the defendant; and
>
> (b) Address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment.
>
> 3. Before imposing sentence the court shall afford the victim an opportunity to:
>
> (a) Appear personally , **[or]** by counsel **[;]** ***or by personal representative;*** and

(b) Reasonably express any views concerning the crime, the person responsible, the impact of the crime on the victim and the need for restitution.

4. The prosecutor shall give [to the victim] reasonable notice of the hearing to impose sentence **[.]** ***to:***

(a) The person against whom the crime was committed;

(b) A person who was injured as a direct result of the commission of the crime;

(c) The surviving spouse, parents or children of a person who was killed as a direct result of the commission of the crime; and

(d) Any other relative or victim who requests in writing to be notified of the hearing.

Any defect in notice or failure of **[**the victim**]** *such persons* to appear are not grounds for an appeal or the granting of a writ of habeas corpus.

5. For the purposes of this section **[, "victim" has the meaning ascribed to it in NRS 213.005.]** ***:***

(a) "Relative" of a person includes:

(1) A spouse, parent, grandparent or stepparent;

(2) A natural born child, stepchild or adopted child;

(3) A grandchild, brother, sister, half brother or half sister; or

(4) A parent of a spouse.

(b) "Victim" includes:

(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).

6. This section does not restrict the authority of the court to consider any reliable and relevant evidence at the time of sentencing.

See AB 186 (1995), AB 227 (1991). The Legislature then amended the statute again in 1997 (SB 219) and 2001 (SB 181), and again in 2009 (AB 187) to read as follows:

176.015 1. Sentence must be imposed without unreasonable delay. Pending sentence, the court may commit the defendant or continue or alter the bail.

2. Before imposing sentence, the court shall:

(a) Afford counsel an opportunity to speak on behalf of the defendant; and

(b) Address the defendant personally and ask him if ~~[he]~~ ***:***

(1) He wishes to make a statement in his own behalf and to present any information in mitigation of punishment ~~[.]~~ ***; and***

(2) He is a veteran or a member of the military. If the defendant is a veteran or a member of the military and meets the qualifications of paragraphs (b) and (c) of subsection 2 of section 7 of this act, the court may, if appropriate, assign the defendant to:

(I) A program of treatment established pursuant to section 6 of this act; or

(II) If a program of treatment established pursuant to section 6 of this act is not available for the defendant, a program of treatment established pursuant to NRS 176A.250 or 453.580.

3. After hearing any statements presented pursuant to subsection 2 and before imposing sentence, the court shall afford the victim an opportunity to:

(a) Appear personally, by counsel or by personal representative; and

(b) Reasonably express any views concerning the crime, the person responsible, the impact of the crime on the victim and the need for restitution.

4. The prosecutor shall give reasonable notice of the hearing to impose sentence to:

(a) The person against whom the crime was committed;

(b) A person who was injured as a direct result of the commission of the crime;

(c) The surviving spouse, parents or children of a person who was killed as a direct result of the commission of the crime; and

(d) Any other relative or victim who requests in writing to be notified of the hearing.

➥ Any defect in notice or failure of such persons to appear are not grounds for an appeal or the granting of a writ of habeas corpus. All personal information, including, but not limited to, a current or former address, which pertains to a victim or relative and which is received by the prosecutor pursuant to this subsection is confidential.

5. For the purposes of this section:

(a) ***"Member of the military" has the meaning ascribed to it in section 4 of this act.***

(b) "Relative" of a person includes:

(1) A spouse, parent, grandparent or stepparent;

(2) A natural born child, stepchild or adopted child;

(3) A grandchild, brother, sister, half brother or half sister; or

(4) A parent of a spouse.

~~[(b)]~~ ***(c) "Veteran" has the meaning ascribed to it in section 5 of this act.***

(d) "Victim" includes:

(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).

6. This section does not restrict the authority of the court to consider any reliable and relevant evidence at the time of sentencing.

