No. 19-6100

IN THE SUPREME COURT OF THE UNITED STATES

December 3, 2019

MELVYN PERRY SPROWSON, *Petitioner,*

v.

THE STATE OF NEVADA, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Nevada's child pornography statute is not facially unconstitutional and/or overbroad.

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STATEMENT OF THE CASE

On January 13, 2014, Melvyn Perry Sprowson, Jr., (hereinafter "Petitioner") was charged by way of Information with: Count 1 – First Degree Kidnapping (Category A Felony – NRS 200.310, 200.320); Count 2 – Child Abuse, Neglect or Endangerment With Substantial Bodily or Mental Harm (Category B Felony – NRS 200.508(1)); and Counts 3-6 – Unlawful Use of a Minor in the Production of Pornography (Category A Felony – NRS 200.700, 200.710(A)(B), 200.750). RA 000066-69.

On March 7, 2014, Petitioner filed a Petition for Writ of Habeas Corpus, Motion to Dismiss, and Memorandum of Points and Authorities. Pet. App. 3. The State filed its Return to Writ of Habeas Corpus and Opposition to Motion to Dismiss

under seal on March 31, 2014.[1] Petitioner filed his Reply on April 7, 2014. RA 000070-80. Petitioner's Petition and Motion to Dismiss was denied on April 30, 2014. Pet. App. 2.

On August 28, 2014, Petitioner filed a Motion for Independent Psychological/Psychiatric Examination of the Complaining Witness. Id. at 000081-103. The State filed its Opposition on September 5, 2014. Id. at 000104-23. Petitioner filed his Reply on October 13, 2014. Id. at 000124-32. On November 5, 2014, Petitioner's Motion was denied. Id. at 000156-57.

On September 5, 2014, the State filed a Motion in Limine to Preclude Evidence of Victim's Prior Sexual Abuse at Trial. Id. at 000133-47. Petitioner filed his Opposition on October 14, 2014. Id. at 000148-55. On November 5, 2014, the State's Motion was granted in part. Id. at 000156-57.

On February 4, 2015, Petitioner's bail was revoked due to continued contact with the victim. Id. at 000158.

Jury trial commenced on March 22, 2017. Id. at 000159. On March 31, 2017, after eight days of trial, the jury returned a verdict of guilty on all counts. Id. at 000169-72.

On June 26, 2017, Petitioner was sentenced to the Nevada Department of Corrections as follows: as to Count 1 – Life with parole eligibility after five (5) years

[1] Because Respondent's Return was filed under seal, it has not been included in Respondent's Appendix.

has been served; as to Count 2 – thirty (30) to ninety-six (96) months consecutive to Count 1; as to Count 3 – Life with parole eligibility after five (5) years has been served consecutive to Count 2; as to Count 4 - Life with parole eligibility after five (5) years has been served concurrent with Count 3; as to Count 5 - Life with parole eligibility after five (5) years has been served concurrent with Count 4; and as to Count 6 - Life with parole eligibility after five (5) years has been served concurrent with Count 5 for an aggregate total of one hundred fifty (150) months to Life. Id. at 000173-74. The Judgment of Conviction was filed on July 5, 2017. Id. at 000210-12.

On August 1, 2017, Petitioner filed a Notice of Appeal. Id. at 000213-16. On July 1, 2019, the Nevada Supreme Court filed an Order Affirming in Part, Reversing in Part and Remanding. Pet. App. 1.

On September 27, 2019, Petitioner filed a Petition for Writ of Certiorari.

STATEMENT OF FACTS

Respondent offered the following factual summary to the Nevada Supreme Court:

In 2013, 16 year old J.T. lived with her mom, grandmother and two sisters. RA 000008. In August of 2013, J.T. met Petitioner on Craigslist and began speaking with him over the Internet. Id. Petitioner had an ad on Craigslist that said, "Lonely millionaire" and stated a fake age of 34. Id. In the course of communicating, J.T.

told Petitioner that she was 16 and that her mother could not know they were talking. Id.

At first J.T. and Petitioner communicated through Craigslist e-mail, where they exchanged photos. Id. Later, they communicated through Kik, a texting application, because it was easier than e-mailing and because J.T.'s mother could not see the messages like she could with traditional texting. Id. Eventually Petitioner asked her to be his girlfriend and she said yes. Id. at 000009. After they became boyfriend and girlfriend Petitioner asked her for "sexy pictures" and she sent them. Id. He did not think they were sexy enough, so he directed J.T. to pose in different positions. Id. Specifically, J.T. testified that she did not think of taking her clothes off, but that Petitioner requested her to. Id. He also asked for pictures of her butt, her crotch, and partly nude photos. Id. When asking for one of the crotch photos, Petitioner specifically directed J.T. to "spread [her] legs." Id.

After they began talking, Petitioner went to J.T.'s work without informing her to observe her working. Id. After he left he texted her and told her he had been there, describing what she was wearing. Id.

Eventually J.T. met with Petitioner at a roller skating rink. Id. J.T. was there with a friend, and J.T. told her friend that Petitioner was one of her old teachers. Id. At that point, J.T. still did not know that Petitioner was really 44 instead of 34. Id.

She did not find out his real age until she slept over at his house. Id. At the roller rink the two had a short conversation and then Petitioner left. Id.

J.T. did not tell her mom that she was communicating with Petitioner. Id. J.T. told Petitioner that she could not tell her mom because she would not be happy, and J.T. made sure to call Petitioner first if they were going to talk so they could avoid being caught. Id. at 000009-10.

The first time J.T. went to Petitioner's house she told her mom that she was at a friend's house. Id. at 000010. Petitioner picked her up at Target and drove her to his house where J.T. stayed for two nights. Id. During the two nights at Petitioner's house, they drank alcohol, had sexual intercourse, and did not use a condom. Id. On the second morning, Petitioner gave J.T. a promise ring that looked like a wedding ring. Id.

J.T. wore the ring around her neck so her mom would not see it. Id. Her mom did see it, however, and J.T. made up multiple lies about where she got it. Id. J.T.'s mom did not believe her and took away J.T.'s phone and computer. Id. After looking through J.T.'s phone, her mom realized J.T. had been calling a strange number and grew suspicious. Id. J.T. had her phone on the bus one day and informed Petitioner that her mom was growing wary. Id.

On August 28, 2013, J.T. told her mom that she needed her laptop for a project, and e-mailed Petitioner to tell him that they would not be able to talk for a

while and they needed to figure something out. Id. They devised a plan where Petitioner would pick J.T. up from home in the early morning while her mom slept. Id. Petitioner told J.T. to bring her social security card and birth certificate with her, which she did. Id. She also found her cell phone and laptop and brought them with her. Id. at 000010-11. Petitioner was waiting for her in front of her house; he confirmed that she brought the documents, and instructed her to turn off her cell phone so her family could not track it. Id. at 000011. Petitioner drove J.T. to his house, and when they arrived he changed the number on his cell phone because J.T.'s mom knew the number and he did not want her to be able to track him. Id.

J.T. lived with Petitioner for two months, from August 28, 2013, until November 1, 2013. Id. Petitioner was a teacher and while he was at work, J.T. would color or watch television or movies. Id. Before J.T. lived with Petitioner, she attended school but did not go to school while living with him; they planned that she would return to school when she was 17 and a half because at that point they thought she would be old enough to stay with Petitioner. Id. Petitioner gave J.T. a coloring book and one fiction book, but no educational supplies. Id. She was allowed to use her laptop but she could not touch her phone because her family might find her. Id.

J.T. testified that she had rules when she lived with Petitioner that included not turning her phone on, not to go outside because she could be recognized, and to not have anyone over to the house – especially other males. Id.

Petitioner took J.T. out of the house only a few times; once he took her to the lake because she wanted to get outside, and one time, when she missed her family, he drove her by their home at night without stopping. Id. On one other occasion they went to Walmart at night; however, Petitioner left J.T. in the car and had her recline her seat back while wearing a hat and glasses. Id. at 000011-12. Indeed, whenever they left the house Petitioner had the idea that J.T. should dress like a boy by wearing a hat and glasses, loose clothing, and putting her hair up. Id.

Although the doors were not locked and J.T. was physically free to leave, she did not feel emotionally free to leave. Id. Approximately two to three times per week Petitioner would get angry and tell J.T. to pack her bags because he was taking her home. Id. After she did, Petitioner would become sad and cry and would ask J.T. to stay, so she did. Id. One of these occasions occurred when J.T. said she missed her family. Id.

Petitioner devised a plan whereby if the two were caught J.T. would say that Petitioner had been looking for a roommate on Craigslist and J.T. moved in with him, but they were not in a sexual relationship. Id. J.T. agreed to the plan. Id. Once, while she was living with Petitioner, a private investigator came to the door looking for J.T. Id. After Petitioner looked through the peephole, he told J.T. to gather her things and hide. Id. She sat on the stairs and could hear Petitioner and the investigator talking; she could tell that the investigator was looking for her, and Petitioner

responded that he did not know what he was talking about. Id. After the investigator left, Petitioner told J.T. they were fine and the investigator believed what he told him. Id. Another time, Petitioner came home with a missing poster looking for J.T. Id. at 000012-13. In spite of that, Petitioner would tell J.T. that her mom was not looking for her and that her mom did not care. Id. at 000013. On another occasion, Petitioner returned from work and told J.T. that the police had come to his work looking for her, and they did not think he was a bad guy but they thought she was a prostitute. Id.

In the nine weeks that J.T. was with Petitioner, they were intimate two or three times a week. Id. Petitioner was picky about some things, getting upset about the way J.T. did dishes and telling her that her handwriting was bad, and she could not sing. Id. While she lived with him he provided her with alcohol more than one time and on one occasion she got "pretty drunk." Id.

On November 1, 2013, the police came to the door while J.T. was home alone. Id. J.T. spoke with them but was not entirely honest and tried to stick to the plan she and Petitioner made. Id. J.T. was then taken to the Southern Nevada Children's Assessment Center where she spoke with a female and was more forthcoming, but still tried to stick to the plan. Id. She was then taken to her mom's house, but felt guilty because she did not stick to the plan and she wanted to return to Petitioner's home. Id. After trying to leave the house and go back to Petitioner's a few times,

J.T.'s mother took her to Montevista, a behavioral health center. Id. J.T. stayed at Montevista for three days and returned to her mother's house; however, the treatment she received was not helpful and all she could think about was getting back to Petitioner. Id. at 000013-14. J.T. and her mom later got in an argument because her mom would not let her leave the house. Id. at 000014. J.T. threatened to kill herself and tried to jump off their house balcony to get out of the house and her mom took her back to Montevista. Id. J.T. remained at Montevista for approximately a month while awaiting a position in a long-term treatment facility, Willow Springs. Id. She was at Willow Springs for almost six months and continued to see therapists at the time of trial. Id. While at Willow Springs, J.T. had to learn how to regulate her emotions as well as re-learn how to interact in society. Id.

After leaving Willow Springs, J.T. returned to her mother's home. Id. She believed that Petitioner was in jail; however, he was not and began contacting her through Instagram using fake names. Id. J.T. was angry that Petitioner was contacting her and that he gave her an STD. Id. Although she struggled with the decision, she knew that Petitioner should not have contacted her and informed her mother and the police. Id.

At trial, it was revealed that J.T. had lied at the preliminary hearing; she testified that she was honest on direct examination but lied during cross-examination because during the break Petitioner was mouthing "I love you" and "it's okay," as

well as winked at her and placed his hand over his heart. Id. She felt guilty and decided to revert back to the plan they previously devised, so she tried to protect Petitioner during cross-examination. Id. at 000014-15.

ARGUMENT

I. PETITIONER'S PETITION SHOULD NOT BE GRANTED BECAUSE IT DOES NOT RAISE A FEDERAL QUESTION.

Petitioner's request for extraordinary relief does not present a conflict between inferior courts or an important federal question. This Court should reject Petitioner's attempt to entice it into reviewing the Nevada Supreme Court's denial of Petitioner's unsupported claim that Nevada's child pornography statute is facially unconstitutional and/or overly broad.

Rule 10 of the Rules of the Supreme Court of the United States (RSCUS) precludes discretionary intervention in this matter. Certiorari is only warranted where there is a substantial conflict between decisions of lower state and/or federal courts, or where an important question of federal law needs to be settled. It is generally accepted that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." 36 C.J.S. Federal Courts §295 (2012). As explained in Ross v. Moffit, 417 U.S. 600, 616-17, 94 S. Ct. 2437, 2447 (1974), "[t]his Court's review … is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."

A conflict between lower courts must be substantial to warrant intervention by this Court. Indeed, "[i]t is very important that [this Court] be consistent in not granting the writ of certiorari except . . . in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 79, 75 S. Ct. 614, 620 (1955).

An important question of federal law is one that goes beyond whether the alleged error complained of "is undesirable, erroneous or even 'universally condemned.'" Smith v. Phillips, 455 U.S. 209, 221, 102 S. Ct. 940, 948 (1982). In order to amount to an important federal question, the issue must be one of broad scope that actually needs to be settled:

> A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. ... 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decisions of constitutional issues unless avoidance becomes evasion.

Rice, 349 U.S. at 74, 75 S. Ct. at 616-17 (citations omitted).

Petitioner does not allege a substantial conflict or an important federal question. Instead, Petitioner complains that the trial court and the Nevada Supreme Court were wrong in upholding Nevada's child pornography statute because

Petitioner disagrees with the "sexual portrayal" language used. Petition at 35-38. Petitioner cites to Massachusetts v. Oakes, 491 U.S. 576, 109 S.Ct. 2633 (1989) to support his contention that Nevada's child pornography statute is unconstitutional and, thus, warrants intervention by this Court. Petition at 35-38. However, the statute at issue in Oakes is far broader than the statute at issue in Petitioner's case.

In Oakes, the defendant was convicted of violating a statute prohibiting adults from "posing or exhibiting minors 'in a state of nudity' for purposes of visual representation or reproduction in any publication, motion picture, photograph, or picture. 491 U.S. at 578, 109 S.Ct. at 2635. The statute also had a "sexual conduct" requirement, however, the jury was not instructed on this requirement and, thus, convicted defendant based on the minor "being in a state of nudity." Id. at 580, 109 S.Ct. at 2636. Following defendant's conviction, the Massachusetts statute was amended to add a "lascivious intent" requirement to the nudity portion of the statute, but not the sexual conduct portion. Id. at 583, 109 S.Ct. 2638. Based on the amendment of the statute, this Court determined that the defendant's challenge was moot and, thus, declined to consider defendant's argument. Id. at 583-84, 109 S.Ct. at 2638. However, the case was remanded to determine whether the former version of the statute, which the defendant was convicted under, could be constitutionally applied to the defendant. Id. at 585, 109 S.Ct. at 2639.

In the instant case, Nevada's current statute requires that a minor be involved in sexual conduct or a sexual portrayal. NRS 200.710. Both portions of the statute require that the minor be involved in the pornography in a way that is *intended* to sexually gratify the viewer. See NRS 200.700(3-4). A photograph of a child at the beach or in the bath tub, a comparison Petitioner insists on making to his horrendous conduct in this case, are not criminal under this statute. 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. See Shue v. State, 133 Nev. 798, 806, 407 P.3d 332, 339 (2017); see also, Osborne v. Ohio, 495 U.S. 103, 113 n.10, 110 S.Ct. 1691 (1990). Nevada's statute is distinguishable from the statute in Oakes and, thus, Petitioner's reliance on this case lacks merit.

Further, Petitioner contends that Nevada and New Jersey have "nonconforming" statutes and, thus, his petition warrants consideration. Petitioner's inclusion of the related statutes in each state negates his entire contention. All of the statutes provided include a requirement that the minor be used in the production in such a way that is lewd, lascivious or displays nudity with the intent that such display sexually gratifies the user. See Petition Appendix 5. This language is also included in the provisions of the Nevada and New Jersey statutes Petitioner takes issue with. See Petition Appendix 6. Neither statute fails to conform or "relaxes" the definition

of what qualifies as child pornography. In fact, these portions of the statute include the same underlying requirement of each statute provided by Petitioner. Petitioner's contentions do not merit discretionary intervention by this Court because he fails to raise an important federal question and/or demonstrate an embarrassing conflict between inferior courts.

II. WERE THIS COURT TO CONSIDER PETITIONER'S CLAIMS, THERE IS STILL NO REASON TO INTERVENE BECAUSE PETITIONER'S CLAIMS ARE MERITLESS.

Even if this Court were willing to ignore its own rules and precedents in order to consider Petitioner's challenge to the Nevada Supreme Court's upholding a state criminal statute, there still is no reason for this Court to intervene since the statute is not unconstitutional or overly broad.

NRS 200.710 provides:

> 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.

(emphasis added).

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 shown to the jury included J.T. in her underwear and bra, a photo of her in her underwear as she was bent over a chair exposing her buttocks, a photo of her vaginal area with her legs spread, J.T.'s bare breasts, and J.T.'s bare buttocks. RA at 000009. Moreover, Petitioner asked J.T. to send him "sexy" pictures, and directed her on how to pose to make them sexier for his viewing pleasure, and there was no evidence that these pictures had a serious literary, artistic, political or scientific value. Id. Thus, the evidence showed that Petitioner directed J.T. to take the photos in order to appeal to his prurient interest in sex, and the convictions are therefore proper under a theory of sexual portrayal.

Additionally, NRS 200.700(3) defines sexual conduct 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 manipulated or inserted by a person into the genital or anal opening of the body of another. The photographs complained of by Petitioner are ones of J.T.'s vaginal area. She spread her thighs and took a photo of just her crotch at the direction of Petitioner. It should be noted that she is wearing underwear, however, her thighs are spread and her pubic hair can be seen. This is absolutely a lewd exhibition of the genitals and meets the statutory requirement. It is completely lewd for a child to spread her legs and take a photo of her vagina, clothed or not.

Therefore, as an initial matter, the photographs of J.T. for which Petitioner sustained convictions for, satisfy both the sexual conduct and sexual portrayal requirements in NRS 200.700.

1. NRS 200.700(4) is not facially invalid under the First Amendment

Petitioner argues that prohibiting creating or possessing images of minors as the subject of a sexual portrayal in a performance is an unconstitutional content-based restriction upon speech. Petition 16-25. To support his argument, Petitioner cites to R.A.V. v. St. Paul, 505 U.S. 377, 112 S.Ct. 2538 (1992) for the proposition that the First Amendment prohibits the government from criminalizing speech or expressive conduct because it disapproves of the ideas expressed. However, Petitioner fails to acknowledge that some areas of speech, consistent with the First Amendment, can be regulated because of their constitutionally proscribable content. Id. at 379, 112 S.Ct at 2541. Although First Amendment speech protections are far reaching, it has been long recognized that free speech is not an absolute right devoid of limitations and restrictions. Chalpinsky v. New Hampshire, 315 U.S. 568, 571, 62 S.Ct. 766, 769 (1942). There are well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problems. Id.

There are two types of pornography that receive no First Amendment protection; obscenity and child pornography. See, N.Y. v. Ferber, 458 U.S. 747, 102

S.Ct. 3348 (1982); Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304 (1957). In Roth, this Court determined that obscenity is not within the area of constitutionally protected speech or press. 354 U.S. at 485, 77 S.Ct. at 1309. The Court reexamined the obscenity standard in Miller v. California, 413 U.S. 15, 24, 93 S.Ct. 2607, 2614-15 (1973) and ruled obscenity is limited to works that, when taken as whole, appeal to the prurient interest in sex, portray sexual conduct in a patently offensive way and have no serious literary, artistic, political or scientific value.

In Ferber, this Court, in a unanimous decision, held that child pornography was far outside the First Amendment protection. 458 U.S. at 749 102 S.Ct. at 3350. Ferber upheld a statute proscribing the dissemination of child pornography regardless of whether the material was obscene under Miller. Id. at 761, 102 S.Ct at 3356. The Court found that child pornography could be censored without violating the First Amendment even if it did not meet the definition of obscene. Id. This was so because the government had a compelling interest in preventing sexual exploitation of children. Id. at 756-57, 102 S.Ct at 3354 ("safeguarding the physical and psychological well-being of a minor is a compelling interest"). The Court pointed out that it had approved of legislation aimed at protecting the physical and emotional well-being of youth even when the laws operated in the sensitive area of a constitutionally protected right. Id. at 757, 102 S.Ct at 3354.

Petitioner erroneously argues that sexual portrayal of a minor falls inside the protection of the First Amendment because sexual portrayal is not limited to works that visually depict sexual conduct involving children. Petition at 18. However, this Court, in Ferber, specifically ruled that states are entitled to greater leeway in regulating pornographic depictions of children than images of adults, emphasizing the state's compelling interest in protecting children who may be exploited or abused in the production of child pornography. Id. at 756, 102 S.Ct at 3354. The language defining sexual portrayal states that the image must appeal to the prurient interest in sex. NRS 200.700(4). The intent of the language was to target those images that might not explicitly portray a minor engaging in sexual conduct but are nonetheless pornographic depictions of minors because of the obscene nature of the image.[2] See, Hearing on A.B. 405 Before the Senate Comm. on Judiciary, 68th Leg. (Nev., June 14, 1995). Therefore, sexual portrayal of minors as defined by NRS 200.700(4) is a proper regulation of pornographic depictions of children as it achieves the States' compelling interest of protecting children. Furthermore, sexual portrayal of children is outside the protection of the First Amendment because the language includes the element of obscenity, which the U.S. Supreme Court has held to be an unprotected class of speech. Miller, 413 U.S. at 16, 93 S.Ct. at 2610.

[2] Nevada's obscenity statute, NRS 201.235, uses the words "prurient interest" and the phrase "lacks serious literary, artistic, political or scientific value" when defining obscenity and this same language is found in the definition of "sexual portrayal" in the child pornography statutes. NRS 200.700(4).

Petitioner's citation to several non-binding cases to support the proposition that criminalization of an image of a child based solely upon the effect it has upon the viewer is unconstitutional is inapposite. Petition at 18-19. In United States v. Villard, 700 F. Supp. 803, 804 (D.N.J. 1988) the defendant was convicted for transporting child pornography, four magazines and a videocassette. During trial, the State was unable to produce the original magazines but had a witness, a government informant, describe to the jury the images and played a surveillance tape of the informant and defendant discussing the magazines. Id. at 806-07. The Court held that witness testimony regarding the photograph in question, without more, was not a sufficient basis to conclude that the photograph contained explicit sexual conduct. Id at 813.

Similarly, the Court in Rhoden v. Morgan, 86 3 F. Supp. 612, 614 (M.D. Tenn. 1994) found that the jury has to base their determination whether the photograph contains explicit sexual conduct on the actual photograph, not on the individual who viewed the photograph. The testimony and description of the photograph by a witness is not enough to establish that it contains explicit sexual conduct; the jury must have an opportunity to view the photograph. Id. Petitioner's cited cases stand for the proposition that the jury cannot convict for violation of state child pornography statutes based on the fact that an individual has previously been deemed a sex offender; the jury must actually see the photograph. These cases do

not stand for Petitioner's proposition that the intent of the creator/director of the performance or the intended effect on the viewer cannot be considered when determining whether an image constitutes child pornography.

Finally, similar statutes have been found constitutional. In Commonwealth v. Provost, 418 Mass. 416, 420, 636 N.E.2d 1312, 1315 (1994) the defense argued that a statute that made it illegal to take photographs of partially nude children with lascivious intent was unconstitutional in that it criminalized the depiction of pure nudity. The Court held that even though the pictures were not child pornography under Ferber, the statute was still constitutional and did not violate the First Amendment. Id. The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. Id. at 420-21, 636 N.E.2d at 1315. When "'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.'" Id., *citing* Texas v. Johnson, 491 U.S. 397, 406, 105 L. Ed. 2d 342, 109 S.Ct. 2533 (1989). Provost concluded that the compelling interest in protecting children from exploitation was both unrelated to the suppression of expression and sufficiently compelling. Id. at 421, 636 N.E. at 1315.

Petitioner argues that NRS 200.710(2) and NRS 200.730 are not the least restrictive means of promoting a compelling government interest. Petition at 20.

Even assuming, arguendo, the statutes are a content-based restriction on speech; they are the least restrictive means of promoting a compelling government interest. The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. Ferber, 458 U.S. at 757, 102 S. Ct. at 3055.

Petitioner claims that the compelling government interest appears to be: 1) protecting children from being filmed in public, 2) child pornography as the visual depiction of sexual abuse; and 3) protecting children from being recorded. Petition at 22-25. However, based on the legislative history, the compelling government interest is to protect children from sexual exploitation and the psychological harm that comes from images that use minors as subjects of sexually stimulating and pornographic portrayals. See, Hearing on A.B. 405 Before the Senate Comm. on Judiciary, 68th Leg. (Nev., April 12, 1995). The concern of the Nevada State Legislature was that the statute as written contained a gap that left children unprotected. Id. Children were being sexually exploited when they were the subject of images that had a pornographic purpose, but the children were not engaging in sexual conduct. Id.

First, Petitioner contends that NRS 597.810 provides a civil remedy that would protect children from being filmed by pedophiles. Petition at 23. This argument vastly under values the compelling interest the statute aims to achieve. A mere civil fine is a woefully inadequate response to the sexual exploitation of

children. Further, NRS 597.810 provides a civil remedy only for any "commercial use" using a photograph or likeness of another person without first having obtained written consent. This provides no protection for those children whose images are never "commercially used."

Petitioner further alleges that the statutes prohibiting creating an image of a child simulating or engaging in "sexual conduct to produce a performance" satisfies the interest of protecting minors from having their sexual abuse documented. NRS 200.710(1). Petition at 23. However, this argument is fatally flawed because children can be sexually exploited in ways that do not fall within the definition of sexual conduct. In part, the Legislature sought to amend the statutes to include sexual portrayal because of an incident where children were secretly filmed in a public place and then those videos were edited into other pornographic videos. Hearing on A.B. 405 Before the Senate Comm. on Judiciary, 68th Leg. (Nev., April 12, 1995). The concern was that statutes prohibiting only images that depict children engaging in sexual conduct do not achieve the compelling interest of protecting children from sexual exploitation.

Lastly, Petitioner complains that NRS 200.604, which prohibits capturing the image of the private area of a person, satisfies the interest in protecting children from being filmed while nude. Petition at 25. However, Petitioner ignores that NRS 200.604 requires the images to be captured without consent and taken in a place

where the person has an expectation of privacy. This does not meet the compelling interest because it does not protect children in places where they might not have expectation of privacy. Additionally, most victims of child sexual abuse know their abuser, who is usually a close family member or friend. These are not only people in positions of authority, they are people children want to please, so they would most likely consent to the taking of such a picture. Because Petitioner's proposed alternatives fail to achieve the compelling government interest as effectively as NRS 200.710(2) and NRS 200.730, the statutes are the least restrictive means. Ashcroft v. ACLU, 542 U.S. 656, 665, 124 S.Ct. 2783, 2791 (2004). Therefore, this Court need not consider Petitioner's Petition because his claims that Nevada's statutes are protected under the First Amendment lack merit.

2. NRS 200.700(4) is not unconstitutionally overbroad

Petitioner argues that NRS 200.700(4) is overbroad because it allegedly makes any legitimate image of minors child pornography, if the images appeal to a pedophile. Petition at 25-30.

This Court has held that a statute may be overbroad if in its reach it prohibits constitutionally protected conduct. Grayned v. Rockford, 408 U.S. 104, 114, 92 S.Ct. 2294, 2302 (1972). In considering an overbreadth challenge, a court must decide, "whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." Id. at 115, 92 S.Ct. at 2302. However,

when a law regulates arguably expressive conduct, "the scope of the [law] does not render it unconstitutional unless its overbreadth is not only real, but substantial as well, judged in relation to the [law's] plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601, 615, 93 S.Ct. 2908 (1973). A statute is subjected to less scrutiny where the behavior sought to be prohibited by the State moves from "pure speech" toward conduct "and that conduct – even if expressive – falls within the scope of otherwise valid criminal laws that reflect legitimate state interests." Id. The First Amendment overbreadth doctrine is "strong medicine"; it has been invoked by the courts with hesitation and "only as a last resort". Ferber, 458 U.S. at 769, 102 S.Ct. 3350. Even if a portion of the law proscribes protected expression, an overbreadth challenge will fail if the "'remainder of the statute... covers a whole range of easily identifiable and constitutionally proscribable... conduct.'" Id. at 770 n. 25, 102 S.Ct. at 3351. States have a wider latitude in regulating child pornography than depictions of adults, and that the possible danger of infringing on serious literary, scientific, or educational works does not make a statute unconstitutionally overbroad. Id. at 773, 102 S.Ct. at 3363.

Petitioner erroneously claims that Nevada's sexual portrayal portion of its child pornography statute is overbroad because it omits sexual conduct as a requirement. Petition at 26-27. In this case, sexual portrayal is specifically defined as depictions of minors that appeal to prurient interest in sex. NRS 200.700(4).

Furthermore, the statue explicitly includes language that exempts material that have serious literary, artistic, political or scientific value. Id. That language narrows the statute's reach to exclude protected conduct. Although some protected expression could possibly be reached by the statute, this tiny fraction of material could be protected by a case-by-case analysis. Ferber, 485 U.S.at 773-74, 102 S.Ct. at 3363 (whatever overbreadth may exist should be cured through case-by-case analysis). The legitimate reach of the statute outweighs its arguably impermissible applications. Therefore, the statute is not substantially overbroad and this claim should be denied.

Petitioner further contends that United States v. Stevens, 559 U.S. 460, 130 S.Ct. 1577 (2010), requires that a photograph must be an integral part of conduct in violation of a valid criminal statute in order to be considered pornography. Petition at 28. However, Stevens did not hold that each case must be evaluated to see if the photograph is related to an underlying criminal statute. Instead, Stevens explained 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."

Stevens, 559 U.S. at 471, 130 S.Ct. at 1587 (internal citations omitted). Thus, the Stevens Court did not state that each photograph must be evaluated, but rather

explained its reasoning for removing child pornography from First Amendment protection.

Moreover, the discussion from Stevens is nothing more than judicial dictum analyzing various concerns and is not essential to the holding of that case. Indeed, the Stevens Court was merely explaining previous examples of speech which are outside the protection of the First Amendment. As dictum, this "test" is not binding on this Court. See Black v. Colvin, 142 F. Supp. 3d 390, 395 (E.D. Pa. 2015) ("Lower courts are not bound by dicta." (*citing* United States v. Warren, 338 F.3d 258, 265 (3d Cir. 2003)).

Additionally, Petitioner's argument that parents who take an innocent, naked, photograph of their child could be prosecuted and convicted if the most sensitive citizen of Nevada believes the image is sexually gratifying is without merit. Petition at 30. First, Petitioner's various hypotheticals are irrelevant attempts to distract the Court from his conduct. Here, Petitioner was not an innocent parent taking pictures of his children and he was not a fifteen year old exchanging photos with another fifteen year old. Instead, Petitioner was a forty-four year old man, who originally pretended to be a thirty-four year old millionaire, that lured a sixteen year old girl to meet him and manipulated her into being in a relationship with him. He directed her to take sexually provocative photos of herself and re-directed her photographs when they were not provocative enough for him. The new photos had the victim's breasts,

buttocks, and pubic hair exposed. Further, he kept her in his home, prevented her from speaking with her family and forced her to wear disguises when she left the house. Petitioner attempts to distract from his horrendous conduct by consistently comparing the photos in the instant case to those taken under innocent circumstances.

Second, the Nevada State Legislature specially included the language of "appeals to the prurient interest in sex" because it considers a community objective standard and does not encompass parents taking innocent pictures of their children. See, Hearing on A.B. 405 Before the Senate Comm. on Judiciary, 68th Leg. (Nev., April 12 and June 14, 1995). The Legislature further limited the possible conduct that could be criminalized under the statute by adding the exception for depictions that have "serious literary, artistic, political or scientific value." NRS 200.700(4). That language narrows the statute's reach to exclude protected conduct. Thus, Petitioner's claims that Nevada's sexual portrayal statute is overbroad is without merit and his Petition should be denied.

3. The Nevada Supreme Court's Analysis in *Shue* and *Sprowson* Do Not Conflict with Other State Courts.

Petitioner claims that the Nevada Supreme Court's decisions in both Shue, 133 Nev. at 806, 407 P.3d at 339 and Sprowson v. State, 2019 WL 2766854 (Nev. July 1, 2019) conflict with other state court decisions. Petition at 31-35. However,

Petitioner's case and Nevada's statute are distinguishable from each of the cited "conflicting" cases and, thus, Petitioner's claim fails.

Petitioner claims that Nevada's "sexual portrayal" portion of NRS 200.710(2) is overbroad because it encompasses constitutionally protected behavior. Petitioner cites to three separate cases to support his contention that the Nevada Supreme Court's decisions conflict with other states. In Purcell v. Commonwealth, 149 S.W.3d 382, 386 (Ky. 2004), overruled on other grounds by Commonwealth v. Prater, 324 S.W.3d (Ky. 2010), the statute at issue merely required "willful or intentional exhibition of the genitals." The Kentucky Supreme Court ruled that the statute was overbroad because there was no exception for mere nudity without lewd or obscene intent, which is protected by the First Amendment. Id. at 390. However, the Purcell Court determined that this overbreadth could be cured by "defining 'sexual conduct by a minor' as a 'willful or intentional exhibition of the genitals' only when such exhibition is lewd." Id. at 391. The Court further added, "[w]e conclude that the best approach is to consider all factors, i.e., the nature of the depiction, the intent and demeanor of the child, and the photographer's intent with respect to the effect of the depiction on its intended audience." Id. at 392.

Petitioner next cites to State v. Bonner, 138 Idaho 254 (2002). In Bonner, the statute at issue made it illegal for any person at least five years of age older than a minor who was sixteen or seventeen, with the intent of "arousing, appealing to or

gratifying the lust, passion, or sexual desires of such person, minor child, or third party to…[m]ake any photographic or electronic recording of such minor child." Id. at 256. The Idaho Supreme Court determined that this Idaho statute was overbroad because it did not limit the content of photos and recordings and, thus was not sufficiently narrow to avoid criminalizing constitutionally protected conduct. Id. at 259.

In Foster v. Commonwealth, 6 Va.App. 313, 333 n.1 (1988), the statute at issue prohibited any person over the age of eighteen to allow, encourage, entice, etc., a person under the age of eighteen to perform in or be the subject of sexually explicit visual material. Sexually explicit visual material was considered material which was "obscene for children" and which depicts "nudity, sexual excitement, sexual conduct, sexual intercourse of sadomasochistic abuse." Id. at 333 n.2. Material was obscene for children if ir appealed to the prurient interest *of the child*, it affronted adult standards for what is suitable *for children*, and it lacked serious literary, artistic, political and scientific value *for children*. Id. The Virginia Court of Appeals determined that the statute was overbroad because it impermissibly banned the production of material that would be suitable for adults but unsuitable for children. Id. However, the Foster Court found that the phrase "obscene for children" and the corresponding definition could be removed from the statute and that the remaining portions were not vague or overbroad. Id. at 325-26.

Under NRS 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 felony. NRS 200.700(4) defines a "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." Unlike Purcell and Bonner, Nevada's statutes do not criminalize "mere nudity" or any photograph or recording of a minor. Instead, Nevada's statutes specifically provide the type of conduct which is to be criminalized and, as described above, do not impermissibly ban material that is constitutionally protected. Nevada's statutes narrowly define what material can be considered child pornography and, thus, Petitioner's cited cases are distinguishable. Therefore, Petitioner's reliance on Purcell and Bonner are misplaced and his claims fail.

Further, unlike Foster, Nevada's statute does not criminalize conduct that may be suitable for adults but unsuitable for children. Rather, Nevada's statute prohibits a person from using a minor as the subject of material meant to appeal to the prurient interest in sex and has no other legitimate value. Nevada's statutes do not have the same inadequacies at Virginia's statute, which was challenged in 1988, and thus, Petitioner's reliance on Foster is misplaced and his claims fail. As Petitioner has provided this Court only meritless arguments, his Petition must be denied.

///

CONCLUSION

The Writ fails to establish that exercise of discretionary jurisdiction is warranted. There is no important federal issue or conflict in authority presented and as such this Court should deny certiorari.

Respectfully submitted.

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APPENDIX

IN THE SUPREME COURT OF THE STATE OF NEVADA

MELVYN PERRY SPROWSON, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 73674

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

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STATEMENT OF THE FACTS

In 2013, 16 year old J.T. lived with her mom, grandmother and two sisters. 10AA2208. In August of 2013, J.T. met Appellant on Craigslist and began speaking with him over the Internet. 10AA2210, 2216. Appellant had an ad on Craigslist that said, "Lonely millionaire" and stated a fake age of 34. 10AA2210-11. In the course of communicating, J.T. told Appellant that she was 16 and that her mother could not know they were talking. 10AA2212-13, 2217.

At first J.T. and Appellant communicated through Craigslist e-mail, where they exchanged photos. 10AA2213. Later, they communicated through Kik, a texting application, because it was easier than e-mailing and because J.T.'s mother could not see the messages like she could with traditional texting. 10AA2217-18.

Eventually Appellant asked her to be his girlfriend and she said yes. 10AA2218-19. After they became boyfriend and girlfriend Appellant asked her for "sexy pictures" and she sent them. 10AA2219. He did not think they were sexy enough, so he directed J.T. to pose in different positions. 10AA2219-20. Specifically, J.T. testified that she did not think of taking her clothes off, but that Appellant requested her to. 10AA2226. He also asked for pictures of her butt, her crotch, and partly nude photos. 10AA2225-29. When asking for one of the crotch photos, Appellant specifically directed J.T. to "spread [her] legs." 10AA2230.

After they began talking, Appellant went to J.T.'s work without informing her to observe her working. 10AA2233. After he left he texted her and told her he had been there, describing what she was wearing. Id.

Eventually J.T. met with Appellant at a roller skating rink. 10AA2234. J.T. was there with a friend, and J.T. told her friend that Appellant was one of her old teachers. 10AA2234-35. At that point, J.T. still did not know that Appellant was really 44 instead of 34. 10AA2235-36. She did not find out his real age until she slept over at his house. 10AA2236. At the roller rink the two had a short conversation and then Appellant left. 10AA2236.

J.T. did not tell her mom that she was communicating with Appellant. 10AA2237. J.T. told Appellant that she could not tell her mom because she would

not be happy, and J.T. made sure to call Appellant first if they were going to talk so they could avoid being caught. 10AA2237.

The first time J.T. went to Appellant's house she told her mom that she was at a friend's house. 10AA2238-39. Appellant picked her up at Target and drove her to his house where J.T. stayed for two nights. 10AA2239-42. During the two nights at Appellant's house, they drank alcohol, had sexual intercourse, and did not use a condom. 10AA2241-43. On the second morning, Appellant gave J.T. a promise ring that looked like a wedding ring. 10AA2243-44.

J.T. wore the ring around her neck so her mom would not see it. 10AA2247. Her mom did see it, however, and J.T. made up multiple lies about where she got it. 10AA2247. J.T.'s mom did not believe her and took away J.T.'s phone and computer. 10AA2248-49. After looking through J.T.'s phone, her mom realized J.T. had been calling a strange number and grew suspicious. 10AA2248. J.T. had her phone on the bus one day and informed Appellant that her mom was growing wary.

On August 28, J.T. told her mom that she needed her laptop for a project, and e-mailed Appellant to tell him that they would not be able to talk for a while and they needed to figure something out. 10AA2250-51. They devised a plan where Appellant would pick J.T. up from home in the early morning while her mom slept. 10AA2251. Appellant told J.T. to bring her social security card and birth certificate with her, which she did. Id. She also found her cell phone and laptop and brought

them with her. 10AA2252. Appellant was waiting for her in front of her house; he confirmed that she brought the documents, and instructed her to turn off her cell phone so her family could not track it. 10AA2253. Appellant drove J.T. to his house, and when they arrive he changed the number on his cell phone because J.T.'s mom knew the number and he did not want her to be able to track him. 10AA2254.

J.T. lived with Appellant for two months, from August 28th until November 1st. 10AA2276. Appellant was a teacher and while he was at work, J.T. would color or watch television or movies. 10AA2262. Before J.T. lived with Appellant, she attended school but did not go to school while living with him; they planned that she would return to school when she was 17 and a half because at that point they thought she would be old enough to stay with Appellant. 10AA2256-57. Appellant gave J.T. a coloring book and one fiction book, but no educational supplies. 10AA2257-58. She was allowed to use her laptop but she could not touch her phone because her family might find her. 10AA2258-59.

J.T. testified that she had rules when she lived with Appellant that included not turning her phone on, not to go outside because she could be recognized, and to not have anyone over to the house – especially other males. 10AA2263-64.

Appellant took J.T. out of the house only a few times; once he took her to the lake because she wanted to get outside, and one time, when she missed her family, he drove her by their home at night without stopping. 10AA2264-65. On one other

occasion they went to Walmart at night, however, Appellant left J.T. in the car and had her recline her seat back while wearing a hat and glasses. 11AA2381. Indeed, whenever they left the house Appellant had the idea that J.T. should dress like a boy by wearing a hat and glasses, loose clothing, and putting her hair up. 10AA2265.

Although the doors were not locked and J.T. was physically free to leave, she did not feel emotionally free to leave. 10AA2265-66. Approximately two to three times per week Appellant would get angry and tell J.T. to pack her bags because he was taking her home. 10AA2266-68; 11AA2432. After she did, Appellant would become sad and cry and would ask J.T. to stay, so she did. 10AA2266-68. One of these occasions occurred when J.T. said she missed her family. Id.

Appellant devised a plan whereby if the two were caught J.T. would say that Appellant had been looking for a roommate on Craigslist and J.T. moved in with him, but they were not in a sexual relationship. 10AA2260. J.T. agreed to the plan. Id. Once, while she was living with Appellant, a private investigator came to the door looking for J.T. 10AA2268. After Appellant looked through the peephole, he told J.T. to gather her things and hide. 10AA2269. She sat on the stairs and could hear Appellant and the investigator talking; she could tell that the investigator was looking for her, and Appellant responded that he did not know what he was talking about. Id. After the investigator left, Appellant told J.T. they were fine and the investigator believed what he told him. 10AA2270. Another time, Appellant came

home with a missing poster looking for J.T. 10AA2278. In spite of that, Appellant would tell J.T. that her mom was not looking for her and that her mom did not care. 10AA2279. On another occasion, Appellant returned from work and told J.T. that the police had come to his work looking for her, and they did not think he was a bad guy but they thought she was a prostitute. 10AA2281-82.

In the nine weeks that J.T. was with Appellant, they were intimate two or three times a week. 10AA2279. Appellant was picky about some things, getting upset about the way J.T. did dishes and telling her that her handwriting was bad, and she could not sing. 10AA2280. While she lived with him he provided her with alcohol more than one time and on one occasion she got "pretty drunk." 10AA2281.

On November 1st, the police came to the door while J.T. was home alone. 10AA2283. J.T. spoke with them but was not entirely honest and tried to stick to the plan she and Appellant made. 10AA2284. J.T. was then taken to the Southern Nevada Children's Assessment Center where she spoke with a female and was more forthcoming, but still tried to stick to the plan. 10AA2284-85. She was then taken to her mom's house, but felt guilty because she did not stick to the plan and she wanted to return to Appellant's home. 10AA2286. After trying to leave the house and go back to Appellant's a few times, J.T.'s mother took her to Montevista, a behavioral health center. 10AA2287. J.T. stayed at Montevista for three days and returned to her mother's house; however, the treatment she received was not helpful

and all she could think about was getting back to Appellant. 10AA2287-88. J.T. and her mom later got in an argument because her mom would not let her leave the house. 10AA2288. J.T. threatened to kill herself and tried to jump off their house balcony to get out of the house and her mom took her back to Montevista. 10AA2288-89. J.T. remained at Montevista for approximately a month while awaiting a position in a long-term treatment facility, Willow Springs. 10AA2290. She was at Willow Springs for almost six months and continued to see therapists at the time of trial. 10AA2298-3000. While at Willow Springs, J.T. had to learn how to regulate her emotions as well as re-learn how to interact in society. 10AA2299-2300.

After leaving Willow Springs J.T. returned to her mother's home. 10AA2301. She believed that Appellant was in jail, however, he was not and began contacting her through Instagram using fake names. Id. J.T. was angry that Appellant was contacting her and that he gave her an STD. 10AA2307-08. Although she struggled with the decision, she knew that Appellant should not have contacted her and informed her mother and the police. 10AA2310-11.

At trial it was revealed that J.T. had lied at the preliminary hearing; she testified that she was honest on direct examination but lied during cross-examination because during the break Appellant was mouthing "I love you" and "it's okay," as well as winked at her and placed his hand over his heart. 10AA2292-97. She felt

guilty and decided to revert back to the plan they previously devised, so she tried to protect Appellant during cross-examination. Id.

SUMMARY OF THE ARGUMENT

First, Appellant's claim that the court marshal engaged in voir dire is without merit because the marshal did not question the jurors about their qualifications. Moreover, the jurors who were dismissed may have been released by a court administrator, and Appellant cannot show he was prejudiced by having an opportunity to discuss whether or not to dismiss them.

Second, the victim's prior sexual history was properly excluded as irrelevant. The information had nothing to do with the charges Appellant faced. The information that the victim had mental problems before meeting Appellant was properly admitted into evidence, however, the reasons behind her previous mental problems were irrelevant and properly excluded.

Third, Appellant's convictions on Counts 3 and 5 were proper either as sexual conduct because a minor exposing her vaginal area and pubic hair constitutes lewd exhibition of the genitals, or as sexual portrayal. Moreover, as this Court recently held, NRS 200.700(4) is not unconstitutional because child pornography is not protected under the First Amendment, the statute is not overbroad, nor is it vague.

Fourth, the district court did not err by not *sua sponte* offering to pay the expenses for Appellant's witness. This is particularly true when Appellant did not

notice the witness, did not subpoena her, and never requested funds to transport her. Although Appellant was granted funds to cover reasonable defense costs, the district court was not required to volunteer those funds for an unreasonable situation such as this.

Fifth, there was no prosecutorial misconduct because the State presented a proper introduction to the jury by providing an overview of the case, properly engaged in voir dire by questioning a juror about her knowledge of a topic that may have come up, and did not comment on Appellant's constitutional rights by pointing out that the victim was afraid of Appellant at trial and asking the jury to hold him responsible for his crimes.

Finally, Appellant has failed to exhibit cumulative error as he has failed to show there was any error or that the question of guilt was close.

For these reasons, the State respectfully asks this Court order Appellant's Judgment of Conviction be AFFIRMED.

ARGUMENT

I. THERE WAS NO STRUCTURAL ERROR WHEN JURORS GAVE UNSOLICITED STATEMENTS TO THE COURT MARSHAL

Appellant begins by complaining of structural error, alleging that the court marshal questioned potential jurors outside the parties' presence. AOB, 10-17. Before the jury was brought into the courtroom to begin voir dire, the court marshal informed the jurors about reasons which were not appropriate to excuse them from

jury service, and some of the jurors then informed the marshal of reasons they felt they were unable to serve. 8AA1747. Appellant claims this amounts to voir dire and the district court erred in not administering the truthfulness oath as required by NRS 16.030(5), therefore amounting to structural error pursuant to Barral v. State, 131 Nev. Adv. Op. 52, 353 P.3d 1197 (2015).

In Barral, this Court found that the district court's refusal to administer the truthfulness oath before conducting voir dire, and after defense counsel requested it, amounted to structural error because the conviction resulted from an improperly selected jury. Barral, 131 Nev. Adv. Op. at ___, 353 P.3d at 1200. "The structural error doctrine [exists] to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it 'affects the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.'" Weaver v. Massachusetts 137 S.Ct. 1899, 1907 (2017) (quoting Arizona v. Fulminante, 499 U.S. 279, 309-10, 111 S.Ct. 1246, 1264 (1991)). The United States Supreme Court identified issues of structural error in Fulminante, noting that such errors affect "the entire conduct of the trial from beginning to end." Fulminante, 499 U.S. at 309-10, 111 S.Ct. at 1265. The examples of structural error provided by the Court were the denial of counsel, an impartial judge, unlawful exclusion of members of the defendant's race from a grand jury, the right to self-representation at trial, and the

right to a public trial. Id. (internal citations omitted). Thus, as this Court has found, "structural error results from a constitutional deprivation that so infects the entire framework that the result is no longer reliable." Garcia v. State, 117 Nev. 124, 129, 17 P.3d 994, 997 (2001) (citation omitted).

In contrast, a harmless error analysis is used when a trial error is involved. A trial error is an error that occurred "during the presentation of the case to the jury [that] may therefore be quantitatively assessed…to determine whether its admission was harmless beyond a reasonable doubt." Fulminante, 499 U.S. at 307-08, 111 S.Ct. at 1264.

Here, the jurors' sua sponte disclosures of their potential conflicts did not amount to voir dire. NRS 16.030(5) requires the truthfulness oath to be administered before the jurors are "examined as to their qualifications to serve as jurors." There is no indication in this case that the court marshal questioned the prospective panel to determine their "qualifications to serve as jurors." Instead, he informed them that certain reasons would not excuse their service, and some jurors "indicated that they may have reasons for getting out of jury duty which comply with the court's rules." 8AA1747. Because this did not amount to examining the jurors as to their qualifications, it was not voir dire and the court was not required to administer the truthfulness oath pursuant to NRS 16.030(5) and Barral. Accordingly, this was not structural error and must instead be analyzed for harmless error.

Although Appellant complains that the process used by the district court was improper overall, he focuses his argument on three jurors whom he claims he objected to dismissing. One was dismissed due to prearranged travel plans, one due to not being a United States citizen, and one due to caring for her young child. 8AA1753-54, 1755-57.[1]

NRS 6.010 guides who is qualified to act as a juror, and states that it is limited to "every qualified elector." Moreover, this Court has adopted rules for the Eighth Judicial District Court which permit the court administrator to excuse jurors due to certain hardships. Rule 6.50 states:

> A person summoned for jury service may be excused by the court administrator because of major continuing health problems, fulltime student status, child care problems or severe economic hardship.

EDCR 6.50. Additionally, Rule 6.70 makes clear that the rules related to trial juries and jurors "must be liberally construed to secure the proper and efficient administration of the business and affairs of the court and to promote and facilitate the administration of justice."

[1] In all, twelve juror were dismissed. 8AA1747-57. Six of those were dismissed with no objection from either side due to (1) being the sole caregiver for a family member who had recent surgery, (2) having a disease which impacted her hearing, (3) being a caregiver for his child who had been run over by a school bus, (4) having prearranged, prepaid travel plans, (5) having a daughter with special needs, and (6) being a student with daytime classes. Id. at 1749-51, 1751-52, 1754, 1755, 1757. Three others were not dismissed, one at Appellant's specific request. Id. at 1747-49, 1752-53, 1754-55. The final three, discussed *supra*, were ultimately dismissed.

In this case, juror 788 was not a United States citizen and the district court properly dismissed him because he was not a qualified juror. 8AA1755. Appellant now claims that he objected to this dismissal, but in actuality he simply asked for clarification:

> THE COURT: That individual is not a U.S. citizen. They cannot sit on the jury.
> [THE STATE]: Okay.
> THE COURT: So we will have to send that one back down to Jury Services.
> [APPELLANT]: I just want to – that one's not qualified?
> THE COURT: No, you have to be a U.S. citizen.

Id. at 1755. It is not clear from the record how the district court knew juror 788 was not a United States citizen; although the conversation surrounding the majority of the prospective jurors discussed their conversation with the court marshal, such was never mentioned for this particular juror. The court just informed the parties to look at a specific page and that the juror listed was not a citizen. Nonetheless, as a non-citizen the individual was not a qualified juror and could not serve on the panel. Therefore, the district court did not err in dismissing him and Appellant cannot show that he was prejudiced by the court doing so.

Next, juror 725 presented documentation showing that he had prearranged, prepaid travel plans. 8AA1753. Appellant initially stated "I'd like to keep this one," and then immediately asked "[w]hat was his reasoning? He said he was traveling?" Id. at 1754. The court clarified that was the juror's reasoning, and that the court's

practice is to release jurors if they have provided proof that they had travel plans. Id. In accordance with EDCR 6.50, jurors may be released if serving would cause them severe economic hardship. It is reasonable that being required to forfeit payment for prearranged travel plans would be a severe economic hardship. Once Appellant understood the juror's conflict and the court's practice, he agreed to dismiss the juror, stating "all right." 8AA1754. Appellant was unfamiliar with the jury selection process in general and required explanation regarding selecting jurors, dismissing them, and when he would be required to use his preemptory challenges. Id. at 1748-49. Juror 725 was the first juror who indicated that he had prearranged travel plans, and as soon as the court's policy was explained to Appellant he agreed to dismiss juror 725. Indeed, the very next juror to be discussed also had prearranged travel plans and Appellant agreed to dismiss him without hesitation. Id. at 1754. To the extent Appellant's initial statement can be construed as an objection, he ultimately agreed to the dismissal after having the purpose and policy explained to him and he cannot show that he was prejudiced by this.

Likewise, Appellant had initial questions about juror 809. Id. at 1756. Specifically, he asked for the court to repeat the juror's reasoning and the court informed him that the juror was breast feeding her baby. Id. Appellant then asked the court if "that happens all day?" because he is "not a mother." Id. The court informed him that it would depend on the mother, at which point Appellant indicated

that he would like to keep her. Id. The marshal then certified that he had seen documentation of sorts in that the mother had her "whole bag" with her. Id. At that point the State expressed concern that the baby would not be able to eat if it does not take a bottle, and the court indicated that it would accept her representation that she was the sole food source for the baby and would probably have to be dismissed. Id. at 1756-57. Appellant then agreed to dismiss her, stating that she would probably be distracted anyway. Id. at 1757. Far from being an objection to releasing her, the record indicates this was a conversation about whether or not breast feeding was an adequate reason to release someone, particularly in light of Appellant's lack of knowledge on the subject. Again, after clarification regarding the matter, Appellant ultimately agreed to dismiss juror 809 and cannot show that he was prejudiced by this.

Not only did the marshal's conversations with the jurors not amount to examining them for their qualifications, this Court has adopted rules which permit a court administrator to excuse jurors for certain hardships. Of the three jurors specifically complained about in this appeal, one was released because he was not a qualified juror pursuant to NRS 6.010, and two were released – upon stipulation from the parties – because of (1) economic hardship, and (2) child care problems. The decision to excuse jurors for those reasons are permissibly left in the hands of a court administrator before the prospective juror is even near a courtroom in order to

"secure the proper and efficient administration of the business and affairs of the court." EDCR 6.50, 6.70. Appellant received much more than the rule entitles him to by being permitted to hear the jurors' reasoning, discuss it with the court and opposing counsel, and decide whether or not to agree to the dismissal. These jurors could have properly been dismissed by a court administrator; that Appellant received more than the rule provides for does not permit him to now receive a reversal of his conviction. This claim should be denied.

II. THE DISTRICT COURT DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS BY EXCLUDING IRRELEVANT EVIDENCE

Appellant next claims that the district court improperly relied on Nevada's rape shield statutes, NRS 50.090 and NRS 48.069, to exclude evidence of J.T.'s prior sexual encounters. AOB, 17-30. Appellant contends that the statutes do not apply to his case because he was not charged with sexual assault or statutory sexual seduction. However, the district court actually based its ruling on relevancy.

NRS 48.035 states in pertinent part:

> 1. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.
>
> 2. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

Evidence of J.T.'s prior victimization and prior sexual history was irrelevant in that it provided no probative value in the case. Beyond that, the danger of unfair prejudice from such evidence was great. In addition, such evidence did not contribute to Appellant's case and would have misled the jury as to the real issue in the case, which was whether Appellant kidnapped J.T., used her to produce pornography, and committed the crime of child abuse, neglect, or endangerment with substantial bodily and/or mental harm. The district court properly found that evidence of J.T.'s prior sexual encounters was irrelevant and prohibited Appellant from discussing them. Although the State did discuss the rape shield statutes in its motion in limine, and there was some discussion of the statutes throughout the course of the proceedings, the district court was clear that Appellant was prohibited from discussing the victim's prior sexual encounters because they were not relevant. 6AA1336-38 (holding that Appellant could introduce evidence of J.T.'s pre-existing psychological issues because they were relevant, but could not discuss specifics of her previous sexual encounters); 7AA1422 (stating that it was not relevant that J.T. was a victim in a prior case); 10AA2131 (stating that there had to be a nexus between J.T.'s prior sexual relationships and Appellant's case for it to be relevant); 11AA2320 (holding that Appellant could ask about J.T.'s prior therapy, but that she had previously run away was not relevant); 11AA2393 (informing Appellant that what J.T. did with other men is not relevant); 11AA2459-63 (finding that J.T.'s prior

conflicts with her mother were relevant to Appellant's defense, but that J.T.'s relationships with older men were not relevant to the charges against Appellant); 11AA2451 (finding that who gave J.T. an STD was not relevant to the charges against Appellant); 13AA2790 (finding that the specific instance of J.T.'s prior sexual encounter was not relevant to Appellant's case). Because the court's rulings were based on relevancy and not rape shield laws, Appellant's argument is without merit and should be denied.

As to Appellant's claim that the court's ruling prevented him from presenting a defense, such a claim is belied by the record. AOB, 20-23.

First, Appellant claims that evidence that J.T. had a history of running away to be with older men showed the Appellant did not kidnap J.T. by enticing her. AOB, 21. However, Appellant overlooks the fact that, in addition to enticement, the State could prove first-degree kidnapping by showing that he led, took away, carried away, or detained J.T. He has failed to show that the jury convicted him based on enticement.[2] Moreover, consent is not a defense to first-degree kidnapping. NRS 200.350(2). Even if Appellant could show that J.T. willingly left her home, he could not show that he did not convince her to do so, or that he did not detain her with the intent to keep her from her mother. Indeed, Appellant specifically instructed J.T. to

[2] Indeed, Appellant's citations are to two sections where the State specifically said it was ***not*** proceeding on a theory of enticement. AOB, 21; 11AA2323, 2354.

bring her social security card and birth certificate, picked her up in the early morning while her mother slept, and had her get in his car. 10AA2251-52. At that point he made her turn her phone off so it could not be tracked, and changed his phone number so he could also not be located. 10AA2253-54. Furthermore, he drove her away from her home to his home where he kept her hidden for approximately nine weeks. Id. During that time he would not let her turn her phone on or have anyone over, she did not attend school, he took her out of the house only a few times, and he had her dress in disguise when they did leave. 10AA2256, 2258, 2263, 2264-65. There was substantial evidence that he led, took, or carried her away and that was the pertinent evidence in this case. Evidence of what J.T. had done previously was not relevant to the charges against Appellant and was properly prohibited.

As to Appellant's complaint that he needed to introduce evidence of J.T.'s prior rape to show that her substantial mental harm was not caused by him, but by her prior rape, he has omitted the fact that the district court was very sensitive to this issue and permitted him to introduce evidence of J.T.'s mental status before her encounter with Appellant. AOB, 21-22. Indeed, the court ruled many times that Appellant could introduce evidence which showed that J.T. had been in therapy and had prior psychological issues. When ruling on the State's motion in limine, the court specifically stated "the psychological issues [J.T.] had before are relevant to the defense's case because I guess there's always a theory you could argue she's no

worse off after the [Appellant] incident than she was before, she was a mess before, and I think that's entirely relevant since it's an element of one of the charges. But again, at this point I don't think that the why is important." 6AA1338. Thus, the record shows that Appellant was not prevented from presenting his theory of the case – that he did not cause J.T.'s mental problems – he was simply prevented from explaining that her psychological problems stemmed from being raped previously. Indeed, Appellant asked J.T. if she was seeing a therapist before she met him, if she had previously run away, and if she had nightmares before staying with him. 11AA2317-18, 2351-52, 2425. Likewise, Appellant was able to ask J.T.'s mother if she had previously run away. 12AA2524. Moreover, the State also elicited information regarding J.T.'s prior mental health problems. J.T.'s mother testified that she and J.T. had gone to counseling together and J.T. had gone alone to counseling for a couple of years. 11AA2476. Because Appellant was not prevented from presenting his defense, this claim is without merit and should be denied.

As to Appellant's claim that he was entitled to present this information under a theory of res gestae, AOB, 22, he has overlooked that res gestate requires that he could not "describe the act in controversy or the crime charged without referring to the other act or crime…" NRS 48.035(3). He claims he had trouble explaining why he committed these crimes and that he was entitled to do so because kidnapping is a specific intent crime. AOB, 22-23. The intent the State was required to prove was

that he intended to keep, imprison, or confine J.T. from her parents, guardians, or other person having lawful custody of her, or to perpetrate upon her a crime. NRS 200.310(1). Appellant has failed to show what about J.T.'s past affected his decision making in such a way as to be at issue in the case. J.T.'s past victimization did not impact whether Appellant intended to keep J.T. from her mother, nor whether he intended to perpetrate a crime upon her. Because Appellant has failed to show that he was prevented from presenting a valid defense this claim is without merit and should be denied.

Appellant next claims that because he was prevented from discussing J.T.'s past sexual history his Confrontation Clause rights were violated. AOB, 23. This is without merit.

The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him," and gives the accused the opportunity to cross-examine all those who "bear testimony" against him. Crawford v. Washington, 541 U.S. 36, 51, 124 S.Ct. 1354, 1364 (2004). The elements of confrontation include physical presence, oath, cross-examination, and observation of demeanor by the trier of fact. Maryland v. Craig, 497 U.S. 836, 846, 110 S.Ct. 3157, 3163 (1990) (internal citations omitted). However, the evidence elicited must still comply with other applicable laws and rules. This Court generally reviews a district court's decision to admit evidence for an abuse of

discretion; however, various issues regarding the admissibility of evidence that implicate constitutional rights are reviewed as mixed questions of law and fact subject to de novo review. Hernandez v. State, 124 Nev. 60, 188 P.3d 1126 (2008); see, e.g., Rosky v. State, 121 Nev. 184, 190-91, 111 P.3d 690, 694 (2005) (adopting the mixed question of law and fact standard for reviewing a district court's decision regarding the admissibility of a criminal defendant's statement offered by the State); Johnson v. State, 118 Nev. 787, 794, 59 P.3d 450, 455 (2002) ("Suppression issues present mixed questions of law and fact.").

Appellant claims he was not sufficiently able to cross-examine J.T. and her mother regarding the kidnapping because he was not allowed to ask about previous times J.T. had responded to Craigslist ads or if she had previously run away to be with an older man. However, he has failed to address why this was relevant. The district court properly ruled that Appellant could question J.T. and her mother about her previous actions, just not ***why*** she took them. Thus, the jury was aware that J.T. had previously run away, and could have accepted Appellant's argument that she did so again here. However, her reasoning for running away previously was not relevant, and the district court properly excluded such testimony.

Appellant next claims that he was not permitted to ask J.T. or her mother about a 19 year old boyfriend of J.T.'s. He points out that Dr. Nwapa's letter stated J.T. tried to jump off the balcony of her home because of the alleged 19 year old

boyfriend, but that J.T. and her mother testified it was because of Appellant. AOB, 25. However, he has failed to indicate anywhere in the record showing that he attempted to impeach either of them using this information. Indeed, the section of the record he directs this Court to only discusses that he was not permitted to question J.T. about an STD that she had. AOB, 25; 11AA2390-99. Because Appellant did not seek to introduce testimony of the alleged 19 year old boyfriend, the court could not have erred.

To the extent Appellant complains that he was not permitted to question J.T. about the STD, he has again failed to show why such would be relevant. None of the charges related to an STD, and whether she had one or not, and whether it was from Appellant or not, was irrelevant.

Appellant next complains that he was not permitted to ask J.T. about why she was seeing a therapist before meeting him. Again, the district court properly ruled that the fact J.T. was in therapy was relevant to her mental health and therefore to whether or not Appellant caused substantial harm to such, but that ***why*** she was in therapy was not relevant. Appellant was permitted to question J.T. regarding her mental health prior to meeting him, including the fact that she was in therapy, but he was not permitted to elicit information regarding ***why*** she was in therapy because it was not relevant. The district court's ruling was proper.

Appellant next claims that one of the pictures taken by J.T. was pre-existing (and therefore not taken at his direction) and that he was not permitted to cross-examine her on this issue. This is belied by the record. Appellant initially asked J.T. if she had previously taken a picture of her breasts prior to meeting him. 11AA2366. The State objected as to relevance, and the district court sustained the objection and told Appellant to ask the question in a different way. Id. at 2366-67. Appellant then asked J.T. if she had previously taken a picture like this and she denied doing so. Id. at 2367-68. Rather than continue his cross-examination Appellant chose to accept her answer and move on because he did not want to upset her. Id. at 2368. That Appellant made the strategic choice to avoid the subject rather than continue and risk upsetting the victim in front of the jury was a strategic choice he made while defending his case; it was not a violation of his right to confrontation.

