IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER SENA, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	NO. 79036

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEF.
309 South Third Street, #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

Attorney for Appellant

STEVEN B. WOLFSON
CLARK COUNTY DA
200 Lewis Avenue, 3rd Floor
Las Vegas, Nevada 89155
(702) 671-2700

AARON D. FORD
Attorney General
100 North Carson Street
Carson City, Nevada 89701
(775) 684-1265

Counsel for Respondent

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER SENA, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	NO. 79036

APPELLANT'S OPENING BRIEF

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEF.
309 South Third Street, #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

Attorney for Appellant

STEVEN B. WOLFSON
CLARK COUNTY DA
200 Lewis Avenue, 3rd Floor
Las Vegas, Nevada 89155
(702) 671-2700

AARON D. FORD
Attorney General
100 North Carson Street
Carson City, Nevada 89701
(775) 684-1265

Counsel for Respondent

TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES

PAGE NO.

Cases

Misc. Citations

Statutes

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER SENA, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	NO. 79036

APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

Appellant CHRISTOPHER SENA ("Sena"), appeals from a final judgment under Nevada Rule of Appellate Procedure 4(b) and NRS 177.015. The district court filed the Amended Judgment of Conviction on July 08, 2019. Appellant's Appendix Vol. XI p. 2399-2407 ("AA XI 2399-2407"). Sena timely filed his Notice of Appeal on June 14, 2019. Id. at 2393.

ROUTING STATEMENT

Sena's case is presumptively assigned to the Nevada Supreme Court because of his 95 convictions after jury trial, seventy-one (71) are category A felonies and thirteen (13) are category B felonies. Id. at 2399-2407. Convictions involving category A or B felonies after

jury trial are not within the original jurisdiction of the Court of Appeals. See NRAP 17(b)(2)(A).

ISSUES PRESENTED FOR REVIEW

I. The Courtroom Closure Violated Sena's State and Federal Constitutional Right to a Public Trial.

II. The State Filed Numerous Charges Outside the Statutes of Limitation.

III. The State Presented Insufficient Evidence of Guilt.

IV. Sena's Convictions Violate His Due Process Right Against Multiple Convictions for the Same Offense.

V. Sena's Convictions Violate His Due Process Rights Under the Double Jeopardy Clause of the United States and Nevada Constitutions.

STATEMENT OF THE CASE

On September 19, 2014, the State filed a criminal complaint charging Sena with: five (5) counts of Child Abuse, Neglect or Endangerment; three (3) counts of Sexual Assault with a Minor Under 14; three (3) counts of Lewdness with a Minor Under 14; three (3) counts Sexual Assault with a Minor Under 16; and four (4) counts of Incest, for a total of 18 counts. AA I 1-6. On September 22, 2014, the

Justice Court arraigned Sena and appointed the Clark County Public Defender to represent Sena. Id. at 78.

On October 22, 2014, the State filed an amended criminal complaint adding an three (3) additional counts of Sexual Assault on a Minor Under 14, one (1) count of Lewdness with a Minor Under 14, and one (1) count Preventing or Dissuading Witness or Victim from Reporting Crime or Commencing Prosecution, for a total of 23 counts. Id. at 7-13. On December 18, 2014, the State filed a second amended criminal complaint, removing one count of Incest, skipping count 15 entirely, and adding: nine (9) counts Possession of Child Pornography; four (4) counts Use of Minor in Production of Pornography; four (4) additional counts of Lewdness with a Minor Under 14; two (2) counts of Promotion of Sexual Performance of Minor Under 14; eleven (11) additional counts of Sexual Assault on a Minor Under 14; four (4) additional counts of Sexual Assault on Minor Under 16; and two (2) counts of Sexually Motivated Coercion, for a total of 57 counts. Id. at 14-33.

The justice court commenced the preliminary hearing on August 27, 2015 and completed the hearing on November 20, 2015. Id. at 93-96. On December 15, 2015, the State filed a Third Amended Criminal

Complaint alleging 124 total counts including: Conspiracy to Commit Sexual Assault; Lewdness with a Minor Under 14; Sexual Assault on a Minor Under 14; Sexual Assault on a Minor Under 16; Incest; Open and Gross Lewdness; Sexual Assault; Preventing or Dissuading a Witness or Victim from Reporting Crime or Commencing Prosecution; Child Abuse and Neglect via Sexual Exploitation; Possession of Child Pornography; Use of Minor in Production of Pornography; and Use of Minor Under 14 in Production of Pornography. Id. at 34-76. On that same date the magistrate held Sena to answer on all counts in the district court. Id. at 100-111.

The State filed the Information in the district court on December 16, 2015. AA V 1008. On January 20, 2016, Sena pleaded not guilty and waived his Constitutional and statutory right to a speedy trial. AA XI 2409. During the pendency of trial, Sena filed a pretrial petition of writ of habeas corpus,[1] and both the State and defense filed numerous motions and notices. Id. at 2411-41. The State also amended the Information on October 12, 2016 over Sena's objection. AA VI 1251-1301; AA XI 2416.

[1] The district court denied Sena's petition *via* written order on October 31, 2016. AA VI 1251-1301.

Sena's trial began on September 5, 2018. AA XI 2441. Just before trial began the State filed a Second Amended Information containing 120 total counts. AA IX 1959-2001; AA XI 2441. After a discovery dispute arose on the trial's third day, the court released the jurors and rescheduled trial for January 28, 2019. AA XI 2445. On January 23, 2019, the State filed a Third Amended Information. AA X 2115-2157; AA XI 2449.

The new trial began on January 28, 2019. AA XI 2450. *Voir dire* lasted four days. AA XI 2449-56. After the court read the empaneled jurors the Third Amended Information, the State filed a Fourth Amended Information. AAX 2171-2213; AA XI 2457. According to the 4th Information, counts 1-53 alleged crimes committed against Sena's biological daughter AS. See AA X 2172-87. Counts 54-69 alleged crimes committed against Sena's biological son TS. Id. at 2187-94. Counts 70-86 alleged crimes committed against Sena's biological son BS. Id. at 2194-2202. Counts 87-106 alleged crimes committed against Sena's ex-wife Terrie's son RS. Id. at 2202-09. Counts 107-116 alleged crimes committed against Terrie's niece EC. Id. at 2209-11. Counts 117-119 alleged crimes committed against Terrie's niece TG. Id. at 2211-12. Count 120

alleged one crime committed against Terrie's sister MC. Id. at 2212-13.

Sena's trial concluded on February 19, 2019. AA XI 2471. On February 21, 2019, the jury found Sena guilty of 95 total counts and acquitted him of 25 counts. AA XI 2359-2383. At Sena's sentencing hearing on May 28, 2019, the district court stayed adjudication on certain counts[2] and imposed various concurrent and consecutive sentences on the remaining counts for a total aggregate sentence of 327 years to life in prison. AA XI 2384-92.

The court filed the Judgment of Conviction on May 31, 2019. Id. at 2384. Sena filed his Notice of Appeal on June 14, 2019. Id. at 2393. On June 8, 2019, the court filed an Amended Judgment of Conviction adding language concerning lifetime supervision. Id. at 2399, 2407.

STATEMENT OF FACTS

- **Sena family background.**

On May 22, 1990, Sena and Terrie had a daughter, AS. AA XX 4459. Sena and Terrie married on September 17, 1990. AA XXIII

[2] The district attorney acknowledged it pleaded some counts alternatively to other counts and thus the convictions merged. See AA XXIX 6731.

5239. Terrie has two sisters relevant to this case, Kimberly Grisham and MC. See AA XX 4464-670. Kimberly had a daughter relevant to this case, TG. AA XXII 4987. MC had a daughter relevant to this case, EC. AA XXI 4907.

Sena and Terrie separated in 1993 but reunited in 1994. AA XXIII 5241. Sometime in 1994, Sena and Terrie moved to Denver, Colorado. Id. While in Denver, Sena and Terrie had a son, TS. Id. at 5242. TS was born on December 2, 1994. In 1995 Terrie and Sena returned to Las Vegas. Id.

Sena and Terrie separated after returning to Las Vegas but reunited in 1996. Id. at 5265. In August 1997 Sena and Terrie divorced. Id. at 5266, 5269. Pursuant to the divorce decree, the court awarded Sena primary physical custody of AS and TS. Id. at 5267. After the divorce Terrie became pregnant *via* another individual. Id. at 5274-75. On June 14, 1998 Terrie gave birth to a son, RS. AA XXIV 5514.

Sena met his second wife Deborah sometime during 1997. AA XX 5859. In late 1997 or early 1998, Deborah became pregnant with Sena's son, BS. Id. at 5862. Sena and Deborah married in 1998. Id. at 5865. BS was born on August 13, 1998. AA XXIII 5275. That

same year Terrie moved into Sena's trailer on Yellowstone Ave. in Las Vegas with her son RS. Id. at 5274. Beginning in 1998, the following persons resided in Sena's trailer: Sena; Terrie; Deborah; AS; TS; BS; and RS.

Each of Sena's children, as well as Terrie's son RS, alleged Sena sexually abused them throughout their lives. The State also alleged Sena sexually abused Terrie's sister MC and MC's daughter EC. Additionally, Sena's children, Terrie, and Deborah, all claimed Sena physically and mentally abused them as well. See AA XXIII 5240, 5270, 5337; AA XXV 5877-78. For example, AS claimed several incidents of abuse where Sena allegedly physically battered her.[3] See AA XX 4500, 4506-07. BS claimed that Sena was generally an abusive and controlling person. AA XXV 5708. RS claimed Sena was both physically and emotionally abusive. AA XXIV 5520. Nevertheless, despite Sena's alleged abuse, Terrie and RS routinely moved in and out of the Yellowstone Ave. between 1999 and 2014 and never reported any abuse to authorities. AA XXIII 5282.

- **Specific allegations against Sena**.

[3] AS only actually reported one incident to a school counselor and CPS did not substantiate the allegation. Id. at 4503.

- Terrie's sister MC.[4]

MC is Terrie's younger sister. AA XXII 5038. MC was born on May 16, 1981. Id. According to Terrie, Sena began expressing a sexual interest in MC around 1993. AA XXIII 5243.

MC claimed Sena first abused her during an incident when she was approximately 14 or 15 years old while visiting Terrie and Sena's apartment on Hopkins Ave. in Las Vegas, Nevada. MC claimed Sena touched her breasts while she touched Sena's penis.[5] AA XXII 5046-48, 5050. MC did not disclose this incident to anyone. Id. at 5049.

MC alleged two other incidents occurred at the same apartment. During the first incident, which occurred when MC 15 or 16 years old, Sena allegedly subjected MC to anal intercourse.[6] Id. at 5061-63. MC did not disclose this alleged incident to anyone. Id. at 5065. During the second incident, which also allegedly occurred when MC was 15 or 16 years old, Sena allegedly subjected MC to anal intercourse

[4] Only count 120 of the Fourth Amended Information involved allegations pertaining to MC. AA X 2212.
[5] The State did not charge Sena with any crimes related to this alleged incident.
[6] The State did not charge Sena with any crimes related to this alleged incident.

again.[7] Id. at 5067. MC did not disclose this alleged incident to anyone. Id. at 5086.

According to MC, on at least four occasions Sena took photographs of her either nude or engaged in sexual activity.[8] Id. at 5051. The first photograph session occurred when MC was 14 or 15 years old. Id. at 5055. MC alleged Sena took photographs of her naked on her bed at her parents' house. Id. at 5055. In these photos MC posed while holding a blue vibrator.[9] Id. at 5059.

During another incident Sena allegedly took photographs of MC and Terrie together while lying on a bed. Id. at 5057. MC alleged she was 16 or 17 years old when Sena took these photos.[10] Id. at 5057.

During a third incident Sena allegedly took nude photographs of MC and Terrie together when MC was 17 years old and while Terrie was pregnant with RS.[11] Id.

---

[7] The State did not charge Sena with any crimes related to this alleged incident.

[8] The court admitted all photographs involving MC at trial as exhibits 83-87. AA XXII 5055.

[9] Count 120, Possession of Child Pornography. AA X 2212-13. The jury found Sena guilty on this count. AA XI 2383.

[10] The court admitted this photograph as exhibit 88. AA XXII 5057. The State did not charge Sena with any crimes related to this alleged incident.

Finally, during a fourth incident when MC was 18 or 19 years old, Deborah photographed or videotaped MC, Terrie, and Sena engaged in sexual acts. Id. at 5058; AA XXVI 6108. Deborah took these photographs in 1999 in the detached office located in Sena's backyard at the Yellowstone Ave address.[12] AA XXII 5078.

- Terrie's niece EC.[13]

MC's daughter, EC was born on December 21, 2000. Id. at 5071. EC began visiting Sena's residence when she turned 11 or 12 years old. AA XXI 4910. During one visit, Sena allegedly fondled EC's breasts and vagina while in his office. Id. at 4912-16. EC alleged "more than 10" similar incidents occurred over the next three years.[14] See Id. at 4917, 4919, 4930. EC never disclosed these alleged incidents to anyone. Id. at 4924-25.

---

[11] The State introduced this photograph at trial as exhibit 89. Id. The State did not charge Sena with any crimes related to this alleged incident.

[12] The State introduced these photographs at trial as exhibits 90-93. Id. at 5058. The State did not charge Sena with any crimes related to this alleged incident.

[13] Counts 107-116 of the Fourth Amended Information involved allegations pertaining to EC. AA X 2209-11.

[14] It is unclear how these alleged incidents occurred over three years when EC testified that she began visiting Sena's residence when she was 11 years-old yet was only 13 years-old when police arrested Sena in September 2014. Id. at 4910, 4925. Nevertheless, these incidents were charged as counts 107-114, Lewdness with Child Under 14,

During one visit, EC took a shower in the bathroom located within the office. AA XXIII 5333. While EC showered, Sena surreptitiously video-recorded EC through a gap in the bathroom door.[15] Id. at 5334. While Sena filmed EC, Terrie orally copulated him.[16] Id.

- Terrie's niece, TG.[17]

TG is Kimerly Grisham's daughter and Terrie's niece. AA XXII 4985. TG was born on January 9, 1997. Id. Between 2004 and 2013 TG regularly visited Sena's residence on Yellowstone Ave. Id. at 4988. During these visits TG allegedly witnessed Sena verbally and physically abuse his children. Id. at 4993-94. TG also allegedly witnessed sexual "things" as well. Id. at 4996. Specifically, when TG was either 11 or 13 years old she recalled Sena showing her sexually

---

within the Fourth Amended Information. AA X 2209-10. The Jury found Sena guilty on counts 107-10 but not guilty on counts 111-114. AA XI 2380-82.

[15] EC did not know how old she was at the time Sena filmed her in the shower. AA XXI 4928. Nevertheless, the State charged Sena with counts 115 and 116, Use of Minor in Production of Pornography and Possession of Child Pornography. AA X 2211. The Jury found Sena guilty on these counts. AA XI 2382.

[16] At trial the court admitted a still image taken from the video as exhibit 81. AA XXI 5335. The court admitted the video itself as exhibit 82. AA XXII 5196.

[17] Counts 117-119 of the Fourth Amended Information involved allegations pertaining to TG. AA X 2211-12.

graphic photographs and videos on his computer, including photographs involving TG's aunt, MC.[18] Id. at 5007-5009.

During another visit, Terrie dyed TG's hair in the bathroom located in the office. AA XXIII 5327. While TG showered to remove the dye, Sena surreptitiously filmed her through a gap in the bathroom door.[19] Id. at 5328. Terrie orally copulated Sena while he filmed TG. Id. at 5329. TG was 13 or 14-years-old when Sena recorded this video. AA XXII 5016.

- Sena's daughter, AS.[20]

AS was born on May 22, 1990. AA XX 4459. According to AS, Sena began sexually abusing her when she was 11 years old. Id. at 4524. AS recalled the first incident began when she happened to notice Sena masturbating. Id. at 4529. Sena called AS into the room and thereafter fondled AS's breasts. Id. at 4529-30. Sena allegedly moved AS to the living room and began massaging AS's clitoris, and

---

[18] Count 117, Child Abuse, Neglect or Endangerment – Sexual Exploitation. AA X 2211-12. The jury found Sena guilty for this count. AA XI 2382.

[19] Counts 118 and 119, Use of Minor in Production of Pornography and Possession of Child Pornography. AA X 2212. The jury found Sena guilty for both counts. AA XI 2382-83. The State introduced a still image from this video at trial as exhibit 79 and the video itself as exhibit 80. AA XXII 5015, 5194.

[20] Counts 1 through 53 of the Fourth Amended Information involved allegations pertaining to AS. AA X 2172-2187.

ultimately penetrated her anus with his penis.[21] Id. at 4533. AS claimed after Sena ejaculated, he told her not to tell anyone or else he would have her sent to "juvie" because she had done something wrong.[22] Id. at 4534.

AS alleged similar abuse occurred almost every day, except weekends, throughout middle school.[23] Id. at 4535. These incidents involved either anal intercourse,[24] oral intercourse,[25] or vaginal

---

[21] It appears the State charged the anal penetration in Count 3 of the Fourth Amended Information, Sexual Assault with Minor Under 14. AA X 2173. The jury found Sena guilty for this count. AA XI 2359. Additionally, it appears the State charged Sena in counts 4 and 5, Lewdness with a Minor Under 14, for allegations he fondled AS's genitals before penetration. AA X 2173. The Jury found Sena guilty for count 4 but not guilty for count 5. AA XI 2360. However, because Counts 3 and 4 were pleaded alternatively, the Court only sentenced on Count 3. Id. at 2401.

[22] Count 53, Preventing or Dissuading Witness from Reporting Crime or Commencing Prosecution. AA X 2186-87. The jury found Sena guilty on this count. AA XI 2369.

[23] Counts 2, 10, 13, 18, Lewdness with Child Under 14, alleged that Sena fondled AS's breasts over a three-year period beginning when she was 11 years old. See AA XXVIII 6459. The Jury found Sena guilty for counts 2, 10, and 13, but not guilty for count 18. AA XI 2359, 61-62. Additionally, counts 24 and 29, Open and Gross Lewdness, alleged that Sena fondled AS's breasts when she was 14 and 15 years old. AA X 2177-80. The jury found Sena guilty for both counts. AA XI 2364-65. Counts 34, 39, and 44, Open and Gross Lewdness, alleged that Sena fondled AS's breasts when she was 16, 17, and 18 years old. AA X 2181-83. The jury found Sena not guilty on these counts. AA XI 2366, 68-69.

[24] Counts 6, 8, 11 and 16, Sexual Assault With Minor Under 14. AA X 2173-75. Counts 7, 9, 12 and 17, Lewdness with Minor Under 14.

intercourse,[26] and allegedly occurred once a year until AS finished high school.[27] See Id. at 4535-46, 4556-75.

AS further alleged when she was 14 years old Sena forced her to engage in sexual conduct with himself and Terrie. Id. at 4567.

Id. at 2173-77. The jury found Sena guilty on counts 6-9 and 11-12 but not guilty on counts 16 and 17. AA XI 2360-62. Because the State pleaded counts 6 and 7, 8 and 9, and 11 and 12 alternatively, the court only sentenced Sena on counts 6, 8, and 11. Id. at 2401-02. Counts 23 and 28, Sexual Assault on Minor Under 16, alleged that Sena penetrated AS anally with his penis when AS was 14 and 15 years old. AA X 2177-78. The jury found Sena guilty on both counts. AA XI 2363-64. Counts 33, 38 and 43, Sexual Assault, alleged that Sena anally penetrated AS with his penis when AS was 16, 17, and 18 years old. AA X 2181-83. The jury found Sena guilty on count 33 but not guilty on count 38 and 43. AA XI 2365-67.

[25] Counts 14 and 19, Sexual Assault with Minor Under 14. AA X 2176-77. Counts 15 and 20, Lewdness with a Minor Under 14. AA X 2175-76. The jury found Sena guilty on all counts. AA XI 2362-63. However, the State pleaded these counts alternatively and therefore, the court only sentenced Sena on the Sexual Assault counts and not the Lewdness counts. Id. at 2402. Counts 25 and 30, Sexual Assault with Minor Under 14. AA X 2177, 2180. The jury found Sena guilty on count 25 and not guilty on count 30. AA XI 2364-65. Finally, counts 35, 40, and 45, Sexual Assault. AA X 2181-83. The jury found Sena guilty on count 35, but not guilty on counts 40 and 45. AA XI 2266-68.

[26] Counts 21 and 26, Sexual Assault with Minor Under 14, and counts 22 and 27, Incest. AA X 2178-79. The jury found Sena guilty on all counts. AA XI 2363-64. Counts 31, 36, and 41, Sexual Assault, and counts 32, 37, and 42, Incest. AA X 2180-83. The jury found Sena guilty on all counts. AA XI 2365-67.

[27] AS testified at times she initiated sex with Sena to protect the other children from abuse. AA XXI 4772. Curiously, AS also testified that she did not know Sena was allegedly abusing the other children until she learned that fact in May 2014. Id.

During this incident AS claimed Sena anally penetrated her with his penis[28] while Terrie fondled AS's breasts. Id. at 4569.

When AS was 17 or 18 years old she claimed Sena forced her to engage in sexual conduct with himself and Deborah. Id. at 4576. According to AS, Sena made her and Deborah fondle each other's breasts[29] and lick each other's clitorises[30] while Sena penetrated AS with his penis.[31] AA XX 4578-84.

- Sena's son TS.[32]

TS was born on December 2, 1994. AA XXIV 5625. According to TS, Sena and Deborah sexually abused him on two occasions. Id. at 5656.

The first incident allegedly occurred when TS was between 13 and 15 years old. AA XXIV 5657. According to TS, Sena threw a paintbrush at him and then ordered TS to take a shower. Id. at 5659-

---

[28] Count 52, Sexual Assault with Minor Under 16. AA X 2186. Id. at 6470. The jury found Sena guilty on this count. AA XI 2369.
[29] Counts 49 and 50, Open and Gross Lewdness. AA X 2185. The jury found Sena guilty on both counts. AA XI 2369.
[30] Count 48, Sexual Assault. AA X 2184-85. The jury found Sena guilty on this count. AA XI 2368. Count 51, Open and Gross Lewdness. Id. The jury found Sena guilty on both counts. AA XI 2368-69.
[31] Counts 46, Sexual Assault, and count 47, Incest. AA X 2184. The jury found Sena guilty on both counts. AA XI 2368.
[32] Counts 54-69 of the Fourth Amended Information involved allegations pertaining to TS. AA X 2172, 2186-92.

60. While TS showered, Deborah entered the shower. Id. at 5661. TS claimed Deborah performed fellatio[33] on him while Sena filmed the incident.[34] Id. at 5663. Additionally, Sena also allegedly directed TS to penetrate Deborah's vagina with his penis. Id. at 5664-65. TS tried but was ultimately unsuccessful.[35] Id. at 5665; AA XXV 5893.

The second incident occurred when TS was 15 or 16 years old as well. AA XXIV 5668. TS claimed the incident began when Sena asked TS to come to the master bedroom. Id. Once there, Sena told TS to disrobe. Id. Deborah, then entered the room. Id. at 5669. Deborah performed fellatio on TS.[36] AA XXV 5670. TS then

---

[33] Count 54, Sexual Assault with a Minor Under 16. AA X 2187. The jury found Sena guilty although though neither TS nor Deborah alleged Sena directed Deborah to do this. See AA XI 2370; XXIV 5563; AA XXV 5693. Counts 55, Child Abuse, Neglect or Endangerment – Sexual abuse and count 56, Open and Gross Lewdness. AA X 2187. The jury found Sena guilty on both counts. AA XI 2370.

[34] Counts 59 and 60, Use of Minor in Producing Pornography and Possession of Child Pornography. AA X 2133-34. The court admitted a photograph from this video as exhibit 74-A. AA XXIV 5667; AA XXV 5895. The court admitted the video itself as exhibit 75. AA XXII 5183. The jury found Sena guilty on both counts. AA XI 2371.

[35] Count 57, Child Abuse, Neglect or Endangerment – Sexual Abuse and count 58, Open and Gross Lewdness. AA X 2188-89. The Jury convicted Sena on both counts. AA XI 2370.

[36] Count 61, Sexual Assault with Minor Under 16, count 62, Sexual Assault, count 67, Sexual Assault with Minor Under 16, and count 68 Sexual Assault. AA X 2190, 2193. The jury found Sena guilty on

engaged in sexual intercourse with Deborah while Sena filmed the incident.[37] Id. at 5670. Sena allegedly engaged in sexual intercourse with Deborah as well. Id. at 5671. Eventually, Sena told TS to leave the bedroom. Id. at 5672.

- Terrie's son RS and Sena and Deborah's son BS.

BS is Sena and Deborah's biological son. Id. at 5706. BS was born on August 13, 1998. Id. at 5703. RS is Terrie's biological son. AA XXIV 5514. Sena is not RS's father. RS was born on June 14, 1998. Id.

- Incident between Terrie, Deborah, BS and RS.

According to Terrie, in 2012 – when BS and RS were approximately 14 years old – Sena ordered her and Deborah to bring BS and RS into the master bedroom. AA XXIII 5289. After

---

counts 62 and 68 and not guilty on counts 61 and 67. AA XI 2371-72; AA XXVIII 6487.

[37] Count 63, Sexual Assault with Minor Under 16, count 64, Sexual Assault, count 65, Sexual Assault with Minor Under 16, and count 66, Sexual Assault. AA X 2191-92. The jury found Sena not guilty on counts 63 and 65 and guilty on counts 64 and 66. AA XI 2371-72; AA XXVIII 6488. Because Sena filmed this incident, the State charged count 69, Use of Minor in Production of Pornography. AA X 2194. The court admitted a photograph from this incident as exhibit 74 and the video itself as exhibit 75. AA XXV 5673; AA XXII 5183. The jury found Sena guilty on this count. AA XI 2373.

complying, Terrie and Deborah claimed Sena instructed each to give oral sex to BS and RS.[38] Id.; AA XXVI 6038.

- Incidents between Terrie and BS.[39]

The first incident between BS and Terrie occurred when BS was 14 years old. AA XXV 7523. BS went into Sena's office to ask Sena a question. Once there, Sena allegedly ordered BS to fondle Terrie's breasts.[40] Id. at 5724. Sena then allegedly ordered Terrie perform oral sex on BS.[41] Id. After performing oral sex, Terrie mounted BS and his penis entered her vagina.[42] Id. at 5727. Afterwards, Sena allegedly threatened BS not to tell anyone what had happened.[43] Id. at 5728; AA XXIII 5302-03.

The second incident also occurred in the office. AA XXV 5728. When BS was either 14 or 15 years old he walked in on Sena engaged

---

[38] The State did not charge any crimes related to this allegation.
[39] Counts 79-86 of the Fourth Amended Information, involved allegations related to Sena, Terrie, and BS. AA X 2172, 2198-2202.
[40] Count 81, Child Abuse, Neglect or Endangerment – Sexual Abuse and Count 82, Open and Gross Lewdness. AA X 2199-2200. The jury found Sena guilty on both counts. AA XI 2375.
[41] Count 79, Sexual Assault on Minor Under 16. AA X 2198-99. The jury found Sena guilt on this Count. AA XI 2375.
[42] Count 80, Sexual Assault on Minor Under 16. AA X 2199. The jury found Sena guilty on this count. AA XI 2375.
[43] Count 86, Preventing or Dissuading Victim or Witness from Reporting Crime or Commencing Prosecution. AA X 2201-02. The jury found Sena guilty on this Count. AA XI 2376.

in sexual intercourse with Terrie. Id. at 5729. Sena allegedly "forced" BS to join. Id. BS fondled Terrie's breasts,[44] penetrated Terrie's vagina with his penis,[45] and received oral sex from Terrie.[46] Id. at 5731-32.

- Incidents between Deborah and BS.[47]

According to Deborah, when BS was three (3) years old (around 2001) Sena forced her to perform oral sex on BS.[48] AA XXV 5881. Sena allegedly told Deborah if she did not do so he would send embarrassing photographs to Deborah's relatives. Id. at 5881. After Deborah performed oral sex on BS, Sena allegedly placed BS between her legs. Id. at 5883.

BS claimed when he was around 14 or 15 years old Sena ordered him into the pool with Sena and Deborah. AA XXV 5733.

---

[44] Count 84, Child Abuse, Neglect or Endangerment – Sexual Abuse and count 85, Open and Gross Lewdness. AA X 2201. The jury found Sena not guilty on these counts. AA XI 2376.

[45] Count 83, Sexual Assault with a Minor Under 16. AA X 2200. The jury found Sena guilty on this count. AA XI 2375.

[46] The State did not charge Sena with any crime related to this allegation.

[47] Allegations involving Deborah and BS were charged in the Information within counts 70-78. AA X 2172, 2194-2198.

[48] The State did not charge Sena with any crimes related to this allegation.

Once in the pool, Sena and Deborah engaged in sexual activity.[49] Id. at 5734. BS eventually left the pool and returned inside. Id. A short while later Sena told BS to come to the master bedroom. Id. at 5737. Once there, Sena ordered BS to disrobe and lay on the bed. Id. at 5739. Thereafter, while Sena filmed,[50] Deborah performed oral sex on BS twice[51] followed by sexual intercourse twice.[52] Id.

- Incidents between Terrie and RS.[53]

RS alleged two incidents of sexual abuse with Terrie. AA XXIV 5551. During the first incident, RS was either 13 or 14 years old. RS alleged Sena called him into the office and made Terrie

---

[49] Count 70, Child Abuse, Neglect or Endangerment – Sexual Abuse. AA X 2194. The jury found Sena not guilty on this count. AA XI 2373.

[50] Counts 77, Use of Minor in Production of Pornography, and count 78, Possession of Child Pornography. AA X 2198. Court admitted still image from video as exhibit 72 and the video itself as exhibit 73. See AA XXII 5178-80; AA XXV 5913, 5740. The jury found Sena guilty on both counts. AA XI 2374.

[51] Counts 71 and 76, Sexual Assault with Minor Under 16. AA X 2195, 97. The jury found Sena guilty on both counts. AA XI 2373-74.

[52] Counts 72 and 74, Sexual Assault with Minor Under 16 and counts 73 and 75, Incest. AA X 2195-97. The jury found Sena guilty on all counts. AA XI 2373-74.

[53] The incidents between RS and Terrie were charged as counts 95-106 in the Fourth Amended Information. AA X 2172, 2204-09.

remove RS's pants and place RS's penis into her mouth twice,[54] while Sena filmed the incident.[55] Id. at 5552.

The second incident occurred when RS was in either 8th or 9th grade. Id. at 5555. According to RS, Sena called RS into the bedroom and while Sena filmed,[56] he ordered RS disrobe and ordered Terrie to perform oral sex on RS.[57] Id. at 5555. Terrie also mounted RS and his penis entered her vagina.[58] Id. After RS penetrated Terrie with his penis, Terrie performed oral sex on RS again.[59] Id. at 5556.

- Incidents between Sena and RS.[60]

---

[54] Counts 101 and 102, Sexual Assault with Minor Under 16. AA X 2206-07. The jury found Sena guilty on both counts. AA XI 2379.

[55] Count 103, Use of Minor in Production of Pornography, and count 104, Possession of Child Pornography. AA X 2207-08. The jury found Sena guilty on both counts. AA XI 2379-80. The court introduced an image from this incident as exhibits 77-77B. AA XXIV 5552; AA XXII 5193; AA XXIII 5309.

[56] Count 99, Use of Minor in Production of Pornography, and count 100, Possession of Child Pornography. AA X 2206. The Court introduced photo from this incident as exhibit 76. AA XXIV 5557; AA XXII 5188-89; AA XXIII 5304. The jury found Sena guilty on both counts. AA XI 2379.

[57] Count 95, Sexual Assault on Minor Under 16. AA X 2204. The jury found Sena guilty on this count. AA XI 2378.

[58] Counts 96, Sexual Assault on Minor Under 16, and count 97, Incest. AA X 2204-05. The jury found Sena guilty on both counts. AA XI 2378.

[59] Count 98, Sexual Assault on Minor Under 16. AA X 2205-06. The jury found Sena guilty on this count. AA XI 2378.

[60] The incidents between RS and Sena were charged within counts 87 – 94, 105, of the Fourth Amended Information. AA X 2202-04, 2208.

RS alleged when he was 14 or 15 years old Sena showed him pornography depicting Terrie and Sena engaged in sexual intercourse.[61] AA XXIV 5534. RS also alleged Sena sexually abused him on three occasions when RS was between 11 and 12 years old. Id. at 5539.

For the first incident, RS alleged Sena entered RS's bedroom, removed RS's clothes, and anally penetrated RS with Sena's penis.[62] Id. at 5541. Afterwards Sena allegedly threatened RS not to tell anyone.[63] Id. at 5543. For the second incident, RS alleged Sena called him into the master bedroom, removed RS's clothing, and anally penetrated RS with Sena's penis.[64] Id. at 5545. For the third incident,

---

Upon the State's request, the Jury acquitted Sena of counts 93 and 94. AA XI 2377-78.

[61] Count 105, Child Abuse, Neglect or Endangerment – Sexual Exploitation. AA X 2208. The jury found Sena guilty on this count. AA XI 2380.

[62] Count 87, Sexual Assault on a Minor Under 14, and count 88, Lewdness with a Minor Under 14. AA X 2202. Although the jury convicted Sena for both counts (AA XI 2376), the State charged these counts alternatively and therefore the count only sentenced Sena on count 87. Id. at 2405.

[63] Count 106, Preventing or Dissuading Witness or Victim from Reporting Crime or Commencing Prosecution. AA X 2208-09. The jury found Sena guilty on this count. AA XI 2380.

[64] Count 89, Sexual Assault with a Minor Under 14, and count 90, Lewdness with a Minor Under 14. AA X 2202-03. Although the jury convicted Sena on both counts (AA XI 2377), the State charged these

RS alleged Sena once made RS "sit on [Sena's] dick."[65] Id. at 5546-47.

- **Events leading to Sena's arrest.**

In mid-2014, BS became depressed and suicidal. AA XXV 5741. BS eventually confided in AS that Sena had forced BS to engage in sexual acts with Terrie.[66] Id. at 5742. AS told BS that Sena had allegedly abused her as well. AS and BS confided in Deborah and all three decided to leave Sena's residence. Id. at 5743-44.

Prior to leaving AS rented a storage shed while Deborah secured a place to live. AA XX 4597. After an alleged physical altercation between BS and Sena, Deborah, AS and BS expedited their plan to leave. Id. at 4599-4600. Eventually, BS, AS and Deborah left Sena's residence during the evening between June 13, 2004 and June 14th of 2014. AA XXV 5748. Believing that Sena had placed tracking software on their phones, BS and Deborah left their phones at the residence. AA XX 4607.

---

counts alternatively and therefore the count only sentenced Sena on count 89. Id. at 2405.

[65] Count 91, Sexual Assault with a Minor Under 14 and count 92, Lewdness with a Minor Under 14. AA X 2203. Although the jury convicted Sena on both counts (AA XI 2377), the State charged these counts alternatively and therefore the count only sentenced Sena on count 91. Id. at 2405.

[66] BS did not disclose he had engaged in sexual acts with Deborah. Id.

AS, BS, and Deborah stayed at a safe house for approximately two weeks before moving into an apartment. AA XX 4608; AA XXV 5756. While at the safe house, Deborah filed TPO paperwork against Sena but did allege any sexual abuse. AA XXVI 6041. The court denied the TPO and Deborah never re-applied. Id.

The morning after AS, BS, and Deborah left Sena ordered Terrie and RS to leave believing AS left due to animosity towards Terrie. AA XXIII 5342. Sena hoped if Terrie left, AS would return. Id. Sena also attempted to contact AS via text message and email.[67] AA XX 4609-11. AS, BS, and Deborah did not respond to Sena's texts or emails. Eventually, Sena asked Terrie to convince AS to return. AA XXIII 5343-44.

On September 11, 2014, Sena allegedly sent an email from Deborah's personal email account, deborahzx6r@gmail.com, to Deborah's co-workers at Cox Communications. AAVI 6062-63. Sena allegedly attached images to the email depicting Deborah engaged in

[67] The court admitted emails Sena sent to Deborah as exhibits 94, 98, and 99. AA XXVI 6050-53.

sexual conduct with a dog.[68] AA XXVI 6062-63. After this incident, Deborah initiated divorce proceedings. Id. at 6087.

