

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

2  
3                   **ALEC DAVE,**

4                                   Appellant,

5                                   vs.

6                   **STATE OF NEVADA,**

7                                   Respondent.

8  
9                                   **RESPONDENT'S ANSWERING BRIEF**

10  
11                                   Appeal from Judgment of Conviction  
12                                   Sixth Judicial District Court, County of Humboldt  
13                                   The Honorable Michael R. Montero

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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 follows:  
8

9            ISSUE I: DID THE DISTRICT COURT ABUSE ITS DISCRETION BY  
10 SENTENCING THE APPELLANT TO LIFE IN THE NEVADA  
11 DEPARTMENT OF CORRECTIONS, WITH THE POSSIBILITY OF PAROLE,  
12 WITH ELIGIBILITY FOR PAROLE BEGINNING WHEN A MINIMUM OF  
13 TEN (10) YEARS HAS BEEN SERVED, AFTER A GUILTY PLEA ON FOUR  
14 (4) COUNTS OF LEWDNESS WITH A CHILD UNDER 14 YEARS OF AGE, A  
15 CATEGORY A FELONY IN VIOLATION OF NRS 201.230(2)?  
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18                                    STATEMENT OF THE CASE

19            The Respondent does not object to Appellant's statement of the case.

20                                    STATEMENT OF FACTS

21            On November 2<sup>nd</sup>, 2021, Appellant entered a plea of guilty pursuant to an  
22 Information, filed on October 13, 2021, which charged him with four (4) counts of  
23 Lewdness with a Child under 14 years of Age, a Category A Felony, in violation of  
24 NRS 201.230(2). The facts of this case arose out of circumstances where the  
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1 Appellant between May of 2015 through December 2020, on various occasions, had  
2 both sexual and anal intercourse with known, but unnamed two male and two female  
3 juvenile victims, all four of which were under the age of Fourteen (14) years, in  
4 McDermitt, Humboldt County, Nevada. (*See Appellant's Appendix pages 1-5*).

#### 6 STANDARD OF REVIEW

7 The Respondent argues that the standard of review for Issue 1 is an abuse of  
8 discretion standard of review, as discussed below.

#### 10 ARGUMENT

11 ISSUE I: THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION  
12 BY SENTENCING THE APPELLANT TO LIFE IN THE NEVADA  
13 DEPARTMENT OF CORRECTIONS, WITH THE POSSIBILITY OF PAROLE,  
14 WITH ELIGIBILITY FOR PAROLE BEGINNING WHEN A MINIMUM OF  
15 TEN (10) YEARS HAS BEEN SERVED, AFTER A GUILTY PLEA ON FOUR  
16 (4) COUNTS OF LEWDNESS WITH A CHILD UNDER 14 YEARS OF AGE, A  
17 CATEGORY A FELONY IN VIOLATION OF NRS 201.230(2).  
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19 Under the Nevada law, this Court has previously ruled that the sentencing  
20 judge has wide discretion in imposing a sentence, and that this determination will not  
21 be overruled absent a showing of abuse of discretion, *Norwood v. State*, 112 Nev. 438,  
22 915 P.2d 177 (1996), citing *Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379  
23 (1987). Additionally, a sentencing court is often privileged to consider facts and  
24 circumstances which would clearly not be admissible at trial. *Silks v. State*, 92 Nev. 91,  
25

1 93-94, 545 P.2d 1159, 1161 (1976). Moreover, it is a well-established law in Nevada  
2 that the legislature, within Constitutional limits, is empowered to define crimes and  
3 determine punishments and that the courts are not to encroach upon this domain  
4 lightly. *Schmidt v. State*, 94 Nev. 695, 697. (1978). See also *Egan v. Sheriff*, 88 Nev. 611,  
5 503 P. 2d 16 (1972); *Deveroux v. State*. 96 Nev. 288. 610 P.2d 722, 723. See also *State v.*  
6 *Sala*, 63 Nev. 270, 169 P.2d 524 (1946). The degree to which a judge considers age  
7 and the absence of a prior record of offenses is within this or discretionary authority.  
8 *Deveroux Supra* 610 P.2d at 723., and *Sheriff v. Williams*, 96 Nev. 22, 604 P.2d 800  
9 (1980). There is also a general presumption in Nevada favoring the validity of statutes  
10 which dictates a recognition of their constitutionality unless a violation of  
11 Constitutional principles is clearly apparent. *Schmitz Supra* at 697. Similar to *Norwood*,  
12 *supra*, the Court in *Deveroux, supra* noted that the trial judge has wide discretion in  
13 imposing a prison term and, in the absence of a showing of abuse of such discretion,  
14 this Court will not disturb the sentence. *Deveroux, supra* 610 P.2d at 723. See also *State v.*  
15 *Sala*, 63 Nev. 270, 169 P.2d 524 (1946). The degree to which a judge considers age  
16 and the absence of a prior record of offenses is within his discretionary authority.  
17 *Deveroux, supra* 610 P.2d at 723.

18  
19 Furthermore, this Court has held that a sentence of imprisonment which is  
20 within the limits of a valid statute, regardless of its severity, is normally not considered  
21 cruel and unusual punishment in the Constitutional sense. *Schmidt Supra* at 665. *United*  
22 *States v. Johnson*, 507 F.2d 826 (7th Cir. 1974), *Cert. denied*. 421 U.S. 949, 95 S.Ct. 1682,  
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1 44 L.Ed.2d 103 (1975), and that a sentencing proceeding is not a second trial and the  
2 court is privileged to consider facts and circumstances that would not be admissible at  
3 trial. *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).  
4

5 Finally, contrary to Appellant's assertions to the contrary, a district court is not  
6 required to articulate its reasons for imposing a particular sentence. *See Campbell v.*  
7 *Eight Judicial Dist. Court*, 114 Nev. 410, 414, 957 P.2d 1141, 1143 (1998).  
8

9 In the present case, the District Court here was within its rights, based on all  
10 the facts and circumstances presented to it at sentencing surrounding the Appellant to  
11 sentence him to four consecutive life terms in the Nevada Department of  
12 Corrections, with the possibility of parole, with eligibility for parole beginning when a  
13 minimum of ten (10) years has been served, after a Guilty Plea to four (4) counts of  
14 Lewdness with a Child under 14 Years of Age, a Category A Felony in violation of  
15 NRS 201.230(2), against two female and two male juvenile victims. Before the District  
16 Court at sentencing was a Presentence Investigation Report prepared by the Nevada  
17 Department of Public Safety/Division of Parole and Probation, with an attached  
18 psychological evaluation of the Appellant, that was both provided to the Appellant  
19 and his attorney, and where both indicated that they reviewed the report and did not  
20 see a need to make any corrections to the report, nor did the Appellant offer an  
21 allocation to the District Court at sentencing, after being given an opportunity to do  
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1 so. (*See Appellant's Appendix Pages 20-22, 24 - 25*).<sup>1</sup> Additionally, the District Court at  
2 sentencing received victim impact testimony from the mother of three of the victims,  
3 who testified about the impact done to her children. (*See Appellant's Appendix pages 25-*  
4 *26*).

6 Moreover, Appellant incorrectly assumes that the District Court did not  
7 consider the "individualized circumstances" of the Appellant before it, including both  
8 the aggravating and mitigating circumstances on this case. To assert now, as Appellant  
9 does in his Opening Brief, that the District Court did not consider the individuated  
10 circumstances of this case that takes the individual and the crime into mitigation is  
11 simply belied by the record below. *See U.S. v. Lai*, 944 F.2d. 1434, 1441 (9<sup>th</sup> Cir.1991)  
12 ([t]he district court may not consider improper, inaccurate, or mistaken information,  
13 nor may it make groundless inferences in imposing sentence), which is entirely  
14 consistent with *Denson v. State*, 112 Nev. 489, 915 P.2d 284,(1996)([t]his Court "will  
15 reverse a sentence if it is supported *solely* by impalpable and highly suspect evidence")  
16 (*Emphasis original*). *Denson, supra* 112 Nev. at 492, 915 P.2d. at 286. Furthermore, in the  
17 present case, Appellant does not now allege that the District Court relied on  
18 impalpable or highly suspect evidence in sentencing him, only that it did not consider  
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22  
23 <sup>1</sup> In the Present case, although Appellant's trial counsel presented an oral argument at  
24 sentencing, that only ran five lines in the sentencing transcript, Appellant's trial  
25 counsel did touch upon the youth of the appellant, and his remorse, before  
concluding that concurrent sentences were appropriate in tis cased. (*See Appellant's  
Appendix page 22*).



1 the "individualized circumstances" on this case into consideration, which as noted  
2 above, is belied by sentencing transcript below. *See Denson, supra* and *Appellant's*  
3 *Appendix Pages 18-29.*

4  
5 In summary, in the present case, the District Court fashioned an appropriate  
6 and legal sentence for the Appellant to serve four consecutive life terms in the  
7 Nevada Department of Corrections, with the possibility of parole, with eligibility for  
8 parole beginning when a minimum of ten (10) years has been served, after a Guilty  
9 Plea to four (4) counts of Lewdness with a Child under 14 Years of Age, a Category A  
10 Felony in violation of *NRS 201.230(2)*, against two female and two male juvenile  
11 victims, with three hundred fifty-nine (359) days credit for time served, where the  
12 imposed term of imprisonment in this case was within the statutory limits of life  
13 terms in the Nevada Department of Corrections, with the possibility of parole, with  
14 eligibility for parole beginning when a minimum of ten (10) years has been served, for  
15 each count of Lewdness with a Child under 14 Years of Age, a Category A Felony in  
16 violation of *NRS 201.230(2)*.

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19 Finally, the sentence in this case was within the District Court's sound  
20 discretion, as allowed under *Norwood v. State, Supra*, and *Silks v. State, Supra*, nor was  
21 the sentence imposed here contrary to the Due Process Clause of the Fifth  
22 Amendment of the United States Constitution to be considered cruel and unusual  
23 punishment under *Schmidt, Supra* at 665 & *United States v. Johnson*, 507 F.2d 826 (7th  
24 Cir. 1974), Cert. den. 421 U.S. 949, 95 S.Ct. 1682, 44 L.Ed.2d 103 (1975).  
25

1 CONCLUSION

2 Based on the arguments above, the State of Nevada respectfully asks this  
3 Court to affirm the sentence imposed upon Appellant in this case.  
4

5 Dated this 9<sup>th</sup> day of June, 2022.

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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

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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 9<sup>th</sup> day of June, 2022.

4  
5 MICHAEL MACDONALD  
6 Humboldt County District Attorney

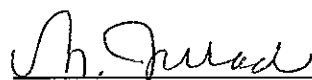
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1 **CERTIFICATE OF SERVICE**

2  
3 Pursuant to NRCP 5(b) I certify that I am an employee of the Humboldt  
4 County District Attorney's Office, and that on the 9<sup>TH</sup> day of June, 2022, I  
5 mailed/delivered a copy of the **RESPONDENT'S ANSWERING BRIEF** to:  
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