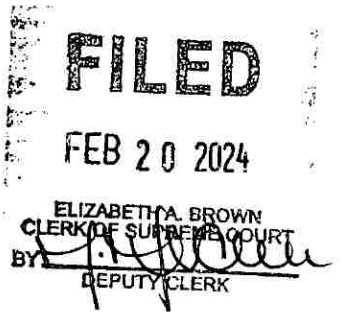
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PATROCINIO MENDOZA-PALACIOS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85880-COA



ORDER OF AFFIRMANCE

Patrocinio Mendoza-Palacios appeals from a judgment of conviction, entered pursuant to an *Alford*[1] plea, of attempted sexual assault and incest. Eighth Judicial District Court, Clark County; Crystal Eller, Judge.

First, Mendoza-Palacios argues the district court erred by accepting his *Alford* plea because (1) the factual basis for his plea supported the original charges of sexual assault of a minor under 16 years of age but not the charge of attempted sexual assault to which he pleaded; and (2) he did not understand the elements of attempted sexual assault. The State argues that Mendoza-Palacios cannot challenge the validity of his *Alford* plea on direct appeal and must raise his challenge in the district court in the first instance. In reply, Mendoza-Palacios appears to concede that such a challenge must generally be made to the district court in the first instance but argues that this court retains discretion to consider such claims when compelling reasons warrant review.

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

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Generally, this court will not consider a challenge to the validity of a guilty plea on direct appeal from a judgment of conviction.[2] *Bryant v. State*, 102 Nev. 268, 272, 721 P.2d 364, 367-68 (1986), *as limited by Smith v. State*, 110 Nev. 1009, 1010-11 n.1, 879 P.2d 60, 61 n.1 (1994). "Instead, a defendant must raise a challenge to the validity of his or her guilty plea in the district court in the first instance . . . ." *Id.* at 272, 721 P.2d at 368; *see also Smith*, 110 Nev. at 1010-11 n.1, 879 P.2d at 61 n.1 (stating that unless the error clearly appears from the record, a challenge to the validity of a guilty plea must be first raised in the district court in a motion to withdraw guilty plea or postconviction petition for a writ of habeas corpus). Mendoza-Palacios did not previously raise a challenge to the validity of his *Alford* plea in the district court, and the alleged errors do not clearly appear in the record. Therefore, we decline to consider this claim on appeal.

Second, Mendoza-Palacios argues the district court abused its discretion at sentencing by considering whether he had taken responsibility for his actions. Mendoza-Palacios contends he was not required to admit his guilt and that the district court punished him for entering an *Alford* plea. "The sentencing judge is accorded wide discretion in imposing a sentence; absent an abuse of discretion, this court will not disturb the district court's determination on appeal." *Martinez v. State*, 114 Nev. 735, 737-38, 961 P.2d 143, 145 (1998). "This discretion enables the sentencing judge to consider a wide, largely unlimited variety of information to insure that the punishment fits not only the crime, but also the individual defendant." *Id.* at 738, 961 P.2d at 145;

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[2]We note that an *Alford* plea is equivalent to a guilty plea insofar as how the court treats a defendant. *State v. Lewis*, 124 Nev. 132, 133 n.1, 178 P.3d 146, 147 n.1 (2008), *overruled on other grounds by State v. Harris*, 131 Nev. 551, 556, 355 P.3d 791, 793-94 (2015).

accord Denson v. State, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996) ("Possession of the fullest information possible concerning a defendant's life and characteristics is essential to the sentencing judge's task of determining the type and extent of punishment.").[3]

As a preliminary matter, the record does not indicate that the district court, although acknowledging that Mendoza-Palacios entered an *Alford* plea at sentencing, punished Mendoza-Palacios more harshly for having done so. The record indicates that prior to entry of his *Alford* plea, Mendoza-Palacios repeatedly suggested that he had engaged in the sexual conduct he was charged with but that his actions were not morally wrong. At a hearing on August 23, 2022, Mendoza-Palacios stated that "what I did wrong was to fall in love with" the victim and that he and the victim had a "beautiful relationship." On the first day of trial, Mendoza-Palacios initially stated he "did something wrong with [the victim] that is inappropriate" but then stated that "deep inside [his] heart," he did not feel he had "done anything wrong or bad." On the second day of trial, Mendoza-Palacios stated, "I feel bad of what happened, you know, with the age difference, but this was consensual." And

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[3]We note that where a defendant has exercised their right to a jury trial, the imposition of a harsher sentence due to the defendant's refusal to admit guilt violates their Fifth Amendment right against self-incrimination and constitutes an abuse of discretion if they maintained their innocence. *See Brake v. State*, 113 Nev. 579, 584-85, 939 P.2d 1029, 1033 (1997); *Brown v. State*, 113 Nev. 275, 291, 934 P.2d 235, 245-46 (1997); *Bushnell v. State*, 97 Nev. 591, 593-94, 637 P.2d 529, 530-31 (1981). However, this line of reasoning is inapplicable here. Mendoza-Palacios was not convicted pursuant to a jury verdict, and while defendants have a constitutional right to a jury trial, there is no correlating constitutional right to enter an *Alford* plea. *See Alford*, 400 U.S. at 38 n.11. Moreover, Mendoza-Palacios's right against self-incrimination is not implicated because he waived this right pursuant to the plea agreement.

Mendoza-Palacios repeated this sentiment at the sentencing hearing, when he stated he did not know the law and that he was "not guilty of anything."

