IN THE SUPREME COURT OF THE STATE OF NEVADA

TENNILLE WHITAKER,

Appellant,

vs.

WARDEN, JERRY HOWELL &
THE STATE OF NEVADA,

Respondents.

SUPREME COURT No. 83049
Dist Ct. Case. DC-CV-20-69

APPEAL FROM JUDGMENT OF THE HONORABLE
KRISTON HILL
FOURTH JUDICIAL DISTRICT COURT

APPELLANT'S APPENDIX

VOLUME 2

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

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

INDEX TO APPELLANT'S APPENDIX

Volume One

INDEX TO APPELLANT'S APPENDIX

Volume One

Volume Two

DC-CV-20-C09

Case No.: ~~CV-HC~~

Dept. No.: 1

FILED

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ELKO CO DISTRICT COURT

CLERK____ DEPUTY LP

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

TENNILLE RAE WHITAKER,

Petitioner,

v.

JERRY HOWELL, WARDEN, FLORENCE MCCLURE WOMEN'S CORRECTIONAL CENTER.

Respondent.

VERIFIED PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)

COMES NOW, TENNILLE RAE WHITAKER, Petitioner above-named and files a Post-Conviction Petition for Writ of Habeas Corpus pursuant to NRS 34.730 et seq, and alleges as follows:

1. That Petitioner is imprisoned or restrained of her liberty by William Hutchings, Warden of the Florence McClure Women's Correctional Center in Clark County, Nevada.

2. Name and Location of Court which entered the judgment of conviction under attack: Fourth Judicial District Court, County of Elko, State of Nevada.

3. Date of Judgment of Conviction: October 5, 2018.

258

4. Case No: CR-FP-17-3893.

5. Length of Sentence: Minimum aggregate sentence of 96 months and the maximum aggregate sentence of 240 months. Specifically, Count I: 24-60 month in prison. Count 2: 24-60 months in prison. Count III: 24-60 month in prison. Count 4: 24-60 months in prison. All sentences to run consecutively.

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this Motion? No.

7. Nature of Offenses involved in Conviction being challenged:

Count I: Sexual Conduct between Certain Employees of School or Volunteers at at School and Pupil, NRS 201.540.

Count II. Sexual Conduct between Certain Employees of School or Volunteers at School and Pupil, NRS 201.540.

Count 3: Sexual Conduct between Certain Employees of School or Volunteers at School and Pupil, NRS 201.540.

Count 4: Sexual Conduct between Certain Employees of School or Volunteers at School and Pupil, NRS 201.540.

8. What was your plea: No Contest.

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: I agreed to plead No Contest to four counts of violating NRS 201.540 in exchange for dismissal of all

other charges against me and the recommendation of the prosecution that I be sentenced to no more than 4 to 12 years in prison.

10. I was found guilty by: The District Court accepting the plea bargain agreement and accepting my plea of No Contest.

11. Did you testify at Trial: N/A

12. Did you appeal from the judgment of conviction: Yes.

13. If you did appeal, answer the following:

a. Name of Court: Nevada Supreme Court.

b. Case number or citation: 77294.

c. Result: Order of Affirmance.

d. Date of Result: 11/21/2019

14. If you did not appeal, explain briefly why not: N/A

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? No.

16. If your answer to No. 15 was yes, give the following Information: N/A

17. Has any ground being raised in this petition been previously presented to this or any other court by way of a petition for habeas corpus, motion, application or any other post-conviction proceeding? No.

18. N/A

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? No.

260

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? No.

21. Give the name of each attorney who represented you in the proceedings resulting in your conviction and on direct appeal: Byron Bergeron was the trial attorney. Karla K. Butko and Byron Bergeron were my attorneys on direct appeal.

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? No.

23. State concisely every ground on which you claim that you are being held unlawfully.

A. Petitioner was denied Effective Assistance of Counsel under the Sixth Amendment of the United States Constitution from the time of her arraignment on April 30, 2018 up to and including her sentencing on October 4, 2018.

SUPPORTING FACTS

On October 4, 2018 Petitioner was sentenced by the Fourth Judicial District Court to the statutory maximum sentence of 2 to 5 years incarceration on each of the four counts to which she had pled no contest. The sentences were imposed to run consecutively. The sentences imposed by the Court were in excess of the sentencing recommendations of the State of Nevada, pursuant to the terms of the plea agreement, and in excess of the recommendation of the Division of Parole and Probation, which included an upward deviation request from the Parole and Probation supervisor.

The Court stated that retribution and deterrence required consideration by the Court and informed Petitioner that the four boys said to have been sexually involved with Petitioner and their

families were the victims, not Petitioner. The Court also stated that the most important job of the Court is the protection of the public and that required Petitioner's incarceration.

At the sentencing hearing Petitioner's counsel concentrated almost exclusively in his presentation on the legal question of whether the alleged victims were pupils within the meaning of the statute under which she had been charged and whether Petitioner had committed the crimes identified in the statute even though she had pled No Contest to the violations and no right to appeal the legal question had been reserved. Attached is a transcript of the sentencing proceedings.

In response to the Court's question about whether counsel had looked at the legislative history of the underlying statute of the four counts, he answered "No." Counsel then went on to state:

> "And there may be a lot I didn't do because this case just keeps cascading and cascading factually. The further we get away from the arraignment, waiving the Prelim, the second arraignment, and now the sentencing. And, quite frankly there's a lot I would like to do but the fact is I don't even think I can keep half of it straight today. And that's just me being particularly honest with the Court."

Counsel did not inform the Court that he had been injured and hospitalized shortly before sentencing and as a result had been in irregular communication with Petitioner for a significant period of time prior to sentencing on October 4.

Counsel did not ask for a continuance of the sentencing hearing, nor did the Court inquire further after counsel informed the Court that he was unprepared and confused.

The following omissions of counsel at the sentencing hearing clearly show that Petitioner's sentence was based on the Court not having been properly informed. In summary, it is clear that the Court was misinformed or not informed of the following facts and circumstances, all of which

appear to have been decided by the Court against Petitioner receiving less than the maximum sentence.

1. Whether Petitioner had deliberately initiated any of the relationships with the young men.
2. Whether Petitioner actually had mental health problems and if so, what they were.
3. Whether Petitioner refused treatment for her mental health problems.
4. Whether the young man Petitioner had sexual relations with who committed suicide around 2 years later did so as a result of his relationship with Petitioner.
5. Whether a significant number of residents in the community of Wells, Nevada, feared and opposed Petitioner receiving lenient treatment and returning to the community?
6. Whether the male victims left their residences in and around Wells because of their humiliation at having engaged in sexual behaviors with Defendant.
7. Whether a victim impact statement can properly include the public's point of view about sentencing.

Petitioner was asked by the Court at sentencing if she had anything to say in her behalf. Her statement consisted solely of an apology and expressions of affection for the purported victims and their families.

Had Petitioner been properly prepared by counsel to answer that question, Petitioner would have informed the Court that the first instance of a physical relationship with the young men was with BH. Petitioner and the mother of BH were personal friends.

That relationship began by BH physically forcing himself on Petitioner, first by kissing Petitioner on several occasions in her classroom. Petitioner would have told the Court that while she couldn't physically prevent the kissing and didn't encourage it to start.

Petitioner would have informed the Court that she and her husband were having severe marital difficulties that had gone on for approximately a year. That one of her responses to those difficulties was over consumption of alcohol. That it was clear to her that if she informed anybody about the misbehavior of BH in her classroom or took any other discernible steps to prevent a reoccurrence of the kissing, her marriage would be over when her husband learned about the kissing.

The Ing Psychosexual Evaluation, attached hereto, on page 4 sets out the nature of the marital difficulty which involved Petitioner failing to tell her husband about an instance of pre-marital sex which he considered to be Petitioner having lied to him.

Petitioner would also have informed the Court that the sexual activity with BH after he kissed her occurred as follows. She had gone to the residence of the parents of BH for a business purpose to meet with BH's mother.

That Petitioner and the mother of BH, with whom she had been friends, consumed alcohol and Petitioner became intoxicated. Petitioner attempted to leave the residence in her automobile, but was having difficulty driving. That BH, intervened and told her he would drive her home. Petitioner agreed. That in Petitioner's car, BH physically forced Petitioner's face to his groin area, unzipped his pants, and physically forced Petitioner to engage in oral sex. That Petitioner was too intoxicated to offer reasonable or effective resistance or to prevent the occurrence of such acts in the future for the reasons set out above.

Had counsel been properly prepared for sentencing, he would have informed the Court that Petitioner's failure to inform anyone of the acts of BH and her continuing failure to resist him, is and has been the subject of intense psychiatric investigations by forensic psychiatrists, academic reports, and has been a matter of expert testimony in a number of high profile rape cases, all of which show that the impact of forced sexual activity on females leads to a variety of apparently contradictory behaviors by females that almost exactly mirror Petitioner's subsequent behavior in the instant case.

Petitioner would also have informed the Court that the remaining 3 named victims had initiated contact with her after having been informed by BH that Petitioner had been non-resistant to his actions. That while no threat of the three young men to publicly reveal Petitioner's lack of resistance to BH was directly made, it was clearly implied by the circumstances and means and methods the three young men used to force her non-resistance to their desires.

Testimony from law enforcement officers was available to show that BH's claims of sexual contact with Petitioner had been widely circulated throughout the school by BH. At a minimum counsel should have made that argument to the Court to explain Petitioner's non-resistance.

At sentencing, Petitioner's counsel told the Court; "As a side note, my client has always indicated to me that the young men involved initiated contact with her , which is consistent with them volunteering to be student aides." Saying that "is consistent with them volunteering to be student aides" implies that all four of the young men at least volunteered to be, or had been, Petitioner's student aides. That is not true. Nor does it specifically define what "initiated contact" actually encompassed with BH.

On April 30, 2018, at Petitioner's arraignment, Petitioner's trial counsel filed a document with the Court entitled Psychosexual Evaluation. No order for a psycho-sexual evaluation had

previously been made by the Court. It was, however, obvious under Nevada law that a psychosexual evaluation showing Petitioner would be a low risk to reoffend would be necessary to make Petitioner eligible for probation. A copy of the Ing Evaluation is attached hereto for convenience.

The evaluation had been prepared and signed by Steven Ing on April 20, 2018. Mr. Ing's Curriculum Vitae, filed with the Court, established that he held a master's degree in Counseling and Educational Psychology and was a Licensed Marriage and Family Therapist in Nevada. The Psychosexual Evaluation conclusion of Mr. Ing was that testing showed Petitioner was a low risk to reoffend.

Defendant's sentencing took place 6 months after that evaluation was completed and filed. No attempt to update the Ing Evaluation was made by Petitioner's counsel.

The transcript of the sentencing proceeding establishes that Petitioner's counsel repeatedly referred to Mr. Ing as Doctor Ing. Mr. Ing did not have a doctor's degree. Petitioner's counsel did not address the nature of Mr. Ing's education, however, the prosecutor pointed out to the Court that Mr. Ing did not possess a doctorate degree.

A portion of Mr. Ing's evaluation of Petitioner included his conclusion that Petitioners had a Major Depressive Disorder, AD/HD, was hyperactive and impulsive, and had a Borderline Personality Disorder. Mr. Ing's Master's college degree was in counseling and educational psychology. Mr. Ing was obviously not qualified to give an expert opinion on Petitioner's mental health problems absent additional training being established by the Defense.

Mr. Ing reported in his evaluation that Petitioner had "avoided the medical consultations he had recommended for treatment of her major depressive disorder."

Petitioner, had she been asked at sentencing, would have informed the Court that she not only had made and kept a variety of medical appointments with an Elko physician after April 30 to determine whether she had any identifiable medical conditions that would explain her behaviors, but that she had also obtained an MRI in connection with the function of her pituitary glands at the University of Utah to determine if it was functioning properly. She would have informed the Court that she understood the pituitary gland controls virtually all other glands in the human body including those governing human behavior. Those medical evaluations all came after the evaluation was written by Mr. Ing and before sentencing.

Petitioner would also have informed the Court, had she been asked by counsel, that it had been unreported by Mr. Ing that her not taking medications resulted from Ing's recommendation that she take no medications in connection with what he saw as her mental health problems and also that Petitioner's husband had opposed her taking any medication on the grounds that he felt she might commit suicide if she did so.

Counsel by not making that information available to the Court caused it to appear to the Court that Petitioner had done nothing and intended to do nothing to address the underlying mental health problems that led to her behavior with the young men.

The evaluation of Petitioner by the Division of Parole and Probation in its Presentence Investigation report established that the standardized and proportional evaluations led to a recommendation that Petitioner should be placed on probation. The Division's recommendation deviated from that outcome because a Division supervisor found that Petitioner had a high need for treatment that was overdue. That conclusion was obviously based on Mr. Ing's statement that she had not sought medical help.

Counsel argued to the Court that the Division's deviation recommendation in the presentence report, based on Petitioners lack of and high need for treatment, was erroneous because Petitioner had been in treatment with Mr. Ing.

The Court informed counsel that in fact the Division's conclusion was directly based on Mr. Ing's report that Petitioner had provided to the Court. Counsel withdrew the defense objection to the parole and probation deviation recommendation, which made it appear that in fact Petitioner had been deliberately resisting treatment and chose to admit it.

It would be impossible for the Court to have reached any conclusion from the deviation exchange except that Petitioner's counsel was not prepared for sentencing. It would also have been impossible for the Court to conclude anything except that Petitioner was not interested in addressing and curing any existing mental health problems that caused or contributed to her behavior.

The importance of Mr. Ing's credibility and knowledge was specifically questioned by the Court by observing that Mr. Ing, having served as a family counselor to Petitioner and her husband, was likely not objective in his analysis of her.

The prosecutor at sentencing argued that Mr. Ing didn't know what he was talking about and that no statements submitted to the Court on behalf of Petitioner had mentioned anything evidently mentally wrong with Defendant before her behavior with the teenage boys. That does not realistically conform to the content of the Ing report, but Petitioners counsel didn't object to the assertion of the prosecutor.

The Court is informed that several people who knew and were associated with Petitioner, had they been asked, would have made themselves available at sentencing to comment on the onset of Petitioner's obvious depression. As described in the Ing report, Petitioner and her husband were

having significant marital difficulties and Petitioner had described for Mr. Ing a number of events and characteristics of herself that suggested mental health problems.

Petitioner, had she been asked at sentencing, would have informed the Court that her life had become so confused and pointless that she was very pleased that she had been arrested so that her deceptions could end.

Counsel for Petitioner, as well as the prosecutor, also knew that at least one of the young men involved with Petitioner, CM, informed law enforcement that he had known Petitioner for several years and that her behavior in the past had been professional and friendly, but by the time he became Petitioner's teacher's aide, she had become childlike and crazy. The Court was not informed of that.

The Court was informed, specifically by the statement of CM's parents in their victim impact statement, that the second victim after BH, identified as CM, committed suicide as a result of "the demons" Petitioner put in his head. No information was provided that verified the facts upon which that conclusion was based.

The actual facts are that CM committed suicide in Reno around 2 years after Petitioner last interacted with him. As noted above, Petitioner, if asked, would have specifically informed the Court that CM initiated contact with Petitioner, not the other way around.

The plea bargain agreement was signed in April 2018, at least two months before CM's suicide and as much as two years after the last contact between Petitioner and CM. CM was, therefore, under no obligation to present testimony or participate in the prosecution in any way.

Petitioner, had she been asked at sentencing, would have informed the Court that CM initiated contact with her. The fact that CM told law enforcement that Petitioner acted child-like and crazy also suggests she hadn't put "demons" in his head.

Petitioner informs the Court that there are witnesses who could have testified that CM had mental health problems long before he ever had anything to do with Petitioner. Sheriff's office Investigators could have been produced to testify that CM informed them in an interview that it was CM, not Petitioner that ended the relationship. CM's mother, who gave a victim impact statement, had she been asked could have informed the Court that just prior to his suicide CM's long term relationship with a female had been terminated by her.

At a minimum, Petitioner's counsel should have realized that CM's suicide would almost certainly be raised at sentencing as being attributable to Petitioner and as a justification for the imposition of harsh punishment and he needed to be ready to address it. Counsel said and did nothing to counter that at sentencing.

VICTIM IMPACT STATEMENTS

BH'S mother, Jennifer Hooper, in her victim impact statement at sentencing, was allowed to present allegations of long-term sexual grooming by Petitioner, both as to Ms. Hooper's son, and "other young boys" without a response or objection from the defense. Neither was there an admonition by the Court to confine her victim impact statement to the harm the crime against her son had caused the Hooper family. Ms. Hooper's claim of grooming efforts of Petitioner to boys in the fourth or sixth grade was nonsense and uncontested, but counsel's failure to contest the assertion made it probable in the Court's mind that Petitioner had been promoting the sexual contacts with teenage boys for many years.

Law enforcement reports establish that significant and broad investigative work was done to establish whether there was any evidence of Petitioner having engaged in earlier grooming activities and none was found. Ms. Hooper claimed Petitioner's grooming activities consisted of

Petitioner being sympathetic to her son who had a seizure disorder and was being heavily medicated 6 years before the events in the instant case.

Ms. Hooper was also allowed to assert in her victim impact statement that all four of the victims had been teacher aides of Petitioner. That assertion is absolutely false, but no objection was made by the defense, nor for that matter by the prosecution, who also knew it was not true.

Ms. Hooper was allowed, without objection, to assert that Petitioner ruined proms, stalked unnamed students, taunted girlfriends, and threated to engage in more relationships 'with the young men, again without objection from the Defense. Those allegations are false. Counsel did not cross-examine Ms. Hooper on any subject.

Most importantly, Ms. Hooper was allowed, again without objection by the Defense, to assert "complete devastation" to the community of Wells as a result of Petitioner's acts.

Although the Court stated it was ignoring the improper petition that had been sent to the Court by citizens of Wells, Ms. Hooper's victim impact statement was in many ways repetitive on that subject. No objection to her statement was made, nor were any of the alleged facts refuted in any way.

Neither the family nor the victims involved in two of the counts provided direct verbal or written victim impact statements. That did not deter the Court from concluding that Petitioner had indeed hurt them, which implies the Court accepted Ms. Hooper's assertion that every young man was injured.

Petitioner acknowledges that she cannot point to any specific statement or holdings by the Court, but it is clear to her that the Court, based on all of the facts presented in the victim impact statements, was concerned about placing Petitioner on probation in large part because petitioner intended, as the Court understood it, going to serve out her probation in Wells, where if only by

happenstance she would periodically come into contact with relatives of the boys who were apparently vastly injured by Petitioners' actions.

Petitioner, if asked, would have informed the Court that she and her husband had discussed the desirability of her serving any term of probation imposed outside the Wells area and had so informed her counsel. Defense counsel told the Court at sentencing only that he was "pretty sure" she would. Petitioner would have advised the Court that her willingness to serve her probation term elsewhere had been told to her counsel prior to sentencing.

The most important omission of Petitioner's Counsel at sentencing was in not setting out with some precision for the Court exactly what Petitioner's plans were if she were granted probation. For example, the rule for people found guilty of sexual misconduct with children is that they can't be around juveniles in a secluded area unless they are in the company of another adult. Petitioner's husband is employed by the Nevada Department of transportation. It was left unclear at sentencing whether the marriage would continue. Petitioner was not specifically informed of the no contact rule before sentencing. Petitioner lived with her two children both of whom were juveniles.

Petitioner's probation request should have been supported by specific plans for treatment to insure Petitioner would never reoffend. Other than using the therapist, Mr. Ing in the past, no definitive treatment plan was provided to the Court. Indeed, Mr. Ing had been clear in the Psychosexual Evaluation that Petitioner needed both mental health treatment and counseling. No representation was made to the Court even that the counseling with Mr. Ing was going to continue. No representation to the Court was made that Petitioner understood that alcohol consumption was involved in her decision making and that she understood that her alcohol use had to stop.

There was also no request that Petitioner should have pled No Contest, but Mentally Ill, so that if she were incarcerated the prison system would be obliged to provide mental health treatment.

All of the foregoing applies not only to Petitioner's rehabilitation, it also directly applies to protecting the public, which, as noted elsewhere, was the expressed primary concern of the Court at sentencing.

VERIFICATION

Under penalties of perjury, the undersigned attorney declares that he is the attorney for the Petitioner named in the foregoing Petition for Writ of Habeas Corpus and that Petitioner has personally authorized Counsel to commence the action. Counsel additionally verifies that he knows the content thereof, that the pleading is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters, he believes the same to be true.

Respectfully submitted this 28 day of July, 2020

Gary D Woodbury

GARY D. WOODBURY
Attorney for Petitioner
1053 Idaho Street
Elko, Nevada 89801

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I, KIMBERLY DAWSON, on the 28 day of JULY 2020, served the foregoing VERIFIED PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION) by delivering, mailing or by facsimile transmission or causing to be delivered, mailed, or transmitted by facsimile transmission, a copy of said document to the following:

By delivering to:

THE HONORABLE DISTRICT COURT JUDGE NANCY PORTER
FOURTH JUDICIAL DISTRICT COURT
ELKO COUNTY COURTHOUSE
ELKO, NV 89801

ELKO COUNTY DISTRICT ATTORNEY
540 COURT STREET, SECOND FLOOR
ELKO, NV 89801

By mailing to:

JERRY HOWELL, WARDEN
FLORENCE MCCLURE WOMENS CORRECTIONAL CENTER
4370 SMILEY ROAD
LAS VEGAS, NV 89115-1808

AG AARON FORD
OFFICE OF THE ATTORNEY GENERAL
100 N. CARSON CITY ST.
CARSON CITY, NV 89701

TENNILLE WHITAKER #1205834
FLORENCE MCCLURE WOMENS CORRECTIONAL CENTER
4370 SMILEY ROAD
LAS VEGAS, NV 89115-1808

K. Dawson
KIMBERLY DAWSON

CASE NO.: DC-CV-20-69

DEPT. NO. 1

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF ELKO, STATE OF NEVADA

TENNILLE RAE WHITAKER,

Petitioner,

vs.

JERRY HOWELL, WARDEN, FLORENCE MCCLURE WOMEN'S CORRECTION CENTER,

Respondent.

ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, by and through the Elko County District Attorney's Office and Chad B. Thompson Deputy District Attorney, and answers Petitioner's Petition For Writ Of Habeas Corpus. This Answer is made and based upon the following Points and Authorities in support hereof, as well as the documents, pleadings and exhibits already on file with this Honorable Court.

Dated this 12th day of October, 2020.

TYLER J. INGRAM
Elko County District Attorney's Office

By: _____
Brea M. Mitchell
Deputy District Attorney
State Bar Number: 14926

Affirmation Pursuant to NRS 239B.030
SSN Does Appear
SSN Does Not Appear BM

POINTS AND AUTHORITIES

I. Procedural History (required by NRS 34.760):

Respondent informs the Court that a judgment of conviction was entered against Petitioner for 4 counts of violations of NRS 201.540. Exhibit 1 (Judgement of Conviction filed on October 5, 2018). Petitioner has previously applied for relief from her conviction via direct appeal to the Supreme Court of Nevada in case 77294. The issues raised at the Nevada Supreme Court were as follows:

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 psychosexual 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 psychosexual 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.

Exhibit 2 (Appellant's Opening Brief in the Supreme Court) p. 7-8; See generally Exhibit 3 (Respondent's Answering Brief in the Supreme Court). The Supreme Court retained jurisdiction, filing an Order of Affirmance on November 21, 2019. Exhibit 4. The Remittitur was filed February 12, 2020. Exhibit 5.

Transcripts are available. Relevant transcripts are attached hereto. Respondent is not aware of any proceedings that were recorded and not transcribed. If Respondent learns differently, it will inform the Court.

II. Evidentiary Hearing

Not all post-conviction petitions merit an evidentiary hearing. After reviewing the petition, return and answer, and all supporting documents, the District Court should determine whether an evidentiary hearing is required. NRS 34.770(1). First, an evidentiary hearing is not required if the claims are not supported by specific factual allegations. Second, an evidentiary hearing is not required if the claims are belied by the record. "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann v. State, 118 Nev. 351, 46 P.3d 1228, 1230 (2002).

III. Applicable Law and Argument

In her petition, Whitaker claims ineffective assistance at sentencing and puts forth a number of ineffective assistance of counsel instances all of which occurred at or just prior to sentencing. Whitaker claims no issue with the arraignment hearing. Before directly responding to those instances, the State will first address the mandatory statutory provisions requiring dismissal.

a. Dismissal of the Petition

NRS 34.810 states that:

1. The court shall dismiss a petition if the court determines that:

> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel.

Whitaker has not claimed that she did not enter her plea knowingly and voluntarily and without effective assistance of counsel, but rather claims that she was assisted poorly during sentencing only. This is insufficient and the Petition should be dismissed based upon the above statute which says that it shall be dismissed. While true the statute does not specifically include No Contest pleas, the Nevada Supreme Court has said that such pleas are treated the same as guilty pleas for all criminal purposes:

> "To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a defendant must demonstrate a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial." State v. Langarica, 107 Nev. 932, 933, 822 P.2d 1110, 1111 (1991), *cert. denied,* 506 U.S. 924, 121 L. Ed. 2d 261, 113 S. Ct. 346 (1992). It is clear that Gomes' decision not to go to trial would not have changed regardless of which kind of plea was entered because the consequences of the two pleas are the same in a criminal case. Furthermore, they are the same in a civil case as well.
>
> A plea of nolo contendere does not expressly admit guilt but nevertheless authorizes a court to treat the defendant as if he or she were guilty. North Carolina v. Alford, 400 U.S. 25, 35, 27 L. Ed. 2d 162, 91 S. Ct. 160 (1970).

State v. Gomes, 112 Nev. 1473, 1478-79, 930 P.2d 701, 705-06 (1996).

A criminal defendant in Nevada has only four possible pleas: not guilty, guilty, guilty but mentally ill, or nolo contendere. NRS 174.035(1). The United States Supreme Court could not "perceive any material difference" in practical consequences between pleading guilty while protesting one's innocence and pleading nolo contendere. Gomes, at 1478-79 (citing Alford at 37.).

Ultimately, Respondent believes that because a No Contest plea is treated as a plea of guilty for all criminal purposes, NRS 34.810.1(a) applies here and this Court should dismiss the Petition.

b. Ineffective Assistance of Counsel Claim

Whitaker has claimed ineffective assistance of counsel from the time after her arraignment and entry of pleas through the sentencing hearing. Petitioner's Writ, 4.

Whitaker claims a multitude of "facts" to support this ground. Id. It should be noted that Petitioner has failed to cite either the record or any relevant authority throughout the entirety of her Petition.

If this Court does not order a dismissal of the petition pursuant to 34.810, it is Respondent's position that Whitaker has overall failed to meet her burden because she has failed to demonstrate ineffective assistance of counsel and prejudice from said assistance.

Of course, the landmark case is Strickland v. Washington, 466 U.S. 668 (1984), in which the U.S. Supreme Court set forth the legal standard for assessing ineffective assistance of counsel (IAC) claims. In that case, the Court held that in order to prevail in an IAC claim, a Petitioner must make two showings. First, the petitioner "must show that counsel's performance was deficient," which requires that the petitioner demonstrate that his trial counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland at 687. Additionally, a petitioner must "show that counsel's representation fell below an objective standard of reasonableness." Strickland at 687-688.

In deciding IAC claims, "Judicial scrutiny of counsel's performance must be highly deferential," and "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland at 689-690. As the Court explained:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Id.

Basically, in assessing a trial counsel's performance, there is a strong presumption that trial counsel's decisions could be considered "sound trial strategy." If a petitioner is not able to overcome this strong presumption, then he cannot succeed in showing that his trial counsel's performance was deficient, i.e., falling below an objective standard of reasonableness.

Second, in addition to showing that trial counsel's performance was deficient, a petitioner must also show that the deficient performance prejudiced the petitioner's case. Id. at 687.

The Court explained that not every error made by a trial attorney warrants reversal; rather, only those trial errors which actually prejudiced a petitioner's case entitle a petitioner to relief:

> Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.
> It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Id. at 693.

In order to make a showing of prejudice, the petitioner must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. In discussing the prejudice requirement, the Court further explained that in order to make a showing of prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

The Court emphasized that a petitioner must make both showings: "Unless a defendant makes both showings, it cannot be said that the conviction...resulted from a breakdown in the adversary process that renders the result unreliable." Id. at 687.

The Court also emphasized that a district court reviewing an IAC claim may address the prejudice prong and the deficiency prong in any order; in other words, if a district court concludes that a petitioner has suffered no prejudice, the court can dispose of a habeas petition without ever even addressing the deficiency prong. The Court explained:

> Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Id. at 697.

Finally, it is important to remember that it is the petitioner who bears the burden of proving both prongs (i.e., the deficiency prong and the prejudice prong) in a habeas petition alleging an IAC claim. Id. at 687; see also Means v. State, 120 Nev. 1001, 1011 (2004). Furthermore, the petitioner has the burden of proving the facts underlying an IAC claim by a preponderance of the evidence. Means at 1012 ("[W]e now hold that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence").

Again, hindsight is not the lens through which a court is meant to review a case in a petition for writ of habeas corpus challenging the effective assistance of trial counsel. Importantly, Strickland requires that "...every effort must be made to eliminate the distorting effects of hindsight." Strickland at 689.

Instead, the question should be put to the court, whether not doing these things was

reasonable given the information and knowledge that trial counsel possessed at the time of trial and if not, whether a defendant was prejudiced. Id. at 690.

Here, Whitaker has failed to establish ineffective assistance of counsel because she has failed to show both that counsel's representation fell below an objective standard of reasonableness and that it resulted in prejudice. First, Whitaker argues that trial counsel was "unprepared and confused". Petitioner's Writ, p. 5. She claims that for the 6 months following her entry of pleas at arraignment that she received ineffective assistance of counsel due to the Steven Ing report being completed April 21, 2018, but not updated by the time of sentencing, October 4, 2018. Id. at 9. She claims that she was improperly prepared for her statement at sentencing, in that she wishes she had said a lot more than she did. Id. at 6-8. She claims that counsel did not object sufficiently to the items of evidence that the sentencing Judge indicated that she would not consider at sentencing. Id. at 13. An example of this failure was the lack of a formal objection regarding the 'petition' - for lack of a better term - signed by many citizens of Wells which of course was not a proper victim impact statement and was agreed upon by all present and indicated so by the court. Exhibit 6 (Sentencing Transcript), p. 21, 41-42. Counsel for Whitaker also argues that there were numerous arguments or facts that should have been raised at sentencing regarding the victims and/or the Petitioner's mental health which Respondent deems yet again wishing she had said more at sentencing. Petitioner's Writ, p. 9. Finally, Petitioner states the "...most important omission by defense counsel was not setting out with some precision for the court exactly what Petitioner's plans were if she were granted probation." Id. at 15.

These complaints are made regarding what arguments and/or evidence Petitioner believes should have been adduced at the sentencing hearing, but there is no argument that their omission resulted in counsel's assistance falling below an objectively reasonable standard nor that the outcome would have been different. In other words, Whitaker has not claimed any prejudice, only that she'd like to try sentencing over hoping the outcome would be different.

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Whitaker's claim that counsel was "unprepared and confused"

In an attempt to support her claim that counsel's assistance was ineffective, Whitaker argued that he had failed to "inform the Court that he had been injured and hospitalized shortly before sentencing and had been in irregular communication with Petitioner for a significant period of time..." Id. at 5. Respondent does not believe there is anything in the record to support this claim. Further, Whitaker's argument appears to quote directly from the sentencing transcript. Ex. 6, p. 9. Arguably, Petitioner used the quote out of context to try to provide additional support for her claim. However, Petitioner has failed to show that the communication between Petitioner and counsel prior to sentencing fell below an objective standard of reasonableness, and further, that counsel not being aware of the legislative history of the underlying statute of the four counts resulted in his assistance falling below an objective standard of reasonableness. Most importantly, Petitioner has failed to show that the outcome of the sentencing hearing would have been different if Petitioner and counsel had "regular" communication and if counsel had known the legislative history of the underlying statute.

Whitaker's claim of ineffective assistance of counsel due to the Ing evaluation

Petitioner argues that it was ineffective assistance of counsel to not attempt to update the psychosexual evaluation between the arraignment and sentencing. Petitioner's Writ, p. 9. She claims that she had obtained additional medical evaluations after the Ing evaluation was written and before sentencing. Id. at 10. Further, it's Petitioners position that by not making this information available to the Court it "caused it to appear to the Court that Petitioner had done nothing and intended to do nothing to address the underlying mental health problems that led to her behavior with the young men." Id.

Petitioner's argument fails to address that counsel mentioned Petitioner's participation and/or dedication to counseling multiple times during the sentencing hearing: First by stating, "...she had been in counseling for 12 months, maybe, at the time this was written" Ex. 6, p. 6; and later when arguing, "She's participated in counseling for 15 months. She's done 62 sessions with her husband" Ex. 6, p. 33; and "She wouldn't have done that level of

counseling if she wasn't appropriately remorseful" Ex. 6, p. 47. Further, the psychosexual evaluation adds, Petitioner "is open to the idea of getting help for [her] problems and her behavior over the better part of the last year confirms this." Psychosexual Evaluation attached to Petitioner's Writ (hereinafter "Eval"), p. 13. Additionally, one of the witnesses counsel called to testify at the sentencing hearing was Mr. Romans, a pastor at Lighthouse Christian Fellowship. Ex. 6, p. 64-65. Mr. Romans informed the Court that he gives "biblical advice," and that he had known Petitioner and her husband "since June of 2017." Ex. 6, p. 65. He informed the Court that in addition to counseling, "[Petitioner and her husband] would come once a week, on a Tuesday evening, to speak to [him] and [his] wife... since June 2017." Ex. 6, p. 66.

The Court was informed that Whitaker attended multiple counseling sessions, that she sought biblical advice, and that she was open to getting help for her behavior. Ultimately, it is impossible to conclude that Court determined Whitaker "had done nothing and intended to do nothing" to address her mental health issues when this information was made available to the Court. Most important, Whitaker has failed to show how either having a different and/or new evaluation submitted prior to sentencing would have changed the result of sentencing.

Whitaker's claim that she was not properly prepared by counsel regarding sentencing

Petitioner argues that if she had been properly prepared she would have informed the Court, amongst other things that: (1) she and her husband were having marital difficulties, (2) one of her responses to those difficulties was "over consumption of alcohol", (3) the victims initiated contact with her, and (4) her "life had become so pointless that she was very pleased that she was arrested so that her deceptions could end." Petitioner's Writ, p. 6-8, 10, 12.

There is no statement by Whitaker that her attorney muzzled her during the proceeding or that she was not allowed to say any of the things contained in her petition. Additionally, Petitioner fails to address that some of the information she claims she wanted to provide the Court, had already been provided to the Court per other means during sentencing. For example, the psychosexual evaluation contained history about her and her husband's marital difficulties. Eval, p. 3-4. In addition, the Eval contained information about

Petitioner's drinking – "After disclosing to Willie [Petitioner] began drinking a lot. A bottle of wine a day, three shots of Crown Royal. That went on for a year or more." Eval, p. 3. Counsel, at sentencing, did inform the Court that "[his] client has always indicated to [him] that the young men involved initiated contact with her, which is consistent with them volunteering to be student aides." Ex. 6, p. 35. Petitioner argues that this statement by counsel was untrue because not all the young men had been Petitioner's student aides.[1] Petitioner's Writ, p. 8. Petitioner also indicated more should have been said to define how contact was initiated. Id. Yet, Petitioner has not shown that if the Court would have been provided with further details of how contact was initiated, her sentence would have been different. Lastly, the Eval did contain information about her "depressed mood," "diminished interest," "feeling of worthlessness," etc. that Petitioner had been feeling. Eval, p. 6. Although the Eval did not explicitly state that "life had become so pointless that she was very pleased that she was arrested so that her deceptions could end," it arguably provided some insight to the "pointless" feelings Petitioner claims she wanted to inform the Court of.

Conclusively, Petitioner has failed to show that omissions in her statement at sentencing were (1) fault of her counsel, and (2) that fault resulted in ineffective assistance of counsel. Clearly, some of the information Petitioner believed was omitted was, in fact, available for the Court to consider at sentencing. So, it is likely impossible to conclude that the outcome of sentencing would have been different had Petitioner said more at sentencing.

Whitaker's claim that the Court was improperly informed due to omissions of counsel

Amongst other alleged omissions, Petitioner claimed that "several people" would have made themselves available to comment on Petitioner's "obvious depression." Petitioner's Writ, p. 11. Petitioner fails to address that counsel did provide witnesses. Three witnesses: Petitioner's friend, Petitioner's father, and Petitioner's pastor. Ex. 6, p. 58, 61, 64. It is true that these witnesses did not specifically address depression (which arguably was addressed

[1] If Petitioner made this statement in an attempt to support the claim that counsel was unprepared and confused, it should be noted that counsel had indicated previously that "two were, clearly, not even teacher's aides." ST at 25.

in the Eval), but they did testify positively on behalf of Petitioner, specifically that they believed probation was an appropriate sentence. Id.

Lastly, Petitioner claims that the "most important omission of Petitioner's Counsel at sentencing was in not setting out with some precision for the Court exactly what Petitioner's plans were if she were granted probation." Petitioner's Writ, p. 15. Similar to all of Petitioner's other claims, Petitioner has failed to address how providing the Court with more information regarding a plan if granted probation, would have resulted in a different outcome at sentencing. Most concerning, Petitioner's argument ignores discretion given to the judicial authority at sentencing.[2] At the end of the day, a judge does not have to follow a sentencing recommendation. So, even if a plan for probation was provided to the Court, it is impossible to determine that that recommendation would have been followed here.

IV. Conclusion

This Petition is rare in the sense that it is alleging ineffective assistance of counsel solely based of counsel's actions and/or omissions at the sentencing hearing. Petitioner has claimed that counsel's acts or omissions could have had some conceivable effect on the outcome of sentencing. However, this is not enough to show that counsel's acts or omissions were unreasonable. As stated in Strickland, "[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Strickland, at 693. Petitioner has failed to overcome the presumption that counsel's conduct was within the wide range of reasonable professional assistance, and further, that but for counsel's acts and/or omissions, she would have received a different sentence. "Even the best criminal defense attorneys would not defend a particular client in the same way." Id. at 689-690.

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[2] "Consistent with the doctrine of separation of powers, the judicial authority includes sentencing authority."[T]he district court retains wide discretion in imposing [a] sentence" when accepting a guilty plea pursuant to a plea agreement that includes a sentencing recommendation. Fugate v. State, 2017 Nev. Unpub. LEXIS 437, *1, 396 P.3d 745, 2017 WL 2591343 (citing Sandy v. Fifth Judicial Dist. Court, 113 Nev. 435, 440, 935 P.2d 1148, 1151 (1997); Stahl v. State, 109 Nev. 442, 444, 851 P.2d 436, 438 (1993).)
In Fugate, the plea agreement and the district court had stated that the sentencing decision was the court's alone. Fugate v. State, 2017 Nev. Unpub. LEXIS 437, *6, 396 P.3d 745, 2017 WL 2591343. Ultimately, the court determined that Fugate consented to the possibility that the district court could impose a higher sentence, and it was within its sentencing authority to do so. Id.

Respondent respectfully requests the Petition be dismissed pursuant to NRS 34.810, or that it be denied for the reasons argued above.

Dated this 12th day of October, 2020.

TYLER J. INGRAM
Elko County District Attorney's Office

By: _____
Brea M. Mitchell
Deputy District Attorney
State Bar Number: 14926

Unsworn Declaration In Support Of Answer

Pursuant to NRS 53.045

Comes now BREA M. MITCHELL, who declares the following to the above-entitled Court:

1. That the Declarant is presently serving as a Deputy District Attorney of the Elko County District Attorney's Office.
2. That I have read the assertions of fact set forth in this pleading and incorporate them into this Declaration.
3. This Answer is made in good faith, and not merely for the purposes of delay.
4. I declare under penalty of perjury that the foregoing is true and correct.

Dated this 12th day of October, 2020.

_____
Brea M. Mitchell
Deputy District Attorney
State Bar Number: 14926

CERTIFICATE OF SERVICE

I hereby certify, pursuant to the provisions of NRCP 5(b), that I am an employee of the Elko County District Attorney's Office, and that on the 12th day of September, 2020, I served the foregoing ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS, by delivering or mailing or causing to be delivered or mailed, a copy of said document, to the following:

By delivery to:

THE HONORABLE NANCY PORTER
FOURTH JUDICIAL DISTRICT COURT
ELKO COUNTY COURTHOUSE
ELKO, NV 89801

GARY D. WOODBURY
ATTORNEY AT LAW
1053 IDAHO ST.
ELKO, NV 89801

Erika Weber

ERIKA WEBER
CASEWORKER

DA# HC-20-01742

Case No. DC-CV-20-69
Dept. No. 1

FILED
2021 APR 28 AM 10:55
ELKO CO DISTRICT COURT
CLERK ____ DEPUTY ____

In the Fourth Judicial District Court of the State of Nevada
In and for the County of Elko

TENILLE WHITAKER

Petitioner,

Vs.

Notice of Entry of Order

JERRY HOWELL, WARDEN
FLORENCE MCCLURE WOMEN'S
CORRECTIONAL CENTER
Respondent.

Please take notice that on 04/27/2021, the Court entered an Order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the Order of this Court. If you wish to appeal, you must file a notice of appeal with the Clerk of this Court within 33 days after the date this notice is mailed to you.

This notice was mailed on 04/29/2021 addressed to:

Gary Woodbury
1053 Idaho St
Elko, NV 89801
[Box in Clerk's Office]

Elko County District Attorney's Office
[Box in Clerk's Office]

Dated this April 28, 2021

Kristine Jakeman
Kristine Jakeman, Elko County Clerk

By: Rebecca Howell
Deputy Clerk

289

Woodb

FILED
2021 APR 27 PM 2:20
ELKO CO DISTRICT COURT
CLERK ____ DEPUTY

CASE NO. DC-CV-20-69
DEPT. NO. 1

IN THE FOURTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

TENILLE WHITAKER,

Petitioner,

V.

JERRY HOWELL, WARDEN
FLORENCE MCCLURE WOMEN'S
CORRECTIONAL CENTER,

Respondent.

/

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

On July 28, 2020, Petitioner Tenille Whitaker filed the instant verified petition for writ of *habeas corpus*, alleging that her trial counsel was ineffective for decisions made and actions not taken at sentencing, and that the court would have sentenced her differently had counsel been effective. On August 28, 2020, this Court directed the District Attorney's Office to file a response to the petition. On October 12, 2020, the District Attorney's Office filed a response to the petition. For the reasons stated below, the petition is DENIED.

I. Mandatory Dismissal

Preliminarily, it appears that the Court must dismiss this petition pursuant to NRS 34.810(1)(a), as the petition was "not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel." Petitioner has alleged deficient performance by trial counsel at sentencing which she believes negatively

290

impacted the sentence imposed by the Court; she does not link this deficient performance up to her entry of plea, however, so it appears that these claims fall outside the limited scope of postconviction *habeas corpus* petitions challenging judgments based on guilty pleas.

As the issue of the correct interpretation of NRS 34.810(1)(a) is currently before the Nevada Supreme Court,[1] however, the Court will also address the petition on the merits.

II. Ineffective Assistance of Counsel

To show ineffective assistance of counsel, Petitioner must show first, that trial counsel's representation of her fell below an objective standard of reasonableness, and second, that trial counsel's deficient performance prejudiced her defense, meaning that there is a reasonable probability that, but for trial counsel's mistakes, the results of the proceeding at issue (here, the sentencing hearing) would have been different. Strickland v. Washington, 466 US 668, 688 (1984); Warden v. Lyons, 100 Nev 430, 432 (1984). A court may address the Strickland prongs in any order. Strickland at 697. To warrant an evidentiary hearing, Petitioner must make specific factual allegations not belied by the record that, if true, would entitle her to relief. Hargrove v. State, 100 Nev. 498, 502-03 (1984).

A. Trial Counsel's Sentencing Argument (Issues Addressed)

Petitioner first states that trial counsel's sentencing argument focused almost exclusively on whether the victims were "pupils" under NRS 201.540, whether Petitioner had committed the crimes to which she pled no contest, and the fact that trial counsel indicated to the Court that he had not looked at the legislative history of NRS 201.450. Petitioner additionally states that trial counsel had been injured and hospitalized shortly before sentencing and as a result had been in irregular communication with Petitioner for a significant period of time before sentencing, and, further, that trial counsel informed the Court that he was unprepared and confused, but the Court did not inquire further and trial counsel did not seek a continuance. Petitioner does not state how any of the above

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[1] See Gonzales v. Nevada, No. 78152 (NV. Sup. Ct, filed on Feb. 20, 2019).

falls below an objective standard of reasonableness, nor how the results of the sentencing hearing would have been different had trial counsel acted differently.

Trial counsel did spend time correcting the Pre-Sentence Investigation ("PSI") report's interchanging the words "pupil" and "student" and "student aide" when asked by the Court if he saw any errors or omissions in the PSI and did spend time making argument as to whether the victims in this case were "pupils" under NRS 201.450. When asked for his argument as to sentencing, trial counsel continued to discuss the meaning of the word "pupil" as well as whether Petitioner should have pled No Contest or gone to trial. He also made arguments as to the constitutionality of NRS 201.450, alleging that the statute is overbroad and/or void for vagueness.

In addition to the above, however, trial counsel eventually acknowledged that his client had pled to the underlying offenses and did provide argument as to how the Court should sentence Petitioner. Specifically, trial counsel focused on the mitigating factors of Petitioner's psychosexual evaluation, which found her to be a low risk of reoffending; her going to counseling; her guilt and remorse; the allegation that her students initiated the sexual contact with her; that she would be interested in serving her probation outside of Elko County, away from her victims' families; and the good character testimonies of Petitioner's pastor, father, and friend. Trial counsel also made a point to make sure the Court was not considering the letter sent from a group of people living in Wells, some of whom were not victims pursuant to NRS 176.015. Petitioner does not show how trial counsel discussing the definition of "pupils," correcting the PSI, and making comments as to whether Petitioner should have pled No Contest or not fell below an objective standard of reasonableness when those comments were coupled with trial counsel's actual sentencing argument and discussion of mitigating factors. Further, Petitioner has not shown a reasonable probability that her sentence would have been lesser without those comments being made. Without those comments, trial counsel still would have addressed the same mitigating factors he eventually did. The Court finds Petitioner has not met her burden for an evidentiary hearing as to trial counsel's "pupils" argument.

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292

Further, the Court finds Petitioner has not met her burden as to the allegations that trial counsel had been hospitalized, uncommunicative with Petitioner, and unprepared and confused at the sentencing hearing. Petitioner has provided no factual support for her allegations that trial counsel was hospitalized or uncommunicative; a bald allegation will not suffice to set an evidentiary hearing. Further, trial counsel did not state that he was unprepared and confused at the sentencing hearing; rather, he stated that he had not delved into the legislative history of NRS 201.450. Petitioner has not shown that trial counsel's failure to look into the legislative history of NRS 201.450 fell below an objective standard of reasonableness, or that, had he done so, Petitioner's resulting sentence would have been lower. The Court therefore declines to set an evidentiary hearing as to these allegations.

B. Trial Counsel's Sentencing Argument (Issues not Addressed)

Petitioner next states that trial counsel should have addressed the following issues at the sentencing hearing:

whether Petitioner deliberately initiated any of the relationships with her victims; whether Petitioner had mental health problems and, if so, what they were; whether Petitioner refused treatment for her mental health problems; whether the suicide of one of Petitioner's victims was attributable to Petitioner's relationship with him; whether a significant number of Wells residents feared and opposed Petitioner returning to the community; whether the victims who left Wells did so because of their humiliation at having engaged in sexual behaviors with Petitioner; and whether a victim impact statement can properly include the public's point of view about sentencing.

Pertinently, trial counsel's sentencing argument did address who initiated the sexual relationships (1), Petitioner's ongoing mental health counseling (3), the first victim's suicide and how it was distant in both time and location from his relationship with Petitioner (4), and the inappropriateness of the written letter or petition from the citizens of Wells (7). The question of Petitioner's mental health diagnoses (2) was addressed in the psychosexual evaluation that trial counsel had had prepared for Petitioner, and which found her to be suffering from borderline

personality disorder, ADHD, and major depressive disorder. The Court weighed and considered all of the above at sentencing.

Petitioner alleges that trial counsel should have gone into who initiated the sexual relationships further by advising the Court that Petitioner's first victim forced himself on her with kisses and eventually forced her to engage in oral sex with him when she was inebriated. Petitioner does not deny that she engaged in repeated, consensual, sexual contact with the victims in this case outside of those unwanted kisses and oral sex. Although Petitioner states that there were rumors at the school about her engaging in sexual contact with her pupils, Petitioner admits that she was neither forced nor blackmailed into engaging in these additional sexual contacts with the victims. Having pled to consensually engaging in sexual relations with her pupils, Petitioner cannot now (or at sentencing) allege that these acts were actually nonconsensual. Trial counsel not raising this issue was not objectively unreasonable.

As to whether a significant number of Wells residents feared and opposed Petitioner returning to Wells (5), and whether the victims who left Wells did so because of Petitioner's presence therein (6), Petitioner has not shown how trial counsel's addressing these issues in his sentencing argument would have had a reasonable probability of changing the ultimate sentencing decision, nor how not addressing them was objectively unreasonable.

Petitioner next alleges that trial counsel should have advised the Court that Petitioner and her husband were having marital difficulties and that Petitioner was drinking heavily at the time she engaged in sexual relations with her pupils. This information was already provided to the Court in the psychosexual evaluation. Trial counsel not bringing this information up a second time was not objectively unreasonable.

1. Failure to Update Psychosexual Evaluation Prior to Sentencing

Petitioner next alleges that the psychosexual evaluation should have been updated immediately prior to sentencing. Petitioner does not allege what an updated psychosexual evaluation would have shown. She states instead that the current psychosexual evaluation stated that she had

not followed the medical consultation recommended by Mr. Ing, the preparer of the evaluation, and that, if asked, Petitioner would have told the Court that she had obtained an MRI and had followed up with a physician to see if she had any identifiable medical conditions which might explain her criminal behaviors. Trial counsel already addressed Petitioner's history of consistently attending her counseling sessions, so Petitioner has not shown that trial counsel was deficient in that regard. As to the MRI and physician consultation, Petitioner has not shown what the results of the MRI and consultation were, and how production of those results would have led to a reasonable probability of a different outcome at sentencing.

2. Petitioner's Medications

Petitioner next alleges that trial counsel was deficient for not instructing her to tell the Court that she was not taking medications because both Mr. Ing and Petitioner's husband opposed her doing so. Again, Petitioner has not shown how her making this statement at sentencing would have had a reasonable probability of changing the results of the sentencing hearing, which is especially true as neither trial counsel, nor the prosecution, nor any of the witnesses, nor the Court itself made any references to medication during the hearing. The statement as to medication not being made did not, as Petitioner alleges, cause it to appear that Petitioner had done and would continue to do nothing to address her mental health problems. As indicated above, trial counsel mentioned several times that Petitioner had been consistently attending mental health counseling and intended to continue doing so. There is no indication that whether Petitioner was or was not taking medication had any kind of effect on the Court's sentencing decision.

3. The Pre-Sentence Investigation Report and Petitioner's Need for Treatment

Petitioner next alleges that trial counsel was deficient for not continuing to object to the inclusion of Mr. Ing's statement, copied into the PSI, that Petitioner's need for treatment was as high as it was overdue. Petitioner argues that this statement made it appear to the Court that she was not seeking medical help for her behavior. This is belied by the fact that trial counsel mentioned several times that Petitioner was attending counseling and had been for some time, as well as by the fact that

the Court stated that it was aware that the PSI statement had come directly from the psychosexual evaluation. That evaluation clearly indicated that Petitioner had been attending treatment and was interested in continuing to attend treatment. Thus, in context, Mr. Ing's statement is understood as describing the reasons why it is important that Petitioner continue counseling, now that she has finally started attending. Trial counsel allowing this statement to remain in the PSI did not fall below an objective standard of reasonableness, and Petitioner has not shown that the results of the sentencing hearing would have been any different without it.

4. Letters or Statements about Petitioner's Depression or Depressed Behavior

Petitioner next alleges that trial counsel was deficient for not objecting to the State's statement that Mr. Ing did not know what he was talking about. The Court reviewed both the transcript and the video of the sentencing hearing. Petitioner misstates the record. The State indicated that, contrary to what was indicated in the psychosexual evaluation, none of the letters provided to the Court on behalf of Petitioner mentioned any awareness or belief that Petitioner had been depressed.

Petitioner goes on to argue that trial counsel was deficient because he could have gotten letters and/or testimony from friends of Petitioner who could have told the Court that they had known or believed Petitioner to be depressed at or before the time she committed her crimes. Petitioner neither identifies these people, nor what testimony they would have provided, nor how having that testimony would have provided a reasonable probability of a different sentencing outcome.

Petitioner then states that trial counsel was deficient for not informing the Court about Petitioner's marital difficulties, her confused and pointless life, or the fact that one of her victims had noted a change in her personality from professional to childlike. Again, Petitioner's mental health struggles, drinking, feelings of worthlessness, and marital issues were mentioned in the psychosexual evaluation and in Petitioner's pastor's testimony. The Court was aware of all of these issues at the time of sentencing; Petitioner has not met her burden of showing that more testimony on this subject

would have created a reasonable probability of a different sentencing outcome.

5. Petitioner's First Victim's Suicide

Petitioner next asserts that trial counsel was deficient because he did not focus more on Petitioner's first victim and the first victim's suicide. Trial counsel mentioned that the suicide was separated in time and space from the victim's relationship with Petitioner, and that the victims, not Petitioner, initiated the sexual behaviors between them.

Petitioner argues that trial counsel should have brought up her first victim's mental health history, or the fact that he was broken up with by his girlfriend shortly before killing himself. Petitioner provides no specific facts as to what the victim's mental health history entails, who she would have had testify about it and the victim's break-up, and how any of this testimony would have created a reasonable probability of a lesser sentence.

If it is true that Petitioner's first victim was mentally ill and therefore an even more vulnerable and pliable victim even than the other children with whom she engaged in sexual relations, trial counsel may have thought it prudent not to raise this fact to the Court at sentencing. There is no reason to believe that trial counsel's strategic decisions fell below an objective standard of reasonableness.

6. Victim Impact Testimony

Petitioner next argues that trial counsel should have objected to Ms. Hooper's victim impact testimony when she stated that all four of the victims had been student aides of Petitioner, that Petitioner had been grooming students for years, that she had ruined proms, stalked students, taunted girlfriends, and threatened to engage in more relationships with more teenage boys, and that the community of Wells was completely devastated by Petitioner's acts. Again, trial counsel previously clarified that only two out of four students were Petitioner's student aides.

There is no reason to believe that the Court relied on the statements as to Petitioner's past bad acts or the statement as to the devastation of Wells in making its ruling. The Court stated that the four teenage boys with whom Petitioner engaged in sexual relations and their families were the

victims in this case. The Court did not reference the grooming or other bad acts Ms. Hooper described, nor the impact of this case on the people of Wells. Trial counsel not delving into a series of bad acts of which he appeared to be unaware may have been a prudent strategic decision. Petitioner has failed to show how trial counsel not questioning the witness as to these allegations, or the allegation that all of Wells was suffering, fell below an objective standard of reasonableness. As the Court never mentioned these statements in its ruling, Petitioner has also failed to show how, but for those statements being allowed to be made, Petitioner's sentence would have been lesser.

7. Classification of Victims and Harm

Petitioner also alleges that it was improper for the Court to determine that the family and victims who did not testify were injured by Petitioner's actions. All four teenage boys with whom Petitioner engaged in sexual relations are legally her victims under NRS 201.540 and NRS 176.015(5)(d)—they are the individuals against whom these crimes were committed.

The Court did not need to rely on anything other than Petitioner's no contest plea to these crimes to know that these teenage boys and their families were her victims and were thus, *by definition*, injured by her. Petitioner has not shown how trial counsel not objecting to the Court's identification of these teenage boys as victims fell below an objective standard of reasonableness or unreasonably prejudiced him.

8. Petitioner's Plans Post-Sentencing

Petitioner next contends that trial counsel was deficient by not making Petitioner's specific ongoing treatment and residency plans clear to the Court. Petitioner does not make those plans clear now, nor how these specific treatment plans would have caused a reasonable probability of a different sentencing result for Petitioner. Trial counsel and the psychosexual evaluation and Petitioner's pastor all already indicated that Petitioner was in treatment, had been for an extended period of time, and that she intended to continue that treatment post-sentencing.

Trial counsel also indicated that Petitioner would like to move out of the Wells area if she were granted probation. There is no guarantee that Petitioner would have been allowed to move

within or without Elko County even if granted probation, however. The Nevada Division of Parole and Probation would have to take into account numerous factors once Petitioner were granted probation to decide whether to grant her request to move, and, if so, to where. There is no reason to believe that trial counsel was deficient for not more strenuously stating Petitioner's desire to leave Wells. There is further nothing to suggest that, had trial counsel done so, there would have been a reasonable probability of a more lenient sentence.

9. Change of Plea

Petitioner finally contends that trial counsel should have advised her to plead no contest but mentally ill. Nevada does not recognize such a plea. The closest equivalent would be where a plea of guilty but mentally ill. See NRS 175.553(1) and NRS 174.035. If a defendant is found to be guilty but mentally ill, and still mentally ill at the time of sentencing, the sentencing court is required to include an order for the defendant to receive mental health treatment while incarcerated or on probation. NRS 176.057(1)(b)(2). To accept Petitioner's plea of guilty but mentally ill, the Court must have been able to find her guilty beyond a reasonable doubt, that she established by a preponderance of the evidence that due to a mental disease or defect, she was mentally ill at the time she committed her offenses, and that she had not established by a preponderance of the evidence that she was not guilty by reason of insanity. NRS 175.533(1). Petitioner has not shown that she would have met the qualifications to so plead; neither has she shown that she was still mentally ill at the time of her sentencing such that the Court would have been required to order her to receive ongoing mental health treatment as part of her sentence. Thus, Petitioner has neither shown that trial counsel was deficient for not having her plead this way, nor that there is a reasonable probability of her sentence changing if she were able to plead guilty but mentally ill.

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THEREFORE, as Petitioner has not met her burden of proof for a habeas corpus evidentiary hearing as to any of the grounds she raised, her petition for writ of habeas corpus is hereby DENIED.

SO ORDERED this 27th day of April, 2021.

KRISTON N. HILL
DISTRICT JUDGE - DEPARTMENT 1

300

CERTIFICATE OF HAND DELIVERY

Pursuant to NRCP 5(b), I certify that I am an employee of the Fourth Judicial District Court, Department 1, and that on this 27th day of April, 2021, I personally hand delivered a file stamped copy of the foregoing addressed to:

Tyler J. Ingram, Esq.
Elko County District Attorney
540 Court Street, 2nd Floor
Elko, NV 89801
[Box in Clerk's Office]

Gary Woodbury, Esq.
1053 Idaho Street
Elko, NV 89801
[Box in Clerk's Office]

301

Case No. DC-CV-20-69

Dept.: 1

2021 MAY -7 PM 1:55

ELKO CO DISTRICT COURT

CLERK____ DEPUTY____

IN THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF ELKO

TENNILLE RAE WHITAKER,
Petitioner,

v.
JERRY HOWELL, WARDEN,
FLORENCE MCCLURE WOMEN'S
CORRECTIONAL CENTER.
Respondent.

MOTION FOR RECONSIDERATION

COMES NOW Petitioner Tennille Rae Whitaker pursuant to District Court Rule 13(7) and moves this Court to reconsider the decision in its order filed April 28, 2021, denying a hearing and denying Habeas Corpus relief to Petitioner in the above-entitled case.

Reconsideration is warranted because the "Supporting Facts" in Petitioner's writ were analyzed individually rather than in combination with other facts and information before the Court and because no account was taken of the Nevada Supreme Court's decision in Lofthouse v State, 136 Nev Ad. Op.44 (2020) holding that there are no individual victims pursuant to NRS 201.540.

SUPPORTING FACTS

The outline of facts and circumstances provided to the Court in Petitioner's Writ were not intended to categorize each factual assertion contained therein as individually justifying a finding that trial counsel was ineffective. Petitioner assumed that the varied assertions of Petitioner would be analyzed and evaluated both individually and in combination and that the facts alleged,

302

in their totality together with the circumstances before the court in the record of proceeding would establish a pattern of ineffective assistance of counsel resulting in prejudice to Petitioner.

In order to make a valid determination of whether counsel was ineffective and whether the ineffectiveness prejudiced Petitioner it is necessary to evaluate what appeared to be important to the sentencing court and led to imposition of the maximum sentence.

There are a variety of ways to determine at least some of the important things on a sentencing Court's mind at the time of sentencing that influenced the sentence. In the instant case, as in many cases, it was obvious to Petitioner that what the sentencing judge said during the sentencing proceeding was of great significance to the Court.

Given the number of people in the Court attending the sentencing and Judge Porter's assertion on the record that she understood the case to be very emotional for everyone there, see page 5, line 2 of the sentencing transcript, that the case was somewhat emotional for Judge Porter as well.

Judge Porter said on the record moments before the actual sentence was imposed, that she had doubts about Mr. Ing's objectivity in his evaluation and conclusion of Petitioner determining that she was a low risk to reoffend. See page 79, line 22 of the transcript.

Petitioner believes that means that Judge Porter didn't think Petitioner was, in truth, a low risk to reoffend. In order to reach that conclusion, Judge Porter, first, had to ignore the fact that Petitioner had no prior criminal record.

Presumably, Judge Porter did that by adopting the conclusions of Ms. Hooper's victim impact testimony about Petitioner's behavior years before the events giving rise to the prosecution and the assertions of Lt. Harp in his upward deviation recommendation and similar assertions from the 5 ½ page offense synopsis contained in the pre-sentence report. In short, that Petitioner had done bad things in the past, she simply hadn't gotten caught . At a minimum, cross examination of Ms. Hooper was a necessity.

The sentencing court adopted the prosecution's argument that retribution and deterrence were important factors to consider, sentencing transcript, page 79, line 23. Given other

statements by the Court, retribution would necessarily be the pay back for Petitioner victimizing the young men.

That conclusion is reinforced by the claim of Mr. Ing that Petitioner declined to take medications to deal with her mental health problems.

Judge Porter said on the record immediately before imposing the sentence, that Petitioner was not the victim. The victims were the four boys and their families. See page 81 line 8.

Petitioner sees that statement by the Judge as clearly establishing that counsel's one sentence statement he identified as a side note on page 35, line 21 of the sentencing transcript, that the boys-initiated contact with Petitioner by volunteering to be student aides hadn't convinced the Court.

That's why Petitioner stated in the Writ she should have been prepared by Counsel to swear to tell the truth and in the sentencing hearing to inform the Court, particularly about the behavior of BH. See page 7, line 16 of the Writ.

Had Counsel prepared petitioner to do that at sentencing the statement by her could conceivably have lowered the number of "victims" seen by the Court to 3, it could have impacted the Court's view of the veracity of BH's mother, and it could have resulted in the Court having to find a factual persuasive justification for Lt. Harp's claims.

In this Court's order denying Petitioner's Writ, this Court repeatedly justified its denial to grant relief by reason of the fact that the four young men involved with Petitioner were "victims" under Nevada law.

On page 9 of the Order, this Court expressly held the boys were "legally" her victims under Nevada law.

Trial counsel told the sentencing court he hadn't looked at the legislative history of NRS 201.540. Trial counsel failed to cross examine Ms. Madison after her victim impact testimony about her son's mental health issues. Trial counsel failed to cross examine Ms. Hooper, who gave a victim impact statement not only about the impact on her son and family, but on the citizens of Wells.

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Lieutenant Harp's upward deviation recommendation was almost in its entirety about the victimization of the four young men. Trial Counsel gave no response to Harp's assertions.

Petitioner did not admit that she was neither forced or blackmailed into the sexual activities. She simply said it was indirect. Page 8 at line13.

The Nevada Supreme Court in Lofthouse v State, 136 Nev Ad. Op.44 (2020) held that individuals are not victims in a prosecution under NRS 201.540. Lofthouse was decided on July 16, 2020. The initial appeal in Lofthouse was filed in 2016, and the appellate brief was filed on October 11, 2017.

Neither the State in its answer to the Petition, nor this Court in its order denying relief to Petitioner cited Lofthouse.

The precise point being made in this request for Reconsideration is that it is very clear that Petitioner was prejudiced both by the sentencing court and this court by the ongoing and legally incorrect view that the young men and their families were victims.

It is clear that Trial Counsel should have understood well before sentencing that the sentencing court was being informed by parole and probation that the concept of victimization of the young men was of great significance to that agency.

It is also clear that Trial Counsel should have noted and informed the sentencing court that NRS 201.540 appears under the heading of the Nevada Revised Statutes as "Crimes Against Decency and Morals": That Sexual Conduct as defined in NRS 201.520 is absolutely silent about the conduct being against the will of anyone.

Petitioner's assertion early in her writ that trial counsel focused almost exclusively on his assertion that the young men weren't pupils was meant to establish that the focus not only didn't help Petitioner, it may have significantly distracted the sentencing court from virtually anything trial counsel argued.

Petitioner therefore requests that this Court reconsider its findings denying the writ and requests that the Court set a hearing to provide the parties an opportunity to fully develop the case.

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DATED this 7 day of May, 2021.

Gary D. Woodbury
Nevada Bar No. 1915

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I, KIMBERLY DAWSON, on the 7 day of MAY, 2021, served the foregoing MOTION TO RECONSIDER by delivering, mailing or by facsimile transmission or causing to be delivered, mailed, or transmitted by facsimile transmission, a copy of said document to the following:

By delivering to:

THE HONORABLE DISTRICT COURT JUDGE KRISTON HILL
FOURTH JUDICIAL DISTRICT COURT
ELKO COUNTY COURTHOUSE
ELKO, NV 89801

And

ELKO COUNTY DISTRICT ATTORNEY
540 COURT STREET, SECOND FLOOR
ELKO, NV 89801

Kimberly A. Dawson
KIMBERLY DAWSON

CASE NO. DC-CV-20-69

DEPT. NO. 1

Affirmation Pursuant to NRS 239B.030
SSN Does Appear ____
SSN Does Not Appear ✓

2021 MAY 14 PM 2:47
ELKO DISTRICT COURT
CLERK ____ DEPUTY ____

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF ELKO, STATE OF NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

TENNILLE RAE WHITAKER,

Defendant.

OPPOSITION TO MOTION TO RECONSIDER

COMES NOW, Plaintiff, State of Nevada, by and through its attorneys, TYLER J. INGRAM, District Attorney for the County of Elko, and CHAD B. THOMPSON, Chief Criminal Deputy District Attorney, and submits the following Points and Authorities in support of this Opposition together with all pleadings and papers on file herein.

Dated this 14th day of May, 2021.

TYLER J. INGRAM
Elko County District Attorney

By: _____
CHAD B. THOMPSON
Chief Criminal Deputy District Attorney
State Bar Number: 10248

308

POINTS AND AUTHORITIES

While the underlying case is criminal, Petition's for Writ of Habeas Corpus are governed by the rules of civil procedure (NRS 34.780). In the Rules of Civil Procedure, Rule 60 seems most applicable for a Motion to Reconsider. It states:

> **Rule 60. Relief From a Judgment or Order**
>
> ...
>
> (b) **Grounds for Relief From a Final Judgment, Order, or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.
>
> ...

Under this rule, nothing seems to apply here based upon what the Petitioner has written in her Motion for Reconsideration, other than the "any other reason" catch all language in the last section, (6).

Looking to the Federal Rules of Civil Procedure there is this from United States District Court for the District of Nevada:

> The Federal Rules of Civil Procedure do not contain a provision governing the review of interlocutory orders. "As long as a district court has jurisdiction over the case, then it possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient." *City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 885 (9th Cir. 2001) (internal quotation marks and citation omitted) (emphasis omitted). This inherent power is grounded "in the common law and is not abridged by the Federal Rules of Civil Procedure." *Id.* at 887. While other districts in the Ninth Circuit have

> adopted local rules governing reconsideration of interlocutory orders, the District of Nevada has not. Rather, this district has used the standard for a motion to alter or amend judgment under Rule 59(e). *See, e.g., Henry v. Rizzolo*, No. 2:08-cv-00635-PMP-GWF, 2010 U.S. Dist. LEXIS 94643, 2010 WL 3636278, at * 1 (D. Nev. Sept. 10, 2010) (quoting *Evans v. Inmate Calling Solutions*, No. 3:08-cv-00353-RCJ-VPC, 2010 U.S. Dist. LEXIS 41100, 2010 WL 1727841, at * 1-2 (D. Nev. 2010)) [**8] . "A motion for reconsideration must set forth the following: (1) some valid reason why the court should revisit its prior order, and (2) facts or law of a 'strongly convincing nature' in support of reversing the prior decision." *Rizzolo*, 2010 U.S. Dist. LEXIS 94643, 2010 WL 3636278, at * 1 (citing *Frasure v. U.S.*, 256 F.Supp.2d 1180, 1183 (D. Nev. 2003)). Moreover, "[r]econsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *Id.* (quoting *United States Aviation Underwriters v. Wesair, LLC*, No. 2:08-cv-00891-PMP-LRL, 2010 U.S. Dist. LEXIS 35648, 2010 WL 1462707, at * 2 (D. Nev. 2010) (internal citation omitted)). (emphasis added)
>
> Phillips v. C.R. Bard, Inc., 290 F.R.D. 615, 665 (D. Nev. 2013)

Further, it is instructive to look at other rules that govern motions to reconsider in order to gauge what the court ought to look for before granting one. "No motion once heard and disposed of shall be renewed in the same cause, nor shall the same matters therein embraced be reheard, unless by leave of the court granted upon motion therefor, after notice of such motion to the adverse parties." D.C.R. 13. In the newly minted Nevada Rules of Criminal Practice it states: "A party may seek reconsideration of a ruling of the court upon a showing of changed circumstances." N.R.Cr.P. 8(7)(B). In the Nevada Supreme Court, a Petition for Rehearing requires the following:

> "The petition shall state briefly and with particularity the points of law or fact that the petitioner believes the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. Any claim that the court has overlooked or misapprehended a material fact shall be supported by a reference to

the page of the transcript, appendix or record where the matter is to be found; any claim that the court has overlooked or misapprehended a material question of law or has overlooked, misapplied or failed to consider controlling authority shall be supported by a reference to the page of the brief where petitioner has raised the issue." NRAP 40(a)(2). (emphasis added)

Reviewing all of the above, it appears to be clear that the standard for reconsideration does require some valid reason, supported by a change in facts or law. None of Whitaker's arguments, save possibly one, would appear to qualify for this court's reconsideration. The rest of the arguments are more or less further arguing with the court's ruling which is no basis for reconsideration. From Whitaker's motion the only possibility for reconsideration is whether the case that she failed to cite in her petition, but would now like this court to consider, Lofthouse v. State, 136 Nev. Adv. Rep. 44, 467 P.3d 609 (2020), is a sufficient change in law or circumstance to grant this extra review.

The decision in Lofthouse was filed on July 16, 2020. Petitioner filed her Petition on July 28, 2020. She could have included the Lofthouse argument in her original Petition or sought an extension of time before filing to include it her Petition. The State filed its answer on October 12, 2020. Petitioner chose not to file anything to supplement the record or address what she sees now as an issue as a result of the Lofthouse decision after the State's Answer. As Petitioner failed to include this in her Petition or any supplemental pleading prior to the rendering of the decision, it should be denied.

If the court is inclined to review the Lofthouse, the consideration of the argument does not require an evidentiary hearing, simply because it is a matter of law and not an issue of fact. The Lofthouse decision does NOT say what the Petitioner hopes, that the young men

with whom Petitioner had sexual relations are not victims and that NRS 201.540 is in essence a victimless crime and therefore no one who qualifies as a victim under the statute would be allowed to give a victim impact statement at the time of sentencing. NRS 176.015(5)(d) defines a "victim" as:

> (d) "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 Nevada Constitution defines a victim as:

> 7. As used in this section, "victim" means any person directly and proximately harmed by the commission of a criminal offense under any law of this State. If the victim is less than 18 years of age, incompetent, incapacitated or deceased, the term includes the legal guardian of the victim or a representative of the victim's estate, member of the victim's family or any other person who is appointed by the court to act on the victim's behalf, except that the court shall not appoint the defendant as such a person.

Nev. Const. Art. 1, § 8A (7). How do these definitions not encompass NRS 201.540 pupils / children?

The Lofthouse decision found that for the limited scope of applying the Kidnapping statute, NRS 201.540 does not apply as an unlawful act upon the person of a minor. Lofthouse is more about limiting the "already broad kidnapping statute" than interpreting whether NRS 201.540 is a crime where victim impact statements are permitted at sentencing. Lofthouse at 613.

The Nevada Supreme Court reviewed this statute as it applied to the kidnapping statute, nothing more. Reading further into it is not supported by the decision. To do so would be to render Statutory Sexual Seduction a victimless crime. Lewdness with a child 14 or 15 years of age, Lewdness with a child under the age of 14...all victimless crimes, because the crime is based out of 201 for some of them and is only a result of the status of the child's age, much like being a pupil, and the age of the adult perpetrating the crime, much like being a teacher. Consent is not a defense to any of them. This does not make it victimless. The same goes for NRS 201.540, consent is irrelevant. The State of Nevada's children are not a "piece of meat," to use the crude phrase, because treating any of these crimes as victimless is to treat the children of Nevada like they are a "piece of meat" unable to have a voice, unallowed to speak their mind at sentencing when an adult or person in a position of authority oversteps the bounds of the law.

This is an issue of law and the court could decide it without an evidentiary hearing. It is not an issue of fact, whether they are victims or not and whether their families were able to testify at sentencing. The Motion to Reconsider the decision to not have an evidentiary hearing should be denied as the Petitioner has not presented anything new or a changed circumstance. The Motion to Reconsider the decision of this court denying the Writ should also be denied as the Lofthouse decision does not make NRS 201.540 a victimless crime.

Dated this 14th day of May, 2021.

TYLER J. INGRAM
Elko County District Attorney

By: _____
CHAD B. THOMPSON
Chief Criminal Deputy District Attorney
State Bar Number: 10248

313

Unsworn Declaration In Support Of Opposition

Pursuant to NRS 53.045

Comes now CHAD B. THOMPSON, who declares the following to the above-entitled Court:

1. That the Declarant is presently serving as a Chief Criminal Deputy District Attorney of the Elko County District Attorney's Office.
2. That I have read the assertions of fact set forth in this pleading and incorporate them into this Declaration.
3. This Opposition is made in good faith, and not merely for the purposes of delay.
4. I declare under penalty of perjury that the foregoing is true and correct.

Dated this 14th day of May, 2021

CHAD B. THOMPSON
Chief Criminal Deputy District Attorney
State Bar Number:10248

CERTIFICATE OF SERVICE

I hereby certify, pursuant to the provisions of NRCP 5(b), that I am an employee of the Elko County District Attorney's Office, and that on the 14th day of May, 2021, I served the foregoing Opposition, by delivering, mailing or by facsimile transmission or causing to be delivered, mailed or transmitted by facsimile transmission, a copy of said document to the following:

By delivering to:

THE HONORABLE KRISTON N. HILL
FOURTH JUDICIAL DISTRICT COURT
ELKO COUNTY COURTHOUSE
ELKO, NV 89801

GARY D. WOODBURY
ATTORNEY AT LAW
1053 IDAHO STREET
ELKO, NV 89801

FOR
ERIKA WEBER
CASEWORKER

DA# HC-20-01742

Case No. DC-CV-20-69

Dept.: 1

FILED

2021 MAY 18 AM 9:43

ELKO CO DISTRICT COURT

CLERK____ DEPUTY ____

IN THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF ELKO

TENNILLE RAE WHITAKER,
Petitioner,

v.
JERRY HOWELL, WARDEN,
FLORENCE MCCLURE WOMEN'S
CORRECTIONAL CENTER.
Respondent.

REPLY TO OPPOSITION TO MOTION TO RECONSIDERATION

Comes now the Petitioner above named in Reply to the Opposition to Motion filed by the State in the above-entitled case.

First, Petitioner informs the Court that the Opposition to Motion to Reconsider heading does not comport with the underlying heading of the case at issue.

The Opposition has cited a number of Nevada Court rules, as well as Federal and Supreme Court rules as providing procedures when a Motion for Reconsideration is at issue.

District Court rule 13(7) appears to give unfettered discretion to the District Courts to rehear motions. There is too little difference between the provisions of NRCP 60 (6) and DCR 13(7) to warrant further argument on that potential issue.

Petitioner's Motion for Reconsideration was filed to clarify and to prevail on two separate, but also connected issues.

First, the Court analyzed Petitioner' various contentions of ineffective assistance of Counsel at Sentencing in isolation from each other.

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316

After deciding that a fact or circumstances was insufficient in isolation to warrant relief, no examination of those facts or circumstances was again considered in relation to other alleged facts or circumstances that might be impacted.

As with any motion arguments composed of more than one factual or legal contention, the decision should theoretically be based on weighing all potentially pertinent facts, circumstances and law.

As indicated above, there is a connection between Petitioner's assertion that her factual contentions were decided in isolation and her contention that Lofthouse is controlling law.

Lofthouse has retroactive effect, Rivers v Roadway Express, Inc., 511 U. S. 298 (1994), K & P Homes v Christiana Trust, 133 Nev. Ad Op 51 (2017). It not only is the present law of the State of Nevada, it has been the law in Nevada since at least 2015.

DATED this 17 day of May, 2021.

Gary D. Woodbury
Nevada Bar No. 1915

317

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I, KIMBERLY DAWSON, on the 18 day of MAY, 2021, served the foregoing REPLY TO OPPOSITION TO MOTION TO RECONSIDER by delivering, mailing or by facsimile transmission or causing to be delivered, mailed, or transmitted by facsimile transmission, a copy of said document to the following:

By delivering to:

THE HONORABLE DISTRICT COURT JUDGE KRISTON HILL
FOURTH JUDICIAL DISTRICT COURT
ELKO COUNTY COURTHOUSE
ELKO, NV 89801

And

ELKO COUNTY DISTRICT ATTORNEY
540 COURT STREET, SECOND FLOOR
ELKO, NV 89801

Kimberly Dawson
KIMBERLY DAWSON

Woodbury

FILED

2021 MAY 24 PM 3:05

ELKO CO DISTRICT COURT

CLERK____ DEPUTY____

Case No.: DC-CV-20-69

Dept. No.: 1

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF ELKO, STATE OF NEVADA

TENILLE WHITAKER,

Petitioner,

V.

JERRY HOWELL, WARDEN
FLORENCE MCCLURE WOMEN'S
CORRECTIONAL CENTER,

Respondent.

/

ORDER DENYING MOTION FOR RECONSIDERATION

On May 7, 2021, Petitioner filed a Motion for Reconsideration. On May 14, 2021, Respondent filed an Opposition to Motion to Reconsider. On May 18, 2021, Petitioner filed a Reply to Opposition to Motion to Reconsider. For the reasons stated below, Petitioner's Motion is DENIED.

Pursuant to NRCP 60, the Court may reconsider a prior final judgment or order on any of the following grounds:

> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or

applying it prospectively is no longer equitable; or
(6) any other reason that justifies relief.

NRCP 60(b).

Petitioner alleges firstly that the Court only considered each of her factual allegations individually and not in aggregate, and secondly that the Court did not consider the implications of Lofthouse v. State, 467 P3d 609 (2020), on who is a "victim" under NRS 201.540. As neither of these grounds fits neatly within any of the enumerated categories of NRCP 60(b)(1-5), the Court will address them under the catchall provision of NRCP 60(b)(6).

As to Petitioner's first ground for reconsideration, the Court notes that the Nevada Supreme Court has never addressed whether multiple deficiencies by trial counsel can be aggregated for purposes of the prejudice prong of Strickland v. Washington, 466 US 668 (1984). See State v. Elmajzoub, 2015 Nev Unpub LEXIS 1521 (2015). Even if it were appropriate to aggregate deficiencies, however, Petitioner has not proven that trial counsel was deficient; there are therefore no deficiencies to aggregate. Petitioner's Motion for Reconsideration on this ground is therefore DENIED.

Petitioner next alleges that she was prejudiced by the "ongoing and legally incorrect view that the young men [with whom Petitioner had sexual relations] and their families were victims" in this case. Petitioner relies on Lofthouse in support of this contention. Lofthouse addressed only whether NRS 201.540 is a predicate offense for the purposes of a conviction of first-degree kidnapping; specifically, it addressed whether NRS 201.540 is a crime perpetrated upon the person of a minor. Lofthouse determined that, for the purposes of NRS 200.310(1), NRS 201.540 was a crime against public decency, not a crime committed against the person of the minor child. Lofthouse does not address whether the children with whom the violators of NRS 201.540 engage in sexual conduct are victims for the purposes of any other statute or sentencing hearing.

Pursuant to NRS 176.015(3), the Court is required to afford victims the opportunity to express their views at the sentencing hearing concerning the crime, the defendant, the impact of the crime on the victims, and the need for restitution. Victims are defined broadly by NRS 176.015(5)(d)

to include persons against whom a crime has been committed, persons who have been injured or killed as a direct result of the crime being committed, and the relatives of either of those people. Here, even if the Court adopted Petitioner's torturous logic and applied Lofthouse to remove the children with whom she engaged in sexual conduct from the definition of victims in NRS 176.015(5)(d)(1), these children and their relatives would still be her victims under NRS 176.015(5)(d)(2-3). These children were absolutely injured as a direct result of the commission of Petitioner's crimes; the ripples of her actions on their developing psyches may not be fully understood for years to come. The Court therefore finds Lofthouse inapposite and, even if application of Lofthouse to the context of a sentencing hearing were appropriate, it would still not have barred the Court from considering any of these children or their families as victims pursuant to NRS 176.015. Petitioner's Motion is therefore DENIED as to her second ground for relief as well.

THEREFORE, as the Court finds that Petitioner has presented no grounds to justify granting her relief from the Court's Order Denying Writ of Habeas Corpus, her Motion is hereby DENIED.

DATED this 24th day of May, 2021.

KRISTON N. HILL
DISTRICT JUDGE. - DEPT. 1

CERTIFICATE OF HAND DELIVERY

Pursuant to NRCP 5(b), I certify that I am an employee of the Fourth Judicial District Court, Department 1, and that on this 24th day of May, 2021, I personally hand delivered a file stamped copy of the foregoing ORDER DENYING MOTION FOR RECONSIDERATION addressed to:

Tyler J. Ingram
Elko County District Attorney
540 Court Street, 2nd floor
Elko, Nevada 89801
[Box in Clerk's Office]

Gary Woodbury
1053 Idaho Street
Elko, NV 89801
[Box in Clerk's Office]

Norman

Case No. DC-CV-20-69

Dept.: 1

2021 MAY 27 PM 2:49
ELKO CO DISTRICT COURT
CLERK _____ DEPUTY

IN THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF ELKO

TENNILLE RAE WHITAKER,
Petitioner,

v.

JERRY HOWELL, WARDEN,
FLORENCE MCCLURE WOMEN'S
CORRECTIONAL CENTER.
Respondent.

NOTICE OF APPEAL

NOTICE is hereby given that TENNILLE RAE WHITAKER, Appellant above named, hereby appeals to the Supreme Court of Nevada from the final judgment entered in this action on the 27th day of APRIL 2021.

Dated this 27 day of MAY 2021.

Gary D. Woodbury

GARY D. WOODBURY
Attorney for Defendant
1053 Idaho St.
Elko, NV 89801

323

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I, KIMBERLY DAWSON, on the 27 day of May, 2021 served the foregoing NOTICE OF APPEAL by delivering, mailing or by facsimile transmission or causing to be delivered, mailed, or transmitted by facsimile transmission, a copy of said document to the following:

By Delivering to:

THE HONORABLE KRISTON HILL
FOURTH JUDICIAL DISTRICT COURT
ELKO COUNTY COURTHOUSE
ELKO, NV 89801

AND

ELKO COUNTY DEPUTY DISTRICT ATTORNEY
540 COURT ST, 2ND FLOOR
ELKO, NV 89801

KIMBERLY DAWSON

324

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 E-Flex delivery service of the Nevada Supreme Court (D.A.'s office)

X mailing, First Class Mail, a true copy thereof through the United States Postal Service at Reno, Nevada. (Client)

addressed as follows:

Tyler Ingram
Chad Thompson
Elko County District Attorney's Office
540 Court Street, Second Floor

Tennille Whitaker
Inmate 1205834
Florence McClure Women's Correctional Ctr.
4370 Smiley Road
Las Vegas, NV 89115

DATED this 15th day of September, 2021.

KARLA K. BUTKO, ESQ.