Next, Appellant argues that because the State asked J.T. if Appellant asked her questions regarding her virginity and whether or not she liked sex he was therefore entitled to ask her answers to those questions. AOB, 26. He claims her answers were relevant to show his mental state in pursuing J.T. and to "dispel the false impression conveyed on direct examination that [his] questions were unwelcome." AOB, 26. This is without merit. Whether J.T. had previously had sex, and her feelings about sex, were not relevant to Appellant's case. None of the crimes he was charged with could have been negated by J.T.'s virginity or feelings

about sex. Appellant's attempt to delve into J.T.'s sexual history was not relevant and the district court properly excluded such questioning. The State's questions, however, were relevant in that they laid a foundation to ask J.T. about the photographs she sent Appellant and showed the progression of their relationship. 10AA2213. Appellant was free to question her regarding other conversations they had, whether she wanted to stay at his house for two months, and perhaps even whether or not the questions regarding her virginity were welcome. However, whether or not she was a virgin and whether or not she liked sex were not relevant to these crimes and the district court did not err in so ruling.

Appellant next addresses the question of the STD head on. As discussed supra, Appellant has failed to show this evidence was relevant. He claims that the State relied on the STD information in closing to argue that he was liable for substantial bodily harm; this is belied by the record. Although the State did say that the evidence supported substantial bodily harm, it did not say that the charge was supported by the STD. 14AA3027. Indeed, that statement was made directly after commenting on the substantial mental harm caused by Appellant and may well have been a misstatement of bodily harm rather than mental harm. Id. In fact, the State's entire closing argument related to the child abuse centered around the mental harm J.T. suffered. 14AA3020-27. Aside from the last sentence wherein the State mistakenly said that Appellant is guilty of child abuse, neglect or endangerment with

substantial bodily harm the State never mentioned bodily harm. 10AA3027. The State discussed J.T.'s lack of concern for her family after returning from Appellant's, J.T.'s desire to return to Appellant, her threat of suicide, her time at the long-term treatment facility, and her difficulties with school that arose after being kidnapped, all while discussing the concept of substantial mental harm. 10AA3024-27. However, the State never mentioned the STD or any other bodily harm suffered by J.T. and the fact that the State mistakenly said "bodily" rather than "mental," without mentioning the STD, does not show that the State relied on the evidence in charging Appellant.

Moreover, to the extent Appellant complains because the State broached the issue of the STD, the State explained to the district court that it did so in order to explain why J.T. had a change of heart in talking to the State about this matter. 11AA2448-49. Indeed, the messages from Appellant after J.T. returned from Willow Springs showed that J.T. was upset about the STD and it was shortly after those messages that J.T. truly opened up by informing her mother and the police that Appellant was contacting her. 10AA2307-11. Because the court was ruling evidence about the STD was not relevant, the State explained why it believed the evidence was relevant at the time it was brought up. 11AA2448-49. It was important for the jury to understand J.T.'s change in attitude from protecting Appellant at the preliminary hearing to being cooperative at trial and was relevant for that purpose,

however, it was not relevant to show whether or not Appellant actually gave the STD to J.T. In order to handle the situation, the district court decided to give a limiting instruction to the jury. Id.; 5AA1154. Because the State had a relevant reason for discussing the evidence and Appellant did not, the district court did not err in preventing Appellant from questioning J.T. regarding who gave her the STD.

Finally, Appellant claims that he was prevented from asking J.T.'s doctor if she ever disclosed harm by anyone else. AOB, 28. Appellant began this line of questioning by asking the doctor if J.T. had talked to her "about any other situation, or anyone else that was involved in her past about – that may have influenced…some kind of –" 12AA2695. It was at that point the State asked to approach, in order to find out where Appellant was going with the questioning. Id. at 2696. The parties and the court then discussed exactly what information Appellant was trying to get in and how best to do so. Id. at 2696-2700. Appellant asked if he could ask whether there was a previous incident, and the State's position was that he could not. Id. at 2699. The court stated that J.T.'s prior mental health treatment was relevant, and Appellant asked if he could ask if she had previously received mental health treatment because "that's all [he wanted] to ask." Id. at 2699-70. The State did not object and the court permitted him to continue. Appellant was properly permitted to question J.T.'s doctor regarding her previous mental health treatment. Any discussion of specific instances of harm by someone else would have been irrelevant

as to the crimes Appellant was charged with. J.T.'s mental state and the extent to which Appellant harmed her were relevant, but the events leading to her mental state prior to meeting Appellant were irrelevant and properly excluded.

Appellant claims that preventing him from discussing specific instances of past abuse J.T. suffered was improper and it cannot be harmless error. Assuming, *arguendo*, that the evidence excluded was relevant and was improperly excluded, it was harmless. There was overwhelming evidence in this case that Appellant prevented J.T. from leaving by forbidding her from using her phone, keeping her from going to school, not allowing her to go outside, not allowing her to have friends over, and having her dress in disguise the few times she was allowed to leave the house. These actions caused her substantial mental harm. After leaving Appellant's house, J.T. threatened to kill herself, and required a significant amount of therapy. This included learning how to reintegrate into society because she had been in isolation for so long. 10AA2299-2300. None of Appellant's proposed evidence would have overcome that. There was, without doubt, evidence that J.T. had previously suffered mental harm, however, the jury was privy to that information. The jury knew she had mental problems before meeting Appellant; explaining exactly ***how*** she was previously mentally harmed would not change the fact that the jury found she suffered further mental harm due to Appellant's actions.

Accordingly, the outcome would not have been different and any error, to the extent it exists, was harmless.

III. THE PHOTOGRAPHS FROM THIS CASE DEPICTED SEXUAL CONDUCT AND/OR SEXUAL PORTRAYAL AND NRS 200.700(4) IS NOT UNCONSTITUTIONAL

Appellant begins by claiming that the photographs discussed in Counts 3 and 5 did not portray sexual conduct and therefore his convictions on those counts must be reversed. AOB, 30-31. What Appellant fails to acknowledge in this section is that for those counts he was charged with using, encouraging, enticing, or permitting a minor to simulate or engage in sexual conduct ***and/or to be the subject of a sexual portrayal***. 2AA252-53. Accordingly, even if the pictures did not depict sexual conduct, he could have still been properly convicted on the basis of the photographs depicting sexual portrayal. Nonetheless, the photographs did contain sexual conduct and therefore he could have been properly convicted under either theory.

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 shown to the jury included J.T. in her underwear and bra, a photo of her in her underwear as she was bent over a chair exposing her buttocks, a photo of her vaginal area with her legs spread, J.T.'s bare breasts, and J.T.'s bare buttocks. 14AA3030-31. Moreover, Appellant asked J.T. to send him "sexy" pictures, and directed her on how to pose

to make them sexier for his viewing pleasure, and there was no evidence that these pictures had a serious literary, artistic, political or scientific value. 10AA2219-20. Thus, the evidence showed that Appellant directed J.T. to take the photos in order to appeal to his prurient interest in sex, and the convictions are therefore proper under a theory of sexual portrayal.

Additionally, NRS 200.700(3) defines sexual conduct 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 manipulated or inserted by a person into the genital or anal opening of the body of another. The photographs complained of by Appellant are ones of J.T.'s vaginal area. She spread her thighs and took a photo of just her crotch at the direction of Appellant. It should be noted that she is wearing underwear, however, her thighs are spread and her pubic hair can be seen. This is absolutely a lewd exhibition of the genitals and meets the statutory requirement. It is completely lewd for a child to spread her legs and take a photo of her vagina, clothed or not.

Therefore, under a theory of either sexual portrayal or sexual conduct these photographs meet the definition of Unlawful Use of a Minor in the Production of Pornography and the convictions should stand.

Appellant next argues that NRS 200.700(4), which defines sexual portrayal, is unconstitutional and therefore his convictions on Counts 3-6 should be reversed. AOB, 32-47. This Court recently addressed this issue in Shue v. State, 407 P.3d 332 (2017), and found that NRS 200.700(4) is not unconstitutional.

This Court reviews the constitutionality of a statute de novo. Berry v. State, 125 Nev. 265, 279, 212 P.3d 1085, 1095 (2009) (*citing* Silvar v. Eighth Judicial Dist. Court, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006)). However, this Court starts with the presumption that a statute is constitutional. Id. This Court will not invalidate it unless the party challenging the statute makes a "clear showing of invalidity." State v. Castaneda, 126 Nev. __, __, 245 P.3d 550, 552 (2010). Further, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." Id. (quoting Hooper v. California, 155 U.S. 648, 657, 15 S.Ct. 207, 211 (1895)).

However, Appellant failed to raise two of his three claims below.[3] That failure waives all but plain error. Maestas v. State, 128 Nev. __, __, 275 P.3d 74, 89 (2012). This Court reviews unpreserved constitutional errors for plain error. Martinorellan v. State, 131 Nev. __, __, 343 P.3d 590, 593 (Nev. 2015). Plain error is "so

[3] Appellant states that he challenged the constitutionality of NRS 200.700(4) in his pretrial Petition for Writ of Habeas Corpus. AOB, 30. However, he only challenged the constitutionality of NRS 200.700(4) as being vague; he did not raise a facial challenge or argue that it is overbroad. 2AA290-92.

unmistakable that it reveals itself by a casual inspection of the record." Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995). A defendant has the burden to demonstrate that the error affected his substantial rights, by causing actual prejudice or a miscarriage of justice. Martinorellan, 131 Nev. at __, 343 P.3d at 591. Thus, reversal for plain error is only warranted if the error is readily apparent and defendant demonstrates that the error is prejudicial to his substantial rights. Id.

Here, there is no plain error because a casual inspection of NRS 200.700(4) does not reveal the statute unconstitutional. To the contrary, as is apparent from Appellant's ten pages of argument as to his two unpreserved claims, any claim that NRS 200.700(4) is unconstitutional requires detailed and thorough analysis of case law and legislative history. Furthermore, Appellant fails to demonstrate actual prejudice because NRS 200.700(4) is constitutional.

1. NRS 200.700(4) is not facially invalid under the First Amendment

Appellant argues that prohibiting creating or possessing images of minors as the subject of a sexual portrayal in a performance is an unconstitutional content-based restriction upon speech. AOB, 34-41. To support his argument Appellant cites to R.A.V. v. St. Paul, 505 U.S. 377, 112 S.Ct. 2538 (1992) for the proposition that the First Amendment prohibits the government from criminalizing speech or expressive conduct because it disapproves of the ideas expressed.. However, Appellant fails to acknowledge that some areas of speech, consistent with the First

Amendment, can be regulated because of their constitutionally proscribable content. Id. at 379, 112 S. Ct at 2541. Although First Amendment speech protections are far reaching, it has been long recognized that free speech is not an absolute right devoid of limitations and restrictions. Chalpinsky v. New Hampshire, 315 U.S. 568, 571, 62 S.Ct. 766, 769 (1942). There are well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problems. Id.

There are two types of pornography that receive no First Amendment protection; obscenity and child pornography. See, N.Y. v. Ferber, 458 U.S. 747, 102 S.Ct. 3348 (1982); Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304 (1957). In Roth, the U.S. Supreme Court determined that obscenity is not within the area of constitutionally protected speech or press. 354 U.S. at 485, 77 S.Ct. at 1309. The U.S. Supreme Court reexamined the obscenity standard in Miller v. California, 413 U.S. 15, 24, 93 S.Ct. 2607, 2614-15 (1973) and ruled obscenity is limited to works that, when taken as whole, appeal to the prurient interest in sex, portray sexual conduct in a patently offensive way and have no serious literary, artistic, political or scientific value.

In Ferber, the U.S. Supreme Court, in a unanimous decision, held that child pornography was far outside the First Amendment protection. 458 U.S. at 749 102 S.Ct. at 3350. Ferber upheld a statute proscribing the dissemination of child

pornography regardless of whether the material was obscene under Miller. Id. at 761, 102 S. Ct at 3356. The Court found that child pornography could be censored without violating the First Amendment even if it did not meet the definition of obscene. Id. This was so because the government had a compelling interest in preventing sexual exploitation of children. Id. at 756-57, 102 S. Ct at 3354 ("safeguarding the physical and psychological well-being of a minor is a compelling interest"). The U.S. Supreme Court pointed out that it had approved of legislation aimed at protecting the physical and emotional well-being of youth even when the laws operated in the sensitive area of a constitutionally protected right. Id. at 757, 102 S. Ct at 3354.

Appellant erroneously argues that sexual portrayal of a minor falls inside the protection of the First Amendment because sexual portrayal is not limited to works that visually depict sexual conduct involving children. AOB, 35-37. Appellant contends that United States v. Stevens, 559 U.S. 460, 130 S.Ct. 1577 (2010), requires that a photograph must be an integral part of conduct in violation of a valid criminal statute in order to be considered pornography. However, Stevens did not hold that each case must be evaluated to see if the photograph is related to an underlying criminal statute. Instead, Stevens explained 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."

Stevens, 559 U.S. at 471, 130 S.Ct. at 1587 (internal citations omitted).[4] Thus, the Stevens Court did not state that each photograph must be evaluated, but rather explained its reasoning for removing child pornography from First Amendment protection.

Additionally, the U.S. Supreme Court in Ferber specifically ruled that states are entitled to greater leeway in regulating pornographic depictions of children than images of adults, emphasizing the state's compelling interest in protecting children who may be exploited or abused in the production of child pornography. Id. at 756, 102 S. Ct at 3354. The language defining sexual portrayal states that the image must appeal to the prurient interest in sex. NRS 200.700(4). The intent of the language was to target those images that might not explicitly portray a minor engaging in sexual conduct but are nonetheless pornographic depictions of minors because of the obscene nature of the image.[5] See, Hearing on A.B. 405 Before the Senate Comm.

[4] The State notes that consensual intercourse and using a minor to produce pornography are not mutually exclusive as Appellant would like this Court to believe. J.T. was a minor when these photographs were taken, and is entitled to the same protections as other minor children.

[5] Nevada's obscenity statute, NRS 201.235, uses the words "prurient interest" and the phrase "lacks serious literary, artistic, political or scientific value" when defining obscenity and this same language is found in the definition of "sexual portrayal" in the child pornography statutes. NRS 200.700(4).

on Judiciary, 68th Leg. (Nev., June 14, 1995). Therefore, sexual portrayal of minors as defined by NRS 200.700(4) is a proper regulation of pornographic depictions of children as it achieves the States' compelling interest of protecting children. Furthermore, sexual portrayal of children is outside the protection of the First Amendment because the language includes the element of obscenity, which the U.S. Supreme Court has held to be an unprotected class of speech. Miller, 413 U.S. at 16, 93 S.Ct. at 2610.

Moreover, the discussion from Stevens is nothing more than judicial dictum analyzing various concerns and is not essential to the holding of that case. Indeed, the Stevens Court was merely explaining previous examples of speech which are outside the protection of the First Amendment. As dictum, this "test" is not binding on this Court. See Black v. Colvin, 142 F. Supp. 3d 390, 395 (E.D. Pa. 2015) ("Lower courts are not bound by dicta." (*citing* United States v. Warren, 338 F.3d 258, 265 (3d Cir. 2003))).

Finally, similar statutes have been found constitutional. In Commonwealth v. Provost, 418 Mass. 416, 420, 636 N.E.2d 1312, 1315 (1994) the defense argued that a statute that made it illegal to take photographs of partially nude children with lascivious intent was unconstitutional in that it criminalized the depiction of pure nudity. The Court held that even though the pictures were not child pornography under Ferber, the statute was still constitutional and did not violate the First

amendment. Id. The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. Id. at 420-21, 636 N.E. 2d at 1315. When "'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.'" Id., *citing* Texas v. Johnson, 491 U.S. 397, 406, 105 L. Ed. 2d 342, 109 S.Ct. 2533 (1989). Provost concluded that the compelling interest in protecting children from exploitation was both unrelated to the suppression of expression and sufficiently compelling. Id. at 421, 636 N.E. at 1315.

The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. Farber, 458 U.S. at 757, 102 S.Ct. at 3055. Statutes with a protective purpose should be liberally construed in order to effectuate the benefits intended to be obtained and this Court should not overrule its holding in Shue. Cote H. v. Eighth Judicial Dist. Court, 124 Nev. 36, 40, 175 P.3d 906, 908 (2008).

2. NRS 200.700(4) is not unconstitutionally overbroad

Appellant argues that NRS 200.700(4) is overbroad because it allegedly makes any legitimate image of minors child pornography, if the images appeal to a pedophile, and therefore urges this Court to overrule its holding in Shue. AOB, 41-44.

The U.S. Supreme Court has held that a statute may be overbroad if in its reach it prohibits constitutionally protected conduct. Grayned v. Rockford, 408 U.S. 104, 114, 92 S.Ct. 2294, 2302 (1972). In considering an overbreadth challenge, a court must decide, "whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." Id. at 115, 92 S.Ct. at 2302. However, when a law regulates arguably expressive conduct, "the scope of the [law] does not render it unconstitutional unless its overbreadth is not only real, but substantial as well, judged in relation to the [law's] plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601, 615, 93 S.Ct. 2908 (1973). A statute is subjected to less scrutiny where the behavior sought to be prohibited by the State moves from "pure speech" toward conduct "and that conduct – even if expressive – falls within the scope of otherwise valid criminal laws that reflect legitimate state interests." Id. The First Amendment overbreadth doctrine is "strong medicine"; it has been invoked by the courts with hesitation and "only as a last resort". Ferber, 458 U.S. at 769, 102 S.Ct. 3350. Even if a portion of the law proscribes protected expression, an overbreadth challenge will fail if the "'remainder of the statute... covers a whole range of easily identifiable and constitutionally proscribable... conduct.'" Id. at 770 n. 25, 102 S.Ct. at 3351. States have a wider latitude in regulating child pornography than depictions of adults, and that the possible danger

of infringing on serious literary, scientific, or educational works does not make a statute unconstitutionally overbroad. Id. at 773, 102 S.Ct. at 3363.

In this case, sexual portrayal is specifically defined as depictions of minors that appeal to prurient interest in sex. NRS 200.700(4). Furthermore, the statue explicitly includes language that exempts material that have serious literary, artistic, political or scientific value. Id. That language narrows the statute's reach to exclude protected conduct. Although some protected expression could possibly be reached by the statute, this tiny fraction of material could be protected by a case-by-case analysis. Ferber, 485 U.S.at 773-74, 102 S.Ct. at 3363 (whatever overbreadth may exist should be cured through case-by-case analysis). The legitimate reach of the statute outweighs its arguably impermissible applications. Therefore, the statute is not substantially overbroad and this claim should be denied.

3. NRS 200.700(4) is not unconstitutionally vague

"[T]he Due Process Clause of the Fourteenth Amendment prohibits the states from holding an individual 'criminally responsible for conduct which he could not reasonably understand to be proscribed.'" Sheriff v. Martin, 99 Nev. 336, 339, 662 P.2d 634, 636 (1983) (quoting United States v. Harris, 347 U.S. 612, 617, 74 S.Ct. 808 (1954)). A statute is void for vagueness, and therefore facially unconstitutional, if the statute both: (1) fails to provide notice sufficient to enable ordinary people to understand what conduct is prohibited; and (2) authorizes or encourages arbitrary

and discriminatory enforcement." City of Las Vegas v. Dist. Ct., 118 Nev. 859, 862, 59 P.3d 477, 480 (2002). However, a statute gives sufficient notice of proscribed conduct when, viewing the context of the entire statute, the words used have a well-settled and ordinarily understood meaning. Nelson v. State, 123 Nev. 534, 540-41, 170 P.3d 517, 522 (2007). When a term or offense has not been defined by the Legislature, courts will generally look to the common law definitions of the related term or offense. Ranson v. State, 99 Nev. 766, 767, 670 P.2d 574, 575 (1983).

Appellant argues that Nevada's definition of sexual portrayal fails to provide adequate notice of prohibited conduct. AOB 45. Appellant does not argue that the statute has a divergent meaning such that it precludes reasonable notice of proscribed conduct. Appellant contends that the average person would not understand what conduct was prohibited by the terms "sexual portrayal" and the definition lacks any objective standards. Id. However, the statute at issue is not so imprecise that vagueness permeates its text. Indeed, the term "prurient" has a common ordinary meaning relating to lust or lascivious desire. Webster's Encyclopedic Unabridged Dictionary (1996) p. 1558. Any person of ordinary intelligence has full and fair warning that portrayals of children that connect children to a sexual desire are prohibited by law. Therefore, Appellant fails to meet his burden that the statute is unconstitutionally vague and this claim should be denied.

Additionally, Appellant's argument that parents who take an innocent, naked, photograph of their child could be prosecuted and convicted if the most sensitive citizen of Nevada believes the image is sexually gratifying is without merit. AOB, 45-46. First, Appellant's various hypotheticals are irrelevant attempts to distract the Court from his conduct. The U.S. Supreme Court held that a facial-vagueness challenge is appropriate only if the statute implicates constitutionally protected conduct or "is impermissibly vague in all of its applications." Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495, 102 S.Ct. 1186, 1191 (1982). However, "[a] challenger who has engaged in conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." Sheriff v. Martin, 99 Nev. 336, 340, 662 P.2d 634, 637 (1983). Thus, a reviewing court must first, "examine the complainant's conduct before analyzing other hypothetical applications of the law." Hoffman Estates, 455 U.S. at 495, 102 S.Ct. at 1191. Second, the Legislature specially included the language of "appeals to the prurient interest in sex" because it considers a community objective standard and does not encompass within it parents taking innocent pictures of their children. See, Hearing on A.B. 405 Before the Senate Comm. on Judiciary, 68th Leg. (Nev., April 12 and June 14, 1995).

IV. THE DISTRICT COURT DID NOT ERR IN REQUIRING APPELLANT TO PAY TRAVEL FEES FOR HIS WITNESS

NRS 50.225 entitles a witness to be paid a $25 fee for testifying, as well as travel expenses for traveling to the court. Moreover, NRS 174.234 states:

> 1. Except as otherwise provided in this section, not less than 5 judicial days before trial or at such other time as the court directs:
>
> (a) If the defendant will be tried for one or more offenses that are punishable as a gross misdemeanor or felony:
>
> (1) The defendant shall file and serve upon the prosecuting attorney a written notice containing the names and last known addresses of all witnesses the defendant intends to call during the case in chief of the defendant; and
>
> (2) The prosecuting attorney shall file and serve upon the defendant a written notice containing the names and last known addresses of all witnesses the prosecuting attorney intends to call during the case in chief of the State.

Appellant now claims that because he was indigent, the district court should have *sua sponte* paid the required expenses for J.T. to appear as a witness in his case-in-chief after he failed to provide notice of her testimony. AOB, 48-51. This is without merit and this claim should be denied.

On the third day of trial Appellant informed the district court and the State that he wanted J.T. to appear as a witness in his case-in-chief. 10AA2012. At first the court thought he wanted to do so simply so he could engage in a direct examination and not be bound by the rules of cross-examination. Id. at 2011-12. The State agreed to allow Appellant to exceed the scope of its direct examination so long as the information sought was relevant. Id. However, Appellant explained, he

wanted more time to prepare. Id. at 2012. The State objected because he did not provide a list of witnesses, and it argued that Appellant had sufficient time to prepare given the length the trial had been pending. Id. at 2012, 2014. The court then informed Appellant that he was responsible for the financial aspect of getting witnesses to court, and that regardless of his self-representation he was required to follow the rules regarding expenses and subpoenas. Id. at 2012-2014. Rather than make a motion for his expenses to be provided by the court, Appellant chose to complain about how difficult it was to represent himself. Id. at 2015-16. Appellant never requested that the court provide travel expenses for his witness, yet now seems to think the district court should have simply volunteered to do so. He claims that because he was awarded "reasonable costs" associated with his defense, the court should have *sua sponte* volunteered to cover the last-minute travel expenses of a witness who had not been noticed. A reasonable cost related to this witness would have been to prepare for trial, notice her as a witness, subpoena her, and make the necessary travel arrangements. Instead, Appellant simply showed up to court on the third day of trial, stated that he needed more time to prepare for her (after trial had been pending for four years), and that he wanted her there for his case-in-chief. Appellant fulfilled none of the requirements for obtaining a witness, and it was not the responsibility of the district court to volunteer to cover the costs associated with Appellant's lack of diligence.

Moreover, Appellant had an opportunity to conduct meaningful cross-examination of the victim. Indeed, recognizing Appellant's pro se status, the State agreed to not object to Appellant exceeding the scope of its direct examination in order to allow him as much access to the witness as possible. In light of the fact that Appellant failed to prepare in any way to present J.T. as a witness in his case in chief, the opportunity to not be bound by the rules of evidence and examination and to be allowed to go outside the scope of direct in order to fully engage with J.T. was eminently reasonable.

Although the State and the district court attempted to make modifications in light of the fact that Appellant was representing himself, he was nonetheless required to follow the necessary law and procedures. That he failed to do so, and the district court did not *sua sponte* fix his mistakes, is not error on behalf of the court and this claim should be denied.

V. THERE WAS NO PROSECUTORIAL MISCONDUCT

Claims of prosecutorial misconduct are analyzed under a two-step analysis. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). First, this Court determines if the conduct was improper. Id. Second, the Court determines whether misconduct warrants reversal. Id. As to the first factor, argument is not misconduct unless "the remarks … were 'patently prejudicial.'" Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (quoting, Libby v. State, 109 Nev. 905, 911, 859

P.2d 1050, 1054 (1993)). Notably, "statements by a prosecutor, in argument, … made as a deduction or conclusion from the evidence introduced in the trial are permissible and unobjectionable." Parker v. State, 109 Nev. 383, 392, 849 P.2d 1062, 1068 (1993) (quoting, Collins v. State, 87 Nev. 436, 439, 488 P.2d 544, 545 (1971)). Further, the State may respond to defense theories and arguments. Williams v. State, 113 Nev. 1008, 1018-19, 945 P.2d 438, 444-45 (1997), receded from on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

With respect to the second step, reversal is not warranted if the misconduct was harmless error, which depends on whether it was of constitutional dimension. Valdez, 124 Nev. at 1188, 196 P.3d at 476. Error of a constitutional dimension requires impermissible comment on the exercise of a specific constitutional right, or 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." Id. at 1189, 196 P.3d at 477. If the error is not of a constitutional dimension, reversal will only occur if the error substantially affected the jury's verdict. Id.

Importantly, a defendant is entitled to a fair trial, not a perfect one, and therefore "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone[.]" United States v. Young, 470 U.S. 1, 11, 105 S.Ct. 1038, 1044 (1985). Accord, Leonard, 117 Nev. at 81, 17 P.3d at 414. "[W]here evidence of guilt is overwhelming, even aggravated prosecutorial

misconduct may constitute harmless error." Smith v. State, 120 Nev. 944, 948, 102 P.3d 569, 572 (2004) (*citing* King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000)). In determining prejudice, this Court considers whether a comment had: (1) a prejudicial impact on the verdict when considered in the context of the trial as a whole; or (2) seriously affects the integrity or public reputation of the judicial proceedings. Rose, 123 Nev. at 208-209, 163 P.3d at 418.

Here, Appellant claims the State engaged in prosecutorial misconduct due to statements made during voir dire, allegedly using a juror to educate the jury, and allegedly commenting on Appellant's constitutional rights. Each of these claims is without merit.

Regarding voir dire, Appellant complains because the State gave the jury an introduction to the case before jury selection began, as requested by the judge. AOB, 53-55. As an initial matter, Appellant did not object to the State's introduction and therefore this matter is not preserved for appellate review. This Court has consistently reaffirmed that "[t]he failure to specifically object on the grounds urged on appeal preclude[s] appellate consideration on the grounds not raised below." Pantano v. State, 122 Nev. 782, 795 n. 28, 138 P.3d 477, 486 n. 28 (2006) (quotation omitted). Moreover, appellate review requires that the district court be given a chance to rule on the legal and constitutional questions involved. Lizotte v. State, 102 Nev. 238, 239-40, 720 P.2d 1212, 1214 (1986). Where an appellant fails

to preserve an issue on appeal, this Court reviews the issue for plain error. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). In order to demonstrate plain error, Appellant must show that: (1) there was an error; (2) that the error was plain; and (3) that the error affected his substantial rights. Id.; see also NRS 178.602. To show that an error affected his substantial rights, a defendant must demonstrate "actual prejudice or a miscarriage of justice." Id. Appellant has failed to do so here.

When the State objected to Appellant's introduction and the district court sustained the objection, Appellant argued with the court regarding its ruling. 8AA1780. He now claims this Court should construe that as an objection to the State's introduction. AOB, 55. However, the record is clear that he did not see anything wrong with the State's introduction, he was instead unhappy that he could not exceed the bounds of introduction and engage in argument. Because of that, this claim should be reviewed only for plain error.

Appellant has included verbatim the section of the State's introduction to which he now objects. A plain reading of the State's introduction shows no "highly inflammatory language," other than describing what is a highly inflammatory act. The State did not present any argument, but rather told the jury what the case was about. Specifically, that Appellant and the victim met online, they entered a dating relationship, Appellant caused J.T. to take and send nude and sexually explicit photos, Appellant picked J.T. up from the family home one night and took her to

live at his house for about nine weeks while her family searched for her, and that while there she was not able to contact anyone or go to school, and that she was caused to perform sexual acts while there. The State was asked to tell the jury what the case was about, presumably to help them have an overall understanding of the proceedings. The introduction also serves to inform the jury about the charges, including a limited amount of facts related to those charges, so that both sides may gauge if a juror is appropriate for this type of case. Appellant did not object while the State was presenting its introduction. When Appellant was given an opportunity to introduce himself to the jury, he did not tell the jury what the case was about, but rather tried to discuss specific pieces of evidence which would be presented and disparage the State's case. Appellant argued:

> A lot of things the State has stated is designed to create an image in your mind to look at me as a person who has done horrible things. Now, keep in mind, when they say pictures of a nude person, the picture's not – or actually exhibits –

8AA1779. It was at that point the State objected, because Appellant was no longer giving an introduction or even an overview of the case, but rather was delving into specific pieces of evidence and arguing about the State's portrayal of him. Because Appellant had ceased introducing himself and had begun arguing, the court did not err in sustaining the State's objection. Likewise, because the State presented a

proper introduction as to the nature of the case, it did not engage in prosecutorial misconduct.

Appellant next claims that during voir dire the State used its introduction to choose a jury with a predisposition. AOB, 55. This is again unpreserved for appeal and should only be examined for plain error. It is furthermore without merit.

As the State explained to the jurors, the point of voir dire is to ensure each side receives a fair jury. The State and the jurors knew the nature of the case, and ensuring that there were no jurors seated who would not be able to overlook such facts was paramount. Rather than going through each charge, the State asked if any juror had a "strong reaction or a gut reaction right away" to its introduction of the case. 9AA1907. This is a question that is asked in almost every jury trial. It is an important question because if a juror is so affected by the charge that they feel they cannot be fair and impartial both sides need to know that information upfront. Appellant argues this was the State impermissibly seeking a commitment from the jurors, however, it is clear from the record that the State did not seek a commitment from the jurors. Instead, the State wished to find out if any of the jurors could not overcome their bias regarding the facts of the case. This was not prosecutorial misconduct, but was instead proper voir dire in order to guarantee a fair jury. Accordingly, this claim is without merit and should be denied.

Appellant also, in a footnote, discusses some comments the jurors made regarding their initial reaction. AOB, 56. To the extent Appellant intends to imply that he did not receive an unbiased jury, this is without merit. Juror 607, Ms. Rafferty, said she had a gut reaction, but also said that despite that gut reaction it would not be fair if she did not hear both sides. 9AA1908-09. Juror 756, Ms. Jensen, stated that she had an initial reaction but that she would be able to base her opinion on the evidence presented in court and make a finding of not guilty if the evidence did not support a finding of guilt. 9AA1910-12. Juror 646, Ms. Cisneros, stated that she had an initial reaction because she is a teacher. 9AA1912. However, she stated that she does not hold teachers to a higher standard. 9AA1913-14. Juror 709, Ms. Silvasy, initially stated that she had heard of the case on the news and was concerned about whether she could be "true to the system." 9AA1917. However, she also said she understood that the media often gets the facts wrong and that she could rely only on what she heard in court. 9AA1917-18. She further stated that if the State did not prove the charges beyond a reasonable doubt, and if she had doubts, she would raise her concerns. 9AA1918-19. Juror 721, Ms. Peete, stated that she had an "eerie feeling," and did not know if she could be fair to Appellant. 9AA1922. The State acknowledged this type of case could be difficult to listen to, but that Appellant had a right to a fair jury. 9AA1922-23. Ms. Peete stated again that it would be difficult for her to hear the evidence, but that "[she] would try to be [inaudible] to be right is

right and wrong is wrong." 9AA1923. Because she was willing to listen to the evidence presented and decide what was right and what was wrong, she was fit to sit on the jury. Juror 740, Ms. Thomas, stated that she hoped the charges were not true, but that she would not have a problem being fair to both sides. 9AA1924. Based on the jurors' follow-up comments, they were all appropriate members of the jury and, to the extent Appellant argues such, he did not have a biased jury.

