IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSHUA RAY VASQUEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 79409-COA

ORDER VACATING JUDGMENT AND REMANDING

Joshua Ray Vasquez appeals from a judgment of conviction entered pursuant to an *Alford*[1] plea of battery with the use of a deadly weapon constituting domestic violence. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.[2]

Vasquez claims the district court abused its discretion at sentencing by failing to rule on his objections to the presentence investigation report (PSI). He argues that he timely objected to the Division of Parole and Probation's scores, that sentencing was continued to allow the Division to respond to his objections (which it did), and that the district court was advised that he still had objections to the PSI but did not rule on

[1]*See North Carolina v. Alford*, 400 U.S. 25 (1970).

[2]The Honorable Ronald J. Israel presided over the initial sentencing, ordered sentencing continued, and directed the Division of Parole and Probation to prepare a supplemental presentence investigation report. The Honorable Joseph T. Bonaventure presided over the continued sentencing and imposed the sentence.

them. He asserts that errors in the Division's computation of his scores will negatively affect his prison classification and parole eligibility.

We review a district court's sentencing decision for abuse of discretion. *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). "[A]n abuse of discretion [also] occurs whenever a court fails to give due consideration to the issues at hand." *Patterson v. State*, 129 Nev. 168, 176, 298 P.3d 433, 439 (2013).

"A defendant has the right to object to factual or methodological errors in sentencing forms, so long as he or she objects before sentencing." *Blankenship v. State*, 132 Nev. 500, 508, 375 P.3d 407, 412 (2016) (brackets and internal quotation marks omitted). The Nevada Supreme Court has emphasized that any objections made by a defendant to his PSI "must be resolved prior to sentencing." *Id.*; *Sasser v. State*, 130 Nev. 387, 390, 324 P.3d 1221, 1223 (2014); *Stockmeier v. State, Bd. of Parole Comm'rs*, 127 Nev. 243, 250, 255 P.3d 209, 214 (2011).

Vasquez properly objected to his PSI prior to sentencing and argued that his scores should have been higher in several categories but were not because the Division relied upon subjective criteria, impalpable or highly suspect evidence, or misread NAC 213.590 by disregarding portions of the code or allowing the code to bring about absurd results.[3] The district court did not resolve Vasquez's objections.

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[3]We note NAC 213.590 was repealed in 2016.

We conclude that the district court abused its discretion by sentencing Vasquez without due consideration to his objections to the PSI, and therefore, Vasquez's sentence must be vacated and his case remanded for resentencing. Accordingly, we

ORDER the judgment of the district court VACATED AND REMAND this matter to the district court for proceedings consistent with this order.

_____, C.J.
Gibbons

_____, J.
Bulla

TAO, J., concurring:

"Vague laws invite arbitrary power." *United States v. Havis*, 907 F.3d 439, 450 (6th Cir. 2018) (Thupar, J., concurring), quoting *Sessions v. Dimaya*, ___ U.S. ___, 138 S.Ct. 1204, 1223 (2018) (Gorsuch, J., concurring in part and concurring in the judgment). What happens when an executive-branch agency acts without any law or regulation at all to constrain it — not even a vague one?

This seemingly simple appeal from the imposition of a criminal sentence raises serious separation-of-powers questions regarding the power of the administrative state and the deference that courts must give it. This appeal challenges the validity of the criteria that governs how the Nevada Division of Parole and Probation (P&P) drafts its Pre-Sentence

Investigation Reports (PSI's) which include recommendations regarding how P&P thinks criminal defendants ought to be sentenced by the district court in any particular case. Nevada law requires P&P to prepare such a PSI and make a sentencing recommendation to the court in every case in which a defendant stands convicted of a felony crime. NRS 176.135(1); NAC 213.580. The PSI must include a specific recommendation as to whether P&P considers the defendant a suitable candidate for probation rather than imprisonment. NRS 176.145; NAC 213.610.

The legal framework governing P&P's sentencing recommendations was originally created in 1989 by NRS 213.10988, a statute that required P&P to establish, by regulation, "standards" for its PSI recommendations. NRS 213.10988(1) states as follows:

> 1. The Chief Parole and Probation Officer shall adopt by regulation standards to assist him or her in formulating a recommendation regarding the granting of probation or the revocation of parole or probation to a convicted person who is otherwise eligible for or on probation or parole. The standards must be based upon objective criteria for determining the person's probability of success on parole or probation.

The statute represents a legislative command that P&P has no discretion to ignore. "The use of the word 'shall' in the statute divests the district court of judicial discretion." *Goudge v. State*, 128 Nev. 548, 553, 287 P.3d 301, 304 (2012) (internal citations omitted). Further, "[t]his court has explained that, when used in a statute, the word 'shall' imposes a duty on a party to act and prohibits judicial discretion and, consequently, mandates the result set forth by the statute." *Id.* "It is a well-settled principle of statutory construction that statutes using the word 'may' are generally directory and

permissive in nature, while those that employ the term 'shall' are presumptively mandatory." *Nev. Comm'n on Ethics v. JMA/Lucchesi,* 110 Nev. 1, 9-10, 866 P.2d 297, 302 (1994). "[T]his court has stated that 'shall' is mandatory unless the statute demands a different construction to carry out the clear intent of the legislature." *Pasillas v. HSBC Bank USA,* 127 Nev. 462, 467, 255 P.3d 1281, 1285 (2011) (quoting *S.N.E.A. v. Daines,* 108 Nev. 15, 19, 824 P.2d 276, 278) (internal quotation marks omitted). "'[S]hall' is mandatory and does not denote judicial discretion." *Johanson v. Eighth Judicial Dist. Court,* 124 Nev. 245, 249–50, 182 P.3d 94, 97 (2008) (alteration in original) (quoting *Washoe Medical Center v. Second Judicial Dist. Court,* 122 Nev. 1298, 1303, 148 P.3d 790, 793 (2006)).

Thus, P&P is legally required to adopt regulations as set forth in NRS 213.10988. In response, P&P implemented NAC 213.590 setting forth 27 criteria, which P&P followed from 1989 until 2016. The Nevada Supreme Court reviewed and summarized the regulation and its criteria in *Blankenship v. State,* 132 Nev. 500, 508, 375 P.3d 407, 412 (2016). However, a few months after *Blankenship* was decided, NAC 213.590 was repealed on December 21, 2016. Because these criteria are no longer included in any regulation, we need not decide whether they were ever sufficient to comply with NRS 213.10988.

Instead, in 2016 NAC 213.590 was replaced by adding a new second paragraph to NAC 213.580 that reads as follows:

> The Division will conduct an evaluation pursuant to subsection 1 using an objective evidence-based assessment tool that incorporates the standards adopted by the Chief Parole and Probation Officer pursuant to NRS 213.10988 and is predictive of continued criminality. The Division may consider

> certain variables as part of an evaluation, including, without limitation, the criminal history, employment and residential stability, social and behavioral patterns, education, family situation, mental health and mental disabilities of and any substance abuse by the person being evaluated.

The plain text of this regulation states that P&P will base evaluations upon "standards" that will be adopted, which "may" include such variables as "criminal history, employment and residential stability, social and behavioral patterns, education, family situation, mental health and mental disabilities of and any substance abuse." The first sentence is mandatory ("will") but non-specific as to what is required. The second sentence contains more detail but is entirely optional ("may") and therefore need not be followed.

So the situation we have before us is this. In NRS 213.10988, the Legislature commanded ("shall") P&P to adopt by regulation "standards" based upon "objective criteria." As of 2016, the only regulation that complies with this command is NAC 213.580 which only goes so far as to promise that P&P will conduct evaluations using "standards" to be otherwise adopted. The problem is this: NAC 213.580 is not itself a "regulation" that embodies "standards." It's nothing more than a bland promise that P&P will create some "standard" outside of NAC 213.580 that the regulation does not itself identify. This promise is accompanied by a list of optional variables that P&P may, but need not, consider. The question is whether NAC 213.580 is sufficient to comply with the command of NRS 213.10988.

To make things even more complicated, P&P has admitted in court filings that it still continued to use the 27 criteria previously set forth

in NAC 213.590 that were repealed in 2016. In an amicus brief filed with the Nevada Supreme Court several months after the repeal of NAC 213.590, P&P stated that "the Division has not implemented an updated or different PSI scoring tool" and "continues to utilize the former scoring tool, including the 27 objective criteria formally contained in NAC 213.590." Amicus Brief of the State of Nevada, Department of Public Safety, Division of Parole and Probation, p.5 n.4, filed October 23, 2017, in *Lashouri v. State*, No. 72205, 2018 WL 3000492 (June 8, 2018). Based upon the PSI issued in Vasquez's case, P&P appears to still rely upon at least some, if not all, of those 27 criteria today, four years after NRS 213.590 was repealed.

This is a problem. In fact, it's multiple problems piled atop one another. First, it's questionable whether NAC 213.580 actually complies with NRS 213.10988. NRS 213.10988 commands that P&P create regulations adopting standards based upon objective criteria, to which P&P responded by creating a regulation that did not actually adopt any standards or any objective criteria but merely promised that P&P would issue standards and be objective in its internal evaluations. But a promise to issue a standard is not itself a standard, and a promise to be objective is not itself an objective criterion. Thus, currently there does not seem to exist any regulation that includes any standard or any objective criteria for such recommendations. P&P may have some kind of internal scoring sheet and other evaluation tools that include such a standard with such criteria, but those things are not regulations themselves, and whatever may be contained in those scoring tools does not appear within any regulation that I can see. *See* NRS 213.10988(4).

Second, by issuing sentencing recommendations that follow no standard set forth in any regulation, P&P is making those recommendations in what is, virtually by definition, an arbitrary and capricious manner and without due notice to criminal defendants facing the prospect of prison sentences.

Third, P&P appears to still employ the 27 criteria previously set forth in now-repealed NAC 213.590 to make recommendations today. If so, then it is using standards and criteria that do not appear in any regulation currently in existence.

All of these represent serious problems. Until P&P implements new regulations as required by statute — regulations that actually contain standards based upon objective criteria within them — I would suggest that sentencing courts in this State ignore any PSI issued by P&P when making sentencing decisions, at risk of having any sentence that relies upon such PSI's deemed invalid and reversed.

I.

Vasquez isn't the world's most sympathetic appellant. After an extremely violent attack on his then-girlfriend, he was originally charged with a variety of felonies including kidnapping but eventually pled guilty to one count of Battery with Use of a Deadly Weapon Constituting Domestic Violence. But "[a] judge who likes every result he reaches is very likely a bad judge, reaching for results he prefers rather than those the law compels." *A.M. v. Holmes*, 830 F.3d 1123, 1170 (10th Cir. 2016) (Gorsuch, J., dissenting). Whatever Vasquez did, my concern here is about the law far more than anything to do with Vasquez in particular.

In preparation for Vasquez's sentencing, P&P prepared a PSI that included background information describing Vasquez and the crime, as well as a recommendation regarding sentencing generated from a numeric score based upon a list of 27 factors previously set forth in NAC 213.590, including such things as (broadly described) the offender's prior criminal history (NAC 213.590(1)(a) - (g)), the nature of the present offense ((h), (i), (k) (l), (n), (o), (p)), the physical, emotional, and financial harm to the victim (j), the offender's educational and employment background ((q), (r), (s), (t), (u), (v), (w)), and the offender's amenability to rehabilitation (((x), (y), (z), (aa)).

Upon reviewing the PSI, Vasquez objected to certain portions of it, and the district court directed P&P to review and address the objections. In response, P&P filed a Supplemental PSI that offered further explanation regarding its recommendations and adjusted some of the point calculations, but largely re-affirmed the original sentencing recommendation. With the new explanation, Vasquez conceded some of his previous objections but continued to assert other objections to the PSI. The district court noted that the objections were a matter of record and imposed sentence.

