IN THE SUPREME COURT OF THE STATE OF NEVADA

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TENNILLE RAE WHITAKER,

Appellant,

vs. CASE NO.77294

THE STATE OF NEVADA,

Respondent.

Appeal From The Fourth Judicial District Court
Of The State of Nevada
In And For The County Of Elko

RESPONDENT'S ANSWERING BRIEF

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ROUTING STATEMENT

Whitaker claims that under NRAP 17(a)(12) that this case is of statewide public concern. In support of such a claim Whitaker states the following reasons: (1) NRS 201.540 is unconstitutionally vague; (2) Whitaker claims that a statement amounting to a "petition," was received late by Whitaker. This is simply not true. The "petition" as Whitaker deems it, was with the PSI and submitted by the Division at the same time as the presentence investigation report, and is referenced in the PSI as being attached and is part of the report. AA p. 77-88. The so-called "late filing" that Whitaker referred to at sentencing was an October 1st filing by the State of a victim impact letter submitted by the sister of one of the victims to the District Attorney's office who in turn and on the same day that it was received filed the statement with the District Court and sent it to defense counsel. AA p. 109, 111 154-155; (3) Whitaker next claims that the sentencing hearing was "contentious." The State does not believe this to be an accurate statement either. Courtroom admonishments on paper do not mean anything and there are no outbursts or anything of the kind in the transcript; (4) Whitaker claims that other states have grappled with this issue of constitutionality; (5) the term pupil is not defined in the statute; (6) the no contest offer of proof filing was insufficient in some fashion; (7) the psycho-

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sexual evaluation and the weight given to it by the District Court at sentencing; (8) the PSI deviation and recommendation of sentence; and finally (9) that the State somehow violated the 'spirit' of the plea agreement by recommending exactly what it said it would do in the plea agreement.

In deciding to route this case to the Supreme Court there is only one issue that should be considered and that is the viability of the claim by Whitaker that NRS 201.540 is unconstitutional. The rest of the arguments bear no weight on an issue of 'statewide concern' as they were all issues of discretion for the District Court to decide. The State's position is that the argument against the statute's constitutionality is extremely weak as the State has a rational basis in passing a law protecting the students of the schools of the State, and part of that is not allowing sexual relations with the teachers/employees thereof. Therefore, the Court of Appeals should retain jurisdiction, but in reality the State is not opposed to either Court reviewing the matter.

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STATEMENT OF THE ISSUES

While Whitaker lists them 1-8, the State prefers to break them down as follows:

1) a) Whether NRS 201.540 is unconstitutionally vague?

b) Whether NRS 201.540 is unconstitutionally overbroad?

c) Whether NRS 201.540 violates the equal protection clause of the 14th amendment and is therefore unconstitutional?

d) Whether NRS 201.540 violates the constitutional right to privacy and is therefore unconstitutional?

2) Did the District Court abuse its discretion and commit plain error affecting the substantial rights of Whitaker, namely her due process rights, by not, sua sponte, raising the issue of voluntary recusal upon its review of all the documents filed or provided to the District Court in preparation for the sentencing hearing? Did Whitaker preserve for appeal this issue?

3) Was the District Court required to order the preparation of a psychosexual evaluation from an independent evaluator in lieu of the report submitted by Whitakers' evaluator? Did Whitaker preserve for appeal this issue?

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4) Did the District Court consider and rely upon highly suspect or impalpable evidence at the Sentencing Hearing in rendering the sentence that it did and thereby commit plain error affecting the substantial rights of Whitaker, namely her due process rights? Did Whitaker preserve for appeal this issue?

5) Did Whitaker enter her plea of 'no contest' freely, voluntarily and with full understanding of her Constitutional Rights, the nature of the charges and the consequences of the plea at the arraignment? Did Whitaker preserve for appeal this issue?

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STATEMENT OF THE CASE

Tennille Rae Whitaker was charged by way of a Criminal Complaint filed in the Elko Justice Court on August 29, 2017 charging her with 12 counts of Sexual Conduct Between School Employee or Volunteer and a Pupil and alleging that the acts occurred on or about or between the 1st day of September, 2015 and the 6th day of June 2017 in the city of Wells and/or the surrounding areas near the city of Wells, within the County of Elko, State of Nevada. RA p. 1-8.

A Waiver of Preliminary Hearing on Advice of Counsel was filed on November 6, 2017, signed by Ms. Whitaker and her counsel. RA p. 9-11. Thereafter, in anticipation of the agreement, the State filed on November 16, 2017 a Criminal Information charging only 4 of the original 12 counts, one for each of the 4 victims. AA p. 1. On April 27, 2018 the State filed its offer of proof with respect to the proposed plea of no contest which alleged that the victims would testify that they were attending the same school at which Whitaker was employed and the victims were pupils thereof and none of the victims had received their high school diploma at the time of the sexual conduct with Whitaker. AA p. 14. The plea agreement was filed on April 30, 2018 and Whitaker therein agreed to plead "no contest" to the 4 counts in the Criminal Information and the State agreed that it would file no

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further charges other than the 4 counts and that at the time of sentencing both sides would be free to argue, "except that the State will be limited to arguing for a sentence that does not exceed an aggregate sentence of 4-12 years." AA p. 6-7.