During a meeting with her divorce attorney Deborah mentioned Sena's alleged sexual abuse. Id. at 6088. Deborah's attorney contacted police. Id. When police arrived, Deborah wrote a statement detailing Sena's alleged abuse but did not disclose her involvement. Id. A few days later Metro assigned the case to Detective Larry Samples. Id. at 6175. A week after that Samples met with Deborah, AS, and BS at the Child Advocacy Center ("CAC"). Id. at 6177.

At the CAC, Samples interviewed AS while other forensic interviewers spoke with BS and Deborah.[69] Id. at 6178-79. After the interviews Metro executed a search warrant at Sena's residence. Id. at 6181-82. When police executed the warrant, they detained TS and

---

[68] The court admitted the emails as exhibits 95 and 96. AA XXVI 6068. The court did not admit the attached images having deemed the images inadmissible. Id. Nevertheless, Detective Larry Samples testified as to the context of the video from which the images were taken. See AA XXVII 6226-6230.

[69] AS did not disclose any sexual abuse involving Deborah during her interview. AA XXVII 6298.

Sena. Id. at 6183. Later, Samples conducted an audiotaped interviewed with Sena at the scene.[70] Id. at 6184-85.

During the interview Sena admitted he engaged in consensual sexual conduct with AS but advised she was 22 years old at the time. Id. at 6194. Sena also admitted he engaged in consensual sexual conduct with AS and Deborah at the same time on two (2) or four (4) occasions. Id. at 6195. Furthermore, Sena admitted to engaging in consensual sexual conduct with Terrie and AS on one occasion. Id. During his interview, Sena disclosed he possessed a red flash drive stored in his safe in his office. Id. Police arrested Sena that evening.

Samples learned Terrie, RS, and TS had also lived at Sena's residence. AA XXVII 6213. On September 30, 2014, Samples interviewed TS who denied he had been abused. Id. at 6214. Samples later learned the red flash drive contained images depicting possible child pornography. Id. On November 24, 2014, Samples asked AS to identify the persons depicted in the images recovered from the flash

[70] The court admitted a copy of the audiotaped interview as exhibit 100 and a transcript of the audiotaped interview as exhibit 101. AA XXVI 6187-88.

drive.[71] Id. at 6218. AS identified images depicting TG, EC, and MC. Id. Samples then interviewed TG, EC, and MC on December 1, 2014. Id. at 6219. All three confirmed they were depicted in the images. Id.

Samples interviewed Terrie on December 9, 2014. Id. at 6214. Terrie advised she never witnessed Sena commit any physical abuse against AS. Id. at 6327. Terrie admitted to engaging in sexual conduct with the children. Id. at 6334. Based upon this conversation, Samples sought charges against both Terrie and Deborah. Id. at 6221.

Metro arrested Terrie and Deborah on December 11, 2014. Id. AS became upset that police arrested Deborah but not upset that police arrested Terrie. AA XX 4666-67. AS sent an email to District Attorney Steve Wolfson advising that if Wolfson agreed to drop Terrie's and Deborah's charges, she and the other children would ensure that Sena "dies in prison." AA XXV 5775. AS also sent a letter to the Las Vegas Review Journal requesting Wolfson, and presumably Clark County Sheriff Joe Lombardo, release Deborah and Terrie from the Clark County Detention Center. AA XX 4669.

---

[71] The red flash drive contained images and videos depicting Terrie, Deborah, and RS, BS, and TS on the flash drive's unallocated space. AA XXII 5171-72.

The State initially alleged 15 offenses against Terrie. AA XXIV 5482. If convicted, Terri faced 110 years to life in prison. Id. at 5483. Terrie ultimately pleaded guilty to one count of Sexual Assault and agreed to testify against Sena in exchange for a sentence of 10 years to life in prison. AA XXIII 5234-35. Likewise, Deborah pleaded guilty to one count Sexual Assault and agreed to testify against Sena in exchange for a sentence of 10 years to life in prison as well. AA XXV 5855-57. Prior to Deborah's sentencing hearing, AS sent a letter to the court stating if prosecutors dismissed the charges against Deborah, AS and BS would help "make sure [Sena] dies in prison." AA XX 4674.

SUMMARY OF THE ARGUMENT

The district court committed numerous errors which violated Sena's right to a fair trial. Most significantly, the court closed the courtroom to the public without notice to the parties. Sena objected when he discovered the closure. The court summarily overruled Sena's objection. Later, the court made retrospective justifications for the closure order. However, these justifications are belied by the court's earlier claims. Thus, without proper justifications the court violated Sena's right to a public trial which is structural error thus mandating reversal.

Additionally, prior to trial Sena requested the court dismiss counts 2-53 – all allegations involving AS – based upon the State's failure to file the charges within the applicable statutes of limitation. The court denied Sena's request. In doing so the court clearly misinterpreted the law governing the statutes of limitations for offenses constituting child sexual abuse and for crimes committed in a secret manner. The court compounded its error by making a definitive factual finding that Sena's alleged "control" over AS tolled the statute of limitations indefinitely. In addition to counts 2-53, many other offenses alleged were also filed outside the applicable statutes of limitations as well. Admittedly, Sena did not raise this defense to those charges below. Nevertheless, Sena contends he did not waive the defense.

The State also failed to present sufficient evidence to support certain convictions. First, the State failed to provide any evidence whatsoever that Sena, Deborah, and Terrie, conspired to commit sexual assault upon AS, TS, RS, and BS. Second, the State failed to present any evidence whatsoever that the images depicting EC and TG in the shower constituted "child pornography." Specifically, neither EC nor TG were engaged in sexual conduct in the videos.

Alternatively, under a theory the videos depicted a "sexual portrayal" in a performance, Sena contends that portion of the child pornography statute is unconstitutionally vague and overbroad.

Moreover, the court improperly sentenced Sena for multiple convictions based upon one offense. Specifically, the jury convicted Sena for multiple counts of possession of child pornography when the State only alleged and proved one possessory act. Similarly, the jury improperly convicted Sena for multiple counts of incest for engaging in more than one act of sexual intercourse with the same victim. However, the proper unit of prosecution for Incest is the number of incestuous relationships and not the number of times persons engage in sexual intercourse. The jury also convicted Sena for multiple counts of Child Abuse, Neglect or Endangerment for various acts that occurred during a single incident. However, because Child Abuse, Neglect or Endangerment is a continuing offense the proper unit of prosecution is one count per abusive incident.

Finally, The State alleged Sena committed Child Abuse, Neglect or Endangerment *via* Open and Gross Lewdness. The jury convicted Sena for both the abuse and the lewd act. However, as alleged, Open and Gross Lewdness is a lesser included offense of

Child Abuse, Neglect or Endangerment. Because a defendant cannot be convicted for both the greater offense and the lesser included offense, Sena's convictions for Child Abuse, Neglect or Endangerment and Open and Gross Lewdness violate his Constitutional right against double jeopardy.

ARGUMENT

I. The Courtroom Closure Violated Sena's Constitutional Right to a Public Trial.

The Federal public trial right rests upon the First, Fifth and Sixth Amendments. Presley v. Georgia, 558 U.S. 209, 211-12 (2010). This right is applicable to states *via* the 14th amendment. See In re Oliver, 333 U.S. 257, 272-73 (1948). Accordingly, State "[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials." Presley, 558 U.S. at 215. Indeed, only in rare cases may a court close the courtroom without violating the defendant's public trial right. See Weaver v. Mass., 137 S.Ct. 1899, 1909-10 (2017).

The right to a public trial is not absolute, however. Indeed, in some circumstances the court may close the courtroom. Yet, if a court desires to close the courtroom "the following requirements **must** be met: (1) 'the party seeking to close the hearing must advance an

overriding interest that is likely to be prejudiced'; (2) 'the closure must be no broader than necessary to protect [the overriding] interest'; (3) 'the trial court must consider reasonable alternatives to closing the proceeding'; and (4) 'the trial court must make findings adequate to support the closure.'" Feazell v. State, 111 Nev. 1446, 1448 (1995) (quoting Waller v. Georgia, 467 U.S. 39, 48 (1984)) (emphasis added).

Additionally, courtroom closures can be "total" or "partial." See Feazell, 111 Nev. at 1448. "Whether a closure is total or partial ... depends not on how long a trial is closed, but rather who is excluded during the period of time in question." U.S. v. Thompson, 713 F.3d 388, 395 (8th Cir.2013) (citations omitted). A partial closure occurs where "courtroom access is restricted but some members of the public are permitted to remain." U.S. v. Laureano-Perez, 737 F.3d 45, 77 (1st Cir. 2015).

For partial closures, Nevada applies a modified Waller standard. Rather than an "overriding interest," the court need only find a "substantial interest."[72] Feazell, 111 Nev. at 1448. Nevertheless, a

[72] Some courts make no distinction between "partial" or "total" closures. See People In Interest of G.B., 433 P.3d 138 (Col.App.2018); State v. Ortiz, 981 P.2d 1127, 1137 (Hawai'i 1999); State v. Mahkuk, 736 N.W.2d 675, 684-85 (Minn.2007); People v. Floyd, 988 N.E.2d 505 (N.Y. 2013); People v. Jones, 284 A.D.2d 277 (N.Y.2001).

partial closure must not be broader than necessary to protect the "substantial interest" and the court must consider reasonable alternatives to the partial closure and make adequate findings to support the closure. Id. (citing Woods v. Kuhlmann, 977 F.2d 74, 76-77 (2nd Cir. 1992); see also U.S. v. Sherlock, 962 F.2d 1349, 1357 (9th Cir. 1989); Com. v. Cohen, 921 N.E.2d 906, 922 (Mass. 2010)). Conclusory statements will not suffice as "adequate findings." Presley, 558 U.S. at 216.

This Court reviews constitutional errors – like the violation of the right to a public trial – *de novo*. See Martinorellan v. State, 131 Nev. 43, 46-47 (2015); see also U.S. v. Ivester, 316 F.3d 955, 958 (9th Cir. 2003) ("We review de novo a Sixth Amendment claim for violation of defendants' right to a public trial."). Additionally, violation of the public trial right is structural error mandating reversal. Jeremias v. State, 134 Nev. 46, 47 (2018); U.S. v. Gonzalez-Lopez, 548 U.S. 140, 148-49 (2006).

A. The district court partially closed Sena's trial without providing adequate justifications.

During the trial's eighth day the district attorney advised it learned victim advocates were unable to enter the courtroom and requested they be allowed to do so. AA XXII 5123-24. The court

acknowledged it closed the courtroom and claimed it did so because it did not want people "walking in and out of here when somebody's on the witness stand." Id. at 5124. The court denied the district attorney's request to open the courtroom and instead explained that advocates would have wait to enter the courtroom until a break. Id. at 5125. Later that day Sena objected to the courtroom closure. AA XXIII 5206. Sena acknowledged the closure was partial and not total. Id. at 5209. The court overruled Sena's objection advising tersely, "[a]ll right. Your record's made." Id.

Nevertheless, during a subsequent break, the court advised it had reviewed Weaver and, furiously back-pedaling, explained:

> I have not closed the court. What I have done is I have made it clear that – and we've put signs up, that no one is to enter or leave while a witness is on the stand and we're in session.
>
> They're more than to welcome to come here at any time, and they could stay here the whole time. I've not -- and the only one question that it would even have possibly on a first amendment issue would be the newspaper individual, but I allowed him to leave and come -- he's actually been here a couple times.
>
> He showed up, I think, the third day during a witness, and I gave him a little bit of a look, and he looked back at me, but he was here.

> So I understand you've made your record. I appreciate it.
>
> Id. at 5218-19.

The next day, Sena perfected his record citing Waller in support. Id. at 5223. Sena also advised that an attorney from the Clark County Public Defender's office had been barred from entering the courtroom the day before. Id. at 5224.

The court, relying upon U.S. v. Rivera, 682 F.3d 1223, 1229 (9th Cir. 2012) and Peterson v. Williams, 85 F.3d 39, 41 (2nd Cir. 1996), advised its closure was a procedural rule. AA XXIII 5225. However, the court then explained that it closed the courtroom due to the "sensitive emotional nature of the victim's testimony"[73] and to avoid potential disruptions. Id. Additionally, the order did not apply to members of the press. Id. at 5226. The court entered into the record a note it had placed on the courtroom doors which stated, "Please note, if you come in to listen to the trial, you must wait until the break in order to leave the courtroom as to not disrupt the

[73] Problematically, the courtroom closure applied to all witnesses not just those providing "sensitive" testimony.

proceedings and/or draw attention. Thank you for your cooperation."[74] Id. at 5226; AA XXIX 6781. The court also explained the closure somehow sought to discourage perjury and "to continue to encourage witness to come forward." AA XXIII 5227.

Finally, the court's marshall, Edward Kuntz, testified regarding the incident involving the attorney from the Public Defender's Office. According to Kuntz:

> Two people came in. One said he was an attorney, he came to observe. He did tell me that he was on the same team as you guys, I believe he said. And I said, well, we don't want people coming in and out of the courtroom while the young lady was testifying. And I offered him to sit in the side room, and they did.
>
> ...
>
> They sat there. I think maybe 10, 15 minutes later, I heard the door slam so they must have left. So I
> never refused them. They left on their own.
>
> Id. at 5230-31.

As noted, in Nevada, **before** a judge may partially close the courtroom, the following requirements must be met: (1) the party

[74] The court did not clarify when it placed the note on the door, i.e., before trial or on the 9th day after Sena objected to the closure.

seeking closure must assert a substantial interest that is likely to be prejudiced; (2) closure must not be broader than necessary to protect the substantial interest; (3) court must consider reasonable alternatives to closing; and (4) court must make adequate findings supporting the closure. Feazell, 111 Nev. at 1448. Although this Court has not addressed a courtroom closure similar to closure in Sena's case, other courts have. In fact, in a case almost identical to Sena's, the Massachusetts Supreme Court found that barring people from entering the courtroom during trial by placing a "do not enter" note on the courtroom door represented an unconstitutional partial closure. Comm v. Cohen, 921 N.E.2d 906, 924 (Mass. 2010).

In Cohen, the court placed a sign on the courtroom door at the trial's inception stating, "Jury Selection in Progress. Do Not Enter." Id. at 913. Jury selection lasted two days but the court inadvertently left the sign on the door for another two days. Id. When the defendant learned about the sign, and the fact the courtroom had been closed for four days, he moved for a mistrial which was denied. Id. On appeal after conviction the defendant asserted the lower court "...failed to satisfy procedural requirements for court room closure, making only retrospective findings to support it; did not satisfy substantive

requirements for closure because the record shows that the public was excluded by court policy, regardless of and despite available space; erred in giving constitutional significance to the excluded spectators' failure to protest; and erred in her findings of fact." Id. at 917.

The Massachusetts Supreme Court first found that the courtroom closure was only a "partial" rather than total closure but was also not a trivial or *de minimis* closure. Id. at 920. The court then applied the modified Waller standard – the same standard Nevada uses – and noted the trial court's belated reasons for the closure, "lack of space to accommodate the general public due to the number of prospective jurors in the court room; and (2) preventing the intermingling of prospective jurors with spectators who might have some connection to or express opinions about the case, and the potential taint of the jurors that could result[,]" either were or could be substantial interests. Id. at 922. However, the court explained that even assuming the interests were substantial, "the remaining Waller factors must be satisfied." Id.

Addressing the remaining Waller factors, the court held the "do not enter" sign had a preemptive and preventative effect and therefore was too broad. Id. at 924. The court also concluded the trial court

failed to consider reasonable alternatives to the closure. Id. Specifically, "[t]here are ways to communicate to members of the public that the court room currently cannot accommodate them other than by placing a "Do Not Enter" sign on the door." Id. Finally, the court noted that the trial court did not provide adequate findings to glean from the record sufficient support for the closure. Id. Accordingly, the closure violated the defendant's public trial right which is structural error. Id. at 926-27.

Here, the district court did not comply with Waller **prior to the closure**. This failure alone warrants reversal.[75] Nevertheless, even if this Court accepts the district court's retrospective justifications, the closure still violated Sena's Constitutional right to a public trial.

The district court's purported "substantial interests" justifying the closure were, the "sensitive emotional nature of the victim's testimony" – and to avoid potential disruptions in their testimony (AA

[75] See Kleinbart v. U.S., 388 A.2d 878, 883 (D.C. Ct. App. 1978) ("we hold that it is only under the most exceptional circumstances that limited portions of a criminal trial may be closed even partially to the public. When the trial court believes such exceptional circumstances exist, **counsel must be so informed on the record and they must be heard on the question**. After so proceeding, the trial court may close limited portions of a trial upon proper determination of the strict and inescapable necessity for such a course of action. **The closing of a trial to the public, without such a finding, is per se reversible**." (emphasis added)).

XXIII 5225) – to somehow discourage perjury, and "to continue to encourage witness to come forward." Id. at 5227. However, prior to these *post hoc* justifications no one – the court, the district attorney's office, or Sena – expressed any concern that an open courtroom would somehow affect the witnesses' testimonies. In fact, the closure likely had the opposite effect as the district attorney's victim advocates could not be present to support the witnesses during their testimonies. See AA XXII 5123-24. Additionally, the district court failed to explain how members of the general public entering the courtroom during a witness's testimony would somehow encourage perjury.

Additionally, assuming the court's reasons for the closing amounted to a "substantial interest," the court failed to explain why the closure was not broader than necessary. Indeed, the court made no findings whatsoever that other less onerous actions would not satisfy the court's purported interests.

Finally, the court did not consider any reasonable alternatives to its closure order. Therefore, the court's alleged "findings" supporting the closure where either nonexistent or belied by the record. Ultimately, like in Cohen, the court's unconstitutional closure order is

structural error and Sena respectfully requests this Court reverse his convictions.

II. The State Filed Numerous Charges Outside the Applicable Statutes of Limitation.

NRS 171.085 explains the applicable statute of limitations for felony offenses while NRS 171.090 explains the applicable statute of limitations for gross misdemeanor offenses. Per NRS 171.085, the statute of limitations for most felonies is three (3) years. For sexual assault the statute of limitations is 20 years. Id. Per NRS 171.090(1), the statute of limitations for gross misdemeanor offenses is two (2) years. However, under NRS 171.095 the statutes of limitation, as noted in NRS 171.085 and 171.090, are tolled for crimes committed in a secret manner or for crimes constituting child sexual abuse as defined in NRS 432B.100.

The aforementioned statutes have been amended several times since their adoption. As relevant here, the Legislature amended NRS 171.085 in 2001, 2005, 2009, and 2015. Additionally, the Legislature amended NRS 171.095 in 2001, 2005, 2011, and 2013. The legislature amended NRS 171.090 in 2005, but that amendment did not substantially alter the statute's language. Nevertheless, "with respect to limitation periods and tolling statutes, the statutes in effect

at the time of the offense control." Bailey v. State, 120 Nev. 406, 407-08 (2004) (quoting State v. Quinn, 117 Nev. 709, 712 (2001)).

This, Court has occasionally interpreted NRS 171.095. First, in Houtz v. State, 111 Nev. 457, 458 (1995), the defendant committed lewd conduct upon a minor between 1977 and 1979. Id. In 1990 the victim – then 25 years old – reported the crimes to police. Id. at 458. In 1991 the State charged the defendant with three gross misdemeanor counts of Open and Gross Lewdness and three felony counts of Lewdness with a Minor Under 14. Id. The defendant requested dismissal arguing the State filed the charges outside the statutes of limitation. Id. at 459. Although troubled by the State's delay, the district court denied the defendant's motion. Id. The defendant then conditionally pleaded guilty to one count Lewdness with a Minor and appealed. Id.

On appeal, the defendant argued under the child sexual abuse tolling provision of the 1985 version of NRS 171.095, the State had to file charges, "by the time the victim reaches the age of twenty-one." Id. at 461. In response, the State argued the "secret manner" tolling provision in NRS 171.095(1) applied – and not the child sexual abuse

provision – and therefore, the State had 3 or 2 years from "discovery" to file charges. Id. at 459.

This Court declined to address the defendant's claim noting the child sex abuse provision was not in effect at the time of the offenses. Id. Moreover, the Court concluded because the defendant used intimidation to prevent the victim from reporting the offenses, "the crimes were committed in a 'secret manner.'" Id. at 461. Nevertheless, the Court held the secret manner provision in NRS 171.095(1) **did not toll the statute of limitations indefinitely**. Id. Indeed, the Court noted any suggestion otherwise would effectively nullify the statute of limitations and lead to absurd results.[76] Id. Therefore, the Court held, "the tolling of the statute of limitations because of the 'secret offense' provision should not be beyond the time when the minor reaches the age of majority—eighteen years of age." Id. at 462. In support, the Court noted the post-1985 amendments to NRS 171.095 – which added the provision tolling the statute of limitations until a victim of child sexual abuse turns 21 years old – were **"consistent with [the Court's] conclusion" that the**

[76] The Court explained, "the Nevada Legislature has never included child sexual abuse among those offenses which have no statute of limitations for prosecution." Id. at 461-62.

"secret manner" provision in NRS 171.095 cannot extend past the point where the victim reaches a certain age. Id. at 462. Ultimately, because the victim did not report the crimes until 25, this Court reversed the defendant's conviction.

Next, in Quinn, 117 Nev. at 710-11, the State charged the defendant on December 17, 1998, with two counts felony Lewdness with a Minor Under 14 and four counts gross misdemeanor Indecent Exposure based upon allegations the defendant committed lewd acts upon his stepdaughter between January 1, 1993 and December 12, 1996. Id. The victim told her mother about the incidents on December 12, 1996, and the mother may have told her pastor that same day. Id.

In the district court the defendant requested the court dismiss the gross misdemeanor charges arguing under NRS 171.090 and 171.095, the State only had two years to file the charges upon "discovery" by the victim's mother. Id. The State countered that the crimes were not "discovered" until they were reported to law enforcement on November 2, 1998. Id. The district court agreed with the defendant and dismissed the charges. Id. The State appealed.

On appeal, the primary issue involved what constitutes "discovery" under the secret manner provision in NRS 171.095. This Court interpreted NRS 171.095(1)(a) which provided, "[i]f a felony, gross misdemeanor or misdemeanor is committed in a secret manner, an indictment for the offense must be found, or an information or complaint filed, within the periods of limitation prescribed in NRS 171.085 and 171.090 after the discovery of the offense unless a longer period is allowed by paragraph (b)." Id. at 712. The Court explained NRS 171.095(1)(b) provides "longer tolling periods [than NRS 171.095(1)(a)] so long as the offense constitutes 'sexual abuse of a child'" under NRS 432B.100. Id. However, the Court noted NRS 432B.100 did not include Indecent Exposure and therefore, 171.095(1)(b) did not apply. Id. The Court also reaffirmed its previous holding in Houtz. Id. at 713-15.

Lastly, the Court held "for purposes of tolling the statute of limitations under the "secret manner" provision of NRS 171.095(1)(a), discovery occurs when any person—including the victim—other than the wrongdoer (or someone acting in *pari delicto* with the wrongdoer) has knowledge of the act and its criminal nature, unless the person with knowledge: (1) fails to report out of fear induced by threats made

by the wrongdoer or by anyone acting in *pari delicto* with the wrongdoer; or (2) is a child-victim under eighteen years of age and fails to report for the reasons discussed in Walstrom v. State, 104 Nev. 51 (1988). Id. at 715-16. The Court then remanded the case for the district court to determine whether the victim's mother failed to report the abuse due to fear or whether the pastor learned of the incidents the same day as the victim's mother. Id. at 716. If the pastor had learned of the offenses then he "discovered" them. Id. If the pastor discovered them, then the State filed the gross misdemeanor charges outside the two-year statute of limitations. Id.

Finally, in Bailey, 120 Nev. at 407, the defendant committed a lewd act upon a six-year-old between January 1, 1995 and January 1, 1996. The victim reported the incident to her mother in June 1996, but her mother never reported the incident to anyone else. Id. In 2001 the victim reported the incident to a school counselor who notified police. Id. On May 8, 2002, the State filed a criminal complaint charging the defendant with one count of Lewdness with a Minor Under 14. Id. The defendant moved to dismiss arguing per NRS 171.095(1)(a) the State had to file the case within three years after the victim told her mother. Id. The State countered that it could charge the defendant

under NRS 171.095(1)(b) before the victim turned 21 years old. Id. The district court denied defendant's motion finding: (1) the offense was committed in a secret manner; (2) the offense is subject to the extended statute of limitations for crimes constituting sexual abuse pursuant to NRS 171.095(1)(b) and NRS 432B.100; and (3) the extended statute of limitations runs until the victim reaches 21 years old since the victim knew about the sexual abuse. Id.

On appeal, the defendant relied upon Quinn and argued that NRS 171.095(1)(a) applied in his case and his offense was "discovered" when the victim told her mother in 1996. Id. at 408. Therefore, the State had three years from discovery (June 1999) to file the charge. Id. This Court disagreed.

First, the Court noted the charge in Quinn, Indecent Exposure, did not constitute child sexual abuse under NRS 432B.100. Therefore, NRS 171.095(1)(b) did not apply in Quinn. Id. By contrast, the Lewdness with a Minor Under 14 charge in Bailey's case did constitute child sexual abuse under NRS 432B.100. Therefore, the tolling provision in NRS 171.095(1)(b) and not NRS 171.095(1)(a) applied. Id. at 408-09.

Furthermore, the Court reiterated that the three-year statute of limitations for felonies under NRS 171.085, "is subject to the longer periods provided for in NRS 171.095." Id. at 409. The Court noted the tolling period in NRS 171.095(1)(a) (secret manner) is subject to NRS 171.095(1)(b) (child sexual abuse). Id. Thus, the Court held "where NRS 171.095(1)(b) applies, **the time periods provided for in NRS 171.095(1)(a) and NRS 171.085 are inapplicable**." Id. (emphasis added). Essentially, when the State alleges a crime constituting child sexual abuse the statute of limitations is tolled according to NRS 171.095(1)(b) and not 171.095(1)(a). Accordingly, the district court correctly refused to grant the defendant's motion to dismiss because under NRS 171.095(1)(b) the State filed the charges before the victim turned 21 years old. Id.

To summarize, for all crimes committed in a secret manner, and not considered child sexual abuse, the statutes of limitation for felonies (NRS 171.085) and gross misdemeanors (NRS 171.090) are tolled until the crime is "discovered." NRS 171.095(1)(a). Upon discovery the State must file the charges within NRS 171.085's statute of limitations. However, if the suspect "prevents" discovery through threats or if the child victim fails to disclose the offense due to the

offense's sensitive nature, then the statute of limitations tolls until the child victim's 18th birthday and then begin to run. See Houtz, 111 Nev. at 462.

For crimes constituting child sexual abuse per NRS 432B.100, the statutes of limitation are tolled until child discovers or reasonably should have discovered the crimes, but not beyond the victim's 21st birthday. Bailey, 120 Nev. at 409; see also Hubbard v. State, 110 Nev. 671, 676 (1994) ("if the victim is a child, prosecution must take place before the victim is aged twenty-one."). Most importantly the statute of limitations in NRS 171.085 and 171.090 are never tolled "indefinitely" under either NRS 171.095(1)(a) or 171.095(1)(b).

A. The district erred by refusing to dismiss counts 2-53.

AS's birthday is May 22, 1990. AA XX 4459. Accordingly, AS turned 18 years old on May 22, 2008, and 21 years old on May 22, 2011. Most importantly, AS was 24 years old when she first disclosed Sena's alleged abuse and when the State first filed any criminal charges against Sena on September 19, 2014. AA I 1-6. The Fourth Amended Information, upon which Sena was tried, alleged counts 2 through 53 – all offenses involving AS – occurred between May 22, 2001 and August 30, 2014. Id. at 2171-86.

Given the dates alleged in counts 2-53, the 2001 version of NRS 171.085 applied to counts 2-53. This version provides the State had to file the sexual assault charges within four (4) years after the commission of the offense.[77] NRS 171.085 (West 2001).

Moreover, given the State's May 22, 2001 through August 30, 2014 allegation dates for counts 2 through 53, the 2001 version of NRS 171.095 would apply.[78] Under the 2001 version of NRS 171.095(1)(a), "[i]f a felony, gross misdemeanor or misdemeanor is committed in a secret manner, an indictment for the offense must be found, or an information or complaint filed, within the periods of limitation prescribed in NRS 171.085 and 171.090 after the discovery of the offense[.]" Under NRS 171.095(1)(b)(1)-(2), "[a]n indictment must be found, or an information or complaint filed, for any offense constituting sexual abuse of a child, as defined in NRS 432B. 100, before the victim of the sexual abuse is: (1) Twenty-one years old if he

---

[77] The Legislature amended NRS 171.085 in 2003, 2005, 2009, 2013, but did not alter the 4-year and 3-year limitations set forth in paragraphs 1 and 2.

[78] While the Legislature amended NRS 171.095 in 2005 and 2011, it did not alter the 21 and 28 years of age requirements within subsections (1)(b)(1) and (1)(b)(2). See NRS 171.095 (2001), as amended by Laws 2005, c.331, § 14, eff. June 10, 2005 and NRS 171.095 (2005), as amended by Laws 2011, ch.31, § 1, eff. May 12, 2011.

discovers or reasonably should have discovered that he was a victim of the sexual abuse by the date on which he reaches that age; or (2) Twenty-eight years old if he does not discover and reasonably should not have discovered that he was a victim of the sexual abuse by the date on which he reaches 21 years of age." NRS 171.085 (West 2001).

Additionally, because the State alleged some offenses occurred up to October 2014, the 2013 amendment to NRS 171.095 could possibly apply as well. Under the 2013 amendment the statutes of limitation for crimes constituting child sex abuse are, "[t]hirty-six years old if the victim discovers or reasonably should have discovered that he or she was a victim of the sexual abuse by the date on which the victim reaches that age; or [] [f]orty-three years old if the victim does not discover and reasonably should not have discovered that he or she was a victim of the sexual abuse by the date on which the victim reaches 36 years of age." NRS 171.095, as amended by Laws 2013, ch.69, § 3, eff. May 23, 2013. However, these amendments only apply to child sex abuse offenses occurring "before October 1, 2013, if the applicable period of limitation has commenced **but has not yet expired on October 1, 2013**." Id. (emphasis added).

Here, the Sexual Assault, Lewdness, and Incest allegations within counts 2-52 are all felonies. The Open and Gross Lewdness counts within counts 2-52 are gross misdemeanors.[79] Any of the felonies and gross misdemeanors crimes that occurred while AS was under 18 years of age constitute Child Sexual Abuse as defied in NRS 432B.100 and were subject to the tolling provisions under NRS 171.095(1)(b).[80]

Based upon these statutes, Sena filed a Motion to Dismiss counts 2 through 53 prior to trial arguing under the child sexual abuse tolling provision in the 2001 version of NRS 171.095(1)(b) the State had to file the charges before AS's 21st birthday, May 22, 2011. AA VII 1390-1422. Additionally, although not conceding the charges were subject to the "secret manner" tolling provision under NRS 171.095(1)(a), if the State asserted the "secret manner" exception applied then it had to prove the crimes were committed in a secret manner. Id. at 1400. Even then, the statutes of limitation would only

---

[79] Prior to 2003 NRS 432B.100 did not include Open and Gross Lewdness as child sex abuse. In 2003 the legislature added Open and Gross Lewdness to NRS 432B.100. See Nevada Laws 2003, ch. 261, § 28, eff. May 28, 2003. Here, because each Open and Gross Lewdness allegation within counts 2-53 allegedly occurred after 2003, those allegations are considered child sexual abuse.

[80] Per NRS 432B.040, a "child" is defined as someone under the age of 18.

toll until AS's 18th birthday. Id. (citing Houtz v. State, 111 Nev. 457 (1995)).

In Opposition the State acknowledged the 2001 version of NRS 171.095 applied in Sena's case. Id. at 1448. Nevertheless, the State argued the offenses were committed in a secret manner under NRS 171.095(1)(a) due to Sena's alleged threats and/or intimidation, and not "discovered" until September 2014 when AS spoke to Deborah's attorney. Id. at 1453.

In his reply Sena reiterated NRS 171.095(1)(a) does not apply when the offenses constitute child sexual abuse under NRS 171.095(1)(b). Id. at 1459. Nevertheless, even if NRS 171.095(1)(a) did apply, the statute of limitations could only toll until AS's 18th birthday, and not indefinitely. Id.

The district court found the secret manner provision within NRS 171.095(1)(a) applied even to crimes constituting child sexual abuse. AA XXIX 6790. Additionally, the court concluded the statute of limitations for a crime committed in a secret manner could toll "indefinitely" until the alleged victim is released from the assailant's control. Id. at 6791, 6801. Moreover, the court made a definitive factual finding that Sena's "control" over AS and the other children

prevented "discovery" until AS left the house at 24 years-old in June 2014.[81] Id. at 6792. The court clearly erred.

1. Counts 2-20.

The State alleged in counts 2, 4, 5, 7, 9, 10, 12, 13, 15, 17, 18, and 20 that Sena committed Lewdness with a Minor under 14 **between May 22, 2001 and May 21, 2004**. AA X 2171-77. The State alleged in counts 3, 6, 8, 11, 14, 16, and 19 that Sena committed Sexual Assault on a Minor **between May 22, 2001 and May 21, 2004**. Id. at AA X 2173-77. Given this date range, AS was 11 through 13 years old during all alleged incidents.

Under the 2001 version of 171.085, applicable in Sena's case, the statute of limitations for the Lewdness counts was three (3) years and the Sexual Assault counts was four (4) years. However, because the aforementioned counts constitute child sexual abuse under NRS 432B.100, the statutes of limitation tolled under NRS 171.095(1)(b).

Notwithstanding tolling under NRS 171.095(1)(b), AS knew Sena allegedly abused her when the abuse occurred. Therefore, AS "discovered" the abuse when it happened. Accordingly, the State had

[81] The district court also bizarrely suggested Sexual Assault is a continuing offense which does not end until the suspect stops threatening or controlling the victim. Id. at 6794-95.

to file the charges before AS reached 21 years of age. See Bailey, 120 Nev. at 409; Hubbard, 110 Nev. at 676. AS turned 21 years old on May 22, 2011. The State first filed charges related to AS on September 19, 2014. AA I 1-6. Accordingly, the State filed counts 2-30 outside the applicable statutes of limitation and the district court erred by refusing to dismiss these charges prior to trial.[82]

2. Counts 21 through 30, 45 and 52.

The State alleged in counts 21 through 30, 45 and 52, that Sena committed seven (7) counts of Sexual Assault on Minor Under 16,[83] three (3) counts of Incest,[84] two (2) counts of Open and Gross Lewdness,[85] and two (2) counts of Sexual Assault[86] between **May 22, 2004 and May 21, 2006**. AA X 2178-80, 83, 86. AS was between 14 and 15 years old during these alleged incidents.

Under 171.085 and 171.090, the statute of limitations for Incest is three (3) years, Sexual Assault four (4) years, and Open and Gross Lewdness two (2) years. All offenses were subject to the tolling period under NRS 171.095(1)(b) because they constitute child sexual

---

[82] The jury acquitted Sena of counts 5, 16, 17 and 18. See AA XI 2360, 62.
[83] Counts 21, 23, 25, 26, 28, 30, and 52. AA X 2178-80, 86.
[84] Counts 22, 27, and 80. AA X 2178-80.
[85] Counts 24 and 29. AA X 2178, 80.
[86] Count 31 and 45. AA X 2180, 2183.

abuse per NRS 432B.100. AS "discovered" the offenses when they occurred because AS knew she had been abused. Therefore, the State had to file all charges within counts 20-30, 45 and 52, before AS reached 21 years old on May 22, 2011. As noted, the earliest the State filed any charges against Sena was September 19, 2014. AA I 1-6. Accordingly, the State filed counts 20-30, 45 and 52, outside the applicable statutes of limitation and the district court erred by refusing to dismiss these charges prior to trial.[87]

3. Counts 46 through 51.

The State alleged in counts 46 through 51 that Sena committed two (2) counts Sexual Assault,[88] one (1) count Incest,[89] and three (3) counts Open and Gross Lewdness[90] **between May 22, 2007 and June 30, 2008**.[91] AA X 2184-86. These allegations involved a single incident between AS, Deborah, and Sena. AS testified the incident occurred "around" her 18th birthday. AA XX 4576-77. Deborah testified AS was "17 or 18" during the incident. AA XXV 5902; AA XXVIII 6467.