Vasquez now appeals, arguing that the district court "failed to resolve" some of his outstanding objections. A defendant facing criminal sentencing has the right to object to the contents of the PSI, so long as the objection is made before sentencing. *Blankenship v. State*, 132 Nev. 500, 508, 375 P.3d 407, 412 (2016). If any such objections are made, the district court must "resolve" the objection prior to imposing sentence. *Sasser v. State*, 130 Nev. 387, 390, 324 P.3d 1221, 1223 (2014).

District courts may not rely upon factual information that is "impalpable or highly suspect" in imposing criminal sentences, *Denson v. State*, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996), and a defendant may object if the court does rely on such information. Therefore, a PSI may not contain recommendations based on "impalpable or highly suspect" evidence. *Goodson v. State*, 98 Nev. 493, 495-96, 654 P.2d 1006, 1007 (1982). "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 v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). 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.

Here, a remand is necessary because the district court failed to resolve all of Vasquez's objections, leaving some of them hanging. But the larger question is how the district court must resolve those objections on remand.

II.

This appeal presents a question upon which, on further reflection, I have experienced something of a change in heart, as the filing of additional appeals raising the same or similar issues have forced this court to revisit the question from new perspectives with different sets of facts supported by new arguments crafted by different attorneys, giving me time for further and deeper consideration. But as Robert Jackson once put it, "I see no reason I should be consciously wrong today because I was

unconsciously wrong yesterday." *Massachusetts v. United States*, 333 U.S. 611, 639-640 (1948) (Jackson, J., dissenting).

In *Narcho v. State*, Docket No. 78075-COA (Order Vacating and Remanding, March 19, 2020) this court was presented with a "facial" challenge to the validity of the standards and criteria that used to be contained in pre-repeal NAC 213.590. Narcho argued that the regulations were illegal because the establishing statute, NRS 213.10988, required that P&P craft "objective criteria" governing how its sentencing recommendations were supposed to be made, and the actual regulations set forth in NAC 213.590 were not objective but rather, as Narcho argued, "highly subjective."

As an initial observation, Narcho's argument did not correctly frame NRS 213.10988; the statute did not require just "objective criteria" but rather by its plain words required "standards" which, in turn, must be based upon such objective criteria. In any event, in resolving the appeal, this court did not need to squarely confront the question of constitutionality or legality because the sentencing court had failed to either sustain or overrule Narcho's objection, and thus all we needed to do was remand the matter for the district court to resolve the objection in the first instance. But in dissent, I wrote that there was no need for the district court to do anything but deny the objection because NAC 213.590 appeared to be valid and legal. At the risk of boring readers by quoting myself, at the time I wrote:

> In interpreting the meaning, scope, and validity of an agency's regulations, courts must give considerable deference to how the agency itself interprets those statutes and regulations. In the federal judiciary, this kind of deference is known as

> "*Chevron*" deference when applied to agency interpretations of statutes, and "*Auer*" or "*Brand X*" deference when applied to agency interpretations of administrative regulations. Of late, both types of deference have been the subject of considerable controversy.
>
> But whatever ends up happening in the federal judiciary, as of today (and as of the date Narcho was sentenced), Nevada employs analogues of both forms of judicial deference to state agency actions.
>
> Consequently, while Narcho argues that P&P's criteria violates its governing statutes, the court cannot assume this to be true and, indeed, must begin by presuming the exact opposite.

(Citations omitted). However, this analysis was premised upon the unstated, but quite obvious, factual assumption that the standards and criteria actually existed and were not unicorns that resided only within someone's imagination. If those regulations do not in fact exist — as they appear not to upon a second inspection of the regulatory scheme — then the analysis I outlined in dissent in *Narcho* was not correct.

Unlike *Narcho*, the instant case doesn't quite assert a broad "facial" challenge to the legality of NAC 213.580. It only presents a more narrow "as-applied" challenge, with Vasquez arguing that P&P illegally scored him. But facial invalidity subsumes as-applied invalidity; if a set of regulations is invalid in a facial way, they also must necessarily be invalid as applied to any individual defendant. Thus, if P&P's approach to making recommendations is facially invalid, then it is also invalid as applied to Vasquez in this case. And it is in relation to that question where my change of heart has occurred.

I have now come to believe that the regulations may be invalid. In *Sierra Packaging & Converting LLC v. Nevada OSHA*, 133 Nev. 663, 669, 406 P.3d 522, 527 (Ct. App. 2017) (Tao, J., concurring), I wrote the following about the importance of requiring that federal regulations be published and followed:

> The very purpose of requiring that federal regulations be published for all the world to see is to give fair notice to potential violators of the precise conduct prohibited under pain of administrative sanction. *See* Oliver W. Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 459 (1897) (written law serves to notify when the state will bring its force to bear, and "a bad man has as much reason as a good one" to want to know when "the axe will fall"). Congress delegated some rule-making power in this arena to federal OSHA to define what conduct ought to be punished. But once OSHA exercised that delegated power and promulgated something into the Code of Federal Regulations, I doubt that Congress intended that its state counterparts could subsequently re-cast the meaning of those words on the fly, totally ad hoc, under the rubric of "agency interpretation," in order to penalize some unrelated conduct that OSHA's own published words don't reasonably cover. That strikes me as the very definition of "arbitrary," not to mention a serious due process problem to boot.
>
> Once written, words are supposed to have a fixed meaning that ought to be more or less understandable to any reasonable person endeavoring to read them with an eye toward avoiding penalty. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 78 (2012) ("Words must be given the meaning they had when the text was adopted."). It's true

> that litigants and lawyers may, and constantly do, argue over shades of meaning when the written words are unclear. But when words are clear, what shouldn't be the subject of argument is whether they have any definite meaning at all. Government agencies aren't supposed to be able to prosecute anyone they want whether or not the targeted conduct bears any relation to words published anywhere in any regulation or statute. Law isn't a looking-glass world where words mean whatever happens to be most convenient in one moment and something very different in the next. *See* Lewis Carroll, *Through the Looking-Glass* 188 (Signet Classic 2000) ("'When *I* use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.' 'The question is,' said Alice, 'whether you *can* make words mean so many different things.'").
>
> OSHA drafted a regulation and made it law through the regular procedures of the Administrative Procedures Act. Having done so, it (and its state counterpart agencies) ought to stand by the original meaning of its own regulation and not try to make it now mean something else. *Cf.* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150 (2016) ("*Chevron* encourages the Executive Branch (whichever party controls it) to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints.").

Sierra Packaging dealt with an agency (Nevada OSHA) asserting a premise that unduly stretched the words of the governing regulation beyond reason. But at least the words existed and any interested party could read them. Here, the problem is worse, because there are no words to read because

there are no "standards" within the regulation, despite the statutory command that they must exist. Whatever P&P is doing, it's doing on a whim ungoverned by any published words at all. The question we face is whether the Nevada Constitution permits such a thing to happen. I think not.

III.

NRS 213.10988 commands that P&P must issue regulations consisting of "standards" based upon "objective criteria" for sentencing recommendations. P&P has argued in court filings that it utilizes 27 criteria that previously existed within NRS 213.590. But those criteria do not exist within any regulation now, so they don't tell us whether P&P has complied with NRS 213.10988. Quite to the contrary, NRS 213.10988(4) specifies that the standards "shall" be issued as formal regulations under the procedures set forth in NRS Chapter 233B. The 27 criteria (as well as any internal scoring sheet that P&P might use) clearly do not qualify as such a thing. The only formal regulation that actually exists is NAC 213.580. Only if NAC 213.580 complies with NRS 213.10988 can we conclude that P&P is in compliance with its statutory mandate.

NAC 213.580 says that P&P will use objective tools, but those tools are not included within the text of NAC 213.580, so they aren't part of any regulation. The remainder of NAC 213.580(2) states that P&P "may" (but apparently is not required to) consider such things as "criminal history, employment and residential stability, social and behavioral patterns, education, family situation, mental health and mental disabilities of and any substance abuse." Does this list comply in setting "standards" based upon "objective criteria"? That's a complicated question, because in reading

regulations we have to deal with the question of deference, which I will discuss below in the next section. But as a general matter, deference is due only to interpretations of statutory and regulatory text that are "reasonable." With that in mind, I would say that the answer is questionable at best and probably worse than that.

Let's start with the text of NRS 213.10988. It requires P&P to create "standards" based upon "objective criteria." The Merriam-Webster On-Line Dictionary (2020) defines "standard" as follows:

> 3 : something established by authority, custom, or general consent as a model or example
>
> 4 : something set up and established by authority as a rule for the measure of quantity, weight, extent, value, or quality

Black's Law Dictionary (11th ed. 2019) defines "objective" as

> objective *adj.* (17c) 1. Of, relating to, or based on externally verifiable phenomena, as opposed to an individual's perceptions, feelings, or intentions <the objective facts>. 2. Without bias or prejudice; disinterested <because her son was involved, she felt she could not be objective>. 3. Existing outside the mind as something real, not only as an idea <objective reality>.

The Merriam-Webster On-Line Dictionary (2020) defines "objective" as:

> 1.a: expressing or dealing with facts or conditions as perceived without distortion by personal feelings, prejudices, or interpretations . . . b. of a test: limited to choices of fixed alternatives and reducing subjective factors to a minimum; 2.a: of, relating to, or being an object, phenomenon, or condition in the realm of sensible experience independent of individual thought and perceptible by all observers : having reality independent of the mind.

As I understand it, a "standard" is a rule for measuring something. But NAC 213.580 includes no "standards" and doesn't even really try, only promising that "standards" will be created somewhere else. So right off the bat the regulation has a defect.

The promise of standards is followed by a list of "variables." Perhaps the variables represent a standard, one might suggest. But they're optional ("may"): P&P can ignore the variables when it issues recommendations, so the recommendations need not be based upon the variables at all. That's not much of a standard. Beyond that, are they "objective"? "Objective criteria" refers to criteria that are not open to interpretation and ought not change based solely upon the whims of any individual observer. But many of the variables listed within NAC 213.580 aren't anything like that. Things like "employment history" and "criminal history" are only questionably (at best) "criteria" that most would consider "objective." I doubt that any reasonable person would read such words as "social and behavioral patterns" and "residential stability" and know what they mean without having to resort to their own "perceptions, feelings, or intentions" to give them meaning that doesn't exist within the regulation itself. *See* Black's Law Dictionary definition of "objective."

Let's review just one example from the list. Take "residential stability." Construed generously, one could read some objectivity into this term; one could understand it to refer, for example, to the number of times a defendant changed residence addresses during a certain period of time. That provides a number or, even better, a ratio of average address changes per year, which certainly sounds objective. But how much weight to give to that ratio, and how to understand the context surrounding that ratio, are

entirely different questions, as is the ultimate question of how that ratio links to the likelihood of future criminality or success on probation. Suppose a defendant has lived at four different addresses within a four-year period. Is that proof of residential stability or instability? If the defendant changed addresses because he repeatedly quit jobs for no reason, one might reasonably conclude that living in four different places in four years would be evidence of instability that might reflect a lack of character. But if he lost his job and was evicted during the 2008 economic crash because his company declared bankruptcy, then moved back with his parents to look for work, then found a job and moved to a new apartment, then did so well that he was promoted and bought a new house, that might also indicate instability in a technical way, but most people would say not any accompanying deficiency in character. Or, if the defendant was a college student who lived in four different dormitories during each year of school, most people would conclude that there exists no evidence of instability at all, but rather as much stability as ever comes with life as a college student.

And that's just one example that ignores even more vague items on the list, like "social and behavioral patterns." I dare someone to explain to me how that's an "objective" thing at all under the common meaning of the term "objective."

So one might conclude that the plain text of NAC 213.580 only questionably complies with the command of NRS 213.10988. But when evaluating administrative regulations issued by executive branch agencies, we don't merely look at the text of a regulation, draw our own conclusions, and call it a day. Rather, there's another layer of analysis involved, which relates to the question of deference.

IV.