The net effect of these amendments was two-fold. First, in 1990, the definition of "victim" was extremely narrow, but the Legislature has widely expanded it since then. Second, in 1990 the statute contemplated only two methods for a victim to convey his or her testimony to the court: only via live testimony, or by sending written documentation to the Division or Parole and Probation for inclusion in the PSI report. The plain words of the 1989 version of the statute permitted no other method. *Buschauer*, 106 Nev. 890, 804 P.2d 1046. In 1995, the Legislature expressly added section (6) to

permit much more. Indeed, when AB 186 was introduced in 1995 to add section (6), its stated purpose was as follows:

> Existing law permits only the victim to appear personally or through counsel to express views concerning the crime and its impact on the victim. Testimony indicated that it is sometimes difficult for victims to appear, so this bill creates a mechanism for the expression of views relevant to sentencing by persons other than the direct victim.

Thus, the overtly stated purpose of the amendment was to overrule and change "existing law" by allowing "persons other than the direct victim" to be heard. If this means anything, it means that section (6) was added to expand, not constrict, the kinds of people entitled to communicate with the court through NRS 176.015.

During legislative committee hearings to review the amendment, witnesses understood the bill to expressly permit "courts [to] receive Victim Impact Statements to take into consideration at the time of sentencing." (Testimony of Mr. Doyle, Douglas County District Attorney, Minutes of the Assembly Committee on the Judiciary, March 14, 1995). Notably, then-district Judge Michael P. Gibbons of the Ninth Judicial District Court specifically drew attention to the language of then-Section (6), in testimony described in the Committee minutes as: "Judge Gibbons called attention to subsection 6 on the second page which he said was added because the language of the supreme court decision is fairly restrictive." (Minutes of the Senate Committee on Judiciary, April 5, 1995).

The bottom line of all of this is simple: section (6) was always designed to be just what its plain words seem to say: to be expansive, not restrictive; to allow sentencing courts to consider more, not less. Section (6)

was expressly designed to expand what district courts were permitted to do in 1990; the legislative history behind it is full of express references to "changing existing law" that was too "restrictive" at the time.

That begs the next logical question: what was the state of existing law in 1990? When the Legislature designs a statute to change existing law, it "is understood to legislate against a back-ground of common-law . . . principles." *Samantar v. Yousuf*, 560 U.S. 305, 320, n. 13 (2010). The Legislature is presumed to be familiar with interpretations of its statutes by the judiciary. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 (2009) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute.") (citing *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)); *see also Nevada State Democratic Party v. Nevada Republican Party*, --- Nev. ---, ---, 256 P.3d 1, 2 (Nev. 2011).

Since well before the 1990's, sentencing hearings have never been fact-finding adjudications based upon evidence admissible under the rules of evidence, but rather exercises of judicial discretion in which courts can consider any information not "impalpable or highly" suspect and are "privileged to consider facts and circumstances which clearly would not be admissible at trial." *Silks*, 92 Nev. at 93-94, 545 P.2d at 1161; *see Denson*, 112 Nev. at 492, 915 P.2d at 286 (sentencing court may consider information that is not "impalpable or highly suspect"); *Goodson*, 98 Nev. at 495-96, 654 P.2d at 1007 (same). "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, this court will refrain from interfering with the sentence imposed." *Silks*, 92 Nev. at 94, 545 P.2d at 1161.

When section (6) was added, it was designed very purposefully and deliberately to expand what then-existing law allowed crime victims to

do and say during sentencing hearings. It also expanded "existing law" by allowing "persons other than the direct victim" to be heard. Its plain text reflects its breadth: "nothing" in the statute "prohibits" a sentencing court to consider things that the statutory text does not contemplate.

V.

Despite this, the majority makes sentencing hearings more restrictive than they were in 1990. How does it accomplish this? It reads section (6) not as a negative provision that explains what the statute does not do, but rather as a positively-phrased closed limit that strictly constricts what the court may consider.

For example, the majority complains that some of the letters could not be considered because they contained "hearsay" that would not be "admissible" under the Nevada Rules of Evidence, but suggests that they could be considered if put in the form of "declarations and affidavits." (Order, p. 6).

