



## TABLE OF CONTENTS

Table of Authorities	ii, iii
Jurisdictional Statement	1
Routing Statement	1
Statement of the Issues	1
Statement of the Case	1-3
Statement of the Facts	3
Standard of Review	4
Argument	4-9
Conclusion	9
Certificate of Compliance	10-11

## TABLE OF AUTHORITIES

### Cases

<i>Campbell v. Eight Judicial Dist. Court</i> , 114 Nev. 410, 414, 957 P.2d 1141, 1143 (1998)	5
<i>Denson v. State</i> , 112 Nev. 489, 915 P.2d 284, (1996)	8
<i>Deveroux v. State</i> , 96 Nev. 288, 610 P.2d 722, 723	4,5
<i>Egan v. Sheriff</i> , 88 Nev. 611, 503 P.2d 16 (1972)	4
<i>Houk v. State</i> , 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987)	4
<i>Norwood v. State</i> , 112 Nev. 438, 915 P.2d 177 (1996)	4,5,9
<i>Schmidt v. State</i> , 94 Nev. 695, 697 (1978)	4,5,9

1	<i>Sheriff v. Williams</i> , 96 Nev. 22, 604 P.2d 800 (1980)	5
2	<i>Silks v. State</i> , 92 Nev. 91, 93-94, 545 P.2d 1159, 1161 (1976)	4,5,9
3		
4	<i>State v. Sala</i> , 63 Nev. 270, 169 P.2d 524 (1946)	4,5
5		
6	<i>United States v. Johnson</i> , 507 F.2d 826 (7th Cir. 1974), Cert. den. 421 U.S. 949, 95 S.Ct. 1682, 44 L.Ed.2d 103 (1975).	5,9
7		
8	<i>United States v. Lai</i> , 944 F.2d. 1434, 1441 (9 <sup>th</sup> Cir.1991)	8
9		
10	<u>Statutes</u>	
11	NRS 179D.097(1)(g)	1,2,3,4,6,8,9
12	NRS 201.366(1)(b)	2
13	NRS 200.508(1)(a)(2)	1,2,3,4,6,8,9
14	NRS 201.230(2)	1,2
15		
16	Misc:	
17	<i>United States Constitution, Fifth Amendment (Due Process Clause)</i>	9
18		
19		
20		
21		
22		
23		
24		
25		

1                                   JURISDICTIONAL STATEMENT

2           The Respondent does not object to Appellant's jurisdictional statement.

3                                   ROUTING STATEMENT

4           The Respondent does not object to Appellant's routing statement.

5                                   STATEMENT OF THE ISSUE

6           Respondent objects to Appellant's statement of the issue and notes the issue as  
7  
8 follows:

9           ISSUE I: DID THE DISTRICT COURT ABUSE ITS DISCRETION BY  
10 SENTENCING THE APPELLANT TO THE NEVADA DEPARTMENT OF  
11 CORRECTIONS, INSTEAD OF PLACING HIM ON PROBATION, FOR ONE  
12 COUNT OF CHILD ABUSE, NEGLECT, OR ENDANGERMENT,  
13 INVOLVING SEXUAL EXPLOITATION, A CATEGORY B FELONY IN  
14 VIOLATION OF NRS 200.508(1)(a)(2) and NRS 179D.097(1)(g)?  
15  
16

17                                   STATEMENT OF THE CASE

18           The Respondent objects to Appellant's statement of the case and notes the  
19 following.  
20

21           On July 24, 2019, the Respondent filed a Felony Complaint in the Justice Court  
22 of Union Township, Humboldt County, Nevada, charging the Appellant with thirteen  
23 (13) counts of Lewdness with a Child Under 14 years, a Category A Felony, in  
24 violation of NRS 201.230(2). (*See Respondent's Appendix Pages 1 to 7*). Subsequently, on  
25 September 12, 2019, Respondent filed an Information against Appellant charging him

1 with the three (3) counts of Lewdness with a Child Under 14 years, a Category A  
2 Felony, in violation of NRS 201.230(2). (See Appellant's Appendix Pages 1 to 4).

3 Thereafter, on October 23, 2020, Respondent filed an Amended Information against  
4 Appellant charging him with the eleven (11) counts of Lewdness with a Child Under  
5 14 years, a Category A Felony, in violation of NRS 201.230(2), as well as two counts  
6 of Sexual Assault on a Child Under 12 years, a Category A Felony, in violation of  
7 NRS 201.366(1)(b) and NRS 200.366(3)(c). (See Appellant's Appendix Pages 5 to 13).

8  
9 Subsequently, prior to a settlement conference in this matter before the District  
10 Court Judge, Honorable William A. Maddox, settlement negotiations between the  
11 Appellant and Respondent resulted in Respondent, on October 12, 2021, filing a  
12 Second Amended Information charging the Appellant with one count of Child Abuse,  
13 Neglect, or Endangerment, involving Sexual Exploitation, a Category B Felony, in  
14 violation of NRS 200.508(1)(a)(2) and NRS 179D.097(1)(g). (See Appellant's Appendix  
15 Pages 14-16). On the same day on October 12, 2021, before the Honorable William A.  
16 Maddox, Appellant entered a guilty plea to one count of Child Abuse, Neglect, or  
17 Endangerment, involving Sexual Exploitation, a Category B Felony in violation of  
18 NRS 200.508(1)(a)(2) and NRS 179D.097(1)(g), with a "joint recommendation" of a  
19 minimum term of ninety-six (months) and a maximum, term of two hundred-forty  
20 (240) months in the Nevada Department of Corrections. (Emphasis added). (See  
21 Appellant's Appendix Pages 17-23). Thereafter, on December 14, 2021, the District  
22 Court sentenced the Appellant pursuant to his signed Guilty Plea Agreement to a  
23  
24  
25

1 minimum term of ninety-six (months). and a maximum term of two hundred-forty  
2 (240) months in the Nevada Department of Corrections, for one (1) count of Child  
3 Abuse, Neglect, or Endangerment, involving Sexual Exploitation, a Category B  
4 Felony, in violation of NRS 200.508(1)(a)(2) and NRS 179D.097(1)(g). (See Appellant's  
5 Appendix – pages 24-27).

### 7 STATEMENT OF FACTS

8 On October 12<sup>nd</sup>, 2021, Appellant entered a plea of guilty pursuant to a Second  
9 Amended Information, filed on October 12, 2021, which charged him with a single  
10 count of Child Abuse, Neglect, or Endangerment, involving Sexual Exploitation, a  
11 Category B Felony in violation of NRS 200.508(1)(a)(2) and NRS 179D.097(1)(g).  
12 Subsequently, on December 14, 2021, the District Court sentenced the Appellant to a  
13 minimum term of ninety-six (months) and a maximum term of two hundred-forty  
14 (240) months in the Nevada Department of Corrections, for one (1) count of Child  
15 Abuse, Neglect, or Endangerment, involving Sexual Exploitation, a Category B  
16 Felony, in violation of NRS 200.508(1)(a)(2) and NRS 179D.097(1)(g). The facts of  
17 this case arose out of circumstances where the Appellant, between July of 2017  
18 through the summer of 2019, on various occasions, committed acts of sexual  
19 lewdness and sexual assault on his niece, a known, but unnamed female under the age  
20 of fourteen (14) years, in Winnemucca, Humboldt County, Nevada. (See Appellant's  
21 Appendix pages 5-16, 40, 41).

22 ///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

## ARGUMENT

This Court has previously ruled that the sentencing judge has wide discretion in imposing a sentence, and that this determination will not be overruled absent a showing of abuse of discretion, *Norwood v. State*, 112 Nev. 438, 915 P.2d 177 (1996), citing *Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). Additionally, a sentencing court is often privileged to consider facts and circumstances which would clearly not be admissible at trial. *Silks v. State*, 92 Nev. 91, 93-94, 545 P.2d 1159, 1161 (1976). Moreover, it is a well-established law in Nevada that the legislature, within Constitutional limits, is empowered to define crimes and determine punishments and that the courts are not to encroach upon this domain lightly. *Schmidt v. State*, 94 Nev. 695, 697. (1978). See also *Egan v. Sheriff*, 88 Nev. 611, 503 P. 2d 16 (1972); *Deveroux v. State*. 96 Nev. 288. 610 P.2d 722, 723. See also *State v. Sala*, 63 Nev. 270, 169 P.2d 524

1 (1946). The degree to which a judge considers age and the absence of a prior record  
2 of offenses is within this or discretionary authority. *Deveroux Supra* 610 P.2d at 723.,  
3 and *Sheriff v. Williams*, 96 Nev. 22, 604 P.2d 800 (1980). There is also a general  
4 presumption in Nevada favoring the validity of statutes which dictates a recognition  
5 of their constitutionality unless a violation of Constitutional principles is clearly  
6 apparent. *Schmitz Supra* at 697. Similar to *Norwood, supra*, the Court in *Deveroux, supra*  
7 noted that the trial judge has wide discretion in imposing a prison term and, in the  
8 absence of a showing of abuse of such discretion, this Court will not disturb the  
9 sentence. *Deveroux, supra* 610 P.2d at 723. *See also State v. Sala*, 63 Nev. 270, 169 P.2d  
10 524 (1946). The degree to which a judge considers age and the absence of a prior  
11 record of offenses is within his discretionary authority. *Deveroux, supra* 610 P.2d at 723.  
12

13  
14  
15 Additionally, this Court has held that a sentence of imprisonment which is  
16 within the limits of a valid statute, regardless of its severity, is normally not considered  
17 cruel and unusual punishment in the Constitutional sense. *Schmidt Supra* at 665. *United*  
18 *States v. Johnson*, 507 F.2d 826 (7th Cir. 1974), *Cert. denied*, 421 U.S. 949, 95 S.Ct. 1682,  
19 44 L.Ed.2d 103 (1975), and that a sentencing proceeding is not a second trial and the  
20 court is privileged to consider facts and circumstances that would not be admissible at  
21 trial. *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).  
22

23 Finally, contrary to Appellant's assertions to the contrary, a district court is not  
24 required to articulate its reasons for imposing a particular sentence. *See Campbell v.*  
25 *Eight Judicial Dist. Court*, 114 Nev. 410, 414, 957 P.2d 1141, 1143 (1998).



1 In the present case, the District Court here was within its rights, based on all  
2 the facts and circumstances presented to it at sentencing surrounding the Appellant to  
3 sentence him to a minimum term of ninety-six (months), and a maximum term of two  
4 hundred-forty (240) months in the Nevada Department of Corrections for a single  
5 count of Child Abuse, Neglect, or Endangerment, involving Sexual Exploitation, a  
6 Category B Felony in violation of NRS 200.508(1)(a)(2) and NRS 179D.097(1)(g), for  
7 prior sexual acts against his niece, a female victim under the age of fourteen (14) years  
8 of age. (*See Appellant's Appendix Pages 41-42*). Before the District Court at sentencing  
9 was a Presentence Investigation Report prepared by the Nevada Department of  
10 Public Safety/Division of Parole and Probation, with an attached psychological  
11 evaluation of the Appellant, that was both provided to the Appellant and his attorney,  
12 and where both indicated that they reviewed the report and did not see a need to  
13 make any corrections to the report. Moreover, Appellant had the opportunity to make  
14 an allocation in this case before the District Court. (*See Appellant's Appendix Pages 32-*  
15 *33, 38-39*).<sup>1</sup> Additionally, the District Court, at sentencing, received victim impact

---

20 <sup>1</sup>In the present case, although Appellant's trial counsel presented an oral argument at  
21 sentencing that only ran eleven lines in the sentencing transcript, Appellant's trial  
22 counsel did touch upon the fact that the Appellant's psychological examination  
23 showed him to be a low risk to offend; that statistically his recidivism rate was low;  
24 that he was not a threat to the community; that he had always been employed; that he  
25 was a productive member of society; and that he had no criminal history. (See  
Appellant's Appendix page 361)

1 testimony from the sole child victim in this case, the Appellant's niece, who testified  
2 about the long-lasting impact done to her by the Appellant in depriving her of her  
3 childhood. (*See Appellant's Appendix pages 41-42*).

4  
5 Moreover, it is very disturbing that the Appellant asks for probation on appeal,  
6 where he jointly agreed in his Guilty Plea Agreement in this case with Respondent to  
7 recommend a minimum term of ninety-six (months) and a maximum, term of two  
8 hundred-forty (240) months in the Nevada Department of Corrections, even after his  
9 trial counsel at sentencing had to be reminded by the District Judge of his joint  
10 recommendation with Respondent, and indicated that he then had "misspoken" in  
11 having previously asked for probation. (*Emphasis added*).(*See Appellant's Appendix Pages*  
12 *16-23, 36*. This is on top of the fact now that Appellant appears to have filed an  
13 altered Guilty Plea Agreement with this Court concealing the language in the Guilty  
14 Plea Agreement of his waiver to appeal his conviction, unless it was under very  
15 limited circumstances, which do not appear to even apply here. (Compare *Appellant's*  
16 *Appendix Page 21* with *Respondent's Appendix 12*). Nevertheless, Appellant incorrectly  
17 assumes that the District Court did not consider the "individualized circumstances" of  
18 the Appellant before it, including both the aggravating and mitigating circumstances  
19 on this case. To assert now, as Appellant does in his Opening Brief, that the District  
20 Court did not consider the individuated circumstances of this case that takes the  
21  
22  
23  
24  
25

1 individual and the crime into mitigation is simply belied by the record below. *See U.S.*  
2 *v. Lai*, 944 F.2d. 1434, 1441 (9<sup>th</sup> Cir.1991) ([t]he district court may not consider  
3 improper, inaccurate, or mistaken information, nor may it make groundless inferences  
4 in imposing sentence), which is entirely consistent with *Denson v. State*, 112 Nev. 489,  
5 915 P.2d 284,(1996)([t]his Court “will reverse a sentence if it is supported *solely* by  
6 impalpable and highly suspect evidence”) (*Emphasis original*). *Denson, supra* 112 Nev. at  
7 492, 915 P.2d. at 286.  
8

9  
10 Furthermore, in the present case, Appellant does not now allege that the  
11 District Court relied on impalpable or highly suspect evidence in sentencing him, only  
12 that it did not consider the “individualized circumstances” on this case into  
13 consideration, which as noted above, is belied by sentencing transcript below. *See*  
14 *Denson, supra* and *Appellant’s Appendix Pages 18-29*.  
15

16 In summary, in the present case, the District Court fashioned an appropriate  
17 and legal sentence for the Appellant to serve a minimum term of ninety-six (months)  
18 and a maximum, term of two hundred-forty (240) months in the Nevada Department  
19 of Corrections, for a single count of Child Abuse, Neglect, or Endangerment,  
20 involving Sexual Exploitation, a Category B Felony in violation of NRS  
21 200.508(1)(a)(2) and NRS 179D.097(1)(g), against his female juvenile niece under the  
22 age of fourteen years of age, at the time the offense was committed, with nine  
23 hundred-twenty (920) days credit for time served, where the imposed term of  
24 imprisonment in this case was within the statutory limits of a minimum term of  
25

1 ninety-six (months) and a maximum, term of two hundred-forty (240) months in the  
2 Nevada Department of Corrections, for each count of Child Abuse, Neglect, or  
3 Endangerment, involving Sexual Exploitation, a Category B Felony in violation of  
4 NRS 200.508(1)(a)(2) and NRS 179D.097(1)(g).  
5

6 Finally, the sentence in this case was within the District Court's sound  
7 discretion, as allowed under *Norwood v. State, Supra*, and *Silks v. State, Supra*, nor was  
8 the sentence imposed here contrary to the Due Process Clause of the Fifth  
9 Amendment of the United States Constitution to be considered cruel and unusual  
10 punishment under *Schmidt, Supra* at 665 & *United States v. Johnson*, 507 F.2d 826 (7th  
11 Cir. 1974), Cert. den. 421 U.S. 949, 95 S.Ct. 1682, 44 L.Ed.2d 103 (1975).  
12

13 CONCLUSION  
14

15 Based on the arguments above, the State of Nevada respectfully asks this  
16 Court to affirm the sentence imposed upon Appellant in this case.

17 Dated this 10<sup>th</sup> day of June, 2022.

18 MICHAEL MACDONALD  
19 Humboldt County District Attorney

20 By Anthony R. Gordon  
21 ANTHONY R. GORDON  
22 Nevada State Bar No. 2278  
23 Deputy District Attorney  
24 P.O. Box 909  
25 Winnemucca, Nevada 89446

1                    **ATTORNEY CERTIFICATION OF COMPLIANCE**

2                    I hereby certify that this brief complies with the formatting requirements  
3 of NRAP 32(a)(4), the typeface requirements of *NRAP 32(a)(5)* and the type style  
4 requirements of *NRAP 32(a)(6)* because this brief has been prepared in a  
5 proportionally spaced typeface using Microsoft Word in type face of 14 point and  
6 Garamond type face.  
7

8                    I further certify that this brief complies with the page or type volume  
9 limitations of *NRAP 32(a)(7)* because, excluding the parts of the brief exempted by  
10 *NRAP 32(a)(7)(c)*, it does not exceed 30 pages.  
11

12                   Finally, I hereby certify that I have read the respondent brief and to the  
13 best of my knowledge, information, and belief, it is not frivolous or interposed for an  
14 improper purpose. I further certify that this brief complies with all the applicable  
15 Nevada Rules of Appellate Procedure, in particular *NRAP 23(e)(1)*, which requires  
16 every assertion in the brief regarding matters in the record to be supported by a  
17 reference to the page and volume number, if any, of the transcript or appendix where  
18 the mater relied on is to be found. I understand that I may be subject to sanctions in  
19  
20

21                   ///

22                   ///

23                   ///

24                   ///

1 the event that the accompanying brief is not in conformity with the requirements of  
2 the Nevada Rules of Appellate Procedure.

3 Dated this the 10<sup>th</sup> day of June, 2022.

5 MICHAEL MACDONALD  
6 Humboldt County District Attorney

7 By Anthony R. Gordon  
8 ANTHONY R. GORDON  
9 Nevada State Bar No. 2278  
10 Deputy District Attorney  
11 P.O. Box 909  
12 Winnemucca, Nevada 89446  
13 (775) 623-6360  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

Matt Stermitz  
Humboldt County Public Defender  
Drawer 909  
Winnemucca, Nevada 89445

Aaron Ford  
Attorney General  
100 N. Carson Street  
Carson City, Nevada 89701

Employee, Humboldt County  
District Attorney's Office