IN THE SUPREME COURT OF THE STATE OF NEVADA

JASON RICHARD LOFTHOUSE,	)	NO. 70587
	)	
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

Appellant JASON RICHARD LOFTHOUSE ("Lofthouse"), appeals from a final judgment under Nevada Rule of Appellate Procedure 4(b) and NRS 177.015. The district court filed the Judgment of Conviction on May 20, 2016. Appellant's Appendix Vol. II, p. 380 ("AA II 380"). Lofthouse filed his Notice of Appeal on June 9, 2016. Id. at 389.

ROUTING STATEMENT

Lofthouse's case is presumptively assigned to the Nevada Supreme Court. Lofhouse was convicted for two category A felonies after jury trial. Id. at 380-82. Convictions involving category A or B felonies after jury trial are not within the original jurisdiction of the

Court of Appeals. See NRAP 17(b)(2)(A). Additionally, Lofthouse's appeal involves the constitutionality of NRS 200.310(1) and issues of statewide importance regarding NRS 201.540 and NRS 200.310(1). See NRAP 17(a)(10)-(11).

ISSUES PRESENTED FOR REVIEW

I. Lofthouse Did Not Commit Kidnapping as a Matter of Law.

II. Lofthouse's prosecution under NRS 201.540 preempted his prosecution under NRS 200.310(1).

III. The District Court's Instructional Errors Deprived Lofthouse of His Constitutional Right to a Fair Trial.

IV. Lofthouse's General Verdict Violated His Federal and State Due Process Rights.

V. Lofthouse's Redundant Convictions Violated his Constitutional Right Against Double Jeopardy.

VI. The District Court's Refusal to Answer a Jury Question Violated Lofthouse's Constitutional Right to a Fair Trial.

VII. Prosecutorial Misconduct Violated Lofthouse's Constitutional Right to a Fair Trial.

VIII. The District Court Violated Lofthouse's Constitutional Right to Confront his Accuser.

IX. The State's Witness Improperly Opined Regarding Lofthouse's Guilt.

X. The District Court Violated Lofthouse's Nevada Constitutional Right Against Double Jeopardy by Increasing Lofthouse's Maximum Sentence.

XI. Cumulative Error Warrants Reversal.

STATEMENT OF THE CASE

The State filed a criminal complaint on June 9, 2015 charging Lofthouse with one count of Sexual Conduct between Certain Employees or Volunteers of School and Pupil[1] and one count of First-Degree Kidnapping.[2] AA I 1-2. The complaint alleged Lofthouse, a history teacher at Rancho High School, engaged in sexual conduct with his student M.T. Id.

Police arrested Lofthouse on June 4, 2015. Id. at 3. The court arraigned Lofthouse on June 9, 2015 and scheduled a preliminary

[1] NRS 201.540.
[2] NRS 200.310.

hearing for June 23, 2015.[3] Id. at 5. On June 23rd the court continued the preliminary hearing to July 9, 2015 at the State's request. Id. at 6.

Prior to the preliminary hearing the State filed an amended complaint adding 10 additional Sexual Conduct between School Employee and Pupil counts, two Open and Gross Lewdness counts[4]; and an additional First-Degree Kidnapping count. Id. at 9-13. The State presented one witness at the hearing. Id. at 7. At the hearing's conclusion the State voluntarily dismissed one Sexual Conduct between Certain Employees or Volunteers of School and Pupil count. Id. at 8. Lofthouse requested the court dismiss the remaining counts. Id. The court denied Lofthouse's request and held him to answer in the district court. Id.

The State filed the Information and an Amended Information in the district court on July 16, 2015.[5] Id. at 15, 21. At his arraignment Lofthouse pleaded not guilty and waived his right to a speedy trial. AA II 419. The arraignment court scheduled calendar call for October 27, 2015 and jury trial for November 2, 2015. Id. at 420.

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[3] Attorneys Robert Draskovich and Louis Schneider represented Lofthouse in the Justice Court. AA I 5.

[4] NRS 201.210.

[5] It is unclear how the Amended Information differed from the Information.

Lofthouse filed a pretrial Petition for Writ of Habeas Corpus on August 20, 2015 challenging the justice court's probable cause determination on the Kidnapping and the Open and Gross Lewdness counts. AA I 124-142. The State filed a Return and Lofthouse filed a Traverse. Id. at 151, 173. On September 22, 2015, Lofthouse substituted attorneys Jason Margolis and Dmitry Gurovich in place of his previously retained counsel.[6] The court continued argument on Lofthouse's Petition to November 10, 2015, and reset jury trial to January 25, 2016.[7] AA II 425-26, 441. Later, the parties agreed to continue the trial to March 21, 2016. Id. at 495. Eventually the court granted Lofthouse's petition in part bydismissing the open and gross lewdness counts. Id. at 477-78; 496. The State filed a Second Amended Information reflecting the court's decision. AA I 213.

Trial began on March 21, 2016 and concluded on March 25th. See AA III 508; AA VI 1408. The jury convicted Lofthouse of all charges. AA II 265-68. At Lofthouse's sentencing hearing the Court ordered certain counts to run concurrent and others to run consecutive

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[6] Gurovich is not a licensed Nevada attorney. However, the district court approved Gurovich's application for limited practice. See AA I 200-01.

[7] The court eventually continued the Petition one more time to December 2, 2015. AA II 452.

but essentially imposed a total sentence of 72 to 180 months in prison. AA VI 1445-49. The Court filed the Judgment of Conviction ("JOC") on May 20, 2016. AA II 380.

On May 26, 2016 Lofthouse's attorneys moved to withdraw. AA II 383. The district court granted the request on June 9, 2016 and appointed the Clark County Public Defender to represent Lofthouse. Id. at 391-92. That same day Lofthouse filed a proper person Notice of Appeal. Id. at 389-90. On July 13, 2017, upon limited remand from this Court, the district court modified Lofthouse's sentence to remove lifetime supervision but also increased Lofthouse's maximum sentence to 228 months. AA VII 1588.

STATEMENT OF FACTS

Lofthouse was a respected U.S. history teacher at Rancho High School in Las Vegas, Nevada. AA VI 1247. In January 2015, Lofthouse took family leave after the birth of his third child. Id. During leave Lofthouse communicated with his students, including M.T., via social media. AA V 1019. Initially, these communications involved innocuous school-related issues. Id. at 1021. Eventually M.T. and Lofthouse began flirting via text-messages. Id. at 1023-24.

In early May 2015, Lofthouse returned from family leave. Id. at 1026. Shortly after Lofthouse returned from family leave M.T. performed fellatio on Lofthouse in his classroom.[8] Id. at 1028, 1030. After this incident M.T. and Lofthouse agreed to spend a day together at a hotel. Id. at 1031.

Lofthouse rented a room at the Aliante Hotel and Casino. Id. at 1037. On May 20, 2015, he met M.T. near her house and drove her to the hotel.[9] Id. at 1035. At the hotel M.T. and Lofthouse engaged in consensual sexual intercourse two times.[10] Id. at 1038-39. M.T. and Lofthouse also performed oral sex on each other.[11] Id. Lofthouse and M.T. left the Aliante around 2:00 p.m. and Lofthouse immediately returned M.T. to her house. Id. at1042.

A few days later M.T. again performed fellatio on Lofthouse in his classroom.[12] Id. at 1044. Thereafter, M.T. and Lofthouse again decided to spend a day together at a hotel. Id. On May 28, 2015 Lofthouse met M.T. near her parent's house and drove her to the

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[8] Count 1 of the Second Amended Information. AA I 214.
[9] Count 2. Id.
[10] Counts 5, 6. Id. at 215.
[11] Counts 3, 4. Id. at 214-15.
[12] Count 7. Id. at 215.

Cannery Hotel and Casino.[13] Id. at 1049. At the hotel M.T. and Lofthouse performed oral sex on each other.[14] Id. at 1051. M.T. and Lofthouse also engaged in consensual sexual intercourse twice.[15] Id. Lofthouse and M.T. left the hotel at 2:00 p.m. and Lofthouse took M.T. directly to her house. Id. at 1053.

On June 1, 2015, former student Maria Aleman ("Aleman") advised Rancho teacher Belisa Brownlee ("Brownlee") that a Rancho student and teacher were involved in a sexual relationship. AA IV 933-34. Brownlee learned M.T. was the suspected student and relayed this information to Rancho assistant principal Gwen LaFond ("LaFond"). Id. at 928-29. LaFond notified the Clark County School District Police ("CCSDP"). AA IV 903. CCSDP Officer Patty ("Patty") investigated the allegations. Id.

On June 3, 2015, Patty located M.T. and Lofthouse in Lofthouse's classroom. Id. at 909. Patty escorted M.T. to an administrative office to meet with CCSDP Detective Troxell ("Troxell"). Id. at 911. Troxell questioned M.T. regarding her

[13] Count 8. Id. at 216.
[14] Counts 9, 10. Id. at 216.
[15] Counts 11, 12. Id. at 217.

alleged sexual relationship with Lofthouse. AA VI 1261. M.T. denied the allegations. Id.

Later that day M.T. told her parents she had engaged in sexual conduct with Lofthouse. AA V 1057. M.T.'s father contacted Troxell who re-interviewed M.T. Id. M.T. admitted to Troxell that she had a consensual sexual relationship with Lofthouse. Id. at 1058. However, M.T. advised Lofthouse never forced her to do anything she did not want to do. Id. at 1058. Additionally, Lofthouse never imprisoned her or attempted to keep her from her parents. Id. at 1125-27. Troxell searched M.T.'s phone and secured video surveillance from the Cannery but not the Aliante. AA VI 1267, 1277. The next day Troxell arrested Lofthouse at Rancho. Id. at 1269-70.

SUMMARY OF THE ARGUMENT

Jason Lofthouse is currently serving six (6) to nineteen (19) years in prison for having consensual sexual relations with his 17 year-old student. To secure this harsh sentence the State charged Lofthouse with First-Degree Kidnapping. However, as a matter of law Lofthouse could not be charged with or convicted of kidnapping. Alternately, if Lofthouse could be charged with and convicted of kidnapping then Nevada's kidnapping law, NRS 200.310(1), is unconstitutionally

vague. If NRS 200.310(1) is not unconstitutionally vague, Lofthouse's prosecution under NRS 201.540 preempted his prosecution under NRS 200.310(1). If Lofthouse's prosecution under NRS 201.540 did not preempt his prosecution under NRS 200.310(1), then the jury nevertheless convicted Lofthouse upon insufficient evidence or an invalid theory of liability. Finally, Lofthouse's multiple convictions for engaging in individual sexual acts with M.T. violated his Constitutional right against double jeopardy.

Additionally, the district court committed numerous trial errors which denied Lofthouse his Constitutional Right to a fair trial. First, the district court incorrectly instructed the jury and refused Lofthouse's proffered instruction which correctly stated the law and comprised Lofthouse's theory of defense. Next, the court violated Lofthouse's fundamental right to confront his accuser. Finally, the court violated the prohibition against double jeopardy by increasing Lofthouse's sentence after his conviction.

The State violated Lofthouse's right to a fair trial as well. The State engaged in pervasive misconduct during *voir dire*, opening statement, and rebuttal argument. Additionally, the State obstructed Lofthouse's access to witnesses, urged a law enforcement witness to

opine on Lofthouse's guilt, and incorrectly defined of an essential element during rebuttal argument. During deliberation the jury sought clarification on the State's definition however the district court refused to clarify the jury's confusion. Although the aforementioned errors individually warrant reversal, if this Court disagrees, the errors' cumulative effect violated Lofthouse right to a fair trial and warrant reversal.

ARGUMENT

I. Lofthouse Did Not Commit Kidnapping as a Matter of Law.

The United States Constitution's Due Process clause "protects an accused against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Carl v. State, 100 Nev. 164, 165, 678 P.2d 669 (1984). On appeal, where the evidence is uncontroverted, this Court "may decide whether such uncontroverted evidence, as a matter of law, does or does not show the commission of a crime." State v. Busscher, 81 Nev. 587, 589, 407 P.2d 715, 716 (1965).

The undisputed facts show Lofthouse and his 17 year-old student, M.T., began a sexual relationship in May 2015. AA V 1017, 1033, 1125-28. On two occasions Lofthouse drove M.T. to hotels to

engage in consensual sexual conduct. Id. at 1036-38, 1049-51. After each hotel visit Lofthouse immediately returned M.T. to her house. Id. at 1042, 1053. According to M.T. Lofthouse never imprisoned her, detained her, or forced her to do anything she did not want to do. Id. at 1125. Additionally, M.T. would have engaged in sexual conduct with Lofthouse had he not been her teacher. Id.

Based upon the above facts the State charged Lofthouse with First-Degree Kidnapping alleging he either led, took, enticed, or carried away, M.T. with the intent to: (1) keep, imprison, or confine her from her parents; (2) hold her to unlawful service; or (3) perpetuate upon her person the unlawful act of Sexual Conduct between School Employee and Pupil (NRS 201.540). See AA II 22, 24; NRS 200.310(1). However, during trial the State abandoned theories (1) and (2) and proceeded only under theory (3). AA VI 1321, 1346.

First-Degree Kidnapping under NRS 200.310(1) prohibits leading, taking, enticing, carrying away, or detaining a minor, "with the intent to...perpetrate **upon the person** of the minor any unlawful act[.]" (Emphasis added). Here, Lofthouse did not commit a crime for merely for driving 17 year-old M.T. to a hotel for the purposes of

having sex. M.T. was 17 years-old and could legally consent to sexual relations with a 32 year-old man. See NRS 200.364(6). Lofthouse's actions only became "criminal" based upon his status as M.T.'s teacher. See NRS 201.540. Therefore, by engaging in sexual conduct with M.T. Lofthouse violated NRS 201.540, which prohibits sexual conduct between a teacher and a student. However, Lofthouse did not "kidnap" M.T. because he could not perpetuate, **upon M.T.'s person**, an unlawful act.

Resolving Lofthouse's claim that he did not commit kidnapping as a matter of law involves a question of statutory interpretation. Specifically, whether NRS 200.310(1)'s phrase, "perpetuate upon the person of the minor any unlawful act" prohibits someone from intending to commit any crime whatsoever upon a minor or only prohibits intending to commit a "crime against the person" upon a minor. This Court reviews questions regarding statutory interpretation *de novo*. State v. Lucero, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011).

"[W]hen the words in a statute are clear on their face, they should be given their plain meaning unless such a reading violates the spirit of the act." Anthony Lee R., A Minor v. State, 113 Nev. 1406,

1414, 952 P.2d 1, 6 (1997). When statutory language is susceptible to two reasonable interpretations this Court looks beyond the words to determine legislative intent. State v. White, 130 Nev. ___, ___, 330 P.3d 482, 484 (2014). Statutory language should always be construed to avoid absurd or unreasonable results. Id.; see also Haney v. State, 124 Nev. 408, 412, 185 P.3d 350, 353 (2008) ("the rule of lenity demands that ambiguities in criminal statutes be liberally interpreted in favor of the accused.").

A. NRS 200.310(1)'s plain language.

NRS 200.310(1) *plainly* prohibits moving or detaining a minor while intending to commit a "crime against the person" upon a minor. Only "crimes against the person" can be perpetuated "upon the person." Morality crimes, crimes against the state, and crimes against property cannot be committed "upon" a person.

Sexual Conduct between Certain Employees of School or Volunteers at School and Pupil (NRS 201.540) is not a crime against the person. Rather, it is a "crime against public decency and good morals." See Title 15, Chapter 201. As noted, crimes against good morals and public decency do not have individual victims and therefore cannot be committed "upon" a person. See Susan W.

Brenner, Fantasy Crime: The Role of Criminal Law in Virtual Worlds, 11 Van. J. Ent. & Tech. L. 1, 8-9 (2008). Similarly, status offenses cannot be committed "upon a person."

Lofthouse's acts were only criminal based upon his status as M.T.'s teacher. Therefore, under NRS 200.310(1)'s plain meaning Lofthouse could not commit kidnapping as a matter of law because his crime -- Sexual Conduct between Teacher and Student -- could not be committed "upon" M.T.'s person.

B. NRS 200.310(1)'s legislative intent.

If this Court believes NRS 200.310(1)'s language is ambiguous regarding whether the law applies only to "crimes against the person" or to any crime whatsoever, this Court can look to legislative history and common law for guidance.

Before 1947 Nevada's kidnapping statute stated pertinently:

> Every person who shall willfully
>
> ... lead, take, entice away, or detain, a child under the age of sixteen years with intent to conceal him from his parent, guardian or other person having lawful care or control of him, **or to steal any article upon his person**
> . . .
>
> Shall be guilty of kidnaping[.]

> Revised Laws of Nevada § 6419 (sec. 154) (p. 1839) (1912) (emphasis added).

In 1947 the legislature amended the statute to read:

> ... every person who leads, takes, entices, or carries away or detains any minor with the intent to keep, imprison, or confine it from its parents, guardians, or any other person having lawful custody of such minor, or with the intent to hold such minor to unlawful service, **or perpetuate upon the person of such minor any unlawful act**, shall be deemed guilty of kidnapping in the first degree.[16]
> Statutes of Nevada, S.B. 99 (1947) (emphasis added).

Unfortunately, the Legislature did not compile legislative history prior to 1965.[17] Therefore, there is no legislative record available to determine the legislative intent behind kidnapping's 1947 amendment. Nevertheless, this Court can consider kidnapping's common law origins and extra-jurisdictional precedent interpreting kidnapping statutes similar to Nevada's pre-1947 version.

At common law kidnapping was an aggravated form of false imprisonment. See Brown v. State, 574 S.W.2d 57, 60 (Tenn. 1978)

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[16] The legislature also amended NRS 200.310 in 1959, 1979, 1987, and 1995. However, those amendments did not materially alter the pertinent section of NRS 200.310.

[17] See,<https://www.leg.state.nv.us/Division/Research/Library/LegHistory/Tutorial/Pre1965.cfm>, last accessed June 20, 2017.

(citing Wharton's Law of Criminal Procedure, Vol. I, p. 735). Basically, "kidnapping was limited to the taking of a person from his own country." A Rationale of the Law of Kidnapping, 53 Colum. L. Rev. 540, 540-41 (1953). Eventually kidnapping laws evolved to merely require asportation or detention rather than removal from the person's country. Id. at 541.

Child stealing, which "consisted of taking an unmarried female under the age of sixteen years from her parents," was not a common law offense. Id. at 550-51. England's Parliament codified child stealing which was considered a crime against the parent, not the minor.[18] Id.; see also People v. Simmons, 12 Cal.App.2d 329, 332, 55 P.2d 297, 299 (1936); State v. Metcalf, 129 OR. 577, 578, 278 P. 974, 975 (1929).

States eventually began combining common law kidnapping and child stealing into a single criminal offense. In 1983 Idaho analyzed its kidnapping law which was similar to Nevada's pre-1947 law. Idaho's kidnapping law stated:

> [K]idnapping is committed by a person who willfully:

[18] Because child stealing was a crime against the parents, a child of "tender years" could not consent to its own seizure or abduction. See State v. Hoyle, 114 Wash. 290, 291, 194 P. 976 (1921).

> 1. Seizes, confines, inveigles or kidnaps another, with intent to cause him, without authority of law, to be secretly confined or imprisoned within this state, or to be sent out of this state, or in any way held to service or kept or detained against his will; or,
> 2. Leads, takes, entices away or detains a child under the age of sixteen (16) years, with intent to keep or conceal it from its parent, guardian or other person having lawful care or control thereof, or with intent to steal any article upon the person of the child.[19]
>
> State v. Palin, 106 Idaho 70, 72, 675 P.2d 49, 51 (1983).

According to Idaho, subsection 1 defined "simple kidnapping," and subsection 2 defined "child stealing." Id. at 73, 675 P.2d at 52. Subsection 2's phrase, "with the intent to steal any article upon the person of the child" meant the accused intended "to rob from the child." Id.; see also State v. Berry, 200 Wash. 495, 509, 93 P.2d 782, 789 (1939); People v. Pellot, 105 A.D.2d 223, 227, 483 N.Y.S.2d 409, 412 (1984); Commonwealth v. Meyers, 146 Pa. 24, 29, 23 A. 164 (1892); Burns v. Commonwealth, 129 Pa. 138, 145, 18 A. 756, 757 (1889) (noting similar language "was enacted to protect parental and other lawful custody of children against the greed and malice of the kidnapper.").

[19] I.C. § 18-4501.

Idaho's interpretation comported with the common law definition for a "crime against the person." At common law a crime against the person was any crime involving the threat of physical force. See U.S. v. Trejo-Galvan, 304 F.3d 406, 408 (5th Cir. 2002) (citing Black's Law Dictionary 379 (7th ed. 1999) and 4 William Blackstone, Commentaries on the Laws of England 205-19 (1st American ed. 1772) (reprint 1992)); Alice Ristroph, Criminal Law in the Shadow of Violence, 62 Ala. L. Rev. 571, 577 (2011) ("In short, crimes against the person are crimes against the body.").

Given the similarities between Idaho's kidnapping law and Nevada's pre-1947 version, NRS 200.310 also combined common law kidnapping and child stealing.[20] Therefore, the pre-1947 Nevada Kidnapping law prohibited taking a child from its parents or committing robbery upon the child. In Nevada, Robbery has been and still is a "crimes against the person." See NRS Title 15, Chapter 200. Although Nevada eventually replaced the words "to steal any article upon his person," with "perpetuate upon the person of such minor any unlawful act," nothing suggests this amendment altered child

[20] Common law prevails in Nevada unless abrogated by the legislature. See NRS 193.050(3); Vansickle v. Haines, 7 Nev. 249, 285 (1872).

stealing's historical prohibition against committing crimes -- like robbery, which are "crimes against the person."

Here, Sexual Conduct between Teacher and Student under NRS 201.540 does not involve the threat of physical force. NRS 201.540 is a crime against good morals and applies to **consensual** teacher-student sexual conduct where the student is at least 16 years old. See Hearing on S.B. 122 Before the Senate Judiciary Comm., 69th Leg. (Nev., March 13, 1997). Society is the "victim" under NRS 201.540, not the individual minor. Therefore, NRS 201.540 cannot be committed "upon the person" of a minor.[21] Accordingly, if NRS 200.310(1) is ambiguous then NRS 200.310's history also proves Lofthouse did not commit kidnapping as a matter of law.

C. If NRS 200.310(1) applies to all crimes then the statute is unconstitutionally vague.

If this Court disagrees with Lofthouse's arguments *supra*, and believes NRS 200.310(1) applies to any crime whatsoever perpetuated "upon" a minor's person, then NRS 200.310(1) is unconstitutionally vague.

[21] Non-consensual teacher-student sexual conduct could be prosecuted as sexual assault under NRS 200.366 which is a crime against the person.

A statute's constitutionality is reviewed *de novo*. Silvar v. District Court, 122 Nev. 289, 293, 129 P.3d 682, 685 (2006). A vague statute "...fails to provide a person of ordinary intelligence fair notice of what is prohibited, **or** is so standardless that it authorizes or encourages seriously discriminatory enforcement."[22] U.S. v. Williams, 553 U.S. 285, 304 (2008). To avoid a "standardless" statute, the Legislature must "establish minimal guidelines to govern law enforcement.'" Cornella v. Justice Court, 132 Nev. ___, ___, 377 P.3d 97, 101 (2016) (quoting Kolender v. Lawson, 461 U.S. 352, 358 (1983)). The "standardless" concern is more important than the fair notice concern because without adequate guidelines, "a criminal statute may permit a standardless sweep" allowing "police, prosecutors, and juries to 'pursue their personal predilections.'" Silvar, 122 Nev. at 293, 129 P.3d at 685 (*quoting* Kolender, 461 U.S. at 358.).

Interpreting NRS 200.310(1) to allow criminal liability for intending to commit **any crime whatsoever** "upon" the person of a minor would allow prosecutors to charge First-Degree Kidnapping in

[22] "[T]he vagueness tests are independent and alternative, not conjunctive." State v. Castaneda, 245 Nev. 478, 482 fn. 1, 245 P.3d 550, 553 fn.1 (2010).

absurd situations where a person moves, detains, or entices a minor while intending to commit **any unlawful act**. Therefore, enticing a minor to enter a room with promises of alcohol or tobacco is First-Degree Kidnapping. See NRS 202.055. Taking a 17-year-old to distribute promotional materials offering free alcohol is First-Degree Kidnapping. See NRS 202.057. Additional examples include telling a minor to retrieve a firearm (NRS 202.300); enticing a minor to ride a horse on a public street or highway (NRS 202.530); detaining a minor in an unattended vehicle (NRS 202.575); detaining a minor while gambling in a casino (NRS 453.350); and leading a minor by the hand while walking in the street where a sidewalk is provided (NRS 484B.297(1)).[23]

Allowing prosecution in the above circumstances would radically expand kidnapping liability beyond what the legislature arguably ever intended. A constitutionally valid law cannot allow prosecutors such unfettered charging discretion. Accordingly, if the court believes NRS 200.310(1) imposes criminal liability for all unlawful acts "upon" a minor then the law is vague and Lofthouse respectfully requests this Court vacate his kidnapping convictions.

[23] These examples are by no means exhaustive.

II. Lofthouse's prosecution under NRS 201.540 preempted his prosecution under NRS 200.310(1).

If this court disagrees with Lofthouse's arguments *supra*, Lofthouse still could not be prosecuted or convicted for kidnapping because his prosecution for violating NRS 201.540 preempted his prosecution for violating NRS 200.310(1).