Administrative regulations have the force of law when "properly adopted." *See State ex rel. Nev. Tax Comm'n v. Saveway Super Serv. Stations, Inc.*, 99 Nev. 626, 630, 668 P.2d 291, 294 (1983) ("A properly adopted substantive rule establishes a standard of conduct which has the force of law."). In interpreting regulations issued through the Nevada Administrative Procedures Act, NRS Chapter 233B, courts are required to give "broad deference" to the agency that issued them. *See State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000) ("When determining the validity of an administrative regulation, courts generally give 'great deference' to an agency's interpretation of a statute that the agency is charged with enforcing."); *State Indus. Ins. Sys. v. Miller*, 112 Nev. 1112, 1119, 923 P.2d 577, 581 (1996) ("The construction placed on a statute by the agency charged with the duty of administering it is entitled to deference.").

But this simple statement opens up a Pandora's box of complications that the Nevada Supreme Court has not yet resolved, because there are actually several different potential kinds of deference (to different kinds of actions) to choose from.

Under the federal administrative system, there exist several different kinds of judicial deference to executive branch agencies depending upon what the agency did and what kind of statute or regulation authorized the agency action. They're commonly known as *Chevron* deference, *Chevron USA. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), under which courts must defer to reasonable agency interpretations of statutes enacted by the Legislature that the agency is charged with enforcing; *Auer* or *Brand-*

X deference, *Auer v. Robbins*, 519 U.S. 452 (1997) and *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Svcs.*, 545 U.S. 967 (2005), under which courts must defer to reasonable agency interpretations of the agency's own properly-issued regulations; *Seminole Rock* deference, *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), under which courts must defer to an agency interpretation clarifying its own ambiguous regulations and those interpretations pre-empt the regulations themselves; and deference under what's known as "*Chenery II*," *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), under which agencies are permitted to issue new regulations with retroactive effect by adjudicating enforcement actions without having to publish the new regulations through the formal rule-making process.

The Nevada Supreme Court has stated that courts must give "great deference" to how Nevada executive agencies interpret the statutes they are charged with enforcing. *See State Farm Mut. Auto. Ins. Co.*, 116 Nev. at 293, 995 P.2d at 485. This is a clear and explicit state analogue to federal *Chevron* deference. But what's less clear is whether that simple statement is enough to create a state-law analogue for each and every additional kind of deference known in the federal system, including *Auer, Brand X, Seminole Rock,* and *Chenery II* deference. What's even less clear is whether the Nevada Constitution permits such analogues when our state constitution is more expressly protective of the concept of separation-of-powers than the U.S. Constitution is.

Here, there are multiple interrelated questions that involve different potential kinds of deference. The first is whether NAC 213.580 complies with the command of NRS 213.10988 that regulations must

include "standards" based upon "objective criteria." The answer to this depends partly upon what P&P thinks NRS 213.10988 actually means. If the statutory word "standard" within NRS 213.10988 means what dictionaries commonly define it to mean, then the answer may be no, for the reasons I've outlined above. But if the word means something else, then the answer may be quite different. We must give "deference" to however P&P answers this question, because the agency is interpreting a statute it is charged with enforcing. *See id.* But *Chevron*-type deference applies only when the agency interpretation is "reasonable" in view of the actual text of the statute. Unreasonable interpretations are not entitled to deference. *See Chevron*, 467 U.S. at 845. In fact, *Chevron* sets forth a two-level analysis ("Chevron Step One" and "Chevron Step Two") to determine whether an agency interpretation is entitled to deference or not. *Id.* at 842-43. It's unclear whether Nevada recognizes such a two-step approach, but the larger point is that not everything an agency says is entitled to judicial deference just because the agency believes it to be true. Here, I'm not sure there exists any reasonable interpretation of the text of NRS 213.10988 under which P&P can just issue a regulation consisting of little more than a promise to issue "standards" without actually stating what they are.

Then there's another level of deference here. Whether NAC 213.580 complies with NRS 213.10988 also depends on what NAC 213.580 itself means. And the question then becomes, do we interpret NAC 213.580 ourselves, or give deference to how P&P interprets it? If we give deference to P&P, then that involves a kind of *Auer* or *Brand X*-type deference to an agency interpretation of its own regulation, neither of which yet exists in Nevada. Even if they did exist, an agency interpretation of its own

regulation is entitled to deference only when it's reasonable, and unreasonable interpretations are entitled to no deference. Considering the text of NAC 213.580, I'm not sure that it's reasonable for any agency to interpret it as actually setting forth any "standards" based upon "objective criteria" when it expressly states that the agency will issue standards elsewhere outside of the regulation itself.

So there are a slew of unanswered questions at hand, but they all seem to tilt toward a conclusion that, even considering the deference we must give, no reasonable agency interpretation of NAC 213.580 can possibly make it satisfy the command of NRS 213.10988 that regulations must include "standards" based upon "objective criteria."

If that is correct, then there is only one remaining way to justify P&P's actions. We know what P&P is doing in practice; it's issuing recommendations using criteria not set forth in any formal regulation like NAC 213.580 but instead based upon 27 criteria that used to exist in NAC 213.290 but no longer exist anywhere within the NAC. The best argument that exists here in support of P&P is a kind of analogue to *Chenery II* deference under which state agencies need not publish regulations through the rulemaking process but can create them in an ad hoc manner through enforcement-type actions. *See SEC v. Chenery Corp.*, 332 U.S. 194 (1947). It's not exactly like *Chenery II* in that P&P isn't actually litigating cases that result in final adjudications through some kind of enforcement action. So it's actually a bit beyond *Chenery II* in that it allows P&P to make regulations by just doing what it chooses to do. If Nevada recognizes this kind of deference, we'd be permitting P&P (and every other executive agency) to create regulation simply by doing what it wants, without written

notice through NRS Chapter 233B, without a public comment period, and yet with retroactive effect. But is this an approach that the Nevada Constitution permits? While *Chenery II* is currently good law as applied to federal regulations and has been accepted as permitted under the U.S. Constitution, some prominent commentators have deemed it a serious threat to liberty and called for it to be overruled. *See* Neal Gorsuch, *A Republic If You Can Keep It*, 70-71 (2019). As other commentators have noted, after *Chenery II*, the number of federal regulations enacted through the actual rule-making process plummeted while the number of rules created by adjudication skyrocketed, and some agencies now do almost all of their rulemaking through adjudication rather than through the APA. *Id.; see also* Myron Magnet, *Clarence Thomas and the Lost Constitution*, 69-70 (2019).