But the text of NRS 176.015 contains none of the following words: "admissible," "evidence," "hearsay," "declaration," or "affidavit." The actual text of NRS 176.015 only states that the sentencing court is free to consider information that is "reliable and relevant," words that the majority blithely equates to "admissible at trial under the Nevada Rules of Evidence" without any evidence in the text that the statute was designed this way. Worse, it expressly contradicts at least one long-settled Nevada Supreme Court case, *Silks*, 92 Nev. 91, 545 P.2d 1159, which expressly concluded that the sentencing court "is privileged to consider facts and circumstances which clearly would not be admissible at trial." *Id.* at 93-94, 545 P.2d at 1161. It also completely ignores that sentencing hearings have never been conducted in accordance with the high standards of the rules of evidence, but require only information that is not "impalpable or highly suspect,"

whether admissible or not. *Denson*, 112 Nev. at 492, 915 P.2d at 286; *Goodson*, 98 Nev. at 495-96, 654 P.2d at 1007.

Moreover, it's an absurd conclusion because the majority's distinction between handwritten victim-impact letters and "declarations and affidavits" fails even on its own terms: declarations and affidavits are hearsay just as inadmissible as handwritten letters. *See Singh v. Holder*, 593 F. App'x 690, 691 (9th Cir. 2015) ("affidavits are hearsay"); *F.T.C. v. Nat'l Bus. Consultants, Inc.*, 376 F.3d 317, 322 (5th Cir. 2004) ("affidavits are hearsay under Rule 801 of the Federal Rules of Evidence. They do not qualify as a hearsay exception under either Rule 803 or Rule 804."). More, all handwritten victim-impact letters are hearsay, because all of them were written out of court in lieu of live in-person testimony. Under the hearsay rule, there's no legal distinction whatsoever between the 4 letters that the majority approves of and the 46 that it deems improper; every one of them would be hearsay.

Know what else is inadmissible hearsay? The central sentencing document: PSI reports prepared by the Division of Parole and Probation are hearsay compilations prepared out of court summarizing information received from other sources.

> Although presentence reports are an extremely useful sentencing tool, by their nature the information they contain is 'generally hearsay, even remote hearsay at the second and third remove.' *United States v. Frushon*, 10 F.3d 663, 666 (9th Cir. 1993) (quoting *United States v. Fine*, 975 F.2d 596, 603 (9th Cir. 1992)). As a result, presentence reports are generally inadmissible at trial to prove any of the hearsay reports they contain. *See United States v. Matta-Ballesteros*, 71 F.3d 754, 767 (9th Cir. 1995), as amended by 98 F.3d 1100 (9th Cir. 1996). Because they are not subject to evidentiary standards,

> presentence reports may also contain factual errors.

United States v. Kovac, 367 F.3d 1116, 1120 (9th Cir. 2004). If the majority is correct that the court cannot consider hearsay, then it cannot consider PSIs.

Further, the Nevada Supreme Court held that NRS 176.015 permits victims to write impact letters to Parole and Probation which could then summarize them in the PSI report. *See Buschauer*, 106 Nev. 890, 804 P.2d 1046. The statute still permits victims to utilize that method today. Many do. Know what that is? It's an out-of-court letter summarized in an out-of-court PSI report: not just hearsay, but double hearsay to boot. I'm having trouble seeing how NRS 176.015 can be read to permit such double-level-hearsay but yet exclude the single-level-hearsay about which the majority now complains.