Whitaker filed a psycho-sexual evaluation on April 30, 2018. AA p. 19. In a separate filing, she also submitted letters in support. AA p. 60. Along with those documents the State and the department of parole and probation submitted letters by persons for consideration at sentencing and in one instance a person submitted a letter straight to the District Court, the letters are included from p. 77-112 of Appellant's Appendix.

The Sentencing Hearing was held on October 4, 2018, at which it was disclosed to the public that the Division of Parole and Probation had recommended a sentence of 12 to 36 months on each count, with all of the counts to run consecutively to one another and that Ms. Whitaker not be granted probation, thus making the aggregate sentence 4-12 years in prison. AA p. 138. The State concurred with the Division in its argument. AA p. 55. Following the arguments Whitaker called 3 witnesses. AA p. 191-201. The State called two witnesses, both were mothers of victims. AA p. 202-211. Following the testimony, the District Court pronounced the sentence.

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STATEMENT OF THE FACTS

NRAP 28(a)(8) states that this section should include those facts "...relevant to the issues submitted for review with appropriate references to the record." Id. In regards to the constitutionality of the statute, which encompasses the first 4 of the 8 issues cited by Whitaker, the facts of the instant case are wholly irrelevant since this is a "facial attack" of the statute. Appellant's Opening Brief p. 19. In regards to the remaining 4 issues, issue 5 and 7 really deal with the same information, issue 6 and 8 are each different.

Facts pertinent to issues 5 and 7 are that at the sentencing hearing the District Court specifically went through the filings to be considered at sentencing. AA p. 152-156. During which the District Court specifically stated:

> "So I can tell you, Mr. Bergeron, I have read every word of every statement in the file. I recognize that there are people who have submitted letters or signed letters that are not victims, pursuant to the statute, and so I'm not considering them to be victims. I understand – you can see all these people here. We have a lot of people who are interested in this proceeding. The victims get to make an impact statement, and that's what I'm considering." AA p. 154.

Whitaker's counsel made no objection to the District Court's statement, presumably satisfied that the District Court would follow the law. Later the

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District Court emphasized in regards to the alleged "petition" that the vast majority of the people who signed it were not victims and that it was not influencing the District Court's decision. AA p. 174-175.

Defense Counsel did express a lack of appreciation to the District Court for the October 1, 2018 filing by the State of a victim impact statement. AA p. 109, 154-155. It is written by the oldest sister of the victim O.C. from Count 2 on behalf of the family. AA p. 111. The District Court allowed Mr. Bergeron to make his complaint known and allowed the State to respond and found no 'evil intent' on the part of the State considering the fact that Mr. Bergeron had traveled to Elko unbeknownst to the State or the District Court earlier than the day of sentencing and the State received the statement from the family on the same day that they then filed the statement with the District Court. AA p. 155-156.

Whitaker's statement that the objectionable "petition" was filed late is false. Appellant's Brief p.13. The "petition" was attached to a victim impact letter submitted by one of the mothers of a victim and was included with the PSI when it was provided to Whitaker and counsel. AA p. 77-88. The PSI references the "petition" on page 11 of the report, that it is attached with the report.

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Other than that, Mr. Bergeron did not object to any statements offered, or request a recusal of the District Court judge, or request a continuance of the sentencing hearing.

The facts pertinent to issue 6 are as follows. At the arraignment the Defendant was asked by the District Court the following questions:

> THE COURT: Do you understand that you will have to undergo a psychosexual evaluation?
>
> THE DEFT: Yes, Your Honor.
>
> THE COURT: Do you understand that to be eligible for probation that evaluator will have to find that you are not at a high risk to re-offend?
>
> THE DEFT: Yes.

AA p. 47. In regards to the ordering of the psychosexual report, at the arraignment the District Court ordered that a pre-sentence investigation be conducted and a report submitted to the court. AA p. 55. The presentence report was dated September 17, 2018. AA p. 138-139. NRS 176.139 requires that the Division, "shall arrange for a psychosexual evaluation of the defendant as part of the Division's presentence investigation and report to the court." NRS 176.139(1). Furthermore, a court must order the defendant to pay for the evaluation so long as they are able to do so. NRS 176.139(7). It is not incumbent upon the court to order a psychosexual evaluation pursuant to the statute. As noted above the Defendant submitted

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the psychosexual evaluation in a filing with the District Court on April 30, 2018. AA p. 19. The Evaluation appears to meet the requirements of NRS 176.139. In regards to the psychosexual evaluation the District Court only stated the following:

> "Mr. Ing was treating Ms. Whitaker for several months before he performed the psychosexual evaluation. I have never seen a psychosexual evaluation from a treating practitioner, so I looked at the statute to see if that's permissible. It's not excluded. But because of that, I do question his objectivity." AA p. 212.

The District Court did not say that it would not recognize the findings of Mr. Ing.

The facts pertinent to issue 8 are as follows: the State filed the Offer of Proof regarding the No Contest plea on April 27, 2018. AA p. 14. It addresses each of the elements of NRS 201.540. The District Court did canvas both Whitaker and Mr. Bergeron about the filed Offer of Proof. AA p. 129-130. Neither objected to the State's filed document or the District Court's finding of a factual basis. Furthermore, the District Court made a specific finding that Whitaker entered her plea "...freely and voluntarily, with full understanding of her Constitutional Rights, the nature of the charges, and the consequences of the plea." AA p. 130-131. Also of note, earlier in the arraignment the State had described the elements and

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punishments to the charges. AA p. 120-121. The Criminal Information was handed to Whitaker which outlines the elements of each of the charges. AA p. 1, 118-119. Whitaker also signed the plea agreement and within it are the punishments for each of the charges. AA p. 6-7, 123-124. Whitaker made no objections to the handling of the entry of plea hearing either at that hearing or during the sentencing hearing.

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STANDARD OF REVIEW

Whether NRS 201.540 is constitutional is subject to de novo review, with the presumption that the statute is constitutional. Byars v. State, 336 P.3d 939, 945 (Nev. 2014). The State would note that Whitaker never raised this issue in any lower court proceeding other than making a backhanded stab during sentencing argument. AA p. 162.

Whitaker did not object and preserve the issue of the District Court's recusal which typically precludes review, however this Court may address plain errors affecting the defendants' substantial rights and constitutional errors sua sponte. Sterling v. State, 108 Nev. 391, 394 (1992) (citing Emmons v. State, 107 Nev. 53, 61 (1991); Leonard v. State, 117 Nev. 53, 63 (2001) (citing Cordova v. State, 116 Nev. 664, 666 (2000); NRS 178.602. Affecting the substantial rights means that the error must have been prejudicial and the Defendant bears the burden of proving it as such. Gallego v. State, 117 Nev. 348, 365 (2001) (citing United States v. Olano, 507 U.S. 725, 734-735 (1993)).

Whitaker furthermore failed to object at the arraignment hearing regarding the no contest offer of proof prepared by the State, and Whitaker did not object to the psychosexual evaluation and the ordering thereof by the District Court at the arraignment hearing or the sentencing hearing.

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Whitaker therefore failed to preserve those issues as well. At sentencing, while the issue was brought up by the District Court in regards to non-victim statements, Whitaker did not object to the District Court proceeding, ask for a continuance or anything of the like and therefore again, in regards to the "suspect" sentencing evidence that issue was also not preserved for appeal and Whitaker is hopeful that this Court will consider them as plain error or constitutional error.

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ARGUMENT

1) The Constitutionality of NRS 201.540

The constitutionality of a statute is a question of law that is reviewed de novo. Sheriff v. Burdg, 118 Nev. 853, 857 (2002).

"The leading rule in regard to the judicial construction of constitutional provisions is a wise and sound one, which declares that in cases of doubt every possible presumption and intendment will be made in favor of the constitutionality of the act in question, and that the courts will only interfere in cases of clear and unquestioned violation of the fundamental law. It has been repeatedly said that the presumption is that every state statute, the object and provisions of which are among the acknowledged powers of legislation, is valid and constitutional, and such presumption is not to be overcome unless the contrary is clearly demonstrated." State ex rel. Clarke v. Irwin, 5 Nev. 111, 120 (1869). This presumption applies to statutes as well as city and county ordinances. Carson City v. Red Arrow Garage, 47 Nev. 473 (1924); Ormsby County v. Kearney, 37 Nev. 314 (1914).

a) Vagueness

Whether a statute or ordinance is unconstitutionally vague is determined by applying a two part analysis wherein the courts decide

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whether 1) the law in question provides sufficient notice to the public and 2) that the law provides sufficient clarity so that enforcement of the law will not be arbitrary or discriminatory. Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972); Silvar v. Eighth Judicial Dist. Court ex rel. County of Clark, 122 Nev. 289, 293 (2006). However, "...the Constitution does not require impossible standards." United States v. Petrillo, 332 U.S. 1, 7 (1947).

In this particular case Whitaker challenges the use of the words 'pupil,' 'volunteer' and the phrase 'position of authority' in the statute NRS 201.540.

> NRS 201.540 Sexual conduct between certain employees of school or volunteers at school and pupil:
>
> 1. 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

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(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.

2. The provisions of this section do not apply to a person who is married to the pupil at the time an act prohibited by this section is committed.

3. The provisions of this section must not be construed to apply to sexual conduct between two pupils.

(Added to NRS by 1997, 2522; A 2001, 703; 2013, 2098; 2015, 1445, 2242; 2017, 2320)

While there are no definitions for the terms 'pupil', 'volunteer' and 'position of authority', they are not terms of art such that they ought to be attributed anything more than their ordinary meaning. Furthermore, it is interesting to note that in the following statute, NRS 201.550, which applies to colleges or universities rather than public or private schools as in NRS 201.540, the legislature does specifically define a 'position of authority' as a "...teacher, instructor or professor; ...administrator; or ...head or assistant coach." NRS 201.550(2)(a-c). Furthermore, in NRS 201.550 it is interesting to note that throughout the statute instead of using 'pupil' the legislature used the term 'student.' Clearly the effort by the legislature is to differentiate between elementary, middle, and high school students and those people enrolled in colleges and universities. Furthermore, by defining or limiting the term

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'position of authority' to those who are teachers etc., the legislature was demonstrating their desire to incorporate protections for the children of pre-college enrollment in casting a wider net and recognizing the influence that all adults play in an elementary or secondary education school. Of further interest is the dropping of the term 'volunteer' entirely from the college or university statute.

The term pupil is not as ill-defined as Whitaker contends. It is a common word understood by people universally to mean a student at a school and also other types of learners. The statute sufficiently describes the types of pupils at issue when it defines the types of schools the pupils are attending, those being private or public schools, which are defined by law in NRS 201.490 and NRS 201.500 which send the person to NRS 394.103 and NRS 385.007(7) respectively.

It appears clear that with the section header for NRS 201.470-201.550 reading "Sexual Conduct with Pupils and Students" the legislature used the two terms to clarify the institutions at which they studied. Even though the terms may be synonymous in the English language what is most important is the institution at which they learned, not the use of the term pupil or student. Focusing on the term pupil or student is focusing on the wrong issue. It is not what the pupils or students *are* that makes them in need of the protection

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afforded by the statute, but rather *where* they are doing their learning and who they come into contact with as a result of that location, the State recognized schools. The legislature determined that the pupils or students of State recognized schools required the protection of the statute.

In regards to the term volunteer, it also is not a word of difficult understanding. Anyone who has ever attended a public or private school is very familiar with the use of other people within the schools besides teachers and administrators. The PTA organization along with other unorganized persons are invited and encouraged to help out daily. Clearly, the legislature is trying to protect children from conduct that occurs as a result of associations created while at school.

Position of authority is clearly someone in charge, the phrase is built of words of common understanding. Obviously the legislature cannot know all of the different scenarios for which a volunteer or employee might be utilized at a public or private school.

In this particular, case Whitaker has challenged the words "pupil" "volunteer" and "position of authority" as being too vague to put the public on notice as to how they ought to behave in relation to school children. The Nevada Supreme Court has dealt with far more difficult words and found them to be sufficiently clear to put one on notice. *See* Summers v. Sheriff, 90

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Nev. 180 (1974)(finding the term "lewd" not unconstitutionally vague); Williams v. State, 110 Nev. 1182 (1994) (finding the term "non-accidental" not unconstitutionally vague) *citing* Information Providers' Coalition v. F.C.C., 928 F.2d 866, 874 (9th Cir. 1991) (finding the term "indecent" not unconstitutionally vague). Courts clearly understand that it would be impossible to "expect mathematical certainty from our language." Grayned at 110. Indeed the terms above get the point across but are also broad enough to encompass the intent of the statute. Statutes need not be so specific. State v. Joas, 168 A.2d 27 (1961) (The clear and apparent purpose of the statute here involved illustrates the impossibility of delineating in precise detail all of these innumerable acts which could constitute driving a vehicle 'carelessly...' Mind of man is incapable of visualizing in advance all possible factual situations which would fall within these categories.") Likewise, the terms 'volunteer' and 'position of authority' are clear enough to put one on notice in order to protect the children of the schools of the Nevada, but broad enough to encompass the different scenarios that may occur in schools throughout Nevada. The terms are in the sweet spot of constitutional clarity.

b) Overbroad

The Statute is not unconstitutionally overbroad as contested by

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Whitaker. Whitaker states that the 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." Appellant's Brief p. 23. This is not true, NRS 201.540 would not apply to an 18 year old student as it requires that the defendant be "21 years of age or older" and furthermore, subsection 3 of the statute specifically excludes "...sexual conduct between two pupils." NRS 201.540(1)(a), (3).

If Whitaker is stating that somehow it is overbroad because it limits the 18 year old's dating pool by limiting the people that the person might have sex with, it does not. The pupils are not subject to punishment under NRS 201.540. The statute only limits the teachers / persons of authority at the school. The 18 year old would be limited the same way everyone else is as it pertains to children under the age of 16. NRS 200.364, NRS 200.366. The Scott case cited by Whitaker is instructive, but not beneficial to Whitaker.

> "Whether or not a statute is overbroad depends upon the extent to which it lends itself to improper application to protected conduct." N. Nev. Co. v. Menicucci, 96 Nev. 533, 536, 611 P.2d 1068, 1069 (1980). Specifically, "the overbreadth doctrine invalidates laws . . . that infringe upon First Amendment rights." Silvar v. Eighth Judicial Dist. Court, 122 Nev. 289, 297, 129 P.3d 682, 687 (2006). In other words, the overbreadth doctrine applies to statutes that have a seemingly legitimate purpose but are worded so broadly that they also apply to protected speech. See id. We have held that "even minor

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> intrusions on First Amendment rights will trigger the overbreadth doctrine." Id. at 297-98, 129 P.3d at 688. At the same time, however, we have warned that "the overbreadth doctrine is strong medicine and that a statute should not be void unless it is substantially overbroad in relation to the statute's plainly legitimate sweep." Id. at 298, 129 P.3d at 688 Scott v. First Judicial Dist. Court of Nev., 363 P.3d 1159, 1162 (Nev. 2015)

NRS 201.540 is narrowly tailored to address those who have stewardship over the children of Nevada at Public and Private schools and their particular behaviors with those children that they interact with at the schools. It does not encompass others inadvertently as suggested by Whitaker.

c) The Equal Protection Argument.

Teachers, administrators, volunteers or others that have positions of authority at public or private schools in Nevada are not a protected or suspect class recognized by courts and Whitaker does not argue that they are, agreeing that the test is a rational basis test. Appellant's Brief p. 26.

> An equal protection analysis also proceeds with the presumption that the legislation under scrutiny is constitutional. Graham v. Richardson, 403 U.S. 365, 371 (1971). Furthermore, the instant case presents no judicially recognized suspect class or fundamental right which would warrant a greater prospect of our intervention under a standard of strict scrutiny. Likewise, it presents no quasi-suspect class such as sex, illegitimates or the poor, which would actuate the application of a mid-range or intermediate level of scrutiny of the legislative purpose and classification. We are thus left with the rather benign and deferential prospect of scrutinizing the challenged legislation for foundational support containing an ingredient of rational basis.

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Allen v. State, 100 Nev. 130, 135-36, 676 P.2d 792, 795-96 (1984).

As in Allen, this case is also a rational basis case, and this Court may not find for Whitaker if, "under any conceivable scenario, the classification by the legislature" of employees, volunteers or persons in a position of authority at public or private schools "bears a rational relationship to the achievement of a legitimate legislative purpose." Id. See also Sereika v. State, 114 Nev. 142, 148-149 (1998).

Clearly, the legislature has an interest in protecting the children of this State from sexual conduct, "consensual" or otherwise. It has an interest in sending the message to employees, volunteers and persons in a position of authority, that the children of the schools are there to learn, not to be preyed upon or groomed or dated by such people. Clearly it is rational to believe that in order for a student to be able to do their best in school they ought not to be placed in a situation regarding a sexual relationship with one of these people. Such relationships are counterproductive to the aims of school not only for the child involved, but to others who are aware of such relationships. The State has in interest in focusing the child's attention on their education and to encourage their attendance at schools. This statute sends that message and creates a safe place for the children to learn and to develop. There are many other reasons, to be sure, and listing them all is

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likely not feasible, but the State must only come up with a rational basis under a scenario, not all of them. The above seem to suffice.

d) Mens Rea and the Right to Privacy

NRS 201.540, criminalizes engaging in sexual conduct with a pupil. The phrase 'engage in sexual conduct' is the action, the willful or intentional action that the would-be defendant has to accomplish in order to commit the crime. It is the mens rea element of this general intent crime. It is not a strict liability crime, but it is also not a specific intent crime.

It is similar to statutory sexual seduction, NRS 200.368 and NRS 200.364 wherein it states that "statutory sexual seduction means ordinary sexual intercourse...committed by a person 18 years of age or older with a person who is 14 or 15 years of age..." Id. The verb utilized by that statute is 'committed,' which again makes the act willful or intentional, but not strict liability and not a specific intent crime, but again a general intent act committed.

If this case had gone to a trial the issue of the mens rea would have been addressed in the jury instructions. Whitaker makes the same unsuccessful argument as Ford did; that this statute without the "bad-mind" adverb phrases must be a strict liability statue and therefore as such is unconstitutional.

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However, the statute does indicate that the defendant must "engage in sexual conduct." This clearly means that the Defendant is doing so of her own volition, willfully. Whitaker, like Ford, "makes too much" of the statutes omitted stated intent requirement. Ford v. State, 262 P.3d 1123, 1127 (Nev. 2011). It is not a strict liability crime and therefore not unconstitutional. The statute uses the phrase "engage in sexual conduct" to describe the requirement of fault or in this case making it a general intent crime. Ford at 1128-1129. Thereby, it would be constitutional if read this way and therefore this Court should do so. Ford at 1130 (quoting Virginia and Truckee R.R. Co. v. Henry, 8 Nev. 165, 174 (1873).

Next Whitaker argues the Clancy case and somehow tries to equate it and this case with the discharging of a firearm which the State frankly does not understand.

Finally, Whitaker argues various other court decisions and how they ought to bear sway on this case. The first case is from the Supreme Court of Georgia which struck down its statute because it would encompass 30 year old law professors sleeping with 50 year old law students. Appellant's Brief p. 28. This case has no application to Nevada's statute as Nevada's statute as written is narrowly tailored to public and private elementary, middle and high schools as noted above which do not include and would never include

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30 and 50 year olds.

The next case is from the Alabama Criminal Court of Appeals, where they upheld the statute, which would not benefit Whitaker, but is cited anyway. Whitaker also notes that Washington, Kansas and Connecticut have all upheld their similar statutes without citing any of them. The only case, apparently, that helps Whitaker's cause is the case out of Arkansas. Of note, the State found, likely, the Kansas case referred to but not cited by Whitaker. It is State v. Edwards, 288 P.3d 494 (Kan. 2012) and it picks apart the Arkansas case. Furthermore, the Kansas statute appears to contain hallmarks of the Nevada statute, specifically the language regarding a person being in a position of trust or authority. Edwards at 503. The Arkansas statute requires that the teacher "uses" the position of authority over the victim to engage in sexual contact. A.C.A. § 5-14-125.

Also of distinction, in Arkansas, as part of their constitution the Supreme Court has interpreted "the fundamental right to privacy to include all private, consensual, noncommercial acts of sexual intimacy between adults." Paschal v. State, 388 S.W.3d 429, 435 (Ark. 2012). As such, when reviewing the statute in Arkansas they used the strict scrutiny standard and furthermore found that there was another statute that could have been used and that the Arkansas statute that is similar to Kansas and Nevada was

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therefore not the least restrictive means. Id. at 436-437 Neither Kansas nor Nevada have such a pathway, an alternative statute, and furthermore neither have apparently extended the right to privacy the way that Arkansas has.

Finally, the Arkansas case was an 'as applied' constitutional challenge due to the student in Paschal being 18 years of age, but Whitaker has mounted a facial challenge of the statute. Whitaker appears to want to make an 'as applied' challenge, but notes that the record is insufficient since there was no preliminary hearing or evidentiary hearing where the ages of the boys was fleshed out. Whitaker then claims that the State should have preserved the record on behalf of Whitaker and included such facts in the Offer of Proof and then blithely claims it is not Whitaker's responsibility to "charge adequately."

It is Whitaker's responsibility to make or preserve the issue and thus the record for appeal. If Whitaker would like, the State would happily stipulate to the dates of birth of the 4 victims in order to supplement the record and clarify that there is zero grounds for an 'as applied' challenge similar to the Arkansas case since all of these young men were not 18 at the time. For Whitaker to claim an insufficient record is talking out of both sides of her mouth since she has received the discovery. It is clear that none of these young men were adults and therefore an as applied attack on the

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statute, the same that was successful in the Arkansas case where the victim was an 18 year old student, an adult under Arkansas law, would not succeed. Id. at 434.

Similarly, an as applied challenge will not succeed regarding the unique nature of the Wells Combined School. AA p. 150. Whitaker wants to speak about the facts of Whitaker being an elementary teacher and the boys being high schoolers, but the reality is that there is no distinction in Wells, as they have one school that covers all grades, several buildings sure, not unlike many modern schools, but one principal. There is little evidence in the record to address this issue and again the burden was on Whitaker to preserve and create a record on appeal. While the PSI possesses many of these facts, it cannot be cited here.

This case is not akin to the Arkansas case, and the statute does contain a mens rea element in the verb used. As to all other constitutional claims, there are none that bear any weight necessitating that this Court strike down NRS 201.540.

The Issue of Recusal, the Psychosexual Evaluation, the Alleged Suspect Sentencing Evidence and the Offer of Proof at the Arraignment.

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Whitaker did not preserve any of the following issues at the sentencing or arraignment hearings. Whitaker has framed these issues as constitutional issues, or in other words, substantial rights. If this Court chooses to entertain any of these unpreserved issues, they must be reviewed for plain error where the burden is on Whitaker. Rippo v. State, 113 Nev. 1239, 1259 (1997).

2) The issue of Recusal

Whitaker's claim that the District Court reviewed or heard suspect sentencing evidence and therefore should have recused herself from the Sentencing Hearing is without merit. The State must clarify at the outset, again, that the so called 'petition' was provided to Whitaker and her attorney along with the PSI, being attached thereto, well in advance of the sentencing hearing as noted in the PSI and cited above. Furthermore, the DA's office did NOT forward the 'petition.' What the DA's office did receive, file and then forward to Whitaker was a victim impact statement from the sister of one of the victims, having received it the Friday before sentencing and filed that date with the District court. AA p. 109. There is no requirement under NRS 176.015 that a victim statement be provided in advance. The victim could have stood up and read it at the sentencing hearing with no notice at all as it clearly fell within the statements

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permissible under the statute. However, the State received it and forwarded it on to the Defense and the District Court as a courtesy, but as everyone knows, no good deed goes unpunished and somehow Whitaker has attached the most nefarious of motives and deeds to the State's action. These assertions are belied by the record which has clearly been misunderstood by Whitaker.