But whether *Chenery II* remains good law in interpreting federal regulations, I harbor serious doubt that the Nevada Constitution permits any kind of state analogue to it that permits Nevada state agencies to make up rules on the fly, especially in criminal cases.

V.

The fundamental problem with excessive judicial deference to agency regulation is that it tramples upon the concept of separation-of-powers enshrined in both the U.S. Constitution and Nevada Constitution. *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, ___ U.S. ___, 140 S. Ct. 2183, 2186 (2020); *Dimaya*, ___ U.S. at ___, 138 S.Ct. at 1223. This division is "essential to the preservation of liberty" in order to prevent "a gradual concentration of the several powers in the same department." The Federalist No. 51, 321 (James Madison), quoted in *Morrison v. Olson*, 487

U.S. 654, 698 (1988) (Scalia, J., dissenting); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 640 (1952) (Jackson, J., concurring) ("the Constitution diffuses power the better to secure liberty . . . ."; "The purpose of the Constitution was not only to grant power, but to keep it from getting out of hand."). "[T]he Framers considered structural protections of freedom the most important ones . . . . The fragmentation of power produced by the structure of our Government is central to liberty, and when we destroy it, we place liberty at peril." *Nat'l. Fed. of Indep. Businesses v. Sebelius*, 567 U.S. 519, 707 (2012) (Scalia, J., dissenting). Indeed, there are some who have called for *Chevron, Auer, Brand X*, and *Chenery II* to all be overruled because they unconstitutionally permit Congress to overstep its constitutional bounds by enabling executive branch agencies to perform the legislative task of writing laws, while also allowing the same executive branch agencies to perform the traditionally judicial task of interpreting the laws that they just wrote without oversight or interference from actual courts. *See Baldwin v. U.S.*, 140 S.Ct. 690 (2020) (Thomas, J., dissenting from denial of certiorari) (questioning validity of *Brand X* deference); *Gundy v. U.S.*, 139 S.Ct. 2116 (2019) (Gorsuch, J., dissenting) (questioning scope of legislative delegation of power to the executive); *see also Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (questioning the constitutionality of *Chevron* deference as violating the principle of separation of powers); *Waterkeeper All. v. Envir. Protect. Agency*, 853 F.3d 527, 539 (D.C. Cir. 2017) (Brown, J., concurring) ("An Article III renaissance is emerging against the judicial abdication performed in *Chevron*'s name. If a court could purport fealty to *Chevron* while subjugating statutory clarity to agency 'reasonableness,' textualism will be

trivialized."). *Cf. Sierra Packaging & Converting LLC v. Nev. OSHA*, 133 Nev. 663, 669, 406 P.3d 522, 527 (Ct. App. 2017) (Tao, J., concurring) (questioning *Chevron* deference); *Tom v. Innovative Home Sys., LLC*, 132 Nev. 161, 178, 368 P.3d 1219, 1230 (Ct. App. 2016) (Tao, J., concurring) (noting practical problems with treating executive-branch advisory opinions as if they were judicial decisions). *See generally* Aaron L. Nielsen, *Beyond Seminole Rock*, 106 Geo.L.J. 943 (2017) ("*Seminole Rock*. . . may be living on borrowed time").

In criminal cases, excessive deference also trespasses upon basic Due Process requirements that criminal defendants be given fair notice of, and an opportunity to defend against, government actions that operate to deprive them of liberty. "Perhaps the most basic of due process' customary protections is the demand of fair notice." *Dimaya*, ___ U.S. at ___, 138 S.Ct. at 1223. Moreover, while some level of retroactivity can be tolerated in civil cases, ex post facto prosecution and punishment are constitutionally prohibited in criminal cases. *See Collins v. Youngblood*, 497 U.S. 37 (1990). Whatever merit *Chevron, Auer, Brand X, Seminole Rock,* and *Chenery II* deference (and their state analogues) may possess when an executive agency acts in civil or administrative actions where the stakes are limited to monetary fines or license revocations, when they're applied to criminal cases that result in long prison terms, "alarm bells should be going off." *Havis*, 907 F.3d at 450.

And that's just under the U.S. Constitution. State constitutions cannot be less protective of individual liberty than the U.S. Constitution, but they are entirely free to be more protective. *See* Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law*

(Oxford Univ. Press 2018). And the very purpose of separating governmental power into co-equal branches is to protect individual liberty. *See* The Federalist No. 51, 321 (James Madison). The Nevada Constitution explicitly assigns and divides governmental power among the three co-equal and independent branches of government in its own separate clause. Article III, section 1 states:

> The powers of the Government of the State of Nevada shall be divided into three separate departments, the Legislative, the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.

Nev. Const. art III, §1.

The Nevada Constitution tracks the U.S. Constitution on a number of fronts, such as, for example, search-and-seizure issues under the Fourth Amendment, *see State v. Lloyd*, 129 Nev. 739, 745, 312 P.3d 467, 471 (2013), and its Due Process Clause, *see Wyman v. State*, 125 Nev. 592, 600, 217 P.3d 572, 578 (2009). But it diverges somewhat from the federal constitution when it comes to the concept of separation of powers, and is likely even more protective than the U.S. Constitution is. *See Wallace v. Smith*, Docket No. 70574-COA (Order of Affirmance, Mar. 5, 2018) (Tao, J., concurring). The concept of separation of powers is only implied in the structure of the federal constitution, though very strongly and clearly implied. "The Constitution does not expressly announce that the national government is dedicated to the theory of separation of powers, but the intention of the framers clearly emerges from the language they used."

Eleanore Bushnell & Don W. Driggs, *The Nevada Constitution: Origin and Growth*, 78 (1980). In contrast, "Nevada attempts a distinct separation." *Id.* Unlike the U.S. Constitution, the Nevada Constitution contains an express and independent clause describing the three branches of government and separating them. Nev. Const. art III, §1; *cf. Comm'n on Ethics v. Hardy*, 125 Nev. 285, 292, 212 P.3d 1027, 1103-04 (2009) (discussing other differences between Nevada Constitution and U.S. Constitution).

