**EIGHTH JUDICIAL DISTRICT COURT**
**CLERK OF THE COURT**

REGIONAL JUSTICE CENTER
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LAS VEGAS, NEVADA 89155-1160
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Steven D. Grierson
Clerk of the Court

Anntoinette Naumec-Miller
Court Division Administrator

November 15, 2019

Elizabeth A. Brown
Clerk of the Court
201 South Carson Street, Suite 201
Carson City, Nevada 89701-4702

RE: JOSHUA CALEB SHUE vs. BRIAN E. WILLIAMS, SR.
**S.C. CASE: 79874**
D.C. CASE: A-19-798713-W

Dear Ms. Brown:

In response to the e-mail dated November 15, 2019, enclosed is a certified copy of the Findings of Fact and Conclusions of Law filed October 31, 2019 in the above referenced case. If you have any questions regarding this matter, please do not hesitate to contact me at (702) 671-0512.

Sincerely,
STEVEN D. GRIERSON, CLERK OF THE COURT

Heather Ungermann, Deputy Clerk

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JONATHAN E. VANBOSKERCK
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(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JOSHUA SHUE
#1550230

Defendant.

CASE NO: A-19-798713-W /
C-13-288172-1

DEPT NO: XXI

# FINDINGS OF FACT AND CONCLUSIONS OF LAW

DATE OF HEARING: September 24, 2019
TIME OF HEARING: 9:30 AM

THIS CAUSE having come on for hearing before the Honorable VALERIE ADAIR, District Judge, on the 24th day of September, 2019, the Petitioner not being present, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through VIVIAN LUONG, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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## POINTS AND AUTHORITIES

## PROCEDURAL HISTORY

On March 13, 2013, Joshua C. Shue ("Defendant") was charged by way of Indictment with one count of Child Abuse and Neglect (Category B Felony – NRS 200.508), twenty nine counts of Use of Child in Production (Category A Felony – NRS 200.710), ten counts of Possession of Visual Presentation Depicting Sexual Conduct of a Child (Category B Felony – NRS 200.700, NRS 200.780), and one count of Open and Gross Lewdness (Gross Misdemeanor – NRS 201.210).

On April 17, 2013, Defendant filed a pre-trial Petition for Writ of Habeas Corpus. The State filed its Response on April 30, 2013. The Court denied Defendant's Petition on May 2, 2013.

On December 3, 2013, Defendant filed a Motion for Discovery. In his motion, Defendant alleged that the State made payments to the victim, H.I. The State filed its Response on December 11, 2013. On May 19, 2014, the district court held an evidentiary hearing and found that no payments were made by the State to H.I.

On August 6, 2014, Defendant filed a Motion to Dismiss Indictment Because of Violation Based on Inadequate Notice. The State filed its Opposition on August 18, 2014. The court denied Defendant's Motion on August 19, 2014.

Defendant's jury trial commenced on August 25, 2014. On August 29, 2015, the jury returned a verdict of guilty on all charges. On January 15, 2015, Defendant was sentenced to Nevada Department of Corrections as follows: Count 1 – minimum of 24 months and a maximum of 72 months; Count 2 – life with the possibility of parole after 5 years, consecutive to Count 1, plus a $1,000.000 fine; Count 3, 6, 9, 12, 15, 18, 24, 27–38 – life with the possibility of parole after 5 years, concurrent, plus $1,000.000 fine for each count; Count 4 and 25 – life with the possibility of parole after 10 years, concurrent; Count 7, 10, 13, 16, 19, 21, 22 – life with the possibility of parole after 10 years, concurrent, plus $1,000.00 fine for each count; Count 5, 8, 11 – minimum of 12 months and a maximum of 36 months, concurrent; Count 14, 17, 20, 23, 40, 41 – minimum of 12 months and maximum of 72 months, concurrent;

Count 26 – minimum of 23 months and maximum of 72 months, concurrent; Count 39 – 364 days in the Clark County Detention Center, concurrent. The Judgment of Conviction was filed on January 21, 2015. On January 19, 2016, an Amended Judgment of Conviction was filed. Subsequently, on January 4, 2019, a Second Amended Judgment of Conviction was filed.

Defendant filed a Notice of Appeal on February 12, 2015. In a published opinion, the Nevada Supreme Court affirmed in part and reversed in part on December 14, 2017. Specifically, nine of the ten Possession of Visual Presentation Depicting Sexual Conduct of a Child counts because the State had not presented the mechanics of how each individual "visual presentation" was captured and the single Open and Gross Lewdness count because of insufficient evidence. The other convictions remained. Remittitur was stayed until the Supreme Court of the United States denied certiorari, whereupon remittitur issued on October 15, 2018.

Defendant filed a Motion to Appoint Counsel on January 7, 2019. The State filed its Opposition on January 17, 2019. Because there was no petition pending at that time, this Court denied the Motion without prejudice on January 31, 2019.

Defendant filed a Petition for Writ of Habeas Corpus (Post-Conviction) and Motion to Appoint Counsel on July 15, 2019. The State filed its Response on September 4, 2019. The Court held a hearing on September 24, 2019, and denied the Petition as well as the Motion, finding as follows.

## ANALYSIS

### I. DEFENDANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant raises four (4) claims of ineffective assistance of counsel ("IAC"). Such claims are analyzed under the two-pronged test articulated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), wherein the defendant must show (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. Id. at 687, 104 S. Ct. at 2064. "A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one."

Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1997); Molina v. State, 120 Nev. 185, 190, 87 P.3d 533, 537 (2004).

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371, 130 S. Ct. 1473, 1485 (2010). The question is whether an attorney's representations amounted to incompetence under prevailing professional norms, "not whether it deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 88, 131 S. Ct. 770, 778 (2011). Further, "[e]ffective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449 (1970)).

The court begins with a presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011–12, 103 P.3d 25, 32–33 (2004). The role of a court in considering alleged ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)).

This analysis does not indicate that the court should "second guess reasoned choices between trial tactics, nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711 (citing Cooper, 551 F.2d at 1166 (9th Cir. 1977)). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. "Strategic choices"—such as "deciding if and when to object, which witnesses, if any, to call, and what defenses to develop"—"made after thorough investigation of law and facts relevant to plausible options

are virtually unchallengeable." Id. at 691, 104 S. Ct. at 2064; Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002). Further, counsel cannot be deemed ineffective for failing to make futile objections, file futile motions, or for failing to make futile arguments. Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

Not only must the petitioner show that counsel was incompetent, but he must also demonstrate that but for that incompetence the results of the proceeding would have been different:

> In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, Strickland asks whether it is reasonably likely the results would have been different. This does not require a showing that counsel's actions more likely than not altered the outcome, but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters only in the rarest case. The likelihood of a different result must be substantial, not just conceivable.

Harrington, 562 U.S. at 111–12, 131 S. Ct. at 791–92 (internal quotation marks and citations omitted); accord McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (noting that a defendant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different).

Importantly, when raising any Strickland claim, the defendant bears the burden to demonstrate the underlying facts by a preponderance of the evidence. Means, 120 Nev. at 1012, 103 P.3d at 33. "Bare" or "naked" allegations are not sufficient to show ineffectiveness of counsel; claims asserted in a petition for post-conviction relief must be supported with specific factual allegations which if true would entitle petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

Each of Defendant's IAC claims are denied on the merits.

A. Ground One: Accepting the State's Offer

First, Defendant complains counsel was ineffective for failing to accept an offer when directed to do so and misadvising Defendant regarding possible sentencing. Petition at 6.

However, Defendant's assertion that there was any offer made is a bare and naked assertion, suitable only for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225. The record does not indicate that any offer whatsoever was made. In fact, the record reflects that the State told the justice court that they had not "been able to work this out," and that that was why a Second Amended Criminal Complaint was filed. Reporter's Transcript, February 27, 2013, at 17. Further, the claim is belied by Defendant's own arguments. He claims that when he asked his attorney whether the alleged negotiations meant "they were all done," his attorney stated he did not know. Petition at 6. Clearly, this meant that there was no meeting of the minds as to the offer and the parties were still in the negotiation phase. Accordingly, Defendant cannot establish that counsel was objectively unreasonable with regard to negotiations or that Defendant was prejudiced by any of counsel's actions.

As to the sentencing issue, the record makes clear that Defendant did not complain about counsel's alleged misrepresentations at the time he was sentenced. See Recorder's Transcript of Proceedings, January 15, 2015, 22–23. Accordingly, this claim is belied by the record and it, too, is summarily denied. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Regardless, Defendant could never establish prejudice as to this claim. Because this conviction was the result of a jury verdict, counsel's representations as to the possible minimum sentence—whether 5 years or 10 years—had no reasonable probability of changing the outcome for Defendant. McNelton, 115 Nev. at 403, 990 P.2d at 1268.

Accordingly, this claim is denied on the merits.