---

[87] The jury acquitted Sena on count 30, Sexual Assault on Minor Under 16, and count 45, Sexual Assault. AA XI 2365, 68.
[88] Counts 46 and 48. AA X 2184.
[89] Count 47. AA X 2184.
[90] Counts 49, 50, and 51. AA X 2185-86.
[91] The jury found Sena guilty on all counts. AA XXI 2368-69.

Under 171.085, the statutes of limitation for Incest was three (3) years, Sexual Assault four (4) years, and Open and Gross Lewdness two (2) years. All offenses constitute child sexual abuse if AS was under 18 years of age at the time of the alleged incidents. If AS was under 18, then the State had to file the charges before AS's 21st birthday. NRS 171.095(1)(b). Once again, the earliest the State filed any charges Against Sena was on September 19, 2014. AA I 1-6. Accordingly, if AS was 17 years old during the incident, the State filed counts 46 through 51, outside the applicable statutes of limitation.

Alternatively, if AS was 18 years old when the allegations occurred, the tolling provision under NRS 171.095(1)(b) does not apply. Rather, the State had until June 30, 2012 to file the Sexual Assault charges, June 30, 2011 to file the Incest charges, and June 30, 2010 to file the Open and Gross Lewdness charges. The earliest the State filed any charges Against Sena was on September 19, 2014, which is outside the statutes of limitations. AA I 1-6. These statutes of limitation could potentially toll under NRS 171.095(1)(a) provided the offenses were committed in a "secret manner." As noted, the applicable statutes of limitations for offenses committed in a secret

manner toll until "discovery." Upon discovery, the periods of limitation in NRS 171.085 begin to run.

Here, both AS and Deborah "discovered" the offenses alleged within counts 46 through 51 when the offenses occurred because both were aware the offenses occurred. Therefore, Sena did not intend to keep all those but himself unaware that he committed the offenses. Additionally, although the State alleged Sena committed the offenses within counts 46 through 51 pursuant to a conspiracy with Deborah (AA X 2184-86), Deborah testified she never **willingly** agreed to participate in sexual acts with Sena and AS and therefore could not have "conspired" with Sena. See Sanders v. State, 110 Nev. 434, 436 (1994) ("[a]greement among two or more persons is an essential element of the crime of conspiracy, and mere association is insufficient to support a charge of conspiracy."); Johnson v. Sheriff, 91 Nev. 161, 163 (1975)("[w]hen one of two persons merely pretends to agree, the other party, whatever he may believe, is in fact not conspiring with anyone."). Therefore, Deborah "discovered" the offenses when they occurred because Deborah was not acting in *pari delicto* with Sena. *Pari delicto* means "two (or more) people are all at fault or are all guilty of a crime."

<https://dictionary.law.com/Default.aspx?selected=971>, accessed April 8, 2020.

Additionally, assuming AS was 18 years old during the incident with Sena and Deborah, AS was an adult who regularly left the house to go to work and would have had innumerable opportunities to report Sena's alleged behavior. Indeed, neither AS nor Deborah testified that they failed to report Sena's alleged crimes within counts 46 through 51 based upon any explicit threat Sena conveyed. While a general "fear" may suffice for crimes Sena allegedly committed when AS was 11 years old, a generalized "fear" is not sufficient to toll the statutes of limitations under NRS 171.095(1)(a)'s secret manner provision for an adult over 18 years of age. Accordingly, the secret manner tolling provision in NRS 171.095(1)(a) did not toll the statutes of limitation for counts 46 through 51.

4. Counts 31 through 44.

Counts 31 through 44 alleged eight (8) counts Sexual Assault,[92] three (3) counts Incest,[93] and three (3) counts of Open and Gross Lewdness[94] occuring **between May 22, 2006 and August 30, 2014**.

[92] Counts 31, 33, 35, 36, 38, 40, 41, 43. AA X 2180-83.
[93] Counts 32, 37, 42. AA X 2180-83.
[94] Counts 34, 39, 44. AA X 2181-83.

AA X 2180-83. AS was 16 through 23 years old during these dates. However, although the State alleged counts 31 through 44 occurred up to AS's 23rd birthday, the State argued at trial that counts 31 through 44 actually occurred when AS was "16, 17, 18 and beyond." See AA XXVIII 6466-67.

It appears because AS could only testify generally that Sena abused her during high school – and could not provide any specific dates – the State simply alleged Sena committed two acts of Sexual Assault (vaginal and anal), one act of Incest, and one act of Open and Gross Lewdness occurring at the same time, once per year, when AS was 16 years old, 17 years old, and 18 years old. Id. Accordingly, the actual dates for all allegations within counts 31 through 44 would be May 22, 2006 through May 21, 2009, and not through August 30, 2014.[95]

The charges allegedly occurring before AS's 18th birthday all constitute child sexual abuse. Therefore, the State had to file the charges before AS turned 21 years old on May 22, 2011. The earliest the State filed any charges against Sena was September 19, 2014 and

[95] Indeed, it is unclear how Sena could have possibly committed any act as alleged within counts 31 through 44 in August 2014 as AS left Sena's house in June 2014. AA XXV 5748.

therefore, any counts within 31 through 44 where the State alleged AS was under 18 years-old were filed outside the statutes of limitations.[96]

For charges occurring when AS was 18 years old, the child sexual abuse tolling provision under NRS 171.095(1)(b) does not apply. Therefore, the State had to file the Open and Gross Lewdness counts by May 22, 2011 (2 years from the offense), the Incest counts by May 22, 2012 (3 years from the offense) and the Sexual Assault counts by May 22, 2013 (4 years from the offense). However, the earliest the State filed any charges related to AS was in September 2014 which is outside the statutes of limitations. Once again, the statutes of limitation could only potentially toll until discovery for any crimes committed in a secret manner.

Like counts 46 through 51, AS "discovered" the offenses within counts 31 through 44 when they occurred as she knew the offenses occurred. Moreover, AS did not fail to report Sena's alleged offenses based upon fear induced by a contemporaneous threat. Indeed, AS never testified that she failed to report the alleged crimes within counts 31 through 44 based upon any explicit threat Sena conveyed. As noted, a generalized "fear" is not sufficient to toll the statutes of

[96] The jury acquitted Sena on counts 34, 38, 39, 40, 43 and 44. AA XXI 2366-68.

limitations under NRS 171.095(1)(a)'s secret manner provision for an 18-year-old adult. Finally, assuming AS was 18 when some incidents occurred, she was an adult who regularly came and went from the residence. Thus, AS has innumerable opportunities to report Sena's alleged behavior. Accordingly, the State filed counts 31 through 44 outside the applicable statutes of limitation.

5. Count 53.

The State charged Sena in count 53 with dissuading AS from reporting, commencing criminal prosecution, or causing Sena's arrest.[97] AA X 2186. The State alleged Sena "dissuaded" AS from reporting his crimes sometime between May 22, 2001 and June 30, 2014. Id. Specifically, Sena dissuaded AS by, "telling the said AS that the said Defendant would kill and/or break the legs of the said AS and/or have AS taken away and sent to juvenile detention if the said AS told anyone of the sexual acts the said AS was forced to commit or have committed upon the said AS." Id.

Although, this Court has never squarely addressed dissuading's unit of prosecution, in Estes v. State, 122 Nev. 1123, 1128 (2006) this Court impliedly recognized the State could actually charge one count

[97] NRS 199.305.

of dissuading per alleged threat.[98] Thus, here, Sena contends dissuading is complete when the threat is made and the State's decision to charge Sena with one dissuading count means it believed there was one threat. Thus, the statute of limitations began when Sena made the initial threat. That threat allegedly occurred when AS was 11 years old and supposedly involved telling AS if she reported Sena's actions she would be sent to juvenile detention. AA XX 4534. AS would have been 11 years old in 2001.

The statute of limitations for count 53 is three (3) years unless tolled. NRS 171.085. Dissuading is not considered child sexual abuse per NRS 432B.100 and therefore is not tolled under NRS 171.095(1)(b). Dissuading could be tolled under NRS 171.095(1)(a) until "discovery," provided it occurred in a "secret manner." However, even so, the tolling cannot extend beyond AS's 18th birthday. See Houtz, 111 Nev. at 462.

---

[98] Similarly, this Court has not addressed whether dissuading is a continuing offense which would delay the statute of limitations from running. See Perelman v. State, 115 Nev. 190, 192 (1999) (When a felony is deemed to be a "continuing offense" the statute of limitations does not begin "until the continuous commitment of the offense is completed."). However, Estes also suggests dissuading is not a continuing offense.

AS "discovered" the dissuading offense when Sena allegedly threatened to send her to juvenile detention. Assuming this threat itself dissuaded AS and thus means it was committed in a secret manner, the statute of limitations only tolled until AS's 18th birthday. Houtz, 111 Nev. at 462. AS turned 18 on May 22, 2008. Three years from her 18th birthday was May 22, 2011. The State filed the dissuading charge against Sena in the Third Amended Criminal Complaint on December 15, 2015. AA I 34, 49. Therefore, the State filed count 53 outside the applicable statute of limitations.

a. The district court erred by concluding the secret manner tolling applied to crimes constituting child sexual abuse.

The district court erred by concluding crimes constituting child sexual abuse could toll under NRS 171.095(1)(a)'s secret manner provision. As noted, "[w]here NRS 171.095(1)(b) [child sexual abuse tolling] applies, **the time periods provided for in NRS 171.095(1)(a) and NRS 171.085 are inapplicable**." Bailey, 120 Nev. at 409. (emphasis added).

Nevertheless, assuming NRS 171.095(1)(a) [secret manner tolling] could apply to crimes constituting child sexual abuse – notwithstanding previous authority saying otherwise – the district

court still erred by concluding that NRS 171.095(1)(a) tolled the statutes of limitation beyond AS's 18th birthday. Under NRS 171.095(1)(a), the statutes of limitations toll for offenses committed in a secret manner until "discovery," but not beyond the victim's 18th birthday. See Houtz, 111 Nev. at 462. Thus, assuming NRS 171.085(1)(a) applied to offenses constituting child sexual abuse, once AS turned 18 the State had to file the felonies no later than 3 or 4 years after AS turned 18 years old, or her 22nd birthday. See NRS 171.085. However, as noted, the State filed all charges pertaining to AS after her 24th birthday.

Finally, assuming the district court was correct that the secret manner tolling applied to crimes constituting child sexual abuse, the court nevertheless erred by concluding Sena's supposed "control" over AS conclusively established the crimes were not "discovered" until AS disclosed the crimes to Deborah's divorce attorney. The court is the arbiter of the law and not the facts. See N.R.S. Const. Art. 6, § 12; NRS 175.161(1). Assuming statutes of limitation are non-jurisdictional affirmative defenses, then whether the State filed charges within the applicable time limits and whether the offenses were committed in a secret manner should have been submitted to the

jury. See Dozier v. State, 124 Nev. 125, 127 (2008) ("[t]he district court denied Dozier's motion [to dismiss based upon the statute of limitations], finding that he appeared to have concealed the assaults from his ex-wife and that **it was a question for the jury**.") (emphasis added). Therefore, even if the court was correct that NRS 171.095(1)(a) applied to crimes constituting child sexual abuse, the court usurped the jury's fact-finding role and totally removed Sena's defense theory from the jury's consideration. E.g., Williams v. State, 99 Nev. 530, 531 (1983) (internal citations omitted). Accordingly, this Court must reverse Sena's convictions.

i) Sena preserved his statute of limitations defense.

Statutes of limitation are non-jurisdictional affirmative defenses which must be raised in the trial court or are deemed waived on appeal. See Hubbard, 110 Nev. at 677. To raise the defense, "a defendant must present sufficient facts to demonstrate that the statute of limitations should not be tolled." Id. When a defendant affirmatively raises a statute-of-limitations defense, and the State seeks to disprove that defense under NRS 171.095(l)(a), "the State must do so by a preponderance of the evidence." Dozier, 124 Nev. at 154. In civil cases, "[t]he appropriate accrual date for the statute of

limitations is a question of law only if the facts are uncontroverted." Winn v. Sunrise Hosp. & Med. Ctr., 128 Nev. 246, 253 (2012) (citing Day v. Zubel, 112 Nev. 972, 977 (1996)).

Here, Sena preserved his statute of limitations defense regarding counts 2-53. Sena filed a motion to dismiss on August 11, 2017. AA VII 1390. The court entertained argument on August 30, 2017 and denied Sean's motion at that time. See AA XXIX 6782-6805. As noted *supra*, the district court erred in denying Sena's motion because pursuant to either tolling provision under NRS 171.095, the State filed all charges within counts 2 – 53 outside the applicable statutes of limitation. Accordingly, this Court should vacate any convictions within counts 2-53.

B. The State filed other charges outside the statutes of limitation.

The State filed other charges outside the applicable statutes of limitation as well. Sena did not address these charges in the district court. Nevertheless, Sena contends he did not waive his statute of limitations defense.

1. Count 1.

In count 1 the State charged Sena with Conspiracy to Commit Sexual Assault. AA X 2172. The State alleged this single conspiracy

between Sena, Deborah, and Terrie to commit sexual assault against all their children occurred at some point between May 22, 2004 and June 30, 2014. Id.

The statute of limitations for the felony conspiracy allegation is three (3) years unless tolled. See NRS 171.085. The charge is not considered child sexual abuse per NRS 432B.100 and therefore, is not tolled under NRS 171.095(1)(b). The charge could be tolled under NRS 171.095(1)(a) provided Sena committed the offense in a "secret manner."

In Nevada a "conspiracy" is "an agreement between two or more persons for an unlawful purpose." Nunnery v. Eighth Judicial Dist. Ct., 124 Nev. 477, 480 (2008). The crime is complete upon the co-conspirators' agreement to commit an unlawful act. Id. No overt act is necessary to support a conspiracy conviction. Id. (citing NRS 199.490).

Here, because the State alleged a single agreement, *i.e.*, conspiracy, between Sena, Terrie, and Deborah to commit sexual assault upon AS, TS, BS, and RS, the agreement to commit these acts would logically have occurred before the first act. The earliest act Sena, Deborah, and Terrie allegedly committed pursuant to this

conspiracy was the alleged sexual assault upon AS by Sena and Terrie which occurred between May 22, 2004 and May 21, 2006. AA X 2186. Therefore, the statute of limitations for conspiracy was June 30, 2011 at the latest, unless committed in a secret manner.

Problematically, AS "discovered" the conspiracy when the Sexual Assault occurred as she was aware Sena and Terrie supposedly agreed to commit Sexual Assault. Additionally, AS's failure to report the alleged conspiracy was not based upon any fear induced by threats. Indeed, AS never testified that she failed to report the conspiracy based upon any explicit threat Sena conveyed. Therefore, the secret manner tolling provision in NRS 171.095(1)(a) does not apply to count 1. Accordingly, the State had to charge Sena with the offense no later than three (3) years from the date the conspiracy occurred which was before June 30, 2009. Conversely, assuming the secret manner tolling applied, the three (3) year limitation began to run once AS turned 18. Thus, the State had until June 30, 2011 to file the charge. The State actually filed the conspiracy charge in the Third Amended Criminal Complaint on December 15, 2015. AA I 34. Accordingly, the State filed count 1 outside the statute of limitation.

2. Count 117.

Count 117 alleged Sena committed Child Abuse, Neglect or Endangerment *via* Sexual Exploitation against TG. AA X 2211-12. TG was born on January 9, 1997. AA XXII 4985. When TG was either 11 or 13 years old (2008 or 2010) she alleged Sena showed her pornographic images on his computer. Id. at 5007-5009.

The applicable statute of limitations for Child Abuse, Neglect or Endangerment is three (3) years, unless tolled. See NRS 171.085(2). Assuming TG was 11 years old (2008) when Sena showed her the pornographic images the State had to charge Sena no later than 2011 under NRS 171.085. If TG was 13 when Sena showed her the images (2010), then the State had to charge Sena no later than 2013. The State first charged Sena with Child Abuse, Neglect or Endangerment in the Third Amended Criminal Complaint on December 15, 2015. AA I 73-74. This is outside the statute of limitations unless tolled.

Sena concedes encouraging a child to view pornography qualifies as sexual exploitation under NRS 200.508(4)(a) and NRS 432B.110(2). Sena also concedes images depicting persons engaged in sexual conduct would qualify as "pornography." However, Child Abuse, Neglect or Endangerment does not constitute child sexual abuse under NRS 432B.100 and therefore, cannot toll under NRS

171.095(1)(b). The statute of limitations could toll until "discovery," only if the offense was committed in a secret manner. NRS 171.095(1)(a).

Sena did not commit the offense in count 117 in a secret manner because he not commit the offense deliberately intending to keep everyone, including TG, unaware he committed the offense. Indeed, TG "discovered" the offense when Sena showed TG the photos. AA XXII 5009. Additionally, while TG did not disclose Sena's offense, she never claimed she failed to do because Sena threatened her. In fact, TG testified she was not afraid of Sena. Id. at 4995. Moreover, TG's failure to report Sena's offense was not based upon the reasons expressed in Walstrom – the inherent vulnerability of child victims. Unlike in Walstrom, Sena did not subject TG to a lewd act and TG was not under 5 years old. See Walstrom, 104 Nev. at 55-56. Accordingly, the secret manner tolling provision in NRS 171.095(1)(a) does not apply to count 117.

3. Count 118.

In count 118 the State charged Sena with Use of Minor Under 18 in Production of Pornography for surreptitiously filming TG in the shower when TG was 13 or 14 years old (around 2010 or 2011). AA

X 2212. The State first alleged Sena committed this offense in the Third Amended Criminal Complaint filed on December 15, 2015. AA I 74.