That the Nevada constitution has such an express clause while the federal constitution does not suggests that the framers of the state constitution took the concept of separation of powers more seriously than perhaps even the federal founders did. They may even have thought that the decades of experience between the adoption of the federal constitution in 1789 and the drafting of the Nevada Constitution in 1864 showed that the federal articulation of the concept didn't go quite far enough, or at least wasn't clear enough.

In this case, there are at least three layers of constitutional problems. First, the statute that authorizes P&P's actions, NRS 213.10988 is extremely vague to the point of bordering on an unconstitutional delegation of legislative power to the executive without any guiding "intelligible principle" (a problem I'll explore a bit further in the next section). But that problem, as dangerous as it is, isn't quite at stake in this appeal because whether or not the Legislature's delegation was proper or excessive, the second problem that subsumes the first is that P&P may not have done what it was required to do under the statute anyway. Put aside whether you think P&P is entitled to some Nevada analogue of *Auer, Brand*

X, or *Chenery II* deference in how it interprets NRS 213.10988 and NAC 213.580. At the very least, P&P is currently relying upon a regulation that includes no "standards" of its own and instead relying upon 27 criteria that appear nowhere in any regulation. And that leads to the third problem: by acting without proper regulatory boundaries, every time P&P makes a sentencing recommendation, it does it without any defendant having any idea how or why it decided what it decided. Nobody quite knows how P&P makes its recommendations except insofar as it decides to tell us informally in such things as amicus briefs. Further, whatever method it might be using now, it's free to change it anytime it wishes without needing to actually propose any new regulations. It could, if it wanted to, even use different standards and criteria in different cases pending at the same time simply because there is no regulation that prohibits it from doing so. That strikes me as the definition of an arbitrary exercise of power. It might not quite be abusive, and I'm sure that P&P does its level best to ensure that its recommendations are as consistent as they can make them, if for no other reason than the public outcry (and loss of respect among the judges reading the recommendations) that would ensue if it didn't. But in the end, "the fairness of a process must be adjudged on the basis of what it permits to happen, not what it produced in a particular case." *Morrison*, 487 U.S. at 731. It might be true that P&P has been doing a pretty good job for the past four years, but the absence of fixed regulatory guideposts means that there's no legal prohibition against it doing something else entirely any time it wants.

Considering how much more expressly the Nevada Constitution preserves the idea of separation of powers then even the U.S. Constitution does, I doubt that it would permit this kind of approach.

VI.

One can argue that all of these problems originated in 1989 when the Legislature tried to grapple with the problem of making the imposition of probation and parole more uniform, but couldn't quite agree on how to do it. The "patient zero" here is NRS 213.10988.

NRS 213.10988 sprang from Senate Bill 546 (1989), which was designed for the express purpose of "requir[ing] the adoption of objective standards to be used in granting or revoking parole and probation." (Preamble to S.B. 546). But instead of actually devising any such "objective standards," the Legislature punted, crafting a statute that said, in its entirety, as follows:

> **NRS 213.10988 Chief to adopt standards for recommendations regarding parole or probation.**
>
> 1. The Chief Parole and Probation Officer shall adopt by regulation standards to assist him or her in formulating a recommendation regarding the granting of probation or the revocation of parole or probation to a convicted person who is otherwise eligible for or on probation or parole. The standards must be based upon objective criteria for determining the person's probability of success on parole or probation.
>
> 2. In establishing standards, the Chief Parole and Probation Officer shall first consider all factors which are relevant in determining the probability that a convicted person will live and remain at

> liberty without violating the law if parole is continued or probation is granted or continued.
>
> 3. The Chief Parole and Probation Officer shall adjust the standards to provide a recommendation of greater punishment for a convicted person who has a history of repetitive criminal conduct or who commits a serious crime, with a violent crime considered the most serious, than for a convicted person who does not have a history of repetitive crimes and did not commit a serious crime.
>
> 4. When adopting regulations pursuant to this section, the Chief Parole and Probation Officer shall follow the procedure set forth in chapter 233B of NRS for the adoption of regulations.
>
> 5. The Chief Parole and Probation Officer shall report to each regular session of the Legislature:
>
> (a) The number and percentage of recommendations made regarding parole and probation which conflicted with the standards; and
>
> (b) Any recommendations regarding the standards.

Digging through its five sections, all that this statute really says is that P&P should implement administrative regulations pursuant to the Administrative Procedures Act (NRS Chapter 233B) that strive to adopt more uniform standards. In other words, the Legislature didn't bother to actually come up with a solution, but instead just asked P&P to come up with one.

The Legislature's punt — and its clear and deliberate intention to do just that — are evidenced in the legislative debate surrounding S.B. 546. During testimony before the Assembly Judiciary Committee,

legislators noted that the issue was complex and that the Legislature had experienced difficulty for years in devising a good solution, with one complaining that "I don't know for how many sessions [we] have been trying to establish some parole guidelines in our prison system and they've never been able to pass . . . and I suggest to you that if we instituted prison guidelines we would have a more fair, more equitable system and I think you'd see a difference in terms of parole statistics." (Summary of testimony of Senator Wagner, Minutes of Assembly Committee on Judiciary, June 27, 1989). Another suggested that "[c]oncrete guidelines were needed in order to provide an objective base." (Summary of comments of Senator Horn, Minutes of Assembly Committee on Judiciary, June 27, 1989). On the other hand, others expressed concern over whether the proper approach should include clear guidelines at all, wondering whether including more details might "foster intense litigation in the area of sentencing and parole determinations." (Summary of comments of Chairman Sadler, Minutes of Assembly Committee on Judiciary, June 27, 1989). To alleviate these concerns, various amendments were made whose net effect would be, in the words of one witness, "court[s] would not even know what specific standards were used [by P&P] but relied, instead, on [P&P]'s recommendations." (Summary of comments of Douglas County District Attorney Brent Kolvet, Minutes of Assembly Committee on Judiciary, June 28, 1989). When certain legislators wondered why earlier versions had tried to specify some exact standards but those standards were later removed, one witness noted that "a person could not always objectively quantify each and every criteria to justify a particular sentence, or the granting of probation or parole. When those objective standards were mandated it . . . allowed the defendant an

opportunity to object to the objective standard used." (Summary of comments of Ed Basl, Washoe County Chief Deputy District Attorney, Minutes of Minutes of Assembly Committee on Judiciary, June 28, 1989). Others confirmed that the goal was for the bill not to specify any such standards, and "[i]f the committee wanted to set criteria and mandate it be done, [one witness] urged them to do it through an administrative process." (Summary of comments of Douglas County District Attorney Brent Kolvet, Minutes of Assembly Committee on Judiciary, June 28, 1989). Legislative counsel confirmed that, in this bill as amended, the "legislature was not setting forth the standards as other legislatures had chosen to do." (Summary of comments of Jennifer Stern, Legislative Counsel, Minutes of Assembly Committee on Judiciary, June 28, 1989).