Here are some other things that are hearsay. Police reports are hearsay. *See Carrasco v. Las Vegas Metro. Police Dep't*, 4 Fed. Appx. 414, 416 (9th Cir. 2001) (reversing summary judgment because "police reports by themselves are unauthenticated hearsay"); *Emami v. Dist. Court*, 834 F.2d 1444 (9th Cir. 1987) (police reports are inadmissible in civil lawsuits). Descriptions of a defendant's criminal history unsupported by certified copies of judgments of conviction are hearsay—in other words, the very description of the defendant's criminal record set forth in the PSI report. *See Kirksey v. State*, 107 Nev. 499, 504, 814 P.2d 1008, 1011 (1991) (three-judge panel erred by considering "computer printout that appears to contain Kirkey's criminal history" without a certified copy of any valid judgment of conviction, and error was "troubling" but harmless considering plethora of other evidence). Further, arguments of counsel are hearsay, because

attorneys are not percipient witnesses to any event relevant to the crime (indeed, if they were, they could not serve as attorneys in the case). *See In Re Execution of Search Warrants*, 134 Nev. Adv. Op. 97 (2018) ("arguments of counsel . . . are not evidence"); *S. Sutter, LLC v. LJ Sutter Partners, L.P.*, 193 Cal. App. 4th 634, 668 (2011) ("We give no weight to counsels statements, as arguments by counsel are not evidence.").

In short, the majority adds verbiage to NRS 176.015 that is not only not present anywhere in the text, but operates to prevent district courts from considering just about everything that district courts have always considered during sentencing hearings for decades, including such things as police reports describing the crime, PSI reports, criminal history reports, and arguments of counsel, all of which are hearsay.

Worse, if the hearsay rule applies at all to sentencing hearings, then the majority has changed the very nature of sentencing hearings. The rules of evidence are required when a court engages in fact finding. But sentencing hearings aren't supposed to be fact-finding inquiries, only exercises in judicial discretion. *See Martinez v. State*, 115 Nev. 9, 13, 974 P.2d 133, 135 (1999) ("[a] defendant is not entitled to a full evidentiary hearing at sentencing regarding restitution."). But if the rules of evidence apply, sentencing hearings must now be conducted as formal bench trials based upon witness testimony and documents admissible under the rules of evidence and subject to cross-examination. This isn't what the statute says, and it places into jeopardy every criminal sentencing in which no such formal bench trial was conducted, meaning every criminal sentence ever imposed in the State of Nevada since 1990. If the majority means what it says, then they're all illegal and all of them ought to be reversed.

VI.

Here are some conclusions that flow from the way the majority reads the statute. The majority concludes that some of the letters cannot be considered because the writers did not personally know the dead victim, i.e., they came from people who "never even met" the deceased. (Order, p. 5).

But that requirement doesn't appear anywhere in the statute either, and adding it makes no sense. The statute contemplates two distinct kinds of victims: those who survive and are victims themselves, and those who die and whose surviving family members become "victims." *See* NRS 176.015(5)(d)(2) and (5)(d)(3) (contrasting the "person who has been killed" with a "relative" of a person who has been killed). Under the statute, both are victims. It seems perfectly clear to me that a letter from someone who doesn't personally know a deceased victim, but who knows the surviving family members and can describe the impact that the death had upon them, possesses information that is "reliable and relevant" to the criminal sentence. Indeed, that is the point of NRS 176.015(5)(d)(3) and Marsy's Law: to enable the court to learn how the criminal death of one person affected any surviving family members. One doesn't have to know the deceased to speak to the pain suffered by the survivors. Yet the majority says that if witnesses didn't personally know the deceased, the statute prohibits them from saying anything about the survivors that they do know. The majority effectively reads the statute to require that courts can only consider letters from people who knew all of the victims, both living and dead, but not letters from people who only knew the living victims but not the dead ones. But this language appears nowhere in the text, and there's no evidence anywhere, either inside or outside the text, that the Legislature intended this result.

VII.

Here are some more conclusions that the majority's reading demands. If the statute is exclusive as the majority thinks and nobody but the listed "victims" and "relatives" can testify, then orphans will never have anyone to speak for them because foster parents and social workers aren't among the "victims" or "relatives" expressly listed in NRS 176.015, no matter how many years they spent raising the orphan before he died. Conversely, if the deceased was a foster parent himself, then the orphans that he raised can't speak if they were never formally adopted, no matter how many years they spent together. Yet an estranged parent who abandoned the deceased decades ago would be permitted to testify because the statute includes "parents." But not life-long best friends or roommates, and not any distant relatives like uncles or aunts who raised the deceased in the parent's absence. Elderly widows and widowers whose parents and siblings may be long dead cannot have friends or distant family speak for them. In short, the majority reads the statute to permit plenty of testimony on behalf of those privileged to hail from two-parent families with lots of siblings, but to treat the most vulnerable and alone among us very differently based upon nothing but the formal dictionary title of their relationships.

Romantic partnerships present another problem. Per the majority, husbands and wives of deceased victims would be permitted to speak, but not boyfriends or girlfriends who never bothered to legally marry the deceased no matter how long their relationship. Even fiances and fiancees are excluded because they're not yet legal spouses, even if the sentencing hearing occurs the very day before the wedding. The majority also reads the statute to exclude romantic partners who were legally prohibited from marrying, such as same-sex or LGBTQ relationships prior

to 2015 (and, rest assured, we are still receiving appeals from cases adjudicated prior to 2015 with great regularity, especially on habeas review). If any same-sex partner of a deceased victim spoke to a Nevada sentencing court prior to 2015, that sentence is now void and must be reversed for the exact same reason that the majority reverses Aparicio's sentence. I wonder if this is a constitutional way to read NRS 176.015; a statute that permits married men and women to speak for each other but prohibits unmarried same-sex or LGBTQ partners from doing so strikes me as questionable in the wake of *Obergefell v. Hodges*, 576 U.S. 644 (2015) (invalidating state laws prohibiting same-sex marriage as violating the Equal Protection Clause). We're supposed to read statutes in a way that renders them constitutional, not in a tortured way that raises questions of constitutionality. *See State v. Kopp*, 118 Nev. 199, 203, 43 P.3d 340, 342-43 (2002) ("It is well settled that when a statute may be given conflicting interpretations, one rendering it constitutional, and the other unconstitutional, the constitutional interpretation is favored") (internal quotations marks omitted).

VIII.

As another example, let's look at what the majority's reading does to restitution. The majority concludes that victim-impact letters cannot contain hearsay, that they can only originate from victims particularly listed in NRS 176.015, and that the writers must personally know the deceased. These requirements are individually wrong for the simple reason that they appear nowhere in the statute. But things get worse when you combine all three principles together.

Consider how these rules apply to restitution, one of the categories of information the statute requires the court to consider under NRS 176.015(3)(b). Normally, courts can rely on medical bills or funeral

invoices to award restitution for medical or funeral expenses. But not according to the majority, and here's why. Funeral homes aren't listed among the "victims" identified in NRS 176.015. Neither are hospitals, physicians, or other health-care providers. So according to the majority, funeral homes and medical providers cannot communicate directly with the court under NRS 176.015 to request compensation for expenses because they are not themselves victims identified within the statute. But family members can't provide the court with invoices or bills for those expenses either, because that would be inadmissible hearsay; the recipient of a bill or invoice cannot authenticate a third-party invoice merely because it was received in the mail. *See United States v. Borrasi*, 639 F.3d 774, 779-80 (7th Cir. 2011) ("statements written by physicians not testifying before the court" are hearsay); *United States v. Christ*, 513 F.3d 762, 769-70 (7th Cir. 2008) ("statements made by third parties" in a business record are hearsay to recipients who do not work for the business). So, in order to satisfy the majority's interpretation, medical providers and funeral homes must send live witnesses to testify if they seek restitution. *But see Martinez v. State*, 115 Nev. 9, 13, 974 P.2d 133, 135 (1999) ("[a] defendant is not entitled to a full evidentiary hearing at sentencing regarding restitution."). But when they arrive, they run smack dab into this problem: they aren't victims themselves and they "never met" the deceased before he died, so according to the majority their information can't be considered. So even though NRS 176.015(5)(b) specifically authorizes victims to request restitution, the majority's interpretation deprives victims of any reasonable way to ask for it.

IX.