While Whitaker never raised the issue at the sentencing hearing of the District Court judge needing to recuse herself, she makes the argument that the District Court, after merely looking at the submitted documents, must have realized that she needed to recuse herself. This is an impossible standard. A judge would be subject to the perfect filings of the parties as well as the preparers of the PSI for if they make a mistake and file something inappropriate then the judge must recuse herself. Isn't this precisely the kind of thing that judges do? Don't they make decisions about which items of evidence are fair to be considered and which are not and because the District Court did that she must recuse herself?

Whitaker cites cases that give lip service to the principles of a fair judge, but when read further none of them deal with the issue presented in this case. In re Murchism, 349 U.S. 133, 138-139 (1955) (the "judge-grand jury" cannot preside over the proceeding where witness testimony that was

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the alleged perjury or contempt was given, then charge the alleged perjurers with contempt, try them and convict them as the judge is a potential material witness in the charge of contempt.); Withrow v. Larkin, 421 U.S. 35 (1975) (Members of the state medical examining board could both conduct an investigation into allegations of professional misconduct and also preside at the suspension hearing.); Mistretta v. United States, 488 U.S. 361 (1989) (Sentence Reform Act of 1984 was constitutional and did not delegate excessive legislative power to the Sentencing Commission); Bracy v. Gramley, 520 U.S. 899 (1997) (reversal of denial of habeas relief without allowing for discovery, order for remand for discovery in habeas hearing due to specific allegations of impropriety by the judge.); Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009) (Judge who received $3 million dollars in campaign contributions did not recuse himself from the contributor's case, calling them extreme facts, the probability of actual bias rose to an unconstitutional level.); Tumey v. Ohio, 273 U.S. 510 (1927) (Judgment of a mayor's court for violating the state's prohibition act was thrown out because the mayor was paid from the fines paid by those whom the mayor found guilty creating a direct, personal, substantial and pecuniary interest in reaching a judgment.) Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986) (ruling of the Supreme Court of Alabama reversed where one of the

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justices did not recuse himself even though he had personal law suits against the same insurance company which was a party to the case.)

None of the above cases are even remotely close to the instance of the District Court receiving statements for and against the accused at sentencing, weeding through them, disregarding that which is not appropriate and then rendering sentence.

Whitaker did not ask for a continuance or object in any way to the District Court going forward with the sentencing. Only now, after the sentence has been handed down and Whitaker is dissatisfied with the result, does she claim that the District Court should have recused herself. Whitaker makes all sorts of accusations, but does not cite to the record in support thereof. A judge explaining courtroom protocol and behavior is not evidence of hostility or a threat to the gallery. AA p. 137-138. Furthermore, to say the District Court "had to tell the courtroom attendees how to behave" is reading something into the transcript that simply doesn't exist - an overt act that caused the warning. Whitaker argues as if there was one, and the record clearly shows there was not.

Whitaker then deems the District Court to have been swayed by the 'petition' because of the sentence that she gave the Defendant. Again, there is nothing in the record to support this allegation. AA p. 174-175, 212-214.

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The District Court as noted above explained what she would consider and what she would not according to the law. AA p. 154. The District Court made her ruling about which evidence to consider, weighed it appropriately and made her ruling. Cameron v. State, 114 Nev. 1281, 1282-1283 (1998). There is no error.

3) The issue of the psychosexual evaluation.

With regards to the psychosexual evaluation, again there is nothing in the record that Whitaker can cite to where the District Court discounted the report. She said that it met the standard and accepted it. She did not exclude it which means that she did weigh it in fashioning a sentence. AA p. 212. The District Court had to, as all judges do, weigh the evidence for and against and weigh the objectivity of each. What Whitaker deems as error is in reality what judges do. They are not required to accept at face value anyone's statement, but rather they are to weigh and judge all of them. Just because Whitaker is dissatisfied with the sentence does not mean that her substantial rights were violated. Furthermore, the State argued extensively about Mr. Ing's report. Whitaker would like this Court to read between the lines and assume as she has done that because the District Court did not follow Mr. Ing's recommendation that the District Court had long made up its mind about Mr. Ing's recommendation and therefore the District

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Court should have ordered a new psychosexual evaluation. But this is all assumption and does not give room for any of the argument at sentencing by the State, the victims and the like to influence the judge. Whitaker cannot meet her burden demonstrating plain error here.

The transcript reads like most sentencing hearing transcripts where the judge hears from both sides and makes comments about each and then renders a sentence. A valid psychosexual report was submitted and evaluated and in reality, based on the sentence given, Whitaker cannot show prejudice as the District Court sent her to prison for the longest term possible and one evaluator or another recommending probation would not have made a difference.

