IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S REPLY BRIEF

(Appeal from Judgment of Conviction)

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

REPLY ARGUMENT

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

A. The district court closed the courtroom to the public.

The State argues the district court did not "close" the courtroom because the court's "order" did not "exclude" anyone. Respondent's Answering Brief (RAB) 73 (citing U.S. v. Thompson, 713 F.3d 388, 395 (8th Cir. 2013))[1]. Rather, the State contends the court only

[1] The State misleadingly asserts, per Thompson, that a "courtroom closure analysis turns on *who* is denied access, and not *when* a person is denied access." RAB 73. However, the Thompson court made this distinction when addressing whether a courtroom closure is total or

restricted entry until "a pause in witness testimony." Id. Thus, the State claims the court only imposed a "procedural rule" and not a closure. Id.

1. The court did not merely impose a procedural rule.

Although the court mentioned it desired members of the public wait until a break in witness testimony before entering the courtroom, this "rule" nevertheless effectively barred people from entering the courtroom during trial. Moreover, the court's supposed "rule" is based upon a faulty assumption – that members of the public who were not present when the court announced the "rule" somehow knew about the "rule."

Essentially, only persons physically present in the courtroom at the time the "rule" was announced would be aware of the supposed "procedural rule." Other members of the public not present would not know that were subject to this "rule." Therefore, persons unaware of the court's "rule," who desired to observe the trial but arrived at the courtroom after a witness began testifying, would be physically barred

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partial and not whether a closure actually occurred, as the State implies.

from entering through no fault of their own.[2] Similarly, potential spectators would have to guess as to when a witness may finish their testimony before being "allowed" to enter. Practically speaking, a spectator who did not know exactly when the court chose to commence proceedings, and who arrived seconds after a witness began testifying – even through no fault of their own – would miss a witness's entire testimony.

Additionally, the record demonstrates at least two members of the Clark County Public Defender's Office and an unknown number of District Attorney Victim advocates were expressly prohibited from entering the courtroom during the trial. See AA XXII 5123-24; XXIII 5230-31. Meanwhile, the district court ignored its supposed "rule" by "allowing" Clark County District Attorney Steve Wolfson to enter. The district court acknowledged Mr. Wolfson entered the courtroom, without waiting until a break, after the court's Marshall asked, "well—you want me to stop the Boss?" Id. at 5124. The court further acknowledged, notwithstanding its supposed concern about courtroom disruptions, that when Mr. Wolfson entered, "[y]ou know, the jurors

[2] As Sena noted in his Opening Brief (see AOB 37 fn. 74), the court failed to adequately explain when it placed the note on the courtroom door advising the public about the "rule."

all – as soon as Mr. Wolfson walked in here, I think you lost probably 15, 20 minutes of your testimony because they all turned around and looked at him." Id.

Although the State claims, "[t]his was not a closure, but rather was an appropriate exercise of courtroom control which was necessary to properly ensure the fair administration of justice[]" (RAB 75), the State does not cite any authority to support its proposition. Furthermore, the cases the district court relied upon as justification for its supposed "procedural rule" actually support Sena's claim that the court partially closed the courtroom. See XXIII 5227. Specifically, the court relied upon Peterson v. Williams, 85 F.3d 39 (2nd Cir. 1996) and U.S. v. Rivera, 682 F.3d 1223 (9th Cir. 2012) to justify its supposed "rule." These decisions are not binding precedent in Nevada however, and more importantly they do not support the court's claim.

In Peterson the Second Circuit did not sanction supposed "procedural rules" preventing entry into a courtroom during witness testimony. Instead, the court noted there are some courtroom closures that are too "trivial" to violate the right to a public trial. Peterson, 85

F.3d at 43.[3] Similarly, although Rivera recognized Peterson's triviality exception to courtroom closures, the Ninth Circuit nevertheless concluded that excluding some members of the defendant's family while others remained in the courtroom, during a sentencing hearing was not "trivial" and amounted instead to an improper courtroom closure. Rivera, 682 F.3d at 1232. Indeed, other courts explicitly recognize that excluding some individuals from the courtroom, even only for a portion of the proceedings, while others remain in the courtroom, constitutes a partial closure. See U.S. v. Yazzie, 743 F.3d 1278, 1288 n. 4 (9th Cir. 2014) (observing a partial closure occurs "when specified individuals are excluded, rather than the public as a whole."); Judd v. Haley, 250 F.3d 1308, 1315 (11th Cir. 2001) (defining partial closure as a "situation[ ] in which the public retains some (though not complete) access to a particular proceeding.").