So both its text and legislative origin make clear what the statute is: not legislating, but rather delegating the hard work of legislating to the executive branch. It's passing the buck to someone else so that the Legislature can claim political credit for doing "something," while leaving the actual substance of that "something" to be designed by someone else entirely. Then, if whatever regulations come out the other end of the administrative pipeline turn out to work well, the Legislature is poised to take credit. But if what comes out of the pipe doesn't work well, then there's an easy scapegoat at hand at which to point the finger.

Was this delegation constitutional? If the Nevada Constitution were exactly like the U.S. Constitution, then I'd say probably yes. The U.S. Supreme Court recently affirmed the validity of a broad delegation pretty much exactly like this one in *Dimaya*, ___ U.S. at ___, 138 S.Ct. at 1204. There, the court held that a federal statute that stated little more than that

the Attorney General must create and implement regulations governing the post-release registration of federal sex offenders was not an excessive delegation of legislative power to the Department of Justice. That law has obvious and close parallels to NRS 213.10988, so if we must apply the same constitutional test as *Dimaya* did, we must reach the same outcome.

But the Nevada Constitution isn't the same as the U.S. Constitution, and especially not on the idea of separation of powers. It has an express separation-of-powers clause that the U.S. Constitution does not. Unless we're willing to conclude that the framers of the Nevada Constitution, having had the advantage of decades of experience between 1789 and 1864 to design their own text, deliberately made the Nevada Constitution different than the U.S. Constitution on this point but, when they did so, they understood that they were doing nothing meaningful at all. I doubt that to be the case as a historical matter. And that assumption contradicts how we normally read constitutional text. Normally, "no part of a statute should be rendered nugatory, nor any language turned to mere surplusage, if such consequences can properly be avoided." *Indep. Am. Party v. Lau,* 110 Nev. 1151, 1154, 880 P.2d 1391, 1392 (1994) (citation and quotation marks omitted). Quite to the contrary, "a material variation in terms suggests a variation in meaning." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts,* 170 (2012). That suggests that the separation-of-powers analysis of *Dimaya* ought not bind us under the very different Nevada Constitution.

In any event, as this appeal comes to us, we need not reach a definitive conclusion either way. Whatever problems exist in NRS 213.10988, in the context of this appeal they're pre-empted by the more

immediate problem that, whether the underlying delegation of legislative power was legitimate or not, P&P didn't do what it was supposed to do under it anyway.

VII.

What P&P was supposed to do with NRS 213.10988 was create regulations setting forth "standards" based upon "objective criteria" governing sentencing recommendations. As things now stand, the only regulation that exists is NAC 213.580, which says little more than that P&P promises that it will issue such "standards" elsewhere and follow an objective process, without actually saying what those standards are or what "objective criteria" they're based upon. A promise to issue standards is not a standard.

What kind of regulations should P&P have issued instead? That's for P&P to say in the first instance; that's why power was granted to them in the first place by NRS 213.10988. As I noted in *Narcho*:

> [W]hile a court may conceivably strike down an individual agency action taken in violation of statutes or its own regulations, what no court can do under the Nevada Constitution is to write, by judicial fiat, new statutes or regulations that the agency must follow instead. NRS Chapter 233B sets forth strict procedures by which administrative executive-branch regulations must be enacted, and those procedures do not contemplate courts just creating such regulations from the bench from scratch. "A court can only strike down. It can only say 'This law or that law is void.' It cannot modify." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 651 (1943) (Frankfurter, J., dissenting); *see Holiday Ret. Corp.*

v. State of Nev., Div. of Indus. Relations, 128 Nev. 150, 154, 274 P.3d 759, 761 (2012) ("It is the prerogative of the Legislature, not this court, to change or rewrite a statute.").

VIII.

For the foregoing reasons, I concur that a remand is warranted because the district court never properly "resolved" all of Vasquez's objections. But I note that there may exist larger problems here that the district court may want to consider on remand.

When deciding what sentence to impose, some judges ignore P&P's recommendations. For example, my old Eighth Judicial District Court colleague Judge James Bixler used to announce in open court that he didn't even bother to read the recommendations because sentencing was an exercise of the court's discretion and he didn't consider P&P's views particularly important. But it's likely that other judges give some, perhaps even great, weight to them in considering what kind of sentence to impose. After all, there'd be no purpose in going through the effort to make such sentencing recommendations unless they're expected to play at least some part in the sentencing judge's decision, although how much influence they have may vary from case to case and judge to judge. Especially since P&P is the agency that would supervise the defendant if he or she is granted probation rather than incarcerated, it's safe to assume that the agency's recommendation as to whether it's willing to supervise the defendant probably carries at least some weight in many sentencing decisions. *See Goodson v. State*, 98 Nev. 493, 495-96, 654 P.2d 1006, 1007 (1982) ("Because the sentencing court will rely on a defendant's PSI, the PSI must not include information based upon "impalpable or highly suspect evidence.")

In view of the potential problems with the current regulations, it may behoove district judges to emulate what Judge Bixler used to do, and refrain from relying too heavily on any recommendations they receive from P&P until this serious defect is resolved.

_____, J.
Tao

cc: Hon. Ronald J. Israel, District Judge
Hon. Joseph T. Bonventure, Senior Judge
Special Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk