

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER ADAM TRUSCA,
Appellant,

vs.

THE STATE OF NEVADA,
Respondent.

No. 83853

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CHRISTOPHER ADAM TRUSCA,
Appellant,

vs.

THE STATE OF NEVADA,
Respondent.

No. 84183

APPELLANT'S OPENING BRIEF

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Appeal from Judgment of Conviction  
Eighth Judicial District Court, Clark County  
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RULE 26.1 DISCLOSURE

Pursuant to Rule 26.1, Nevada Rules of Appellate Procedure, the undersigned hereby certifies to the Court as follows:

1. Appellant Christopher Trusca is the Appellant in Trusca v. State, Nevada Supreme Court Docket #83853/84183.

2. The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal. Appellant is represented in this matter by the undersigned and the law firm of which counsel is the owner, Resch Law, PLLC, d/b/a Conviction Solutions. Appellant was represented in the proceedings below by Peter Isso, Esq.

RESCH LAW, PLLC d/b/a Conviction
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By: 

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I. JURISDICTION

This is an appeal from a judgment of conviction following a guilty plea in State v. Trusca, Case No. C-21-356689-1. The written judgment of conviction was filed on October 25, 2021. App. at 115. A timely notice of appeal was filed on November 23, 2021. App. at 118. An order denying Trusca's motion to modify sentence was filed January 26, 2022. App. at 123. A notice of appeal from it was filed January 28, 2022. This Court has appellate jurisdiction over these consolidated appeals pursuant to NRS 177.015(3) and NRAP (c).

II. ROUTING STATEMENT (RULE 17)

According to NRAP 17, this matter is an appeal that arises from a plea of guilt, therefore likely presumptively assigned to the Court of Appeals.

III. ISSUES PRESENTED FOR REVIEW

- A. Whether, by holding the sentencing hearing remotely in violation of Administrative Order 21-04, the trial court violated Mr. Trusca's state and federal rights to due process and assistance of counsel.
- B. Whether the trial court erred when it sentenced Mr. Trusca based on materially untrue information concerning the relationship between his severe drug addiction and viewing child pornography.
- C. Whether Mr. Trusca's conviction and sentence should be reversed based on cumulative error.

IV. STATEMENT OF THE CASE

Appellant Christopher Trusca ("Trusca") was charged by information with one count of possession of visual presentation depicting sexual conduct of a child. App. at 1. Pursuant to a guilty plea agreement, Trusca pled guilty with all parties reserving the right to argue for any sentence, along with Trusca being allowed to remain out of custody with no electronic monitoring. App. at 3.

At the plea canvas hearing, the court explained that Trusca was eligible for probation unless he was determined to be a high risk to reoffend. App. at 17. A later psychosexual evaluation, already transmitted to this Court under seal, found Trusca a moderate risk to reoffend. (See psychosexual report, p. 8).

Sentencing was held October 19, 2021. App. at 22. At the time, Trusca was represented by counsel who appeared for the sentencing remotely using the Bluejeans system. App. at 22. Trusca also appeared over Bluejeans, but from a location separate from his attorney. App. at 23.

The record indicates interruptions which interfered with the parties' communications with the court. App. at 24 (noting "massive" feedback).

At the conclusion of the hearing, the court sentenced Mr. Trusca to prison and ordered him to appear and surrender at a hearing the following week. App. at 29. At the surrender hearing, the court granted an additional thirty days in which to surrender based on Trusca's infant daughter's need for medical procedures. App. at 32.

Following the surrender hearing, Trusca retained undersigned counsel to assist with post-sentencing remedies. To that end, Trusca filed a motion to modify sentence on November 8, 2021. App. at 34. In it, Trusca raised issues concerning the sentencing to include that it was held remotely, and that the court appeared to rely on materially untrue information when it pronounced the sentence.

A hearing on the motion was held November 23, 2021. At that time, the court denied the substance of the motion, denied a request for bail, and ordered Mr. Trusca taken into custody to serve his sentence. App. at 114.

Trusca appealed from the conviction and sentence in a notice of appeal filed November 23, 2021. App. at 118. He separately appealed the denial of the motion to modify sentence on January 28, 2022. App. at 126. This Court later consolidated the appeals, which are presented together in this opening brief.

