IN THE SUPREME COURT OF THE STATE OF NEVADA

DEQUINCY BRASS, Appellant, vs. THE STATE OF NEVADA, Respondent.	))))))))))	NO. 81142

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APPELLANT'S REPLY BRIEF

(Appeal from Judgment of Conviction)

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APPELLANT'S REPLY BRIEF

ARGUMENT

I. Response to Statement of Fact.

In its Statement of Fact, the State incorrectly claims that V.M. accused Brass of sexually assaulting her in her home on at least *six* separate occasions. See Respondent's Answering Brief ("RAB") at pp. 5-7. In fact, V.M. testified to only four discrete incidents of sexual assault in the home, but *also* testified about a statement she gave to Elizabeth Espinoza during her forensic interview where she gave a different account of those same four events. Compare (V:1165-1208 & VI:1228-29) (direct testimony about the incidents themselves) with (VI:1217-26) (testimony about V.M.'s statements to Elizabeth Espinoza). The State inadvertently relies on V.M.'s forensic interview testimony to assert that V.M. identified two *additional* incidents of

sexual assault in the home. The following language in the State's Answering Brief comes from V.M.'s forensic interview statement and does not set forth any "additional" incidents beyond the ones to which she testified at trial:

> On a third occasion, V.M. and Brass were downstairs while Kimberly was asleep upstairs 6AA1223. Brass instructed V.M. to take off her clothes and put her legs around Brass. Id. Brass then put his penis inside V.M.'s anus. Id. A couple of days later, Brass instructed V.M. to put his penis inside her mouth and V.M. did so. 6AA1224.

RAB at p. 7.

Additionally, the State makes the following unsupported statement[1] without citing the record: "And on yet another occasion, Brass caused V.M. to sit on his lap while both he and V.M. were naked, and again forced his penis inside V.M's vagina." RAB at p. 7. This unsupported allegation is a repetition of the initial incident to which V.M. testified at trial (V:1165-73) and previously reported to Elizabeth Espinoza (VI:1223-24). Tellingly, V.M. testified that that she believed there were only 3 discrete incidents of sexual assault that occurred in the home, not six, as alleged in the State's Answering Brief. (V:1208) (referencing "a couple" of incidents that occurred in one living room, and "like once the other living room."). Thus, to the extent the State's Answering Brief indicates that there were six incidents in the home, that is inaccurate.

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[1] Cf. NRAP 28(e)(3).

II. The district court violated Brass's Sixth Amendment rights by denying his requests to substitute counsel.

Brass was denied his Sixth Amendment right to effective assistance of counsel when the district court refused his repeated requests to substitute counsel when it should have been obvious to the court that an irreconcilable conflict existed and that Mitchell Posin was unprepared to represent him at trial. See Young v. State, 120 Nev. 963, 968-69, 102 P.3d 573, 576 (2004); Wood v. Georgia, 450 U.S. 261, 271 (1981); U.S. Const. Amend. VI, Amend XIV; Nev. Const. Art. 1, Sec. 8.

A. Factual inaccuracies in Respondent's Answering Brief, pp. 18-22.

Initially, the State asserts that the district court properly denied Brass's requests to substitute counsel because his "trial had already been continued five times at his request." RAB at 18. This claim is inaccurate because there were only four continuances. (I:236-247). Furthermore, the record reflects that each continuance was caused by *Posin's failure to prepare for trial*, and the district court knew or should have known that Posin was responsible.

The first continuance came right on the heels of Posin's attempt to withdraw from Brass's case, when Posin was clearly not preparing for trial:

- On March 12, 2018, Posin moved to withdraw for nonpayment. (I:25-30).
- On March 29, 2018, Posin withdrew his motion. (II:351E-F).

- Days later, on April 3, 2018, Posin requested a continuance. (II:351J-K).

Instead of immediately commencing work on Brass's case after committing to the representation, Posin waited two months (until June 8, 2018) to obtain an *ex parte* order authorizing employment of Investigator Robert Lawson. (I:33-34).[2] The delay in obtaining an investigator contributed to Posin's request for a second continuance at calendar call on July 19, 2018. (I:353).

The State did not object to the second continuance, having waited until calendar call to make key items of discovery available to the defense. (I:104-05). And although the State made that discovery "available" for Posin to pick up,[3] the State refused to *give* that discovery to Posin unless he first paid cash. See (I:104) (indicating the discovery was available to Posin on July 19, 2018 on a "CASH ONLY" basis).

Ultimately, Posin waited until November 2, 2018—*six days before calendar call*—to pay for and pick up his client's discovery. (I:118;II:359). This discovery included documents that the State made available on July 19th, October 9th, and October 19th, all on a "CASH ONLY" basis. (I:106-

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[2] Despite the court's order, Investigator Lawson was not actually *retained* until October 2018. (II:399).

[3] (I:118).

07,118). At calendar call on November 8, 2018, Posin *admitted* that he was unprepared for trial because he had failed to obtain the discovery in a timely manner due to a "financial reason" relating to his "client's family." (II:359). So, the court granted the third continuance with full knowledge that Posin had failed to obtain discovery or prepare for trial while awaiting payment from Brass's family. (II:360).

The fourth continuance on May 13, 2019 was expressly found to be Posin's fault. (II:392-93,407-409,413). Posin had failed to follow up with Investigator Lawson in a timely manner and, had he done so, he would have known that the employee who was responsible for investigating Brass's case had quit without conducting any investigation whatsoever. (II:392-93,407-09). The court held Posin *personally* responsible for this continuance, and only granted the continuance with the recognition that Posin would have been ineffective without it. (II:409,413).

Although the State claims that Brass "conveniently waited to file his Motion to Dismiss [Counsel] until February 21, 2020, the Friday before trial" (RAB at 18), the timing of Brass's motion was not a matter of "convenience." At multiple status checks between May 2019 and February 2020, Posin told the court that he was actively preparing for trial and Brass

relied on those representations. (II:417,422,425-26,429,455).[4] Brass was unaware of the full extent of Posin's failure to prepare until Investigator Lawson visited him at CCDC shortly before trial. (II:453,455;III:655).

The State characterizes the conflict between Posin and Brass/Lawson as one of pure strategy, where Posin's "strategy was to cross-examine the State witnesses" while "both Brass and Mr. Lawson believed that [Posin] should have subpoenaed witnesses to testify on Brass's behalf." (RAB at 21). However, Brass and Lawson were not primarily concerned with trial strategy; they were concerned that Posin knew "nothing" about the case and failed to follow up on *any* of Investigator Lawson's leads, which would have been necessary for Posin to make an *informed decision* about trial strategy. (III:646-659). For instance, a witness from Apple advised Investigator Lawson that company documents would show when and where Brass and Kimberly were working to limit the potential time-frame when the crimes could have taken place, and Lawson told Posin to subpoena the information

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[4] One reason the court granted the final continuance was so Posin could obtain a forensic expert to counter A.W.'s claim that Brass had remotely deleted items from her cellphone. (II:406-07). At a status check on December 3, 2019, Posin claimed he anticipated "having one shortly." (II:426). On December 17, 2019, Posin claimed he'd "made inquiries, and I think I may have somebody." (II:429). But on January 14, 2020, Posin decided to "go in a different direction" and retained no expert at all. (II:433). The court never asked Posin *why* he decided not to retain an expert at either Young hearing. See AOB at 38.

but he never did. (III:647). Likewise, Lawson spoke to the manager of the Palm Hotel where one of the crimes allegedly occurred, and was informed that the allegation "could not possibly have happened" because Brass was "never registered there," but Posin never followed up to obtain any supporting documentation. (II:399-400;III:648). Witnesses told Lawson that A.W. had an inability to "tell the truth" and would "dominate" V.M. in their relationship, yet Posin never followed up with those witnesses. (III:648). Lawson also learned of a "substantial CPS history that we asked Mr. Posin to subpoena" for the court to review in camera, yet Posin never did that either. (III:648). But most crucially, just days before trial, Lawson learned that "Posin had literally no knowledge of this case" and "was basically asking my investigator and myself how we would try the case." (III:647). This was not merely a dispute about strategy; Posin was woefully unprepared to defend Brass at trial.

The State claims that when the district court "asked Mr. Lawson" to identify the witnesses that Posin failed to subpoena and set forth their anticipated testimony, "Mr. Lawson could not provide the names of any of these people." RAB at 21. However, the court did not *ask* Lawson any such question at the Young hearing. (III:644-659). The court simply gave Lawson an opportunity to speak, and he did so. Id. Lawson's failure to volunteer

specific names that the court never requested is not a basis for this Court to reject Brass's argument on appeal.

B. The district court failed to consider the extent of the conflict.

"A conflict of interest arises when counsel's 'loyalty to, *or efforts on behalf of*, a client are threatened by his responsibilities to another client or a third person *or by his own interests*.'" Jefferson v. State, 133 Nev. 874, 876, 410 P.3d 1000, 1002 (Nev. App. 2017) (quoting People v. Horton, 11 Cal.4th 1068, 47 Cal.Rptr.2d 516, 906 P.2d 478, 501 (1995)) (emphasis added); see also Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992) (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991) ("[A] conflict exists when an attorney is placed in a situation conducive to divided loyalties.").

When a conflict of interest affects the adequacy of an attorney's representation, reversal is required without a showing of prejudice. Clark, 108 Nev. at 326, 831 P.2d at 1376; Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980). Although the district court's decision to deny Brass's request for substitution of counsel is reviewed for an abuse of discretion, the question of whether an actual conflict existed is reviewed de novo. See Jefferson, 133 Nev. at 876–77, 410 P.3d at 1002–03.

In its Answering Brief, the State mischaracterizes the conflicts at issue in this case. RAB at 23. The State claims that Brass "alleges that Posin should not have agreed to accept money from Brass's family in exchange for representation." RAB at 23. But that is *not* Brass's argument. It was not the payment arrangement *itself* that was the problem; it was the fact that Posin's representation of Brass *stalled* when Brass's family was unable to pay his legal fees. See RPC 1.8(f) (prohibiting third-party payment arrangements where there is "interference with the lawyer's independence of professional judgment or with the client-lawyer relationship").

Had Posin continued to represent Brass to the best of his ability in the face of his family's non-payment of legal fees, there would have been no conflict of interest.[5] Likewise, Posin *always* had the right to withdraw based on Brass's family's non-payment of legal fees. See RPC 1.16 (b) ("a lawyer may withdraw from representing a client if: . . . (5) The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled" or "(6) The representation will result in an unreasonable financial burden on the lawyer…"). And Posin was

[5] Posin could have paid cash for the discovery when the State made it available to him and sought reimbursement later, to ensure that he was prepared for the November trial setting.

certainly aware of his right to withdraw for nonpayment, since his original motion to withdraw in March 2018 was premised on these very subsections of RPC 1.16(b). (I:26-27).

However, Posin did *not* have the right to stop working on Brass's case until Brass's family paid his legal fees. See RPC 1.8(f). Posin's inaction delayed the case unnecessarily, prejudicing both his client *and* the State. Posin's admission to the court in November of 2018 that he failed to obtain and review his client's discovery until six days before calendar call because of "financial reason[s] of my client's family" (I:118;II:359) was an acknowledgement that Posin allowed the third-party fee arrangement to detrimentally affect his representation of Brass in violation of RPC 1.8(f). This conflict of interest was plain from the record, and should be considered by this Court when evaluating whether Posin should have been removed.

The State claims there was nothing "unusual" about Posin's initial attempt to withdraw as Brass's attorney in March of 2018. RAB at 25. However, Posin violated RPC 1.16(b)(5) by failing to inform Brass that he would be filing such a motion, and by failing to appear in court when the motion was scheduled to be heard, leaving Brass to communicate directly with the court without a lawyer present. (I:27,234;II:351B). And the State concedes that Posin did these things while he was on probation after

pleading guilty to violations of Nevada's Rules of Professional Conduct. RAB at 25.

Brass also contends that Posin's disciplinary history with the State Bar of Nevada created an actual conflict of interest at the Young hearings. See Appellant's Opening Brief (AOB) at 30-35. The State argues that "Brass has not established that any prior discipline was in any way material to the facts of Brass's case." RAB at 25. Yet, the prior discipline provides important context for this Court to assess Posin's performance and the credibility of his representations at the Young hearings in February 2020. Posin's prior discipline involved similar ethical lapses, including violations of RPC 1.1 (competence), RPC 1.3 (diligence), and RPC 1.4 (communication). See In re Discipline of Posin, No. 69417, 132 Nev. 986 (March 25, 2016) (unpublished). Had the district court been aware of Posin's prior discipline, it likely would have credited the complaints raised by Brass and Lawson at the Young hearings. Under RPC 3.3(d), Posin had a duty to advise the district court of that discipline when the court asked him, point blank, "if everything, or a substantial portion of what Mr. Lawson and Mr. Brass have told me is true, then do I need to refer you to the State Bar?" (III:656).

In addition, the existence of that discipline served as a *motive* for Posin to downplay his lack of preparedness to the district court, and it

explains *why* Posin asked the district court *three times* not to report him to the State Bar of Nevada. (III:657-58). The prior discipline created a direct conflict of interest between Posin and Brass at the two Young hearings, incentivizing Posin to misrepresent his preparedness to the court to avoid further discipline from the State Bar of Nevada. In this way, the prior discipline placed Posin "in a situation conducive to divided loyalties." See Clark, 108 Nev. at 326, 831 P.2d at 1376. As a direct result of Posin's lack of candor to the tribunal, the district court forced Brass to go to trial with an attorney who was unprepared and whose loyalties were divided. See Clark, 108 Nev. at 326, 831 P.2d at 1376; Cuyler, 446 U.S. at 349-50.

Although Brass repeatedly advised the district court that he had a conflict with his attorney who was failing to prepare for trial,[6] the State argues that Brass nevertheless "waived" appellate consideration of the afore-mentioned conflicts by failing to expressly cite them as a basis for Posin's removal as counsel. RAB at 23. The State asks this Court to overlook

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[6] Brass advised the court of his concerns with Posin's lack of preparation on five different occasions: (1) on May 13, 2019, when he orally told the court "I don't think he's prepared to represent me in this case" (II:387); (2) on October 1, 2019, when he orally told the court that he still had not fully communicated with Posin "but I think that he is supposed to come and visit me" (II:422); (3) in writing on February 18, 2020, in his motion to dismiss counsel (I:154-158); (4) orally, at the sealed Young hearing on February 20, 2020 (II:451-61); and (5) orally, at the sealed Young hearing on February 24, 2020 (III:644-659).

Posin's clear ethical violations, which should have been obvious to the district court, because Brass failed to rely on them when requesting the appointment of a new attorney. Yet, Brass was effectively making a pro se challenge against his attorney who failed to disclose his prior discipline to the court under circumstances rendering that discipline highly relevant.

The Court should decline to find either "forfeiture" or "waiver" of Posin's actual conflicts of interest because Posin had a duty of candor to the tribunal, and he violated that duty to the detriment of his client.[7] See RPC 3.3(d). Furthermore, while Brass would dispute that plain error analysis should apply when *Posin* was the one who failed to disclose his disciplinary history, to the extent the Court does apply plain error analysis, it may

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[7] Courts have a "duty to ensure that pro se litigants do not lose their right to a hearing on the merits of their claim due to ignorance of technical procedural requirements." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988). To these ends, appellate courts liberally construe objections by pro se defendants to avoid a finding of forfeiture and to permit appellate review. See, e.g., Haines v. Kerner, 404 U.S. 519, 520 (1972) (holding pro se complaints "to less stringent standards than formal pleadings by lawyers"); United States v. Gray, 581 F.3d 749, 752–53 (8th Cir. 2009) ("We liberally construe pro se objections to determine whether the defendant objected"); United States v. Ben-Shimon, 249 F.3d 98, 103-04 (2d Cir. 2001) (general objection of pro se defendant at sentencing should have been construed liberally for preservation purposes); State v. England, 45 Kan. App. 2d 33, 37, 245 P.3d 1076, 1080 (Kan. App. 2010) ("because England was a pro se litigant, we will liberally construe his objection to criminal history as a motion to correct an illegal sentence"); Hudson v. Gammon, 46 F.3d 785,786 (8th Cir. 1995) ("liberally construed, [defendants'] pro se objection sufficiently directed the district court to the alleged errors").

properly consider all of the evidence in the record, including Posin's statements and actions at prior proceedings and his documented disciplinary history as evidence of a conflict. See, e.g., Greer v. United States, 141 S.Ct. 2090, 2098 (2021) ("[A]n appellate court conducting plain-error review may consider the *entire* record—not just the record from the *particular proceeding* where the error occurred.") (emphasis in original).

In Greer, the United States Supreme Court recently explained that it was permissible to rely on information contained in a defendant's PSI report, prepared after the trial and long after the error in question, to determine whether the trial court's failure to properly instruct the jury was plainly erroneous. Id. Here, the Court should consider evidence[8] of Posin's actions and statements to the district court *prior to* the two Young hearings because it put the court on notice that a conflict existed that warranted Posin's removal as counsel.

Although the State contends that Brass should have provided "documentation" to the district court regarding Posin's disciplinary history

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[8] This evidence includes: (1) Posin's attempt to withdraw without communicating with Brass or appearing in court in March 2018; (2) Posin's admission in November 2018 that he failed to obtain discovery until six days before calendar call because Brass's family had not paid him, necessitating a third continuance; and (3) the court's finding in May 2019 that Posin was at fault for the fourth continuance because he failed to follow up with his investigator in a timely manner. See pp. 2-5 and 10-12, supra.

(RAB at 25), it was *Posin's* responsibility to provide this information to the court. See RPC 3.3(d) ("In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse."). Posin's failure to comply with his ethical obligation only underscores the degree of conflict that existed at the time of the Young hearings. In any event, the Court may take judicial notice of Posin's prior disciplinary history, which was a matter of public record that existed at the time of the Young hearing and could easily have been discovered by the district court had it simply checked the State Bar of Nevada's website. See NRS 47.150.

Understandably, the State relies heavily on Posin's self-serving proclamations that he was prepared for trial. RAB at 26-27. But the very portions of the record relied on by the State *also* contain Posin's repeated requests that the court not refer him to the State Bar, undermining the credibility of his assertions. And contrary to the State's claim, the fact that Posin announced "ready" before the court asked whether it should refer him to the State Bar does not mean that Posin was actually "ready" for trial. C.f. RAB at 27. As detailed in Brass's Opening Brief, Posin failed to notice a single defense witness, subpoena or disclose any evidence to the State, identify any experts, file any pretrial motions in limine (including requests

for Summitt[9] or Miller[10] hearings), oppose any motions filed by the State, or follow up on *any* of the leads generated by his investigators in a 22-count sexual-assault case where his client faced a possible sentence of more than 100 years in prison.[11] See AOB at pp. 3-11 & 33. And although Posin clearly did not want to be referred to the State Bar, he acknowledged that he had not done enough to work up Brass's case:

> THE COURT: Okay, so tell me what exactly you've done to prepare for trial.
>
> MR. POSIN: I have reviewed all the evidence and the transcripts but, you know, I don't think that's enough. I really don't.
>
> THE COURT: What else have you done?
>
> MR. POSIN: Prepared potential opening statements, cross-examinations.

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[9] Despite evidence in V.M.'s forensic interview transcript indicating alternate sources of sexual knowledge (VI:1386,1414), Posin never requested a Summitt hearing. Cf. Summitt v. State, 101 Nev. 159, 697 P.2d 1374 (1985).

[10] The court precluded Posin from introducing evidence that R.M. falsely claimed V.M. and his mother sexually and physically abused him because Posin had been aware of the allegations before trial but failed to request a Miller hearing. (VI:1260-65).

[11] Although "the trial lawyer alone is entrusted with decisions regarding legal tactics such as deciding what witnesses to call," Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002), the lawyer has an obligation to adequately investigate and prepare his or her case to intelligently make those sorts of strategic decisions. See Dumas v. State, 111 Nev. 1270, 903 P.2d 816 (1995) (defense counsel's failure to obtain neurological or psychiatric testimony regarding petitioner's mental condition was ineffective assistance of counsel).

(III:656). Contrary to the State's assertion, the conflict between Posin and Brass went far beyond an "unchallengeable" disagreement about "strategy." RAB at 24. It involved Posin's complete lack of knowledge about the case, which was the direct result of his failure to adequately prepare. (III:646-50).

Finally, Brass was not required to prove that the outcome of the trial would have been different had there been no conflict. Cf. RAB at 27-28. Under Young v. State, to determine whether the district court abused its discretion in failing to appoint substitute counsel, this Court need only consider "(1) the extent of the conflict; (2) the adequacy of the [court's] inquiry [into the conflict]; and (3) the timeliness of the motion." 120 Nev. 963, 968, 102 P.3d 572, 576 (2004). Likewise, if the Court finds that an actual conflict of interest adversely affected Posin's performance, reversal is required without a showing of prejudice. See Clark, 108 Nev. at 326, 831 P.2d at 1376; Cuyler, 446 U.S. at 348. Here, reversal is required under both standards.

C. The motion was not a ploy to cause delay nor was it so untimely as to preclude relief.

The Court will evaluate "the timeliness of a motion to substitute counsel by balancing a defendant's constitutional right to counsel against the inconvenience and delay that would result from the substitution of counsel." Young, 120 Nev. at 969-70, 102 P.3d at 577.

The State contends that Brass's final two requests to substitute counsel in February 2020 were a "delay tactic" and that the district court "correctly balanced Brass's right to counsel against the inconvenience and delay that would result from the substitution of counsel." RAB at 30. The State further contends that Brass's complaints were untimely and dilatory, as in Garcia v. State, and that Brass's case is distinguishable from Young v. State, where the court found a defendant's complaints to be timely. Both arguments fail. RAB at 29.

In Young, this Court held that a motion to substitute counsel that was denied on the eve of trial was timely where the defendant "made his first motion to substitute counsel . . . over three and one-half months before his trial started." 120 Nev. at 970, 102 P.3d at 577. Although granting the motion would have resulted in a continuance and a delay, this Court chose not to hold the delay against the defendant. Id. The Court explained, "had the district court acted on Young's motion in a timely manner, the resulting inconvenience and delay would have been minimal." Garcia, 121 Nev. at 338-39, 113 P.3d at 843. By contrast, this Court found a dilatory motive in Garcia where the defendant had never before raised *any* concerns about his attorney and "waited until the eve of trial and filed his motion in open court." Id.

This case is more analogous to Young than to Garcia. Initially, the district court acknowledged that Brass had first raised concerns about Posin's representation in May of 2019—almost a year before his trial started. (III:471-73). This is much earlier than the complaint that was raised in Young. In addition, the district court had already found *Posin*—not Brass—to be *personally* responsible for the fourth continuance in May 2019, and only granted that continuance because it believed Posin would have been ineffective without one. (II:409,413). Posin was *also* personally responsible for the third continuance in November 2018, when he admittedly waited until 6 days before calendar call to retrieve key items of discovery from the State due to "financial reasons of my client's family" in violation of RPC 1.8(f)(2). (I:118;II:359). Had the district court removed Posin when the conflict became glaringly apparent in November 2018, the inconvenience and delay would have been minimal, just like in Young. Instead, the district court ignored the conflict and improperly held Posin's lack of preparation against *Brass* at the Young hearings in February 2020. (III:471-74). Posin's ongoing lack of preparation should have been viewed as evidence of the *conflict* between the attorney and client, not as evidence of a dilatory motive by Brass.

The State also relies heavily on the district court's finding that Brass did not file his written motion to withdraw when he initially said he did. RAB at 30. But as Brass explained to the court, "The week prior to our calendar call, I had a visit with Mr. Lawson. And at that point, I wrote you a letter, which I'm not sure if you received and that's what I sent that particular week. And then following that I sent in the motion. So, I do apologize for that." (III:654-55).[12]

Even if Brass was mistaken about the date when he submitted his motion to withdraw, it does not undermine the credibility of his complaints about Posin, or suggest that those complaints were a "ploy" to delay trial. Here, there was an unbiased third party—Investigator Lawson—who raised identical concerns about Posin's preparedness for trial and corroborated each of Brass's complaints. In fact, Investigator Lawson was *so concerned* about Posin's lack of preparation that he requested and obtained permission from the court to withdraw from the case based on those concerns. (III:658-59). By contrast, in Garcia, the district court only had the defendant's word to go on, making a dilatory motive much more likely.

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[12] As explained in his Opening Brief, Brass relied on Posin's representations to the court at the various status checks assuring everyone that he was diligently preparing for trial. Brass only learned the truth when Investigator Lawson came to visit him at CCDC shortly before calendar call. See AOB at 35-36.

Contrary to the State's claim, the district court did not find that the concerns raised by Brass and Lawson at the second Young hearing were "nonspecific," nor did the district court find that "Brass and Mr. Lawson [were] unable to identify specific witnesses who could testify to specific, relevant, and admissible evidence." Compare RAB at 30-31 with (III:470-74). The word "specific" was never used in the court's ruling. (III:470-74). And the court never *asked* Investigator Lawson to name the individual witnesses that Posin had failed to follow up with. (III:644-659).

Because the record does not support the court's finding that Brass "filed his motion[s] for dilatory tactics or bad-faith interference with the administration of justice" and because any inconvenience or delay would have been minimal had Posin been removed earlier, this Court should find Brass's motions timely. Young, 120 Nev. at 970, 102 P.3d at 577.

D. The district court's inquiry was inadequate.

Citing this Court's unpublished order in Mojica v. State, No. 77573, 472 P.3d 1206 (Nev. Sept. 30, 2020), the State contends that the district court did not need to undertake *any* inquiry at all into Brass's complaints, and that by holding two Young hearings, the court's inquiry was necessarily adequate. RAB at 18. The district court took that same position as well, telling the parties, "if you look at *Garcia*, the Court didn't even hold a

hearing apparently on the motion to dismiss counsel. I clearly have held now two hearings on the motion to dismiss counsel." (III:470-71). Yet, this position is contrary to binding U.S. Supreme Court precedent.

In Wood v. Georgia, 470 U.S. 261 (1981), the Supreme Court held that district courts have a "duty" to conduct an adequate inquiry when "the possibility of a conflict of interest was sufficiently apparent" and that it violates due process when the court fails to undertake that adequate inquiry. Citing Cuyler v. Sullivan, 446 U.S.335, 347(1980), the Supreme Court explained in Wood that reversal is required "when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.'" Wood, 450 U.S. at 271 fn. 18.

In this case, the court should have known that a conflict existed between Posin and Brass *long before* the two Young hearings. See fn. 8, supra. Where Posin failed to appear in court on his motion to withdraw in March 2018, where Posin admitted to the court in November 2018 that he was unprepared for trial because of "financial reason[s] of my client's family," and where the court found Posin to be personally responsible for the May 2019 continuance, the court had no basis to credit Posin's self-serving claims of preparedness at the Young hearings in 2020 without digging deeper to determine if those assertions were accurate.

Contrary to the State's claim, Brass does not need to "show that an alternate defense strategy would have succeeded" for this Court to reverse. Cf. 34. Rather, reversal is required if the court failed to investigate when "the possibility of a conflict of interest was sufficiently apparent." Wood, 450 U.S. at 271 fn. 18. And here, the court was on notice of the conflict when *two witnesses*—Brass *and* Lawson—advised the court of their concerns with Posin's representation and when Posin begged the court not to refer him to the State Bar. Lawson even suggested that the court ask Posin whether he had "any issues or things going on in his life" because Posin had told Lawson he was "overwhelmed." (III:650). Yet, the court never asked Posin this question. Under the circumstances, the court's inquiry was inadequate and requires reversal. See AOB at 38 (identifying other questions the court failed to ask).

III. The State presented insufficient evidence of guilt for lewdness and dissuading.

A. Insufficient evidence of lewdness.

Lewdness convictions must be dismissed on appeal when they are merely "incidental" to sexual assault convictions. Gaxiola v. State, 121 Nev. 638, 653, 119 P.3d 1225, 1235 (2005). A lewd act in violation of NRS 201.230 is "incidental" to a subsequent sexual assault when performed "to arouse the victim and create willingness to engage in sexual conduct."

Crowley v. State, 120 Nev. 30, 34, 83 P.3d 282, 285-86 (2004) (defendant's acts of touching and rubbing the victim's penis were incidental to subsequent fellatio, not separate acts); Ebeling v. State, 120 Nev. 401, 404, 91 P.3d 599, 601 (2004) (defendant's act of rubbing his penis against victim's buttocks was incidental to penetration, not a separate act).

On the other hand, a lewd act is not "incidental" to a subsequent sexual assault if there is clear evidence of an *interruption* between the two acts. See Townsend v. State, 103 Nev. 113, 121, 734 P.2d 705, 710 (1987) (where evidence indicated that the defendant *stopped* fondling the child's breasts before digitally penetrating her, the acts were separate and distinct); Wright v. State, 106 Nev. 647, 650, 799 P.2d 548, 549-50 (1990) (where evidence indicated that defendant *stopped* an attempted sexual assault when a car passed and then resumed the sexual assault after the car was gone, the acts were separate and distinct). Thus, the relevant question is whether the State proved that the defendant *stopped* engaging in an act of lewdness before commencing a subsequent sexual assault.

The State does not dispute that it bore the burden of proof as to whether the acts of lewdness alleged in this case were incidental to the subsequent sexual assaults that occurred during the same episodes. Instead, the State appears to argue that because Brass made "commands" during the

sexual encounters for V.M. to remove her clothes and sit on his lap and repositioned her before sexually assaulting her, those "commands" were somehow separate and distinct from the sexual assaults. RAB at 39-40. Yet, the State cites no authority for the proposition that a verbal command issued during a continuous sexual encounter "stops" or "interrupts" the encounter. To the contrary, this Court has held that verbally instigating a lewd act is, *in and of itself*, a specific form of lewdness. See State v. Catiano, 120 Nev. 1030, 1036, 102 P.3d 588, 592-93 (2004) (defendant could properly be charged with lewdness for inducing some boys to masturbate in his presence by offering them money, giving them alcohol, and playing pornographic videos). The commands cited by the State did not "interrupt" or "stop" the sexual encounter; rather, if they occurred,[13] they were part of a continuous sequence of events that enabled Brass to engage in sexual intercourse with V.M. Therefore, Count 1 and Count 5 must be reversed because they were incidental to the sexual assault convictions that occurred during the same episodes. See AOB at 39-42.

[13] Brass maintains his innocence on appeal.

B. Insufficient evidence of dissuading.

The State failed to prove that Brass dissuaded A.W. or V.M. from reporting a crime to a peace officer. Relying on NRS 199.305(1) subsections (b) and (c), the State argues:

> according to the plain language of NRS 199.305, the State did not have to prove that Brass specifically told A.W. or V.M. not to call the police because Brass's commands to both victims not to tell their mothers or not to tell anyone sufficiently acted *to dissuade them from commencing prosecution or causing "the arrest of a person in connection with a crime."*

RAB at 41 (emphasis added). Yet, Brass was not charged with dissuading under NRS 199.305(1) subsections (b) or (c), so the italicized language does not apply in this case. Brass was charged with dissuading under NRS 199.305(1)(a)(2),[14] and that section *does* require that the victim be dissuaded "from reporting a crime to a peace officer."

The State concedes that Brass never told V.M. or A.W. not to report him to the "police" or to a "police officer." RAB at 42. Allowing a general threat not to tell "anyone" to satisfy this subsection would render meaningless the specific statutory language identifying the six classes of individual to whom a crime may be reported. The State should have charged Brass under subsections (b) or (c) had it wanted a general threat not to tell

[14] (I:182,184).

"anyone" to suffice. Because the State did not charge Brass under those subsections, counts 12 and 19 should be reversed.

IV. Improper jury instructions contributed to Brass's convictions for lewdness and dissuading.

A. Improper instruction on lewdness.

Jury Instruction 18 did not properly convey to jurors the State's burden of proving that an act of lewdness was not incidental to an act of sexual assault that occurred during a single sexual encounter. Cf. Gaxiola, 121 Nev. at 653, 119 P.3d at 1235. The State claims that "the jury was specifically instructed that before Brass could be found guilty of sexual assault and lewdness arising from the same sexual encounter, the jury had to conclude that there was an interruption between those acts." RAB at 46. Not so. Instruction 18 told jurors the opposite—that "where multiple sexual acts occur as part of a single criminal encounter a defendant may be found guilty for each separate or different act of sexual assault/lewdness." (I:200). According to Instruction 18, if the sexual acts are of a "different" type—and this would include an act of sexual assault and an act of lewdness, which necessarily are "different" types—the defendant could be found guilty of both, regardless of whether there was any interruption between those acts.

Brass failed to cite the remainder of Instruction 18 in his Opening Brief because it is wholly irrelevant to this issue. The remainder of the

instruction addresses when a defendant can be found guilty of multiple counts of the "*same* specific type" of sexual conduct during a single criminal encounter. (I:200). For instance, if a defendant were vaginally penetrating a victim, stopped, and then vaginally penetrated the victim again, the defendant could be found guilty of two counts of sexual assault. Although this part of the instruction does address "interruptions" between acts of the "same specific type" of sexual conduct, the language does not apply to sexual acts that are of a "different type," such as sexual assault and lewdness. Because Instruction 18 failed to properly convey the State's burden under Gaxiola and caused actual prejudice or a miscarriage of justice, Brass's four lewdness convictions must be reversed notwithstanding Posin's failure to object. Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). But even if the Court does not reverse on this basis alone, it may be considered as part of a cumulative error analysis, and as evidence of Posin's ineffectiveness. See AOB at pp. 69-71.

B. Improper instruction on dissuading.

NRS 199.305 criminalizes the act of "intimidating or threatening another person" with the *effect* of dissuading that other person from reporting a crime, commencing a criminal prosecution, or causing an arrest. The State is correct that NRS 199.305 does not contain language referencing

"specific intent." RAB at 47. And the State is correct that Jury Instruction 24 tracks the "exact language" contained in NRS 199.305. Id. But as this Court recognized in Ford v. State, 127 Nev. 608, 613-14, 262 P.3d 1123, 1126-27 (2011), statutes that criminalize speech but do not contain an express scienter requirement or any "'bad-mind' adverbs or phrases" can create unconstitutionally vague and overbroad "strict liability" offenses.[15] When that occurs, this Court will save an otherwise-unconstitutional statute by interpreting it to *require* specific intent. Id.

In Virginia v. Black, 538 U.S. 343 (2003), the United States Supreme Court recognized that only intentional "true threats" or intimidation could be criminalized under the First Amendment. Although the Court held that it does not violate the First Amendment for a State to criminalize cross burning with "intent to intimidate," the Court determined that the "intent to

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[15] The State tries to distinguish NRS 199.305 (dissuading) from NRS 201.300(1) (pandering), by claiming that Nevada's pandering statute contained "bad mind" words. RAB at 48. But Ford recognized that (like Nevada's dissuading statute) Nevada's pandering statute "*does not* use any 'bad mind' adverbs or phrases" such as "'intentionally' or with intent to ...'; 'knowingly or 'with knowledge that ...'; 'purposely' or 'for the purpose of...'". Ford, 127 Nev. at 613, 262 P.3d at 1126 (quoting 1 Wayne R. LaFave, *Substantive Criminal Law* § 5.1(a), at 333 (2d ed. 2003)) (emphasis added).

intimidate" was a necessary element of the crime, and that a conviction secured without proving that element could not stand.[16]

Based on Black, the Ninth Circuit agreed that, to criminalize threats or intimidation, "the intent to intimidate is necessary and … the government must prove it in order to secure a conviction." United States v. Cassel, 408 F.3d 622, 634-35 (9th Cir. 2005). In Cassel, the Ninth Circuit examined a federal statute that criminalized any act of intimidation that "hinders, prevents, or attempts to hinder or prevent" a federal land sale, and even though the statute did not include an express mens rea requirement, it interpreted the statute to require an intent to threaten. Id. Ultimately, the Ninth Circuit reversed Cassel's conviction because the jury instructions did not include a specific intent requirement. Id. at 635-36.

Like the federal statute in Cassel and the pandering statute in Ford, Nevada's dissuading statute *must* be construed to require specific intent or it will violate the First Amendment. And because Brass's jury was never

[16] Specifically, the Supreme Court held, "while a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate, the provision in the Virginia statute treating any cross burning as prima facie evidence of intent to intimidate renders the statute unconstitutional in its current form." 538 U.S. at 347.

instructed on specific intent,[17] Brass's convictions for dissuading must be reversed even for plain error. See Ford, 127 Nev. at 625-26, 262 P.3d at 1134 (reversing Ford's conviction where, as here, "the error was plain and the failure to give a specific intent instruction affected Ford's substantial rights."). But even if the Court does not reverse on this basis alone, it may be considered as part of a cumulative error analysis and as evidence of Posin's ineffectiveness. See AOB at pp. 69-71.

V. The court erred by failing to give Tavares instructions before admitting unduly prejudicial bad act evidence that was not proven by clear and convincing evidence.

The State asserts that "any claim that A.W. testified or that the State argued that Brass drugged A.W. and assaulted her is belied by the record." RAB at 52. Although A.W. may not have used the word "drugged" during her testimony, the State concedes that A.W. testified that Brass gave her some water, she fell asleep, and she woke up with her pants unbuttoned and her side hurting. (IV:948). And the State introduced this testimony by asking

[17] Like in Ford, 127 Nev. at 625-26, 262 P.3d at 1134, "the general intent instruction [that Brass received] also addressed motive and admonished the jury that '[m]otive is not an element of the crime charged and the State is not required to prove a motive on the part of the Defendant in order to convict.' Combined with the lack of an instruction on specific intent, these instructions created the misimpression that [Brass] could be convicted based simply on a showing that he intended to speak the words he did." (I:186).

A.W. to discuss the "first time something happened" with Brass at V.M.'s house. (IV:943).

A.W.'s testimony that Brass allegedly gave her water, she drank it, fell asleep, and woke up with her pants unzipped and her side hurting was not introduced simply to establish the "consistency" of A.W.'s recollections. Cf. RAB at 52. In closing, the State argued that A.W.'s testimony about this incident shows "how she remembers the acts that the Defendant did." (VII:1551) (emphasis added). The State wanted the jury to know that something was "done" to A.W. on this occasion—namely, that she was drugged and sexually assaulted while she slept.

During A.W.'s testimony, the State highlighted the significance of the water that Brass gave her by having her confirm, "You drank the water?" (IV:948). And the State emphasized the fact that, when A.W. went to sleep, her pants were still zipped and her side did not hurt, insinuating that Brass had done something to her while she slept. (IV:948). Then, the State ensured that the jury would believe Brass drugged A.W. by playing a video of A.W.'s forensic interview for the jury, where she described the same incident as follows:

> I came inside. I put my bike down. And then -- and then I sat down on the couch with Venice and Quincy was staring at me. And I didn't say anything. I was just looking at the floor [indiscernible]. And then I asked for some water, and Quincy

> got it. And I drank it, and I felt weird after that. And then after -- after that, I just -- I don't remember anything. And then I just woke up and I felt pain on my side.

(VI:1430) (emphasis added). A.W.'s statement that Brass gave her water that made her feel "weird" and that she couldn't "remember anything" after drinking it would leave a reasonable juror with the impression that she had been drugged. And as set forth in Brass's Opening Brief, this uncharged allegation was not, and never could have been, proven by clear and convincing evidence. AOB at 48-50.[18]

The State tries to minimize this and other uncharged (and unprovable) criminal acts described in A.W.'s and V.M.'s forensic interviews by arguing that neither A.W. nor V.M. *directly* testified about those bad acts. RAB at 52-53. But the dramatic forensic interview videos were the very last thing that the State showed to the jury right before it rested its case. (VI:1340-1462). And the impact of these videos was not lost on the State.

Without receiving any Tavares instruction, the jury got to watch in open court as A.W. described the following uncharged bad acts to the forensic interviewer on video:

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[18] Even if the Court applied Franks v. State to this allegation, no "jury could reasonably find by a preponderance of the evidence that the bad act constituting a sexual offense occurred." 135 Nev. 1, 5, 432 P.3d 752, 756 (2019). There was a reason the State did not charge Brass with this incident. The State knew it could not be proven.

- that Brass "punched" R.M. in the head and bruised him (VI:1432);
- that Brass "does drugs. I just don't know which one. I know he's [indiscernible], but I know he does drugs" (VI:1433);
- that Brass "already tried to kill Kim" (VI:1434);
- that Brass would drug Kim too—"I knew something was wrong because every time he gave her something, or he went by her, she went to sleep" (VI:1434);
- that Brass deleted her text messages—"And then after that, when I look to text messages, [t]hey all disappeared, like someone deleted it. And he deleted them [indiscernible]. He tapped my phone, he deleted it. My phone. And he deleted a bunch of stuff from my phone" (VI:1438).

And the jury also received unredacted transcripts of the forensic interviews and preliminary hearing testimony that the State encouraged the jurors to review during their deliberations. See AOB at pp. 48-52. The unredacted transcripts referenced additional uncharged bad acts, including A.W.'s testimony at preliminary hearing that she saw Brass drug Kim by putting a long, white skinny pill in her drink (VIII:1855-56), and A.W.'s statements to the forensic interviewer that Brass put sleeping pills into Kim's food to make her go to sleep (VIII:1775), that Brass drugged Kim and turned the gas on and lit a fire while the family slept in an attempt to kill them all (VIII:1778-79), that Brass stalked her like a "lion going after his prey" by driving repeatedly by her house and flashing a gun at her and throwing rocks at her window (VIII:1781-83,1786-89,1830), and that Brass drove them around while high on drugs and alcohol. (VIII:1783-84).

Then, in closing, the State repeatedly urged jurors to review the forensic interviews during their deliberations, mentioning those interviews no fewer than 26 times. (VII:1534-49,1556,1575,1579). Although the State downplays its reliance on the forensic interviews, claiming it was only using them "for the purpose of establishing V.M.'s and A.W.'s credibility," (RAB at 55), the fact remains that the State repeatedly encouraged jurors to reexamine that evidence without ever offering any limiting instruction to guide jurors through that examination. Cf. Tavares v. State, 117 Nev. 725, 733, 30 P.3d 1128, 1133 (2001) (requiring a specific limiting instruction immediately prior to the introduction of the bad act and a general instruction at the end of trial).

The State's Answering Brief fails to address the fact that none of the allegations could have been proven by clear and convincing evidence, as would have been necessary to admit the uncharged bad acts at trial. Cf. Bigpond v. State, 128 Nev. 108, 116, 270 P.3d 1244, 1249 (2012). The statements made during V.M.'s and A.W.'s forensic interviews were unsworn. A.W.'s statements were incredible, and V.M.'s statement that her "mom said [Brass], he left the gas on when they were asleep upstairs, and then he left" was inadmissible hearsay. (VIII:1700).

The State claims that the "all of A.W.'s statements during her forensic interview were relevant *res gestae*." RAB at 53. But as this Court explained in Bellon v. State, the "complete story of the crime" doctrine must be construed narrowly. Accordingly, we have stated that 'the crime must be so interconnected to the act in question that a witness cannot describe the act in controversy without referring to the other crime.'" 121 Nev. 436, 444, 117 P.3d 176, 181 (2005) (internal quotations omitted).

Applying the rule from Bellon, it is obvious that res gestae cannot apply in this case. As the State repeatedly argued in its Answering Brief, neither A.W. nor V.M. directly testified about any of these uncharged bad acts. RAB at 51, 53. If the uncharged acts were truly "res gestae," then A.W. and V.M. could not have told their story without mentioning them. The fact that the witnesses did testify without directly referencing the uncharged bad acts proves those acts were not res gestae.[19]

The State claims that "there was no error for failing to issue a Tavares instruction" because "neither A.W. nor V.M. specifically testified to these other charged acts." RAB at 55. Yet, as set forth above, the State played the forensic interview videos for the jury, and the jury should have received an

[19] As explained above, however, A.W. *did* testify directly about one uncharged bad act—where she claimed to have been drugged and then sexually assaulted. But A.W. did not *have to* testify about that alleged incident to discuss the sexual assaults for which Brass was charged.

instruction *before* the videos were played. And A.W. *did* testify about the incident where she was allegedly drugged and assaulted while she slept.

To the extent the State claims that Tavares instructions were unnecessary because "Brass used V.M's and A.W.'s forensic interviews and preliminary hearing testimony during cross examination and closing argument," (RAB at 56) that is completely beside the point. As this Court recognized in Tavares,

> Because the prosecutor is the one who must seek admission of uncharged bad act evidence and because the prosecutor must do so in his capacity as a servant to the law, we conclude that the prosecutor shall henceforth have the duty to request that the jury be instructed on the limited use of prior bad act evidence. Moreover, when the prosecutor fails to request the instruction, the district court should raise the issue *sua sponte.*

117 Nev. at 731, 30 P.3d at 1132. Regardless of whether Brass "used" the forensic interview transcripts at trial,[20] the State still had a duty to request a limiting instruction and the court still had a duty to give it. For the same reason, Posin's inexplicable stipulation to admit unredacted versions of the

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[20] While Posin may have referenced the forensic interviews during his incredibly brief cross-examinations of A.W. and V.M., he asked them *no questions* about the uncharged bad acts, focusing *entirely* on the crimes charged and their disclosure of those crimes. (V:999-1003;VI:1230-34). Posin's closing argument likewise focused on the discrepancies in their testimony about the charged crimes. (VII:1563-67). Brass did not benefit in any way from the jury's exposure to the uncharged bad acts contained in the forensic interview statements. As in Buck v. Davis, "[n]o competent defense attorney would introduce such evidence about his own client." 137 S.Ct. 759, 775-76 (2017).

forensic interview transcripts and videos into evidence did not relieve the State of its burden to request and obtain cautionary instructions before and after their admission.

The district court's admission of unduly prejudicial and unprovable bad acts evidence violated Brass's state and federal constitutional rights to due process and a fair trial. See U.S Const. Amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3 and 8; Roever v. State, 114 Nev. 867, 863, 963 P.2d 503, 506 (1998). But even if this Court finds that Posin forfeited Brass's objection to the bad acts by stipulating to admit unredacted versions of the videos and transcripts into evidence, the court's failure to give mandatory Tavares instructions requires reversal because it had a "substantial and injurious effect or influence in determining the jury's verdict" in this case. Mclellan v. State, 124 Nev. 263, 269-70, 182 P.3d 106, 111 (2008) (footnotes omitted). Additionally, the Court can consider the failure to give Tavares instructions as further evidence of cumulative error. See AOB at 71.

VI. The jury was improperly exposed to the prosecutor's notes and victim impact testimony.

Reversal is required because jurors were improperly exposed to the prosecutor's notes and to victim impact testimony contained in the unredacted forensic interview statements. Contrary to the State's claim, Brass does not concede that "he has waived appellate review" of this issue.

RAB at 57. Rather, Brass acknowledged the *likelihood* that the Court might deem the argument forfeited *or* waived, but nevertheless urged the Court to consider the error in admitting this evidence, because there was no possible strategic reason for Posin to have permitted it to happen. AOB at 53-55.

The jury should never have had access to State's annotated version of a forensic interview statement with the words, "he already tried to kill Kim" underlined. (VIII:1778). And the jury should not have seen the State's annotation, bracketing out A.W.'s description of Brass as "a stalker" and "a lion going after his prey, how it observes them, then it attacks" and further detailing how Brass "observed [A.W.] for a very long time" and knew here she lived, and where she went to school. (VIII:1786).

The State does not dispute that these annotations were made by the prosecutor and shared with the jury. RAB at 60 ("the State may have underlined a statement"). But the State tries to distinguish the cases relied on by Brass, pointing out that "those cases establish that what should matter to this court's analysis is whether the jury was exposed to statements that they should not have been." RAB at 59. And the State claims that its "markings" were not "statements" because, "[p]ursuant to NRS 51.045(1), a 'statement' is defined as 'an oral or written assertion."

This argument fails. When material is underlined or bracketed-out in the context of litigation, courts routinely deem that material to be "work product" because it conveys counsel's impressions about the significance of the evidence. See United States v. Watts, 934 F. Supp. 2d 451, 496 (E.D.N.Y. 2013) ("Defense counsels' notes, which include underlining, arrows, and circling, 'also reflect the mental impressions and thought processes of counsel, which entitles them to protection under the work product doctrine.'") (internal citation omitted); United States v. Willis, 565 F. Supp. 1186, 1192 (S.D. Iowa 1983) (photocopies bearing notations and underlining by counsel is work-product and IRS is not "entitled to discover these notations and indications of emphasis"). Here, the underlining and bracketing were "statements" that identified what the State deemed to be significant portions of A.W.'s forensic interview.

The State suggests that there was nothing improper about the jury receiving its annotated forensic interview transcript because "Brass has failed to argue, much less establish, that the State intentionally made markings to draw the jury's attention to any statement in the forensic interviews." RAB at 60. However, as the Sixth Circuit recognized in U.S. v. Walker, 1 F.3d 423, 429 (6th Cir. 1993), it does not matter whether the State acted intentionally—when documents of this nature are inadvertently given

to the jury, "[i]t is the communication's potential to impact upon a juror's ability to perform his or her duties impartially, rather than the form or source of the communication" that matters.

Here, the State's annotations drew the jury's attention to two uncharged bad acts for which no Tavares instructions were given, and the annotations indicated that the State believed the allegations were important to its case. In addition, the transcripts contained inadmissible and inflammatory statements by A.W. and V.M. about the penalties they wished Brass to receive, including "the death penalty" and wanting him "to get killed." (VIII:1700-01,1834). Because there is no possible strategic reason for Posin to have allowed this incendiary material to go to the jury, the Court should reverse Brass's convictions based on Posin's ineffective assistance of counsel. See Mazzan v. State, 100 Nev. 74, 80, 675 P.2d 409, 413 (1984); Buck, 137 S.Ct. at 775-76. Alternatively, the Court can consider the introduction of such inadmissible evidence when assessing cumulative error. See AOB at 71.

VII. Violation of Brass's rights to due process and an impartial jury.

Posin rendered ineffective assistance of counsel and contributed to the cumulative error in this case by failing to challenge[21] (or failing renew prior challenges)[22] for cause to four biased jurors:

- Juror 334 had been sexually assaulted as a child and made the equivocal statement, "I think I can be unbiased" (III:501) before promising the court she could be fair (III:576).

- Juror 492 told the court that, due to the troubling "nature of the charges," he would have difficulty sitting a juror. (III:641). He could not assure the court that he would be fair, stating *three times* that he "believe[d]" he could "try to be fair." (III:641). Then, when questioned by the State, Juror 492 could not say whether he would be able to follow the instructions given by the court. (IV:763).

- Juror 484 had a mother-in-law who had been raped and told the court, "[t]o be honest, I don't know" when asked if he could be fair and impartial. (III:536). When the court asked him again, if there was anything about his mother-in-law's experience that would cause him not to be fair and impartial, he said, "I'll try to be fair." (III:589). Three questions later, Juror 484 answered "yes" when the court asked if he could be fair and impartial. (III:590).

- Juror 369 had been injured by a drunk driver and repeatedly said "there should be harsher penalties" and that he would have to "try" to be impartial toward Brass. (III:604-06,782-83). Juror 369 made comments about the penalty Harvey Weinstein should receive.

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[21] Brass concedes that Posin never challenged Juror 369.

[22] Posin *did* challenge Juror 334 (III:501-04), Juror 484 (III:558-59), and Juror 492 (III:694-95). But after the court denied his challenges without prejudice, Posin asked them *no questions* about their biases and passed them all for cause. (IV:833-867).

(IV:783). He also said he would presume the victims were telling the truth unless that presumption were overcome. (IV:840-54).

Jurors should be stricken for cause when their "voir dire answers demonstrate the juror's views would prevent or substantially impair the juror's ability to be impartial and apply the law." Sayedzada v. State, 134 Nev. 283, 289, 419 P.3d 184, 191 (Nev. App. 2018). Yet, "bias may also arise based on the juror's background or experiences and may exist even where the juror promises impartiality." Id. In Sayedzada, the Court of Appeals ruled that the district court should have stricken a juror for cause where she was a victim of a similar crime to the one at issue in the defendant's case and expressed doubt about her ability to remain partial, even though she later told the court she could be fair.

The State contends that there was no basis to strike the four jurors because they all assured the court they could be fair and impartial. RAB at 67-71. But, just like the juror who should have been stricken for cause in Sayedzada, these jurors' experiences and equivocal statements about their ability to be fair cast doubt on their subsequent assurances of impartiality. Although Posin had an opportunity to question each of these jurors about their biases, he failed to do so and ultimately passed them all for cause. (IV:833-867). All four ended up on the jury. (I:170). Because there is "no reason or motive for counsel's actions which would be consistent with a

modicum of effective advocacy," the Court should find Posin ineffective on direct appeal for failing to follow up with these jurors and challenge them for cause. Mazzan, 100 Nev. at 80, 675 P.2d at 413. The Court may also consider the empaneling of biased jurors as evidence of cumulative error. See AOB at p. 71.

VIII. Violation of Brass's right to a public trial.

The court violated Brass's right to a public trial when it excluded Brass's family members from the courtroom while A.W., V.M., and R.M. testified without satisfying the four-part test set forth in Waller v. Georgia, 467 U.S. 39, 48 (1984), as adopted by this Court in Feazell v. State, 111 Nev. 1446, 1448, 906 P.2d 727, 728 (1995).

Relying on a federal habeas case from the Second Circuit, the State contends that Waller's procedural requirements only "apply when judges close their courtrooms *over a defendant's objection.*" RAB at 73 (emphasis in original). Yet, the State's argument is inconsistent with subsequent decisions issued by the United States Supreme Court and the Nevada Supreme Court.

In Presley v. Georgia, 558 U.S. 209, 214-15 (2010), the United States Supreme Court explained that "trial courts are required to consider

alternatives to closure even when they are not offered by the parties." As the Supreme Court explained,

> The public has a right to be present whether or not any party has asserted the right. In *Press–Enterprise I,* for instance, neither the defendant nor the prosecution requested an open courtroom during juror *voir dire* proceedings; in fact, both specifically argued in favor of keeping the transcript of the proceedings confidential. *Id.,* at 503–504, 104 S.Ct. 819. The Court, nonetheless, found it was error to close the courtroom. *Id.,* at 513, 104 S.Ct. 819.

Presley, 558 U.S. at 214–15. A district court's independent obligation to consider the Waller factors does not turn on the presence or absence of a contemporaneous objection by the defense.

Additionally, this Court's holding in Feazell is broader than that of Waller. Although there is no indication that Feazell *ever* objected to the courtroom closure, this Court held that the four-part Waller test applies in all cases involving courtroom closures:

> Thus, *before a trial court can exclude the public from trial proceedings, the following requirements must be met*: (1) "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced"; (2) "the closure must be no broader than necessary to protect [the overriding] interest"; (3) "the trial court must consider reasonable alternatives to closing the proceeding"; and (4) "the trial court must make findings adequate to support the closure."

Feazell, 111 Nev. at 1448, 906 P.2d at 729 (quoting Waller, 467 U.S. at 48) (emphasis added).

Finally, in Jeremias v. State, 134 Nev. 46, 412 P.3d 43 (2018), this Court relied on Pressley and agreed that district courts have an independent obligation to consider alternatives to a courtroom closure, even when a defendant fails to object. This Court "assume[d] that Jeremias satisfie[d] the first two prongs [of the plain error test] by demonstrating that the district court closed the courtroom to members of the public (his family) for an inadequate reason (courtroom congestion) without balancing other interests or exploring reasonable alternatives." 134 Nev. at 50, 412 P.3d at 48-49. But because Jeremias failed to object to the closure, this Court explained that Jeremias's entitlement to relief "turns on whether he can satisfy the third prong [of the plain error test]: that the error affected his substantial rights." Id. at 50, 412 P.3d at 49.

As in Jeremias, the district court did not consider alternatives to the partial closure of the courtroom, nor did it make any findings adequate to support the closure. But Posin failed to object to the closure in this case. So, as in Jeremias, Brass's entitlement to relief depends on whether he can show that the court's error "affected his substantial rights." Id.

Citing U.S. v. Sherlock, 962 F.2d 1349, 1352 (9th Cir. 1992), the State contends that there was a "substantial reason" to close the courtroom to Brass's family, namely that "[a]ll three victims were testifying to sensitive

and traumatic sexual traumas—a subject the Ninth Circuit has already deemed as a substantial reason to close a courtroom." RAB at 74. But that was not the reason given by the State for the closure. The *actual* reason given by the State was witness intimidation—the minor victims alleged that Brass's family members had been "staring at them and taking pictures of them" at the preliminary hearing years earlier, and "were taking pictures of them today, this morning" as well. (IV:897-98). Posin disputed these allegations, and Brass's family members (one of whom was a school teacher) explained to the court that the allegations were untrue. (IV:898-90). The prosecutor had no recollection of this happening at the preliminary hearing. (IV:897). And the court acknowledged, "I can't rule or make a finding about any witness intimidation." (IV:899-90). As such, the court's findings did not support the closure order in this case. Cf. Sherlock, 962 F.2d at 1359 (closure appropriate after "court found that some of the defendants' family members peered and giggled at the witnesses and that their presence during Bennally's testimony would cause her trauma and embarrassment.").

Brass concedes that plain error review applies and that under Jeremias, this Court is unlikely to find that the error, in and of itself, affected his substantial rights. *However*, this Court may still consider the error when it evaluates cumulative error and Posin's ineffectiveness for failing to object

to the closure. See AOB at 69-71. In a case where the credibility of the minor witnesses was central to Brass's defense, the exclusion of Brass's family members from the trial may well have made it easier for those witnesses to fabricate. See Coy v. Iowa, 487 U.S. 1012, 1019 (1988) ("It is always more difficult to tell a lie about a person 'to his face' than behind his back.").

IX. Violation of Brass's Confrontation Clause rights in connection with Sandra Cetl's testimony and SNCAC exam documentation.

The State relies on Rule 4 of Supreme Court Rules Part IX-A(B) to argue that it was permissible for Sandra Cetl to appear remotely because *Posin* failed to oppose the State's motion in October 2018. RAB at 80-82. But Rule 4 requires that *either* "the defendant expressly consents to the use of simultaneous audiovisual transmission" *or* the "court makes an individualized determination, based on clear and convincing evidence, that the use of simultaneous audiovisual transmission equipment for a particular witness is necessary." The district court did not comply with Rule 4 because it never canvassed Brass to determine if *he* expressly consented to the waiver, nor did the court make an individualized determination that the procedure was necessary in this case.

In State v. Thomas, 376 P.3d 184 (N.M. 2016), the New Mexico Supreme Court addressed a nearly identical situation and found a Confrontation Clause violation where the district court allowed a forensic analyst who moved out of state to testify by two-way video without canvassing the defendant to determine if he consented to the procedure, and without determining under Maryland v. Craig that the procedure was necessary to further an important public policy. Although the attorney in Thomas eventually objected, allowing the error to be evaluated for harmlessness, the case is significant because it shows that a constitutional error did, in fact, occur in this case, and that Posin allowed it to happen.

The court also erred by permitting Dr. Cetl to testify about the contents of the SNCAC paperwork prepared by SANE nurse Alexis Pierce, and by admitting that paperwork into evidence. Because SANE nurses are tasked with gathering evidence of a crime, statements made *to* SANE nurses, and statements made *by* SANE nurses while conducting their investigations are testimonial, and those statements may not be introduced at trial unless the declarant testifies, or the defendant had a prior opportunity to cross-examine the declarant about the statement in question. See AOB at 62 (citing Medina v. State, 122 Nev. 346, 353, 143 P.3d 471, 476 (2005) and Crawford v. Washington, 541 U.S. 36, 51 (2004)). This rule also applies to documents

prepared by SANE nurses during police investigations. Bullcoming v. New Mexico, 564 U.S. 647, 664 (2011). The SNCAC paperwork indicated that VM.'s and R.M.'s exams were conducted by Alexis Pierce at the request of the Henderson Police Department. (VIII:1612,1621). Because Pierce did not testify and was not previously subject to cross-examination, it was error to admit evidence of her reports and conclusions at trial.

The State argues that "Brass has failed to point either this Court or the State to any specific testimonial statement Dr. Cetl testified to or any testimonial statement contained in the SNCAC report admitted to the jury." RAB at 77. However, *everything* Pierce wrote in her SNCAC reports was testimonial hearsay, regardless of whether Dr. Cetl later reviewed and signed off on them. See AOB at 63. And as explained in his Opening Brief, the reports were damaging because they contained Pierce's findings of "probable abuse." AOB at 64. But even if the Court does not find these errors, alone, caused "actual prejudice or a miscarriage of justice," the Court may consider them in evaluating cumulative error and ineffective assistance of counsel. See AOB at 69-71.

X. Prosecutorial Misconduct.

The State engaged in misconduct during its closing and rebuttal by making generic tailoring arguments in violation of Brass's rights to appear

and defend in person under Article I, Section 8 of the Nevada Constitution. (VII:1539,1574). See, e.g., Woodstone v. State, 2019 WL 959244, 435 P.3d 657 (Nev. February 22, 2019) (unpublished); Ortiz v. State, 2021 WL 1085375, 482 P.3d 1207 (Nev. March 19, 2021) (unpublished) (J., Stiglich concurring). Without specific evidence of fabrication, the State told the jury (both orally and on a PowerPoint slide) that Brass's credibility was suspect because he "had the chance to sit through everyone's testimony." (VII:1539;IX:1919). The State reiterated the generic claim in its rebuttal. (VII:1574). And where the State concedes that it "never accused Brass of fabricating evidence during cross-examination," (RAB at 89) the arguments it made in closing were necessarily generic.

The State also engaged in misconduct when, on redirect, it asked Brass whether "both Kim and [V.M.] are lying" (VII:1496) where Brass did not directly challenge their veracity during his direct examination. (VII:1465-85) See Daniel v. State, 119 Nev. 498, 519, 78 P.3d 890, 904 (2003). Even if the Court does not find these errors, alone, caused "actual prejudice or a miscarriage of justice," the Court may consider them in evaluating cumulative error and ineffective assistance of counsel. See AOB at 69-71.

XI. Remaining Claims.

Brass is satisfied that his Opening Brief adequately addresses all remaining claims and he incorporates those arguments herein.

CONCLUSION

For all the foregoing reasons, Brass's convictions must be vacated and his case remanded to the district court for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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DATED this 10th day of August, 2021.

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