In the Supreme Court of the State of Nevada

WILLIAM COSBY, JR.,

Appellant,

vs.

No. 89650

ANGELA LESLIE,

Respondent.

Appeal from an Order Accepting Certified Question, Directing Briefing, and Directing Submission of Filing Fee in Case Number 2:23-cv-00932-GMN-DJA
The Second Judicial District Court of the State of Nevada
Chief Justice Douglas Herndon

APPELLANT'S OPENING BRIEF

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26.1 DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the Appellant is an individual. There are no persons or entities as described in NRAP 26.1(a) that must be disclosed.

The following law firms have appeared and/or are expected to appear in this Court on behalf of Appellant:

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Dated this 30th day of June, 2025.

By: /s/*Jennifer Bonjean*

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to NRAP 5 where on January 30, 2025, it considered and accepted a question certified to it by the United States District Court for the District of Nevada. This Court ordered briefing by the parties and set a briefing schedule which has been adhered to.

ROUTING STATEMENT

This case involves a question of law certified by a United States District Court and is therefore presumptively retained by the Nevada Supreme Court pursuant to NRAP 17(a)(6).

ISSUE PRESENTED FOR REVIEW

Whether a person sexually assaults another, pursuant to NRS 200.366, when a perpetrator forces a victim to masturbate them with the victim's hand without their consent.

STATEMENT OF THE CASE

This appeal stems from a civil suit filed in the United Stated District Court for the District of Nevada by nine (9) Plaintiffs against one Defendant, William Cosby, Jr. ("Bill Cosby" or "Appellant"). *Lise Lotte-Lublin, et al. v. William Cosby, Jr.*, 23-cv-00932 (U.S. Dist. Nev. 2023). Plaintiffs invoked Nevada Senate Bill 129 ("SB 129"), effective May 31, 2023, which purports to revive expired tort claims that arise from a sexual assault which occurred when the plaintiff was 18 years of age or older.

S.B. 129, 82nd Leg. (Nev. 2023). To revive a claim, the alleged sexual assault must constitute an assault as defined by NRS 200.366.

Each of the nine Plaintiffs alleged that, in one manner or another, Appellant Cosby committed a sexual assault against them that would give rise to a sexual battery claim under SB129. A1-A27. Appellee Angela Leslie was the only Plaintiff who did not allege that Appellant committed an act of sexual penetration on her.

Defendant Cosby moved to dismiss the complaint in its entirety for a variety of reasons. A28-A50. The District Court largely denied Cosby's motion and certified a legal question to this court, namely whether a person sexually assaults another, pursuant to NRS 200.366, when a perpetrator forces a victim to masturbate them with the victim's hand without their consent. A203-A219. This court accepted the certified question on January 30, 2025. A220-A222. This brief follows.

STATEMENT OF FACTS

On June 14, 2023, nine Plaintiffs, one of whom is Appellee, Angela Leslie, sued William Cosby, Jr. in the United States District Court for the District of Nevada. A1-A27. Each Plaintiff alleged that at some point in the 70s, 80s, or 90s, the Defendant sexually assaulted them, and they now seek damages. *Id.* Each of the nine Plaintiffs alleged that, in one manner or another, Appellant Cosby committed a sexual assault against them that would give rise to a claim under SB129. *Id.*

Relevant here is Plaintiff-Appellee Angela Leslie's claim. Leslie alleged that around the late 1980s or 1990s, Cosby invited her to travel to Las Vegas, Nevada "under the pretense" that he wanted to mentor her as an actor. A13. Leslie alleged that she met Cosby in his hotel suite, and he directed her to act as if she was intoxicated for an acting exercise. *Id.* Leslie alleged that Cosby offered her an alcoholic beverage so that she would perform better. *Id.* She further claimed that she went to wet her hair at the direction of Cosby and when she returned from the bathroom, Defendant was sitting on the bed wearing only a white robe. A14. Appellant alleges that Defendant grabbed her hand, covered it in lotion, and masturbated himself using her hand. *Id.* Leslie claimed Defendant tried to climb atop her, but she fought him off. *Id.* Defendant went to the bathroom and when he returned, he told Leslie she needed to leave because he had a phone call. Leslie claims she then left the hotel room. *Id.*

Defendant Cosby moved to dismiss the complaint in its entirety on the following grounds: (1) SB 129 Did Not Create a New Common Law Tort of "Sexual Assault" But Rather Abolished the State of Limitations for Traditional Causes of Actions that Arise from a Sexual Assault as Defined by the Nevada's Criminal Code; (2) Angela Leslie's Claims Are Barred by the Statute of Limitations As They Do Not Allege Sexual Assault As Defined in Nevada Revised Statutes 200.366; (3) SB 129 Violates the Special Legislation Clause of the Nevada Constitution; (4) SB 129

Violates Due Process Under the United States and Nevada Constitutions Where It Retroactively Deprives Defendant Of His Statute Of Limitations Defense, A Vested Right; and (5) SB 129 Violates The Ex Post Facto Clause Enshrined in both the United States and Nevada Constitutions Where It Retroactively Extends The Statute Of Limitations And Ties Liability To Criminal Conduct. A28-A50.

Magistrate Judge Daniel Albregts recommended dismissing Plaintiffs' claims for sexual assault where no authority holds that sexual assault is a private cause of action. A182-A202. The magistrate otherwise recommended denying Cosby's motion to dismiss. *Id.* District Court Judge, Gloria M. Navarro adopted the magistrate's recommendation in part, granted Defendants' motion relating to the Plaintiffs' sexual assault claims, denied the remainder of Cosby's motion to dismiss, and certified to this court the question to be answered in this appeal: Whether a person sexually assaults another, pursuant to NRS 200.366, when a perpetrator forces a victim to masturbate them with the victim's hand without their consent. A220-A222.

SUMMARY OF THE ARGUMENT

For Appellee Leslie's claim to proceed in the underlying lawsuit, she must allege a sexual assault under NRS 200.366. She has failed to do so. Because Leslie claims that Appellant forced her masturbate him, she does not allege sexual assault which requires her to plead conduct that constitutes "sexual penetration" as defined by NRS 200.364(9). As such, her civil complaint is time-barred and is not revived by SB129.

To end run the plain language of SB129, Leslie insists that her claim of forced masturbation amounts to a "sexual assault" pursuant to NRS 200.366 because "sexual penetration" as defined by NRS 200.364(9) includes masturbation. Not so. The statutory text of NRS 200.364(9), which mirrors statutory definitions of "sexual penetration" in states across the country, does not encompass masturbatory acts. Apart from cunnilingus, fellatio, and sexual intercourse in its ordinary meaning, "sexual penetration" is defined as "any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital or anal openings of the body of another." NRS 200.364(9). Leslie urges this Court to re-define the word "intrusion" to mean bodily contact and to read the phrase "any intrusion, however slight, of any part of a person's body" in isolation, separated entirely from the modifying prepositional phrase "into the genital or anal openings of the body of another." Leslie posits that the phrase standing alone means

masturbation, fondling, or any number of unspecified acts. Leslie overlooks that her reading would also criminalize sticking a finger in someone's ear as a sexual assault.

Leslie's interpretation is contrary to the clear and unambiguous language of the statute and runs afoul of well-established principles of statutory construction which require courts to read statutes: (1) as a whole; (2) in a manner to avoid constitutional problems; and (3) in favor of an accused. Indeed, Leslie's construal would render the statute unconstitutionally vague and contrary to existing precedent.

Nevada courts have never found that forced masturbation or genital fondling (even of children) constitutes "sexual penetration" notwithstanding that these sexual acts are not new, unique or unusual. Rather, these acts have routinely been charged and prosecuted as violations of the lewdness statute. Notwithstanding the absence of a case directly on point, prosecutors, defendants, and courts of Nevada have interpreted "sexual penetration" in lockstep with their sister states which share identical or near identical statutory definitions of "sexual penetration."

This is not a close call. The plain and ordinary meaning of the statute requires that "sexual penetration" involve an intrusion "into the vaginal or anal openings of the body of another." Any other interpretation would render the definition non-sensical, or at the very least, unconstitutionally vague since it would criminalize entirely non-sexual conduct. Leslie's construal would wreak havoc on the criminal

justice system, make the offense of lewdness a nugatory, and call into question an entire body of law interpreting lewdness offenses under NRS 201.210 and 201.230.

The statutory definition of "sexual penetration" has been in existence for over 50 years. This Court previously found the statute to be constitutionally sound and "clear and unambiguous." *State v. Solander,* No. 67710, 2016 Nev. Unpub. LEXIS 222, at *3-4 (Nev. April 19, 2016) (Unpublished Disposition); *see also, Fields v. Sheriff, Clark County,* 93 Nev. 640, 641, 572 P. 2d 213 (1977) (holding that Nevada's statutory definition of "sexual penetration" is not unconstitutionally vague). Courts, prosecutors, and defendants have to date found no difficulty understanding its plain meaning. That meaning should not change on a dime because someone might lose their chance to sue Bill Cosby. If the Nevada Legislature is of the view that forced masturbation should be punished in a different manner, it should enact a statute saying so - as many states have done.

The answer to the certified question is an easy one. No, a person does not sexually assault another, pursuant to NRS 200.366, when he allegedly forces someone to masturbate him without consent.

STANDARD OF REVIEW

The certified question before this Court involves statutory interpretation of NRS 200.364(9), that is, whether masturbatory conduct amounts to "sexual penetration" for the purpose of establishing a violation of NRS 200.366. The Nevada Supreme Court decides certified questions of law de novo, "in accordance with the purpose of a certified questions, which is to clarify [Nevada's] law when 'there is no controlling precedent." This court's review "is limited to the facts provided by the certifying court, and [this court] must answer the questions of law posed to [it] based on those facts." *Zurich American Insurance Co. v. Ironshore Specialty Insurance Co.*, 137 Nev. 651, 654, 497 P.3d 625, 628 (2021) (*citing In re Fontainebleau Las Vegas Holdings*, 127 Nev. 941, 953, 267 P.3d 786, 793 (2011)). Relatedly, statutory interpretation is a question of law subject to de novo review. *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004).

ARGUMENT

Appellee Leslie Did Not Allege a Sexual Assault Pursuant to NRS 200.366 Where Masturbation Does Not Constitute Sexual Penetration Under Any Logical Reading of NRS 200.364(9).

Angela Leslie seeks damages to recover for her alleged "sexual assault" that occurred decades ago. Recent Nevada legislation revived previously time-barred claims only where a plaintiff has alleged a sexual assault as defined by NRS 200.366.

The statute provides, in relevant part, that a person is guilty of sexual assault if the person,

> (a) Subjects another person to sexual penetration, or forces another person to make a sexual penetration on themselves or another, or on a beast, against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of the perpetrator's conduct;

NRS 200.364(9) defines "sexual penetration" as:

> cunnilingus, fellatio, or any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital or anal openings of the body of another, including sexual intercourse in its ordinary meaning. This term does not include any such conduct for medical purposes.

Neither NRS 200.366 nor NRS 200.364 reference masturbatory conduct.

Appellant Leslie can prevail in reviving her time-barred sexual battery claim only if this court finds that masturbation of one by another, without the other's consent, constitutes a "sexual penetration" as is required by NRS 200.366. Penetration, as defined by the plain language of the statute, does not include masturbation. Unsurprisingly, no court in Nevada has found that masturbation constitutes "sexual penetration." Moreover, no court in the country has found that masturbation constitutes "sexual penetration," including courts that have examined statutory definitions of "sexual penetration" identical, or nearly identical, to that set out in NRS 200.364(9). Importantly, where states have sought to criminally punish forced masturbation, their penal codes have expressly stated so. Because sexual assault pursuant to NRS 200.366 requires proof of "sexual penetration," a claim of

forced masturbation cannot, as a matter of law, constitute a violation of NRS 200.366.

A. The Clear and Unambiguous Statutory Text of NRS 200.364(9) Does Not Encompass Masturbation.

Statutory interpretation is a question of law subject to de novo review. *Catanio*, 120 Nev. at 1033, 102 P.3d at 590. When construing a statute, courts focus on the words used in the statute. *Lofthouse v. State,* 136 Nev. 378, 380, 467 P. 3d 609, 611 (2020). Courts give those words their plain and ordinary meaning unless the context requires a technical meaning or a different meaning is apparent from the context. *Id.* Put plainly, a court's analysis begins and ends with the statutory text if it is clear and unambiguous." *Blackburn v. State,* 129 Nev. 92, 95, 294 P. 3d 422, 425 (2013).

There is nothing ambiguous about the statutory definition of "sexual penetration." Fairly understood, NRS 200.364(9) defines "sexual penetration" as: (1) cunnilingus; (2) fellatio; (3) any intrusion, however slight, of any part of a person's body into the vaginal or anal openings of the body of another; (4) any object manipulated or inserted by a person into the vaginal or anal openings of the body of another; or (5) sexual intercourse in its ordinary meaning. The plain language of the statutory text does not cover acts involving masturbation, simulated sex, or fondling. With the exception of cunnilingus or fellatio, which do not require an intrusion,

sexual assault requires an intrusion into the vaginal or anal openings of the body of another.

To avail herself of the reviver statute, Leslie engages in linguistic acrobats to make a case for finding that "sexual penetration" means masturbation. First, Leslie's construal would require adopting a metaphorical definition of intrusion. In a legal context, "intrusion" is generally accepted as meaning the act of wrongfully entering. *Intrusion*, BLACK'S LAW DICTIONARY, 12th ed. 2024), *available at* Westlaw; *intrusion*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/intrusion (last visited June 29, 2025). Leslie's interpretation would require this Court to find that her hand intruded onto Appellant's penis or that Appellant's penis intruded onto her hand. In short, Leslie attempts to equate the word "intrusion" with contact between the body part of one person and the body part of another. This Court should not entertain a request to interpret words contrary to every dictionary definition in existence.

Second, Leslie's argument requires the phrase "any intrusion, however slight, of any part of a person's body" to be separated from the modifying prepositional phrase "into the vaginal or anal openings of the body of another." Never mind that doing so renders the definition of "sexual penetration" incomprehensible. Axiomatic principles of statutory construction foreclose Leslie's novel, but meritless, argument. Statutes "must be construed as a whole and not be read in a way that would render

words or phrases superfluous or make a provision nugatory." *Blackburn,* 129 Nev. at 97, 294 P. 3d at 426. "A statute cannot be dissected into individual words, each one being thrown on the anvil of dialectics to be hammered into meaning which has no association with the words from which it has violently been separated." *Id.*

Leslie makes nonsense of the statute by invoking the rule of last antecedent, arguing that because the prepositional phrase "into the vaginal or anal openings of the body of another" also modifies the phrase "any object manipulated or inserted by a person" it does not modify the antecedent phrase "any intrusion, however slight, of any part of a person's body." While the last- antecedent rule may be helpful in construing a statute that does not speak clearly to the issue at hand, this statute does not fit the bill. Standing alone, the phrase "any intrusion, however slight, of any part of a person's body" might cover masturbatory conduct, but it would also cover all manner of touching, including non-sexual touching.

Contrary to *Blackburn,* Leslie urges dissection of the statute into independent phrases to hammer the definition of "sexual penetration" into a meaning never intended by lawmakers who enacted the statute over 50 years ago. That this is an issue of first impression, even though forced masturbation and genital touching are not new or novel sex crimes, suggests that there has been no confusion among prosecutors, courts, or defendants that "sexual penetration" does not mean masturbation and that statute is "clear and unambiguous" in so far as it requires that

an intrusion either by a perpetrator's body part or an inanimate object, be "into the vaginal or anal openings of the body of another" *See Solander,* No. 67710, 2016 Nev. Unpub. LEXIS 222, at *3-4 (Nev. April 19, 2016) (Unpublished Disposition) (holding that the language of NRS 200.366 and NRS 200.364(9) is "clear and unambiguous.").

Nevada is not alone in how it defines sexual penetration. Many state statutes define sexual penetration similarly or even identically to NRS 200.364(9).[1] As best as Appellant can tell, *no* state court anywhere has read the phrase "any intrusion, however slight, of any part of a person's body" separate and independent of the modifying prepositional phrase "into the vaginal or anal openings of the body of another." More to the point, no state court anywhere has interpreted the statutory

[1] *See, e.g.*, S.D. CODIFIED LAWS § 22-22-2 South Dakota (defining "sexual penetration" as "any intrusion, however, slight, of any part of the body, or of any objection into the genital or anal openings of another person's body."); MICH. COMP. LAWS § 750520a(k) (defining "sexual penetration" as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however, slight, of any part of a person's body or of any object into the genital or anal openings of another person's body . . ."); TENN CODE ANN. § 39-13-501(7) (defining "sexual penetration" as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of the alleged victim's, the defendant's or any other person's body, but emission of semen is not required."); ARK. CODE ANN. § 5-14-123 (defining "sexual penetration" as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into a genital or anal opening of another person's body."); MINN. STAT. § 609.341(12)(1)-(2) ("sexual penetration" means "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, into the genital or anal openings …"); WIS. STAT. § 948.01(6) (definition "sexual intercourse" as "vulvar penetration, as well as cunnilingus, fellation or anal intercourse between persons or any other intrusion, however, slight, of any part of a person's body or any other object into the genital or anal opening either by a person or upon the person's instruction. of another, but emission of semen is not required.")

definition of "sexual penetration" to include "masturbation." Rather, when states want to identify masturbation as prohibited conduct, they say so expressly in their statutes.[2] In fact, the Nevada legislature did just that when it defined "sexual conduct" in NRS 201.520 to mean, *inter alia,* "masturbation." NRS 201.520 defines "sexual conduct" in various ways, including "penetration" which is distinguished from "masturbation." The statutory definition of "sexual conduct" in NRS 201.520 suggests that Nevada lawmakers know the difference between "masturbation" and "sexual penetration" and are perfectly capable of expressing it.

In other examples, under the Arizona criminal code, masturbation is expressly identified in the statutory definition of "sexual intercourse" which states that "sexual intercourse" is "penetration into the penis, vulva, or anus by any part of the body or by any object *or masturbatory contact with penis or vulva*" ARIZ. REV. STAT. ANN. § 13-1401(A)(4). (emphasis added) Similarly, Colorado's criminal code expressly defines masturbatory conduct in its statutory definition of "sexual contact" separate and distinct from its statutory definitions of "sexual intrusion," and "sexual penetration." *Compare* COLO. REV. STAT. § 18-3-401(4)(a) with § 18-3-401(6) and

[2] *See, e.g.,* N.H. REV. STAT. ANN. § 649-A:2(III) (definition of "sexually explicit conduct" expressly includes, *inter alia,* "human masturbation"); OR. REV. STAT. §163.665(3) ("sexually explicit conduct" is defined to mean, *inter alia,* "masturbation."); WASH. REV. CODE § 9.68A.011(7) ("sexually explicit conduct is defined to mean, *inter alia,* "masturbation."); ALASKA STAT. § 11.41.455(a) ("sexual exploitation of a minor" prohibits the use of children for, *inter alia,* "masturbation"); KAN. STAT. ANN. 2014 Supp. 21-5510(d)(1) (definition of "sexually explicit conduct" expressly includes "masturbation.")

§ 18-3-401(5); *see Pierson v. People,* 2012 CO 47, 279 P. 3d 1217, 1220 (2012) (observing that the criminal code distinguishes "masturbation" from "sexual intercourse.")

With the foregoing in mind, *State v. Richardson,* 307 N.C. 692, 300 S.E. 2d 379 (1983) offers sound advice. There, the defendant was tried and convicted for the charge of prostitution for allegedly masturbating an undercover agent from the Jacksonville Police Department. The defendant appealed, arguing that the Court of Appeals misconstrued the definition of prostitution by including within the definition a sexual act of masturbation. *Id.* at 693. The Supreme Court of North Carolina agreed. *Id.*

Section G.S. 14-203 of the North Carolina criminal code reads: "the term prostitution shall be construed to include the offering or receiving of the body for *sexual intercourse* for hire, and shall also be construed to include the offering or receiving of the body for indiscriminate *sexual intercourse* without hire." *Id.* (emphasis in the original) Sexual intercourse was defined as "[t]he actual contact of the sexual organs of a man and a woman, and an actual penetration into the body of the latter." The supreme court held that it could not construe the definition of "sexual penetration" to encompass acts of masturbation, stating "[i]f the legislature wishes to include acts, such as cunnilingus, fellatio, masturbation, buggery, or sodomy it should do so with specificity…" *Id.*

The lesson of *Richardson* holds true here. This Court cannot construe the definition of "sexual penetration" to encompass acts of masturbation. This is particularly so where criminal statutes must be construed in favor of defendants. *Catanio*, 120 Nev. at 1033, 102 P.3d at 590. If the Nevada Legislature wishes to include masturbation in the definition of "sexual penetration" or enact a statute that criminalizes acts of forced masturbation in some way other than as gross lewdness, it should do so with specificity. Any attempt to shoehorn acts of forced masturbation into the definition of "sexual penetration" is misguided and will create far more problems than it solves.

B. Forced Masturbation Constitutes the Offense of "Open or Gross Lewdness," a Violation of NRS 201.210.

Appellee Leslie alleges that Appellant Cosby forced her to masturbate him when Cosby grabbed her hand and placed it on his genitals. Under Nevada law, this conduct constitutes open and gross lewdness under NRS 201.210, an offense mutually exclusive from sexual assault under NRS 200.366. *Braunstein v. State,* 118 Nev. 68, 79, 40 P.3d 413, 421(2002) (holding that the crimes of sexual assault and lewdness are mutually exclusive and convictions for both based upon a single act cannot stand).

NRS 201.210 provides:

A person who commits any act of open or gross lewdness is guilty:

(a) Except as otherwise provided in this subsection, for the first offense, of a gross misdemeanor**.** (b) For any subsequent offense, or if the person has previously been convicted of a sexual offense as defined in NRS 179D.097, of a category D felony and shall be punished as provided in NRS 193.130. (c) For an offense committed by a person 18 years of age or older in the presence of a child under the age of 18 years or a vulnerable person as defined in paragraph (a) of subsection 8 of NRS 200.5092, of a category D felony and shall be punished as provided in NRS 193.130. (emphasis added)

Although lewdness is not expressly defined by the Nevada Revised statutes, when an offense has not been defined by the Legislature, courts generally look to the common law definitions of the related term or offense. *Berry v. State,* 125 Nev. 265, 280, 212 P.3d 1085, 1095 (2009); *see also, Ranson v. State,* 99 Nev. 766, 767, 670 P.2d 574, 575 (1983). At common law, "open lewdness was defined as an 'unlawful indulgence of lust involving gross indecency with respect to sexual conduct' committed in a public place and observed by persons unlawfully present." *Berry,* 125 Nev. at 280, 212 P.3d at 1095. This Court later clarified that the Legislature intended to broaden the common law definition to include acts which were committed in a private place. *Id.*

According to this Court, "gross lewdness" in NRS 201.210, has a well-defined, well-understood, and generally accepted meaning. "Lewd" means sexual conduct that is "[o]bscene or indecent; tending to moral impurity or wantonness" "evil, wicked, or "sexually unchaste or licentious" or "preoccupied with sex and

sexual desire; lustful." *Id* at 281. "Gross" simply means "immediately obvious . . . glaringly noticeable usu[ally] because of inexcusable badness or objectionableness." *Id.*

The conduct described by Leslie in her complaint does not satisfy the elements of sexual assault under NRS 200.366, but it does constitute the distinct crime of open and gross lewdness *See Ranson,* 99 Nev. at 767, 670 P.2d at 575 (the defendant was charged, *inter alia,* with open or gross lewdness when he entered the victim's house without her permission, forced her to partially undress at gunpoint and began fondling her breasts and buttocks, and at one point bit the victim's buttocks). Critically, Leslie's claim that Appellee Cosby forced her masturbate his penis constitutes sexual penetration, making him guilty of the offense of sexual assault is contrary to established Nevada case law which holds that the rubbing of a child's genitals (without intrusion), breasts, and buttocks constitutes the offense of lewdness – not sexual assault. *See* NRS 201.230.

For example, in *Gaxiola v. State,* 121 Nev. 633, 644, 119 P.3d 1225, 1229 (2005), the defendant was charged with lewdness based on fondling a child's penis and making the child fondle his penis as distinct from separate sexual assault charges which involved acts of fellatio. *See also Crowley v. State,* 120 Nev. 30, 34, 83 P.3d 282, 285 (2004) (defendant's acts of touching and rubbing the victim's penis constituted lewdness distinct from a subsequent act of fellatio); *Ebeling v. State,* 120

Nev. 401, 404, 91 P.3d 599, 601 (2004) (defendant's act of rubbing his penis against a victim's buttocks constituted lewdness separate from penetration); *Townsend v. State,* 103 Nev. 113, 120, 734 P.2d 705, 709 (1987) (distinguishing the fondling of a child's breasts which amounted to lewdness from digital penetration of the child which constitutes sexual assault); *Fritz v. State*, No. 84469, 2023 Nev. App. Unpub. LEXIS, at *4 (Nev. January 13, 2023) (Unpublished Disposition), 523 P.3d 1103 (fondling of child's breasts constituted lewdness as opposed to subsequent fellatio which constituted sexual assault).

As the foregoing body of law establishes, forced touching of genitals without intrusion constitutes the crime of open and gross lewdness not sexual assault. If this Court were to accept Leslie's contrary interpretation, it would produce the absurd and arguably unconstitutional result of punishing forced touching of an adult more seriously than forced touching of a child which is firmly established in case law as the crime of lewdness not sexual assault. Alternatively, it would make the crime of gross lewdness a nugatory, or at the very least, would most certainly result in arbitrary and discriminatory enforcement of a newly imagined offense of sexual assault. While there exists no case that holds that masturbation is not sexual penetration (apparently one was not necessary until women had an opportunity to sue Bill Cosby for half-century old conduct), the authority of this Court shows that the type of conduct described by Leslie has been traditionally charged as an offense

of lewdness not sexual assault. If there is an appetite for a change in the law, that's a job for the legislature.

C. Leslie's Interpretation of the Statue Renders it Unconstitutionally Vague.

To read "intrusion of any part of a person's body" in isolation, as Leslie suggests, would subject the statute to a constitutional challenge. Relying on United States Supreme Court precedent, this Court has held that where a particular statute is so imprecise that "vagueness permeates the text of such a law, it is subject to facial attack." *City of Las Vegas v. Eighth Judicial Dist. Court,* 118 Nev. 859, 862, 59 P.3d 477, 479 (2002). A criminal statute can be invalidated for vagueness: (1) if it fails to provide notice sufficient to enable persons of ordinary intelligence to understand the conduct is prohibited or (2) if it is so standardless that it authorizes or encourages or even fails to prevent arbitrary and discriminatory enforcement." *Id. See also, Flaming Paradise Gaming LLC v. Chanos,* 125 Nev. 502, 512, 217 P.3d 546,553-554 (2009).

In 1977, this Court rejected an argument that the definition of sexual penetration was unconstitutionally vague. *Fields v. Sheriff, Clark County,* 93 Nev. 640, 641, 572 P.2d 213, 213 (1977). The validity of that holding depends on reading the phrase "intrusion of any part of person's body" in conjunction with the modifying prepositional phrase "into the vaginal or anal openings of the body of another." To read "intrusion of any part of a person's body" standing alone leaves the public with

no understanding of what conduct is prohibited. Sticking a finger in someone's nose could constitute "sexual penetration."

If construed to cover conduct such as masturbation, this Court would be forced to broaden the definition of "intrusion" to the point of absurdity, giving it a metaphorical rather than precise and technical meaning. Leslie's interpretation would obliterate clear and specific standards and would encourage, authorize and invariably lead to arbitrary enforcement. Because Leslie's novel interpretation would put the statute into constitutional jeopardy, this Court should opt for the constitutional interpretation that has been the precedent of this State for decades. *See Cegavske v. Hollywood,* 512 P. 3d 284, 288 (Nev. 2022); *Sheriff, Washoe County v. Wu,* 101 Nev. 687, 689, 708 P.2d 305, 305-306 (1985) (holding if a statute lends itself to both a constitutional and unconstitutional interpretation, courts apply an interpretation that does not violate the constitution.)

The statutory language NRS 200.365(9) is clear and unambiguous but even if a creative interpretation could be had, this Court must decide the question consistent with the clear intent of the legislature at the time the statue was enacted and to avoid inevitable constitutional challenges.

CONCLUSION

For the foregoing reasons, Appellant William Cosby, Jr. respectfully requests this court answer the question presented in the negative, that a person does *not* commit a sexual assault pursuant to NRS 200.366, when a person forces another to masturbate them with the other's hand without their consent.

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RULE 28.2 ATTORNEY CERTIFICATION

Pursuant to NRAP 28.2, undersigned counsel certifies that:

1. This Opening Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman in size 14 point font.

2. I further certify that this Opening Brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains approximately 5,105 words, which is less than the 14,000 word count available for an opening brief.

3. Finally, I certify that I have read this Opening Brief and, to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Opening Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion regarding matters in the record to be supported by a reference to the page of the record on appeal where the matter relied upon is to be found.

I understand that I may be subject to sanctions in the event that the accompanying Opening Brief is not in compliance.

DATED this 1st day of July, 2025.

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