IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM COSBY, JR.,
Appellant,

vs.

ANGELA LESLIE,
Respondent.

Case No. 89650

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

Brief of Amicus Curiae Nevada Attorneys for Criminal Justice in Support of Appellant William Cosby, Jr.

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NRAP 26.1 DISCLOSURE

The undersigned counsel certifies that the following are persons and entities as described in Nev. R. App. P. 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Kristy Holston, of the Clark County Public Defender, represents amicus curiae Nevada Attorneys for Criminal Justice.

/s/ Kristy S. Holston
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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

Nevada Attorneys for Criminal Justice is a state-wide non-profit organization of criminal defense attorneys in Nevada. Nevada Attorneys for Criminal Justice has an interest in this case because our members often represent individuals charged with sex crimes, and Respondents' position on the definition of sexual assault would have wide-ranging consequences for any defendant facing sex crime charges. Nevada Attorneys for Criminal Justice submits this proposed brief accompanied by a Motion for Leave to File an Amicus Curiae on Behalf of Appellant pursuant to NRAP 29(a).

No party or party's counsel authored this brief in whole or in part; no person contributed money or other consideration intended to fund preparing or submitting this brief.

SUMMARY OF THE ARGUMENT

When a perpetrator forces a victim to masturbate them with the victim's hand without their consent the perpetrator does not commit a sexual assault because the sexual penetration necessary

to establish a sexual assault must be an intrusion into the genital or anal openings rather than an intrusion onto any body part.

The plain language, structure, and context of the sexual penetration definition contemplates two kinds of intrusions which would establish sexual penetration: (1) any intrusion, however slight, of any part of a person's body into the genital or anal openings of the body of another or (2) any intrusion, however slight, of . . . any objection manipulated or inserted by a person into the genital or anal openings of the body of another. In the recent case of Alfaro v. State, this Court indicated an agreement with this reading of the statute through emphasizing those two phrases in the Court's citation of the statute. Alfaro v. State, 139 Nev. Adv. Op. 24, 145 (2023). Additionally, this Court should infer that because the Legislature intentionally included masturbation in its definition of sexual conduct that it also intentionally excluded masturbation from its definitions of sexual assault or sexual penetration.

An intrusion and a touch become synonymous when talking about a body part that it not an opening, and because a sexual

penetration does not require a sexual intent Leslie's reading of the statute would mean that a touching of any part of a person's body (even without sexual intent) would count as sexual penetration. Therefore, under Leslie's interpretation a simple battery would become a sexual assault – an absurd result which would be unconstitutionally vague. Finally, by enacting the Lewdness statutes in NRS 201.210 and NRS 201.230, the legislature has provided a clear and specific penalty structure for forced sexual touching without intrusion, thereby precluding the need to charge such conduct as sexual assault.

ARGUMENT

I. NRS 200.364(9) Clearly and Unambiguously Requires Intrusion Into the Genital or Anal Openings to Establish a Sexual Penetration According to Canons of Statutory Interpretation

The definition of "sexual penetration" in NRS 200.364(9) unambiguously encompasses cunnilingus, fellatio, and any intrusion into the vaginal or anal openings, but not acts involving masturbation or fondling. "Any part of a person's body" and "any

object" are items that can intrude into the genital or anal openings to establish a sexual penetration.

According to NRS 200.364(9):

> "Sexual penetration" means 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.[1]

The statute expressly identifies three types of sex acts as sexual penetration: cunnilingus, fellatio, and sexual intercourse. Setting aside those three clearly identified sexual acts, we are left with the phrase:

> 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

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[1] The addition of the final sentence is the one change that has occurred to the definition of sexual penetration since 1977. Because that change does not affect the legal analysis, this brief simply refers to NRS 200.364(9). In 1977 Nev. Stat. 200.364(2) defined "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." Fields v. Sheriff, Clark Cnty., 93 Nev. 640, 641 (1977).

Id. Within this phrase, "intrusion" is the main noun that the rest of the phrase modifies or expands on. The prepositional phrase "into the genital or anal openings" follows a series of two parallel noun phrases linked by the coordinating conjunction "or": <u>any part of a person's body</u> or <u>any object manipulated or inserted by a person</u>." NRS 200.364(9) (emphases added). When the nouns listed in a series are straightforward and parallel a postpositive modifier normally applies to the entire series (the series-qualifier canon). *See* Antonin Scalia & Bryan A. Garner, <u>Reading Law: The Interpretation of Legal Texts</u> 147 (2012). Here, these noun phrases are parallel because: they both are introduced with the modifier "any;" they both are headed by a singular noun ("part" and "object"); they both are followed by a modifier; and they are joined by the coordinating conjunction "or." Additionally, the preposition "of" only appears once before the two parallel noun phrases rather than once in front of each phrase indicating that both noun phrases involve intrusion **<u>of</u>** items **<u>into</u>** the openings. Put simply, NRS 200.364(9) contemplates two kinds of intrusions: (1) any intrusion, however slight, of any part of a person's body into the genital or anal

openings of the body of another or (2) any intrusion, however slight, of . . . any objection manipulated or inserted by a person into the genital or anal openings of the body of another.

Additionally, Leslie's reading of the statute argues that intrusion of any part of a person's body is a discrete theory of sexual penetration separate and independent from a theory involving insertion of an object into the genital or anal openings. Appellant's Appendix Volume I ("AA I") p. 79. However, if the legislature had intended to create two separate and independent theories it could have done so by inserting a comma to create a separate clause. *See* Clark Cnty. Dep't of Family Services v. Eighth Judicial Dist. Court, 141 Nev. Adv. Op. 10 at page 10 (2025) *citing to* Scalia & Garner, Reading Law, *supra*, at 150 "(explaining that where items in a list are separated by commas, and a modifier phrase is not set off from the final item by a comma, the modifier only applies to the final item)."

Leslie's reading not only ignores the series-qualifier canon, but also ignores that the phrase "any part of a person's body" serves the purpose of identifying something that qualifies as a

penetrating, or intruding, item. To change the meaning of "any part of a person's body" from being the penetrating thing to being the penetrated thing would render the statute meaningless by identifying no item that would qualify as the penetrating item. Under Leslie's reading, if "any part of a person's body" defines what can be intruded upon, then what type of thing could do the intruding?

Citation to the last-antecedent canon to establish a sexual assault for an intrusion of any part of a victim's body fails for multiple reasons. AA II 186. First, there are no antecedents in the phrase at issue because "strictly speaking, only pronouns have antecedents." *See* Scalia & Garner, Reading Law, *supra*, at 152. Next, the nearest-reasonable referent canon (commonly confused as the last-antecedent canon) applies when the syntax involves something other than a parallel series of nouns or verbs. Id. at 152. But here, the modifier involves a list of two parallel noun phrases.

Additionally, the United States Supreme Court has acknowledged "that structural or contextual evidence may 'rebut the last antecedent inference.'" Lockhart v. United States, 136 S.

Ct. 958, 965 (2016) *quoting* Jama v. Immigration and Customs Enforcement, 125 S.Ct. 694, 708 (2005). The structure and context of the sexual penetration definition relies on the phrase "any part of a person's body" to identify what intruding item establishes a sexual penetration and so "any part of a person's body" cannot refer to the victim's body and become the thing intruded upon. That is, any part of a person's body cannot intrude into itself, which NRS 200.364(9) indicates by distinguishing "a person's body" from "the body of another."

The structure and context of the sexual penetration definition also indicates that a penetration or intrusion would occur **into** something (like an "opening") rather than **onto** something (like "any part" of a body). Touching an arm or a leg or a neck as an "intrusion" would be a confusing concept. The structure and context reveal that "into the genital or anal openings" must modify "any intrusion, however slight" to avoid the absurd result of touching "any part" of a body becoming a sexual penetration. The nearest-reasonable-referent canon cannot be applied in a situation that

would require accepting such an "unlikely premise." Id. *citing to* Paroline v. United States, 134 S. Ct. 1710, 1721 (2014).

In the recent case of Alfaro v. State, this Court analyzed the 2013 definition of sexual penetration, which substantively matched the current definition and the 1977 definition. Alfaro v. State, 139 Nev. Adv. Op. 24, 145 (2023). In Alfaro, this Court indicated that the phrase "into the genital or anal openings" modified "any intrusion, however slight" through emphasizing those two phrases in the Court's citation of the statute:

> NRS 200.364(5) (2013) defined "[s]exual penetration" to mean "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."

Id. at 145 (emphases in original). The Alfaro Court's emphases convey that those two phrases were to be read together to define the penetration at issue as being "any intrusion, however slight, of any part of a person's body into the genital or anal opening."

The definition of "sexual conduct" found in NRS 201.520 further shows that the Nevada legislature understands sexual penetration and masturbation to have different meanings. In

prohibiting sexual conduct with pupils and students NRS 201.520 defines "sexual conduct" by listing eight types of sex acts that are prohibited. *See also* NRS 201.540. "Masturbation" is listed separately from "penetration," and NRS 201.520 also lists "physical contact…with the unclothed genitals or public area" for a sexual purpose as a theory of sexual conduct separate and distinct from "penetration." Because the Legislature included masturbation in its definition of sexual conduct but did not do so in its definitions of sexual assault or sexual penetration, "it should be inferred that the omission was intentional." In re Christensen, 122 Nev. 1309, 1323, 149 P.3d 40, 49 (2006) ("One basic tenet of statutory construction dictates that, if the legislature includes a qualification in one statute but omits the qualification in another similar statute, it should be inferred that the omission was intentional.").

Finally, even if this Court were to find the definition of sexual penetration ambiguous, the ambiguity must be decided in favor of a criminal defendant.

II. Defining Sexual Penetration as Touching of Any Part of a Person's Body Would Create an Absurd Result and Render the Statute Unconstitutionally Vague

If a slight intrusion of any part of a person's body is not limited to being an intrusion of an opening, then the slight intrusion means the same thing as a touch. Though one could intrude into an ear, one could not intrude into an arm, into a knee, into a calf, nor into a shoulder. A slight intrusion of a body part that is not an opening would logically mean the same action as a touching of that body part, or using the terminology of criminal law, a potential battering of that body part. An intrusion and a touch become synonymous when talking about a body part that it not an opening.

This is especially true because this Court has decided the definition of "sexual penetration" does not include an element of sexual motivation or gratification. State v. Solander, 132 Nev. 1033 (2016) (unpublished disposition). Therefore, a touching of any part of a person's body would not need to be a sexual touch to count as sexual penetration, and a simple battery would become a sexual assault – an absurd result. This would render NRS 200.364(9)

unconditionally vague because it would fail to provide notice as to what type of intrusion onto the body creates a sexual assault rather than a battery. *See* Kolender v. Lawson, 461 U.S. 352, 357–58 (1983). Because simple battery is a misdemeanor and sexual assault carries a penalty of life imprisonment with parole eligibility after either 10 or 35 years, the lack of distinction between the two offenses would create a constitutional problem.

Reading NRS 200.364(9) to define sexual penetrating as "any intrusion, however slight, of any part of a person's body" would also be unconstitutionally vague because it would not limit, in any way, what type of item intruding on a body part would give rise to a sexual penetration. Leslie's reading posits that "any part of a person's body" refers to the victim's body and identifies what can be intruded upon. In a logical reading of NRS 200.364(9) the phrase "any part of person's body" identifies any body part as an item that would give rise to a sexual penetration when inserted into an opening. A reading which eliminates the identification of a penetrating item would fail to provide sufficient notice of what type

of item would establish a sexual penetration when intruded upon any part of a person's body.

III. Nevada Has Already Defined and Penalized the Conduct of Masturbation Against the Victim's Will as an Open or Gross Lewdness, Thereby Precluding the Ability to Charge Such Conduct as Sexual Assault

Charging a defendant with sexual assault for conduct that falls squarely within the scope of a specific statutory offense would be inappropriate because the Legislature has already defined and penalized such conduct under the Lewdness statutes. Criminal statutes should not overlap in a way that creates redundant or conflicting charges for the same conduct. *See* Sheriff, Douglas Cnty. v. LaMotte, 100 Nev. 270, 273 (1984) ("Expansion of the range of punishments for those drunk drivers who kill fellow motorists or bystanders would constitute an impermissible judicial excursion into the Legislature's domain."). *See also* Leavell v. Eighth Judicial Dist. Court, 136 Nev. 840 (2020) (unpublished disposition).

The court's decisions in Leavell and LaMotte reflects the broader principle of legislative intent in criminal law. Nevada's

statutory framework for DUI offenses, including DUI causing death, demonstrates the legislature's intent to address these specific crimes comprehensively. By enacting the Lewdness statutes in NRS 201.210 and NRS 201.230, the legislature has provided a clear and specific penalty structure for forced sexual touching without intrusion, thereby precluding the need to charge such conduct as sexual assault. This approach ensures that defendants are prosecuted under the appropriate statutory provisions without expanding the scope of more general crimes like sexual assault.

IV. The Federal District Court misreads this Court's precedent.

The federal district court commits a couple of legal errors that warrant discussion. In its Order the federal district court cited to two Nevada cases – Rose v. State and Sampson v. State – for the proposition that touching of a hand or digit to a genital meets the definition of sexual penetration. AA II 207. Rose v. State, 123 Nev. 194 (2007). Sampson v. State, 121 Nev. 820 (2005). These decisions

do not stand for the propositions the federal district court read them for.

First, the federal district court implies that the defendant in Rose v. State was convicted of sexual assault where he merely touched the victim's genital with his fingers but misses the fact that the victim testified with graphic details to describe the touching. Id. at 204. AA II 207. This Court's decision in Rose addressed the sufficiency of the evidence to support the convictions in regard to the number of charges rather than in regard to whether sexual penetration was established. Id. at 203. The question of sexual penetration was not at issue and so this Court had no occasion to discuss it and did not purport to. However, the decision did make clear that the victim "described different locations where she was touched and graphically detailed [the defendant's] actions," which indicates that the state did present evidence of the details of the vaginal touching which would establish any intrusion, however slight, into the genital opening. Id. at 204. That evidence was not detailed in the Nevada Supreme Court's decision because penetration was not at issue in the decision. Therefore, Rose v.

State does not stand for the proposition that "the act of a hand touching a genital" is sufficient to establish a sexual penetration because Rose is silent on the details which described the touching.

The federal district court also claims that the defendant in Sampson v. State was conviction of sexual assault when the defendant touched the victim's penis and forced the victim to masturbate Sampson's penis with the victim's hand. AA II 207. However, this Court's decision in Sampson does not state that the sexual assault conviction was for touching the victim's penis and forced masturbation. In fact, a review of the briefs in the case[2] reveals that the sexual assault charge was for fellatio and the forced masturbation, or penis touching, was charged as a Lewdness with a Child. The Sampson case demonstrates that forced masturbation or fondling of a penis is not a sexual assault, but rather, is a lewdness.

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[2]Appellant's Opening Brief in Nevada Supreme Court Case 41627, Sampson v. State of Nevada, Filed on October 14, 2004, at 7. Available online at: https://caseinfo.nvsupremecourt.us/public/caseView.do;jsessionid=ED0C7585C9B3C9665B1A962FB86237D4?csIID=9478

CONCLUSION

Amicus Curiae Nevada Attorneys for Criminal Justice respectfully requests that this Court hold 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.

Dated this 8th day of July, 2025.

Respectfully submitted,

/s/ Kristy S. Holston

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Century Schoolbook.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 29 because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 2,474 words.

3. Finally, I hereby certify that I have read this amicus curiae 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 brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume

number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 8th day of July, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2025, I electronically filed the foregoing document with the Nevada Supreme Court by using the appellate electronic filing system. The following participants in the case will be served by the electronic filing system:

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