V. STATEMENT OF FACTS

The facts relevant to this appeal are largely those which arose around the time of sentencing. There is no particular challenge here to the voluntariness of the plea, nor does Mr. Trusca seek to withdraw his plea. That said, serious errors occurred at the time of the sentencing hearing.

This Court is surely well aware of the (still-ongoing) COVID-19 pandemic. On March 13, 2020, the President declared the pandemic a national emergency, and that national emergency remains in full force and effect as of the filing of this brief.¹

¹ <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/02/18/notice-on-the-continuation-of-the-national-emergency-concerning-the-coronavirus-disease-2019-covid-19-pandemic-2/> (last checked March 21, 2022)

Among various responses to the pandemic, the Chief Judge of the Eighth Judicial District Court issued a series of administrative orders. In effect at the time of sentencing in Mr. Trusca's case was Administrative Order 21-04, which stated in relevant part that "Out-of-custody defendants **shall** appear in person for...**sentencings where the negotiation contemplates a prison or jail sentence...**" App. at 73. (Emphasis added).

But that is not what happened here. At the sentencing, counsel and Trusca both appeared remotely over Bluejeans, and, they were not in the same location together. The court sentenced Mr. Trusca to prison time, as was contemplated by the plea agreement.

This issue was fully preserved and presented below when it was argued in the motion to modify sentence. However, in addressing the issue the trial court stated in conclusory fashion that it was "his and/or his counsel's choice" to appear remotely without ever addressing the unequivocal mandate set forth in the administrative order. App. at 109.

The second primary issue in this appeal concerns arguments presented by the State at sentencing. The State, in overwhelming terms,

demanded the sentencing court disregard Mr. Trusca's documented drug addiction problem based solely on the prosecutor's personal opinions about drug use:

Now I don't get the opportunity to respond to the Defendant's statements and migration (sic). But the theme of this case over the last several years or the last year that I have been assigned to it has been that Mr. Trusca has suffered from an opioid addiction. And, Your Honor, I am sympathetic towards drug addiction, and I am sympathetic towards drug addiction that causes an individual to commit property crimes or cause an individual to commit financial crimes to support their addiction. I don't accept, and I don't support the idea that drug addiction causes you to view child pornography for several years. His opioid addiction did not cause him to view a video of a prepubescent teenager masturbating and being forced to perform oral sex on an adult male. That's just not how drug addiction works, in the State's opinion. And I ask this Court, and I urge this Court to sort of disregard drug addiction. He's not here because he was feeding his addiction; he was here because he was viewing child pornography over the course of several years.

App. at 26-27.

That Mr. Trusca had a severe drug problem was never really in dispute. His father provided a detailed letter to the court which outlined the tragic circumstances wherein Trusca's older brother Nicholas died a

couple years after Nicholas lost his own infant son. App. at 20. Nicholas was described as Mr. Trusca's "only friend" and mentor. His loss devastated Mr. Trusca, and led to a serious substance abuse addiction.

Likewise, the psychosexual report corroborated these arguments. To be sure, the report was very poorly reasoned, but it did identify three factors that the examiner felt contributed to the ultimate conclusion of a moderate risk to offend. Those were 1) the number of images at issue, 2) the death of Mr. Trusca's brother (which did correspond with the time Mr. Trusca started to use illegal drugs and dropped out of school) and 3) Mr. Trusca's substantial history of substance abuse including substances such as Xanax and heroin at the time of the charged offenses.

At sentencing, the court provided no rationale for its sentence. Instead, the judge proclaimed "[t]he harm and conduct here is immense, and a prison term is warranted." App. at 29. This was so even though the defense attorney argued that Mr. Trusca had been "sober from opiates" going into sentencing – presumably to make note of the fact Mr. Trusca had also remained trouble-free during that time. App. at 27. Mr. Trusca

himself attempted to inform the Court that drugs and the loss of his brother were components of a “whole portion” of his life that resulted in a “bad downward spiral.” App. at 27.

Much more about this issue was presented in the motion to modify sentence. As explained in the motion, publicly available scholarly research has, in fact, studied this exact relationship, and initial findings show a correlation between those who view child pornography and drug abuse. Jung et. al. found that over half of child pornography users admitted to drug use, with a slight increase in admitted drug abuse for non-contact offenders (p.35, table 3). Jung notably compares this to their alcohol use: “Although the samples did not differ in their use of alcohol around the time preceding the index offence, non-contact offenders were more likely than child pornography and child molesters to have used drugs” (p.18). Sandy Jung, Liam Ennis, Shayla Stein, Alberto L. Choy & Tarah Hook (2013), *Child Pornography Possessors: Comparisons and Contrasts with Contact- and Non-Contact Sex Offenders*, Journal of Sexual Aggression, 19:3, 295-310, DOI: 10.1080/13552600.2012.741267.

Further, Carnes' 2005 study on "Addiction Interaction Disorder" linked sex addiction (including porn addiction) to other addictions, finding that slightly under half of the survey sex addicts suffered from a chemical dependency of some kind (pp.80-84, Tables 2-4). Patrick J. Carnes, Robert E. Murray & Louis Charpentier (2005), *Bargains With Chaos: Sex Addicts and Addiction Interaction Disorder*, *Sexual Addiction & Compulsivity*, 12:2-3, 79-120, DOI: 10.1080/10720160500201371. Carnes offers several explanations for the linked addictions. First, Carnes finds that addictions can form a "Cross Tolerance" addiction, where two (or more) addictions ramp up simultaneously - ie, "the patient whose drinking and machine poker playing got worse at the same time. It is the parallel leap in activity that should catch the clinician's attention" *Id.* at pp. 87-89.

Another is the "Fusion Dependence" or "Intensification" addiction. Carnes provides an example similar to the scenario here: "Think of the cocaine addict who has certain compulsive sexual behaviors and only does them on cocaine. He does not do the sex separate from the cocaine,

nor will he do the cocaine without the sexual behavior. The addictions have become fused or inseparable" Id. at pp.95-97.

The court denied this portion of the motion as well, stating that there was "nothing to show that the Judge took that into account for anything other than hyperbole" and that the studies cited were not conclusive. App. at 109.

VI. SUMMARY OF ARGUMENT

In violation of constitutional and statutory requirements as well as a local administrative order, the trial court proceeded with sentencing without the defendant present in court, and while the defendant had no ability to privately consult with his attorney. These grave errors deprived Appellant of his right to counsel and right to be present for all proceedings during a critical stage hearing. Whether viewed as error, plain error, or an illegal proceeding, the end result is that Appellant is entitled to a new sentencing proceeding.

An independent error exists on the related issue that, during sentencing, the State provided materially untrue information in the form of

a lengthy personal opinion concerning the relationship between drug use and child pornography. The trial court erred by considering the information and by denying the motion to modify sentence based on it.

VII. ARGUMENT

A. The trial court erred by holding a remote sentencing where prison time was contemplated and probable under the plea agreement, and Trusca had no ability to privately consult with his attorney during sentencing.

The record here stands clear that at the time of sentencing, counsel and Mr. Trusca separately appeared on Bluejeans when in fact the court should have required both of them to be present in person.

Standard of Review

This Court reviews constitutional errors under a de novo standard. Martinoirellan v. State, 131 Nev. 43, 46-47, 343 P.3d 590 (2015). Preserved constitutional error requires reversal unless the State can show the error was harmless beyond a reasonable doubt. Id. Unpreserved errors are reviewed under the plain error standard, meaning, this Court examines if the error was both readily apparent and prejudicial. Id. at 49.

The remote sentencing held in this case violated this Court's recently pronounced requirements for criminal cases.

The motion to modify sentence in this case was filed on November 8, 2021. On November 10, 2021, this Court pronounced its decision in Chaparro v. State, 137 Nev. Adv. Rep. 68, 497 P.3d 1187 (2021). The decision in Chaparro was obviously highly relevant to the issues in Mr. Trusca's case, and counsel addressed it at the argument on the motion. App. at 105-106. The court ultimately did not especially comment on whether or how the case affected its ruling.

The Chaparro case did several things, not the least of which were to reiterate as this Court has many times in the past that criminal defendants have a right to be present for all critical stage proceedings, and sentencing is a critical stage proceeding. Id. at 1191. This Court did recognize a due process right to the defendant's presence, to the degree that a "fair and just hearing would be thwarted by the defendant's absence." Id., citing Kirksey v. State, 112 Nev. 980, 1000, 923 P.2d 1102 (1996).

To be sure, the Court ultimately held that remote sentencings in criminal cases are permissible but only under the circumstances enumerated in the decision. Id. at 1191. Specifically, the sentencing in that particular case was permissible because “[C]haparro was able to be heard, to be seen, to confidentially communicate with counsel, and speak on the record.” Id. at 1191.

Relatedly, the decision notes that an administrative order in effect at the time of the sentencing prohibited in-person hearings, and the defendant insisted on sentencing without delay. Id. The decision turned highly on the “unprecedented” nature of the pandemic. Id. at 1192 (noting further the “...realities of the moment...”).

The “realities of the moment” were far different for Mr. Trusca than they were for the litigant in Chaparro. Mr. Trusca’s sentencing took place nearly two years into the pandemic. The COVID-19 outbreak remains a national emergency to be sure. But, there is no explaining away the fact that at the time of Mr. Trusca’s sentencing, the applicable administrative

order did not prohibit in-person sentencing hearings; it required them where prison time was contemplated.

In this case, the court and parties were surely aware that prison time was not just contemplated, but a real possibility. The psychosexual report revealed a “moderate” risk to reoffend. While this meant probation was available and possible, it certainly did not have the effect of negating a possible prison sentence. This meant that an in-person appearance, which the operable administrative order required, was crucial so that the proceeding could be conducted fairly.

But the difference in applicable administrative orders is not the only difference between Mr. Trusca’s case and that described in Chaparro. Mr. Trusca did not want to have a remote sentencing, and, had no way to communicate with his attorney privately during the remote sentencing. App. at 49. Further, the connection was poor and Mr. Trusca was not able to hear all that transpired. App. at 49.

The record of the sentencing further supports these facts. The hearing was marked by interference which interrupted the proceeding.

App. at 24. The record also shows counsel and Mr. Trusca were not in the same location during the hearing. App. at 23. Therefore, this case differed from Chaparro in the sense that Trusca could not have a private discussion with his attorney during the hearing, and, there were interruptions in the proceeding based on the technology being used.

The right to be present for a critical stage proceeding means the right to be present *in-person*. "Even in situations where the defendant is not actually confronting witnesses or evidence against him, he has a due process right 'to be present in his own person whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge.'" Kentucky v. Stincer, 482 U.S. 730, 745 (1987), quoting Snyder v. Massachusetts, 291 U.S. 97, 105-106 (1934).

This right is also set forth in Nevada's statutes. Nevada law requires the in-person presence of the defendant for sentencing. NRS 178.388. The statute further sets forth the circumstances under which the defendant's in-person presence can be waived at sentencing. Not one of those

requirements was met in Mr. Trusca's case, so there is no credible argument that he waived the right to be present in-person for sentencing.

In the federal judiciary it's not even a question: remote sentencings violate due process. United States v. Williams, 641 F.3d 758, 764-65 (6th Cir. 2011) (noting that "all" federal circuits to consider the issue have determined presence by video conference at sentencing violates the defendant's right to be present for sentencing). A "face-to-face meeting between the defendant and the judge permits the judge to experience 'those impressions gleaned through . . . any personal confrontation in which one attempts to assess the credibility or to evaluate the true moral fiber of another.'" United States v. Thompson, 599 F.3d 595, 600 (7th Cir. 2010) (quoting Del Piano v. United States, 575 F.2d 1066, 1069 (3d Cir. 1978)).

While this Court has allowed remote sentencings under the guidelines in Chaparro, those guidelines were not followed here. The harm from a lack of in-person hearing has been explained as follows:

The physical separation of a parolee from counsel inevitably takes its toll on the effectiveness of the counsel, and this effect is most strongly felt by the communication between them. Some courts have tried to curb this problem by providing

telephone lines that allow for privileged communication. However, this practice still cannot replace the quality of the attorney-client relationship created by in-person interaction. . . . [T]he human interactions that foster the relationship are muted by the technology, which detracts from the defendant's experience. Likewise, counsel cannot gauge the defendant's mental and emotional state, and neither party can use nonverbal cues to communicate with each other during a proceeding, both of which are necessary to effective communication.

Kacey Marr, *The Right to "Skype": The Due Process Concerns of Videoconferencing at Parole Revocation Hearings*, 81 U. Cin. L. Rev. 1515, 1533–34 (2013) (footnotes omitted).

The resolution to this error depends on how it is viewed. Mr. Trusca's base position is that this is preserved error: The motion to modify sentence plainly raised the issue, and it was heard prior to the expiration of the time for seeking direct review. As a result, the issue is preserved for this Court's review and reversal is required unless the State can show the error was harmless beyond a reasonable doubt.

Should the Court take the issue as one of plain error, the burden could fall to Mr. Trusca to show the error was harmful. But this has already been stated, as the sentencing court was deprived of any opportunity to have Mr. Trusca stand before it (as the administrative order required). Had

the court been able to gauge, in-person, Mr. Trusca's mental and emotional state, it would have been compelled to find Mr. Trusca highly remorseful with a personal story that would probably have resulted in a less serious outcome such as probation or at least probation with a minimal jail term.

In addition, Mr. Trusca was prejudiced another way in that he was not able to confidentially consult with his attorney during the remote hearing. Had they been present together, they presumably would have better "read the room" so to speak. The prosecutor delivered four transcript pages of argument in support of a prison sentence. Defense counsel's response was a meager and largely inaccurate couple sentences. App. at 27.

The burden then fell to Mr. Trusca to justify any points in mitigation, which he certainly tried to do. But had he been able to consult with counsel, he could better have explained his position. As it stands, neither counsel nor Mr. Trusca directly addressed why probation would be appropriate or what steps Mr. Trusca would be willing to take on probation to better ensure success.

Had counsel and Mr. Trusca been able to talk in real time during the sentencing, they could have presented to the Court proposals for probation to include the length of any term, treatment Mr. Trusca could undergo, the possibility of a short jail term in lieu of a lengthy prison sentence, and perhaps most importantly drug treatment options that, even according to the psychosexual report, would have largely eliminated Mr. Trusca's risk to reoffend. Because they were not able to discuss these issues as the sentencing unfolded, these crucial arguments were never presented.

The Court should also grant relief on this issue arising from the denial of the motion to modify sentence.

Mr. Trusca unquestionably presented these issues in his motion to modify sentence. To the extent that motion provides a separate basis for review of the issue, the following points are provided for the Court's consideration.

First, Mr. Trusca had not yet started to serve his sentence at the time the motion was filed and heard. The trial court was therefore inherently empowered to reconsider the sentence without any further showing.

Campbell v. Eighth Judicial Dist. Ct., 114 Nev. 410, 413, 957 P.2d 1141

(1998) (District Court lacks jurisdiction to modify sentence once defendants “began to serve” said sentences). This point is further proof that the error was preserved for review on direct appeal.

But should this Court separately consider the error as one concerning the legality of the sentence, then the following would apply:

We emphasize that a motion to modify a sentence is limited in scope to sentences based on mistaken assumptions about a defendant’s criminal record which work to the defendant’s extreme detriment. Motions to correct illegal sentences address only the facial legality of a sentence. An “illegal sentence” for purposes of a statute identical to NRS 176.555 was defined by the District of Columbia Court of Appeals as “one ‘at variance with the controlling sentencing statute,’ or ‘illegal’ in the sentence that the court goes beyond its authority by acting without jurisdiction or imposing a sentence in excess of the statutory maximum provided...” Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985) (quoting Prince v. United States, 432 A.2d 720, 721 (D.C. 1981) and Robinson v. United States, 454 A.2d 810, 813 (D.C. 1982)). A motion to correct an illegal sentence “presupposes a valid conviction and may not, therefore, be used to challenge alleged errors in proceedings that occur prior to the imposition of sentence.” Id. A motion to correct an illegal sentence is an appropriate vehicle for raising the claim that the sentence is facially illegal at any time; such a motion cannot, however, be used as a vehicle for challenging the validity of a judgment of conviction or sentence based on alleged errors occurring at trial or sentencing. Issues

concerning the validity of a conviction or sentence, except as detailed in this opinion, must be raised in habeas proceedings.

Edwards v. State, 112 Nev. 704, 918 P.2d 321, 324 (1996).

This Court has further explained that, as a matter of due process, “the district court has inherent authority to correct, vacate, or modify a sentence that is based on a materially untrue assumption or misstatement of fact that has worked to the extreme detriment of the defendant, but only if the mistaken sentence ‘is the result of the sentencing judge’s misapprehension of a defendant’s criminal record.’” Id. at 324.

The decision in Edwards reflects federal law, which recognizes a “due process right to a fair sentencing procedure which includes the right to be sentenced on the basis of accurate information.” United States v. Rone, 743 F.2d 1169, 1171 (7th Cir. 1984), citing United States v. Tucker, 404 U.S. 443 (1972). A sentence “must be set aside where the defendant can demonstrate that false information formed part of the basis for the sentence.” Id.

Crucially, this Court has also held that sentencing based on erroneous information, such as incorrect information supplied by the prosecution, can

justify granting a modification of a previously imposed sentence. State v. Eighth Judicial Dist. Ct., 100 Nev. 90, 100-101, 677 P.2d 1044 (1984). This is so even where the misrepresentations are “unintentional.” Id.

Should the Court reach this issue in the context of a motion to modify sentence, Mr. Trusca would urge that a sentence imposed in violation of constitutional requirements is illegal. Edwards, 112 Nev. 704.

Unquestionably, the easier way to address errors concerning the remotely-held sentencing are by way of direct review. This consolidated appeal certainly encompasses that question.

But, for all the same reasons, Mr. Trusca contends his sentence was illegal in as much as it was imposed in violation of his Sixth Amendment right to assistance of counsel as well as his right to due process.

B. The trial court erred when it sentenced Mr. Trusca based on materially untrue information concerning the relationship between his severe drug addiction and viewing child pornography.

At sentencing, the prosecutor gave a lengthy explanation of what amounted to personal opinion concerning the many ways drug use could not, according to the State, lead to an addiction to child pornography. That

argument was contrary not just to the research presented in the motion to modify sentence, but was also contrary to the psychosexual report on file with the court.

Standard of Review

It is error for the trial court to sentence the defendant based on materially untrue information, particularly where the source of that information is the State. State v. Eighth Judicial Dist. Ct., 100 Nev. 90, 100-101, 677 P.2d 1044 (1984). No express reliance on the information is required. This Court is permitted to infer that the sentence court probably relied on the inaccurate information when the sentence was pronounced. Id. at 102 (noting “implicit finding that these mistakes resulted in a materially untrue sentence foundation which worked to the extreme detriment of the defendant”).

The trial court erred when it based the sentence on materially untrue information, and again when it denied the motion to modify sentence.

The trial court erred by relying on the prosecutor’s statements about drug use and child pornography. Mr. Trusca is not paining with a broad

brush – the State relied on a false equivalency when it suggested there’s no general connection between drug use and child pornography. App. at 26. That’s likely true in as much as not every defendant who uses drugs will go on to view child pornography. But sentencing is an individualized process, and the record in this case shows that drug use contributed to Mr. Trusca’s risk factors for viewing child pornography.

The research cited in the motion to modify, and repeated in this brief, simply suggested there is a link in as much as addictive disorders frequently overlap, and individuals predisposed to addiction may find themselves addicted not just to drugs but other things as well. Some of those things may be legal yet destructive, such as gambling or high-risk behaviors. Other things may be contraband, such as drugs, or yes, child pornography.

In denying the motion to modify sentence, the trial court improperly focused on an alleged lack of record that the sentencing judge took any of the State’s statements into account. App. at 109. This Court has never held that materially untrue information is relied on only where specifically called

out by the sentencing judge. Although that certainly would make the issue undebatable, such a high level of clarity is not required.

This Court has instead held that it is reasonable to infer from the record as a whole whether the judge probably relied on the materially untrue information. State v. Eighth Judicial Dist. Ct., 100 Nev. 90, 100-101, 677 P.2d 1044 (1984). Factors to consider could include the favorability of presentencing and other reports, the defendant's criminal record, the defendant's position in the community, and the actual nature of the offense. Id. at 102.

Taking these into account, it is reasonable to conclude the State's deriding of Mr. Trusca's drug addiction affected the sentence. The presentence reports were generally favorable. The presentence report itself no longer contains an actual recommendation, so it does not specify whether probation would be a good idea or not. It does, however, reflect on the defendant's record which is that Mr. Trusca had no prior felony convictions. Further, Mr. Trusca has several misdemeanor convictions for

drugs and property crime, although it is suggested here this is further proof that his claims of serious drug addiction are legitimate.

That all said, the psychosexual report plainly contemplated community supervision as opposed to incarceration. Report, pp. 8-9. As a result, it must qualify as “extremely favorable” under State v. Eighth Judicial Dist. Ct., because there is no other reasonable reading of it other than that Mr. Trusca was recommended for probation.

Mr. Trusca’s position in the community also supported that probation was appropriate. At the time of sentencing, Mr. Trusca’s position was that of a loving father to a seriously ill infant child. App. at 49-50. It isn’t clear from the case what “position” qualifies for relief, but assuming the term could broadly include a variety of importance, Mr. Trusca was and remains important to his infant daughter.

A lack of personal involvement with the victims is cited as a basis for relief by this Court. Id. at 102. This is not to diminish Mr. Trusca’s offenses. He pled guilty to viewing child pornography and took responsibility for

what he did do. But the State never alleged that he had any personal interactions with any underage individuals.

Given the above factors and especially the favorable psychosexual evaluation, the better reasoned position is that the sentencing court did rely on the State's arguments about drug use when it sentenced Mr. Trusca to a prison term instead of probation. There were strong arguments to support the case for probation. Something overrode those, which this Court can and should infer was the State's long argument against Mr. Trusca's mitigating evidence.

Whether viewed as direct error or in the context of a motion to modify sentence, the sentence should be reversed and the matter remanded for a new sentencing proceeding. As to the issue of direct review, criminal defendants have a due process right to be sentenced based on accurate information. Townsend v. Burke, 334 US. 736, 741 (1948); See also State ex. rel. Nevada Dept. of Prisons v. Kimsey, 109 Nev. 519, 853 P.2d 109, 111 (1993).

Therefore, concerning the direct appeal portion of this consolidated appeal, the sentencing court erred by relying on the State's arguments. The court never disclaimed reliance on them, and for the reasons set forth above it is probable the sentence was based on the information argued by the State. The issue was preserved by way of the timely objection in the motion to modify sentence.

If the issue was reviewed for plain error, the argument already set forth establishes that the error was prejudicial. There is a strong case to be made for probation had the State's pre-rebuttal to Mr. Trusca's mitigation case not been made.

Finally, even if reviewed as part of the motion to modify sentence, the questions to be asked remain very similar. First, the information provided was materially untrue. In general terms, drug addiction can lead to other addictions. In terms specific to Mr. Trusca, as outlined in the psychosexual report, that is in fact exactly what happened. Argument that this was impossible was therefore materially untrue.

These arguments worked to Mr. Trusca's extreme detriment in that he is now sitting in prison whereas the psychosexual report all but recommended probation. Based on these errors, the matter should be remanded for a new sentencing proceeding.

C. The convictions and sentences should be reversed based on cumulative error.

The errors alleged here collectively rendered the sentencing proceeding unfair. "The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." Valdez v. State, 196 P.3d 465, 481 (Nev. 2008), quoting Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100,1115 (2002).

When evaluating a claim of cumulative error, these factors are considered: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Valdez, 196 P.3d at 481 quoting Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000); Rose v. State, 123 Nev. 194, 163 P.3d 408, 419 (2007).

Errors at sentencing cumulated to result in an unfair proceeding even if no one error justified reversal. The sentencing court received inaccurate

information and the improperly held remote hearing prevented accurate information from being presented. The combined effect of these errors justified a new sentencing proceeding.

VIII. CONCLUSION

Based on the above, Trusca requests this honorable Court reverse his convictions and sentences and remand the matter for a new sentencing proceeding.

DATED this 23rd day of March, 2022.

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RULE 28.2 ATTORNEY CERTIFICATE

1. 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, including 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 upon is 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.
2. I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font of the Ebrima style.
3. I further certify 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 proportionally spaced, has a typeface of 14 points or more, and contains 5,500 words.

DATED this 23rd day of March, 2022.

RESCH LAW, PLLC d/b/a Conviction
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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on March 23, 2022. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

STEVEN WOLFSON
Clark County District Attorney
Counsel for Respondent

AARON FORD
Nevada Attorney General

A handwritten signature in dark ink, appearing to be 'J. Resch', is written over a horizontal line.

An Employee of RESCH LAW,
PLLC, d/b/a Conviction Solutions