**IN THE SUPREME COURT OF THE STATE OF NEVADA**

RICHARD ALEXANDER JENKINS ,
Appellant.

v.

STATE OF NEVADA,
Respondent.

Case No. 83465

_____/



**PETITION FOR REVIEW**

COMES NOW, Appellant, RICHARD ALEXANDER JENKINS, and petitions the Nevada Supreme Court for review of the Order of Affirmance filed June 22, 2022.

This Petition is brought pursuant to NRAP Rule 40B.

In the routing statement of the Appellant's Opening Brief, AOB at 1, we suggested that the case should stay with the Nevada Supreme Court, not only per NRAP 17(b)(2)(A), but also because it raises questions of first impression.

The issues themselves, as broadly stated, might not have appeared to have raised any significant issues of law, to wit: 1) The evidence is insufficient to sustain the judgment of guilt of lewdness with a 14-to-16-year-old minor child as a matter of state and federal law; 2) The trial court abused its discretion and violated Appellant's Fifth, Sixth and Fourteenth Amendment rights to a fair trial and to due process of law when it allowed the State's "cold Child Sexual Abuse Accommodation Syndrome" to testify; 3) The trial court abused it discretion and

committed reversible error in allowing evidence of uncharged non-sexualized toucings between Appellant and G.W. In so doing, the trial court violated Appellant's Fifth, Sixth and Fourteenth Amendment rights to due process of law and to a fair trial.

However, contained within each broadly-stated issue is a specific question of law that this Court had not previously adjudicated and which is outcome-determinative, to wit:

**A) ISSUE 1:**

Where the defendant is a "father figure" to the alleged victim, can the proscribed lewd intent be proven where the evidence, in the light most favorable to the State, establishes: 1) at no time did the defendant touch the victim skin-to-skin; 2) at no time did the defendant say anything sexual in nature to the victim; 3) there is no evidence of fondling, groping or rubbing on the child's body on or near the alleged victim's clothed private parts; 4) there is no evidence of "escalated behavior" on the part of the defendant.

This Court has not decided this issue. The closest this Court has come was Shue v. State, 133 Nev. 798, 808, 407 P.3d 332, 340 (2007)[reversed in part], where this Court held that an NRS 201.230 prosecution cannot be based on the defendant's act of kissing a 15-year-old minor without her consent, absent evidence of the nature of the kiss.

In the Order of Affirmance, the Court of Appeals stated at page 5 that "Jenkins concedes that he touched G.W. as she alleged during the private interactions in the center and Jenkins's home, including placement of his hand inside the front of her pants." Jenkins conceded no such thing[1]. What Jenkins conceded is that G.W. so testified. Jenkins' testimony as detailed at AGO at 11-12 is that he never did those things at all. And as the Court of Appeals stated at page 2, the touching of the buttocks was according to G.W.'s testimony, not according to what the videotape revealed.

Accordingly, the Court of Appeals's comments at footnote 2 regarding State v. Interiano, 868 So.2d 9, 15-16 (La. 2004) miss the mark. Again, Jenkins does not concede physical touching; he concedes that that is what G.W. claimed and what the jury apparently believed.

And the case Jenkins highlighted at AOB at 18 was People v. Ostrowski, 914 N.E.2d 558, 567-68 (Ill. App. 2009), a case that the Court of Appeals did not discuss. Again, we turn to the cases cited at AOB at 17-18, which align with Shue: The question of whether the touching of a victim's clothing violates a statute such as NRS 201.230 is an objective test: It is not met by whether the child is offended, but whether a reasonable person objectively would objectively and unhesitatingly

[1] In the words of Mr. Jenkins after reading this Order: "If I had done that and had conceded to doing that I would have saved $120,000 in attorney's fees and taken the State's 1-6 year plea offer!"

view the touching as irritating or disturbing. The proscribed lewd intent cannot be proven merely by the touching alone in that instance.

Again, a body-to-body hug by a "father figure" to a teenaged girl lasting nine seconds does not address the point made at AOB at 19 and 16: The due process standard of insufficient evidence applies even to one who is not morally blameless. The charges that make more sense to our fact pattern are either attempted lewdness or misdemeanor battery.

Likewise, the "slide down G.W.'s pants" as she described it, was much different than what the Court of Appeals implied. G.W. testified that when Appellant put his hands down her pants he slid "a little bit" and did not touch her vagina, but got "towards the top" thereof. (AAv6: 1281) Again: Lewdness? No. Attempted lewdness? Maybe. Battery? Also maybe.

But it was undisputed that G.W. did not feel uncomfortable when Appellant did what he did. See: Id. at 1278-79 (G.W.'s testimony); AAv7: 1617 (Percipient testimony of Alyssa Jenkins, G.W.'s best friend). So, how was the evidence sufficient to sustain the conviction of the charged offenses?

**B. ISSUE 2:**

How can we allow an otherwise qualified CSAAS expert to testify to "grooming" – especially as a "cold expert," and when grooming is not at issue?

Again, we go back to the basic definition of "grooming." "Grooming

behavior" is not relevant in every child sex abuse case, but is relevant to explain how a child can apparently not resist sexual abuse, protect the abuser, and become reluctant to turn against the abuser. Put otherwise, such expert testimony is relevant to help a jury understand superficially unusual behavior of the victim. See: Perez v. State, 123 Nev. 850, 859, 313 P.3d 862, 868 (2013).

Here, "grooming" simply was not an issue and therefore could not be admitted either per NRS 50.350 or NRS 50.275.

As Mr. Jenkins pointed out, to begin with G.W. was a teenager both at time of trial and the time of the prosecuted acts, and a "grooming expert" was not necessary to establish her motivations. She easily described them, as did the Court of Appeals at OOA at 1.

Secondly, a "CSAAS" expert was unnecessary to establish why G.W. gave a different statement to the detective that was either inconsistent to or an embellishment upon her initial statement. The reason for that was because of G.W.'s subsequent interactions with Coach Marie Foster. See: AOB at 28-29. This Appellant had absolutely nothing whatsoever to do with G.W.'s decision to make a second or third statement to the investigator. The Court of Appeals did not discuss these facts at all in the OOA.

And what the Court of Appeals did not discuss, but what we trumpeted in our brief, is that this "CSAAS" expert should not have been permitted to testify per

Hallmark v. Eldridge, 124 Nev. 492, 189 P.3d 646 (2008) and Townsend v. State, 103 Nev. 113, 118-19, 734 P.2d 705, 708 (1987), not only because he was a "cold expert" who knew absolutely nothing about the facts of this case, but more importantly, because his description of facially innocent activities, without reference to the entirety of the fact pattern of this case, created a highly speculative aura of turning innocent behavior into criminal activity worthy of a minimum of 16 years in prison.

The Court of Appeals did not discuss either State v. Starks, 492 P.3d 326, 332 (Ariz. App. 2021) or State v. Etzel, 488 P.3d 783, 791 (Or. App. 2021), both of which mandated reversal in allowing cold experts to testify that facially innocent acts could be grooming.

The prejudice of this expert testimony is enormous. Based on this testimony, any adult who puts his arm around a child and tells him/her that she is doing great can be sentenced to a minimum of 16 years in prison. How is that right?

**C. ISSUE 3:**

The thrust of our argument on the uncharged misconduct evidence issue is that even if the "uncharged misconduct" is related to the charged crime, and even if the uncharged misconduct is proven by clear and convincing evidence, if the uncharged misconduct is not prosecutable then its probative value is always going to be outweighed by the danger of unfair prejudice. In that instance, the evidence is

simply not relevant because it is not material, and therefore it is inadmissible. NRS 48.015, 48.025.

As we pointed out at AOB at 27, per Randolph v. State, 136 Nev.Ad.Op. 78, 477 P.3d 342, 349 (2020), the uncharged misconduct must be something prosecutable. It must be a crime of some sort. Here, it is undisputed that the uncharged misconduct at issue violated no statute.

At AOB at 27-28 we emphasized Taylor v. State, 109 Nev. 849, 853, 858 P.2d 843, 846 (1993) and Cipriano v. State, 111 Nev. 534, 541-43, 894 P.2d 347, 351-52 (1995), overruled on other grounds, State v. Sixth Judicial District Court, 114 Nev. 739, 743, 964 P.2d 48, 50-51 (1998) as examples of this concept in sex offense cases. The Court of Appeals distinguished Taylor at OOA 10-11 on the basis that the uncharged "non-criminal misconduct" involved a different minor child there than the prosecutrix.

But again, how can evidence that is not criminal – i.e., not reasonably prosecutable – establish a motive or an intent on the part of the defendant to engage in criminal misconduct? The Court of Appeals did not explain.

This Court reversed a sexual assault and lewdness conviction, where the defendant denied wrongdoing and presented character witnesses, and in rebuttal the State presented evidence of something ambiguous the defendant said, which the witness interpreted as an improper sexual invitation. Berner v. State, 104 Nev.

695, 697, 765 P.2d 1144, 1146 (1988). Although reversal was had on many grounds, one was that the comment did not tend to prove any fact at issue.

And in Richmond v. State, 118 Nev. 924, 935, 59 P.3d 1249, 1256 (2002) this Court noted that it is error for a witness to testify in such a manner that the jury could infer that the defendant had engaged in prior criminal activity.

As noted in Honkanan v. State, 105 Nev. 901, 903, 784 P.2d 981, 983 (1989), this Court cannot uphold a conviction when allowing it to stand means disregarding our rules of evidence in favor of ad hoc justice. And as noted in Ledbetter v. State, 122 Nev. 252, 263, 129 P.3d 671, 679 (2006) using "motive evidence" to bolster otherwise relatively week charges heightens the likelihood of unfair prejudice.

As we pointed out at ARB at 9-10, in order for the non-criminal, non-prosecutable conduct to be admissible, it would have to be *res gestae* under NRS 48.035(3). Based upon how "res gestae" has been defined in Weber v. State, 121 Nev. 554, 574, 119 P.3d 107, 121 (2005), Bellon v. State, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005), Flores v. State, 116 Nev. 659, 662, 5 P.3d 1066, 1068 (2000) and Bletcher v. State, 111 Nev. 1477, 1479-80, 907 P.2d 978, 979 (1995), this uncharged misconduct did not meet the definition of res gestae.

Therefore, the issue for the Court of Appeals to decide was this: Given that the evidence – not only of the events in question but also the witnesses'

dramatically-stated opinions as to the "inappropriateness" of that evidence and the one-sided, misleading video clips of them – could not come into evidence per NRS 48.045(3) or 48.035(3), under what circumstances could Jenkins' conduct come in per NRS 48.045(2)? The Court of Appeals did not explain, but our answer is clear: It can't.

## CONCLUSION

All three issues in this case involve questions that are important, in order to determine when a defendant receives a fair trial not riddled with prejudicial inculpatory evidence or speculation that gets turned into inculpatory evidence.

Ultimately what we have is Gage, G.W.'s mother's boyfriend, and this Appellant engaging in remarkably similar conduct per G.W.'s description. Gage was not prosecuted, while Mr. Jenkins is serving a minimum of 16 years in prison – based upon, insofar as we can tell, G.W.'s subjective reactions to her best friend's father as opposed to her mother's boyfriend. This simply is not right. This Petition should be granted and this conviction should be reversed.

DATED this 8th day of July, 2022.

Respectfully submitted,

RICHARD F. CORNELL, P.C.
150 Ridge Street, 2nd Floor
Reno, Nevada 89501

By: */s/RichardCornell*_____
Richard Cornell

## ATTORNEY'S CERTIFICATE OF COMPLIANCE

I, RICHARD F. CORNELL, hereby certify as follows, pursuant to NRAP 40(b)(4):

I have read the Petition for Review before signing it; to the best of my knowledge, information and belief, the Petition is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

The Petition complies with all applicable Nevada Rules of Appellate Procedure, including the requirements of NRAP 28(e) and 40(a)(2), in that every factual assertion in the brief regarding matters in the record is supported by appropriate references to the record on appeal.

Further, I certify that the document complies with the formatting requirements of Rule 32(a)(4)-(6). Specifically, the brief is 2.0-spaced; it uses a mono-spaced type face – Times New Roman14-point; it is in a plain style; and the margins on all four sides are at least one (1)inch.

The Petition also meets the applicable page and word limitations set forth in NRAP 40(b)(3), because it contains less than 4,667 words, to wit: 2,050 words.

DATED this 8th day of July, 2022.

*/s/RichardCornell*_____
Richard Cornell, Esq., #1553

## CERTIFICATE OF SERVICE

The undersigned does hereby swear and declare under penalty of perjury that they are an employee of RICHARD F. CORNELL, P.C., and that on the 8th day of July, 2022, they caused a true and correct copy of the preceding document to be served upon all necessary parties by way of electronic service through the Court's E-flex filing system, addressed as follows:

Chelsea Mazza
Douglas County District Attorney's Office
cmazza@douglas.nv.gov.

DATED this 8th day of July, 2022.

*/s/KathrynOBryan*_____
Kathryn O'Bryan