IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Jul 19 2021 10:33 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

MELVYN PERRY SPROWSON, JR.,
Appellant(s),

vs.

THE STATE OF NEVADA,
Respondent(s),

Case No: A-21-829115-W

Docket No: 83060

RECORD ON APPEAL

ATTORNEY FOR APPELLANT
MELVYN SPROWSON, JR. #1180740,
PROPER PERSON
1200 PRISON RD.
LOVELOCK, NV 89419

ATTORNEY FOR RESPONDENT
STEVEN B. WOLFSON,
DISTRICT ATTORNEY
200 LEWIS AVE.
LAS VEGAS, NV 89155-2212

A-21-829115-W **Melvyn Sprowson, Jr., Plaintiff(s)**
vs.
Garrett, Warden, Defendant(s)

I N D E X

Melvyn Sprowson, Jr.
Inmate Name
Prison No. 1180740
Lovelock Correctional Center
~~Ely, Nevada 89301~~ 1200 Prison RD.
Lovelock, NV. 89419
In Propria Persona

FILED
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CLERK OF COURT

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DA

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

Melvyn Sprowson, Jr.
Petitioner,
v.
Garrett, Warden
Respondent.

Case No. C-14-295158-1
Dept. No. XXIII

Date of Hearing: _____
Time of Hearing: _____
(Not a Death Penalty Case)

A-21-829115-W
Dept. 24

PETITION FOR WRIT OF HABEAS CORPUS
(POST-CONVICTION) (NON DEATH)

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the department of corrections, name the warden or head of the

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institution. If you are not in a specific institution of the department but within its custody, name the director of the department of corrections.

(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) When the petition is fully completed, the original and copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the attorney general's office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: Lovelock Correctional Center

2. Name and location of court which entered the judgment of conviction under attack: 8th Judicial District Court, Las Vegas, NV.

3. Date of judgment of conviction: 7/5/2017

4. Case Number: C-14-295-158-1

5. (a) Length of sentence: 5-Life, 5-life

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes___ No ✓

If "yes", list crime, case number and sentence being served at this time: N/A

7. Nature of offense involved in conviction being challenged: First Degree Kidnapping and Unlawful use of a Minor in the Production of Pornography.

8. What was your plea? (check one)

(a) Not guilty ✓ (c) Guilty but mentally ill ___

(b) Guilty ___ (d) Nolo contendere ___

9. If you entered a plea of guilty to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty was negotiated, give details: N/A

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury ✓

(b) Judge without a jury ___

11. Did you testify at the trial? Yes ✓ No ___

12. Did you appeal from the judgment of conviction?

Yes ✓ No ___

13. If you did appeal, answer the following:

(a) Name of court: Nevada Supreme Court

(b) Case number or citation: 73674

(c) Result: Remand in Part, Affirm in Part

(d) Date of result: 7/1/2019

(Attach copy of order or decision, if available)

14. If you did not appeal, explain briefly why you did not:

N/A

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes ✓ No ___

16. If your answer to No. 15 was "yes," give the following information:

(a) (1) Name of court: United States Supreme Court

(2) Nature of proceeding: Writ of Certiorari

(3) Grounds raised: Unlawful use of a Minor in the Production of Pornography statue is Unconstitutional.

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ___ No ✓

(5) Result: Denied Case # 19-6100

(6) Date of result: 1/13/2020

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: N/A

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: N/A

(2) Nature of proceeding: N/A

(3) Grounds raised: N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ___ No ✓

(5) Result: N/A

(6) Date of result: N/A

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: N/A

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion?

Yes ___ No ✓

(2) Second petition, application or motion?

Yes ___ No ✓

(3) Third or subsequent petitions, applications or motions?

Yes ___ No ✓

Citation or date of decision.

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length)

N/A

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? If so, identify:

(a) Which of the grounds is the same: None

(b) The proceedings in which these grounds were raised:

N/A

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

N/A

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

N/A

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) NO

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ___ No ✓

If yes, state what court and the case number: N/A

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Deborah Westbrook (Direct Appeal).

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack:

Yes ___ No ✓

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) Ground one: See Attachment 1

Supporting FACTS (Tell your story briefly without citing cases or law): See Attachment 1

(b) Ground two: See Attachment 2

Supporting FACTS (Tell your story briefly without citing cases or law): See Attachment 2

(c) Ground three: See Attachment 3

Supporting FACTS (Tell your story briefly without citing cases or law): See Attachment 3

(d) Ground four: N/A

Supporting FACTS (Tell your story briefly without citing cases or law): _____

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WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

EXECUTED at Lovelock Correctional Center on the 7th day of January, 2021.

Signature of Petitioner

120 Prison RD. Lovelock, NV. 89419
Address

Signature of Attorney (if any)
Attorney for Petitioner
Address

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

Petitioner

Attorney for Petitioner

CERTIFICATE OF SERVICE BY MAIL

I, Melvyn Sprowson, hereby certify pursuant to N.R.C.P. 5(b), that on this 7th day of January, 2021, I mailed a true and correct copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS** addressed to:

[Respondent prison or jail official]
[Address]
Warden Garrett

[District Attorney of County of Conviction]
[Address]
Office of District Attorney
200 Lewis Ave.
P.O. Box 552212
Las Vegas, NV
89155

Signature of Petitioner

Erica F. Berrett
Deputy Attorney General
555 E. Washington Ave.
Suite 3900
Las Vegas, NV. 89101

Attachment One pg. 1 of 5

Ground One: Appellate Counsel was ineffective for (a) Failing to challenge the First-Degree Kidnapping conviction due to the improper Child Abuse conviction, or alternatively for (b) Failing to ask that the First-Degree Kidnapping Conviction be vacated on remand to the trial court, thereby violating Sprowson's Fifth, Sixth, and Fourteenth Amendment rights.

Facts: Mr. Sprowson was deprived of his right to the effective assistance of counsel because direct appellate counsel failed to challenge on direct appeal the First-Degree Kidnapping conviction due to the improper child abuse conviction or, alternatively, by failing to do so on remand to the trial court. Appellate counsel's failure to challenge the Kidnapping conviction was unreasonable given the State's heavy reliance on the child abuse theory to establish the Kidnapping charge, and the fact the jury received a general, and not special, verdict form.

The second amended criminal information charged Sprowson with First-Degree Kidnapping stating that Sprowson took J.T. to perpetrate an unlawful act. 12/13/2013 Second Amended Criminal Information. It specifically alleged that the unlawful act was the predicate offense of either child abuse with with substantial mental harm, a felony,

and/or contributing to the delinquency of a minor, a misdemeanor. The State charged Sprowson with both crimes in Las Vegas Justice Court. Id. After Sprowson was bound over to the District Court, the State filed a new information in which it removed the misdemeanor charge of Contributing to the delinquency of a minor. See 1/10/2014 Bindover, 1/13/2014 Information.

At trial, the State heavily focused on the mental and emotional harms J.T. suffered after running off with Sprowson, largely focusing on how this harm showed that Sprowson was guilty of the child abuse charge, and that the resulting child abuse was a predicate offense for First-Degree Kidnapping. The relevant instruction to the jury on First-Degree Kidnapping stated:

> Every person who leads, takes, entices, or carries away or detains any minor with the intent to keep, imprison, or confine him or her from his or her parents, guardians, or any other person having lawful custody of the minor, or PERPETRATE UPON THE PERSON OF THE MINOR AN UNLAWFUL ACT is guilty of Kidnapping in the First Degree.

3/31/2017 Jury Instruction No. 7 (emphasis added). In other words, this instruction required the jury to find that the State had proven beyond a reasonable doubt that Sprowson had the specific intent either (1) to keep J.T. from her mother permanently or for a protracted period of time; or that Sprowson lead or carried J.T. away with the specific intent to perpetuate an unlawful

act against J.T. through (2) child abuse with Substantial bodily harm and/or (3) contributing to the delinquency of a minor. 3/30/2017 Trial Tr. at 14-15, 25, 36-37. Because the Jury was not required to assess Sprowson's guilt on the delinquency of a minor charge, the State provided a jury instruction identifying the elements of the crime. 3/31/2017 Jury Instruction No. 12. The Jury instructions also included an instruction that the Jury "need not be unanimous on the means or the theory of First-Degree Kidnapping in arriving" at the verdict. 3/31/2017 Jury Instruction No. 9. Moreover, the verdict form was a general verdict form and thereby failed to indicate the theory or theories that the Jurors relied upon to reach a guilty Verdict on the First-Degree Kidnapping Charge. 3/31/2017 Verdict.

At trial, the State introduced evidence regarding the purported repercussions of J.T. running away with Sprowson on her mental well-being and then relied upon this theory to support the First-Degree Kidnapping Charge. See Trial Tr. 3/30/2017 at 37-44. The State put on an expert to testify regarding J.T.'s subsequent mental health treatment, Dr. Bryn Rodriguez, an internal medicine and pediatric physician who performed the initial medical evaluation of J.T. upon her initial admission to Montevista Hospital on 11/2/2013, and again when J.T. was readmitted on 11/16/2013 3/30/2015 Tr. at 62-66. The State also questioned J.T's mother about the changes she saw in her daughter after she came back from staying with Sprowson. Similarly, the State commented in closing on the visceral reactions that the victim had during trial when being questioned by Sprowson. See 3/30/2017 Trial Tr. at 115-116. The State relied heavily upon this evidence of extreme emotional damage to the victim after her time living with Sprowson, where

he was manipulative and emotionally abusive. The Nevada Supreme Court indicated as such in its decision overturning the child abuse conviction. The Court stated in relevant part:

> "the district court precluded Sprowson from cross-examining the victim's doctor about the victim's past psychological damage after the doctor testified that only 5 to 10 percent of her patients require the type of long-term care that the victim required after her interaction with Sprowson. Further, the district court precluded Sprowson from impeaching the victim and her mother with medical documentation indicating that the victim's relationship with her 19-year-old boyfriend contributed to the victim's mental health issues subsequent to her interaction with Sprowson.... Indeed, the State's closing argument characterized the victim as a normal teenager with no issues until Sprowson came along and that he, alone, was responsible for any mental harm she suffered. To assess the victim's 'normal range of performance or behavior,' the jury needed to know why the victim was in counseling, not that she was in counseling.

7/01/2019 Nevada Supreme Court Order Affirming in part, Reversing in Part, and Remanding. Accordingly, the Nevada Supreme Court overturned the child abuse conviction.

However, counsel failed to ask for all the appropriate relief on appeal. On direct appeal, counsel should have asked that the Kidnapping conviction be vacated as the error with respect to the child abuse count undermined the validity of the Kidnapping conviction. Child abuse constituted a predicate offense under the First-Degree Kidnapping Count. Thus,

the child abuse conviction had a direct impact on the Kidnapping conviction and resulted in constitutional harm to Sprowson. Appellate counsel's failure to raise this claim was unreasonable in light of the state's heavy reliance on the child abuse theory of liability for First-Degree Kidnapping and the jury's return of a general verdict form, in which it convicted on the child abuse charge. For these reasons, that conviction should have also been vacated. Accordingly, there is a reasonable probability that, had counsel sought this relief, the outcome of the appeal would have been different.

Counsel had an additional opportunity to seek this relief yet failed to do so. On remand, after the amended judgment of conviction issued on 2/19/2020, appellate counsel, who continued her representation after remand, failed to ask that the Kidnapping conviction be vacated. If that request had been denied by the trial court, she would have had the opportunity to file another direct appeal challenging the First-Degree Kidnapping charge after the amended judgment was entered. For the same reasons as discussed above, this deficient performance was prejudicial. If the request had been made, in the trial court, and, if necessary, on appeal, there is a reasonable probability the Kidnapping conviction would have been vacated.

Ground TWO: Appellate counsel was Ineffective for failing to raise a claim of prosecutorial misconduct based on the state's Knowing use of false or misleading testimony, thereby violating Sprowson's fifth, sixth, and fourteenth amendment rights.

Facts: Mr. Sprowson was deprived of his right to the effective assistance of counsel because direct appellate counsel failed to raise a claim of prosecutorial misconduct for permitting Key witnesses to provide misleading testimony to the jury. Specifically, both the victim and her mother provided testimony tailored by the State about their mother-daughter relationship, the victim's relationship with Sprowson, as well as the victim's behaviors before, during, and after J.T. lived with Sprowson. In doing so, the prosecution permitted these witnesses to give misleading testimony about the nature of the victim's relationship with her mother, of her relationship with Sprowson, and of the victim's history of meeting older men on the internet and running away with them.

During opening statements, the State noted that the victim informed Sprowson they needed to keep their conversations private because she had a very protective mother who would not approve of her messaging an older man online. 3/24/17 Tr. 34-35. She also noted that her mother regularly checked her text messages. Sprowson testified that J.T.'s mother withheld her phone and laptop from her for roughly two years. CITE. Yet, no background was given to the jury on this issue despite copious medical

records indicating J.T. had a documented history of meeting much older men online and running off with them, all prior to her relationship with Sprowson. See Exhibits (Medical Records). The State requested and filed all medical records from J.T.'s pyschological and psychiatric treatment before and after the incident under seal with the court, but none of these documents were introduced at trial. See 7/14/2015 Receipt of Copy of Protected Information and Records from Montevista Hospital, Willow Springs Center, Hope Counseling, Desert Behavioral Health, Doctor Robin Donaldson, and Doctor Eugene Ransenman.

While the State questioned the victim and her mother about the fact that J.T. had attended therapy for some years prior to her relationship with Sprowson, the State tailored its questioning of these two witnesses to preclude mention of evidence excluded by the Court's prior ruling - regarding the prior incident with David Schlomann - and to paint a misleading picture of the victim as a relatively normal girl with some anxiety issues, who fought with her mother over seemingly mundane things, and who was fundamentally altered as a result of Sprowson. See 3/30/2017 Trial Tr. at 19 (stating in its closing argument that the relationship between J.T. and her mother was normal and became frought after she met Sprowson).

On the stand, when asked whether J.T. had any issues with her mother prior to running off with Sprowson, she stated that they were "Normal issues" such as not keeping her room clean or "staying out late". 3/24/2017 Tr. at 99-101. Similarly, the victim's mother, Kathryn Smith, indicated that she

and J.T. had a relatively normal relationship and that J.T. had only run away once before. See 3/24/2017 Tr. at 33-34, 48, 68, 82. Yet, progress notes from therapy sessions received by the victim indicated that J.T. had run away on at least three occasions, all with older men, and that on one occasion she had left for approximately three days. Other medical records noted that J.T. had run away with an older man for two to three weeks. These records also showed that the victim had witnessed domestic abuse perpetrated by her biological father against her mother and that her mother and her had lived in homeless shelters at various times. This testimony, which the State let go uncorrected, clearly went to the credibility of both witnesses, making relevant the victim's testimony that she wanted to return home at various points but Sprowson emotionally manipulated her to stay. Moreover, Sprowson attempted to testify about this pattern of behavior of running away from her mother but was precluded from doing so by the Court, thereby limiting his ability to provide an adequate defense to the State's alternate theory that he had the specific intent to keep her from her mother for a protracted period of time.

In addition, the State elicited misleading testimony that it then failed to correct about J.T.'s second visit to Montevista, which clearly misled the jury into thinking that J.T. attempted to harm herself because of her mother's disapproval of Sprowson.

State: What were your thoughts during that process there?

J.T.: Just everything was him. Like I just had to get back to him.
State: Could you get him out of your head?
J.T.: NO
State: So when you got home [from your first visit to Montevista], are you still-like you're going with that plan?
J.T.: Yes.
State: Can you explain how that happened?
J.T.: When me and my mom got on an argument on the stairs and she wouldn't let me out of the house, so I was going to jump over the balcony to get out [if] the house.
State: Did you talk-like when you were threatening her, did you threaten like you were going to kill yourself if you couldn't be with him?
J.T.: Yes.

3/23/2017 Tr. at 179-180. The testimony manifestly indicates that the mother's refusal to let J.T. be with Sprowson caused her to threaten suicide. Similarly, J.T.'s mother stated at trial that the attempted suicide incident arose because J.T. couldn't be with Sprowson. See 3/24/2017 Trial Tr. at 71-72. Yet, the treating psychiatrist at Montevista, Dr. Emmanuel Nwapa, stated in a letter to the court, dated 11/21/2013, that J.T. tried to jump off a balcony because she was having an argument with her mother in regards to a 19-year-old boy friend. See 7/14/2015 Receipt of Copy of Protected Information and Records from Montevista Hospital, Willow Springs Center,

Hope Counseling, Desert Behavioral Health, Doctor Robin Donaldson, and Doctor Eugene Ronsenman.

The State misrepresented the facts at trial by permitting key witnesses to testify misleadingly; in doing so, the State hindered the jury from accurately assessing the credibility of these witnesses or the specific intent of Sprowson in living with J.T., both of which were material to the jury's verdict. Appellate Counsel was objectively unreasonable in not raising this claim on direct appeal— it was patently a winning claim. If Counsel had not performed deficiently and had raised this claim on direct appeal, there is a reasonable probability that the outcome of the direct appeal would have been different.

Ground Three: Appellate Counsel was ineffective for failing to challenge the constitutionality of the use of a child in the production of pornography, Conviction on the basis that "Encourage," "Entice," and "Permit" are unconstitutionally overbroad and vague, thereby violating Sprowson's first, fifth, Sixth, and fourteenth amendments rights.

Facts: Mr. Sprowson's right to the effective assistance of Counsel was violated when direct appellate counsel failed to raise a claim that Nevada's statute criminalizing the use of a minor in the production of a pornographic performance is unconstitutionally overbroad and vague based on the terms "encourage," "entice", and "permit," and thereby failed to provide constitutionally adequate notice of what conduct is prohibited by statute.

The State charged Sprowson with four counts of using a minor in the production of child pornography in violation of NRS § 200.710 based on photographs, taken on four separate occasions, J.T. had taken of herself and sent to Sprowson, her then boyfriend.

The statute states:

1. A person who knowingly uses, encourages, entices, or permits a minor to simulate or engage in or assist others to simulate or engage in sexual

Conduct to produce a performance is guilty of a felony.

2. A person who knowingly uses, encourages, entices, coerces or permits a minor to be the subject of a sexual portrayal in a performance is guilty ... regardless of whether the minor is aware that the sexual portrayal is part of a performance.

NRS § 200.710. Based on the evidence at trial, it is clear the State was asking the jury to conclude that Sprowson either encouraged, enticed, or permitted J.T. to produce these photographs as there was no evidence at trial that Sprowson "used" J.T. - he was not physically present when she took the photographs and there is no evidence he distributed these photos. See 3/30/2017 at 50. Accordingly, appellate counsel should have challenged the statute's use of "encourage" and "permit" on due process grounds. as these terms are both vague and overbroad.

Because this claim was obvious, appellate counsel should have raised it on direct appeal. Had this claim been raised, there is a reasonable probability the outcome of the appeal would have been different.

Melvyn P. Sprowson # 1180740
Lovelock Correctional Center
1200 Prison RD.
Lovelock, NV
89419

Lovelock Correctional Center

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CLERK OF THE DISTRICT COURT
200 Lewis Avenue, 3rd Fl.
Las Vegas, NV 89155

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DISTRICT COURT
CLARK COUNTY, NEVADA

Melvyn Sprowson, Jr.,

Petitioner,

vs.

Garrett, Warden,

Respondent,

Case No: A-21-829115-W
Department 24

ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS

Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction Relief) on February 09, 2021. The Court has reviewed the Petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore,

IT IS HEREBY ORDERED that Respondent shall, within 45 days after the date of this Order, answer or otherwise respond to the Petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive.

IT IS HEREBY FURTHER ORDERED that this matter shall be placed on this Court's Calendar on the 5th day of April, 20 21, at the hour of 8:30 o'clock for further proceedings.

Dated this 9th day of February, 2021

6F9 FBD A639 876E
Erika Ballou
District Court Judge

District Court Judge
Erika Ballou
District Court Judge

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Melvyn Sprowson, Jr., Plaintiff(s) vs. Garrett, Warden, Defendant(s)	CASE NO: A-21-829115-W DEPT. NO. Department 24

AUTOMATED CERTIFICATE OF SERVICE

Electronic service was attempted through the Eighth Judicial District Court's electronic filing system, but there were no registered users on the case.

If indicated below, a copy of the above mentioned filings were also served by mail via United States Postal Service, postage prepaid, to the parties listed below at their last known addresses on 2/10/2021

Melvyn Sprowson	#1180740 LCC 1200 Prison Road Lovelock, NV, 89419

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Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA
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MELVYN SPROWSON, JR, PLAINTIFF(S) vs GARRETT, WARDEN, DEFENDANT (S)	Case No.: A-21-829115-W Department 24

NOTICE OF HEARING FOR PETITION FOR WRIT OF HABEAS CORPUS

PLEASE TAKE NOTICE that this matter is set before the **HONORABLE ERIKA BALLOU**, for **PETITION FOR WRIT OF HABEAS CORPUS** on **April 5th, 2021**, at the hour of 08:30 a.m., in District Court Department 24 in the Regional Justice Center, 200 Lewis Avenue, 12C Floor, Courtroom C, Las Vegas, Nevada. Your presence is required.

HONORABLE ERIKA BALLOU

/s/ Chapri Wright

By: Chapri Wright
Judicial Executive Assistant

ERIKA BALLOU
DISTRICT JUDGE
DEPARTMENT 24
LAS VEGAS, NV 89101

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CLERK OF THE COURT

OPWH

DISTRICT COURT

CLARK COUNTY, NEVADA

MELVYN SPROWSON, Plaintiff(s) vs. GARRETT WARDEN, Defendant(s)	Case No.: A-21-829115-W Department XXIV

ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS

Petition filed for Writ of Habeas Corpus (Post-Conviction Relief) on February 9, 2021. The Court has review the Petition and has determined that a response would assist the Court in determining whether the Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore.

IT IS HEREBY ORDERED that Respondent shall, within 45 days after the date of this Order, answer or otherwise respond to the Petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive.

IT IS HEREBY FURTHER ORDERED that this matter shall be placed on this Court's Calendar on May 24 2021, in chambers in District Court Department XXIV.

Dated this 19th day of March, 2021

F9B 759 D5E4 80DE
Erika Ballou
District Court Judge

ERIKA BALLOU
DISTRICT COURT JUDGE
DEPT XXIV
LAS VEGAS, NV 89155

CERTIFICATE OF SERVICE

The Undersigned hereby certifies that on the date of the filing, a copy of this Order was electronically served through the Eighth Judicial District Court EFP system or, if no e-mail was provided, by facsimile, U.S. Mail and/or placed in the Clerk's Office attorney folder(s) for:

Clark County DA's Office
Appellate Division
200 Lewis Avenue
Las Vegas, Nevada 89101

Chapri Wright
Judicial Executive Assistant

ERIKA BALLOU
DISTRICT COURT JUDGE
DEPT XXIV
LAS VEGAS, NV 89155

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Melvyn Sprowson, Jr., Plaintiff(s) vs. Garrett, Warden, Defendant(s)	CASE NO: A-21-829115-W DEPT. NO. Department 24

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order for Petition for Writ of Habeas Corpus was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 3/19/2021

D A	motions@clarkcountyda.com
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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

MELVYN SPROWSON, #5996049

Defendant.

CASE NO: **A-21-829115-W**
(C-14-295158-1)

DEPT NO: **XXIV**

STATE'S RESPONSE TO DEFENDANT'S PETITION FOR POST-CONVICTION WRIT OF HABEAS CORPUS

DATE OF HEARING: **MAY 24, 2021**
TIME OF HEARING: **8:30 AM**

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through KAREN MISHLER, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in this State's Response to Defendant's Petition for Post-Conviction Writ of Habeas Corpus.

This Response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On January 13, 2014, Petitioner Melvyn Sprowson ("Petitioner") was charged with Count 1 – First Degree Kidnapping (Category A Felony – NRS 200.310, 200.320); Count 2 – Child Abuse, Neglect, or Endangerment with Substantial Bodily and/or Mental Harm (Category B Felony – NRS 200.501(1)); and Counts 3 through 6 – Unlawful Use of a Minor in the Production of Pornography (Category A Felony – NRS 200.700, 200.710(A)(B), 200.750).

On March 22, 2017, Petitioner's jury trial began. On March 31, 2017, the jury found Petitioner guilty of all counts.

On June 26, 2017, the district court sentenced Petitioner to Count 1 – five years to life; Count 2 – 30 to 96 months, to run consecutive to Count 1; Count 3 - five years to life, to run consecutive to Count 2; Count 4 - five years to life, to run concurrently to Count 3; Count 5 – five years to life, to run concurrently to Count 4; and Count 6 – five years to life, to run concurrently to Count 5. Petitioner's Judgment of Conviction was filed on July 5, 2017.

On July 1, 2019, the Nevada Supreme Court issued an Order Affirming in Part, Reversing in Part, and Remanding. Specifically, the Court reversed Petitioner's conviction for Count 2 – Child Abuse, Neglect, or Endangerment with Substantial Bodily and/or Mental Harm and ordered a new trial on that count only. Remittitur issued on January 17, 2020.

On February 12, 2020, the State agreed to strike Count 2 and run Count 3 consecutive to Count 1. An Amended Judgment of Conviction was filed on February 19, 2020.

On February 9, 2021, Petitioner filed the instant Petition for Writ of Habeas Corpus (Post-Conviction) (Non Death). The State responds as follows.

STATEMENT OF FACTS

In 2013, 16-year-old J.T. lived with her mom, grandmother and two sisters. In August of 2013, J.T. met Petitioner on Craigslist after he posted an ad that said, "Lonely millionaire" and provided a fake age of 34. J.T. told Petitioner she was 16 and that her mother could not know they were talking. Petitioner was a kindergarten teacher.

At first, J.T. and Petitioner communicated through Craigslist e-mail, where they exchanged photos. Later, they communicated through Kik, a texting application, because it was easier than e-mailing and J.T.'s mother could not see the messages like she could with traditional texting. Eventually Petitioner asked her to be his girlfriend and she said yes. After, Petitioner asked J.T. for "sexy pictures" and she sent them. Petitioner did not think they were sexy enough, so he told J.T. to pose in different positions. Specifically, J.T. testified that she did not think of taking her clothes off, but Petitioner told her to. Petitioner also asked for pictures of her butt, her crotch, and partly nude photos. When asking for one of the crotch photos, Petitioner specifically told J.T. to "spread [her] legs."

After they began talking, Petitioner secretly went to J.T.'s work. After he left, he texted her and to tell her he had been there and described what she was wearing. Eventually, J.T. met Petitioner at a roller-skating rink. J.T. was there with a friend, and told her friend that Petitioner was one of her old teachers. At the roller rink the two had a short conversation and then Appellant left.

At that point, J.T. still did not know that Appellant was really 44 instead of 34. She did not learn his real age until she slept over at his house. J.T. did not tell her mom that she was communicating with Petitioner. J.T. told Petitioner she could not tell her mom because she would not be happy, and J.T. made sure to call Petitioner first if they were going to talk.

The first time J.T. went to Petitioner's house she told her mom that she was staying at a friend's. Petitioner picked J.T. up at Target and took her to his house where J.T. stayed for two nights where they drank alcohol and had sexual intercourse without a condom Petitioner gave J.T. a promise ring that looked like a wedding ring which J.T. wore around her neck so her mom would not see it. When J.T.'s mom saw the ring and asked J.T. about it, J.T. made up multiple lies about where she got it. J.T.'s mom did not believe her and took away J.T.'s phone and computer. When J.T.'s mom looked through J.T.'s phone, she noticed that J.T. had been calling a strange number and grew suspicious. J.T. had her phone on the bus one day and warned Petitioner that her mom was growing wary.

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On August 28, 2013, J.T. told her mom that she needed her laptop for a school project, and e-mailed Petitioner to tell him that they would not be able to talk for a while and they needed to figure something out. They devised a plan where Petitioner would pick J.T. up from home early one morning while J.T.'s mom was asleep. Petitioner told J.T. to bring her social security card and birth certificate, which she did. J.T. also brought her cell phone and laptop. When Petitioner picked her up that morning, he confirmed that she brought the documents, and told her to turn off her cell phone so her family could not track it. Petitioner drove J.T. to his house and when they arrived, Petitioner changed his cell phone number so J.T.'s mom could not track him.

J.T. lived with Petitioner for two months, from August 28, 2013 until November 1, 2013. While Petitioner was at work, J.T. would color or watch television or movies. While J.T. attended school before living with Petitioner, she stopped going when she moved in with him. They planned for J.T. to return to school when she was 17 and a half because they thought she would be old enough to stay with Petitioner then. Petitioner gave J.T. a coloring book and one fiction book, but no educational supplies.

While living with Petitioner, J.T. had ruled to follow. J.T. was allowed to use her laptop but could not touch her phone because her family might find her. J.T. could not to go outside because she could be recognized, and could not have anyone over to the house – especially other males.

Petitioner took J.T. out of the house only a few times: he took her to the lake because she wanted to get outside once; drove her by their home at night without stopping once after she said she missed her family; and went to Walmart at night where Petitioner left J.T. in the car wearing a hat and glasses with her seat reclined back. Indeed, whenever they left the house Petitioner made J.T. wear a hat, glasses, loose clothing, and put her hair up so she would look like a boy.

Although the doors were not locked and J.T. was physically free to leave, she did not feel emotionally free to leave. Approximately two to three times per week Petitioner would get angry and tell J.T. to pack her bags because he was taking her home. Petitioner would then

become sad, cry and ask J.T. to stay, so she did. One of these occasions occurred when J.T. said she missed her family.

Petitioner told J.T. that if they were caught, J.T. would say that she was Petitioner's roommate, but they were not in a sexual relationship. J.T. agreed to the plan. Once, while was living with Petitioner, a private investigator came to the door looking for J.T. Petitioner looked through the peephole, told J.T. to gather her things and hide, and Petitioner spoke with the investigator. J.T. sat on the stairs and heard the investigator tell Petitioner he was looking for J.T. She then heard Petitioner tell the investigator that he did not know what the investigator was talking about. After the investigator left, Petitioner told J.T. they were fine, and the investigator believed Petitioner. Another time, Petitioner came home with a missing-person poster with J.T.'s picture on it. In spite of that, Petitioner told J.T. that her mom was not looking for her and that her mom did not care. On another occasion, Petitioner told J.T. that the police had come to his work looking for her, and that they thought she was a prostitute.

When J.T. lived with Appellant, they were had sex two or three times a week. Petitioner also provided her with alcohol more than one time and on one occasion she got "pretty drunk." Petitioner also got upset about the way J.T. did dishes, told her that her handwriting was bad, and that she could not sing.

On November 1, 2013, the police came to Petitioner's home while J.T. was home alone. J.T. spoke with them but was not entirely honest and tried to stick to the story Petitioner instructed her to tell. The police took J.T. to the Southern Nevada Children's Assessment Center where she spoke with a female police officer and was more forthcoming, but still not completely honest. J.T. was then reunited with her mother, but felt guilty because she did not stick to Petitioner's story and wanted to return to Petitioner's home. When J.T. kept trying to leave her mother's house to go back to Petitioner, a J.T.'s mother took her to Montevista, a behavioral health center where J.T. stayed for three days. Back at her mother's house, all J.T. she could think about was getting back to Petitioner and J.T.'s mother would not let her leave the house. When J.T. threatened to kill herself and tried to jump off the house balcony to get out of the house, and her mom took her back to Montevista where J.T. remained for

approximately a month while waiting for a vacancy at Willow Springs, a long-term treatment facility. While at Willow Springs, J.T. had to learn how to regulate her emotions as well as re-learn how to interact in society. J.T. was at Willow Springs for almost six months and continued seeing therapists after she left. J.T. was still in therapy when she testified at trial.

After leaving Willow Springs J.T. returned to her mother's home. J.T. believed Petitioner and discovered he was not when he began contacting her through Instagram using fake names. J.T. was angry that Petitioner was contacting her and thought he gave her an STD. Although she struggled with the decision, she informed her mother and the police that Petitioner reached out to her.

At trial, J.T. testified that she lied during her cross-examination at the preliminary hearing. J.T. explained that she was honest on direct examination but lied during cross-examination because Petitioner mouthed "I love you," "it's okay," winked at her, and placed his hand over his heart during a break between direct and cross examination. Because of this J.T. felt guilty and decided to tell the version of events Petitioner told her to say when he lived with her in an effort to protect Petitioner.

ARGUMENT

I. THE INSTANT PETITION IS PROCEDURALLY TIME BARRED PURSUANT TO NRS 34.726

A petitioner must raise all grounds for relief in a timely filed first post-conviction Petition for Writ of Habeas Corpus. Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001). A petitioner must challenge the validity of their judgment or sentence within one year from the entry of judgment of conviction or after the Supreme Court issues remittitur pursuant to NRS 34.726(1). This one-year time limit is strictly applied and begins to run from the date the judgment of conviction is filed or remittitur issues from a timely filed direct appeal. Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528 (2001); Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).

Moreover, filing an amended judgment of conviction does not restart the mandatory one-year deadline. The Nevada Supreme Court has explained that:

> [C]onstruing NRS 34.726 to provide such an extended time period would result in an absurdity that the Legislature could not have intended. A judgment of conviction may be amended at *any time* to correct a clerical error or to correct an illegal sentence. Because the district court may amend the judgment many years, even decades, after the entry of the original judgment of conviction, restarting the one-year time period for all purposes every time an amendment occurs would frustrate the purpose and spirit of NRS 34.726. Specifically, it would undermine the doctrine of finality of judgments by allowing petitioners to file post-conviction habeas petitions in perpetuity.

Sullivan v. State, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004).

Instead, unless the claims raised in a post-conviction petition challenge a change made in the amended judgment of conviction, a court must dismiss a petition as procedurally barred if filed more than one year after remittitur or the original judgment of conviction was filed.

"Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory," and "cannot be ignored [by the district court] when properly raised by the State." State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231 & 233, 112 P.3d 1070, 1074–75 (2005). For example, in Gonzales v. State, the Nevada Supreme Court rejected a habeas petition filed two days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the Notice within the one-year time limit. 118 Nev. 590, 596, 53 P.3d 901, 904 (2002). Absent a showing of good cause, district courts have a duty to consider whether claims raised in a petition are procedurally barred, and have no discretion regarding whether to apply the statutory procedural bars. Riker, 121 Nev. at 233, 112 P.3d at 1075.

Here, Petitioner's Judgment of Conviction was filed on July 5, 2017, and remittitur issued on January 17, 2020. While an Amended Judgment of Conviction was filed on February 19, 2020, none of the claims raised in the instant Petition challenge anything pertaining to the change made in the Amended Judgment of Conviction and the clock to timely file a post-conviction petition began to run on January 17, 2020. The instant Petition was filed on February 9, 2021, 23 days past the one-year deadline. As such, absent a showing of good cause, the instant Petition must be denied as procedurally time-barred.

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II. PETITIONER HAS NOT SHOWN GOOD CAUSE TO OVERCOME PROCEDURAL BARS

Courts may consider the merits of procedurally barred petitions only when petitioners establish good cause for the delay in filing and prejudice should the courts not consider the merits. NRS 34.726(1)(a)-(b); NRS 34.810(3). Simply put, good cause is a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). To establish good cause, a petitioner must demonstrate that "an impediment external to the defense prevented their compliance with the applicable procedural rule." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525-26 (2003). Good cause exists if a Petitioner can establish that the factual or legal basis of a claim was not available to him or his counsel within the statutory time frame. Hathaway, 119 Nev. at 252-53, 71 P.3d at 506-07. Once the factual or legal basis becomes known to a petitioner, they must bring the additional claims within a reasonable amount of time after the basis for the good cause arises. See Pellegrini, 117 Nev. at 869-70, 34 P.3d at 525-26 (holding that the time bar in NRS 34.726 applies to successive petitions). A claim that is itself procedurally barred cannot constitute good cause. State v. District Court (Riker), 121 Nev. 225, 235, 112 P.3d 1070, 1077 (2005). See also Edwards v. Carpenter, 529 U.S. 446, 453 120 S. Ct. 1587, 1592 (2000).

Here, Petitioner has failed to establish or even address good cause. Petitioner does not argue that some external impediment justifies the filing of this Petition outside of the one-year time bar, or that he discovered new facts or evidence not available to him within the one-year time limit. As such, the instant Petition must be denied.

III. PETITIONER HAS FAILED TO SHOW PREJUDICE BECAUSE HIS CLAIMS LACK MERIT

To establish prejudice, petitioners must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v.

Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)).

Petitioner claims appellate counsel was ineffective for three reasons. First, Petitioner claims that appellate counsel should have argued that his First-Degree Kidnapping conviction needed to be reversed because he was improperly convicted of Child Abuse, Neglect, or Endangerment. Petition: Attachment One, at 1. Second, Petitioner argues that appellate counsel should have argued that the prosecution engaged in misconduct by eliciting misleading information from J.T. and her mother. Petition: Attachment Two, at 1-5. Third, Petitioner argues that appellate counsel was ineffective for failing to argue that the "encourage," "entice," and "permit" language of NRS 200.710 rendered the statute unconstitutionally overbroad. Petition: Attachment Three, at 1-2. All three of Petitioner's claims fail and Petitioner cannot establish prejudice sufficient to overcome the procedural bars.

The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Claims of ineffective assistance of counsel are analyzed under the two-pronged test articulated in Strickland, 466 U.S. 668, 104 S. Ct. 2052 (1984), wherein the defendant must show: 1) that counsel's performance was deficient, and 2) that the deficient performance prejudiced the defense. Id. at 687, 104 S. Ct. at 2064. Nevada adopted this standard in Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984). "A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one." Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996); Molina v. State, 120 Nev. 185, 190, 87 P.3d 533, 537 (2004).

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371,130 S. Ct. 1473, 1485 (2010). "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. The question is whether an attorney's representations amounted to incompetence under prevailing professional norms, "not whether it deviated from best practices or most common custom."

Harrington v. Richter, 562 U.S. 86, 88, 131 S. Ct. 770, 778 (2011). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449 (1970)).

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011-1012, 103 P.3d 25, 32-33 (2004). Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)). This analysis does not indicate that the court should "second guess reasoned choices between trial tactics, nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711. The role of a court in considering alleged ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Id. In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

The Strickland analysis does not "mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711 (citing Cooper, 551 F.2d at 1166 (9th Cir. 1977)). To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade."

United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984). "Counsel cannot be deemed ineffective for failing to make futile objections, file futile motions, or for failing to make futile arguments." Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Id. at 846, 921 P.2d at 280; see also Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S. Ct. at 2066. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Further, claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part, "[Petitioner] must allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions *may cause your petition to be dismissed.*" (emphasis added).

Even if a petitioner can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice by showing a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The Strickland test also applies to whether appellate counsel can be deemed ineffective. Smith v. Robbins, 528 U.S. 259, 263, 120 S.Ct. 746, 752 (2016). A petitioner must show that his counsel was objectively unreasonable in failing to find and argue arguable issues and that there was a reasonable probability that, but for counsel's failure, the petitioner would have prevailed on appeal. Id. at 286, 120 S.Ct. at 765. Appellate counsel is not ineffective for failing to raise frivolous claims. Jones v. Barnes, 463 U.S. 745, 745, 103 S.Ct. 3308, 3309 (2016). In fact, appellate counsel should not raise every claim, and should instead focus on their strongest ones in order to maximize the possibility of success on appeal. Smith, 528 U.S. at 288, 120 S.Ct. at 766. A finding of ineffective assistance of appellate counsel is generally only found when issues not raised on appeal are clearly stronger than those presented. Id.

A. Petitioner's Attachment One Claim Fails.

Petitioner argues that appellate counsel was ineffective for failing to argue that the First-Degree Kidnapping conviction should be vacated on appeal or, alternatively, for failing to argue before the district court that because the Nevada Supreme Court vacated the Child Abuse, Neglect, or Endangerment Resulting in Substantial Physical/Mental Harm, that the district court should also vacate the First-Degree Kidnapping Conviction. Petition: Attachment One, at 1. Specifically, Petitioner alleges that appellate counsel failed to argue in his direct appeal that Petitioner's First-Degree Kidnapping Conviction should be vacated because the State relied heavily on Petitioner's guilt of child abuse to establish his guilt of kidnapping. Id. Petitioner explains that because the Nevada Supreme Court vacated his conviction for Count 2 – Child Abuse, appellate counsel should have also argued that his conviction for Count 1 – First-Degree Kidnapping should be vacated as child abuse was the only predicate offense by which he could be guilty of first-degree kidnapping. Id. at 2-5. Petitioner's claim fails.

First, Petitioner's claim that appellate counsel was ineffective for failing to argue that his conviction for First-Degree Kidnapping should be vacated is belied by the record. On direct appeal, appellate counsel argued that Petitioner was entitled to an entirely new trial on all counts. Exhibit A at 30. In support of this argument, counsel argued that the district court improperly excluded evidence that was relevant to whether Petitioner enticed J.T. to run away

from her family and whether J.T. suffered substantial physical or mental harm. Id. at 21. Counsel elaborated that Petitioner had a right to tell the jury about what J.T. told him about her past because it negated any claim that Petitioner had the specific intent to kidnap J.T. Id. at 22-23. Counsel further argued that the district court violated Petitioner's confrontation clause rights "by preventing him from impeaching key witness testimony about the essential elements of the charges against him and by preventing him from questioning witnesses on topics the State had already discussed on cross examination." Id. 24. Specifically, counsel argued on direct appeal that, "[a]lthough the State accused Petitioner of kidnapping J.T. by 'enticing' her away from her family [sic], the court would not allow [Petitioner] to ask J.T. if his Craigslist ad was the 'first' such ad she had responded to." Id. Finally, counsel argued that such errors were not harmless because the State argued significantly during closing arguments that Petitioner 'enticed' J.T. into leaving her family. Id. Accordingly, Petitioner's claim that counsel did not argue that his conviction for Count 1 – First-Degree Kidnapping should be vacated is belied by the record.

To the extent Petitioner believes that counsel should have argued that his kidnapping conviction should be vacated because his child abuse conviction should be vacated, such a claim fails as that argument would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. The State did not claim that Petitioner was guilty of First-Degree Kidnapping solely because he enticed J.T. to run away. Instead, the State could have proved Petitioner's guilt by proving beyond a reasonable doubt that Petitioner led, took, carried away, or detained J.T. Information at 2 (filed January 13, 2014). As the jury was not required to be unanimous on which theory of liability Petitioner was guilty of first-degree kidnapping, any argument that his first-degree kidnapping conviction should be vacated because he did not "entice" J.T. would have failed.

Indeed, even if Petitioner could show that J.T. willingly left her home, he could not show that he did not convince her to do so, or that he did not detain her with the intent to keep her from her mother. At trial, J.T. testified that Petitioner specifically instructed her to bring her social security card and birth certificate, picked her up in the early morning while her mother slept, and told her to get in his car. Jury Trial – Day 4, at 142-43 (March 24, 2017). At

that point Petitioner made J.T. turn her phone off so it could not be tracked and changed his phone number so he could also not be located. Id. at 144-45. Petitioner then drove J.T. away from her home to his home where he kept her hidden for approximately nine weeks. Id. During that time he would not let her turn her phone on, have anyone over, did not attend school, took her out of the house only a few times and made her dress in disguise when they did leave. Id. at 147, 149, 154-56. Accordingly, there was substantial evidence that Petitioner led, took, or carried J.T. away, all of which supported his conviction for Count 1 – First-Degree Kidnapping.

Indeed, in reviewing Petitioner's claim on appeal, the Nevada Supreme Court concluded that "the victim's past was relevant to whether [Petitioner] willfully enticed the victim to leave hear mother's home and go to his because it says nothing about the defendant's actions and consent is not a defense to first-degree kidnapping of a person under the age of 18. Order Affirming in Part, Reversing in Part, and Remaining, Docket No. 73674, at 4 (citing NRS 200.350(2); see NRS 48.015 (defining relevant evidence)). Accordingly, appellate counsel cannot be deemed ineffective for failing to make a futile argument.

Further, counsel cannot be deemed ineffective for failing to argue before the district court, after the Nevada Supreme Court's remand of Count 2 – Child Abuse, Neglect, or Endangerment with Substantial Bodily and/or Mental Harm for a new trial, also required vacating Petitioner's conviction for Count 1 – First-Degree Kidnapping. The Nevada Supreme Court had already concluded that Petitioner was properly convicted of Count 1 – First-Degree Kidnapping. This Court cannot overrule the Nevada Supreme Court. NEV. CONST. Art. VI § 6. Accordingly, any argument before the district court that contradicted the Nevada Supreme order would have failed and counsel cannot be deemed ineffective. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

For these reasons, Petitioner also cannot show prejudice and any argument regarding his conviction for first-degree kidnaping not made either on direct appeal or before the district court would have been successful. Appellate counsel therefore cannot be deemed ineffective and this Court should deny Petitioner's claim.

B. Petitioner's Attachment Two Claim Fails.

Petitioner argues that appellate counsel was ineffective for failing to allege that the State committed prosecutorial misconduct when it knowingly used false or misleading evidence. Petition: Attachment Two, at 1. Specifically, Petitioner argues that the State permitted both J.T. and her mother to give misleading testimony about their relationship, J.T.'s relationship with Petitioner, and J.T.'s relationships with older men and the reasons she was in therapy. Id. Petitioner acknowledges that the State did so in compliance with the district court's ruling. Id. at 2. Nevertheless, Petitioner claims this amounted to prosecutorial misconduct because Petitioner was precluded from attacking or impeaching the witnesses' credibility which then prevented the jury from hearing and considering all relevant evidence. Id. at 2-5. Petitioner's claim fails.

First, Petitioner acknowledges that the State tailored their questions and arguments in compliance with the district court's ruling that evidence regarding J.T.'s prior relationships or evidence of prior mental health treatment was inadmissible. Petition: Attachment Two, at 2. As the State cannot be accused of misconduct for complying with the district court's ruling, appellate counsel can therefore not be deemed ineffective for failing to argue as much. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

It appears that Petitioner's complaint rests with the district court's ruling. This claim must fail for two reasons. First, as it is not a claim of ineffective assistance of counsel, it is improper to raise in post-conviction habeas proceedings and therefore must be dismissed. Second, any claim that appellate counsel was ineffective for failing to challenge the district court's ruling is belied by the record. On appeal, counsel devoted 14 pages of argument to challenging the district court's ruling and explaining why the error was not harmless. Exhibit A at 17-30. In reviewing counsel's argument, the Nevada Supreme Court concluded that while the district court's ruling did not impact Petitioner's conviction for first-degree kidnapping, it was relevant to the substantial-mental-harm element of the child abuse charge:

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> NRS 200.508(4)(e) defines "Substantial mental harm" as "an injury to the intellectual or psychological capacity or the emotional condition of a child as evidenced by an observable and substantial impairment of the ability of the child to function within his or her normal range of performance or behavior." This language puts at issue the victim's state of mind when she met [Petitioner]. Yet, the district court precluded [Petitioner]from cross examining the victims doctor about the victims past psychological damage after the doctor testified that only 5 to 10 percent of her patients require the type of long term care that the victim required after her interaction with [Petitioner]. Further, the district court precluded [Petitioner] from impeaching the victim and her mother with medical documentation indicating that the victim's relationship with her 19 year old boyfriend contributed to the victims mental health issues subsequent to her interaction with [Petitioner]. (internal citation omitted). Indeed, the State's closing argument characterized the victim as a normal teenager with no issues until [Petitioner] came along and that he, alone, was responsible for any mental harm she suffered. NRS 200.508(4)(e). To assess the victim's "normal range of performance or behavior," the jury needed to know *why* the victim was in counseling, not just *that* she was in counseling. We cannot conclude, beyond a reasonable doubt that these errors did not contribute to the verdict on the child abuse count. (internal citation omitted). We therefore reverse the conviction for child abuse and remand for a new trial on that charge.
>
> Lastly, [Petitioner] argues that the district court abused its discretion in precluding him from asking the victim about her belief that he gave her a sexually transmitted disease. We conclude that [Petitioner] should have been permitted to cross examine the victim about this highly prejudicial testimony that had little probative value to the state's case, especially since the state opened the door to it. (internal citation omitted). However, the error was harmless because the District Court gave a limiting instruction and, in the context of the charges, we conclude the error did not contribute to the verdict.

Order Affirming in Part, Reversing in Part, and Remaining, Docket No. 73674, at 4-6.

As counsel's argument on appeal was successful, Petitioner has failed to show how arguing that the State engaged in prosecutorial misconduct reasonably would have changed the outcome. For these reasons, Petitioner's claim is belied by the record and his claim fails.

C. Petitioner's Attachment Three Claim Fails.

Petitioner argues that appellate counsel was ineffective for not arguing that the "encourage," "entice," and "permit" language of NRS 200.710 rendered the statute unconstitutionally overbroad. Petition: Attachment Three, at 1-2. Specifically, Petitioner claims that because there was no evidence that Petitioner was physically present when J.T. took sexually suggestive pictures and he did not distribute the images, there was no evidence

that he encouraged, enticed, or permitted her to produce pornography. Id. Petitioner's claim fails.

First, Petitioner's claim that counsel did not argue that NRS 200.710 was unconstitutionally overbroad is belied by the record. Indeed, on appeal, counsel argued that the NRS 200.400(4) definition of "sexual portrayal" was unconstitutionally overbroad. Exhibit A, at 41-44. However, the Nevada Supreme Court rejected counsel's argument and held that the NRS 200.710(4) definition of "sexual portrayal" was constitutional. Order Affirming in Part, Reversing in Part, and Remaining, Docket No. 73674, at 7-6.

Next, while counsel did not claim that the "encourage," "entice," and "permit" language of NRS 200.710 rendered the statute unconstitutionally overbroad, Petitioner nevertheless has failed to establish deficient performance as his claim that those three words render the statute invalid is nothing but a bare and naked claim unsupported by proper legal authority. Petitioner has not provided any analysis regarding how NRS 200.710 is overbroad or why such a claim would have been successful on appeal. Instead, Petitioner appears to focus his argument on whether there was sufficient evidence supporting his convictions for Unlawful Use of a Minor in the Production of Pornography. However, whether there was sufficient evidence to support a conviction is not the same as whether a statute is constitutional. Petitioner's claim must therefore fail as it is nothing but a bare and naked assertion.

Regardless, as any challenge to the constitutionality to the "encourage," "entice," and "permit" language of NRS 200.710 would have failed. According to First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech. The doctrine seeks to strike a balance between competing social costs. Virginia v. Hicks, 539 U.S. 113, 119-20 (2003). In order to maintain an appropriate balance, the U.S. Supreme Court has vigorously enforced the requirement that a statute's overbreadth be *substantial,* not only in an absolute sense, but also relative to the statute's plainly legitimate sweep. U.S. v. Williams, 553 U.S. 285, 292-93 (2008) (upholding a pandering or solicitation of child pornography statute against a claim of overbreadth under the First Amendment).

//

The U.S. Supreme Court has held that a statute may be overbroad if in its reach it prohibits constitutionally protected conduct. Grayned v. Rockford, 408 U.S. 104, 114 (1972). In considering an overbreadth challenge, a court must decide, "whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." Id. at 115. However, when a law regulates arguably expressive conduct, "the scope of the [law] does not render it unconstitutional unless its overbreadth is not only real, but substantial as well, judged in relation to the [law's] plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). A statute is subjected to less scrutiny where the behavior sought to be prohibited by the State moves from "pure speech" toward conduct "and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests." Id.

Specifically, overbreadth challenges target laws, "which do[] not aim specifically at evils within the allowable area of State control but, on the contrary, sweep[] within [their] ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press." Thornhill v. State of Alabama, 310 U.S. 88, 97-98 (1940). Such a statute may be invalidated, even if the intrusion on First Amendment rights is minor, because it, "readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." Id.

NRS 200.710(2) states:

> A person who knowingly uses, encourages, entices, coerces or permits a minor to be the subject of a sexual portrayal in a performance is guilty of a category A felony and shall be punished as provided in NRS 200.750, regardless of whether the minor is aware that the sexual portrayal is part of a performance.

While "encourage," "entice," and "permit" are not explicitly defined in statute, Black's Law Dictionary defines all three:

> **encourage** *vb.* (15c) *Criminal law.* To instigate; to incite to action; to embolden; to help. See AID AND ABET. — **encouragement,** *n.* [...]

> **entice** *vb.* (14c) To lure or induce; esp., to wrongfully solicit (a person) to do something.
> […]
>
> **permit** (pər-**mit**) *vb.* (15c) **1.** To consent to formally; to allow (something) to happen, esp. by an official ruling, decision, or law <permit the inspection to be carried out>. **2.** To give opportunity for; to make (something) happen <lax security permitted the escape>. **3.** To allow or admit of <if the law so permits>.

Black's Law Dictionary (11th ed. 2019) (emphasis in original).

Both "sexual conduct" and "sexual portrayal" have been defined by statute. Specifically, NRS 200.700(3) defines "sexual conduct" as including "lewd exhibition of the genitals;" and NRS 200.700(4) defines "sexual portrayal" as a depiction of a person that appeals to the "prurient interest in sex and which does not have serious literary, artistic, political or scientific value." Further, the Nevada Supreme Court has consistently held—as it did on Petitioner's appeal—that the definitions of sexual portrayal and sexual conduct are constitutional. Order Affirming in Part, Reversing in Part, and Remaining, Docket No. 73674, at 6-8; see also Shue v. State, 133 Nev. 798, 805-07, 407 P.3d 332, 338-39 (2017) (concluding that Nevada's statutes barring the sexual portrayal of minors are not overbroad because the type of conduct proscribed under NRS 200.700(4) does not implicate the First Amendment's protection and sufficiently narrows the statute's application to avoid vagueness)

Accordingly, the proscribed conduct outlined in NRS 200.710 is clear and a defendant would be well aware of whether they were encouraging, enticing, or permitting a minor to be the subject of a sexual portrayal. Petitioner has not explained how this the "encourage," "entice," and "permit" language of NRS 200.710 could be construed as applying to otherwise legal and protected conduct particularly because it pertains to encouraging, enticing or permitting a minor to engage in sexual conduct or be the subject of a sexual portrayed. Indeed, based on the evidence admitted at trial, Petitioner's conduct clearly fell within the proscribed conduct and any challenge to the evidence would have failed. At trial, J.T. testified that Petitioner her for "sexy pictures," which she sent. Jury Trial – Day 4, at 110 (March 24, 2017). However, Petitioner did not think they were sexy enough, so he directed J.T. to pose in different positions. Id. at 110-11. Specifically, J.T. testified that she did not think of taking her

clothes off, but that Petitioner told her to do so. Id. at 117. Petitioner also asked for pictures of her butt, her crotch, and partly nude photos. Id. at 116-20. When asking for one of the crotch photos, Petitioner specifically directed J.T. to "spread [her] legs." Id. at 121.

As Petitioner has failed to establish that NRS 200.710 was unconstitutionally overbroad or that challenging the "encourage," "entice," and "permit" language of the statute would have succeeded on appeal, appellate counsel cannot be deemed ineffective for failing to make a futile argument. Accordingly, Petitioner's claim fails.

CONCLUSION

For the foregoing reasons, the State respectfully requests this Court deny Petitioner's Petition for Post-Conviction Writ of Habeas Corpus.

DATED this 24th day of March, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Karen Mishler*
KAREN MISHLER
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Nevada Bar #013730

CERTIFICATE OF SERVICE

I hereby certify that service of the above and foregoing was made this 24th day of MARCH 2021, to:

MELVYN SPROWSON, JR., BAC#1180740
LOVELOCK CORRECTIONAL CENTER
1200 PRISON ROAD
LOVELOCK, NV 89419

BY */s/ Howard Conrad*
Secretary for the District Attorney's Office
Special Victims Unit

hjc/SVU

EXHIBIT "1"

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

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APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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Docket 73674 Document 2018-16706

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

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	)	
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

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

ROUTING STATEMENT

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

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

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

ISSUES PRESENTED FOR REVIEW

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

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

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

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

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

VI. Cumulative error requires reversal.

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

STATEMENT OF THE FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SUMMARY OF THE ARGUMENT

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

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

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

ARGUMENT

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

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

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

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

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

NRS 16.030(5).

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

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

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

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

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

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

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

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

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

(VIII:1755).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Factual and Procedural Background.

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

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

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

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

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

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

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

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

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

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

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

Likewise, evidence that J.T. had been repeatedly raped at age 14 by 39-year-old David Schlomann undermined the State's claim that Sprowson's actions (as opposed to the prior, more egregious incident) caused J.T. "substantial mental harm." (VI:1335,1337;VII:1424-25). See **NRS 200.508(1).** To establish "substantial mental harm" the State had to prove that as a result of Sprowson's actions, J.T. suffered "an injury to the intellectual or psychological capacity or the emotional condition of a child as evidenced by an observable and substantial impairment of the ability of the child to function within *his or her normal range of performance or*

behavior." **NRS 200.508(4)(e)** (emphasis added). The jury needed to know what J.T.'s "normal range of performance or behavior" was prior to meeting Sprowson and the extent of any impairment that had already been caused by Schlomann's actions. (III:513).

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

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

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

2. Violation of Sprowson's Confrontation Clause Rights.

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

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

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

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

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

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

a. Cross-Examination Related to Kidnapping

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

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

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

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

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

c. Cross-Examination related to Child Pornography

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

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

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

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

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

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

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

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

3. Violations were not Harmless Beyond a Reasonable Doubt.

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

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

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

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

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

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

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

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

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

In Counts 3 and 5, the State charged Sprowson with using J.T. "to simulate or engage in sexual conduct to produce a performance" in violation of **NRS 200.710(1)**. (V:1133;XIV:3035). Sexual conduct is defined as "sexual intercourse, lewd exhibition of the genitals, fellatio, cunnilingus, bestiality, anal intercourse, excretion, sado-masochistic abuse, masturbation, or the penetration of any part of a person's body or of any object

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

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

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

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

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

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

B. The Definition of Sexual Portrayal is Unconstitutional.

In Counts 3-6, the State charged Sprowson with using J.T. as the subject of a sexual portrayal in a performance in violation of **NRS 200.710(2)**. (V:1133-34). **NRS 200.700(4)** defines sexual portrayal as "the depiction of a person in a manner which appeals to the prurient interest in sex and which does not have serious literary, artistic, political or scientific value."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(VIII:1777-78).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PROSPECTIVE JUROR NO. 651: Exactly.

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

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

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

PROSPECTIVE JUROR NO. 651: Yes.

MS. BLUTH: That's grooming.

PROSPECTIVE JUROR NO. 651: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. Cumulative error requires reversal.

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By */s/ Deborah L. Westbrook*
DEBORAH L. WESTBROOK, #9285
Deputy Public Defender
309 South Third St., Ste. 226
Las Vegas, NV 89155-2610
(702) 455-4685

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 size font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

Proportionately spaced, has a typeface of 14 points or more and contains 13,994 words which does not exceed the 14,000 word limit.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 2 day of May, 2018.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By */s/ Deborah L. Westbrook*
DEBORAH L. WESTBROOK, #9285
Deputy Public Defender
309 South Third St., Ste. 226
Las Vegas, NV 89155-2610
(702) 455-4685

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 2 day of May, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM LAXALT
STEVEN S. OWENS
DEBORAH L. WESTBROOK
HOWARD S. BROOKS

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

MELVYN PERRY SPROWSON
NDOC No. 1180740
c/o High Desert State Prison
P.O. Box 650
Indian Springs, NV 89018

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

Electronically Filed
04/22/2021
CLERK OF THE COURT

RSPN
MELVYN P. SPROWSON, JR. #1180740
LOVELOCK CORRECTIONAL CENTER
1200 PRISON ROAD
LOVELOCK, NEVADA 89419
PROPER PERSON

DISTRICT COURT
CLARK COUNTY, NEVADA

MELVYN P. SPROWSON, JR., PETITIONER,	CASE NO.: A-21829115-W
VS. THE STATE OF NEVADA, RESPONDENT.	DEPT. NO. XXIV

PETITIONER'S REPLY TO THE STATE'S RESPONSE TO THE PETITIONER'S PETITION FOR POST-CONVICTION WRIT OF HABEAS CORPUS

DATE OF HEARING: MAY 24, 2021
TIME OF HEARING: 8:30AM

COMES NOW, PETITIONER, MELVYN P. SPROWSON, JR., in proper person, and hereby submits the attached Points and Authorities in reply to the State's response to petitioner's Post-Conviction Writ of Habeas Corpus. This reply is based upon all the

papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

DATED this 7th day of April 2021.

Respectfully,
Melvyn Sprowson

MELVYN P. SPROWSON, JR.
Petitioner, Proper Person

POINTS AND AUTHORITIES

NRS 34.726 Limitations on time to file; stay of sentence.

1. Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1-year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1-year after the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant

to section 4 of Article 6 of the Nevada Constitution issues its Remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:

(a) That the delay is not the fault of the petitioner; and

(b) The dismissal of the petition as untimely will unduly prejudice the petitioner.

I. PETITION HISTORY

On January 17, 2020 the Supreme Court of Nevada issued a remittitur for petitioner Melvyn P. Sprowson, Jr., (see Exhibit A, 3 pages).

On January 7, 2021 the petitioner mailed to the 8th Judicial District Court, a post-conviction writ of Habeas Corpus. The petition was submitted to D. Bequette, the Lovelock Correctional Center Law Library Supervisor. The petition was then mailed through the U.S. Postal System by the Lovelock Correctional Center mailroom (see Exhibit B, 2 pages).

On January 12, 2021, the 8th Judicial District Court RECEIVED the petitioner's post-conviction Writ of Habeas Corpus 5 days before the filing deadline of January 17, 2021 (see Exhibit C, 2 pages).

On February 9, 2021, the 8th Judicial District Court filed the petitioner's post-conviction Writ of Habeas Corpus, 28 days after the District Court had received the petitioner's post-conviction Writ of Habeas Corpus, through NO FAULT OF THE PETITIONER.

On March 24, 2021 the State filed a response to the petitioner's post-conviction Writ of Habeas Corpus (see Exhibit D, 2 pages).

On March 30, 2021, the petitioner was SERVED a copy of the State's response to the petitioner's Writ of Habeas Corpus. The petitioner was SERVED through the U.S. Postal System via the Lovelock Correctional Center ~~Law Library~~ Supervisor D. Bequette. Proof of service can be provided upon request.

II. LEGAL ARGUMENT

According to NRS 34.726 1(a), if there is good cause, such as "That the delay is not the fault of the petitioner," a petition that challenges the validity of a judgment of conviction must be heard and not denied as untimely filed.

In the instant case, the petitioner did everything in a timely manner and according to the law. The petitioner mailed the petition on January 7, 2021, 10 days before it was due on January 17, 2021 (see Exhibit B, 2 pages).

The District Court received the petitioner's post-conviction Writ of Habeas Corpus on January 12, 2021, 5 days before the filing deadline (see Exhibit C, 2 pages). The District Court then 28 days after receiving the petition, filed it on February 9, 2021, through no fault of the petitioner. Thus, the delay was the fault of the District Court, not the petitioner. The petitioner has shown GOOD CAUSE for the delay, a delay not his own.

III. CONCLUSION

For the foregoing reasons, the

petitioner prays and respectfully requests that this Honorable Court consider for good cause the petition as timely and grant the petitioner's Post-Conviction Writ of Habeas Corpus.

DATED this 7th day of April 2021.

Respectfully Submitted,

M. Sprowson

MELVYN P. SPROWSON, JR.
Petitioner, Proper Person

CERTIFICATE OF SERVICE

I hereby certify that service via the U.S. Postal mail service of the above and foregoing was made this 7th day of April 2021, to:

District Attorney's Office
C/O Karen Mishler
200 Lewis Avenue
P.O. Box 552212
Las Vegas, Nevada
89155

By: M. Sprowson
MELVYN SPROWSON, JR.
Petitioner, Proper Person

EXHIBIT "A"

IN THE SUPREME COURT OF THE STATE OF NEVADA

MELVYN PERRY SPROWSON, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 73674
District Court Case No. C295158

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: January 17, 2020

Elizabeth A. Brown, Clerk of Court

By: Danielle Friend
Administrative Assistant

cc (without enclosures):
Hon. Stefany Miley, District Judge
Clark County Public Defender
Clark County District Attorney

RECEIPT FOR REMITTITUR

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on JAN 2 3 2020.

HEATHER UNGERMANN
Deputy District Court Clerk

RECEIVED
APPEALS
JAN 2 3 2020
CLERK OF THE COURT

Docket 83060 Document 2021-20704

IN THE SUPREME COURT OF THE STATE OF NEVADA

MELVYN PERRY SPROWSON, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 73674
District Court Case No. C295158

FILED
JAN 23 2020
CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Elizabeth A. Brown, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order."

Judgment, as quoted above, entered this 1 day of July, 2019.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this January 17, 2020.

Elizabeth A. Brown, Supreme Court Clerk

By: Danielle Friend
Administrative Assistant

C-14-295158-1
CCJAR
NV Supreme Court Clerks Certificate/Judgm
4889611

CERTIFIED COPY
This document is a full, true and correct copy of the original on file and of record in my office.
DATE: January 17, 2020
Supreme Court Clerk, State of Nevada
By _____ Deputy

EXHIBIT "B"

NDOC LOVELOCK CORRECTIONAL CENTER
LAW LIBRARY SUPERVISOR D. BEQUETTE
OUTGOING LEGAL MAIL LOG

~~Attachment~~ ~~Four~~ ~~Pg 2 of 2~~

SPROWSON 12	1180740	AG-LV LVNV 89101	1/7/2021
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SPROWSON 12	1180740	CLARK CO DA LVNV 89155	1/7/2021

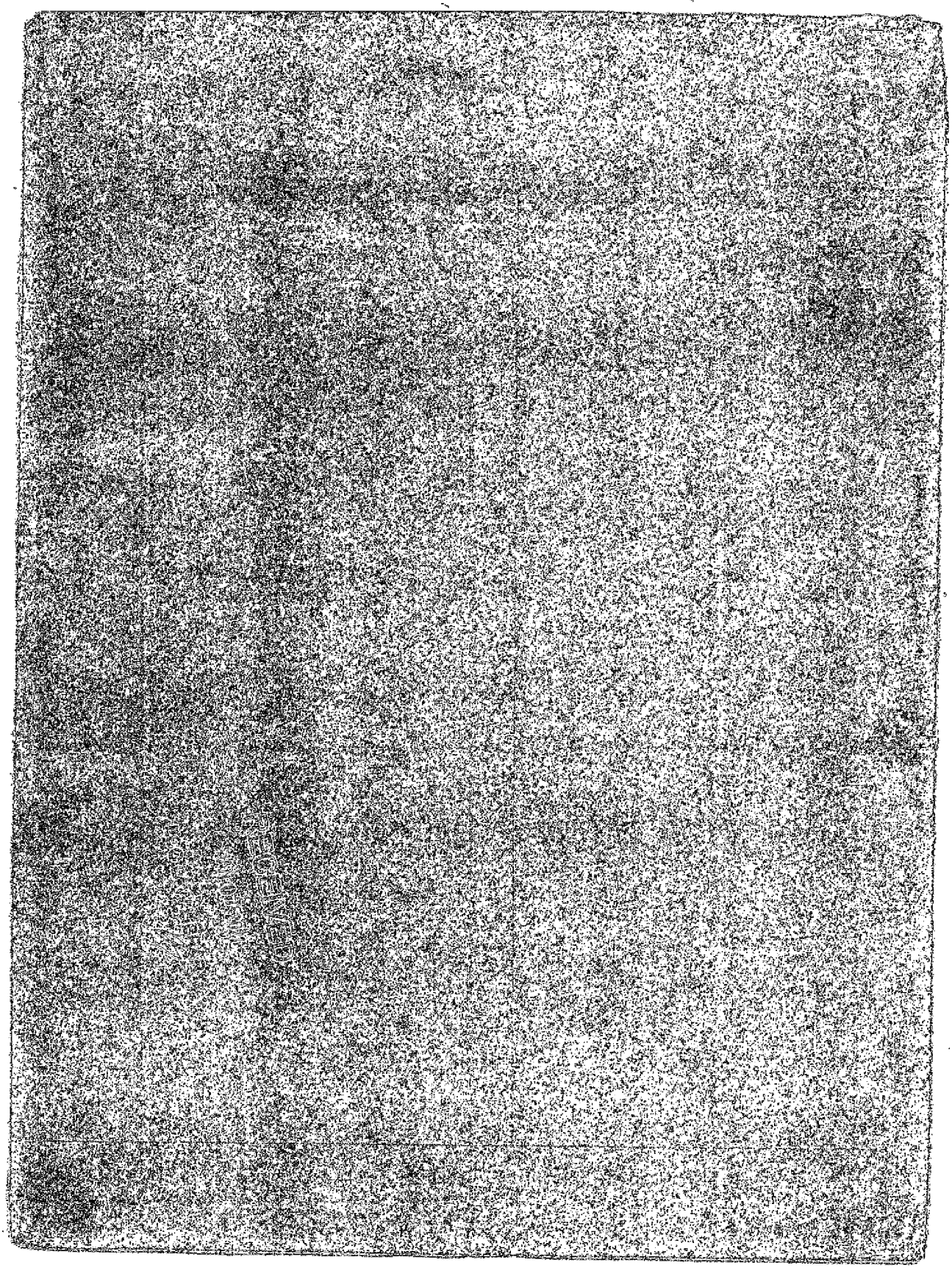
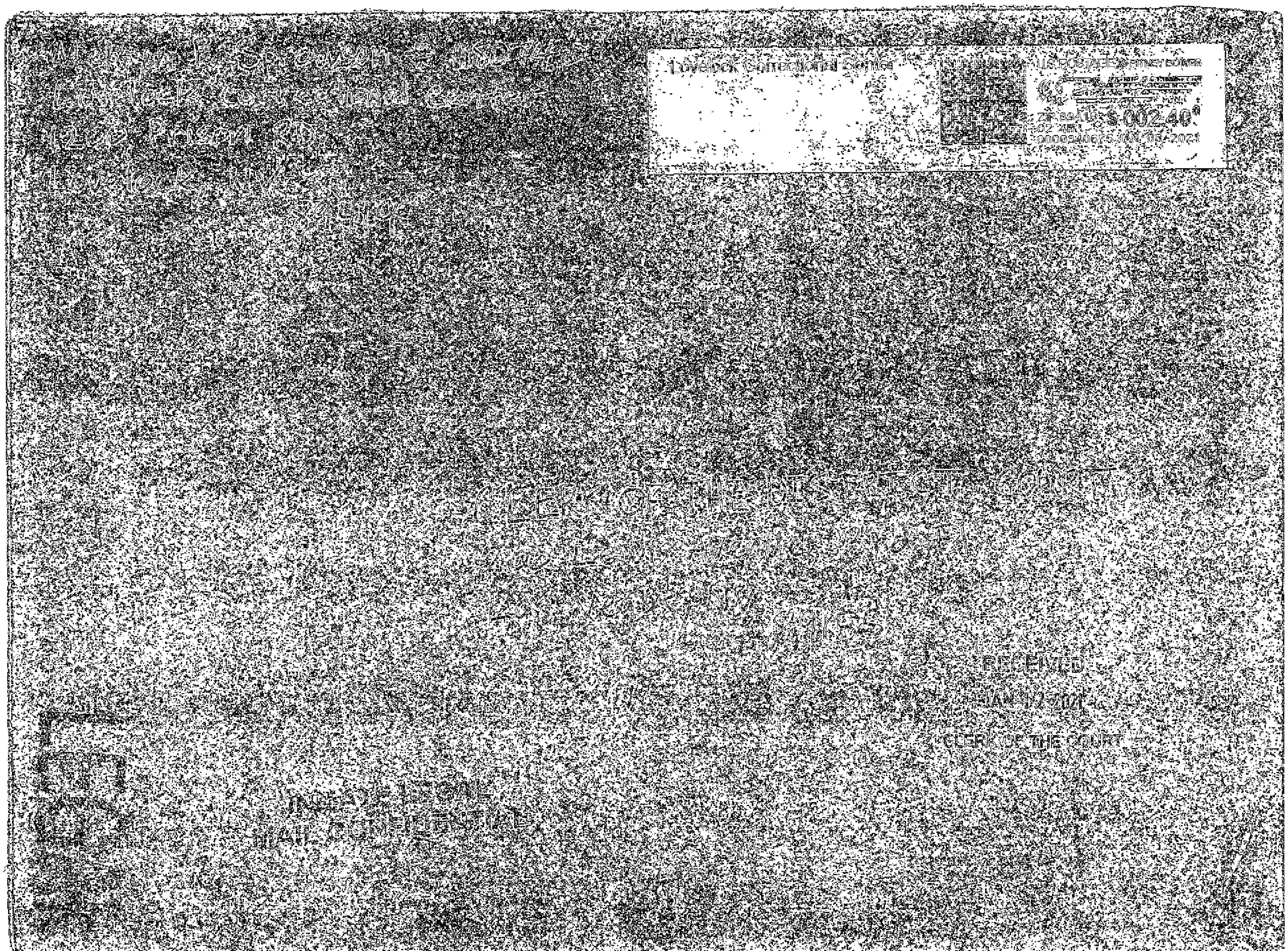


EXHIBIT "C"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Melvyn Sprowson, Jr.
Inmate Name
Prison No. 1180740
Lovelock Correctional Center
~~Ely, Nevada 89301~~ 1200 Prison RD.
Lovelock, NV. 89419
In Propria Persona

FILED
FEB - 9 2021
CLERK OF COURT

PP. DA

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

Melvyn Sprowson, Jr.
Petitioner,
v.
Garrett, Warden
Respondent.

Case No. C-14-295158-1
Dept. No. XXIII

Date of Hearing: _____
Time of Hearing: _____
(Not a Death Penalty Case)

A-21-829115-W
Dept. 24

PETITION FOR WRIT OF HABEAS CORPUS
(POST-CONVICTION) (NON DEATH)

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the department of corrections, name the warden or head of the

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EXHIBIT "D"

clothes off, but that Petitioner told her to do so. Id. at 117. Petitioner also asked for pictures of her butt, her crotch, and partly nude photos. Id. at 116-20. When asking for one of the crotch photos, Petitioner specifically directed J.T. to "spread [her] legs." Id. at 121.

As Petitioner has failed to establish that NRS 200.710 was unconstitutionally overbroad or that challenging the "encourage," "entice," and "permit" language of the statute would have succeeded on appeal, appellate counsel cannot be deemed ineffective for failing to make a futile argument. Accordingly, Petitioner's claim fails.

CONCLUSION

For the foregoing reasons, the State respectfully requests this Court deny Petitioner's Petition for Post-Conviction Writ of Habeas Corpus.

DATED this 24th day of March, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Karen Mishler*
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #013730

CERTIFICATE OF SERVICE

I hereby certify that service of the above and foregoing was made this 24th day of MARCH 2021, to:

MELVYN SPROWSON, JR., BAC#1180740
LOVELOCK CORRECTIONAL CENTER
1200 PRISON ROAD
LOVELOCK, NV 89419

BY */s/ Howard Conrad*
Secretary for the District Attorney's Office
Special Victims Unit

hjc/SVU

Melvyn Sprowson #1180740
Lovelock Correctional Center
1200 prison RD.
Lovelock, NV
89419

Lovelock Correctional Center

U.S. POSTAGE PITNEY BOWES
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02 4W
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Clerk of the District Court
200 Lewis Avenue, 3rd Fl
Las Vegas, NV. 89155

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Steven D. Grierson
CLERK OF THE COURT

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Melvyn Sprowson #1180740
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Melvyn Sprowson In Pro Se

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

Melvyn P. Sprowson, Jr.,
Petitioner,

-vs-

THE STATE OF NEVADA,
Respondent.

Case No. A-21829115-W

Dept. No. XXIV

NOTICE OF APPEAL

NOTICE IS GIVEN that Petitioner, Melvyn Sprowson, in pro se, hereby appeals to the Nevada Supreme Court the Findings of Fact, Conclusions of Law and Order Denying / Dismissing Petition for Writ of Habeas Corpus, as filed/entered on or about the 26th day of May, 2021, in the above-entitled Court.

Dated this 1st day of June, 2021.

M. Sprowson

Melvyn Sprowson #1180740
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

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CLERK OF THE COURT

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CERTIFICATE OF SERVICE

I do certify that I mailed a true and correct copy of the foregoing NOTICE OF APPEAL to the below address(es) on this 1st day of June, 2021, by placing same in the U.S. Mail via prison law library staff:

District Attorney's Office
c/o Karen Mishler
200 Lewis Ave.
P.O. Box 552212
Las Vegas, NV 89155

Erica F. Berrett
Deputy Attorney General
555 E. Washington Ave.
Suite 3900
Las Vegas, NV 89101

M. Sprowson

Melvyn Sprowson # 1180740
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding NOTICE OF APPEAL filed in District Court Case No. A-21829115-W does not contain the social security number of any person.

Dated this 1st day of June, 2021.

M. Sprowson

Melvyn Sprowson

Petitioner In Pro Se

Melvyn Sprowson # 1180740
Lovelock Correctional Center
200 Prison Road
Lovelock, NV
89419

LOVELOCK CORRECTIONAL CENTER

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Clerk of the Court
200 Lewis Avenue, 3rd Fl.
Las Vegas, NV
89155-1160

INMATE LEGAL
MAIL CONFIDENTIAL

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Steven D. Grierson
CLERK OF THE COURT

ASTA

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

MELVYN SPROWSON, JR.,

Plaintiff(s),

vs.

GARRETT, WARDEN,

Defendant(s),

Case No: A-21-829115-W

Dept No: XXIV

CASE APPEAL STATEMENT

1. Appellant(s): Melvyn Sprowson

2. Judge: Erika Ballou

3. Appellant(s): Melvyn Sprowson

Counsel:

Melvyn Sprowson #1180740
1200 Prison Rd.
Lovelock, NV 89419

4. Respondent (s): Garrett, Warden

Counsel:

Steven B. Wolfson, District Attorney
200 Lewis Ave.
Las Vegas, NV 89155-2212

5. Appellant(s)'s Attorney Licensed in Nevada: N/A
Permission Granted: N/A

Respondent(s)'s Attorney Licensed in Nevada: Yes
Permission Granted: N/A

6. Has Appellant Ever Been Represented by Appointed Counsel In District Court: No

7. Appellant Represented by Appointed Counsel On Appeal: N/A

8. Appellant Granted Leave to Proceed in Forma Pauperis**: N/A
***Expires 1 year from date filed*
Appellant Filed Application to Proceed in Forma Pauperis: No
Date Application(s) filed: N/A

9. Date Commenced in District Court: February 9, 2021

10. Brief Description of the Nature of the Action: Civil Writ

Type of Judgment or Order Being Appealed: Civil Writ of Habeas Corpus

11. Previous Appeal: Yes

Supreme Court Docket Number(s): N/A

12. Child Custody or Visitation: N/A

13. Possibility of Settlement: Unknown

Dated This 11 day of June 2021.

Steven D. Grierson, Clerk of the Court

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk
200 Lewis Ave
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

cc: Melvyn Sprowson

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CLERK OF THE COURT

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #13730
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

MELVYN SPROWSON,
#5996049

Defendant.

CASE NO: A-21-829115-W

DEPT NO: XXIV

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: MAY 24, 2021
TIME OF HEARING: 8:30 AM

THIS CAUSE having come on for hearing before the Honorable ERIKA BALLOU, District Judge, on the 24 day of May, 2021, the Petitioner not being present, proceeding in proper person, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through SARAH OVERLY, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

//

//

//

//

//

FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HIISTORY

On January 13, 2014, Petitioner Melvyn Sprowson ("Petitioner") was charged with Count 1 – First Degree Kidnapping (Category A Felony – NRS 200.310, 200.320); Count 2 – Child Abuse, Neglect, or Endangerment with Substantial Bodily and/or Mental Harm (Category B Felony – NRS 200.501(1)); and Counts 3 through 6 – Unlawful Use of a Minor in the Production of Pornography (Category A Felony – NRS 200.700, 200.710(A)(B), 200.750).

On March 22, 2017, Petitioner's jury trial began. On March 31, 2017, the jury found Petitioner guilty of all counts.

On June 26, 2017, the district court sentenced Petitioner to Count 1 – five years to life; Count 2 – 30 to 96 months, to run consecutive to Count 1; Count 3 - five years to life, to run consecutive to Count 2; Count 4 - five years to life, to run concurrently to Count 3; Count 5 – five years to life, to run concurrently to Count 4; and Count 6 – five years to life, to run concurrently to Count 5. Petitioner's Judgment of Conviction was filed on July 5, 2017.

On July 1, 2019, the Nevada Supreme Court issued an Order Affirming in Part, Reversing in Part, and Remanding. Specifically, the Court reversed Petitioner's conviction for Count 2 – Child Abuse, Neglect, or Endangerment with Substantial Bodily and/or Mental Harm and ordered a new trial on that count only. Remittitur issued on January 17, 2020.

On February 12, 2020, the State agreed to strike Count 2 and run Count 3 consecutive to Count 1. An Amended Judgment of Conviction was filed on February 19, 2020.

On February 9, 2021, Petitioner filed the instant Petition for Writ of Habeas Corpus (Post-Conviction) (Non Death). On March 24, 2021, the State filed a Response. On April 22, 2021, Petitioner filed a Reply to the State's Response.

STATEMENT OF FACTS

In 2013, 16-year-old J.T. lived with her mom, grandmother and two sisters. In August of 2013, J.T. met Petitioner on Craigslist after he posted an ad that said, "Lonely millionaire"

and provided a fake age of 34. J.T. told Petitioner she was 16 and that her mother could not know they were talking. Petitioner was a kindergarten teacher.

At first, J.T. and Petitioner communicated through Craigslist e-mail, where they exchanged photos. Later, they communicated through Kik, a texting application, because it was easier than e-mailing and J.T.'s mother could not see the messages like she could with traditional texting. Eventually Petitioner asked her to be his girlfriend and she said yes. After, Petitioner asked J.T. for "sexy pictures" and she sent them. Petitioner did not think they were sexy enough, so he told J.T. to pose in different positions. Specifically, J.T. testified that she did not think of taking her clothes off, but Petitioner told her to. Petitioner also asked for pictures of her butt, her crotch, and partly nude photos. When asking for one of the crotch photos, Petitioner specifically told J.T. to "spread [her] legs."

After they began talking, Petitioner secretly went to J.T.'s work. After he left, he texted her and to tell her he had been there and described what she was wearing. Eventually, J.T. met Petitioner at a roller-skating rink. J.T. was there with a friend, and told her friend that Petitioner was one of her old teachers. At the roller rink the two had a short conversation and then Appellant left.

At that point, J.T. still did not know that Appellant was really 44 instead of 34. She did not learn his real age until she slept over at his house. J.T. did not tell her mom that she was communicating with Petitioner. J.T. told Petitioner she could not tell her mom because she would not be happy, and J.T. made sure to call Petitioner first if they were going to talk.

The first time J.T. went to Petitioner's house she told her mom that she was staying at a friend's. Petitioner picked J.T. up at Target and took her to his house where J.T. stayed for two nights where they drank alcohol and had sexual intercourse without a condom Petitioner gave J.T. a promise ring that looked like a wedding ring which J.T. wore around her neck so her mom would not see it. When J.T.'s mom saw the ring and asked J.T. about it, J.T. made up multiple lies about where she got it. J.T.'s mom did not believe her and took away J.T.'s phone and computer. When J.T.'s mom looked through J.T.'s phone, she noticed that J.T. had been calling a strange number and grew suspicious. J.T. had her phone on the bus one day and

warned Petitioner that her mom was growing wary.

On August 28, 2013, J.T. told her mom that she needed her laptop for a school project, and e-mailed Petitioner to tell him that they would not be able to talk for a while and they needed to figure something out. They devised a plan where Petitioner would pick J.T. up from home early one morning while J.T.'s mom was asleep. Petitioner told J.T. to bring her social security card and birth certificate, which she did. J.T. also brought her cell phone and laptop. When Petitioner picked her up that morning, he confirmed that she brought the documents, and told her to turn off her cell phone so her family could not track it. Petitioner drove J.T. to his house and when they arrived, Petitioner changed his cell phone number so J.T.'s mom could not track him.

J.T. lived with Petitioner for two months, from August 28, 2013 until November 1, 2013. While Petitioner was at work, J.T. would color or watch television or movies. While J.T. attended school before living with Petitioner, she stopped going when she moved in with him. They planned for J.T. to return to school when she was 17 and a half because they thought she would be old enough to stay with Petitioner then. Petitioner gave J.T. a coloring book and one fiction book, but no educational supplies.

While living with Petitioner, J.T. had ruled to follow. J.T. was allowed to use her laptop but could not touch her phone because her family might find her. J.T. could not to go outside because she could be recognized, and could not have anyone over to the house – especially other males.

Petitioner took J.T. out of the house only a few times: he took her to the lake because she wanted to get outside once; drove her by their home at night without stopping once after she said she missed her family; and went to Walmart at night where Petitioner left J.T. in the car wearing a hat and glasses with her seat reclined back. Indeed, whenever they left the house Petitioner made J.T. wear a hat, glasses, loose clothing, and put her hair up so she would look like a boy.

Although the doors were not locked and J.T. was physically free to leave, she did not feel emotionally free to leave. Approximately two to three times per week Petitioner would

get angry and tell J.T. to pack her bags because he was taking her home. Petitioner would then become sad, cry and ask J.T. to stay, so she did. One of these occasions occurred when J.T. said she missed her family.

Petitioner told J.T. that if they were caught, J.T. would say that she was Petitioner's roommate, but they were not in a sexual relationship. J.T. agreed to the plan. Once, while was living with Petitioner, a private investigator came to the door looking for J.T. Petitioner looked through the peephole, told J.T. to gather her things and hide, and Petitioner spoke with the investigator. J.T. sat on the stairs and heard the investigator tell Petitioner he was looking for J.T. She then heard Petitioner tell the investigator that he did not know what the investigator was talking about. After the investigator left, Petitioner told J.T. they were fine, and the investigator believed Petitioner. Another time, Petitioner came home with a missing-person poster with J.T.'s picture on it. In spite of that, Petitioner told J.T. that her mom was not looking for her and that her mom did not care. On another occasion, Petitioner told J.T. that the police had come to his work looking for her, and that they thought she was a prostitute.

When J.T. lived with Appellant, they were had sex two or three times a week. Petitioner also provided her with alcohol more than one time and on one occasion she got "pretty drunk." Petitioner also got upset about the way J.T. did dishes, told her that her handwriting was bad, and that she could not sing.

On November 1, 2013, the police came to Petitioner's home while J.T. was home alone. J.T. spoke with them but was not entirely honest and tried to stick to the story Petitioner instructed her to tell. The police took J.T. to the Southern Nevada Children's Assessment Center where she spoke with a female police officer and was more forthcoming, but still not completely honest. J.T. was then reunited with her mother, but felt guilty because she did not stick to Petitioner's story and wanted to return to Petitioner's home. When J.T. kept trying to leave her mother's house to go back to Petitioner, a J.T.'s mother took her to Montevista, a behavioral health center where J.T. stayed for three days. Back at her mother's house, all J.T. she could think about was getting back to Petitioner and J.T.'s mother would not let her leave the house. When J.T. threatened to kill herself and tried to jump off the house balcony to get

out of the house, and her mom took her back to Montevista where J.T. remained for approximately a month while waiting for a vacancy at Willow Springs, a long-term treatment facility. While at Willow Springs, J.T. had to learn how to regulate her emotions as well as re-learn how to interact in society. J.T. was at Willow Springs for almost six months and continued seeing therapists after she left. J.T. was still in therapy when she testified at trial.

After leaving Willow Springs J.T. returned to her mother's home. J.T. believed Petitioner and discovered he was not when he began contacting her through Instagram using fake names. J.T. was angry that Petitioner was contacting her and thought he gave her an STD. Although she struggled with the decision, she informed her mother and the police that Petitioner reached out to her.

At trial, J.T. testified that she lied during her cross-examination at the preliminary hearing. J.T. explained that she was honest on direct examination but lied during cross-examination because Petitioner mouthed "I love you," "it's okay," winked at her, and placed his hand over his heart during a break between direct and cross examination. Because of this J.T. felt guilty and decided to tell the version of events Petitioner told her to say when he lived with her in an effort to protect Petitioner.

ANALYSIS

I. THE INSTANT PETITION IS PROCEDURALLY TIME BARRED PURSUANT TO NRS 34.726

A petitioner must raise all grounds for relief in a timely filed first post-conviction Petition for Writ of Habeas Corpus. Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001). A petitioner must challenge the validity of their judgment or sentence within one year from the entry of judgment of conviction or after the Supreme Court issues remittitur pursuant to NRS 34.726(1). This one-year time limit is strictly applied and begins to run from the date the judgment of conviction is filed or remittitur issues from a timely filed direct appeal. Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528 (2001); Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).

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Moreover, filing an amended judgment of conviction does not restart the mandatory one-year deadline. The Nevada Supreme Court has explained that:

> [C]onstruing NRS 34.726 to provide such an extended time period would result in an absurdity that the Legislature could not have intended. A judgment of conviction may be amended at *any time* to correct a clerical error or to correct an illegal sentence. Because the district court may amend the judgment many years, even decades, after the entry of the original judgment of conviction, restarting the one-year time period for all purposes every time an amendment occurs would frustrate the purpose and spirit of NRS 34.726. Specifically, it would undermine the doctrine of finality of judgments by allowing petitioners to file post-conviction habeas petitions in perpetuity.

Sullivan v. State, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004).

Instead, unless the claims raised in a post-conviction petition challenge a change made in the amended judgment of conviction, a court must dismiss a petition as procedurally barred if filed more than one year after remittitur or the original judgment of conviction was filed.

"Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory," and "cannot be ignored [by the district court] when properly raised by the State." State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231 & 233, 112 P.3d 1070, 1074–75 (2005). For example, in Gonzales v. State, the Nevada Supreme Court rejected a habeas petition filed two days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the Notice within the one-year time limit. 118 Nev. 590, 596, 53 P.3d 901, 904 (2002). Absent a showing of good cause, district courts have a duty to consider whether claims raised in a petition are procedurally barred, and have no discretion regarding whether to apply the statutory procedural bars. Riker, 121 Nev. at 233, 112 P.3d at 1075.

Here, Petitioner's Judgment of Conviction was filed on July 5, 2017, and remittitur issued on January 17, 2020. While an Amended Judgment of Conviction was filed on February 19, 2020, none of the claims raised in the instant Petition challenge anything pertaining to the change made in the Amended Judgment of Conviction and the clock to timely file a post-conviction petition began to run on January 17, 2020. The instant Petition was filed on

February 9, 2021, 23 days past the one-year deadline. As such, absent a showing of good cause, the instant Petition is denied as procedurally time-barred.

II. PETITIONER HAS NOT SHOWN GOOD CAUSE TO OVERCOME PROCEDURAL BARS

Courts may consider the merits of procedurally barred petitions only when petitioners establish good cause for the delay in filing and prejudice should the courts not consider the merits. NRS 34.726(1)(a)-(b); NRS 34.810(3). Simply put, good cause is a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). To establish good cause, a petitioner must demonstrate that "an impediment external to the defense prevented their compliance with the applicable procedural rule." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525-26 (2003). Good cause exists if a Petitioner can establish that the factual or legal basis of a claim was not available to him or his counsel within the statutory time frame. Hathaway, 119 Nev. at 252-53, 71 P.3d at 506-07. Once the factual or legal basis becomes known to a petitioner, they must bring the additional claims within a reasonable amount of time after the basis for the good cause arises. See Pellegrini, 117 Nev. at 869-70, 34 P.3d at 525-26 (holding that the time bar in NRS 34.726 applies to successive petitions). A claim that is itself procedurally barred cannot constitute good cause. State v. District Court (Riker), 121 Nev. 225, 235, 112 P.3d 1070, 1077 (2005). See also Edwards v. Carpenter, 529 U.S. 446, 453 120 S. Ct. 1587, 1592 (2000).

Here, Petitioner has failed to establish or even address good cause. Petitioner does not argue that some external impediment justifies the filing of this Petition outside of the one-year time bar, or that he discovered new facts or evidence not available to him within the one-year time limit. As such, the instant Petition is denied.

III. PETITIONER HAS FAILED TO SHOW PREJUDICE BECAUSE HIS CLAIMS LACK MERIT

To establish prejudice, petitioners must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial

disadvantage, in affecting the state proceedings with error of constitutional dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)).

Petitioner claims appellate counsel was ineffective for three reasons. First, Petitioner claims that appellate counsel should have argued that his First-Degree Kidnapping conviction needed to be reversed because he was improperly convicted of Child Abuse, Neglect, or Endangerment. Petition: Attachment One, at 1. Second, Petitioner argues that appellate counsel should have argued that the prosecution engaged in misconduct by eliciting misleading information from J.T. and her mother. Petition: Attachment Two, at 1-5. Third, Petitioner argues that appellate counsel was ineffective for failing to argue that the "encourage," "entice," and "permit" language of NRS 200.710 rendered the statute unconstitutionally overbroad. Petition: Attachment Three, at 1-2. All three of Petitioner's claims fail and Petitioner cannot establish prejudice sufficient to overcome the procedural bars.

The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Claims of ineffective assistance of counsel are analyzed under the two-pronged test articulated in Strickland, 466 U.S. 668, 104 S. Ct. 2052 (1984), wherein the defendant must show: 1) that counsel's performance was deficient, and 2) that the deficient performance prejudiced the defense. Id. at 687, 104 S. Ct. at 2064. Nevada adopted this standard in Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984). "A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one." Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996); Molina v. State, 120 Nev. 185, 190, 87 P.3d 533, 537 (2004).

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371,130 S. Ct. 1473, 1485 (2010). "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. The question

is whether an attorney's representations amounted to incompetence under prevailing professional norms, "not whether it deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 88, 131 S. Ct. 770, 778 (2011). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449 (1970)).

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011-1012, 103 P.3d 25, 32-33 (2004). Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)). This analysis does not indicate that the court should "second guess reasoned choices between trial tactics, nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711. The role of a court in considering alleged ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Id. In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

The Strickland analysis does not "mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711 (citing Cooper, 551 F.2d at 1166 (9th Cir. 1977)). To be effective, the constitution "does not require that counsel

do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984). "Counsel cannot be deemed ineffective for failing to make futile objections, file futile motions, or for failing to make futile arguments." Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Id. at 846, 921 P.2d at 280; see also Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S. Ct. at 2066. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Further, claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part, "[Petitioner] must allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions *may cause your petition to be dismissed.*" (emphasis added).

Even if a petitioner can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice by showing a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing

Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The Strickland test also applies to whether appellate counsel can be deemed ineffective. Smith v. Robbins, 528 U.S. 259, 263, 120 S.Ct. 746, 752 (2016). A petitioner must show that his counsel was objectively unreasonable in failing to find and argue arguable issues and that there was a reasonable probability that, but for counsel's failure, the petitioner would have prevailed on appeal. Id. at 286, 120 S.Ct. at 765. Appellate counsel is not ineffective for failing to raise frivolous claims. Jones v. Barnes, 463 U.S. 745, 745, 103 S.Ct. 3308, 3309 (2016). In fact, appellate counsel should not raise every claim, and should instead focus on their strongest ones in order to maximize the possibility of success on appeal. Smith, 528 U.S. at 288, 120 S.Ct. at 766. A finding of ineffective assistance of appellate counsel is generally only found when issues not raised on appeal are clearly stronger than those presented. Id.

A. Petitioner's Attachment One Claim is denied.

Petitioner argues that appellate counsel was ineffective for failing to argue that the First-Degree Kidnapping conviction should be vacated on appeal or, alternatively, for failing to argue before the district court that because the Nevada Supreme Court vacated the Child Abuse, Neglect, or Endangerment Resulting in Substantial Physical/Mental Harm, that the district court should also vacate the First-Degree Kidnapping Conviction. Petition: Attachment One, at 1. Specifically, Petitioner alleges that appellate counsel failed to argue in his direct appeal that Petitioner's First-Degree Kidnapping Conviction should be vacated because the State relied heavily on Petitioner's guilt of child abuse to establish his guilt of kidnapping. Id. Petitioner explains that because the Nevada Supreme Court vacated his conviction for Count 2 – Child Abuse, appellate counsel should have also argued that his conviction for Count 1 – First-Degree Kidnapping should be vacated as child abuse was the only predicate offense by which he could be guilty of first-degree kidnapping. Id. at 2-5. Petitioner's claim is denied.

First, Petitioner's claim that appellate counsel was ineffective for failing to argue that his conviction for First-Degree Kidnapping should be vacated is belied by the record. On direct appeal, appellate counsel argued that Petitioner was entitled to an entirely new trial on all

counts. Exhibit A at 30. In support of this argument, counsel argued that the district court improperly excluded evidence that was relevant to whether Petitioner enticed J.T. to run away from her family and whether J.T. suffered substantial physical or mental harm. Id. at 21. Counsel elaborated that Petitioner had a right to tell the jury about what J.T. told him about her past because it negated any claim that Petitioner had the specific intent to kidnap J.T. Id. at 22-23. Counsel further argued that the district court violated Petitioner's confrontation clause rights "by preventing him from impeaching key witness testimony about the essential elements of the charges against him and by preventing him from questioning witnesses on topics the State had already discussed on cross examination." Id. 24. Specifically, counsel argued on direct appeal that, "[a]lthough the State accused Petitioner of kidnapping J.T. by 'enticing' her away from her family [sic], the court would not allow [Petitioner] to ask J.T. if his Craigslist ad was the 'first' such ad she had responded to." Id. Finally, counsel argued that such errors were not harmless because the State argued significantly during closing arguments that Petitioner 'enticed' J.T. into leaving her family. Id. Accordingly, Petitioner's claim that counsel did not argue that his conviction for Count 1 – First-Degree Kidnapping should be vacated is belied by the record.

To the extent Petitioner believes that counsel should have argued that his kidnapping conviction should be vacated because his child abuse conviction should be vacated, such a claim is denied as that argument would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. The State did not claim that Petitioner was guilty of First-Degree Kidnapping solely because he enticed J.T. to run away. Instead, the State could have proved Petitioner's guilt by proving beyond a reasonable doubt that Petitioner led, took, carried away, or detained J.T. Information at 2 (filed January 13, 2014). As the jury was not required to be unanimous on which theory of liability Petitioner was guilty of first-degree kidnapping, any argument that his first-degree kidnapping conviction should be vacated because he did not "entice" J.T. would have failed.

Indeed, even if Petitioner could show that J.T. willingly left her home, he could not show that he did not convince her to do so, or that he did not detain her with the intent to keep

her from her mother. At trial, J.T. testified that Petitioner specifically instructed her to bring her social security card and birth certificate, picked her up in the early morning while her mother slept, and told her get in his car. Jury Trial – Day 4, at 142-43 (March 24, 2017). At that point Petitioner made J.T. turn her phone off so it could not be tracked and changed his phone number so he could also not be located. Id. at 144-45. Petitioner then drove J.T. away from her home to his home where he kept her hidden for approximately nine weeks. Id. During that time he would not let her turn her phone on, have anyone over, did not attend school, took her out of the house only a few times and made her dress in disguise when they did leave. Id. at 147, 149, 154-56. Accordingly, there was substantial evidence that Petitioner led, took, or carried J.T. away, all of which supported his conviction for Count 1 – First-Degree Kidnapping.

Indeed, in reviewing Petitioner's claim on appeal, the Nevada Supreme Court concluded that "the victim's past was relevant to whether [Petitioner] willfully enticed the victim to leave hear mother's home and go to his because it says nothing about the defendant's actions and consent is not a defense to first-degree kidnapping of a person under the age of 18. Order Affirming in Part, Reversing in Part, and Remaining, Docket No. 73674, at 4 (citing NRS 200.350(2); see NRS 48.015 (defining relevant evidence)). Accordingly, appellate counsel cannot be deemed ineffective for failing to make a futile argument.

Further, counsel cannot be deemed ineffective for failing to argue before the district court, after the Nevada Supreme Court's remand of Count 2 – Child Abuse, Neglect, or Endangerment with Substantial Bodily and/or Mental Harm for a new trial, also required vacating Petitioner's conviction for Count 1 – First-Degree Kidnapping. The Nevada Supreme Court had already concluded that Petitioner was properly convicted of Count 1 – First-Degree Kidnapping. This Court cannot overrule the Nevada Supreme Court. NEV. CONST. Art. VI § 6. Accordingly, any argument before the district court that contradicted the Nevada Supreme order would have failed and counsel cannot be deemed ineffective. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

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For these reasons, Petitioner also cannot show prejudice and any argument regarding his conviction for first-degree kidnaping not made either on direct appeal or before the district court would have been successful. Appellate counsel therefore cannot be deemed ineffective and this Court should deny Petitioner's claim.

B. Petitioner's Attachment Two Claim is denied.

Petitioner argues that appellate counsel was ineffective for failing to allege that the State committed prosecutorial misconduct when it knowingly used false or misleading evidence. Petition: Attachment Two, at 1. Specifically, Petitioner argues that the State permitted both J.T. and her mother to give misleading testimony about their relationship, J.T.'s relationship with Petitioner, and J.T.'s relationships with older men and the reasons she was in therapy. Id. Petitioner acknowledges that the State did so in compliance with the district court's ruling. Id. at 2. Nevertheless, Petitioner claims this amounted to prosecutorial misconduct because Petitioner was precluded from attacking or impeaching the witnesses' credibility which then prevented the jury from hearing and considering all relevant evidence. Id. at 2-5. Petitioner's claim is denied.

First, Petitioner acknowledges that the State tailored their questions and arguments in compliance with the district court's ruling that evidence regarding J.T.'s prior relationships or evidence of prior mental health treatment was inadmissible. Petition: Attachment Two, at 2. As the State cannot be accused of misconduct for complying with the district court's ruling, appellate counsel can therefore not be deemed ineffective for failing to argue as much. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

It appears that Petitioner's complaint rests with the district court's ruling. This claim is denied for two reasons. First, as it is not a claim of ineffective assistance of counsel, it is improper to raise in post-conviction habeas proceedings and therefore dismissed. Second, any claim that appellate counsel was ineffective for failing to challenge the district court's ruling is belied by the record. On appeal, counsel devoted 14 pages of argument to challenging the district court's ruling and explaining why the error was not harmless. Exhibit A at 17-30. In reviewing counsel's argument, the Nevada Supreme Court concluded that while the district

court's ruling did not impact Petitioner's conviction for first-degree kidnapping, it was relevant to the substantial-mental-harm element of the child abuse charge:

> NRS 200.508(4)(e) defines "Substantial mental harm" as "an injury to the intellectual or psychological capacity or the emotional condition of a child as evidenced by an observable and substantial impairment of the ability of the child to function within his or her normal range of performance or behavior." This language puts at issue the victim's state of mind when she met [Petitioner]. Yet, the district court precluded [Petitioner]from cross examining the victims doctor about the victims past psychological damage after the doctor testified that only 5 to 10 percent of her patients require the type of long term care that the victim required after her interaction with [Petitioner]. Further, the district court precluded [Petitioner] from impeaching the victim and her mother with medical documentation indicating that the victim's relationship with her 19 year old boyfriend contributed to the victims mental health issues subsequent to her interaction with [Petitioner]. (internal citation omitted). Indeed, the State's closing argument characterized the victim as a normal teenager with no issues until [Petitioner] came along and that he, alone, was responsible for any mental harm she suffered. NRS 200.508(4)(e). To assess the victim's "normal range of performance or behavior," the jury needed to know *why* the victim was in counseling, not just *that* she was in counseling. We cannot conclude, beyond a reasonable doubt that these errors did not contribute to the verdict on the child abuse count. (internal citation omitted). We therefore reverse the conviction for child abuse and remand for a new trial on that charge.
>
> Lastly, [Petitioner] argues that the district court abused its discretion in precluding him from asking the victim about her belief that he gave her a sexually transmitted disease. We conclude that [Petitioner] should have been permitted to cross examine the victim about this highly prejudicial testimony that had little probative value to the state's case, especially since the state opened the door to it. (internal citation omitted). However, the error was harmless because the District Court gave a limiting instruction and, in the context of the charges, we conclude the error did not contribute to the verdict.

Order Affirming in Part, Reversing in Part, and Remaining, Docket No. 73674, at 4-6.

As counsel's argument on appeal was successful, Petitioner has failed to show how arguing that the State engaged in prosecutorial misconduct reasonably would have changed the outcome. For these reasons, Petitioner's claim is belied by the record and his claim is denied.

C. Petitioner's Attachment Three Claim is denied.

Petitioner argues that appellate counsel was ineffective for not arguing that the "encourage," "entice," and "permit" language of NRS 200.710 rendered the statute unconstitutionally overbroad. Petition: Attachment Three, at 1-2. Specifically, Petitioner claims that because there was no evidence that Petitioner was physically present when J.T. took sexually suggestive pictures and he did not distribute the images, there was no evidence that he encouraged, enticed, or permitted her to produce pornography. Id. Petitioner's claim is denied.

First, Petitioner's claim that counsel did not argue that NRS 200.710 was unconstitutionally overbroad is belied by the record. Indeed, on appeal, counsel argued that the NRS 200.400(4) definition of "sexual portrayal" was unconstitutionally overbroad. Exhibit A, at 41-44. However, the Nevada Supreme Court rejected counsel's argument and held that the NRS 200.710(4) definition of "sexual portrayal" was constitutional. Order Affirming in Part, Reversing in Part, and Remaining, Docket No. 73674, at 7-6.

Next, while counsel did not claim that the "encourage," "entice," and "permit" language of NRS 200.710 rendered the statute unconstitutionally overbroad, Petitioner nevertheless has failed to establish deficient performance as his claim that those three words render the statute invalid is nothing but a bare and naked claim unsupported by proper legal authority. Petitioner has not provided any analysis regarding how NRS 200.710 is overbroad or why such a claim would have been successful on appeal. Instead, Petitioner appears to focus his argument on whether there was sufficient evidence supporting his convictions for Unlawful Use of a Minor in the Production of Pornography. However, whether there was sufficient evidence to support a conviction is not the same as whether a statute is constitutional. Petitioner's claim is bare and naked assertion.

Regardless, as any challenge to the constitutionality to the "encourage," "entice," and "permit" language of NRS 200.710 would have failed. According to First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech. The doctrine seeks to strike a balance between competing social costs.

Virginia v. Hicks, 539 U.S. 113, 119-20 (2003). In order to maintain an appropriate balance, the U.S. Supreme Court has vigorously enforced the requirement that a statute's overbreadth be *substantial,* not only in an absolute sense, but also relative to the statute's plainly legitimate sweep. U.S. v. Williams, 553 U.S. 285, 292-93 (2008) (upholding a pandering or solicitation of child pornography statute against a claim of overbreadth under the First Amendment).

The U.S. Supreme Court has held that a statute may be overbroad if in its reach it prohibits constitutionally protected conduct. Grayned v. Rockford, 408 U.S. 104, 114 (1972). In considering an overbreadth challenge, a court must decide, "whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." Id. at 115. However, when a law regulates arguably expressive conduct, "the scope of the [law] does not render it unconstitutional unless its overbreadth is not only real, but substantial as well, judged in relation to the [law's] plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). A statute is subjected to less scrutiny where the behavior sought to be prohibited by the State moves from "pure speech" toward conduct "and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests." Id.

Specifically, overbreadth challenges target laws, "which do[] not aim specifically at evils within the allowable area of State control but, on the contrary, sweep[] within [their] ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press." Thornhill v. State of Alabama, 310 U.S. 88, 97-98 (1940). Such a statute may be invalidated, even if the intrusion on First Amendment rights is minor, because it, "readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." Id.

NRS 200.710(2) states:

> A person who knowingly uses, encourages, entices, coerces or permits a minor to be the subject of a sexual portrayal in a performance is guilty of a

> category A felony and shall be punished as provided in NRS 200.750, regardless of whether the minor is aware that the sexual portrayal is part of a performance.

While "encourage," "entice," and "permit" are not explicitly defined in statute, Black's Law Dictionary defines all three:

> **encourage** *vb.* (15c) *Criminal law.* To instigate; to incite to action; to embolden; to help. See AID AND ABET. — **encouragement,** *n.*
> [...]
> **entice** *vb.* (14c) To lure or induce; esp., to wrongfully solicit (a person) to do something.
> [...]
> **permit** (pər-**mit**) *vb.* (15c) **1.** To consent to formally; to allow (something) to happen, esp. by an official ruling, decision, or law <permit the inspection to be carried out>. **2.** To give opportunity for; to make (something) happen <lax security permitted the escape>. **3.** To allow or admit of <if the law so permits>.

Black's Law Dictionary (11th ed. 2019) (emphasis in original).

Both "sexual conduct" and "sexual portrayal" have been defined by statute. Specifically, NRS 200.700(3) defines "sexual conduct" as including "lewd exhibition of the genitals;" and NRS 200.700(4) defines "sexual portrayal" as a depiction of a person that appeals to the "prurient interest in sex and which does not have serious literary, artistic, political or scientific value." Further, the Nevada Supreme Court has consistently held—as it did on Petitioner's appeal—that the definitions of sexual portrayal and sexual conduct are constitutional. Order Affirming in Part, Reversing in Part, and Remaining, Docket No. 73674, at 6-8; see also Shue v. State, 133 Nev. 798, 805-07, 407 P.3d 332, 338-39 (2017) (concluding that Nevada's statutes barring the sexual portrayal of minors are not overbroad because the type of conduct proscribed under NRS 200.700(4) does not implicate the First Amendment's protection and sufficiently narrows the statute's application to avoid vagueness)

Accordingly, the proscribed conduct outlined in NRS 200.710 is clear and a defendant would be well aware of whether they were encouraging, enticing, or permitting a minor to be the subject of a sexual portrayal. Petitioner has not explained how this the "encourage," "entice," and "permit" language of NRS 200.710 could be construed as applying to otherwise

legal and protected conduct particularly because it pertains to encouraging, enticing or permitting a minor to engage in sexual conduct or be the subject of a sexual portrayed. Indeed, based on the evidence admitted at trial, Petitioner's conduct clearly fell within the proscribed conduct and any challenge to the evidence would have failed. At trial, J.T. testified that Petitioner her for "sexy pictures," which she sent. Jury Trial – Day 4, at 110 (March 24, 2017). However, Petitioner did not think they were sexy enough, so he directed J.T. to pose in different positions. Id. at 110-11. Specifically, J.T. testified that she did not think of taking her clothes off, but that Petitioner told her to do so. Id. at 117. Petitioner also asked for pictures of her butt, her crotch, and partly nude photos. Id. at 116-20. When asking for one of the crotch photos, Petitioner specifically directed J.T. to "spread [her] legs." Id. at 121.

As Petitioner has failed to establish that NRS 200.710 was unconstitutionally overbroad or that challenging the "encourage," "entice," and "permit" language of the statute would have succeeded on appeal, appellate counsel cannot be deemed ineffective for failing to make a futile argument. Accordingly, Petitioner's claim is denied.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

DATED this 15 day of June, 2021.

Dated this 15th day of June, 2021

F08 026 0EA2 34F6
Erika Ballou
District Court Judge

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY _____
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #13730

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CERTIFICATE OF SERVICE

I certify that on the _____ day of June, 2021, I mailed a copy of the foregoing proposed Findings of Fact, Conclusions of Law, and Order to:

BY _____
Secretary for the District Attorney's Office

13F17841X/KM/jb/mlb/SVU

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Melvyn Sprowson, Jr., Plaintiff(s) vs. Garrett, Warden, Defendant(s)	CASE NO: A-21-829115-W DEPT. NO. Department 24

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Findings of Fact, Conclusions of Law and Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 6/15/2021

D A	motions@clarkcountyda.com
Dept 24 Law Clerk	dept24lc@clarkcountycourts.us
AG 1	rgarate@ag.nv.gov
AG 2	aherr@ag.nv.gov

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6/17/2021 12:41 PM
Steven D. Grierson
CLERK OF THE COURT

NEFF

DISTRICT COURT
CLARK COUNTY, NEVADA

MELVYN SPROWSON, JR.,

Petitioner,

vs.

GARRETT, WARDEN; ET.AL.,

Respondent,

Case No: A-21-829115-W

Dept No: XXIV

NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PLEASE TAKE NOTICE that on June 15, 2021, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on June 17, 2021.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 17 day of June 2021, I served a copy of this Notice of Entry on the following:

☑ By e-mail:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:
Melvyn Sprowson, Jr. #
1180740
1200 Prison Rd.
Lovelock, NV 89419

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

Electronically Filed
06/15/2021 1:07 PM
CLERK OF THE COURT

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
KAREN MISHLER
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Nevada Bar #13730
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

MELVYN SPROWSON,
#5996049

Defendant.

CASE NO: A-21-829115-W

DEPT NO: XXIV

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: MAY 24, 2021
TIME OF HEARING: 8:30 AM

THIS CAUSE having come on for hearing before the Honorable ERIKA BALLOU, District Judge, on the 24 day of May, 2021, the Petitioner not being present, proceeding in proper person, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through SARAH OVERLY, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HIISTORY

On January 13, 2014, Petitioner Melvyn Sprowson ("Petitioner") was charged with Count 1 – First Degree Kidnapping (Category A Felony – NRS 200.310, 200.320); Count 2 – Child Abuse, Neglect, or Endangerment with Substantial Bodily and/or Mental Harm (Category B Felony – NRS 200.501(1)); and Counts 3 through 6 – Unlawful Use of a Minor in the Production of Pornography (Category A Felony – NRS 200.700, 200.710(A)(B), 200.750).

On March 22, 2017, Petitioner's jury trial began. On March 31, 2017, the jury found Petitioner guilty of all counts.

On June 26, 2017, the district court sentenced Petitioner to Count 1 – five years to life; Count 2 – 30 to 96 months, to run consecutive to Count 1; Count 3 - five years to life, to run consecutive to Count 2; Count 4 - five years to life, to run concurrently to Count 3; Count 5 – five years to life, to run concurrently to Count 4; and Count 6 – five years to life, to run concurrently to Count 5. Petitioner's Judgment of Conviction was filed on July 5, 2017.

On July 1, 2019, the Nevada Supreme Court issued an Order Affirming in Part, Reversing in Part, and Remanding. Specifically, the Court reversed Petitioner's conviction for Count 2 – Child Abuse, Neglect, or Endangerment with Substantial Bodily and/or Mental Harm and ordered a new trial on that count only. Remittitur issued on January 17, 2020.

On February 12, 2020, the State agreed to strike Count 2 and run Count 3 consecutive to Count 1. An Amended Judgment of Conviction was filed on February 19, 2020.

On February 9, 2021, Petitioner filed the instant Petition for Writ of Habeas Corpus (Post-Conviction) (Non Death). On March 24, 2021, the State filed a Response. On April 22, 2021, Petitioner filed a Reply to the State's Response.

STATEMENT OF FACTS

In 2013, 16-year-old J.T. lived with her mom, grandmother and two sisters. In August of 2013, J.T. met Petitioner on Craigslist after he posted an ad that said, "Lonely millionaire"

and provided a fake age of 34. J.T. told Petitioner she was 16 and that her mother could not know they were talking. Petitioner was a kindergarten teacher.

At first, J.T. and Petitioner communicated through Craigslist e-mail, where they exchanged photos. Later, they communicated through Kik, a texting application, because it was easier than e-mailing and J.T.'s mother could not see the messages like she could with traditional texting. Eventually Petitioner asked her to be his girlfriend and she said yes. After, Petitioner asked J.T. for "sexy pictures" and she sent them. Petitioner did not think they were sexy enough, so he told J.T. to pose in different positions. Specifically, J.T. testified that she did not think of taking her clothes off, but Petitioner told her to. Petitioner also asked for pictures of her butt, her crotch, and partly nude photos. When asking for one of the crotch photos, Petitioner specifically told J.T. to "spread [her] legs."

After they began talking, Petitioner secretly went to J.T.'s work. After he left, he texted her and to tell her he had been there and described what she was wearing. Eventually, J.T. met Petitioner at a roller-skating rink. J.T. was there with a friend, and told her friend that Petitioner was one of her old teachers. At the roller rink the two had a short conversation and then Appellant left.

At that point, J.T. still did not know that Appellant was really 44 instead of 34. She did not learn his real age until she slept over at his house. J.T. did not tell her mom that she was communicating with Petitioner. J.T. told Petitioner she could not tell her mom because she would not be happy, and J.T. made sure to call Petitioner first if they were going to talk.

The first time J.T. went to Petitioner's house she told her mom that she was staying at a friend's. Petitioner picked J.T. up at Target and took her to his house where J.T. stayed for two nights where they drank alcohol and had sexual intercourse without a condom Petitioner gave J.T. a promise ring that looked like a wedding ring which J.T. wore around her neck so her mom would not see it. When J.T.'s mom saw the ring and asked J.T. about it, J.T. made up multiple lies about where she got it. J.T.'s mom did not believe her and took away J.T.'s phone and computer. When J.T.'s mom looked through J.T.'s phone, she noticed that J.T. had been calling a strange number and grew suspicious. J.T. had her phone on the bus one day and

warned Petitioner that her mom was growing wary.

On August 28, 2013, J.T. told her mom that she needed her laptop for a school project, and e-mailed Petitioner to tell him that they would not be able to talk for a while and they needed to figure something out. They devised a plan where Petitioner would pick J.T. up from home early one morning while J.T.'s mom was asleep. Petitioner told J.T. to bring her social security card and birth certificate, which she did. J.T. also brought her cell phone and laptop. When Petitioner picked her up that morning, he confirmed that she brought the documents, and told her to turn off her cell phone so her family could not track it. Petitioner drove J.T. to his house and when they arrived, Petitioner changed his cell phone number so J.T.'s mom could not track him.

J.T. lived with Petitioner for two months, from August 28, 2013 until November 1, 2013. While Petitioner was at work, J.T. would color or watch television or movies. While J.T. attended school before living with Petitioner, she stopped going when she moved in with him. They planned for J.T. to return to school when she was 17 and a half because they thought she would be old enough to stay with Petitioner then. Petitioner gave J.T. a coloring book and one fiction book, but no educational supplies.

While living with Petitioner, J.T. had ruled to follow. J.T. was allowed to use her laptop but could not touch her phone because her family might find her. J.T. could not to go outside because she could be recognized, and could not have anyone over to the house – especially other males.

Petitioner took J.T. out of the house only a few times: he took her to the lake because she wanted to get outside once; drove her by their home at night without stopping once after she said she missed her family; and went to Walmart at night where Petitioner left J.T. in the car wearing a hat and glasses with her seat reclined back. Indeed, whenever they left the house Petitioner made J.T. wear a hat, glasses, loose clothing, and put her hair up so she would look like a boy.

Although the doors were not locked and J.T. was physically free to leave, she did not feel emotionally free to leave. Approximately two to three times per week Petitioner would

get angry and tell J.T. to pack her bags because he was taking her home. Petitioner would then become sad, cry and ask J.T. to stay, so she did. One of these occasions occurred when J.T. said she missed her family.

Petitioner told J.T. that if they were caught, J.T. would say that she was Petitioner's roommate, but they were not in a sexual relationship. J.T. agreed to the plan. Once, while was living with Petitioner, a private investigator came to the door looking for J.T. Petitioner looked through the peephole, told J.T. to gather her things and hide, and Petitioner spoke with the investigator. J.T. sat on the stairs and heard the investigator tell Petitioner he was looking for J.T. She then heard Petitioner tell the investigator that he did not know what the investigator was talking about. After the investigator left, Petitioner told J.T. they were fine, and the investigator believed Petitioner. Another time, Petitioner came home with a missing-person poster with J.T.'s picture on it. In spite of that, Petitioner told J.T. that her mom was not looking for her and that her mom did not care. On another occasion, Petitioner told J.T. that the police had come to his work looking for her, and that they thought she was a prostitute.

When J.T. lived with Appellant, they were had sex two or three times a week. Petitioner also provided her with alcohol more than one time and on one occasion she got "pretty drunk." Petitioner also got upset about the way J.T. did dishes, told her that her handwriting was bad, and that she could not sing.

On November 1, 2013, the police came to Petitioner's home while J.T. was home alone. J.T. spoke with them but was not entirely honest and tried to stick to the story Petitioner instructed her to tell. The police took J.T. to the Southern Nevada Children's Assessment Center where she spoke with a female police officer and was more forthcoming, but still not completely honest. J.T. was then reunited with her mother, but felt guilty because she did not stick to Petitioner's story and wanted to return to Petitioner's home. When J.T. kept trying to leave her mother's house to go back to Petitioner, a J.T.'s mother took her to Montevista, a behavioral health center where J.T. stayed for three days. Back at her mother's house, all J.T. she could think about was getting back to Petitioner and J.T.'s mother would not let her leave the house. When J.T. threatened to kill herself and tried to jump off the house balcony to get

out of the house, and her mom took her back to Montevista where J.T. remained for approximately a month while waiting for a vacancy at Willow Springs, a long-term treatment facility. While at Willow Springs, J.T. had to learn how to regulate her emotions as well as re-learn how to interact in society. J.T. was at Willow Springs for almost six months and continued seeing therapists after she left. J.T. was still in therapy when she testified at trial.

After leaving Willow Springs J.T. returned to her mother's home. J.T. believed Petitioner and discovered he was not when he began contacting her through Instagram using fake names. J.T. was angry that Petitioner was contacting her and thought he gave her an STD. Although she struggled with the decision, she informed her mother and the police that Petitioner reached out to her.

At trial, J.T. testified that she lied during her cross-examination at the preliminary hearing. J.T. explained that she was honest on direct examination but lied during cross-examination because Petitioner mouthed "I love you," "it's okay," winked at her, and placed his hand over his heart during a break between direct and cross examination. Because of this J.T. felt guilty and decided to tell the version of events Petitioner told her to say when he lived with her in an effort to protect Petitioner.

ANALYSIS

I. THE INSTANT PETITION IS PROCEDURALLY TIME BARRED PURSUANT TO NRS 34.726

A petitioner must raise all grounds for relief in a timely filed first post-conviction Petition for Writ of Habeas Corpus. Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001). A petitioner must challenge the validity of their judgment or sentence within one year from the entry of judgment of conviction or after the Supreme Court issues remittitur pursuant to NRS 34.726(1). This one-year time limit is strictly applied and begins to run from the date the judgment of conviction is filed or remittitur issues from a timely filed direct appeal. Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528 (2001); Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).

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Moreover, filing an amended judgment of conviction does not restart the mandatory one-year deadline. The Nevada Supreme Court has explained that:

> [C]onstruing NRS 34.726 to provide such an extended time period would result in an absurdity that the Legislature could not have intended. A judgment of conviction may be amended at *any time* to correct a clerical error or to correct an illegal sentence. Because the district court may amend the judgment many years, even decades, after the entry of the original judgment of conviction, restarting the one-year time period for all purposes every time an amendment occurs would frustrate the purpose and spirit of NRS 34.726. Specifically, it would undermine the doctrine of finality of judgments by allowing petitioners to file post-conviction habeas petitions in perpetuity.

Sullivan v. State, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004).

Instead, unless the claims raised in a post-conviction petition challenge a change made in the amended judgment of conviction, a court must dismiss a petition as procedurally barred if filed more than one year after remittitur or the original judgment of conviction was filed.

"Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory," and "cannot be ignored [by the district court] when properly raised by the State." State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231 & 233, 112 P.3d 1070, 1074–75 (2005). For example, in Gonzales v. State, the Nevada Supreme Court rejected a habeas petition filed two days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the Notice within the one-year time limit. 118 Nev. 590, 596, 53 P.3d 901, 904 (2002). Absent a showing of good cause, district courts have a duty to consider whether claims raised in a petition are procedurally barred, and have no discretion regarding whether to apply the statutory procedural bars. Riker, 121 Nev. at 233, 112 P.3d at 1075.

Here, Petitioner's Judgment of Conviction was filed on July 5, 2017, and remittitur issued on January 17, 2020. While an Amended Judgment of Conviction was filed on February 19, 2020, none of the claims raised in the instant Petition challenge anything pertaining to the change made in the Amended Judgment of Conviction and the clock to timely file a post-conviction petition began to run on January 17, 2020. The instant Petition was filed on

February 9, 2021, 23 days past the one-year deadline. As such, absent a showing of good cause, the instant Petition is denied as procedurally time-barred.

II. PETITIONER HAS NOT SHOWN GOOD CAUSE TO OVERCOME PROCEDURAL BARS

Courts may consider the merits of procedurally barred petitions only when petitioners establish good cause for the delay in filing and prejudice should the courts not consider the merits. NRS 34.726(1)(a)-(b); NRS 34.810(3). Simply put, good cause is a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). To establish good cause, a petitioner must demonstrate that "an impediment external to the defense prevented their compliance with the applicable procedural rule." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525-26 (2003). Good cause exists if a Petitioner can establish that the factual or legal basis of a claim was not available to him or his counsel within the statutory time frame. Hathaway, 119 Nev. at 252-53, 71 P.3d at 506-07. Once the factual or legal basis becomes known to a petitioner, they must bring the additional claims within a reasonable amount of time after the basis for the good cause arises. See Pellegrini, 117 Nev. at 869-70, 34 P.3d at 525-26 (holding that the time bar in NRS 34.726 applies to successive petitions). A claim that is itself procedurally barred cannot constitute good cause. State v. District Court (Riker), 121 Nev. 225, 235, 112 P.3d 1070, 1077 (2005). See also Edwards v. Carpenter, 529 U.S. 446, 453 120 S. Ct. 1587, 1592 (2000).

Here, Petitioner has failed to establish or even address good cause. Petitioner does not argue that some external impediment justifies the filing of this Petition outside of the one-year time bar, or that he discovered new facts or evidence not available to him within the one-year time limit. As such, the instant Petition is denied.

III. PETITIONER HAS FAILED TO SHOW PREJUDICE BECAUSE HIS CLAIMS LACK MERIT

To establish prejudice, petitioners must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial

disadvantage, in affecting the state proceedings with error of constitutional dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)).

Petitioner claims appellate counsel was ineffective for three reasons. First, Petitioner claims that appellate counsel should have argued that his First-Degree Kidnapping conviction needed to be reversed because he was improperly convicted of Child Abuse, Neglect, or Endangerment. Petition: Attachment One, at 1. Second, Petitioner argues that appellate counsel should have argued that the prosecution engaged in misconduct by eliciting misleading information from J.T. and her mother. Petition: Attachment Two, at 1-5. Third, Petitioner argues that appellate counsel was ineffective for failing to argue that the "encourage," "entice," and "permit" language of NRS 200.710 rendered the statute unconstitutionally overbroad. Petition: Attachment Three, at 1-2. All three of Petitioner's claims fail and Petitioner cannot establish prejudice sufficient to overcome the procedural bars.

The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Claims of ineffective assistance of counsel are analyzed under the two-pronged test articulated in Strickland, 466 U.S. 668, 104 S. Ct. 2052 (1984), wherein the defendant must show: 1) that counsel's performance was deficient, and 2) that the deficient performance prejudiced the defense. Id. at 687, 104 S. Ct. at 2064. Nevada adopted this standard in Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984). "A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one." Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996); Molina v. State, 120 Nev. 185, 190, 87 P.3d 533, 537 (2004).

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371,130 S. Ct. 1473, 1485 (2010). "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. The question

is whether an attorney's representations amounted to incompetence under prevailing professional norms, "not whether it deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 88, 131 S. Ct. 770, 778 (2011). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449 (1970)).

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011-1012, 103 P.3d 25, 32-33 (2004). Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)). This analysis does not indicate that the court should "second guess reasoned choices between trial tactics, nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711. The role of a court in considering alleged ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Id. In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

The Strickland analysis does not "mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711 (citing Cooper, 551 F.2d at 1166 (9th Cir. 1977)). To be effective, the constitution "does not require that counsel

do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984). "Counsel cannot be deemed ineffective for failing to make futile objections, file futile motions, or for failing to make futile arguments." Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Id. at 846, 921 P.2d at 280; see also Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S. Ct. at 2066. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Further, claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part, "[Petitioner] must allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions *may cause your petition to be dismissed.*" (emphasis added).

Even if a petitioner can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice by showing a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing

Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The Strickland test also applies to whether appellate counsel can be deemed ineffective. Smith v. Robbins, 528 U.S. 259, 263, 120 S.Ct. 746, 752 (2016). A petitioner must show that his counsel was objectively unreasonable in failing to find and argue arguable issues and that there was a reasonable probability that, but for counsel's failure, the petitioner would have prevailed on appeal. Id. at 286, 120 S.Ct. at 765. Appellate counsel is not ineffective for failing to raise frivolous claims. Jones v. Barnes, 463 U.S. 745, 745, 103 S.Ct. 3308, 3309 (2016). In fact, appellate counsel should not raise every claim, and should instead focus on their strongest ones in order to maximize the possibility of success on appeal. Smith, 528 U.S. at 288, 120 S.Ct. at 766. A finding of ineffective assistance of appellate counsel is generally only found when issues not raised on appeal are clearly stronger than those presented. Id.

A. Petitioner's Attachment One Claim is denied.

Petitioner argues that appellate counsel was ineffective for failing to argue that the First-Degree Kidnapping conviction should be vacated on appeal or, alternatively, for failing to argue before the district court that because the Nevada Supreme Court vacated the Child Abuse, Neglect, or Endangerment Resulting in Substantial Physical/Mental Harm, that the district court should also vacate the First-Degree Kidnapping Conviction. Petition: Attachment One, at 1. Specifically, Petitioner alleges that appellate counsel failed to argue in his direct appeal that Petitioner's First-Degree Kidnapping Conviction should be vacated because the State relied heavily on Petitioner's guilt of child abuse to establish his guilt of kidnapping. Id. Petitioner explains that because the Nevada Supreme Court vacated his conviction for Count 2 – Child Abuse, appellate counsel should have also argued that his conviction for Count 1 – First-Degree Kidnapping should be vacated as child abuse was the only predicate offense by which he could be guilty of first-degree kidnapping. Id. at 2-5. Petitioner's claim is denied.

First, Petitioner's claim that appellate counsel was ineffective for failing to argue that his conviction for First-Degree Kidnapping should be vacated is belied by the record. On direct appeal, appellate counsel argued that Petitioner was entitled to an entirely new trial on all

counts. Exhibit A at 30. In support of this argument, counsel argued that the district court improperly excluded evidence that was relevant to whether Petitioner enticed J.T. to run away from her family and whether J.T. suffered substantial physical or mental harm. Id. at 21. Counsel elaborated that Petitioner had a right to tell the jury about what J.T. told him about her past because it negated any claim that Petitioner had the specific intent to kidnap J.T. Id. at 22-23. Counsel further argued that the district court violated Petitioner's confrontation clause rights "by preventing him from impeaching key witness testimony about the essential elements of the charges against him and by preventing him from questioning witnesses on topics the State had already discussed on cross examination." Id. 24. Specifically, counsel argued on direct appeal that, "[a]lthough the State accused Petitioner of kidnapping J.T. by 'enticing' her away from her family [sic], the court would not allow [Petitioner] to ask J.T. if his Craigslist ad was the 'first' such ad she had responded to." Id. Finally, counsel argued that such errors were not harmless because the State argued significantly during closing arguments that Petitioner 'enticed' J.T. into leaving her family. Id. Accordingly, Petitioner's claim that counsel did not argue that his conviction for Count 1 – First-Degree Kidnapping should be vacated is belied by the record.

To the extent Petitioner believes that counsel should have argued that his kidnapping conviction should be vacated because his child abuse conviction should be vacated, such a claim is denied as that argument would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. The State did not claim that Petitioner was guilty of First-Degree Kidnapping solely because he enticed J.T. to run away. Instead, the State could have proved Petitioner's guilt by proving beyond a reasonable doubt that Petitioner led, took, carried away, or detained J.T. Information at 2 (filed January 13, 2014). As the jury was not required to be unanimous on which theory of liability Petitioner was guilty of first-degree kidnapping, any argument that his first-degree kidnapping conviction should be vacated because he did not "entice" J.T. would have failed.

Indeed, even if Petitioner could show that J.T. willingly left her home, he could not show that he did not convince her to do so, or that he did not detain her with the intent to keep

her from her mother. At trial, J.T. testified that Petitioner specifically instructed her to bring her social security card and birth certificate, picked her up in the early morning while her mother slept, and told her get in his car. Jury Trial – Day 4, at 142-43 (March 24, 2017). At that point Petitioner made J.T. turn her phone off so it could not be tracked and changed his phone number so he could also not be located. Id. at 144-45. Petitioner then drove J.T. away from her home to his home where he kept her hidden for approximately nine weeks. Id. During that time he would not let her turn her phone on, have anyone over, did not attend school, took her out of the house only a few times and made her dress in disguise when they did leave. Id. at 147, 149, 154-56. Accordingly, there was substantial evidence that Petitioner led, took, or carried J.T. away, all of which supported his conviction for Count 1 – First-Degree Kidnapping.

Indeed, in reviewing Petitioner's claim on appeal, the Nevada Supreme Court concluded that "the victim's past was relevant to whether [Petitioner] willfully enticed the victim to leave hear mother's home and go to his because it says nothing about the defendant's actions and consent is not a defense to first-degree kidnapping of a person under the age of 18. Order Affirming in Part, Reversing in Part, and Remaining, Docket No. 73674, at 4 (citing NRS 200.350(2); see NRS 48.015 (defining relevant evidence)). Accordingly, appellate counsel cannot be deemed ineffective for failing to make a futile argument.

Further, counsel cannot be deemed ineffective for failing to argue before the district court, after the Nevada Supreme Court's remand of Count 2 – Child Abuse, Neglect, or Endangerment with Substantial Bodily and/or Mental Harm for a new trial, also required vacating Petitioner's conviction for Count 1 – First-Degree Kidnapping. The Nevada Supreme Court had already concluded that Petitioner was properly convicted of Count 1 – First-Degree Kidnapping. This Court cannot overrule the Nevada Supreme Court. NEV. CONST. Art. VI § 6. Accordingly, any argument before the district court that contradicted the Nevada Supreme order would have failed and counsel cannot be deemed ineffective. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

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For these reasons, Petitioner also cannot show prejudice and any argument regarding his conviction for first-degree kidnaping not made either on direct appeal or before the district court would have been successful. Appellate counsel therefore cannot be deemed ineffective and this Court should deny Petitioner's claim.

B. Petitioner's Attachment Two Claim is denied.

Petitioner argues that appellate counsel was ineffective for failing to allege that the State committed prosecutorial misconduct when it knowingly used false or misleading evidence. Petition: Attachment Two, at 1. Specifically, Petitioner argues that the State permitted both J.T. and her mother to give misleading testimony about their relationship, J.T.'s relationship with Petitioner, and J.T.'s relationships with older men and the reasons she was in therapy. Id. Petitioner acknowledges that the State did so in compliance with the district court's ruling. Id. at 2. Nevertheless, Petitioner claims this amounted to prosecutorial misconduct because Petitioner was precluded from attacking or impeaching the witnesses' credibility which then prevented the jury from hearing and considering all relevant evidence. Id. at 2-5. Petitioner's claim is denied.

First, Petitioner acknowledges that the State tailored their questions and arguments in compliance with the district court's ruling that evidence regarding J.T.'s prior relationships or evidence of prior mental health treatment was inadmissible. Petition: Attachment Two, at 2. As the State cannot be accused of misconduct for complying with the district court's ruling, appellate counsel can therefore not be deemed ineffective for failing to argue as much. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

It appears that Petitioner's complaint rests with the district court's ruling. This claim is denied for two reasons. First, as it is not a claim of ineffective assistance of counsel, it is improper to raise in post-conviction habeas proceedings and therefore dismissed. Second, any claim that appellate counsel was ineffective for failing to challenge the district court's ruling is belied by the record. On appeal, counsel devoted 14 pages of argument to challenging the district court's ruling and explaining why the error was not harmless. Exhibit A at 17-30. In reviewing counsel's argument, the Nevada Supreme Court concluded that while the district

court's ruling did not impact Petitioner's conviction for first-degree kidnapping, it was relevant to the substantial-mental-harm element of the child abuse charge:

> NRS 200.508(4)(e) defines "Substantial mental harm" as "an injury to the intellectual or psychological capacity or the emotional condition of a child as evidenced by an observable and substantial impairment of the ability of the child to function within his or her normal range of performance or behavior." This language puts at issue the victim's state of mind when she met [Petitioner]. Yet, the district court precluded [Petitioner]from cross examining the victims doctor about the victims past psychological damage after the doctor testified that only 5 to 10 percent of her patients require the type of long term care that the victim required after her interaction with [Petitioner]. Further, the district court precluded [Petitioner] from impeaching the victim and her mother with medical documentation indicating that the victim's relationship with her 19 year old boyfriend contributed to the victims mental health issues subsequent to her interaction with [Petitioner]. (internal citation omitted). Indeed, the State's closing argument characterized the victim as a normal teenager with no issues until [Petitioner] came along and that he, alone, was responsible for any mental harm she suffered. NRS 200.508(4)(e). To assess the victim's "normal range of performance or behavior," the jury needed to know *why* the victim was in counseling, not just *that* she was in counseling. We cannot conclude, beyond a reasonable doubt that these errors did not contribute to the verdict on the child abuse count. (internal citation omitted). We therefore reverse the conviction for child abuse and remand for a new trial on that charge.
>
> Lastly, [Petitioner] argues that the district court abused its discretion in precluding him from asking the victim about her belief that he gave her a sexually transmitted disease. We conclude that [Petitioner] should have been permitted to cross examine the victim about this highly prejudicial testimony that had little probative value to the state's case, especially since the state opened the door to it. (internal citation omitted). However, the error was harmless because the District Court gave a limiting instruction and, in the context of the charges, we conclude the error did not contribute to the verdict.

Order Affirming in Part, Reversing in Part, and Remaining, Docket No. 73674, at 4-6.

As counsel's argument on appeal was successful, Petitioner has failed to show how arguing that the State engaged in prosecutorial misconduct reasonably would have changed the outcome. For these reasons, Petitioner's claim is belied by the record and his claim is denied.

C. Petitioner's Attachment Three Claim is denied.

Petitioner argues that appellate counsel was ineffective for not arguing that the "encourage," "entice," and "permit" language of NRS 200.710 rendered the statute unconstitutionally overbroad. Petition: Attachment Three, at 1-2. Specifically, Petitioner claims that because there was no evidence that Petitioner was physically present when J.T. took sexually suggestive pictures and he did not distribute the images, there was no evidence that he encouraged, enticed, or permitted her to produce pornography. Id. Petitioner's claim is denied.

First, Petitioner's claim that counsel did not argue that NRS 200.710 was unconstitutionally overbroad is belied by the record. Indeed, on appeal, counsel argued that the NRS 200.400(4) definition of "sexual portrayal" was unconstitutionally overbroad. Exhibit A, at 41-44. However, the Nevada Supreme Court rejected counsel's argument and held that the NRS 200.710(4) definition of "sexual portrayal" was constitutional. Order Affirming in Part, Reversing in Part, and Remaining, Docket No. 73674, at 7-6.

Next, while counsel did not claim that the "encourage," "entice," and "permit" language of NRS 200.710 rendered the statute unconstitutionally overbroad, Petitioner nevertheless has failed to establish deficient performance as his claim that those three words render the statute invalid is nothing but a bare and naked claim unsupported by proper legal authority. Petitioner has not provided any analysis regarding how NRS 200.710 is overbroad or why such a claim would have been successful on appeal. Instead, Petitioner appears to focus his argument on whether there was sufficient evidence supporting his convictions for Unlawful Use of a Minor in the Production of Pornography. However, whether there was sufficient evidence to support a conviction is not the same as whether a statute is constitutional. Petitioner's claim is bare and naked assertion.

Regardless, as any challenge to the constitutionality to the "encourage," "entice," and "permit" language of NRS 200.710 would have failed. According to First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech. The doctrine seeks to strike a balance between competing social costs.

Virginia v. Hicks, 539 U.S. 113, 119-20 (2003). In order to maintain an appropriate balance, the U.S. Supreme Court has vigorously enforced the requirement that a statute's overbreadth be *substantial,* not only in an absolute sense, but also relative to the statute's plainly legitimate sweep. U.S. v. Williams, 553 U.S. 285, 292-93 (2008) (upholding a pandering or solicitation of child pornography statute against a claim of overbreadth under the First Amendment).

The U.S. Supreme Court has held that a statute may be overbroad if in its reach it prohibits constitutionally protected conduct. Grayned v. Rockford, 408 U.S. 104, 114 (1972). In considering an overbreadth challenge, a court must decide, "whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." Id. at 115. However, when a law regulates arguably expressive conduct, "the scope of the [law] does not render it unconstitutional unless its overbreadth is not only real, but substantial as well, judged in relation to the [law's] plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). A statute is subjected to less scrutiny where the behavior sought to be prohibited by the State moves from "pure speech" toward conduct "and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests." Id.

Specifically, overbreadth challenges target laws, "which do[] not aim specifically at evils within the allowable area of State control but, on the contrary, sweep[] within [their] ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press." Thornhill v. State of Alabama, 310 U.S. 88, 97-98 (1940). Such a statute may be invalidated, even if the intrusion on First Amendment rights is minor, because it, "readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." Id.

NRS 200.710(2) states:

> A person who knowingly uses, encourages, entices, coerces or permits a minor to be the subject of a sexual portrayal in a performance is guilty of a

> category A felony and shall be punished as provided in NRS 200.750, regardless of whether the minor is aware that the sexual portrayal is part of a performance.

While "encourage," "entice," and "permit" are not explicitly defined in statute, Black's Law Dictionary defines all three:

> **encourage** *vb.* (15c) *Criminal law.* To instigate; to incite to action; to embolden; to help. See AID AND ABET. — **encouragement,** *n.*
> [...]
> **entice** *vb.* (14c) To lure or induce; esp., to wrongfully solicit (a person) to do something.
> [...]
> **permit** (pər-**mit**) *vb.* (15c) **1.** To consent to formally; to allow (something) to happen, esp. by an official ruling, decision, or law <permit the inspection to be carried out>. **2.** To give opportunity for; to make (something) happen <lax security permitted the escape>. **3.** To allow or admit of <if the law so permits>.

Black's Law Dictionary (11th ed. 2019) (emphasis in original).

Both "sexual conduct" and "sexual portrayal" have been defined by statute. Specifically, NRS 200.700(3) defines "sexual conduct" as including "lewd exhibition of the genitals;" and NRS 200.700(4) defines "sexual portrayal" as a depiction of a person that appeals to the "prurient interest in sex and which does not have serious literary, artistic, political or scientific value." Further, the Nevada Supreme Court has consistently held—as it did on Petitioner's appeal—that the definitions of sexual portrayal and sexual conduct are constitutional. Order Affirming in Part, Reversing in Part, and Remaining, Docket No. 73674, at 6-8; see also Shue v. State, 133 Nev. 798, 805-07, 407 P.3d 332, 338-39 (2017) (concluding that Nevada's statutes barring the sexual portrayal of minors are not overbroad because the type of conduct proscribed under NRS 200.700(4) does not implicate the First Amendment's protection and sufficiently narrows the statute's application to avoid vagueness)

Accordingly, the proscribed conduct outlined in NRS 200.710 is clear and a defendant would be well aware of whether they were encouraging, enticing, or permitting a minor to be the subject of a sexual portrayal. Petitioner has not explained how this the "encourage," "entice," and "permit" language of NRS 200.710 could be construed as applying to otherwise

legal and protected conduct particularly because it pertains to encouraging, enticing or permitting a minor to engage in sexual conduct or be the subject of a sexual portrayed. Indeed, based on the evidence admitted at trial, Petitioner's conduct clearly fell within the proscribed conduct and any challenge to the evidence would have failed. At trial, J.T. testified that Petitioner her for "sexy pictures," which she sent. Jury Trial – Day 4, at 110 (March 24, 2017). However, Petitioner did not think they were sexy enough, so he directed J.T. to pose in different positions. Id. at 110-11. Specifically, J.T. testified that she did not think of taking her clothes off, but that Petitioner told her to do so. Id. at 117. Petitioner also asked for pictures of her butt, her crotch, and partly nude photos. Id. at 116-20. When asking for one of the crotch photos, Petitioner specifically directed J.T. to "spread [her] legs." Id. at 121.

As Petitioner has failed to establish that NRS 200.710 was unconstitutionally overbroad or that challenging the "encourage," "entice," and "permit" language of the statute would have succeeded on appeal, appellate counsel cannot be deemed ineffective for failing to make a futile argument. Accordingly, Petitioner's claim is denied.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

DATED this 15 day of June, 2021.

Dated this 15th day of June, 2021

F08 026 0EA2 34F6
Erika Ballou
District Court Judge

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY _____
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #13730

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CERTIFICATE OF SERVICE

I certify that on the _____ day of June, 2021, I mailed a copy of the foregoing proposed Findings of Fact, Conclusions of Law, and Order to:

BY _____
Secretary for the District Attorney's Office

13F17841X/KM/jb/mlb/SVU

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Melvyn Sprowson, Jr., Plaintiff(s) vs. Garrett, Warden, Defendant(s)	CASE NO: A-21-829115-W DEPT. NO. Department 24

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Findings of Fact, Conclusions of Law and Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 6/15/2021

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Dept 24 Law Clerk	dept24lc@clarkcountycourts.us
AG 1	rgarate@ag.nv.gov
AG 2	aherr@ag.nv.gov

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Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

MELVYN SPROWSON, Plaintiff, vs. GARRETT WARDEN, et al., Defendant.	CASE#: A-21-829115-W DEPT. XXIV

BEFORE THE HONORABLE ERIKA BALLOU, DISTRICT COURT JUDGE

MONDAY, MAY 24, 2021

RECORDER'S TRANSCRIPT OF HEARING:
PETITION FOR WRIT OF HABEAS CORPUS

APPEARANCES:

For the State: SARAH OVERLY, ESQ.
Chief Deputy District Attorney

RECORDED BY: SUSAN SCHOFIELD, COURT RECORDER

Las Vegas, Nevada, Monday, May 24, 2021

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[Hearing began at 9:30 a.m.]

THE COURT: Page number 3, Melvyn Sprowson versus Garrett, Case Number A-21-829115-W. Mr. Sprowson is not present. He is in the Nevada Department of Prison.

This petition for habeas corpus, the Petition for Writ of Habeas Corpus that was filed on February 9th, 2021, is denied, pursuant to NRS 34.726-1, as procedurally time barred.

Mr. Sprowson had until January 17th of 2021 to file this petition. It's 23 days after the one-year deadline, and because he didn't even address any good cause for the untimely filing, we can't hear it under NRS 34.726 or 34.810(3).

Also, as his claim for ineffective assistance of counsel he failed to establish prejudice that worked to his actual and substantial disadvantage, so it's going to be denied.

So, Ms. Overly, can you prepare the Order.

MS. OVERLY: Yes, Your Honor.

[Hearing concluded at 9:32 a.m.]

* * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Susan Schofield

SUSAN SCHOFIELD
Court Recorder/Transcriber

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**May 24, 2021**

A-21-829115-W Melvyn Sprowson, Jr., Plaintiff(s)
vs.
Garrett, Warden, Defendant(s)

May 24, 2021 **8:30 AM** **Petition for Writ of Habeas Corpus**

HEARD BY: Ballou, Erika **COURTROOM:** RJC Courtroom 12C

COURT CLERK: Ro'Shell Hurtado

RECORDER: Susan Schofield

REPORTER:

PARTIES PRESENT: Overly, Sarah Attorney

JOURNAL ENTRIES

- Sarah Overly, Esq. present via Bluejeans video conference. Deft. not present.

Pursuant to NRS 34.726(1) Petitioner s Writ of Habeas Corpus filed on February 9, 2021, is hereby DENIED as it is procedurally time-barred. This Court finds that Petitioner had until January 17, 2021, to find this instant petition. This instant petition was filed 23 days after the one-year deadline. This Court further finds that Petitioner has failed to establish good cause for the untimely filing of his petitioner under NRS 34.726 and NRS 34.810(3).

Lastly, as to Petitioner s claims for ineffective assistance of counsel, Petitioner has failed to establish prejudice that worked to his actual and substantial disadvantaged. Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993). Accordingly, it is hereby ordered that Petitioner s Writ of Habeas Corpus is hereby DENIED.

CLERK'S NOTE: This Minute Order was mailed to Melvyn Sprowson Jr. #1180740, LLC, 1200 Prison Road, Lovelock, NV, 89419.//05.25.2021rh

Certification of Copy and Transmittal of Record

State of Nevada
County of Clark } **SS:**

Pursuant to the Supreme Court order dated June 29, 2021, I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, do hereby certify that the foregoing is a true, full and correct copy of the complete trial court record for the case referenced below. The record comprises one volume with pages numbered 1 through 205.

MELVYN SPROWSON, JR.,

Plaintiff(s),

vs.

GARRETT, WARDEN,

Defendant(s),

Case No: A-21-829115-W

Dept. No: XXIV

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto Set my hand and Affixed the seal of the Court at my office, Las Vegas, Nevada This 19 day of July 2021.

Steven D. Grierson, Clerk of the Court

Heather Ungermann, Deputy Clerk