IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSHUA CALEB SHUE,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

NO. 67428

APPELLANT'S REPLY BRIEF

(Appeal from Judgment of Conviction)

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TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES

PAGE NO.

Cases

Statutes

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSHUA CALEB SHUE, Appellant, vs. THE STATE OF NEVADA, Respondent.	NO. 67428

APPELLANT'S REPLY BRIEF

REPLY ARGUMENT

I. Laws involving use of minor as the subject of a sexual portrayal in a performance are unconstitutional.

Appellant did not assert a challenge to NRS 200.710(2), 200.730, and 200.700(4) prior to trial. Respondent argues Appellant's failure to challenge the statutes in the district court "waives all but plain error." Respondent's Answering Brief p. 11 ("RAB"). Although the failure to object in the district court typically bars consideration on appeal, this Court has repeatedly held that it will address constitutional issues raised for the first time on appeal. *E.g.* State v. Taylor, 114 Nev. 1071, 1077, 968 P.2d 315, 320 (1998); Phipps v. State, 111 Nev. 1276, 1280, 903 P.2d 820, 823 (1995); *see also* U.S. v. Tisor, 96 F.3d 370, 378 (9th Cir. 1996)(Federal appellate courts will review

issues raised for the first time on appeal, "if to do so would not require the development of new facts."); Kimes v. Stone, 84 F.3d 1121, 1126 (9th Cir. 1996)(appellate court will review issue raised for the first time on appeal when the issue is "purely one of law" or "to prevent a miscarriage of justice.").

Appellant believes this Court should consider his constitutional challenge to NRS 200.710(2) and 200.730 because the statutes fatal defects are glaringly obvious.[1] Indeed, the criminalization of speech or expression is fraught with constitutional concerns. Moreover, the statute's defects affected Appellant's substantial right to be free from conviction for allegedly violating a facially invalid law. Finally, Appellant suffered actual prejudice because he is currently serving life in prison for allegedly creating non-pornographic images of children.[2]

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[1] Respondent's contention that Appellant's "17 pages of argument" in his Opening Brief proves the issue is not readily apparent is nonsense. *See* RAB 11. Constitutional problems with statutes that criminalize speech or expression are obvious. Respondent confuses the issues' obviousness with Appellant's obligation to thoroughly brief the issue on appeal. Appellant's obligation to address the issue required a detailed discussion of U.S. Supreme Court case law and legislative history and that is why he devoted 17 pages to the argument in his Opening Brief.

[2] Appellant cannot think of any "strategic" reason why trial counsel would not challenge the constitutionality of the statutes prior to trial. If this Court accepts Respondent's contention, and refuses to consider Appellant's argument on direct appeal, this Court will invariably address the issue during

a. NRS 200.710(2) and NRS 200.730 are content based restrictions on speech and expression and are not the least restrictive means of accomplishing a compelling government interest.

Respondent argues that Nevada laws which prohibit creating images of minors as subjects of a sexual portrayal are constitutional because the statutes "include[] the element of obscenity" and obscenity is not protected speech. RAB 14. Furthermore, Respondent argues there is no constitutional prohibition against criminalizing images based upon the effect the image has upon the viewer. Id. at 14-15. Finally, Respondent suggests the statutes are the least restrictive means to achieve the governments compelling interest of preventing children from being used as sexual stimulus for pedophiles. Id. at 17-18.

i. Sexual portrayal's quasi-obscenity language does not convert nonsexual images into "child pornography."

Respondent correctly notes that both obscenity and actual child pornography do not receive First Amendment protection. RAB 12. However, States cannot prohibit creating or possessing simple nude images of children. Nor can States define child pornography to include any image of a child which a pedophile may find sexually stimulating. In fact, States can

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possible post-conviction proceedings. Judicial economy favors consideration in the instant proceeding.

only constitutionally proscribe child pornography if the law clearly defines the prohibited conduct, limits the prohibition to images which visually depict sexual conduct involving children, suitably limits and describe "the category of sexual conduct proscribed," and contains an element of scienter. N.Y. v. Ferber, 485 U.S. 747, 764-65 (1982). States can criminalize allegedly obscene images only if the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and when taken as a whole, lacks serious literary, artistic, political, or scientific value. *See* Miller v. California, 413 U.S. 15, 24 (1973).

NRS 200.710(2) and 200.730 prohibit creating visual depictions of minors as the subjects of a sexual portrayal in a performance. This Court has recognized that these statutes constitute Nevada's prohibition upon child pornography. *See* Casteel v. State, 122 Nev. 356, 362, 131 P.3d 1, 5 (2006); Wilson v. State, 121 Nev. 345, 350, 114 P.3d 285, 289 (2005). Sexual portrayal, i.e. child pornography, is defined in NRS 200.700(4) as "the depiction of a person in a manner which appeals to the prurient interest in sex and which does not have serious literary, artistic, political or scientific value." Notably, NRS 200.700(4) does not mention "community standards," the

"average person," or any clearly defined sexual conduct. The mere fact that NRS 200.700(4) contains some elements of Miller's obscenity test cannot mean that images which meet that definition are automatically child pornography. State prohibitions on child pornography are limited to images which depict minors engaged in clearly defined sexual conduct.[3] *See* Ferber, 485 U.S. at 764-65.

If Respondent is suggesting NRS 200.710(2) and 200.730 are actually prohibitions against creating obscene images of children, and not pornographic images of children, the statutes still fail because "sexual portrayal's definition in NRS 200.700(4) does not include Miller's requirement that the images are to be judged based upon the average person applying contemporary community standards.[4] This fatal defect would render any purportedly obscene image of a child constitutionally defective as well. Although Nevada has a compelling interest in protecting children, it

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[3]Appellant maintains that NRS 200.710(1), 200.730's prohibition upon creating images of children engaged in **sexual conduct**, as defined by NRS 200.700(3), renders NRS 200.710(2) and 200.700(3) unnecessary and unconstitutional.

[4] Respondent appears to make this argument when it notes the Legislature's intent in creating NRS 200.710(2), 200.730 and 200.700(3) was to "target those images that might not explicitly portray a minor engaging in sexual conduct but are nonetheless pornographic depictions of minors because of the obscene nature of the image." RAB 14.

cannot create laws which prohibit nonsexual images of children by simply calling the images child pornography.

ii. States cannot constitutionally prohibit expressive images based upon the effect the images might have upon hypothetical persons.

Respondent argues state laws involving child pornography can prohibit nonsexual visual depictions of children based upon the effect the image might have upon the viewer. RAB 15. Respondent does not directly address Appellant's cited authority but instead cites extra-jurisdictional cases which purportedly support Respondent's claim. Id. at 15-16.

First, Respondent cites U.S. v. Villard, 700 F.Supp. 803 (D.N.J. 1988). Id. at 15. In Villard, after conviction at trial for transporting child pornography, the defendant moved for judgment of acquittal or alternatively for new trial. Villard, 700 F. Supp. at 808. The Federal District Court noted that the defendant was convicted based solely upon witness testimony describing the alleged child pornography. Id. Therefore, the court granted the defendant's motion finding because the jury did not independently view the images, the government did not prove beyond a reasonable doubt that the

image contained a "lascivious display of the genitals or pubic area."[5] Id. at 813-14.

Villard does not support Respondent's argument that state laws can prohibit nonsexual images of children based upon the effect the image has upon the viewer. On the contrary, Villard is replete with language expressly recognizing otherwise. *See* Id. at 811-813 ("...the law does not prohibit the transportation of visual depictions of mere nudity[,]" "Private fantasies are not within the statute's ambit[,]" and "The fact that Villard appeared from the evidence to be a pedophile and that he apparently enjoyed viewing these photos does not suffice.").[6]

Finally, Respondent cites Commonwealth v. Provost, 418 Mass. 416, 636 N.E.2d 1312 (1994), for proof that states can ban any image of children based upon the effect the image has on the viewer. In Provost, the

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[5] Respondent also cited Rhoden v. Morgan, 863 F.Supp. 612, 614 (M.D. Tenn. 1994) in support. In Rhoden the Federal district court similarly held that in a federal obscenity prosecution the jury must evaluate the actual material and cannot merely rely upon witness testimony.

[6] The government later appealed the district court's ruling to the Third Circuit Court of Appeals in U.S. v. Villard, 885 F.2d 117 (3rd Cir. 1989). Appellant cited the 3rd Circuit Villard decision twice in his Opening Brief. *See* AOB 17, 54. In that case, the 3rd Circuit affirmed the lower court's decision noting when the image at issue allegedly depicts a lascivious display of the genitals or pubic area courts should apply the Dost factors. Id. at 122. Moreover, the Dost factors require one to scrutinize the image objectively and not based upon the effect the image may have had upon the defendant. Id. at 125 ("Although it is tempting to judge the actual effect of the photographs on the viewer, we must focus instead on the intended effect on the viewer.").

Massachusetts Supreme Court upheld a state law that prohibited encouraging a minor, **with lascivious intent**, to pose nude.[7] Id. at 421, 636 N.E.2d at 1315. Although the court noted the nude images at issue could not be considered child pornography, the statute was nevertheless constitutional because the State's compelling interest in protecting children from exploitation was unrelated to the statute's suppression of expression. Id.

The key difference between the statute in Provost and NRS 200.710(2) and 200.730 is the Massachusetts statute focused upon the intent the person had while creating the images. In contrast, NRS 200.710(2) and 200.730 does not require that the person who uses a minor as the subject of the vaguely defined "sexual portrayal" intend for the images to be lewd or lascivious. Rather, the focus is on whether the images ultimately appeal to some person's, not necessarily the defendant's, shameful or morbid interest in sex.

iii. Nevada cannot assert a compelling interest in preventing children from being sexual stimuli for pedophiles because laws cannot criminalize private thoughts.

[7] The prior version of the statute at issue had been deemed unconstitutional because it lacked the requirement that the defendant create the image with "lascivious intent." The Massachusetts's legislature subsequently amended the statute to add the "lascivious intent" element. *See* Commonwealth v. Oakes, 407 Mass. 92, 93, 551 N.E.2d 910 (1990).

Appellant disagrees with Respondent that states can constitutionally assert a compelling interest in preventing children from being sexual stimuli for pedophiles. Although most persons view pedophilia as repulsive the government should not and cannot assert control over a person's private thoughts. Stanley v. Georgia, 394 U.S. 557, 566 (1969)("Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.").

Nevada does have a compelling interest in protecting children from sexual exploitation. However, as Respondent concedes in its Answering Brief, NRS 200.710(2), 200.730, and 200.700(3)'s goal was to control the thoughts of persons who used nonsexual images of children for a "pornographic purpose," not to protect children from being exploited by documenting their sexual abuse. RAB 17.

b. Use of minor as the subject of a "sexual portrayal" in a performance is unconstitutionally overbroad.

Respondent argues NRS 200.710(2) and 200.730 are not overbroad because sexual portrayal's definition in NRS 200.700(4) excludes works which have "serious literary, artistic, scientific, or educational" value. RAB 20. Thus, although Respondent concedes the statutes could reach some

protected conduct, the statutes' legitimate reach outweigh the "arguably impermissible applications." Id.

Appellant's alleged conduct is a form of expression entitled to constitutional protection. *See* N.Y. v. Ferber, 485 U.S. 747, 766, fn. 18 (1982)(*citing* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)). Where "conduct and not merely speech is involved, [] the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). As argued *supra*, NRS 200.710(2) and 200.730 cannot protect a legitimate government interest insofar as the statutes purport to criminalize nonsexual images of children if those images are used as sexual stimuli for pedophiles. Accordingly, the statutes have no legitimate sweep and therefore are facially invalid.

Moreover, NRS 200.710(2) and 200.730's overbreadth is both real and substantial. The legislature's caveat that images with serious literary, artistic, scientific, or educational value are exempt from prosecution does not narrow the statutes' ability to criminalize any image of a child whatsoever because the statute does not provide any guidelines for how one determines whether a nonsexual image of a child has serious literary, artistic, scientific, or educational value. Based upon this deficiency the least educated, artistically

challenged, illiterate juror can find a defendant guilty based upon nothing more than the fact that someone is sexually aroused by an image of a child.[8]

c. Use of minor as the subject of a "sexual portrayal" in a performance is unconstitutionally vague.

Respondent essentially argues NRS 200.710(2) and NRS 200.730 are not unconstitutionally vague because "prurient," as part of sexual portrayal's definition, has a commonly understood meaning. RAB 22. Additionally, Respondent asserts Appellant cannot complain of vagueness as applied to others because he engaged in conduct "clearly proscribed." Id. Finally, Respondent makes a bare assertion that because the legislature added the language "appeals to the prurient interest in sex" to sexual portrayal's definition the statute contemplates a community objective standard. Id. at 22-23.

First, as discussed *infra*, "prurient" does not have a commonly understood meaning as evidenced by the prosecutor's inability to adequately define it during closing argument. Second, "the plain meaning of a statute's words are presumed to reflect the legislature's intent."[9] Here, the statutes do not state that a visual depiction must appeal to the prurient interest in sex **as**

[8] Indeed, Appellant would wager he could certainly find 12 persons who would agree the television show Dance Moms, which at times depicts pre-teen girls dancing seductively, has no artistic value.

[9] Anthony Lee R. v. State, 113 Nev. 1406, 1414, 952 P.2d 1, 6 (1997).

judged by community standards. Because "community standards" is missing from the statute itself, Respondent cannot credibly assert the legislature intended that an image's prurient interest in sex should be judged by community standards.

Next, Respondent argues Appellant's "various hypotheticals are irrelevant attempts to distract the Court from his conduct." RAB 22. Moreover, Respondent incorrectly claims that "a facial vagueness challenge is appropriate only if the statute implicates constitutionally protected conduct or 'is impermissibly vague in all its applications." Id. In actuality, if the challenged statute "does not implicate constitutionally protected conduct, the court may strike it down as vague on its face only if it is permissibly vague in all its applications." Sheriff v. Martin, 99 Nev. 336, 340, 662 P.2d 634, 637 (1983)(*citing* Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 494-95 (1982). Here, because Appellant's alleged conduct is constitutionally protected, he need not show the statutes are vague in all their applications. Additionally, Appellant can complain that the law is vague as applied to other persons' conduct. *See* Hoffman Estates, 455 U.S. at 495.

Finally, Appellant challenged the statutes' vagueness in his Opening Brief as both "failing to provide a person of ordinary intelligence fair notice of what is prohibited" and because the statutes are "so standardless [they]

authorize[] or encourage[] seriously discriminatory enforcement." AOB 28-31. This Court has recognized an Appellant may assert a vagueness challenge to a statute under either theory. *See* Castaneda, 245 Nev. at 553, fn. 1("the vagueness tests are independent and alternative, not conjunctive."). To substantiate his claim, Appellant noted that based upon his alleged conduct police initially arrested him for violating NRS 200.604, capturing image of private area of another person. AA I 18. However, when prosecutors realized police recovered lubrication and condoms in a desk drawer near Appellant's laptop containing the images, the prosecutors pursued their own predilections and recharged Appellant with multiple counts of violating NRS 200.710(2) ostensibly because the videos appealed to Appellant's prurient interest in sex. It was only because of sexual portrayal's vague definition that prosecutors were able to do this.

Although Appellant thoroughly addressed this claim in his Opening Brief, Respondent failed to address the argument in its Answering Brief. This Court should treat the failure as a confession of error and reverse Appellant's conviction. *See* Polk v. State, 233 P.3d 537, 360, 126 Nev. Adv. 19 (2010)("We have also determined that a party confessed error when that party's answering brief effectively failed to address a significant issue raised in the appeal.").

II. The court erred by refusing to instruct the jury regarding essential elements of the charged crimes.

a. Instruction 'B'

Respondent argues the district court did not err when it refused Appellant's proposed jury instruction 'B' because instructions 12-18 contained the proper definition of child pornography. RAB 26. Therefore, Respondent claims proposed instruction 'B' was not a correct statement of law. Id.

First, Appellant never asserted that proposed instruction 'B' was the definition of child pornography. Accordingly, Respondent's argument concerning instructions 12-18 is unconvincing. Moreover, proposed instruction 'B' was a correct statement of law. For counts 5, 8, 11, 14, 17, 20, 23, 26, 40, and 41 the State charged Appellant with possessing images of children as the subject of a sexual portrayal **or** engaging in **sexual conduct**. AA I 3-13 (emphasis added). Therefore, "sexual conduct" was an element of the crime the State had to prove beyond a reasonable doubt. NRS 200.700(3) defines "sexual conduct" as: "sexual intercourse, **lewd exhibition of the genitals**, fellatio, cunnilingus, bestiality, anal intercourse, excretion, sado-masochistic abuse, masturbation, or the penetration of any part of a person's

body or of any object manipulated or inserted by a person into the genital or anal opening of the body of another."

The images of H.I. and C.I. did not depict sexual intercourse, fellatio, cunnilingus, bestiality, anal intercourse, excretion, sado-masochistic abuse, masturbation, or penetration of any body part by an object. Consequently, the images could only depict "sexual conduct" if they depicted a lewd exhibition of H.I.'s and C.I.'s genitals. Appellant's proposed instruction 'B' was based upon U.S. v. Dost, 636 F.Supp. 828, 832 (S.D. Ca. 1986), which provides a test to determine whether the image depicts a "lewd exhibition of the genitals."[10]

The district court erred by refusing Appellant's proposed instruction. The court did not provide a jury instruction defining "sexual conduct" per NRS 200.700(3). Consequently, the court also did not provide the jury with

[10] Respondent makes the fallacious argument that the district court was correct in rejecting Appellant's instruction 'B' because instruction 'B' was based upon "a federal pornography statute." RAB 26. In Dost, the defendant was charged with violating 18 U.S.C. § 2251(1) for using a minor to engage in **sexually explicit conduct** for the purpose of producing a visual images. Dost, 636 F.Supp. at 829-30. Under 18 U.S.C. § 2255, sexually explicit conduct is defined almost identically to NRS 200.700(3). The Dost court listed six factors useful for determining whether the images depicted a "lascivious exhibition of the genitals or pubic area of any person." It is intellectually dishonest for Respondent to argue the Dost factors are based exclusively upon a federal pornography statute when 18 18 U.S.C. § 2251(1) mirrors almost every state's prohibition upon creating images of children's lewdly or lasciviously displayed genitals.

an instruction regarding how to determine what constitutes a lewd exhibition of the genitals. Whether the videos at issue lewdly displayed H.I.'s and C.I.'s genitals was a fact the State had to prove beyond a reasonable doubt. The jury was never instructed regarding how to make this determination. Additionally, the error was not harmless because no one can credibly argue that had the jury been correctly instructed it nevertheless would have found the images of H.I. and C.I., who were engaged in innocuous bathroom activities, to be a lewd display of the genitals.

b. Instruction 'I'

According to Respondent, the district court did not err in failing to give Appellant's proposed instruction 'I' because: (1) child pornography does not require the child to be "doing something sexually explicit;" (2) the instruction did not mirror Nevada's definition of "sexual conduct;" and (3) "the State never argued the videos or photographs depicted sexual conduct but rather the images depicted the minors as the subjects of a sexual portrayal[.]" RAB 27-28. Respondent is incorrect on all counts.

First, child pornography does require the child to be engaged in sexual conduct. *See* N.Y. v. Ferber, 485 U.S. 747, 764-65 (1982)(explaining state laws prohibiting child pornography must, among other things, "limit the prohibition to works **that visually depict sexual conduct of children** below

a specified age."). Second, Appellant's proposed instruction, while containing definitions for other pertinent terms and phrases, contained a definition for sexual conduct which is almost identical to the definition found in NRS 200.700(3).[11]

Finally, as Appellant has repeatedly argued, for counts 5, 8, 11, 14, 17, 20, 23, 26, 40, and 41 the State charged Appellant with possessing images of children as the subject of a sexual portrayal **or** engaging in **sexual conduct**. AA I 3-13. Therefore, the State did allege the images depicted sexual conduct and not merely a sexual portrayal.

c. Lack of instruction defining prurient interest in sex

Respondent blames Appellant for the lack of instruction defining "prurient interest in sex" claiming Appellant should have objected to the exclusion. RAB 28. Because Appellant did not object, Respondent asserts this court should only review the issue for plain error. Respondent suggests that the exclusion is not plain error because "prurient" has an ordinarily understood meaning.

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[11] The only significant difference between Appellant's definition of sexual conduct and NRS 200.700(3)'s is Appellant replaced "lewd exhibition of the genitals" with "lascivious exhibition of the genitals or pubic region." *Compare* NRS 200.700(3) with AA II 272. Nevertheless, the words lewd and lascivious "have nearly identical meanings." U.S. v. Knox, 32 F.3d 733, 748 fn. 12 (3rd Cir. 1994).

Appellant has no obligation or power to instruct the jury. Rather, the district court is responsible for ensuring that the jury is fully and correctly instructed. Crawford v. State, 121 Nev. 744, 754-55, 121 P.3d 582, 589 (2005). Because Appellant has no obligation to instruct the jury plain error analysis is inappropriate. Additionally, "prurient" does not have an ordinarily understood meaning as evidenced by the trial prosecutor's inability to accurately define it during her rebuttal argument. *See also* Dunlap v. State, 292 Ark. 51, 66, 728 S.W.2d 155, 163 (1987)(Purtle, J., dissenting, "[a]dmittedly, I do not know the meaning of the word 'prurient' and certainly cannot tell from our statute what it means. The average person should be able to read a law and understand what is prohibited before the act is done."); Red Bluff Drive-In, Inc. v. Vance, 648 F.2d 1020, 1026 (5th Cir. 1981)("Many jurors may find it helpful to learn that 'prurient interest' means shameful and morbid.").

III. The state committed prosecutorial misconduct which prejudiced Appellant.

a. Arguing uninstructed legal theory and misstating the law

Respondent argues the trial prosecutor did not commit misconduct by arguing uninstructed legal theories and misstating the law because Respondent maintains "prurient" simply means lustful thoughts. RAB 33-35.

Respondent cites a litany of cases involving obscenity in support. However, each and every case Respondent cites pre-dates both Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) and Roth v. U.S., 354 U.S. 476, 487 (1957).[12] *See* RAB 34-35. Both Brockett and Roth unequivocally state that a "prurient interest in sex" cannot be merely a person's lustful thoughts. The prosecutor's argument did nothing to distinguish a normal interest in sex versus a shameful or morbid interest in sex. Accordingly, the jury likely found Appellant guilty without finding the State proved an essential element of the charged crime. Therefore, the prosecutor's argument was misconduct warranting reversal.

b. Calling Anita a liar

Respondent claims the State did not call Anita a liar during closing argument when the prosecutor discussed Anita's testimony but instead was only commenting upon Anita's credibility. RAB 37. Respondent's concession actually supports Appellant's argument. The prosecutor's personal opinion regarding Anita's truthfulness or credibility was completely irrelevant. "The jury is the sole and exclusive judge of the credibility of the witnesses and the weight to be given the evidence." King v. State, 87 Nev. 537, 538, 490 P.2d 1054 (1971); Yates v. State, 103 Nev. 200, 204-05, 734

[12] The cases Respondent cites are dated: 1940; 1933; 1954; 1953; and 1945.

P.2d 1252, 1255 (1987)("[t]he District Attorney may argue the evidence and inferences before the jury. He may not heap verbal abuse on a witness nor characterize a witness as a perjurer or a fraud. Such characterizations transform the prosecutor into an unsworn witness on the issue of the witness credibility and are clearly improper.").

a. The court violated Appellant due process right to confront his accuser and to have the jury determine all facts.

i. Step Up payments

Respondent contends the district court correctly refused to allow Appellant to question H.I. concerning payments from the Step Up program because "those questions were totally unrelated to the case or the State." RAB 40. Respondent appears to suggest as long as the State did not make the payments to H.I., then the questions were irrelevant. However, the mere fact that the District Attorney did not make the payments does not mean the "State" did not make the payments or that the payments did not color H.I.'s testimony. In fact, Clark County's Department of Family Services makes the Step up payments to eligible individuals through Clark County Social Services.[13] Therefore, the "State," or a State representative, actually did

[13] *See* <http://www.clarkcountynv.gov/Depts/social_service/Services/pages/Step-up.aspx>, last accessed November 30, 2015.

make the payments to H.I. Also, if H.I. manufactured allegations against Appellant in order to become emancipated from Anita then the payments from Clark County are intrinsically linked to H.I.'s veracity, motive, and bias. Accordingly, the district committed reversible error by refusing to allow Appellant to question H.I. about the payments.

ii. Age of individual in Exhibit '3'

Respondent first asserts State's witness, Detective Ramirez, did not improperly opine regarding the person's age in exhibit 3. RAB 41. Instead, Respondent claims Ramirez merely testified regarding how he collects evidence. Id. Respondent artfully cites portions of Ramirez's trial testimony to support its argument. Id.

While the prosecutor did ask Ramirez foundational questions concerning how he analyzes computers for possible evidence collection (*see* AA V 868), much later, during redirect examination, the State expressly and improperly asked Ramirez to opine regarding the age of one of the persons in exhibit 3. AA V 913. The prosecutor's question at that point was not designed to elicit a response concerning evidence collection. Instead, the impermissible question to a respected law enforcement official removed an essential fact from the jury's consideration. Notwithstanding the jury's ability to view the exhibit and make its' own determination, the question was

improper and at minimum contributed to the cumulative error in Appellant's case.

IV. The Indictment violated Appellant's due process right to fair notice of what conduct he must defend against.

Respondent contends Appellant waived his right to challenge the Indictment's sufficiency on Appeal because he did not challenge it in the district court. RAB 43. Alternatively, Respondent contends the Indictment provided Appellant with adequate notice of the State's child abuse theory of prosecution. Id. at 44.

Unfortunately Appellant's trial attorney did not object to the Indictment's inadequacy. Nevertheless, the "waiver" doctrine should not preclude this Court from considering the issue on appeal. First, "[r]elaxation of [the waiver rule] is sometimes appropriate in appeals wherein there are significant questions of general impact or when injustice might otherwise result." Ripplinger v. Collins, 868 F.2d 1043, 1054 (9th Cir. 1989). Moreover, an appellate court should exercise its discretion to consider an issue raised for the first time on appeal when doing so would not require development of new facts. Anderson v. Cumming, 827 F.2d 1303, 1305 (9th Cir. 1987).

Here, it appears Appellant was convicted of Child Abuse under a theory of sexual abuse or exploitation when the State initially only alleged a theory of non-accidental physical or mental suffering. It would be unjust for this Court to avoid the issue merely because Appellant's trial attorney did not explicitly object. Additionally, resolution of the issue would not require development of any new or additional facts. Instead, resolution merely involves comparing the Indictment's language to the arguments made at trial. Therefore, this Court should consider Appellant's argument on appeal.

Pursuant to NRS 173.075(3), "The indictment or information must state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated." Appellant's Indictment only referenced NRS 200.508 generally and did not allege Appellant violated NRS 200.508(4). *See* AA I 1. Because NRS 200.508 sets forth multiple means of committing Child Abuse, the State was required to allege exactly which means it was proceeding under. Having failed to do so the Indictment was fatally defective and allowed the State to change its theory of prosecution mid-trial.

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V. As a matter of law almost all the images at issue did not depict either a sexual portrayal or sexual conduct and therefore the State could not and did not present sufficient evidence of guilt.

As a preliminary matter, Respondent suggests Appellant's argument that the images did not depict a sexual portrayal or sexual conduct as a matter of law should be denied because Appellant "fails to cite any legal authority." RAB 47. This is incorrect.

Respondent misunderstands Appellant's argument. Appellant basically contends because the images, as a matter of law, did not depict either a sexual portrayal or sexual conduct the State did not and could not present sufficient evidence of Appellant's guilt. Also, Appellant's argument is supported by authority. Specifically, Appellant references NRS 200.700(3) and a plethora of cases in support. *See* AOB 50-58.

For example, Appellant cited State v. Gates, 182 Ariz. 459, 897 P.2d 1345 (Ct. App. Div. 1, 1995) and Lockwood v. State, 588 So.2d 57, 58 (4th Dist. Ct. App. FL, 1991) where two different Appellate Courts interpreting state laws almost identical to NRS 200.700(3), and under similar factual scenarios, found that certain images of children in various stages of undress were not child pornography. Additionally, Appellant exhaustively analyzed each and every image at issue in his case while applying the Dost factors. *See* AOB 53-56. Finally, given the First Amendment implications in

Appellant's case, it is ultimately unimportant what Respondent believes. This Court will have an opportunity to review the images itself and decide, de novo, whether the images depict child pornography. *See* U.S. v. Amirault, 173 F.3d 28, 33 (1st Cir. 1999).

VI. Appellant's due process rights were violated when he was convicted of open and gross lewdness and child abuse based upon insufficient evidence.

1. Open and gross lewdness

Respondent claims the State presented sufficient evidence to support Appellant's conviction for Open and Gross Lewdness because Appellant kissed H.I. on the lips, admitted to having romantic thoughts about H.I., and H.I. felt uncomfortable after the kiss. RAB 53. Notwithstanding this "evidence," Respondent ignores the requirement that the "act" for Open and Gross Lewdness must be sexual in nature. *See* Berry v. State, 125 Nev. 265, 281, 212 P.3d 1085, 1096 (2009)(*abrogated on other grounds by* State v. Castaneda, 245 P.3d 550, 553 fn. 1, 126 Nev. Adv. Op. 45 (2010)).

No witness testified that Appellant's kiss was "sexual." In fact, Appellant denied the kiss was sexual. AA VII 1309, 1318. Moreover, H.I. could not remember whether the kiss was a "peck" or "a more involved kiss." AA VI 1043. It is a fantastic logical leap to suggest, as Respondent does, that

all kisses are "sexual." Appellant acted as a surrogate father to H.I. and in doing so would periodically provide paternal affection to her. The good night kiss Appellant gave H.I. was not more perverse than any kiss a father would give his child.

2. Child abuse

If this Court agrees that the State originally alleged Appellant committed Child Abuse under a theory of non-accidental physical injury or mental suffering, the State did not produce any evidence whatsoever that H.I. actually suffered physical injury or mental suffering as a result of Appellant's alleged actions. Rather, the only evidence the State presented was that H.I. felt "uncomfortable" by Appellant's actions.[14] The State did not even clarify whether H.I.'s discomfort was physical or mental.

Although NRS 200.508 does not define "mental suffering," NRS 200.508(4)(e) defines "Substantial mental harm" as "an injury to the intellectual or psychological capacity or the emotional condition of a child as evidenced by an observable and substantial impairment of the ability of the child to function within his or her normal range of performance or behavior."

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[14] The State opposed Appellant's motion to compel a psychological examination of H.I. *See* AA I 190. Had the State not done so, and Appellant had examined H.I., the examination would have arguably either corroborated the State's theory or conclusively disproved the theory.

Here, if this Court removes NRS 200.508(4)(e)'s modifiers concerning "substantial" and uses the remainder to define "mental harm," discomfort is not mental suffering and is not impairment to the child's ability to function within a normal range. Therefore the State did not present any evidence that H.I. suffered mental harm.

Assuming the State did sufficiently plead the Indictment under a theory of Child Abuse by sexual abuse or exploitation, the State still did not present any evidence that H.I. may have suffered physical injury or mental harm as a result of Appellant's alleged actions. Instead, Respondent asserts, without any factual support, that "any person might suffer mental suffering having to learn that their privacy was violated in such a major way and having to watch themselves nude in front of total strangers." RAB 54. Simply because Respondent thinks this is true does not make it so.

Criminal convictions must be based upon evidence and not speculation. If the State desired to actually prove its case it could have asked H.I. about any alleged "mental harm" she may have experienced. Alternately, the State could have noticed an expert who may have testified that Appellant's alleged actions could have resulted in mental harm to the alleged victim. Having failed to do so, the State's evidence is simply insufficient to sustain Appellant's conviction.

VII. The cumulative effects of the numerous errors deprived Appellant of his constitutional right to a fair trial.

Respondent claims the numerous trial errors' cumulative effect does not warrant reversal because: (1) Appellant has not asserted any "meritorious" claims of error; (2) sufficient evidence supports Appellant's guilt; and (3) Appellant was not convicted of any "grave" crimes. RAB 54-55.

Appellant has asserted numerous "meritorious" claims which entitles him to reversal individually and collectively. Specifically, Appellant was tried and convicted for violating an unconstitutional law, the court failed to adequately instruct the jury, and the prosecutor committed serious misconduct. Additionally, although Appellant's alleged behavior may have subjected him to some criminal liability,[15] the evidence presented at trial simply does not satisfy the statutory requirements for creating and possessing child pornography, child abuse, or open and gross lewdness.

Finally, Appellant is concerned by Respondent's suggestion that cumulative error only applies to "grave" offenses and that Appellant's alleged offenses are not grave. This Court has never held cumulative error **only** applies to "grave" offenses. Moreover, Appellant is serving life in prison and

[15] *See* NRS 200.604, capturing the image of the private area of a person.

must register as a sex offender if he is ever released. Certainly the legislature sought to make child pornography a "grave" offense by virtue of the significant, life altering, penalties proscribed. Accordingly, if this Court somehow does not believe any of the individual errors which occurred at trial warrant reversal, the cumulative effect of the errors certainly denied Appellant his Due Process right to a fair trial and demands reversal.

CONCLUSION

Based upon the foregoing arguments, Appellant respectfully requests that this Court reverse his conviction.

Respectfully submitted,

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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 Times New Roman in 14 size font.

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DATED this 4th day of December, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 4th day of December, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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