The statute of limitations for the charge is three (3) years. NRS 171.085(2). Thus, the State had to file the charge at the latest sometime in 2014, unless tolled under NRS 171.095. The allegations do not constitute child sexual abuse under NRS 432B.100 and cannot toll under NRS 171.095(1)(b). If Sena committed the offense in a secret manner, the statute of limitations could toll under NRS 171.095(1)(a).

Should the State argue Sena committed the crime in a secret manner, Sena contends he did not commit the alleged offense in a deliberately surreptitious manner intending to, and keeping, all those but himself, or someone acting in *pari delicto*, unaware the offense has been committed. Walstrom, 104 Nev. at 56. Indeed, Terrie was present when Sena filmed TG. Although the State alleged Sena committed the acts underlying count 118 pursuant to a conspiracy with Terrie (AA X 2212), Terrie never testified she agreed to film TG. See Sanders, 110 Nev. at 436; Johnson, 91 Nev. at 163. In fact, Terrie testified she did not know Sena intended to film TG until he began to

do so. AA XXIII 5329-30. Moreover, Terrie – a person with knowledge – did not fail to report out of fear induced by any specific threat. Additionally, Terrie routinely left the Yellowstone residence over the years and could have disclosed Sena's alleged crimes without fear Sena would imminently harm her.[99] Finally, Terrie was not a child-victim under eighteen who failed to report for the reasons discussed in Walstrom. See Quinn, 117 Nev. at 715-16. Accordingly, the tolling provision in NRS 171.095(1)(a) does not apply to count 118 and the State charged Sena outside the statute of limitations.

4. Count 115.

In count 115 the State charged Sena with Use of Minor Under 14 in Production of Pornography for surreptitiously filming EC in the shower sometime between December 21, 2010 and June 30, 2014. AA X 2211. The State first alleged this offense in the Third Amended Criminal Complaint filed on December 15, 2015. AA I 73.

The statute of limitations for count 115 was three (3) years. NRS 171.085(2). Thus, the State had to file the charge within three

[99] Notably, Terrie procured a restraining order against Sena in 1993 which further proves she was capable of reporting Sena's alleged abusive behavior. AA XXIII 5270.

years after the incident, unless tolled under NRS 171.095. The allegation does not constitute child sexual abuse under NRS 432B.100 and therefore, is not subject to the tolling provisions under NRS 171.095(1)(b). The allegation could be committed in a secret manner, and if so, would toll under NRS 171.095(1)(a).

EC was born on December 21, 2000. AA XXI 4905. Although the State alleged Sena committed the offense between December 21, 2010 and June 30, 2014 (AA X 2211), EC testified she did know her age when Sena filmed her in the shower. AA XXI 4924, 4928. Additionally, the State never asked Terrie about EC's age. Nevertheless, based upon the dates alleged, EC was anywhere from 10 to 13 years old when the filming occurred. Using the earliest date, December 21, 2010, the State had to file the charges no later than December 21, 2013 pursuant to NRS 171.085, unless NRS 171.095(1)(a) applied.

NRS 171.095(1)(a) did not apply. Sena did not commit the offense in a secret manner because he did not commit the alleged offense intending to keep everyone but himself unaware that he committed the offense. Terrie was present when Sena filmed EC. Additionally, although the State alleged Sena committed the offense

pursuant to a conspiracy with Terrie (AA X 2211), Terrie never testified she agreed to film EC. Therefore, Terrie was not acting in *pari delicto* with Sena. Also, Terrie was not a child-victim under eighteen years of age who failed to report the offense against EC based upon the reasons discussed in Walstrom. Furthermore, Terrie did not fail to report Sena's offense against EC out of fear induced by threats made by Sena. Accordingly, the tolling provision in NRS 171.095(1)(a) does not apply. Assuming the offense occurred around December 2010, the State had until December 2013 to charge Sena. However, the State actually charged Sena on December 15, 2015, which is outside the statute of limitations.

5. Counts 55 and 57.

The State charged Sena in counts 55 and 57 with Child Abuse, Neglect or Endangerment *via* Sexual Abuse occurring between December 2, 2008 and December 1, 2010. AA X 2187-88. TS's birthdate is December 2, 1994. AA XXIV 5625. Thus, TS would have been either 14 or 15 years old at the time of these offenses.

The statute of limitations for the felony Child Abuse charges is three (3) years. NRS 171.085. These charges do not constitute child sexual abuse under NRS 432B.100 and therefore, cannot be tolled

under NRS 171.095(1)(b). However, the charges could be committed in a secret manner subject to the tolling provisions under NRS 171.095(1)(a).

Sena did not commit the offenses in counts 55 and 57 in a secret manner. Sena did not commit the alleged offenses in a deliberately surreptitious manner intending to and keeping all but himself unaware the offenses had been committed. In fact, Deborah and TS were present during the alleged incidents within counts 55 and 57. Deborah was not acting in *pari delicto* with Sena because Deborah steadfastly maintained she did not willingly engage in sexual conduct with TS. See Sanders, 110 Nev. at 436; Johnson, 91 Nev. at 163. Moreover, Deborah was not a child-victim under eighteen years of age who failed to report the offense against TS based upon the reasons discussed in Walstrom. Additionally, Deborah never testified she failed to report the crimes involving TS due to fear induced by a specific threat. Rather, Deborah testified she only generally feared Sena. For purposes of "discovery" under NRS 171.095(1)(a), vague threats unrelated to the crime the person knows about should not suffice to extend the statute of limitations. Thus, Sena never intended to keep

"all those" but himself or someone acting with him from being aware the crime had been committed.

Similarly, Sena never "prevented" TS's discovery due to threats. In fact, TS never claimed Sena threatened him. Lastly, although TS was under 18 years old at the time of the offense, assuming TS failed to report based upon Walstrom, the statute of limitations only tolled for three years from TS's 18th birthday. TS turned 18 on December 2, 2012, yet the State charged the offenses on December 15, 2015, which is just outside the statute of limitations. AA I 34, 49-56.

6. Counts 59 and 69.

The State charged Sena in count 59 with Use of Minor in Producing Pornography for filming TS and Deborah engaging in sexual conduct between December 2, 2008 and December 1, 2010. AA X 2189. Thus, TS was 14 or 15 years old when this offense occurred.

The statue of limitations for count 59 is three (3) years. The offense does not constitute child sexual abuse under NRS 432B.100 and therefore, is not tolled under NRS 171.095(1)(b). If the offense was committed in a secret manner the statute of limitations would toll

for three years upon discovery, but not more than three years after TS turned 18 years old. NRS 171.095(1)(a). TS turned 18 years old on December 2, 2012. Three years from TS's 18th birthday is December 2, 2015. However, the State first filed the charge on December 15, 2015. AA I 34, 51. Therefore, even if count 59 was committed in a secret manner the State filed the charge outside the statute of limitations.

In count 69 the State charged Sena with Use of Minor in Producing Pornography for filming TS and Deborah during a second incident. Id. at 2194; AA XXVIII 6488-89. The State alleged this incident occurred sometime between December 2, 2008 and December 1, 2013. AA X 2194. Thus, TS would have been between 14 and 18 years old during the offense. However, TS turned 18 years old on December 2, 2012. If the offense actually occurred after TS's 18th birthdate – between December 2, 2012 and December 1, 2013 – TS would not have been a minor. Nevertheless, the jury convicted TS of count 69 (AA XI 2373) thus establishing the offense occurred sometime before December 1, 2012.

The statute of limitations for count 69 is three (3) years. The offense does not constitute child sexual abuse under NRS 432B.100

and therefore, is not tolled under NRS 171.095(1)(b). If the offense was committed in a secret manner the statute of limitations would toll for three years upon discovery, but not more than three years after TS turned 18 years old. NRS 171.095(1)(a). TS turned 18 years old on December 2, 2012. Three years from TS's 18th birthday is December 2, 2015. The State first filed the charge on December 15, 2015. AA I 34, 56. Therefore, even if count 69 was committed in a secret manner the State filed the charge outside the statute of limitations.

7. Count 77.

In count 77 the State alleged Sena used BS as the subject of child pornography between August 13, 2011 and June 30, 2014. AA X 2198. BS was born on August 13, 1998. AA XXV 5703. Therefore, BS turned 18 years old on August 13, 2016. The State first charged these allegations in the Third Amended Criminal Complaint filed on December 15, 2015. AA I 34, 60-61.

Initially, neither BS nor Deborah testified the incident where Sena filmed BS occurred anywhere near June 30, 2014. Rather, BS testified the incident occurred when he was around 14 or 15 years old. AA XXV 5733. Deborah testified BS was "about 15." Id. at 5910. BS would have been 14 years old beginning on August 13, 2012 and

would have turned 15 on August 13, 2013. Therefore, logically, the offense occurred at some time between those dates.

The statute of limitations for the charge was three (3) years. See NRS 171.085 (2003), as amended by Laws 2003, c.10, § 4, eff. July 22, 2003. The offense does not constitute child sexual abuse under NRS 432B.100 and therefore did not toll pursuant to NRS 171.095(1)(b). However, if the offense was committed in a "secret manner," the statute of limitations would toll under NRS 171.095(1)(a) until "discovery" or three years from BS's 18th birthday.

Sena did not commit the allegations within count 77 in a secret manner because he did not commit the alleged offenses in a deliberately surreptitious manner intending to keep all those but himself unaware the offense had been committed. Both BS and Deborah were present when Sena filmed BS and thus both knew Sena used BS in the production of pornography. Although BS's was arguably not obligated to report Sena's alleged offenses either due to his fear of Sena or because he was a child victim who failed to report Walstrom, Deborah – who was also a person with knowledge – did have an obligation to report Sena's alleged actions. Deborah was not a

child-victim under eighteen years of age who failed to report the offense for the reasons discussed in Walstrom. Moreover, Deborah did not claim she failed to report Sena's offense against BS out of fear induced by a specific threat. Additionally, notwithstanding the allegation that Sena committed the offense in count 77 pursuant to a conspiracy with Deborah (AA X 2198), Deborah, never testified she agreed to film BS and therefore, was not acting in *pari delicto* with Sena. See Sanders, 110 Nev. at 436; Johnson, 91 Nev. at 163.

Based upon the aforementioned, the tolling provision in NRS 171.095(1)(a) does not apply to count 77. Therefore, assuming the offense occurred around August 13, 2012, the State had to file the charges before August 13, 2015. The State ultimately filed the charges in the Third Amended Criminal Complaint on December 15, 2015, which is outside the statute of limitations. AA I 60.

8. Counts 99 and 103.

The State alleged in counts 99 and 103 that Sena used RS as the subject of child pornography between June 14, 2010 and June 13, 2014. AA X 2206-07. The State first filed these allegations in the Second Amended Criminal Complaint on December 18, 2014. AA I 24-26. RS turned 18 years old on June 14, 2016. Given the three (3)

year statute of limitations, the State had until either June 14, 2013 or June 30, 2017, to file the charges against Sena.

Neither RS nor Terrie testified the incidents where Sena filmed them occurred anywhere near June 30, 2014. RS testified the incident with Terrie occurred when he was in either eighth or ninth grade. AA XXIV 5555. Terrie testified RS was about 14 1/2 years old. AA XXIII 5305. Based upon this testimony – and given that RS was born on June 14, 1998 – the incident giving rise to counts 99 and 103 would have occurred anywhere from June 15, 2011 (if in eighth grade) to January 13, 2014 (if RS was 14 and 1/2 years old). Therefore, if the incident occurred around June 15, 2011, the State filed the charges outside the three-year statute of limitations under NRS 171.085, unless tolled under NRS 171.095(1)(a).

The offenses within counts 99 and 103 do not constitute child sexual abuse per NRS 432B.100. Thus, the statute of limitations did not toll under NRS 171.095(1)(b). Moreover, the secret manner tolling provision under NRS 171.095(1)(a) did not apply either. Sena did not commit the offenses within counts 99 and 103 in a "secret manner" because he did not commit the alleged offenses intending to keep everyone but himself unaware the offense had been committed.

Indeed, both RS and Terrie were present when Sena filmed BS and both knew Sena used RS in the production of pornography. Thus, the offense was "discovered" when Sena filmed RS.

Additionally, although RS was not obligated to report Sena's alleged offenses per Walstrom, Terrie did have an obligation to report Sena's alleged actions. Terrie was not a child-victim under eighteen years of age. Moreover, Terrie did not claim she failed to report Sena's offense against RS out of fear induced by a specific threat. Furthermore, notwithstanding the State's claim that Sena committed the offenses in count 99 and 103 pursuant to a conspiracy with Sena (AA X 2206-08), Terrie, never testified she agreed to film RS and therefore, was not acting in *pari delicto* with Sena. See Sanders, 110 Nev. at 436; Johnson, 91 Nev. at 163.

Based upon the aforementioned, the tolling provision in NRS 171.095(1)(a) does not apply to counts 99 and 103. Therefore, so long as the offense occurred around June 15, 2011, the State had to file the charges before June 15, 2014. The State ultimately filed the charges in the Second Amended Criminal Complaint on December 18, 2014, outside the statute of limitations. AA I 60.

9. Count 105.

According to RS, when he was 14 or 15 (June 14, 2012 to June 13, 2014), Sena showed him a video of Sena and Terrie engaged in sexual intercourse. AA XXIV 5531-34. Based upon this allegation the State charged Sena in count 105 with Child Abuse, Neglect or Endangerment – Sexual Exploitation. AA X 2208. State first alleged the Child Abuse offense in the Third Amended Crim Complaint filed on December 15, 2015. AA I 70.

Under NRS 171.085 the statute of limitations for felony Child Abuse is three (3) years. Therefore, if the offense occurred any time between June 14, 2012 and December 14, 2012, the State filed the charge outside the three-year statute of limitations, unless tolled.

Child Abuse, Neglect or Endangerment does not constitute child sexual abuse pursuant to NRS 432B.100 and therefore, the statute of limitations did not toll under NRS 171.095(1)(b). The statute of limitations could toll under NRS 171.095(1)(a), but only if Sena committee the offense in a secret manner.

Sena did not commit the alleged offense in a secret manner. RS knew the offense occurred because he was aware Sena showed him the video. Furthermore, Sena did not "prevent" RS from discovering the

offense by threatening RS. RS never claimed Sena threatened any harm to RS should RS disclose that Sena showed him pornography. Additionally, although RS was under 18 years of age, his failure to disclose was not based upon the reasons discussed in Walstrom. Walstrom involved actual lewd acts committed upon the victim. Given the inherently sensitive nature of those acts, and the vulnerability of the victim, the failure to report could be excused. By contrast however, merely showing a teenager pornography is does not implicate the same concerns. Therefore, RS could have reported the alleged offense to anyone living in the house with him. Failing to do that, the statute of limitations did not toll.

a. Although Sena did not raise a statute of limitations defense for the aforementioned charges, he did not waive this issue.

As noted, "statute of limitations is a non-jurisdictional affirmative defense that must be asserted by the defendant or else it is waived." Hubbard, 110 Nev. at 677. However, for an error to be "waived," it has to be invited and not merely forfeited. Error is "invited," and therefore waived, when a defendant "induced or caused the error" or if the defendant "intentionally relinquished or abandoned

a known right." U.S. v. Perez, 116 F.3d 840, 845 (9th Cir. 1997) (*en banc*); see also U.S. v. Silvestri, 409 F.3d 1311, 1327 (11th Cir. 2005) ("Where invited error exists, it precludes a court from invoking the plain error rule and reversing."); Thomas v. Hardwick, 126 Nev. 142, 157, 231 P.3d 1111, 1121 (2010) (citing U.S. v. Yu–Leung, 51 F.3d 1116, 1121–22 (2d Cir.1995)(discussing U.S. v. Olano, 507 U.S. 725 (1993) ("a decision not to raise an objection for strategic reasons amounts to waiver, not merely forfeiture, and is not reviewable even for plain error."). By contrast, "forfeiture is the failure to make the timely assertion of a right." U.S. v. Mariano, 729 F.3d 874, 881 (8th Cir. 2013). Forfeiture "serves to induce the timely raising of claims and objections thereby providing courts the opportunity to consider and resolve them." State v. Puckett, 556 U.S. 129, 134 (2009). Therefore, forfeited errors can be reviewed on appeal under plain error. See Mantinorellan v. State, 343 P.3d 590, 593 (Nev. 2015).

Here, although Sena did not litigate the statute of limitations for the aforementioned charges he did not "invite" the error by intentionally abandoning his claim and thus "waive" the defense. Rather, Sena placed the court on notice regarding the statute of limitations problems in the case, at least with respect to counts 2-53.

While litigating those counts the court made a definitive factual finding that, notwithstanding NRS 171.095 and this Court's caselaw, the statute of limitations tolled indefinitely because Sena "controlled" AS. Based upon this conclusive but incorrect ruling – which effectively negated Sena's statute of limitations defense for all counts – Sena was not obligated to continually address the issue with respect to the other charges as well. See People v. Davis, 880 N.E.2d 1046, 1054 (Ill. App. Ct. 2007) ("The reason for relaxing the waiver rule is that the objection would have fallen on deaf ears."). Therefore, at most Sena forfeited the statute of limitations issue with respect to the aforementioned charges.

NRS 47.040(2) states this Court may take "notice of plain errors affecting substantial rights although they were not brought to the attention of the judge." If this Court conducts plain error review, it "must examine whether there was 'error,' whether the error was 'plain' or clear, and whether the error affected the defendant's substantial rights." State v. Green, 119 Nev. 542, 545 (2003). "Normally, the defendant must show that an error was prejudicial in order to establish that it affected substantial rights." Gallego v. State, 117 Nev. 348, 365 (2001).

Here, the court's error is plain from the record. The court incorrectly found that statutes of limitation could toll indefinitely and that the statutes of limitation in Sena's case conclusively tolled until AS left Sena's house. This incorrect decision affected Sena's substantial right to present a defense to most of the charged crimes, including the offenses discussed above unrelated to AS. Accordingly, this Court should find plain error and reverse Sena's convictions.

i) If Sena waived his statute of limitations defense, this Court can review for ineffective assistance of counsel.

Assuming this Court disagrees and finds Sena waived his statute of limitations defense, this Court may nevertheless address the issue on direct appeal for ineffective assistance of counsel. While this Court has noted claims regarding the failure to raise statutes of limitation should be raised during post-conviction litigation (Gibbons v. State, 97 Nev. 520, 522-23 (1981)), this Court has also advised it can consider ineffective assistance of counsel claims on direct appeal where an evidentiary hearing would be unnecessary. Archanian v. State, 122 Nev. 1019, 1036 (2006) (citing Pellegrini v. State, 117 Nev. 860, 883 (2001) (abrogated on other grounds by Rippo v. State, 134 Nev. 411,

421-22 (2018)). Pertinently, this Court acknowledged where there is a legitimate statute of limitations defense, "it is unlikely that counsel could have had a sound strategic reason for failing to raise a statute-of-limitations defense[.]" McCallister v. State, 389 P.3d 1032 (Nev. Sup Ct. 2017) (unpublished).[100]

Appellate counsel and trial counsel both work for the Clark County Public Defender's Office. Therefore, Appellate Counsel cannot assert, and is not asserting, that trial counsel was ineffective for failing to raise a statute of limitations defense to the charges discussed above. Rather, Counsel is merely advising that this Court could, if it desired, address the issue on direct appeal. If this Court desires to address ineffective assistance of counsel on direct appeal, it may also appoint conflict-free counsel to supplement the instant Opening Brief.

III. The State Presented Insufficient Evidence of Guilt.

"The Due Process clause of the United States Constitution protects an accused against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Carl v. State, 100 Nev. 164, 165 (1984); Oriegel-Candido v. State, 114 Nev. 378, 382 (1998). "The standard of

[100] McCallister is an unpublished decision. Nevertheless, it is citable as persuasive authority. See NRAP 36(C)(3).

review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt." LaPierre v. State, 108 Nev. 528, 529 (1992).

A. Count 1, Conspiracy to Commit Sexual Assault.

"Nevada law defines a conspiracy as an agreement between two or more persons for an unlawful purpose." Nunnery, 124 Nev. at 480. No overt act is necessary to support a conspiracy conviction, and the crime of conspiracy is complete upon the agreement to commit an unlawful act by the co-conspirators. Id. (citing NRS 199.490); see also Moore v. State, 117 Nev. 659, 662-63 (2001). Additionally, conspiracy is a specific intent crime. See generally Washington v. State, 132 Nev. 655, 664 (2016). Therefore, to prove a conspiracy the State must prove each co-conspirator actually agreed to the conspiracy. Id.; See also Johnson, 91 Nev. at 163 ("[w]hen one of two persons merely pretends to agree, the other party, whatever he may believe, is in fact not conspiring with anyone."). "[M]ere association is insufficient to support a charge of conspiracy."). Sanders, 110 Nev. at 436.

In count 1 the State alleged, and the jury found, that Sena conspired with Deborah and Terrie to commit Sexual Assault and in furtherance of the conspiracy performed the acts set forth in counts 46-52, 54-59, 61-77, 79-85, 95-99, 101-103, and 105. AA X 2172. The State alleged **this single agreement** between Sena, Deborah, and Terrie to sexually assault AS, TS, BS, and RS occurred at some indeterminate point between May 22, 2004 and June 30, 2014. Id. Nevertheless, because the State alleged a single conspiracy to commit sexual assault upon AS, TS, BS, and RS – and a conspiracy is complete upon agreement – the agreement to commit the acts would logically have occurred before the first act.

The earliest act committed pursuant to the alleged conspiracy was the alleged sexual assault upon AS by Sena and Terrie. That alleged sexual assault occurred between May 22, 2004 and May 21, 2006. AA X 2186. Therefore, Sena, Deborah, and Terrie would have agreed they were going to sexually assault all their children at some point before this act.

Problematically however, both Deborah and Terrie testified they never **willingly** agreed to participate in sexual acts with Sena and the children. See AA XXIII 5292; 5349; AA XXV 5903, 08. Moreover,

Terrie and Deborah were not both present during many of the incidents, and neither testified each knew about the other's actions. Accordingly, the State failed to present sufficient evidence that Terrie and Deborah "conspired" with Sena to commit sexual assault upon the children. See Sanders, 110 Nev. at 436; Johnson, 91 Nev. at 163. Accordingly, Sena respectfully requests this Court vacate his Conspiracy conviction.

B. Counts 115, 116, 118 and 119, Use of Minor in Producing Pornography and Possession of Child Pornography.

In counts 115 and 116 the State alleged Sena used EC in producing pornography by recording her in the shower and later possessed the image of EC in the shower. AA X 2211. The State alleged the image depicted EC engaged in sexual conduct and/or as the subject of a sexual portrayal. Id.

Likewise, in counts 118 and 119 the State alleged Sena used TG in producing pornography by recording her in the shower and later possessed the image of EC in the shower. Id. at 2212. The State alleged the image depicted EC engaged in sexual conduct and/or as the subject of a sexual portrayal. Id. Essentially, for these counts the

State alleged alternate means of violating NRS 200.730, either the image depicted sexual portrayal or sexual conduct.

The jury found Sena guilty for all charges. However, if the jury found Sena guilty under a theory that the images depicted a sexual portrayal, Sena is entitled to reversal because the "sexual portrayal" language in NRS 200.710(2) is unconstitutional. Alternatively, if the jury convicted Appellant under the alternate theory that the images depicted "sexual conduct," Sena is also entitled to reversal because as a matter of law the images did not depict "sexual conduct."

Whether the images at issue depict a sexual portrayal or sexual conduct is a mixed question of law and fact for which this Court should apply *de novo* review.[101] E.g., U.S. v. Amirault, 173 F.3d 28, 33 (1st Cir. 1999); see also Comm v. Rex, 11 N.E.3d 1060, 1067 (Mass.2014) ("the United States Supreme Court had emphasized ...that 'cases involving speech under the First Amendment require independent appellate review of the offending material to ensure that protected speech is not infringed.'") (citing Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 504-05 (1984).

[101] Sena will file a separate motion in this court, pursuant to NRAP 30, directing the District Court Clerk's office to transmit the State's trial exhibits to this Court for review.

1. The images in counts 115, 116, 118, 119 do not depict sexual conduct.

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." Here, the images Sena allegedly created and possessed as charged in counts 115, 116, 118 and 119 did not depict sexual intercourse, fellatio, cunnilingus, bestiality, anal intercourse, excretion, sado-masochistic abuse, masturbation, or bodily penetration. Accordingly, the images could only depict "sexual conduct" if they depicted a "lewd exhibition of the genitals."

The factors relevant to determining whether an image lewdly exhibits the genitals are: (1) whether the genitals or pubic area are the focal point of the image; (2) whether the setting of the image is sexually suggestive (i.e., a location generally associated with sexual activity); (3) whether the child is depicted in an unnatural pose of inappropriate attire considering her age; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; (6)

whether the image is intended or designed to elicit a sexual response in the viewer. U.S. v. Dost, 636 F.Supp. 828, 832 (S.D. Cal. 1986). The 6th factor does not turn on whether the defendant himself is sexually aroused by the image. See U.S. v. Wallenfang, 568 F.3d 649, 658 (8th Cir. 2009)("the relevant factual inquiry ... is not whether the pictures in issue appealed, or were intended to appeal, to [the defendant's] sexual interests but whether, on their face, they appear to be of a sexual character."); State v. Kerrigan, 860 N.E.2d 816 (Ohio. 2006)(" it is the character of the material or performance, not the purpose of the person possessing or viewing it, that determines whether it involves a lewd exhibition or a graphic focus on the genitals."); U.S. v. Villard, 885 F.2d 117, 125 (3rd Cir. 1989)("We must, therefore, look at the photograph, rather than the viewer.").

Here, the State alleged Sena produced "pornography" by filming EC and TG "showering in the nude" and possessed the resulting videos depicting EC and TG "in the nude." AA X 2211-12. However, images depicting adolescents "in the nude" do not constitute "sexual conduct." First, a bathroom is not a sexually suggestive location, or a location generally associated with sexual activity. Second, EC and TG are not depicted unnaturally nor inappropriately

"posed." In fact, neither is posed and instead each is behaving as anyone taking a shower naturally would. Third, none of the images depict sexual coyness or a willingness to engage in sexual activity. Rather, EC and TG are completely unaware they are being filmed. Fourth, although EC and TG are both nude in the videos, their genitals are not the focal point of the image.[102] Finally, objectively, there is nothing "sexual" about the images themselves.

In a case very similar to Sena's, the Arizona Court of Appeals reversed and entered a judgment of acquittal after the defendant's conviction for sexual exploitation of a minor. State v. Gates, 182 Ariz. 459 (Ct. App. Div. 1, 1995). In Gates, the defendant made three surreptitious videos of children in his home. Id. at 461. Under Arizona law, the defendant could only be criminally charged if the videos depicted "sexual conduct." Id. at 462. Specifically, the videos had to depict a "lewd exhibition of the genitals, pubic or rectal areas of any person." Id. (citing A.R.S. § 13-3551(2)(f)).

---

[102] Although the Nevada Revised Statutes do not define "genitals" in any title or section, genitals is generally defined as "the sexual organs; the testicles and penis of a male or the labia, clitoris, and vagina of a female." See <http://dictionary.reference.com/browse/genitals?s=t>, accessed May 14, 2020.

The first video depicted a fourteen (14) year-old girl changing clothing. Id. The second video depicted "several clothes-changing sessions involving three other girls under the age of fifteen" and a ten (10) year-old girl as she took a shower. Id. The third video contained "a montage of numerous photographic images of children from non-pornographic magazines, catalogs, and other visual or print media." Id. In this video, the camera zoomed in and lingered on the children's genital and pubic areas. Id. At trial, the state presented evidence that the defendant secretly made the tapes, admitted to being sexually attracted to young girls, and while watching the videos "fantasized about the girls while masturbating." Id. at 461.

In reversing, the appellate court noted it could not find the images lewd merely by focusing on the defendant's intent in making the videos. Id. Rather, the law required that the minors be engaging in sexual conduct regardless of the defendant's intent. Id. Ultimately, the court held the videos did not depict a lewd exhibition of the genitals and therefore did not depict sexual conduct.[103] Id. at 466; see

[103] The court noted, "Although it is offensive that the children in this case were victimized as they were by Appellant, the dispositive fact in regard to the crime charged in this case is that none of the minors was filmed by Appellant while the minor was engaged in sexual conduct." Id.

also Lockwood v. State, 588 So.2d 57, 58 (4th Dist. Ct. App. FL, 1991)(conviction reversed where videotape of minor only depicted, "the innocent, normal everyday occurrence of a female child undressing, showering, performing acts of female hygiene and donning her clothes, none of which meets any of the detailed sexual acts contained in the statute[,]" including an "actual lewd exhibition of the genitals.").

Here, like in Gates, the images of EC and TG do not depict a lewd exhibition of the genitals. Instead, the images are innocuous, non-sexual, depictions of adolescents naked as they shower. Objectively, the images are not designed to elicit a sexual response. Thus, as a matter of law the images are not child pornography.

2. Criminalizing "sexual portrayals" involving minors is unconstitutional.

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." To the extent the jury convicted Sena based upon the State's alternate theory that the images in counts 115, 116, 118, and 119 depicted a "sexual portrayal," Sena's convictions should be vacated 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).

a. 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). Indeed, "content based regulations are presumptively invalid." Id. Pertinently, the criminalization of an image of a child based solely upon the effect it has on the viewer is unconstitutional. See Villard, 855 F.2d at 125 ("[w]hen a picture does not constitute child pornography, even though it portrays nudity, it does not become child pornography 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").

To succeed in a facial attack to NRS 200.700(4), Sena must establish the statute "lacks any 'plainly legitimate sweep.'" U.S. v. Stevens, 559 U.S. 460, 472 (2010) (quoting Washington v. Glucksburg, 521 U.S. 702, 740 n. 7 (1997)). Sena contends that by criminalizing all images of children that subjectively appeal to a person's "prurient interest in sex,"[104] NRS 200.700(4) is facially unconstitutional. However, Sena acknowledges this Court has concluded otherwise.

In Shue v. State, 133 Nev. 798, 807 n.10 (2017), this Court stated – in a footnote – that the statute does not "implicate protected speech under the First Amendment." Relying on New York v. Ferber, 458 U.S. 747, 757 (1982), the Shue court concluded that the First Amendment does not protect depictions of children which "appeal to the prurient interest in sex" and which do not have "serious literary, artistic, political, or scientific value." Shue, 133 Nev. at 798.

[104] 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).

However, in reaching this conclusion, Shue ignored US v. Stevens, 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. 460, 482 (2010), the Supreme Court struck down a federal statute that criminalized the creation, sale or possession of images depicting 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 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. 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. But our decision did not rest on this "balance of competing interests" alone. 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." 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.'" Ferber thus grounded its analysis in a previously recognized, long-established category of unprotected speech, and our subsequent decisions have shared this understanding.

Id. at 471 (emphasis added) (internal citations omitted). 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**. Id. (citing Ashcroft v. Free Speech Coalition, 535 U.S. 232 (2002)).

After Stevens, an image cannot constitute "child pornography" that is wholly exempt from First Amendment protection unless that image 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 images at issue did not depict any child sexual conduct, let alone child sexual abuse,[105] that would exempt them from First Amendment protection under Ferber and Stevens. Each image depicts adolescent girls engaged in innocuous activity. Because these images did not depict "sexual abuse," they were not "child pornography."

---

[105] 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.

Likewise, because the photographs did not involve "sexual conduct", they could not be considered "obscene." See Miller v. California, 413 U.S. 15, 23-24 (1973). Indeed, 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 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, stating:

> 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 200.700(4) and 200.710(2) does none of these things, it is not narrowly tailored and it fails strict scrutiny.

b. 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 "obscenity" deemed unprotected in Miller. See, e.g., Stevens, 559 U.S. at 471; Ashcroft, 535 U.S. at 251 ("where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.").

Again, contrary to this Court's ruling in Shue, 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, 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. Miller, 413 U.S. at 23-24 ("...we now confine the

permissible scope of such regulation to works which depict or describe sexual conduct.").

Unfortunately, NRS 200.710(2) and 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. Thus, 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.

c. NRS 200.700(4) is unconstitutionally vague both facially 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.

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 also 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. Thus, 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.

For all the foregoing reasons, NRS 200.200(4) and 200.710(2) are unconstitutionally vague, both facially and as applied. Accordingly, this Court should vacate Sena's convictions in counts 115, 116, 118, 119.

///

IV. Sena's Convictions Violate His Due Process Right Against Multiple Convictions for the Same Offense.

The United States' and Nevada Constitutions' double jeopardy clauses protect a defendant from multiple punishments for the same offense. U.S.C.A. V, XIV; Nev. Const. art. 1, § 8; Whalen v. United States, 445 U.S. 684, 688 (1980). When an accused is charged with multiple violations involving a single statute and raises a double jeopardy challenge, this Court must determine the proper "unit of prosecution" under that statute. Castaneda v. State, 131 Nev. 434, 436 (2016). "[D]etermining the appropriate unit of prosecution presents an issue of statutory interpretation and substantive law" and is reviewed *de novo*.[106] Id.

In reviewing a challenged statute for its unit of prosecution, this Court first attributes the plain meaning to the statutory language. State v. Cantanio, 120 Nev. 1030, 1033 (2004). In doing so, this Court "...should normally presume that [the] legislature did not intend multiple punishments for the same offense absent a clear expression of legislative intent to the contrary." Firestone v. State, 120 Nev. 13, 16 (2004). If the statutory language is ambiguous however, this Court

[106] Although Sena did not object to his redundant convictions below, this Court can address the issue for the first time on appeal. E.g., McCullough v. State, 99 Nev. 72, 74 (1983).

should "...turn to other legitimate tools of statutory interpretation, including related statutes, relevant legislative history, and prior judicial interpretations of related or comparable statutes by this or other courts." Castaneda, 131 Nev. at 444. If these tools do not resolve any ambiguity, then this Court must apply the rule of lenity and construe the statute in the accused's favor. State v. Lucero, 127 Nev. 92, 99 (2011).

A. Sena could only be convicted for one (1) count of Possession of Child Pornography.

In Castaneda, this Court specifically addressed the unit of prosecution for Possession of Child Pornography. There, the jury convicted the defendant for 15 counts of possession of child pornography based upon 15 distinct images recovered at the same time from the same location on the same computer. Id. at 444. On appeal, this Court noted that the State "prosecuted the images as a group and did not attempt to show, other than there were 15 different images, individual distinct crimes of possession." Id. (citing State v. Pickett, 211 S.W.3d 696, 706 (Tenn. 2007)). Accordingly, the Court held, "Castaneda's simultaneous possession at one time and place of 15 images depicting child pornography constituted a single violation of NRS 200.730." Id.

Here, the State charged Sena with seven (7) counts of Possession of Child Pornography[107] for possessing various images **on or about September 18, 2014**. AA X 2189-90, 2198, 2206-08, 2211-13. Although Metro seized numerous electronic media and data storage devices from Sena's residence, only the red flash drive contained any images depicting child pornography. AA XXII 5167. Essentially, the police recovered each image from the same location at the same time. More importantly, the State prosecuted the images as a group. Specifically, the State alleged the possession date for all images as September 18, 2014. AA X 2189-90, 2198, 2206-08, 2211-13. Finally, at trial the the State made no effort whatsoever to prove distinct possessions on different dates. Thus, Sena's simultaneous possession of seven images depicting alleged child pornography at the same time and place constituted a single violation of NRS 200.730. Accordingly, Sena respectfully requests this Court reverse six of his Possession of Child Pornography convictions.

///

///

[107] Counts 60, 78, 100, 104, 116, 119, and 120. AA X 2133-34, 2142, 2150, 2152, 2155, 2156-57.

B. Sena could only be convicted for three (3) counts of Incest.

The State charged Sena with a total of nine (9) counts of Incest: six (6) counts involving AS;[108] two (2) counts involving BS;[109] and one (1) count involving RS.[110] For the allegations involving AS and BS, the proper unit of prosecution is one count per victim.

NRS 201.180 prohibits Incest and states, "[p]ersons being within the degree of consanguinity within which marriages are declared by law to be incestuous and void who **intermarry with each other or who commit fornication or adultery with each other** shall be punished for a category A felony by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of life with the possibility of parole[.]" (Emphasis added).

Fornication is generally defined as sexual intercourse between two unmarried persons. Douglas v. State, 130 Nev. 285, 288 (2014) (citing Rev. James Stormonth, Dictionary of the English Language 733 (1877)). Adultery is generally defined as, "the voluntary sexual intercourse of a married person with the person other than the

[108] Counts 22, 27, 32, 37, 42, and 47. AA X 2178-80, 82-84.
[109] Counts 73 and 75. AA X 2196-97.
[110] Count 97. AA X 2204.

offender's husband or wife."[111] Intermarry is generally defined as "to become connected by marriage, as two families, tribes, castes, or religions[;] to marry within one's family[;] to marry outside one's religion, ethnic group, etc[;] to marry."[112]

While the State believes the words, intermarry, fornication, and adultery permits separate charges per individual act perpetuated upon a single victim, the statute does not **clearly** permit this conclusion. Just as plausibly, adultery and fornication also suggest a course of conduct or separate acts within a single relationship.[113] Indeed, had the legislature desired to permit a separate charge per individual act perpetuated upon the same person, it could have done so explicitly by prohibiting those within the degree of consanguinity from committing

---

[111] See <https://thelawdictionary.org/adultery/>, last accessed April 13, 2020.

[112] See < https://www.dictionary.com/browse/intermarry>, last accessed April 13, 2020.

[113] Under the State's interpretation a defendant who commits incest through "intermarriage" could be charged for one count of incest for everyday he remains married to his blood relative. However, authorities generally agree, "[u]nder a statute declaring intermarriage between persons related within the prohibited degrees to be incest, the offense **becomes complete on the intermarriage**[.]" 42 C.J.S. Incest § 8 (2020). Thus, if "intermarriage" only permits one unit of prosecution, but "adultery" and "fornication" permit more than one, the same statute would have two different units of prosecution depending solely upon whether the defendant either fornicates, commits adultery, or intermarries. This interpretation would lead to an absurd result.

an act of intermarriage with each other or **an act** of fornication or **an act** of adultery. The legislature has done precisely this in many other contexts. See NRS 447.210(2) ("Every day that any hotel is in violation of any of the provisions of this chapter constitutes a separate offense."); NRS 477.250(2) ("Each day on which a violation occurs is a separate offense."); NRS 440.765(5)("The offenses described in this section are separate from the primary offense if any, and the unlawful possession of a birth certificate is a separate offense from its unlawful use."); see also NRS 394.610, NRS 394.670; NRS 445A.645; NRS 512.270; NRS 641A.440.

Based upon the foregoing, NRS 201.180's plain language is – at best – ambiguous as to the proper unit of prosecution. Because NRS 201.180's statutory text does not unambiguously establish that Sena could be prosecuted on a per-act of sexual intercourse or adultery basis, this Court must turn to "other legitimate tools of statutory interpretation, including related statutes, relevant legislative history, and prior judicial interpretations of related or comparable statutes by this or other courts." Castaneda, 373 P.3d at 111.

Nevada has prohibited Incest since before statehood. Indeed, in 1861 Nevada territorial law provided, "[p]ersons being within the

degree of consanguinity within which marriages are declared by law to be incestuous and void, who shall intermarry with each other, or who shall commit fornication or adultery with each other, shall, upon conviction, be punished by imprisonment in the state prison not less than one nor exceeding ten years." See Compiled Laws of Nevada 1861 to 1900 (inclusive) p. 928, available at <https://play.google.com/store/>, accessed April 15, 2020. The legislature eventually codified Incest as NRS 201.180 in 1911 and subsequently amended NRS 201.180 in 1979, 1995, and 2005. However, these amendments did not materially the pertinent language prohibiting Incest. Therefore, NRS 201.180's current language is substantially similar to the statutory language in 1861.

Unfortunately, there are no legislative committee minutes regarding statutes enacted in Nevada prior to 1965.[114] Therefore, there is no relevant legislative history upon which this Court can turn to discern legislative intent. Nevertheless, virtually every state prohibits some form of intrafamilial sexual relationships or marriage.[115] See

---

[114] See,<https://www.leg.state.nv.us/Division/Research/Library/LegHistory/Tutorial/Pre1965.cfm>, last accessed June 20, 2017.

[115] In the United States, criminal Incest prohibitions vary wildly, and Rhode Island appears to be the only state which does not criminally prohibit incest. See Hammer, Brenden J., Tainted Love: What the

Inbred Obscurity: Improving Incest Laws in the Shadow of the "Sexual Family," 119 Harv. L. Rev. 2464 (2006). The collective rationales for doing so are based upon genetic concerns in children born of incestuous relationships; protection of minors from sexual abuse at the hands of relatives, protection of traditional notions of "family;" and adherence to Christian religious orthodoxy. Id. at 2465. Yet, given the increasing recognition of an individual right to intimate associations, and the right to engage in private consensual sexual conduct,[116] the concerns underpinning incest prohibitions are constitutionally dubious. See generally Vera Bergelson, Vice is Nice But Incest is Best: The Problem of a Moral Taboo, 7 Crim. L. & Phil. 43 (2013). Indeed, there are arguably far less-restrictive ways to address government concerns underpinning anti-Incest laws without resorting to a categorical prohibition against consensual sexual relationships between consenting, adult, blood-relatives. Id. Thus, without a **legitimate** rationalization for anti-incest law, government prohibition appears to be based primarily upon society's collective

---

Seventh Circuit Got Wrong in Muth v. Frank, 56 DePaul L. Rev. 1065, 1072 (2007).

[116] See e.g., Lawrence v. Texas, 539 U.S. 558 (2003); Griffin v. Strong, 983 F.2d 1544, 1547 (10th Cir. 1993) ("The freedom of intimate association is a substantive due process right, as is its subset, the familial right of association.").

repugnance at the idea of blood-relatives engaging in sexual intercourse or marriage. However, when criminal laws are based solely on society's collective disapproval, rather than proscribing conduct directed at an identifiable "victim," the unit of prosecution need not be on a "per-act" basis.

Moreover, this Court recently decreed – in the absence of any legislative history – that "incest condemns sex between close relatives **without regard to whether the intercourse was consensual**." Douglas, 130 Nev. at 286. Thus, although there was no legislative history available, this Court nevertheless found that NRS 201.180 is a strict liability offense. For "unit of prosecution" purposes, as a strict liability offense NRS 201.180 is distinguishable from other sexual offenses where a certain intent is required, an identifiable "victim" exists, and where consent would be a defense. For example, in sexual assault prosecutions, "separate and distinct acts of sexual assault may be charged as separate counts and result in separate convictions even though the acts were the result of a single encounter and all occurred within a relatively short time." Gaxiola v. State, 119 P.3d 1225, 1234 (2005). This conclusion is logical in the context of sexual assault because sexual assault is considered a "crime[] against the person,"

codified under Title 15, Chapter 200 of the Nevada Revised Statutes. See NRS 200.364-200.3784. When a crime is against "the person," each distinct act perpetrated upon that person is a separate violation of his or her bodily autonomy which should logically result in a separate penalty for each violation. By contrast, Incest is a crime against "public decency and good morals" under Title 15, Chapter 201 of the Nevada Revised Statutes. As noted, if the primary "evil" Incest prohibitions seek to address is the degradation of decency and morals, then logically criminal penalties need not be imposed upon a per-act basis, but rather a per relationship basis.

Next, although this Court has never explicitly addressed NRS 201.180's unit of prosecution, it has done so implicitly. In State v. Seymour, 57 P.2d 390 (Nev. 1936), the Court affirmed the defendant's conviction for **one count Incest** although the victim claimed she engaged in sexual intercourse with the defendant [her first cousin] **twice a week between June 1, 1934, and February 15, 1935**. While the Court's affirmance does not explicitly recognize the unit of prosecution as one count per incestuous relationship, the Court's affirmance impliedly recognized that the State correctly only charged one count notwithstanding allegations of multiple acts of sexual

intercourse between blood relatives. See also Muth v. Frank, 412 F.3d 808, 811 n.3 (7th Cir. 2005) (recognizing Wisconsin's incest law prohibits "sexual and/or marital **relationships**... based upon the parties' close blood relationship.") (emphasis added).

Finally, if this Court does not believe the aforementioned clarifies Incest's proper unit of prosecution, then it should apply rule of lenity and construe NRS 201.180 in Sena's favor. See Lucero, 127 Nev. at 99. If so, then this Court must reverse Sena's multiple Incest convictions regarding AS and BS.

C. Counts 55 and 57 are redundant.

The State charged Sena in counts 55 and 57 with two (2) counts of Child Abuse, Neglect or Endangerment – Sexual Abuse for the single incident in the shower between TS and Deborah. AA X 2187-88; AA XXVIII 6482-83. In Rimer v. State, 131 Nev. 307, 313 (2015), this Court held that the legislature "intended for child abuse and neglect to be treated as a continuing offense" for statute of limitations purposes. Although Rimer did not explicitly address Child Abuse, Neglect or Endangerment's status as a continuing offense for unit of prosecution purposes, generally speaking a continuing offense is complete upon the last act of the alleged crime. See Perelman v.

State, 115 Nev. 190, 192 (1999). Analogously, this Court has also noted Child Abuse, Neglect or Endangerment *via* sexual abuse is a continuing offense even though the act of sexual abuse – Lewdness with a Minor – is not a continuing offense. See High Desert State Prison v. Sanchez, 454 P.3d 1270, 1273 (Nev. 2019).

Here, counts 55 and 57 occurred during a single incident between TS and Deborah in the shower. Count 55 alleged Child Abuse, Neglect or Endangerment *via* Sexual Abuse when TS washed Deborah in the shower. AA X 2187. Count 57 alleged Child Abuse, Neglect or Endangerment *via* Sexual Abuse when Deborah fondled TS's penis in the shower. Id. at 2188. Both the washing and the fondling were also charged separately as two separate counts of Open and Gross Lewdness within counts 56 and 58. Id. at 2187-88. However, like in Sanchez, while Open and Gross Lewdness is not a continuing offense, Child Abuse *via* Sexual Abuse is a continuing offense which was complete upon the last lewd act. Accordingly, Sena could not be convicted for two counts of Child Abuse, Neglect or Endangerment and he respectfully requests this Court vacate one conviction.

V. Sena's Convictions Violate His Due Process Rights Under the Double Jeopardy Clause of the United States and Nevada Constitutions.

The Double Jeopardy Clause of the United States and Nevada Constitutions protects against multiple punishments for the same offense. Jackson v. State, 128 Nev. 598, 604 (2012). This clause is applicable to Nevada via the 14th Amendment. Id. This Court presumes that where "two statutory provisions proscribe the 'same offense" the legislature does not intend to impose two punishments for that offense." Id. (citing Ruthledge v. U.S., 517 Nev. 292, 297 (1996)).

Nevada relies upon the test announced in Blockburger v. U.S., 284 299 (1932) to determine whether two statutes punish the same offense. Jackson, 128 Nev. at 604. Under Blockburger, "if the elements of one offense are entirely included within the elements of a second offense, the first offense is a lesser included offense and the Double Jeopardy Clause prohibits a conviction for both offenses." Id. at 604-605 (internal citations omitted). "Whether conduct that violates more than one criminal statute can produce multiple convictions in a single trial is essentially a question of statutory construction, albeit

statutory construction with a constitutional overlay[,]" and is subject to *de novo* review. Id. at 603.

Finally, "[a]lthough failure to object at trial generally precludes appellate review, this Court has discretion to constitutional or plain error." Lachance v. State, 130 Nev. 263, 273 (2014). "Plain error exists when the error was clear and it affects a defendant's substantial rights." Id. (citing Mclellan v. State, 124 Nev. 263, 269 (2008)).

A. Allegations involving TS.

When TS was either 13 or 15 years old, he claims Sena encouraged him to take a shower with Deborah and while in the shower Sena directed both TS and Deborah to wash each other. AA XXIV 5662-63. Based upon this allegation, the State charged Sena in count 55 with Child Abuse, Neglect, or Endangerment *via* Sexual Abuse by causing, directing, or encouraging TS "to wash said Deborah Sena as said Deborah Sena washed the said TS." AA X 2187. Additionally, the State charged Sena in count 56 with Open and Gross Lewdness by Sena causing, directing, or encouraging TS to "wash Deborah Sena as Deborah Sena washed the said TS." Id. at 2188.

During this same incident, TS claimed Sena allegedly directed TS to penetrate Deborah's vagina with his penis. AA XXIV 5664-65.

TS was ultimately unsuccessful. Id. at 5665; AA XXV 5893. Based upon this allegation, the State charged Sena in count 57 with Child Abuse, Neglect, or Endangerment *via* Sexual Abuse for causing, directing, or encouraging Deborah to "use her hand(s) and/or finger(s) to touch and/or rub and/or fondle the penis of TS, and/or having the penis of said TS between the legs and/or genital area of Deborah Sena." AA X 2188. Additionally, the State charged Sena in count 58 with Open and Gross Lewdness claiming Sena assisted and/or caused Deborah to "use her hand(s) and/or finger(s) to touch and/or rub and/or fondle the penis of TS, and/or having the penis of said TS between the legs and/or genital area of Deborah Sena." Id. at 2189.

B. Allegations involving BS.

BS alleged when he was 14 years old Sena ordered Terrie to expose her breasts and ordered BS to fondle Terrie's breasts. AA XXV 7523-74. Based upon this allegation, the State charged Sena in count 81 with Child Abuse, Neglect, or Endangerment *via* Sexual Abuse claiming Sena caused, directed, or encouraged BS "to fondle the breast(s) of Terrie Sena." AA X 2199. Additionally, the State charged Sena in count 82 with Open and Gross Lewdness claiming

Sena assisted and/or caused BS to "touch and/or rub and/or fondle the breast(s) of Terrie Sena. Id. at 2200.

1. Open and Gross Lewdness is a lesser included offense of Child Abuse, Neglect or Endangerment.

NRS 200.508(1)(b)(1) provides pertinently, "[a] person who willfully causes a child who is less than 18 years of age to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect ... is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years; or unless a more severe penalty is prescribed by law for an act or omission that brings about the abuse or neglect. NRS 200.508(4)(a) states, "'[a]buse or neglect' means physical or mental injury of a nonaccidental nature, **sexual abuse**, sexual exploitation, negligent treatment or maltreatment of a child under the age of 18 years, as set forth in paragraph (d) and NRS 432B.070, **432B.100**, 432B.110, 432B.140 and 432B.150, under circumstances which indicate that the child's health or welfare is harmed or threatened with harm." (emphasis added). NRS

432B.100(1)-(7) defines "sexual abuse" as: Incest (NRS 201.180); Lewdness with a Child (NRS 201.230); Sado-masochistic Abuse (NRS 201.262); Sexual Assault (NRS 200.366); Statutory Sexual Seduction (NRS 200.368); **Open and Gross Lewdness (NRS 201.210)**; and Mutilation of a Female Child (NRS 200.5083).

NRS 201.210 does not actually define "open and gross lewdness," but instead merely explains that anyone who "commits any act of open and gross lewdness is guilty...for the first offense, of a gross misdemeanor[,] or as a category D felony if committed "by a person 18 years of age or older in the presence of a child under the age of 18 years." Nevertheless, interpreting NRS 201.210, this Court has explained "lewd" means: "(1) pertaining to sexual conduct that is obscene or indecent; tending to moral impurity or wantonness, (2) evil, wicked or sexually unchaste or licentious, and (3) preoccupied with sex and sexual desire; lustful." Shue, 133 Nev. at 808. "Open" modifies "lewdness" and suggests acts committed in an open rather than secret manner. Berry v. State, 125 Nev. 265, 280 (2009) (abrogated on other grounds by State v. Castaneda, 126 Nev. 478, 483 (2010)). "Gross" merely modifies "lewdness" and means lewd acts

that are "glaringly noticeable or obviously objectionable." Berry, 125 Nev. at 281.

Here, the Open and Gross Lewdness counts (counts 56, 58, and 82) concerning TS and BS are lesser-included offenses of the respective Child Abuse, Neglect, or Endangerment counts (counts 55, 57, and 81). All the "elements" of Open and Gross Lewdness are included within the elements of Child Abuse, Neglect, or Endangerment. Specifically, Child Abuse, Neglect, or Endangerment is defined in NRS 200.508(4) to include sexual abuse. Sexual abuse is defined as Open and Gross Lewdness. Thus, Sena could not commit the sexual abuse type[117] of Child Abuse, Neglect, or Endangerment against TS and BS without also committing Open and Gross Lewdness. Indeed, at trial the State explicitly argued that when it proved the allegations underpinning the Open and Gross Lewdness counts it necessarily proved the Child Abuse, Neglect, and Endangerment counts as well. See AA VIII 6482-83; 6493.

[117] See Clay v. Eighth Judicial Dist. Ct., 129 Nev. 445, 452 (2013) (explaining there are five "types" of abuse or neglect a defendant can commit and these "types" are defined in NRS 200.508(4)(a) as: (1) nonaccidental physical injury; (2) nonaccidental mental injury; (3) sexual abuse; (4) sexual exploitation; or (5) negligent treatment or maltreatment.).

Accordingly, Sena respectfully requests this Court vacate his convictions for counts 56, 58, and 82.

CONCLUSION

Based upon the foregoing arguments, Sena respectfully requests this Court reverse his convictions.

Respectfully submitted,

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By: */s/ William M. Waters*
WILLIAM M. WATERS, #9456
Chief Deputy Public Defender
309 South Third Street, #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

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.

2. I further certify that this brief does not comply with the page or type-volume limitations of NRAP 32(a)(7) and the appropriate motion is being filed with the Opening Brief, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

Proportionately spaced, has a typeface of 14 points or more and contains 27,608 words and 2,600 lines of text which does exceed the 14,000 word and 1,300 lines of text limitations.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by

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

DATED this 20 day of May, 2020.

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By: */s/ William M. Waters*
WILLIAM M. WATERS, #9456
Chief Deputy Public Defender
309 South Third Street, #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 20 day of May, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
ALEXANDER CHEN

WILLIAM M. WATERS
HOWARD S. BROOKS

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

CHRISTOPHER SENA
NDOC No: 1217884
c/o High Desert State Prison
P.O. Box 650
Indian Springs, NV 89070

BY *__/s/ Carrie M. Connolly__*
Employee, Clark County Public
Defender's Office