Here, it appears that the district court's concern was the risk that Mendoza-Palacios posed to the public because of his failure to acknowledge the immorality of his behavior. A district court may consider the risk a defendant poses to the public. *See Dzul v. State*, 118 Nev. 681, 693, 56 P.3d 875, 883 (2002) (recognizing "the historical practice and understanding that a sentence imposed upon a defendant may be shorter if rehabilitation looks more certain and that confession and contrition are the first steps along the road to rehabilitation"). Given Mendoza-Palacios's admissions, he has not demonstrated that the district court was prohibited from considering whether he acknowledged the immorality of his actions in determining his sentence. Under the unique facts of this case, Mendoza-Palacios fails to demonstrate the district court abused its discretion by considering his conduct as it relates to public safety.

Third, Mendoza-Palacios argues the district court relied upon impalpable or highly suspect evidence when it determined that he did not take responsibility for his actions. Generally, this court will not interfere with a sentence imposed by the district court that falls within the parameters of relevant sentencing statutes "[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); *see Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998).

The district court relied upon Mendoza-Palacios's prior in-court statements in determining that he had not acknowledged the immorality of his conduct. For the reasons previously discussed, the district court's

determination is supported by the record. To the extent Mendoza-Palacios challenges the district court's characterization of his prior in-court statements, Mendoza-Palacios fails to demonstrate that the district court's characterization constitutes impalpable or highly suspect evidence. Therefore, we conclude Mendoza-Palacios is not entitled to relief on this claim.[4]

Fourth, Mendoza-Palacios argues the district court relied upon impalpable or highly suspect evidence when it considered the factual basis for his *Alford* plea because the alleged facts supported the original charges rather than the charge of attempted sexual assault to which he pleaded. The Nevada Supreme Court has not limited the facts that a sentencing court may consider to only those included within a charging document or in a plea agreement. *See Denson*, 112 Nev. at 494, 915 P.2d at 287 (stating a district court may consider prior uncharged crimes during sentencing); *Silks*, 92 Nev. at 94 n.2, 545 P.2d at 1161 n.2 (recognizing a district court may consider "other criminal conduct . . . , even though the defendant was never charged with it or convicted of it" (quotation marks omitted)). Moreover, Mendoza-Palacios confirmed in the plea agreement that he understood the sentencing judge could consider "information regarding charges not filed, dismissed charges, or charges to be dismissed pursuant to this agreement." Therefore, Mendoza-Palacios fails to demonstrate that the district court relied upon impalpable or highly suspect

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[4]Mendoza-Palacios also appears to argue the district court violated his First Amendment rights when it considered any prior in-court statements he made "regarding his beliefs." Mendoza-Palacios does not explain how consideration of his prior in-court statements at sentencing violated his First Amendment rights. Therefore, we decline to consider this argument. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority).

evidence when it considered the factual basis for his plea, and we conclude he is not entitled to relief on this claim.[5]

Fifth, Mendoza-Palacios argues the district court erred by imposing a more severe sentence because he exercised his constitutional right to a jury trial. Specifically, Mendoza-Palacios contends that when determining his sentence, the district court erroneously considered the fact that he entered his *Alford* plea on the fourth day of trial. "It is well established that a sentencing court may not punish a defendant for exercising his constitutional rights and that vindictiveness must play no part in the sentencing of a defendant." *Mitchell v. State*, 114 Nev. 1417, 1428, 971 P.2d 813, 820 (1998), *overruled on other grounds by Sharma v. State*, 118 Nev. 648, 655, 56 P.3d 868, 872 (2002), *and Rosky v. State*, 121 Nev. 184, 190-91, 111 P.3d 690, 694 (2005). "The defendant has the burden to provide evidence that the district court sentenced him vindictively."[6] *Id.*

At the sentencing hearing, the district court stated its recollection that Mendoza-Palacios did not take the plea deal until after voir dire had been completed and the State's witnesses "were here, ready, willing, and able to

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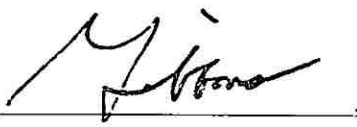
[5]To the extent Mendoza-Palacios reargues his claim that the factual basis for his plea is itself erroneous, we reiterate that this court will not consider a challenge to the validity of an *Alford* plea on direct appeal in the first instance. *See Bryant*, 102 Nev. at 272, 721 P.2d at 367-68.

[6]Mendoza-Palacios suggests the vindictiveness standard only applies "to re-trial and sentencing after a successful appeal." In *Mitchell*, the supreme court held that the district court did not vindictively sentence the defendant because the defendant exercised his constitutional right to a trial. 114 Nev. at 1429, 971 P.2d at 821. *Mitchell* did not indicate that the vindictiveness standard was limited to sentences imposed after a re-trial or a successful appeal, and the defendant in *Mitchell* did not challenge a sentence imposed after a re-trial or a successful appeal. *See id.* at 1428-29, 971 P.2d at 820-21. Therefore, we reject this claim.

testify." The district court did not refer to the case's procedural history as a justification for its sentencing decision, nor does the record otherwise indicate that this recollection informed the court's sentencing decision. Rather, the district court (1) explicitly stated it was basing its sentencing decision on the facts of the crimes as recited by the State during the plea canvass and (2) indicated that Mendoza-Palacios's failure to acknowledge the immorality of his behavior was also a factor in its sentencing decision. Therefore, we conclude the district court did not vindictively sentence Mendoza-Palacios because he exercised his constitutional right to a jury trial.

Having considered the sentence and the crime, we conclude the district court did not abuse its discretion in sentencing Mendoza-Palacios. Accordingly, we

ORDER the judgment of conviction AFFIRMED.[7]



_____, C.J.
Gibbons

_____, J.
Bulla

[7]The Honorable Deborah L. Westbrook did not participate in the decision in this matter.

cc: Hon. Crystal Eller, District Judge
Special Public Defender
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk