IN THE SUPREME COURT OF THE STATE OF NEVADA

TENNILLE RAE WHITAKER,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Docket Number 77294

Dist Ct. Case. CR-FP-17-3893

APPEAL FROM JUDGMENT OF THE HONORABLE JUDGE NANCY PORTER

FOURTH JUDICIAL DISTRICT COURT

APPELLANT'S OPENING BRIEF

KARLA K. BUTKO, Esq.
Attorney for Appellant
P. O. BOX 1249
Verdi, Nevada 89439
(775) 786-7118
State Bar #: 3307
Byron Bergeron, Esq.

TYLER INGRAM, ESQ.
Elko County District Attorney
Attorney for Respondent
540 Court Street, Second Floor
Elko, Nevada 89801
(775) 738-3101
CHAD B. THOMPSON, ESQ.

19-09133

IN THE SUPREME COURT OF THE STATE OF NEVADA

TENNILLE RAE WHITAKER,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Docket Number 77294

Dist Ct. Case. CR-FP-17-3893

APPEAL FROM JUDGMENT OF THE HONORABLE JUDGE NANCY PORTER

FOURTH JUDICIAL DISTRICT COURT

APPELLANT'S OPENING BRIEF

KARLA K. BUTKO, Esq.
Attorney for Appellant
P. O. BOX 1249
Verdi, Nevada 89439
(775) 786-7118
State Bar #: 3307
Byron Bergeron, Esq.

TYLER INGRAM, ESQ.
Elko County District Attorney
Attorney for Respondent
540 Court Street, Second Floor
Elko, Nevada 89801
(775) 738-3101
CHAD B. THOMPSON, ESQ.

TABLE OF CONTENTS

TABLE OF CONTENTS CONTINUED

PAGE

6. The District Court violated Nevada law when it failed to order a psycho-sexual evaluation to be prepared as part of the presentence report process. After violating law, the District Court abused its discretion and violated the due process rights of Appellant when it acknowledged that it would not recognize the findings of the psycho-sexual evaluation report completed by the defense to justify probation.

7. Improper victim impact evidence was provided to the sentencing court, in violation of NRS 176.015. Appellant's rights to due process were violated by providing the sentencing court documentary evidence not provided timely to defense counsel. Appellant's rights were violated by the admission of suspect evidence into this sentencing proceeding.

8. The nolo contendere plea was not supported by a factual recitation that substantiated criminal charges against Appellant regarding two of the four victims herein.

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

STATEMENT OF JURISDICTION

This Court has jurisdiction over the direct appeal from the judgment of conviction which entered after a guilty plea. NRAP 4 (b). The judgment of conviction entered October 5, 2018. AA 219. The sentencing hearing occurred October 4, 2018. AA 116. The Memorandum of Plea Agreement/ Nolo Contendere Plea Agreement withheld the right to appeal and the court canvas during the nolo contendere plea confirmed the right to appeal stood after plea. AA 10, 52. The notice of appeal was filed October 17, 2018. AA 225.

ROUTING STATEMENT

The convictions for Counts I - IV in this matter are for category C felonies. As such, this case is presumptively assigned to the intermediate Court of Appeals under NRAP 17(b). In spite of that, the Nevada Supreme Court should retain jurisdiction over this appeal. There are several issues of first impression raised by this direct appeal.

NRAP 17 (11) provides that the Nevada Supreme Court shall retain jurisdiction over matters raising as a principal issue a question of statewide public importance.

NRS 201.540 has never been the subject of a published opinion in Nevada. The law uses terminology not seen in other statutory schemes and which terms are not defined by the Legislature. Statutes similar to this one have been struck down

as unconstitutional in other states. As in those statutory schemes, consensual sex between the teacher and a person over the age of consent has been criminalized. This is the only profession to be subjected to criminal sanctions for consenting sexual acts. The legal issue is whether this type of statutory scheme violates the Equal Protection Clause because it criminalizes consensual sexual conduct for the school professional or employee but not other professions.

Prior to the sentencing proceeding, the Department of Parole & Probation delivered to the sentencing court a document which purported to be victim impact statements for sentencing purposes. The document was addressed to the District Attorney but instead seeks to advise the sentencing court of the conscience of the community. This "Petition" was served upon defense counsel the morning of the sentencing hearing. AA 77-88. The document contains signatures of over 70 people. Many signatures are illegible. Judge Porter admitted that she had reviewed the document but failed to recuse herself even after this display by the small community of Elko against the Defendant. The document was not timely served upon defense counsel so that he could file proper motions to recuse the court and seek a venue change. AA 174-75.

The sentencing hearing itself appeared to be quite contentious. Judge Porter noted the extremely large number of people present to watch the sentencing

hearing. At times Judge Porter advised the court audience that improper or inappropriate behavior would have them expelled from the courtroom.

The outcry by the community demonstrates the volatility in this arena of the law. A review of existing laws in other states leaves little or no published opinions. The opinions that have entered have been mixed, with several states striking down laws similarly written to Nevada's statute. Other states have upheld their laws. The simple issue of the age of consent to have sexual relations is divided in America. The age of consent ranges from ages 14-18.

The term "pupil" is not defined as it relates to NRS 201.540. The facts herein will demonstrate that Ms. Whitaker was an elementary school teacher in Elko, Nevada. All of the victims consented to the sexual acts between themselves and Ms. Whitaker. Of the charges against her, two of the 16-18 year old victims were not involved at the elementary school at all. Ms. Whitaker is certified only as an elementary teacher and has never taught at the high school. Two of the victims, were student aides at the elementary school. The high school and elementary school are not housed in the same building. AA 150. The State's argument at sentencing was that the location does not matter because the two schools are in the same school district. AA 182. The statutory scheme does not say same school district.

The Offer of Proof filed by the State in support of the nolo contendere plea was legally insufficient to demonstrate that Ms. Whitaker violated NRS 201.540. AA 14-15. The nolo contendere plea canvas of the court did not require Ms. Whitaker to admit the facts contained in the offer of proof were accurate or legally adequate at any point. AA 53-54. The plea canvas read more of an *Alford* plea than a nolo contendere plea.

The defense presented a psycho-sexual evaluation for Ms. Whitaker that was filed into the Court record on the same date as the nolo contendere plea. Judge Porter did not order the Department of Parole & Probation to secure an additional psycho-sexual evaluation. At the sentencing hearing, Judge Porter stated that she believed providing a psycho-sexual evaluation from Steven Ing, M.A., M.F.T., was inadequate and that Mr. Ing suffered from a conflict because Ms. Whitaker had attended 13 one-hour sessions, 7 ninety minute sessions, and one two hour session for the interview for the evaluation process with Mr. Ing. 1AA 20. Instead of seeing the treatment efforts of Ms. Whitaker as mitigating, Judge Porter negated the process and diminished the value of the evaluation. 1AA 212.

At no time did Judge Porter provide the defense with notice that she would not accept the evaluation of Mr. Ing, nor did Judge Porter order a psycho-sexual evaluation in accordance with NRS 176A.110 and NRS 176.139. Probation was available for this offense. At no time prior to sentencing did the State of Nevada

object to the submitted psycho-sexual evaluation by Steven Ing, nor did the State request the court to order a psycho-sexual evaluation through the Department of Parole & Probation. The State brutally attacked the report of Steven Ing at their sentencing argument. AA 157, 183-186.

The Department of Parole & Probation prepared an Addendum to their report, to justify a prison recommendation rather than the probation which Ms. Whitaker qualified for under the scored recommendation which the Department normally uses. See Deviation Justification by Lt. Harp attached to PSI report and the sentence recommendation selection scale thereto. This report was dated September 17, 2018, with the sentencing date of October 4, 2018, quickly approaching. The plea entered April 30, 2018, almost five months earlier. It was at this point that the defense was alerted that the Department was seeking prison time, even though Ms. Whitaker qualified for probation under both their charts and her psycho-sexual evaluation. AA 189.

The State entered into a plea agreement with Ms. Whitaker. In that argument, the State agreed to cap its argument for a sentence that did not exceed an aggregate sentence of 4-12 years. The State's argument at the sentencing hearing violated the spirit of this plea agreement. The State admitted that Ms. Whitaker qualified for probation under the normal sentence recommendation scales but

argued for the deviation which recommended the same amount of time as the plea bargain cap of the State. AA 189.

As this Court can see, this is a case that should remain at the Nevada Supreme Court. There are many errors which are worthy of the High Court's review.

SUMMARY OF ARGUMENT

Even though this conviction arose as the result of a guilty plea, there are serious issues which need to be addressed. A key question is the application of NRS 201.540 by way of defining the school as a school district. There are statutory schemes in America which use the term school district, but the Nevada Legislature chose not to do that. The application of NRS 201.540 is inappropriate as Ms. Whitaker was not a teacher at the school at which the 16-17 year old males attended. The schools are not on the same property. Ms. Whitaker was an elementary school teacher. The district court failed to order a psycho-sexual evaluation to be prepared but then limited the benefit of the psycho-sexual evaluation prepared by defense counsel's expert. The district court failed to provide due process under law that it had any type of issue with the proposed psycho-sexual evaluation. The State failed to object until it attacked the evaluation during sentencing. The Department of Parole & Probation had almost five months to write this report, the psycho-sexual evaluation by the defense had been filed on

the date of the plea, but then deviated from its own scored recommendation selection scale when it chose to recommend prison rather than probation. The district court received from the Department, a document which was completely illegal, a petition from members of the community seeking harsh treatment of the defendant. The district court did not present that document to defense counsel and the surprise was on the defense when they discovered its existence on the date of sentencing. The actions of the community members to poison the sentencing judge and the actions of the spectators in court on sentencing violated the due process rights of Ms. Whitaker to a fair and impartial proceeding.

STATEMENT OF THE ISSUES

1. NRS 201.540 is unconstitutionally vague.

2. NRS 201.540 is unconstitutionally overbroad.

3. NRS 201.540 violates the Equal Protection Clause.

4. NRS 201.540 is unconstitutional because it does not require a *mens rea* and is applied as a strict liability offense. NRS 201.540 violates the constitutional right to privacy.

5. The District Court abused its discretion when it refused to voluntarily recuse itself when it was subjected to inadmissible and suspect sentencing documents which were intended to prejudice the Defendant.

6. The District Court violated Nevada law when it failed to order a psycho-sexual evaluation to be prepared as part of the presentence report process. After violating law, the District Court abused its discretion and violated the due process rights of Appellant when it acknowledged that it would not recognize the findings of the psycho-sexual evaluation report completed by the defense to justify probation.

7. Improper victim impact evidence was provided to the sentencing court, in violation of NRS 176.015. Appellant's rights to due process were violated by providing the sentencing court documentary evidence not provided timely to defense counsel. Appellant's rights were violated by the admission of suspect evidence into this sentencing proceeding.

8. The nolo contendere plea was not supported by a factual recitation that substantiated criminal charges against Appellant regarding two of the four victims herein.

STATEMENT OF THE CASE

Tennille Rae Whitaker ("Ms. Whitaker") was charged by way of a criminal information with four counts of Sexual Conduct Between School Employee or Volunteer and a Pupil, a Category C Felony as defined in NRS 201.540. AA 1-5. The charges alleged consensual sexual relations with four pupils, all over the age of consent, 16. AA 1-5.

Ms. Whitaker entered into a plea bargain with the State wherein she would enter a nolo contendere plea to four counts of violation of NRS 201.540, the State would cap any sentence recommendation at 4-12 years in prison but otherwise the Parties remained free to argue. Prior to the plea, the State filed with the Court a document entitled, "Offer of Proof with Respect to the Defendant Tennille Rae Whitaker's Proposed Plea of Nolo Contendere". This document was not signed by the Defendant or her counsel. AA 14-15. The document does not state facts sufficient to demonstrate guilt on all counts alleged.

On April 30, 2018, Ms. Whitaker entered a nolo contendere plea to the four

counts in the criminal information. The District Court did not ask Ms. Whitaker or whether she admitted the facts as alleged in the Offer of Proof of the State. The District Court asked defense counsel, Byron Bergeron, to admit the facts but his response was that he found that improper but agreed that both he and his client wanted the plea to go forward. The plea was accepted by the court.

On the same date, defense counsel Bergeron filed into court a Psycho-Sexual Evaluation which was authored by Steven Ing., M.A., M.F.T. AA 19-39. The evaluation contained the Curriculum Vitae of Steven Ing as attached. AA 34-39. The recommendation of Steven Ing found that Ms. Whitaker was a low risk to reoffend even stating "Ms. Whitaker's risk to the community is as low as she could possibly score using the actuarial tables described below. AA 29, 31. The District Court did not object to the evaluation, nor did it order an evaluation under NRS 176.139 or NRS 176A.110. The State did not object to the evaluation of Steven Ing.

The case proceeded to sentencing on October 4, 2018, almost five months later. The Department of Parole & Probation authored a presentence report in which it objected to its own sentence recommendation selection scale and sought a deviation from the probation which Ms. Whitaker charted out to and instead sought four consecutive prison terms of 12-36 months. See PSI and supporting documents.

Ms. Whitaker was sentenced to four consecutive prison terms of 24-60 months in prison. AA 220-221. The judgment of conviction entered on October 5, 2018. AA 219-224.A timely notice of appeal was filed on October 17, 2018. AA 225.

STATEMENT OF FACTS

The criminal information on the four counts alleged against Ms. Whitaker includes a time period on or between September 1, 2015 and June, 2017. Each of the counts in the criminal information alleged that Ms. Whitaker did as follows:

> Being over the age of 21, while employed at or volunteering at a public or private school, did engage in sexual conduct with a pupil, who was 16 years of age or older and had not received a high school diploma, a general educational development certificate or any equivalent document and: the student was attending the public or private school at which the Defendant was employed or volunteered ; or the student had contact with the Defendant in the course of the Defendant performing his or her duties as an employee or volunteer.
> AA 1-3.

Notably, the criminal information did not allege the ages of the pupils in question. AA 1-2. The criminal information did not allege the school at which Ms. Whitaker taught or the school which the pupils attended. The memorandum of plea did not allege any basis in fact for the entry of a plea. AA6-10. The offer of proof of the State (in support of the nolo contendere plea) did not allege the age of the pupils, the location of the offense(s) or the location Ms. Whitaker taught or the location of the school the pupils attended.

At the entry of plea, the State alleged the charge against Ms. Whitaker. This

recitation did not contain any factual background for admission. AA 44-45. The District Court asked Ms. Whitaker if she had read the offer of proof. The District Court asked Mr. Bergeron to admit the State could prove the charges beyond a reasonable doubt. He did not admit that. Mr. Bergeron stated words to the effect that he wanted the negotiated plea to go forward. AA 54.

The preliminary hearing in this case was waived. The facts as to the allegations against Ms. Whitaker are being cited from the sentencing transcript and the presentence report.

Indeed, Ms. Whitaker was an elementary school teacher at the Wells Elementary School Ms. Whitaker was not a high school teacher, nor did she teach at the high school in Wells, Nevada. AA 150. The four male pupils were pupils of the Wells High School. AA 150. The investigation began on September 30, 2016. The victims were O. C. age 17; B. H. teacher's aide but potentially not while sexual relationship was ongoing, age >16 ; L.T. age >16 ; and C.M. age >16 -- teacher's aide. PSI pages 6-11. Ms. Whitaker had a romantic relationship with each of the four males alleged.

On the same date as the entry of plea, (04/30/18) Ms. Whitaker filed with the Court a psycho-sexual evaluation completed by Steven Ing, M.A., M.F.T., which deemed Ms. Whitaker to be a low risk to re-offend. The evaluation demonstrated that by the date of the plea, Ms. Whitaker had attended 25.5 hours of

treatment and assessment with Steven Ing. Ms. Whitaker between July 5, 2017 and April 30, 2018, attended 13 one hour sessions, 7 ninety minute sessions and one 2 hour session for the evaluation process. The treatment sessions were in Reno and Ms. Whitaker resides in Death, Nevada.

Mr. Ing's conclusions were that Ms. Whitaker had no criminal history at all; had been married for 19 years; was a licensed elementary school teacher; worked for the Elko School District for 11 years; had been the victim of child sexual abuse; suffered from signs of depression; suffers from AD/HD; does not suffer from any substance abuse issues; and would benefit from treatment. AA 21-28.

The evaluation stated: "Ms. Whitaker's risk to the community is as low as she could possibly score using the actuarial tables described below." AA 29.

Attached to the Psycho-Sexual Evaluation was the Curriculum Vitae of Steven Ing. At no time prior to the sentencing hearing, about five months later, did the District Court object to the credentials of Steven Ing to prepare the evaluation. At no time did the District Court order a psycho-sexual evaluation to be prepared by the Department of Parole & Probation. At no time prior to sentencing did the State object to the credentials of Steven Ing to prepare the evaluation. At no time did the State request that the District Court order a psycho-sexual evaluation to be prepared by the Department of Parole & Probation.

On the same date as the plea, the Defendant filed letters from friends and

family members of Ms. Whitaker in support of sentencing mitigation. AA 60-76. The letters explained to the District Court that Ms. Whitaker was remorseful, regretted her actions, was a good mother, was helpful to her friends and neighbors.

A document dated May 7, 2018, was prepared by the Department of Parole & Probation. That document included a "Petition" signed by members of the community which was circulated and prepared by one of the victim's family members. That Petition was not served on Ms. Whitaker or her attorney until the morning of sentencing on October 4, 2018. The "Petition" is dated May 7, 2 018. Mr. Bergeron discussed the "Petition" during his sentencing argument. The "Petition" included suspect evidence and was an all out attack on both Ms. Whitaker and her husband. AA 78-84. The "Petition" was forwarded by the DA's Office to the Court. AA 154.

Yet another alleged victim impact letter was filed with the court from Tammy Myers. Ms. Myers began her letter by stating that she had young boys the same as the victims in the case but that her boys were not victims of a sexual crime at the hands of Ms. Whitaker. AA 100.

Another improperly delivered victim impact letter was provided to the Court by Thad Ballard, President of the Board of Trustees, Elko County School District. Mr. Ballard used his position of power in his letter to ask the court to impose the maximum time in prison. According to MR. Ballard, "It is not possible for the

Court to impose a sentence that is too harsh". AA 108. Mr. Ballard described the school district as a victim. Yet, this same school district did not suspend Ms Whitaker and place her on leave when the first allegation arose, nor did it conduct a timely investigation. Mr. Ballard believed the reputation of the entire community had been maligned by Ms. Whitaker. AA 108. Mr. Ballard stated that every student in the school and every parent in the school was a victim. AA 107.

The Department of Parole & Probation authored its presentence report on September 17, 2018. Ms. Whitaker should have received a recommendation of probation. At page 3, the Department acknowledged receipt of the Evaluation by Steven Ing and cited to it, demonstrating that Ms. Whitaker qualified for probation as she was not deemed a high risk to re-offend (low actually). PSI Page 3-4.

The Department of Parole & Probation prepared an Addendum to their report, to justify a prison recommendation rather than the probation which Ms. Whitaker qualified for under the scored recommendation which the Department normally uses. See Deviation Justification by Lt. Harp attached to PSI report and the sentence recommendation selection scale thereto. The recommendation of the Department was the same at the State's cap of sentencing, in at 12-36 months in prison each count to be served consecutively for a total of 4-12 years in prison. AA 156-157.

The sentencing hearing in this case was heated. The courtroom emotional

level was high. At the onset, Judge Porter noted that there was quite a few people here, a lot more than normal and she warned the audience that the Bailiff will remove anyone not behaving. AA 137. Later in the proceeding, Judge Porter noted that: "You can see all these interested people here. We have a lot of people who are interested in this proceeding." AA 154.

Mr. Bergeron objected to the presentence report and requested that the terms used in the document mirror those found in the statute. Mr. Bergeron requested the change from student, student aide or other terminology as such to be replaced by the term "pupil" as found in the statute. Mr. Bergeron advised the court that only two of the male victims were actually student aides in contact with Ms. Whitaker in that capacity. The other two male victims were students at the high school and not student aides for Ms. Whitaker. AA 141, 142, 145-46, 149, 158. Mr. Bergeron pointed out that some victims already had the requisite credits to graduate from high school. AA 147. Mr. Bergeron objected to the deviation by the Department to seek prison terms. AA 151.

Judge Porter noted during the sentencing hearing that she had received the Petition from the DA's office. AA 154. One victim impact letter was served on defense counsel by mailing it to Mr. Bergeron to his office in Reno on October 1, 2018. The sentencing hearing was October 4, 2018, in Elko, Nevada. Mr. Bergeron objected. AA 154-55. Mr. Bergeron received it in person from the DA

on the morning of sentencing. AA 155.

Mr. Bergeron pointed out that this case suffered from extensive media coverage. There were articles published as far away as England. AA 158. Mr. Bergeron advised the Court of the many negative impacts of excessive media coverage in a criminal prosecution. AA 177.

Judge Porter asked if the various parties present in court had reviewed the Evaluation by Steven Ing. AA 157.

During the sentencing proceeding, Mr. Bergeron pointed out that many of the crimes alleged against Ms. Whitaker were not crimes at all. Mr. Bergeron felt the State overcharged the case. AA 159-160. Mr. Bergeron pointed out the inadequacies of NRS 201.540. AA 160. Mr. Bergeron pointed out that statutory schemes similar to Nevada's NRS 201.540 have been struck down as unconstitutional in Alabama, Arkansas and other states. AA 161. Mr. Bergeron argued the vagueness of the statute, it's failure to define key terms, and its overbreadth. AA 162-164. He argued that it violated Equal Protection because the law applied only to teachers. AA 165.

During the argument, Mr. Bergeron asked the Court if there was some type of "Petition" that had reached the Court. Judge Porter minimized this document by stating: "It was a letter that was signed by several people. And I recognize that the vast majority of those are not victims, as defined by the statute. AA 174. Mr.

Bergeron was not advised there were over 70 signatures on that "Petition". Judge Porter stated, "It's not influencing me, Mr. Bergeron. It's been signed by several people. AA 175. The presence of this document was not revealed by the sentencing court before the hearing began. AA 175.

During the State's sentencing argument, the State pointed out that Steven Ing, M.A., M.S.T., should not be referenced as a Doctor. AA 183. Deputy D.A. Thompson attacked the Ing Evaluation. AA 183-187. Mr. Bergeron objected to the attack upon Ing. AA 191. The Court responded that it considered the State's commentary to be argument.

Judge Porter advised Mr. Bergeron that she would not consider any constitutional arguments that were made during the sentencing proceeding, nor would she consider possible overreaching by the DA's office. Judge Porter indicated that it was too late in the State Court proceedings to have a remedy and that Federal Court was the place to raise those issues. AA 212.

Judge Porter advised that she questioned the objectivity of Steven Ing in his report, because he was treating Ms. Whitaker for several months prior to authoring the Evaluation. In reality, the Ing report was dated April 20, 2018. Ms. Whitaker attended counseling with Steven Ing from July 5, 2017 through sentencing. AA 20. This was the first that defense was advised that the Ing report was unsatisfactory to the sentencing court.

At this point of the proceeding, Judge Porter again admonishes the crowd in the courtroom: "I'm going to advise the observers again to behave appropriately, or you will be removed." Judge Porter then imposed a sentence more severe than the Department of Parole & Probation deviation argument, more severe than that sought by the State and imposed the maximum sentence on each count, to be served consecutively to each other. AA 214-215; 219-224. NRS 193.130. This appeal follows.

ARGUMENT

1. NRS 201.540 is unconstitutionally vague.

Standard of Review:

Challenges to the constitutionality of a statute are reviewed de novo. "Statutes are presumed to be valid, and the burden is on the challenger to make a clear showing of their unconstitutionality. To overcome this burden, there must be a 'clear showing' of invalidity." *Sheriff, Washoe County v. Burdg*, 118 Nev. 853, 857, 59 P.3d 484, 486 (2002); *State v. Castaneda*, 126 Nev. 478, 481, 245 P.3d 550, 552 (2010). This court can consider constitutional issues for the first time on appeal. *Class v. United States*, 138 S. CT. 798 (2018). See *Jacobs v. Adelson*, 130 Nev., Adv. Op. 44, 325 P.3d 1282, 1288 (2014); *Barrett*, 111 Nev. at 1500, 908 P.2d at 693 (holding that this court may consider constitutional issues for the first time on appeal).

Argument:

A statute is unconstitutionally vague and subject to facial attack if it (1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited and (2) lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement. *Silvar v. Eighth Judicial Dist. Court ex rel. County of Clark*, 122 Nev. 289, 293, 129 P.3d 682, 685 (2006). Of the two prongs, the second prong is the most important because it is "concerned with guiding the enforcers of statutes." Indeed, "absent adequate guidelines, a criminal statute may permit a standardless sweep, which would allow the police, prosecutors, and juries to 'pursue their personal predilections.' " *Id.*

The statute in this case, NRS 201.540, provides in relevant part:

> Except as otherwise provided in subsection 2, a person who:
>
> (a) Is 21 years of age or older;
>
> (b) Is or was employed by a public school or private school in a position of authority or is or was volunteering at a public or private school in a position of authority; 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.

The statute's use of the word "pupil" is not a term of legal art, and is so ill-defined that it does not permit an individual to conform their conducted to permitted avenues, and allows a standardless sweep of enforcement.

The definition of pupil is: a person, usually young, who is learning under the close supervision of a teacher at school, a private tutor, or the like. Dictionary.com. The Merriam-Webster definition of pupil is: a child or young person in school or in the charge of a tutor or instructor : student. 2 : one who has been taught or influenced by a famous or distinguished person. The Merriam-Webster definition of student is: a person who attends a school, college, or university. : a person who studies something. Clearly, the Legislature had some reason not to use the term student and instead to use the term "pupil".

The term: "position of authority" is not defined at all. This leaves one to wonder, if a parent hands out milk in the lunchroom, does this statute apply to them? If a parent attends a class Valentine's Day party and provides snacks to the students, does this statute apply to them? Is a parent on a school campus immediately considered a person of authority because of their status as an adult and parent?

The term "volunteer" is not defined. This term fares no better on a statutory review. The same standardless enforcement is available when enforcing NRS 201.540.

In this case, two of the male victims were high school students. They were not "pupils" at the school at which Ms. Whitaker taught. Ms. Whitaker taught 4th grade. These males were over 16, and not her students. Nor did Ms. Whitaker have any control or authority over those persons. She could not be legally guilty of two of the counts in the Information. This Court should rule that the failure to define "pupil" and the ability to apply this statute in an arbitrary and capricious manner causes the statute to be unconstitutionally vague.

"The void-for-vagueness doctrine is rooted in the Due Process Clauses of the Fifth and Fourteenth Amendments." *Carrigan v. Comm'n on Ethics*, 129 Nev. 894, 899, 313 P.3d 880, 884 (2013). "A criminal statute can be invalidated for vagueness (1) if it fails to provide a person of ordinary intelligence fair notice of what is prohibited; or (2) if it is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Scott*, 131 Nev., Adv. Op. 101, 363 P.3d at 1164 (internal quotation marks omitted). The key difference between the two tests is that the first test deals with the person whose conduct is at issue, while the second deals with those who enforce the laws, such as police officers. Id. The two tests are independent of one another, and failing either test renders the law unconstitutionally vague. *Castaneda*, 126 Nev. at 481-82, 245 P.3d at 553.

This Court, in *Scott*, also found the CCCMC section unconstitutionally vague because there was a lack of specific standards in the code, which allowed for

arbitrary and discriminatory application of the code. *Scott* at 9-10. The code was "worded so broadly that Sheriff's deputies [were] given 'unfettered discretion to arrest individuals for words or conduct that annoy or offend them'." *Scott* at 10, citing *City of Houston, Texas v. Hill*, 482 U.S. 465 (1987).

Specifically, the Scott Court found that:

> Vagueness permeates the text of CCMC 8.04.050(1) because, as in this case, it is entirely within the deputy's discretion to determine what conduct violates the ordinance and at what point that conduct—including speech—reaches a level that "hinder[s], obstruct[s], resist[s], delay[s], or molest[s]" him or her in the discharge of their duties. It is obvious that the prohibitions in CCMC 8.04.050(1) are "violated scores of times daily, . . . yet only some individuals—those chosen by the police in their unguided discretion—are arrested." *Scott* at p. 10.

Similarly, NRS 201.540 fails to present any standards for enforcement whatsoever. It reads as a strict liability offense. There are only two exceptions, if the couple is married or if the sexual conduct is between pupils.

If this Court would take the time to simply chat with regular people, and licensed teachers, this Court would discover that people simply do not know that the age of consent of sixteen does not apply to all sexual encounters. People do not know that there are different rules for teachers than there are for other consenting sexual partners.

2. NRS 201.540 is unconstitutionally overbroad.

Standard of Review:

This Court reviews the constitutionality of a statute de novo. *Scott v. First Judicial Dist. Court*, 131 Nev., Adv. Op. 101, 363 P.3d 1159, 1161 (2015). The review begins with the presumption that a statute is constitutional, and the challenging party has the burden to make a "clear showing of invalidity." *State v. Castaneda*, 126 Nev. 478, 481, 245 P.3d 550, 552 (2010). This court can consider constitutional issues for the first time on appeal. See *Jacobs v. Adelson*, 130 Nev., Adv. Op. 44, 325 P.3d 1282, 1288 (2014); Barrett, 111 Nev. at 1500, 908 P.2d at 693 (holding that this court may consider constitutional issues for the first time on appeal). *Class v. United States*, 138 S. CT. 798 (2018).

Argument:

This statute could apply to an adult student, 18 years old, attending high school and who has a right to have sexual encounters with any person of his choice. Section 2 (c) does not stop the age of the effect of this enforcement when a person, student, pupil attains age eighteen and is an adult.

In *Scott v. First Judicial District Court*, 131 Nev. Adv. Op. 101, 363 P.3d 1159, (2015), this Court struck down as vague and overbroad Carson City Municipal Code ("CCMC") 8.04.050(1)(2005). CCMC 8.04.050(1)(2005) read:

> "It is unlawful for any person to hinder, obstruct, resist, delay, molest or threaten to hinder, obstruct, resist, delay or molest any city officer or

member of the Sheriffs' office or fire department of Carson City in the discharge of his official duties."

This Court specifically found that CCMC 8.04.050(1)(2005) was unconstitutionally overbroad because it prohibited protected speech, it did not contain any specific intent requirement, and it prohibited any conduct whatsoever that violated the terms of the CCMC; including inadvertent or constitutionally protected speech. *Scott* at p. 6-8.

This Court should rule that NRS 201.540 is overbroad and unconstitutional because the statute prohibits consensual sexual relationships between those who are able to consent by law based upon their status as being part of a school

3. NRS 201.540 violates the Equal Protection Clause.

Standard of Review:

Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional. In order to meet that burden, the challenger must make a clear showing of invalidity. *Tam v. Eighth Judicial Dist. Court*, 131 Nev., Adv. Op. 80, 358 P.3d 234, 237-38 (2015) (internal quotation marks omitted). When the law does not implicate a suspect class or fundamental right, it will be upheld as long as it is rationally related to a legitimate government interest. *Zamora v. Price*, 125 Nev. 388, 395, 213 P.3d 490, 495 (2009). This court can consider constitutional issues for the first time on appeal. See *Jacobs v. Adelson*, 130 Nev., Adv. Op. 44, 325 P.3d 1282, 1288 (2014); *Barrett*, 111 Nev. at

1500, 908 P.2d at 693, which case held that that this court may consider constitutional issues for the first time on appeal. *Class v. United States*, 138 S. CT. 798 (2018).

Argument:

In the United States Supreme Court case of *McKleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987), the High Court explained the requirements for bringing an equal protection challenge:

> Our analysis begins with the basic principle that a defendant who alleges an equal protection violation has the burden of proving "the existence of purposeful discrimination." *Whitus v. Georgia, 385 U.S. 545, 550 (1967).* A corollary to this principle is that a criminal defendant must prove that the purposeful discrimination "had a discriminatory effect" on him. *Wayte v. United States, 470 U.S. 598, 608 (1985).* Thus, to prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose.

McKleskey, 481 U.S. at 292, 107 S.Ct. at 1767. The Court denied McKleskey's appeal, because he could not show discrimination in his case specifically.

The McKleskey Court acknowledged:

> Because of the risk that the factor of race may enter the criminal justice process, we have engaged in "unceasing efforts" to eradicate racial prejudice from our criminal justice system. *Batson v. Kentucky, 476 U.S. 79, 85 (1986).* Our efforts have been guided by our recognition that "the inestimable privilege of trial by jury ... is a vital principle, underlying the whole administration of criminal justice," *Ex parte Milligan, 4 Wall. 2, 123 (1866).* See *Duncan v. Louisiana, 391 U.S. 145, 155 (1968).*

McKleskey, 481 U.S. at 310, 107 S.Ct. 1776.

There is no rational reason for this statute to exist. The statute is not rationally related to a governmental interest. Persons over the age of consent may consent to sexual relations to persons of their choice.

The Fourteenth Amendment to the United States Constitution provides that no State may "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Equal protection of the law "has long been recognized to mean that no class of persons shall be denied the same protection of the law which is enjoyed by other classes in like circumstances." *Allen v. State*, Pub. Emp. Ret. Bd., 100 Nev. 130, 135, 676 P.2d 792, 795 (1984).

For this law to rule that a volunteer, person of authority, or teacher cannot have the same relationship with an 18 year old student as another member of the community is to deny residents of Nevada their right to Equal Protection under the law.

4. NRS 201.540 is unconstitutional because it does not require a *mens rea* and is applied as a strict liability offense. NRS 201.540 violates the constitutional right to privacy.

Standard of Review:

Decisions of statutory interpretation are reviewed de novo. *State v. Lucero*, 127 Nev. Adv. Op. 7, 249 P.3d 1226, 1228 (2011).

Argument:

Indeed, courts take "particular care ... to avoid construing a statute to dispense with *mens rea* where doing so would criminalize a broad range of apparently innocent conduct." *Ford v. State*, 127 Nev. Adv. Op. 55, 262 P.3d 1123, 1130 (2011). Thus, the statute which reads as a strict liability statute, not requiring any type of *mens rea*, mandates reversal of these four convictions.

Second, of particular note is *Clancy v. State*, 129 Nev. Adv. Op. 89, 313 P.3d 226, 229 (2013). In *Clancy*, this Court stated that omission of a *mens rea* requirement in a statute does not end the inquiry; rather, the "primary goal in construing a statute is to ascertain the Legislature's intent in enacting it." *Id.* See also *Ford v. State*, 127 Nev. Adv. Op. 55, 262 P.3d 1123, 1127 (2011) ("many cases interpret[ ] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them").

In *Clancy*, this Court evaluated NRS 484E.010, Nevada's vehicular stop and assist statute, which did not include any *mens rea* requirement whatsoever. In finding that a Defendant must have at least a knowledge that the accident occurred, this court found that the purposes of NRS 484E.010, to stop and provide identifying information and render reasonable assistance to injured persons, could only be effectively accomplished if an individual had knowledge of the accident.

Similarly, in the present case, the purpose of NRS 201.540 is clear. The law serves as a deterrent, creating criminal liability if an individual in a capacity of teacher, volunteer, discharges a firearm in an area in which it is unsafe to do so. It is not a statute meant to punish an act that has already happened, but rather is intended to act as a preventative measure to prevent injuries to individuals and encourage responsible gun ownership. As in *Clancy*, the purposes of NRS 201.540 are not effectuated in the absence of a *mens rea* requirement.

In *Chase v. State*, 285 Ga693, 681 S.E. 2nd 116 (2009), the Georgia Supreme Court held that consent was a defense to a violation of the crime of sexual assault of a person enrolled in school. Factually, a cafeteria employee student had a consensual sexual relationship with a teacher. The Georgia Court held that their law, as written, without consent as a defense, would mean that a 30 year old law school professor could have a consensual sexual encounter with a 50 year old law school student and violate their law.

The sexual relationship in this case was consensual. Ms. Whitaker was not in a position of authority over two of the victims. Ms. Whitaker did not use a position of authority to have consensual sex with any of the victims. Factually, this case is similar to that of teacher Carrie Witt, who was charged with having sex with a male student who was 17 and another male student who was 18. Ms. Witt's case was an Alabama case and was dismissed by Circuit Court Judge Glen Thompson

because the age of consent was 16 in Alabama. The Alabama Criminal Court of Appeals disagreed and reversed the circuit court but that was based upon the fact that the Alabama statute did not allow consent as a defense to the charge. See *State v. Witt*, CR-16-1189 (2018).

Arkansas struck down a statute which allowed criminal charges to be brought when a teacher had consensual sexual relations with a student over 18. Arkansas deemed the statute to violate the fundamental constitutional right of privacy. Arkansas found that even if the State had a compelling state interest to protect its students, that the criminal statutory scheme was not the least restrictive means possible to address the state interest. The Arkansas Court held their statute unconstitutional. See *Paschal v. State*, 388 S. W. 3d 429, 288 Ed. Law Rep. 946 (2012).

To the contrary, the State of Washington has allowed prosecution of a teacher even if the student has attained age 18 and is an adult under all other laws. The State of Connecticut has upheld its statute. Kansas has done the same.

Nevada's statute presumably covers students who are 18 and still in high school as it does not use either the term "minor" or give an age (age of majority) at which the statute no longer applies.

Under the facts as presented at the time of the plea, the charges in the Criminal Information and the Offer of Proof by the State, there is little to know if and when

these male victims turned 18. It is the State's job to plead its charges adequately, not the defense attorneys. It is the State's job to put forth supporting facts which demonstrate a criminal violation of the law.

5. The District Court abused its discretion when it refused to voluntarily recuse itself when it was subjected to inadmissible and suspect sentencing documents which were intended to prejudice the Defendant.

Standard of Review:

Determining whether a judge's recusal is compelled by the Due Process Clause does not require proof of actual bias; instead, a court must objectively determine whether the probability of actual bias is too high to ensure the protection of a party's due process rights. U.S. Const. amend. 14. *Ivey v. District Court*, 129 Nev. 154, 299 P.3d 354 (2013).

Argument:

The Supreme Court held long ago that a "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). "Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." Id.; cf. *Mistretta v. United States*, 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."). This most basic tenet of our judicial system helps to ensure

both the litigants' and the public's confidence that each case has been adjudicated fairly by a neutral and detached arbiter.

"The Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard," for a judicial bias claim. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). While most claims of judicial bias are resolved "by common law, statute, or the professional standards of the bench and bar," the "floor established by the Due Process Clause clearly requires a 'fair trial in a fair tribunal' before a judge with no actual bias against the defendant or interest in the outcome of his particular case." Id . at 904–05 (quoting *Withrow v. Larkin*, 421 U.S. 35, 46 (1975)). The Constitution requires recusal where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow*, 421 U.S. at 47. The Court's inquiry is objective. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009). This Court does not ask whether Judge Porter actually harbored subjective bias. Id. This Court asks whether the average judge in her position was likely to be neutral or whether there existed an unconstitutional potential for bias. Id. "Every procedure which would offer a possible temptation to the average judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the [accused] due process of law." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

This was a hostile case. The community signed a Petition. That Petition was not filed into court or provided to defense counsel in a timely manner where the Defendant could bring a motion to recuse the Judge. The Petition was damaging. The Petition attacked not only the Defendant, it attacked her Husband. The Petition was filled with suspect evidence. The Petition was forwarded by the DA's office to the sentencing court. The courtroom was filled on sentencing day. Judge Porter had to tell the courtroom attendees how to behave and actually threatened that her Bailiff would remove observers who did not behave properly from the courtroom. To have this Judge, who had been provided improper and prejudicial signatures in support of the harshest sentence available sit on this case smacks of a due process denial. There is no way that this Defendant received a fair sentencing hearing. Ms. Whitaker qualified for probation. She had attended 15 months of treatment. She lost her job. Her family and friends stood by her because she was taking all of the right steps to attend to treatment and get her life back. Not only did Judge Porter deny probation, Judge Porter imposed a sentence in excess of that increased by the Department of Parole& Probation's deviation recommendation of 12-36 months on each count. Judge Porter sentenced in excess of the sentence sought by the State. Judge Porter did so because she had been swayed by suspect and improper documents which had been provided to her in violation of the due process rights of Ms. Whitaker.

This Court must remand this case to a different Judge, who should not be privy to the prior improper and suspect sentencing proceeding or documents. Only proper victim impact evidence should be provided at the new sentencing hearing. This is not the Cowboy West. This is a court in the State of Nevada which is duty bound to protect the constitutional rights of all people.

Ms. Whitaker need not prove actual bias to establish a due process violation, just an intolerable risk of bias. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986); see also *Caperton*, 556 U.S. at 883: the "Due Process Clause has been implemented by objective standards that do not require proof of actual bias." (citing *Lavoie*, 475 U.S. at 825; *Mayberry v. Pennsylvania*, 400 U.S. at 455, 465–66 (1971); *Tumey*, 273 U.S. at 532). Due process thus mandates a "stringent rule" that may sometimes require recusal of judges "who have no actual bias and who would do their very best to weigh the scales of justice equally" if there exists a "probability of unfairness." *Murchison*, 349 U.S. at 136. But this risk of unfairness has no mechanical or static definition. It "cannot be defined with precision" because circumstances and relationships must be considered. Id. This case needed to be transferred out of the Elko School District. This is shown by the letter delivered to the sentencing court by the School Board Trustee Ballard. The actions of the community demonstrated their goal of the conscience of the community demanding the maximum possible sentence, no matter who the Defendant was or

what actions she had taken since her arrest to rehabilitate herself. The actions of the Department of Parole & Probation to deviate and increase the penalty because of the small town and petition it received from the members of the community demonstrate that recusal was mandated.

6. **The District Court violated Nevada law when it failed to order a psycho-sexual evaluation to be prepared as part of the presentence report process. After violating law, the District Court abused its discretion and violated the due process rights of Appellant when it acknowledged that it would not recognize the findings of the psycho-sexual evaluation report completed by the defense to justify probation.**

Standard of Review:

Decisions of statutory interpretation are reviewed de novo. *State v. Lucero*, 127 Nev. Adv. Op. 7, 249 P.3d 1226, 1228 (2011).

Argument:

While this seems like something so very simple to handle, the Courts in Nevada each take differing approaches to this psycho-sexual evaluation process. It is clear that Judge Porter failed to abide by the terms of NRS 176A.110 & NRS 176.139. If Judge Porter had acknowledged this and accepted the findings of the Steven Ing Evaluation, there would be no prejudice to Ms. Whitaker. However, Judge Porter advised on the court record during sentencing that she would not do so. Judge Porter believed that because Steven Ing had been treating Ms. Whitaker that he was biased toward her favor and that the low risk to re-offend would be disregarded by her.

Statutes governing presentence psychological risk assessments do not mandate reliance on actuarial tools alone, and a clinician may rely on his or her professional opinion in conducting a psychosexual evaluation; when a clinician's professional opinion departs from the quantifiable test results, the district court should acknowledge the discrepancy and make specific findings about the deviation in its determination of whether a psychosexual evaluation is based upon a currently accepted standard of assessment. Steven Ing made specific findings about Ms. Whitaker. He did so after having extensive contact with her, 25.5 hours of time with her. This is far in excess of the normal psycho-sexual evaluation in which the evaluator spends an hour or two with the defendant.

An appellant must show that the district court relied solely on impalpable or highly suspect evidence to render the court's sentencing decision invalid. *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). Before a district court can accept a presentence psychosexual evaluation, it has an obligation to determine whether the evaluator was qualified and whether the evaluation is based on currently accepted standards of assessment; in making these determinations, the district court also must articulate specific findings so that the supreme court can properly review its reasoning. NRS 176.139(2). See *Webb v. Shull*, 128 Nev. 85, 93, 270 P.3d 1266, 1271 (2012).

Steven Ing is highly regarded in Northern Nevada in the area of providing

treatment groups for sex offenders and in psycho-sexual evaluations. Steven Ing's report demonstrated that he reviewed the entire file including three - three ring binders, DVD's Elko County Sheriff's Office Reports, Witness Statement, booking sheets, transcripts of several interviews, the search warrant application, the probable cause declaration and other items. AA 20. The report is exceptionally thorough, provides diagnostic test results, history, family history, and recommendations for treatment. AA 20-33. The report provides the scoring for the "low risk" determination. AA 31.

Judge Porter's refusal to accept the report's conclusions because Steven Ing was treating Ms. Whitaker was improper. This Evaluation was provided to the Court on April 30, 2018, the date of the plea. If Judge Porter was going to refuse to accept the report and its conclusions, then Judge Porter had an obligation to ORDER an independent evaluation pursuant to NRS 176.139. The proper procedure would have been to order an independent evaluation and then Order that the Defendant reimburse the Court for that evaluation. To find out five months later, at the sentencing hearing, that the Court had any type of issue with Steven Ing authoring the report flies in the face of the Due Process Clause of the Fifth Amendment to the United States Constitution.

To state a procedural due process violation claim under the Fourteenth Amendment's Due Process Clause, the claimant must allege facts showing that the

state has deprived him or her of a liberty interest and has done so without providing adequate procedural protections. Once a court has determined that a protected liberty interest has been impaired, the question remains what process is due. Due process has never been, and perhaps never can be, precisely defined. Accordingly, exactly what procedure is required in any given case depends upon the circumstances. Due process is not a technical conception with a fixed content unrelated to time, place and circumstances. Rather, it is flexible and calls for such procedural protections as the particular situation demands. The most basic requirement of due process, however, is the opportunity to be heard "at a meaningful time and in a meaningful manner". *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), *Lassiter v. Department of Social Services*, 452 U.S. 18, 24 (1981), *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965).

Ms. Whitaker's rights to due process under the law were violated when Judge Porter failed to provide due notice that the presented Psycho-Sexual Evaluation was insufficient for the Judge's satisfaction and failed to Order an independent psycho-sexual evaluation under NRS 176.139.

7. **Improper victim impact evidence was provided to the sentencing court, in violation of NRS 176.015. Appellant's rights to due process were violated by providing the sentencing court documentary evidence not provided timely to defense counsel. Appellant's rights were violated by the admission of suspect evidence into this sentencing proceeding.**

Standard of Review:

When an impact statement includes references to specific prior acts of the defendant that fall outside the scope of NRS 176.015(3), due process requires that the accuser be under oath, [and have] an opportunity for cross-examination and. reasonable notice of the prior acts which the impact statement will contain must be provided. *Buschauer v. State*, 106 Nev. 890, 804 P.2d 1046 (1990).

Argument:

This case involved a rather unique sentencing approach. The Department of Parole & Probation filed court documents on their behalf. Those documents contained some proper victim impact evidence. Those documents also contained suspect evidence and improper victim impact evidence. Persons who were not victims were allowed to address the Court by way of written documents, some of which were not even timely presented to the defense.

One set of documents filed in October 1, 2018. The hearing was October 4, 2018. Defense counsel's office is in Reno. The hearing was in Elko. Defense counsel received one victim impact document from the State the morning of the sentencing hearing. The Petition seems to have never been delivered to defense counsel but was reviewed by the Department of Parole & Probation, the State of Nevada and Judge Porter prior to the sentencing hearing.

The letter from the School Board of Trustees was prejudicial and suspect. The letter was inadmissible.

> NRS 176.015 (5)(d) provides: Victim" includes:
> (1) A person, including a governmental entity, against whom a crime has been committed;
> (2) A person who has been injured or killed as a direct result of the commission of a crime; and
> (3) A relative of a person described in subparagraph (1) or (2).

The School District was not noticed as a victim of this crime. In reality, the School District contributed to the problem by its failure to take timely action. Be that as it may, the over 70 folks who illegibly signed the Petition could not be investigated, nor could they be brought to court to see if they had ever even met Ms. Whitaker. The sentencing court was biased by suspect and inadmissible sentencing evidence, mandating a new sentencing hearing before a court that has not been subjected to such prejudicial conduct.

