IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER SENA, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 79036

RESPONDENT'S AMENDED ANSWERING BRIEF

Appeal From Judgement of Conviction
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

Pursuant to NRS 17(a)(11), this Appeal is presumptively assigned to the Nevada Supreme Court because there are issues of first impression to be addressed. Should this Court disagree, this appeal would not presumptively be assigned to the Nevada Court of Appeals pursuant to NRAP 17(b)(2) because it is a direct appeal from a Judgment of Conviction based on a jury verdict for Category A and B felonies.

STATEMENT OF THE ISSUE(S)

I. Whether the district court did not close the courtroom during trial?
   A. Whether the district court's procedural rule does not amount to closure of the courtroom?
   B. Whether any closure was appropriate?

C. Whether any prejudice suffered as a result of the "closure" was so *de minimus* that no error occurred?

II. Whether the state filed charges against Appellant within the statute of limitations?

A. Whether all charges against A.S. were filed within the appropriate statute of limitations?

1. Whether Appellant was charged with Counts 2 through 52 within the applicable statute of limitations?
2. Whether Appellant was charged with Count 53 within the appliable statute of limitations.
3. Whether the district court did not err in concluding that the secret manner tolling provision applied to Counts 2 through 53?

B. Whether Appellant was properly charged with other counts within the statute of limitations?

1. Whether Appellant was charged with Count 1, Conspiracy to Commit Sexual Assault within the appliable statute of limitations?
2. Whether Appellant was charged with the challenged crimes committed against T.S.: Counts 55, 57, 59, and 69, within the applicable statute of limitations?
3. Whether Appellant was charged with the challenged crimes committed against B.S.: Count 77 within the appliable statute of limitations?
4. Whether Appellant was charged with the challenged crimes committed against R.S.: Counts 99, 103, and 105 within the appliable statute of limitations?
5. Whether Appellant was charged with the challenged crime committed against E.C.: Count 115 within the appliable statute of limitations?
6. Whether Appellant was charged with the challenged crimes committed against T.G.: Count 117 within the appliable statute of limitations?
7. Whether Appellant was charged with the challenged crime committed against T.G.: Count 118 within the appliable statute of limitations?
8. Whether this Court should not Appellant's ineffective assistance of counsel claim?

III. Whether the was sufficient evidence of guilt?
   A. Whether there was sufficient evidence of Count 1, Conspiracy to Commit Sexual Assault?
   B. Whether there was sufficient evidence of Counts 115, 116, 118, and 119?
      1. Whether the pornography of E.C. and T.G. depict sexual conduct?
      2. Whether the NRS 200.700(4) definitions of sexual portrayals is constitutional?
         a. Whether NRS 200.700(4) is facially valid?
         b. Whether NRS 200.700(2) and (4) are not overbroad?
         c. Whether NRS 200.700(4) is not vague facial or as applied?

IV. Whether Appellant's convictions do not violate his right against multiple convictions for the same offense?
   A. Whether Appellant was properly charged and convicted of seven counts of possession of child pornography?
   B. Whether Appellant was properly charged and convicted of nine counts of incest?
   C. Whether Appellant was properly charged and convicted of Counts 55 and 57, child abuse – sex abuse?

V. Whether Appellant's convictions do not violate Double Jeopardy?
   A. Whether Appellant's convictions for Counts 55 and 56 do not violate double jeopardy?
   B. Whether Appellant's convictions for Counts 57 and 58 do not violate double jeopardy?
   C. Whether Appellant's convictions for Counts 81 and 82 do not violate double jeopardy?

STATEMENT OF THE CASE

On December 16, 2015, Appellant Christopher Sena ("Appellant") was charged with Count 1 – Conspiracy to Commit Sexual Assault; Counts 2, 4, 5, 7, 9, 10, 12, 13, 15, 17, 18, 20, 88, 90, 92, 107, 108, 109, 110, 111, 112, 113, and 114 – Lewdness With a Child Under the Age of 14; Counts 3, 6, 8, 11, 14, 16, 19, 87, 89,

and 91 – Sexual Assault with a Minor Under 14 Years of Age; Counts 21, 23, 25, 26, 28, 30, 52, 54, 61, 63, 65, 67, 71, 72, 74, 76, 79, 80, 83, 93, 94, 95, 96, 98, 101, and 102 – Sexual Assault with a Minor Under 16 Years of Age; Counts 22, 27, 32, 37, 42, 47, 73, 75, and 97 – Incest; Counts – 24, 29, 34, 39, 44, 49, 50, 51, 56, 58, 82, and 85 – Open or Gross Lewdness; Counts 31, 33, 35, 36, 38, 40, 41, 43, 45, 46, 48, 62, 64, 66, and 68 – Sexual Assault; Counts 53, 86, and 106 – Preventing or Dissuading Witness or Victim from Reporting Crime or Commencing Prosecution; Counts 55, 57, 70, 80, 81, and 84 – Child Abuse, Neglect, or Endangerment – Sexual Abuse; Counts 60, 78, 100, 104, 116, 119, and 120 – Possession of Visual Presentation Depicting Sexual Conduct of a Child; Counts 59, 69, 77, 99, 103 – Use of Minor in Producing Pornography; Counts 105 and 117 – Child Abuse, Neglect, or Endangerment – Sexual Exploitation; Count 115 – Use of Minor Under the Age of 14 in Producing Pornography; and Count 118 – Use of a Minor Under the Age of 18 in Producing Pornography. 10AA2171-2235.

On August 17, 2017, Appellant filed a Motion to Dismiss Counts for Violation of Statute of Limitations ("Motion"). 7AA1390-1422. On August 22, 2017, the State filed an Opposition to Appellant's Motion. 7AA1423-54. On August 28, 2017, Appellant filed a Reply. 7AA1455-61. On August 30, 2017, the district court denied Appellant's Motion. 29AA6782-6805.

Appellant's jury trial began on January 28, 2019. 15AA3247. On February 21, 2019, the jury found Appellant guilty of Counts 1-4, 6-10-15, 17, 19-29, 31-33, 35-37, 41-42, 46-60, 62, 64, 66, 68-69, 71-83, 86- 92, 95-110, 115-120. 11AA2359-83. The jury found Appellant not guilty of Counts 5, 16, 17, 18, 30, 34, 38, 39, 40, 43, 44, 45, 61, 63, 65, 67, 70, 84, 85, 93, 94, 111, 112, 113, and 114. Id.

On May 28, 2019, the district court sentenced Appellant to 327 years and 4 months to life. 29AA6779. Appellant's Judgment of Conviction was filed on May 31, 2019. 11AA2384-92.

STATEMENT OF THE FACTS

Appellant's crimes occurred over the span of 15 years against the following minor victims: A.S., T.S., B.S., R.S., E.C., T.G., and M.C. 9AA1959-2001. Several counts alleged that Appellant was guilty because he committed the crimes with Terrie Senna and/or Deborah Sena.

A.S. is Appellant's first child, born on May 22, 1990, Terrie and Appellant. RA1. T.S. was born on December 2, 1994, to Terrie and Appellant. Id. R.S. was born on June 14, 1998, to Terrie and another man. Id. Of the four children living at Appellant's residence, R.S. was the only child not biologically related to Appellant. Id. B.S. was born on August 13, 1998, to Deborah and Appellant. Id. E.C. and T.G. are Terrie's nieces. Id. E.C. was born on December 21, 2000. Id. T.G. was born on January 9, 1997. Id. M.C. is Terrie's younger sister by 11 years. Id.

Terrie met Appellant when she was 17, Appellant was 21, and began living together in 1989, when Terrie was 18. 23AA5236-38. Terrie gave birth to A.S. when she was 19. 23AA5239. Appellant and Terrie first separated in late 1993. 23AA5239-40. Terrie and Appellant rekindled their relationship in 1993 and T.S. was born December of 1994. 23AA5241-42. Appellant and Terrie separated again shortly after T.S.'s birth, reconciled in 1996, but separated one year later. Id.; Appellant filed for divorce and received primary physical custody of A.S. and T.S. 23AA5266-67.

During this divorce, Appellant met Deborah. 25AA5859-61. When Deborah discovered she was pregnant with B.S., Appellant said he would take the baby away from her if she left him. 25AA5862-63. Deborah and Appellant married in 1998. 25AA5865. Appellant, Deborah, A.S., and T.S. moved into a trailer located at 6012 Yellowstone in Clark County, Nevada. 25AA5866. Deborah gave birth to B.S. in 1998. 25AA5703.

Appellant and Terrie then rekindled their sexual relationship when Terrie was pregnant with R.S. by another man. 23AA5274-75. In 1999, Appellant moved Terrie and R.S. into his trailer. 24AA5514; 23AA5278. Deborah was not pleased with the idea but felt like her hands were tied. Id.

Deborah consistently worked at Cox Communications and provided the majority and most consistent financial support. 20AA4492-93; 25AA5871-72.

Terrie worked the occasional job. 20AA4492-94. Appellant was a DJ and worked "gigs" for Las Vegas Metropolitan Police Department Events but never had consistent work. 20AA4498. Whenever Appellant had a "gig," Appellant forced the entire family to accompany him and set up the stage and his equipment. 20AA4499.

Appellant's trailer had three bedrooms with an office attached as a separate building behind the main residence. 20AA4471. T.S., B.S., and R.S. shared a bedroom, A.S. had her own room, Appellant and Deborah slept in the master bedroom, and Terrie slept in the office. 20AA4472. The boys' bedroom window looked onto the front patio which led around the residence to an above-ground pool and hot tub. 20AA4474-75. Inside the main residence was a living room and bathroom with an accordion door and no locks. 20AA4485. The only lock inside the main residence was on the master bedroom where Appellant and Deborah slept. 20AA4486.

The office had a bathroom with an accordion door, a kitchen, and an office area with Appellant's computer. 20AA4473; 20AA4490-91. Appellant installed a divider-wall to block the computer from view from the front door. 22AA4999. No one could touch Appellant's computer. 20AA4558-59. Around the computer, Appellant displayed pictures and figurines of naked women. 22AA4999-5001.

Terrie's and Deborah's relationship was "awkward," and they were never close. 23AA5283; 25AA5873. When Terrie first moved in, Deborah did not know

Terrie and Appellant were having sex until Appellant asked Deborah and Terrie to have a threesome with him five years later. 25AA5874-75. Appellant, Terrie and Deborah would either have a threesome with Terrie and Deborah or one woman would watch while he had sex with the other. 23AA5285-86.

While Terrie lived with Appellant, she brought her nieces, E.C. and T.G. over to visit their cousins. 23AA5321. When E.C. and T.G. spent time at Appellant's residence, Appellant told R.S., B.S., or T.S. to bring E.C. or T.G. to them to the office, then told the boys to leave so he could be alone with the girls. 24AA5535-36.

Appellant installed surveillance cameras on the exterior and interior of the residence and office in 2008 or 2009 all locations except for the bedrooms and Appellant's computer. 20AA4513-14; 20AA4518-23. Appellant did this so he could watch the children. 24AA5636-37.

A.S.'s testimony:

A.S. could never say "no" to Appellant because he would hit her. 20AA4499. Appellant hit A.S. whenever he was angry and did so on multiple occasions. Id. When A.S. was nine, Appellant threw a metal pipe at her head. 20AA4500. The next day, the school nurse saw the injury and called Child Protective Services ("CPS"). 20AA4501. When A.S. got home that day, Appellant knew she spoke with CPS, and beat her because of it. 20AA4502. 20AA4503. Appellant threw wrenches, remote controls, rocks, and shoes at A.S. and her siblings. 20AA4504-07. When A.S. was

14, Appellant dragged her into the trailer by her hair, threw her on the floor, put his foot on her throat, and said "I brought you into this world and can take you out of it." 20AA4500. Appellant called A.S. stupid, useless, and pathetic daily. 20AA4511. As A.S. got older, Appellant began calling her "his little slut." Id.

A.S. was afraid of Appellant and believed he was always watching her. 20AA4512. A.S. was 21 when she got her first job at City Shop. 20AA4496-97. One day, A.S.'s boss told her to call the police to report a "bum" sitting outside. 20AA4497. A.S. misheard her boss and reported a "bomb." Id. A.S. did not tell anyone about this incident, but Appellant knew what happened before she got home. Id. A.S. started working at Albertsons two years later. 20AA4496-97. When A.S. got home from work, Appellant knew everything she had done. 20AA4512. A.S. believed her co-worker was Appellant's friend, and she saw Appellant's friends at the store watching her. Id. If A.S. or her siblings were not in front of the cameras when Appellant checked them, Appellant called and yelled at her. 20AA4515. If A.S. ignored those calls, Appellant would yell, beat, and rape her. 20AA4515-16; 20AA4524.

In 2001, when A.S. was 11, she. returned home from school and saw Appellant in the master bedroom masturbating. 20AA4524-26. This was not uncommon. Id. A.S. was the first child home from school and would be alone with Appellant for about one hour each day. 20AA4563-65. Appellant asked A.S. if she

loved him. 20AA4526; 20AA4530. A.S. said, "of course, I love you, you're my dad." 20AA4528-29. Appellant told A.S. he would show her how to love him. Id.

Appellant touched A.S.'s breasts and "private parts".[1] 20AA4529-31. Appellant took A.S. to the living room, locked the front door, told A.S. to undress, and inserted his fingers in her vaginal lips.[2]20AA4531-32. Appellant continued asking A.S. if he loved her and, not knowing any better, A.S. continued saying, "yes, I love you." 20AA4531.

Appellant instructed A.S. to get on her hands and knees and forced his penis inside A.S.'s anus.[3] 20AA4532. A.S. told Appellant she did not like it, and he told her to get used to it. 20AA4533. After, Appellant told A.S. he had "police friends," nobody would believe her if she said anything, and she would go to jail because she had done something wrong.[4] 20AA4533-34.

Appellant continued anally raping A.S. nearly every day for 15 years. 20AA4534. When A.S. was 11, 12, and 13 Appellant raped A.S in the living room, master bedroom, the office, and the boys' room.[5] 20AA4535. When Appellant anally raped A.S. in the boys' bedroom, he looked out the window to make sure no one

[1] Count 2. 10AA2172.
[2] Counts 3-4. 10AA2173.
[3] Counts 5-7. 10AA2173-74.
[4] Count 53. 10AA2183.
[5] Counts 8, 10-11, 13, 16 and 18. 10AA2174-77.

came home.[6] 20AA4536. Whenever Appellant anally raped A.S., he rubbed his penis against her buttocks.[7] 20AA4541-43. When A.S. told Appellant he was hurting her, Appellant told her to get used to it. Id. When A.S. was 11, 12, and 13, Appellant forced A.S. to put his penis in her mouth.[8] 20AA4538-40. This happened a couple of times per month *at minimum*. 20AA4540-41. When Appellant did so, he would sometimes rub his penis against her face.[9] 20AA4543.

When A.S. turned 14, A.S. came home from school and got in the shower because she thought Appellant was not home. 20AA4545. While A.S. was in the shower, Appellant got in the shower with her and put his penis in her vagina.[10] Id. Appellant then put his penis inside A.S.'s anus.[11] 20AA4546. When Appellant left, A.S. felt so dirty, she tried to scrub herself clean. 20AA4547. Appellant started vaginally penetrating A.S. once per week, *at minimum*.[12] 20AA4562-67. After, A.S. would hit her stomach with a plank of wood because she thought that doing so would keep her from getting pregnant 20AA4566.

[6] Counts 8-9. 10AA2174-77.
[7] Counts 9, 12, and 17. 10AA2173-77.
[8] Counts 14 and 19. 10AA2176-77.
[9] Counts 15 and 20. 10AA2176-77.
[10] Counts 21-22. 21AA2178.
[11] Count 23. 10AA2178.
[12] Count 23, 26-28. 10AA2178-79.

A.S. testified that when she was 14 and 15, Appellant fondled her breasts at least a couple of times per month.[13] 20AA4556. When she and Appellant watched television, Appellant massaged whichever breast was closest either over or under her clothes. Id. Appellant continued forcing A.S. to give him fellatio.[14] 20AA4556. A.S. remembered one occasion when Appellant was showing A.S. cartoon pornography in the office of the father and daughter from the Jetsons having sex. 20AA4559-60. Appellant either masturbated himself, or commanded A.S. to put his penis in her mouth. 20AA4560-61. A.S. did as Appellant commanded because she was afraid of Appellant. 20AA4561.

When A.S. was 14, A.S. saw Appellant and Terrie watching pornography in the office. 20AA4567. Appellant told Terrie that A.S. had never had anal sex and that she wanted to experience it. 20AA4567; 20AA4569. A.S. and Appellant knew this was a lie because Appellant had anally raped A.S. that same day. 20AA4569. When Appellant told Terrie that A.S. should experience sex, A.S. knew she had to do whatever Appellant said. Id.

Appellant told A.S. to undress and lay on the ground. Id. Terrie took off her shirt and bra, knelt by A.S.'s head, and began kissing and touching A.S.'s breasts. 20AA4570. Appellant did not tell Terrie to do so. Id. Appellant knelt by A.S.'s legs

[13] Counts 24 and 29. 10AA2178-79.
[14] Count 25 and 30. 10AA21-80.

and anally penetrated her while Terrie continued kissing and fondling A.S.'s breasts.[15] 20AA4570-71. Terrie never said or did anything to stop Appellant.[16] 20AA4571. After, Appellant and Terrie began kissing and taking off Terrie's pants before A.S. left the office. 20AA4571-72. A.S. never spoke to Terrie about what happened and hated her "because she allowed it to happen." 20AA4572. Appellant continued to anally and vaginally penetrate A.S., forced her to perform fellatio, and fondled her breasts at least once per year when she was between 16 and 24.[17] 20AA4574-75; 20AA4586.

Around A.S.'s 18th birthday, she came home and saw Appellant, naked, and standing in the living room. 20AA4576. Appellant told A.S. to lock the front door and brought Deborah, into the living room. 20AA4577. Appellant told A.S. to undress and instructed her and Deborah to kiss, fondle each other's breasts, and touch each other's clitorises. [18] 20AA4577-80. Appellant told A.S. and Deborah to kneel on the ground and lick Appellant's penis. 20AA4579-80.

Appellant than put his penis inside Deborah while A.S. laid on her back, underneath Deborah. 20AA4615-16. Appellant commanded A.S. to touch her own

[15] Count 52. 10AA2186.
[16] Count 1. 10AA2172.
[17] Counts 31-38, and 39-45. 10AA2180-88.
[18] Counts 48-50. 10AA2184-85.

clitoris, and A.S. did so.[19] 20AA4616. Appellant then put his penis inside A.S.'s vagina and anus while Deborah remained on top of her.[20] Id.; 21AA4818.

At first, A.S. thought Appellant's actions were normal because it happened so often, and Appellant, Terrie, and Deborah never explained to her what a "normal" family relationship was. 21AA4809-10. A.S. did not know any better. 21AA4809-10.