The majority also complains because certain victims asked the court to impose the maximum sentence upon Aparicio. But there's nothing

wrong with this. Under NRS 176.015(3)(b), victims can express "any" (meaning "all") views regarding the impact of the crime or the defendant. The Nevada Supreme Court has always read the statute broadly to permit requests for particular sentences:

> Appellant contends in particular that the district court denied him a fair sentencing hearing because it allowed the victim and the victim's mother to request that the district court impose the maximum possible sentence. . . . we have held that a victim may request that the district court impose a specific sentence. *Randell v. State*, 109 Nev. 5, 7-8, 846 P.2d 278, 280 (1993).

Smith v. State, 112 Nev. 871, 872-73, 920 P.2d 1002, 1002-03 (1996). The supreme court follows this approach today. *See Fluckiger v. State*, Docket No. 78074 (Order of Affirmance, April 16, 2020), 460 P.3d 994 (2020); *Leahy v. State*, Docket No. 75966 (Order of Affirmance, June 17, 2019), 442 P.3d 1080 (2019); *Cervantes v. State*, Docket No. 77233 (Order of Affirmance, October 24, 2019), 450 P.3d 913 (2019); *Bond v. State*, Docket No. 75804 (Order of Affirmance, June 17, 2019), 443 P.3d 545 (2019).

X.

It's atextual, indeed anti-textual—as well as ahistorical—to interpret the addition of section (6) as the majority does: by permitting less, not more, than was permitted in 1990. In 1990, sentencing courts could consider inadmissible hearsay and could consider evidence that merely met the extraordinarily low standard of not being "impalpable or highly suspect." Since at least 1996, victims have been permitted to ask the court to impose the maximum sentence. In 1989, the statute narrowly defined the kinds of victims entitled to speak, but the 1990 Legislature deemed this

too "restrictive" and purposely added language broadly (and non-exclusively) expanding the definition of both victims and relatives. As section (6) was understood in the 1990s, all 50 of the letters in this case would have been proper. But the majority applies none of these principles and concludes that 46 of the letters are no longer proper today, effectively concluding that the district court here could consider less evidence from crime victims than courts used to be able to.

The remedy for this oddity is to just read NRS 176.015 as written, with no elaborate spin: the focus is not upon the artificial title of the relationship between the letter-writer and the deceased, but rather upon the quality of the "evidence" that the witness possesses and whether that information will help the court. NRS 176.015(b) and (d) identifies certain people entitled to speak, but it "includes" those people without excluding others. Under NRS 176.015(6), the sentencing court can consider "any evidence" that helps regardless of the source or any formal relationship to the victim. Under NRS 176.015(3)(b), victims can express "any" views regarding the impact of the crime or the defendant. These plain and unadorned words are how orphans, foster parents, best friends, long-term companions, elderly widows and widowers, and other non-traditional family members can all, every one of them, get justice as "victims" when someone kills a loved one in a crime

XI.

The result of this appeal should have been affirmance. In evaluating an appeal from a sentencing hearing, we are permitted only to reverse for "abuse of discretion." "The sentencing judge has wide discretion in imposing a sentence, and that determination will not be overruled absent a showing of abuse of discretion." *Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). A district court's "determination to admit or exclude

evidence is given great deference and will not be reversed absent manifest error." *Vega v. State*, 126 Nev. 332, 342, 236 P.3d 632, 638 (2010).

An "abuse of discretion" occurs when "no reasonable judge could reach a similar conclusion under the same circumstances." *Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014). Thus, our inquiry on appeal is not to determine whether the letters are "reliable and relevant"—which actually is supposed to mean anything even a smidge more than "impalpable or highly suspect"—but rather whether any reasonable judge could have considered them to be reliable and relevant under that low standard. Whether we would have considered them ourselves is beside the point when the district court is given "great discretion" to which we must defer. Here, a reasonable judge could easily conclude that none of the letters fell below the generous standard of being anything more than "impalpable or highly suspect," and could have considered all of them.

For these reasons, I respectfully dissent. "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, this court will refrain from interfering with the sentence imposed." *Silks*, 92 Nev. at 94, 545 P.2d at 1161.

Tao, J.

Tao

cc: Hon. Cristina D. Silva, District Judge
Nevada Defense Group
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk