IN THE SUPREME COURT OF THE STATE OF NEVADA

MELVYN PERRY SPROWSON, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	NO. 73674

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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	)	
Appellant,	)	
	)	
vs.	)	
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THE STATE OF NEVADA,	)	
	)	
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APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

Appellant, MELVYN PERRY SPROWSON ("Sprowson"), appeals from his judgment of conviction pursuant to **NRAP 4(b)** and **NRS 177.015**. Sprowson's judgment of conviction was filed on July 5, 2017. (Appellant's Appendix Vol. VI:1167-69).[1] This Court has jurisdiction over Sprowson's appeal, which was timely filed on August 1, 2017. (III:602). See **NRS 177.015(1)(a).**

ROUTING STATEMENT

This case is not presumptively assigned to the Court of Appeals because Sprowson went to trial and was convicted of one count of first

[1] Hereinafter, citations to the Appellant's Appendix will start with the volume number, followed by the specific page number. Thus, (Appellant's Appendix Vol. VI:1167-69) will be shortened to (VI:1167-69).

degree kidnapping and four counts of unlawful use of a minor in the production of pornography (all category A felonies). See **NRAP 17(b)(2).**

ISSUES PRESENTED FOR REVIEW

I. The court committed structural error during *voir dire* by allowing the marshal to question potential jurors outside the parties' presence and excusing jurors based on their unsworn, out-of-court statements.

II. The court violated Sprowson's constitutional rights by using Nevada's rape shield statutes to exclude evidence that refuted essential elements of the charges against him.

III. Sprowson's convictions for unlawful use of a minor in the production of pornography must be reversed because they did not involve "sexual conduct" and because **NRS 200.700(4)** is unconstitutional.

IV. The court violated Sprowson's constitutional rights by denying his request to call J.T. as a witness in his case in chief unless he could afford to pay for her travel, where the court was aware of his indigent status.

V. Prosecutorial misconduct so infected the trial with unfairness as to make Sprowson's resulting convictions a denial of due process.

VI. Cumulative error requires reversal.

STATEMENT OF THE CASE

On December 19, 2013, the State filed a criminal complaint charging Sprowson with one count of first degree kidnapping, one count of child abuse, neglect or endangerment with substantial bodily harm, four counts of unlawful use of a minor in production of pornography, and two

misdemeanor charges of contributory delinquency and obstructing a police officer. (I:5-8). After a preliminary hearing, Sprowson was bound over to district court on all six felony charges. (I:17-18).[2]

At his arraignment on January 29, 2014, Sprowson pled not guilty. (VI:1176). On March 7, 2014, Sprowson filed a pretrial petition for writ of habeas corpus. (II:270-304). After a hearing on April 30, 2014, the court denied Sprowson's petition. (VI:1300).

On September 5, 2014, the State moved to exclude evidence of J.T.'s prior sexual abuse at trial, relying primarily on Nevada's rape shield statutes. (III:492-506). Although Sprowson opposed the motion and pointed out that the rape shield statutes did not apply because he was not charged with rape (III:507-514), the court granted the State's motion. (VI:1186).

On May 8, 2015, Sprowson advised the court of his indigent status by filing an Ex Parte Application for Court Approval of Payment of Specific Categories of Ancillary Defense Costs pursuant to **NRS 7.135**. (III:568-73). In a Minute Order on May 27, 2015, the court found Sprowson "indigent as his current incarceration has rendered him unable to pay for his legal defense in the instant case" and approved payment of specific categories of ancillary defense costs. (III:576-77).

[2] The State elected to stay the bindover on the misdemeanor counts. (I:17-18).

On July 21, 2015, Sprowson's attorney, John Momot, moved to withdraw. (III:622-626). On August 19, 2015, Sprowson filed a Motion to Proceed Pro Se. (III:629-634). After a **Faretta**[3] canvas on August 24, 2015, the court granted Sprowson's motion and allowed him to represent himself with the Clark County Public Defender's Office serving as standby counsel. (VI:1202).

On October 12, 2015, the State filed a "bad acts" motion to admit evidence that Sprowson violated a no-contact order by sending text messages to J.T. from a hotel in Oklahoma. (IV:715-725). After a **Petrocelli**[4] hearing on December 10, 2015, the court granted the motion. (VII:1501).

A nine day jury trial began on March 21, 2017. (VI:1234-46). On March 31, 2017, the jury found Sprowson guilty of all counts. (VI:1246). The court sentenced Sprowson to life in prison with parole eligibility after 12.5 years. (XIV:3152-53). Sprowson's Judgment of Conviction was filed on July 5, 2017. (VI:1167-69). This appeal was timely filed on August 1, 2017. (VI:1171-74).

[3] **Faretta v. California**, 422 U.S. 806, 819 (1975).
[4] **Petrocelli v. State**, 101 Nev. 46, 51-52, (1995).

STATEMENT OF THE FACTS

From August to November 2013, Sprowson had a consensual sexual relationship with his sixteen-year-old girlfriend J.T. (I:111-120). They became acquainted with one another in July 2013 after J.T. answered Sprowson's Craigslist ad. (I:111-12). They initially communicated via Craigslist and then through a texting app called Kik. (I:112). On August 1, 2013, J.T. agreed to be Sprowson's "girlfriend". (I:112). Thereafter, J.T. sent Sprowson some nude and semi-nude photographs because they both "wanted to".[5] (I:112-13).

At some point, J.T. asked Sprowson if she could sleep over at his house and he agreed to pick her up and drive her home with him. (I:114). J.T. got permission from her mom to spend two nights at her friend Jessica's house, but instead spent those nights with Sprowson. (I:114). During their sleepover, J.T. and Sprowson had intercourse once or twice without a condom. (I:114). Sprowson gave J.T. a diamond promise ring to solidify their relationship. (I:114).

When J.T. returned home, her mom saw the ring and became suspicious. (I:114-15). J.T. lied about where the ring came from, but her mom did not believe her. (I:114). J.T.'s mom confiscated the ring, along

[5] These photographs and the related pornography charges will be discussed in greater detail in **Section III**, infra.

with J.T.'s phone and computer, but J.T. found a way to keep in touch with Sprowson. (I:114-15). J.T. told her mom she needed the computer for a project, but instead e-mailed Sprowson and told him come pick her up. (I:115).

When questioned at the preliminary hearing by Judge Kephart, J.T. admitted she told Sprowson that she would kill herself if he did not pick her up. (I:146).[6] J.T. grabbed her social security card and birth certificate, snuck out the front door at 3:00 or 4:00 a.m. and got in Sprowson's car. (I:116). When they got to Sprowson's townhome, J.T. told Sprowson to change his phone number because her mom knew his number. (I:116).

J.T. lived with Sprowson from August 28, 2013 until November 1, 2013. (I:116). During this time, J.T. never felt like Sprowson mistreated her. (I:118).[7] Sprowson gave J.T. books to read and had "all kinds of stuff" to do at his house. (I:116). J.T. had access to Sprowson's laptop and was able to check the internet daily. (I:117,123).

Although Sprowson wanted J.T. to go to school, she chose not to because she did not want to be found. (I:116). To avoid detection, J.T. did not leave S Sprowson's home when he was at work. (I:116-17). Instead,

[6] At trial, J.T. claimed this was a lie. (XI:2410).
[7] J.T. testified they did not have intercourse "often" -- maybe "once a week". (I:118). Twice, J.T. drank alcohol at Sprowson's house. (I:119).

Sprowson would take J.T. out for rides in his car at night dressed as a boy. (I:117). At trial, J.T. admitted she could have left Sprowson's townhome at any time. (XI:2426-27).

J.T. and Sprowson loved each other. (I:117). J.T. and Sprowson were aware her family was looking for her, having seen posts on the internet that she was "missing". (I:118). J.T. was also aware that a private investigator had come to Sprowson's door inquiring about her. (I:120). Although she missed her family, J.T. planned to "stick it out" at Sprowson's home until she was like "17 and a half" and then they would get married and she would go back to school. (I:115).

On November 1, 2013, police located J.T. at Sprowson's townhome and brought her back to her mom. (I:120). J.T. told her mom she "couldn't stop [J.T.] from going back" to Sprowson and that she would "always go back" to him. (I:120). When J.T. threatened to kill herself if she had to stay with her mom, her mom sent her to Montevista hospital for 10 days. (I:120;154). A few days after J.T. returned home, she became upset about "another boy" and "wanted to jump off the balcony because she couldn't use

the phone", so J.T.'s mom sent her back to Montevista for a month of treatment. (I:121;154).[8]

In a letter dated November 21, 2013, J.T.'s psychiatrist Emmanuel Nwapa, M.D., confirmed that J.T. had been committed to Montevista for a month because she "tried to jump off a balcony" during "an argument with her mother in regards to a 19-year-old male boyfriend." (XVI:3258-59). Dr. Nwapa reported that J.T. "had a history of promiscuous behavior dating much older men, some of them in in their 40s and others in their 30s" and a history of sexually transmitted disease. (XVI:3258-59). Dr. Nwapa described J.T. as "extremely impulsive" and "depressed", and said she had "mood swings". Id. Under the circumstances, Dr. Nwapa "recommended for her to go to a long-term residential treatment facility". (XVI:3258-59). J.T. subsequently received six months of inpatient mental health treatment at Willow Springs Treatment Center. (XI:2298).

This was not the first time J.T. had required extensive mental health treatment. In 2012, when J.T. was only fourteen, she met a 39-year-old man named David Schlomann while the two were playing an online computer game. (II:333,343). "Their communication quickly turned sexual, and the

[8] Unless otherwise stated, the prior recitation of facts is based on J.T. and her mother's preliminary hearing testimony elicited on direct examination by Jacqueline Bluth. At trial, J.T. admitted that she was "telling the truth" when Bluth questioned her at the preliminary hearing. (XI:2292).

two exchanged nude photographs." (II:343). J.T. sent Schlomann "photos of her topless, in her underwear, and of her face." (III:334). On April 13, 2012, Schlomann traveled from New Mexico to Las Vegas to have sex with J.T. (II:334). The two arranged to have Schlomann pick J.T. up at midnight after her mother went to sleep. (XII:334). They went to Arizona Charlie's, where Schlomann pressured her into various forms of sexual activity, even after she repeatedly said she did not want to and that she was experiencing pain. (II:287).

J.T. had a history of running away from home, having previously run away on three separate occasions. (I:128-29). Because of her traumatic experience with Schlomann, and her history of running away, J.T. underwent two years of individual and family therapy with her mother, who took J.T.'s phone and computer away for 2 years. (I:129; II:287).

SUMMARY OF THE ARGUMENT

The State did not want the jury to know about J.T.'s history as a sexual assault survivor and runaway who'd dated several men in their 30's and 40's, because those facts undermined its theory that Sprowson enticed J.T. to leave her family and caused her substantial mental harm. The court violated Sprowson's constitutional rights by using Nevada's rape shield statutes to improperly exclude this key evidence from trial.

The court also committed structural error during *voir dire* by allowing a marshal to question potential jurors in the hallway outside the parties' presence and excusing eight jurors based on their unsworn, out-of-court statements to that marshal. The court further violated Sprowson's constitutional rights by denying his request to call J.T. as a witness in his case-in-chief unless he could afford to pay for her travel, where J.T. was a key witness and the court knew he was indigent.

The State violated Sprowson's constitutional rights by engaging in a continuous course of prosecutorial misconduct throughout the trial. Finally, Sprowson's pornography convictions must be reversed because they did not involve "sexual conduct" and because **NRS 200.700(4)** is unconstitutional. Whether these errors are considered alone or in combination, Sprowson is entitled to a new trial.

ARGUMENT

I. The court committed structural error during *voir dire* by allowing the marshal to question potential jurors outside the parties' presence and excusing jurors based on their unsworn, out-of-court statements.

A criminal defendant has a due process right to be tried by a fair and impartial jury. See, e.g., **In re Murchison**, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process"); **McNally v. Walkowski**, 85 Nev. 696, 700 (1969) ("The right to trial by jury, if it is to

mean anything, must mean the right to a fair and impartial jury"); **U.S.C.A. V, VI, XIV; Nev. Const. art 1, § 3.**

In order to secure this right, **NRS 16.030(5)** requires that all jurors be sworn in before answering any questions about their qualifications to serve as impartial jurors:

> Before persons whose names have been drawn are examined as to their qualifications to serve as jurors, the judge or the judge's clerk shall administer an oath or affirmation to them in substantially the following form:
>
> Do you, and each of you, (solemnly swear, or affirm under the pains and penalties of perjury) that you will well and truly answer all questions put to you touching upon your qualifications to serve as jurors in the case now pending before this court (so help you God)?

NRS 16.030(5).

Additionally, the judge must conduct the initial examination of prospective jurors and then permit defense counsel to conduct a supplemental examination. See, e.g., **NRS 175.031** ("The court shall conduct the initial examination of prospective jurors . . ."); **NRS 16.030(6)** ("The judge shall conduct initial examination of prospective jurors and the parties or their attorneys are entitled to conduct supplemental examinations which must not be unreasonably restricted").

The Nevada Supreme Court "will not condone any deviation from [these] constitutionally or statutorily prescribed procedures for jury

selection." **Barral v. State**, 131 Nev. Adv. Op. 52, 353 P.3d 1197, 1200 (2015) (emphasis added). "An indictment or a conviction resulting from an improperly selected jury must be reversed." **Id**.

In this case, before the jury venire was ever brought into the courtroom and administered the oath, the court advised the parties that the marshal, Jason Dean, had already spoken with the prospective jurors in the hallway to determine whether any could be excused from jury service. (VIII:1746-47). The court explained, "So Jason's already gone out there, given them the general speech about all the things that won't get them out of jury duty, and there are some individuals who have indicated that they may have reasons for getting out of jury duty which comply with the court's rules." (VIII:1747).

The court then proceeded to discuss the unsworn responses of eleven prospective jurors and make determinations regarding whether those jurors could remain in the venire. (VIII:1747-57). Jason's conversation with the jurors addressed potential conflicts of interest and the jurors' qualifications to serve. In this regard, Jason informed the court (who then informed the parties) that Juror No. 631 was concerned she might have a "conflict" with the judge because the two used to work together at State Farm Insurance Company. (VIII:1747). Jason also informed the court that Juror No. 788

was apparently "not a U.S. citizen" although no one verified that this was actually the case. (VIII:1755).

All told, the court dismissed eight jurors during this improper procedure, including three jurors that Sprowson objected to dismissing. (VIII:1746-57). Sprowson advised the court that he wanted to "keep" Juror No. 725; however, the court stated that the juror would have to be let go due to his pre-planned travel arrangements. (VIII:1753-54). In doing so, the court never confirmed, under oath, that the juror's travel arrangements would actually conflict with trial.

Sprowson also opposed the dismissal of Juror 788; however, the court dismissed that juror before the parties could confirm, under oath, that she was ineligible to serve:

> THE COURT: All right. We'll send that one back down to Jury Services. Turning to Page 3, we have Tejani Chavez-Acosta, Badge 788. Do you guys see that one?
>
> MS. BLUTH: Yes.
>
> THE COURT: That individual is not a U.S. citizen. They cannot sit on the jury.
>
> MS. BLUTH: Okay.
>
> THE COURT: So we will have to send that one back down to Jury Services.
>
> SPROWSON: I just want to -- that one's not qualified?
>
> THE COURT: No, you have to be a U.S. citizen . . . .

(VIII:1755).

Finally, Sprowson opposed the dismissal of Juror No. 809, who informed Jason that she could not serve on the jury because she was breast feeding her eight-month-old baby. (VIII:1756). Although Sprowson told the court, "I'd like to keep this one" (VII:1756), the court decided to "accept her representation that she's the sole food source for the eight-month-old baby" and excuse her from the venire. (VIII:1757).[9] As with the other jurors, the court did not swear-in Juror No. 809 or question her under oath before dismissing her.

The court's *voir dire* procedures plainly violated **NRS 16.030(5)**, **NRS 175.031** and **NRS 16.030(6)**. Before prospective jurors were asked any questions about their qualifications to serve, the court was required to administer the oath. See **NRS 16.030(5)**. After administering the oath, the court was required to conduct the initial questioning of the prospective jurors. See **NRS 175.031** and **NRS 16.030(6)**. Instead of following these rules, the court delegated her responsibilities to a marshal, who asked prospective jurors about their qualifications to serve on the jury outside the presence of the parties and without administering the oath.

[9] Although Sprowson subsequently made the offhanded comment, "she'll probably be distracted anyways. I agree" (VIII:1757), the fact that he objected prior to the court's ruling preserved this issue for appellate review.

Sprowson has no way of knowing what the court's marshal told prospective jurors in the hallway or what questions he asked to elicit the information that was later conveyed in court. Sprowson had to accept the marshal's representations to the court about what the jurors told him about their ability to serve. The court dismissed eight of those jurors based solely on their out-of-court statements to the marshal. Sprowson never had an opportunity to see the jurors or listen to them before decisions were made to remove them from the panel. The court's failure to comply with **NRS 16.030(5)**, **NRS 175.031** and **NRS 16.030(6)** was a structural error that requires reversal. See **Barral**, 353 P.3d at 1200.[10]

Whether the court's actions in this case constituted structural error is a question of law that this Court reviews *de novo*. **Id.** at 1198. As this Court explained in **Barral**, trial errors that violate a defendant's right to an impartial jury are "structural errors" requiring automatic reversal without a showing of prejudice. **Id**. at 1198-99 (citing, inter alia, **Peters v. Kiff**, 407

[10] The court also violated **NRS 16.030(5)** *after* the jury venire entered the courtroom. Without giving the oath required by **NRS 16.030(5)**, the court asked if the jurors had "any type of physical limitation that could affect what we need to do in this case". (VIII:1772-75). Several jurors responded before the court administered the oath. (VIII:1772-75,1781). Thereafter, the court did not re-address any of the questions that were asked prior to the oath being given. (VIII:1781-1840;IX:1870-2003;X:2024-93). A similar error occurred in **Cazares v. State**, Case No. 71728, currently pending before this Court.

U.S. 493, 502 (1972); **Estes v. Texas**, 381 U.S. 532, 545 (1965); and **Mayberry v. Pennsylvania**, 400 U.S. 455, 465–66 (1971)).

The facts of this case are analogous to those of **Barral**, 353 P.3d at 1200, where this Court found structural error when a district court failed administer the oath to the jury venire before *voir dire*. In **Barral**, jurors were both selected and rejected based on their unsworn responses during *voir dire*. Because "'there is no way to determine' the composition of the jury or the decision it would have rendered if the jury had been selected pursuant to constitutional mandates", the **Barral** court deemed the court's error structural. **Id.** (quoting **Peters v. Kiff**, 407 U.S. 493, 498-505 (1972)). The error in this case is arguably much more serious than the error in **Barral**. In **Barral**, the prospective jurors were at least questioned in open court before they were selected or dismissed. Here, jurors were stricken from the venire based solely on their out-of-court statements to a marshal.

This case is also analogous to **Brass v. State**, 128 Nev. 748, 752 (2012), where this Court found structural error when the trial court overruled a **Batson**[11] challenge and dismissed a juror without holding the constitutionally-required **Batson** hearing. As this Court explained,

> Dismissing this prospective juror prior to holding the *Batson* hearing had the same effect as a racially discriminatory

[11] **Batson v. Kentucky**, 476 U.S. 79 (1986).

> peremptory challenge because even if the defendants were able to prove purposeful discrimination, they would be left with limited recourse.

Brass, 128 Nev. at 752. The error was deemed structural in **Brass** because the juror was stricken without complying with **Batson**'s constitutional mandate. Here, the court removed eight jurors without complying with Nevada's jury selection statutes. We cannot know whether those eight jurors would still have been dismissed had the oath been administered and the court properly questioned them as required by statute. As in in **Brass**, and **Barral**, the court's jury selection procedures were "intrinsically harmful to the framework of the trial" and "reversal is warranted." 128 Nev. at 754.[12]

II. The court violated Sprowson's constitutional rights by using Nevada's rape shield statutes to exclude evidence that refuted essential elements of the charges against him.

The court violated Sprowson's state and federal constitutional rights to due process and a fair trial, his right to present a defense and his right to confront the witnesses against him by improperly excluding evidence

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[12] Sprowson also had "the right under the Confrontation Clause of the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments to be present at every stage of the trial." **Collins v. State**, 405 P.3d 657, 661 (Nev. 2017) (citing **Illinois v. Allen**, 397 U.S. 337, 338 (1970); **United States v. Gagnon**, 470 U.S. 522, 526, (1985); **Nev. Const. art. I, § 8**). The court violated these rights by allowing her marshal to question the prospective jurors outside the parties' presence.

relevant to the charges against him. **U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 8.**

A. Factual and Procedural Background.

Prior to trial, the State filed a motion *in limine* to exclude evidence of J.T.'s prior sexual history at trial, relying primarily on Nevada's rape shield statutes, **NRS 50.090** and **NRS 48.069**. (III:492-506). Sprowson opposed the motion, arguing that the rape shield statutes did not apply because Sprowson was not accused of rape, the evidence was admissible under the *res gestae* doctrine, and the evidence was relevant to establish all parties' motivations and to defend against the crimes charged. (III:507-14). Although the court agreed that J.T.'s prior mental health status was relevant to the child abuse charges, it ruled that Sprowson could not tell the jury *why* J.T. had sought mental health treatment, nor could he get into any details of J.T.'s relationship history. (VI:1333-41).

Sprowson challenged the court's rape shield ruling prior to trial (VII:1419-25); but, the court refused to reconsider, telling him to look at the rape shield statutes to determine what he could or could not get into. (VI:1211;VII:1425). Sprowson also challenged the court's rape shield ruling on multiple occasions *during* trial, to no avail. (X:2125-36;XI:2316-

24, 2455-68, 2390-99, 2446-52;XII:2687-2702; XIII:2779-91). The court's rulings were reversible constitutional error.

B. The court abused its discretion and violated Sprowson's constitutional rights by applying the rape shield statutes in a non-rape case.

A district court's decision to admit or exclude evidence is reviewed for abuse of discretion. **Mclellan v. State**, 124 Nev. 263, 267 (2008). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." **Crawford v. State**, 121 Nev. 744, 748 (2005) (quoting **Jackson v. State**, 117 Nev. 116, 120 (2001)). Here, the court improperly relied on Nevada's rape shield statutes, **NRS 50.090** and **NRS 48.069**, to exclude evidence that was both admissible and highly relevant to Sprowson's defense.

By their express terms, Nevada's rape shield statutes only apply when the State is prosecuting a defendant for sexual assault, statutory sexual seduction, or conspiracy to commit either crime. See **NRS 50.090** (statute applies "[i]n any prosecution for sexual assault or statutory sexual seduction or for attempt to commit or conspiracy to commit either crime"); **NRS 48.069** (statute applies "[i]n any prosecution for sexual assault or for attempt to commit or conspiracy to commit a sexual assault").

As this Court recognized in **Sonia F v. Eighth Judicial District Court**, 125 Nev. 495, 499 (2009), "where the Legislature has . . . explicitly applied a rule to one type of proceeding, this court will presume it deliberately excluded the rule's application to other types of proceedings." By specifically listing only two types of prosecutions where the rape shield statutes apply (prosecutions for sexual assault, statutory sexual seduction, or attempt or conspiracy to commit those crimes), the Legislature intended to exclude all other crimes from the statutes' reach. See **Sonia F**, 125 Nev. at 500 ("under the rules of statutory construction, the Legislature specifically phrased **NRS 50.090** to apply to criminal prosecutions to the exclusion of civil proceedings"). Because Sprowson was charged with kidnapping, child abuse, and unlawful use of a minor in the production of pornography (II:251-54), the court abused its discretion by applying the rape shield statutes in this case. The court's evidentiary rulings violated Sprowson's constitutional rights requiring reversal.

1. Violation of Sprowson's Right to Present a Defense.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" **Crane v.**

Kentucky, 476 U.S. 683, 690 (quoting **California v. Trombetta**, 467 U.S. 479, 485 (1984)). "This right is abridged by evidence rules that 'infring[e] upon a weighty interest of the accused' and are 'arbitrary or disproportionate to the purposes they are designed to serve.'" **Holmes v. South Carolina**, 457 U.S. 319, 324-25 (2006) (quoting **United States v. Scheffer**, 523 U.S. 303, 308 (1998) (quotation omitted)).

The improperly-excluded evidence was extremely relevant to the charges against Sprowson. (III:508-13). Evidence that J.T. had a history of meeting older men on the internet and running away from her family to be with them undermined the State's theory that Sprowson kidnapped J.T. by "enticing" her. (XI:2321-23,2351-55). See **NRS 200.310(1)**.

Likewise, evidence that J.T. had been repeatedly raped at age 14 by 39-year-old David Schlomann undermined the State's claim that Sprowson's actions (as opposed to the prior, more egregious incident) caused J.T. "substantial mental harm." (VI:1335,1337;VII:1424-25). See **NRS 200.508(1).** To establish "substantial mental harm" the State had to prove that as a result of Sprowson's actions, J.T. suffered "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." **NRS 200.508(4)(e)** (emphasis added). The jury needed to know what J.T.'s "normal range of performance or behavior" was prior to meeting Sprowson and the extent of any impairment that had already been caused by Schlomann's actions. (III:513).

The excluded evidence was also necessary to the presentation of Sprowson's case under Nevada's *res gestae* statute, **NRS 48.035(3)**. (III:509-13). Sprowson was aware of J.T.'s history as a runaway and sexual abuse victim and that information affected both his actions, and the actions of J.T. and her mom (I:137;III:510-13). When Sprowson finally testified at trial, he had difficulty explaining why he did what he did because there was so much information that the court had prevented him from discussing. (XIII:2840-42, 2844, 2846, 2865). Sprowson was unable to tell his complete story in a coherent manner because the court made him leave out so many important details. The court prevented Sprowson from testifying about the contents of his conversations with J.T. that would have explained *why* he did what he did and what he knew about J.T.'s then-existing mental state. (XIII:2779-91).

Sprowson had a right to tell the jury what he knew about J.T.'s traumatic past because that information affected his own decision-making process, which was directly at issue in the case. See **Bolden v. State**, 121

Nev. 908 (2005) (kidnapping is a specific intent crime).[13] (VII:1418-19). By preventing Sprowson from introducing this vital evidence at trial, the court violated his right to present a defense.

2. Violation of Sprowson's Confrontation Clause Rights.

"The Sixth Amendment's guarantee of the right of an accused to confront accusatory witnesses is a fundamental right that is made obligatory on the states by the Fourteenth Amendment." **Ramirez v. State**, 114 Nev. 550, 557 (1998). This fundamental right is secured through cross-examination. **Id.** (citing **Davis v. Alaska**, 415 U.S. 308, 315 (1974)).

A cross-examiner may properly "delve into the witness' story to test the witness' perceptions and memory, [and] . . . has traditionally been allowed to impeach, i.e., discredit the witness." **Davis**, 415 U.S. at 316. Cross-examination should not be restricted unless the inquiries are "'repetitive, irrelevant, vague, speculative, or designed merely to harass, annoy or humiliate the witness.'" **Lobato v. State**, 120 Nev. 512, 520 (2004) (quoting **Bushnell v. State**, 95 Nev. 570, 573 (1979)).

This Court reviews whether the district violated the Confrontation Clause *de novo*. See **Chavez v. State**, 125 Nev. 328 (2009). In doing so, this Court considers the importance of the witness' testimony to the State's

[13] **Bolden** was overruled on other grounds by **Cortinas v. State**, 124 Nev. 1013 (2008).

case, whether the testimony was cumulative, the presence or absence of corroborative or contradictory evidence on material points, and "the overall strength of the prosecution's case." **Medina v. State**, 122 Nev. 346, 355, (2006) (internal citations omitted).

Here, the court violated Sprowson's confrontation clause rights by preventing him from impeaching key witness testimony about the essential elements of the charges against him and by preventing him from questioning witnesses on topics the State had already discussed on direct examination.

a. Cross-Examination Related to Kidnapping

Although the State accused Sprowson of kidnapping J.T. by "enticing" her away from her family (XIV:2997-3002), the court would not allow Sprowson to ask J.T. if his Craigslist ad was the "first" such ad she had responded to. (XI:2420). The court would not allow Sprowson to ask J.T. if the times she ran away before were "similar" to what happened in this case. (XI:2318-24). The court would not allow SPROWSON to ask J.T.'s mother about the reasons J.T. had run away from home previously. (XI:2455-68).

b. Cross-Examination Related to Child Abuse with Substantial Mental Harm

Although "substantial mental harm" was an element of the child abuse charges against Sprowson, the court would not allow him to ask J.T. or her

mother about representations they made to Dr. Emmanuel Nwapa when J.T. was admitted to Montevista. (XI:2390-99). Dr. Nwapa's letter stated that J.T. was admitted after she tried to jump off a balcony" during "an argument with her mother in regards to a 19-year-old male boyfriend." (XVI:3258-59). At trial, however, J.T. and her mother claimed that J.T. was admitted after she tried to jump off the balcony of her home because of *Sprowson*. (XI:2288-89;XII:2513). Sprowson should have been allowed to impeach this testimony by asking about the 19-year-old male boyfriend referenced in Dr. Nwapa's letter.

The court also prevented Sprowson from asking J.T. about why she was seeing a therapist prior to meeting him. (XI:2318-24). Sprowson was entitled to inquire about the nature of her therapy as it directly impacted the State's claim that Sprowson's actions caused her substantial mental harm. (III:510).

c. Cross-Examination related to Child Pornography

Although the State needed to prove that Sprowson caused J.T. to take pornographic photos of herself, see **NRS 200.710**, the court prevented Sprowson from impeaching her testimony on this important issue. Sprowson testified that one of the photographs that he was accused of producing was a pre-existing photograph of J.T.'s breasts that she had

already taken. (XIII:2879). Yet, J.T. denied ever offering Sprowson an existing "breast picture". (XI:2366-67). J.T. testified that the first time she ever took a "breast picture" was when she was communicating with Sprowson on Kik. (XI:2366-67). However, Sprowson was aware that J.T. had previously taken topless photographs and sent them to David Schlomann. (I:137;II:298). Sprowson was entitled to impeach J.T.'s testimony that she had never taken a breast picture before by asking about the pictures she'd previously sent to Schlomann. The evidence was also relevant to the State's closing argument that Sprowson "clearly . . . enticed" J.T. to take the pictures. (XVI:3381).

d. Cross-Examination Related to Topics Raised by the State

In its opening statement and on direct examination of J.T., the State presented evidence that when J.T. was communicating online with Sprowson, he asked her if she was a "virgin" and if she "liked sex" (X:2143,2213). While the court seemed to recognize that the door had been opened, it would not allow Sprowson to ask J.T. on cross-examination how she *answered* those questions. (XI:2316-17). J.T.'s responses to the questions were relevant to show Sprowson's mental state in pursing J.T. and to dispel the false impression conveyed on direct examination that Sprowson's questions were unwelcome.

In its opening statement and on direct examination of J.T., the State presented evidence that J.T. was upset that Sprowson had given her an STD. (X:2168-69,2307-08;XI:2287). The State both read and showed the jury a string of Instagram messages from J.T. that referenced the STD five times and stated, "I don't sleep around and I damn straight didn't have an std before I met you." (XVI:3260-3276). Yet, the court prevented Sprowson from asking J.T. about her "history of sexually transmitted disease" as reported to Dr. Nwapa. (XI:2390-99;XVI:3258-59).[14] Sprowson made an offer of proof that "[J.T.] specifically told [him] that she tested positive as a result of [the 2014 incident], and then they went back and tested her again and then it tested negative." (XI:2446-2452). Sprowson was aware of at least two other men that J.T. slept with who could have been the source of the STD; however, the court prevented him from presenting this information as well. Id. Although the court claimed that the STD was "irrelevant" and

[14] The court failed to offer a contemporanous oral limiting instruction when the evidence was admitted as required by **Tavares v. State**, 117 Nev. 725, 733 (2001). After the STD evidence had already been admitted, the court realized how prejudicial it was and conceded that if Sprowson had objected contemporaneously, it "probably would have sustained the objection". (XI:2447). The court also acknowledged that it "[p]robably" should have given a contemporaneous limiting instruction at the time. (XI:2451-52). The court had a duty to intervene *sua sponte* to protect Sprowson's rights when the unduly prejudicial STD evidence was admitted. See **Garner v. State**, 78 Nev. 366, 372-73 (1962).

that Sprowson had no need to respond (XI:2395), the State subsequently relied on the STD in closing to argue that Sprowson was liable for child abuse with substantial bodily harm. (XIV:3027).

On direct examination, J.T.'s doctor testified that J.T. ended up in a long term treatment program at Willow Springs in Reno, and that only 5-10% of her patients require such long term care. (XII:2694-95). The State used this evidence to argue that Sprowson was the reason for J.T.'s long term commitment. (XIV:3026). Yet, on cross-examination, the court prevented Sprowson from asking J.T.'s doctor if J.T. disclosed *another* situation that could have caused prior psychological damage. (XI:2687-2702). The court prevented Sprowson from asking J.T.s doctor if she ever disclosed harm by "anyone else". (XII:2697-2700). As a result, the jury was left with the impression that all of J.T.'s mental trauma was caused by Sprowson and Sprowson alone.

3. Violations were not Harmless Beyond a Reasonable Doubt.

The State cannot "show beyond a reasonable doubt that the error[s] complained of did not contribute to the verdict obtained." **Chapman v. California**, 386 U.S. 18, 24 (1967). After hiding behind the rape shield statutes throughout trial, the State argued in closing that J.T. and her mother had a "normal life together as mom and teenage daughter" until Sprowson

came along. (XIV:3000). Although the State promised it wouldn't argue that Sprowson "enticed" J.T. to leave her family (XI:2323,2354), the State devoted a significant portion of its closing argument to a theory of kidnapping by "enticement", using sixteen PowerPoint slides to drive the point home. (XIV:2997-3002;XVI:3294-3309).

After preventing Sprowson from discussing J.T.'s history of traumatic sexual abuse, the State argued:

> So what do we know about [J.T.]? *Prior to the defendant coming into the picture, [J.T.] is this teen, kind of has this normal relationship with her mother.* What about when she returns from the defendant's residence? She shows up at home, she has no concern for her family. Remember we talked about this before, her mom looks at her and says, That's not [J.T.] I see as I look into her eyes.

(XIV:3024) (emphasis added). The State argued that J.T. had been "forever changed in her life because of what happened" with Sprowson and that Sprowson, alone, was responsible for her mental harm. (XIV:3023). The State argued that "before this happened, [J.T.] was a high school student doing very well in high school, loved high school. After this happened, [J.T.'s] having trouble just figuring out how am I going to transition into college." (XIV:3027). The State even relied on the STD evidence to suggest that Sprowson was liable for child abuse with substantial bodily harm. (XIV:3027). Because the State cannot show that the court's erroneous "rape

shield" rulings were harmless beyond a reasonable doubt, a new trial is required.

III. Sprowson's convictions for unlawful use of a minor in the production of pornography must be reversed because they did not involve "sexual conduct" and because NRS 200.700(4) is unconstitutional.

Sprowson did not unlawfully use J.T. in the production of child pornography because the images that the State charged Sprowson with creating did not depict any "sexual conduct".[15] In addition, notwithstanding this Court's recent decision in **Shue v. State**, 407 P.3d 332 (2017), Sprowson cannot be convicted of using J.T. to produce a "sexual portrayal" because **NRS 200.700(4)** is unconstitutional.[16]

A. The Photographs at Issue Do Not Depict Sexual Conduct.

In Counts 3 and 5, the State charged Sprowson with using J.T. "to simulate or engage in sexual conduct to produce a performance" in violation of **NRS 200.710(1)**. (V:1133;XIV:3035). Sexual conduct is defined 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

[15] Sprowson raised this argument in his petition for writ of habeas corpus. (II:289-90).

[16] Sprowson challenged the constitutionality of **NRS 200.700(4)** in his petition for writ of habeas corpus. (II:290-92).

manipulated or inserted by a person into the genital or anal opening of the body of another." **NRS 200.700(3)** (emphasis added).

The photograph at issue in in Count 3 is the last photograph contained in **State's Exhibit 28**, a close-up shot of J.T.'s crotch, wearing underwear, with some pubic hair showing. (XVI:3379). See **State's Exhibit 28**.

The two photographs at issue in Count 5 were contained in **State's Exhibit 24**. (XVI:3380). In both photographs, J.T. was wearing underwear, but had her legs spread with some pubic hair showing. See **State's Exhibit 24.**

The State argued that these three pictures depicted "sexual conduct" because they were a "lewd exhibition of the genitals." (XIV:3035). However, J.T.'s genitals were covered in all three pictures, so as a matter of law this claim fails. See **State v. Castaneda**, 126 Nev. 478, 487 (2010) (genitals must be exposed for open and gross lewdness charge), citing with approval, **Com. v. Arthur**, 420 Mass. 535, 650 N.E.2d 787, 790–91 (1995) (the common law gives "fair warning" that "exposure of [one's] genitalia [is] a crime" and holding that exposing pubic hair but not genitals does not violate the law). To the extent the jury may have found Sprowson guilty under this theory, his convictions on Counts 3 and 5 must be reversed.

B. The Definition of Sexual Portrayal is Unconstitutional.

In Counts 3-6, the State charged Sprowson with using J.T. as the subject of a sexual portrayal in a performance in violation of **NRS 200.710(2)**. (V:1133-34). **NRS 200.700(4)** defines sexual portrayal 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."

The photographs at issue in Count 3 were contained **in State's Exhibit 25** and **State's Exhibit 28**. (XVI:3379). There was no nudity in any of the pictures at issue in Count 3, as J.T.'s private parts were covered by either a bra or panties in all of the pictures. See **State's Exhibits 25 & 28**.

The two photographs at issue in Count 4 were contained in **State's Exhibit 26**. (XVI:3380). In these two pictures, J.T.'s head was not visible, but her breasts and underwear were shown. See **State's Exhibit 26**.

The two photographs at issue in Count 5 were contained in **State's Exhibit 24**. (XVI:3380). As described above, in these pictures, J.T. was wearing underwear, but had her legs spread with some pubic hair showing. See **State's Exhibit 24**.

The photograph at issue in Count 6 was contained in **State's Exhibit 27**. (XVI:3380). This photograph depicted J.T.'s bare buttocks and back as seen in a bathroom mirror. See **State's Exhibit 27**.

J.T. testified that she took these pictures *after* she became Sprowson's girlfriend because he wanted them, and because she "wanted to". (I:112-13).

The State argued that all of the photographs appealed to a "prurient interest in sex" because Sprowson had "a sexual interest" in [J.T.] when he asked her to take the "sexy" pictures. (XIV:3033-34;XVI:3387). Yet, J.T. was over the age of consent in Nevada and Sprowson could legally have sex with her. See **NRS 200.364**. Where Sprowson's sexual interest in J.T. was *lawful*, it could not be deemed "prurient". See **Shue v. State**, 407 P.3d 332 (2017) (prurient means "a shameful or morbid interest in nudity, sex, or excretion" or involving "sexual responses over and beyond those that would be characterized as normal.").

Additionally, because the pictures at issue depicted no sexual conduct and no sexual abuse, the fact that Sprowson was sexually interested in J.T. – *someone he could legally have sex with* – does not convert his request for "sexy" pictures into a request for child pornography.[17] Sprowson's

[17] This case is distinguishable from **State v. Hughes**, 127 Nev. 626 (2011), which involved a visual depiction of *sexual conduct* between the defendant and a 17-year-old.

convictions for production of child pornography should be reversed because Nevada's law defining "sexual portrayal" is unconstitutional.

The Court reviews these constitutional issues *de novo*. **Ford v. State**, 127 Nev. 608, 612 (2011).

1. **NRS 200.700(4)** is facially invalid under the First Amendment.

The First Amendment prohibits the government from criminalizing speech or expressive conduct because it disapproves of the ideas expressed. **R.A.V. v. City of St. Paul, Minn**, 505 U.S. 377, 382 (1992). Therefore, "content based regulations are presumptively invalid." **Id.**

To succeed in a facial attack, Sprowson must establish that **NRS 200.700(4)** "lacks any 'plainly legitimate sweep'". **Stevens**, 559 U.S. at 472 (quoting **Glucksburg**, 521 U.S. at 740 n. 7). By criminalizing all images of children that appeal to a person's "prurient interest in sex", [18] **NRS 200.700(4)** is facially unconstitutional.

Criminalization of an image of a child based solely upon the effect it has on the viewer is unconstitutional. See **U.S. v. Villard**, 855 F.2d 117, 125 (3rd Cir. 1989)("[w]hen a picture does not constitute child pornography, even though it portrays nudity, it does not become child pornography

[18] The legislature explicitly intended A.B. 405 to "go after" persons who are sexually gratified by images of bathing-suit-clad children. See Hearing on A.B. 405 Before the Assembly Comm. on Judiciary, 68th Leg. (Nev., April 12, 1995).

because it is placed in the hands of a pedophile, or in a forum where pedophiles might enjoy it"); **Jacobson v. U.S.**, 503 U.S. 540, 551-52 (1992); **Paris Adult Theatre I v. Slaton**, 413 U.S. 49, 67 (1973); **Stanley v. Georgia**, 394 U.S. 557, 565-566 (1969); **Rhoden v. Morgan**, 863 F. Supp. 612, 619 (M.D. Tenn. 1994) ("A determination that a photograph constitutes child pornography focuses on the photograph itself rather than on the effect such photograph has on an individual viewer"); Amy Adler, Inverting the First Amendment, 149 U. Pa. L. Rev. 921, 961 (2001)("if the subjective viewpoint of the pedophile can turn any depictions of children into erotic pictures, then all representations of children could be child pornography").

Although **NRS 200.700(4)** is a content-based restriction on speech, this Court recently held in a footnote to **Shue v. State**, 407 P.3d 332, 339, n.10 (2017), that the statute does not "implicate protected speech under the First Amendment." Relying on **New York v. Ferber**, 458 U.S. 747, 757 (1982), **Shue** concluded that the First Amendment does not protect any depictions of children which "appeal to the prurient interest in sex" and which do not have "serious literary, artistic, political, or scientific value." 407 P.3d at 339.

However, in reaching this conclusion, **Shue** ignored **United States v. Stevens**, 559 U.S. 460 (2010), which was "one of the 'most doctrinally

significant constitutional opinions of the Supreme Court's October 2009 Term.'" **People v. Hollins**, 971 N.E.2d 504 (Ill. 2012) (J. Burke, dissenting) (citation omitted).

In **Stevens**, 559 U.S. at 482, the Supreme Court struck down a federal statute that criminalized the creation, sale or possession of certain depictions of animal cruelty. **Stevens** rejected the government's request that it apply **Ferber** and recognize "depictions of animal cruelty" as a new category of speech wholly exempted from First Amendment protection. **Id.** at 469-471. As Chief Justice Roberts explained:

> When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis. In *Ferber*, for example, we classified child pornography as such a category, 458 U.S., at 763, 102 S.Ct. 3348. We noted that the State of New York had a compelling interest in protecting children from abuse, and that the value of using children in these works (as opposed to simulated conduct or adult actors) was de minimis. *Id.*, at 756–757, 762, 102 S.Ct. 3348. But our decision did not rest on this "balance of competing interests" alone. *Id.*, at 764, 102 S.Ct. 3348. We made clear that *Ferber* presented a special case: The market for child pornography was "intrinsically related" to the underlying abuse, and was therefore "an integral part of the production of such materials, an activity illegal throughout the Nation." *Id.*, at 759, 761, 102 S.Ct. 3348. As we noted, "'[i]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.'" *Id.*, at 761–762, 102 S.Ct. 3348 (quoting *Giboney*, supra, at 498, 69 S.Ct. 684). *Ferber* thus grounded its analysis in a previously recognized, long-established category of

> unprotected speech, and our subsequent decisions have shared this understanding.

559 U.S. at 471 (emphasis added). **Stevens** made it clear that when **Ferber** exempted "child pornography" from First Amendment protection, it did so because the speech at issue in that case was "intrinsically related" to the "underlying sexual abuse" of children, *which was a crime in and of itself.* 559 U.S. at 471 (citing **Ashcroft v. Free Speech Coalition**, 535 U.S. 232 (2002)).

After **Stevens**, a photograph cannot constitute "child pornography" that is wholly exempt from First Amendment protection unless that photograph is "an integral part of conduct in violation of a valid criminal statute." **Hollins**, 971 N.E.2d at 520 (J. Burke, dissenting); accord Harvard Law Review Association, *The Supreme Court 2009 Term, Leading Cases, I. Constitutional Law. D. Freedom of Speech and Expression*, 124 Harv. L. Rev. 239, 247 (2010 ("According to *Stevens*, *Ferber* did not affirm a new exception to the First Amendment, but was a special example of the historically unprotected category of speech integral to the commission of a crime"); Lawrence Walters, *Symposium, Sexually Explicit Speech, How to Fix the Sexting Problem: An Analysis of the Legal and Policy Considerations for Sexting Legislation*, 9 First Amend. L. Rev. 98, 113-14 (2010 ("Any doubts as to the limits of *Ferber* and *Osborne* pertaining to the

policy justifications for child pornography prohibitions, were laid to rest by the recent Supreme Court decision in *U.S. v. Stevens*, where the Court made it clear that child pornography laws cannot be constitutionally applied in circumstances where no actual minor is sexually abused during the production of the material").

In this case, the photographs at issue did not depict any sexual conduct (let alone sexual abuse[19] of a child), that would exempt them from First Amendment protection under **Ferber** and **Stevens**. See, generally, **State's Exhibits 24-28**. In the vast majority of photographs (and in *all* photographs related to Counts 3 and 5), J.T.'s private parts were covered by her underwear. There were only three pictures that involved partial nudity (exposed breasts and buttocks) and those were charged in Counts 4 and 6. All photographs were taken in the context of a lawful, romantic relationship between two individuals who were over the legal age of consent. (I:112-13). Because the photographs were not "an integral part of conduct in violation of a valid criminal statute", they were not "child pornography". See **Hollins**, 971 N.E.2d at 520 (J. Burke, dissenting) ("there was nothing unlawful about

[19] Nevada defines "sexual abuse" as: (1) incest; (2) lewdness with a child; (3) sado-masochistic abuse; (4) sexual assault; (5) open and gross lewdness; or (6) mutilation of the genitalia of a female child, aiding, abetting, encouraging or participating in the mutilation of the genitalia of a female child, or removal of a female child from this State for the purpose of mutilating the genitalia of the child. **NRS 432B.100.**

the production of the photographs taken by defendant in this case because the sexual conduct between defendant and A.V. was entirely legal"). Likewise, because the photographs did not involve "sexual conduct", they could not be considered "obscene". **Miller v. California**, 413 U.S. 15, 23-24 (1973).

Contrary to this Court's ruling in **Shue**, 407 P.3d at 339, the phrase "which does not have serious literary, artistic, political or scientific value" did not sufficiently narrow the statute's application to avoid criminalizing innocuous photos of minors. When the government tried to make a similar argument to save the "depictions of animal cruelty" statute in **Stevens**, Justice Roberts swiftly disposed of it:

> The only thing standing between defendants who sell such depictions and five years in federal prison – other than the mercy of a prosecutor – is the statute's exceptions clause. Subsection (b) exempts from the prohibition "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value." . . . .
>
> Quite apart from the requirement of "serious" value in § 48(b), the excepted speech must also fall within one of the enumerated categories. Much speech does not. Most hunting videos, for example, are not obviously instructional in nature, except in the sense that all life is a lesson. . . .
>
> *Most* of what we say to one another lacks "religious, political, scientific, educational, journalistic, historical, or artistic value" (let alone serious value) but it is still sheltered from government regulation.

Stevens, 559 U.S. at 477-80.

Under the doctrine of *stare decisis*, this Court will not overturn precedent "absent compelling reasons for doing so." **Miller v. Burk**, 124 Nev. 579, 597 (2008). However, this Court will depart from that doctrine "where such departure is necessary to avoid the perpetuation of error." **Armenta-Carpio v. State**, 129 Nev. 531, 536 (2013) (quoting **Stocks v. Stocks**, 64 Nev. 431, 438 (1947)). Because this Court's analysis in **Shue** was soundly rejected by the United States Supreme Court in **Stevens**, it must be overruled to "avoid the perpetuation of error." See **Armenta-Carpio**, 129 Nev. at 536.

"If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest." **U.S. v. Playboy Entertainment Group, Inc.**, 529 U.S. 803, 813 (2000). In addition, the regulation must be "the least restrictive means to further the articulated interest." **Sable Communications of Cal., Inc., v. FCC**, 492 U.S. 115, 126 (1989). Courts have uniformly held that "overinclusive content-based measures fail [strict] scrutiny." **Seres v. Lerner**, 120 Nev. 928, 102 P.3d 91 (2004); *see also* **Playboy**, 529 U.S. at 818 ("It is rare that a regulation restricting speech because of its content will ever be permissible.").

Notwithstanding the government's compelling interest in preventing "sexual exploitation and abuse of children", see **Ferber**, 458 U.S. at 757, Nevada's child pornography statute fails because it is not narrowly-tailored. In order for a restriction on "child pornography" to satisfy the First Amendment, it must: (1) adequately define the prohibited conduct; (2) limit the prohibition to works that visually depict sexual conduct of children below a specified age; (3) suitably limit and describe "the category of sexual conduct proscribed;" and (4) require an element of "scienter on the part of the defendant." **Ferber**, 458 U.S. at 764-65; accord **Stevens**, 559 U.S. at 482. Because **NRS 200.710(4)** does none of these things, it is not narrowly tailored and it fails strict scrutiny. **NRS 200.710(4)** is unconstitutional because it "lacks any 'plainly legitimate sweep.'" See **Stevens**, 559 U.S. at 472 (quoting **Glucksburg**, 521 U.S. at 740 n. 7).

2. **NRS 200.700(4)** is unconstitutionally overbroad.

"[T]he 'overbreadth doctrine provides that a law is void on its face if it sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of protective First Amendment rights[.]'" **Silvar v. Eighth Judicial District Court**, 122 Nev. 289, 292 (2006) (citation omitted). In an overbreadth analysis, the "court's first task is to determine whether the enactment reaches a substantial amount of constitutionally

protected conduct." **Hoffman Estates v. Flipside, Hoffman Estates**, 455 U.S. 489, 494 (1982).

In **Shue**, this Court held that **NRS 200.700(4)** was not overbroad because it barred "a core of constitutionally unprotected expression which might be limited". See **Shue**, 407 P.3d at 339. However, as set forth above, the statute bars far more than the "child pornography" deemed unprotected in **Ferber** and the "obscenity" deemed unprotected in **Miller**. See, e.g., **Stevens**, 559 U.S. at 471; **Ashcroft v. Free Speech Coalition**, 535 U.S. 234, 251 (2002) ("where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment."); **Hollins**, 971 N.E.2d at 520 (J. Burke, dissenting) (photograph is not "child pornography" exempt from First Amendment protection unless it is "an integral part of conduct in violation of a valid criminal statute", *i.e.*, it is the product of sexual abuse).

Again, contrary to this Court's ruling in **Shue**, 407 P.3d at 339, the phrase "which does not have serious literary, artistic, political or scientific value" does not sufficiently narrow the statute's application to avoid criminalizing innocent photos of minors. See **Stevens**, 559 U.S. at 477-480. That phrase originated in **Miller v. California**, 413 U.S. 15 (1973), which established an "obscenity" test to determine if an image was unprotected by

the First Amendment. However, **Miller**'s obscenity test was expressly limited to works which, *in and of themselves*, depicted or described sexual conduct:

> We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed.

Miller, 413 U.S. at 23-24 (internal citations omitted) (emphasis added).

Unfortunately, **NRS 200.700(4)** applies to all photographs of children regardless of whether they depict or describe any "sexual conduct" that is specifically defined under the applicable state law. C.f. **Miller**, 413 U.S. at 23-24. In violation of **Miller**, the statute impermissibly focuses on the effect the photographs have on the viewer and whether those photographs appeal to the viewer's "prurient interest in sex".

Even with **NRS 200.700(4)**'s supposed limitations, the statute is undeniably overbroad. A mother who takes photos of her children in the bath, wearing swimsuits on the beach, or running around in their underwear at home and uploads them to Facebook could be a pornographer if the photos are later obtained by a pedophile who finds them sexually stimulating. A seventeen-year-old who takes a seductive "selfie" in her

underwear and uploads that photo to her Instagram feed could also be a child pornographer if anyone is sexually aroused by the photo. Two fifteen-year-olds who use Snapchat to exchange "sexy" swimsuit selfies are likewise child pornographers if they took the pictures for a "sexual" purpose. Indeed, the State could have charged J.T. with producing pornography in this case because she took the "sexy" photos herself. The only thing saving J.T. from criminal liability in this case was the State's prosecutorial discretion.

NRS 200.700(4) is substantially overbroad because it criminalizes almost every non-commercial photographic image of a minor that appeals to a viewer's "prurient interest in sex". See **Stevens**, 559 U.S. at 480 ("*Most* of what we say to one another lacks "religious, political, scientific, educational journalistic, historical, or artistic value" (let alone serious value) but is still sheltered from government regulation."). Given the widespread dissemination of such photographs via text message, and on social media platforms like Facebook, Instagram and Snapchat, **NRS 200.700(4)** is profoundly overbroad in its sweep. **Shue** must be overruled. See **Armenta-Carpio**, 129 Nev. at 536.

3. **NRS 200.700(4)** is unconstitutionally vague, both on its face and as applied.

The "[v]agueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment." **U.S. v. Williams**, 533 U.S. 285, 304 (2008). "A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." **Id.** "Laws must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly, and must also provide explicit standards for those who apply the laws, to avoid arbitrary and discriminatory enforcement." **Sheriff v. Martin**, 99 Nev. 336, 339 (1983) (citing **Hoffman Estates**, 455 U.S. at 498).

Nevada's definition of "sexual portrayal" fails to provide adequate notice as to what conduct, activity or imagery is prohibited. (II:292-92). The statute focuses not on whether the image of the minor contains sexual conduct, but instead on the potential effect the image has on a viewer. Therefore, a reasonable person must guess at what images appeal to some person's morbid interest in sex.

The definition lacks any objective standards to guide law enforcement. Any parent who takes a naked or semi-clothed photograph of

their child and puts it on Facebook could be prosecuted and convicted as a child pornographer if the image is sexually gratifying to a pedophile. Any teenagers under the age of 18 who post "sexy" selfies on Instagram could be prosecuted and branded sex offenders for the rest of their lives. Any teenagers under the age of 18 who "sext" each other could likewise be prosecuted and branded lifelong sex offenders. This is particularly troubling given the high prevalence of sexting among teens. See Megan Sherman, Sixteen, Sexting, and A Sex Offender: How Advances in Cell Phone Technology Have Led to Teenage Sex Offenders, 17 B.U. J. Sci. & Tech. L. 138, 139 (2011) ("according to a study by the National Campaign to Prevent Teen and Unplanned Pregnancy, one in five teenagers (twenty percent) admit to participating in sexting."); see also Sarah Wastler, The Harm in "Sexting"?: Analyzing the Constitutionality of Child Pornography Statutes that Prohibit the Voluntary Production, Possession, and Dissemination of Sexually Explicit Images by Teenagers, 33 Harv. J.L. & Gender 687 (2010) ("existing child pornography statutes are unconstitutional to the extent that they proscribe the voluntary production and dissemination of self-produced pornographic images").

Criminalizing "sexual portrayals" allows police and prosecutors to brand someone a "pedophile" and then prosecute them for creating or

possessing otherwise lawful photographs of minors under the age of 18. To secure a conviction, the State need only argue that the so-called "pedophile" was sexually aroused by the photographs and suddenly the photographs become pornography. That's exactly what happened in this case when the State argued in closing that Sprowson was guilty of producing pornography because he was sexually interested in J.T. when he requested that she send him "sexy" photos. (XIV:3032-34;XVI:3387-88).

Yet, Sprowson was not a pedophile. Because J.T. was 16 years old, Sprowson could legally have sexual intercourse her. See **NRS 200.364**; see also **Lawrence v. Texas**, 539 U.S. 558, 578 (2003) (sexual intimacy between two consenting adults is a fundamental privacy right). Where Sprowson's sexual desire for J.T. was legal, his sexual interest in J.T.'s photographs does not convert "sexy" photographs into "child pornography". Again, all of the photographs in this case were taken during a lawful, romantic relationship between two individuals who were over the age of consent. None of the pictures depicted "sexual conduct". Sprowson could not have known that requesting "sexy" pictures would render him liable for production of child pornography. (II:292). For all the foregoing reasons, **NRS 200.364** is unconstitutionally vague, both on its face and as applied.

IV. The court violated Sprowson's constitutional rights by denying his request to call J.T. as a witness in his case in chief unless he could afford to pay for her travel, where the court was aware of his indigent status.

Since May of 2015, the court knew Sprowson was indigent and lacked financial resources to defend himself. (III:576-77). At that time, Sprowson submitted an *ex parte* application pursuant to **NRS 7.135**, the Sixth and Fourteenth Amendments of the United States Constitution, and Article 1, Section 8 of the Nevada Constitution, asking "the State to pay the reasonable costs associated with defending the Defendant against the alleged charges". (II:568-573). In a Minute Order on May 27, 2015, the Court found Sprowson "indigent" and granted his request for reasonable defense costs. (III:576-77).

On the third day of trial, Sprowson sought permission to call J.T. as a witness in his case-in-chief after the State rested. (X:2010-20). The State informed Sprowson that J.T. was "flying out of the area" after she testified in the State's case-in-chief. (X:2010). The State objected to making J.T. available during Sprowson's case-in-chief because it did not want her to miss school. (X:2012). The State further objected because Sprowson had not formally "noticed" J.T. as a witness. (X:2014).

Sprowson explained that he wanted to reserve his direct examination of J.T. until he presented *his* case-in-chief because needed "time to prepare"

a response to the State's case. (X:2012). Sprowson explained that "fundamental fairness" and his constitutional right to present a defense were additional reasons to grant his request. (X:2010,2013-14).

Although the court ruled that Sprowson could call J.T. in his case-in-chief because the lack of notice did not prejudice the State, it conditioned that right on Sprowson's ability to pay for her appearance. (X:2013). If Sprowson could not afford to fly J.T. back to Las Vegas to testify in his case-in-chief, he could not question her in his case-in-chief. (X:2018).

The court's ruling violated Sprowson's constitutional rights to due process and equal protection under state and federal law. In **Griffin v. Illinois**, 351 U.S. 12 (1956), the Supreme Court deemed it unconstitutional to require an indigent criminal defendant to pay for a transcript in order to appeal his conviction. As the Court explained:

> Surely no one would contend that either a State or the Federal Government could constitutionally provide that defendants unable to pay court costs in advance should be denied the right to plead not guilty or to defend themselves in court. Such a law would make the constitutional promise of a fair trial a worthless thing. Notice, the right to be heard, and the right to counsel would under such circumstances be meaningless promises to the poor. In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial.

Griffin, 351 U.S. at 17–18. This Court reached a similar conclusion in **State v. Second Judicial Dist. Ct.**, 85 Nev. 241 (1969) ("the constitutional rights of the accused require that court-appointed counsel be reimbursed for out-of-pocket expenses in representing his client").

As his own attorney, Sprowson had a constitutional right to present his case as he saw fit and introduce witnesses in his case-in-chief. See **Faretta**, 422 U.S. at 819 ("The Sixth Amendment . . . grants to the accused personally the right to make his defense. It is the accused, not counsel . . . who must be accorded 'compulsory process for obtaining witnesses in his favor.'"). J.T. was the most important witness in the case. The State chose to present J.T. as its first witness (X:2203-04), and thereafter introduced additional testimony from her mother, her physician (Bryn Rodriguez), and her therapist (Vena Davis) to establish that J.T. experienced substantial mental harm as a result of Sprowson's actions. (XI:2470-XII:2526,2687-2702;XIII:2806-2821). Sprowson was entitled to recall J.T. to testify in his case-in-chief after the State rested so he could question her about new information relayed by the other three witnesses.

Where the court was aware of Sprowson's indigent status and had already ruled that he was entitled to "reasonable costs associated with defending the Defendant against the alleged charges" (II:568-573), it was

harmful constitutional error for the court to condition Sprowson's ability to call J.T. in his case-in-chief upon his ability to pay. See **Griffin**, 351 U.S. at 17–18; **Second Judicial Dist. Ct.**, 85 Nev. at 244.

V. Prosecutorial misconduct so infected the trial with unfairness as to make Sprowson's resulting convictions a denial of due process.

Prosecutorial misconduct violated Sprowson's state and federal constitutional rights to a fair trial by an impartial jury and to due process of law. **U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3 and 8.** "When considering claims of prosecutorial misconduct, this [C]ourt engages in a two-step analysis. First, [it] must determine whether the prosecutor's conduct was improper. Second, if the conduct was improper, [it] must determine whether the improper conduct warrants reversal." **Valdez v. State**, 124 Nev. 1172, 1188 (2008).

When the defense objects to prosecutorial misconduct, this Court applies a harmless error standard of review on appeal. **Id**. If the error is of constitutional dimension, this Court applies **Chapman v. California**, 386 U.S. 18 (1967), and reverses unless the State shows beyond a reasonable doubt that the error did not contribute to the verdict. **Valdez**, 124 Nev. at 1189. Prosecutorial misconduct can reach a constitutional dimension if "in light of the proceedings as a whole, the misconduct 'so infected the trial with

unfairness as to make the resulting conviction a denial of due process.'" **Valdez**, 124 Nev. at 1189 (quoting **Darden v. Wainwright**, 477 U.S. 168, 181 (1986)). When prosecutorial misconduct was not objected to and preserved for appeal, this Court will review for plain error. **Valdez**, 124 Nev. at 1190. This Court will reverse when plain error affects appellant's substantial rights by "causing 'actual prejudice or miscarriage of justice.'" **Id.** (quoting **Green v. State**, 119 Nev. 542, 545 (2003)).

A. The State gave what amounted to a closing argument during voir dire, *determined which jurors were most susceptible to that argument and ensured that those jurors were empaneled.*

The purpose of *voir dire* is "to discover whether a juror 'will consider and decide the facts impartially and conscientiously apply the law as charged by the court.'" **Witter v. State**,[20] 112 Nev. 908, 914 (1996) (quoting **Adams v. Texas**, 448 U.S. 38, 45 (1980)). The parties may question potential jurors to evaluate bias, but may not "indoctrinate or persuade the jurors." **Khoury v. Seastrand**, 132 Nev. Adv. Op. 52, --, 377 P.3d 81, 86 (2016) (internal quotation omitted). See also **State v. Holmquist**, 243 S.W.3d 444, 451 (Mo. Ct. App. 2007) ("Counsel may not . . . try the case on *voir dire*, may not attempt to elicit a commitment from the jurors about how they would react to hypothetical facts, and may not seek to predispose any of

[20] **Witter** was overruled on other grounds by **Nunnery v. State**, 127 Nev. 749, 776 (2011).

the jurors to react a certain way to anticipated evidence"); accord **People v. Polk**, 942 N.E.2d 44, 66 (Ill. App. 2010) ("The purpose of *voir dire* is to select an impartial jury, not to indoctrinate a jury or choose a jury with a predisposition").

In this regard, Eighth Judicial District Court Rule 7.70(b)-(d) prohibits *voir dire* questioning regarding anticipated legal instructions, a potential verdict based on hypothetical facts, and questions that are, in substance, arguments of the case. Prosecutors have a special obligation to comply with these rules governing *voir dire*. According to the commentary to the ABA Standards for Criminal Justice, Prosecution Function and Defense Function, Standard 3–5.3(c) (3d ed. 1993): "A prosecutor should not intentionally use the voir dire to ... argue the prosecution's case to the jury."

In this case, the State gave what amounted to a closing argument during its introduction in *voir dire*, determined which potential jurors were most susceptible to that improper argument, and then ensured that those jurors were subsequently empaneled. Reversal is required.

1. The State's Introduction and Sprowson's Objection

The court invited the State to "please stand up, introduce themselves and tell us a little bit about the case." (VIII:1776). The prosecutor then described the case in graphic detail, using highly inflammatory language:

> Specifically, it's alleged that between July 1st, 2013, and November 1st of 2013, Melvyn Sprowson, the Defendant, at the age of about 44, developed a sexual relationship with 16-year-old girl by the name of [J.T.]. Contact was initially made on Craigslist over the Internet and that progressed to a continued contact between the Defendant and -- and this child over the Internet and by phone in which the Defendant asked [J.T.] to be his girlfriend, which progressed to the Defendant causing [J.T.] to take nude and sexually explicit photos of herself and send them to the Defendant over the computer through the Internet; and which lead to the Defendant picking up [J.T.] from her home, the home she shared with her mother, her sister and her grandmother in the middle of the night while her family slept, and taking her to live at his house for an extended period of time while [J.T.'s] family searched for her.
>
> Now, [J.T.] was at the Defendant's residence, residing for approximately nine weeks, and during which this -- over this period of time was completely isolated from any contact with her parents or anyone else, not attend school, slept in the same bed as the Defendant and was caused to perform sexual acts. And this continued over this period of about nine weeks until the police found the child at that residence.

(VIII:1777-78).

Despite his *pro se* status, Sprowson recognized the incendiary nature of the prosecutor's argument and tried to refute it when he introduced himself to the jury. (VIII:1779-80). Yet, the State immediately objected and the court sustained the objection, telling him it was improper to "try our case

right now." (VIII:1779-80).[21] By giving a closing argument during jury selection, the State violated Sprowson's constitutional right to a fair trial by an impartial jury. See, e.g., **Watters v. State**, 129 Nev. 886, 892 (2013).

2. The State identified the prospective jurors who had the strongest "reaction" to their improper argument and six of them were later empaneled.

The State's misconduct during *voir dire* was magnified when it asked whether any of the prospective jurors "had a strong reaction" to its inflammatory "introduction" and eight (8) people raised their hands. (IX:1907-24). This line of questioning was a blatant "attempt to elicit a commitment from the jurors about how they would react" to the State's theory of the case, **Holmquist**, 243 S.W.3d at 451, allowing it to improperly "choose a jury with a predisposition." **Polk**, 942 N.E.2d at 66.

Ultimately, six (6) of the twelve (12) jurors who ended up sitting in judgment of Sprowson were individuals who admitted they were strongly affected by the State's improper argument during *voir dire*, including

[21] Sprowson recognized that the court's ruling impacted his right to a "fair trial". (VIII:1780). He wanted the "same opportunity" to argue his case in *voir dire* that the State just had. (VIII:1780). This Court should liberally construe Sprowson's *pro se* objections as having preserved this issue for appellate review. See, e.g., **United States v. Gray**, 581 F.3d 749, 752–53 (8th Cir. 2009) ("We liberally construe pro se objections to determine whether the defendant objected"); **Erickson v. Pardus**, 551 U.S. 89, 94 (2007) ("A document filed *pro se* is 'to be liberally construed,' and 'a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers'").

Gwendolyn Peete[22], Leslie Thomas, Martha Silvasy,[23] Antoinette Cisneros, and Diane Rafferty. (V:1129).

This was no accident. The State took advantage of the fact that Sprowson was a *pro se* litigant to deprive him of his right to a fair trial by an impartial jury. No matter what standard of review this Court applies on appeal -- be it plain error or constitutional harmless error -- Sprowson is entitled to a new trial because the jury was predisposed to find him guilty. See **Valdez**, 124 Nev. at 1189-90.

B. The State indoctrinated the jury about "grooming" and relied on comments made by jurors to argue in closing that SPROWSON had "groomed" J.T.

The State engaged in further misconduct during *voir dire* by eliciting testimony from a prospective juror about the concept of grooming and turning her into a *de facto* expert on the subject:

> PROSPECTIVE JUROR NO. 651: All of us Clark County School District employees are required to watch sexual harassment videos and in it it mentions being groomed or grooming, someone that targets an individual and prepares them for some sort of sexual harassment.

---

[22] Peete disclosed that she had "a chill and ugly feeling" when she saw Sprowson, and that "when they said [the] statement, then my stomach dropped. So I don't know if I could be fair with the – with him." (IX:1922).
[23] Silvasy did not know if she could be "true to the system" after hearing the State's recitation of charges, which were "a horrible thing to happen to a child". (IX:1917).

MS. BLUTH: Okay. So in the -- in the video that you watched, did -- were you ever -- like, could you give an example?

PROSPECTIVE JUROR NO. 651: For example, a teacher might ask a student to stay after and maybe ask questions, leading questions, is your mom at home, or something like that and try to get some information and, then, maybe compliment them, make them feel really good about who they are and what they see, so that kind of thing.

MS. BLUTH: Okay. So and -- and, then, another example of grooming -- and I'm going to ask a question after this -- is that, then, the teacher starts meeting them every day.

PROSPECTIVE JUROR NO. 651: Exactly.

MS. BLUTH: And, then, it's not at school anymore, it's away from school?

PROSPECTIVE JUROR NO. 651: Away from school, yes.

MS. BLUTH: And, then, it's sleepovers and things like that?

PROSPECTIVE JUROR NO. 651: Yes.

MS. BLUTH: That's grooming.

PROSPECTIVE JUROR NO. 651: Yes.

(IX:1986-88). The State used Juror 651 to indoctrinate the jury about the concept of grooming. By highlighting evidence that would be presented at trial (*e.g.*, teacher/student sleepovers), the State invited the jury to use "grooming" as the lens through which they viewed evidence in the case. This was misconduct. See **Khoury**, 377 P.3d at 86 (parties may not "indoctrinate or persuade the jurors" during *voir dire*); **EJDCR 7.70(b)-(d)**

(prohibiting *voir dire* questions that are, in substance, arguments of the case).

The State's misconduct was highly prejudicial. In closing, the State used Juror 651's "definition of grooming" to argue that Sprowson was liable for kidnapping under a grooming theory. (XIV:3001). The State also used Juror 651's status as a school teacher trained by the Clark County School District about grooming to impeach Sprowson's credibility after he testified that he did not know what grooming was. (XIV:3001). These arguments were improper because they were not based on evidence in the case. See **Williams v. State**, 103 Nev. 106, 110 (1987) ("prosecutor may not argue facts or inferences not supported by the evidence.").

The prosecutor's improper grooming arguments are similar to those deemed reversible error by the Kansas Supreme Court in **State v. Simmons**, 254 P.3d 97 (Kan. 2011). In **Simmons**, 254 P.3d at 105, a prosecutor indoctrinated the jury on Stockholm Syndrome during *voir dire* by "establish[ing] a definition of Stockholm Syndrome through a potential juror, appear[ing] to make the definition unassailable by openly agreeing with it" and "ask[ing] the panel to view certain evidence against A.H. 'in light of the Stockholm Syndrome" as defined by the venireperson and

himself – an intentional improper use of voir dire to argue an important part of his case to the jury".

Here, as in **Simmons**, the State used *voir dire* to indoctrinate the jury on grooming and used "evidence" presented by a juror to argue that Sprowson was guilty of kidnapping and had lied to the jury. Although Sprowson did not object, the State's misconduct affected his substantial rights by "causing 'actual prejudice or miscarriage of justice.'" **Valdez**, 124 Nev. at 1190 (quoting **Green**, 119 Nev. at 545).

C. The State impermissibly commented on Sprowson's constitutional rights.

Prosecutorial "misconduct that involves impermissible comment on the exercise of a specific constitutional right has been addressed as constitutional error." **Valdez**, 124 Nev. at 1190 (citing **Chapman**, 386 U.S. at 21, 24; **Bridges v. State**, 116 Nev. 752, 764 (2000)).

The Sixth Amendment's Confrontation Clause guarantees the defendant a "face-to-face meeting" with witnesses testifying against him. **Coy v. Iowa**, 487 U.S. 1012, 1016 (1988). "That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs." **Coy**, 487 U.S. at 1020.

At trial, the State repeatedly commented on Sprowson's Confrontation Clause rights by presenting evidence and argument about the stress and anxiety that J.T. suffered after Sprowson chose to defend himself at trial. The State elicited the following testimony from J.T.'s therapist:

> Q Okay. . . . **Did she express to you that there was still a court case going on?**
>
> A Yes.
>
> Q **And did she have fears or anxiety about that?**
>
> A Yes.
>
> . . . .
>
> Q **Did she discuss with you a specific aspect of the case that made her particularly upset?**
>
> A Yes.
>
> Q And what was that?
>
> A Two things, people knowing that, you know, she was the victim and, then, also, **being cross-examined.**
>
> Q **Did she express anxiety about the fact that she felt that the -- the Defendant was blaming her?**
>
> A Yes.

(XIII:2818-19) (emphasis added). In a case where the State was required to prove, beyond a reasonable doubt that Sprowson's *crimes* caused J.T. substantial mental harm, see **NRS 200.508**, it was unduly prejudicial for the

State to present "expert" testimony that J.T. suffered anxiety because Sprowson pled "not guilty" and chose to represent himself. This was a direct comment on Sprowson's exercise of his constitutional rights and reversible constitutional error, notwithstanding his failure to object.

The State's misconduct was compounded in closing when the prosecutor highlighted J.T.'s courtroom anxiety for the jury, and described the damage that Sprowson was continuing to inflict by exercising his personal right of confrontation:

> nothing spoke louder when [J.T.] didn't realize that the defendant would get to approach her with exhibits and things like that. And she shot that chair back and started kind of to scream and cry. Those types of things, those actions mean way more than anything that I could ever tell you in a closing argument.

(XIV:3097). The State went on to describe J.T.'s demeanor when Sprowson was cross-examining her and pointed out that "[s]he wouldn't even look up for the first 40 minutes." (XIV:3105).

In addition, the State impermissibly commented on Sprowson's decision to plead "not guilty" by urging the jury to hold him "responsible" during rebuttal closing, since he refused to take responsibility at the trial. Initially, during cross-examination, the State asked Sprowson multiple questions about taking responsibility for his actions including, "But you're saying you didn't do it, so what are you taking responsibility for?"

(XIII:2959-62). In rebuttal closing, the State argued, "when people won't take responsibility for their own actions, somebody else has to find them accountable for their actions." (XIV:3101). The State further argued, "when someone won't be responsible or hold themselves accountable for their decisions, that's when a jury comes in. You are the only 12 people who can tell him what he did was wrong". (XIV:3109-10).

The State' comments told the jury to hold Sprowson accountable because he had the audacity to plead not guilty. Despite Sprowson's failure to object, the State's comments were reversible plain error. See, e.g., **State v. Johnson**, 360 S.E.2d 317 (S.C. 1987) (prosecutor's "improper reference to appellant's lack of remorse was error because it was a comment upon his constitutional right to plead not guilty and put the state to its burden of proof", requiring reversal).

VI. Cumulative error requires reversal.

"The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." **Valdez**, 124 Nev. at 1195 (quotation omitted). When evaluating a claim of cumulative error, this Court will consider: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3)

the gravity of the crime charged." **Id.** (quotation omitted); see also **Taylor v. Kentucky**, 436 U.S. 478, 487 n. 15 (1978).

The first factor supports reversal because the evidence against Sprowson was not overwhelming. None of the photographs that Sprowson obtained from J.T. involved any sexual conduct that would constitute child pornography, as defined in **Ferber**, or obscenity, as defined in **Miller**. As to the child abuse and kidnapping counts, this Court cannot find overwhelming evidence of guilt where the court actively prevented Sprowson from refuting essential elements of both claims.

The quantity and character of errors also supports reversal. The court's multiple errors were constitutional in nature -- delegating *voir dire* to a marshal and excusing jurors based on their unsworn out-of-court statements, improperly using Nevada's rape shield statutes to exclude key defense evidence, and denying Sprowson's request to call J.T. as a witness in his case-in-chief based solely on his indigent status. The prosecutors' actions also violated Sprowson's constitutional rights: making improper arguments in *voir dire* and closing, selecting jurors predisposed to find Sprowson guilty, and commenting on Sprowson's constitutional rights.

The crimes charged – kidnapping, child abuse, and use of a minor in the production of pornography – are grave, and Sprowson is currently

serving sentence of 12.5 years to life. Because the cumulative effect of errors in this case denied Sprowson a fair trial, reversal is required. See **Valdez**, 124 Nev. at 1198.

CONCLUSION

Sprowson requests that his convictions be reversed and his case remanded for a new trial on all but the unconstitutional child pornography counts.

Respectfully submitted,

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DATED this 2 day of May, 2018.

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