"The preemption doctrine provides that a prosecution under a general criminal statute with a greater punishment is prohibited if the Legislature enacted a specific statute covering the same conduct and intended that the specific statute would apply exclusively to the charged conduct." People v. Jones, 108 Cal.App.4th 455, 463, 133 Cal.Rptr.2d 358, 363 (2003); see also Gaines v. State, 116 Nev. 359, 365, 998 P.2d 166, 170 (2000) (when a specific statute is in conflict with a general statute the specific statute takes precedence). To determine whether a prosecution is preempted, courts consider whether: (1) "each element of the general statute corresponds to an element on the face of the [specific] statute"; **or** (2) "it appears from the statutory context that a violation of the [specific] statute will necessarily or commonly result in a violation of the general statute." Jones, 108 Cal.App.4th at 463, 133 Cal.Rptr.2d at 363 (internal citations omitted) (emphasis added).

NRS 200.310(1) has a greater punishment than NRS 201.540. Additionally, NRS 200.310(1) only **generally** prohibits moving or detaining a minor while intending to commit an unlawful act "upon the person of the minor." Conversely, NRS 201.540 **specifically** prohibits sexual relationships between teachers and students. Indeed, during NRS 201.540's legislative hearings lawmakers repeatedly explained the law would **specifically** prohibit sexual relationships between teachers and students.[24] See Hearing on S.B. 122 Before the Senate Judiciary Comm., 69th Leg. (Nev., March 13, 1997); Senate Daily Journal, S.B. 122, at 52, 69th Leg. (Nev., April 8, 1997); Hearing on S.B. 122 Before the Assembly Judiciary Comm., 69th Leg. (Nev., May 2, 1997).

Finally, although NRS 200.310(1)'s elements do not correspond to NRS 201.540's elements, every violation of NRS 201.540 (the specific statute), would -- *de facto* -- result in a violation NRS 200.310(1) (the general statute) because movement, detention, enticement always occurs in some form when a teacher and student

[24] The district court acknowledged this fact at Lofthouse's sentencing hearing. See AA VI 1444 ("[t]he legislature has created a law to deal **specifically** with this situation.")

engage in sexual conduct. Therefore, Lofthouse's prosecution under NRS 201.540 preempted his prosecution under NRS 200.310.

III. The District Court's Instructional Errors Deprived Lofthouse of His Constitutional Right to a Fair Trial.

The district court is responsible for ensuring that the jury is fully and correctly instructed regarding the law governing the case. Crawford v. State, 121 Nev. 744, 754-55, 121 P.3d 582, 589 (2005). This Court reviews *de novo* whether an instruction given is a correct statement of law. Cortinas v. State, 124 Nev. 1013, 1019, 195 P.3d 315, 319 (2008). When an instruction incorrectly states the law by omitting, misdescribing, or presuming an element of the offense this Court reviews the instruction for harmless error. Collman v. State, 116 Nev. 687, 722, 7 P.3d 426, 449 (2000). Under this standard the Court asks, "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" Id. at 722-23, 7 P.3d at 449. If the Court "cannot reach this conclusion...it should not find the error harmless.'" Id. at 723, 7 P.3d at 449 (quoting Neder v. U.S., 527 U.S. 1, 19 (1999)).

A. Instruction 17.

Jury instruction 17 stated, "For both Sexual Conduct Between Certain Employees or Volunteers of School and Pupil and First-

Degree Kidnapping, there is no requirement that the Defendant knew that the minor was under the age of 18. Proof that the minor was under the age of 18 at the time is sufficient." AA I 255. Instruction 17 incorrectly stated the law with respect to First-Degree Kidnapping.

First-Degree Kidnapping is a specific intent crime. See Jensen v. Sheriff, 89 Nev. 123, 126, 508 P.2d 4, 5-6 (1973) ("The dominating element of the crime of kidnapping is the intent with which the acts enumerated in the statute are done[.]"); Anderson v. State, 2016 WL 1170834, *2 (NV. Ct. App. 2016) (unpublished) (recognizing First-Degree Kidnapping is a specific intent crime when State alleges the defendant had intent to commit an unlawful act upon a minor); Fondo v. State, 2016 WL 207611,*1 (2016) (unpublished) (recognizing voluntary intoxication is defense to First-Degree Kidnapping because First-Degree Kidnapping is a specific intent crime); In the Matter of A.L, a minor v. State, 2016 WL 2943799, *1 (NV. Ct. App. 2016) (unpublished) (recognizing First-Degree Kidnapping is specific intent crime); see also Karen L.Schultz, J.D., 1 Am. Jur. 2d, Abduction and Kidnapping § 28 (2017); 114 A.L.R. 870, Offense of abduction or kidnapping as affected by defendant's belief in legality of his act, (Originally published in 1938) ("...under statutes defining

'kidnapping,' which require that the seizure, detention, concealment, or carrying away be 'wilful,' 'without authority of law,' etc., the intent is material, and an accused's belief in the legality of his act has been held a good defense to a charge of kidnapping.").

This Court has held when the defendant's intent is specified in the statute, "that intent must be proven as to each element of the crime." Garcia v. Sixth Jud. Dist. Ct., 117 Nev. 697, 701, 30 P.3d 1110, 1112 (2001). In Garcia, the State charged the defendant with violating NRS 202.055 for knowingly selling alcohol to persons less than 21 years-old. Id. at 697, 30 P.3d at 1111. On the defendant's Petition for Writ of Certiorari to this Court, the Court vacated the defendant's conviction holding the word "knowingly," as used in NRS 202.055, meant the State had to prove the defendant actually or constructively **knew** the purchaser was under 21. Id. at 701-02, 30 P.3d at 1113. Importantly, this Court also noted NRS 202.055 is not a strict liability offense. Id. at 702, 30 P.3d at 1113. Mistake of age is not a defense to strict liability offenses. See Jenkins v. State, 110 Nev. 865, 869, 877 P.2d 1063, 1065 (1994)). However, mistake of age is a defense to specific intent crimes.

Here, the State alleged Lofthouse committed First-Degree Kidnapping by willfully moving, detaining, or enticing a minor with **the intent** to commit Sexual Conduct Between Teacher and Student, against her person. Although NRS 200.310(1) does not use the word "knowingly," kidnapping is nevertheless a specific intent crime. Accordingly, the State had to prove Lofthouse knew M.T. was a minor because mistake of age would be a defense to kidnapping. Essentially, instruction 17 relieved the State of its burden of proof regarding an essential element of the charged crime.

Lofthouse's California attorney failed to object to instruction 17. See AA VI 1236. "Generally, the failure to clearly object on the record to a jury instruction precludes appellate review." Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 94-95 (2003). However, this Court can review jury instructions for plain error. Id.; see also NRS178.602. Under the plain error standard the Court determines whether there was error, whether the error is plain or clear from the record, and whether the error affected a defendant's substantial rights, i.e. the defendant must show prejudice or a miscarriage of justice. Id.

Instruction 17 clearly misstated the law, and that misstatement is plainly in the trial record. Moreover, the error prejudiced Lofthouse

by relieving the State of its burden of proof as to an essential element of the charged crime. Finally, the instruction also prejudiced Lofthouse because although M.T. testified she was 17 years-old during her relationship with Lofthouse (AA V 1033), the State did not present any evidence Lofthouse knew M.T. was 17 years-old. Therefore, the jury convicted Lofthouse for a category A felony upon insufficient evidence.

B. Lofthouse's proposed instruction.

At trial Lofthouse proposed the following jury instruction which accurately states the law regarding dual liability for kidnapping and associated offenses:

> In order to find the defendant guilty of both first-degree Kidnapping and an associated offense of Sexual Conduct Between Certain Employees or Volunteers of School and Pupil, you must also find beyond a reasonable doubt either:
>
> (1) That any movement of [M.T.] was not incidental to the associated offense;
>
> (2) That any incidental movement of [M.T.] substantially increased the risk of harm to the victim over and above that necessarily present in in the associated offense;

> (3) That any incidental movement of [M.T.] substantially exceeded that required to complete the incidental offense;
>
> (4) That [M.T.] was lead, taken, enticed, carried away or detained, and that this substantially increased the risk of harm to her; or
>
> (5) The movement or restraint had an independent purpose or significance.
>
> AA II 264.

The State objected to Lofthouse's instruction claiming the prohibition against dual liability for kidnapping and associated offenses **only** applies when the State charges kidnapping and a crime **specifically mentioned** in NRS 200.310. AA VI 1239. The court rejected Lofthouse's instruction explaining, "I think that the instruction goes beyond the parameters of what the statute requires for a conviction for first-degree kidnapping." Id. at 1240.

Lofthouse maintains he could not be convicted for kidnapping. See arguments, *supra*. However, if this court disagrees, Lofthouse was entitled to his proffered jury instruction which correctly stated the law and also implicated his theory of defense. Dual liability for kidnapping and **an associated offense** is prohibited based upon

"concern[s] with avoiding an uncontemplated double punishment." Langford v. State, 95 Nev. 631, 638, 600 P.2d 231, 236 (1979) (citing Jensen, 89 Nev. at 125-26, 508 P.2d at 5 (emphasis added)). Therefore:

> movement or restraint incidental to an underlying offense where restraint or movement is inherent, as a general matter, will not expose the defendant to dual criminal liability under either the first- or second-degree kidnapping statutes. However, where the movement or restraint serves to substantially increase the risk of harm to the victim over and above that necessarily present in an associated offense, *i.e.,* robbery, extortion, battery resulting in substantial bodily harm or sexual assault, or where the seizure, restraint or movement of the victim substantially exceeds that required to complete the associated crime charged, dual convictions under the kidnapping and robbery statutes are proper. Also, [] dual culpability is permitted where the movement, seizure or restraint stands alone with independent significance from the underlying charge.
>
> Mendoza v. State, 122 Nev. 267, 274-75, 130 P.3d 176, 180 (2006).

In contrast, where Kidnapping stands alone (i.e., kidnapping without an intent to commit an "associated offense"), "(i)t is the fact, not the distance, of forcible removal of the victim that constitutes kidnapping." Langford, 95 Nev. at 638, 600 P.2d at 236.

Although this Court's precedent regarding dual liability generally involves Kidnapping and Robbery -- which is specifically mentioned in NRS 200.310 (see e.g., Wright v. State, 94 Nev. 415, 581 P.2d 442 (1978); Jefferson v. State, 95 Nev. 577, 599 P.2d 1043 (1979); Turner v. State, 98 Nev. 243, 645 P.2d 971 (1982); Hutchins v. State, 110 Nev. 103, 867 P.2d 1136 (1994); Mendoza v. State, 122 Nev. 267, 130 P.3d 716 (2006); Pascua v. State, 122 Nev. 1001, 145 P.3d 1031 (2006)), this Court has never held the dual liability prohibition for kidnapping and associated offenses **only applies** to crimes **specifically mentioned** in NRS 200.310.

In fact, in Curtis D. v. State, 98 Nev. 272, 273, 646 P.2d 547 (1982) the juvenile court found the defendant committed both **first-degree kidnapping** and **misdemeanor battery** upon a 13 year-old victim. Misdemeanor battery is not specifically listed in NRS 200.310. On appeal, this Court affirmed noting, "[a] separate charge of first degree kidnapping is proper if the movement of the victim is not merely incidental **to the associated offense** and it results in substantially increased risk of harm." Id. at 274, 646 P.2d at 548 (emphasis added).

Additionally, in Villa v. State, 2016 WL 4159472 (2016), this Court noted the dual liability prohibition applies to "kidnapping and **another offense arising out of the same course of conduct**[.]"(citing Mendoza, 122 Nev. at 275, 130 P.3d at 181). Likewise, in Downs v. State, 2017 WL 2815092, *2 (2017), this Court noted Mendoza provided "a suggested jury instruction for situations wherein kidnapping is charged with **an associated offense**." There, the State pled child abuse as the associated offense under NRS 200.310(1) by alleging the defendant committed child abuse "upon the person" of the minor. See Id. Child abuse is not specifically listed in NRS 200.310.[25] Id.

The aforementioned cases clearly demonstrate this Court has acknowledged the dual liability prohibition involves not just offenses mentioned in NRS 200.310, but any "associated offense" or an "offense arising out of the same course of conduct." [26] Here, Lofthouse's Kidnapping and Sexual Conduct between Teacher and Pupil allegations arose from **the same course of conduct**. Therefore, Lofthouse was charged with Kidnapping and **an associated offense**.

[25] The offenses listed in NRS 200.310 are sexual assault, extortion, robbery, murder, or battery with substantial bodily harm.

[26] Villa and Downs are unpublished. Although these decisions are not precedent they are nevertheless persuasive. See NRAP 36(C)(3).

Accordingly, Lofthouse's proposed instruction correctly defined kidnapping's elements as noted by this Court.

Moreover, Lofthouse's proposed instruction embodied his theory of defense. A defendant has a right to jury instructions on his or her "...theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be." See Vallery v. State, 118 Nev. 357, 372, 46 P.3d 66, 77 (2002). If a court fails to instruct the jury on the defense theory of the case when ". . . supported by some evidence which, if believed, would support a corresponding jury verdict, . . . [this omission] constitutes reversible error." Williams v. State, 99 Nev. at 531, 665 P.2d at 261.