How Whitaker can state the following in her brief is astounding:

> "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." Appellant's Brief p. 34.

This statement is false. AA p. 212. Whitaker's further citation of a construction defect case regarding the 'alter ego doctrine' in support of a claim that the District Court had to, in some fashion, make specific factual findings before she was allowed to order a prison term against the wishes of the psychosexual evaluator is equally perplexing. Appellant's Brief p. 35

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(citing Webb v. Shull, 128 Nev. 85 (2012)). Nothing in NRS 176A.110, 176.139 or anywhere requires the sentencing judge to follow the recommendations of the evaluator or make specific findings similar to NRS 193.165 or other similar statutes.

Whitaker continually makes claims that the District Court had to follow the evaluator's findings or if not, inform the parties that she would or wouldn't but cites no authority for this proposition. The plea agreement made no such provision for a Cripps inquiry and there is nothing in the law that requires the judge to tell the parties what the judge is thinking especially when the sentencing hearing has not been held and clearly hearing arguments from the parties and listening to witnesses makes a difference. Cripps v. State, 122 Nev. 764 (2006). Why bother with the sentencing hearing if the judge must tell everyone what she is going to do before anyone says anything? Just because Whitaker filed with the District Court her statements in support of sentencing first, back in April 2018, doesn't mean that thereby her wishes must be granted. Such a position leaves no room for the State to argue as it did against Mr. Ing's report. AA p. 183-186.

The District Court judge never said that the psychosexual evaluation was insufficient or did not meet the requirements of NRS 176.139, nor was it

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stricken from consideration.

4) Highly Suspect or Impalpable Evidence at Sentencing.

There was no reliance by the District Court on such evidence at sentencing and the District Court clearly stated this on the record as noted above. This issue has been brought up sufficiently above and the State incorporates those arguments here. The only new issue raised has to do with the letter from the member of the School Board of Trustees. This is true that one of the School Board Members wrote a letter. AA p. 105. The State read the same statute quoted by Whitaker, NRS 176.015 and therein one finds that a "governmental entity" may be a victim. Because several of the incidents and contacts occurred on school property and the minors involved were students of the Wells school and out of an abundance of caution, due to the statute ("After hearing any statements presented pursuant to subsection 2 and before imposing sentence, the court shall afford the victim an opportunity to:..." NRS 176.015(3)), the State decided to submit the letter and let the District Court decide whether an elected School Board Official qualified as a victim or victim representative. AA p. 108.

While the District Court did not specifically state which statements she was considering and which she was not, she did clearly state that she was only considering "victim" statements which is what the law requires.

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AA p. 154, NSR 176.015. The record is devoid of any evidence that the District Court considered the School Board member letter or not. There was no discussion on the record whether he would qualify as a victim or victim representative. The State made no mention of this letter in its argument.

Based upon the statements that were lawful to be considered and the arguments that were made, this particular statement would seem to fall under the realm of harmless error if it is error, since the District Court did not mention it at any time demonstrating that the District Court hadn't given any weight to it. Cameron at 1283.

5) The No Contest Offer of Proof

This claim on appeal was not preserved by objection and is not supported by the record. As noted above in the mens rea constitutionality argument, the elements of the crime were set forth in the charging document and the statute. The plea canvas record clearly checks all the boxes of a constitutionally valid plea as required. State v. Gomes, 112 Nev. 1473, 1480-1481 (1996). Whitaker claims error without a single citation to the record of where the error occurred or any supporting case law. The Criminal Information meets the requirements of NRS 173.075 and the plea agreement meets the requirements of NRS 174.063. AA p. 1, 6. This claim of error should be summarily denied.

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CONCLUSION

Nevada's law, NRS 201.540, bears a rational basis to the government's interest in providing the children of this state a safe place to obtain an education free from the pressures or problems associated with students possibly becoming romantically involved with a teacher. The law is constitutional.

Whitaker violated this law with 4 students of the Wells Combined School. Whitaker, in lieu of facing 12 counts at trial, entered into a plea agreement to 4 counts and was sentenced appropriately as the District Court saw fit, within the bounds of the law. Her conviction should be affirmed.

RESPECTFULLY SUBMITTED this 29 day of March, 2019.

TYLER J. INGRAM
Elko County District Attorney

By: _____
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CERTIFICATE OF COMPLIANCE

I hereby certify that this Respondent's Answering 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). This Respondent's Answering Brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007, in size 14 point Times New Roman font.

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 Respondent's Answering Brief exempted by NRAP32(a)(7)(C), because it contains 7,903 words.

I hereby certify that I have read the Respondent's Answering 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), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal.

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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 29 day of March, 2019.

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CERTIFICATE OF SERVICE

I certify that this document was filed electronically with the Nevada Supreme Court on the 29th day of March, 2019. Electronic Service of the Respondent's Answering Brief shall be made in accordance with the Master Service List as follows:

Honorable Adam Paul Laxalt
Nevada Attorney General

and

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