A.S. never wanted to do anything sexual with Appellant, but did so to protect her family 20AA4588; 20AA4806. Whenever Appellant became angry, A.S. forced herself to have sex with Appellant because he was "less mean" after. 20AA4587. When A.S. was 17 or 18, Appellant asked A.S. if she wanted him to do what he was doing to A.S. to "poor young [E.C.]." Id. E.C. was 7 or 8. 20AA4591. Whenever E.C. and T.G. visited, A.S. tried stay with them, but Appellant gave her chores so he could be alone with either E.C. or T.G. in the office. 20AA4591-92.

The entire time A.S. lived with Appellant's, he threatened and abused her.[21] Appellant told A.S. that if she called the police, he would break her legs and paralyze her, and would have "45 minutes to do whatever the hell he wants" to her before the police arrived. 20AA4615. A.S. believed Appellant because police spent time with Appellant in the office. 20AA4614. Appellant told A.S. that the mob put cement

[19] Count 51. 10AA2186.
[20] Counts 46-47. 10AA2184.
[21] Count 53. 10AA2186-87.

shoes on people and threw them in Lake Mead. 20AA4615. Whenever A.S. told Appellant, "no," he threatened to break her legs or reminded her about how much time he would have to hurt her before the police arrived. 21AA4799.

A.S. did not move out of Appellant's residence because she wanted to protect her brothers and cousins. 20AA4586. The majority of A.S.'s paycheck went towards supporting Appellant, and she did not know how to drive because Appellant never taught her. 21AA4806. As a result, A.S. did not move out until she was 24. 20AA454593. A.S. found B.S. crying and he told A.S. that Appellant had been sexually abusing him. 20AA4594-95. B.S. was 15. 20AA4596. A.S. became upset and angry because she realized that forcing herself to have sex with her father was all for nothing. 20AA4595. A.S. knew she and B.S. had to leave. 20AA4595.

A.S. and B.S. convinced Deborah to leave with them. 20AA4597. They planned to leave once they saved enough money but realized they needed to escape sooner. 20AA4599-4600. Appellant beat B.S. because he caught B.S. making dinner for A.S. because "boys aren't meant to cook." 20AA4600. A.S. and Deborah decided to leave the next day. 20AA4600-02.

On June 13, 2014, A.S. waited for Appellant to fall asleep, crawled through the residence to avoid being seen on the cameras and put items she planned to take with her by the front door. Id. A.S. woke B.S. up, and when Deborah woke up, they snuck their items to the truck and left. 20AA4602-04. A.S. was the only one who

took her phone because she had her own phone plan, and Appellant put trackers in B.S.'s and Deborah's phones. 20AA4606-07.

A.S. did not tell Terrie because she feared Terrie would tell Appellant. 20AA4662-63. A.S. did not tell T.S. she was leaving because he was 18 and not routinely sleeping at the residence. 21AA4805. A.S. did not take R.S. because he was Terrie's son and it would have been considered kidnapping. 21AA4807.

First, A.S., B.S., and Deborah went to Albertsons where A.S. quit her job so Appellant could not find them. 20AA4604-05. Next, they went to a domestic violence shelter where they lived for two weeks. 20AA4608-09. When Appellant realized A.S., B.S., and Deborah left, he started calling A.S., emailing Deborah, and going to A.S.'s work. 20AA4608-10. When A.S. picked up her last paycheck from Albertsons, Appellant had written a note on the paycheck telling her to come home. 20AA4605-06.

A.S. had not planned to report Appellant's abuse to the police because she believed that Appellant was friends with police. 21AA4800. However, three months after A.S., B.S., and Deborah left, A.S. spoke to Detective Samples about Appellant's abuse and rape. 20AA4613-14.

T.S.'s testimony:

Appellant because abusing T.S. when he was between 13 and 15. 24AA5657. Appellant was painting the roof of the trailer and told T.S. to make sure paint did not

drip on the walls. Id. When paint got on the walls, Appellant threw a paint-soaked brush at T.S. and Deborah and told T.S. to go inside. 24AA5657-60. Appellant called T.S. into the bathroom and told T.S. get in the shower to wash the paint off. 24AA5660-61. Deborah was naked in the bathroom and followed T.S. into the shower. 24AA5661. Appellant did not tell her to do so. Id.

Appellant instructed Deborah and T.S. to wash each other.[22] 24AA5663. With no instruction from Appellant, Deborah performing fellatio on T.S.[23] Id. Appellant then directed Deborah to stand up and bend over. 24AA5664. Appellant told T.S. to put his penis in Deborah's vagina. 24AA5665. T.S.'s penis was not erect, so he rubbed his penis against Deborah's legs and genital lips.[24] 24AA5665-66. T.S. followed Appellant's instructions to prevent Appellant from getting angry. 24AA5666. At trial, T.S. identified a still frame of a video Appellant took of this event.[25] 24AA5667. T.S. did not know the incident was recorded until police showed him the video. 24AA5673.

When T.S. was between 15 and 16, Appellant called him into the bedroom, told him to undress and lay on the bed. 24AA5668-69. Appellant was naked. Id. Appellant called Deborah into the bedroom and she performed fellatio on T.S.[26]

[22] Counts 55-56. 10AA2187-88.
[23] Count 54. 10AA2187.
[24] Counts 57-58. 10AA2188-89.
[25] Counts 59-60. 10AA2189-90.
[26] Counts 61-62. 10AA2190.

24AA5669. Deborah got on top of T.S. and put T.S.'s penis in her vagina.[27] 24AA5670-71. Appellant told T.S. to get on top of Deborah and put his penis in her vagina.[28] 24AA5674. T.S.'s penis went inside Deborah's vagina both times. Id. Appellant then instructed Deborah to perform fellatio on T.S.[29] while Appellant put his penis in Deborah's vagina. 24AA5672. T.S. did as Appellant commanded because he did not want to fight with Appellant. 24AA5675. T.S. did not know he was being filmed but identified still images of the incident at trial.[30] 24AA5673.

On June 14, 2014, T.S. was asleep on the couch when Appellant woke him up and told him Deborah, A.S., and B.S. left. 24AA5643. T.S. felt betrayed and abandoned because they did not take him. 24AA5644. That day, Appellant made Terrie and R.S. move out. 24AA5645. Appellant told T.S. to convince A.S. to move back, which T.S. did because Appellant had access to his phone. 24AA5646.

Appellant warned T.S. that Appellant might be arrested. 24AA5647. On September 17, 2014, T.S. was asleep on the couch when SWAT arrived and arrested Appellant. 24AA5648-49.

On September 30, 2014, T.S. spoke with detectives and denied any sexual conduct—involving himself or anyone else—occurring at the hands of Appellant.

[27] Counts 63-64. 10AA2191.
[28] Count 65-6610AA2192.
[29] Count 67-68. 10AA2193.
[30] Count 69. 10AA2371.

24AA5651. T.S. was not aware of sexual conduct involving any of the other children when he first spoke to officers. 24AA5651-52. T.S. testified that he did not disclose the sexual abuse to detectives because he was scared and surprised that police knew about the abuse. 24AA5652. T.S. was ashamed, embarrassed, and thought disclosing the abuse would affect his future and make his friends think he was a monster. 24AA5662-63.

B.S.'s testimony:

Appellant struck B.S. across the face and pushed him to the ground on multiple occasions. 25AA5711. When B.S. was 14, Appellant was angry at B.S., dragged B.S. into the house, slapped him, pinned him to floor, and began punching him aggressively saying, "I brought you into this world, I can bring you out."[31] Id. Deborah was present and did nothing. Id. Appellant told B.S. that he knew how to break legs and hide a body, and said he could do more harm before the police showed up. 25AA5713. B.S. did not think the police would believe B.S. because Appellant was friends with police. 25AA5713-14.

Appellant began sexually abusing B.S. when B.S. was 14. 25AA5722. First, B.S. went into the office when Appellant made Terrie show B.S. her breasts and ordered B.S. to touch them.[32] 25AA5723-24. Appellant told Terrie to perform

[31] Count 86. 10AA2201-22.
[32] Counts 81-82. 10AA2099-2200.

fellatio on B.S.[33] Id. Appellant instructed B.S. to lay on the ground while Terrie put B.S.'s penis in her vagina.[34] 25AA5726. Appellant stood in the corner masturbating. Id. B.S. did as Appellant said because Appellant threated to kill B.S. 25AA5727-28.[35] Appellant threatened to kill B.S. if he called the police. 25AA5728.

On a second occasion, B.S. saw Appellant and Terrie having sex when Appellant instructed him to join Appellant and Terrie. 25AA5728-29. Appellant told B.S. to touch and kiss Terrie's breasts, and put B.S.'s penis in Terrie's vagina.[36] 25AA5731. Appellant began masturbating before instructing Terrie to perform fellatio on B.S. while Appellant put his penis in Terrie's vagina. 25AA5732.

When B.S. was around the same age, Appellant instructed B.S. to get in the pool and watch Deborah and Appellant have sex.[37] 25AA5734-35. After, B.S. went into the house and Appellant told B.S. to follow him into the bedroom where Deborah was naked on the bed. 25AA5737. Appellant instructed Deborah to put B.S.'s penis in her mouth[38], then get on top of B.S. and put B.S.'s penis in her vagina.[39] Id. Appellant instructed B.S. to get on top of Deborah and put his penis in

[33] Count 79. 10AA2198.
[34] Count 80. 10AA2199.
[35] Count 86. 10AA2201-02.
[36] Counts 83-85. 10AA2200-01.
[37] Count 70. 10AA2194.
[38] Counts 72-73. 10AA2195-96.
[39] Count 71. 10AA2194.

Deborah's vagina.[40] Id. Appellant was standing in the corner masturbating. 25AA5739. Appellant instructed Deborah to put B.S.'s penis in her mouth again[41] while Appellant put his penis in Deborah's vagina. 25AA5739-40. Appellant threatened to kill B.S. if B.S. told anyone.[42] 25AA5740. B.S. did not know Appellant was recording the incident but identified a still image of the recording at trial.[43] 25AA5740.

B.S. never reported Appellant's abuse because he believed Appellant's threats since Appellant beat and yelled at B.S. 25AA5798. B.S. did not tell anyone what was happening until 2014 when he was 15, suicidal and hopeless. 25AA5741. B.S. told A.S. what Appellant was making B.S. do with Terrie, but not Deborah because Deborah was his biological mother. 25AA5742-43. A.S. told B.S. what Appellant had been doing to her. 25AA5743.

After, A.S., B.S., and Deborah decided to leave after B.S.'s school year so Appellant could not find them. 25AA5743-44. They did not include Terrie or R.S. because of Terrie's history of reconciling with Appellant, and R.S. was Terrie's son. 25AA5745. In June of 2014, after Appellant attacked B.S. form making dinner for A.S., pushed him up a wall, and threatened to fight because Appellant was "not

[40] Counts 74-75. 10AA2196-97.
[41] Count 76. 10AA2197.
[42] Count 86. 10AA2201-02.
[43] Counts 77-78. 11AA2374.

drunk now." 25AA5746-47. B.S., A.S., and Deborah left the next night, earlier than planned. 25AA5746.

B.S. and A.S. woke up early, gathered the items they planned to leave with, crawled to the front door to avoid being seen on the security cameras to pile up the items, and waited for Deborah to wake up. 25AA5748. When Deborah was ready, the three put their items in Deborah's truck and left. 25AA5753. B.S. and Deborah left their cell phones because Appellant could track their locations. 25AA5751-52. For two weeks, B.S., A.S., and Deborah stayed at a safe house. 25AA5753; 25AA5756. B.S. spoke to the police in September 2014. 25AA5756-57.

R.S.'s testimony:

R.S. was the only child not biologically related to Appellant. 24AA5524. As a result, Appellant treated R.S. significantly worse. 24AA5524. Appellant called R.S. "stupid," "useless," "worthless," and told R.S. his biological father never loved him. 24AA5520. When R.S. was 12 or 13, Appellant asked R.S. if he felt loved. 20AA5526. R.S. answered "no," Appellant hit R.S., and repeated his question. Id. R.S. continued to tell him "no," and Appellant continued hitting R.S. until R.S. lied and said he felt loved. 24AA5526-27. When Appellant hit R.S., he knew how not to leave marks. 24AA5525. Appellant told R.S. Appellant would come after him if he

called the police.[44] 24AA5526. R.S. believed this meant Appellant would kill him. 24AA5523.

When R.S. was 11 or 12, Appellant tried to convince R.S. to have sex with E.C. and R.S. refused. 24AA5537. When R.S. was the same age, Appellant walked into R.S.'s bedroom and put his penis in R.S.'s anus.[45] 24AA555541. Appellant and R.S. were alone in the trailer. Id. R.S. screamed and tried to get away, but Appellant covered his mouth, and held R.S. down. 24AA5542. Appellant told R.S. he would kill R.S. or his mother if R.S. told anyone.[46] 24AA5543; 24AA5523.

On another occasion, Appellant called R.S. into the bedroom while everyone was outside, made R.S. undress and Appellant put his penis inside R.S.'s anus.[47] 24AA5544-45. R.S. told Appellant he did not want to have sex, but Appellant forced him to. 24AA5545. R.S. thought Appellant would kill him if he refused.[48] Id.; 24AA5523. Appellant stopped five minutes later when B.S. came into the residence. 24AA5546. On a third occasion, Appellant was sitting on the couch naked in the living room, made R.S. take of R.S.'s clothes, and put his penis inside R.S.'s anus.[49]

[44] Count 106.10AA2208-09.
[45] Counts 87-88. 10AA2202.
[46] Counts 106.10AA2208-09.
[47] Counts 89-90. 10AA2202-03.
[48] Count 106. 10AA2208-09.
[49] Counts 91-92. 10AA2203.

24AA5547-48. After these three incidents, R.S. explained the rapes "stopped happening for a while."[50] 24AA5548.

When R.S. was 13 or 14, Appellant called him into the bedroom with Terrie. 24AA5555. Appellant told R.S. to undress and instructed Terrie to put R.S.'s penis in her mouth.[51] Id. Appellant told R.S. to get on top of Terrie and put his penis in Terrie's vagina.[52] Appellant told R.S. to lay on his back and instructed Terrie to put R.S.'s penis in her mouth a second time[53] while Appellant put his penis in Terrie's vagina. 24AA5555-56. R.S. did not resist Appellant's instruction because he was afraid of Appellant. 24AA5558. R.S. identified a still image of the incident at trial.[54] 24AA5557-58.

R.S. was 14 or 15 when Appellant showed him a video of Appellant and Terrie having sex.[55] 24AA5531-34. On another occasion, Appellant called R.S. into the office with Terrie, and made Terrie put R.S.'s penis in her mouth.[56] 24AA5551-22. Appellant took off his clothes and Terrie alternated between putting Appellant's and

[50] Counts 93-94. 10AA2203-04.
[51] Count 95. 10AA2204.
[52] Counts 96-97. 10AA2204-05.
[53] Count 9810AA2205-06.
[54] Counts 99-100. 10AA2206.
[55] Count 105. 10AA2208.
[56] Count 101. 10AA2206.

R.S.'s penis in her mouth.[57] 24AA5552. At trial, R.S. identified images of that incident.[58] 24AA5557.

R.S. did not tell anyone what was happening to him until after Appellant was arrested. 24AA5560-61. At the time, R.S. was living with his grandparents because Appellant threw R.S. and Terrie out after A.S., Deborah, and B.S. left. 24AA59-60. R.S. told Terrie what Appellant had been doing to him, but Terrie just went to California to get her truck driver's license. 24AA5562-63. When Terrie was in California, Appellant was arrested, and R.S. told the police what Appellant was doing. Id.

E.C.'s testimony:

When E.C. was in middle school, she spent the weekends visiting her cousins A.S., T.S., and R.S. 21AA09-10. Appellant frequently took her to the office where they were alone, pulled up her shirt and touched her breasts.[59] 21AA4912-15. Appellant pulled down E.C.'s pants and touched her vagina under her underwear.[60] 21AA4915-17. This happened more than once a year until E.C. stopped visiting her cousins. 21AA4917-21. E.C. did not tell anyone about the abuse because she was

[57] Count 102. 10AA2207.
[58] Counts 103-104. 10AA2207-08.
[59] Counts 108, 110, 112, and 114. 10AA2209-10.
[60] Counts 107, 109, 111, and 113. 10AA2209-10.

embarrassed, did not know how to bring it up, and did not want to think about what happened because it was depressing. 21AA4925; 21AA4948.

When E.C. was at Appellant's residence, she showered in the office bathroom. 21AA4923-24. She did not think anyone was in the office and did not give anyone permission to take pictures or videos of her in the shower. 21AA4927. E.C. identified still photographs taken of her while she was in the shower at trial.[61] Id.

T.G.'s testimony:

T.G. explained that she and E.C., spent weekends visiting their cousins A.S., T.S., and R.S. 22AA4990. T.G. frequently saw and heard Appellant yell and hit A.S., R.S., B.S., and T.S. 22AA4993-94. Whenever Appellant yelled, the children would do exactly as they were told. 22AA4995. This happened so frequently it was not surprising to T.G. Id.

When T.G. was between 11 and 13, Appellant told T.S., R.S., or B.S. to bring her to Appellant in the office and then told them to leave her alone with Appellant. 22AA5005-17. Appellant showed T.G. a picture a woman performing fellatio on Appellant, a video of two people having sex, and pictures of T.G.'s aunt, M.C., performing oral sex on Appellant when M.C. was a teenager.[62] 22AA5008-09. Appellant told T.G. this was normal and not to be embarrassed. 22AA5010. T.G.

[61] Counts 115-116. 10AA2211-12.
[62] Count 117. 10AA2211-12.

was 15 when Appellant found out she had lost her virginity. 22AA5005. Appellant began asking her questions about what sexual positions she was in and what she liked. Id. T.G. stopped going to Appellant's residence after that. Id.

T.G. showered in the office bathroom when Appellant and Terrie were in the office. 22AA5013-14. T.G. identified a picture taken of her in the shower when she was 13 at trial.[63] 22AA2014-16. T.G. did not know Appellant filmed her while she was in the shower until 2014 when the police showed her the video. 22AA5021.

M.C.'s testimony:

M.C. met Appellant when she was 7 or 8 when Terrie started dating Appellant. 22AA5038-40. In 1995 and 1996, M.C. was 14 or 15 when Appellant told M.C. she should be a model and he wanted pictures of M.C.'s body to compare to Terrie's. 22AA5052. Appellant told M.C. to take off her clothes, told her how to pose, and made her pose with a blue vibrator while he photographed her.[64] 22AA5059-60. Terrie while Appellant photographed M.C. and did nothing to stop Appellant. 22AA5053. When M.C. was 16 or 17, Appellant made M.C. and Terrie take naked pictures together. 22AA5057; 22AA5060. When M.C. was 18, Appellant took pictures of M.C., Terrie, and himself while having sex. 22AA5058; 22AA5061.

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[63] Counts 118-119. 10AA2212.
[64] Count 120. 10AA2212-13.

Terrie Sena's testimony:

Terrie admitted that Appellant took nude pictures of she and M.C. when M.C. was 15, and that she saw Appellant taking nude pictures of M.C. when M.C. was 13. 23AA5253-61.

