IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSHUA CALEB SHUE Appellant, vs. THE STATE OF NEVADA, Respondent.	)	NO. 67428 **E-File**

PETITION FOR REHEARING

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TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES

PAGE NO.

Cases

Statutes

Misc. Citations

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSHUA CALEB SHUE,	)	NO. 67428
	)	
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

PETITION FOR REHEARING

COMES NOW, Deputy Public Defender WILLIAM M. WATERS, on behalf of the Appellant, JOSHUA CALEB SHUE, petitions this court for rehearing, pursuant to NRAP 40, in the above-referenced case.

This petition is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 29 day of December, 2017.

Respectfully submitted,

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POINTS AND AUTHORITIES

NRAP 40(c)(2)(A),(B) permits this Court to consider rehearing, "[w]hen the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or [w]hen the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case." See also Am. Cas. Co. of Reading, Pa. v. Hotel & Rest. Employees & Bartenders Int'l Union Welfare Fund, 113 Nev. 764, 766, 942 P.2d 172, 174 (1997) (rehearing granted when court overlooked issue in prior opinion). This Court has noted that "rehearings are not granted to review matters that are of no practical consequence" and this Court will consider rehearing only when "necessary to promote substantial justice." Gordon v. Eighth Judicial Dist. Court, 114 Nev. 744, 745, 961 P.2d 142 (1998).

I. This Court Overlooked, Ignored, Or Misapprehended the Law and Facts in upholding NRS 200.710(2); 200.730(1) and 200.700(4)'s Constitutionality.

Shue challenged his 29 convictions for using minors to create pornography[1] by arguing NRS 200.700(4) and 200.710(2)

[1] This Court acknowledged the jury convicted Shue for "29 counts of use of a child in the production of **pornography**." Shue, 133 Nev. Adv. Op. at * 1 (emphasis added).

unconstitutionally restricts speech or expression protected under the First Amendment. See Appellant's Opening Brief ("AOB") 14-19. Therefore, under U.S. Supreme Court precedent the State had to demonstrate the statute is the least restrictive means to accomplish a compelling government interest. Id. at 19. Alternatively, Shue argued NRS 200.710(2), 200.730(1), and 200.700(4) are also overbroad and vague. Id. at 25-31.

However, in affirming Shue's convictions for violating NRS 200.710(2) this Court essentially ignored Shue's first argument by misapplying United States Supreme Court precedent and finding depictions prohibited under NRS 200.710(2); 200.730(1) and 200.700(4) are not protected by the First Amendment. Additionally, this Court misapplied U.S. Supreme Court precedent in finding the laws are not overbroad.

A. NRS 200.700(4) Unconstitutionally Prohibits Depictions Protected by the First Amendment.

This Court failed to sufficiently analyze whether depictions of minors proscribed under NRS 200.700(4) satisfy the definition for either child pornography or obscenity which are unprotected by the First Amendment. See Ashcroft v. Free Speech Coalition, 535 U.S.

234, 240 (2002) ("The principal question to be resolved, then, is whether the CPPA is constitutional where it proscribes a significant universe of speech that is neither obscene under Miller[2] nor child pornography under Ferber.[3]"); U.S. v. Handley, 564 F.Supp.2d 996, 1002 (S.D. Iowa 2008) (determining first whether 18 U.S.C. 1466A violates the 1st amendment and then after resolving that issue, determining whether the statute is impermissibly vague and overbroad.); U.S. v. Stevens, 559 U.S. 460, 480 (2010) (explaining that both the district court and the appeals court first analyzed whether the challenged statute was facially invalid as a content-based restriction on protected speech). Instead, this Court merely presupposed NRS 200.700(4) proscribes images unprotected by the First Amendment. See Shue, 133 Nev. Adv. Op. at * 12 ("As explained below, we conclude that Nevada statutes barring the sexual portrayal of minors are not overbroad because the type of conduct proscribed under NRS 200.700(4) does not implicate the First Amendment's protection."); Id. at * 14 ("As such, Nevada statutes barring the sexual portrayal of minors necessarily demonstrate a 'core of constitutionally unprotected expression to which it might be

[2] Miller v. California, 413 U.S. 15 (1973).
[3] New York v. Ferber, 458 U.S. 747 (1982).

limited.'"); Id. ("Because NRS 200.700(4) does not implicate protected speech under the First Amendment, we conclude that Nevada Statutes barring the sexual portrayal of minors are not overbroad."); Id. at * 14 fn. 10 ("Because we conclude that such statutes do not implicate protected speech under the First Amendment, we reject the first argument.").

In finding NRS 200.700(4) does not prohibit protected speech this Court simplistically held Shue's conduct -- "surreptitiously recording his then-girlfriend's minor children naked in the bathroom performing bathroom activities and taking an up-skirt photo of one of the children -- is clearly proscribed under the statute's plain language and does not implicate the First Amendment's protection." Id. at * 13-14. Thus, based primarily upon Shue's conduct, this Court essentially concluded depictions under NRS 200.700(4) would necessarily qualify as child pornography or perhaps obscenity. However, this holding, purportedly based upon Ferber's definition regarding child pornography, is contrary to clearly established Federal law as interpreted by the United States Supreme Court.

The clear problem with NRS 200.700(4) is that it facially and thus unconstitutionally prohibits creating or possessing **any image** of a

child, whether the child is engaged in sexual conduct or not, so long as the image appeals to a prurient interest in the child's sexuality.[4] The State cannot constitutionally do this because criminalizing an image of a child based on the image's effect upon the viewer is unconstitutional. See U.S. v. Villard, 855 F.2d 117, 125 (3rd Cir. 1989); Jacobson v. U.S., 503 U.S. 540, 551-52 (1992); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67 (1973); Rhoden v. Morgan, 863 F. Supp. 612, 619 (M.D. Tenn. 1994); U.S. v. Whorley, 550 F.3d 326, 348 (4th Cir. 2008); Stanley v. Georgia, 394 U.S. 557, 566 (1969)("Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."); 50 Am. Jur. 2d Lewdness, Indecency, Etc. § 27. Conduct involving children; child pornography, generally (2017); Amy Adler, The Perverse Law of Child Pornography, 101 Colum. L. Rev. 209, 259-60 (March 2001); Amy Adler, Inverting the First Amendment, 149 U. Pa. L. Rev. 921,

[4] The Nevada Legislature specifically wrote NRS 200.710(2) to prohibit one from creating images of bathing suit clad children for use as sexual stimuli. See Hearing on A.B. 405 Before the Assembly Comm. on Judiciary, 68th Leg. (Nev., April 12, 1995). Additionally, the State acknowledged as much in its Answering Brief ("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." RAB 17.

961 (2001)("if the subjective viewpoint of the pedophile can turn any depictions of children into erotic pictures, then all representations of children could be child pornography.").

Nevertheless, to substantiate its holding in Shue's case this Court relied upon *dicta* in Ferber and noted, because "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance[]" the U.S. Supreme Court has sustained legislation "...aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." Shue, 133 Nev. Adv. Op. at 14 (quoting Ferber, 485 U.S. at 757.). However, this language from Ferber cannot be divorced from the case's subject matter, images of minors masturbating which qualifies as sexual conduct under N.Y. law. Id. at 752.

The N.Y. law in Ferber prohibited "use of child in a sexual performance" and defined "sexual performance" as "any performance or part thereof which includes **sexual conduct** by a child less than sixteen years of age." Id. at 750-51. The law further defined "sexual conduct" as "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or

lewd exhibition of the genitals." Id. The question before the Ferber court was whether possession of non-obscene visual depictions of minors masturbating is protected under the First Amendment. Id. at 753.

In answering this question, the Court held states can criminalize non-obscene visual images depicting children **engaged in actual sexual conduct** without violating the First Amendment because the government has a compelling interest in preventing **child sexual abuse** and **child pornography** is the visual depiction of the child sexual abuse. Id. at 757. However, because other visual depictions of minors -- including depictions involving nudity -- are protected by the First Amendment, the court clarified that state laws prohibiting child pornography (which is not protected by the First Amendment) **must**: (1) adequately define **the prohibited conduct**; (2) limit the prohibition to works that visually depict **sexual conduct of children** below a specified age; (3) suitably limit and **describe "the category of sexual conduct proscribed**;" and (4) require an element of "scienter on the part of the defendant." Id. at 764-65 (emphasis added). See also, U.S. v. Williams, 553 U.S. 285, 288 (2008); Clay Calvert, The Perplexing Problem of Child Modeling Websites: Quasi-

Child Pornography and Calls for New Legislation, 40 Cal. W.L.Rev. 231, 237 (2004); U.S. v. Dean, 635 F.3d 1200, 1204 (11th Cir. 2011) ("However, Ferber limits the category of unprotected child pornography to 'works that visually depict sexual conduct by children below a specified age.'").

Importantly, Ferber noted states can prohibit creating or possessing non-obscene images of children engaged in clearly defined sexual conduct because the images are the visual a documentation of child sexual abuse. Ferber, 458 U.S. at 759. However, Nevada defines "sexual abuse" as either: (1) incest; (2) lewdness with a child; (3) sado-masochistic abuse; (4) sexual assault; (5) open and gross lewdness; or (6) mutilation of the genitalia of a female child, aiding, abetting, encouraging or participating in the mutilation of the genitalia of a female child, or removal of a female child from this State for the purpose of mutilating the genitalia of the child.[5] NRS 432B.100. Nevada has not defined sexual abuse to include filming minors engaged in non-sexual, innocuous, bathroom activities. Thus, although this Court's decision relies heavily upon Shue's alleged

[5] This same definition is found elsewhere in the NRS. See e.g. NRS 200.4631(5)(c).

conduct, there is no credible argument that Shue **sexually abused** H.I. and C.I.

Nevertheless, unlike the valid N.Y. law in Ferber, NRS 200.710(2) broadly prohibits a person from knowingly using, encouraging, enticing, coercing or permitting "a minor to be the subject of a sexual portrayal in a performance." 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."

Clearly, NRS 200.700(4) violates Ferber's mandate that state laws regarding child pornography must be limited to images involving child sexual conduct. Basically, NRS 200.700(4) cannot proscribe "child pornography" because the statute does not adequately define any "prohibited conduct" on the child's part. Indeed, NRS 200.700(4) does not require that the minor be engaged in any specifically defined sexual conduct at all.[6] Instead, NRS 200.700(4) simply prohibits -- as

[6] Compare NRS 200.700(4) with NRS 200.700(3) ("'Sexual conduct' means sexual intercourse, lewd exhibition of the genitals, fellatio, cunnilingus, bestiality, anal intercourse, excretion, sado-masochistic abuse, masturbation, or the penetration of any part of a person's body or of any object manipulated or inserted by a person into the genital or anal opening of the body of another."); see also NRS 200.727(2); NRS 41.1396(5)(b); NRS 212.187(3)(a); NRS 368A.057(2); NRS

this Court put it -- creating images of minors "that appeal to 'the shameful or morbid interest in the sexuality of the minor[.]'" Shue, 133 Nev. Adv. Op. 99 at * 11.

Problematically, creating images of minors who are not engaged in **clearly defined sexual conduct**, even if those images appeal to a prurient interest in a child's sexuality and do not have serious literary, artistic, political or scientific value, is protected by the First Amendment. See generally Ashcroft, 535 U.S. at 251 ("Indecent materials are generally entitled to First Amendment Protection unless they constitute child pornography or obscenity"); U.S. v. Moon, 73 M.J. 382 (C.A.A.F 2014) ("Unlike child pornography and obscenity, the conduct at issue in this case — possessing images of nude minors that fall into neither of those categories — implicates the protections of the First Amendment."); Carissa Byrne Hessick, The Limits of Child Pornography, 89 Ind. L.J. 1437, 1440 (2014) ("If an image constitutes child pornography, its creation, distribution, and possession may be outlawed [however,] [i]f an image is not child pornography, then those who create, distribute, or possess it may be entitled to First Amendment Protection."). Therefore, irrespective of Shue's conduct

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201.520(1)-(8).

NRS 200.710(2), 200.730(1) and 200.700(4) do not comply with Ferber. Accordingly, images prohibited under these statutes -- ones "that appeal to the shameful or morbid interest in the sexuality of the minor" -- cannot be considered **child pornography** exempt from First amendment protection. Thus, based upon this Court's misapplication of Ferber rehearing is warranted.

a. NRS 200.700(4) Does not Prohibit Obscene Images Involving Minors.

Alternatively, this Court may have found NRS 200.700(4) validly prohibits creating or possessing obscene images depicting minors because obscenity is not protected by the First Amendment. See Miller, 413 U.S. at 15. A depiction is "obscene" if it meets **all** the following requirements: (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) the average person, applying contemporary community standards, would find that the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by state law; and (3) "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Id. at 24. Moreover, according to the U.S. Supreme Court "the obscenity exception to the First Amendment does not cover whatever a

legislature finds shocking, but only depictions of '**sexual conduct**.'" Brown v. Entertainment Merchants Ass'n, 564 U.S. 786, 792-93 (2011) (emphasis added).

Here, NRS 200.700(4) cannot possibly prohibit obscene images of minors. As noted *supra*, NRS 200.710(2), 200.730(1) and 200.700(4) do not apply to depictions of children engaged in "sexual conduct." Rather, the statutes proscribe **any** image of a child which could possibly "appeal to a prurient interest." Therefore, NRS 200.710(2) cannot be a constitutionally valid proscription against obscene images involving children. See Com. v. Lebo, 795 A.2d 987, 992 (PA Super 2002); Raymond Heartless, Inc. v. State, 401 A.2d 921, 925 (DE 1979); State v. Ward, 85 Ohio App.3d 378, 381, 619 N.E.2d 1097, 1099 (OH. Ct. App. 1993) ("In applying the Miller test to the photographs at issue, we find that an average person might find that both photographs appeal to prurient interests and that both photographs lack serious literary, artistic, political or scientific value. However, both photographs do not meet the criteria regarding 'sexual conduct' outlined in the second part of the Miller test."); Purcell v. Com., 149 S.W.3d 382, 388 (KY. Sup. Ct. 2004) (overruled on other grounds by Com. v. Prater, 324 S.W. 3d 393 (KY. Sup. Ct. 2010)).

B. NRS 200.700(4) Does Not Implicate a Compelling Government Interest or Alternatively is Not the Least Restrictive Means to Satisfy any Compelling Interest.

Shue made a facial challenge to NRS 200.710(2), 200.730(1) and 200.700(4). See AOB 14-19. Essentially, Shue argued because NRS 200.700(4)'s definition for "sexual portrayal" does not conform to the U.S. Supreme Court's "child pornography" definition, and instead NRS 200.700(4) proscribes non-sexual images involving children based upon the effect an image has on the viewer the statute lacked any "plainly legitimate sweep." Id. at 17-18. See also Stevens, 559 U.S. at 472 ("To succeed in a typical facial attack, Stevens would have to establish 'that no set of circumstances exists under which [the statute] would be valid,' [] **or** that the statute lacks any 'plainly legitimate sweep.'") (Internal citations omitted).

Alternatively, although images depicting children which appeal to an unhealthy interest in the child's sexuality are protected under the First Amendment, Nevada could still regulate such protected speech if the State proves the regulation is the least restrictive means to further a compelling interest. See Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 126 (1989); Ashcroft v. ACLU, 542 U.S. 656, 660 (2004) ("content-based restrictions on speech are presumed

invalid and the Government bear the burden of showing their constitutionality.). Accordingly, Shue discussed the State's potential "compelling interests" and why NRS 200.700(4) and 200.710(2) are not the least restrictive means to achieve those interests. See AOB 19-24.

As Shue noted in his briefs, Nevada cannot criminalize private, prurient, pedophilic thoughts. AOB 17-19. See also Villard, 855 F.2d at 125; Jacobson, 503 U.S. at 551-52; Paris Adult Theatre I, 413 U.S. at 67; Rhoden, 863 F. Supp. at 619; Whorley, 550 F.3d at 348; Stanley, 394 U.S. at 566; 50 Am. Jur. 2d Lewdness, Indecency, Etc. § 27. Conduct involving children; child pornography, generally (2017). Therefore, NRS 200.700(4) has no legitimate or compelling interest and is therefore facially invalid. However, this Court ignored Shue's argument by incorrectly interpreting Ferber and claiming -- in a footnote no less -- "[b]ecause we conclude that such statutes do not implicate protected speech under the First Amendment, we reject the first argument." Shue, 133 Nev. Adv. Op. at * 14 fn. 10. This Court's refusal to address Shue's argument was a clear misapplication of law. Therefore, this Court should grant rehearing to determine: (1) whether Nevada could assert a compelling interest in regulating a person's

private thoughts concerning a minor's sexuality; and (2) whether NRS 200.710(2) and 200.700(4) is the least restrictive means to achieve that interest.