[3] In Peterson, the Second Circuit recognized a closure occurred, but noted the closure was brief and inadvertent. Id. at 43. Moreover, the court noted, "the public may not have missed much of importance as a result of the accidental closure, since just about all of the defendant's testimony that was relevant was repeated, soon after he testified, as part of the defense counsel's summation." Id. This holding hardly supports the State and court's contention here.

2. The district court did not comply with the mandatory procedure before closing the courtroom.

When addressing Sena's claim that he is entitled to reversal because the district court did not comply with the procedure **before** closing the courtroom (see RAB 77-78), the State acknowledges Waller v. Georgia, 467 U.S. 39, 48 (1984) mandates the court do so but contends Sena's argument fails because, "Appellant here failed to object when the district court first explained the rule." RAB 78 (citing AA XIX 4381). The State notes that Sena first objected to the courtroom closure on the trial's eighth day and mentioned Waller for the first time on the trial's ninth day. RAB 78. Thus, the State claims Sena "waived" the issue and therefore the issue is only reviewable for plain error. Id. at 79. The State is incorrect.

At the trial's beginning the court noted, "what I'm going to do when I have a witness on the stand throughout this proceeding, I'm going to ask my Marshal to stand guard of the door and not let people move in and out of here." AA XIX 4381. However, it wasn't until two members of the Clark County Public Defender's office were denied entry that Sena realized the court had literally barred them from entering the courtroom. AA XXIII 5223-24. Moreover, as noted

supra, District Attorney Wolfson had apparently entered the courtroom during witness testimony earlier in the trial. AA XXII 5124. Thus, Sena could reasonably believe because Wolfson entered during testimony, the court was not actually prohibiting entry. Accordingly, once Sena learned two public defenders had been barred, Sena became aware that the court had actually closed the courtroom and timely lodged his objection. Therefore, plain error or waiver does not apply to Sena's claim.

Alternatively, the State claims upon Sena's objection the district court "properly addressed Appellant's concerns pursuant to [Weaver v. Mass., 137 S.Ct. 1899 (2017)] by explaining that it enacted a procedural rule to ensure that the jury was not distracted during witness testimony." RAB 80 (citing AA XXIII 5219).[4] The State acknowledges however that the next day Sena perfected his record relying upon Waller v. Georgia, 467 U.S. 39 (1984). RAB 80. The State then claims the court then "made adequate findings of substantial

[4] Sena first objected citing Weaver and noted a failure to object to the closure would constitute ineffective assistance of counsel. AA XXIII 5209, 5228.

reasons supporting the closure that were no broader than necessary given the alternatives in accordance with Waller."[5] RAB 81.

First, the State claims the court explained it imposed a partial closure "(1) in consideration of witnesses who testified to traumatic and emotional events; and 2) to limit disruption and distractions that would interfere with juror focus on that testimony." RAB 81. The State suggests "limiting access to a courtroom during witness testimony because to protect witnesses who are testifying about years worth of traumatic events is a substantial reason for a closure." RAB 82. Yet, the State also acknowledges the court's closure applied to all witnesses, not just witnesses testifying "about years worth of traumatic events." Id. Curiously, the State fails to explain however how this supposed "substantial justification" applied to the dozens of witnesses whose testimony had nothing to do with the victim's "years worth of trauma" or how the alleged victim would be somehow traumatized by other expert or lay witnesses giving dispassionate testimony regarding

[5] Pursuant to Feazel v. State, 111 Nev. 1446, 1449 (1995), Nevada follows a modified Waller standard for partial closures. Unlike total closures, a party seeking a partial closure must assert a substantial interest rather than overriding interest, that is likely to be prejudiced. However, as with total closures, the partial the closure must not be broader than necessary to protect the substantial interest, the court must consider reasonable alternatives to closure, and the court must make adequate findings to support any closure. Id.

child sexual abuse while the alleged victims were not even present in the courtroom to hear that testimony.

Nevertheless, the State also claims "[g]iven the length of the trial, and the number and seriousness of the charges, the court had a **substantial** reason for taking reasonable steps towards maintaining order and limiting distractions, to ensure jurors remained focused on the testimony at issue." RAB 82. (emphasis added). The State then suggests unironically that, "[p]osting a sign on the courtroom door and reminding spectators to exit and enter the courtroom during breaks in witness testimony was therefore **reasonable** to ensure swift and accurate administration of justice with little delay." RAB 82. (emphasis added). Furthermore, the State claims the court's order was "no broader than necessary to protect these stated substantial reasons" because people could still enter at some indeterminate point if they arrived while a witness was testifying, the court never removed anyone from the courtroom, the media was streaming the trial on social media,[6] and although no one could enter during testimony, a

[6] The fact that the trial streamed on social media militates against the State's contention the closure was due to privacy concerns. Indeed, if local media streamed the trial over the internet – even if the alleged victims were not identifiable – these alleged victims were nevertheless

person could nevertheless "watch and listen in the foyer." RAB 83. The State is incorrect on all counts.

While maintaining order and limiting distractions during trial could be a legitimate concern, it is hardly a **substantial** reason, let alone an overriding interest, to justify broadly closing the courtroom to the general public for hours at a time.[7] Moreover, because the court gave its justifications only after Sena objected, the court never adequately explained why it was specifically concerned about supposed disruptions in Sena's case. Additionally, the court never considered less obstructive ways to address its supposed concerns about distractions. For example, the court could have suggested people wait to enter the courtroom until breaks in testimony, but if persons nevertheless desired to enter during testimony the court could insist they do so quietly. The court could have admonished, *via* note posted on the door, that refusal to enter quietly could result in that person's removal from the courtroom and prohibition upon re-entry.

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testifying about "years worth of trauma" in front of every person in the world with an internet connection.

[7] Based upon the transcripts, generally the court went two hours or more between breaks.

The State also claims, "the court sufficiently explained its reasons for the 'closure' on the record." RAB 84. However, once again, the State ignores the fact the court must state those reasons **before** the closure. Waller, 467 U.S. at 48; Feazel, 111 Nev. at 1448 ("before a trial court can exclude the public from trial proceedings, the following requirements must be met[.]"). Therefore, the court's reasons which were placed on the record after the closure were nothing more than post hoc justifications contradicted by the court's expressly stated reason mentioned at the trial's inception.[8] Compare AA XIX 4381 with AA XXIII 5224-28.

The State next argues the closure in Sena's case was so *de minimus* that it did not implicate Sena's Sixth Amendment Public Trial Right. RAB 86. However, it's unclear whether this *de minimis* "triviality exception" – which the district court also alluded to at trial – even applies. "A trio of splits has emerged among federal courts of appeals and state supreme courts on the constitutional meaning of "closure": i) whether a defendant must demonstrate a specific person

[8] See Daniel Levitas, Scaling Waller: How Courts Have Eroded The Sixth Amendment Public Trial Right, 59 Emory L.J. 493, 499 (2009) ("[trial and appellate courts] resort to post hoc findings to justify closure when the trial court fails to hold a hearing and make the findings required by Waller.").

was excluded from the courtroom, ii) **whether temporary closures can be too trivial to trigger Sixth Amendment concerns**, and iii) whether the exclusion of a select group of spectators (dubbed a "partial closure") warrants reversal as a structural error." Kristin Saetveit, Close Calls: Defining Courtroom Closures Under the Sixth Amendment, 68 Stan. L. Rev. 897, 909 (2016) (emphasis added).

Admittedly, "[o]nly a small minority of courts has eschewed the triviality doctrine." Id. Nevertheless, it appears this Court has never addressed whether Nevada recognizes the triviality doctrine. In any event, "trivial" closures, as discussed by jurisdictions recognizing such, involve inadvertent or brief closures and not broad, deliberate closures, involving for every testifying witness at trial. Id. at 913. Here, the court's broad closure to all persons, for hours at a time, during every witness's testimony, could hardly be classified as "brief" or "inadvertent" even if this Court recognized the "trivial closure" exception.

3. The courtroom closure in Sena's case is structural error.

The State addresses Sena's argument that the court's closure is structural error but while doing so appears to misunderstand the proper legal standard. The State argues:

> Appellant's claim that any courtroom closure is structural error mandating reversal is contradicted by the very case Appellant relies on: Jeremias v. State, 134 Nev. 46 (2018). In Jeremias, this Court explained that a violation of a defendant's right to a public trial is not inherently prejudicial and rejected a structural error analysis for any and all courtroom closures. Id. at 1910.[9] In doing so, this Court noted that even the U.S. Supreme Court concluded that a trial still may be fundamentally fair even if a closure is deemed improper. Id. (*citing* Weaver, 137 S.Ct. at 1910). In Weaver, the U.S. Supreme Court established a two-part test to determine whether structural error applies in courtroom closure cases: 1) when the effect of the error is difficult to assess; and 2) to protect against unjust convictions that may result when the public or press are denied access to a courtroom. Weaver, 137 S.Ct. at 1910. If neither of those factors are met, the court should assess the error under harmless error.
>
> RAB 87-88.

In his opening brief Sena cited Jeremias for the seemingly non-controversial legal principle that a violation of the public trial right is structural error mandating reversal. See AOB 34 ("Additionally, violation of the public trial right is structural error mandating reversal. Jeremias v. State, 134 Nev. 46, 47 (2018); U.S. v. Gonzalez-Lopez,

[9] There is no page 1910 in Jeremias in either the Nevada or Pacific reporter.

548 U.S. 140, 148-49 (2006)). Elsewhere in Jeremias this Court noted, "[t]he failure to preserve an error, even an error that has been deemed structural, forfeits the right to assert it on appeal." Jeremias, 134 Nev. at 50. Nevertheless, Sena **did not** cite Jeremias for this principle. Moreover, Sena's citation to Jeremias generally should in no way be construed as a concession he somehow failed to object to the closure.

Nevertheless, per Jeremias, when the defendant fails to object to a courtroom closure, he must demonstrate plain error on appeal. Id. Under plain error, the defendant must demonstrate the error is plain from the record and that the error affected his substantial rights by causing actual prejudice or a miscarriage of justice. Id. (citing Valdez v. State, 124 Nev. 1172, 1190 (2008). Moreover, as the U.S. Supreme Court explained in Weaver, "a violation of the right to a public trial during jury selection is not inherently prejudicial, nor does it render every trial unfair." Id. at 51. Therefore, when a defendant raises ineffective assistance of counsel during post-conviction proceedings based upon his trial attorney's failure to object to a courtroom closure – which amounts to structural error – the defendant still must demonstrate prejudice under Strickland v. Washington, 466 U.S. 668,

687 (1984), i.e., a reasonable probability the proceedings would be different absent counsel's error. Weaver, 137 S.Ct. at 1911.

Based upon its inability to recognize the distinctions between Jeremias and Weaver,[10] the State bizarrely claims if a properly objected-to courtroom closure is somehow not deemed prejudicial, then structural error does not apply and this court is free to tailor an appropriate remedy "to cure any violation." RAB 87. The State then suggests, "[s]hould this Court conclude that a remedy for this 'closure' is appropriate, the proper remedy would be to remove the sign posted on the door and allow anyone to enter the courtroom at any time." RAB 87. However, the State also claims doing so would not "change the result of the trial, particularly considering the overwhelming evidence of Appellant's guilt." Id. at 89.

The State appears to have conflated various concepts in asserting without qualification that harmless error can apply to the

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[10] Simply put, Jeremias involved a situation where the defense attorney failed to object to the courtroom closure below but raised the issue in direct appeal. In resolving the issue this Court noted plain error applies on direct appeal even to structural errors. Weaver involved a situation where the defense attorney failed to object to the courtroom closure at trial or raise the issue on direct appeal. In resolving the issue, the U.S. Supreme Court noted in post-conviction proceedings the defendant will still have to prove prejudice under ineffective assistance of counsel for unpreserved structural errors.

structural error of a courtroom closure. In fact, the State's claim could only arguably apply had Sena not objected to the closure below. However, Sena maintains he objected and adequately preserved the closure error for appeal.

To be clear, Sena's district court partially closed the courtroom ostensibly to prevent "disruptions." The court did not comply with mandatory precedent **before** closing the courtroom. Sena objected to the courtroom closure when he learned people had been physically barred from entering the courtroom. At that point, the court claimed additional concerns, but those concerns were belied by the record. Even then, the court failed to consider less restrictive ways to satisfy its supposed concerns. Accordingly, the courtroom closure violated Sena's right to a public trial which is structural error mandating reversal.

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

Regarding statutes of limitation for almost all crimes at issue in Sena's case, the law at the time of the offenses in Nevada is clear. Per NRS 171.085 (West 2001), the statute of limitations for most felonies is three (3) years. For sexual assault the statute of limitations is four

(4) years.[11] Id. Per NRS 171.090(1), the statute of limitations for gross misdemeanor offenses is two (2) years. However, under NRS 171.095 the statutes of limitation, as noted in NRS 171.085 and 171.090, are tolled for crimes committed in a secret manner or for crimes constituting child sexual abuse as defined in NRS 432B.100. For all crimes committed in a secret manner, and not considered child sexual abuse, the statutes of limitation for felonies (NRS 171.085) and gross misdemeanors (NRS 171.090) are tolled until the crime is "discovered." NRS 171.095(1)(a). Upon discovery the State must file the charges within NRS 171.085's period of limitations.

For crimes constituting child sexual abuse per NRS 432B.100, the statutes of limitation are tolled until child discovers or reasonably should have discovered the crimes. NRS 171.095(1)(b). Discovery occurs when any person—including the victim—other than the wrongdoer (or someone acting in *pari delicto* with the wrongdoer) has knowledge of the act and its criminal nature, unless the person with knowledge: (1) fails to report out of fear induced by threats made by the wrongdoer or by anyone acting in *pari delicto* with the wrongdoer; or (2) is a child-victim under eighteen years of age and fails to report

[11] The State concedes that for most many of the charges against Sena the 2001 version of NRS 171.085 applies. See RAB 91.

for the reasons discussed in Walstrom v. State, 104 Nev. 51 (1988). If the suspect "prevents" discovery through threats or if a child victim fails to disclose the offense due to the offense's sensitive nature, then the statute of limitations tolls until the child victim's 18th birthday and then begin to run, but not beyond the victim's 21st birthday. See Houtz v. State, 111 Nev. 457, 462 (1995); Bailey v. State, 120 Nev. 406, 409 (2004); Hubbard v. State, 110 Nev. 671, 676 (1994) ("if the victim is a child, prosecution must take place before the victim is aged twenty-one."). Most importantly the statute of limitations in NRS 171.085 and 171.090 are never tolled "indefinitely" under either NRS 171.095(1)(a) or 171.095(1)(b) or this court's precedent.

Pursuant to the aforementioned authorities, Sena argued in his Opening Brief that the State charged him with counts 1-53, 55, 57, 59, 69, 77, 99, 103, 105, 115, 117 and 118 outside the applicable statutes of limitation. Sena then painstakingly detailed how the State did so. In response, the State first addresses NRS 171.095's legislative history, various purported policy goals, and a case from this Court addressing a statute of limitations for civil claims[12] to – as best as Sena can tell – distract this Court from precedent which squarely supports

[12] Peterson v. Braun, 106 Nev. 271 (1990).

Sena's argument or to suggest this Court overrule its precedent. See RAB 92-93, 99-100. Given page/word limitations Sena cannot once again address each and every allegation within his Reply Brief under the State's desired paradigm. Accordingly, Sena would simply refer this Court to the arguments contained within his Opening Brief at pp. 50-84 and reiterate, based upon the law applicable to the charges at issue, and not based upon the State's desire to change the law, the State filed numerous charges against Sena outside the statutes of limitation and this Court should reverse those convictions.

III. The State Presented Insufficient Evidence for Counts 1, 115, 116, 118 and 119.

A. Count one, Conspiracy to Commit Sexual Assault.

Sena argued in his Opening Brief that the State presented insufficient evidence to prove he entered into an agreement with Deborah and/or Terri, i.e. a conspiracy, to commit Sexual Assault. AOB 91-93. Although "conspiracy" is a specific intent crime (Washington v. State, 132 Nev. 655, 664 (2016)), the State cites NRS 195.020 and asserts "every person participating in a felony or gross misdemeanor, 'whether the person directly commits the act constituting the offense, or aids or abets in its commission,' is equally

guilty of the conspiracy." RAB 156. Moreover, the State claims, "it is not a defense to conspiracy that the person who aided, abetted or was counseled or procured did not have the criminal intent that the crimes be committed." Id.

The State's citation to NRS 195.020 is misleading. NRS 195.020 generally defines "principals" to crimes and explains if a person aids and abets another in the commission of a crime, even if that person committing the crime does not possess the requisite criminal intent, the aider and abettor is nevertheless liable. Yet the State selectively quotes NRS 195.020 and adds additional language, not found in the statute, to make it appear the statute allows criminal liability for conspiracy when co-conspirators do not possess "criminal intent that the crimes be committed." Whether intentional or inadvertent, the State is incorrect.

Here, the State charged Sena with conspiracy under NRS 199.480. AA X 2171. As Sena noted in his Opening Brief, conspiracy requires the State to prove each co-conspirator actually agreed to the conspiracy.[13] Washington, 132 Nev. at 664; Johnson v.

[13] It appears Jury Instruction 40 incorrectly defined "Conspiracy" based upon the same reliance and selective quotation of NRS 195.020

Sheriff, 91 Nev. 161, 163 (1975) ("[w]hen one of two persons merely pretends to agree, the other party, whatever he may believe, is in fact not conspiring with anyone."); Sanders v. State, 110 Nev. 434, 436 (1994) ("[M]ere association is insufficient to support a charge of conspiracy."). Because both Terri and Deborah each testified they never agreed to commit a sexual assault, the State failed to present sufficient evidence that Sena is guilty of count 1, Conspiracy to commit Sexual Assault.

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

The State argues all images related to counts 115, 116, 118, and 119 depicted either sexual portrayal or sexual conduct. RAB 166. Specifically, the State argues the images depict a lewd exhibition of the genitals and therefore, "sexual conduct." Id. at 169-70. Alternatively, the State argues the prohibition against using minors as the subject of a "sexual portrayal" in a performance is not

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as the State asserts here. See AA XI 2344. Although Sena did not specifically object to this instruction at trial, he did request a special verdict form for all charges where the State alleged Sena's Guilt as either a principal, aider or abettor, or pursuant to a conspiracy. See AA XXVII 6412-13.

unconstitutional. Id. at 175. The State primarily relies upon Shue v. State, 133 Nev. 798 (2017) in support.

Sena maintains the images at issue do not depict "sexual conduct" as they do not depict a lewd exhibition of the subject's genitals. See AOB 95-99. Additionally, Sena maintains this Court incorrectly decided Shue. In particular, the Shue Court ignored U.S. v. Stevens, 599 U.S. 460 (2010). Under Stevens, child pornography laws cannot be constitutionally applied in circumstances where no actual minor is sexually abused during the production of the material. Here, the alleged victims depicted in the images encompassed by counts 115, 116, 118, and 119, were not sexually abused by Sena. Therefore, under Stevens, the images cannot be child pornography and Shue should be overruled.

IV. Sena's Multiple Convictions for Possession of Child Pornography, Incest, and Child Abuse Violates his Due Process Right Prohibiting Multiple Convictions for the Same Offense.

The State initially claims because Sena "did not challenge the unit of prosecution for any of his charges" he has "waived appellate review of any of these three issues for all but plain error." RAB 194. However, as Sena noted in his Opening Brief, this Court can address

and indeed has addressed unit of prosecution issues for the first time on appeal. See McCullough v. State, 99 Nev. 72, 74 (1983).

A. Possession of Child Pornography.

This Court held in both Shue and Castaneda v. State, 131 Nev. 434 (2016), that NRS 200.730's use of the word "any" in reference to the possession of "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," renders the statute ambiguous as to the unit of prosecution. Accordingly, if the State prosecutes a defendant for possessing multiple images all recovered at the same time and same place it is only one count for unit of prosecution purposes.

Nevertheless, the State asserts pursuant to Figueroa-Beltran v. U.S., 467 P.3d 615 (Nev. 2020),[14] "the identity of the victim in the images should play a factor when the possessor is also the producer of

[14] In Figueroa-Beltran, while answering a certified Federal question, this Court reiterated statutory use of "any" is generally ambiguous. However, for NRS 453.337, which prohibits possession of "any" controlled substance for purposes of sale, **based upon the legislative history and other tools of statutory construction** the identity of a controlled substance is an element of crime. Id. at 623. Obviously, this should not suggest that the legislative history and other tools of statutory interpretation for the wholly different charge of possession of child pornography should produce the same result.

the pornography." RAB 197. However, the State fails to provide cogent analysis to support its hypothesis and therefore, this Court should reject the State's suggestion.

The State also claims because Sena conceded guilt on unrelated possession of child pornography counts he forfeits his ability to challenge some convictions on appeal. RAB 198 (citing AA XXVIII 6532). Nevertheless, to the extent Sena "forfeited" his claims, based upon his supposed concession, he reiterates that this Court has addressed redundant convictions for the first time on appeal. McCullough, 99 Nev. at 74. Additionally, because redundant convictions implicate the double jeopardy clause, this Court can address issues involving constitutional rights for the first time on appeal. See Tam v. Eighth Jud. Dist. Ct., 131 Nev. 792, 798 (2015). Moreover, without conceding ineffective assistance of counsel, Sena notes this Court could, if it desired to do so, consider ineffective assistance of counsel claims on direct appeal where an evidentiary hearing would be unnecessary.[15] Archanian v. State, 122 Nev. 1019, 1036 (2006).

[15] As noted in his Opening Brief, Sena is not arguing ineffective assistance of counsel in this appeal. Rather, he is merely noting this

Alternatively, the State claims it proved "separate and distinct acts of possession" while acknowledging "the child pornography supporting all seven of [Sena's] convictions were found on the red flash drive." RAB 198. In support, the State merely recites facts suggesting Sena was present and participated in the acts depicted on the videos. See RAB 198-203. Moreover, although the State failed to present any evidence that Sena transferred the videos from the camera to the flash drive, the State encourages this Court to simply speculate that logically he, "would have" done so. RAB 198.

The State's argument is not much different than the argument this Court rejected in Shue. In Shue, it was also "obvious" that the defendant surreptitiously filmed the minor victims on separate occasions. Nevertheless, the State failed to prove the defendant subsequently transferred the videos to his computer where they were recovered. See Shue, 133 Nev. at 804 ("The State argues that 8 of the 10 possession counts are distinguishable from Castaneda because [Shue's victim] H.I. testified that each video was created on a different day, thus providing sufficient evidence of distinct acts of possession."). Indeed, as this Court noted in Shue, "[i]nstead of

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court could address his claim under ineffective assistance of counsel if it wanted to do so.

presenting evidence of distinct acts of possession, the State relied on the circumstances surrounding the video recordings, primarily that the events depicted on the videos occurred on different days, to infer distinct acts of possession. That inference alone, however, is insufficient to establish 'distinct crimes of possession' in light of our holding in Castaneda." Id. Here, like in Shue, the State relied upon these same "inferences" while prosecuting Sena for possessing multiple images located at the same time in the same location. Accordingly, it did not establish distinct acts of possession and Sena can only be convicted for one count.

B. Incest.

The State argues that Sena, "was appropriately tried and convicted of nine counts of incest on a per-fornication basis." RAB 206. The State asserts allowing one court of Incest per act of fornication, "is in line with both case law and policy." Id. Specifically, "charging one count per fornication protects children from repeated sexual abuse...[i]f a defendant could only be charged with one count of incest per 'relationship,' there is no reason for that defendant to not continue to rape their biological child. Id. The State's logic is flawed.

A parent who "rapes" his/her biological child can be, and likely will be, prosecuted for one count of sexual assault per incident as sexual assault statutes authorizes one count per sexual act. In contrast, disallowing the State to charge multiple counts of Incest per each instance of "fornication," will absolutely not encourage biological parents to rape their children because they could only be charged for one count of incest as the State speciously suggests.

C. Child Abuse.

In his Opening Brief, Sena's argued Child Abuse, Neglect, and Endangerment is a continuing offense and therefore, his convictions for counts 55 and 57 are redundant. See AOB 122-23. Specifically, counts 55 and 57 occurred during a single incident between TS and Deborah in the shower. Count 55 alleged Child Abuse, Neglect or Endangerment *via* Sexual Abuse when TS washed Deborah in the shower. AA X 2187. Count 57 alleged Child Abuse, Neglect or Endangerment *via* Sexual Abuse when Deborah fondled TS's penis in the shower. Id. at 2188. Because Child Abuse *via* Sexual Abuse is a continuing offense, it is complete upon the last lewd act which occurs during the same incident.

The State answers Sena's argument by asserting, "[t]he plain language of the statute demonstrates that the unit of prosecution is causing a child to suffer unjustifiable physical pain or mental suffering or placing a child in a situation where the child may suffer physical pain or mental suffering. RAB 208. Thus, Sena's "commandments that changed the situation from one where T.S. and Deborah were washing each other, into a more sexualized one where Appellant was commanding T.S. to put his penis in Deborah's vagina...created two separate situations in which T.S. may have suffered physical or mental harm. Id.

The State does not demonstrate how the plain language in NRS 200.508 makes clear that, "the unit of prosecution is causing a child to suffer unjustifiable physical pain or mental suffering or placing a child in a situation where the child may suffer physical pain or mental suffering." In fact, under the State's illogical assertion, it could charge one count of child abuse per different types of physical pain/mental suffering a child experiences during a single abusive incident. For example, a parent who overzealously strikes his child's bottom with a paddle could theoretically be charged with two counts child abuse related to that single incident provided the child felt physical pain and

also shame and humiliation, i.e. mental suffering. Clearly this suggestion is nonsensical and not authorized by the NRS 200.508's "plain language."

V. Sena's Convictions for Child Abuse and Open and Gross Lewdness Violate Double Jeopardy.

The State first argues because Sena did not raise his double jeopardy issue below this Court should only address the issue for plain error. RAB 213. As previously noted, this Court can and should address constitutional issues on appeal even if not addressed below. E.g., Tam, 131 Nev. at 798; McCollough, 99 Nev. at 74.

Next, the State argues "[t]he simple fact that a crime [open and gross lewdness] is enumerated within a definition of another, more serious, offense [child abuse] does not automatically make that enumerated offense a lesser include crime and this Court should not conclude as much." RAB 213. Moreover, the State suggests this Court has implicitly condoned dual convictions for both child abuse and the underlying offense supporting the child abuse allegation in Rimer v. State, 131 Nev. 307, 332 (2015). Id. at 214. However, as the State concedes, in Rimer this Court held that the defendant's convictions for **involuntary manslaughter** and **child abuse and**

neglect resulting in substantial bodily harm did not violate double jeopardy. Id. Thus, while it is technically true this Court in Rimer did not find that involuntary manslaughter and child abuse and neglect resulting in substantial bodily harm violate double jeopardy, the State's assertion lacks context.

The Rimer defendant was originally charged with Second Degree Murder and Child Abuse, Neglect, Endangerment resulting in Substantial Bodily Harm. The Jury found him guilty of Involuntary Manslaughter – a lesser-included offense of Second Degree Murder – and also the Child Abuse, Neglect, Endangerment resulting in Substantial Bodily Harm allegation. In affirming the defendant's convictions for both manslaughter and child abuse, this Court noted that each offense contains an element the other does not. Most obviously, manslaughter requires a killing where child abuse does not. Id. at 332. Here, unlike in Rimer, it is an entirely different situation where, based upon the State's charging decision, the State has to prove that an act of Open and Gross Lewdness occurred as a predicate to proving child abuse occurred.

The State next spends inordinate time analyzing NRS 200.508 before ultimately noting, "[i]n Counts 55, 57, and 81, the State alleged

only that Appellant was guilty of child abuse *via* sexual abuse. RAB 217 (citing AA X 2331-32, 2343).[16] Thus, the State spuriously asserts because it "did not allege that Appellant was guilty solely because he committed an act of open or gross lewdness, it could have "established that [Sena] 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." RAB 217.

Based upon the 4th Amended Information the State clearly alleged the the Open and Gross Lewdness Sena committed was the sexual abuse underlying the Child Abuse, Neglect, or Endangerment charges. Therefore, the State did not allege, much less prove, that Sena committed Child Abuse, "five different ways, which could have included lewdness with a child under 16 or open or gross lewdness." Rather, the State only alleged that the acts constituting Open and Gross Lewdness were necessary to establish Child Abuse, Neglect, or Endangerment. Therefore, Open and Gross Lewdness is a lesser included offense of Child Abuse, Neglect, or Endangerment *via*

[16] Pages 2331-33 and 2343 are actually in Appellant's Appendix vol. XI not X. Additionally, pages 2331-33 and 2343 cite to jury instructions, not the 4th Amended Information which contains the actual allegation. See AA X 2187-89.

Sexual Abuse, and Sena's convictions violated his right to be free from multiple convictions for the same offense.

CONCLUSION

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

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DATED this 5th day of April, 2021.

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I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 5th day of April, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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