When Terrie and Appellant had sex, Appellant wanted Terrie to talk about having sex with B.S., R.S., or T.S. before he orgasmed. 23AA5287-88. Terrie did as Appellant asked and thought nothing of it. Id. When A.S. was 12 years old, Appellant told Terrie that A.S. was better in bed. 23AA5291. While Terrie was "mortified," she still did nothing to protect her daughter. 23AA5291-92.

Terrie was present when Appellant annually penetrated A.S. when she was 16. 23AA5292-93. At Appellant's instruction, A.S. undressed and bent over an ottoman in the front room while Appellant put his penis in her anus. 23AA5295. Appellant instructed A.S. and Terrie to touch and kiss each other's breasts. 23AA5296.

Terrie remembered three instances of engaging in sex with B.S. when B.S. was 14. 23AA5297-98. Appellant said he was teaching B.S. how to be a real man. Id. Appellant told B.S. to put his mouth on Terrie's vagina and then to put his penis in Terrie's vagina. 23AA5299. After, Appellant told B.S. that he would break B.S.'s legs and B.S. would never see his mother again if he told anyone. 23AA5302-03. After B.S. left, Appellant and Terrie had sex. 23AA5303.

Terrie engaged in three instances of sex acts with, R.S. when he was 14. 23AA5305. Appellant said he was teaching R.S. how to be a man and have sex with a woman. 23AA5306. For the first incident in the office, Appellant told Terrie to switch back and forth between putting Appellant's and R.S.'s penis in her mouth. 23AA5306. Appellant recorded this on his computer and Terrie identified images from this incident at trial.[65] 23AA5309.

During the second incident, Appellant made Terrie perform fellatio on R.S. before instructing Terrie to put R.S.'s penis in her vagina while Appellant recorded them on his computer. 23AA5308-09.[66] 23AA5309. Terrie identified images from this incident at trial. 23AA5308-09. During the third incident, Appellant brought R.S. into the bedroom, told him to undress and Terrie to put R.S.'s penis in her mouth, then put his penis in her vagina while Appellant told R.S. to touch Terrie's breasts. 23AA5313; 23AA5317-18.

Terrie was present when Appellant filmed T.G. and E.C. in the shower and never tried to stop him. 23AA5325. When T.G. was 16 years old, she was taking a shower in the office bathroom. 23AA5325-27. Appellant locked the main door and turned the television volume up. 23AA5328. Appellant put a stool by the bathroom door, grabbed a gray camcorder, pointed the camera through the gap between the

[65] Counts 99-100. 10AA2206.
[66] Counts 103-104. 10AA2207-08.

door and door frame, and started recording T.G. 23AA5326. When Appellant told Terrie to perform fellatio on him while he filmed T.G., Terrie complied without asking any questions. 23AA5329-30.

Appellant and Terrie engaged in a similar act with E.C. 23AA5332. Like T.G., E.C. was in the shower in the office bathroom when Appellant locked the door to the office, grabbed a camcorder, climbed on top of a stool he placed by the bathroom door, and filmed E.C. through the accordion door.[67] 23AA5332-34. Again, Terrie performed fellatio while he recorded E.C. 23AA5334-35. After E.C. got out of the shower, Appellant and Terrie watched the video on his computer while they had sex. Id.

After A.S., B.S., and Deborah left, Appellant threw Terrie and R.S. out of his residence. 23AA5283; 23AA5337; 23AA5341-42. Appellant called Terrie and told her to convince A.S. to return. 23AA5344-45. A few months later, Terrie went to California to get her truck driver's license. 23AA5346. Appellant was arrested and R.S. spoke to the police when Terrie was in California. 23AA5347. Terrie did not speak with police until December 2014 and was arrested the next day. 23AA5347-48.

Terrie ultimately pled guilty to one count of Sexual Assault where she would be sentenced to 10 years to life in exchange for truthful testimony at Appellant's

[67] Count 115. 10AA2210.

trial. 23AA5234-36. In doing so, Terrie acknowledged and accepted responsibility for her part in Appellant's plan. 23AA5349-50. Terrie acknowledged that she never left Appellant despite what he was doing, never told him "no," and never tried to protect her children. 24AA5498-99.

Deborah Sena's testimony:

Deborah acknowledged that Appellant did not force her to do anything. 25AA5885. Despite testifying that the was afraid of Appellant, Deborah acknowledged that she participated in Appellant's plans. 25AA5887.

Appellant and Deborah sexually abused T.S. when he was 15 or 16 twice. 25AA5888. Deborah corroborated T.S.'s testimony that Appellant ordered T.S. and Deborah to wash each other in the shower. 25AA5889-92. When Appellant told T.S. to put his penis in her vagina, she covered her vagina so T.S.'s penis was in her hand instead. Id. Appellant filmed the incident.[68] 25AA5894. Appellant later showed Deborah the video on his computer while she performed fellatio on Appellant.[69] 25AA5894-95.

Six months later, Appellant and Deborah were having sex when Appellant asked Deborah to describe T.S.'s penis. 25AA5896. Deborah told Appellant that she did not put T.S.'s penis in her vagina and Appellant called T.S. into the room, told

[68] Count 59. 10AA2189.
[69] Count 60. 10AA2189-90.

Deborah to perform fellatio on T.S., then put T.S.'s penis in her vagina. 25AA5896-99. Id. Appellant filmed the incident.[70] 25AA5900. Afterwards, Appellant and Deborah had sex. Id.

Appellant and Deborah raped B.S. when he was 15. Appellant called for B.S. to get into the pool with him and Deborah and ordered B.S. to watch them having sex.[71] 25AA5914. After, Appellant brought B.S. into the bedroom and instructed Deborah to perform fellatio on B.S. 25AA5910-11. Appellant instructed Deborah to get on top of B.S. and put B.S.'s penis in her vagina. 25AA5911-12. Appellant told B.S. to get on top of Deborah and put his penis in Deborah's vagina. 25AA5912. Afterwards, Deborah saw Appellant taking a small video camera to the office.[72] 25AA5913. Appellant later complained that the video was at a "poor angle."[73] 25AA5914.

When A.S. was 17 or 18, Appellant brought Deborah into the living room, where A.S. was and made them undress. 25AA5902-03. Appellant told A.S. and Deborah to kiss, touch and kiss each other's breasts, and touch each other's clitorises before Appellant had sex with A.S. while Deborah continued touching A.S.'s

[70] Count 69. 10AA2194.
[71] Count 70. 10AA2194.
[72] Count 77. 10AA2198.
[73] Count 78. 10AA2198.

breasts. 25AA5906. Deborah did everything Appellant told her to and never tried to protect A.S. 25AA5908.

Appellant told Deborah he would show the police the sexual videos he made of her if she left him. 25AA5923. One of those videos depicted Deborah performing fellatio on their family dog. 25AA5917-19. Deborah never reported Appellant's actions to the police. 25AA5909. Deborah acknowledged that she did not do so because she knew she could be implicated in Appellant's conduct. Id.

In June 2014, Deborah, A.S., and B.S. left Appellant's residence when A.S. and B.S. convinced her to leave. 25AA5930; 25AA5925. They snuck out of the residence because if Appellant would kill them if he caught them. Id. Deborah and B.S. left their phones because Appellant could track them. 25AA5934.

Deborah called a domestic violence shelter and learned that A.S. could stay at a safe house because she was a female abuse victim, as could B.S. because he was Deborah's minor child. 25AA5925-27. However, T.S. could not because he was 18 and therefore an adult. 25AA5927. Deborah did not tell Terrie she was leaving because they were not friends and did not take R.S. because he was Terrie's son. 25AA5928.

Deborah filed for divorce and temporary protection two months after she left Appellant. 26AA6086. She had no plan to report—and did not report—Appellant's actions to the police. 26AA6041; 26AA6086-87. When Appellant learned that

Deborah, A.S., and B.S. left, he began emailing Deborah every day, from multiple email addresses. 26AA6043-84. Appellant told Deborah that he reached out to his law enforcement friends who were providing him information, that Deborah she had no proof he had done anything wrong, and that rumors could not be proven. 26AA6058; 26AA6059-60. Appellant promised to "make things difficult for her." 26AA6072-77. Appellant threatened to send the images of her performing fellatio on the family dog to her employers. 26AA6062. When Deborah did not go back to Appellant, Appellant sent those images to Deborah's employers. 26AA6062-65.

Despite these emails, Deborah did not mention Appellant's conduct to her divorce lawyer until Appellant sent the images of her engaging in bestiality. 26AA6087-88. Deborah's lawyer called the police. 26AA6088. Deborah spoke to the police, who had to continue redirecting her back to her involvement in the sexual activity, about one week later and provided Appellant's emails. 26AA6088-89; 26AA6143; 26AA6072.

Deborah was arrested in December 2014 and ultimately pled guilty to one count of Sexual Assault where she would be sentenced to 10 years to life in exchange for truthful testimony at Appellant's trial. 26AA6090; 25AA5854-57. In doing so, Deborah acknowledged that she participated in Appellant's plans and took responsibility for her criminal actions. 26AA6091.

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Detective Samples' testimony:

Detective Samples began investigating Appellant's crimes when Deborah's attorney contacted the police. 26AA6176. Samples met Deborah, A.S., and B.S. at the Children's Assessment Center, where they were individually and separately interviewed. 26AA6177-80. Based on those interviews, Samples obtained a search warrant for Appellant's residence. 26AA6181.

During the execution of the search warrant on September 17, 2014, Samples interviewed Appellant. 26AA6186. Appellant did not admit to engaging in sex with the children but stated that he and A.S. started having sex when she was 22. 26AA6194. Appellant did not see any problem with having sex with his biological daughter. 26AA6194-95. Appellant initially denied having any pornography but eventually acknowledged that a red flash drive ("USB") was hidden in a safe in the office with pornographic images. 26AA6190-95.

The pornography recovered was played during Samples' testimony.[74] Samples identified several images Appellant took of M.C. when she was a minor and holding a blue dildo or engaging in sex acts with Terrie and Appellant.

[74] Appellant indicated that he going to a motion to transmit the State's exhibits of the pornography to this Court. AOB94, n.101. It does not appear that the motion was filed.
Due to the sensitive nature of the videos and because there is sufficient descriptions of the pornography in the written trial, the State believes transmitting child pornography to this Court is unnecessary.

27AA6232-37. Samples identified pornography Appellant made of T.G. in the shower. 27AA6237-38. T.G. was nude, he could hear Appellant moaning, and that Appellant recorded Terrie performing fellatio on him. 27AA6239. Samples identified pornography Appellant made of E.C. in the shower and filmed in the same way as T.G. 27AA6239-41.

Next, Samples identified two videos of T.S. with Appellant and Deborah. 27AA6242-44. The first video showed Appellant setting up the camera in the bathroom doorway and recording T.S. and Deborah washing each other naked in the shower. 27AA6244. Appellant could be heard telling T.S. and Deborah what to do. 27AA6245. Appellant recorded the second video in the master bedroom. 27AA6245. Appellant and Deborah could be heard speaking before Appellant brought in T.S., and Deborah proceeded to perform fellatio on T.S. and put T.S.'s penis in her vagina. 27AA6246-49. Appellant could be heard telling T.S. what to do. Id.

Next, Samples identified a video involving Appellant, Deborah, and B.S. in the master bedroom. 27AA6250-51. Appellant and Deborah were heard discussing B.S. before B.S. entered. 27AA6253. Deborah performed fellatio on B.S. while Appellant masturbated. 27AA6252.

Samples identified two videos involving R.S., Appellant and Terrie. 27AA6254-57. Because the first video was old, it was recovered in images. 27AA6253. In those stills Terrie performed fellatio on Appellant and R.S.

27AA6254-57. The second video depicted R.S., Appellant and Terrie. 27AA6257-58. Appellant was discussing what was going to happen before and Terrie undressed R.S. when Appellant was not present in the room. 27AA6258-60. When Appellant entered, he was naked and instructed R.S. to put his penis in her vagina. 27AA6260-61.

Detective Ramirez's testimony:

Detective Ramirez analyzed the electronics seized from Appellant's residence. 22AA5132-36. This included digital cameras and camcorders which did not have a large memory capacity, or anything saved. 22AA5147-48. Ramirez analyzed Appellant's computer located in the office for both saved and deleted material, finding nothing noteworthy. 22AA5151-52; 22AA5157-58. Ramirez analyzed the USB. 22AA5160. Ramirez located Appellant's pornography of R.S., B.S., T.S., E.C., T.G., and M.C.; and the video of Deborah engaging in bestiality with the family dog. 22AA5174; 22AA5169.

Ramirez identified a video of Deborah performing fellatio on B.S., attempting to put B.S.'s flaccid penis in her vagina, performing fellatio on him a second time, then inserting B.S.'s penis in her vagina.[75] 22AA5181-82. Appellant was depicted masturbating before putting his penis in Deborah's vagina while she performed fellatio on B.S. 22AA5179-82.

[75] Count 77-78. 10AA2198.

Ramirez identified a second video filmed in Appellant's bedroom of Deborah, T.S., and Appellant.[76] 22AA5184. The recording captured Appellant setting up the video camera and recorded Deborah taking off her clothes and performing fellatio on Appellant for some time until Appellant brought T.S. into the room and Deborah put T.S.'s penis in her mouth. 22AA5185-86. Deborah laid on the bed and T.S. put his penis in Deborah's vagina. Id. Deborah got on top of T.S. and tried to put his penis in her vagina until Appellant instructed T.S. to lay on the bed so Deborah could put T.S.'s penis in her mouth while Appellant put his penis in her vagina. 22AA5187.

Ramirez identified the pornography of T.S. and Deborah in the shower.[77] Id. Deborah got into the shower, while T.S. was washing himself, and began washing T.S. 22AA5188.

Ramirez identified a fourth video showing Appellant setting up the camera in the master bedroom and recording Appellant and Terrie discussing what to do to R.S.[78] 22AA5189. Appellant brought R.S. into the room and briefly left while Terrie undressed R.S. 22AA5190. When Appellant returned, Terrie put R.S.'s penis in her mouth. Id. Terrie told R.S. to touch her breasts and explained how to touch and kiss her breasts. Id. Terrie told R.S. to get on top of her, grabbed R.S.'s hips, and pulled

[76] Count 69. 10AA2194.
[77] Counts 59-60. 10AA2189-90.
[78] Counts 99-100. 10AA2206.

R.S.'s penis inside her vagina. 22AA5191. R.S. is told to lay on his back and Terrie resumed oral sex while Appellant put his penis in Terrie's vagina. Id.

A fifth video was old and could be pieced back together by images.[79] 22AA5192. These images depicted Terrie was going back and forth between putting R.S.'s and Appellant's penis in her mouth. 22AA5193-94.

Ramirez identified two videos showing T.G. and E.C. in the shower naked.[80] 22AA5195. The videos were filmed though a gap in the door and included Terrie performing fellatio on Appellant and Appellant was heard moaning. 22AA5196-97.

Ramirez recovered several naked pictures of M.C., posing with a vibrator, with her sister Terrie, or with Terrie and Appellant engaging in sex. 22AA5197-99.

SUMMARY OF THE ARGUMENT

The court did not close the courtroom and instead implemented a procedural rule that did not prohibit spectators from entering, applied to everyone, and was thoroughly explained before either side presented evidence. Any partial "closure" was appropriate. This rule protected witnesses testifying to traumatic events and limited distractions, and was no broader than necessary to safeguard these substantial interests. Any prejudice was so *de minimus* that no error occurred.

[79] Counts 103-104. 10AA2207-08.
[80] Counts 115-117 and 118-119. 10AA2211-12.

Appellant was timely charged with all crimes. Appellant sexually abused in secret and prevented discovery by threatening and controlling A.S. Therefore, Appellant's crimes could not reasonably have been discovered until A.S. left Appellant's residence at 24 and the State had until A.S. was 28 to charge Appellant with these crimes. A.S. reported Appellant's crimes three months after she escaped Appellant, and Appellant was charged with the crimes committed against A.S. three months later.

The district court correctly surmised that A.S.'s fear of Appellant and evidence of Appellant's consistent abuse prevented and induced A.S. to fail to report Appellant's crimes until she was out of his home. This ruling was in line with both case law, statutory interpretation, and legislative intent.

All other challenged counts were timely filed. Appellant was timely charged with Count 1. Appellant's conspiracy with Terrie and Deborah was secret because all crimes committed in furtherance of that conspiracy occurred in secret. Not only is child sexual abuse ("CSA") inherently secretive, but Appellant threatened all victims into remaining silent.

Appellant was timely charged with Counts 55, 57, 59, and 69, 77, 99, 103, and 105. All crimes occurred in secret and were not discovered until police recovered the USB containing the pornography. Neither T.S., B.S. or R.S. knew they were being filmed. Deborah or Terrie's presence during the abuse did not make

Appellant's abuse "discovered" because they were participants in Appellant's crimes.

Appellant was timely charged with Counts 115 and 118. Neither E.C. nor T.G. knew Appellant filmed them until the police showed them the images and Terrie participated in Appellant's crime. The pornography was not discovered until police recovered the flash drive containing the pornography. Appellant was charged for these crimes 15 months later.

Appellant was timely charged with Count 117. Appellant caused T.G. to be alone with him and told her what he was showing her was normal. Therefore, Appellant's crime was not discovered until T.G. spoke to the police.

This Court should not consider Appellant's claim that trial counsel was ineffective for failing to challenge the statute of limitations for counts not challenged. This claim is inappropriate for direct appeal and must first be raised in post-conviction habeas proceedings.

The State proved that Appellant was guilty of Count 1. Terrie and Deborah never tried to stop Appellant and instead took actions in furtherance of the abuse without any direction from Appellant. Video evidence confirmed this. Terrie and Deborah confirmed they knew they were criminally responsible for Appellant's actions.

The State proved that Appellant was guilty of Counts 115, 116, 118, and 119. All charges stem from Appellant surreptitiously filming E.C. and T.G. naked in the shower and possessing that pornography. focused on the minor's genitalia and was receiving oral sex while he filmed them. Appellant's actions have no conceivable serious literary, artistic, political, or scientific value and cannot be compared to a parent taking pictures of their child at the beach. Terrie performing fellatio on Appellant while he filmed his nieces confirmed that Appellant's intent was to satisfy his prurient interest. All statutes criminalizing child pornography are constitutional.

Appellant's convictions for possession of child pornography, incest, and child abuse do not violate his right against multiple convictions. The State established separate and distinct acts of possession of child pornography by showing the manner of recording. Appellant was properly convicted of nine counts of incest. Each conviction was for each instance of fornication, not for the relationship between Appellant and child. Appellant was properly convicted of two counts of child abuse via sexual abuse because each conviction was for separate acts.

Appellant's convictions do not violate double jeopardy. Open or gross lewdness is not a lesser included offense of child abuse because it required proof of elements not required for child abuse.

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ARGUMENT

I. THE DISTRICT COURT DID NOT CLOSE THE COURTROOM

Appellant argues that the court partially closed the courtroom by posting a sign on the courtroom door without first providing adequate justification. AOB34-35. Appellant alleges that the court's justification for closing the courtroom was not provided prior to the closure and was insufficient to support closure. AOB40-42. Appellant's claim fails. This was a procedural rule, not a closure. Any partial closure was supported with substantial reasons or was so trivial that Appellant's Sixth Amendment rights were not violated.

The Sixth Amendment guarantees the accused a right to a public trial. Faezell v. State, 11 Nev. 1446, 1448 (1995). This right "is not absolute and must give way in some cases to other interests essential to the fair administration of justice." U.S. v. Sherlock, 962 F.2d 1349, 1356 (9th Cir. 1992). Indeed, "the presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." Press-Enterprise Co. v. Superior Court of California, Riverside County,464 U.S. 501, 502 (1984).

There are two types of courtroom closures—total or partial. Woods v. Kuhlmann, 977 F.2d 74, 76 (2d Cir. 1992). A full closure occurs when persons except witnesses, court personnel, and the parties are excluded for an entire

proceeding. Id. A partial closure occurs when a specific group of people are excluded for only a portion of the hearing. Id. Courts are clear that courtroom closure analysis turns on *who* is denied access, and not *when* a person is denied access. U.S. v. Thompson, 713 F.3d 388, 395 (8th Cir. 2013).

Here, the court made clear several times that everyone was welcome to observe the entire trial and the only rule was that people needed to enter the courtroom during a pause in witness testimony. 22AA5124; 23AA5207-09; 23AA5218; 23AA5227; 28AA6434. In accordance with that rule, the court posted the following sign prior to parties delivering their opening statements:

> Please note, if you come in to listen to the trial, you must wait until the break in order to leave the courtroom so as not to disrupt the proceedings and/or draw attention. Thank you for your cooperation.

29AA5227.

A. The court's procedural rule does not amount to a courtroom closure.

Judges have broad discretion to control courtroom activity, even when the restriction touched on matters protected by the Constitution. See Seymour v. U.S., 373 F.2d 629 (5th Cir. 1967). A defendant's right to a public trial must not divert or distract from fair and just adjudication of controversies "in the calmness and solemnity of the courtroom." Sheppard v. Maxwell, 384 U.S. 333, 350-51 (1996).

Here, before opening statements, the district court explained that people who were in the courtroom during witness testimony needed to wait to leave until the

testimony was over. 19AA4381. This was an appropriate exercise of courtroom control and necessary to properly ensure the fair administration of justice. Appellant's trial received significant media attention and the court even personally addressed the prior to trial:

> THE COURT: Also, I'll tell you that I know you guys want to get your stories out, and so a lot of you leave in the middle of statements or whatever. I'll allow you to leave in between, like, when the State does their opening. When they're done with their opening, I'll allow you to leave. I'm not going to let people coming and going while somebody is addressing the jury. Okay?

19AA4396.

As trial progressed, the court made clear anyone could watch trial. 23AA5219. Prior to closing arguments, the trial judge again explained that anyone could watch the trial, but that he wanted people in the courtroom to stay during the entire argument to limit distractions. 28AA6434. Given the importance of ensuring a fair trial, a procedural rule aimed at achieving a fair and just verdict was an appropriate exercise of judicial discretion.

B. Any "closure"[81] was appropriate.

Appellant argues that the judge's decision to "close" the courtroom constituted only a partial closure. 23AA5207-09; AOB34. Accordingly, the State

[81] The use of quotation marks around "closure" is for the sole purpose of maintaining the State's position that the district court's actions did not constitute a courtroom closure.

only addresses whether this partial "closure" was appropriate. The standard of review for a defendant's claim of a violation of his right to a public trial is de novo. U.S. v. Ivester, 316 F.3d 955, 958 (9th Cir. 2003).

In Waller v. Georgia, the U.S. Supreme Court announced a four-part test to apply before a judge may close a courtroom, *over the objections of the accused*: 1) the party seeking to close the courtroom advances an overriding interest to be prejudiced; 2) the closure is broader than necessary to protect that interest; 3) the court considers reasonable alternatives; and 4) the court makes findings adequate to support that closure. 467 U.S. 39, 48 (1984). In 1995, this Court adopted this test. Feazell, 111 Nev. at 1448. This test applies when judges close their courtrooms *over a defendant's objection*. Courts have refused to expand Waller to include cases in which the defendant did not object. See, e.g., Downs v. Lape, 657 F.3d 97, 108 (2d Cir. 2011).

When a party objects to a partial closure, parties need only advance a "substantial reason," when closing a courtroom over a party's objection. Id. Then, "a court must look to the particular circumstances to see if the defendant still received the safeguards of the public trial guarantee." U.S. v. Sherlock, 962 F.2d 1349, 1352 (9th Cir. 1992).

Appellant's claim that he is entitled to reversal simply because the judge did not explain its reasoning for "closing" the courtroom *prior* to doing so fails.

Appellant failed to object when the district court first explained the rule. 19AA4381. Appellant did not accuse the judge of improperly closing the courtroom until the eighth day of trial, and did not object pursuant to Waller until the ninth day of trial. 23AA5207-09. When Appellant did so, the court made clear that it had not closed the courtroom, specifically saying that everyone was more than welcome to view the trial. Id.

Appellant has therefore waived the issue of whether the court violated Waller for the first eight days of trial for all but plain error. Martinorellan v. State, 131 Nev. 43, 49 (2015) Guy v. State, 108 Nev. 770, 780 (1992). Regardless, of which standard of review is applied, when Appellant objected to the "closure" pursuant to Waller, the court properly applied the factors. 23AA5223. First, the judge explained he limited entry during witness testimony for two reasons: 1) in consideration of witnesses testifying to traumatic and emotional events; and 2) to limit disruption and distractions that would interfere with juror focus on that testimony. 23AA5225.

Limiting access to a courtroom to protect witnesses testifying about years of traumatic events is a substantial reason for a closure. At trial, seven victims testified about years of sexual abuse Appellant committed when they were minors. This was a 15-day trial with 120 charged sex-crimes involving 7 victims, and 2 co-conspirators. Given the length of the trial, and the number and seriousness of the charges, the court took reasonable steps towards ensuring jurors remained focused

on the testimony. This procedural rule was therefore reasonable to ensure swift and accurate administration of justice with little delay.

The court's directive was no broader than necessary to protect these substantial reasons. The court never removed the public or media from the courtroom and made clear that spectators were always welcome. 23AA5218. In fact, the media streamed the trial on social media the entire time. 23AA5225-26. If someone wanted to view the trial, they could watch and listen to testimony in the foyer. 23AA5226-27.

The court explained its reasons for the "closure" on the record. The court explained spectators "were free to observe the testimony and were always welcome for this trial," established that the order was no broader than necessary and noted that the rule had the intended effects. 23AA5225-27. Any partial "closure" proper.

C. Any prejudice was *de minimus*.

Certain closures are so *de minimus* that they do not implicate or threaten a defendant's constitutional rights. Woodard, 4 Cal.4th at 385-86. Partial closures motivated by legitimate concerns to maintain security, prevent continuous interruptions, and do not involve the exclusion of preexisting spectators does not constitute a denial of defendant's right to a public trial. Id. at 381.

This Court has rejected structural error analysis for any and all courtroom closures because a violation of a defendant's right to a public trial is not inherently

prejudicial. Jeremias v. State, 134 Nev. 46 (2018). To determine whether structural error applies, courts should apply a two-part test: 1) whether the effect of the error is difficult to assess; and 2) whether reversal will protect against unjust convictions that may result when the public is denied access to a courtroom. Weaver, 137 S.Ct. at 1910. If neither of those factors are met, the remedy should be tailored to cure any violation. Waller, 467 U.S. at 50.

Appellant has not asserted or established that the effect of any error here is difficult assess or that this error increased the likelihood of an unjust conviction. When an attorney tried to enter the courtroom during trial, the Marshal told him to wait until testimony concluded and suggested he wait in the anteroom. 23AA52230. At the time, there were members of the public and press inside the courtroom. 23AA5229-31. That some unknown attorney could not get into the courtroom when they wanted does not violate Appellant's Sixth Amendment right. Next, there was no risk of an unjust conviction because the record is clear that there were members of both the public and the press present at all trial.

It is difficult to conceive of a situation where removing that procedural rule would change the result of the trial, particularly considering the overwhelming evidence of Appellant's guilt. The court's "closure" ensured that Appellant received not only a public trial, but a fair trial free from unnecessary distractions or disruptions.

II. THE STATE FILED CHARGES AGAINST APPELLANT WITHIN THE STATUTE OF LIMITATIONS

Appellant argues the State filed charges outside the statute of limitations. AOB50-86. Appellant claims that the State must have charged Appellant with Counts 2-53, before A.S. turned 21, regardless of whether they were committed in secret. AOB65-67. Appellant claims that the district court erred in concluding that the "secret manner tolling provision" of NRS 171.095(1)(a) applied. AOB65. Next, Appellant argues that the State charged Appellant with 12 other crimes outside the statute of limitations because they were not committed in secret. AOB78-80. Appellant's claims fail.

Nevada law has established that "with respect to limitations periods and tolling statutes, the statues in effect at the time of the offense control." State v. Quinn, 117 Nev. 709, 712 (2001). The period of limitation prescribed in NRS 171.085 during all times alleged required filing an indictment within 4 years after the commission of sexual assault, and 3 years after the commission of felonies other than murder, theft, robbery, burglary, forgery, arson, or sexual assault. Pursuant to NRS 171.090, defendants must be charged for gross misdemeanors within two years of the commission of the offense. NRS 171.085 and NRS 171.090 are subject to the tolling provisions of NRS 171.095(1):

> Except as otherwise provided in subsection 2:
> (a) If 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).
> (b) An 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 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.

Pursuant to the relevant portions of NRS 432B.100, "sexual abuse" includes incest, lewdness with a minor, sexual assault or a minor, and open or gross lewdness. In 2013, NRS 171.095(1)(b)(1) and was amended to extend the statute of limitations to 36 if the victim discovers or reasonably should have discovered the abuse; and (2) was amended from 28 to 43 if the victim has not or reasonably should not have discovered the abuse by the time they turn 36.[82]

The language of NRS 171.095 was established in 1993. Legislative history reflects the legislature's desire to provide greater victim access to courts, specifically victims of child abuse. A.B. 525, Assembly Committee on Judiciary, 2-3 (May 6, 1993); A.B. 525, Senate Committee on Judiciary, 19-20 (May 17, 1993). The legislature specifically recognized that the decision to change the statute of limitations for child sex abuse (hereinafter "CSA") showed "that many victims have

[82] As several charges filed included dates up until 2014, to the extent the 2013 amendments to NRS 171.095(1)(b)(1) and (2) apply, they will be addressed with respect to those charges.

a very difficult time, especially when it involves a parent or other close relative, in bringing these actions. This is especially difficult to do before the victim is mature and enough to deal with the memories … and then have the courage to go forward to the authorities and report the abuse." Id.

The legislature recognized that this change did not prejudice a defendant because the State would still have to prove beyond a reasonable doubt that the abuse occurred, regardless of how much time had passed. Id. As such, when addressing how the statute of limitations toll with respect to CSA, the legislature is clear in its goal to increase a victim's access to the judicial system.

Statutory interpretation is a question of law subject to de novo review. State v. Catanio, 120 Nev. 1030, 1033 (2004). When determining how specific statutes apply to the facts of a case, this Court looks to reason and public policy to discern legislative intent. State v. Catanio, 120 Nev. 1030, 1033 (2004). The most common policy justification for statutes of limitation is the unreliable evidentiary impact of fading memories. *Criminal Statutes of Limitations: An Obstacle to the Prosecution and Punishment of Child Sexual Abuse*, 25 CDZLR 907, 911 (December 2003). In the early 2000s, states began recognizing a conflict between statutes of limitation and prosecuting child sex abuse, and enacted tolling provisions for crimes constituting sexual abuse of minors. Id. at 925-30.

This Court first addressed the tolling of statute of limitations in CSA cases in 1988 and held that "a crime is done in a secret manner under NRS 171.095 when it is committed in a deliberately surreptitious manner that is intended to and does keep all but those committing the crime unaware that the offense has been committed." Walstrom v. State 104 Nev. 51, 56 (1988), *overruled on other grounds by*, Hubbard v. State, 112 Nev. 946, 920 (1996). The State need only prove by a preponderance of the evidence that a crime was committed in secret. Id. at 54.

In Walstrom, the defendant's wife discovered hidden film of Walstrom committing lewd acts with a minor female eight years prior. Id. at 52-53. The child portrayed in the pornographic images was never located and did not testify. Id. at 52-53. This Court rejected Walstrom's claim that the "secret manner" tolling provision did not apply because there was a victim present and aware of what Walstrom was doing at the time the crime was committed. Id. at 55. In doing so, this Court concluded that the inherently repugnant nature of CSA indicates that abuse is almost always intended to be kept secret. Id. at 55.

This Court acknowledged that minor victims of sexual abuse are vulnerable and the trauma and coercion from their abuser may cause them to stay silent. Id. Viewing the facts in the light most favorable to the prosecution, the Court concluded that there was substantial evidence that Walstrom committed his crimes in secret: Walstrom was alone with the victim, hid the film in a locker in his personal vehicle,

and denied participating in the production of child pornography when he was arrested and interviewed by police. Id. at 56-57. As a result, the statute of limitations tolled until Walstrom's wife discovered the photographs. Id. at 57.

This Court again addressed tolling the statute of limitations for CSA in Houtz v. State. 111 Nev. 457 (1995). There, Houtz abused a student on three occasions during the 1977-78 school year, when the victim was under 14. Id. at 4580. Houtz left the jurisdiction one year later. Id. The victim did not report the abuse until he was 25. Id.

By the time Houtz appealed his conviction, NRS 171.095 had been amended to include the subsections at issue in Appellant's case.[83] Id. at 461. However, the court noted that the language did not exist and the time Houtz sexually abused the victim. Id. As a result, Houtz specifically declined to address any apparent conflict between NRS 171.095's secret manner tolling provision and the tolling provision specifically applicable to CSA. Id.

Houtz explained that the "secret offense" provision should not extend beyond when the victim reaches the age of majority because anything else would lead to absurd results.[84] Id. at 462. However, Houtz did not address the "discovery"

[83] The version of NRS 171.095(2) contained in language of the 2001 version of NRS 171.095(b)(1) and (2). Accordingly, any reference in Houtz to NRS 171.095(2) is a reference to the language that is now found in NRS 171.095(1)(b).

[84] In doing so, Houtz noted that this holding was consistent with the amended language of NRS 171.095. This can no longer be said. While current language of

provision of NRS 171.095 or how that would affect the tolling of the statute of limitations. When there is a question of when a secret crime is discovered, Houtz is inapplicable.

In State v. Quinn, this Court held that discovery occurs when a person other than the defendant or someone acting in *pari delicto* with the defendant has knowledge of the crimes unless that person "(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." 117 Nev. 709, 715 (2001). Under this rule, "a crime can remain undiscovered even if multiple persons know about it so long as the silence is induced by the wrongdoer's threats." Id. at 715-16.

Quinn, Walstrom, and Houtz all acknowledge and balance "the realities of child sexual abuse crimes against the important fairness interests which underlie criminal statutes of limitation" because statutory "interpretation should be in line with what reason and public policy would indicate the legislature intended." Id. at 713-14.

Bailey v. State was the first time this Court addressed any apparent conflict between NRS 171.095(1)(a) and (b). 120 Nev. 406, 407 (2004). Bailey committed

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NRS 171.045 was set in 2013 and not applicable to the majority Appellant's, Houtz indicates that these changes are something this Court should consider.

lewd acts with a six-year old child between January 1995 and January 1996. Id. at 407. The victim reported Bailey's actions to her mother, six months later. Id. Bailey was not charged for his crimes until 2002. Id.

Bailey held that nothing in NRS 171.095(1)(a) limited its application to offenses committed in a secret manner and that the State has until the minor victim turns 21 to file charges against a defendant *unless* the victim "does not discover or reasonably should not have discovered the sexual abuse until after the age of 21." Id. at 409; n.8. If the victim did not or reasonably could not have discovered a defendant's crimes, the State has until the victim turns 28 to file charges. Id. at n.8.

This Court has addressed tolling the statute of limitations for child sex abuse crimes in one other circumstance. In Petersen v. Bruen, Bruen abused Petersen for eight years while Petersen participated in the Big Brothers program. 106 Nev. 271, 273 (1990). Petersen did not report Bruen's actions until he sought out psychotherapy to address his emotional and psychological problems and realized the harm Buren's actions had. Id.

The Bruen Court acknowledged that oftentimes, "statutes of limitation find their justification in necessity and convenience rather than logic, and it has been said that they represent expedience rather than principles." Id. at 273. In reviewing the language of NRS 11.190(4)(e), which set the statute of limitations to file a personal injury suit at two years, this Court reasoned that "to place the passage of time in a

position of priority and importance over the plight of CSA victims would seem to be the ultimate exaltation of form over substance, convenience over principle." Id. at 281. Bruen noted that "to protect the adult sexual abuser at the expense of the child is an "'intolerable perversion of justice.'" Id. at 275.

Bruen explained that "courts are not bound to always take the words of a statute either in their literal or ordinary sense, if by so doing it would lead to any absurdity or manifest injustice, but may in such cases modify, restrict, or extend the meaning of the words, so as to meet the plain, evident policy and purview of the act[.]" Id. at 276-77.

In sum, the inherently repugnant nature of CSA makes it a secret crime. Walstrom, 104 Nev. at 57. While the statute of limitations for child sex abuse do not toll indefinitely, Houtz, 111 Nev. 461, "to place the passage of time in a position of priority and importance over the plight of CSA victims would seem to be the ultimate exaltation of form over substance, convenience over principle," Bruen, 106 Nev. at 281.

The plain language of NRS 171.095 does not toll the statute of limitations for secret offenses indefinitely. Instead, it tolls them until discovery. Discovery occurs when person other than the defendant or someone acting in *pari delicto* with the defendant has knowledge of the crimes unless that person does not report out of fear induced by the wrongdoer or does not report for the reasons discussed in Walstrom.

Quinn, 117 Nev. at 715. In either circumstance, if the victim does not report the sexual abuse until after they are 21, the abuse is not discovered, and the State has until the victim turns 28 to file criminal charges. Bailey, 120 Nev. at 409; n.8.

Despite Appellant's heavy reliance on Houtz, the facts of Houtz are quite different from the facts here. Perhaps most important, Appellant's sexual abuse was constant and continued for years up until Appellant no longer had access to his victim. Houtz recalled only three instance of abuse that occurred over a one-year period. Next, Appellant was a parent figure to his victims and four victims lived with him. Houtz was the victim's band teacher for one year. Third, Appellant maintained constant control over each victims' lives through threats and abuse. Such was not the case in Houtz. All victims here reported Appellant's sexual abuse within six months of escaping Appellant's control, whereas the victim in Houtz did not report his abuser until over a decade after he last saw Houtz. As such, Houtz should not apply to the facts here.

Quinn is more applicable here because Quinn is the only case involving a similar parental relationship with his victim. Neither Walstrom, Houtz, Bruen, or Bailey dealt with the issue of when a defendant maintains constant control over their victim which prevents them from reporting. However, none of this Court's relevant jurisprudence has dealt with a defendant sexually abuse multiple victims over a number of years and on countless occasions. That is what happened here.

Therefore, the question before this Court is: when a defendant continuously and constantly sexually assaults his children, and when there is substantial evidence that a defendant maintains constant abusive control and power over his children, when do the statutes of limitations begin to run? The State would suggest that a defendant's crimes cannot reasonably be discovered when a defendant's control and threats induce victims into silence.

Here, there was overwhelming evidence that Appellant induced all victims to remain silent through coercion or threats. As such, this Could should conclude that consistent with Quinn, Appellant's crimes were not "discovered" until Appellant's ability to control each victim vanished when they left Appellant's home. Concluding as much is in line with this Court's acknowledgment that minor victims of sexual abuse are more vulnerable to coercion into silence, and with legislative intent to grant child victims greater access to the courts. To the extent any charge was filed against Appellant before the subject victim turned 21, any related count was filed within the statute of limitations regardless of when it reasonably could have been discovered. Bailey, 120 Nev. at 409.

Concluding otherwise would only "protect the adult sexual abuser at the expense of the child." Bruen, 106 at 275. When there is overwhelming evidence that a CSA victim did not report their abuser because they were trapped in a cycle of abuse and control at the hands of their abuser, and when they report that abuse within

months of escaping that cycle so proof is not obscured by the passage of time, concluding that these victims would have had to report Appellant's crimes while they still remained under Appellant's control would run afoul of both reason and public policy, thus leading to an absurd result.

A. Charges against A.S.

Appellant claims the State did not file charges against Appellant until after A.S. turned 21 in 2011, after the statute of limitations expired. AOB56.

A.S. moved out of Appellant's trailer when she was 24 ad and spoke with police about Appellant's actions in September of 2014. 20AA4465-66; 20AA4592; 20AA4517. Appellant was charged with the crimes committed against A.S. that month. 1AA84-86. While A.S. was 24 at the time, Appellant prevented discovery through threats and abuse until that time. Therefore, the statute of limitations tolled until Appellant's crimes were discovered.

1. Counts 2-52.

Appellant was charged with Counts 2-52 for abusing A.S. 15 years. Counts 2-31 constitute CSA pursuant to NRS 432B.100. 10AA2172-80. Counts 46-51 constitute CSA, occurring on or between May 22, 2007 and May 22, 2008. 10AA2184-86. The State agrees that the 2001 version of NRS 171.095 applies to these counts.

Next, Counts 31-44 charged Appellant with additional felony sex crimes involving A.S., occurring on or between May 22, 2006 and August 30, 2014. 10AA2180-83. Appellant alleges that because the State argued that these counts "occurred when AS was '16, 17, 18 and beyond,'" the actual dates of the offenses would have occurred before A.S.'s 18th birthday and the 2001 tolling provisions of NRS 1714.095(1)(b) apply. AOB61 (citing 28AA6466-67). However, argument is not evidence and A.S. testified that Appellant's abuse continued after the turned 18. 20AA4574-75; 20AA4586. Given the date range alleged and A.S.'s trial testimony, Appellant's claim that all charged crimes occurred before A.S. turned 18 fails. As such, the 2013 amendment to NRS 171.095, could apply to these counts. In determining which version of NRS 171.095(1)(b) applies, this Court should view the evidence in the light most favorable to the prosecution. Walstrom, 104 Nev. at 56.

For all crimes constituting child sex abuse, NRS 171.095(1)(b) applies and the State had to file charges against Appellant by the time A.S. turned 21 *only* if she discovered or reasonably should have discovered those crimes before then. Otherwise, the State had until A.S. was 28 to file charges against Appellant For all crimes that did not constitute CSA, the statute of limitations tolled until discovery if the crimes were committed in secret pursuant to NRS 171.095(1)(a).

Regardless, the question is the same: when were Appellant's crimes discovered, or should have been reasonably discovered? Pursuant to Quinn, Appellant's crimes were not "discovered" if A.S did not report the abuse because of Appellant's threats. 117 Nev. at 715-16.

A.S. could not have reasonably discovered or reported Appellant's crimes until she left his residence because that is when he no longer was coercing or threatening her. As that occurred when A.S. was 24, the State had until A.S. was 28 to file charges against Appellant. Appellant was charged with his crimes when A.S. was 24. Counts 2-53 were filed within the appropriate statute of limitations.

There was overwhelming evidence that Appellant prevented discovery of his crimes through continued threats and intimidation. Appellant first raped A.S. when she was 11 and told A.S. no one would believe her if she told anyone. 20AA4533-34. As the abuse continued, so did Appellant's threats. Appellant told A.S. he would break her legs and paralyze her, and that he would have "45 minutes to do whatever the hell he wants" to her before the police got there. 20AA4615. Appellant told her that the mob put cement shoes on people and threw them in Lake Mead. 20AA4615. Whenever A.S. refused sex, Appellant threatened to break her legs or reminded her about having time before the police arrived to do whatever he wanted. 21AA4799. That Appellant was constantly threatening to inflict significant bodily injury if A.S.

reported Appellant's abuse is overwhelming evidence that Appellant intended for his crimes to be concealed.

Appellant began raping A.S. when she was 11, vulnerable, confused, subject to psychological manipulation. Appellant said this was how he showed his love. 20AA4528-29; 20AA4533. At first, A.S. thought this was normal because it happened so often, and no one explained to her what a "normal" family relationship was. 21AA4809-10. Appellant did not occasionally rape A.S. 20AA4534. As a result of this constant victimization, it is reasonable to conclude that A.S. did what she needed to survive. A.S. reported Appellant's abuse only once when she was nine, and Appellant beat her for it. 20AA4500-02.

Appellant controlled A.S. to the point where she felt as though she could not escape. Appellant created and environment of fear, abuse, and control. Appellant threw wrenches, remote controls, rocks, and shoes at A.S. whenever she did not meet his expectations. 20AA4504-07. When she was 14, Appellant threw her on the ground, put his foot on her throat and said, "I brought you into this world, I can take you out of it." 20AA4500. Appellant verbally abused A.S. and called her useless, pathetic, and "his little slut." 20AA4511. It is illogical to expect a child to report her parent-abuser when there is clear evidence that said parent-abuser uses physical violence to control his children and beats them for reporting his actions.

No matter where A.S. was working, Appellant always knew what she had done that day before she ever got home to talk to him about her day. 20AA4512. Appellant monitored his children by installing cameras in- and outside of the residence so he could watch her. 20AA4513-14; 20AA4518-23. Appellant called A.S. if she was not where she was supposed to be and raped her if she did not answer the phone. 20AA4515-16; 20AA4524. Appellant never taught A.S. how to drive and her paycheck when towards supporting Appellant. 21AA4806. This all established that A.S. reasonably felt like Appellant controlled of her life.

Appellant's control continued because A.S. believed that she needed to force herself to have sex with Appellant so he would not beat her brothers, who were at least eight years younger, because Appellant was "less mean" after. 20AA4537; 20AA4587. It is reasonable to conclude that a sister with 3 young brothers felt a sense of duty to protect her brothers from abuse, particularly when A.S. had been the victim of sexual abuse for so long.

Even after A.S. decided to escape, she remained victim to his fear and threats. To escape, A.S. waited for Appellant to fall asleep, and crawled through the trailer so Appellant would not see them moving. 20AA4602-04. A.S. was so afraid Appellant that she quit her job. 20AA4604-05. This fear was validated when A.S. picked up her last paycheck and Appellant had left a note on the check. 20AA4605-

06. Even at trial, A.S. was so afraid of Appellant that she asked the court Marshall to sit closer to her. 20AA4632.

Moreover, all crimes committed against A.S. were committed in secret. The inherently repugnant nature of Appellant's 15 years' worth of sexual abuse of his biological daughter makes the crimes secret. Walstrom 104 Nev. at 57. When Appellant was her sole abuser, she was alone with Appellant and he locked the doors or looked out windows during the abuse to ensure he was not discovered. 20AA4563-65; 20AA4525; 20AA4531; 20AA4545; 20AA4536. When Appellant was arrested and interviewed, Samples testified that Appellant would not acknowledge that he had sex with A.S. when she was a minor. 26AA6194. These factors indicate that Appellant intended to keep his sexual abuse of A.S. secret.

On the two occasions Appellant included Terrie or Deborah in his plans, which were charged as Counts 52 and Counts 46-51, the crimes were committed in secret because both Terrie and Deborah were acting in furtherance of a conspiracy. As explained *infra* III.A, there was overwhelming evidence that both Terrie and Deborah were participants in a conspiracy to commit sexual assault. A.S. testified that when she was 14, Terrie participated in Appellant's sexual abuse, touched her breasts without being told by Appellant and she did nothing to stop Appellant from anally raping A.S. 20AA4570-71. When Deborah participated in Appellant's abuse, she did nothing to stop Appellant or protect A.S. 20AA4580.

There was overwhelming evidence that Appellant's crimes could not reasonably have been discovered until A.S. left in June of 2014 when she was 24. A.S. was still victim to Appellant's abuse and when she was 21 and could not reasonably have reported Appellant's. Given this pattern and proof of abuse and control, it is illogical to expect A.S. to report her Appellant while she was still subject to that abuse and control. The State then had until A.S. was 28 to file criminal charges against Appellant. The fact that A.S. reported Appellant's crimes a mere three months after she was free from Appellant's control and abuse is indicative that it was Appellant who was coercing A.S. into remaining silent. As the criminal complaint was filed against Appellant December of 2014, Appellant was properly charged with Counts 2-52.

1. Count 53.

Count 53 charged Appellant with Preventing or Dissuading Witness or Victim from Reporting Crime or Commencing Prosecution, on or between May 22, 2001 through June 30, 2014. 10AA2186-87. NRS 171.095(1)(a) applies and the statute of limitations tolled until this crime was discovered, if committed in secret. This Court should reject Appellant's contention that because the State did not charge Appellant with multiple counts this crime as to A.S., there was only one threat made and the effect of that threat ended immediately after the first threat was made in 2001. AOB63-65. That Appellant was charged once with this crime, does not mean

Appellant did not continue threatening A.S. and such a contention is belied by the record.

There was substantial evidence that Appellant's issued numerous threats to A.S. As explained in greater detail *supra* II.A.1., A.S. testified that Appellant threatened her multiple times. 20AA4533-34; 20AA4615; 21AA4799. These threats were issued in secret because they had to do with A.S. keeping Appellant's rapes secret. The inherently repugnant nature of CSA establishes that both the threats and the underlying crime Appellant was coercing A.S. into not reporting were committed in secret. Appellant was charged with Count 53 less than three months after A.S. spoke to the police. Therefore, Appellant was appropriately charged with Count 53.

2. The court did not err in concluding that the secret manner tolling provision applied.

Appellant claims that the court erred in concluding that the secret manner tolling provision applied to Counts 2-53. AOB65-67. Appellant claims the ruling contradicts Houtz, and all charges against A.S. should have been dismissed. Id. Appellant's claim fails.

The court correctly denied Appellant's Motion after appropriately interpreting the statute in effect at the time with case law, policy, and legislative intent. The court accurately balanced the policy goals behind extending the statute of limitations for CSA victims to report their abuser. 29AA6789-90.

The court concluded that Counts 2-53 were timely filed, because A.S.'s preliminary hearing testimony made it clear that A.S. was "still under the tutelage or control of" Appellant until she was 24 and she remained under his control throughout the abuse. 29AA6700-85. The court explained that "if the secret manner that causes it to be secret is continuing to the point where the person that's controlling the other individual to prevent them from revealing, that it tolls the statute." 29AA6801. This conclusion was proper. As explained *supra* II.A.1. it is clear that A.S. could not have reasonably discovered Appellant's crimes by the time she was 21. The court distinguished Houtz:

> THE COURT: […] What circumstances was she under that prevented her from saying anything about it? And I know the law, I mean, I don't think the law works to the point where the law requires you, irrespective of what position you're under, to reveal it. And if you fail and don't reveal it because the evidence shows that -- because your client had control and that, you know, I'll tell you, I wrote that down specifically, maintain control over A.S. I -- that's the whole thing.
>
> Until that control is released, I think that's the whole purpose of what a secret crime is it's kept secret to avoid any further conflict that you may have with the person that's committed the crime against you. And that -- and it's controlled by the person committing the crime against you.
>
> So under those circumstances I believe that the evidence is sufficient to overcome any legal requirement that the Court dismiss those counts.

19AA6792-94.

It is reasonable to believe that if a person was violent once, he would be violent again: "I guess abuse, or punishment, or discipline, or whatever, from an

individual who threatened to use that type of thing again. And you've actually experienced it. Doesn't it give some kind of credence to the fact, okay, he did it once before I know he can do it again?" 29AA6799; 29AA6799. That fear caused A.S. to remain silent until she was free of Appellant's control and abuse. That did not happen until A.S. was 24 and she could not have reasonably discovered and reported Appellant's crimes until then. The court correctly denied Appellant's Motion.

Appellant claims that, at the very least, whether Appellant's control over A.S. prevented his crimes from being "discovered" was a question that should have been submitted to the jury. AOB65-67. A statute of limitations defense is an affirmative defense that must be raised by the defense before they are entitled to a jury instruction that the State must establish that the crimes were committed in a secret manner. Dozier v. State, 124 Nev. 125, 131 (2008). Appellant did not raise a statute of limitations defense. Instead, Appellant argued that everyone was willing participants in his crimes. 28AA6526-32; 28AA6538. Appellant attacked A.S. credibility. 28AA6558-59. Appellant's has waived his ability to make this claim on appeal. Guy, 108 Nev. at 780.

B. Other counts not challenged before the court.

Appellant claims that the State did not timely charge Appellant with 12 other counts. Appellant did not challenge the statute of limitations regarding those counts before the court and claims he should be excused from doing so because the court

denied his Motion. Regardless of Appellant's belief in successfully arguing a motion, Appellant had to make that argument before the court before it could be considered on appeal.

Challenges to criminal statute of limitations are treated as non-jurisdictional, affirmative defense which must be first raised in the trial court or they are waived. Hubbard v. State, 112 Nev, 946, 948 (1996). In Guy, this Court declined to consider a challenge to the lower court's hearsay ruling because trial counsel failed to argue that specific hearsay objection at trial and "the trial court had no opportunity to consider their merit." 108 Nev. at 779–80. This Court should conclude the same here. Therefore, Appellant's claims are waived and reviewable only for plain error. Dermody v. City of Reno, 113 Nev. 207, 210-11 (1997); Guy, 108 Nev. at 780; Davis, 107 Nev. at 606. Regardless, of which standard is applied, Appellant cannot show any error.

1. Count 1.

On December 15, 2015, Appellant was charged with Count 1 – Conspiracy to Commit Sexual Assault for crimes committed on or between May 22, 2007, and June 30, 2014. 1AA34-35. Count 1 does not constitute CSA and the statute of limitations tolls if it was committed in secret. AOB69. Appellant alleges Count 1 was not committed in secret because A.S., "discovered" the conspiracy when Appellant and Terrie sexually abused her between May 22, 2004 and May 21, 2006. AOB70. As

Appellant was not charged with Count 1 until 2015, when A.S. was 25, Appellant claims it was filed outside the statute of limitations. Id. Appellant's claim fails.

As explained *infra* III.A, there was substantial evidence that Appellant intended to keep his conspiracy with Terrie and Deborah secret. First, the conspiracy was to rape their children. Crimes of CSA are inherently committed in secret. Walstrom 104 Nev. at 56. Terrie and Deborah testified that they had no plans to report Appellant because they understood they could be implicated in Appellant's crimes. 23AA5346; 24AA5498-99; 25AA5909. This established that Appellant, Terrie, and Deborah intended that their conspiracy to remain a secret and the statute of limitations therefore tolled until the conspiracy was discovered when A.S. spoke to the police. The State charged Appellant with Count 1 15 months later, within the applicable statute of limitations.

Moreover, A.S.'s alleged discovery of this conspiracy did not trigger the statute of limitations. As explained *supra* II.A.1, there was substantial evidence that Appellant coerced and threatened A.S. to remain silent about Appellant's abuse, which included his conspiracy with Terrie and Deborah.

2. Counts 55, 57, 59, and 69.

Appellant claims that four crimes committed against T.S. were filed outside the statute of limitations. In Counts 55 and 57, the State alleged that when T.S. was between 14 or 15, between December 2, 2008 to December 1, 2010, Appellant

committed Child Abuse via Sexual Abuse by making T.S shower with Deborah and put his penis on Deborah's genital area. 1AA49-51. Counts 59 and 69 – Use of a Minor in the Production of Pornography, were for filming T.S. and Deborah engaging in sex acts between December 2, 2008 and December 1, 2010, and December 2, 2008 and December 1, 2013 respectively. 1AA51-52; 1AA56.

The statute of limitations for child abuse and use of a minor in the production of pornography is three years unless tolled pursuant to NRS 171.095(1). NRS 171.085(2). According to Appellant, the tolling provision of NRS 171.095(1)(b) did not apply. AOB77-80. Appellant argues that the only way Counts 55 and 57 could have been charged within the applicable statute of limitations is if the statute of limitations tolled pursuant to NRS 171.095(1)(a). According to Appellant, Appellant's crimes were not committed in secret because Deborah and T.S. were present during the commission of Appellant's crimes. Id. Appellant's argument fails.

Counts 55 and 57, charged as child abuse via sexual abuse which trigger NRS 171.095(1)(b) based on the plain language of the statute. As explained *infra* V, Appellant's conduct as alleged in Counts 55 and 57 qualify as child abuse as either lewdness with a child, or open or gross lewdness. Next, the State does not dispute that use of a minor in producing pornography is not included in the NRS 432B.100 definition of CSA. Only the tolling provisions of NRS 171.095(1)(a) apply to Counts 59 and 69. In applying NRS 171.095(1)(a) and its corresponding jurispurdience, the

statute of limitations would not begin to run until police discovered the pornography.

Whether the tolling provisions of NRS 171.095(1)(a) or (b) apply, the relevant inquiry is when the crimes underlying Counts 55, 57, 59, and 69 were discovered. Counts 55 and 57 were for Appellant causing Deborah to shower naked and wash T.S., and then commanding T.S. to put his penis between Deborah's legs and rub it against her vaginal lips. 10AA2187-89. Video proof and T.S.'s and Deborah's trial testimony proved Appellant's guilt. 24AA5663-66; 25AA5889-94; 10AA2189-90; 11AA2371. Count 59 was for filming this incident, and Count 69 was for filming a separate sexual encounter involving T.S., Deborah, and Appellant. 10AA2194.

Appellant's crimes were committed in secret because they were CSA. Walstrom, 104 Nev. at 56. Moreover, the facts supporting Counts 55, 57, 59, and 69 were not discovered until police recovered the flash drive containing these images.

Regarding Counts 55 and 57, Appellant prevented discovery through control, threats, and abuse. T.S. testified that Appellant had a quick temper and frequently used physical violence to make the children do whatever he wanted. 24AA5630-31; 24AA5634. T.S. never told anyone what Appellant was doing to him because he was ashamed, embarrassed, thought it would affect his future, and make his friends think he was a monster. 24AA5662-63. Embarrassment, fear, and shame are all factors discussed in Walstrom that impact a child abuse victim's ability to report their abuser. Quinn, 117 Nev. at 175.

Like Walstrom, the policy concerns supporting statutes of limitation to prevent proceeding against Appellant with insufficient evidence are not applicable here because there is video evidence of Appellant's guilt. The jury did not need to rely solely on T.S.'s testimony. Therefore, this Court should conclude here, as it did in Walstrom that Appellant's crimes charged as Counts 55 and 57 were committed in secret.

Regarding Counts 59 and 69, T.S. did not know he was being recorded until police showed him the videos. 24AA5673. Prior to police discovering the images, it would appear that the only person other than Appellant who knew about the videos was Deborah. While Appellant showed Deborah the video of her and T.S. in the shower a week later, that does not mean that Appellant's crime was discovered at that time. 25AA5894. As explained *infra* III.A, there was overwhelming evidence that Deborah was involved in a conspiracy with Appellant particularly because she performed fellatio on Appellant while he watched the video. 25AA5895.

Regarding Count 69, T.S. testified that he did not know he was being filmed and Deborah never testified to knowing that Appellant filmed this abuse. 24AA5673. Samples testified that Deborah and Appellant could be heard discussing what they were going to do to T.S. before T.S. was brought into the room. 27AA6246-47. Therefore, Deborah's knowledge of the abuse or video does not mean Appellant's crime was discovered.

The statute of limitations to charge Appellant with Counts 55, 57, 59, and 69 tolled until the pornography was discovered on the USB in September of 2014. 27AA6210-12. Appellant was properly charged 15 months later.

3. Count 77.

Appellant claims the State charged Appellant with Count 77 – Use of a Minor in Producing Pornography, outside the three-year statute of limitations because the crime was not committed in secret. AOB80. Appellant alleges that based on B.S.'s and Deborah's trial testimony, this occurred when B.S. was around 15, which would have been between August 13, 2013 and August 13, 2014. AOB80. According to Appellant, the statute of limitations did not toll pursuant to NRS 171.095(1)(b). AOB81. Appellant's claim fails.

In Count 77, the State alleged that between August 13, 2011 and June 30, 2014, when B.S. between 13 and 15, Appellant filmed B.S. while Deborah performed fellatio on B.S. 1AA60; 25AA5703. These charges were filed on December 15, 2015, when B.S. was 17. 1AA34.

Appellant's claim fails simply because this Court has made clear that the statute of limitations for crimes committed against children tolls until the minor victim turns 21. Bailey, 120 Nev. at 409. As Appellant was charged with Count 77 when B.S. was 17, Appellant's claim fails.

Regardless, B.S. explained that he did not know Appellant filmed him. 25AA5740. Deborah's presence during Appellant's abuse does not mean that Appellant's crimes were discovered before 2014. Deborah was complicit in Appellant's schemes and acting in furtherance of a conspiracy as explained *infra* III.A. 25AA5913. Samples testified that Appellant and Deborah could be heard discussing what they were going to do to B.S. before B.S. was brought into the master bedroom. 27AA6253. Deborah's presence does not negate the fact that Appellant's crime was committed in secret. The statute of limitations to charge Appellant with Count 77 did not begin until the pornography was discovered and Appellant was charged 15 months later.

4. Counts 99, 103, and 105.

Appellant claims that Counts 99, 103, and 105 were filed outside the statute of limitations. AOB83-86. Appellant claims none of offenses constitute CSA and were not committed in secret. AOB83; AOB85. Appellant claims Counts 99 and 103 were filed outside the applicable statute of limitations if the acts occurred around June 15, 2011. AOB83. According to Appellant, his crimes were discovered when they occurred because R.S. and Terrie were present, and Appellant did not threaten R.S. AOB84-86. Appellant's claim fails.

Count 99 alleged that between June 14, 2010 and June 13, 2014 Appellant filmed Terrie performing sex acts with R.S. when R.S. was between 12 and 16.

1AA24. Count 103 alleged that a similar video was made between those same dates. 1AA25. Counts 99 and 103 were filed when R.S. was 16. 1AA24-25.

Count 105, alleged that when R.S. was between 14 and 15 between June 14, 2010 and June 13, 2014, Appellant made R.S. watch videos of Appellant and Terrie and/or Deborah having sex. 1AA70. The State charged Appellant with Count 105 when R.S. was 17. 1AA34; 1AA70.

Appellant's claim fails because the statute of limitations for crimes committed against children tolls until the victim turns 21. Bailey, 120 Nev. at 409. As R.S. was 16 and 17 when Appellant was charged with Counts 99, 103, and 105, charges were timely filed.

Appellant's argument the crimes charged as Counts 99 and 103 took place around June 15, 2011 fails. Viewing the facts in the light most favorable to the prosecution, R.S.'s own trial testimony belies Appellant's claim. Koza v. State, 100 Nev. 245, 250 (1984). R.S. testified that he was between 13 and 15 when Appellant filmed him. 24AA5552-57. Without assessing whether the statute of limitations here tolled pursuant to NRS 171.095, the State charged Appellant with Counts 99 and 103 within three years of the commission of the crime because he was charged with Counts 99 and 103 on December 14, 2014.

Regardless, the tolling provisions of NRS 171.095(1)(a) apply. As the crimes alleged in Counts 99 and 103 are like Walstrom. There was no evidence that R.S.

knew he was being filmed. Samples testified that when he interviewed Appellant hid flash drive hidden in the office with pornographic images. 26AA6190. Like Walstrom, this established that Appellant intended for that video to be kept secret.

While Terrie testified that she was aware that Appellant filmed the assaults on his computer, that does not mean that Appellant's crime was discovered at that time because Terrie was acting in *pari delicto* with Appellant as explained *infra* III.A. 25AA5913. Indeed, Samples testified that in the video charged as Count 99, Appellant and Terrie were heard talking about what they were going to do to R.S. and Terrie was shown undressing R.S. when Appellant was not even present. 27AA6258-60. Ramirez testified Terrie put R.S.'s hands on her breasts and pulled his penis into her vagina, with no instruction from Appellant.22AA5190-91.

While no such information was available for the images charged as Count 103, common sense dictates that if Terrie actively participated in forcing her biological son to have vaginal intercourse with her, she would actively participate in performing oral sex on him as well. Therefore, Terrie's her presence does change that Appellant's crimes were committed in secret.

Count 105 was committed in secret. R.S. testified that when he was 14 or 15 in 2012 or 2013, Appellant showed him a video of Appellant and Terrie having sex. 24AA5531-34. Appellant prevented discovery Count 105, 99, and 103 by threatening R.S. to remain silent. After Appellant raped R.S. the first time, Appellant

told him that he would kill R.S. or his mother is R.S. reported Appellant's crime. 24AA5543; 24AA5523. Appellant renewed this threat after each rape. 24AA5545; 24AA5523. Given Appellant's physical abuse of R.S., it was reasonable for R.S. to believe that Appellant would make good on his threats to kill him. 24AA5524-27. R.S. was terrified of Appellant and did everything that Appellant told him to. 24AA5558.

Appellant was timely charged with Count 105 on December 15, 2015. The statute of limitations to charge Appellant with Counts 99 and 103 did not began to run when the USB containing the pornography was discovered in September 2014. Appellant was timely charged three months later.

5. Count 115.

Appellant argues that because use of a minor to produce pornography is not included within the NRS 432B.100 definition of CSA, the State had charge Appellant with Count 115 within three years unless it was committed in secret. AOB73. According to Appellant, Count 115 was not committed in secret because it Terrie was present. AOB73-74.

In Count 115, the State alleged that between December 21, 2010 and June 30, 2014, Appellant filmed E.C., a minor, naked in the shower. 1AA73. Appellant was charged with Count 115 on December 15, 2015, when E.C. was 14. 1AA73.As

detailed *infra* III.B. Appellant surreptitiously filmed E.C. naked in the shower while Terrie performed fellatio on him. 23AA5332-34.

This Court has made clear that the statute of limitations for crimes committed against children toll until the minor victim turns 21. Bailey, 120 Nev. at 409. As E.C. was 14 when Appellant was charged with Count 115, the statute of limitations had not begun to run.

Regardless, pursuant to the factual similarities between Walstrom and the facts here, the statute of limitations did not run until the pornography was discovered. E.C. testified that she did not know she was being filmed. 21AA4927. Terrie's presence does not change that. As explained *infra* III.A. and III.B., Terrie was acting in *pari delicto* with Appellant and did nothing to stop Appellant. 23AA5335. This pornography was not discovered until September 17, 2014, when the police recovered the USB. 26AA6193-95. E.C. did not discover what Appellant had done until she spoke with detectives. Appellant was charged 15 months later.

6. Count 117.

Count 117 alleged that T.G. was between 7 and 16, when Appellant showed her pornographic images. 1AA73-74. Appellant argues that because sexual exploitation is not included within the NRS 432B.100, the statute of limitations did not toll pursuant to NRS 171.095(1)(b). AOB71. According to Appellant,

Appellant's crime was discovered the moment he showed T.G. images. AOB72. Appellant's claim fails.

The State charged Appellant with Count 117 on December 15, 2015, when T.G. was 18. 1AA73-74. The statute of limitations for crimes committed against children tolls until the victim turns 21. Bailey, 120 Nev. at 409. Therefore, Appellant's argument fails.

Appellant committed this crime in a deliberately surreptitious manner that was intended to keep others from learning about his actions. Appellant caused T.G. to be alone with him in the office, showed T.G. pornography on his computer, and told T.G. this was normal and not to be embarrassed. 24AA5535-36; 25AA5719-22; 22AA5007-10. Given T.G.'s young age, Appellant's comments reasonably confused T.G. to the point where she would not have told anyone what was happening.

7. Count 118.

Count 118 alleged that when T.G. was between 7 and 16 from January 9, 2004 to January 8, 2013, Appellant filmed T.G. naked in the shower. 1AA74. Appellant argues that the statute of limitations did not toll pursuant to NRS 171.095(1)(b), and that the State had to file charges against within three years unless the crime was committed in secret. AOB73. According to Appellant, Count 118 was not committed in secret because Terrie was present. AOB73-74. Appellant's claim fails.

Appellant was charged with Count 118 on December 15, 2015, when T.G. was 18. 1AA73-74. The statute of limitations for crimes committed against children tolls until the minor victim turns 21. Bailey, 120 Nev. at 409.

Regardless, given the similarities between Walstrom, the statute of limitations did not begin to run until the pornography was discovered. This pornography was not discovered by anyone other than Appellant or someone acting in *pari delicto* until September 17, 2014, when the police recovered the USB containing the pornography. 26AA6193-95. T.G. did not know Appellant filmed her until she spoke with detectives in 2014. 22AA2014-16. Appellant was timely charged 15 months later.

That Terrie was present when Appellant filmed T.G. does not change that Appellant's crime was committed in secret because Terrie was acting in *pari delicto* with Appellant as explained *infra* III.A. This all established that Appellant committed Count 118 in secret. Therefore, the statute of limitations tolled pursuant to NRS 171.095(1)(a) and Appellant was timely charged with Count 118.

8. This Court should not consider Appellant's claims for ineffective assistance of counsel.

Appellant hints that this Court should consider trial counsel's failure to challenge the statute of limitations for these 12 counts for ineffectiveness of counsel. AOB90. Appellant is not actually accusing trial counsel of being ineffective. Instead, Appellant acknowledges that it would be improper to suggest that a co-worker was

ineffective. Instead, Appellant asks this Court to *sua sponte* explore whether trial counsel was ineffective. This Court should not consider a claim Appellant does not raise. Clark v. State, 89 Nev. 392, 393 (1973).

Regardless, claims of ineffective assistance of counsel are inappropriate for direct appeal. Rather, "claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings." Franklin v. State, 110 Nev. 750, 752 (1994). For this Court to review claims of ineffective assistance of counsel, it must be clear that counsel was ineffective. Mazzan v. State, 100 Nev. 74, 79-80 (1984). Otherwise, ineffective assistance of counsel claims should be raised first in a petition for post-conviction relief. Pellegrini v. State, 117 Nev. 860, 883 (2001).

Here, the trial record alone is insufficient to establish ineffective assistance of counsel. Appellant cannot establish that counsel was *per se* ineffective because any challenge to the statute of limitations would have failed.

III. THERE WAS SUFFICIENT EVIDENCE OF GUILT

Appellant argues that there was insufficient of evidence of guilt for Counts 1, 115, 116, 118, and 119. AOB91-94. First, Appellant claims that there was insufficient evidence of Count 1 – Conspiracy to Commit Sexual Assault because there was no evidence of an actual agreement between Appellant and Terrie or Deborah. AOB 91-92. Next, Appellant claims that the images described in Counts

115, 116, 118, and 119 did not constitute sexual portrayals or sexual conduct. AOB94. Both of Appellant's claims fail.

The standard of review for sufficiency of the evidence on appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. Edwards v. State, 90 Nev. 255, 258–59 (1974). When there is substantial evidence in support, the jury's verdict will not be disturbed on appeal. Brass v. State, 128 Nev. 748, 754 (2012). Evidence is only insufficient when "the prosecution has not produced a minimum threshold of evidence upon which a conviction may be based, even if such evidence were believed by the jury." Evans v. State, 112 Nev. 1172, 1193 (1996).

"[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." Origel-Candido v. State, 114 Nev. 378, 381 (1998). In rendering its verdict, a jury is free to rely on circumstantial evidence. Wilkins, 96 Nev. at 374. Indeed, "circumstantial evidence alone may support a conviction." Hernandez v. State, 118 Nev. 513, 531 (2002).

A. There was sufficient evidence of Count 1.

A conspiracy is an agreement between two or more persons for an unlawful purpose. Doyle v. State, 112 Nev. 879, 886 (1996). An agreement may be inferred by a "coordinated series of acts" in furtherance of the underlying offense. Id. Pursuant to NRS 195.020, "whether the person directly commits the act constituting

the offense, or aids or abets in its commission" is equally guilty of the conspiracy. Moreover, it is not a defense to conspiracy that the person who aided or was counseled did intend that the crimes be committed. NRS 195.020.

Circumstantial evidence may be relied upon to support a conviction for conspiracy. Sheriff v. Lang, 104 Nev. 539, 543 (1988). This circumstantial evidence need not exclude every reasonable hypothesis of innocence, provided the evidence permits a conclusion of guilt beyond a reasonable doubt. Holland v. U.S., 348 U.S. 121, 139–40 (1954).

Conspiracy is a specific intent crime and there must be proof that the defendant had "the intent to agree or conspire and the intent to commit the offense." Washington v. State, 132 Nev. 655, 664 (2012). "A person who knowingly does an act to further the object of a conspiracy, *or otherwise participates therein*, is criminally liable as a conspirator." Washington, 132 Nev. at 6644. While mere association is insufficient to establish a conspiracy, "proof of even a single overt act may be sufficient to … support a charge of conspiracy." Id. Evidence of aiding and abetting an act in furtherance of the conspiracy is sufficient evidence of a conspiracy. Lewis v. State, 100 Nev. 456, 460 (1984).

"To sustain the conspiracy conviction, there need only be a showing that defendant knew of the conspiracy's purpose and some action indicating his participation." U.S. v. Collazo, 732 F.2d 1200, 1205 (4th Cir.1984). This may

consist of a defendant's "relationship with other members of the conspiracy, the length of this association, [the defendant's] attitude [and] conduct, and the nature of the conspiracy." A common purpose and plan may be inferred from "a development and collocation of circumstances." Glasser v. U.S., 315 U.S. 60, 80 (1942).

Here, there was sufficient evidence that Appellant was guilty of conspiracy to commit sexual assault. The State had to prove beyond a reasonable doubt that Appellant and Deborah or Terrie agreed and took steps in furtherance of committing sexual assault. The jury could reasonably infer that a conspiracy existed through the videos depicting the sexual assaults and Deborah's and Terrie's testimony admitting to sexually assaulting their children with Appellant.

That Terrie and Deborah testified that they never willingly participated in the sexual assaults is inapposite. Neither pled guilty to conspiracy to commit sexual assault. Neither Terrie nor Deborah's intent was relevant to whether Appellant conspired or induced Terrie or Deborah to commit sexual assaults when neither woman made their unwillingness known to Appellant before, during, or after any of the sexual assaults.

Instead, the relevant inquiry is Appellant's intent when conspiring with Terrie or Deborah to commit sexual assault. Appellant intended to conspire with Deborah or Terrie and took steps with the intent sexual assault be committed. Witness

testimony and video evidence confirmed that Appellant included and instructed Terrie and Deborah during the sexual assaults.

A.S. testified that Appellant instructed Deborah to kiss A.S.'s breasts and touch A.S.'s clitoris, and Deborah what Appellant said. 20AA4579-82. T.S. testified that Appellant instructed Deborah to put T.S.'s penis in her mouth and vagina, and Deborah complied. 24AA4559-71. B.S. testified that Appellant instructed Terrie to put B.S.'s penis in her mouth and vagina, and that Terrie do so. 25AA5723-26. R.S. testified that Terrie followed Appellant's instructions to put R.S.'s penis in her mouth and vagina. 25AA5552-24. No one testified that Terrie or Deborah told Appellant "no" or did anything to protect their children. 24AA5498-99; 26AA6091. Therefore, there was overwhelming evidence that Appellant had the intent to conspire with Deborah and Terrie and that he took steps in furtherance of that conspiracy.

Moreover, Terrie and Deborah's alleged lack of criminal intent is not a defense to conspiracy. NRS 195.020. Regardless, Deborah or Terrie were not mere associates. They did not simply stand by while Appellant raped their children. Instead, they actively participated, knew what they were doing was wrong, did it anyway, and took responsibility for their role at trial. 24AA5498-99; 26AA6091.

Deborah and Terrie's testimony that they did not willingly rape their children, is belied by both the video evidence and witness testimony. When Appellant and

Terrie raped A.S., Terrie took off her own shirt and began to kiss A.S. and touch A.S.'s breasts with no instruction from Appellant. 20AA4570-71. When Appellant told T.S. to get in the, Deborah followed him into the shower and started performing fellatio on T.S. without instruction from Appellant. 24AA5663.

The jury did not need to rely solely on witness testimony. In the pornography presented to the jury Appellant and the women could be heard planning the sexual assaults. 28AA6452-54. Appellant and Deborah could be heard talking about what they were planning to do to T.S. 28AA6452-53. At no point did Deborah say "no." Id.

Terrie and Appellant could be heard discussing what they were going to do with R.S. 28AA6453. The objection Terrie makes is to fitting "two cocks in [her] mouth at the same time." Id. In a separate video, Terrie told R.S. to touch her breasts and pulled R.S.'s penis in her vagina without being told or instructed by Appellant to do so. 22AA5189-91.

Terrie and Deborah's failure to report Appellant's actions established a conspiracy. After Deborah left, she filed for both a Temporary Protective Order ("TPO") and a divorce but did not mention Appellant's actions. 26AA6041; 26AA6086-87. Deborah did not do so until Appellant sent an image of her engaging in bestiality to her employers. 26AA6087-88. The only reason police learned about Appellant's abuse is because Deborah's lawyer called the police. 26AA6088.

Deborah testified she did not report Appellant because she knew she could be held criminally liable for her actions. 25AA5908-09.

Terrie did not go to the police after Appellant threw her and R.S. out of his residence. 24AA5562-63. She did not speak to police after they contacted her several times. 23AA5346. At trial, Terrie acknowledged and accepted responsibility for her part in Appellant's plan. 23AA5349-50. Terrie acknowledged that she never told him "no," and never tried to protect her children from Appellant. 24AA5498-5500. As such, there was overwhelming evidence that Appellant was guilty of Count 1 – Conspiracy to Commit Sexual Assault.

B. Counts 115, 116, 118, and 119.

Appellant claims that filming his nieces, E.C. and T.G., showering is insufficient to support Appellant's convictions for use of a minor in producing pornography and possession of child pornography because those images do not constitute sexual conduct or sexual portrayals. AOB93-94. Appellant's claim fails.

A person who uses or permits a minor to simulate or engage in sexual conduct or be the subject of a sexual portrayal in a sexual performance is guilty of producing child pornography. NRS 200.710. It is unlawful to possess any visual presentation of a minor under 16 engaging in sexual conduct or is the subject of a sexual portrayal. NRS 200.730. "Sexual conduct" included "lewd exhibition of the genitals;" and "sexual portrayal" is a depiction of a person that appeals to the "prurient interest in

sex and which does not have serious literary, artistic, political or scientific value." NRS 200.700(3)-(4).

This Court reviews the constitutionality of a statute de novo. Berry v. State, 125 Nev. 265, 279 (2009). This Court will not invalidate a statute unless there is a "clear showing of invalidity." State v. Castaneda, 126 Nev. 478, 481 (2010).

At trial, E.C. identified an image of her in the shower and testified that she did not know she was being recorded. 21AA4927. Terrie testified that when E.C. was 14 and took a shower in the office bathroom, Appellant locked the door to the main office, turned the television volume up, and filmed E.C. through the doorjamb while Terrie performed fellatio on him. 23AA5332-35. After E.C. left the office, Appellant played the video of E.C. on his computer and had sex with Terrie while they watched it. 23AA5335.

Ramirez identified an image and recording of E.C. in the shower. 22AA5196. The video was played for the jury during Samples' testimony. 27AA6240. The pornography was filmed through a crack in the doorway, and focused on E.C.'s breasts and vagina. 22AA5196-97. While Appellant filmed E.C., he was heard saying, "oh yeah," and filmed Terrie performing fellatio on Appellant. Id. During closing argument, the State explained that E.C. was nude and Appellant zoomed in on E.C.'s breasts and genital area. 28AA6505.

Next, T.G. identified an image of herself in the shower and stated that the image was taken when she was under 16 and without her knowledge. 22AA2014-16. Terrie testified that when T.G. showered in the office bathroom, Appellant locked the door to the office, turned up the volume on the television, put a stool by the bathroom door, grabbed a camcorder, climbed on the stool, and started recording T.G. in the shower. 23AA5326. While recording T.G., Appellant instructed Terrie to perform fellatio on him, which she did. 23AA5328.

This pornography was played during Samples' testimony who explained that Appellant was heard moaning and saying "oh, yeah." 27AA6238-39. Appellant filmed Terrie performing oral sex before returning to film T.G. 27AA6239. Ramirez testified that the pornography showed T.G.'s "buttocks, her vaginal area, which has pubic hair, and her breasts." 22AA5195. Like E.C., the State explained during closing argument that Appellant zoomed in on T.G.'s breasts and genitals "to make sure this he's getting a shot of her breasts," while Terrie performed fellatio on Appellant. 28AA6507.

These counts were all charged in the alternative. The State alleged that the images contained either sexual conduct or constituted a sexual portrayal. The State did not have to prove both.

1. The pornography depicts sexual conduct.

Whether an image contains "lewd exhibition of genitals" is a question of fact which appellate courts will uphold unless clearly erroneous. U.S. v. Wiegand, 812

F.2d 1239, 1244 (9th Cir. 1987). This Court has never defined what constitutes "lewd exhibition of the genitals."

Factors used by other jurisdictions to define "lewd exhibition of the genitals" was set in U.S. v. Dost:

> [T]o determine whether a visual depiction of a child constitutes a lewd or lascivious exhibition of genitals, federal courts consider whether:
> (1) the focal point of the visual depiction is the child's genitalia;
> (2) the place or pose of the child in the photograph is sexually suggestive;
> (3) the child is depicted in an unnatural pose or inappropriate attire;
> (4) the child is fully or partially clothed or nude;
> (5) the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; or
> (6) the visual depiction is intended or designed to elicit a sexual response in the viewer.

636 F.Supp. 828, 832 (S.D.Cal.1986).

The Dost factors are "neither comprehensive nor necessarily applicable in every situation," and that "there may be other factors that are equally if not more important in determining whether" an image constitutes lewd exhibition of genitals. U.S. v. Amirault, 173.F3d, 28, 32 (1st Cir. 1999). Federal courts, including the Ninth Circuit, have concluded that an image is considered "lewd" when the image is arrayed to suit to photographer's lust. Wiegand, 812 F.2d at 1243–44; U.S. v. Wolf, 890 F.2d 241, 244 (10th Cir.1989); U.S. v. Villard, 885 F.2d 117, 122 (3rd Cir.1989); U.S. v. Rubio, 834 F.2d 442, 448 (5th Cir.1987); U.S. v. Knox, 32 F.3d 733, 747

(3rd Cir. 1984). Not all the Dost factors need to be present before an image can be considered lewd.

Here, the pornography of E.C. and T.G. depict lewd exhibition of genitals. The focal point of the pornography of E.C. was her genitalia because Appellant "actually zooms in on her breasts and her genital areas, goes away from her face and towards her breasts and genitals." 28AA6505. Appellant filmed E.C. from a voyeuristic point of view without E.C.'s knowledge. 21AA4927. When E.C. got into the shower, Appellant locked the door to the main office, turned the office television volume up, filmed E.C. through a gap between the top of the bathroom door and the door frame. 23AA5332-35. This transforms the otherwise innocuous bathroom setting into a sexual and fetishized environment.

Next, E.C. was completely naked while Appellant filmed her, and the image was designed to elicit a sexual response. Terrie performed fellatio on Appellant while he filmed E.C., recorded her performing fellatio, and later played the video on his computer while he and Terrie had sex. 22AA5196-97; 23AA5332-35.

The pornography of T.G. displayed lewd exhibition of genitals. Like E.C., Appellant focused on T.G.'s genitals and zoomed the camera in to "make sure that he's getting a shot of her breasts." 28AA6507. T.G. was completely nude and completely unaware that she was being filmed. 22AA5195; 22AA2014-16. Appellant recorded T.G. in the same fashion that he recorded E.C.: through a gap

between the bathroom door and door frame, with the door to the office locked, and the television volume turned up. 23AA5326. This voyeuristic perspective transformed the otherwise innocuous bathroom into a sexual setting.

The pornography of T.G. was designed to and did elicit a sexual response in Appellant. Terrie performed fellatio on him while he recorded T.G., was heard moaning while he filmed T.G., and filmed Terrie performing oral sex. 23AA5328; 27AA6238-39. Therefore, the pornography at issue displayed lewd exhibition of genitals and was therefore child pornography.

2. NRS 200.700(4) is constitutional.

Appellant argues that Nevada's law defining 'sexual portrayal' is facially invalid, unconstitutionally overbroad, and vague both facially and as applied. AOB100-111. Appellant's claims fail.

"Statutes are presumed to be valid, and the burden is on the challenging party to demonstrate that a statute is unconstitutional." Cornella v. Justice Court, 132 Nev. 587, 591 (2016). To overcome this presumption, the party must make a "clear showing" of invalidity. Silvar v. Eighth Judicial Dist. Court, 122 Nev. 289, 292 (2006).

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." This requires that the minor be

involved in the pornography in a way that is *intended* to sexually gratify the viewer. See NRS 200.700(3-4). In Shue v. State, this Court upheld the validity of NRS 200.700(4)'s definition of sexual portrayal. 133 Nev. 798, 807 (2017). This Court concluded that NRS 200.700(4) "necessarily involves a depiction meant to appeal to the prurient interest in sex. Moreover, the phrase, 'which does not have serious literary, artistic, political or scientific value,' sufficiently narrows the statute's application to avoid the proscription of innocuous photos of minors." Id. at 806.

This Court relied on the U.S. Supreme Court definition of "prurient interest" as "a shameful or morbid interest in nudity, sex, or excretion," or involving "sexual responses over and beyond those that would be characterized as normal." Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498 (1985).

Here, Appellant has not provided, and it is difficult to imagine, a situation in which these images could be deemed as having any "literary, artistic, political or scientific value." This is not the same as parents who take pictures of their young children at the beach or in the bath, a comparison Appellant insists on making. E.C. and T.G. were Appellant's teenage nieces. 23AA5325-27; 23AA5332. Neither E.C. nor T.G. knew Appellant filmed them. 22AA5021; 21AA4927. The pornography focuses on E.C.'s and T.G.'s breasts and genitals. 22AA5195; 28AA6507. These are all things parents who take pictures of their children do not do.

The pornography appealed to Appellant's prurient interest in sex. Appellant received oral sex while he filmed E.C. and T.G. and had sex with Terrie while watching the pornography of E.C. 23AA5335. This pornography was meant for Appellant's private collection. Samples testified that Appellant denied having any of these images. 26AA6193-95.

a. NRS 200.700(4) is facially valid.

Appellant claims that "by criminalizing all images of children that subjectively appeal to a person's 'prurient interest in sex,' NRS 200.700(4) is facially unconstitutional." AOB101.

To succeed in a facial attack, a defendant must show that no set of circumstances exist under which the challenged statute would be valid, or that the statute lacks any "plainly legitimate sweep," U.S. v. Stevens, 559 U.S. 460, 472 (2010). The Supreme Court has "never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application." Id. at 630. Instead, "[i]n a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982).

Despite Appellant's reliance on R.A.V. v. St. Paul, 505 U.S. 377 (1992), Appellant fails to acknowledge that some areas of speech can be regulated because

of their constitutionally proscribable content. Id. at 379. It has been long recognized that free speech is not an absolute right devoid of limitations and restrictions. Chalpinsky v. New Hampshire, 315 U.S. 568, 571 (1942). Obscenity and child pornography are not constitutionally protected. Ferber, 458 U.S. 747 (1982). Ferber held that statutes prohibiting child pornography and adequately defining the prohibited conduct are not entitled to First Amendment protections because the government had a compelling interest in preventing sexual exploitation of children. 458 U.S. at 749.

In Shue v. State, the Nevada Supreme Court held that NRS 200.700(4) was not constitutionally overbroad because the limitation to depictions which "do not have serious, literary, artistic, political or scientific value" sufficiently narrows the definition of "sexual portrayal." 407 P.3d at 335.

However, Appellant claims that Stevens, 559 U.S. 460 (2010), requires this Court reconsider Shue. AOB103. Appellant claims Stevens requires proof of sexual abuse and Appellant relies on Steven's reference the dissenting opinion in People v. Hollins, 971 N.E.2d 504 (2012). AOB103-04. This comment is *dicta*, and explained the distinction between criminalizing the possession of child pornography and criminalizing the possession of portrayals of animal cruelty. Id.

Appellant's reliance on Stevens fails. Stevens did not make child pornography protected or partially protected speech. In Stevens, the U.S. Supreme Court

considered the constitutionality of a statute limiting protected speech: animal cruelty. Id. at 471. This Court should not rely on case law interpreting constitutionally protected speech when assessing the validity of a statute prohibiting conduct not protected by the First Amendment. Moreover, this Court has already rejected an attempt to overrule Shue based on Stevens. Sprowson v. State, 2019 WL2766854, *3 (unpublished) (July 1, 2019).

NRS 200.700(4) clearly and adequately defines "sexual portrayal." It is hard to imagine a situation in which Appellant's conduct could be deemed to have any "serious literary, artistic, political or scientific value" or appeals to anything other than Appellant's "prurient interest in sex." Therefore, Appellant's conduct is clearly proscribed under the NRS 200.700(4)'s plain language.

b. NRS 200.700(2) and (4) are not overbroad.

Appellant claims that NRS 200.700(2) and (4) are overbroad because they apply "to all photographs of children." AOB109. Appellant avers that a parent who posts a proud picture of their child on social media could be deemed a producer of child pornography if someone else saw that picture and found it sexually stimulating. AOB109-10. Appellant's claim fails.

"To invalidate a statute as overbroad at the behest of one to whom it properly applies 'is, manifestly, strong medicine' that is administered 'sparingly and only as a last resort.'" Castaneda, 126 Nev. at 491. The U.S. Supreme Court has vigorously

enforced the requirement that a statute's overbreadth be *substantial,* not only in an absolute sense, but relative to the statute's plainly legitimate sweep. U.S. v. Williams, 553 U.S. 285, 292-93 (2008).

A statute may be overbroad if it prohibits constitutionally protected conduct. Grayned v. Rockford, 408 U.S. 104, 114 (1972). In considering an overbreadth challenge, a court must decide "whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." Id. at 115. Overbreadth challenges target laws "which do[] not aim specifically at evils within the allowable area of State control but, on the contrary, sweep[] within [their] ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press." Thornhill v. State of Alabama, 310 U.S. 88, 97-98 (1940).

While Miller, 413 U.S. 15 (1973), is the basis for the language in NRS 200.700(4), Ferber clarified that "the question under the Miller test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work." Ferber, 458 U.S. at 761.

Sexual portrayal of minors as defined by NRS 200.700 is a proper regulation of pornographic depictions of children as it achieves the States' compelling interest of protecting children. The intent of NRS 200.700 was to target images that might not explicitly portray a minor engaging in sexual conduct but are nonetheless

pornographic depictions. See, Hearing on A.B. 405Before the Senate Comm. on Judiciary, 68th Leg. (Nev., June 14, 1995).

Contrary to Appellant's assertions, NRS 200.700(4) is not unconstitutionally overbroad. Again, this Court has held that surreptitiously recording minor naked in the bathroom is clearly proscribed by statute and does not implicate First Amendment protections. Shue 133 Nev. at 807.

Where the Nevada Supreme Court has previously found that conduct like Appellant's does not implicate protected speech and fails an overbreadth challenge, there can be little doubt that Appellant's challenge fails. Although some protected expression could possibly be reached by the statute, Appellant's actions in no way can be considered within this small fraction.

NRS 200.700(4) does not criminalize any picture a parent takes of their child because Appellant has made no showing that those images appeal to the prurient interest in sex. In contrast, Appellant's actions here were clearly designed and intended for his own sexual gratification. 23AA5329-30; 23AA5334.

c. NRS 200.700(4) is not vague facially or as applied.

Appellant argues that Nevada's definition of sexual portrayal fails to provide adequate notice of prohibited conduct. AOB110-11.

Vagueness doctrine is an outgrowth of the Due Process Clause. Holder v. Humanitarian Law Project, 561 U.S. 1 (2010). "Vagueness may invalidate a criminal

law for either of two independent reasons:" (1) if it "'fails to provide a person of ordinary intelligence fair notice of what is prohibited'"; or (2) if it "'is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" Id. at 2718. A statute gives sufficient notice of proscribed conduct when, viewing the context of the entire statute, the words used have a well-settled and ordinarily understood meaning. Nelson v. State, 123 Nev. 534, 540-41 (2007). When a term or offense has not been defined by the legislature, courts will generally look to the common law definitions of the related term or offense. Ranson v. State, 99 Nev. 766, 767 (1983).

In a vagueness analysis, the court may only consider whether a statute is vague as applied to the particular facts at issue, because "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." Id. Moreover, the Nevada Legislature specifically included the language of "appeals to the prurient interest in sex" in the NRS 200.700(4) definition of "sexual portrayal" because it considers a community objective standard which does not encompass within it parents taking innocent pictures of their children. See, Hearing on A.B. 405 Before the Senate Comm. on Judiciary, 68th Leg. (Nev., April 12, and June 14, 1995).

Black's Law Dictionary defines "prurient" as "[c]haracterized by, exhibiting, or arousing inappropriate, inordinate, or unusual sexual desire; having or showing

too much interest in sex." *Prurient*, Black's Law Dictionary (11th ed. 2019). Under this definition, any person of ordinary intelligence has full and fair warning that surreptitiously filming their teenage female nieces naked in the shower for purposes of sexual gratification would constitute a sexual portrayal that is prohibited by law.

Appellant's attempts to argue various hypothetical scenarios have no place in this Court's analysis. Due process does not allow him to assert the rights of others. As explained *supra* III.B.2., Appellant filming E.C. and T.G. naked in the shower while Terrie performed oral sex can in no logical or reasonable way be deemed like parents taking pictures of their children at the beach. Therefore, Appellant has failed to demonstrate that the NRS 200.700(4) definition of "sexual portrayal" is vague facially or as applied.

IV. APPELLANT'S CONVICTIONS DO NOT VIOLATE HIS RIGHT AGAINST MULTIPLE CONVICTION FOR THE SAME OFFENSE

Appellant argues that he should not have been convicted of seven counts of possession of child pornography, nine counts of incest, or two counts of child abuse via sexual abuse. AOB112-23.

Determining the appropriate unit of prosecution presents an issue of statutory interpretation and substantive law. Castaneda v. State, 132 Nev. 464, 437 (2016). "The unit of prosecution of a statutory offense is generally a question of what the legislature intended to be the act or course of conduct prohibited by the statute for purposes of a single conviction and sentence." Brown v. State, 535 A.2d 485, 489

(Md. 1988). "Statutory interpretation is a question of law subject to de novo review." Washington v. State, 132 Nev. 655, 660 (2016). "We must attribute the plain meaning to a statute that is not ambiguous." Id. "An ambiguity arises where the statutory language lends itself to two or more reasonable interpretations." Id.

This Court reviews a redundancy challenge to multiple convictions for an argued single offense *de novo*. Jackson v. State, 128 Nev. 598, 612 (2012) "When a defendant receives multiple convictions based on a single act, this court will reverse redundant convictions that do not comport with legislative intent." State v. Koseck, 113 Nev. 477, 479 (1997).

Appellant did not challenge the unit of prosecution for possession of child pornography, incest, or child abuse via sexual abuse before the district court. Appellant has therefore waived appellate review of these issues. Maestas, 128 Nev. at 146.

A. Appellant was properly charged and convicted of seven counts of possession of child pornography.

Appellant was charged with seven counts of possession of child pornography: Counts 60, 78, 100, 104, 116, 119, and 120. 10AA2189-2213. Appellant argues that because the police seized only one flash drive containing the pornography, charged Appellant with possessing the pornography on the same date, and the State made no effort to show distinct acts of possession, Appellant should only have been convicted of one count of possession of child pornography. AOB114.

NRS 200.730 defines possessing visual presentation depicting sexual conduct of a person under 16 years of age as "knowingly and willfully [possessing] for any purpose any film, photograph or other visual presentation depicting a person under the age of 16 years as the subject of a sexual portrayal or engaging in or simulating, or assisting others to engage in or simulate, sexual conduct."

To support multiple convictions of possession of child pornography, the State must prove separate and distinct acts of possession. Castaneda v. State, 132 Nev. 434, 444 (2016). Because the State prosecuted the images as a group and did not attempt to show 15 "individual distinct crimes of possession, only one conviction of possession of child pornography could stand." Id. at 444. However, the court declined to consider "whether distinct downloads at different times and in different locations would establish separate units of prosecution." Id.

One year later, in Shue reversed 9 out of 10 convictions for possession of child pornography, because the State failed to prove possession at different times or clarify the mechanics of how Shue recorded and saved the child pornography: "[f]or example, it is unknown whether Shue (1) recorded for a period, transferred the videos onto his computer, and then returned the camera to the bathroom; or (2) recorded continuously over a long period of time before transferring everything onto his laptop at once." 133 Nev. at 804.

However, this Court recently noted that it has analyzed the term "any" when addressing the unit of prosecution in different statutes in different ways. Figueroa-Beltran v. U.S., 136 Nev. Adv. Op.__, __ (July 16, 2020). Unlike Castaneda, this Court in Andrews v. State, concluded that the term "any" in Nevada's drug trafficking statute created a separate offense for each substance possessed. 134 Nev. 95, 99 (2018). Figueroa-Beltran clarified that the State could charge one count of trafficking in a controlled substance per control substance recovered without having to establish distinct acts of possession because the identity of the substance matters. 136 Nev. Adv. Op. at __.

Though both Castaneda and Shue held that the State must support multiple convictions of possession of child pornography with proof of independent and distinct acts of possession, Figueroa-Beltran indicates that the identity of the victim in the images should play a factor when the possessor is the producer of the pornography. As the purpose of Nevada's child pornography statutes is to protect the minor victims, considering the identity of those victims when determining the appropriate unit of prosecution is in line with both that policy and recent Nevada Supreme Court jurisprudence.

Appellant conceded that he was guilty of Counts 78, 100, 104, 119, and 120, which were all charges for possession of child pornography. 28AA6532. That

concession forfeits Appellant's ability to challenge those convictions. Nevertheless, the State proved separate and distinct acts of possession.

The State established the mechanics of how Appellant recorded and saved each instance of child pornography. Ramirez testified that neither the digital cameras nor the gray camcorder had large enough memories to store multiple videos and nothing was recovered from those devices. 22AA5147-48. This establishes that Appellant would have transferred any pornography filmed after he filmed it. As there was no way for Appellant to transfer the pornography straight from the cameras to the USB, logic dictates that he would have had to first download each video onto his computer. Ramirez analyzed Appellant's computer located in the office and found nothing noteworthy. 22AA5151-52; 22AA5157-58.

Count 60 was charged for Appellant possessing the pornography of T.S. and Deborah in the shower. 10AA2189-90. Deborah testified that after she got into the shower with T.S., she saw Appellant set up a video camera in the bathroom doorway and filmed Deborah and T.S. 25AA5892. Common sense dictates that Appellant would not have left that video camera positioned in the bathroom doorway after. Appellant showed Deborah this video one week later on his computer. 25AA5894-95. This established that Appellant transferred that video onto his computer to re-watch it.

Count 78 was charged for Appellant possessing pornography of Deborah and B.S. 10AA2198. Deborah testified that immediately after, she saw Appellant taking a video camera to the office and later complained that the video was filmed from a poor angle. 25AA5913-14. This established that after Appellant filmed B.S. and Deborah, he transferred the video onto his computer and watched it again.

Count 100 was charged for Appellant possessing the pornography of Terrie and R.S. 10AA2206. Terrie explained that Appellant filmed this incident on his computer. 23AA5308-09. As a different device was used, this established distinct acts of possession.

Count 104 was charged for Appellant possessing pornography of pornography of Terrie and R.S. 10AA2208. Terrie testified that this was recorded from Appellant's computer. 23AA5308-09. As this video was filmed with a different device and then transferred from that device to the red USB, this is evidence of distinct acts of possession.

Count 116 was charged for Appellant possessing the pornography of E.C. naked in the shower. 10AA2211. Terrie testified that Appellant recorded E.C. in the shower through a gap between the door and door frame and transferred the video onto his computer right after so he could watch in. 23AA5332-35.

Count 119 was charged for Appellant possessing the pornography of T.G. naked in the shower. 10AA12. The mechanics of how Appellant filmed T.G. in the

shower are identical to how Appellant filmed E.C. in the shower. 23AA5326-29. Evidence of Appellant starting and stopping the recording is sufficient to show distinct acts possession.

Count 120 was charged for Appellant possessing the pornography of M.C. when she was a teenager naked on a bed with a vibrator. 10AA12-13. Terrie testified when her sister, M.C. was 13 and 15, she saw Appellant taking naked pictures of her in M.C.'s childhood bedroom. 23AA5253-61. Appellant used a camera to take these pictures and took these pictures about 10 years before he ever victimized his sons and stepson. As this occurred before B.S., R.S., or T.S. were born, and because Appellant was found still in possession of these pictures nearly 20 years after he took them.

The pornography was filmed in different locations—the main bathroom, the master bedroom, the office, and the office bathroom of Appellant's residence; and M.C.'s childhood home. Appellant filmed the pornography on different devices—the camcorder, his office computer, or on a camera. Appellant re-watched the pornography at issue after he recorded it. Appellant filmed five different victims at different ages at different times. Accordingly, the State established separate and distinct acts supporting all seven of Appellant's convictions for child pornography.

B. Appellant was properly charged and convicted of nine counts of incest.

Appellant claims he should only have been convicted of three counts of incest, specifically one count per victim. AOB115. Appellant was charged with Counts 22,

27, 32, 37, 42, 47, 73, 75, 97 – Incest pursuant to NRS 201.180. 10AA2176-2205. Counts 22, 27, 32, 42, and 47 pertained to A.S.; Counts 73 and 75 pertained to B.S.; and Count 97 pertained to R.S. Id.

In all nine counts, Appellant was charged for having committed "fornication," with A.S., B.S., and R.S. Id. During closing argument, the State explained incest is fornication, which is unlawful vaginal intercourse between two unmarried persons. 29AA6447. However, Appellant's argument analyzes the "marriage" aspect of NRS 201.180. AOB115-22. As Appellant was not charged and convicted for having married A.S., B.S., or R.S., the marriage clause of NRS 201.180 is inapplicable.

This Court has not yet addressed what the appropriate unit of prosecution is for incest. NRS 201.180 defines incest as "[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." The relevant verb in NRS 201.180 is "fornicate." In Douglas v. State, this Court concluded that incest is defined as "sexual intercourse between two unmarried persons." 130 Nev. 285, 288 (2014). Douglas held that incest condemns sex between relatives regardless of consent. 130 Nev. 285, 286 (2014). This Court focused on the act of sexual intercourse, not the relationship. Id. at 288. By focusing on the consent aspect of each instance of sexual intercourse, this Court implicitly acknowledged that the appropriate unit of prosecution is each act of sexual intercourse. Id. Indeed,

the entire Douglas opinion contextualized incest in terms of sexual intercourse, and not the relationship. Id.

Here, charging Appellant with one count of incest per incident of vaginal intercourse is in line with both case law and policy. Vaginal intercourse is the only way to reproduce. Charging one count per fornication protects children from repeated sexual abuse. If a defendant could only be charged with one count of incest per "relationship," there is no reason for a defendant to not continue to rape their biological child. Accordingly, Appellant was appropriately charged and convicted of nine counts of incest.

C. Appellant was properly charged and convicted of Counts 55 and 57, Child Abuse, Neglect or Endangerment – Sex Abuse.

Appellant argues that his convictions for Counts 55 and 57, child abuse via sexual abuse are redundant because he was convicted of both counts for the same event. AOB122-23. In Count 55, Appellant was charged for making T.S. shower with his stepmother. 10AA2187. Appellant was charged with Count 57 for making T.S. put his penis in between Deborah's legs. 10AA2188. While both situations occurred when Appellant told Deborah to shower with T.S., the factual basis for Counts 55 and 57 differed.

T.S. testified that Appellant ordered T.S. to get into the shower, that Deborah followed him into the shower, and Appellant ordered Deborah and T.S. to wash each

other. 24AA5660-63. Appellant next ordered T.S. to put his penis into Deborah's vagina. 24AA5664-66.

While these two incidents happened in the same shower, that does not make them the same situation. Appellant's commands for T.S. and Deborah to switch from washing each other to having sex was a clear demonstration of different intent. The jury had to conclude that different actions occurred in order to find Appellant guilty of both Counts 55 and 57.

V. APPELLANT'S CONVICTIONS DO NOT VIOLATE DOUBLE JEOPARDY

Appellant claims that his convictions for Counts 56, 58, and 82 – Open or Gross Lewdness; and Counts 55, 57, and 81 – Child Abuse Neglect or Endangerment violate Double Jeopardy. AOB125. Specifically, the convictions for the same conduct Appellant committed against T.S and B.S. AOB125-26. In support of this claim, Appellant argues that the crime of Open or Gross Lewdness is a lesser included offense of Child Abuse. AOB129.

The Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." Jackson, 128 Nev. at 604. The Double Jeopardy Clause protects against three abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

Two offenses arising out of the same conduct do not violate Double Jeopardy if each offense requires proof of an element that the other does not. Blockburger v. U.S., 284 U.S. 299, 304 (1932). The Blockburger test focuses on the elements needed to establish each crime, not the facts used to prove each crime.

Double Jeopardy precludes consecutive prosecutions for greater and lesser offenses where the lesser offense requires no proof beyond that which is required for conviction of the greater. Brown v. Ohio, 432 U.S. 161, 168 (1977). To determine whether a crime constitutes a lesser included offense, this Court considers "whether the offense charged cannot be committed without committing the lesser offense." Lisby v. State, 82 Nev. 183, 187 (1966). This test is met when all the elements of the lesser offense are included in the elements of the greater offense. Id.

However, the fact that a crime may be considered a lesser included offense does not bar separate prosecutions when the legislature has clearly intended that separate convictions should stand. Jackson, 128 Nev. at 611.

When determining whether the same conduct violates two statutes, the first question is whether the legislature intended for each violation to be a separate offense. Id. When it is clear that the legislature intended the statutes to be separate offenses, Blockburger does not control and cumulative punishments are permitted. Id.

While this Court generally reviews a Double Jeopardy violation *de novo* (Davidson v. State, 124 Nev. 892, 896 (2008)), Appellant did not raise this issue below and has therefore waived appellate review of this claim for all but plain error. Maestas, 128 Nev. at 146.

In support of his claim that open or gross lewdness is a lesser included offense of child abuse and neglect, Appellant relies only on each crime's statutory definition. AOB127-28. An appellant must "present relevant authority and cogent argument; issues not so presented need not be addressed by this court." Browning v. State, 120 Nev. 347, 354 (2004); NRAP 28(a)(9). Summarizing the statutory definitions of "open or gross lewdness," "sexual abuse," and "child abuse and neglect" is insufficient to establish that open or gross lewdness is a lesser included offense of child abuse. The simple fact that a crime is enumerated within a definition of another, more serious, offense does not automatically make that enumerated offense a lesser include crime.

Appellant's argument that his six of his convictions violate double jeopardy fail. It would appear that no jurisdiction has held that sexual abuse, much less open or gross lewdness is a lesser included offense of child abuse. However, on several occasions, this Court has addressed whether a defendant can be properly convicted and sentenced for child abuse and the offense supporting the child abuse. In Rimer v. State, this Court held that Rimer's convictions for involuntary manslaughter and

child abuse did not violate double jeopardy, even though they punished the same act, because each offense required proof of an element the other did not. 131 Nev. 307, 332 (2015). This Court held that the convictions did not violate double jeopardy's prohibition against multiple punishments for the same offense because the conviction were not redundant, and the statutes did not indicate that cumulative punishment was precluded. Id.

This Court can dismiss Appellant's claims without ever examining the facts of each charge because open or gross lewdness—which Appellant claims is the lesser included offense—requires proving elements beyond what is required to prove child abuse via sexual abuse. Whether Appellant's convictions violate double jeopardy turns on whether the jury would have had to conclude that Appellant was guilty of open or gross lewdness in order for them to conclude that Appellant was guilty of child abuse via sexual abuse.

Child abuse, and open or gross lewdness prohibit different conduct. NRS 200.508(1) as written in 2001, stated that "a person who willfully causes a child who is less than 18 years of age to suffer unjustifiable physically 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 a result of abuse or neglect" is guilty of Child Abuse. When sexual abuse is pled as the manner that child abuse is committed, there are seven different ways to establish that abuse: incest, lewdness with a child

under either 14 or 16, sado-masochistic abuse, sexual assault, statutory sexual seduction, open or gross lewdness, and mutilation of female genitalia. NRS 432B.100. Taking each relevant method in turn, NRS 201.230(a) and (b) explains that a person is guilty of lewdness with a child if the defendant is over 18 and "willfully and lewdly commits any lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of" 14 or 16 "with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child[.]"

In Counts 55, 57, and 81, the State alleged only that Appellant was guilty of child abuse via sexual abuse. 10AA2331-32; 10AA2343. The State did not allege that Appellant was guilty solely because he committed an act of open or gross lewdness. Id. Instead, the State could have established that Appellant was guilty of child abuse via sexual abuse in five different ways, which could have included lewdness with a child under 16 **or** open or gross lewdness.

Open or gross lewdness, on the other hand, requires proof that a person committed an act of open or gross lewdness. NRS 201.210. While the statute does not define "open or gross lewdness," this Court recently explained that that the term "lewd" in "open or gross lewdness, 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. The term "open" broadens the statute to include acts secret acts that are openly offensive to the victim. Ranson v. State, 99 Nev. 766, 767-68 (1983).

Comparing the two, open or gross lewdness requires proof beyond what is required for child abuse. This is true even when the theory of child abuse is sexual abuse. Child abuse requires that the victim be under 18, whereas open or gross lewdness has no age requirement. Determining whether or how a party is situated for double jeopardy purposes has proved relevant to this Court in the past. See Douglas, 130 Nev. at 294 ("Incest requires familial relationship, NRS 201.180, while sexual assault does not. NRS 200.366"). Open or gross lewdness is not the only way the State could establish child abuse via sexual abuse. Child Abuse can—and often is—committed in secret. *See generally*, Quinn, 117 Nev. at 716. Open or gross lewdness requires that the act be committed in the "open." Finally, neither NRS 200.508 nor NRS 201.210, suggests that a conviction under one precludes a conviction under the other.

Here, Counts 56, 58, and 82 required establishing that Appellant's conduct was committed in the open. Accordingly, Appellant's argument fails because this alleged "lesser included offense" requires proof of an element the alleged "greater offense" does not.

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A. Counts 55 and 56.

T.S. testified that when he was between 13 and 15, Appellant told T.S. to get into the shower and Deborah followed him. 24AA5660-61. Appellant instructed Deborah and T.S. to wash each other. 24AA5663. Based on this conduct, the State charged Appellant with Count 55 – Child Abuse, Neglect, or Endangerment – Sexual Abuse; and Count 56 – Open or Gross Lewdness. 10AA2187-88. Each count required proof of elements and evidence that the others did not.

Count 55 required proof that T.S. was a minor. T.S. testified he under 16. 24AA5657. Whether this was "open" was irrelevant for purposes of proving all the elements of Count 55. Instead, the State could have proved that Appellant's actions were simply lewd. Count 56, on the other hand, required proof that Appellant committed the above acts were offensive to T.S. Ranson, 99 Nev. at 768. Making a teenage boy wash his naked stepmother is offensive. T.S. testified that he did not want to do as Appellant instructed. 24AA5666. The State did not have to establish that Appellant placed T.S. in a situation where he may have suffered physical or mental harm.

Accordingly, Appellant's convictions for Counts 55 and 56 do not violate double jeopardy. Count 56 required proof of elements beyond the proof required for Count 55, and Appellant's conviction for open or gross lewdness cannot be deemed

a lesser included offense the related child abuse conviction, or a violation of double jeopardy.

B. Counts 57 and 58.

T.S. testified that when he was between 13 and 15, while T.S. and Deborah were in the shower, Appellant told T.S. to put his penis in Deborah's vagina, and only rubbed his penis against Deborah's legs and on her genital lips. 24AA5665-66. Based on this conduct, the State charged Appellant with Count 57 – Child Abuse, Neglect, or Endangerment – Sexual Abuse; and Count 58 – Open or Gross Lewdness. 10AA2188. While this incident supported convictions for both Counts 57 and 58, each required proof of elements and evidence the other did not.

First, Count 57 required proof that T.S. was a minor when Appellant sexually abused him. T.S. testified that he was between 13 and 15 at the time. 24AA5664. The State could have proved that Appellant was guilty by simply establishing that Appellant's actions were lewd. Whether this act occurred in the open was irrelevant for Count 57. However, to establish that Appellant was guilty of Count 58, the State had to prove that Appellant's crime was "open." This required establishing that the crime was offensive to T.S. Making T.S. put his flaccid penis in between his stepmother's legs and rub it against her vaginal lips is offensive. Ranson, 99 Nev. at 768.

Accordingly, Count 58 required proof of elements beyond the proof required for Count 57, Appellant's conviction for open or gross lewdness is not a lesser included offense child abuse and not a violation of double jeopardy.

C. Counts 81 and 82.

B.S. testified that he was 14 when Appellant made Terrie show B.S. her breasts and told B.S. to touch them while they were in the office. 25AA5723-24. Appellant then instructed Terrie to perform fellatio on B.S. before telling Terrie to put B.S.'s penis in her vagina. 25AA5726. B.S. explained that the entire time, Appellant was masturbating himself. Id. Based on this conduct, the State charged Appellant with Count 81 – Child Abuse, Neglect, or Endangerment – Sexual Abuse; and Count 82 – Open or Gross Lewdness. 10AA2199-2200. While this incident supported convictions for both Counts 81 and 82, each count required proof of elements and evidence that the others did not.

Count 81 required proof that B.S. was a minor and that Appellant placed him in a situation where B.S. may have been harmed. To prove sexual abuse, the State needed only to prove that Appellant's conduct was lewd. That element was met when B.S. testified that Appellant told B.S. to touch Terrie's breasts. Id. Whether this lewd act was committed in the open was irrelevant for purposes of proving the elements of Count 81.

However, for the jury to find Appellant guilty of Count 82, the State had to prove that Appellant's conduct was offensive B.S. Ranson, 99 Nev. at 768. Rather, it only required establishing that the crime the victim. B.S. testified that the only reason he did what Appellant told him to do was because Appellant threatened to kill him. 25AA5727-28. Therefore, common sense dictates that forcing a 13- or 14-year-old boy to stand by while his stepmother performs fellatio on him and his biological father at the same time was offensive to B.S.

Accordingly, proving Appellant was guilty of Count 82 required proof beyond what was needed to prove that Appellant was guilty of Count 81.

CONCLUSION

For the foregoing reasons, the State respectfully requests this Court affirm Appellant's Judgment of Conviction.

Dated this 21st day of December, 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 26,917 words.
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 21st day of December, 2020.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on December 21, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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