Although Lofthouse did not specifically refer to his instruction as a "theory of defense" instruction, he consistently asserted prior to and during trial he could not be convicted of both kidnapping and the associated offense Sexual Conduct between Teacher and Pupil. See AA I 10, 12, 16, 18, 22, 24, 118, 134, 136-38, 214, 216; AA II 461-63. Accordingly, the district court committed reversible error by refusing Lofthouse's proposed instruction. See Duckett v. Godinez, 67 F.3d 734, 743 (9th Cir. 1995).

If this court does not believe the instruction was a theory of defense instruction merely because Lofthouse did not explicitly call it such, the court's refusal to give the instruction is nevertheless reversible error. When the State charged kidnapping and an associated offense it had to prove M.T.'s movement increased her risk of harm or had independent significance. See Langford, at 638-39, 600 P.2d at 236-37 ("whether the movement of the victim was incidental to the associated offense and whether the movement increased the risk of harm to the victim are questions of fact to be determined by the jury in all but the clearest cases.") (Internal citations omitted)). Here, even if Lofthouse enticed M.T. to engage in sexual conduct, doing so did not increase any supposed harm inherent when two consenting persons agree to have sexual relations. Therefore, it is not clear beyond a reasonable doubt a rational jury would have found Lofthouse guilty absent the instructional error.

IV. Lofthouse's General Verdict Violated His Federal and State Due Process Rights.

"[A] jury may return a general guilty verdict on an indictment charging several acts in the alternative even if one of the possible bases of conviction is unsupported by sufficient evidence." Gordon v. State, 121 Nev. 504, 507, 117 P.3d 214, 216 (2005) (internal citations

omitted). However, harmless-error review applies when a general verdict may rest on a legally valid or a legally invalid alternative theory of liability. Cortinas v. State, 124 Nev. 1013, 1026-27, 195 P.3d 315, 324 (2008). Under this standard this Court must reverse unless it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id. (quoting Chapman v. California, 386 U.S. 18, 24 (1967)).

Although the State initially charged Lofthouse with kidnapping for either intending to keep M.T. from her parents; holding M.T. to unlawful service; or intending to commit an unlawful act upon her person (AA I 214, 216), the State abandoned the first two theories during trial and proceeded only on the theory Lofthouse intended to commit an unlawful act upon M.T.'s person. See AA VI 1321, 1346. Yet, after the State's concession the court nevertheless instructed the jury it could find Lofthouse guilty even if the jurors did not agree as to any one theory.[27] AA I 249. The court also provided a general verdict form. AA II 265-68.

The State's presented insufficient evidence to support its alternate theories that Lofthouse intended to keep M.T. from her

[27] Lofthouse's California Attorney failed to object to this instruction. See AA VI 1235.

parents or held her to unlawful service. In Schofield v. State, 132 Nev. ___, ___, 372 P.3d 488, 491 (2016), this Court held NRS 200.310(1)'s "intent to keep" requirement means "an intent to keep a minor **permanently or for a protracted period of time**." (Emphasis added). Here, there was no evidence Lofthouse intended to keep M.T. from her parents permanently or for a protracted period of time. After each hotel encounter Lofthouse immediately returned M.T. to her house. Additionally, the State conceded Lofthouse could not be convicted under this theory. AA VI 1321, 1346. Likewise, the State did not present any evidence Lofthouse held M.T. to unlawful service and also conceded Lofthouse could not be convicted under that theory. Id. at 1321 1321. The State's remaining theory, that Lofthouse intended to commit an unlawful act upon M.T.'s person, was an invalid theory. Alternately, the theory was unsupported by the evidence.

As a matter of law Lofthouse could not be charged or convicted for First-Degree Kidnapping. See arguments, *supra*. If this Court agrees, the jury erroneously convicted Lofthouse under an invalid theory, and the error is not harmless. The State exclusively relied upon this theory as evidenced by its closing and rebuttal arguments.

Therefore, it cannot be claimed beyond a reasonable doubt Lofthouse would have been convicted of kidnapping had he not been charged under this invalid theory.

If this Court disagrees with Lofthouse's arguments and believe Sexual Conduct between Teacher and Student can be the associated offense for Kidnapping under NRS 200.310(1), the State nevertheless failed to present any evidence to support this theory. As discussed, the court erred by refusing to give the jury Lofthouse's proposed jury instruction regarding dual liability for kidnapping and associated offenses. Under the State's "intent to commit an unlawful act" theory, Lofthouse's instruction was an accurate statement of law. Moreover, whether M.T.'s movement increased her risk of harm was an element of the charged crime the State had to prove beyond a reasonable doubt. Here, the State failed to present **any evidence**, much less substantial evidence, to show taking Lofthouse increased M.T.'s risk of harm. Therefore, Lofthouse respectfully requests this Court reverse his kidnapping convictions.

V. Lofthouse's Redundant Convictions Violate his Constitutional Right Against Double Jeopardy.

The United States' and Nevada Constitutions' double jeopardy clauses protect a defendant from multiple punishments for the same

offense. U.S.C.A. V, XIV; Nev. Const. art. 1, § 8; Whalen v. United States, 445 U.S. 684, 688 (1980). When an accused is charged with multiple violations involving a single statute and raises a double jeopardy challenge, this Court must determine the proper "unit of prosecution" under that statute. Castaneda v. State, 132 Nev. ___, ___, 373 P.3d 108, 110 (2016) (quoting Jackson v. State, 128 Nev. 598, 612, 291 P.3d 1274, 1278 (2012)). "[D]etermining the appropriate unit of prosecution presents an issue of statutory interpretation and substantive law" and is reviewed *de novo*. Castaneda, 132 Nev. at ___, 373 P.3d at 110.

The State charged Lofthouse with ten separate counts of Sexual Conduct between Teacher and Student. AA I 213-17. Essentially, the State charged a separate count for each individual sexual act between Lofthouse and M.T. Id. Moreover, the court instructed the jury Lofthouse could be found guilty for each separate sexual act occurring during a single encounter. Id. at 254. The prosecutor argued this point to the jury and the jury convicted Lofthouse for all 10 counts. AA II 265-68; AA VI 1307. Nine (9) convictions must be vacated because NRS 201.540 does not authorize multiple punishments for individual sexual acts occurring during a single teacher/student relationship.

NRS 201.540 states pertinently:

> 1. ... a person who:
> (a) Is 21 years of age or older;
> (b) Is or was employed by a public school or private school or is or was volunteering at a public or private school; and
> (c) Engages in sexual conduct with a pupil who is 16 years of age or older, who has not received a high school diploma, a general educational development certificate or an equivalent document and:
> (1) Who is or was enrolled in or attending the public school or private school at which the person is or was employed or volunteering; or
> (2) With whom the person has had contact in the course of performing his or her duties as an employee or volunteer,
> is guilty of a category C felony and shall be punished as provided in NRS 193.130.[28]
>
> (Emphasis added).

[28] NRS 201.540 appears to violate the fundamental right to intimate associations. The statute prohibits teachers from **ever** engaging in sexual conduct with any person who is a former student, over 16, and who never received a diploma or GED. Thus, a student who drops out of school and never receives a diploma or GED could never engage in sexual conduct with a former teacher no matter how many years had passed since the student left school. Nevertheless, because these facts are not present in Lofthouse's case, he does not believe he can challenge NRS 201.540's constitutionality on this basis.

NRS 201.540's plain language is -- at best -- ambiguous as to the proper unit of prosecution. Although the State believes the statute permits separate charges for individual sexual acts, the statute does not clearly permit multiple charges for each sexual act within a single teacher-student sexual relationship.[29]

If the legislature desired to criminalize individual sexual acts between teachers and students it could have done so explicitly. For example, the statute could have prohibited teachers from "engag[ing] in **an act of** sexual conduct with a pupil who is 16 years of age or older." Instead, the statute only generally forbids a teacher from "engag[ing] in sexual conduct with a pupil who is 16 years of age or older." NRS 201.540(1)(c). "Engage" means "[t]o become involved with, do, or take part in something. To be engaged in something, such as a type of employment, implies a continuity of action. It is used in reference to an occupation or anything in which an individual habitually participates[.]" West's Encyclopedia of American Law, edition 2 (2008) (Retrieved May 18 2017 from http://legal-dictionary.thefreedictionary.com/engage) (emphasis added). By only

[29] Multiplicity involves charging a single offense in several counts of a complaint or information and creates potential Double Jeopardy violations by allowing multiple punishments for a single offense. See State v. Sprung, 277 P.3d 1100, 1102 (Kan. 2012).

prohibiting teachers from "engag[ing] in sexual conduct" with students, the statute's plain language seemingly prohibits an ongoing sexual relationship, not individual sexual acts. See, e.g., State v. Hall, 230 P.3d 1048, 1051 (Wash. 2013) (*en banc*) (plain language of the witness tampering statute "supports the conclusion that the unit of prosecution is the ongoing attempt to persuade a witness not to testify in a proceeding").

Additionally, because NRS 201.540's statutory text does not unambiguously establish Lofthouse could be prosecuted on a "per-sexual act" basis, this Court must turn to "other legitimate tools of statutory interpretation, including related statutes, relevant legislative history, and prior judicial interpretations of related or comparable statutes by this or other courts." Castaneda, 373 P.3d at 111.

For "unit of prosecution" purposes, NRS 201.540 is distinguishable from "sexual assault" where this Court has held that "separate and distinct acts of sexual assault may be charged as separate counts and result in separate convictions even though the acts were the result of a single encounter and all occurred within a relatively short time." Gaxiola v. State, 119 P.3d 1225, 1234 (2005). Sexual assault is considered a "crime[] against the person" and was

codified under Title 15, Chapter 200 of the Nevada Revised Statutes. See NRS 200.364-200.3784. When a crime is against "the person," logically each prohibited act perpetrated upon that person results in a separate penalty. By contrast, Sexual Conduct between Certain Employees of School . . . and Pupil" is a "crime[] against public decency and good morals" under Title 15, Chapter 201 of the Nevada Revised Statutes. See NRS 201.540. Where the primary aim of the law is to preserve decency and morals, penalties need not be imposed on a per-act basis.

Moreover, NRS 201.540's legislative history demonstrates the law sought to criminalize sexual relationships between teachers and students rather than individual sexual acts. Legislators repeatedly referenced improper "sexual relationships" between teachers and students when discussing NRS 201.540. See Hearing on S.B. 122 Before the Senate Judiciary Comm., 69th Leg. (Nev., March 13, 1997) ("there are laws prohibiting this relationship with other professions, but not with the teachers with whom we entrust our children.") (emphasis added); Senate Daily Journal, S.B. 122, at 52, 69th Leg. (Nev., April 8, 1997) ("Senate Bill No. 122 .. sets out a category of crime that deals with the relationship between students and teachers...

we have stated that it is illegal for an instructor to have a sexual relationship with a student between the ages of 16, 17 and 18.") (emphasis added); Senate Daily Journal, S.B. 122, at 53, 69th Leg. (Nev., April 8, 1997) (It is because of that particular relationship of a person who is in authority and has an unusual amount of authority or control over a student.") (emphasis added); Exhibit G to Hearing on S.B. 122 Before the Assembly Judiciary Comm., 69th Leg. (Nev., May 16, 1997) (Under existing law, "student/teacher relationships are not covered under statutory sexual seduction statutes.") (emphasis added); Hearing on S.B. 122 Before the Assembly Judiciary Comm., 69th Leg. (Nev., May 2, 1997) (there is "a large problem in Nevada's school system regarding teachers having sexual relationships with students.") (emphasis added). The Legislative Counsel Bureau echoed these concerns when it prepared an opinion letter on NRS 201.540's constitutionality stating, "The provisions of S.B. 122 clearly reflect a goal of 'striking [at] the evil' of sexual exploitation in one of the areas where sexual exploitation is most likely to occur, the student-teacher relationship." Id. at Exhibit C (LCB letter to Senator McGinness dated May 1, 1997) (emphasis added).

Because the "evil" the legislature sought to eradicate was sexual exploitation within the "student-teacher relationship," the appropriate unit of prosecution in such cases is on a per-relationship basis. See Hall, 230 P.3d at 1051. The number of sexual acts a teacher engages in with a student is secondary to the statutory aims of eliminating teacher/student sexual relationships.

Finally, "[a] court should normally presume that a legislature did not intend multiple punishments for the same offense absent a clear expression of legislative intent to the contrary." Firestone v. State, 120 Nev. 13, 16 (2004). Indeed, the rule of lenity obligates this Court "to construe statutes that contain ambiguity in the proscribed conduct in the accused's favor." Castaneda, 373 P.3d at 114. Because NRS 201.540 criminalizes sexual relationships between teachers and students, and does not unambiguously permit prosecution on a per-sexual-act basis, Lofthouse could only be convicted for one violation of NRS 201.540. Therefore, nine convictions for violating NRS 201.540 must be dismissed for violating double jeopardy.

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VI. The District Court's Refusal to Answer a Jury Question Violated Lofthouse's Constitutional Right to a Fair Trial.

NRS 175.451 states pertinently, "After the jury have retired for deliberation... if they desire to be informed on any point of law arising in the cause, they must require the officer to conduct them into court. Upon their being brought into court, the information required **shall** be given in the presence of, or after notice to, the district attorney and the defendant or the defendant's counsel." (Emphasis added).

This court generally reviews a court's refusal to respond to jury inquiries for an abuse of discretion. Tellis v. State, 84 Nev. 587, 591, 445 P.2d 938, 941 (1968). However, where the jury's question "suggests confusion or lack of understanding of **a significant element of the applicable law**," the district court "has a duty to give additional instructions on the law to adequately clarify the jury's doubt or confusion." Gonzalez v. State, 131 Nev. ___, ___, 366 P.3d 680, 683-84 (2015) (emphasis added); see also U.S. v. McCall, 592 F.2d 1066, 1068 (9th Cir. 1979). Recently, this Court "clarified" that a court "does not abuse its discretion when it refuses to answer a jury question **after giving correct instructions** if neither party provides the court with a proffered instruction that would clarify the jury's doubt or

confusion." Jefferies v. State, 133 Nev. ___, ___, 397 P.3d 21, 28 (2017) (emphasis added).

The State charged Lofthouse with First-Degree kidnapping under a theory he either lead, took, **enticed**, carried away or detained M.T. with the intent to perpetuate upon her any unlawful act. See NRS 200.310. Assuming the State could charge Lofthouse with kidnapping (see arguments *supra*), "entice" was an element of the charged crime. The court did not provide an instruction defining "entice." However, during rebuttal argument the prosecutor argued entice's "dictionary definition" is "to attract or arouse hope or desire." AA VI 1346-47. The prosecutor then argued Lofthouse's "...flirting and wooing and promising getaways till he ultimately picks her up and takes her to a hotel[]" enticed M.T. to engage in sexual conduct. Id. at 1349; 1351.

During deliberations the jury sent a question asking:

> May we read the transcript for the definition of enticement provided by the female attorney in her rebuttal closing argument? Thank You. Or can we have the definition of entice or a legal dictionary?
>
> AA VII 1467.

At a hearing outside the jury's presence the prosecutor stated "...our position is you can't supplement the instructions, but I don't see any reason why they can't read what I argued in rebuttal."[30] AA VI 1400. **Without requesting any input from Lofthouse** the court initially excoriated the prosecutor for misstating the law during rebuttal argument but ultimately declined to answer the jury's question or supplement the instructions given. Id. at 1401-03. Instead, the court admonished the jury to rely upon "the instructions of the court as a whole in conjunction with your common experience."[31] Id. at 1403-04. After this clear and unambiguous ruling the court asked if either party had an "issue" with the proposed answer. Id. at 1403. Both the State and Lofthouse's California attorney indicated they did not. Id.

Nevada has not defied "entice" as used in NRS 200.310(1). However, Nevada has defined "entice" as used in Nevada's pandering

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[30] The prosecutor was incorrect. NRS 175.161(1) allows the court to give "further instructions which may become necessary by reason of the argument."

[31] The trial exhibit list indicates court's exhibit 6 is both the juror question and the court's answer. AA VII 1466. When Lofthouse requested a copy of exhibit 6 from the District Court Clerk's Office for inclusion in the Appendix he only received the juror question and not the court's written answer. See Id. at 1467. Thus, it is unclear whether the court made its answer part of the record. Nevertheless, there is no indication the court's written answer differed from the oral answer within the transcript.

law. For pandering "entice" means "[t]o lure or induce; esp., to wrongfully solicit (a person) to do something[.]" Ford v. State, 127 Nev. 608, 617, 262 P.3d 1123, 1129 (2011) (citing Black's Law Dictionary at 1260, 607, 901, 611, 321 (9th ed. 2009)). This definition suggests enticement requires a person to intend to wrongfully solicit and convince someone to do something he/she would not do but for the enticement. Moreover, this definition differs from the prosecutor's supposed "dictionary definition."

The jury's question suggested confusion regarding Kidnapping's essential elements. The confusion was particularly important to Lofthouse because after the court rejected his dual liability/theory of defense jury instruction his sole defense was he did not lead, take, carry away, or **entice** M.T. while intending to commit an unlawful act upon her person. Under Gonzalez, which was prevailing law during Lofthouse's trial, the district court had an obligation to answer the question and clarify the jury's confusion even if the State or Lofthouse did not proffer an answer. See Gonzalez, 131 Nev. at ___, 366 P.3d at 683-84.

If Jefferies applies to Lofthouse's case, even though this Court issued Jefferies' over a year after Lofthouse's trial, the district court

still abused its discretion by refusing to answer the jury question.[32] In Jefferies the jury sought clarification regarding "malice aforethought" in a murder trial. Jefferies, 133 Nev. at ___, 397 P.3d at 28. The court refused to answer the jury question. Id. This court affirmed the district court's refusal by distinguishing Gonzalez and finding because the parties did not proffer an answer this Court was left with "**the correct instruction on malice to review for error**." Id. (Emphasis added).

Here, unlike Jefferies, the district court never provided any instruction, correct or otherwise, for "entice." Instead, the jury only heard the State's impermissible definition. AA VI 1346-47. Thus, unlike Jefferies where the court's refusal to answer the jury questions was harmless, here because the court did not instruct on entice this Court has no "correct" instruction defining "entice" to review.

Additionally, the district court unequivocally indicated it would not provide any additional instructions to clarify the jury's confusion. Id. at 1401. Although the court indicated it "would be interested to hear" comments regarding the court's ultimate response (Id.), the

[32] This Court filed Gonzalez on December 31, 2015. Lofthouse's jury asked its question on March 25, 2016. AA VI 1399. This Court filed Jefferies on July 6, 2017.

response was a refusal to clarify the confusion. Therefore, any attempt to proffer an answer would have been futile. Jefferies did not involve a situation where the court refused to allow the parties to proffer an answer. Therefore, Jefferies would not apply in Lofthouse's case.

Finally, Lofthouse never improperly "lured," "induced," or wrongfully solicited M.T. to do something **she did not want to do**. Lofthouse's relationship with M.T. was only illegal due to his status as her teacher. M.T. was 17 years-old and therefore could legally consent to sexual activity with anyone, including a 32 year-old man. Moreover, M.T. repeatedly testified the she chose to have sexual relations with Lofthouse, their flirtations were mutual, and nothing Lofthouse did made M.T. consider the relationship particularly meaningful. See AA V 1024, 1030, 1068, 1072, 1074, 1087, 1125-30, 1132-33, 1148. Therefore, the court's refusal to clarify the jury's confusion meant the jury considered the State's incorrect definition which Lofthouse's conduct arguably satisfied. Accordingly, the court's refusal to provide a supplemental instruction was not harmless and this Court should reverse Lofthouse's kidnapping convictions.

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VII. Prosecutorial Misconduct Violated Lofthouse's Constitutional Right to a Fair Trial.

This Court applies a two-step approach to claims of prosecutorial misconduct. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). First, the Court determines if the prosecutor did something improper. Id. If the prosecutor did something improper the Court must then determine whether the behavior warrants reversal. Id. Generally, this Court will not reverse a conviction if the error was harmless. Id.

The proper harmless error standard depends upon whether the prosecutorial misconduct was of a constitutional dimension. Id. at 1189, 196 P.3d at 476. Misconduct of a constitutional dimension warrants reversal "unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict." Id. Additionally, prosecutorial misconduct can reach a constitutional dimension if "in light of the proceedings as a whole, the misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Id. at 1189, 196 P.3d at 477 (quoting Darden v. Wainwright, 477 U.S. 168, 181 (1986)). Non-constitutional prosecutorial misconduct is reversible "only if the error substantially affected the jury's verdict." Id. (citing Tavares v. State,

117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001)). When the issue of guilt or innocence is close, "prosecutor misconduct will probably be considered prejudicial." Rowland v. State, 118 Nev. 31, 38, 39 P.3d 114, 118-19 (2002).

A. The prosecutor committed misconduct during *Voir dire.*

The district court is afforded "considerable deference" regarding jury *voir dire's* scope. Witter v. State, 112 Nev. 908, 914, 921 P.2d 886, 892 (1996) (overruled on other grounds by Nunnery v. State, 127 Nev. 749, 776, 263 P.3d 235, 254 (2011)). The "critical concern is that *voir dire* is only used to discover whether a juror 'will consider and decide the facts impartially and conscientiously apply the law as charged by the court.'" Witter, 112 Nev. at 914, 921 P.2d at 892 (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)). The parties may question potential jurors to determine prejudice but cannot "indoctrinate or persuade the jurors." Khoury v. Seastrand, 132 Nev. ___, ___, 377 P.3d 81, 86 (2016) (internal quotation omitted). Indeed, Eighth Judicial District Court Rule 7.70(b)-(d) prohibits *voir dire* questions regarding anticipated legal instructions; a potential verdict

based upon hypothetical facts; or questions which are essentially arguments of the case.[33]

Here, throughout *voir dire* the prosecutor discussed anticipated legal instructions and asked "questions" which were actually arguments. First, the prosecutor repeatedly explained that consent is not a defense to Sexual Conduct between Teacher and Pupil and also explained First-Degree Kidnapping's purpose and elements. See AA III 714-15; 717; 723-25, 730-31). Additionally, the prosecutor argued her case by asserting a teacher is solely responsible for preventing relationships with students. Id. at 720-21. Moreover, the prosecutor introduced evidence during *voir dire* by asking two jurors -- who were both former educators, to explain to other jurors why the law prohibits sexual conduct between teachers and students. Id. at 721-23. Furthermore, the prosecutor asked an adult education teacher in Clark County to explain to the other jurors CCSD's policies and procedures regarding teacher-student misconduct. Id. at 717-19.

[33] *Voir dire* misconduct also violates the Rules of Professional Conduct. See Nevada Rules of Prof. Conduct, Rule 3.5(a); Rachel Harris, Questioning the Questions: How Voir Dire is Currently Abused and Suggestions for Efficient and Ethical Use of the Voir Dire Process, 32 J. Legal Prof. 317, 321 (2008).

The prosecutor also explicitly discussed M.T.'s anticipated testimony by explaining M.T. was "reluctant" to testify and "angry" with the prosecution.[34] Id. at 726-32. Therefore, "getting [her] to answer questions is kind of like pulling teeth." Id. Moreover, the prosecutor asked jurors to speculate why M.T. might be "reluctant to come in here and talk about having sex with her AP U.S. history teacher." Id. at 727. Similarly, the prosecutor asked jurors whether they agreed "kids lie for a reason," and then personally opined that children lie to protect someone else or themselves. Id. at 734.

Finally the prosecutor asked "questions" designed to affect the jurors' objectivity. Specifically, whether jurors agreed that "**we** place a special responsibility on **our** educators." Id. at 718. Likewise, "[d]o **we** trust them with **our** kids?" Id. at 718. After noting many jurors had children in the Clark County School District the prosecutor asked, "[w]hat's your hope... when you send your kids to school every day?

[34] Eventually the district court intervened, *sua sponte,* and told the prosecutor not to "go into a diatribe of what this witness is supposedly going to say." AA III 732. The court admonished the prosecutor a second time as well. Id.

I mean, do you reposit some trust in the school district[]"..."[w]ant them to watch out for your kids?"[35] Id. at 733.

Unfortunately, Lofthouse's California Attorney did not object to the aforementioned misconduct. Generally, failure to object precludes appellate review. Rose v. State, 123 Nev. 194, 208, 163 P.3d 408, 418 (2007). However, this Court will consider unpreserved prosecutorial misconduct if the misconduct "had a prejudicial impact on the verdict when viewed in the context of the trial as a whole...or seriously affects the integrity or public reputation of the judicial proceedings." Id. at 209, 163 P.3d at 418 (citing Gaxiola, 121 Nev. at 654, 119 P.3d at 1236). Moreover, where errors "are patently prejudicial and inevitably inflame or excite the passions of the jurors against the accused, the general rule [waiver] does not apply." Garner v. State, 78 Nev. 366, 372-73, 374 P.2d 525, 529 (1962) (internal citations omitted).

Here, the prosecutor's behavior systematically violated longstanding legal and professional norms. Her farcical "questions" were designed to indoctrinate the jury and foster disdain towards Lofthouse. Indeed, the prosecutor's repeated use of "we" and "our"

[35] The district court intervened advising, "That's been asked and answered, let's move on Ms. Collins." AA III 733-34.

when discussing children was patently prejudicial and designed solely to inflame the juror's passions against Lofthouse. Without question, every parent would naturally feel revulsion towards a teacher who allegedly had sexual relations with a female student in the same school district where jurors send their own children.

Given the misconduct's patently prejudicial nature this Court should not apply plain error review.[36] Garner, 78 Nev. at 372-73, 374 P.2d at 525. However, if this Court insists upon reviewing for plain error, the prosecutor's misconduct is plain from record, prejudicially impacted the verdict, and seriously affected the integrity and public reputation of the proceedings.

Voir dire is a solemn trial component meant to ensure the accused is judged impartially by his peers. See Barral v. State, 131 Nev. ___, ___, 353 P.3d 1197, 1200 (2015) ("A fair tribunal is an elementary prerequisite to due process," so we will not condone any deviation from constitutionally or statutorily prescribed procedures for

[36] A court's duty to ensure an accused receives a fair trial requires it to "exercise [its] discretionary power to control obvious prosecutorial misconduct ***sua sponte***." Collier v. State, 101 Nev. 473, 477, 705 P.2d 1126, 1128 (1985) (emphasis added). Here, the court eventually admonished the prosecutor twice during *voir dire*, but the court's admonishments were designed to expedite the process, not to ensure Lofthouse would ultimately be judged by impartial jurors.

jury selection."). *Voir dire* is not an occasion to incite hostility towards a defendant, preview evidence, or argue one's case.

Lofthouse admirably took responsibility for his conduct by conceding he violated NRS 201.540. See AA VI 1330. However, Lofthouse rightly challenged the State's overreach regarding the kidnapping allegations. By inflaming the jurors' passions the State ensured Lofthouse would not receive impartial consideration regarding the very serious kidnapping allegations. Essentially, no one can objectively view the prosecutor's *voir dire* behavior and confidently claim Lofthouse received a fair trial. Therefore, even if this Court reviews the gross, prejudicial, misconduct for plain error, Lofthouse asserts this court must reverse his conviction.

B. The prosecutor committed misconduct during opening statement.

"An opening statement outlines 'what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument.'" Watters v. State, 129 Nev. ___, ___, 313 P.3d 243, 247 (2013) (quoting U.S. v. Dinitz, 424 U.S. 600, 612 (1976)). Additionally, prosecutors generally cannot undermine the defense and make inappropriate and unfair characterizations during

trial. Riley v. State, 107 Nev. 205, 213, 808 P.2d 551, 556 (1991); see also McGuire v. State, 100 Nev. 153, 677 P.2d 1060 (1984) (a prosecutor cannot disparage or belittle a defendant or his counsel.).

Here, the State disparaged Lofthouse during opening statement. First, the prosecutor impermissibly *argued*:

> This case begins in a classroom at Rancho High School here in Las Vegas. It's a place where Jason Lofthouse was hiding in plain sight. He's hiding from his administration, he's hiding from the rest of the student body, he's hiding his conduct from the community. Hardly the venue that parents would expect that they were sending their school-age high school kids off to.
>
> AA IV 883-84.

Lofthouse did not object to this improper argument.

Next, the prosecutor *argued*:

> You will hear that [M.T], at 17, liked the flattery and the attention and the forbidden nature of it because she's 17. She's 17. Jason Lofthouse is 32. She's a pretty easy mark for that kind of chatter.
>
> Id. at 888-89.

Lofthouse objected to this argument. Id. The court sustained the objection and admonished the jury to disregard the comment. Id.

Finally, the prosecutor *argued* Lofthouse knew he was guilty:

> [H]e concealed himself and locked himself and his student in his classroom in order to have sex. When you conceal your conduct, you know it's wrong. Otherwise, share it with the world, right?
>
> Id. at 894.

Lofthouse objected and the court sustained the objection admonishing the jury to disregard the comment. Id.

The aforementioned arguments were not an outline of anticipated evidence. Instead, the arguments were improper insinuations of guilt, disparagement, and an attempt to inflame the juror's passions. Because the misconduct undermined the presumption of innocence, this Court should review for constitutional error and reverse Lofthouse's conviction. See Valdez, 124 Nev. at 1188, 196 P.3d at 476. Alternately, if the misconduct was non-constitutional, it nevertheless implanted in the jurors' minds a presupposition of guilt. Therefore, the misconduct so infected Lofthouse's trial with unfairness it denied Lofthouse his constitutional right to a fair trial. Under either standard the misconduct warrants reversal.

C. The prosecutor obstructed Lofthouse's access to M.T.

A criminal trial is a search for the truth which is only accomplished when both parties "have an equal opportunity to

interview the persons who have the information from which the truth may be determined." Davis v. State, 110 Nev. 1107, 1119, 881 P.2d 657, 665 (1994) (quoting Gregory v. U.S., 369 F.2d 185, 188-89 (D.C. Cir. 1966)). Obstructing a defendant's access to witnesses violates a defendant's due process right to a fair trial. Kines v. Butterworth, 669 F.2d 6, 9 (1st Cir. 1991); see also Nevada Rules of Prof. Conduct, Rule 3.4(1).

Immediately before M.T. testified the prosecutor complained that Lofthouse's attorney had spoken to M.T. and told her Lofthouse faced life in prison if convicted.[37] AA V 1008. The State argued it was "inappropriate" to contact M.T. and discuss the potential sentence. Id. at 1009. Lofthouse's attorney acknowledged speaking with M.T. but denied discussing any potential sentence. Id. The court reprimanded counsel advising "it better not have happened." Id. at 1010. The court also threatened counsel with sanctions. Id.

There is no statute, court rule, or precedent which strictly prohibits an attorney from contacting an alleged victim and discussing a defendant's potential punishment. Rather, NRS 174.234(5) allows a party to petition the court to withhold a witness' address. However, if

[37] First-Degree Kidnapping is potentially punishable by life in prison. See NRS 200.320(2)(a).

the court agrees to do so it must provide the other party an opportunity to interview the witness. Id. Similarly, NRS 200.591 allows the court to enter protective orders prohibiting contact with alleged victims. However, here the State never requested to withhold M.T.'s contact information or sought a protective order. More importantly, pursuant to NRS 176.015(3), "[a] victim may express an opinion regarding the defendant's sentence in a noncapital case." Randall v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993). Obviously, if a victim can express an opinion regarding a potential sentence that victim is entitled to know the potential sentence.

Lofthouse had a fundamental right to have M.T. testify in his case-in-chief. The State successfully interfered with this fundamental right by cunningly convincing the court Lofthouse's counsel improperly communicated with M.T. Given the district court's harsh warnings against speaking with M.T, Lofthouse did not subsequently interview M.T. or call M.T. in his case-in-chief. Thus, the State's intentional and unethical conduct violated Lofthouse's due process right to access witnesses.

Likewise, the State's nonsensical argument and its underhanded suggestion that Lofthouse's contact with M.T. warranted sanctions

violated Lofthouse's fundamental due process right to a fair trial. When the court chastised Lofthouse's counsel for "inappropriately" contacting M.T., counsel naturally tempered cross-examination to avoid upsetting the court further. Thus, the court's admonishment interfered with Lofthouse's right to vigorously cross-examine M.T. and warrants reversal.

D. The prosecutor committed misconduct in rebuttal argument.

During rebuttal argument the prosecutor argued uninstructed legal theories, offered her personal interpretation regarding NRS 200.310's legislative history, offered personal opinions concerning the evidence and Lofthouse's guilt, and inflamed the juror's passions by equating Lofthouse's conduct to child rape.

1. The prosecutor offered her personal opinion and invoked superior legal knowledge.

"This court has long recognized a prosecutor should be unprejudiced, impartial, and nonpartisan, and he should not inject his personal opinion or beliefs into the proceedings or attempt to inflame the jury's fears or passions in the pursuit of a conviction." Valdez, 124 Nev. at 1192, 196 P.3d at 478 (internal citations omitted). See also Collier, 101 Nev. at 480, 705 P.2d at 1130. Additionally, a prosecutor

cannot invoke her supposedly greater experience or knowledge because doing so invites "undue jury reliance" upon the conclusions the prosecutor personally endorses. See Morales v. State, 122 Nev. 966, 973, 143 P.3d 463, 468 (2006).

During rebuttal argument Lofthouse's prosecutor discussed why M.T. appeared reluctant to testify at trial and improperly opined, "**I think** she still likes him. **I think** she still has some feeling for him." AA VI 1349. Additionally, the prosecutor personally opined Lofthouse was guilty. Id. at 1351. ("To do otherwise [find Lofthouse not guilty], **I think**, flies in the face of the evidence.").

The prosecutor also improperly invoked her superior knowledge by arguing her interpretation regarding NRS 200.310's legislative history. The prosecutor explained the legislature enacted Nevada's kidnapping statue in the 1940's to "protect those under the age of 18." AA VI 1344. Moreover, the legislature drafted NRS 200.310's language regarding keeping children from their parents "in the event the child was kidnapped but no crime was perpetuated upon them." Id. at 1345. Additionally, the legislature drafted NRS 200.310's language regarding holding a minor to unlawful service with "child prostitution" in mind. Id. at 1346. Specifically, the section involves

"pimps" who "endear themselves to these minor prostitutes and they go with them consensually." Id. The prosecutor argued NRS 200.310's language regarding the intent to commit an unlawful act upon the minor's person was "put in place to protect **our** kids." Id. at 1348. See also Id. at 1350 ("And, again, this statute was drafted with **our** kids in mind. It was drafted with **our** kids in mind."). Most egregiously, the prosecutor claimed the legislature drafted this section to **specifically address Lofthouse's conduct**. See Id. at 1348 ("And they [the legislature] put that whole body of the first-degree kidnapping statute in place to handle situations **just like this**."). This argument is not only highly improper, it is historically incorrect.

Nothing in NRS 200.310's legislative history reveals any discussion regarding sexual relations between teachers and consenting 17 year-old students. As discussed earlier, NRS 200.310 codified the common law crime kidnapping and the statutory offense child stealing. Basically, the law prohibited interference with parental custody or stealing from the child. See argument section I *supra*. The Legislature codified NRS 201.540 in 1997 to prohibit sexual relationships between teachers and students. Before 1997 the State could not charge kidnapping if a teacher and his 17-year-old student

agreed to have sexual intercourse at a hotel because teachers were not prohibited from having sexual relations with consenting 17-year-old students. Therefore, the legislature did not enact Kidnapping with situations like Lofthouse's in mind or to protect the jurors' own children from teachers.

2. The prosecutor disparaged Lofthouse and inflamed the jury's passions.

The prosecutor also impermissibly inflamed the jury's passions and disparaged Lofthouse. Like during *voir dire*, the prosecutor repeatedly aligned the jury with the State by claiming the legislature drafted the law "with **our** kids in mind." AA VI 1348, 1350. This inflammatory argument suggested Lofthouse could target the jurors' own children just as he allegedly targeted M.T. It is absolutely improper for a prosecutor to suggest the jury place its' children in the alleged victim's place. See McGuire, 100 Nev. at 157, 677 P.2d at 1064.

Additionally, the prosecutor disparaged Lofthouse by comparing him to a pedophile or child rapist. When discussing Lofthouse's alleged "enticement" the prosecutor argued Lofthouse's actions were the same as "pulling up in a van and saying, 'Do you want some candy, little girl?' It's the same thing. It's the same thing.

And that's what that statute [NRS 200.310(1)] was designed to preclude." AA VI 1347. This inflammatory comment had no place at trial because Lofthouse was not charged with sexual assault. Moreover, because M.T. was 17 and legally capable of consenting to sexual intercourse, Lofthouse's behavior, though perhaps inappropriate, was not remotely similar to luring a random child into a van with candy.

3. The prosecutor argued an un-instructed legal theory.

"[I]t is improper for an attorney to argue legal theories to a jury when the jury has not been instructed on those theories." Lloyd v. State, 94 Nev. 167, 169, 576 P.2d 740, 742 (1978). Likewise, a "prosecutor should not misstate the law in closing argument." U.S. v. Artus, 591 F.2d 526, 528 (9th Cir. 1979).

Because the State charged Lofthouse with First-Degree Kidnapping under the theory he either: led; took; or **enticed** M.T., with the intent to commit a crime upon her person, "entice" was an element of the charged crime. When the court refused Lofthouse's proposed theory of defense jury instruction (see argument section III *supra*), Lofthouse argued he did not kidnap M.T. because he did not

lead, take, or **entice** M.T. with the intent to perpetuate a crime upon her person. See generally AA VI 1333-42.

Duirng closing argument Lofthouse suggested leading, taking, enticing implies "control or dominion over somebody." Id. at 1333. However, Lofthouse never defined entice. In contrast, the State improperly argued "[e]ntice means to attract someone, especially by offering or showing something that is appealing or interesting; to attract artfully or by arousing hope or desire, to tempt." AA VI 1349-47. The prosecutor suggested her definition was "a dictionary definition." Id. at 1347. However, the district court had not provided an instruction defining "entice." Therefore, the prosecutor committed misconduct by suggesting her definition was both the dictionary definition and the law governing the case.[38]

E. Plain error.

Unfortunately, Lofthouse's California attorney failed to object to the aforementioned misconduct. Nevertheless, this Court can review the misconduct for plain error. See NRS 178.602.

[38] The district court acknowledged the prosecutor committed misconduct by improperly defining "entice" but did not intervene *sua sponte* to stop the misconduct. AA VI 1401-03.

Here, the misconduct is plain from a casual inspection of the record. See Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995). Additionally, the misconduct is clear under Nevada law. See McGuire, 100 Nev. at 157, 677 P.2d at 1064; Lloyd, 94 Nev. at 169, 576 P.2d at 742; Collier, 101 Nev. at 480, 705 P.2d at 1130; Valdez, 124 Nev. at 1192, 196 P.3d at 478; Guy, 108 Nev. at 786, 839 P.2d at 588; Morales, 122 Nev. at 973, 143 P.3d at 468; Davis, 110 Nev. at 1119, 881 P.2d at 665; Watters, 129 Nev. at ___, 313 P.3d at 247; Nevada Rules of Professional Conduct, Rule 3.4(1).

Moreover, the misconduct prejudiced Lofthouse because it impacted the jury's verdict, especially when viewed "in the context of the trial as a whole." Likewise, the misconduct "seriously affect[ed] the integrity or public reputation of the judicial proceedings." See Rose, 123 Nev. at 209, 163 P.3d at 418. Indeed, the misconduct was so patently inflammatory and prejudicial plain error should not apply. See Garner, 78 Nev. at 372-73, 374 P.2d at 529.

Beginning in *voir dire*, the State systematically indoctrinated the jury to falsely believe Lofthouse endangered **all** children in the Clark County School District, including the jurors' own children. In opening statement the prosecutor impermissibly argued Lofthouse's

guilt and suggested Lofthouse violated the trust between the individual jurors and the School District. The State amplified its fear-mongering in rebuttal by comparing Lofthouse to a child rapist who lures children into a van with candy. These inflammatory and prejudicial arguments have no place at a trial which is ultimately a search for the truth, not a game to be won at all costs. See generally Azbill v. State, 88 Nev. 240, 250, 495 P.2d 1064, 1070 (1972).

Additionally, the State intentionally misled the court to believe Lofthouse could not contact M.T. before her testimony and/or explain to her the possible penalty for First-Degree Kidnapping. This conduct violated Lofthouse's fundamental right to access witnesses against him and casts doubt upon the fairness and integrity of the judicial system -- which supposedly ensures every accused person an adequate opportunity to defend himself by having access to witnesses.

Furthermore, the State's impermissible argument that the legislature created NRS 200.310(1) with Lofthouse's conduct in mind prejudiced Lofthouse because the jury could reasonably interpret the State's argument to mean the legislature drafted NRS 200.310 to **specifically punish teachers who have sexual relations with their students**. This argument is factually inaccurate and the jury would not

have convicted Lofthouse of kidnapping had the prosecutor not personally attested to the legislature's supposed intent -- especially when the State conceded Lofthouse could only be guilty under the theory he enticed M.T. with the intent to commit an unlawful act upon her person. See Lioce, 124 Nev. at 19, 174 P.3d at 982.

Moreover, because the jury requested the court read-back the prosecutor's definition for "entice" it appears the jury gave significant weight to the prosecutor's impermissible arguments. See AA VI 1400. The court compounded this error by refusing to clarify the jury's confusion (see argument VI, *supra*). Thus, the court allowed the jury to rely upon the prosecutor's impermissible and incorrect argument regarding this uninstructed legal theory.

Finally, "[j]udges who see bad behavior by those appearing before them, especially prosecutors who wield great power and have greater ethical responsibilities, must hold such misconduct up to the light of public scrutiny." Hon. Alex Kozinski, Preface, 44 Geo. L.J. Ann. Rev. Crim. Proc. iii, xxxvi (2015). Although Lofthouse's California attorney failed to object the State's blatant misconduct, the district court should have intervened *sua sponte* to ensure Lofthouse received a fair trial. See Collier, 101 Nev. at 477, 705 P.2d at 1128.

Because the aforementioned misconduct, on the whole, impacted the jury's verdict and destroyed the integrity and public reputation of the judicial proceedings, Lofthouse requests this Court reverse his conviction.

VIII. The District Court Violated Lofthouse's Constitutional Right to Confront his Accuser.

"The Sixth Amendment's guarantee of the right of an accused to confront accusatory witnesses is a fundamental right that is made obligatory on the states by the Fourteenth Amendment." Ramirez v. State, 114 Nev. 550, 557, 958 P.2d 724, 729 (1998). This fundamental right is secured through cross-examination. Id. (citing Davis v. Alaska, 415 U.S. 308, 315 (1974)).

On appeal, this Court reviews whether the district violated the Confrontation Clause *de novo*. See Chavez v. State, 125 Nev. 328, 213 P.3d 476 (2009). When reviewing whether the court violated the confrontation clause this Court considers the importance of the witness' testimony to the State's case, whether the testimony was cumulative, the presence or absence of corroborative or contradictory evidence on material points, and "the overall strength of the prosecution's case." Medina v. State, 122 Nev. 346, 355, 143 P.3d 471, 477 (2006). (Internal citations omitted). Confrontation clause

violations are reviewed for constitutional harmless error. Id. Under this standard, the State must "show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id. (quoting Chapman v. California, 386 U.S. 18, 24 (1967).

During trial Lofthouse asked M.T. whether he made any promises to her, offered to leave his wife for her, bought her flowers or jewelry, or whether he "took her virginity." AA V 1132-33. The State objected and the court sustained the objection. Id. at 1133. Lofthouse then asked M.T. about her prior relationships with males and the State objected again. Id.

At a bench conference Lofthouse explained his questions and M.T.'s anticipated answers were relevant to show M.T. was not biased, did not seek her parents' permission to see other people, and that she, and not Lofthouse, deceived her parents regarding her relationship with Lofthouse. Id. at 1133-36. The State argued the questions violated Nevada's rape shield law. Id. at 1135; see NRS 50.090. Additionally, the State explained it only asked M.T. questions about the relationship's secrecy because "that's part of our burden of

proof under that portion of the first-degree kidnapping statute."[39] Id. at 1141. Lofthouse responded "rape shield" did not apply because he was not charged with sexual assault. Id. at 1138-39. Additionally, his questions and potential answers were relevant to rebut the State's claim that Lofthouse "groomed" or "enticed" M.T. Id. at 1142.

The court refused to allow Lofthouse to question M.T. about prior relationships and instead only allowed Lofthouse to ask M.T. "on occasions that you went out with other boys, did you always tell your parents about it?" Id. at 1144. Later, the court erroneously suggested although Lofthouse's charges did not implicate rape shield, they nevertheless "potentially fall within the parameters of [NRS 48.069][40]" and therefore should have been addressed prior to trial." Id. at 1174-75.

The court's decision violated Lofthouse's fundamental confrontation right. NRS 50.090 only prohibits introducing evidence of "previous sexual conduct of the victim of the crime to challenge the

[39] Presumably the State meant the portion of NRS 200.310 which prohibits regarding keeping a minor from his/her parents -- a theory the State abandoned at trial.

[40] NRS 48.069 governs the procedure for admitting evidence regarding an alleged sexual assault victim's previous sexual conduct to demonstrate consent. Because Lofthouse was not charged with sexual assault, NRS 48.069 was not applicable in his case.

victim's credibility" in a sexual assault or statutory sexual seduction prosecution. Id. Even then, a defendant asserting a consent defense can request a hearing seeking to admit evidence regarding the alleged victim's prior sexual conduct. See NRS 48.069.

Here, the State did not charge Lofthouse with sexual assault or statutory sexual seduction. When M.T. chose to have sexual relations with Lofthouse she was 17 years-old and legally able to consent to sexual relations. See NRS 200.364(6). Indeed, M.T. testified she chose to engage in sexual conduct with Lofthouse and Lofthouse never forced her to do anything she did not want to do. AA V 1125-30. Accordingly, NRS 50.090 and 48.069 were inapplicable in Lofthouse's case.

Additionally, M.T. was the State's most important witness because only she could establish the elements of the charged crimes. The State's kidnapping allegation rested upon whether Lofthouse "enticed" M.T. See AA VI 1321 ("It's C, he -- led, took, enticed her away with the intent to perpetuate upon the person of the minor, upon M.T., any unlawful act."). M.T.'s prior sexual conduct was relevant and probative to Lofthouse's defense that his status and behavior did not "entice" M.T. to accompany him to hotels to engage in sexual

conduct. In fact, it appears the jury understood this issue by asking M.T. whether she liked the "attention that you received from the relationship" with Lofthouse.[41] AA V 1148. There was no other cumulative, contradictory, or corroborative evidence on this point.

Furthermore, assuming the State could charge Lothouse with kidnapping (see argument sections I, II, *supra*) the State's case was not strong. Because the State only alleged Lofthouse lead, took, **enticed**, carried away or detained M.T. with the intent to perpetuate an unlawful act upon her person, it had to prove beyond a reasonable doubt Lofthouse "enticed" M.T. See AA VI 1321. The State lacked any evidence whatsoever to support this allegation. The text messages between M.T. and Lofthouse demonstrate M.T. was a sexually confident woman who desired to have a physical relationship with Lofthouse. M.T. has an absolute and fundamental right to sexual autonomy. Additionally, Lofthouse had a right to present evidence his relationship with M.T. was not significantly important or "enticing" to her. Therefore, by refusing to allow Lofthouse to question M.T. about

[41] M.T. responded, "As in any relationship, I guess the attention was nice." Id. However, believing attention is "nice" does not prove the attention "enticed" her to engage in consensual sexual conduct.

her prior sexual relationships the court deprived Lofthouse of his fundamental right to defend himself.

Finally, the State benefitted from the court's decision. After the court prohibited Lofthouse from eliciting evidence his behavior was not especially meaningful to M.T., the State improperly argued to the jury that sex with a 32 year-old teacher **actually enticed** M.T. See AA VI 1346-1347 ("let's talk about what enticement was to [M.T.], a 17-year-old girl."... "I submit to you that, at 17, the flattery, and the attention, and the wooing, and **the sexual experience**, and **the excitement of a sexual tryst with your teacher** at a hotel getaway, those are all things that are appealing and arousing and tempting and that is what enticement is.") (Emphasis added). Essentially, after precluding Lofthouse from eliciting evidence that M.T. was a normal 17-year old with sexual interests, the State used M.T.'s supposed sexual inexperience to bolster its allegation. Accordingly, the court's refusal to allow Lofthouse to question M.T. was not harmless and Lofthouse respectfully requests this Court reverse his conviction.

IX. The State's Witness Improperly Opined Regarding Lofthouse's Guilt.

Witnesses, and in particular law enforcement witnesses, cannot "render an opinion on a defendant's guilt or innocence." Cordova v.

State, 116 Nev. 664, 669, 6 P.3d 481, 485 (2000). This Court recognizes jurors are likely to be swayed "by the opinion of a witness who is presented as an experienced criminal investigator.'" Id. (quoting Sakeagak v. State, 952 P.2d 278, 282 (Alaska Ct.App.1998)). Improper witness opinion testimony is reviewed for abuse of discretion. Dechant v. State, 116 Nev. 918, 924, 10 P.3d 108, 112 (2000).

State's witness Detective Matt Caldwell testified he forensically examined both LOFTHOUSE and M.T.'s phones. AA V 1155, 1160-61. Caldwell found approximately 3,800 text messages between M.T. and Lofthouse on M.T.'s phone. Id. at 1163. Caldwell generated a report based upon his examinations. Id. at 1165. At trial Caldwell testified he only included messages in his report "that [he] believed to be relevant to the investigation to **prove a crime had been committed**." Id. The text messages were admitted at trial as exhibit 21. Id. at 1011, 1058. Lofthouse's California attorney did not object to this improper testimony.

Although Lofthouse failed to object to the improper testimony this Court can review for plain error. See NRS 178.602; Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005). Under plain error

Caldwell's improper testimony is clear from the record. Additionally, the testimony affected Lofthouse's substantial right to have the jury determine his guilt or innocence based only upon proper evidence. A paramount issue at trial was whether Lofthouse "enticed" M.T. and thus kidnapped her. See AA VI 1344-47. The text messages between Lofthouse and M.T. were crucial evidence on this important issue. Thus, when Caldwell improperly opined he only included messages in his report which **proved Lofthouse committed a crime**, Caldwell essentially opined Lofthouse was guilty.[42] AA V 1165.

X. The District Court Violated Lofthouse's Nevada Constitutional Right Against Double Jeopardy by Increasing Lofthouse's Maximum Sentence.

A district court generally lacks jurisdiction to amend a judgment of conviction once the defendant begins serving his sentence. See State v. Kimsey, 109 Nev. 519, 523, 853 P.2d 109, 112 (1993) (Once a person begins serving his sentence "the power to alleviate the sentence rests entirely with the executive branch."). However, a district court retains jurisdiction to correct an illegal sentence at any time. NRS 176.555. An "illegal" sentence is "one at variance with the controlling

[42] The prosecutor relied upon these messages during rebuttal argument to argue Lofthouse kidnapped M.T. by "enticing" her. AA VI 1346-1347.

sentencing statute or when "the court goes beyond its authority by acting without jurisdiction or imposing a sentence in excess of the statutory maximum provided...." Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996) (internal citations omitted). Moreover, "if any portion of a defendant's criminal sentence is illegal at the time of the pronouncement of sentencing, whether the minimum sentence or the maximum sentence, the entire sentence is illegal." Cassinelli v. State, 131 Nev. ___, ___, 357 P.3d 349, 361 (Nev. Ct. App. 2015).

The court sentenced Lofthouse to 12 to 48 months for count one -- Sexual Conduct between School Employees and Pupil, and 60 to 180 months for count 2 – First-Degree Kidnapping. AA VI 1445-46. The court ordered count two to run consecutive to count 1.[43] Id. The Court orally pronounced Lofthouse's aggregate sentence as 72 to 180 months, or six (6) to fifteen (15) years. Id. at 1149. Later, the court filed the JOC which indicated a total 72 to 180 month sentence. AA II 382. The court also imposed lifetime supervision pursuant to NRS 176.0931. Id.

[43] The court ran other counts concurrent and consecutive to each other as well. However, the court essentially gave Lofthouse to a total sentence of 72 to 180 months. See AA VI 1448-49.

On April 24, 2017, well after Lofthouse file his Notice of Appeal, the Nevada Department of Corrections ("NDOC") sent the district court a letter advising, "[t]he Judgement of Conviction was given a total maximum aggregation of 180 months maximum, according to our calculations it is a 19 year maximum. Please clarify?"[44] AA VII 1487. The district court scheduled a "sentence clarification" hearing for May 18, 2017. Id. at 1485. While researching the aggregation issue, Lofthouse discovered the district court illegally sentenced him to lifetime supervision. Id. at 1550. Lofthouse prepared a written Motion to Correct Illegal Sentence to file in open court on May 18th.

Meanwhile, Lofthouse's deadline to file the Opening Brief in this Court was May 2, 2017. However, because Lofthouse only received the district court transcripts on April 7, 2017, he filed a motion to extend time in this Court. See Motion for Extension of Time to File Opening Brief Due to Late Receipt of Transcripts, case #70587, filed May 2, 2017. This Court denied the motion. See Order, case #70587, filed May 15, 2017. Lofthouse then filed an Emergency Motion to Reconsider or alternately a Motion to Suspend Briefing and

[44] Lofthouse's appellate counsel received the letter on May 9, 2017. See AA VII 1493-94.

Remand so the district court could address Lofthouse's sentence issues. See Appellant's Emergency Motion to Reconsider Denial of Motion for Extension of Time Due to Late Receipt of Transcripts and Motion to Suspend Briefing and Limited Remand to the District Court, case #70587, filed May 16, 2017.

At the May 18th hearing in the district court Lofthouse attempted to file his Motion to Correct Illegal Sentence. AA VII 1550. Although the court did not accept the motion, Lofthouse argued he was not subject to lifetime supervision. Id. at 1556-58. The Court denied Lofthouse's request to vacate lifetime supervision, but explained it would reconsider the issue if this Court granted Lofthouse's Motion to Suspend Briefing and Remand. Id. at 1558.

Regarding the sentence aggregation, Lofthouse noted the district court's 72 to 180 month sentence appeared illegal. Pursuant to NRS 176.0635(1),(2)(b), when a defendant is convicted of two or more offenses and the court runs the sentences consecutively "the court must pronounce the minimum and maximum aggregate terms of imprisonment[.]" Basically, Lofthouse's 72 to 180 month sentence violated NRS 176.035(2)(b) because the court did not aggregate the maximum term. Id. at 1550. Lofthouse further argued to correct the

illegality the court could not increase his maximum term. Id. at 1551. Rather, the court could only decrease his minimum sentence to 60 months. Id. at 1553-55. The court denied Lofthouse's request and reiterated the sentence would remain 72 to 180 months. Id. at 1555.

Later that day this Court granted Lofthouse's motion to suspend briefing. See Order, case #70587, filed May 18, 2017. In its order this Court advised if the district court was inclined to grant Lofthouse's Motion to Correct Illegal Setence, Lofthouse should comply with procedure set forth in Foster v. Dingwall, 126 Nev. 49, 228 P3d. 453 (2010). Id.

Lofthouse then re-filed his Motion to Correct Illegal Sentence in the district court. Id. at 1491. However, Lofthouse's motion only addressed lifetime supervision and did not address the aggregation issue as the district court clearly denied NDOC's request at the May 18th hearing. See Id. at 1491-1500. The State responded to Lofthouse's motion and conceded Lofthouse was not subject to lifetime supervision. Id. at 1523-25. However, the State requested the court increase Lofthouse's maximum sentence to 228 months to comply with NRS 176.035(2)(b). Id. at 1523-25.

On June 8, 2017, the district court indicated it would certify its intent to grant Lofthouse's Motion and remove lifetime supervision. Id. at 1561-62. The court continued the hearing to June 22, 2017 to address the aggregation issue. Id. at 1569. Lofthouse filed a Motion for Remand in this Court, attaching the district court's certification. See Appellant's Motion for Remand, case #70587, filed June 16, 2017. This Court granted Lofthouse's Motion for Remand on July 6, 2017. See Order, case #70587, filed July 6, 2017.

Thereafter, on July 13, 2017 the district court formally granted Lofthouse's Motion to Correct Illegal Sentence and vacated lifetime supervision. AA VII 1576. Over Lofthouse's objection the court also increased Lofthouse's maximum sentence to 228 months. Id. at 1579-80. This Court resumed briefing on August 15, 2017. See Order Reinstating Briefing, case #70587, filed August 15, 2017.

A. The district court lacked jurisdiction to increase Lofthouse's sentence.

As an initial matter, the district court arguably lacked jurisdiction to increase Lofthouse's maximum sentence after this Court remanded Lofthouse's case. This Court's May 18th order advised the parties to follow the procedure set forth in Foster v. Dingwall. See Order, case #70587, filed May 18, 2017. According to Foster, when a

party seeks to alter a judgment pending on appeal it must file a motion in the district court. Foster, 126 Nev. at 52, 228 P.3d at 455. Thereafter, the district court may deny the motion. Id. at 53, 228 P.3d at 455. However, if the court desires to grant the motion it must certify its intent to do so and request a limited remand from this Court. Id. This Court "will then consider the request for a remand and determine whether it should be granted or denied." Id.

Here, no party filed a motion in the district court seeking to alter Lofthouse's 72 to 180 month sentence. Lofthouse's Motion only requested the court vacate lifetime supervision. AA VII 1495-99. The district court certified its intent to grant Lofthouse's motion but did not certify its intent to alter Lofthouse's aggregate sentence. Id. at 1582. This Court remanded Lofthouse's case for the district court to enter an order removing lifetime supervision. See Order, case #70587, filed July 6, 2017. Because the motion for remand did not address the aggregate sentence, the district court arguably did not have jurisdiction to alter Lofthouse's Judgment of Conviction and increase his sentence's severity.

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B. The district court's decision to increase Lofthouse's sentence violated Nevada's prohibition against double jeopardy.

If the district court had jurisdiction to address Lofthouse's aggregate sentence, by increasing the maximum sentence the court violated Nevada's prohibition against double jeopardy. When the district court has jurisdiction to correct an illegal sentence it may do so "only to the extent necessary to bring the sentence into compliance with the statute." Miranda v. State, 114 Nev. 385, 387, 956 P.2d 1377, 1378 (1998) (citing U.S. v. Fogel, 829 F.2d 77, 88 (D.C. Cir. 1987)). In Miranda, the district court sentenced the defendant to 18 to 36 months in prison. Miranda, 114 Nev. at 386, 956 P.2d at 1377. That sentence violated Nevada's 40% rule and was illegal. See NRS 193.130(1). To correct the illegality, the district court subsequently increased the maximum term to 45 months. Miranda, 114 Nev. at 386, 956 P.2d at 1377.

On appeal this Court reversed holding, "[t]o comply with the Double Jeopardy Clause of the Nevada Constitution, a district court may correct an illegal sentence by increasing its severity only when necessary to bring the sentence into compliance with the pertinent statute, and a correction that increases sentence severity is 'necessary'

only when there is no other, less severe means of correcting the illegality." Id. at 387, 956 P.2d at 1378. The Court also noted "the sentencing illegality in the present case could have been corrected by lowering the minimum terms rather than increasing the maximum terms, and, therefore, the correction imposed was not necessary to bring the sentences into compliance with the pertinent sentencing statute." Id.

Here, the district court initially incorrectly aggregated Lofthouse's maximum sentence. See AA II 382; AA VI 1448-49. Therefore, Lofthouse's 72 to 180 month sentence was facially illegal because it was at variance with the controlling sentencing statute. See NRS 176.035(2)(b). However, to correct this illegality the court could not increase the maximum sentence because the less severe way to correct the sentence was to order the 12 to 48 month sentence to run concurrent with the 60 to 180 month sentence for a total legal sentence of 60 to 180 months. See Miranda, 114 Nev. at 387, 956 P.2d at 1378.

District court declined to decrease Lofthouse's minimum sentence by adopting the State's curious assertion that the initial sentence was not "illegal" but simply a "miscalculation" or "mathematical mistake." AA VII 1577, 1580. This argument defies

logic and common sense. Even if the district court made a mathematical error when computing Lofthouse's maximum aggregate sentence, the resulting error created an illegal sentence. In Miranda the court incorrectly calculated 40% of the 36 month maximum sentence. See Miranda, 114 Nev. at 386, 956 P.2d at 1377. Therefore, the illegal sentence in Miranda was also the result of a "mathematical mistake." Nevertheless, this Court determined the district court's decision to re-sentence the defendant more harshly violated Nevada's prohibition against double jeopardy. Similarly, here, the district court's decision to increase Lofthouse's maximum sentence violated Lofthouse's Nevada Constitutional right against double jeopardy.

Although Lofthouse has asserted numerous meritorious issues warranting reversal herein, if this court disagrees then at minimum this Court must remand Lofthouse's case with instructions that the district court modify Lofthouse's sentence to 60 to 180 months.

XI. Cumulative Error warrants reversal.

"Although individual errors may be harmless, the cumulative effect of multiple errors may violate a defendant's constitutional right to a fair trial." Byford v. State, 116 Nev. 215, 241-42, 994 P.2d 700, 717 (2000). "When evaluating a claim of cumulative error, [this

Court] consider[s] the following factors: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Valdez, 124 Nev. at 1195, 196 P.3d at 481.

Lofthouse conceded at trial he engaged in sexual conduct with M.T. However, Lofthouse maintained, and still maintains, he could not be charged or convicted for Kidnapping because Sexual Conduct between Teacher and Student cannot be committed "upon the person of the minor." Alternately, NRS 200.310(1) is unconstitutionally vague.

Additionally, Lofthouse asserts the numerous trial errors independently warrant reversal. However, if this court disagrees, then the cumulative effect of the trial errors absolutely deprived Lofthouse of a fair trial.

Assuming Lofthouse could be charged and convicted for kidnapping, the issue of guilt was close. The State did not present any evidence that taking M.T. to hotels substantially increased her risk of harm above that necessary to complete Sexual Conduct between Teacher and Student under NRS 201.540. Additionally, the State did not present any evidence Lofthouse "enticed" M.T. to engage in sexual conduct with him.

Moreover, both the court and State committed numerous trial errors impacting Lofthouse's fundamental right to a fair trial. The State committed serious and pervasive misconduct including indoctrinating the jury, disparaging Lofthouse, obstructing Lofthouse's access to witnesses, and allowing its witness to opine that Lofthouse was guilty. The Court violated Lofthouse's right to a fair trial by incorrectly instructing the jury and refusing Lofthouse's legally accurate instruction which also comprised his theory of defense. Moreover, the court violated Lofthouse's fundamental confrontation right by refusing to allow him to question M.T. regarding her prior sexual relationships. Finally, Lofthouse's multiple convictions for violating NRS 201.540 violated his right against double jeopardy. Therefore, the majority of the court's errors implicated Lofthouse's fundamental Constitutional rights.

Finally, although all crimes are arguably "serious" a crime's seriousness or lack of seriousness should not determine whether a criminal defendant is entitled to a trial which conforms to accepted notions of fairness and due process. Nevertheless, First-Degree Kidnapping is a category A felony. Category A felonies are punishable by life in prison. See NRS 200.320. Thus, Kidnapping is a

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 size font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

Proportionately spaced, has a typeface of 14 points or more and contains 17,642 words and 1,798 lines of text, which exceeds the 14,000 word limit and 1,300 lines of text limit. The appropriate motion for leave has been filed.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by

a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 29th day of September, 2017.

PHILIP J. KOHN
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By */s/ William M. Waters*
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 29th day of September, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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