8. The nolo contendere plea was not supported by a factual recitation that substantiated criminal charges against Appellant regarding two of the four victims herein.

Standard of Review:

This court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion. *Hubbard,* 110 Nev. at 675, 877 P.2d at 521.

Argument:

The District Court's acceptance of the plea of nolo contendere in this case constituted an abuse of discretion. It is clear that the charging document does not state a crime. The factual allegations fail to present the location, the ages of the parties, the relationship, or support the fact that the Appellant ever used her position as an elementary school teacher in a position of authority over two high school students that were not her students. They went to school in a different school. The State's argument that it was the same school district falls outside of Nevada law. The statutes in some states allege the term "school district" but the Nevada statutory scheme alleges the same school.

In an effort to save this Court time, counsel put together a table which provides the bulk of the law on teacher-student sexual relationships in America. The goal was to be as accurate as possible. The sheer number of hours that it took to compile this information into some readable format was shocking. Every effort has been made to be sure that citations are correct but this disclosure is only fair, counsel is human. Typographical errors may occur and law may have changed since counsel conducted the research. The goal was to provide the Court with an easy method of evaluating the Nevada law against those laws found in other states.

At any rate, the review will demonstrate that many states have not passed laws which criminalize sexual relations between teachers and students. The term pupil as seen in Nevada's statute is uncommon. Most statutes use the term student. Most statutory schemes limit the criminalization to the same school but there are some statutes which do include "school districts". The age of consent varies from 14-19. NRS 201.540 does not state that consent is not a defense to the charge. Hence, consent must be a defense. There has never been an allegation that Ms. Whitaker's actions were nonconsensual.

Arkansas struck down a statute which allowed criminal charges to be brought when a teacher had consensual sexual relations with a student over 18. Arkansas deemed the statute to violate the fundamental constitutional right of privacy. Nevada's statute fairs no better. The statute does not limit its criminalization of sexual relationships between volunteers, teachers and others in a position of authority to students who are minors. Most statutory schemes do not extend the school personnel/student sexual criminal ban to adult students.

CONCLUSION

Nevada Revised Statute 201.540 is unconstitutional. This Court should strike down the statutory scheme found at NRS 201.540.

Alternatively, this Court should hold that the nolo contendere plea that entered was improper and remand the case to a different Judge who has not been part and parcel of the case to date.

Alternatively, this Court should grant Ms. Whitaker a new sentencing hearing, at which her constitutional rights of due process may be protected and at which she is granted a new, impartial judge who has not been subjected to the impermissible sentencing evidence admitted herein.

DATED this 27 day of February, 2019.

By: _____

KARLA K. BUTKO, ESQ.
ATTORNEY FOR APPELLANT
P. O. Box 1249
Verdi, NV 89439
(775) 786-7118
Nevada State Bar No. 3307
Byron Bergeron, Esq.

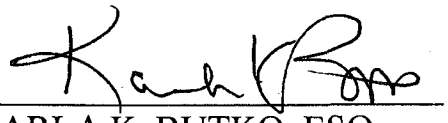
CERTIFICAE OF COMPLIANCE

I hereby certify that I have read this appellate brief, entitled, "APPELLANT'S OPENING 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 Rule of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal.

I further certify that this brief complies with the page- or type- volume limitation of 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does exceed 30 pages but meets the parameters of Word Count and Line Count.

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. The document was prepared in Word. There are 41 typed pages; 10,399 words in this brief and 970 lines of type. The Brief has been prepared in Word, proportionally spaced type, 14 point Times New Roman with 2.0 line spacing.

DATED this 27 day of February, 2019.

By: 

KARLA K. BUTKO, ESQ.
ATTORNEY FOR APPELLANT
P. O. Box 1249
Verdi, Nevada 89439
(775) 786-7118
Nevada State Bar No. 3307

IN THE SUPREME COURT OF THE STATE OF NEVADA

TENNILLE RAE WHITAKER,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

_____/

Docket No. 77294

Dist. Ct. Case No. CR-FP–17-3893

CASE APPEAL STATEMENT (CRIMINAL)

1. **Name of appellant filing this case disclosure statement:**

TENNILLE RAE WHITAKER.

2. **Judge issuing judgment of conviction:**

The Honorable Nancy Porter, Elko

3. **Name/ associations of KARLA K. BUTKO, ESQ.**

Appellant herein is TENNILLE RAE WHITAKER. Counsel for Appellant are:

KARLA K. BUTKO, ESQ., is an employee of KARLA K. BUTKO, LTD. KARLA K. BUTKO, LTD. is a Nevada professional corporation duly licensed to conduct business in the State of Nevada and is owned entirely by Karla K. Butko. BYRON BERGERON, ESQ., is an employee of the Law Offices of Byron Bergeron and is duly licensed to practice law in Nevada. At this

point in time, there is no reasonable belief that other counsel will appear on behalf of Ms. Whitaker in this appellate litigation.

4. **Identity of the Respondent, all parties to the proceedings in the district court:**

Respondent is the State of Nevada, represented by Tyler Ingram, Esq., District Attorney for Elko County represented the State of
Nevada by and through Chad B. Thompson, Deputy District Attorney for Elko County District Attorney's Office at the trial stage and represents the State on this direct appeal; Byron Bergeron, Esq., privately retained counsel, represented Ms. Whitaker at the trial stage of the case and remains counsel on this direct appeal; Karla K. Butko, Esq. was retained as private counsel to represent Ms. Whitaker on this direct appeal.

5. **Licensed Attorneys:** All attorneys are licensed in Nevada to practice law.

6. Appellant has been represented by privately retained counsel throughout the case at the district court proceedings.

7. Appellant is represented by privately retained counsel on direct appeal.

8. N/A

9. The Criminal Information was filed November 16, 2017. The judgment of conviction entered October 5, 2018.

10. Tennille Rae Whitaker was convicted after a nolo contendere plea, to four counts of violation of NRS 201.540, Sexual Conduct between a School Employee and a Pupil, Category C felonies. The district court by way of its judgment of conviction sentenced Ms. Whitaker to consecutive maximum sentences.

11. There have bee no prior appeals.

Dated this 27 day of February, 2019.

KARLA K. BUTKO, ESQ.
State Bar No. 3307
P. O. Box 1249
Verdi, NV 89439
(775) 786-7118

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Karla K. Butko, Ltd., P. O. Box 1249, Verdi, NV 89439, and that on this date I caused the foregoing document to be delivered to all parties to this action by

X placing a true copy thereof in a sealed, stamped envelope with the United States Postal Service at Reno, Nevada, first class postage paid.

____ Federal Express or other overnight delivery

____ Reno/Carson Messenger Service

addressed as follows:

Tyler Ingram, Esq.
Chad B. Thompson, Esq.
Elko County District Attorney's Office
540 Court Street, Second Floor
Elko, NV 89801

DATED this 27 day of February, 2019.

KARLA K. BUTKO, Esq.