Appellant next complains about the State allegedly "indoctrinating" the jury by asking a juror about grooming. AOB, 56-59. Again, this claim was not preserved for appellate review and should be reviewed only for plain error. The State asked the entire prospective jury panel if any of them had heard of grooming. One, in particular, indicated that she had and the State asked her what she knew. 9AA1986-88. The State was permitted to inquire as to the jury's knowledge and topics related to the case, including what they knew about grooming. Appellant claims this was indoctrination or persuasion, AOB, 57, but the State did not engage in any argument, ask the jury to made any findings, or present improper evidence. The State asked a juror about knowledge she had regarding a topic that might come up. It was not improper, and certainly not plainly so.

Appellant further complains that the State engaged in prosecutorial misconduct by using the juror's definition of grooming during closing. AOB, 58. The State did mention in closing that a juror had given a definition of grooming.

14AA3001. However, the juror's definition was essentially an example of grooming whereas the State's closing focused on the big picture idea of grooming. Compare 9AA1987 ("For example, a teacher might ask a student to stay after and maybe ask leading questions…then maybe compliment them") with 14AA3001 ("one of the school teachers actually gave us sort of a definition of grooming, of sort of getting someone and complimenting them, isolating them, sort of pushing, pushing the envelope a bit was kind of the discussion of it"). The State then asked if there was grooming in this case and made argument supported by the evidence presented in the case to show that Appellant enticed and led away the victim. 14AA3001. This was not improper, and this claim should be denied.[6] To the extent this was improper, any error was harmless given the overwhelming amount of evidence.

Finally, Appellant argues that the State improperly commented on Appellant's constitutional rights. AOB, 59-62. Again, each of these complaints were not raised below and were therefore not preserved for appellate review. Further, they are each without merit.

[6] Appellant also claims that the State used the juror's statement that school teachers are "required to watch sexual harassment videos and in it it mentions being groomed or grooming," to impeach Appellant during closing. The State did point out that Appellant was a school teacher and yet claimed to not know what grooming was, but did not refer to the juror's comment from voir dire and therefore did not impeach Appellant using the juror's comment. 14AA3001.

Appellant first complains because the State asked J.T.'s therapist if J.T. had fears or anxieties about the court case, and because J.T. was nervous about cross-examination. 13AA2818-19. Appellant claims this was evidence that J.T. was anxious because he pleaded not guilty and represented himself and was therefore a "direct comment on [his] exercise of his constitutional rights." AOB, 61. Next, Appellant complains because the State pointed out that J.T. was upset when Appellant approached her during trial. Not only did the jury see J.T.'s reaction for itself, but the State's comments had nothing to do with Appellant's constitutional rights, and everything to do with the impact his crimes had on J.T.'s mental state. 14AA3097, 3105. Finally, he complains because the State urged the jury to find him responsible at trial. AOB, 61-62.

To argue this conduct was comment on Appellant's constitutional rights is a complete stretch of the imagination. The State was charged with showing that Appellant's actions had caused J.T. significant mental harm. That she was still dealing with the fallout of his choices years later by suffering anxiety and being unable to look at him or be comfortable near him was evidence of her mental state. Such evidence had nothing to do with whether or not Appellant pleaded not guilty but was rather directly related to J.T.'s anxieties related to her abuse. As to asking the jury to hold Appellant responsible, that is the jury's responsibility if the State meets its burden. Asking them to hold him responsible for his crimes based upon

the evidence presented at trial does not equate to commentary on his decision to plead not guilty – if that were the case, every trial would be such a commentary. Moreover, it was Appellant who brought up the concept of taking responsibility when he began his testimonial narrative by stating that he was willing to take full responsibility for what happened. 13AA2832. However, as his testimony continued, he blamed J.T. for wanting to meet in person, for spending the initial night at his house, for him changing his phone number, and for staying at his house for nine weeks. 13AA2832, 2839-40, 2847-49. It was with this basis that the State commented that the jury should hold him responsible, as he claimed to be willing to do. The State did not impermissibly comment on Appellant's constitutional rights and therefore did not engage in prosecutorial misconduct. Accordingly, this claim should be denied.

VI. THERE WAS NOT CUMULATIVE ERROR SUCH THAT APPELLANT'S CONVICTION MUST BE OVERTURNED.

Appellant lastly alleges that the cumulative effect of error deprived him of his right to a fair trial. However, Appellant has not asserted any meritorious claims of error and thus there is no error to cumulate.

This Court considers the following factors in addressing a claim of cumulative error: (1) whether the issue of guilt is close; (2) the quantity and character of the error; and (3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-5 (2000). Appellant needs to present all three elements to be

successful on appeal. Id. Moreover, a defendant "is not entitled to a perfect trial, but only a fair trial. . . ." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975) (*citing* Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974)).

Here, the issue of guilt was never a close question. The jury heard testimony from J.T. that she felt she could not leave Appellant's house, and from J.T.'s mother regarding the lengths she went to in an attempt to find her daughter. The jury further heard testimony that Appellant requested that J.T. send him the pornographic photos, and that she took them at his direction, and the jury saw the photos. There was also significant testimony regarding J.T.'s mental health, both before and after the incident, and how she was harmed by Appellant's actions. Regarding the quantity and quality of error issue, Appellant fails to demonstrate any error, let alone cumulative error sufficient to warrant relief. Last, regarding the gravity of the crimes charged, Appellant kidnapped and held a young woman for two months, used her to produce pornography, and committed child abuse which resulted in substantial mental harm to her. Those actions are extremely grave. Thus, the third cumulative error factor does not weigh in his favor. Therefore, Appellant's claim of cumulative has no merit and his Judgment of Conviction should be affirmed.

CONCLUSION

For the foregoing reasons, the State respectfully requests that Appellant's Judgment of Conviction be AFFIRMED.

Dated this 31st day of July, 2018.

Respectfully submitted,

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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 Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 13,970 words.
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 31st day of July, 2018.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on July 31, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

MELVYN PERRY SPROWSON, JR., #5996049

Defendant.

Case No: **C-14-295158-1**

Dept No: **XXIII**

I N F O R M A T I O N

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

STEVEN B. WOLFSON, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That **MELVYN PERRY SPROWSON, JR.**, the Defendant above named, having committed the crimes of **FIRST DEGREE KIDNAPPING (Category A Felony - NRS 200.310, 200.320), CHILD ABUSE, NEGLECT, OR ENDANGERMENT WITH SUBSTANTIAL BODILY AND/OR MENTAL HARM (Category B Felony - NRS 200.508(1))** and **UNLAWFUL USE OF A MINOR IN THE PRODUCTION OF PORNOGRAPHY (Category A Felony – NRS 200.700, 200.710(A)(B), 200.750)** in the manner following, to-wit:

That the said Defendant, on or between July 1, 2013 and November 1, 2013, at and within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada,

COUNT 1 - FIRST DEGREE KIDNAPPING

did, unlawfully, feloniously, and without authority of law, lead, take, entice, carry away or detain JAYSENIA TORRES, a minor, with the intent to keep, imprison, or confine said JAYSENIA TORRES, from her parents, guardians, or other person or person having lawful custody of said minor, or perpetrate upon the person of said minor, any unlawful act, to wit: child abuse with substantial mental harm and/or contributing to the delinquency of a minor.

COUNT 2 - CHILD ABUSE, NEGLECT, OR ENDANGERMENT WITH SUBSTANTIAL BODILY OR MENTAL HARM

did, willfully, unlawfully, and feloniously cause a child under the age of eighteen (18) years, to-wit: JAYSENIA TORRES, being approximately sixteen (16) years of age, to suffer unjustifiable mental suffering as a result of abuse or neglect, and/or cause the said JAYSENIA TORRES to be placed in a situation where she might have suffered unjustifiable mental suffering as a result of abuse or neglect, by said Defendant entering into a course of conduct to insure the continued isolation of said JAYSENIA TORRES from her parents and/or guardian; and/or sleeping in the same bed with the said JAYSENIA TORRES; and/or restricting access of the said JAYSENIA TORRES to others; and/or engaging in sexual intercourse with the said JAYSENIA TORRES; and/or promoting and/or encouraging the said JAYSENIA TORRES to quit school; and/or by engaging in controlling behavior toward the said JAYSENIA TORRES; and/or acting in a demeaning way toward the said JAYSENIA TORRES, resulting in substantial mental harm to the said JAYSENIA TORRES.

COUNT 3 - UNLAWFUL USE OF A MINOR IN THE PRODUCTION OF PORNOGRAHPY

did, then and there, willfully, unlawfully, feloniously, and knowingly, use, encourage, entice or permit JAYSENIA TORRES, 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 JAYSENIA TORRES to take photographs in

which the said JAYSENIA TORRES posed in various stages of undress and exposed her breasts, buttocks, and 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 JAYSENIA TORRES.

COUNT 4 - UNLAWFUL USE OF A MINOR IN THE PRODUCTION OF PORNOGRAHPY

did, then and there, willfully, unlawfully, feloniously, and knowingly, use, encourage, entice or permit JAYSENIA TORRES, a minor, be the subject of a sexual portrayal in a performance to-wit: by said Defendant requesting and directing JAYSENIA TORRES to take photographs in which the said JAYSENIA TORRES posed in various stages of undress and exposed her breasts and buttocks 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 JAYSENIA TORRES.

COUNT 5 - UNLAWFUL USE OF A MINOR IN THE PRODUCTION OF PORNOGRAHPY

did, then and there, willfully, unlawfully, feloniously, and knowingly, use, encourage, entice or permit JAYSENIA TORRES, 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 JAYSENIA TORRES to take photographs in which the said JAYSENIA TORRES posed in various stages of undress and exposed her 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 JAYSENIA TORRES.

COUNT 6 - UNLAWFUL USE OF A MINOR IN THE PRODUCTION OF PORNOGRAHPY

did, then and there, willfully, unlawfully, feloniously, and knowingly, use, encourage, entice or permit JAYSENIA TORRES, a minor, to be the subject of a sexual portrayal in a performance to-wit: by said Defendant requesting and directing JAYSENIA TORRES to

take photographs in which the said JAYSENIA TORRES posed in various stages of undress and exposed buttocks 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 JAYSENIA TORRES.

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

BY _____
JACQUELINE BLUTH
Chief Deputy District Attorney
Nevada Bar #010625

Names of witnesses known to the District Attorney's Office at the time of filing this Information are as follows:

ABBOTT; CCSDPD#0199

CALDWELL; CCSDPD#0368

COR or Designee; CCSD RECORDS

COR or Designee; HPD RECORDS

COX, TROY; CCSDPD#UNK; FORENSICS

MACISZAK; CCSDPD#0308

PLATT; CCSDPD#0217

SAVASPANO, DENISE; CFSI, 8815 BARTON ST, RIVERSIDE, CA 92508

SCHELL; CCSDPD#0295

SMITH, CHERYL; UNK

SMITH, KATHRYN; UNK

TORRES, JAYSENIA; UNK

DA#13F17841X/hjc/SVU
CCSDPD EV#13-1105723
(TK06)

RPLY

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Attorney for Defendant/Petitioner
MELVYN PERRY SPROWSON, JR.

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Application of:	CASE NO.: C-14-295158-1
	DEPT. NO.: XXIII
MELVYN PERRY SPROWSON, JR., ID #5996049	DATE: **April 30th 2014**
for Writ of Habeas Corpus	TIME: **9:30 a.m.**

REPLY TO RETURN TO WRIT OF HABEAS CORPUS AND OPPOSITION TO MOTION TO DISMISS

COMES NOW, the Defendant, MELVYN PERRY SPROWSON, JR. (hereinafter "Mr. Sprowson"), by and through his attorney of record, JOHN J. MOMOT, ESQ., files this Reply to the State's Return to Writ of Habeas Corpus and Opposition to Motion to Dismiss. In responding to the Return to the Writ, Petitioner Sprowson incorporates by reference all of the allegations originally set forth in the Petitioner's Writ of Habeas Corpus. This reply is made based upon all of the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing on this matter.

DATED this 7th day of April, 2014.

Respectfully Submitted,

JOHN J. MOMOT, ESQ.

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ARGUMENT

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

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).

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).

Even if Mr. Sprowson did pick up JT, his doing so does not constitute a kidnapping. Mr. Sprowson did not lead, take, entice, or 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. There is no forcible removal of the victim that generally constitutes a kidnapping. Id. Here, 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 going to run away and she needed somewhere to go. In this case, she wanted to go to Mr. Sprowson's home to live with him – not the other way around.

Mr. Sprowson never had any criminal intent to keep, imprison, or confine JT from her mother. It was *JT's intent* to keep herself concealed and to remain hidden at Mr. Sprowson's residence – not the other way around. Whatever precautions that JT and Mr. Sprowson may have

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been taken to avoid detection, was self-imposed by JT because she did not want to return home with her mother.

The State argues that Mr. Sprowson changed his phone number to confine JT from her mother. [See Return to Writ of Habeas Corpus and Opposition to Motion to Dismiss, p. 14, ln. 20-21, 23-24 (RTN, 14/20-21, 23-24)]. Meanwhile, JT testified that Mr. Sprowson only did so because "I told him it would be a good idea because my mom had his other number." [PHT, p. 33]. It was JT's idea, not Mr. Sprowson's, to change his number. The number changed because JT wanted to conceal herself from her mother, not because Mr. Sprowson wanted to confine her.

The State then argues that JT was confined because Mr. Sprowson told her not to go out during the day. [RTN, 14/24-25]. Meanwhile, Mr. Sprowson was at work all day, every weekday that JT resided with him. JT could have walked out of Mr. Sprowson's apartment at any time – but she did not. [PHT, p. 104]. It is doubtful that Mr. Sprowson's suggestion to not go out during the day was the lynchpin that kept JT confined. JT's history of being a runaway clearly evidences her ability to walk out of his apartment at any time while he was at work. [PHT, p. 84]. Here the doors were not barricaded or locked from the inside, the windows were not barred, JT was not held in some remote location – there was no obstacle to her leaving.

The State then argues that Mr. Sprowson only took her out at night and instructed her to wear a hat, glasses, and baggy clothing. [RTN, 14/25-26]. However, JT never testified that it was Mr. Sprowson that instructed her to alter her appearance. [PHT, p. 37]. They may have both agreed that it was the prudent thing to do but JT did not alter her appearance because Mr. Sprowson forced her to do so in order to confine her to the apartment. Moreover, they obviously did leave the apartment and go out together. According to her testimony, they would go for drives during the evening during the school week, because he worked during the day and was sometimes tired. And on the weekends, they would go out for long drives up to the lake during the day. [PHT, p. 142-43; 154].

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The State then complains that Mr. Sprowson told her that she shouldn't call her family because they might catch on to where she was. [RTN, 14/26-2]. Meanwhile, it is important to note that JT was in possession of her cell phone the entire time. She could have called anyone for assistance, including her family, if she wanted to – but she did not. In fact, JT testified that she purposely kept her cell phone off because she wanted to avoid the possibility of being tracked. [PHT, p. 101]. Moreover, JT had internet access to e-mail and/or social media with anyone, including her family, if she wanted to – but she did not. [PHT, p. 101].

Clearly, Mr. Sprowson did not have the criminal intent to keep, imprison, or confine JT from her mother. Here, JT could have returned to K. Smith's home at any time. It was JT's determination to 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.

This is not a matter of whether JT can consent pursuant to NRS 200.350. JT did not just consent; she was purposefully and explicitly trying to remain concealed from her mother. She is the moving party in being a runaway. There is no dispute that JT was a willing participant throughout the nine weeks. The fact of the matter is that 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.

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 be and is not the conduct the legislature intended to punish pursuant to NRS 200.310(1). Count 1, charging Mr. Sprowson with kidnapping, should be dismissed.

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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 is non-accidental in nature, which constitutes substantial mental and/or bodily harm.

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 non-accidental nature to JT. The State lists a litany of complaints against Mr. Sprowson that was allegedly "abusive" and "neglectful" against JT. However, JT's testimony contradicts the charge that Mr. Sprowson abused or neglected her in any way. 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]. She was happy living with Mr. Sprowson and, in her estimation, everything was perfect. [PHT, p. 122].

As to the allegations to confinement, isolation, and inability to call her mother, Mr. Sprowson incorporates the arguments made in the previous section. As to the sleeping arrangements and any intimacy between JT and Mr. Sprowson, it was consensual and non-abusive. [1] While the State believes that this relationship is inappropriate, it certainly was not

[1] Especially when compared to the facts in the case styled State of Nevada vs. David Schlomann, Case No. C295989.

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illegal. As to being picky about some things, telling JT that her letters weren't right, she couldn't wash a dish right, and she couldn't sing – a difference of opinion regarding one's abilities does not constitute abuse and neglect. Regarding her letters, JT testified that it was a matter of Mr. Sprowson offering constructive criticism of her spelling, penmanship, and grammar. [PHT, p. 139-40]. They had a difference of opinion regarding her singing ability but he thought that she was an accomplished guitarist. [PHT, p. 142]. If the slightest criticism regarding spelling, penmanship, grammar, cleanliness, and/or musical aptitude constitutes "abuse and neglect," then every parent must be abusive and neglectful.

As to any difficultly that JT experienced when she was returned to her mother, she was acting out because JT did not want to go back to K. Smith. It certainly was not the result of being "abused and neglected" by Mr. Sprowson. JT's mom testified that JT threatened to kill herself if she had to remain with her. 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]. Apparently, JT's worsened mental state and behavior, according to K. Smith's testimony, had nothing to do with Mr. Sprowson. K. Smith then committed JT to Montevista Hospital again and admitted JT into a long-term treatment facility. [PHT, p. 187-88].

The sufficiency of the evidence presented at the Preliminary Hearing fails to establish that Mr. Sprowson committed the crime of child abuse, neglect, or endangerment at all, much less to the elevated extent of "substantial mental harm." The State presented no evidence, nor can it, that Mr. Sprowson directly and proximately 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. NRS 200.508. This is a matter of law and not a matter of fact for the jury. The State alleged and pled the Information to charge Mr. Sprowson not only "abuse and neglect" but also the enhancement of "substantial

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mental harm," and failed to establish either at the Preliminary Hearing. Therefore, Count 2 must be dismissed.

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

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). The State does not and cannot dispute that the subject is clothed and that the subject's genitals are never actually exposed or exhibited in any of the pictures at issue and charged in Counts 3-6. In each picture the subject is wearing shorts or underwear covering her genitals. [PHT, p. 131-37]. However, the State now argues that because there are two pictures (to-wit: Exhibit 15 and 8) where the subject's thighs are spread and her pubic hair can be seen that "this is absolutely a lewd exhibition of the genitals and meets the statutory requirement." Even though the State readily admits that the subject is wearing underwear and the subject's genital are not actually exposed, nor exhibited. [RTN, 20/26-28; 22/24-26]. Close enough is not good enough – the depiction of pubic hair surrounding the genital area that is covered and clothed is not "lewd," or an "exhibition" of the subject's genital. It may be less than kempt, but it is not a "lewd exhibition."

Quite simply, the State cannot meet the statutory requirement for "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

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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.

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.

The State does not address the defense's arguments that 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 is void for vagueness. NRS 200.701(2) is void for vagueness because the statutory definition for "sexual portrayal" fails to give a person of ordinary intelligence fair notice of what is prohibited.

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)). "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." City of Las Vegas v. Dist. Ct., 118 Nev. at 864, 59 P.3d at 481. 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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Here, there is no defined or explicit standard as to 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." These terms/concepts are not defined by the Nevada Revised Statutes, nor is there an enumerated standard or set of factors to define these terms/concepts. It is important to note that term/concepts such as "prurient interest" in sex and lacking "serious literary, artistic, political or scientific value," terms of art in law, with independent legal significance. These are term/concepts developed through the long line of constitutional law cases regarding obscenity and the regulation of child pornography, including but not limited to the seminal cases of Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) and New York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348 (1982). Any reasonably intelligent person, including Mr. Sprowson, reading that definition for "sexual portrayal" would be at a loss to know what the boundaries are for images that are criminal and prohibited.

Further, 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. The State does not and cannot offer any analysis of an explicit standard or enumerated factors of what it means for an image to appeal to the "prurient interest" in sex and/or what constitutes an image that lacks "serious literary, artistic, political or scientific value" because there are none. The fact that the State simply asserts that the photos charged in Counts 3-6 meet the statutory language of being a "sexual portrayal" because it says it is so, proves that the NRS 200.701(1) leaves the determination of whether an image or picture is criminal to a purely subjective standard and is, therefore, unconstitutional vague.

Thus, Mr. Sprowson 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

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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.

CONCLUSION

The State failed to meet its burden and did not establish probable cause that Mr. Sprowson committed the crimes charged in the Information because the Information is grossly overcharged. Thus, Mr. Sprowson respectfully asks that the Court grant his Petition for Writ of Habeas Corpus and dismiss the Information with prejudice.

DATED this 7th day of April, 2013.

JOHN J. MOMOT, ESQ.

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DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Application of:	CASE NO.: C-14-295158-1
	DEPT. NO.: XXIII
MELVYN PERRY SPROWSON, JR., ID #5996049	DATE: **April 30th, 2014**
for Writ of Habeas Corpus	TIME: **9:30 a.m.**

RECEIPT OF COPY

RECEIPT OF COPY of the foregoing REPLY TO RETURN TO WRIT OF HABEAS CORPUS AND OPPOSITION TO MOTION TO DISMISS is hereby acknowledged this 7 day of April, 2013.

OFFICE OF THE DISTRICT ATTORNEY

By: Esteen Moncille

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CLERK OF THE COURT

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ORIGINAL

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. MELVYN P. SPROWSON, JR., #5996049 Defendant.	Case No. C-14-295158-1 Dept. No. XXIII

NOTICE OF MOTION AND MOTION FOR INDEPENDENT PSYCHOLOGICAL/PSYCHIATRIC EXAMINATION OF THE COMPLAINING WITNESS

COMES NOW, the Defendant, MELVYN P. SPROWSON, JR., by and through his attorney, JOHN J. MOMOT, ESQ., of the Law Office of John J. Momot, and moves this Honorable Court allow him to employ an independent expert to conduct a psychological and/or psychiatric examination on the complaining witness, JT,[1] or in the alternative to allow the defense to interview JT.

///

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[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 motion. Rather she shall be referred to by her initials of JT.

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

DATED this 26 day of August, 2014.

JOHN J. MOMOT, ESQ.

NOTICE OF MOTION

You, and each of you, will please take notice that the undersigned will bring the foregoing Motion on for hearing in the above-entitled Court on the 8 day of Sept, 2014, at the hour of 9:30am A.M./P.M., or as soon thereafter as counsel may be heard by this Honorable Court.

DATED this 26 day of August, 2014.

JOHN J. MOMOT, ESQ.

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

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

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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 continued to supervise 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 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

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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 apartments 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:

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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. 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

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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].

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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].

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]. JT was then enrolled in a long-term treatment facility for up to six months. [PHT, p. 187-88].

II. LAW AND ANALYSIS

1. AN INDEPENDENT PSYCHIATRIC/PSYCHOLOGICAL EVALUATION OF THE COMPLAINING WITNESS IS NECESSARY

Case law in Nevada establishes a set of factors for the court to look at in deciding whether to grant a request for an independent psychological examination. While the case law generally

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addresses the need for such an exam in sexual abuse cases, the rationale behind needing such an exam applies equally in a case such as the instant case. In Abbott v. State, 138 P.3d 462, 469 (2006), the Nevada Supreme Court noted that "child victims are, and rightly so, compelling, sympathetic witnesses" and further noted that not allowing a psychological examination of such a witness, when the defendant proves a compelling need for such an exam, would leave the defendant essentially without a defense.

"The trial judge should order [a psychiatric/psychological] evaluation [of the victim] if the defendant presents a compelling reason for such an examination." Washington v. State, 96 Nev. 305, 307, 608 P.2d 1101, 02 (1980). "A compelling reason exists where the corroborating evidence is *de minimus* or nonexistent, and the defense has a reasonable basis for questioning the effect of the victim's mental state on his or her veracity." Keeney v. State, 109 Nev. 220, 224-225, 850 P.2d 311, 314 (1993), overruled in part, Koerschner v. State, 116 Nev. 1111, 13 P.3d 451 (2000).

The Nevada Supreme Court outlined the factors that this Court should consider in making its determination as to whether the defendant is entitled to such an examination in its decision in Koerschner v. State, 116 Nev. 1111, 13 P.3d 451 (2000). Previously, the court considered four factors; However, Koerschner then modified the previous test, stating:

> We now also hold that whether a compelling need exists for such an intrusion is not a factor to be considered along with the other three factors. Rather, it is the overriding judicial question which must be resolved based upon the other three factors. Thus, compelling reasons to be weighed, not necessarily to be given equal weight, involve whether the State actually calls or obtains some benefit from an expert in psychology or psychiatry, whether the evidence of the offense is supported by little or no corroboration beyond the testimony of the victim, and whether there is a reasonable basis for believing that the victim's mental or emotional state may have affected his or her veracity. *Id.* at 455.

In Abbott v. State, 138 P.3d 462 (2006), the court held that Koerschner was the appropriate test to determine whether a criminal defendant is entitled to an independent psychological examination of an alleged victim. Id. Therefore, Koerschner sets out factors for

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the court to consider: **1) if the State is calling an expert, 2) if the evidence of the offense is supported by little or no corroboration beyond the testimony of the victim, and 3) whether there is a reasonable basis for believing that the victim's mental or emotional state may have affected her veracity.** These factors need not be weighed equally, but instead the Court has the discretion to give more weight to any one of them. Koerschner at 1115, 455-55, (emphasis added). For example, "instances where a child is under a psychological impediment to telling the truth or has been extensively coached are just two examples of cases where an examination of the alleged child victim would be appropriate, even if the State does not plan to use an expert witness at trial." Abbott at 469.

The Nevada Supreme Court has recognized that the assistance a psychologist offers a defendant is very important. See Warner v. State, 102 Nev. 635, 729 P.2d 1359 (1986). In Lickey v. State, the court found that the few jurisdictions that have examined this issue have agreed that the defense should have the same opportunity to procure and present expert testimony as the prosecution. 108 Nev. 191, 194-195, 827 P.2d 824, 826 (1992). Focusing on the concept of judicial courtesy to both sides, the Nevada Supreme Court held in Lickey, that because the State is usually permitted to conduct multiple interviews with the child-victim, the defendant should have been afforded at least one such opportunity to do the same. Lickey, 108 Nev. at 195, 827 P.2d at 826. Ultimately, the Nevada Supreme Court concluded that unless competent evidence presents a compelling reason to protect the victim, *it is error to deny a defendant the assistance of a defense psychologist or psychiatrist to examine the child-victim and testify at trial when the State is provided such assistance*. Id. (emphasis added).

With regard to the first factor, it is anticipated the State will employ an expert(s). The State has charged Mr. Sprowson with causing Child Abuse and Neglect Causing Substantial Mental Injury. Therefore, the State will elicit testimony about the intellectual, psychological, and emotional state of JT and the affect, if any, that these allegations have had on her. To effectively

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defend himself against these allegations, Mr. Sprowson should be afforded an independent examination of JT to rebut such charges and testimony. The court in Abbott clarified the issue of who is an "expert" for consideration of the three factors. In Abbott the court held that:

> A witness is acting as an expert witness, for the purposes of Koerschner, when he does more than merely relate the facts and instead analyzes the facts and/or states whether there was evidence that the victim was coached or biased against the defendant. Therefore, should the State decide to call its forensic investigator, the State should limit the testimony to recitation of the facts of the interview. If the State intends that the investigator will testify beyond the facts of the case and will provide his own experiences and assessments of the interview, the State must notify the district court prior to trial, so as to afford the defendant time to request his own independent psychological evaluation of the victim or otherwise obtain rebuttal testimony. Id.

Because of the State alleged substantial mental harm, the State will have its witnesses do more than merely relate facts. "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). As such, witnesses will have to testify to the effect the alleged facts had on JT's intellectual, psychological and emotional state and whether she sustained any substantial impairment to function within her normal range of behavior. Mental injuries are not like physical injuries; the State cannot present photographs of bruises and allow the jury to make its own determination. Instead, the State must elicit testimony proving that the facts and circumstances of the alleged conduct, which is directly attributable to Mr. Sprowson, did in fact cause the substantial mental harm. Thus, the first Koerschner factor is implicated.

However, even if the State argues that it will not be calling one of JT's treatment providers in its case, this first factor is not dispositive. The Koerschner Court clarifies this factor, stating:

> Keeney does not hold that an independent examination may never be ordered unless the State calls or obtains benefit from an expert. Rather, it holds that error is committed when a defendant in a child-victim case is refused such an examination *if* the State has the benefit of an expert analysis and the other three factors are satisfied. There may be situations where the veracity of a child

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> witness may be brought into question because of his or her emotional or mental state, even though the State had no access to or benefit from an expert.

Id. at 1117, fn. 4, 13 P.3d 455, fn. 4 (emphasis in original).

As to the second factor, not only is the state's evidence *de minimus*, its theory of the case is often contradicted by the complaining witness JT's account of the events. 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].

This segues directly into the third factor of whether or not there is a reasonable basis for believing that the victim's mental or emotional state may have affected her veracity. In this instance there is more than a reasonable basis to believe that the events prior to and following the discovery of JT in Mr. Sprowson's apartment have impacted her mental or emotional state that may affect her veracity.

Here, it is known that 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. See *redacted* LVMPD Declaration of Warrant/Summons, LVMPD Event #120416-2686, by Det. T. Katowich, dated June 5, 2012, attached hereto as *Exhibit A*. The trauma from that prior incident, necessitated two years of individual therapy for JT and family therapy with her mother. [PHT, p.

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191]. It is entirely possible that the trauma to JT's mental and emotional state from this prior incident with Schlomann may have affected JT's veracity. 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. Thus, an independent psychological/ psychiatrc examination is necessary for the defense to make its own objective determination.

This is compound by events that JT reported to Dr. Emmanuel Nwapa, M.D., of Montevista Hospital, dated November 21, 2013, wherein Dr. Nwapa noted a history of promiscuous behavior dating much older men, some of them in their 40s and others in their 30s, as well as a history of sexually transmitted disease. The doctor also noted that she was extremely impulsive, has mood swings, depression, and is being treated with prescribed medication for mood stability. See *redacted* letter of Dr. Emmanuel Nwapa, M.D., of Montevista Hospital, dated November 21, 2013, attached hereto as *Exhibit B*. JT's history and noted characteristics undoubtedly gives a reasonable basis to believe that her mental and emotional state can very well affect her veracity.

The greatest factor supporting the contention for an independent examination is that, in this case, there is a reasonable basis to believe JT's mental and emotional state is being manipulated to affect her veracity. According to Det. Schell's Report, dated November 22, 2013, the characterization of JT's need for therapeutic treatment is that "She needed some reprogramming and behavioral treatment." The report goes on to state that "Her behavior has improved since she has been in intensive therapy; she was prescribed medication for a mood disorder." Here, the source of the manipulation is JT's admission into a long-term residential treatment facility. It is clear that JT's initial perception of the case and of Mr. Sprowson contradicts the State's theory of the case. The objective of JT's commitment into a long-term residential and intensive therapy program is to modify her perception of the relationship that she shared with Mr. Sprowson. The intent is that she will learn through therapy to correct the perception she has of her relationship

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with Mr. Sprowson in a manner that conforms to the State's theory of the case and its portrayal of Mr. Sprowson and that of her family. Undoubtedly, this therapeutic regimen will alter JT's mental and emotional state – as therapy is designed to do – and thus it will impact her veracity and testimony at trial.

Moreover, it has been established that JT is being prescribed antipsychotic medication to control her mood disorder. This is yet another factor that gives a reasonable basis for Mr. Sprowson to question the effect of JT's mental and emotional state on her veracity. It begs the question of whether JT's medication, which is intended to alter her behavioral and/or psychological reactions, could make her more susceptible to suggestibility and/or impact her veracity. Clearly, these are issues that require a psychologist/psychiatrist, or someone with expert knowledge, to shed light on. It is imperative that Mr. Sprowson be permitted to have JT examined by a psychologist and/or psychiatrist to determine the effect of the complaining witness' mental and emotional state on her veracity.

2. IN THE ALTERNATIVE, THIS COURT SHOULD ALLOW THE DEFENSE ACCESS TO INTERVIEW THE COMPLAINING WITNESS

In the alternative, if this Court does not grant this motion, Mr. Sprowson requests that this Court allow his investigator and defense counsels to interview JT. The rationale behind Davis v. State, 110 Nev. 1107, 881 P.2d 657 (1994), is relevant to the decision to allow Mr. Sprowson an opportunity to interview JT. In that case, the Nevada Supreme Court stated:

> Witnesses ... to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity, to interview them. . .
>
> . . .
>
> A criminal trial ... is a quest for truth. That quest will more often be successful if both sides have an equal opportunity to interview the persons who have the information from which the truth may be determined.... It is not suggested here that there was any direct suppression of evidence. But there was unquestionably a suppression of the means by which the defense could obtain evidence. The defense could not know what the eye witnesses to the events in suit were to testify to or how firm they were in their testimony unless defense counsel was provided

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> a fair opportunity for interview. In our judgment the prosecutor's advice to these eye witnesses frustrated that effort and denied appellant a fair trial.

Davis, at 1119, quoting Gregory v. United States, 369 F.2d 185 (D.C.Cir.1966).

Ultimately, the Davis court concluded that, barring special circumstances, the State should not seek to keep witnesses and victims from speaking to defense counsel about the case. Davis, at 1120. Mr. Sprowson is not suggesting that the State is interfering with his ability to interview the children, but the rationale behind the decision is merely illustrative of the substantial trial right a defendant has in interviewing witnesses and victims.

If this Court denies Mr. Sprowson's request for an independent psychological/psychiatric examination, then he would request that this Court order K. Smith to provide a time and place for the defense to speak with JT, based on the principles of Davis. To adequately prepare, the defense should be able to speak to JT to discuss events known to her which could aid in the defense of Mr. Sprowson. Therefore, Mr. Sprowson requests that this Court allow his counsel and investigators access to interview the children.

III. CONCLUSION

Based on the above, Mr. Sprowson respectfully requests that this Honorable Court grant his Motion and allow him to employ an independent expert to conduct a psychological and/or psychiatric examination on the complaining witnesses. There is a compelling need for such an examination because there is anticipated that the State will present testimony regarding the mental state of JT and because there is more than a reasonable basis for believing that the JT may have prior psychological issues or is undergoing psychological treatment which may affect her veracity. In the alternative, if this Court denies his motion for an independent psychological examination if JT, Mr. Sprowson requests that the Court order that K. Smith make JT available for the defense to interview her.

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MELVYN P. SPROWSON, JR.

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. MELVYN P. SPROWSON, JR., #5996049 Defendant.	Case No. C-14-295158-1 Dept. No. XXIII

RECEIPT OF COPY

Receipt of the defendant's NOTICE OF MOTION AND MOTION FOR INDEPENDENT PSYCHOLOGICAL/PSYCHIATRIC EXAMINATION OF THE COMPLAINING WITNESS is hereby acknowledged this _____ day of August, 2014.

CLARK COUNTY DISTRICT ATTORNEY

By:_____

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EXHIBIT "A"

DECLARATION OF WARRANT/SUMMONS
(N.R.S. 171.106)
(N.R.S. 53 amended 7/13/1993)

Event Number: 120416-2686

STATE OF NEVADA)
) ss: David Schlomann
COUNTY OF CLARK)

Det. T. Katowich, being first duly sworn, deposes and says:

That he is a Detective with the Las Vegas Metropolitan Police Department, being so employed for a period of 13 years, assigned to investigate the crime(s) of Luring a Minor With Intent to Engage in Sexual Conduct, Kidnapping 1st Degree, Statutory Sexual Seduction Felony, and Sexual Assault Victim Under 16, committed on or about April 13, 14, 15 2012, which investigation has developed David Schlomann as the perpetrator thereof.

THAT DECLARANT DEVELOPED THE FOLLOWING FACTS IN THE COURSE OF THE INVESTIGATION OF SAID CRIME, TO WIT:

That on 4-16-2012 Officers from LVMPD were contacted by Kathryn Smith and advised that her daughter, J T , had become the victim of a of a crime. The victim was transported to UMC Hospital where she underwent a SANE Exam. A crime report was completed under LVMPD Event #120416-2686.

An interview was completed with J T The following is a summary, it is not verbatim.

J stated that she was playing an "App" game called "Word Feud". On this game people add profiles and photographs of themselves. She was playing a person named "David505". David505's profile said he was from Albuquerque NM. She told him that she was 14 years old and he told her he was 39 years old. They spoke back and forth at length. They began to "sext" back and forth. They spoke on "Word Feud" as well as a website called "MYYEARBOOK.com". On Myyearbook.com, J used the screen name of BLANK!!!xD. David used the screen name of DavidJOHNSON.

Eventually David gave her his cell phone number, (505) 363-6114, and his email address, DSCHOLMAN@GMAIL.COM. She used her sister's cell phone to call him. They had phone sex several times. J stated that she was told by David that he has 3 children including two daughters 14 and 16 and an 8 year old. She stated that David told her he is a crane operator and he lives in Albuquerque NM.

At this point J said that he was her "boyfriend" and they both were saying "I love you". They discussed David coming to visit her in Las Vegas since she couldn't get to Albuquerque by herself. He told her that he was coming out the weekend of April 6, 2012. At the last minute he told her that there was a family emergency and he would come out the following week.

They continued to exchanged emails, with her sending him photos of her topless, in her underwear, and of her face. He sent her photographs of himself as well as his penis.

They were "sexting" back and forth over email, my yearbook, the word feud game, and the victim called him on his cell phone from her sister's cell phone The victim called him on that phone between 5-8 times. Once J mother caught J using her sisters phone she took that phone away.

The victim then borrowed a phone from her friend She continued to text and call David using K phone.

On 4-12-2012 J 's mother caught her texting on K phone and checked the texts. There were numerous texts back and forth between J and David of a sexual nature. J mother, Katie Smith, called David (505-363-6114). When David answered, she told him she is J mother, that J is 14 years old, and to stay away from her. The phone line went dead. Katie called back leaving a message on his phone. On the message she told David that J is 14 and to cease all contact with her.

At this point David had been told by both J and Katie Smith that J was 14 years old. He continued contacting J and made plans to drive to Las Vegas to see her. **[COUNT 1 LURING A MINOR WITH INTENT TO ENGAGE IN SEXUAL CONDUCT 201.560.4A CLASS B FELONY]**

On 4-13-2012 according to what David told J , David rented a car in Albuquerque and drove 9 hours, to see the victim. She got a message that he was in town. They talked back and forth over "Myyearbook.com" and he planned to come to her house and pick her up at midnight, after her mother went to sleep. David let her know he was outside her house, asking if her parents were asleep. J snuck out to meet him. She saw that he was parked around the corner from her house. She ran over and got in his car, a newer orange/red "transformers car" (Chevrolet Camaro). David offered her some watermelon vodka and Jaegermiester. He kissed her. He drove to Arizona Charlies hotel. On the way he instructed her to put her hoodie up and cover her face keeping her face down. He also told her to not hold his hand or stand too close to him as he can't get caught with her because she is 14 years old. **[COUNT 2 KIDNAPPING 1st DEGREE NRS 200.310.1]**

On the drive to the hotel David, played the voice mail that J mom had left him. J heard her mom telling David, that she was 14 years old and to stay away from her. David thought that the message was funny and laughed about it. He also told J that her mother was probably jealous of her because older guys like her.

Once inside the hotel they went to room 3304. In the hotel they sat on the bed and he kissed her. He pushed her back on the bed and they kissed more. David then took her pants and hoodie off.

He then took his own clothes off and told her "you should suck my dick". She began to suck his penis for 10-15 minutes. **[COUNT 3 STATUTORY SEXUAL SEDUCTION FELONY NRS 200.368]** She said, "can I stop now?" He got upset telling her "I wasn't making you do that, I can take you home" She said they then "made up". He then began to finger her vagina. He applied lube to her vagina and rectum. He had her on her hands and knees and began to lube his penis. He then tried to insert his penis into her rectum. She told him "ow" then "can you stop?" He continued to try to insert his penis into her rectum telling her to "Relax". She again asked him to stop and he said "fine, I'm going to take you home".

They then lay down and J fell asleep. She woke to feel David was fingering her vaginar **[COUNT 4 STATUTORY SEXUAL SEDUCTION FELONY NRS 200.368]** She said, "What the heck?" and he told her "it's ok relax." After a while he said, "You should go down on me again". J performed oral sex on him. He ejaculated on her face/hair and he told her that he got some on the wall behind her.

He then told her that he had to take her home before her parents woke up. As they were walking out J saw a pregnant girl from the room next to her in the hallway. She thought the girl looked at her funny, for being young walking out of the hotel with an older guy at 330 am.

He drove her back home around 330-345. He told her, "I Love you", when he dropped her off.

Once she was home, they continued to message on MyYearbook with J using her sister's DS player. She said that those messages are deleted off the system once he deletes the account, (which she thinks that he has already done).

The next night (4-14-2012) David again made arrangements to pick her up. He waited until around midnight, so that J mother would be asleep. She was wearing shorts, a white hoodie with pink writing and a tank top. He again sent her a message that he was outside her house, to pick her up. She snuck out the back door and met him down the street. She got in his car, and he drove her to the hotel. **[COUNT 5 KIDNAPPING 1st DEGREE NRS 200.310.1]**

He took her into the hotel again telling her to keep her hood up and head down.

Once inside they again went to his room (3304). He began kissing her and they lay down on the bed. He took her clothes off, everything except her bra. David then licked J vagina and put his finger in her vagina for about 10 minutes. **[COUNT 6 STATUTORY SEXUAL SEDUCTION FELONY NRS 200.368]** He then put that finger in her mouth. She said "ew" and shoved it away. He laughed. He kissed her again and went back to licking her vagina. He then put lube on her and forced a 2nd finger into her vagina. He tried to put his penis into her vagina, but it hurt, so she told him to "stop". He then told her that she has to "drink a shot, because she made him stop" she drank it and it burned.

David then had her lay on her back with her legs on his shoulders. He tried to put his penis into her vagina, but it wouldn't go in. **[COUNT 7 STATUTORY SEXUAL SEDUCTION FELONY NRS 200.368]** David then put her on her hands and knees and tried again to put his penis in her vagina. It hurt so she told him to just "put it in her butt". He tried, inserting his penis into her rectum. She told him that it hurt there too. She then told him to "stop". He stopped.

David then had her reposition into the missionary position and again put his penis into her vagina. **[COUNT 8 STATUTORY SEXUAL SEDUCTION FELONY NRS 200.368]** Again she told him to stop that it hurt. He stopped.

David had her lay face down and he again put his penis into her vagina, from behind. This time he got it in all the way. It hurt and she begged him to stop. He told her "I'm not going to stop, not going to be gentle." David pulled her up into a "doggy style position" and was moving back and forth. **[COUNT 9 SEXUAL ASSAULT VICTIM UNDER 16 NRS 200.366.2B]** J said that she "could feel it in her tummy and it hurt". She asked him to take it out, telling him that she had to pee. He was mad at her, but took it out. She went in to the bathroom and went to pee. She said that she found gum in her hair, while in the bathroom and tried to get it out. She came

out of the bathroom, got dressed and he took her home. While driving home he offered to give her his watch. She told him that she didn't want it. He dropped her off between 3-4am.

J. tried to contact him the following day, however he wouldn't answer her calls or messages.

J. felt guilty about what had happened, and told her mom about it the following day. Her mother contacted the police and an Incident Crime Report was completed under LVMPD Event #120416-2686.

J. underwent a SANE EXAM. See Nurse Dermanelian's report.

I contacted security at Arizona Charlies and spoke with shift supervisor Ramone Adame. He advised that room 3304 had been rented by David D. Schlomann. He booked the room through Expedia listing a home address of . When David Schlomann checked in he used his NM ID card #. He checked in on the 13th at 1249PM and checked out on the 15th at 514AM.

A check through New Mexico DMV shows David D. Schlomann I. with SSN . with a home address of . His NM ID # is , the same ID that was used to rent the room at AZ Charlies.

Security was also able to show me surveillance footage that showed J. arrive on property, Friday night, in a red Camaro with a wma walk into room 3304 as she had described. It shows her leave hours later just as she described. The suspect gave J. a piggyback ride to the car.

The following night, just as J. described, she was visible on security footage arriving with the same WMA in a red Camaro, walking into room 3304. It shows her leave hours later exactly as she described during her interview.

CSI responded to J. house and recovered the underwear that she wore both nights. In addition CSI took photos of messages that were still on J. computer. CSI also photographed the photos that J. had received from the suspect. The photos on the computer were of the same man who was on video with her at Arizona Charlies walking into room 3304.

I contacted Albuquerque Police Dept Detective Matt Caplan. He made contact with David Schlomann, by telephone. He explained to Schlomann that he would like him to come in for an interview. Schlomann asked what the interview was in reference to. Caplan explained to him that it had to do with his recent trip to Las Vegas. Schlomann immediately invoked his right to an attorney and refused to be interviewed by Caplan.

Wherefore, Declarant prays that a Warrant of Arrest be issued for suspect David Schlomann on the charge(s) of Luring a Minor With Intent to Engage in Sexual Conduct (1 CT), Kidnapping 1st Degree(2 CTS), Statutory Sexual Seduction Felony (5 CTS), and Sexual Assault Victim Under 16 (1 CT).

Event #: 120416-2686

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

Executed on this 5th day of June, 2012.

DECLARANT: DET. T. Katowich 6360 6360

WITNESS: 6978 DATE: 6-5-2012

EXHIBIT "B"

Montevista Hospital

November 21, 2013

RE: Patient Name: T , J
Date of Birth:
Medical Record #:
Admission Date: November 16, 2013

To Whom It May Concern:

J is a 16-year-old Hispanic female who currently lives with her mother and grandmother. She was hospitalized once a few weeks ago here at Montevista Hospital. We discharged her and transitioned her to our day hospital, but she decompensated after four days and came back into the hospital. She is here because she tried to kill herself. She tried to jump off a balcony. She was having an argument with her mother in regards to a 19-year-old male boyfriend. She has had a history of promiscuous behavior dating much older men, some of them in their 40s and others in their 30s. She has a history of sexually transmitted disease and we have treated her with doxycycline for chlamydia. She is extremely impulsive. She has mood swings. She is depressed. We have started her on medication and she is currently on Risperdal for mood stabilization.

We feel that J is not emotionally stable to testify in court at this point in time. We have recommended for her to go to a long-term residential treatment facility where her medication can be better adjusted and also where she can engage in long-term individual therapy.

Please do not hesitate to contact me if more information is needed.

Sincerely,

Emmanuel Nwapa, M.D.

EN/cg25
#1121-010

RA 000103

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OPPS

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

MELVYN PERRY SPROWSON, JR.
#5996049

Defendant.

CASE NO: **C-14-295158-1**

DEPT NO: **XXIII**

STATE'S OPPOSITION TO DEFENDNAT'S MOTION FOR INDEPENDENT PSYCHOLOGIAL/PSYCHIATRIC EXAMINATION OF THE COMPLAINING WITNESS

DATE OF HEARING: SEPTEMBER 10, 2014
TIME OF HEARING: 9:30 A.M.

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JAQUELINE BLUTH, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion for Independent Psychological/Psychiatric Examination of the Complaining Witness.

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

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POINTS AND AUTHORITIES

STATEMENT OF FACTS PERTINENT TO THIS OPPOSITION

Defendant, MELVYN SPROWSON, is charged by way of Criminal Information with the crimes of First Degree Kidnapping (Category A Felony – NRS 200.310, 200.320); Child Abuse, Neglect, or Endangerment with Substantial Bodily and/or Mental Harm (Category B Felony – NRS 200.508(1)) and Unlawful Use of a Minor in the Production of Pornography (Category A Felony – NSR 200.700, 200.710(A)(B), 200.750). The crime occurred on or about July 1, 2013 and November 1, 2013. The victim is a minor female, J.T. (DOB: 06-06-97). The crimes occurred on or between August 30, 2013 and October 31, 2013.

The Preliminary Hearing Testimony of J.T. Pertinent to this Opposition

At the preliminary hearing of this matter, J.T. testified that she was 16 years old and her birthday is June 6, 1997. In June or July of 2013, J.T. lived with her mom, grandmother and two sisters. PHT, p. 13. In July of 2013, J.T. began speaking with Defendant over the Internet. J.T. was 16 when she began speaking with Defendant and she met him on Craigslist. PHT, p. 14. Defendant had an ad on Craigslist that said, "Lonely millionaire" and stated a fake age of 30. J.T. responded to the ad by saying "hi". Defendant responded back by saying "hello" and then J.T. told Defendant that she was 16. PHT, pp. 15-16.

For a few days J.T. and Defendant communicated through Craigslist e-mail, where they exchanged photos. Later, they communicated through Kik, which is a texting application, because it was easier than e-mailing. J.T. testified that in the beginning she and Defendant were just friends and then on August 1 [2013], Defendant asked her out and she said yes. PHT, p. 18. J.T. testified that from August 1st forward, she and Defendant were boyfriend and girlfriend. J.T. further testified that Defendant told her that his real age was 44; and, that after they became boyfriend and girlfriend she sent Defendant more photographs. PHT, pp. 17-19. J.T. testified that she sent Defendant pictures because he asked her to send them and because she wanted to send them. J.T. further testified that when she sent the pictures she knew what to do because Defendant told her what to do. PHT, p. 20.

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Defendant told J.T. different poses to do and she did them because she wanted to. The first place J.T. actually saw Defendant was at the Omelet House, where she was working at the time. J.T. testified that they did not speak, they just looked at each other. J.T. actually physically met with Defendant at a roller skating rink. J.T. was with her friend Jessica but Jessica did not know who J.T. was meeting. Jessica thought J.T. was meeting an old teacher of J.T.'s. PHT, pp. 21-22.

J.T. testified that she did not tell her mom that she was meeting the defendant. J.T. testified that she and Defendant communicated through Kik for 27 days before she actually went to his home. J.T. never told her told her mom that she was communicating with Defendant. J.T. told Defendant that she could not tell her mom because she would not be happy at all. PHT, pp. 23-24. J.T. testified that she made sure that Defendant did not call when her mom was home and they did not video chat when she was anywhere near. Defendant would only call when she asked him to. J.T. and Defendant came up with a plan if their relationship was found out which was that she would just keep going back to him. PHT, p. 24

J.T. testified that the first time she went to Defendant's house she asked him to go there. J.T. told her mom that she was Jessica's house. J.T. told Jessica that she had to do something else and Defendant picked her up and drove her to his house. J.T. stayed at Defendant's house for two nights. J.T. testified that she asked her mom if she could spend a second night at Jessica's because they were having a lot of fun and her mom said yes. PHT, pp. 25-26. J.T. testified that during the two night period at Defendant's house, they had sexual intercourse once or twice. J.T. testified that they did not use a condom because Defendant told her that he could not have kids. J.T. testified that Defendant gave her a promise ring that looked like a wedding ring the night she slept over, which she wore around her neck. J.T. testified that her mom saw the ring and she first told her mom that she had found it and then told her mom that a boy named Joshua had given it to her. J.T.'s mom did not believe her and found out that J.T. had not been sleeping over a Jessica's. J.T.'s mom got J.T.'s phone records and then took away the ring, J.T.'s phone and J.T.'s computer. PHT, 27-29. J.T. told her mom that she needed to do a project and e-mailed the Defendant asking him to come and pick her up, because

if he didn't she wouldn't be able to be with him. Defendant agreed to come and get J.T. and told her to bring her birth certificate and social security card, because she would need them to get a job and other things when she got older. J.T. and Defendant had a plan for her to stick it out, in the house, until she was 17 and a half, and then they were going to get married and she was going to go to school. PHT, pp. 30-31.

J.T. took her birth certificate and social security card and Defendant picked her up at 3:00 or 4:00 in the morning, while her mom was asleep. J.T. snuck out the front door and told the Defendant that he could leave her there if he wanted to. Defendant told J.T. it was ok and took her to his house, in Henderson, Clark County. PHT, pp. 32-33.

J.T. testified that Defendant changed his telephone number because she told him that her mom had his other number. J.T. lived with Defendant for two months, from August 28th until November 1st. J.T. testified that Defendant was a teacher and while he was at work, she would watch TV, play video games or read a book. J.T. testified that before she lived with Defendant, she attended school at A-Tech. J.T. did not go to school while living with Defendant. PHT, pp. 33-34.

J.T. testified that Defendant felt bad about her not going to school but they had made an agreement because she would be found if she did go. J.T. testified that it was her and Defendant's plan, together, that she would go undetected until she was 17 and a half, when she would be old enough to get married and go to school. PHT, p. 35. While J.T. was at Defendant he gave her things to do and books to read to continue her education; and, he gave her board games. J.T. testified that she had rules when she lived with Defendant that included having no guys in the house and for her not to go outside because she could be found. J.T. would sometimes ask Defendant to take her out of the house but he would be tired. J.T. and Defendant sometimes went out of the house at night, but she would dress like a boy with hat and glasses and baggier clothing. PHT, pp. 35-37.

J.T. testified that she considered Defendant to be a little bit of a jealous person because he would accuse J.T. of cheating on him. Defendant would tell J.T. that he knew she was a cheater; that he should not have trusted her; that his brother was right; and, for her to pack her

bags he was taking her home. J.T. would pack her bags and Defendant would become sad and cry. PHT, pp. 37-38. Defendant would ask J.T. to stay because he loved her. J.T. testified that Defendant cried twice; and, that three or four times they just weren't communicating right or something, so she would pack her bags and he would apologize and ask her to stay. During the eight or nine weeks that J.T. was with Defendant she and Defendant stumbled upon her family on Twitter, looking for her. PHT, p. 39.

J.T. discovered that her mom was looking for her after a post her aunt made on Twitter indicating that she was missing and to please repost. J.T. also saw posts on Facebook. J.T. testified that when Defendant saw those things he told her that her mom wanted control over her. J.T. further testified that she missed her mom and her family and she told the Defendant that; but, she felt it was worth it and she would see them in two years. J.T. testified that she ask Defendant to drive her by her family's house at night, which he did. When J.T. asked Defendant if she could call her family he would tell her that they would call the following week, but she never called her family. PHT, pp. 41-43.

In the nine weeks that she was with the Defendant, they were intimate once a week. J.T. testified that Defendant did not mistreat her, but he was picky about some things, telling her that her letters weren't right, she couldn't wash a dish right, and she could not sing. PHT, pp. 43-44.

Defendant told J.T. that her mom did not care about her and they wrote a story that Defendant was Prince Charming and J.T. was a princess and Defendant saved J.T. from her mom. J.T. put the story in a closet at Defendant's house. J.T. testified that she drank alcohol on two occasions after Defendant bought it. J.T. During one of those occasions, J.T. got a little buzzed and had problems walking. J.T. testified that she and Defendant were intimate on that occasion. PHT, p. 45-47.

J.T. testified that their plan if she got caught living with him was for her to keep coming back. They planned for her to tell the police that he was looking for a roommate and she found him on Craigslist. J.T. was not to discuss their relationship and it was supposed to look like they were just roommates. Once while she was living with Defendant, a private investigator

came to the door looking for J.T. She could hear Defendant talking to them but could not hear what he was saying. After he left, Defendant told J.T. that they were fine and they believed what he told them. PHT, pp. 48-49.

On November 1st, the police came to the door while J.T. was home alone. J.T. spoke with them but she was not honest with them, with regard to whether they had sex and that they were just roommate. J.T. testified that she stuck to the plan. J.T. testified that Defendant did not stick to the plan and J.T. was going to be going home. J.T. taken to West Care for a few hours before being taken home to her mom's house. J.T. stayed at her mom's house for a few days and then went to Montevista, a behavioral health center, after trying to leave the house and go back to Defendant's. J.T. stayed in Montevista for ten days. PHT, p. 49-52. J.T. testified that after she returned home to her mom, she felt okay, but later tried to commit suicide by jumping off their house balcony. J.T. testified that she did that because "it was too much." J.T. went back to Montevista for a month and was currently in treatment at a different facility four months. J.T. testified she has nightmares. PHT, pp. 53-54.

The Preliminary Hearing Testimony of Kathryn Smith

Pertinent to this Opposition

Kathryn Smith is the mother of J.T. Kathryn testified that J.T. is 16 years of age and her birthday is June 6, 1997. During the summer, 2013, around June or July, Kathryn began to recognize a change in J.T.'s behavior. In July J.T. began staying in her room more. When Kathryn would walk into the room, she would notice the screen change on the computer which made her suspect. Kathryn took the computer periodically and checked in but found nothing. PHT, pp. 172-173.

Kathryn testified that J.T. came home with a ring that looked like a wedding band. J.T. told Kathryn that she found the ring on the ground in front of Target. Kathryn thought it was strange for J.T. to keep the ring because it was out of character for J.T., who would normally take it to customer service or return it. J.T. gave Kathryn numerous conflicting stories about the ring that made her uncomfortable and suspicious. Kathryn took the ring from J.T. Kathryn also noticed that J.T. was making all kinds of telephone calls to a number that Kathryn did not

recognize. Kathryn confronted J.T. about the calls. Kathryn told J.T. she would have to come up with the truth and they would figure out what the consequences would be. Kathryn took J.T.'s computer and phone away from her on August 28th. The following day, Kathryn woke up and J.T. was not there. PHT, pp. 173-175. Kathryn testified that the residence was located in Henderson, Clark County. PHT, p. 176.

Kathryn testified that she kept J.T.'s Social Security card in her wallet and J.T.'s birth certificate was in a drawer of Kathryn's. PHT, p. 176. When Kathryn woke up and J.T. was not home, she called the phone number that she had seen on the phone records and it was disconnected. Kathryn testified that it had been on the night before when J.T. was home, because Kathryn had called the number several times trying to get someone to answer the phone so that she could have a conversation with them and tell them that they were talking to a 16 year-old, in case they didn't know. PHT, p. 177.

Kathryn testified that she had never met Defendant and she had never given Defendant permission to take her daughter from her home. Kathryn testified that she had given J.T. permission to stay a couple nights with her best friend, Jessica, a couple weeks before that. Kathryn testified that she did not give J.T. permission to be with Defendant during that weekend. PHT, pp. 178-179.

The day that J.T. went missing, Kathryn contacted the Henderson Police Department, who took a report and told her that someone would get back to her. Kathryn did not receive much help there and hired a private detective. Kathryn also looked at J.T.'s bank account and came across the Defendant's name, which she provided to the police. When Kathryn researched the name of Defendant she came across message that said, "Welcome Clark County School District teachers; years 2013-2014." PHT, pp. 179-180. Kathryn gave the Henderson Police the Defendant's name, the name of the school she believed he worked at, as well as an IP address that J.T. had logged onto from her computer. Kathryn testified that she used Facebook, Twitter and Instagram in order to find J.T. and put out word that she was missing, at which time an organization stepped in to help her find J.T. PHT, pp. 181-182.

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Kathryn noticed that some of J.T.'s personal belongings were missing which included her backpack, three pairs of shoes, almost all of her jeans and clothes, as well as her birth certificate and Social Security card. PHT, p. 182. Kathryn testified that Nevada Child Seekers, Close Kids, The National Center for Missing and Exploited Children and Human Trafficking were all involved in helping to find J.T. Kathryn continued to ask the Henderson Police to go to Defendant's house, but they did not go. PHT, p. 183. Kathryn testified that one of the counselor's at her youngest daughter's school worked closely with an officer for the Clark County School District Police Department. Kathryn gave him the information that she had and J.T. was found at Defendant's address within 24 hours. PHT, p. 184.

When J.T. was returned home it did not go well. Kathryn first slept in front of the door so that J.T. would not be able to leave; and, then took to sleeping with J.T. in the car so as not to disturb the others in the house. J.T. was threatening to kill herself at this time and told Kathryn she would rather die that live with her. Kathryn took J.T. to Montevista Hospital, where she stayed for ten days. PHT, p. 185-186.

When J.T. returned home she attempted to jump off a second story balcony because she could not use the phone. After the suicide attempt, J.T. went back to Montevista where she stayed for a period of time before being placed into a long term treatment for approximately six months. Kathryn testified that mentally and behaviorally, J.T. remained unstable and erratic. Kathryn testified that it is much more so than it was before J.T. met Defendant. PHT, p. 187-190.

After J.T. was found and returned home, Kathryn became aware that J.T. had sent Defendant nude photos. Kathryn notified the prosecutor of that information. PHT, p. 211.

I. THE COURT SHOULD NOT ORDER A PSYCHOLOGICAL EXAMINATION OF THE VICTIM IN THE INSTANT MATTER

In Abbott v. State, 138 P.3d 462 (2006), the Nevada Supreme Court departed from a two year old precedent by overruling State v. District Court (Romano), 120 Nev. 613, 97 P.3d 594 (2004). In doing so, the Court returned to the requirements it previously set forth in Koerschner v. State, 116 Nev. 1111, 13 P.3d 451 (2000), reasserting that a trial judge should

order an independent psychological or psychiatric examination of a child victim in a sexual assault case only if the defendant presents a compelling reason for such an examination. The defendant has made no such showing.

In Koerschner the Court stated;

> The primary source of ambiguity in our decisions in these cases centers on the second Keeney factor, i.e., whether the victim is not shown by compelling reasons to be in need of protection. See Griego, 111 Nev. at 450, 893 P.2d at 999. We now conclude that, to the extent Keeney shifted the burden in these matters from the defendant to the State, it should be overturned. In this, we return to the statement in Washington that "[t]he trial judge should order an examination if the defendant presents a compelling reason for such an examination. Washington v. State, 96 Nev. 305, 307, 608 P.2d 1101, 1102 (1980). We now also hold that whether a compelling need exists for such an intrusion is not a factor to be considered along with the other three factors. Rather, it is the overriding judicial question which must be resolved based upon the other three factors.1 Thus, compelling reasons to be weighed, not necessarily to be given equal weight, involve whether the State actually calls or obtains some benefit from an expert in psychology or psychiatry, whether the evidence of the offense is supported by little or no corroboration beyond the testimony of the victim, and whether there is a reasonable basis for believing that the victim's mental or emotional state may have affected his or her veracity.2

Id. at 1116 – 1117, 13 P.3d at 455.

The first factor to consider in determining whether Defendant has proven that a compelling need exists to force the victim to undergo an intrusive psychological evaluation is whether the State has hired such an expert? The answer is NO. The State has not hired an expert in the field of psychology or psychiatry in this case for the purpose of examining J.T.

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[1] Keeney words the second factor, in terms of whether "the victim is not shown by compelling reasons to be in need of protection." Keeney v. State, 109 Nev. 220, 226, 850 P.2d 311, 315 (1993). This assumes that an examination should be ordered unless the State met a burden of proving that the victim is in need of protection. As noted, this changed the statement of the rule as articulated in Washington. We have therefore reworded this consideration so that the burden is on the defendant to prove, based upon the other three former Keeney factors, that compelling circumstances exist to justify the intrusion.

[2] Keeney does not hold that an independent examination may never be ordered unless the State calls or obtains benefit from an expert. Rather, it holds that error is committed when a defendant in a child-victim case is refused such an examination if the State has the benefit of an expert analysis and the other three factors are satisfied. There may be situations where the veracity of a child witness may be brought into question because of his or her emotional or mental state, even though the State has had no access to or benefit from an expert.

Moreover, any information, reports and/or evidence offered by the State that is relative to the victims' psyche, and/or any percipient fact witness relied upon by the State whom may also render their opinions, based upon their area of expertise, will certainly be accessible to Defendant in this case.

The first prong of Koerschner relies on notice that an expert will testify in a certain manner. **Unless and until the State notices Defendant that an expert in psychology/psychiatry has been retained, has in fact examined the victim, and will testify as to the findings of that examination; or the State notices Defendant that another witness will give testimony of something other than percipient facts**, Defendant has not shown that the State has benefited from an expert and consequently cannot meet his burden for the first prong of Koerschner.

Pursuant to the second prong of Koerschner, this Court must also examine whether the Defendant has shown that evidence of the crimes has little or no corroboration beyond the testimony of the victims in this case. A psychological examination ordered because the victim's testimony is uncorroborated would be counterproductive. The only possible reason for an evaluation of the victim to be performed for this reason would be to attack his veracity, which is prohibited by Nevada Law.

In Lickey v. State, 108 Nev. 91, 827 P.2d 824 (1992) the court ruled that it is error to permit the State to have a psychologist testify as to the veracity of a victim. Id. at 826. The Court went on to cite Townsend v. State, 103 Nev. 113, 734 P.2d 705 (1987) by recalling that they unequivocally stated that it was improper for an expert to comment directly on whether the victim's testimony was truthful, because that would invade the prerogative of the jury. Id. at 827.

If it was error in Lickey for the State to have an expert testify as to the veracity of a victim then it is certainly error for a defense expert to testify in the same manner. Hence any testimony that the expert could offer because of the lack of corroboration of the victim's testimony would go the veracity of the victim's testimony, would consequently be inadmissible pursuant to Lickey and would further avalanche the purpose of the jury.

Moreover, to allow the defense expert to testify in any way concerning the lack of corroboration of the victim's account of the crime, would serve to confuse the members of the jury.

In distinguishing Lickey, the Nevada Supreme Court in Cordova v. State, 116 Nev. 664, 6 P.3d 481 (2000) stated: "Cordova contends that the detective improperly testified on Cordova's veracity and guilt under Nevada case law. An expert may not comment on a witness's veracity or render an opinion on a defendant's guilt or innocence. See Lickey v. State, 108 Nev. 191, 196, 827 P.2d 824, 827 (1992); Winiarz v. State, 104 Nev. 43, 50-51, 752 P.2d 761, 766 (1988). This case law is not precisely on point here. The detective did not testify as an expert, nor did he comment on Cordova's veracity as a witness. However, the detective's opinion on the truthfulness of Cordova's confession did implicate the ultimate question of guilt or innocence, and **we recognize the possibility that jurors "may be improperly swayed by the opinion of a witness who is presented as an experienced criminal investigator."** Sakeagak v. State, 952 P.2d 278, 282 (Alaska Ct.App.1998)." Id. at 669, 6 P.3d at 485. (Emphasis added).

Any defense expert who is permitted to examine the victim and later testify concerning the truth of her uncorroborated testimony will be presented to the jury as an expert and may improperly sway the jury by virtue of their opinion. This is exactly why experts are not permitted to comment on the veracity of another witness.

In 2005 the Nevada Supreme Court in Gaxiola v. State, 121 Nev. 638, 119 P.3d 1225 (2005), reiterated its long standing opinion concerning the uncorroborated testimony of a sexual assault victim by stating: "This court has repeatedly stated that the uncorroborated testimony of a victim, without more is sufficient to uphold a rape conviction.[3] Id. at 1232.

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[3] State v. Gomes, 112 Nev. 1473, 1481, 930 P.2d 701, 706 (1996); Washington v. State, 112 Nev. 1067, 1073, 922 P.2d 547, 551 (1996); Hutchins v. State, 110 Nev. 103, 109, 867 P.2d 1136, 1140 (1994); Rembert v. State, 104 Nev. 680, 681, 766 P.2d 890, 891 (1988); Deeds v. State, 97 Nev. 216, 217, 626 P.2d 271, 272 (1981); Henderson v. State, 95 Nev. 324, 326, 594 P.2d 712, 713 (1979); Bennett v. Leypoldt, 77 Nev. 429, 432, 366 P.2d 343, 345 (1961); Martinez v. State, 77 Nev. 184, 189, 360 P.2d 836, 838 (1961); State v. Diamond, 50 Nev. 433, 437, 264 P. 697, 698 (1928).

Before the jury is given a case for deliberation they will be instructed by the Court: "There is no requirement that the testimony of a victim of sexual offenses be corroborated, and her testimony standing alone, if believed beyond a reasonable doubt, is sufficient to sustain a verdict of guilty." This instruction or one similar to it which correctly states Nevada Law pursuant to Gaxiola will be given to the jury.

On the one hand the jury has the ability to discern the believability of the uncorroborated testimony of the victim for the purpose of determining the guilt or innocence of the defendant. But on the other hand this responsibility is removed from them and placed in the hands of a defense expert when the uncorroborated testimony of the victim is a factor in the analysis of whether or not to subject the victim to a harassing and intrusive examination. There can be no other purpose for an expert's examination relating to the uncorroborated testimony of the victim than to cast doubt on his veracity.

Since the testimony of the defense expert would be inadmissible as to the victim's veracity, or more specifically the truthfulness of his uncorroborated testimony, the psychiatric examination based on the amount of corroboration of his testimony becomes an exercise in futility and an unnecessary burden for the victim to bear. Counsel for Defendant will have more than an ample opportunity to cast doubt on the truthfulness of the victim's testimony on cross examination at trial.

Obviously, these are not the types of crimes that are committed in front of an audience. In this case, J.T.'s mother provided testimony that she did not give Defendant permission to take her daughter anywhere, which very much satisfies the first degree kidnapping charge in this case. Likewise, the victim's testimony regarding the pornographic photographs that Defendant instructed her to take of herself is corroborated by the actual photographs in this matter which support the unlawful use of a minor in the production of pornography charges. As for the child abuse, neglect, or endangerment with substantial bodily or mental harm charge, the State does not need an expert to offer proof that J.T. suffered substantial mental harm as a result of the Defendant's abuse and/or neglect, J.T. and her mother will provide testimony to satisfy the elements of substantial mental harm.

J.T. testified that after she was found in Defendant's apartment, it was hard for her to be around people because she had spent nine weeks being around only the Defendant. J.T. testified that being around people was overwhelming to her and made her feel scared and anxious. J.T. went to Montevista Behavior Health for ten days, which she felt did not help her. After J.T. went back home she tried to commit suicide and was placed back in the hospital for a month, before being transferred to a long term facility. J.T.'s mother stated that when J.T. returned home her mental state and behavior were much worse than ever before; and, at the time of the preliminary hearing, J.T. was still receiving treatment at a long term facility, all of which is certainly corroborative of the charge of child abuse, neglect, or endangerment with substantial bodily or mental harm.

Finally, this Court must consider whether the Defendant has shown that there is a reasonable basis to believe that the victim's mental or emotional state may have affected her veracity. In this case, the State will not deny that J.T. suffered emotional trauma as a result of being a victim to the crimes committed by this Defendant; however, Defendant has presented no evidence or pointed to anything in the record to suggest that the victim was suffering from any kind of mental or emotional state that would affect her ability to be truthful in this matter. The fact that J.T. was previously a victim of sexual abuse by an individual who was married and much older than J.T. is unfortunate; however, that individual has since pled guilty and been punished for his crimes and J.T. underwent extensive therapy after the crimes involving that perpetrator were discovered. This all happened long before the Victim ever met the Defendant. Furthermore, being a previous victim of a crime involving sexual abuse is certainly not a reason to force an independent psychological examination on a child. In this case, the State must prove that the victim suffered substantial mental harm as a direct result of the acts of abuse/neglect/endangerment caused by the Defendant. Any previous substantial mental harm J.T. may have suffered as a result of the other case is irrelevant and is certainly no reason to force a psychological examination of this victim. The Defense can obviously bring up that the Victim had issues before and had been through therapy before, but they are not entitled to get into the specifics.

Additionally, evidence of J.T.'s promiscuous behavior of dating much older men, i.e. Scholmann (prior luring/sexual assault case with victim), and the Defendant in the instant case, as well as the victim's contracting a sexually transmitted disease, in no way p uts J.T.'s ability to be truthful in this matter into question. In fact, it is simply a backdoor attempt by this Defendant to bring in evidence of the other closed case involving Scholmann's sexual abuse of J.T. The Defense has been trying to do this from the beginning of this case. They tried at the justice court level on multiple occasions and were denied, and now they are trying again. If anything, the information in the report from Monte Vista Hospital corroborates J.T.'s testimony that after she was found in Defendant's apartment, it was hard for her to be around people because she had spent nine weeks being around only the Defendant; and, that being around people was overwhelming to her and made her feel scared and anxious. J.T. testified that she went to Monte Vista Behavior Health for ten days, which she felt did not help her. After J.T. went back home she tried to commit suicide and was placed back in the hospital for a month, before being transferred to a long term facility. Additionally, J.T.'s mother stated that when J.T. returned home her mental state and behavior were much worse than ever before, all of which negates any argument by the Defendant that J.T. suffered from any mental or emotional condition that put her ability to be truthful about this case in question.

Finally, the fact that J.T. was initially prescribed medicine for a mood disorder is not unexpected given the facts and circumstances of this case as stated in the Statement of Facts above. One would absolutely expect that J.T.'s perception of the relationship she shared with the Defendant to be different after intensive therapy; however, the fact of the matter is that it does not change what her perception was at the time he kidnapped her; held her in his home for weeks while brainwashing her into believing that he was the only one who cared for her; and, manipulating her to conform to his will. Any shift in the victim's perception of the Defendant as the result of receiving long term care does not change the facts or circumstances of this case; and, is simply not a factor pursuant to Koerschner, supra, that would trigger a forced examination of this victim. Additionally, while the Defendant can only guess at the State's theory of the case at this point, the fact remains that the victim in this case went into

treatment because she was suicidal and having a difficult time re-adjusting to society, after what she had been through with the Defendant. Again, this is not a valid reason for this Court to order a forced psychological examination of this victim. This coupled with the fact that the State has not hired any expert to conduct a psychological examination of this victim for the purposes of trial requires that the instant motion be denied.

II. ORDERING A VICTIM TO SUBMIT TO PSYCHOLOGICAL TESTING FOR PURPOSE OF DETERMINING CREDIBILITY UNDERMINES THE ROLE OF THE JURY

The State understands the law as it currently exists as stated above. However, it is the State's position that a victim of sexual assault should never be forced to endure something as intrusive and harassing as a psychological examination unless it has a purpose other than to cast doubt on the veracity of the victim.

For the most part, psychological testing of sexual assault victims is requested by the defense as a means for discovering impeachment evidence to use against the victim. This is an improper method for defense to discover impeachment evidence or to attack the credibility of the victim.

It is one thing to attempt to impeach a witness's credibility by the introduction of evidence showing for instance a background of hospitalization and psychiatric care. However, it is quite another to have a witness undergo a mental examination for the direct purpose of enabling the other side to impeach his testimony. People v. Souvenir, 373 N.Y.S.2d 824, 826-27 (1975). Furthermore, where a judge orders a psychological test for a sexual assault victim and the competency of the victim is not at issue, the court is infringing on the jury's duty to assess credibility.

Pursuant to established law in Nevada, it is the jury's function, not that of the court or a psychiatrist, to assess the credibility of witnesses and the weight of the evidence. McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). In refusing to allow psychological testing of sexual assault victims, the Supreme Court of North Carolina reasoned:

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> As we have seen, competency [of a witness] is for the judge, not the jury. Credibility, however, is of the jury -- the jury is the lie detector in the courtroom. It is now suggested that psychiatrists and psychologists have more expertise than either judges or juries, and that their opinions can be of value to both juries and judges in determining the veracity of witnesses. Perhaps. The effect of revering such testimony, however, may be two-fold: first, if may cause juries to surrender their own common sense in weighing testimony; second, it may produce a trial within a trial on what is a collateral but still important matter.

State v. Clontz, 286 S.E.2d 793, 796 (N.C. 1982), citing with approval United States v. Banard, 490 F.2d 907, 912-13 (9th Cir. 1973).

By allowing courts to order victims to submit to psychiatric tests for the purpose of accessing credibility, the door will be opened to a battle of experts. There is no reason why defendants will not request that each of the state's witnesses submit to a psychological test. In this era of increasing use of experts in both civil and criminal trials, the sad truth is that an "expert" can be found to testify on behalf of almost any viewpoint or position. Wisely, we have historically left credibility determinations to the trier of fact. See, United States v. Ramirez, 871 F.2d 582, 585 (6th Cir. 1989).

III. JUSTICE DOES NOT REQUIRE SEXUAL ASSAULT VICTIM TO SUBMIT TO PSYCHOLOGICAL EXAMINATIONS

A psychological examination of a sexual abuse victim is not a constitutional guarantee. United States v. Riley, 657 F.2d 1377, 1387 (8th Cir. 1981). A defendant's constitutional rights to confront witnesses and to present evidence on his own behalf are clearly protected without a psychological evaluation of the victim.

When California enacted Penal Code 1112, prohibiting courts from ordering psychological testing of sexual assault victims, California courts found that the statute did not violate a defendant's rights under the Confrontation Clause. People v. Fleming, 189 Cal.Rptr. 619, 621 (1983) (overruled on other grounds).

A Texas Court of Appeals also found that psychological tests of victims are not necessary to preserve a defendant's right to confront and cross-examine the witness. State v. Lanford, 764 S.W.2d 593, 594 (Tex. 1989). See also, People v. Glover, 273 N.E.2d 367, 369-

70 (1971) (holding that defendant's due process and equal protection rights were not violated by court's denial of request to have sexual abuse victim submit to psychiatric exam).

Defendants have a host of tools available to ensure that the witness is telling the truth, which eliminate the need for a psychological evaluation of the victim. The traditional methods of assessing credibility of a witness are adequate. Defendants are afforded the opportunity to cross-examine the victim and to present jury instructions regarding credibility. "A zealous concern for the accused is not justification for a grueling and harassing trial of the victim as condition precedent to bring the accused to trial." State v. Looney, 240 S.E.2d. 612, 627 (N.C. 1978).

IV. ORDERING A PSYCHOLOGICAL EVALUATION RE-VICTIMIZES A SEXUAL ASSAULT VICTIM

The ability to force a victim to submit to psychological testing does not appear to be a right that exists for defendants in other types of criminal cases. Thus, it appears that victims of sexual assault are open to attack merely because of the nature of the offense perpetrated against them. There is no more justification for court to order victim of sexual assault to submit to psychiatric evaluation than there is for every other witness in every criminal case to be asked to submit to an examination. See People v. Sourvenir, 373 N.Y.S.2d 824, 827 (1975).

While it is important to ensure that the defendant's rights to present evidence and to confront his accuser are preserved, these rights must be weighed against the rights of the victim to be free from humiliating and formidable psychological exams which probe for the existence of information that may or may not discredit them as a witness.

A. *Court Ordered Psychological Evaluations Constitute an Invasion of the Victims'* Right to Privacy

Even without a court ordered psychological evaluation, the road for a sexual assault victim can be formidable and humiliating. Often victims must submit to an intrusive physical exam, confront their attacker in court, testify regarding personal details of the sexual assault in open court, and be subject to an often severe cross examination by the defense. It would be insensitive to argue that the burden of submitting to a psychological evaluation would have a

minimal impact on the victim. U.S. v. Dildy, 39 F.R.D. 340, 343 (D.C. 1966).

The Nevada Legislature has recognized the hardships that victims of sexual assault must endure. In NRS 200.377, the Nevada Legislature made findings regarding victims of sexual assault:

> The legislature finds and declares that:
>
> 1. This state has a compelling interest in assuring that the victim of a sexual assault:
>
> (a) Reports the assault to the appropriate authorities;
>
> (b) Cooperates in the investigation and prosecution of the assault; and
>
> (c) Testifies at the criminal trial of the person charged with committing the assault.
>
> 2. The fear of public identification and invasion of privacy are fundamental concerns for the victims of sexual assault. If these concerns are not addressed and the victims are left unprotected, the victims may refrain from reporting and prosecuting sexual assaults.
>
> 3. A victim of a sexual assault may be harassed, intimidated and psychologically harmed by a public report that identifies the victim. A sexual assault is, in many ways, a unique, distinctive and intrusive personal trauma. The consequences of identification are often additional psychological trauma and the public disclosure of private personal experiences.
>
> 4. Recent public criminal trials have focused attention on these issues and have dramatized the need for basic protections for the victims of sexual assault.
>
> 5. The public has no overriding need to know the individual identity of the victim of a sexual assault.
>
> 6. The purpose of NRS 200.3771 to 200.3774, inclusive, is to protect the victims of sexual assault from harassment, intimidation, psychological trauma and the unwarranted invasion of their privacy by prohibiting the disclosure of their identities to the public.

In addition, the adoption of the rape shield law, NRS 50.090, indicates the Nevada Legislature's concern for the privacy of sexual assault victims. Among the purposes of the rape shield law is the need to protect sexual assault victims from degrading and embarrassing disclosure of details about their private life and to encourage rape victims to come forward

and report crimes and testify in court. Johnson v. State, 113 Nev. 772, 776, 942 P.2d 167, 170 (1997). Allowing trial courts to compel sexual assault victims to submit to unnecessary psychological testing contravenes the Nevada Legislature's stated intent to protect sexual abuse victims from invasion of their privacy.

Unnecessary and compelled psychological testing inhibits society's interest in prosecuting perpetrators of sexual assault by discouraging victims from coming forward to report the crimes. The fear of embarrassment and invasive psychological testing will prevent victims from reporting sexual assault to the proper authorities.

The continuous accumulation of intimidating and indelicate procedural probings tends to relegate to silence all but the most hardened victims. As we induce such silence in the victim, we discourage the victim from registering her complaint. United States v. Dildy, 39 F.R.D. 340, 343 (1966).

Discouraging the reporting of sexual abuse is not in the public interest. Further, harassing victims of sexual assault by requiring them to submit to psychological examinations contravenes the Nevada Legislature's interest in encouraging victims to report sexual assault and testify for the prosecution.

In addition, where a victim's testimony is conditioned on submitting to a psychological evaluation, witnesses will be even less willing to testify. Absent a statute, there is no authority to enforce a court's order for psychological testing when a witness refuses to submit to the order. Thus, where a victim refuses to submit to testing, a material witness is lost and the State's ability to prosecute sexual assaults decreases. This could severely handicap the State's prosecution of sexual assault cases. The public interest in prosecuting sexual assault cases will not be served where sexual assault victim's enthusiasm to testify is chilled due to court ordered psychological testing. The tremendous invasion of a sexual assault victim's privacy and the danger of decreased reporting of sexual assault cases substantially outweigh any benefit to a defendant of psychological testing of sexual assault victims.

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At least for the time being in Nevada, the overriding judicial question this Court must consider pursuant to Abbott and Koerschner, is whether the defendant has proved, based upon the presence or absence of the aforementioned factors, that compelling circumstances exist to justify an extremely harassing and intrusive examination of the victim which will undoubtedly cause her to unnecessarily relive horrible experiences. In the instant case, the defendant has completely failed to meet his burden and his motion should be denied.

CONCLUSION

Based upon the above and foregoing Points and Authorities, Defendant's Motion for Independent Psychological/Psychiatric Examination of the Complaining Witness must be denied.

DATED this 4th day of September, 2014.

Respectfully submitted,

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

BY /s/ JACQUELINE BLUTH
JACQUELINE BLUTH
Chief Deputy District Attorney
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CERTIFICATE OF E-MAIL

I, hereby certify that service of the above and foregoing, was made this 4th day of September, 2014, by e-mail to:

JOHN J. MOMOT, ESQ.
momotlawfirm@gmail.com

/s/ HOWARD CONRAD
Secretary for the District Attorney's Office
Special Victims Unit

hjc/SVU

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. MELVYN P. SPROWSON, JR., #5996049 Defendant.	Case No. C-14-295158-1 Dept. No. XXIII

REPLY TO STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR INDEPENDENT PSYCHOLOGICAL/PSYCHIATRIC EXAMINATION OF THE COMPLAINING WITNESS AND DISCOVERY REQUEST FOR HER MEDICAL/MENTAL HEALTH TREATMENT RECORDS

COMES NOW, the Defendant, MELVYN P. SPROWSON, JR. ("Mr. Sprowson"), by and through his attorneys, JOHN J. MOMOT, ESQ. and YI LIN ZHENG, ESQ., of the Law Office of Momot & Zheng, and hereby submits the attached Reply to State's Opposition to Defendant's Motions moving this Honorable Court to allow him to employ an independent expert to conduct a psychological and/or psychiatric examination on the complaining witness, JT,[1] or in the alternative to allow the defense to interview JT. Additionally, Mr. Sprowson requests that this Court order the release and production of JT's medical/mental health treatment records.

[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 motion. Rather she shall be referred to by her initials of JT.

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This pleading incorporates by reference the arguments made in Defendant's original motions, is made based upon all papers and pleadings on file herein, the attached Memorandum of Points and Authorities in support hereof, and oral argument at the time of the hearing on this matter, if deemed necessary by this Honorable Court.

DATED this 11 day of October, 2014.

JOHN J. MOMOT, ESQ.

MEMORANDUM OF POINTS AND AUTHORITIES

1. AN INDEPENDENT PSYCHIATRIC/PSYCHOLOGICAL EVALUATION OF THE COMPLAINING WITNESS IS NECESSARY

The State's lengthy Opposition to Mr. Sprowson's Motion for an independent psychiatric/ psychological evaluation of JT has one refrain, which can be summed up in a singular sentence, "… [I]t is the State's position that a victim of sexual assault should never be forced to endure something as intrusive and harassing as a psychological examination[2] unless it has a purpose other than to cast doubt on the veracity of the victim." (Opposition, p. 15, ln. 8-11).

In the case at hand, a compelling reason exists to necessitate an independent psychiatric/ psychological evaluation of JT, other than for the reasons suggested by the State. Here, an independent psychiatric/psychological evaluation is necessary because it directly addresses an essential element of the offense charged against Mr. Sprowson; namely, Count 2 – Child Abuse, Neglect, or Endangerment with Substantial Mental Harm.[3] By so charging Mr. Sprowson, the State has put JT's intellectual, psychological capacity, and emotional condition directly at issue

[2] It should be noted that considering JT has already endured a therapeutic regiment of mental health evaluations, medication, intensive therapy to reprogram her, behavioral therapy, and long-term residential treatment, an additional independent psych evaluation is not particularly intrusive or harassing.

[3] Pursuant to NRS 200.508(4)(e), "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.

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and in controversy. When it comes to substantial mental harm, psychiatric/psychological assessments are the best tool to evaluate the circumstances, the state of mind of the parties, the before and after of JT's intellectual, psychological, and emotional condition, if there is an observable and substantial impairment to her ability to function within her normal range, and whether Mr. Sprowson caused that impairment, if any. The defense does not seek an independent psych evaluation of JT to force her to have to endure yet another examination; the defense's purpose is not to harass, or to re-victimize, or to attack JT's character or credibility, as the State would suggest. Rather it is necessary to make an independent determination and to get to the truth of whether or not JT's intellectual, psychological, and emotional condition was so impaired by Mr. Sprowson that it constitutes substantial mental harm, in order to competently present a defense.

Moreover, it is important to note that there is a glaring discrepancy between the State's arguments and the litany of cases cited in its Opposition which must be distinguished from the case at hand. That being ***the instant case is not a sexual assault case and JT is not a sexual assault victim.*** Because in a sex assault case the intellectual, psychological, and emotional condition of the sex assault victim is irrelevant, given that the crime of sexual assault is determined by whether penetration occurred. Hence, psychiatric/psychological evaluations are disfavored because they are not necessary to determine whether or not penetration occurred. Here, the situation is different and quite the opposite. In order to establish or refute the essential element of substantial mental harm, the intellectual, psychological, and emotional condition of the victim, JT, is absolutely relevant and central to the issue. Hence, psychiatric/psychological evaluations are necessary to determine whether the intellectual, psychological, and emotional condition of the victim suffered any observable and substantial impairment because of the defendant.

Case law in Nevada establishes a set of factors for the court to look at in deciding whether to grant a request for an independent psychological examination. The Nevada Supreme Court outlined the factors in Koerschner v. State, 116 Nev. 1111, 1117, 13 P.3d 451, 455 (2000), stating:

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> We now also hold that whether a compelling need exists for such an intrusion is not a factor to be considered along with the other three factors. Rather, it is the overriding judicial question which must be resolved based upon the other three factors. Thus, compelling reasons to be weighed, not necessarily to be given equal weight, involve [1] whether the State actually calls or obtains some benefit from an expert in psychology or psychiatry, [2] whether the evidence of the offense is supported by little or no corroboration beyond the testimony of the victim, and [3] whether there is a reasonable basis for believing that the victim's mental or emotional state may have affected his or her veracity.

With regard to the **first factor**, the State now claims "As for the child abuse, neglect, or endangerment with substantial bodily or mental harm charge, the State does not need an expert to offer proof that J.T. suffered substantial mental harm as a result of the Defendant's abuse and/or neglect, J.T. and her mother will provide testimony to satisfy the elements of substantial mental harm." (Opposition, p. 12, ln. 25-28). This is precisely what the defense takes issue with. By primarily relying on K. Smith, JT's mom, to provide the testimony to substantiate the elements of substantial mental harm, the State is bolstering K. Smith's testimony and elevating it to that of an "expert." Though the State will argue that K. Smith is but a lay witness, the Court in Abbott v. "State, 138 P.3d 462, 469 (2006), clarified the issue of who is a "expert" for consideration of the three factors. In Abbott the court held that:

> A **witness is acting as an expert witness**, for the purposes of Koerschner, **when he does more than merely relate the facts and instead analyzes the facts** and/or states whether there was evidence that the victim was coached or biased against the defendant. … If the State intends that the [witness] will testify beyond the facts of the case **and will provide his own experiences and assessments** of the interview, the State must notify the district court prior to trial, so as to afford the defendant time to request his own independent psychological evaluation of the victim or otherwise obtain rebuttal testimony.

Here, in order for K. Smith to testify to the elements of substantial mental harm, she must do more than merely relate the facts. She will undoubtedly testify beyond the facts of the case; she will provide testimony that analyzes JT's intellectual, psychological, and emotional state based on her assessment, opinion, and experiences with JT. Pursuant to Abbott, the State is making an "expert" out of K. Smith on JT's intellectual, psychological, and emotional condition.

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The defense submits that this is impermissible for several reasons. Mainly, that K. Smith is the most biased person imaginable to testify regarding JT and this issue. K. Smith's perception of this issue is diametrically opposed to JT's position. According to JT, Mr. Sprowson did not harm her in any way. Meanwhile, K. Smith has been the biggest proponent of Mr. Sprowson's prosecution. Not to mention that the reason JT ran away from home in the first place is because of her differences with K. Smith. Any testimony now regarding JT having difficulty readjusting when she was returned to the home of K. Smith, or that her mood had worsened, or that she threatened to commit suicide is equally attributable to the fact that JT did not want to be returned to K. Smith or her home. JT's behavior after being returned to K. Smith is certainly not proof that it is a direct consequence of substantial mental harm caused by Mr. Sprowson. To allow K. Smith to testify that Mr. Sprowson is at fault, and essentially as an "expert" to JT's intellectual, psychological, and emotion condition, is disingenuous. Furthermore, K. Smith is unqualified to testify about whether JT suffered a substantial impairment to her ability to function within her normal range of performance or behavior. She has no training in child development and psychology. Even in the most favorable light to the State, K. Smith's relationship with JT is misconstrued. Thus, the remedy is to grant the defense's request for an independent psychiatric/ psychological evaluation JT. An independent, non-biased third-party is necessary to make qualified determination of whether JT did in fact suffer substantial mental harm because Mr. Sprowson.

As to the **second factor**, not only is the state's evidence *de minimus*, its evidence is often contradicted by the complaining witness JT's account of the events. 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

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interviewers if she could continue to live with Mr. Sprowson. [PHT, p. 94]. JT had 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].

This segues directly into the **third factor** of whether or not there is a reasonable basis for believing that the victim's mental or emotional state may have affected her veracity. In this instance, there is more than a reasonable basis to believe that the events prior to and following the discovery of JT in Mr. Sprowson's apartment have impacted her mental or emotional state that may affect her veracity; such as JT's mental health treatment after returning to K. Smith.

According to Det. Schell's Report, dated November 22, 2013, the characterization of JT's need for therapeutic treatment is that "She needed some reprogramming and behavioral treatment." The report goes on to state that "Her behavior has improved since she has been in intensive therapy; she was prescribed medication for a mood disorder." Here, JT's admission into a long-term residential treatment facility for reprogramming and behavioral treatment, and intensive therapy is the source of the manipulation to JT's veracity.

It is clear that JT's initial perception of the case and of Mr. Sprowson contradicts the State's theory of the case. The objective of JT's commitment into a long-term residential and intensive therapy program is to modify her perception of the relationship that she shared with Mr. Sprowson. This is basically a medically sanctioned form of extensive coaching of a witness to be biased against the defendant. It is designed to alter JT's perception of Mr. Sprowson, so that the tenor of her testimony changes to conform to the State's theory of the case, its portrayal of Mr. Sprowson, and that of her family. Undoubtedly, this therapeutic regimen will alter JT's mental and emotional state – as therapy is designed to do – and will impact her veracity and testimony at

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trial because she is being instructed and indoctrinated to be biased against Mr. Sprowson. Thus, it is imperative that Mr. Sprowson be permitted to have JT examined by a psychologist and/or psychiatrist, or at the very least to be able to review her mental health treatment records, to determine what effect JT's regimen of re-programming and intensive therapy has had on her mental, emotional state, and veracity.

2. THE COURT SHOULD GRANT THE DEFENSE'S DISCOVERY REQUEST REGARDING THE PHYSICAL AND/OR MENTAL EXAMINATIONS PERFORMED ON THE COMPLAINING WITNESS, BY ORDERING THE *RELEASE AND PRODUCTION OF THOSE DOCUMENTS.*

The Defense's request for discovery materials of physical and/or mental examination includes but is not limited to statements made for medical treatment by JT, Kathryn Smith, and Cheryl Smith, intake paperwork, hospital records, medical documentation, doctors' notes, nurses' notes, test results and/or diagnosis of JT' physical and mental health condition, her course "reprogramming and behavioral treatment," course of intensive therapy, and medication prescribed for the diagnosed mood disorder, and discharge paperwork. In particular, counsel is seeking medical documentation as stated above for her admission and duration of treatment at Monte Vista Hospital on November 4, 2013, November 16, 2013, and any treatment thereafter. This request includes the complete prior medical and mental health history of JT, including but not limited to medical treatment, medical opinions previously rendered, prior history of mental health, psychological, or counseling services, and/or services received by and through victim services in prior cases as an alleged victim. This ongoing request also includes documentation from care provider treating JT during her continued and long-term treatment in Reno, Nevada, and any aftercare treatment providers.

Here, the State cannot argue that the Defense is both not allowed to have an independent psychologist/psychiatrist evaluate JT and not entitled to the reports regarding the physical and mental examinations of JT that are already performed. Because it is the State that has put JT's

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intellectual capacity, psychological, and emotional condition in the center of the controversy by charging Mr. Sprowson with Child Abuse, Neglect, or Endangerment with Substantial Mental Harm in Count 2.

If this was a case alleging substantial bodily harm, as opposed to substantial mental harm, then there would be no question that the State would be required to and ordered to turn over the medical records for treatment to prove that the injuries constitute substantial bodily harm. The duties of the State are not lessened when substantial mental harm is alleged. The substantial mental harm enhancement and component is an essential element of Count 2. Yet the State has produced absolutely nothing to support its allegation that Mr. Sprowson's abuse, neglect and/or endangerment of JT directly caused an 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 a normal range of performance or behavior.

Unless the State intends on ambushing the Defense at trial, the only indication of the evidence that the State intends to present is the testimony of K. Smith – who has historically been embroiled in conflict with JT and is clearly biased against Mr. Sprowson – to establish the element of substantial mental harm. Meanwhile, according to the State, JT necessitated such long-term and intensive mental health treatment because of the substantial mental harm she suffered at the hands of Mr. Sprowson. Consequently, if the therapeutic regiment of mental health evaluations, medication, intensive therapy to reprogram JT, behavioral therapy, and long-term residential treatment were all to treat and remedy the substantial mental harm that she suffered because of Mr. Sprowson, then how are those treatment records not 100% relevant and wholly subject to discovery. Moreover, if JT's statements to the mental health providers are consistent with her testimony at the Preliminary Hearing, then the existing reports on the mental examinations are replete with exculpatory statements to which the Defense is entitled to the discovery.

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3. THIS COURT SHOULD ALLOW THE DEFENSE ACCESS TO INTERVIEW THE COMPLAINING WITNESS

Mr. Sprowson requests that this Court allow his investigator and defense counsels to interview JT. At the Preliminary Hearing, JT testified that it had not been relayed to her that the defense had wanted to interview her but that she was amenable to and was willing to speak to the defense. As such, Mr. Sprowson would request that this Court order K. Smith to provide a time and place for the defense to speak with JT, based on the principles of Davis v. State, 110 Nev. 1107, 881 P.2d 657 (1994), because witnesses to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity, to interview them. To adequately prepare, the defense should be able to speak to JT to discuss events known to her which could aid in the defense of Mr. Sprowson. Therefore, Mr. Sprowson requests that this Court allow his counsel and investigators access to interview JT.

III. CONCLUSION

Based on the above, Mr. Sprowson respectfully requests that this Honorable Court grant his Motion and allow him to employ an independent expert to conduct a psychological and/or psychiatric examination on the complaining witnesses. Additionally, Mr. Sprowson requests that this Court order the release and production of JT's medical/mental health treatment records. Moreover, Mr. Sprowson requests that the Court order K. Smith to make JT available for the defense to interview her.

RESPECTFULLY SUBMITTED this 11 day of October, 2014.

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- MELVYN PERRY SPROWSON, JR., #5996049 Defendant.	CASE NO: **C-14-295158-1** DEPT NO: **XXIII**

NOTICE OF MOTION AND MOTION IN LIMINE TO PRECLUDE EVIDENCE OF VICTIM'S PRIOR SEXUAL ABUSE AT TRIAL

DATE OF HEARING: SEPTEMBER 15, 2014
TIME OF HEARING: 9:30 A.M.

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, District Attorney, through JACQUELINE BLUTH, Chief Deputy District Attorney, and hereby files this Notice of Motion and Motion in Limine to Preclude Evidence of Victim's Prior Sexual Abuse at Trial.

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

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NOTICE OF HEARING

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing motion on for setting before the above entitled Court, in Department XXIII thereof, on _____, the 15 day of September, 2014, at the hour of 9:30 o'clock, or as soon thereafter as counsel may be heard.

DATED this 4th day of September, 2011.

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

BY /s/ JACQUELINE BLUTH
JACQUELINE BLUTH
Chief Deputy District Attorney
Nevada Bar #10625

POINTS AND AUTHORITIES

STATEMENT OF FACTS

Defendant, MELVYN SPROWSON, is charged by way of Criminal Information with the crimes of First Degree Kidnapping (Category A Felony – NRS 200.310, 200.320); Child Abuse, Neglect, or Endangerment with Substantial Bodily and/or Mental Harm (Category B Felony – NRS 200.508(1)) and Unlawful Use of a Minor in the Production of Pornography (Category A Felony – NSR 200.700, 200.710(A)(B), 200.750). The crime occurred on or about July 1, 2013 and November 1, 2013. The victim is a minor female, J.T. (DOB: 06-06-97). The crimes occurred on or between August 30, 2013 and October 31, 2013.

The Preliminary Hearing Testimony of J.T. Pertinent to this Motion

At the preliminary hearing of this matter, J.T. testified that she was 16 years old and her birthday is June 6, 1997. In June or July of 2013, J.T. lived with her mom, grandmother and two sisters. PHT, p. 13. In July of 2013, J.T. began speaking with Defendant over the Internet. J.T. was 16 when she began speaking with Defendant and she met him on Craigslist. PHT, p. 14. Defendant had an ad on Craigslist that said, "Lonely millionaire" and stated a fake age of 30. J.T. responded to the ad by saying "hi". Defendant responded back by saying

"hello" and then J.T. told Defendant that she was 16. PHT, pp. 15-16.

For a few days J.T. and Defendant communicated through Craigslist e-mail, where they exchanged photos. Later, they communicated through Kik, which is a texting application, because it was easier than e-mailing. J.T. testified that in the beginning she and Defendant were just friends and then on August 1 [2013], Defendant asked her out and she said yes. PHT, p. 18. J.T. testified that from August 1st forward, she and Defendant were boyfriend and girlfriend. J.T. further testified that Defendant told her that his real age was 44; and, that after they became boyfriend and girlfriend she sent Defendant more photographs. PHT, pp. 17-19. J.T. testified that she sent Defendant pictures because he asked her to send them and because she wanted to send them. J.T. further testified that when she sent the pictures she knew what to do because Defendant told her what to do. PHT, p. 20.

Defendant told J.T. different poses to do and she did them because she wanted to. The first place J.T. actually saw Defendant was at the Omelet House, where she was working at the time. J.T. testified that they did not speak, they just looked at each other. J.T. actually physically met with Defendant at a roller skating rink. J.T. was with her friend Jessica but Jessica did not know who J.T. was meeting. Jessica thought J.T. was meeting an old teacher of J.T.'s. PHT, pp. 21-22.

J.T. testified that she did not tell her mom that she was meeting the defendant. J.T. testified that she and Defendant communicated through Kik for 27 days before she actually went to his home. J.T. never told her told her mom that she was communicating with Defendant. J.T. told Defendant that she could not tell her mom because she would not be happy at all. PHT, pp. 23-24. J.T. testified that she made sure that Defendant did not call when her mom was home and they did not video chat when she was anywhere near. Defendant would only call when she asked him to. J.T. and Defendant came up with a plan if their relationship was found out which was that she would just keep going back to him. PHT, p. 24

J.T. testified that the first time she went to Defendant's house she asked him to go there. J.T. told her mom that she was Jessica's house. J.T. told Jessica that she had to do something else and Defendant picked her up and drove her to his house. J.T. stayed at Defendant's house

for two nights. J.T. testified that she asked her mom if she could spend a second night at Jessica's because they were having a lot of fun and her mom said yes. PHT, pp. 25-26. J.T. testified that during the two night period at Defendant's house, they had sexual intercourse once or twice. J.T. testified that they did not use a condom because Defendant told her that he could not have kids. J.T. testified that Defendant gave her a promise ring that looked like a wedding ring the night she slept over, which she wore around her neck. J.T. testified that her mom saw the ring and she first told her mom that she had found it and then told her mom that a boy named Joshua had given it to her. J.T.'s mom did not believe her and found out that J.T. had not been sleeping over a Jessica's. J.T.'s mom got J.T.'s phone records and then took away the ring, J.T.'s phone and J.T.'s computer. PHT, 27-29. J.T. told her mom that she needed to do a project and e-mailed the Defendant asking him to come and pick her up, because if he didn't she wouldn't be able to be with him. Defendant agreed to come and get J.T. and told her to bring her birth certificate and social security card, because she would need them to get a job and other things when she got older. J.T. and Defendant had a plan for her to stick it out, in the house, until she was 17 and a half, and then they were going to get married and she was going to go to school. PHT, pp. 30-31.

J.T. took her birth certificate and social security card and Defendant picked her up at 3:00 or 4:00 in the morning, while her mom was asleep. J.T. snuck out the front door and told the Defendant that he could leave her there if he wanted to. Defendant told J.T. it was ok and took her to his house, in Henderson, Clark County. PHT, pp. 32-33.

J.T. testified that Defendant changed his telephone number because she told him that her mom had his other number. J.T. lived with Defendant for two months, from August 28th until November 1st. J.T. testified that Defendant was a teacher and while he was at work, she would watch TV, play video games or read a book. J.T. testified that before she lived with Defendant, she attended school at A-Tech. J.T. did not go to school while living with Defendant. PHT, pp. 33-34.

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J.T. testified that Defendant felt bad about her not going to school but they had made an agreement because she would be found if she did go. J.T. testified that it was her and Defendant's plan, together, that she would go undetected until she was 17 and a half, when she would be old enough to get married and go to school. PHT, p. 35. While J.T. was at Defendant he gave her things to do and books to read to continue her education; and, he gave her board games. J.T. testified that she had rules when she lived with Defendant that included having no guys in the house and for her not to go outside because she could be found. J.T. would sometimes ask Defendant to take her out of the house but he would be tired. J.T. and Defendant sometimes went out of the house at night, but she would dress like a boy with hat and glasses and baggier clothing. PHT, pp. 35-37.

J.T. testified that she considered Defendant to be a little bit of a jealous person because he would accuse J.T. of cheating on him. Defendant would tell J.T. that he knew she was a cheater; that he should not have trusted her; that his brother was right; and, for her to pack her bags he was taking her home. J.T. would pack her bags and Defendant would become sad and cry. PHT, pp. 37-38. Defendant would ask J.T. to stay because he loved her. J.T. testified that Defendant cried twice; and, that three or four times they just weren't communicating right or something, so she would pack her bags and he would apologize and ask her to stay. During the eight or nine weeks that J.T. was with Defendant she and Defendant stumbled upon her family on Twitter, looking for her. PHT, p. 39.

J.T. discovered that her mom was looking for her after a post her aunt made on Twitter indicating that she was missing and to please repost. J.T. also saw posts on Facebook. J.T. testified that when Defendant saw those things he told her that her mom wanted control over her. J.T. further testified that she missed her mom and her family and she told the Defendant that; but, she felt it was worth it and she would see them in two years. J.T. testified that she ask Defendant to drive her by her family's house at night, which he did. When J.T. asked Defendant if she could call her family he would tell her that they would call the following week, but she never called her family. PHT, pp. 41-43.

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In the nine weeks that she was with the Defendant, they were intimate once a week. J.T. testified that Defendant did not mistreat her, but he was picky about some things, telling her that her letters weren't right, she couldn't wash a dish right, and she could not sing. PHT, pp. 43-44.

Defendant told J.T. that her mom did not care about her and they wrote a story that Defendant was Prince Charming and J.T. was a princess and Defendant saved J.T. from her mom. J.T. put the story in a closet at Defendant's house. J.T. testified that she drank alcohol on two occasions after Defendant bought it. J.T. During one of those occasions, J.T. got a little buzzed and had problems walking. J.T. testified that she and Defendant were intimate on that occasion. PHT, p. 45-47.

J.T. testified that their plan if she got caught living with him was for her to keep coming back. They planned for her to tell the police that he was looking for a roommate and she found him on Craigslist. J.T. was not to discuss their relationship and it was supposed to look like they were just roommates. Once while she was living with Defendant, a private investigator came to the door looking for J.T. She could hear Defendant talking to them but could not hear what he was saying. After he left, Defendant told J.T. that they were fine and they believed what he told them. PHT, pp. 48-49.

On November 1st, the police came to the door while J.T. was home alone. J.T. spoke with them but she was not honest with them, with regard to whether they had sex and that they were just roommate. J.T. testified that she stuck to the plan. J.T. testified that Defendant did not stick to the plan and J.T. was going to be going home. J.T. taken to West Care for a few hours before being taken home to her mom's house. J.T. stayed at her mom's house for a few days and then went to Montevista, a behavioral health center, after trying to leave the house and go back to Defendant's. J.T. stayed in Montevista for ten days. PHT, p. 49-52. J.T. testified that after she returned home to her mom, she felt okay, but later tried to commit suicide by jumping off their house balcony. J.T. testified that she did that because "it was too much." J.T. went back to Montevista for a month and was currently in treatment at a different facility four months. J.T. testified she has nightmares. PHT, pp. 53-54.

The Preliminary Hearing Testimony of Kathryn Smith Pertinent to this Motion

Kathryn Smith is the mother of J.T. Kathryn testified that J.T. is 16 years of age and her birthday is June 6, 1997. During the summer, 2013, around June or July, Kathryn began to recognize a change in J.T.'s behavior. In July J.T. began staying in her room more. When Kathryn would walk into the room, she would notice the screen change on the computer which made her suspect. Kathryn took the computer periodically and checked in but found nothing. PHT, pp. 172-173.

Kathryn testified that J.T. came home with a ring that looked like a wedding band. J.T. told Kathryn that she found the ring on the ground in front of Target. Kathryn thought it was strange for J.T. to keep the ring because it was out of character for J.T., who would normally take it to customer service or return it. J.T. gave Kathryn numerous conflicting stories about the ring that made her uncomfortable and suspicious. Kathryn took the ring from J.T. Kathryn also noticed that J.T. was making all kinds of telephone calls to a number that Kathryn did not recognize. Kathryn confronted J.T. about the calls. Kathryn told J.T. she would have to come up with the truth and they would figure out what the consequences would be. Kathryn took J.T.'s computer and phone away from her on August 28th. The following day, Kathryn woke up and J.T. was not there. PHT, pp. 173-175. Kathryn testified that the residence was located in Henderson, Clark County. PHT, p. 176.

Kathryn testified that she kept J.T.'s Social Security card in her wallet and J.T.'s birth certificate was in a drawer of Kathryn's. PHT, p. 176. When Kathryn woke up and J.T. was not home, she called the phone number that she had seen on the phone records and it was disconnected. Kathryn testified that it had been on the night before when J.T. was home, because Kathryn had called the number several times trying to get someone to answer the phone so that she could have a conversation with them and tell them that they were talking to a 16 year-old, in case they didn't know. PHT, p. 177.

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Kathryn testified that she had never met Defendant and she had never given Defendant permission to take her daughter from her home. Kathryn testified that she had given J.T. permission to stay a couple nights with her best friend, Jessica, a couple weeks before that. Kathryn testified that she did not give J.T. permission to be with Defendant during that weekend. PHT, pp. 178-179.

The day that J.T. went missing, Kathryn contacted the Henderson Police Department, who took a report and told her that someone would get back to her. Kathryn did not receive much help there and hired a private detective. Kathryn also looked at J.T.'s bank account and came across the Defendant's name, which she provided to the police. When Kathryn researched the name of Defendant she came across message that said, "Welcome Clark County School District teachers; years 2013-2014." PHT, pp. 179-180. Kathryn gave the Henderson Police the Defendant's name, the name of the school she believed he worked at, as well as an IP address that J.T. had logged onto from her computer. Kathryn testified that she used Facebook, Twitter and Instagram in order to find J.T. and put out word that she was missing, at which time an organization stepped in to help her find J.T. PHT, pp. 181-182.

Kathryn noticed that some of J.T.'s personal belongings were missing which included her backpack, three pairs of shoes, almost all of her jeans and clothes, as well as her birth certificate and Social Security card. PHT, p. 182. Kathryn testified that Nevada Child Seekers, Close Kids, The National Center for Missing and Exploited Children and Human Trafficking were all involved in helping to find J.T. Kathryn continued to ask the Henderson Police to go to Defendant's house, but they did not go. PHT, p. 183. Kathryn testified that one of the counselor's at her youngest daughter's school worked closely with an officer for the Clark County School District Police Department. Kathryn gave him the information that she had and J.T. was found at Defendant's address within 24 hours. PHT, p. 184.

When J.T. was returned home it did not go well. Kathryn first slept in front of the door so that J.T. would not be able to leave; and, then took to sleeping with J.T. in the car so as not to disturb the others in the house. J.T. was threatening to kill herself at this time and told Kathryn she would rather die that live with her. Kathryn took J.T. to Montevista Hospital,

where she stayed for ten days. PHT, p. 185-186.

When J.T. returned home she attempted to jump off a second story balcony because she could not use the phone. After the suicide attempt, J.T. went back to Montevista where she stayed for a period of time before being placed into a long term treatment for approximately six months. Kathryn testified that mentally and behaviorally, J.T. remained unstable and erratic. Kathryn testified that it is much more so than it was before J.T. met Defendant. PHT, p. 187-190.

After J.T. was found and returned home, Kathryn became aware that J.T. had sent Defendant nude photos. Kathryn notified the prosecutor of that information. PHT, p. 211.

Statement of the Case Regarding J.T.'s Prior Victimization Pertinent to this Motion

On June 29, 2012, Defendant, DAVID SCHLOMANN, was charged by way of Criminal Complaint with the crimes of Luring Children or Mentally Ill Persons with the Use of Technology with the Intent to Engage in Sexual Conduct (Category B Felony – NRS 201.560); Burglary (Category B Felony – NRS 205.060); First Degree Kidnapping (Category A Felony – NRS 200.310, 200.320); Statutory Sexual Seduction (Category C Felony – NRS 200.364, 200.366); and Sexual Assault with a Minor Under Sixteen (Category A Felony – NRS 200.364, 200.366). The crimes occurred on or between April 6, 2012 and April 15, 2012. The victim is J.T., then age 14. Defendant was 41 years of age, married, with three children, when he committed the crimes against J.T. Defendant was living in Albuquerque, New Mexico, but traveled to Las Vegas to commit the crimes against J.T. SCHLOMANN knew that the victim was fourteen years of age, yet, on two separate occasions he drove the victim to his hotel room, without the victim's mother's knowledge, and engaged in sexual misconduct with her.

On September 25, 2013, Defendant pled guilty to Count 1 – Luring Children or Mentally Ill Persons with Use of Technology with the Intent to Engage in Sexual Assault (Category B Felony) and Count 2 – Attempt Sexual Assault (Category B Felony). The State retained the right to argue at the rendition of sentence.

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On March 13, 2014, Defendant was sentenced, in addition to $25.00 Administrative Assessment Fee, $150.00 DNA Analysis Fee including testifying to determine genetic markers, $760.00 Psychosexual Evaluation fee, and $2,394.76 in Restitution, to Count 1 – a MINIMUM of SEVENTY-TWO (72) MONTHS and a MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS in the Nevada Department of Corrections (NDC), and in Count 2 – to a MINIMUM of NINETY-SIX (96) MONTHS with a MAXIMUM of TWO HUNDRED FORTY (240) MONTHS in the NDC, CONSECUTIVE TO COUNT 1; SUSPENDED; placed on PROBATION for an indeterminate period not to exceed FIVE (5) YEARS. The Court further imposed all of the conditions as required by NRS 176A.410. The Court further ordered a special SENTENCE OF LIFETIME SUPERVISION to commence upon release from any term or probation parole or imprisonment; and, Defendant register as a sex offender within forty-eight hours of sentencing or release from custody.

LEGAL ARGUMENT

I. EVIDENCE OF J.T.'S PRIOR VICTIMIZATION IS IRRELEVANT AND THEREFORE INADMISSIBLE

The threshold question for the admissibility of evidence is relevance. Brown v. State, 107 Nev. 164, 168, 807 P.2d 1379, 1382 (1991). NRS 48.025(1) provides "all relevant evidence is admissible." NRS 48.015 states "'relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Such determinations of relevancy are within the discretion of the trial court. Brown v. State, 107 Nev. 164, 168, 807 P.2d 1379, 1382 (1991).

In the instant case, evidence regarding J.T. having previously been a victim of crime and the circumstances surrounding that case is irrelevant and therefore inadmissible. J.T.'s previous victimization has no bearing with regard to any issue in this case. Certainly, J.T. having previously been victimized by DAVID SCHLOMANN does nothing to prove or disprove the crimes committed by Defendant in this case. As such, the evidence is inadmissible and should be excluded as the basis for examination at trial.

II. NRS 50.090 AND 48.069 PRECLUDE EXAMINATION REGARDING J.T'S PRIOR VICTIMIZATION

Nevada, joining a vast majority of jurisdictions, passed statutes limiting the admissibility at trial of evidence concerning the sexual history of a complaining witness in a rape or sexual assault case. To this end, NRS 50.090 prohibits the accused from impeaching a rape victim's credibility with evidence of her prior sexual conduct, unless the victim has testified regarding her sexual history or the prosecution has presented evidence regarding the victim's prior sexual conduct. In addition, NRS 48.069 provides:

> In any prosecution for sexual assault or for attempt to commit or conspiracy to commit a sexual assault, if the accused desires to present evidence of any previous sexual conduct of the victim of the crime to prove the victim's consent:
>
> 1. The accused must first submit to the court a written offer of proof, accompanied by a sworn statement of the specific facts that he expects to prove and pointing out the relevance of the facts to the issue of the victim's consent.
>
> 2. If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the victim regarding the offer of proof.
>
> 3. At the conclusion of the hearing, if the court determines that the offered evidence:
>
> (a) Is relevant to the issue of consent; and
>
> (b) Is not required to be excluded under NRS 48.035, the court shall make an order stating what evidence may be introduced by the accused and the nature of the questions which he is permitted to ask. The accused may then present evidence or question the victim pursuant to the order.

In Summit v. State, 101 Nev. 159, 697 P.2d 1374 (1985), the Nevada Supreme Court explained that the general policy behind rape victim shield laws is to (1) reverse the common law rule that use of evidence of a female complainant's general reputation for morality and chastity is admissible to infer consent and to attack credibility, (2) protect rape victims from degrading and embarrassing disclosure of intimate details about their private lives, and (3) encourage rape victims to come forward and report crimes and testify in court protected from unnecessary indignities and needless probing into their respective sexual histories. See also,

Drake v. State, 108 Nev. 523, 836 P.2d 52 (1992); Brown v. State, 107 Nev. 164, 807 P.2d 1370 (1991); Lane v. Second Judicial Dist. Court, 104 Nev. 427, 760 P.2d 1245 (1988).

In the instant case, any examination by the defense regarding J.T'S prior victimization constitutes a thinly veiled attempt to introduce evidence of the victim's prior sexual history, which has absolutely no relevance to this Defendant or this case. Rather, any questions concerning the prior victimization of J.T. and the circumstances surrounding it, would simply be an attempt to assault her character in front of the jury, in contradiction to the letter and policy of Nevada's rape shield statute. This is precisely the type of improper motive for examination that NRS 59.090 and 48.069 seek to preclude.

III. EVIDENCE OF J.T.'S PRIOR VICTIMIZATON IS NOT ADMISSIBLE PURSUANT TO NRS 48.035

NRS 48.035 states in relevant part:

> 1. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.
>
> 2. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

From the foregoing it is clear that evidence of J.T.'S prior victimization and prior sexual history in that respect have no probative value in this case. Beyond that, the danger of unfair prejudice from such evidence is great. In addition, such evidence would add nothing to the Defendant's case and would unjustifiably delay the proceedings; and, mislead the jury as to the real issue in the case, which is whether this Defendant kidnapped J.T., used her to produce pornography, and, committed the crime of child abuse, neglect, or endangerment with substantial bodily and/or mental harm, by keeping her isolated from her family, engaging in sexual intercourse with her, keeping her from going to school; and, engaging in demeaning and controlling behaviors toward her.

//

//

IV. ADMISSION OF J.T'S PRIOR VICTIMIZATION WOULD CONSTITUTE IMPROPER CHARACTER EVIDENCE

NRS 50.085 states:

> 1. Opinion evidence as to the character of a witness is admissible to attack or support his credibility but subject to these limitations:
>
> (a) Opinions are limited to truthfulness or untruthfulness; and
>
> (b) Opinions of truthful character are admissible only after the introduction of opinion evidence of untruthfulness or other evidence impugning his character for truthfulness.
>
> 2. Evidence of the reputation of a witness for truthfulness or untruthfulness is inadmissible.
>
> 3. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime, may not be proved by extrinsic evidence. They may, however, if relevant to truthfulness, be inquired into on cross-examination of the witness himself or on cross-examination of a witness who testifies to an opinion of his character for truthfulness or untruthfulness, subject to the general limitations upon relevant evidence and the limitations upon interrogation and subject to the provisions of NRS 50.090.

In Lobato v. State, 120 Nev. 512, 96 P.3d 765 (2004), the Nevada Supreme Court addressed the issue of the admissibility of extrinsic evidence and determined, in that case, the evidence was admissible because it was relevant to a mode of impeachment that does not implicate the collateral-fact rule-motivation to give false testimony.

In distinguishing the district court's error in not permitting Lobato to introduce extrinsic evidence to impeach the witness on the issue of her motive to testify, the Court noted:

> FN 16. **The present matter is distinct from prior cases in which we ruled that extrinsic evidence was inadmissible and therefore collateral. Those cases dealt with evidence of a witness's prior bad acts, not inquiry into a witness's bias or interest, and we ruled that the use of extrinsic evidence in such situations was impermissible**. See, e.g., Collman v. State, 116 Nev. 687, 7 P.3d 426 (2000) (district court properly precluded questioning a state witness regarding an abortion; such evidence was immaterial to the question of whether the defendant committed homicide and therefore inadmissible); McKee v. State, 112 Nev. 642, 917 P.2d 940 (1996) (error for prosecutor to impeach defendant with extrinsic evidence regarding drug use on a specific day; such evidence was irrelevant to whether defendant trafficked drugs on another day and was therefore inadmissible collateral evidence); Rowbottom v. State, 105 Nev. 472, 779 P.2d

934 (1989) (error to admit extrinsic evidence of prior bad act to impeach defendant's credibility; prosecutor could only impeach by questioning defendant about the act during defendant's own testimony, not by introducing extrinsic evidence); Rembert v. State, 104 Nev. 680, 766 P.2d 890 (1988) (error to allow State to introduce immaterial extrinsic evidence of defendant's termination from employment; the issue at trial was whether defendant had the opportunity to commit sexual assault; therefore, the extrinsic evidence was collateral).

Pursuant to NRS 50.085, evidence of a witness' character is admissible only if it goes to truthfulness or untruthfulness. Moreover, extrinsic evidence, other than a prior criminal conviction, may not be used for the purpose of attacking the credibility of a witness.

CONCLUSION

Based upon the above and foregoing Points and Authorities, the State respectfully requests this Court grant its Motion in Limine to Preclude Evidence of Victim's Prior Sexual Abuse at Trial.

DATED this 4th day of September, 2014.

Respectfully submitted,

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

BY /s/ JACQUELINE BLUTH
JACQUELINE BLUTH
Chief Deputy District Attorney
Nevada Bar #010625

CERTIFICATE OF E-MAIL

I, hereby certify that service of the above and foregoing, was made this 4th day of September, 2014, by e-mail to:

JOHN J. MOMOT, ESQ.
e-mail: momotlawfirm@gmail.com

/s/ HOWARD CONRAD
Secretary for the District Attorney's Office
Special Victims Unit

hjc/SVU

MOT
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Attorney for Defendant
MELVYN P. SPROWSON, JR.

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

MELVYN P. SPROWSON, JR., #5996049

Defendant.

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

OPPOSITION TO STATE'S MOTION *IN LIMINE* TO PRECLUDE EVIDENCE OF VICTIM'S PRIOR SEXUAL ABUSE AT TRIAL

COMES NOW, the Defendant, MELVYN P. SPROWSON, JR. ("Mr. Sprowson"), by and through his attorneys, JOHN J. MOMOT, ESQ. and YI LIN ZHENG, ESQ., of the Law Office of Momot & Zheng, and hereby submits the attached Points and Authorities in opposition to the State's Motion *In Limine* to Preclude Evidence of Victim's Prior Sexual Abuse at Trial.

This Motion is made and based upon the pleadings and papers on file herein, the attached Memorandum of Points and Authorities in support hereof, and oral arguments at the time of hearing on this Motion, if deemed necessary by this Honorable Court.

DATED this 13 day of October, 2014.

JOHN J. MOMOT, ESQ.

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FACTS PERTINENT TO THE PRIOR INCIDENT

In the case styled State of Nevada vs. David Schlomann, Case No. 12F09172X/C295989, the conduct of the defendant in that case was far more egregious than the conduct alleged in the instant case. In that case, the crimes occurred on or between April 6, 2012 and April 15, 2012, when JT was just 14 years old. Schlomann was a 41 year old married man, with three children, from Albuquerque, New Mexico. Schlomann travelled from Albuquerque to Las Vegas to commit the crimes against JT. Schlomann knew that JT was 14 years of age, yet on two different occasions he picked up and drove JT to his hotel room and 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. 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 A*.

On June 29, 2012, Schlomann was charged by way of Criminal Complaint with the following crimes:

Count 1. Using Technology to Lure Children;
Count 2. Burglary;
Count 3. Kidnap 1st Degree;
Count 4. Statutory Sexual Seduction;
Count 5. Statutory Sexual Seduction;
Count 6. Statutory Sexual Seduction;
Count 7. Statutory Sexual Seduction;
Count 8. Burglary;
Count 9. Kidnap 1st Degree;
Count 10. Statutory Sexual Seduction;
Count 11. Statutory Sexual Seduction;
Count 12. Statutory Sexual Seduction;
Count 13. Statutory Sexual Seduction; and
Count 14. Sexual Assault Victim Under 16

Schlomann waived his right to a preliminary hearing. On September 25, 2013, Schlomann pleaded guilty to Count 1: Luring Children with Use of Technology with Intent to Engage in Sexual Conduct and Count 2: Attempt Sexual Assault. The State retained the right to argue at the rendition of sentence.

He was sentenced on March 13, 2014, by the Honorable Abbi Silver. DEFT. SCHLOMANN was ADJUDGED GUILTY of COUNT 1 - LURING CHILDREN OR MENTALLY ILL PERSONS WITH USE OF TECHNOLOGY WITH THE INTENT TO

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ENGAGE IN SEXUAL CONDUCT (Felony) and COUNT 2 - ATTEMPT SEXUAL ASSAULT (Felony). The COURT ORDERED, in addition to the $25.00 Administrative Assessment fee, $150.00 DNA Analysis fee including testing to determine genetic markers, $760.00 Psychosexual Evaluation fee, and $2,394.76 in Restitution, Schlomann was SENTENCED in COUNT 1- to a MINIMUM of SEVENTY TWO (72) MONTHS and a MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS in the Nevada Department of Corrections (NDC), and in COUNT 2 - to a MINIMUM of NINETY SIX (96) MONTHS and a MAXIMUM of TWO HUNDRED FORTY (240) MONTHS in the NDC, CONSECUTIVE TO COUNT 1. The sentence was SUSPENDED; placed on PROBATION for an indeterminate period not to exceed FIVE (5) YEARS. The Court imposed all the conditions of NRS176A.410 for the offense. The COURT FURTHER ORDERED, that a special SENTENCE OF LIFETIME SUPERVISION is imposed to commence upon release from any term of probation, parole or imprisonment; Per NRS 179D.460. Schlomann shall register as a sex offender within 48 hours of sentencing or release from custody.

MEMORANDUM OF POINTS AND AUTHORITIES

THE PRIOR INCIDENT IS ADMISSIBLE PURSUANT TO NRS 48.035(3) AND 48.045(2).

NRS 48.035, which govern the exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time, states:

> 1. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.
>
> 2. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence.
>
> ***3. Evidence of another act or crime which is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime shall not be excluded, but at the request of an interested party, a cautionary instruction shall be given explaining the reason for its admission.***

(emphasis added).

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Meanwhile, NRS 48.045(2) provides that:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Here, the prior incident between JT and Schlomann is relevant to the crime charged; the act is proven by clear and convincing evidence; and the evidence is more probative than prejudicial. *Cipriano v. State*, 111 Nev. 534, 541, 894 P.2d 347, 352 (1995), overruled on other grounds by *State v. Sixth Judicial District Court*, 114 Nev. 739, 964 P.2d 48(1998). The prior incident between JT and Schlomann is admissible because it is so closely related to the controversy and the crimes that Mr. Sprowson is charged with. It is impossible to separate the occurrence of the prior event and how it blends and weaves into the case at hand.

The similarities in the prior case and the instant case are significant. In both incidents, JT met and began conversing with someone online. The online conversations led to in person interactions. JT made arrangements on both occasions to be picked up and voluntarily left with the accused. Whereas in the prior incident, JT was 14 years-old, unable to consent to sex and was pressured to engage in sexual misconduct. Here, JT's interactions with Mr. Sprowson were entirely consensual. JT's own testimony was that Mr. Sprowson treated her by far better and that he did more for her than her mother, and certainly Schlomann. Yet Mr. Sprowson's conduct in the instant case is alleged to be so abusive, neglectful, and/or an endangerment to JT that it caused an 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 a normal range of performance or behavior. Thus, the prior incident with Schlomann is closely related; it has a direct impact on the instant case as to what constitutes abuse, neglect, and/or endangerment by comparison because we have the same victim, highly similar circumstances, both resulting in criminal prosecution of the accused's conduct.

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Moreover, by charging Mr. Sprowson with Child Abuse, Neglect, or Endangerment with Substantial Mental Harm, the State has put JT's intellectual, psychological capacity, and emotional condition directly at issue and in controversy. The substantial mental harm enhancement and component is an essential element of charge. To establish "substantial mental harm" the State must prove that Mr. Sprowson caused an injury to the intellectual or psychological capacity or the emotional condition of JT as evidenced by an observable and substantial impairment of the ability of JT to function within her normal range of performance or behavior. The prior incident with Schlomann provides a reference point to what JT's intellectual or psychological capacity or the emotional condition is and what her normal range of performance or behavior is as it relates to her interactions with Mr. Sprowson.

It was the prior incident with Schlomann that caused K. Smith, JT's mom, to take away and severely limit her access to a computer and cellular phone for a period of almost two years. [PHT, p. 196]. K. Smith only returned those items to JT, on her 16th birthday, in June of 2013. However, because of the prior incident with Schlomann, K. Smith continued to supervise and monitor JT's use of the computer and cellular phone. [PHT, p. 196]. Then on the evening of August 28, 2013, everything came to a head when on suspicion of JT's behavior K. Smith once again confiscated JT's computer, cell phone, and a promise ring she received from Mr. Sprowson. [PHT, p. 175]. JT reacted to this punishment by contacting Mr. Sprowson and begging him to come and get her. 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 August 29, 2013. [PHT, p. 32].

It is the prior incident with Schlomann that precipitated the ongoing conflicts between JT and her mother. The Schlomann incident prompted K. Smith to act the way that she did and to treat JT the way that she did. K. Smith's reaction and treatment of JT following the Schlomann

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incident is why JT decided to run away from K. Smith yet again on the evening of August 28, 2013. It is because of the prior incident with Schlomann and the impact it had on JT's intellectual or psychological capacity or the emotional condition that she reacted by contacting Mr. Sprowson. The Schlomann incident fueled JT's motive, intent, plan, knowledge, and/or absence of mistake or accident when she contacted Mr. Sprowson and sought to escape K. Smith control. Thus, the Schlomann incident is relevant and admissible pursuant to NRS 48.045(2).

Moreover, K. Smith testified at the Preliminary Hearing that as a result of the trauma from that Schlomann incident, JT engaged in two (2) years of individual and family therapy. [PHT, p. 191]. In other words, for the entirety of JT's interactions with Mr. Sprowson, she is belaboring under the trauma of Schlomann incident. The Schlomann incident occurred in April of 2012 up until his sentence in June of 2014, a period of just over two (2) year, which encompasses the period of all of JT's interactions with Mr. Sprowson. There is no doubt that the Schlomann incident altered JT's intellectual or psychological capacity or the emotional condition, as well as her normal range of performance and/or behavior. She was acting under that affect when she decided to run away from K. Smith and contacted Mr. Sprowson to do so. How can the harm that Mr. Sprowson is alleged to have caused JT be separated from the trauma of the Schlomann incident? These two events and their obvious overlap cannot be divided to exist in its own vacuum. As such, the Schlomann incident and the case at hand are so closely related and intertwined that the events of the instant case cannot be described or explained without referring to the Schlomann incident. The prior incident is relevant and admissible pursuant to NRS 48.035(3).

Further, the State's motion *In Limine* to preclude the mention of the Schlomann case at trial is premature. The prior incident is absolutely relevant because it has impacted the actions of all the parties in this case, including but not limited to K. Smith and Mr. Sprowson but especially JT. That Schlomann was convicted and received probation for his crimes against JT is an

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undeniable fact that does not prejudice the State from presenting its case in any way. Additionally, NRS 50.090 and NRS 48.069 are inapplicable to preclude evidence of Schlomann incident because Mr. Sprowson's case is not a prosecution for sexual assault or for an attempt or conspiracy to commit a sexual assault. The State's speculation as to how this prior incident may be utilized in the defense's case in chief is nothing but a fishing expedition to ferret out the defense's theory of the case. The defense can assure the Court, however, that we have absolutely no interest in using the Schlomann incident to attack or to impugn JT character or to impeach her credibility by exploiting her sexual history.

The Schlomann incident is relevant and probative because it reflects the intellectual or psychological capacity or the emotional condition of the parties, as well as the normal range of performance or behavior of the parties, especially as it pertains to JT. It is also admissible because it can offer proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident of the parties, pursuant to NRS 48.045(2). Lastly, because evidence of the Schlomann is so closely related and enmeshed with the acts in controversy and the crimes charged in this case so that the events in this case cannot be described or explained without referring to the Schlomann incident, evidence of the Schlomann incident shall not be excluded, pursuant to NRS 48.035(3). At best, the State is entitled to a cautionary instruction explaining the reason for admission of the evidence of the Schlomann case, also pursuant to NRS 48.035(3).

Respectfully submitted this 13th day of October, 2014.

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. MELVYN P. SPROWSON, JR., #5996049 Defendant.	Case No. C-14-295158-1 Dept. No. XXIII

RECEIPT OF COPY

Receipt of the Defendant's OPPOSITION TO STATE'S MOTION *IN LIMINE* TO PRECLUDE EVIDENCE OF VICTIM'S PRIOR SEXUAL ABUSE AT TRIAL is hereby acknowledged this 14 day of October, 2014.

CLARK COUNTY DISTRICT ATTORNEY

By: Eileen Moreille

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DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor	**COURT MINUTES**	**November 05, 2014**

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

November 05, 2014	**9:30 AM**	**All Pending Motions**	**Defendant's Notice of Motion and Motion for Independent Psychological/Psychiatric Examination of the Complaining Witness; STate's Motion in Limine to Preclude Evidence of Victim's Prior Sexual Abuse at Trial; Deft's Motion for Discovery**

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

COURT CLERK: Katherine Streuber

RECORDER: Maria Garibay

REPORTER:

PARTIES PRESENT:

Bluth, Jacqueline	District Attorney
Sprowson, Melvyn Perry, Jr.	Defendant
Sweetin, James R	District Attorney
Zheng, Yi Lin	Attorney for Defendant

JOURNAL ENTRIES

- Deft's Motion for Independent Psychological Psychiatric Examination of the Complaining Witness: Court pointed out State had not hired psychiatrist to testified. Counsel argued Abbott v. State case

and further argued substantial bodily harm. State advised they had chosen to use testimony of mother and child at Preliminary Hearing and noted they would bring in doctor who had seen child which is different from bringing in an expert. Court inquired whether the State would be turning over treatment records to the defense. State advised they could not turn them over. Counsel stated Koerschner had been satisfied and believed victim is being coached, therefore they should be allowed to have an independent examination. Court pointed out defense had requested an interview with the victim. Counsel agreed they had, however, victim's mother said no at the time. State argued Koerschner, noted kidnapping evidence being overwhelming, believed defense had not met their prongs and pointed out Court could not order victim to speak with anyone which would go against the mother's wishes. Counsel requested contact information and noted victim is 17 years of age and is getting ready to turn 18 to which victim could make her own decision. Court FINDS more than enough evidence outside testimony and ORDERED, motion DENIED. FURTHER, State to provide contact information; Colloquy regarding victim taking mood altering medications. State's Motion in Limine to Preclude Evidence of Victim's Prior Sexual Abuse at Trial: State argued the Rape Shield and noted parties cannot bring in other case nor get into any sexual conduct. Counsel argued Rape Shield did not apply in this case and believed State's motion to be premature. Court noted level of conflict with teenagers. State inquired how two traumas were to be separated and noted incidents have effected how family treats the victim. State then inquired of how to get around previous mental health treatment and noted traumas were not intertwined. Arguments by counsel. State suggested after Court releases medical records, parties could come up with appropriate Jury Instructions. Court stated the why is not important, believes previous history is relevant to the defense and defense should be allowed to get into history. Colloquy regarding prior medical records for in-camera review. Court agreed, however, it did not want to get into prior evidence and ORDERED, motion GRANTED IN PART; Deft's Motion for Discovery: Counsel advised they had received audios of interviews, noted transcripts of said recordings had not been received and requested motion be taken off calendar. COURT ORDERED, motion OFF CALENDAR. Colloquy regarding trial setting. Parties advised they would contact Court's Judicial Executive Assistant to discuss trial stacks and schedules.

BOND

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor	**COURT MINUTES**	**February 04, 2015**

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

February 04, 2015	**9:30 AM**	**Motion to Revoke Bail**	**State's Motion to Revoke Defendant's Bail**

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

COURT CLERK: Katherine Streuber

RECORDER: Maria Garibay

REPORTER:

PARTIES PRESENT:

Bluth, Jacqueline	District Attorney
Momot, John Joseph	Attorney for Defendant
Sprowson, Melvyn Perry, Jr.	Defendant
Zheng, Yi Lin	Attorney for Defendant

JOURNAL ENTRIES

- State reviewed defense's response and argued contact with minor victim. Argument by counsel. Court FINDS Deft. violated condition of bail and ORDERED, motion GRANTED. Deft. REMANDED without bail. Trial date STANDS.

CUSTODY

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **March 22, 2017**

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

March 22, 2017 **1:00 PM** **Jury Trial - FIRM**

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

COURT CLERK: Katherine Streuber

RECORDER: Maria Garibay

PARTIES PRESENT:

Bluth, Jacqueline	Attorney for the State
Sprowson, Melvyn Perry, Jr.	Defendant in Proper Person
Sweetin, James R	Attorney for the State
Yohay, Michael R.	Public Defender/Standby Counsel

JOURNAL ENTRIES

- OUTSIDE THE PRESENCE OF POTENTIAL JURY PANEL. Statement by Deft. regarding property report and advised there is an issue with subpoena issued from the previous Friday. COURT ORDERED, Custodian of Records for the Las Vegas Justice Court Criminal Division of Records appear in Department 23 at 9:15 a.m. on March 23, 2017, with items set forth in criminal subpoena dated March 17, 2017. State stated their concern with trial start time as they had flow in victim to testify and noted she would only be able to testify on Friday as she needed to return to school. COURT SO NOTED. Colloquy regarding jury selection and challenges for cause. POTENTIAL JURY PANEL PRESENT. Voir Dire continued. OUTSIDE THE PRESENCE OF POTENTIAL JURY PANEL. Challenges for cause presented. Mr. Yohay advised the Order for the presence of Custodian Records had been served and accepted for JoAnn Patterson. COURT SO NOTED. POTENTIAL JURY PANEL PRESENT. Voir Dire continued. COURT ORDERED, matter CONTINUED. Evening recess.

03-23-17 9:30 AM TRIAL BY JURY

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **March 23, 2017**

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

March 23, 2017 **9:30 AM** **Jury Trial - FIRM**

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

COURT CLERK: Katherine Streuber

RECORDER: Maria Garibay

PARTIES PRESENT:

Bluth, Jacqueline	Attorney for the State
Sprowson, Melvyn Perry, Jr.	Defendant in Proper Person
Sweetin, James R	Attorney for the State
Yohay, Michael R.	Public Defender/Standby Counsel

JOURNAL ENTRIES

- OUTSIDE THE PRESENCE OF POTENTIAL JURY PANEL. Upon Court's inquiry, Deft. advised he did receive documents and stated he had an understanding of process once explained by Ms. Patterson. Deft. stated he had an issue regarding his direct examination of the victim. Ms. Bluth noted Deft. did not serve them with notice of any witnesses. Court noted it is Deft's responsibility to subpoena witnesses and advised victim could return at Deft's expense. Argument by Deft. State then argued Deft. is held at the same standard as the State. Further argument by Deft. regarding his restrictions. Court agreed with Deft. on his limitations, however, agreed with the State regarding standards. Additional argument by Deft. Potential Juror #643 present and questioned regarding familiarity with the case. Outside presence of juror, Deft. stated juror could remain. Colloquy regarding scheduling. POTENTIAL JURY PANEL PRESENT. OUTSIDE THE PRESENCE OF POTENTIAL JURY PANEL. Potential Juror #698 present and disclosed issue. POTENTIAL JURY PANEL PRESENT. Voir Dire continued. CONFERENCE AT THE BENCH. Voir Dire continued. OUTSIDE THE PRESENCE OF POTENTIAL JURY PANEL. POTENTIAL JURY PANEL PRESENT. Peremptory Challenges exercised. Jury selected and SWORN. Clerk read Information to the Jury. Court instructed the Jury. COURT ORDERED, matter CONTINUED. Evening recess.

03-24-17 9:00 AM TRIAL BY JURY

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **March 24, 2017**

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

March 24, 2017 **9:00 AM** **Jury Trial - FIRM**

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

COURT CLERK: Katherine Streuber

RECORDER: Maria Garibay

PARTIES PRESENT:

Bluth, Jacqueline	Attorney for the State
Sprowson, Melvyn Perry, Jr.	Defendant in Proper Person
Sweetin, James R	Attorney for the State
Yohay, Michael R.	Public Defender/ Standby Counsel

JOURNAL ENTRIES

- OUTSIDE THE PRESENCE OF THE JURY. State noted all evidence had been brought in for Deft's review and believed all of Deft's questions were answered by detectives. Statement by Deft. Colloquy regarding opening statements, direct examination and cross examination. Arguments by parties. Clarifications made by parties. JURY PANEL PRESENT. Open Statement by the State. Opening Statement by Deft. OUTSIDE THE PRESENCE OF THE JURY. JURY PANEL PRESENT. Testimony and exhibits presented. (See worksheets) OUTSIDE THE PRESENCE OF THE JURY. JURY PANEL PRESENT. Testimony and exhibits presented. (See worksheets) OUTSIDE THE PRESENCE OF THE JURY. JURY PANEL PRESENT. Testimony and exhibits presented. (See worksheets) CONFERENCE AT THE BENCH. Testimony and exhibits presented. (See worksheets) CONFERENCE AT THE BENCH. Testimony and exhibits presented. (See worksheets) CONFERENCE AT THE BENCH. OUTSIDE THE PRESENCE OF THE JURY. Argument by the State. JURY PANEL PRESENT. Testimony and exhibits presented. (See worksheets) COURT ORDERED, matter CONTINUED. Evening recess.

03-27-17 1:00 PM TRIAL BY JURY

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **March 27, 2017**

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

March 27, 2017 **1:00 PM** **Jury Trial - FIRM**

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

COURT CLERK: Katherine Streuber

RECORDER: Maria Garibay

PARTIES PRESENT:

Bluth, Jacqueline	Attorney for the State
Sprowson, Melvyn Perry, Jr.	Defendant in Proper Person
Sweetin, James R	Attorney for the State
Yohay, Michael R.	Public Defender/Standby Counsel

JOURNAL ENTRIES

- OUTSIDE THE PRESENCE OF THE JURY. Deft. argued Rape Shield. Argument by the State. Further argument by Deft. State argued regarding Deft's commentaries after asking questions of witness of Friday. Further arguments by parties. Court advised it gave Deft. some leeway in questioning, however, the issues of suicide and dating of older men was not allowed. Deft. made an oral motion for reporter to have contact. Court Services Officer advised Deft. would need to sign a media release. Court stated Deft. can speak to media if he desires as it is no concern to the Court and noted Deft. would need to follow the detention center's protocols. JURY PANEL PRESENT. Testimony and exhibits presented. (See worksheets) OUTSIDE THE PRESENCE OF THE JURY. JURY PANEL PRESENT. Testimony and exhibits presented. (See worksheets) OUTSIDE THE PRESENCE OF THE JURY. Colloquy regarding juror #6. Parties agreed to exchange first alternate juror with juror #6. JURY PRESENT. Testimony and exhibits presented. (See worksheets) COURT ORDERED, matter CONTINUED. Court admonished Deft. of his right to testify or not to testify. Evening recess.

03-28-17 10:30 AM TRIAL BY JURY

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **March 28, 2017**

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

March 28, 2017 **10:30 AM** **Jury Trial - FIRM**

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

COURT CLERK: Katherine Streuber

RECORDER: Maria Garibay

PARTIES PRESENT:

Bluth, Jacqueline	Attorney for the State
Sprowson, Melvyn Perry, Jr.	Defendant in Proper Person
Sweetin, James R	Attorney for the State
Yohay, Michael R.	Public Defender/Standby Counsel

JOURNAL ENTRIES

- JURY PANEL PRESENT. Testimony and exhibits presented. (See worksheets) OUTSIDE THE PRESENCE OF THE JURY. JURY PANEL PRESENT. CONFERENCE AT THE BENCH. Testimony and exhibits presented. (See worksheets) CONFERENCE AT THE BENCH. Testimony and exhibits presented. (See worksheets) OUTSIDE THE PRESENCE OF THE JURY. State noted redaction of statement. JURY PANEL PRESENT. Testimony and exhibits presented. (See worksheets) CONFERENCE AT THE BENCH. COURT ORDERED, matter CONTINUED. Jury Instructions argued OFF THE RECORD.

03-29-17 1:00 PM TRIAL BY JURY

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **March 29, 2017**

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

March 29, 2017 **1:00 PM** **Jury Trial - FIRM**

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

COURT CLERK: Katherine Streuber

RECORDER: Maria Garibay

PARTIES PRESENT:

Bluth, Jacqueline	Attorney for the State
Sprowson, Melvyn Perry, Jr.	Defendant in Proper Person
Sweetin, James R	Attorney for the State
Yohay, Michael R.	Public Defender/Standby Counsel

JOURNAL ENTRIES

- OUTSIDE THE PRESENCE OF THE JURY. Colloquy regarding Wells Fargo subpoena received in Chambers and Jury Instructions. Arguments by parties regarding previous therapy of victim and Rape Shield. Court noted it agreed with both parties to certain extent. Further argument by Deft. JURY PANEL PRESENT. Testimony and exhibits presented. (See worksheets) State RESTED. OUTSIDE THE PRESENCE OF THE JURY. Statement by Deft. JURY PANEL PRESENT. Testimony and exhibits presented. (See worksheets) OUTSIDE THE PRESENCE OF THE JURY. Colloquy regarding jury questions. JURY PANEL PRESENT. Testimony and exhibits presented. (See worksheets) CONFERENCE AT THE BENCH. Defense RESTED. COURT ORDERED, matter CONTINUED. OUTSIDE THE PRESENCE OF THE JURY. Colloquy regarding Jury Instructions. Jury Instructions SETTLED. Evening recess.

03-30-17 9:30 AM TRIAL BY JURY

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **March 30, 2017**

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

March 30, 2017 **9:30 AM** **Jury Trial - FIRM**

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

COURT CLERK: Katherine Streuber

RECORDER: Maria Garibay

PARTIES PRESENT:

Bluth, Jacqueline	Attorney for the State
Sprowson, Melvyn Perry, Jr.	Defendant in Proper Person
Sweetin, James R	Attorney for the State
Yohay, Michael R.	Public Defender/Standby Counsel

JOURNAL ENTRIES

- OUTSIDE THE PRESENCE OF THE JURY. Colloquy regarding legal definitions. Statement by Deft. Argument by the State. JURY PANEL PRESENT. Court Instructed the jury. Closing Argument by Mr. Sweetin. OUTSIDE THE PRESENCE OF THE JURY. JURY PANEL PRESENT. Closing Argument by Deft. CONFERENCE AT THE BENCH. Deft. continued with Closing Argument. OUTSIDE THE PRESENCE OF THE JURY. Argument by the State. JURY PANEL PRESENT. Rebuttal Closing Argument by Ms. Bluth. At the hour of 2:12 p.m., the Jury retired to deliberate.

03-31-17 8:00 AM TRIAL BY JURY

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **March 31, 2017**

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

March 31, 2017 **8:00 AM** **Jury Trial - FIRM**

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

COURT CLERK: Katherine Streuber

RECORDER: Maria Garibay

PARTIES PRESENT:

Bluth, Jacqueline	Attorney for the State
Sprowson, Melvyn Perry, Jr.	Defendant in Proper Person
Sweetin, James R	Attorney for the State

JOURNAL ENTRIES

- The Honorable District Court Judge Carolyn Ellsworth present. At the hour of 10:31 a.m., the jury returned the following Verdict: Deft. found GUILTY of 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; and COUNT 6 - UNLAWFUL USE OF A MINOR IN THE PRODUCTION OF PORNOGRAPHY. Jury thanked and excused. COURT ORDERED, Deft. REMANDED without bail, matter referred to the Division of Parole and Probation (P & P) and SET for sentencing.

CUSTODY

05-17-17 9:30 AM SENTENCING - COUNTS 1 - 6

VER

DISTRICT COURT
CLARK COUNTY, NEVADA

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
MAR 3 1 2017
10:31 am
BY KATHERINE STREUBER, DEPUTY

THE STATE OF NEVADA,
Plaintiff,
-vs-
MELVYN PERRY SPROWSON, JR.,
Defendant.

CASE NO: **C-14-295158-1**
DEPT NO: **XXIII**

VERDICT

We, the jury in the above entitled case, find the Defendant MELVYN PERRY SPROWSON, JR., as follows:

COUNT 1 - FIRST DEGREE KIDNAPPING

(Please check the appropriate box, select only one)

☒ Guilty of FIRST DEGREE KIDNAPPING

☐ Not Guilty

COUNT 2 - CHILD ABUSE, NEGLECT OR ENDANGERMENT WITH SUBSTANTIAL BODILY OR MENTAL HARM

(Please check the appropriate box, select only one)

☒ Guilty of CHILD ABUSE, NEGLECT OR ENDANGERMENT WITH SUBSTANTIAL BODILY OR MENTAL HARM

☐ Guilty of CHILD ABUSE, NEGLECT OR ENDANGERMENT

☐ Not Guilty

C-14-295158-1
VER
Verdict
4637350

COUNT 3 - UNLAWFUL USE OF A MINOR IN THE PRODUCTION OF PORNOGRAPHY

(Please check the appropriate box, select only one)

☒ Guilty of UNLAWFUL USE OF A MINOR IN THE PRODUCTION OF PORNOGRAPHY

☐ Not Guilty

COUNT 4 - UNLAWFUL USE OF A MINOR IN THE PRODUCTION OF PORNOGRAPHY

(Please check the appropriate box, select only one)

☒ Guilty of UNLAWFUL USE OF A MINOR IN THE PRODUCTION OF PORNOGRAPHY

☐ Not Guilty

COUNT 5 - UNLAWFUL USE OF A MINOR IN THE PRODUCTION OF PORNOGRAPHY

(please check the appropriate box, select only one)

☒ Guilty of UNLAWFUL USE OF A MINOR IN THE PRODUCTION OF PORNOGRAPHY

☐ Not Guilty

COUNT 6 - UNLAWFUL USE OF A MINOR IN THE PRODUCTION OF PORNOGRAPHY

(please check the appropriate box, select only one)

☒ Guilty of UNLAWFUL USE OF A MINOR IN THE PRODUCTION OF PORNOGRAPHY

☐ Not Guilty

DATED this 31 day of March, 2017

FOREPERSON

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor	**COURT MINUTES**	**June 26, 2017**

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

June 26, 2017 **9:30 AM** **Sentencing** **SENTENCING - COUNTS 1-6**

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

COURT CLERK: Katherine Streuber

RECORDER: Maria Garibay

PARTIES PRESENT:

Bluth, Jacqueline	Attorney for the State
Sprowson, Melvyn Perry, Jr.	Defendant in Proper Person
Yohay, Michael R.	Public Defender/Standby Counsel

JOURNAL ENTRIES

- Deft. advised he was satisfied with the Supplemental Presentence Report. Court noted an evaluation would need to be completed prior to release on parole. Argument by the State. Argument by Deft. Victim Speakers SWORN and ADDRESSED the Court. DEFT. SPROWSON ADJUDGED GUILTY of COUNT 1 - FIRST DEGREE KIDNAPPING (F); COUNT 2 - CHILD ABUSE, NEGLECT OR ENDANGERMENT WITH SUBSTANTIAL BODILY OR MENTAL HARM (F); COUNT 3 - UNLAWFUL USE OF A MINOR IN THE PRODUCTION OF PORNOGRAPHY (F); COUNT 4 - UNLAWFUL USE OF A MINOR IN THE PRODUCTION OF PORNOGRAPHY (F); COUNT 5 - UNLAWFUL USE OF A MINOR IN THE PRODUCTION OF PORNOGRAPHY (F); and COUNT 6 - UNLAWFUL USE OF A MINOR IN THE PRODUCTION OF PORNOGRAPHY (F). COURT ORDERED, in addition to the $25.00 Administrative Assessment fee, $150.00 DNA Analysis fee including testing to determine genetic markers, $3.00 DNA Collection fee and $8,000.00 Fine, Deft. SENTENCED as to COUNT 1 - to LIFE in the Nevada Department of Corrections (NDC) with parole eligibility after FIVE (5) YEARS have been served; COUNT 2 - to a MAXIMUM of NINETY-SIX (96) MONTHS and MINIMUM of THIRTY (30) MONTHS in the Nevada Department of Corrections (NDC), to run CONSECUTIVE to COUNT 1; COUNT 3 - to LIFE in the Nevada Department of

Corrections (NDC) with parole eligibility after FIVE (5) YEARS have been served, to run CONSECUTIVE to COUNT 2; COUNT 4 - to LIFE in the Nevada Department of Corrections (NDC) with parole eligibility after FIVE (5) YEARS have been served, to run CONCURRENT with COUNT 3; COUNT 5 - to LIFE in the Nevada Department of Corrections (NDC) with parole eligibility after FIVE (5) YEARS have been served, to run CONCURRENT with COUNT 4; and COUNT 6 - to LIFE in the Nevada Department of Corrections (NDC) with parole eligibility after FIVE (5) YEARS have been served, to run CONCURRENT with COUNT 5 with ONE THOUSAND FIFTY-SEVEN (1,057) DAYS credit for time served. The AGGREGATE TOTAL SENTENCE of a MAXIMUM of LIFE with ONE HUNDRED FIFTY (150) MONTHS MINIMUM. COURT ORDERED, a special SENTENCE OF LIFETIME SUPERVISION is imposed to commence upon release from any term of probation, parole or imprisonment. FURTHER, Register as a sex offender in accordance with NRS 179D.460 within 48 hours after any release. At the request of Deft. and agreement by Public Defender's Office, COURT ORDERED, Public Defender's Office SUBSTITUTED IN as counsel for Appeal. BOND, if any, EXONERATED.

NDC

JOC

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

MELVYN PERRY SPROWSON, JR.
#5996049

Defendant.

CASE NO. C-14-295158-1

DEPT. NO. XXIII

JUDGMENT OF CONVICTION

(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crimes of COUNT 1 – FIRST DEGREE KIDNAPPING (Category A Felony) in violation of NRS 200.310, 200.320; COUNT 2 – CHILD ABUSE, NEGLECT OR ENDANGERMENT WITH SUBSTANTIAL BODILY AND/OR MENTAL HARM (Category B Felony) in violation of NRS 200.508(1); and COUNTS 3, 4, 5, and 6 – UNLAWFUL USE OF A MINOR IN THE PRODUCTION OF PORNOGRAPHY (Category A Felony) in violation of NRS 200.700, 200.710(A)(B), 200.750; and the matter having been tried before a jury and the

Defendant having been found guilty of the crimes of COUNT 1 – FIRST DEGREE KIDNAPPING (Category A Felony) in violation of NRS 200.310, 200.320; COUNT 2 – CHILD ABUSE, NEGLECT OR ENDANGERMENT WITH SUBSTANTIAL BODILY AND/OR MENTAL HARM (Category B Felony) in violation of NRS 200.508(1); and COUNTS 3, 4, 5, and 6 – UNLAWFUL USE OF A MINOR IN THE PRODUCTION OF PORNOGRAPHY (Category A Felony) in violation of NRS 200.700, 200.710(A)(B), 200.750; thereafter, on the 26th day of June, 2017, the Defendant was present in court for sentencing with standby counsel MICHAEL YOHAY, Deputy Public Defender, and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offenses and, in addition to the $25.00 Administrative Assessment Fee, $8,000.00 Fine and $150.00 DNA Analysis Fee including testing to determine genetic markers plus $3.00 DNA Collection Fee, the Defendant is SENTENCED to the Nevada Department of Corrections (NDC) as follows: **COUNT 1** – LIFE with parole eligibility after serving a MINIMUM of FIVE (5) YEARS; **COUNT 2** - a MAXIMUM of NINETY-SIX (96) MONTHS with a MINIMUM Parole Eligibility of THIRTY (30) MONTHS, CONSECUTIVE to COUNT 1; **COUNT 3** - LIFE with parole eligibility after serving a MINIMUM of FIVE (5) YEARS, CONSECUTIVE to COUNT 2; **COUNT 4** – LIFE with parole eligibility after serving a MINIMUM of FIVE (5) YEARS, CONCURRENT with COUNT 3; **COUNT 5** - LIFE with parole eligibility after serving a MINIMUM of FIVE (5) YEARS, CONCURRENT with COUNT 4; and **COUNT 6** - LIFE with parole eligibility after serving a MINIMUM of FIVE (5) YEARS, CONCURRENT with COUNT 5; with ONE THOUSAND FIFTY-SEVEN (1,057) DAYS credit for time served.

FURTHER ORDERED, a SPECIAL SENTENCE of LIFETIME SUPERVISION is imposed to commence upon release from any term of imprisonment, probation or parole. In addition, before the Defendant is eligible for parole, a panel consisting of the Administrator of the Mental Health and Development Services of the Department of Human Resources or his designee; the Director of the Department of corrections or his designee; and a psychologist licensed to practice in this state; or a psychiatrist licensed to practice medicine in Nevada must certify that the Defendant does not represent a high risk to re-offend based on current accepted standards of assessment.

ADDITIONALLY, the Defendant is ORDERED to REGISTER as a sex offender in accordance with NRS 179D.460 within FORTY-EIGHT (48) HOURS after any release from custody.

DATED this 30 day of June, 2017.

STEFANY MILEY
DISTRICT COURT JUDGE

NOAS

PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR No. 0556
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
(702) 455-4685
Attorney for Defendant

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff,	CASE NO. C-14-295158-1
v.	DEPT. NO. XXIII
MELVYN PERRY SPROWSON, JR. Defendant.	**NOTICE OF APPEAL**

TO: THE STATE OF NEVADA

STEVEN B. WOLFSON, DISTRICT ATTORNEY, CLARK COUNTY, NEVADA and DEPARTMENT NO. XXIII OF THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK.

NOTICE is hereby given that Defendant, Melvyn Perry Sprowson, presently incarcerated in the Nevada State Prison, appeals to the Supreme Court of the State of Nevada from the judgment entered against said Defendant on the 5th day of July, 2017 whereby he was convicted of Ct. 1 - First Degree Kidnapping (Category A Felony); Ct. 2 - Child Abuse, Neglect or Endangerment with Substantial Bodily and/or Mental Harm; Cts. 3, 4, 5 and 6 - Unlawful Use of Minor in the Production of Pornography and sentenced to $25 Admin. Fee; $8,000 fine and $150 DNA analysis fee including genetic testing plus $3 DNA collection fee; Ct. 1 - Life with parole eligibility after serving five (5) years; Ct. 2 - 30-96 months consecutive to Ct. 1 - Ct. 3 - Five years to Life in

prison, consecutive to Ct. 2; Ct. 4 - Five years to Life concurrent with Ct. 3; Ct. 5 - Five years to Life concurrent with Ct. 4 and Ct. 6 - Five years to Life concurrent with Ct. 5; 1,057 days CTS. Special sentence of lifetime supervision; order to register as a sex offender in accordance with NRS 179D.460 within 48 hours after any release from custody.

DATED this 1st day of August, 2017.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: */s/ Howard S. Brooks*
HOWARD S. BROOKS, #3374
Deputy Public Defender
309 S. Third Street, Ste. 226
Las Vegas, Nevada 89155
(702) 455-4685

DECLARATION OF MAILING

Carrie Connolly, an employee with the Clark County Public Defender's Office, hereby declares that she is, and was when the herein described mailing took place, a citizen of the United States, over 21 years of age, and not a party to, nor interested in, the within action; that on the 1st day of August, 2017, declarant deposited in the United States mail at Las Vegas, Nevada, a copy of the Notice of Appeal in the case of the State of Nevada v. Melvyn Perry Sprowson, Case No. C-14-295158-1, enclosed in a sealed envelope upon which first class postage was fully prepaid, addressed to Melvyn Perry Sprowson, c/o High Desert State Prison, P.O. Box 650, Indian Springs, NV 89070. That there is a regular communication by mail between the place of mailing and the place so addressed.

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

EXECUTED on the 1st day of August, 2017.

/s/ Carrie M. Connolly
An employee of the Clark County
Public Defender's Office

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of the above and foregoing was made this 1st day of August, 2017, by Electronic Filing to:

District Attorneys Office
E-Mail Address:

PDMotions@clarkcountyda.com

Jennifer.Garcia@clarkcountyda.com

Eileen.Davis@clarkcountyda.com

/s/ Carrie M. Connolly
Secretary for the
Public Defender's Office