No. _____

In The Supreme Court of the United States

MELVYN PERRY SPROWSON,
Petitioner

v.

THE STATE OF NEVADA,
Respondent

On Petition For A Writ Of Certiorari To The Supreme Court Of Nevada

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Nevada defines "child pornography" to include any depiction of a minor that "*appeals to* a shameful or morbid interest in the sexuality of the minor and which does not have serious literary, artistic, political, or scientific value, according to the views of an average person applying contemporary community standards". Yet, this definition of "child pornography" violates *New York v. Ferber*, 458 U.S. 747 (1982), because it is not "limited to works that visually depict sexual conduct of children below a specified age" and because it does not suitably limit and describe "the category of sexual conduct proscribed". The definition also violates *Ashcroft v. Free Speech Coalition*, 535 U.S. 232 (2002), by criminalizing conduct that is neither "obscene nor the product of sexual abuse."

Therefore, this petition presents the following question:

Whether a state regulation of child pornography that fails to satisfy all four requirements set forth in *Ferber* and that criminalizes conduct that is neither "obscene nor the product of sexual abuse" is facially unconstitutional and/or overbroad?

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PETITION FOR A WRIT OF CERTIORARI

MELVYN PERRY SPROWSON respectfully petitions for a writ of certiorari to review the judgment and opinion of the Nevada Supreme Court filed on July 1, 2019.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Nevada Supreme court, whose judgment is sought to be reviewed, are:

- Melvyn Perry Sprowson, Defendant and Appellant below and Petitioner here.

- Clark County District Attorney's Office, Steve Wolfson, District Attorney of Clark County, Respondents below and Respondents here.
- Aaron D. Ford, Attorney General of the State of Nevada.

OPINIONS BELOW

The Nevada Supreme Court's Order Affirming in Part, Reversing in Part, and Remanding (Pet. App. 1-11) is unpublished.

STATEMENT OF JURISDICTION

The Nevada Supreme Court entered its Order Affirming in Part, Reversing in Part and Remanding on July 1, 2019. (Pet. App. 1-11). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Federal Constitutional Provisions

The First Amendment of the United States Constitution provides in relevant part that "Congress shall make no law ... abridging the freedom of speech ...." U.S. Const. amend. I.

The Fourteenth Amendment of the United States Constitution provides, in pertinent part: "No State shall . . .

deprive any person of life, liberty, or property, without due process of law ...." U.S. Const. amend. XIV.

B. State Statutory Provisions

Nevada Revised Statutes Title 15, Chapter 200, section 710, subsection 2 prohibits a person from knowingly using, encouraging, enticing, coercing or permitting "a minor to be the subject of a sexual portrayal in a performance." Nev. Rev. Stat. § 200.710(2).

Nevada Revised Statutes Title 15, Chapter 200, section 700, subsection 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." Nev. Rev. Stat. § 200.700(4).

INTRODUCTION

In *New York v. Ferber*, 458 U.S. 747, 764 (1982), this Court identified "child pornography" as a distinct category of unprotected speech under the First Amendment. However, in doing so, this Court placed "limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment." Under *Ferber*, the prohibited conduct must: (1) "be adequately defined by the applicable state law, as written or authoritatively construed"; (2) "be limited 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. A restriction that does not satisfy all four requirements necessarily implicates First Amendment rights. However, *Ferber* did not actually "define" child pornography and, instead, left it up to the States to craft their own definitions of that term.

In *Ashcroft v. Free Speech Coalition*, 535 U.S. 232 (2002), the Supreme Court again limited the permissible scope of child pornography laws, holding that "virtual" child pornography (*e.g.*, "any visual depiction" that "appears to be" a minor engaging in sexually explicit conduct) was entitled to First Amendment protection. This Court explained that where "speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment." *Id.* At 251. Yet, *Ashcroft* declined to say whether images depicting *real* children, but created *without* sexual exploitation, could constitute child pornography. *Id.* at 242.

Today, child pornography is illegal in all fifty States and under Federal law. Every jurisdiction in the country has a law on the books with a definition of child pornography that satisfies *Ferber*'s four requirements. (Pet. App. 116-140). Yet,

Nevada is one of only *two* jurisdictions[1] with an additional definition of child pornography that disregards *Ferber*'s requirement that such restrictions be limited to works that visually depict clearly-defined "sexual conduct". (Pet. App. 141). Further, in violation of *Ashcroft*, Nevada's statute criminalizes conduct that is neither "obscene nor the product of sexual abuse." *Cf. Ashcroft*, 535 U.S at 251.

Nevada's "sexual portrayal" statutes[2] criminalize the possession and production of visual images that depict "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." Nev. Rev. Stat. § 200.700(4) (emphasis added). Nevada's legislature enacted these statutes to prevent suspected pedophiles from filming bathing-suit-clad children in public places. *See* Hearing on A.B. 405 Before the Assembly Comm. On Judiciary, 68th Leg. (Nev., April 12, 1995). At the time, Nevada's legislature understood that the State's existing "child pornography" statute would not capture such conduct.

In *Shue v. State*, 133 Nev. 798, 806, 407 P.3d 332, 338 (2017), the Nevada Supreme Court attempted to narrow the definition of "sexual portrayal" to depictions which "appeal[] to a shameful or morbid interest in the sexuality of the minor,

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[1] The other jurisdiction is New Jersey. (Pet. App. 141).

and which do[] not have serious literary, artistic, political, or scientific value, according to the views of an average person applying contemporary community standards." Yet, even as limited, Nevada's definition of "sexual portrayal" continues to violate both *Ferber* and *Ashcroft*. A "sexual portrayal" need not depict any sexual conduct or sexual abuse. Under Nevada's expansive "sexual portrayal" definition, it does not matter why or how the images were created in the first place. Nudity isn't even required. All that matters is that the visual images, as depicted, *appeal* to an unhealthy interest in the minor's sexuality.

Nevada's "sexual portrayal" statutes reflect a broader, nationwide trend that has expanded the scope of child pornography laws beyond what was traditionally understood to be "child pornography" at the time of *Ferber*. *See* Carissa Byrne Hessick, *The Expansion of Child Pornography Law*, 21 New. Crim. L. Rev. 321, 322 (2018). In 1982, child pornography was understood as "images that are created when a child is molested or sexually manipulated by an adult." *Id.* Indeed, when *Ferber* upheld New York's prohibition of child pornography, it did so because the creation of that material was "intrinsically related" to the underlying sexual abuse of children. *See Ashcroft*, 535 U.S. at 249.

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[2] Nev. Rev. Stat. §§ 200.710(2) and 200.730.

But now, child pornography laws are increasingly "being used to punish people not necessarily because of the nature of the picture they possess, but rather because of the conclusion that [the individuals possessing those images] are sexually attracted to children." Hessick, *supra*, at 322. In both Nevada and New Jersey, legislators have decided that images of minors that do not contain any nudity or sexual conduct can still constitute "child pornography", notwithstanding *Ferber* and *Ashcroft*. While several courts have invalidated or modified their similarly non-conforming statutes to comply with *Ferber* and/or *Ashcroft,* the Nevada Supreme Court upheld its "sexual portrayal" statutes, creating a split of authority.

In 1989, this Court came close to addressing whether a non-conforming statute could nevertheless be constitutional, but ultimately declined to reach that issue on mootness grounds. *See Massachusetts v. Oakes*, 491 U.S. 576 (1989). Definitions of "child pornography" are expanding nationwide, and there is a likelihood that more states will follow the examples set by Nevada and New Jersey, crafting additional "child pornography" statutes that exceed *Ferber*. Therefore, Sprowson seeks clarification from this Court regarding the appropriate limits of such legislation. Sprowson asks whether, to be facially-valid under the First Amendment, a restriction on "child pornography" must "be limited to works that visually

depict clearly defined sexual conduct of children below a specified age" under *Ferber* or limited to works that are "'intrinsically related' to the sexual abuse of children" under *Ashcroft*. This petition raises both a facial challenge and an overbreadth challenge to Nevada's "sexual portrayal" statutes.

STATEMENT OF THE CASE

From August to November 2013, Petitioner Melvyn Perry Sprowson had a consensual sexual relationship with his sixteen-year-old girlfriend, J.T. (Pet. App. 29). The two became acquainted in July 2013 after J.T. answered an advertisement that Sprowson had placed on Craigslist. (Pet. App. 29). Sprowson and J.T. initially communicated on Craigslist and then through a texting app called Kik. *Id.* On August 1, 2013, J.T. agreed to be Sprowson's "girlfriend". *Id.* Thereafter, J.T. "sexted" Sprowson some nude and semi-nude photographs of herself. *Id.*

On December 19, 2013, the State of Nevada (hereinafter "the State") filed a criminal complaint charging Sprowson with several crimes, including four counts of unlawful use of a minor in production of pornography (Counts 3-6). (Pet. App. 26).[3] The photographs at issue in Count 3

[3] Because Petitioner is only challenging his convictions for the four child pornography counts, he does not address the other charges in this Petition.

contained no nudity and in all pictures, J.T.'s private parts were covered, either by a bra or panties. (Pet. App. 56). In the two photographs at issue in Count 4, J.T.'s head was not visible, but her breasts and underwear were exposed. *Id.* In the two photographs at issue in Count 5, J.T. was wearing underwear but her legs were spread and some pubic hair was visible at the edges of her underwear. *Id.* In the photograph at issue in Count 6, J.T.'s back and bare buttocks were visible as seen in a bathroom mirror. (Pet. App. 57).

The State contended that Sprowson violated Nevada's child pornography statutes in one of two ways: ***either*** by using J.T. "to simulate or engage in sexual conduct to produce a performance" in violation of Nev. Rev. Stat. § 200.710(1), ***or*** by using J.T. as the subject of a "sexual portrayal" in a performance in violation of Nev. Rev. Stat. § 200.710(2). (Pet. App. 54-57). The State charged Sprowson under both statutes for Counts 3 and 5, and under the "sexual portrayal" statute alone for Counts 4 and 6. *Id.*

On March 7, 2014, Sprowson filed a pretrial petition for writ of habeas corpus that challenged the statutory definition of "sexual portrayal" as unconstitutional. (Pet. App. 110-115). The district court denied Sprowson's petition. (Pet. App. 12). On March 31, 2017, after a nine-day trial, the jury convicted Sprowson of all four counts of using a minor in the production of pornography. (Pet. App. 28).

After Sprowson was convicted but before he filed his Opening Brief on direct appeal, the Nevada Supreme Court issued a published opinion in *Shue v. State*, 133 Nev. 798, 407 P.2d 332 (2017), *reh'g denied,* (Feb. 23, 2018), *cert. denied*, 139 S. Ct. 117, 202 L. Ed. 2d 73 (2018). In *Shue*, the Nevada Supreme Court ruled that Nevada's "sexual portrayal" statutes were not "overbroad" because (notwithstanding the statute's noncompliance with *Ferber* and *Ashcroft*), it found that the statutes did not "implicate First Amendment protection":

> NRS 200.700(4) defines "'[s]exual 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 United States Supreme Court has defined "prurient" as "a shameful or morbid interest in nudity, sex, or excretion," or involving "sexual responses over and beyond those that would be characterized as normal." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985) (internal quotation marks omitted). Thus, NRS 200.700(4) plainly defines sexual portrayal as the depiction of a minor in a manner that appeals to a shameful or morbid interest in the sexuality of the minor, and which does not have serious literary, artistic, political, or scientific value, according to the views of an average person applying contemporary community standards. As explained below, we conclude 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.

In *Osborne v. Ohio*, the United States Supreme Court upheld the constitutionality of an Ohio statute proscribing nude depictions of minors "because the statute, as construed by the Ohio Supreme Court on [the appellant's] direct appeal, plainly survives overbreadth scrutiny." 495 U.S. 103, 113, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990). In particular, the Ohio Supreme Court interpreted the statute to prohibit "the possession or viewing of material or performance of a minor who is in a state of nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of the person charged." *Id.* (internal quotation marks omitted). Thus, "[b]y limiting the statute's operation in this manner, the Ohio Supreme Court avoided penalizing persons for viewing or possessing innocuous photographs of naked children." *Id.* at 113–14, 110 S.Ct. 1691.

Here, NRS 200.700(4)'s definition of "sexual portrayal" necessarily involves a depiction meant to appeal to the prurient interest in sex. Moreover, the phrase, "which does not have serious literary, artistic, political or scientific value," sufficiently narrows the statute's application to avoid the proscription of innocuous photos of minors. NRS 200.700(4); *see also Osborne*, 495 U.S. at 113 n.10, 110 S.Ct. 1691 ("So construed, the statute's proscription is not so broad as to outlaw all

> depictions of minors in a state of nudity, but rather only those depictions which constitute child pornography." (internal quotation marks omitted)). Finally, the type of conduct that Shue was convicted of pursuant to NRS 200.710(2)—surreptitiously recording his then-girlfriend's minor children naked in the bathroom performing bathroom activities and taking an up-skirt photo of one of the children—is clearly proscribed under the statute's plain language and does not implicate the First Amendment's protection. *See New York v. Ferber*, 458 U.S. 747, 757, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) (providing that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance" and that the United States Supreme Court has therefore "sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights").
>
> As such, Nevada's statutes barring the sexual portrayal of minors necessarily demonstrate a "core of constitutionally unprotected expression to which it might be limited," *City of Houston v. Hill*, 482 U.S. 451, 468, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987) (internal quotation marks omitted). Because NRS 200.700(4) does not implicate protected speech under the First Amendment, we conclude that Nevada's statutes barring the sexual portrayal of minors are not overbroad.

Shue, 133 Nev. at 804–07, 407 P.3d at 337–39 (2017). In a footnote, the court also rejected Shue's facial challenge to the

statutes as content-based restrictions that fail strict scrutiny, "[b]ecause we conclude that such statutes do not implicate protected speech under the First Amendment." 133 Nev. at 807, n.10, 407 P.3d at 339, n.10.

In his Opening Brief filed May 2, 2018, Sprowson challenged his four child pornography convictions on three grounds: (i) the images did not depict "sexual conduct" as defined by statute; (ii) the images did not depict a "sexual portrayal" as defined by statute, and (iii) Nevada's "sexual portrayal" statutes were unconstitutional, notwithstanding the Nevada Supreme Court's contrary holding in *Shue*. (Pet. App. 54-71). In his Brief, Sprowson argued that Nevada's definition of "sexual portrayal" was a facially-invalid, content-based restriction on free speech that did not survive strict scrutiny because it was not narrowly-tailored as required by *Ferber*, 458 U.S. at 764-65, *Ashcroft*, 535 U.S. at 244-59, and *United States v. Stevens*, 559 U.S. 460 (2010). (Pet. App. 58-65). Sprowson argued that the Nevada Supreme Court's analysis in *Shue* conflicted with *Stevens*, 559 U.S. at 471, which explained that child pornography was exempt from First Amendment protection only to the extent it was "intrinsically related" to the "underlying sexual abuse" of children. *Id.* Because Nevada's "sexual portrayal" statute required no showing of sexual conduct, sexual abuse, or *even* nudity, the First Amendment's protections still applied. *Id.* Sprowson also

pointed out that *Stevens* had rejected *Shue's* analysis that Nevada's "sexual portrayal" statutes were adequately narrowed by the phrase, "which does not have serious literary, artistic, political or scientific value." *Id.* (*citing 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."). In addition to his facial-challenge, Sprowson argued that Nevada's sexual portrayal statutes were overbroad, and vague, both facially and as-applied. (Pet. App. 65-71).

In an unpublished Order, the Nevada Supreme Court rejected all of Sprowson's arguments and affirmed his four convictions solely based on the "sexual portrayal" portion of Nevada's child pornography statute:

> We also reject the second argument [that the photographs did not involve a "sexual portrayal"] because the photographs show the minor victim staged in sexually suggestive positions, thus depicting her "in a manner which appeals to the prurient interest in sex and which does not have serious literary, artistic, political or scientific value." NRS 200.700(4) (defining "sexual portrayal"); *see also Shue v. State*, 133 Nev. 798, 805, 407 P.3d 332, 338 (2017) (explaining that a "prurient" interest in sex involves "'a shameful or morbid interest in nudity, sex, or excretion,' or involving 'sexual responses over and beyond those that would be

characterized as normal' " (*quoting Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498 (1985)). Sprowson's argument that the photographs did not appeal to a prurient interest in sex because the victim was his girlfriend and was of legal age to consent to sex is without merit. *See Shue*, 133 Nev. at 805, 407 P.3d at 338 (reiterating that what is prurient depends on "the views of an average person applying contemporary community standards"); *State v. Hughes*, 127 Nev. 626, 630, 261 P.3d 1067, 1070 (2011) (rejecting the argument that a minor under the age of 18 but of legal age to consent cannot be the subject of child pornography). Because the jury could reasonably find that the photographs depicted the minor victim as the subject of a "sexual portrayal," the evidence is sufficient to support the child pornography convictions under NRS 200.710(2). Thus, we need not determine whether the evidence is sufficient to support those convictions on the alternative theory that the photographs showed "sexual conduct" for purposes of NRS 200.710(1).

Nor can we credit Sprowson's argument that Nevada's statutory definition of "sexual portrayal" is unconstitutionally vague or overbroad. *See Shue*, 133 Nev. at 805-07, 407 P.3d at 338-39 (concluding 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). Sprowson's argument that *Shue* should be revisited because it did not discuss *United States v. Stevens*, 559 U.S. 460

> (2010), is unavailing. Stevens does not stand for the proposition that only productions connected to independent criminal conduct will be considered child pornography, as Sprowson suggests. 559 U.S. at 470.

(Pet. App. 6-8). This petition follows.

REASONS FOR GRANTING THE PETITION

I. Nevada's "Sexual Portrayal" Statutes Are Content-Based Restrictions On Speech That Are Not Narrowly-Tailored to Promote a Compelling Government Interest.

The First Amendment prohibits the government from criminalizing speech or expressive conduct because it disapproves of the ideas expressed. *See R.A.V. v. City of St. Paul, Minn*, 505 U.S. 377, 382 (1992). As a result, "content based regulations are presumptively invalid." *Id.* Creating and possessing nude images of children, without more, is protected by the First Amendment. *See Osborne*, 495 U.S. at 112 (*citing Ferber*, 458 U.S. at 765, n. 18). Accordingly, "laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy." *Ferber*, 485 U.S. at 756; *see also U.S. v. Williams*, 533 U.S. 285, 289 (2008) ("[t]he broad authority to proscribe child pornography is not...unlimited."); *Ashcroft*, 535 U.S. at 251 ("where the

speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment").

In accordance with the First Amendment, State laws prohibiting child pornography 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.

Nev. Rev. Stat. §§ 200.710 and 200.730 contain Nevada's statutory prohibitions against the creation and possession of child pornography. The statutes criminalize two different types of "child pornography": (1) child pornography that depicts clearly-defined "sexual conduct",[4] which complies with *Ferber*; and (2) alleged child pornography that merely depicts "a sexual portrayal",[5] which Mr. Sprowson contends is unconstitutional.

Nevada's three "sexual portrayal" statutes are as follows:

- Nev. Rev. Stat. § 200.710(2), which prohibits *using* a minor as the subject of a sexual portrayal in a performance;

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[4] (Pet. App. 130) (*citing* Nev. Rev. Stat. §§ 200.710(1) and 200.700(3)); *see also* Nev. Rev. Stat. § 200.730 (possession).

[5] (Pet. App. 141) (*citing* Nev. Rev. Stat. §§ 200.710(2) and 200.700(4)); *see also* Nev. Rev. Stat. § 200.730 (possession).

- Nev. Rev. Stat. § 200.730, which prohibits *possessing* an image depicting a minor as the subject of a sexual portrayal in a performance; and

- Nev. Rev. Stat. § 200.700(4), which 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."

Nevada's "sexual portrayal" statutes are unconstitutional because they impose content-based restrictions on speech that are not narrowly-tailored in the manner outlined by this Court in *Ferber*, 458 U.S. at 764-65. To comply with *Ferber*, child pornography regulations must be limited to works that visually depict clearly-defined forms of "sexual conduct" involving children. *Id.* Yet, Nevada has criminalized the creation and possession of images that merely *appeal to* a defendant's "prurient interest" in a minor's sexuality. That is unconstitutional.

A picture does not become child pornography simply because it has been placed in the hands of an accused pedophile. *See U.S. v. Villard*, 855 F.2d 117, 125 (3rd Cir. 1989) (*citing Faloona v. Hustler Magizine, Inc.*, 607 F.Supp. 1341 (N.D. Tex. 1985)); *see also 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). Rather, "[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." *Rhoden v. Morgan*, 863 F. Supp. 612, 619 (M.D. Tenn. 1994) (emphasis added).

Moreover, "pedophiles often find stimulation from the very same pictures that non-pedophiles consider innocuous, that we extol and value[.]" Amy Adler, The Perverse Law of Child Pornography, 101 Colum. L. Rev. 209, 259 (March 2001). Additionally, "certain pedophiles may prefer "innocent" pictures" because "the very innocence--the sexual naiveté--of the child subject . . . is sexually stimulating." *Id.* at 259-60; *see also* 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.").

Nevada's "sexual portrayal" statutes make it a crime to create and/or possess any image of a child, nude or otherwise, that appeals to the defendant's "prurient interest" in the minor's sexuality. That could literally include any image of any minor, from a family photo taken at the pool to an advertisement from the Sears catalogue. As content-based restrictions on speech, Nevada's sexual portrayal statutes can only be constitutional if they are the least restrictive means of promoting a compelling government interest. *See U.S. v.*

Playboy Entertainment Group, Inc., 529 U.S. 803, 813 (2000); *Sable Communications of Cal., Inc., v. FCC*, 492 U.S. 115, 126 (1989). As set forth herein, Nevada's "sexual portrayal" statutes are not narrowly-tailored, because they vastly exceed the scope of *Ferber*.

a. Nevada's "sexual portrayal" statutes are not the least restrictive means of promoting a compelling government interest.

In 1979, Nevada first codified its prohibition against using minors to create pornography. 1979 Nev. Stat. 437. Similar to the restriction upheld by this Court in *Ferber*, the 1979 law limited child pornography to visual depictions of children engaged in actual or simulated "sexual intercourse, lewd exhibition of the genitals, fellatio, cunnilingus, beastiality, anal intercourse, excretion, sado-masochistic abuse, masturbation, or penetration of any part of a person's body or of any object manipulated or inserted by a person into the genital or anal opening of the body of another[.]" *Id.*

In 1995, Nevada's legislature amended the State's child pornography laws. Initially, the legislature sought only minor amendments to Nev. Rev. Stat. § 200.710. 1995 Nev. Stat. 950-57. But after an incident where someone secretly filmed bathing-suit-clad children at various public locations around Las Vegas, the legislature sought to prohibit this conduct by banning using minors as the subjects of a "sexual

portrayal." Hearing on A.B. 405 Before the Assembly Comm. on Judiciary, 68th Leg. (Nev., April 12, 1995). Legislators believed authorities could not prosecute the person who filmed the children because the videos did not depict "sexual conduct." *Id.*

"Sexual portrayal" was initially defined as "the lewd or lascivious depiction of the genitals or pubic area whether clothed or not." A.B. 405, 68th Leg. (Nev. 1995). However, because of concerns that this definition was "ambiguous," the definition was amended to anything which "appeals to the prurient interests of others[.]" Hearing on A.B. 405 Before the Assembly Comm. on Judiciary, 68th Leg. (Nev., May 12, 1995). Later the legislature amended the definition to, "appeals to the prurient interest in sex." *Id.*

In the State Senate, senators correctly noted that the "prurient interest" language was not applicable to child pornography. Hearing on A.B. 405 Before the Senate Comm. on Judiciary, 68th Leg., (Nev. June 14, 1995). In fact, child pornography need not appeal to the prurient interest as long as it is "...limited to works that visually depict sexual conduct by children below a specified age," and the category of sexual conduct is suitably limited and described. *Id.* (*citing Ferber*, 458 U.S. at 764).

However, Senator James expressed it was his desire to allow "the community to determine what is acceptable and

what is prohibited by law." *Id.* Thereafter, senators added the words, "and which does not have serious literary, artistic, political or scientific value" to the definition of sexual portrayal. Hearing on A.B. 405 Before the Senate Comm. on Judiciary, 68th Leg., (Nev. June 14, 1995). Nevada Senators erroneously believed adding this would make child pornography subject to "community standards." *Id.* Although one Senator cautioned, "the Legislature must proscribe conduct so that everyone knows what conduct is prohibited and what is not...it requires a 'very tight definition,'" the law passed with the nebulous "prurient interest" language. *Id.*; 1995 Nev. Stat. 950-57.

i. Protecting children from being filmed in public.

Based on this legislative history, Nevada most likely intended its "sexual portrayal" statutes to protect semi-clothed children from being filmed by a potential pedophile in public. Yet, Nevada's "sexual portrayal" statutes are not narrowly-tailored to serve that interest. Nevada could easily have criminalized the non-consensual recording of semi-clothed children in public. *See* Ohio Rev. Code Ann. § 2907.323 (prohibiting the creation of material showing someone else's child in a state of nudity, unless for a "proper purpose", by a person with a "proper interest in the material" and with the written consent of a parent or guardian). But instead, Nevada enacted a law that vastly exceeds the stated purpose.

Furthermore, Nevada law already provides a civil remedy, including injunctive relief, when a person uses the photograph or likeness of another person "without first having obtained written consent for the use[.]" Nev. Rev. Stat. § 597.810. Therefore, Nevada's "sexual portrayal" statutes are not the least restrictive means of protecting minors from undesired photography in the public sphere. *See McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (explaining that content-based restrictions must be "'the least restrictive or least intrusive means' of serving the government's interests").

ii. Preventing visual depictions of child sexual abuse.

Child pornography is "intrinsically related" to the crime of child sexual abuse. *Ashcroft*, 535 U.S. at 249-50. States can prohibit actual child pornography because preventing child sexual abuse is "a government objective of surpassing importance." *Ferber*, 458 U.S. 757. However, where images are "neither obscene nor the product of sexual abuse, [the images do] not fall outside the protection of the First Amendment." *Ashcroft*, 535 U.S. at 251 (*citing Ferber*, 458 U.S. at 764-65); *accord Stevens*, 559 U.S. at 471.

If Nevada's compelling interest is protecting minors from having their sexual abuse documented, then Nev. Rev. Stat. § 200.710(1), which prohibits creating an image of a child simulating or engaging in "sexual conduct" already

satisfies that interest. (Pet. App. 130). As required by *Ferber*, "sexual conduct" is clearly defined in Nev. Rev. Stat. § 200.700(3) and is "limited to works that visually depict sexual conduct of children below a specified age." *See Ferber*, 458 U.S. at 764-65. (Pet. App. 130). The very existence of Nev. Rev. Stat. § 200.710(1) proves that Nevada's "sexual portrayal" statutes are not the least restrictive means to satisfy the State's compelling interest in preventing the visual documentation of child sexual abuse.

Nevada, like every other State in the country, has a law on the books that satisfies *Ferber's* requirements that the prohibited "sexual conduct" of children below a specified age be clearly defined. *See Ferber*, 458 U.S. at 764-65; *See also* (Pet. App. 116-140) (collecting state laws that comply with *Ferber*). Nevada's "sexual portrayal" statutes fail strict scrutiny because they are not the least restrictive means of prohibiting visual depictions of child sexual abuse. *See McCullen*, 573 U.S. at 486.

iii. *Protecting children from being recorded nude.*

To the extent Nevada's legislature may have intended its "sexual portrayal" statutes to protect children from being recorded nude, the statutes are not narrowly-tailored to fit that purpose either. Other, less-restrictive statutes already criminalize such behavior in Nevada. For instance, Nev. Rev. Stat. § 200.604 prohibits capturing the image of the private

area of a person.[6] Again, the very existence of Nev. Rev. Stat. § 200.604 proves that Nevada's sexual portrayal statutes are not the "least restrictive" means of promoting the State's interest in protecting children from being filmed while nude.

Furthermore, numerous other States have successfully criminalized "erotic nudity" (*e.g.*, where the child has been *posed* nude, in a sexualized position, *for the purpose* of sexual gratification) as a form of clearly-defined "sexual conduct" under *Ferber*. (Pet. App. 116-140) (*citing* Colo. Rev. Stat § 18-6-403(d); Del. Code Ann. Tit. 11 § 1100(7)(i); Idaho Code § 18-1507(e); Iowa Code § 728.1(g); Mass. Gen. Laws Ann ch. 272, §31; Mont. Code Ann. § 45-5-625(b)(ii); Neb. Rev. Stat. § 28-1463.02(5)(e); N.J. Rev. Stat §2C:24-4; N.D. Cent. Code § 12.1-27.2-01(4); 18 Pa. Const. Stat. Ann. § 6312(g); Va. Code Ann. § 18.2-374.1). These statutes further prove that Nevada's "sexual portrayal" statutes are not narrowly-tailored to promote a compelling Government interest. *See McCullen*, 573 U.S. at 486.

II. Nevada's "Sexual Portrayal" Statutes Are Facially Overbroad.

In a First Amendment overbreadth analysis, a "court's first task is to determine whether the enactment reaches a

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[6] Nev. Rev. Stat. § 200.604(8)(d) defines "private area" as "the naked or undergarment clad genitals, pubic area, buttocks or female breast of a person."

substantial amount of constitutionally protected conduct." *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494 (1982). Recall that Nevada 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." Nev. Rev. Stat. § 200.700(4).

If that language sounds familiar, that's because Nevada's legislature borrowed heavily from this Court's definition of "obscenity" in *Miller v. California*, 413 U.S. 15 (1973). In *Miller*, this Court established a three-part test to determine whether a visual image is obscene, and, therefore outside the scope of First Amendment protection:

> (a) **[if] 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest;** (b) [if] the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) **[if] the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.**

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

Unfortunately, when crafting Nevada's "sexual portrayal" statute, Nevada's legislature used only the first and third elements from the *Miller* test. In doing so, Nevada's

legislature omitted a key requirement from *Miller* – that the "work depicts or describes, in a patently offensive way, **sexual conduct specifically defined by the applicable state law**." *Id.* (emphasis added). And when the Nevada Supreme Court attempted to "narrow" that definition in *Shue*, the court failed to incorporate the essential element of "sexual conduct". *See Shue*, 133 Nev. at 805, 407 P.3d at 338. Just like *Ferber's* test for "child pornography", *Miller's* "obscenity" test requires a showing of clearly defined sexual conduct.

Nevada's "sexual portrayal" statutes are overbroad because they omit the essential element of clearly-defined "sexual conduct" required both by *Miller* and *Ferber*. As a result, Nevada effectively prevents any person that the State chooses to brand as a "pedophile" from creating or possessing provocative images of minors, regardless of whether those images contain sexual conduct (including lewd or erotic nudity), or a record of child sexual abuse. Once the State charges a defendant with a "child pornography" offense, that defendant necessarily becomes a "pedophile" in the eyes of the jury. Jurors can easily find that the provocative images created or possessed by that defendant "appeal to a shameful or morbid interest in the sexuality of [the] minor . . . according to the views of an average person applying contemporary community standards." *Cf. Shue*, 133 Nev. at 805, 407 P.2d at

338. The charge, *itself*, necessarily colors the jurors' perception of those images.

Furthermore, to the extent that the definition of "sexual portrayal" exempts portrayals that do not "have serious literary, artistic, political or scientific value", that language does not sufficiently narrow the statutes either. *Cf. Shue*, 133 Nev. at 805, 407 P.2d at. 338. When the government tried to make a similar argument to save an overly-broad "depictions of animal cruelty" statute in *United States v. Stevens*, Chief 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.

Whether we like it or not, provocative images of semi-clothed minors are a constitutionally-protected part of our cultural zeitgeist. They appear on child modeling websites, in television shows like "Dance Moms" and "Toddlers and Tiaras",[7] in advertisements for Calvin Klein and Abercrombie and Fitch, and in the photographic artwork of David Hamilton and Jock Sturges.[8] Such provocative images have appeared in countless movies, including *The Tin Drum*, *American Beauty*, *Kids*, and Adrian Lyne's 1997 adaptation of *Lolita*, to name a few.[9] All of these images and more can be considered child pornography under Nevada's "sexual portrayal" statutes so long as a jury, "applying contemporary community standards" determines that the images appeal to the named defendant's "shameful or morbid interest" in the sexuality of minors. *See Shue*, 133 Nev. at 805, 407 P.3d at 338.

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[7] *See* Christine Tanner, *Toddlers, Tiaras, and Pedophilia? The "Borderline Child Pornography" Embraced by the American Public*, 13 Tex. Rev. Ent. & Sports L. 85 (2011).

[8] *See United States v. Various Articles of Merch., Schedule No. 287*, 230 F.3d 649, 657–58 (3d Cir. 2000), *as amended* (Dec. 15, 2000) (discussing Hamilton and Sturges).

[9] *See United States v. Loy*, 237 F.3d 251, 264 (3d Cir. 2001) ("It is also difficult to gauge on which side of the line the film adaptations of Vladimir Nabokov's Lolita would fall, or if Edouard Manet's Le Dejeuner sur L'Herbe is pornographic (or even some of the Calvin Klein advertisements").

Which brings up an even more frightening consequence of Nevada's overbroad statutes: 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 is a child pornographer under Nevada law, if the photos are later obtained by a pedophile who finds them sexually-stimulating. A sixteen-year-old who takes a seductive "selfie" in her underwear and uploads that photo to her Instagram feed is a child pornographer if she intended her photograph to arouse viewers' interest in her sexuality. Two fifteen-year-olds who use Snapchat to exchange "sexy" swimsuit "selfies" while flirting with one-another are likewise child pornographers under Nevada's statute which contains no exemption for teenagers who "sext" one another.

Nevada's "sexual portrayal" statutes are substantially overbroad because they criminalize almost every image of a minor that appeals to a viewer's "prurient interest" in the minor's sexuality, without regard to whether the image contains sexual conduct (including lewd or erotic nudity) or a record of sexual abuse. Given the widespread dissemination of such photographs via text message and on social media platforms like Facebook, Instagram and Snapchat, Nevada's sexual portrayal statutes are profoundly overbroad in their sweep.

III. The Nevada Supreme Court's Analysis In *Shue* And *Sprowson* Conflicts With Other State Courts.

In *Shue* and *Sprowson*, the Nevada Supreme Court concluded that Nevada's sexual portrayal statutes were constitutional notwithstanding their failure to comply with *Ferber's* four requirements. Nevada's ruling places it at odds with other appellate courts which have uniformly held that a violation of any of *Ferber's* requirements renders the offending portion of the statute(s) unconstitutional.

In *Purcell v. Com.*, 149 S.W.3d 382, 388-90 (Ky. 2004), *overruled on other grounds by Com v. Prater*, 324 S.W.3d 393 (Ky. 2010), the Kentucky Supreme Court addressed whether a statute that defined "sexual conduct by a minor" to include the mere "willful or intentional exhibition of the genitals" was facially overbroad. The court compared its statute to other jurisdictions, all of which required such exhibitions to be "lewd" or "lascivious", and not simply "willful or intentional". *Id.* At 389. The court relied on both *Ferber* and *Osborne*, explaining:

> To satisfy the *Ferber* requirement of an 'adequate definition' and the *Osborne* requirement of 'more than mere nudity' statutes of other states employ language such as 'lewd exhibition of the genitals', 'lascivious exhibition of the genitals' or 'exhibition of the genitals for the purpose of sexual stimulation of the viewer' so as to further define the unprotected conduct.

Id. at 388-89. Ultimately, the Kentucky Supreme Court concluded that its statute was facially overbroad because it "criminalizes every instance in which a child is photographed while willfully and intentionally exhibiting his or her genitals." To solve the problem, the court construed its statute to require that any "willful or intentional exhibition of the genitals" also be "lewd". *Id.* at 391.

The defects in Kentucky's overbroad statute are similar to those that afflict Nevada's "sexual portrayal" statute. Like Nevada's law, Kentucky's statute did not contain an exemption "for visual reproductions of a private, family nature not intended for distribution outside the family." *Id.* at 390. Kentucky's statute did not contain an exemption "for visual reproductions that were created with the permission of the child's parents and were not obscene, lewd, or designed for the purpose of sexual stimulation of the viewer." *Id.* Yet, the Kentucky Supreme Court was able to solve both problems by interpreting its statute to fit the requirements established in *Ferber* and *Osborne* -- something Nevada's Supreme Court failed to do.

In *State v. Bonner*, 138 Idaho 254, 61 P.3d 611 (Idaho App. 2003), the Idaho Court of Appeals invalidated a statute that made it a felony for a person five years older than a 16- or 17-year-old minor child to make "any photographic or electronic recording of such minor child" with "the intent of

arousing, appealing to or gratifying the lust, passion, or sexual desires . . ." Idaho Code § 18-1508A(1)(d). Similar to the arguments made by Shue and Sprowson in Nevada, Bonner argued that Idaho's statute was "so broad that the creation of photos or recordings with entirely innocent content is criminalized based solely upon the intent or thoughts of the person creating them", which chills constitutionally protected expression. *Id.* at 256, 61 P.3d at 613. The Idaho Court of Appeals agreed, finding that the statute in question did not meet the definition of obscenity set forth in *Miller*, or the four-part requirement established in *Ferber*, and therefore, under *Ashcroft*, it failed:

> Like the CPPA provisions challenged in [*Ashcroft*] I.C. §18-508A(1)(d) bars the creation of photographs or electronic recordings without regard to whether those materials are obscene or constitute child pornography. Indeed, the statute's proscription extends to photographs or electronic recordings of minors having no sexual or offensive content at all. . . .
>
> We are mindful that § 18-1508A(1)(d) purports to prohibit only photographs and recordings made with the particular intent of arousing lust, passion or sexual desires. This limitation, however, does not save the statute. With its ban on photos and recordings unlimited as to content, the provision of § 18-1508A(1)(d) that narrows the statute's scope is, in essence, a prohibition of particular thoughts. Such legislation is impermissible. In *Stanley v.*

> *Georgia*, 394 U.S. 557, 565-66 (1969), where the Supreme Court struck down a state statute prohibiting private possession of obscene materials, the Court rejected the notion that "the State has the right to control the moral content of a person's thoughts."

183 Idaho at 258-59, 61 P.3d at 615-16. Like the Idaho statute, Nevada's "sexual portrayal" statute "bars the creation of photographs or electronic recordings without regard to whether those materials are obscene or constitute child pornography" and then tries to "control the moral content of a person's thoughts" by allowing a jury to determine whether the resulting images appeal to a "prurient interest" in a minor's sexuality. *See id.* Because Nevada's sexual portrayal statute does not adequately define the prohibited conduct as required by *Ferber* and *Ashcroft*, it fails for the same reasons as did Idaho's statute. *C.f. State v. Morton*, 140 Idaho 235, 91 P.3d 1139 (Idaho 2004) (upholding Idaho's "erotic nudity" statute because it satisfied both *Ferber* and *Osborne* and "suitably limits the category of 'sexual conduct' described").

In *Foster v. Com.*, 6 Va. App. 313, 369 S.E.2d 688 (Va. App. 1988), the Virginia Court of Appeals examined Virginia's child pornography statute which defined a form of "sexually explicit visual material" in relation to whether the images were "obscene for children." The court recognized that its statute was unconstitutional to the extent it did not comply with

Ferber, which required both that the works "*visually* depict sexual conduct by children below a specified age" and *also* suitably limit and describe the category of "sexual conduct" prohibited. *Id.* at 324-25, 369 S.E.2d at 695 (*citing Ferber*, 458 U.S. at 764). As a result, the court struck the offending language and upheld the remainder of its statute which did comply with *Ferber*. Had Nevada's Supreme Court followed the requirements of *Ferber* it would have reached the same result as did the Virginia court.

IV. This Court Should Grant Certiorari To Resolve The Issue Raised, But Left Undecided, In *Massachusetts v. Oakes*.

In *Com. v. Oakes*, 401 Mass. 602, 418 N.E.2d 836 (Mass. 1988), *vacated on grounds of mootness by Massachusetts v. Oakes*, 491 U.S. 576 (1989), the Massachusetts Supreme Court struck down a statute that criminalized "knowingly permitting a child under eighteen years of age 'to pose or be exhibited in a state of nudity . . . for purpose of visual representation or reproduction in any book, magazine, pamphlet, motion picture film, photograph, or picture. . . ." Citing *Ferber*, that court concluded that the statute was unconstitutionally overbroad:

> It criminalizes conduct that virtually every person would regard as lawful. Section 29A for example, makes a criminal of a parent who takes a frontal view picture of his or her naked

> one-year-old running on a beach or romping in a wading pool. Surely the first Amendment protects that kind of activity, even if what the defendant did in this case could properly be criminalized.

Id. at 605, 518 N.E.2d at 838.

In *Massachusetts v. Oakes*, 491 U.S. 576 (1989), this Court granted certiorari to determine whether Massachusetts' statute was, in fact, overbroad. Unfortunately, this Court could not address that question on the merits, because it found that a subsequent legislative amendment to the statute rendered the overbreadth challenge moot. *Id.* at 582. The amendment in question brought Massachusetts' statute into compliance with both *Ferber* and *Osborne*, by adding a "lascivious intent" requirement to the "nudity" portion of the statute. *See id.* at 582. Therefore, the Court vacated the underlying decision and remanded the case so the Massachusetts Supreme Court could evaluate the former statute "as applied" to the defendant alone. *Id.* at 585. Yet, several Justices weighed in on how they "would have" resolved the case, had the issue not become "moot". While Justice Scalia would have found the statute constitutional (despite its noncompliance with *Ferber* and *Osborne*), Justices Brennan, Marshall and Stevens would have invalidated the nonconforming statute as overbroad. *Id.* at 588-90 (J. Scalia, concurring in part and dissenting in part) and at 590-99 (J. Brennan, dissenting).

In the wake of *Massachusetts v. Oakes*, an important legal question remains: can a "child pornography" statute that fails to satisfy the four *Ferber* requirements ever be constitutional? The question is important because, over the past 20 years, America has "dramatically increased" the prosecution and punishment of child pornography offenses. *See* Hessick at 321. Legislatures and prosecutors have expanded the concept of "child pornography" well beyond what was intended at the time of *Ferber* or *Ashcroft,* to include nude or partially-nude images created surreptitiously without a minor's knowledge, innocent images that were digitally altered to appear sexually explicit, and even sexually explicit images created or shared among teenagers themselves (also known as "sexting"). Hessick at 322. It is a political football with which politicians have been all too happy to run.

Both Nevada and New Jersey already have nonconforming statutes on the books. (Pet. App. 141). Left unchecked, more states are sure to join Nevada and New Jersey in expanding their prohibitions on child pornography, and they have every incentive to do so. By "relaxing the definition of what qualifies as child pornography, these states have made it even easier for prosecutors to obtain a conviction for child pornography." Hessick at 343. And in doing so, these states have effectively turned child pornography into a "thought crime". *See id.* at 331.

This case is an ideal vehicle to address the purely legal issue left unresolved in *Massachusetts v. Oakes*: whether a child

This case is an ideal vehicle to address the purely legal issue left unresolved in *Massachusetts v. Oakes*: whether a child pornography statute that does not comply with *Ferber* is necessarily unconstitutional. Sprowson presented that question to the Nevada Supreme Court, when he argued that Nevada's "sexual portrayal" statute was both facially invalid and overbroad. (Pet. App. 34-44). The Nevada Supreme Court addressed both arguments on their merits and upheld Nevada's noncompliant "sexual portrayal" statute, affirming Sprowson's four child pornography convictions under that statute alone. (Pet. App. 6-8).

CONCLUSION

For all the foregoing reasons, this Court should grant certiorari to address whether Nevada can constitutionally prohibit as "child pornography" a depiction of a minor that does not contain sexual conduct or a record of sexual abuse, but merely "appeals to a shameful or morbid interest in the sexuality of [a] minor and . . . does not have serious literary, artistic, political, or scientific value, according to the views of an average person applying contemporary community standards."

Respectfully Submitted,

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No.

In the Supreme Court of the United States

MELVYN PERRY SPROWSON,

Petitioner

v.

THE STATE OF NEVADA,

Respondent

On Petition for a Writ of Certiorari to the Nevada Supreme Court

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CERTIFICATE OF SERVICE

I, P. DAVID WESTBROOK, declare that I am over the age of 18 years, not a party to the within cause and a member of the bar of this Court; my business address is 309 South Third Street, #226, Las Vegas, Nevada 89155-2610. I served a true copy of the **PETITION FOR WRIT OF CERTIORARI TO THE NEVADA SUPREME COURT** on each of the following, by placing same in an envelope addressed as follows:

Aaron D. Ford, Attorney General
State of Nevada, Criminal Justice Division
100 North Carson Street
Carson City, Nevada 89701-4717

Steven B. Wolfson, District Attorney
Attn: Appellate Division
200 Lewis Avenue, 3rd Floor
Las Vegas, NV 89155

Each said envelope was then, on the 27 day of September, 2019, sealed and deposited in the United States mail at Las Vegas, Clark County, Nevada, the county in which I am employed, with the postage thereon fully prepaid. I certify that all parties required to be served have been served. I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 27 day of September, 2019, at Las Vegas, Nevada.

P. David Westbrook
Counsel for Petitioner

No.

In the Supreme Court of the United States

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WORD COUNT CERTIFICATION

As required by Supreme Court Rule 33.1(h), I certify that the document contains 8,031 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 27 day of September, 2019, at Las Vegas, Nevada.

P. David Westbrook

Counsel for Petitioner

APPENDIX

Appendix 1 - Order Affirming in Part, Reversing in Part, and Remanding filed July 1, 2019.

Appendix 2 - District Court Minutes dated April 30, 2014.

Appendix 3 - Appellant's Opening Brief filed May 2, 2018.

Appendix 4 - Petition for Writ of Habeas Corpus, Motion to Dismiss, and Memorandum of Points and Authorities, filed March 7, 2014.

Appendix 5 - Constitutional Statutes Criminalizing the Production of Child Pornography and/or Sexual Exploitation of Children.

Appendix 6 - Unconstitutional Statutes Criminalizing the Production of Child Pornography and/or Sexual Exploitation of Children.

APPENDIX 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 7[illegible]

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree kidnapping; child abuse, neglect, or endangerment with substantial bodily and/or mental harm; and four counts of unlawful use of a minor in the production of pornography. Eighth Judicial District Court, Clark County; Stefany Miley, Judge. Appellant Melvyn Sprowson, Jr., raises six main contentions on appeal. Since the parties are familiar with the facts, we address only those relevant to our discussion of the issues presented.

Structural error during voir dire

First, Sprowson contends that the district court committed structural error during voir dire and that given his pro se status he adequately preserved this issue for appeal. We conclude that Sprowson did not preserve the issue because his queries lacked the specificity required, even under a liberal construction. *See United States v. Gray*, 581 F.3d 749, 752-53 (8th Cir. 2009) (recognizing that although a pro se defendant's objections should be given a liberal construction, the defendant's complaint must be sufficiently specific to convey the objection); *Hudson v. Gammon*,

46 F.3d 785, 786 (8th Cir. 1995) (concluding that a pro se litigant's objections preserved error where they "sufficiently directed the district court to the alleged errors"); *Jeremias v. State*, 134 Nev., Adv. Op. 8, 412 P.3d 43, 48 (2018) (concluding that generally a defendant must object, even to alleged structural error, so that the district court has an opportunity to correct it). Thus, we review for plain error.

To obtain relief under plain-error review, "an appellant must demonstrate that: (1) there was an 'error'; (2) the error is 'plain,' meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant's substantial rights." *Jeremias*, 134 Nev., Adv. Op. 8, 412 P.3d at 48 (quoting *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)). "[A] plain error affects a defendant's substantial rights when it causes actual prejudice or a miscarriage of justice (defined as a 'grossly unfair' outcome)." *Id.* at 49 (citing *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008)).

The district court erred to the extent it delegated its duty to gather sworn information from potential jury members to its marshal. *See* NRS 16.030(5) (stating that "[b]efore 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" (emphasis added)); NRS 16.030(6) ("*The judge* shall conduct the initial examination of prospective jurors and the parties or their attorneys are entitled to conduct supplemental examinations which must not be unreasonably restricted." (emphasis added)). Nonetheless, the error does not qualify as plain because it did not prejudice Sprowson or affect his substantial rights. The record demonstrates that Sprowson agreed to the release of all but one of the excused jurors and the one juror he did not

consent to release was a noncitizen who was ineligible for jury duty. *See Jeremias*, 134 Nev., Adv. Op. 8, 412 P.3d at 49-50 (concluding no prejudice resulted from the district court's voir dire errors that occurred in only one small part of the jury-selection process); *Collins v. State*, 133 Nev. 717, 724, 405 P.3d 657, 664 (2017) (recognizing a distinction between "administrative and preliminary voir dire" and "substantive voir dire"). Accordingly, we discern no plain error on this record entitling Sprowson to relief.

Exclusion of evidence

Second, Sprowson argues that the district court violated his constitutional right to present a defense and cross-examine witnesses by excluding evidence regarding the victim's interaction with other men—specifically, the resulting mental harm from those relationships. We review a district court's decision to exclude evidence for an abuse of discretion. *Vega v. State*, 126 Nev. 332, 341, 236 P.3d 632, 638 (2010). "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, 121 P.3d 582, 585 (2005) (internal quotation marks omitted). When the defendant has preserved the error, we will not reverse the judgment of conviction if the error is harmless. *Newman v. State*, 129 Nev. 222, 236-37, 298 P.3d 1171, 1181-82 (2013). We will deem an error affecting a defendant's constitutional right to present a complete defense harmless only when we can determine, beyond a reasonable doubt, that the error did not contribute to the verdict. *Coleman v. State*, 130 Nev. 229, 243, 321 P.3d 901, 911 (2014).

Before meeting Sprowson, the victim engaged with another older man she met online. He was ultimately convicted for sexually assaulting the victim. That incident caused the victim to begin therapy.

The district court granted in part the State's motion in limine and excluded all evidence of the victim's interaction with the other man, ruling that Sprowson could explore the victim's emotional distress and her previous therapy, but not "the why" behind it.

Sprowson argues that the victim's interaction with the other man was relevant to the kidnapping charge because it showed her history of meeting men online and running away to be with them, which undermined the State's enticement theory. We are not convinced that the victim's past was relevant to whether Sprowson willfully enticed the victim to leave her 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. NRS 200.350(2); *see* NRS 48.015 (defining relevant evidence). We also reject Sprowson's argument that the district court erred in precluding him from asking the victim about their online chat involving her virginity and liking sex. The answers to those questions were irrelevant because they did not tend to prove or disprove any fact of consequence. *See* NRS 48.015.

We conclude, however, that the evidence about the victim's relationship with the other man was relevant to the substantial-mental-harm element of the child abuse charge. *See* NRS 200.508 (defining abuse, neglect, or endangerment of a child and the penalties when substantial mental harm is involved). 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 Sprowson. Yet, 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. *See Lobato v. State*, 120 Nev. 512, 518, 96 P.3d 765, 770 (2004) (noting that a witness's prior inconsistent statements may be used to impeach that witness). 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. 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. *See Coleman*, 130 Nev. at 243, 321 P.3d at 911. We therefore reverse the conviction for child abuse and remand for a new trial on that charge.

Lastly, Sprowson 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 Sprowson 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. *See* NRS 48.035(1); *Cordova v. State*, 116 Nev. 664, 670, 6 P.3d 481, 485 (2000) (explaining that one party may open the door to the introduction of otherwise inadmissible evidence).

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.

Child pornography counts

Third, Sprowson argues that the child pornography convictions require reversal because (1) he did not "produce a performance," according to NRS 200.710,[1] with a photograph that he claimed was taken before he knew the victim; (2) the photographs did not show "sexual conduct" or involve a "sexual portrayal"; and/or (3) the child pornography statute is unconstitutional. We reject the first argument because Sprowson questioned the victim regarding the alleged preexisting photograph, she denied that it predated their relationship, and the jury was not required to credit Sprowson's conflicting testimony. We also reject the second argument because the photographs show the minor victim staged in sexually suggestive positions, thus depicting her "in a manner which appeals to the prurient interest in sex and which does not have serious

---

[1]NRS 200.710 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 category A felony and shall be punished as provided in NRS 200.750.
>
> 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 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.

literary, artistic, political or scientific value." NRS 200.700(4) (defining "sexual portrayal"); *see also Shue v. State*, 133 Nev. 798, 805, 407 P.3d 332, 338 (2017) (explaining that a "prurient" interest in sex involves "'a shameful or morbid interest in nudity, sex, or excretion,' or involving 'sexual responses over and beyond those that would be characterized as normal'" (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498 (1985)). Sprowson's argument that the photographs did not appeal to a prurient interest in sex because the victim was his girlfriend and was of legal age to consent to sex is without merit. *See Shue*, 133 Nev. at 805, 407 P.3d at 338 (reiterating that what is prurient depends on "the views of an average person applying contemporary community standards"); *State v. Hughes*, 127 Nev. 626, 630, 261 P.3d 1067, 1070 (2011) (rejecting the argument that a minor under the age of 18 but of legal age to consent cannot be the subject of child pornography). Because the jury could reasonably find that the photographs depicted the minor victim as the subject of a "sexual portrayal," the evidence is sufficient to support the child pornography convictions under NRS 200.710(2). Thus, we need not determine whether the evidence is sufficient to support those convictions on the alternative theory that the photographs showed "sexual conduct" for purposes of NRS 200.710(1).

Nor can we credit Sprowson's argument that Nevada's statutory definition of "sexual portrayal" is unconstitutionally vague or overbroad. *See Shue*, 133 Nev. at 805-07, 407 P.3d at 338-39 (concluding 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). Sprowson's argument that *Shue* should be revisited because it did not discuss *United States v. Stevens*, 559

U.S. 460 (2010), is unavailing. *Stevens* does not stand for the proposition that only productions connected to independent criminal conduct will be considered child pornography, as Sprowson suggests. 559 U.S. at 470.

Procuring a witness's attendance

Fourth, Sprowson contends that the district court erred in denying him, an indigent defendant, the ability to call the victim as a witness in his case-in-chief unless he could pay for her travel expenses. The record shows that the district court allotted Sprowson defense costs and appointed standby counsel. And although it did not have the duty to do so, the district court advised Sprowson of the procedures for procuring witnesses for trial. *See Harris v. State*, 113 Nev. 799, 803, 942 P.2d 151, 154-55 (1997) (noting that there is no duty that a district court inform a pro se defendant of their right to subpoena witnesses). Sprowson, however, did not subpoena the victim. We perceive no district court error in these circumstances.

Prosecutorial misconduct

Fifth, Sprowson argues that the State committed prosecutorial misconduct with statements made during voir dire and by improperly commenting on his constitutional rights. "When considering claims of prosecutorial misconduct, this court engages in a two-step analysis. First, we must determine whether the prosecutor's conduct was improper. Second, if the conduct was improper, we must determine whether the improper conduct warrants reversal." *Valdez*, 124 Nev. at 1188, 196 P.3d at 476 (footnotes omitted). Because Sprowson failed to object, reversal is warranted only if he demonstrates plain error that affected his substantial rights. *Id.* at 1190, 196 P.3d at 477.

Sprowson complains that the State's description of the case during voir dire was unduly inflammatory but we disagree. The language Sprowson complains about amounted merely to a factual recitation of the State's case. *See Gomez v. United States*, 490 U.S. 858, 874 (1989) (highlighting that "voir dire represents jurors' first introduction to the substantive factual and legal issues in a case"). Sprowson next assigns error to the State identifying and keeping jurors who had a strong reaction to its introduction. But the record shows the State did not seek a commitment and the jurors who reacted also expressed their ability to be fair and impartial. *See Witter v. State*, 112 Nev. 908, 914, 921 P.2d 886, 891 (1996) ("The critical concern of jury 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.'" (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980))), *abrogated on other grounds by Nunnery v. State*, 127 Nev. 749, 263 P.3d 235 (2011).

As to voir dire, Sprowson contends that "[t]he State indoctrinated the jury about grooming." The record does not support this claim. The State's colloquy with the jury on grooming sought to elicit information from the jurors, not to indoctrinate them. *See Khoury v. Seastrand*, 132 Nev. 520, 528-29, 377 P.3d 81, 87-88 (2016) (concluding that questions aimed at discovering the jurors' feelings on a specific issue are not indoctrination).

Next, Sprowson argues that the State committed prosecutorial misconduct by using a juror's definition of grooming to argue in closing that Sprowson groomed the victim. We agree that the State's reference to this grooming definition was improper because it was not based on evidence adduced at trial. *See Williams v. State*, 103 Nev. 106, 110, 734 P.2d 700,

703 (1987) (reiterating that a prosecutor is not permitted to argue facts or inferences not supported by the evidence). But because Sprowson failed to object, plain-error review applies. The comment was brief and ample other evidence supports Sprowson's kidnapping conviction. *See Valdez*, 124 Nev. at 1190, 196 P.3d at 477. The error thus did not affect Sprowson's substantial rights as to require reversal based on plain-error review.

Lastly, Sprowson argues that the State erred in commenting on his constitutional rights. The record does not support Sprowson's contentions that (1) the State improperly inquired about the victim's fear of being cross-examined, (2) the State commented on Sprowson's right to confrontation when it highlighted the victim's reaction to Sprowson approaching her at trial, and (3) the State improperly urged the jury to hold Sprowson responsible. *See Domingues v. State*, 112 Nev. 683, 698-99, 917 P.2d 1364, 1375 (1996) (concluding there was no prosecutorial misconduct where the State reminded the jury that criminal defendants should be held accountable for their reprehensible acts).

Cumulative error

Finally, Sprowson argues that we should reverse the judgment of conviction based on cumulative error. The evidentiary errors related to the victim's mental health affected only the child abuse conviction, which we reverse. The quantity and character of the remaining errors we have identified above are not significant. Nor do those errors appear to have had a cumulative impact on the jury's verdict that warrants reversal where the issue of guilt was not close on the kidnapping and child pornography counts. *See Valdez*, 124 Nev. at 1195, 196 P.3d at 481 (when assessing cumulative error claims, this court considers "(1) whether the issue of guilt is close, (2)

the quantity and character of the error, and (3) the gravity of the crime charged" (internal quotation marks omitted)). Accordingly, we

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.

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

Cadish, J.
Cadish

cc: Hon. Stefany Miley, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

APPENDIX 2

C-14-295158-1

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **April 30, 2014**

C-14-295158-1 State of Nevada
vs
Melvyn Sprowson, Jr.

April 30, 2014 **11:00 AM** **Petition for Writ of Habeas Corpus**

HEARD BY: Miley, Stefany **COURTROOM:** RJC Courtroom 12C

COURT CLERK: Anntoinette Naumec-Miller

RECORDER: Maria Garibay

PARTIES PRESENT: Jacqueline Bluth, Deputy District Attorney, present for the State of Nevada.
Deft. Sprowson, present in custody, with John Momot, Esq., and Yi Lin Zheng, Esq.

JOURNAL ENTRIES

Arguments by counsel. COURT FINDS slight or marginal evidence at the lower court to bindover Deft. on all counts and ORDERED, Petition DENIED on all counts, trial dates STAND.

CUSTODY

APPENDIX 3

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Electronically Filed
May 02 2018 04:25 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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

APPELLANT'S OPENING BRIEF

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IN THE SUPREME COURT OF THE STATE OF NEVADA

MELVYN PERRY SPROWSON,	)	NO. 73674
	)	
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).

[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 contemporaneous 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.

[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

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CERTIFICATE OF COMPLIANCE

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

This brief has been prepared in a proportionally spaced typeface using 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
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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

APPENDIX 4

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CLERK OF THE COURT

PET
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Attorneys for Defendant/Petitioner
MELVYN SPROWSON, JR.

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Application of:	CASE NO.: C-14-295158-1
MELVYN SPROWSON, JR., ID #5996049	DEPT. NO.: XXIII
for Writ of Habeas Corpus	DATE & TIME: 3-24-14 11:00am
	(J/CT CASE NO. 13F17841X)

PETITION FOR WRIT OF HABEAS CORPUS, MOTION TO DISMISS, AND MEMORANDUM OF POINTS AND AUTHORITIES

TO: THE HONORABLE JUDGE OF THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK:

COMES NOW the Petitioner, MELVYN SPROWSON, JR., by and through his attorneys, JOHN J. MOMOT, ESQ., of the law office of JOHN J. MOMOT, LTD., and states:

1. That Attorney for Petitioner is a duly qualified and licensed attorney practicing in Las Vegas, Nevada;

2. That Petitioner makes application for a Writ of Habeas Corpus and Motion to Dismiss;

3. That Petitioner is restrained of his liberty and is in the custody of Sheriff DOUG GILLESPIE, Clark County, Nevada;

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4. That said imprisonment of Petitioner is unlawful because the state presented insufficient evidence at the Preliminary Hearing to establish probable cause to believe that Petitioner committed the offenses with which he is charged;

5. That Petitioner waives the 60-day limitation for bringing this matter to trial and consents that if this Petition is not decided within 15 days before the date set for trial, the Court may, without notice or hearing, continue the trial to such date as it designates;

6. That Petitioner consents that if any party appeals the Court's ruling and the appeal is not determined before the date set for trial, the trial date shall be vacated and the trial postponed, unless the Court otherwise orders;

7. That Petitioner's trial is scheduled for March 24, 2014, in Department XXIII of the above-entitled Court;

8. That no other Petition for Writ of Habeas Corpus has heretofore been filed on behalf of Petitioner in this case; and

9. That this petition is based on the grounds herein as set forth above, the records and pleading on file herein, the Memorandum of Points and Authorities attached hereto, and upon such other grounds and evidence as may be adduced at a hearing of this Writ.

WHEREFORE, Petitioner prays that this Honorable Court direct the County Clerk to issue a Writ of Habeas Corpus directed to the Sheriff of Clark County, Nevada, instructing said Sheriff to produce the body of the Petitioner before the Court.

DATED this 6 day of March, 2014.

Respectfully Submitted,

JOHN J. MOMOT, ESQ.

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AFFIDAVIT OF COUNSEL

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

JOHN J. MOMOT, ESQ., being first duly sworn, according to law, upon oath, deposes and says:

1. That AFFIANT represents the Petitioner in the above-entitled matter;

2. That AFFIANT has read the foregoing Petition for Writ of Habeas Corpus and Motion to Dismiss and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes them to be true; and

3. That Petitioner, MELVYN SPROWSON, JR., has authorized AFFIANT to make the foregoing application for relief.

FURTHER, your Affiant sayeth naught.

JOHN J. MOMOT, ESQ.

SUBSCRIBED and SWORN to before me
this 6th day of March, 2014.

NOTARY PUBLIC in and for said
County and State.

YI LIN ZHENG
NOTARY PUBLIC
STATE OF NEVADA
My Commission Expires: 2-28-2015
Certificate No.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. PROCEDURAL BACKGROUND

The defendant/petitioner MELVYN SPROWSON, JR. (hereinafter "Mr. Sprowson") was arrested on November 1, 2013. He was charged by way of Criminal Complaint in the case styled State of Nevada vs. Melvyn Perry Sprowson, Jr., Case No. 13F17841X.

Following the Preliminary Hearing proceedings, which took place on December 30, 2013 and January 8, 2014, defendant/petitioner was bound over to answer in District Court for the charges contained in the Information, which alleges the following:

COUNT 1:	FIRST DEGREE KIDNAPPING
COUNT 2:	CHILD ABUSE, NEGLECT, OR ENDANGERMENT WITH SUBSTANTIAL BODILY OR MENTAL HARM
COUNT 3:	UNLAWFUL USE OF A MINOR IN THE PRODUCTION OF PORNOGRAPHY
COUNT 4:	UNLAWFUL USE OF A MINOR IN THE PRODUCTION OF PORNOGRAPHY
COUNT 5:	UNLAWFUL USE OF A MINOR IN THE PRODUCTION OF PORNOGRAPHY
COUNT 6:	UNLAWFUL USE OF A MINOR IN THE PRODUCTION OF PORNOGRAPHY

Mr. Sprowson was arraigned on the Information and pleaded not guilty to the charges on January 29, 2014 and invoked his speedy trial rights. Trial is currently set for March 24, 2014 before this Honorable Court. He now files the instant Writ of Habeas Corpus and Motion to Dismiss. Mr. Sprowson respectfully requests that this Court grant this writ and issue an order dismissing the Information against him with prejudice.

II. FACTUAL BACKGROUND

At the Preliminary Hearing the State called five witnesses, to-wit: the alleged victim JT,[1] her mother Kathryn Smith (K. Smith), and Clark County School Police Department (CCSPD)

[1] Because the alleged victim in this case is not over the age of 18 years old, out of an abundance of caution, her full name is not stated in the instant writ. Rather she shall be referred to by her initials of JT.

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Officer Gary Abbott (Ofc. Abbott), Detective David Platt (Det. Platt), and Detective Jeff Schell (Det. Schell). The following testimony was adduced at the Preliminary Hearing:

On or about August 29, 2013, the alleged victim's mother discovered JT, who has a history of being a runaway, had run away from home again. [PHT, p. 84]. This particular occasion was precipitated by ongoing conflicts between JT and her mother that started at least two years ago.

When JT was just 14 years old she was the victim of several sex crimes. The perpetrator was prosecuted in the case styled State of Nevada vs. David Scholmann, Case No. C295989. [PHT, p. 111-12]. As a result of the trauma from that incident, JT engaged in two years of individual and family therapy with her mother. [PHT, p. 191]. In addition, JT's mother took her computer and phone away from her for a period of two years. [PHT, p. 196]. Her mother only recently returned those items to her, on her 16th birthday, in June of 2013, and even then her mother loosely supervised her use of the computer and cellular phone. [PHT, p. 196].

Everything came to a head on the evening of August 28, 2013, when K. Smith once again confiscated JT's computer and phone on suspicion of JT's behavior. [PHT, p. 175]. K. Smith testified that JT spent a lot of time on her phone and computer and would often withdraw to her room. In particular, JT gave conflicting stories as to how she came into possession of a diamond solitaire ring that she wore as a pendant, which K. Smith also confiscated from JT. [PHT, p. 173].

On the morning of August 29, 2013, K. Smith discovered that JT was gone. JT had taken her computer, cellular phone, backpack, three pairs of shoes, almost all of her clothes, birth certificate, and social security card. [PHT, p. 175; 182].

K. Smith filed a runaway report with the Henderson Police Department (HPD) under HPD Event #13-13994. K. Smith engaged the services of private investigators, several organizations, and took to social media outlets to look for JT. [PHT, p. 179-80; 183]. She went through JT's

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cell phone records and bank records and concluded that JT was with Mr. Sprowson. [PHT, p. 198]. K. Smith tried to call the number on JT's phone records but discovered that the phone number was disconnected. [PHT, p. 177]. From the bank records she learned that Mr. Sprowson had wired $150 into JT's account. [PHT, p. 198]. K. Smith testified that HPD provided little assistance; so she hired a private investigator. The private investigator she hired had gone to Mr. Sprowson's residence to give him a missing person's poster for JT and speak to him regarding JT. Thereafter, CCSPD's Ofc. Abbott became involved in the case. [PHT, p. 179-80; 183].

On October 31, 2013, Ofc. Abbott and Det. Platt went to Wengert Elementary School to interview Mr. Sprowson. Mr. Sprowson admitted to knowing JT via text messages, craigslist.com, and phone calls. He stated that he had not met her in person and had no knowledge of her whereabouts. He admitted to having wired JT $150.00 one time in the past. [PHT, p. 222-24].

On November 1, 2013, Ofc. Abbott went to Mr. Sprowson's apartment complex. He interviewed the building manager regarding the lease, the number of residents in the apartment, the people seen coming and going from Mr. Sprowon's apartment, in particular a female. [PHT, p. 225]. Eventually, during their discussion, it was decided that there might (or might not) be a smoke detector alarm going off in the apartment. Ofc. Abbott and the building manager decided to send a maintenance person over to the two potential apartment supposedly to determine whether the smoke alarm was going off in Mr. Sprowson's apartment. [PHT, p. 225]. The maintenance person radioed back to the leasing office that he had found a young lady in Mr. Sprowson's apartment. [PHT, p. 225]. It is important to note, however, that JT testified that the smoke alarm in the apartment did not, and was not actually, going off. [PHT, p. 119; 120].

Ofc. Abbott then went to Mr. Sprowson's apartment and knocked on the door. JT, whom Officer Abbott recognized as the missing runaway, answered the door. [PHT, p. 230]. Later, Sgt.

Macisczak and Det. Jeff Schell, responded to Mr. Sprowson's residence and conducted an audio recorded interview with JT. [PHT, p. 231]. JT was removed from Mr. Sprowson's residence and taken to Child Haven where Michelle Fischer also interviewed her. [PHT, p. 232].

While Ofc. Abbott was at Mr. Sprowson's apartment complex, other CCSPD officers went to Wengert Elementary School, where Mr. Sprowson was working. Police pulled Mr. Sprowson out of class and re-interviewed him, then allowed him to return to class. But police later pulled him out of class again and arrested him for the case at hand. [PHT, p.237-38]. During the arrest, Det. Platt seized Mr. Sprowson's black I-phone and booked it into evidence. [PHT, p.238].

At the time of the Preliminary Hearing JT testified to the following regarding her interaction with Mr. Sprowson:

JT first encountered Mr. Sprowson when she responded to his ad on craigslist.com. [PHT, p. 15]. They began communicating through craigslist.com, then on email, through Kik (an instant messaging application), and on the telephone. [PHT, p. 17]. They saw each other for the first time when he came into the Omelet House where JT worked. [PHT, p. 21]. They physically met for the first time while JT was out at a skating rink with a friend. [PHT, p. 22]. About a month after being in communication with Mr. Sprowson, JT told K. Smith that she was spending two nights at her friend Jessica's house but spent two nights with Mr. Sprowson instead. [PHT, p. 26]. They consummated their relationship and Mr. Sprowson gave JT a promise ring. [PHT, p. 27].

On August 28, 2013, K. Smith suspicious of JT's behavior punished JT by once again taking away JT's phone, computer, as well as the promise ring. [PHT, p. 29]. JT reacted to this punishment by contacting Mr. Sprowson and begging him to come and get her. JT believed that if she did not leave, her mother would forbid her from communicating with Mr. Sprowson ever again. [PHT, p. 30; 144]. Mr. Sprowson was extremely cautious and reluctant to get JT. [PHT, p.

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97-98]. JT insisted and forced the issue by telling him that if he did not come and pick her up, she would kill herself; that either he came to pick her up or she would die that night. [PHT, p. 156]. Mr. Sprowson capitulated and picked her up, after she snuck out, in the early morning of November 29, 2013. [PHT, p. 32].

When JT first arrived at Mr. Sprowson's home, she advised and instructed him to change his phone number to avoid detection because JT was aware that her mother had Mr. Sprowson's phone number from going through JT's phone records. [PHT, p. 33].

JT testified that Mr. Sprowson wanted her to continue attending school while she was residing with him. [PHT, p. 98]. But JT chose not to attend school because she knew that if she attended school she would be discovered and returned to her mother. [PHT, p.90]. However, JT's plans to one day attend college remained unchanged. She originally planned to continue to attend high school until graduation. However, upon moving in with Mr. Sprowson she planned to obtain a GED, go on to college, and to become a teacher. [PHT, p. 95-96; 76].

During her time with Mr. Sprowson, JT spent her days watching television, going on-line, playing board games, coloring, and reading books. [PHT, p. 34]. While JT had internet access to e-mail and access to her cell phone to contact anyone she wanted to, she chose not to because she wanted to avoid being found and returned to K. Smith. [PHT, p. 101]. She wrote letters to Mr. Sprowson to express her feeling towards him. As a teacher, he would offer constructive criticism of her spelling, penmanship, and grammar. [PHT, p. 139-40]. She would help him prepare teaching aids for his kindergarten class. [PHT, p. 141]. They had a difference of opinion regarding her singing ability but he thought that she was an accomplished guitarist. [PHT, p. 142].

Mr. Sprowson went to work each day. JT was unrestrained and could leave at any time. [PHT, p. 104]. Mr. Sprowson took care of JT. [PHT, p. 100]. He was never violent with her. He never talked to JT about pimping and drugs. [PHT, p. 91]. At JT's request, Mr. Sprowson twice

provided JT with alcohol. [PHT, p. 47; 123]. However, there was no smoking or drug activity at Mr. Sprowson's house. [PHT, p. 122].

When JT missed her family, she would ask Mr. Sprowson to take her and drive by her house but it was not her intent to return home. [PHT, p. 42-43; 138]. JT testified that though she missed her family, she believed that the separation was worth it because, according to her plan, she would see them again when she became emancipated, or if Mr. Sprowson gained guardianship of her, or when they got married, or when she turned 18 years old in two years. [PHT, p. 42-43]. When going out, they both agreed that JT should take precaution to avoid detection by altering her appearance with clothing. [PHT, p. 37]. They would go for drives during the evening during the school week. On the weekends, they would go out for long drives up to the lake during the day. [PHT, p. 142-43; 154].

When JT was discovered at Mr. Sprowson's residence, she told her interviewers and testified at the Preliminary Hearing that it was she who wanted to go and live with Mr. Sprowson. JT loved him and wanted to go live with him. [PHT, p. 77]. She was happy living with Mr. Sprowson and that everything was perfect. [PHT, p. 122]. She wanted to continue living with Mr. Sprowson. [PHT, p. 94]. She asked her interviewers if she could continue to live with Mr. Sprowson. [PHT, p. 94].

JT has a history of being a runaway. [PHT, p. 84]. She believed that she had a right to be at Mr. Sprowson's home and did not believe what they were doing was illegal. She looked up the laws regarding truancy and emancipation. [PHT, p. 101-102]. She explicitly did not want Mr. Sprowson to get into trouble. More specifically, she did not want Mr. Sprowson to be charged criminally for helping her. [PHT, p. 102]. She would have returned home to K. Smith, even if she did not want to, if it would have spared Mr. Sprowson from being in trouble with the law. [PHT, p. 139].

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When JT returned home to K. Smith, she repeatedly tried to leave K. Smith's house to return to Mr. Sprowson's home. [PHT, p. 185]. JT threatened to kill herself if she had to remain with K. Smith. Fearing that JT would hurt herself, K. Smith had her hospitalized for 10 days. [PHT, p. 186]. When JT returned home, she was *going on about another boy* and threatened to jump from the balcony because she could not use the phone. [PHT, p. 189-87]. As a result, K. Smith committed JT to Montevista Hospital. [PHT, p. 187]. Currently, JT is in a long-term treatment facility for up to six months. [PHT, p. 187-88].

III. LAW AND ANALYSIS

To establish probable cause to bind a defendant over for trial, the state must demonstrate probable cause that (1) a crime has been committed and (2) the defendant committed it. NRS § 171.206; Jones v. Sheriff, 93 Nev. 297, 565 P.2d 325 (1977). The standard of review for a pretrial habeas challenge to the sufficiency of the evidence is that the state has the burden of showing "slight or marginal" evidence that the crime charged has been committed and that the defendant committed it. Sheriff v. Hodes, 96 Nev. 184, 186, 606 P.2d 178, 179 (1980). A writ of habeas corpus will not be denied if there is a showing of a lack of probable cause that the crime charged was committed and that the defendant committed the crime. In re Rowland, 74 Nev. 215, 218, 326 P.2d 1102, 1103 (1958). Probable cause requires far more than a trace of evidence; the facts must be such as would lead a person of ordinary caution and prudence to believe and conscientiously entertain a strong suspicion that the defendant committed the crime in question. Graves v. Sheriff, 88 Nev. 436, 438, 498 P.2d 1324, 1326 (1972). Where probable cause cannot be established due to insufficient or incompetent evidence, the Petitioner is entitled to have the charges dismissed.

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A. **THE STATE PRESENTED INSUFFICIENT EVIDENCE AT THE PRELIMINARY HEARING TO ESTABLISH FIRST DEGREE KIDNAPPING, AS CHARGED IN COUNT 1.**

Mr. Sprowson had no criminal intent to keep, imprison, or confine JT from her mother. He did not hold JT to unlawful service or perpetrate upon JT an unlawful act. Therefore, he did not kidnap JT. Count 1, first degree kidnapping, should be dismissed because essential elements of the crime charged cannot be established.

The applicable portion of the kidnapping statute reads: "(E)very person who leads, takes, entices, or carries away or detains any minor with the intent to keep, imprison, or confine it from its parents, guardians, or any other person having lawful custody of such minor, or with the intent to hold such minor to unlawful service, or perpetrate upon the person of such minor any unlawful act shall be deemed guilty of kidnapping in the first degree." NRS 200.310(1).

Kidnap means to take and carry away any person by *unlawful force or fraud and against his will.* While there is no minimum requirement for distance of asportation, it is the fact, not the distance, of forcible removal of the victim that constitutes kidnapping. Jensen v. Sheriff, White Pine County, 89 Nev. 123, 125-126, 508 P.2d 4, 5 - 6 (1973); Jefferson v. State, 95 Nev. 577, 579, 599 P.2d 1043, 1044 (1979) (emphasis added).

The dominating element of the crime of kidnapping is the criminal intent with which the acts enumerated in the statute are done. The necessary intent may be inferred from the acts of the accused. Id. (internal citations omitted). Intention is manifested by the circumstances connected with the perpetration of the offense. NRS 193.200; Wilson v. State, 85 Nev. 88, 450 P.2d 360 (1969); State v. Hall, 54 Nev. 213, 13 P.2d 624 (1932).

Mr. Sprowson could not have kidnapped JT because there was never any criminal intent to keep, imprison, or confine JT from anyone. Mr. Sprowson did not carry away JT by unlawful force or fraud and he did not do so against JT's will. Jensen, 89 Nev. 125-26, 508 P.2d 5-6. In fact, JT sought out Mr. Sprowson. JT begged Mr. Sprowson to pick her up and threatened to kill

herself if he did not come get her. [PHT, p. 156]. JT testified that Mr. Sprowson was extremely cautious and reluctant to get JT. [PHT, p. 97-98]. Mr. Sprowson did not seek to remove JT from K. Smith's house. JT was leaving and she needed somewhere to go. In this case, she wanted to go to Mr. Sprowson's home to live with him. It was *JT's intent* to leave K. Smith's residence and not return. It was *JT's intent* to keep herself concealed and to remain hidden at Mr. Sprowson's residence. Mr. Sprowson had absolutely no criminal intent to keep JT imprisoned or confined to his residence.

The facts adduced at the Preliminary Hearing debunk the charge of kidnapping because there was no confinement or imprisonment. Mr. Sprowson's demonstrated intent was to take care of JT and to provide her with a safe place to stay, after JT announced her determination to run away. Mr. Sprowson did not have the requisite criminal intent to kidnap JT, which is the dominating element of the crime. The necessary criminal intent simply cannot be inferred by his conduct in this case.

Here, JT could have returned to K. Smith's home at any time. It was JT's determination to be with Mr. Sprowson and not return to K. Smith's residence that caused her to stay – it was not because Mr. Sprowson sought to keep, imprison, and confine JT from K. Smith. Mr. Sprowson would have taken JT back to K. Smith at any time had she asked – but she did not because she wanted to stay. In fact, at JT's request, Mr. Sprowson drove her by her family's home but JT did not intend on going home to K. Smith; she just wanted to drive by. [PHT, p. 42]. JT could have walked out of Mr. Sprowson's apartment at any time – but she did not. [PHT, p. 104]. Mr. Sprowson wanted JT to continue going to school – but she refused because she did not want to be returned home to K. Smith. [PHT, p. 90; 98]. JT had internet access to e-mail anyone for assistance if she wanted to – but she did not. [PHT, p. 101]. JT was in possession of her cell phone the entire time. She could have called anyone for assistance if she wanted to – but she did

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not. In fact, she consciously made the decision to keep her cell phone off because she wanted to avoid the possibility of being tracked. [PHT, p. 101]. JT even had the presence of mind to instruct Mr. Sprowson to change his telephone number to elude being found out. [PHT, p. 33]. The reality is that JT was keeping herself from K. Smith – not Mr. Sprowson. He did not kidnap JT in any way.

Likewise, Mr. Sprowson did not have any criminal intent to hold JT to unlawful service or to perpetrate upon her an unlawful act. According to JT, Mr. Sprowson took care of her in a positive way. He provided her with food and shelter. [PHT, p.100-01]. He was not violent towards her. He was not holding her for prostitution, nor did he molest her. [PHT, p. 91]. He did not smoke or do drugs, nor did he introduce her to those things. [PHT, p.109; 122]. She did not believe that Mr. Sprowson had any ulterior motives in having her there at the apartment. [PHT, p. 100]. In fact, JT felt that Mr. Sprowson had done more for her than her mom ever did. [PHT, p. 99-100]. There was no kidnapping. Therefore, Count 1 should be dismissed.

Taking all of the facts as a whole, logic dictates that Mr. Sprowson could not have kidnapped JT. The plain language of the statute does not permit a finding of first degree kidnapping when the alleged victim is purposefully and explicitly trying to remain concealed. More specifically, you cannot kidnap someone who is trying to run away from the very person that she is alleged to be kidnapped from, which is the case with JT and K. Smith. This case does not present with the ordinary facts normally associated with a kidnapping. The State is pushing its theory of kidnapping beyond a common sense application of the statute. According to the State's theory, any person who takes care of and provides food and shelter to a runaway youth is guilty of first degree kidnapping. That cannot and is not likely the conduct the legislature intended to punish pursuant to NRS 200.310(1).

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B. THE STATE PRESENTED INSUFFICIENT EVIDENCE AT THE PRELIMINARY HEARING TO ESTABLISH A CHILD ABUSE AND NEGLECT WITH SUBSTANTIAL BODILY OR MENTAL HARM AS CHARGED IN COUNT 2.

Count 2 should be dismissed because Mr. Sprowson did not abuse or neglect JT. Moreover, the substantial bodily harm and substantial mental harm enhancement to the charge is completely unsubstantiated. The State did not and cannot establish that Mr. Sprowson directly caused JT any harm or injury that constitutes substantial mental and/or bodily harm.

NRS 200.508(1) thus sets forth alternative means of committing the offense of child abuse and neglect. The first requires the State to prove that (1) a person willfully caused (2) a child who is less than 18 years of age (3) to suffer unjustifiable physical pain or mental suffering (4) as a result of abuse or neglect. The second requires the State to prove that (1) a person willfully caused (2) a child who is less than 18 years of age (3) to be placed in a situation where the child may suffer physical pain or mental suffering (4) as the result of abuse or neglect. Clay v. Eight Jud. Dist. Ct., 305 P.3d 898, 902 -903 (2013).

"Abuse or neglect" means physical or mental injury of a non-accidental nature, sexual abuse, sexual exploitation, negligent treatment or maltreatment of a child under the age of 18 years. NRS 200.508(4)(a). The State must establish that the Defendant's conduct is the direct and proximate cause of the harm. Ramirez v. State, 235 P.3d 619, 623 (Nev. 2010) (NRS 200.508(1) addresses scenarios where the person charged under the statute directly committed the harm). "Substantial Bodily Harm" is defined as follows: (1) Bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ; or (2) Prolonged physical pain. NRS 0.060. "Substantial Mental Harm" means 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).

To charge the defendant with "Substantial Bodily Harm" and/or "Substantial Mental Harm" is an enhancement to the crime of child abuse and neglect, as well as the penalty range. NRS 200.508(a)(2); NRS 200.508(b)(1). The State must establish that the defendant directly caused substantial physical pain or mental suffering beyond that which is ordinarily caused by the abuse and neglect of a child. *See for example* Levi v. State, 95 Nev. 746, 602 P.2d 189 (1979) (Evidence of cosmetic disfigurement suffered by child as a result of first and second-degree burns to boy's stomach and hand allegedly inflicted by defendant, his father, evidence was sufficient for jury on the "substantial bodily harm" element of the felony offense of child abuse resulting in substantial bodily harm.); Childers v. State, 100 Nev. 280, 281, 680 P.2d 598, 598 (1984) (In child abuse prosecution, evidence that child suffered duodenal hematoma which was life threatening and which actions of defendant could have caused, child was covered with bruises as result of beatings, child had little or no appetite, was in state of malnutrition when she arrived at hospital, required 14 days' hospitalization, suffered impairment of digestive system and prolonged physical pain traceable to defendant's acts, was sufficient to support finding that defendant caused child substantial bodily harm and substantial mental harm.); Perez v. State, 2011 WL 4527520, 11 (Nev. 2011) (The autopsy confirmed this as it revealed that C.F. had numerous bruises on her body, including her back, chest, armpits, face, pubic area, buttocks, left hip, and left leg. Also, the autopsy indicated that C.F. had chewed her fingernails and toenails, suggesting that she was under significant stress prior to her death. The above evidence, viewed in the light most favorable to the prosecution, sufficiently established that Perez committed child abuse resulting in substantial bodily harm and substantial mental harm.).

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Quite simply, the State cannot even establish the base offense of "abuse or neglect," pursuant to NRS 200.508(4)(a). Mr. Sprowson did not cause any physical or mental injury of a nonaccidental nature to JT. There is no testimony regarding any overt act on his part to abuse or neglect JT. Mr. Sprowson did not sexually abuse or sexually exploit JT. JT was not negligently treated or mistreated; she was well cared for, provided with shelter, food, books, games, coloring materials, and generally treated with kindness. The conduct that the State charged Mr. Sprowson with as the basis of the "Child Abuse, Neglect, or Endangerment with Substantial Bodily or Mental Harm" is ultimately contradicted by JT's testimony at the preliminary hearing. According to JT, she did not suffer *any* physical or mental injury as a result of Mr. Sprowson. The facts presented in the instant case are nothing like the facts presented in Levi, Childers, or Perez where child abuse resulting in substantial bodily harm and/or substantial mental harm can actually be substantiated. The facts in this case do not remotely rise to that level of "substantial" harm.

Here, there is no dispute that "substantial bodily harm" did not occur. In fact, during the investigation, CCSPD's Sgt. Macisczak was quoted in a press conference saying that JT was a "willing participant," "no force was used," and that she was at Mr. Sprowson's residence willingly. More importantly the authorities reported that JT was found in "good health and unharmed." Melissa Duran, *Bail Set for Teacher in Kidnapping* (Nov. 6, 2013), http://lasvegas.cbslocal.com/2013/11/06/kindergarten-teacher-arrested-for-kidnapping/, attached hereto as *Exhibit A*. There is not even a hint of Mr. Sprowson using unlawful force or violence in this case. There is not of hint of physical injury to JT, much less "substantial bodily harm."

Likewise as to "substantial mental harm," there was no evidence that Mr. Sprowson caused injury to the intellectual or psychological capacity or the emotional condition of JT as evidenced by an observable and substantial impairment of JT's ability to function within her normal range of performance or behavior. When JT was discovered at Mr. Sprowson's residence,

she told her interviewers and testified at the Preliminary Hearing that she wanted to live with Mr. Sprowson and wanted to continue to live with him. JT loved him. [PHT, p. 77; 94]. She repeatedly asked if she could continue to live with Mr. Sprowson. [PHT, p. 94]. She was happy living with Mr. Sprowson and, in her estimation, everything was perfect. [PHT, p. 122]. The security JT demonstrates by her repeated requests to remain living with Mr. Sprowson indicate that Mr. Sprowson did not injure JT's emotional condition.

There is also no injury to JT's intellectual ability. JT's plans to further her education and attend college remain unchanged. She originally planned to continue to attend high school until graduation, however, upon moving in with Mr. Sprowson, she decided to obtain a GED (in lieu of attending school, since she worried that she would be returned to her mother), go on to college, and to become a teacher. [PHT, p. 95-96; 76]. There was no testimony that there was any demonstrative change to JT's intellectual ability. If anything, JT's intellectual ability remains above average.

There was also no testimony that there is any substantial impairment to JT's psychological capacity. JT remains steadfast in her wish to not have to reside with K. Smith. She still sought the chance to be emancipated from K. Smith. She still hoped that K. Smith would relinquish custody and allow Mr. Sprowson to be her guardian. There is no change to JT's psychological condition between leaving her mother and being returned to her mother.

JT loved Mr. Sprowson and loves him still. [PHT, p. 77, 166]. Whatever judgment one may pass on whether her love is misplaced and whether their relationship is appropriate, such judgment is not an instrument to measure JT's intellectual or psychological capacity or her emotional condition. Such judgment certainly is not an indication that Mr. Sprowson caused JT any mental harm. Such judgment also does not mean that JT has any observable and substantial impairment in her ability to function her normal range of performance or behavior.

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Even if it can be assumed that JT was suffering from substantial mental harm, the State cannot establish that Mr. Sprowson's conduct is the direct casual connection of JT's mental injury. When JT was just 14 years old she was the victim of a crime in the case styled State of Nevada vs. David Schlomann, Case No. C295989. [PHT, p. 111-12]. The conduct of the defendant in that case was far more egregious than the conduct alleged in the instant case. In that case, JT was just 14 years old when she was lured by a 39 year old man from New Mexico for the purposes for engaging in sexual conduct. She ultimately met up with Mr. Schlomann and he pressured her into engaging in various forms of sexual activity, even after she repeatedly stated that she did not want to and that she was experiencing pain; whereas the relationship in this case was completely consensual. See *redacted* Las Vegas Metropolitan Police Department Declaration of Warrant/Summons, LVMPD Event #120416-2686, by Det. T. Katowich, dated June 5, 2012, attached hereto as *Exhibit B*. The trauma from that prior incident, necessitated two years of individual therapy for JT and family therapy with her mother. [PHT, p. 191]. Therefore, if JT suffered any substantial mental harm, it would be impossible to say if it is attributable to Mr. Sprowson or she was belaboring under the mental injury of some other prior incident. See *redacted* letter of Dr. Emmanuel Nwapa, M.D., of Montevista Hospital, dated November 21, 2013, attached hereto as *Exhibit C*.

The State has not established the basic offense of "abuse or neglect," by its definition, much less the enhancement to "substantial bodily harm" or "substantial mental harm." Mr. Sprowson did not inflict upon JT any non-accidental injury causing unjustifiable physical pain or mental suffering. And if JT did suffer substantial mental harm, it is not directly attributable to Mr. Sprowson. Therefore, Count 2 must be dismissed.

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C. THE STATE PRESENTED INSUFFICIENT EVIDENCE AT THE PRELIMINARY HEARING TO ESTABLISH THE PRODUCTION OF CHILD PORNOGRAPHY COUNTS, AS CHARGED IN COUNTS 3-6.

The State must prove that Mr.Sprowson unlawfully used JT in the production of pornography by either one of two ways: NRS 200.701(1) – "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" *or* NRS 200.701(2) – "knowingly uses, encourages, entices, coerces or permits a minor to be the subject of a 'sexual portrayal' in a performance … regardless of whether the minor is aware that the 'sexual portrayal' is part of a performance."

NRS 200.700 provides the definitions and context to evaluate whether a minor was unlawfully used in the production of pornography. NRS 200.700 states:

> 1. "Performance" means any play, film, photograph, computer-generated image, electronic representation, dance or other visual presentation.
> 2. "Promote" means to produce, direct, procure, manufacture, sell, give, lend, publish, distribute, exhibit, advertise or possess for the purpose of distribution.
> 3. "Sexual conduct" means 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 manipulated or inserted by a person into the genital or anal opening of the body of another.
> 4. "Sexual portrayal" means 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 State alleged by way of Information, in Counts 3, 4, 5, and 6, that Mr. Sprowson:

> Did, then and there, willfully, unlawfully, feloniously, and knowingly, use, encourage, entice or permit [JT], a minor to simulate or engage in **sexual conduct** to produce a performance, **and/or** be the subject of a **sexual portrayal** in a performance to-wit: by said Defendant requesting and directing [JT] to take photographs in which the said [JT] posed in various stages of undress and exposed her breast [and/or] buttocks [and/or] genital area for the purpose of producing a pornographic performance and that said performance was recorded at the direction of the Defendant on the cell phone of [JT].
>
> (Emphasis added).

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Mr. Sprowson did not unlawfully use JT in the production of child pornography because the images that the State charged Mr. Sprowson with (1) does not depict "sexual conduct;" and (2) cannot be determined to contain a "sexual portrayal" of JT because the statutory definition is unconstitutionally vague.

1. The State Cannot Establish that the Images Charged in Counts 3-6 of the Information Depicted any "Sexual Conduct."

The images charged in Counts 3-6 of the Information, *i.e.* State's Exhibit No. 8-19 filed under seal, contain no depiction of "sexual conduct" whatsoever, pursuant to NRS 200.700(3). In the pictures at issue and charged in Counts 3-6, the subject is clothed. In almost all of the pictures the subject is wearing a sports bra or bra. There are two photos where the subject's breasts are exposed but the subject's face cannot be seen. The subject's genitals are not exposed in any of the pictures. In each picture the subject is wearing shorts or underwear covering her genitals. [PHT, p. 131-37].

Contrary to NRS 200.700(3), which defines "sexual conduct," none of the images charged in Counts 3-6 depict JT engaged in sexual intercourse, the lewd exhibition of her 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 manipulated or inserted by a person into the genital or anal opening of the body of another.

Because none of the images charged in Counts 3-6 of the Information contained any "sexual conduct," Mr. Sprowson's criminal liability under NRS 200.701(1) must be excluded. Mr. Sprowson cannot be charged under this theory. Therefore, in order to sustain the charges of unlawful use of a minor in the production of pornography, the State must establish that the images charged in Counts 3-6 are a "sexual portrayal" of JT, which it cannot do either.

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2. The State Cannot Determine that the Images Charged in Counts 3-6 of the Information Contained a "Sexual Portrayal" of JT Because the Statute is Unconstitutionally Vague.

Mr. Sprowson cannot be held criminally liable for knowingly using, encouraging, enticing, coercing or permitting JT to be the subject of a 'sexual portrayal' in a performance, pursuant to NRS 200.701(2) because it was and is impossible for Mr. Sprowson or any reasonable person to determine what type of imagery constitutes a "sexual portrayal." NRS 200.701(2) is void for vagueness because the statutory definition for "sexual portrayal," as contained in NRS 200.700(4), fails to give any person of ordinary intelligence fair notice of what is prohibited.

"Vagueness may invalidate a criminal law for either of two independent reasons." Chicago v. Morales 527 U.S. 41, 56, 119 S.Ct. 1849 (1999). A statute is unconstitutionally vague "(1) if it fails to provide a person of ordinary intelligence fair notice of what is prohibited; *or* (2) if it is so standardless that it authorizes or encourages seriously discriminatory enforcement." State v. Castaneda, 126 Nev. ——, ——, 245 P.3d 550, 553 (2010) (quoting Holder v. Humanitarian Law Project, 561 U.S. ——, ——, 130 S.Ct. 2705, 2718 (2010)).

"[M]athematical precision is not possible in drafting statutory language." City of Las Vegas v. Dist. Ct., 118 Nev. at 864, 59 P.3d at 481. Nonetheless, "the law must, at a minimum, delineate the boundaries of unlawful conduct. Some specific conduct must be deemed unlawful so individuals will know what permissible behavior is and what is not." Id. A law that leaves the determination of whether conduct is criminal to a purely subjective determination … is vague. Id. at 865, 59 P.3d at 482. To survive a vagueness challenge, a "law must ... provide explicit standards for those who apply them" and give persons "of ordinary intelligence a reasonable opportunity to know what is prohibited." In re T.R., 119 Nev. 646, 653, 80 P.3d 1276, 1280–81 (2003) (internal citation omitted); State v. Eighth Jud. Dist. Ct. (Logan D.), 306 P.3d 369, 380 (Nev. 2013).

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NRS 200.701(2) provides that Mr. Sprowson is guilty if he knowingly uses, encourages, entices, coerces or permits JT to be the subject of a "sexual portrayal" in a performance, regardless of whether JT is aware that the "sexual portrayal" is part of a performance. Standing alone it is impossible to know what is meant by "sexual portrayal" or how it differs from "sexual conduct," which is proscribed in NRS 200.701(1). Hence, it is necessary to look towards the definition of "sexual portrayal" for guidance.

Pursuant to NRS 200.700(4), "sexual portrayal" means 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. Any reasonably intelligent person, including Mr. Sprowson, reading that definition would be at a loss to know what type of imagery is prohibited for appealing to the "prurient interest" in sex or what standard is the measure for images that lack "serious literary, artistic, political or scientific value." Moreover, those terms/concepts are not defined by the Nevada Revised Statutes, nor is there a standard to define those terms/concepts.

This is particularly true given that "sexual portrayal" is adjacent to a statute concerning "sexual conduct." A statute must be read in conjunction with the statutory scheme as a whole. Reading NRS 200.701(2) in conjunction with NRS 200.701(1) suggests that "sexual portrayal" would, at a minimum, involve a photograph depicting behavior more sexual or revealing than what one might see at a day at the beach or in a handbill passed out on the Las Vegas strip.

The definition of "sexual portrayal" in NRS 200.700(4) does not delineate the boundaries of what imagery excessively appeals to the "prurient interest" and which "does not have serious literary, artistic, political or scientific value." There is no enumerated standard defining what is unlawful so individuals will know what is permissible and what is not. The definition of "sexual portrayal" is unconstitutionally vague because it leaves the determination of whether an image or picture is criminal to a purely subjective standard and determination. NRS 200.701(2), the

unlawful production of child pornography based on the "sexual portrayal" of a minor, cannot survive a vagueness challenge because the definition of "sexual portrayal," does not provide explicit standards for those who apply the law, nor does it give persons of ordinary intelligence a reasonable opportunity to know what is prohibited.

Moreover, the apparent age of persons engaged in sexual conduct is relevant to whether a depiction offends community standards. Pictures of young children engaged in certain acts might be obscene where similar depictions of adults, or perhaps even older adolescents, would not. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 240, 122 S.Ct. 1389, 1396 (2002). As such, it is particularly difficult in this case to determine how it would be impermissible and criminal for JT to be depicted in a manner which appeals to Mr. Sprowson's prurient interest in sex, when it is permissible for him to have sexual relations with her. There is no dispute that at 16 years of age; JT is old enough to consent to sexual activity with a man she loves. JT and Mr. Sprowson can and did engage in sexual activity, which was completely consensual and legal. Given these circumstances, how then can any normal person of average intelligence imagine that the same person that you can have sex with cannot be depicted in a picture or image that might appeal to the prurient interest in sex?

Mr. Sprowon cannot be criminally liable for knowingly using, encouraging, enticing, coercing or permitting JT to be the subject of a 'sexual portrayal' in a performance because NRS 200.701(2) is unconstitutionally vague and must be voided. The statute does not give adequate notice as to what conduct, activity or imagery is prohibited because "sexual portrayal" is not clearly defined. Therefore Counts 3-6 should be dismissed against Mr. Sprowson.

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IV. CONCLUSION

Based on the above, the Petitioner/Defendant MELVYN SPROWSON, JR. respectfully requests that this Honorable Court grant his Petition for Writ of Habeas Corpus and dismiss the charges against him with prejudice.

Respectfully Submitted,

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APPENDIX 5

Jurisdiction	Statutes Criminalizing the Production of Child Pornography and/or Sexual Exploitation of Children	Statutory language that suitably limits and describes the "category of sexual conduct proscribed" as required by *Ferber*
Federal	**18 U.S.C. § 2251** (criminalizing the acts of "employ[ing], us[ing], persuad[ing], induc[ing], entic[ing] or coerc[ing] any minor to engage in . . . Any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct" under certain circumstances)	**18 U.S.C. § 2256** (("(2)(A) Except as provided in subparagraph (B), "sexually explicit conduct" means actual or simulated-- (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the anus, genitals, or pubic area of any person; (B) For purposes of subsection 8(B)1 of this section, "sexually explicit conduct" means-- (i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited; (ii) graphic or lascivious simulated;(I) bestiality; (II) masturbation; or (III) sadistic or masochistic abuse; or (iii) graphic or simulated lascivious exhibition of the anus, genitals, or pubic area of any person")
Alabama	**Ala. Code § 13A-12-197** ("Any person who knowingly films, prints, records, photographs or otherwise produces any obscene matter that contains a visual depiction of a person under the age of 17 years engaged in any act of sado-masochistic abuse, sexual intercourse, sexual excitement, masturbation, breast nudity, genital nudity, or other sexual conduct shall be guilty of a Class A felony")	**Ala. Code § 13A-12-190** (defines all terms including, sado-masochistic abuse, sexual excitement, sexual intercourse, masturbation, breast nudity, genital nudity and other sexual conduct); **Ala. Code § 13A-12-190 (9)** (defines "other sexual conduct" as "[a]ny touching of the genitals, pubic areas, or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification")

Alaska	**Alaska Stat. § 11.41.455(a)** (defining the crime of "unlawful exploitation of a minor" to include "knowingly" inducing or employing a child under 18 years of age "to engage in", or photographing, filming, recording, or televising a child under 18 years of age "engaged in the following actual or simulated conduct: (1) sexual penetration; (2) the lewd touching of another person's genitals, anus or breast; (3) the lewd touching by another person of the child's genitals, anus, or breast; (4) masturbation; (5) bestiality; (6) the lewd exhibition of the child's genitals; or (7) sexual masochism or sadism.")	**Alaska Stat. § 11.41.455(a)** (prohibited conduct includes "the following the following actual or simulated conduct: (1) sexual penetration; (2) the lewd touching of another person's genitals, anus or breast; (3) the lewd touching by another person of the child's genitals, anus, or breast; (4) masturbation; (5) bestiality; (6) the lewd exhibition of the child's genitals; or (7) sexual masochism or sadism.")
Arizona	**Ariz. Rev. Stat. § 13-3553(A)(1)** (prohibits sexual exploitation of a minor by "[r]ecording, filming, photographing, developing or duplicating any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct")	**Ariz. Rev. Stat. 13-3551(5)** (defines "Exploitive exhibition" as "the actual or simulated exhibition of the genitals or pubic or rectal areas of any person for the purpose of sexual stimulation of the viewer."); **Ariz. Rev. Stat. § 13-3551(10)** (defines "sexual conduct" to mean "actual or simulated (a) Sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex. (b) Penetration of the vagina or rectum by any object except when done as part of a recognized medical procedure. (c) Sexual bestiality. (d) Masturbation, for the purpose of sexual stimulation of the viewer. (e) Sadomasochistic abuse for the purpose of sexual stimulation of the viewer. (f) Defecation or urination for the purpose of sexual stimulation of the viewer.")

Arkansas	**Ark. Code Ann. § 5-27-303** (prohibits a person 18 years of age or older who "employs, uses, persuades, induces, entices, or coerces any child . . . to engage in any sexually explicit conduct for the purpose of producing any visual or print medium depicting the sexually explicit conduct")	**Ark. Code Ann. § 5-27-302(4)** (defines "sexually explicit conduct" to mean "actual or simulated:(A) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (B) Bestiality; (C) Masturbation; (D) Sadomasochistic abuse for the purpose of sexual stimulation; or (E) Lewd exhibition of: (i) The genitals or pubic area of any person; or (ii) The breast of a female")
California	**Cal. Penal Code § 311.4** (criminalizes the employment or use of a minor under the age of 18 to perform prohibited acts involving "sexual conduct")	**Cal. Penal Code § 311.4(d)(1)**("'sexual conduct' means any of the following, whether actual or simulated: sexual intercourse, oral copulation, anal intercourse, anal oral copulation, masturbation, bestiality, sexual sadism, sexual masochism, penetration of the vagina or rectum by any object in a lewd or lascivious manner, exhibition of the genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer, any lewd or lascivious sexual act as defined in Section 288, or excretory functions performed in a lewd or lascivious manner, whether or not any of the above conduct is performed alone or between members of the same or opposite sex or between humans and animals. An act is simulated when it gives the appearance of being sexual conduct.")

Colorado	**Colo. Rev. Stat. Ann. § 18-6-403(3)** ("A person commits sexual exploitation of a child if, for any purpose, he or she knowingly: (a) Causes, induces, entices, or permits a child to engage in, or be used for, any explicit sexual conduct for the making of any sexually exploitative material;")	**Colo. Rev. Stat. § 18-6-403** ("Sexually exploitative material" means any photograph, motion picture, video, recording or broadcast of moving visual images, print, negative, slide, or other mechanically, electronically, chemically, or digitally reproduced visual material that depicts a child engaged in, participating in, observing, or being used for explicit sexual conduct."); **Colo. Rev. Stat. § 18-6-403(e)** (defining "explicit sexual conduct" as "sexual intercourse, erotic fondling, erotic nudity, masturbation, sadomasochism, or sexual excitement."); **Colo. Rev. Stat. § 18-6-403(d)**("'Erotic nudity' means the display of the human male or female genitals or pubic area, the undeveloped or developing genitals or pubic area of the human male or female child, the human breasts, or the undeveloped or developing breast area of the human child, for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved.")
Connecticut	**Conn. Gen. Stat. § 53a-196a(a)** ("A person is guilty of employing a minor in an obscene performance when such person (1) employs any minor. . . for the purpose of promoting any material or performance which is obscene as to minors. . .")	**Conn. Gen. Stat. § 53a-193(2)** ("Material or a performance is 'obscene as to minors' if it depicts a prohibited sexual act and, taken as a whole, it is harmful to minors. For purposes of this subdivision: (A) "Minor" means any person less than seventeen years old as used in section 53a-196 and less than sixteen years old as used in sections 53a-196a and 53a-196b, and (B) "harmful to minors" means that quality of any description or representation, in whatever form, of a prohibited sexual act, when (i) it predominantly appeals to the prurient, shameful or morbid interest of minors, (ii) it is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) taken as a whole, it lacks serious literary, artistic, educational, political or scientific value for minors.") **Conn. Gen. Stat. § 53a-193(3)**("'Prohibited sexual act' means erotic fondling, nude performance, sexual excitement, sado-masochistic abuse, masturbation or sexual intercourse.")

Delaware	**Del. Code Ann. tit. 11 § 1108(4)** (a person commits "sexual exploitation of a child when . . . The person permits, causes, promotes, facilitates, finances, produces or otherwise advances an exhibition, display or performances of a child engaging in a prohibited sexual act or the simulation of such an act.")	**Del. Code Ann. tit. 11, § 1100(7)** ("'Prohibited sexual act' shall include: a. Sexual intercourse; b. Anal intercourse; c. Masturbation; d. Bestiality; e. Sadism; f. Masochism; g. Fellatio; h. Cunnilingus; i. Nudity, if such nudity is to be depicted for the purpose of the sexual stimulation or the sexual gratification of any individual who may view such depiction; j. Sexual contact; k. Lascivious exhibition of the genitals or pubic area of any child; l. Any other act which is intended to be a depiction or simulation of any act described in this paragraph.")
Florida	**Fla. Stat. § 827.071** ("A person is guilty of the use of a child in a sexual performance if, knowing the character and content thereof, he or she employs, authorizes, or induces a child less than 18 years of age to engage in a sexual performance or, being a parent, legal guardian, or custodian of such child, consents to the participation by such child in a sexual performance.")	**Fla. Stat. § 827.071 (i)** ("'Sexual performance' means any performance or part thereof which includes sexual conduct by a child of less than 18 years of age."); **Fla. Stat. § 827.071(h)** ("'Sexual conduct' means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast, with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. A mother's breastfeeding of her baby does not under any circumstance constitute 'sexual conduct.'").

Georgia	**Ga. Code Ann. § 16-12-100(b)(1)**("It is unlawful for any person knowingly to employ, use, persuade, induce, entice, or coerce any minor to engage in or assist any other person to engage in any sexually explicit conduct for the purpose of producing any visual medium depicting such conduct.")	**Ga. Code Ann. § 16-12-100(4)** ("'Sexually explicit conduct' means actual or simulated: (A) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (B) Bestiality; (C) Masturbation; (D) Lewd exhibition of the genitals or pubic area of any person; (E) Flagellation or torture by or upon a person who is nude; (F) Condition of being fettered, bound, or otherwise physically restrained on the part of a person who is nude; (G) Physical contact in an act of apparent sexual stimulation or gratification with any person's unclothed genitals, pubic area, or buttocks or with a female's nude breasts; (H) Defecation or urination for the purpose of sexual stimulation of the viewer; or (I) Penetration of the vagina or rectum by any object except when done as part of a recognized medical procedure.")
Hawaii	**Haw. Rev. Stat. § 707-750 (1)**("A person commits the offense of promoting child abuse in the first degree if, knowing or having reason to know its character and content, the person: (a) Produces or participates in the preparation of child pornography; (b) Produces or participates in the preparation of pornographic material that employs, uses, or otherwise contains a minor engaging in or assisting others to engage in sexual conduct; or (c) Engages in a pornographic performance that employs, uses, or otherwise contains a minor engaging in or assisting others to engage in sexual conduct.")	**Haw. Rev. Stat. § 707-750 (2)** ("'Sexual conduct' means actual or simulated sexual intercourse, including genital-genital contact, oral-genital contact, anal-genital contact, or oral-anal contact, whether between persons of the same or opposite sex, masturbation, bestiality, sexual penetration, deviate sexual intercourse, sadomasochistic abuse, or lascivious exhibition of the genital or pubic area of a minor.")

Idaho	**Idaho Code § 18-1507 (2)** ("A person commits sexual exploitation of a child if he knowingly and willfully: . . . . (b) Causes, induces or permits a child to engage in, or be used for, any explicit sexual conduct for the purpose of producing or making sexually exploitative material")	**Idaho Code § 18-1507 (e)** ("'Explicit sexual conduct' means sexual intercourse, erotic fondling, erotic nudity, masturbation, sadomasochism, sexual excitement, or bestiality."); **Idaho Code § 18-1507 (j)** ("'Sexually exploitative material' means any image, photograph, motion picture, video, print, negative, slide, or other mechanically, electronically, digitally or chemically produced or reproduced visual material which shows a child engaged in, participating in, observing, or being used for explicit sexual conduct, or showing a child engaging in, participating in, observing or being used for explicit sexual conduct, in actual time, including, but not limited to, video chat, webcam sessions or video calling.")

Illinois	**720 Ill. Comp. Stat. 5/11-20.1(a)(1)** (criminalizing production of "child pornography")	**720 Ill. Comp. Stat. 5/11-20.1(a)(1)** (limiting child pornography to depictions of the victim "(i) actually or by simulation engaged in any act of sexual penetration or sexual conduct with any person or animal; or (ii) actually or by simulation engaged in any act of sexual penetration or sexual conduct involving the sex organs of the child or person with a severe or profound intellectual disability and the mouth, anus, or sex organs of another person or animal; or which involves the mouth, anus or sex organs of the child or person with a severe or profound intellectual disability and the sex organs of another person or animal; or (iii) actually or by simulation engaged in any act of masturbation; or (iv) actually or by simulation portrayed as being the object of, or otherwise engaged in, any act of lewd fondling, touching, or caressing involving another person or animal; or (v) actually or by simulation engaged in any act of excretion or urination within a sexual context; or (vi) actually or by simulation portrayed or depicted as bound, fettered, or subject to sadistic, masochistic, or sadomasochistic abuse in any sexual context; or (vii) depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the unclothed or transparently clothed genitals, pubic area, buttocks, or, if such person is female, a fully or partially developed breast of the child or other person")
Indiana	**Ind. Code § 35-42-4-4** (criminalizes the production of materials involving "sexual conduct by a child under eighteen (18) years of age")	**Ind. Code § 35-42-4-4(4)** ("'Sexual conduct' means: (A) sexual intercourse; (B) other sexual conduct (as defined in IC 35-31.5-2-221.5); (C) exhibition of the: (i) uncovered genitals; or (ii) female breast with less than a fully opaque covering of any part of the nipple; intended to satisfy or arouse the sexual desires of any person; (D) sadomasochistic abuse; (E) sexual intercourse or other sexual conduct (as defined in IC 35-31.5-2-221.5) with an animal; or (F) any fondling or touching of a child by another person or of another person by a child intended to arouse or satisfy the sexual desires of either the child or the other person.")

Iowa	**Iowa Code § 728.12 (1)** ("It shall be unlawful to employ, use, persuade, induce, entice, coerce, solicit, knowingly permit, or otherwise cause or attempt to cause a minor to engage in a prohibited sexual act or in the simulation of a prohibited sexual act.")	**Iowa Code § 728.1** ("Unless otherwise provided, 'prohibited sexual act' means any of the following: a. A sex act as defined in section 702.17. b. An act of bestiality involving a minor. c. Fondling or touching the pubes or genitals of a minor. d. Fondling or touching the pubes or genitals of a person by a minor. e. Sadomasochistic abuse of a minor for the purpose of arousing or satisfying the sexual desires of a person who may view a visual depiction of the abuse. f. Sadomasochistic abuse of a person by a minor for the purpose of arousing or satisfying the sexual desires of a person who may view a visual depiction of the abuse. g. Nudity of a minor for the purpose of arousing or satisfying the sexual desires of a person who may view a visual depiction of the nude minor.")
Kansas	**Kan. Stat. Ann. § 21-5510** (defining sexual exploitation of a child as, "(1) Employing, using, persuading, inducing, enticing or coercing a child under 18 years of age, or a person whom the offender believes to be a child under 18 years of age, to engage in sexually explicit conduct with the intent to promote any performance")	**Kan. Stat. Ann. § 21-5510(d)(1)**("'Sexually explicit conduct' means actual or simulated: Exhibition in the nude; sexual intercourse or sodomy, including genital-genital, oral-genital, anal-genital or oral-anal contact, whether between persons of the same or opposite sex; masturbation; sado-masochistic abuse with the intent of sexual stimulation; or lewd exhibition of the genitals, female breasts or pubic area of any person")

Kentucky	**Ky. Rev. Stat. Ann. § 531.310 (1)** ("A person is guilty of the use of a minor in a sexual performance if he employs, consents to, authorizes or induces a minor to engage in a sexual performance.")	**Ky. Rev. Stat. Ann. § 531.300 (6)** ("'Sexual performance' means any performance or part thereof which includes sexual conduct by a minor"); **Ky. Rev. Stat. Ann. § 531.300 (4)** ("'Sexual conduct by a minor' means: (a) Acts of masturbation, homosexuality, lesbianism, beastiality, sexual intercourse, or deviant sexual intercourse, actual or simulated; (b) Physical contact with, or willful or intentional exhibition of the genitals; (c) Flagellation or excretion for the purpose of sexual stimulation or gratification; or (d) The exposure, in an obscene manner, of the unclothed or apparently unclothed human male or female genitals, pubic area or buttocks, or the female breast, whether or not subsequently obscured by a mark placed thereon, or otherwise altered, in any resulting motion picture, photograph or other visual representation, exclusive of exposure portrayed in matter of a private, family nature not intended for distribution outside the family")
Louisiana	**La. Stat. Ann. § 14:81.1 A. (1)** ("It shall be unlawful for a person to produce, promote, advertise, distribute, possess, or possess with the intent to distribute pornography involving juveniles.")	**La. Stat. Ann. § 14:81.1 B. (8)** ("'Pornography involving juveniles' is any photograph, videotape, film, or other reproduction, whether electronic or otherwise, of any sexual performance involving a child under the age of seventeen."); **La. Stat. Ann. § 14:81.1 B. (10)** ("'Sexual performance' means any performance or part thereof that includes actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the genitals or anus.")

Maine	**Me. Stat. tit. 17-A, § 282 1.** ("A person is guilty of sexual exploitation of a minor if: A. Knowing or intending that the conduct will be photographed, the person intentionally or knowingly employs, solicits, entices, persuades or uses another person, not that person's spouse, who has not in fact attained 16 years of age, to engage in sexually explicit conduct, except that it is not a violation of this paragraph if the other person is 14 or 15 years of age and the person is less than 5 years older than the other person")	**Me. Stat. tit. 17-A, § 281 4.** ("'Sexually explicit conduct' means any of the following acts: A. A sexual act; B. Bestiality; C. Masturbation; D. Sadomasochistic abuse for the purpose of sexual stimulation; E. Lewd exhibition of the genitals, anus or pubic area of a person. An exhibition is considered lewd if the exhibition is designed for the purpose of eliciting or attempting to elicit a sexual response in the intended viewer; or F. Conduct that creates the appearance of the acts in paragraphs A to D and also exhibits any uncovered or covered portions of the genitals, anus or pubic area")
Maryland	**Md. Crim. Law § 11-207 (a)** ("A person may not: (1) cause, induce, solicit, or knowingly allow a minor to engage as a subject in the production of obscene matter or a visual representation or performance that depicts a minor engaged as a subject in sadomasochistic abuse or sexual conduct")	**Md. Crim. Law § 11-201(f)** ("'Sexual conduct' has the meaning stated in § 11-101 of this title); **Md. Crim. Law § 11-101(d)** ("'Sexual conduct' means: (1) human masturbation; (2) sexual intercourse; or (3) whether alone or with another individual or animal, any touching or contact with: (i) the genitals, buttocks, or pubic areas of an individual; or (ii) breasts of a female individual."); **Md. Crim. Law § 11-201(e)**("'Sadomasochistic abuse' has the meaning stated in § 11-101 of this title."); **Md. Crim. Law § 11-101(c)** ("'Sadomasochistic abuse' means: (1) flagellation or torture committed by or inflicted on an individual who is: (i) nude; (ii) wearing only undergarments; or (iii) wearing a revealing or bizarre costume; or (2) binding, fettering, or otherwise physically restraining an individual who is: (i) nude; (ii) wearing only undergarments; or (iii) wearing a revealing or bizarre costume")

Massachusetts	**Mass. Gen. Laws ch.272, § 29A** (makes a a crime for any person, acting with "lascivious intent", to pose a child, knowing he or she is under eighteen years of age, in a state of nudity "for the purpose of representation or reproduction in any visual material")	**Mass. Gen. Laws Ann. ch. 272, § 31** ("Nudity" means "uncovered or less than opaquely covered human genitals, pubic areas, the human female breast below a point immediately above the top of the areola, or the covered male genitals in a discernibly turgid state. For purposes of this definition, a female breast is considered uncovered if the nipple or areola only are covered."); **Mass. Gen. Laws ch. 272, § 31** ("Lascivious intent" means "a state of mind in which the sexual gratification or arousal of any person is an objective")
Michigan	**Mich. Comp. Laws Ann. § 750.145c (2)** ("A person who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material . . . if that person knows, has reason to know, or should reasonably be expected to know that the child is a child . . . is guilty of a crime")	**Mich. Comp. Laws Ann. § 750.145c (n)** ("'Child sexually abusive activity' means a child engaging in a listed sexual act."); **Mich. Comp. Laws Ann. § 750.145c (i)** ("'Listed sexual act' means sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity.")

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Minnesota	**Minn. Stat. § 617.246 Subd. 2 ("Use of minor.** (a) It is unlawful for a person to promote, employ, use or permit a minor to engage in or assist others to engage minors in posing or modeling alone or with others in any sexual performance or pornographic work if the person knows or has reason to know that the conduct intended is a sexual performance or a pornographic work")	**Minn. Stat. § 617.246 (d)** ("'Sexual performance' means any play, dance or other exhibition presented before an audience or for purposes of visual or mechanical reproduction that uses a minor to depict actual or simulated sexual conduct as defined by clause (e)."); **Minn. Stat. § 617.246 (e)** ("'Sexual conduct' means any of the following: (1) an act of sexual intercourse, normal or perverted, including genital-genital, anal-genital, or oral-genital intercourse, whether between human beings or between a human being and an animal; (2) sadomasochistic abuse, meaning flagellation, torture, or similar demeaning acts inflicted by or upon a person who is nude or clad in undergarments or in a revealing costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed; (3) masturbation; (4) lewd exhibitions of the genitals; or (5) physical contact with the clothed or unclothed pubic areas or buttocks of a human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification."); **Minn. Stat. § 617.246 (e)** (defining pornographic work)
Mississippi	**Miss. Code. Ann. § 97-5-33(1)** ("No person shall, by any means including computer, cause, solicit or knowingly permit any child to engage in sexually explicit conduct or in the simulation of sexually explicit conduct for the purpose of producing any visual depiction of such conduct")	**Miss. Code. Ann. § 97-5-31 (b)** ("'Sexually explicit conduct' means actual or simulated: (i) Oral genital contact, oral anal contact, or sexual intercourse as defined in Section 97-3-65, whether between persons of the same or opposite sex; (ii) Bestiality; (iii) Masturbation; (iv) Sadistic or masochistic abuse; (v) Lascivious exhibition of the genitals or pubic area of any person; or (vi) Fondling or other erotic touching of the genitals, pubic area, buttocks, anus or breast.")

Missouri	**Mo. Ann. Stat. § 573.023 1.** ("A person commits the offense of sexual exploitation of a minor if such person knowingly or recklessly photographs, films, videotapes, produces or otherwise creates obscene material with a minor or child pornography.")	**Mo. Rev. Stat. § 573.010 (11)** (defining "Obscene" as "any material or performance if, taken as a whole: (a) Applying contemporary community standards, its predominant appeal is to prurient interest in sex; and (b) The average person, applying contemporary community standards, would find the material depicts or describes sexual conduct in a patently offensive way; and (c) A reasonable person would find the material lacks serious literary, artistic, political or scientific value"); **Mo. Rev. Stat. § 573.010 (20)** (defining "Sexual conduct" as "actual or simulated, normal or perverted acts of human masturbation; deviate sexual intercourse; sexual intercourse; or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or the breast of a female in an act of apparent sexual stimulation or gratification or any sadomasochistic abuse or acts including animals or any latent objects in an act of apparent sexual stimulation or gratification")
Montana	**Mont. Code Ann. § 45-5-625 (1)(a)**("A person commits the offense of sexual abuse of children if the person . . . knowingly employs, uses, or permits the employment or use of a child in an exhibition of sexual conduct, actual or simulated")	**Mont. Code Ann. § 45-5-625 (b)** (defining "Sexual conduct" as "(i) actual or simulated: (A) sexual intercourse, whether between persons of the same or opposite sex; (B) penetration of the vagina or rectum by any object, except when done as part of a recognized medical procedure; (C) bestiality; (D) masturbation; (E) sadomasochistic abuse; (F) lewd exhibition of the genitals, breasts, pubic or rectal area, or other intimate parts of any person; or (G) defecation or urination for the purpose of the sexual stimulation of the viewer; or (ii) depiction of a child in the nude or in a state of partial undress with the purpose to abuse, humiliate, harass, or degrade the child or to arouse or gratify the person's own sexual response or desire or the sexual response or desire of any person")

Nebraska	**Neb. Rev. Stat. § 28-1463.03 (1)** ("It shall be unlawful for a person to knowingly make, publish, direct, create, provide, or in any manner generate any visual depiction of sexually explicit conduct which has a child other than the defendant as one of its participants or portrayed observers")	**Neb. Rev. Stat. § 28-1463.02 (5)** ("Sexually explicit conduct means: (a) Real or simulated intercourse, whether genital-genital, oral-genital, anal-genital, or oral-anal between persons of the same or opposite sex or between a human and an animal or with an artificial genital; (b) real or simulated masturbation; (c) real or simulated sadomasochistic abuse; (d) erotic fondling; (e) erotic nudity; or (f) real or simulated defecation or urination for the purpose of sexual gratification or sexual stimulation of one or more of the persons involved")
Nevada	**Nev. Rev. Stat. § 700.710(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 category A felony")	**Nev. Rev. Stat. § 200.700(3)** (defining "Sexual conduct" to mean "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 manipulated or inserted by a person into the genital or anal opening of the body of another")
New Hampshire	**N.H. Rev. Stat. Ann. § 649-A:3-b (I)** ("No person shall knowingly create, produce, manufacture, or direct a visual representation of a child engaging in or being engaged in sexually explicit conduct, or participate in that portion of such visual representation that consists of a child engaging in or being engaged in sexually explicit conduct")	**N.H. Rev. Stat. Ann. § 649-A:2 (III)** (defining "Sexually explicit conduct" as "human masturbation, the touching of the actor's or other person's sexual organs in the context of a sexual relationship, sexual intercourse actual or simulated, normal or perverted, whether alone or between members of the same or opposite sex or between humans and animals, or any lewd exhibitions of the buttocks, genitals, flagellation, bondage, or torture. Sexual intercourse is simulated when it depicts explicit sexual intercourse that gives the appearance of the consummation of sexual intercourse, normal or perverted")

New Jersey	**N.J. Rev. Stat. § 2C:24-4 (3)** ("A person commits a crime of the first degree if he causes or permits a child to engage in a prohibited sexual act or in the simulation of such an act . . . If the person knows, has reason to know or intends that the prohibited act . . . may be photographed, filmed, reproduced, or reconstructed in any manner, including on the Internet, or may be part of an exhibition or performance.")	**N.J. Rev. Stat. § 2C:24-4** (Defining "Prohibited sexual act" to mean "(a) Sexual intercourse; or (b) Anal intercourse; or (c) Masturbation; or (d) Bestiality; or (e) Sadism; or (f) Masochism; or (g) Fellatio; or (h) Cunnilingus; or (i) Nudity, if depicted for the purpose of sexual stimulation or gratification of any person who may view such depiction; or (j) Any act of sexual penetration or sexual contact as defined in N.J.S.2C:14-1.")
New Mexico	**N.M. Stat. Ann. § 30-6A-3 (D)** ("It is unlawful for a person to intentionally cause or permit a child under eighteen years of age to engage in any prohibited sexual act or simulation of such an act if that person knows, has reason to know or intends that the act may be recorded in any obscene visual or print medium or performed publicly.")	**N.M. Stat. Ann. § 30-6A-2 (A)** (defining "prohibited sexual act" to mean: "(1) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex; (2) bestiality; (3) masturbation; (4) sadomasochistic abuse for the purpose of sexual stimulation; or (5) lewd and sexually explicit exhibition with a focus on the genitals or pubic area of any person for the purpose of sexual stimulation")
New York	**N.Y. Penal Law § 263.05** ("A person is guilty of the use of a child in a sexual performance if knowing the character and content thereof he employs, authorizes or induces a child less than seventeen years of age to engage in a sexual performance")	**N.Y. Penal Law § 263.00 (1)** (defining "Sexual performance" to mean "any performance or part thereof which . . . includes sexual conduct by a child less than seventeen years of age); **N.Y. Penal Law § 263.00 (3)** (defining "Sexual conduct" to mean "actual or simulated sexual intercourse, oral sexual conduct, anal sexual conduct, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.")

North Carolina	**N.C. Gen. Stat. § 14-190.16(a)(1)** ("A person commits the offense of first degree sexual exploitation of a minor if, knowing the character or content of the material or performance, he . . . [u]ses, employs, induces, coerces, encourages, or facilitates a minor to engage in or assist others to engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity")	**N.C. Gen. Stat. § 14-190.13(5)** (defining "Sexual Activity" as any of the following acts: "a. Masturbation, whether done alone or with another human or an animal. b. Vaginal, anal, or oral intercourse, whether done with another human or with an animal. c. Touching, in an act of apparent sexual stimulation or sexual abuse, of the clothed or unclothed genitals, pubic area, or buttocks of another person or the clothed or unclothed breasts of a human female. d. An act or condition that depicts torture, physical restraint by being fettered or bound, or flagellation of or by a person clad in undergarments or in revealing or bizarre costume. e. Excretory functions . . . f. The insertion of any part of a person's body, other than the male sexual organ, or of any object into another person's anus or vagina, except when done as part of a recognized medical procedure. g. The lascivious exhibition of the genitals or pubic area of any person.")
North Dakota	**N.D. Cent. Code § 12.1-27.2-02 (1)** ("A person is guilty of a class A felony if, knowing the character and content of a performance, that person employs, authorizes, or induces a minor to engage in sexual conduct during a performance...")	**N.D. Cent. Code § 12.1-27.2-01 (4)** ("Sexual conduct" is defined as "actual or simulated: a. Sexual intercourse; b. Sodomy, as defined under section 12.1-27.1-01; c. Sexual bestiality; d. Masturbation; e. Sadomasochistic abuse, as defined under section 12.1-27.1-01; f. Lewd exhibition of the buttocks, breasts, or genitals; g. Nude or partially denuded human figure, as defined in section 12.1-27.1-03.1, if depicted for the purpose of the sexual stimulation or the sexual gratification of any individual who many view such depiction; or h. Physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or breasts. It is not necessary that the minor know that he or she is participating in the described conduct, or any aspect of it.")

Ohio	**Ohio Rev. Code Ann. § 2907.323** (prohibits the creation of material showing someone else's child in a state of nudity, unless for a "proper purpose" and with the written consent of a parent or guardian)	**Ohio Rev. Code Ann. § 2907.01 (H)** (defining "Nudity" to mean "the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.")
Oklahoma	**Okla. Stat. tit. 21, § 1021.2 (A)** ("Any person who shall procure or cause the participation of any minor under the age of eighteen (18) years in any child pornography ... shall be guilty, upon conviction, of a felony")	**Okla. Stat. tit. 21, § 1024.1** ("'child pornography' means and includes any visual depiction or individual image stored or contained in any format on any medium . . . wherein a minor under the age of eighteen (18) years is engaged in any act with a person, other than his or her spouse, of sexual intercourse which is normal or perverted, in any act of anal sodomy, in any act of sexual activity with an animal, in any act of sadomasochistic abuse including, but not limited to, flagellation or torture, or the condition of being fettered, bound or otherwise physically restrained in the context of sexual conduct, in any act of fellatio or cunnilingus, in any act of excretion in the context of sexual conduct, in any lewd exhibition of the uncovered genitals in the context of masturbation or other sexual conduct, or where the lewd exhibition of the uncovered genitals, buttocks or, if such minor is a female, the breast, has the purpose of sexual stimulation of the viewer, or wherein a person under the age of eighteen (18) years observes such acts or exhibitions.")
Oregon	**Or. Rev. Stat. § 163.670 (1)** ("A person commits the crime of using a child in a display of sexually explicit conduct if the person employs, authorizes, permits, compels or induces a child to participate or engage in sexually explicit conduct for any person to observe or to record in a visual recording.")	**Or. Rev. Stat. § 163.665 (3)** ("'Sexually explicit conduct' means actual or simulated: (a) Sexual intercourse or deviant sexual intercourse; (b) Genital-genital, oral-genital, anal-genital or oral-anal contact, whether between persons of the same or opposite sex or between humans and animals; (c) Penetration of the vagina or rectum by any object other than as part of a medical diagnosis or treatment or as part of a personal hygiene practice; (d) Masturbation; (e) Sadistic or masochistic abuse; or (f) Lewd exhibition of sexual or other intimate parts.")

Pennsylvania	**18 Pa. Cons. Stat. Ann. § 6312(b)(1)** ("Any person who causes or knowingly permits a child under the age of 18 years to engage in a prohibited sexual act or in the simulation of such act commits an offense if such person knows, has reason to know or intends that such act may be photographed, videotaped, depicted on computer or filmed.")	**18 Pa. Cons. Stat. Ann. § 6312(g)** ("Prohibited sexual act" means "Sexual intercourse as defined in section 3101 (relating to definitions), masturbation, sadism, masochism, bestiality, fellatio, cunnilingus, lewd exhibition of the genitals or nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction.")
Rhode Island	**11 R.I. Gen. Laws § 11-9-1.3 (a)(1)** ("It is a violation of this section for any person to . . . [k]nowingly produce any child pornography")	**11 R.I. Gen. Laws § 11-9-1.3 (c)(1)** ("'Child pornography' means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct where: (i) The production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (ii) Such visual depiction is a digital image, computer image, or computer-generated image of a minor engaging in sexually explicit conduct; or (iii) Such visual depiction has been created, adapted, or modified to display an identifiable minor engaging in sexually explicit conduct."); **11 R.I. Gen. Laws § 11-9-1.3 (c)(6)** ("'Sexually explicit conduct' means actual: (i) Graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, or lascivious sexual intercourse where the genitals, or pubic area of any person is exhibited; (ii) Bestiality; (iii) Masturbation; (iv) Sadistic or masochistic abuse; or (v) Graphic or lascivious exhibition of the genitals or pubic area of any person")

South Carolina	**S.C. Code Ann. § 16-15-395 (A)(1)** ("An individual commits the offense of first degree sexual exploitation of a minor if, knowing the character or content of the material or performance, he . . . uses, employs, induces, coerces, encourages, or facilitates a minor to engage in or assist others to engage in sexual activity or appear in a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation for a live performance or for the purpose of producing material that contains a visual representation depicting this activity or a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation")	**S.C. Code Ann. § 16-15-375 (5)** ("'Sexual activity' includes any of the following acts or simulations thereof: (a) masturbation, whether done alone or with another human or animal; (b) vaginal, anal, or oral intercourse, whether done with another human or an animal; (c) touching, in an act of apparent sexual stimulation or sexual abuse, of the clothed or unclothed genitals, pubic area, or buttocks of another person or the clothed or unclothed breasts of a human female; (d) an act or condition that depicts bestiality, sado-masochistic abuse, meaning flagellation or torture by or upon a person who is nude or clad in undergarments or in a costume which reveals the pubic hair, anus, vulva, genitals, or female breast nipples, or the condition of being fettered, bound, or otherwise physically restrained on the part of the one so clothed; (e) excretory functions; (f) the insertion of any part of a person's body, other than the male sexual organ, or of any object into another person's anus or vagina, except when done as part of a recognized medical procedure.")
South Dakota	**S.D. Codified Laws § 22-24A-3** ("A person is guilty of possessing, manufacturing, or distributing child pornography if the person: (1) Creates any visual depiction of a minor engaging in a prohibited sexual act, or in the simulation of such an act; (2) Causes or knowingly permits the creation of any visual depiction of a minor engaged in a prohibited sexual act, or in the simulation of such an act; or (3) Knowingly possesses, distributes, or otherwise disseminates any visual depiction of a minor engaging in a prohibited sexual act, or in the simulation of such an act.")	**S.D. Codified Laws § 22-24A-2(16)** ("Prohibited sexual act" means "actual or simulated sexual intercourse, sadism, masochism, sexual bestiality, incest, masturbation, or sadomasochistic abuse; actual or simulated exhibition of the genitals, the pubic or rectal area, or the bare feminine breasts, in a lewd or lascivious manner; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; defecation or urination for the purpose of creating sexual excitement in the viewer; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. The term includes encouraging, aiding, abetting or enticing any person to commit any such acts as provided in this subdivision. The term does not include a mother's breast-feeding of her baby")

Tennessee	**Tenn. Code Ann. § 39-17-1005 (a)** ("It is unlawful for a person to knowingly promote, employ, use, assist, transport or permit a minor to participate in the performance of, or in the production of, acts or material that includes the minor engaging in: (1) Sexual activity; or (2) Simulated sexual activity that is patently offensive.")	**Tenn. Code Ann. § 39-17-1002 (8)** ("'Sexual activity' means any of the following acts: (A) Vaginal, anal or oral intercourse, whether done with another person or an animal; (B) Masturbation, whether done alone or with another human or an animal; (C) Patently offensive, as determined by contemporary community standards, physical contact with or touching of a person's clothed or unclothed genitals, pubic area, buttocks or breasts in an act of apparent sexual stimulation or sexual abuse; (D) Sadomasochistic abuse, including flagellation, torture, physical restraint, domination or subordination by or upon a person for the purpose of sexual gratification of any person; (E) The insertion of any part of a person's body or of any object into another person's anus or vagina, except when done as part of a recognized medical procedure by a licensed professional; (F) Patently offensive, as determined by contemporary community standards, conduct, representations, depictions or descriptions of excretory functions; (G) Lascivious exhibition of the female breast or the genitals, buttocks, anus or pubic or rectal area of any person")
Texas	**Tex. Penal Code Ann. § 43.25 (b)** ("A person commits an offense if, knowing the character and content thereof, he employs, authorizes, or induces a child younger than 18 years of age to engage in sexual conduct or a sexual performance.")	**Tex. Penal Code Ann. § 43.25 (2)** (defining "Sexual conduct" to mean "sexual contact, actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola."); **Tex. Penal Code Ann. § 43.25 (1)** (defining "Sexual performance" to mean "any performance or part thereof that includes sexual conduct by a child younger than 18 years of age.")

Utah	**Utah Code Ann. § 76-5b-201 (1)** ("A person is guilty of sexual exploitation of a minor: (a) when the person: (i) knowingly produces, possesses, or possesses with intent to distribute child pornography")	**Utah Code Ann. § 76-5b-103 (1)** ("'Child pornography' means any visual depiction, including any live performance, photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where: (a) the production of the visual depiction involves the use of a minor engaging in sexually explicit conduct; (b) the visual depiction is of a minor engaging in sexually explicit conduct; or (c) the visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct."); **Utah Code Ann. § 76-5b-103 (10)** ("'Sexually explicit conduct' means actual or simulated: (a) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (b) masturbation; (c) bestiality; (d) sadistic or masochistic activities; (e) lascivious exhibition of the genitals, pubic region, buttocks, or female breast of any person; (f) the visual depiction of nudity or partial nudity for the purpose of causing sexual arousal of any person; (g) the fondling or touching of the genitals, pubic region, buttocks, or female breast; or (h) the explicit representation of the defecation or urination functions.")

Vermont	**Vt. Stat. Ann. tit. 13, § 2822 (a)** ("No person shall, with knowledge of the character and content, promote a sexual performance by a child or a performance that contains a lewd exhibition of the genitals, anus, or breasts of a child, or hire, employ, procure, use, cause, or induce a child to engage in such a performance.")	**Vt. Stat. Ann. tit. 13, § 2821 (4)** ("'Sexual performance' means any performance or any part of a performance, which includes sexual conduct by a child."); **Vt. Stat. Ann. tit. 13, § 2821 (2)** ("'Sexual conduct' means any of the following: (A) any conduct involving contact between the penis and the vulva, the penis and the penis, the penis and the anus, the mouth and the penis, the mouth and the anus, the vulva and the vulva, or the mouth and the vulva; (B) any intrusion, however slight, by any part of a person's body or any object into the genital or anal opening of another with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desire of any person; (C) any intentional touching, not through the clothing, of the genitals, anus, or breasts of another with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desire of any person; (D) masturbation; (E) bestiality; or (F) sadomasochistic abuse for sexual purposes.")
Virginia	**Va. Code Ann. § 18.2-374.1 (B)** ("A person shall be guilty of production of child pornography who: 1. Accosts, entices or solicits a person less than 18 years of age with intent to induce or force such person to perform in or be a subject of child pornography; or 2. Produces or makes or attempts or prepares to produce or make child pornography; or 3. Who knowingly takes part in or participates in the filming, photographing, or other production of child pornography by any means; or 4. Knowingly finances or attempts or prepares to finance child pornography.")	**Va. Code Ann. § 18.2-374.1** ("'child pornography' means sexually explicit visual material which utilizes or has as a subject an identifiable minor" and "'sexually explicit visual material' means a . . . visual representation which depicts sexual bestiality, a lewd exhibition of nudity, as nudity is defined in § 18.2-390, or sexual excitement, sexual conduct or sadomasochistic abuse, as also defined in § 18.2-390, or a book, magazine or pamphlet which contains such a visual representation"); **Va. Code Ann. § 18.2-390 (3)** ("'Sexual conduct' means actual or explicitly simulated acts of masturbation, homosexuality, sexual intercourse, or physical contact in an act of apparent sexual stimulation or gratification with a person's clothed or unclothed genitals, pubic area, buttocks or, if such be female, breast.")

Washington	**Wash. Rev. Code § 9.68A.040 (1)** ("A person is guilty of sexual exploitation of a minor if the person: . . . (b) Aids, invites, employs, authorizes, or causes a minor to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance")	**Wash. Rev. Code § 9.68A.011 (4)** ("'Sexually explicit conduct" means actual or simulated: (a) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals; (b) Penetration of the vagina or rectum by any object; (c) Masturbation; (d) Sadomasochistic abuse; (e) Defecation or urination for the purpose of sexual stimulation of the viewer; (f) Depiction of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer. . . .; and (g) Touching of a person's clothed or unclothed genitals, pubic area, buttocks, or breast area for the purpose of sexual stimulation of the viewer.")
West Virginia	**W. Va. Code § 61-8A-5** ("Any adult who, with knowledge that a person is a minor or who fails to exercise reasonable care in ascertaining the age of a minor, hires, employs or uses such minor to produce obscene matter or to do or assist in doing any sexually explicit conduct, is guilty of a felony. . . .")	**W. Va. Code § 61-8A-1 (k)** ("'Obscene matter' means matter that: (1) An average person, applying contemporary adult community standards, would find, taken as a whole, appeals to the prurient interest, is intended to appeal to the prurient interest, or is pandered to a prurient interest; (2) An average person, applying community standards, would find depicts or describes, in a patently offensive way, sexually explicit conduct; and (3) A reasonable person would find, taken as a whole, lacks serious literary, artistic, political or scientific value."); **W. Va. Code § 61-8A-1 (n)** ("'Sexually explicit conduct' means an ultimate sexual act, normal or perverted, actual or simulated, including sexual intercourse, sodomy, oral copulation, sexual bestiality, sexual sadism and masochism, masturbation, excretory functions and lewd exhibition of the genitals.")

Wisconsin	**Wis. Stat. § 948.05 (1)**("Whoever does any of the following with knowledge of the character and content of the sexually explicit conduct involving the child may be penalized under sub. (2p): (a) Employs, uses, persuades, induces, entices, or coerces any child to engage in sexually explicit conduct for the purpose of recording or displaying in any way the conduct. (b) Records or displays in any way a child engaged in sexually explicit conduct.")	**Wis. Stat. § 948.01 (7)** ("'Sexually explicit conduct' means actual or simulated: (a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required; (b) Bestiality; (c) Masturbation; (d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or (e) Lewd exhibition of intimate parts.")
Wyoming	**Wyo. Stat. Ann. § 6-4-303 (b)** ("A person is guilty of sexual exploitation of a child if, for any purpose, he knowingly: (i) Causes, induces, entices, coerces or permits a child to engage in, or be used for, the making of child pornography; (ii) Causes, induces, entices or coerces a child to engage in, or be used for, any explicit sexual conduct; (iii) Manufactures, generates, creates, receives, distributes, reproduces, delivers or possesses with the intent to deliver, including through digital or electronic means, whether or not by computer, any child pornography")	**Wyo. Stat. Ann. § 6-4-303 (a) (ii)** ("'Child pornography' means any visual depiction . . . where: (A) The production of the visual depiction involves the use of a child engaging in explicit sexual conduct; (B) The visual depiction is of explicit sexual conduct involving a child or an individual virtually indistinguishable from a child; or (C) The visual depiction has been created, adapted or modified to depict explicit sexual conduct involving a child or an individual virtually indistinguishable from a child."); **Wyo. Stat. Ann. § 6-4-303 (iii)** ("'Explicit sexual conduct' means actual or simulated sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, between persons of the same or opposite sex, bestiality, masturbation, sadistic or masochistic abuse or lascivious exhibition of the genitals or pubic area of any person")

APPENDIX 6

Jurisdiction	Statutes Criminalizing the Production of Child Pornography and/or Sexual Exploitation of Children	Statutory language that DOES NOT suitably limit and describe the "category of sexual conduct proscribed" as required by *Ferber*
Nevada	**Nev. Rev. Stat. § 200.710(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 of a category A felony . . . regardless of whether the minor is aware that the sexual portrayal is part of a performance.")	**Nev. Rev. Stat. § 200.700(4)** (defining "Sexual portrayal" to mean "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")
New Jersey	**N.J. Rev. Stat. § 2C:24-4 (3)** ("A person commits a crime of the first degree if he causes or permits a child . . . to be portrayed in a sexually suggestive manner if the person knows, has reason to know or intends that the . . . portrayal may be photographed, filmed, reproduced, or reconstructed in any manner, including on the Internet, or may be part of an exhibition or performance.")	**N.J. Rev. Stat. § 2C:24-4** (defining "Portray a child in a sexually suggestive manner" as, inter alia, "to otherwise depict a child for the purpose of sexual stimulation or gratification of any person who may view the depiction where the depiction does not have serious literary, artistic, political, or scientific value.")