C. This Court Misapplied U.S. Supreme Court Precedent in Finding NRS 200.700(4) is Not Overbroad.

If NRS 200.710(2) prohibits using minors to create images protected under the First Amendment then the statute is facially invalid and this Court need not engage in an overbreath analysis. See Ashcroft, 535 U.S. at 255 (the overbreadth doctrine "prohibits the Government from banning **unprotected speech** if a substantial amount of protected speech is prohibited or chilled in the process."); see also R. Randall Kelso, The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and "Reasonableness" Balancing, 8 Elon L. Rev. 291, 324-25 (2016). However, if NRS 200.700(4) prohibits unprotected speech then this Court misapplied the law regarding overbreath.

This Court essentially concluded because NRS 200.700(4) unambiguously proscribes child pornography it cannot be overbroad. See Shue, 133 Nev. Adv. Op. at * 14 (noting because NRS 200.700(4) only bars "a core of constitutionally unprotected expression which

might be limited," it is therefore not overbroad.). However, this is not the proper test for overbreath. Overbreath applies to laws which validly prohibit unprotected speech **but also** "punish[] a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep." Virginia v. Hicks, 539 U.S. 115, 118-19 (2003). Here, even if NRS 200.700(4) validly prohibits unprotected speech, as this Court claims it does, NRS 200.700(4) could still be unconstitutionally overbroad if it also prohibits a substantial amount of protected speech. See Stevens, 559 U.S. at 477-80 (finding a statute which banned animal "crush" videos overbroad notwithstanding the statutes exceptions clause for depictions having serious religious, political, scientific, educational, journalistic, historical, or artistic value).

Additionally, this Court also misapplied Osborne v. Ohio, 495 U.S. 103 (1990) in claiming NRS 200.700(4)'s 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." Shue, 133 Nev. Adv. Op. * 13. In Osborne, an Ohio statute prohibited possessing any material depicting a minor "in a state of nudity." Id. at 106-07. However, possessing

nude images of children is constitutionally protected. Id. at 112. In finding the statute was not overbroad the Supreme Court approved the Ohio court's interpretation that the statute only prohibited possessing nude images of children that depicted a "lewd exhibition or involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of the person charged." Id. at 113. This limiting interpretation removed constitutionally protected nude photos from criminal liability. Id. at 114.

In contrast, NRS 200.700(4)'s supposed limitation to works which do not have "**serious** literary, artistic, political or scientific value" is not remotely similar to the limitation in Osborne and does not "sufficiently narrow[] the statute to avoid the proscription of innocuous photos of minors." See Shue, 133 Nev. Adv. Op. at * 13. First, unlike the statute in Osborne -- which prohibited possessing nude images of children -- NRS 200.700(4) plainly applies to **all depictions of children** not just nude or lewd depictions. Second, NRS 200.700(4) focuses on the effect the image has on the viewer, not the objective image itself like the images at issue in Osborne.

Indeed, even with NRS 200.700(4)'s supposed limitations, a parent's bathtub photo of her naked child which could appeal to some

person's prurient interest in the child's sexuality would be prohibited by NRS 200.700(4) because the image does not have any literary, political, or social value. Moreover, assuming the picture could be considered "artistic," it would not have **serious** artistic value. Similarly, a low-brow adaptation of Nobokov's Lolita, employing a 14 year old actress in the title role, would violate NRS 200.710(2) because it would appeal to the prurient interest in Lolita's sexuality and would not have **serious** artistic value. See Alder, Amy M., Post-modern Art and the Death of Obscenity Law, 99 Yale L.J. 1359, 1367 (1990) ("Thus if we interpret 'serious value' to mean that a work of art makes a significant rather than a marginal contribution to art, this standard would fail to protect many Post-Modern artists.").

Finally, NRS 200.700(4) does not explain how to judge the supposed "seriousness" of an image's potential artistic, literary, scientific, political or social value which would then limit the statute's applicability. This Court ignored this obvious problem by incorrectly claiming "NRS 200.710(2) plainly prohibits creating images of minors "that appeal to the shameful or morbid interest in the sexuality of the minor, and which does not have serious literary, artistic, political, or scientific value, **according to the views of an average person**

applying contemporary community standards." Id. at 11 (emphasis added). However, the emphasized language appears nowhere within NRS 200.710(2) or NRS 200.700(4).[7] This Court cannot usurp the legislature by adding statutory language to save a clearly unconstitutional statute. See Williams v. United Parcel Servs., 129 Nev. ___, ___, 302 P.3d 1144, 1147 (2013) ("Our duty is to interpret the statute's language; this duty does not include expanding upon or modifying the statutory language because such acts are the Legislature's function."); see also Reno v. ACLU, 521 U.S. 844, 844-85 (1997).

Basically, this Court misapplied the law when it determined NRS 200.700(4) is not overbroad. According to the vast weight of authority NRS 200.700(4) is substantially overbroad because it criminalizes every image of a minor if the image could stimulate a pedophile. Accordingly, this Court misapplied the law regarding overbreath and rehearing is warranted.

CONCLUSION

This Court has noted that "rehearings are not granted to review matters that are of no practical consequence" and this Court will

[7] This language does appear in NRS 201.235, which is Nevada's codification of Miller's obscenity standard.

consider rehearing only when "necessary to promote substantial justice. Gordon, 114 Nev. at 745, 961 P.2d at 142. Here, this Court's Opinion misapplied U.S. Supreme Court precedent regarding what depictions constitute child pornography and are thus exempt from First Amendment protection. By doing so and upholding NRS 200.710(2), 200.730(1) and 200.700(4)'s constitutionality, this this Court effectively created a new class of child pornography, one that does not involve the depiction of minors engaged in clearly defined sexual conduct but instead one that prohibits depicting a minor in any manner whatsoever provided the depiction "appeals to "the shameful or morbid interest in the sexuality of the minor" and which do not have **serious** value.

Unfortunately, Shue's alleged conduct is this Court's primary motivation for affirming his convictions under a clearly illegitimate statute. However, Shue's alleged conduct would not escape criminal liability even if this Court strikes down the plainly unconstitutional statute. For example, the State could have prosecuted Shue under NRS 200.710(1) and NRS 200.700(3) by alleging Shue video-recorded H.I. and C.I. engaged in sexual conduct. Unlike NRS 200.700(4), NRS 200.700(3) clearly proscribes actual child

pornography consistent with Ferber. Under NRS 200.700(3) the State would merely have to allege the videos depicted a lewd display of the children's genitals. Additionally, Shue's alleged conduct may have violated NRS 200.508(4) and certainly violated NRS 200.604 which prohibits capturing the image of the private area of a person. See Hessick, The Limits of Child Pornography, 89 Ind. L.J. at 1440-42 ("the mere fact that images created through surreptitious photographing or filming do not fall within the limits of child pornography does not mean there is no legal recourse against those who have created these images."). Thus, the State has sufficient criminal offenses it could allege against Shue without relying upon a law which is facially unconstitutional.

Nevertheless, this Court misapprehended controlling law in affirming Shue's conviction. Had this Court correctly applied the law as required, it could not affirm Shue's 29 life-sentence convictions for

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creating child pornography when all Shue allegedly did was film minors engaged in non-sexual, innocuous, bathroom activities. Accordingly, substantial justice requires rehearing in Shue's case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition for rehearing complies with the formatting requirements of NRAP32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6), because:

It has been prepared proportionally spaced typeface using Times New Roman in 14 font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 40 or 40A because it is either:

Proportionately spaced, has a typeface of 14 points or more, and contains 4,214 words which does not exceed the 4,667 word limit.

DATED this 29 day of December, 2017.

Respectfully submitted,

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: */s/ William M. Waters*
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Deputy Public Defender

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 29 day of December, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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

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