B. Ground Two: Pre-Trial Investigation

Second, Defendant complains counsel was ineffective for failing to conduct an effective pre-trial investigation. Petition at 7, 11. However, his various, naked assertions are suitable only for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Regardless, Defendant's claim is also being denied on the merits because Defendant fails to demonstrate what a better investigation would have discovered or, where he does identify what allegedly would have been discovered, what difference the information would have made. Molina, 120 Nev. at 190, 87 P.3d at 537. For example, Defendant offers conspiracy theories about some

unknown individual tampering with the videos and about the tangential family court case. But these bare and naked allegations fail to demonstrate that a better result would have been likely even had counsel presented that information to the jury. In fact, it is clear from the existing record that this information was already presented to the jury in various forms and thus would not have resulted in a better outcome. Defendant actually testified at trial that he did not take the pictures and that other people used his computer; there was also testimony that, defense counsel argued, suggested the victim may have taken these images herself. See Recorder's Transcript, August 29, 2014, at 111–12, 116. Defendant cannot establish prejudice because there is no reasonable likelihood of a better result even had counsel presented the information Defendant claims would have been discovered in investigation. McNelton, 115 Nev. at 403, 990 P.2d at 1268. Accordingly, these claims are also denied on the merits.

C. Ground Three: Defining Pornography, Challenging Images, and Trial Conduct

Third, Defendant complains counsel was ineffective regarding his handling of "pornography" in general, of the images specifically—including their potential prurient interest or artistic/educational value—and in his conduct at trial. Petition at 8, 12–13. However, each of these assorted claims is without merit.

Defendant's complaints that counsel was ineffective in defining pornography and, relatedly, for arguing that these images were not pornography are belied by the record. Petition at 8, 12. In fact, counsel argued from the very beginning of the case about the legal definition of pornography and asserted that these images did not meet that definition. See Court Minutes, March 28, 2013, and May 2, 2013. During his closing argument, counsel argued that the photos and videos did not meet the definition of pornography, did not appeal to prurient interest, and may have had artistic value. See Recorder's Transcript ("RT"), August 29, 2014, at 109–12. Thus, Defendant's claim that counsel did not make these challenges about the nature of pornography and these particular images is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Defendant's complaints that counsel was ineffective for not challenging what the Defendant was thinking, his subjective view of the photos, or his actual viewing of the photos,

are all without merit. Petition at 8, 12. As the jury was instructed, "'[s]exual portrayal' means the depiction of a person in a manner which appeals to the prurient interest in sex and which does not have serious literary, artistic, political or scientific value." Jury Instructions, at 21 (Jury Instruction 15). That is, it is not the defendant's own, subjective prurient interest and/or literary or artistic concerns that matter in the creation of child pornography; the issue is whether the images themselves constitute such a portrayal. And as argued above, counsel had already argued that the images did not appeal to the prurient interest and may have had other value. RT, August 29, 2014, at 109–12. In other words, counsel made the strategic choice to address the objective view of the images—not Defendant's subjective frame of mind and/or viewing of these pornographic images of children, as the latter were not elements of any of his crimes and, accordingly, were not relevant. This strategic decision was counsel's, alone, and is virtually unchallengeable. Rhyne, 118 Nev. at 8, 38 P.3d at 167. Thus, counsel was not objectively unreasonable in his challenge of the photos/videos. Further, Defendant cannot establish prejudice, because there is no reasonable probability that the result would have been different had counsel made these challenges about Defendant's subjective view of the photographs—particularly when his defense during his own testimony was that he did not know the images existed. McNelton, 115 Nev. at 403, 990 P.2d at 1268.

Defendant's complaint that counsel did not point out that the victim was not charged for taking similar images of herself was also a strategic decision that is virtually unchallengeable. Rhyne, 118 Nev. at 8, 38 P.3d at 167; Petition at 12.

Defendant's complaints about counsel's conduct during trial—challenging, arguing with, and/or interrupting the judge—also fail to establish that there was a reasonable likelihood of a better outcome for Defendant had counsel acted differently. Petition at 12–13; McNelton, 115 Nev. at 403, 990 P.2d at 1268. Regardless of counsel's conduct, a judge in Nevada is presumed to be unbiased. Goldman v. Bryan, 104 Nev. 644, 764 P.2d 1296 (1988) (overturned on other grounds by Halverson v. Hardcastle, 123 Nev. 29, 163 P.3d 428 (2007)). When seeking to establish judicial bias justifying recusal, defendant must set "forth facts and reasons sufficient to cause a reasonable person to question the judge's impartiality." Towbin Dodge,

LLC v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark, 121 Nev. 251, 260, 112 P.3d 1063, 1069 (2005). Defendant has failed to establish that, even if his allegations about counsel's conduct are true, that conduct resulted in any bias on the judge's part. Defendant has not offered any actions on the Court's part that would cause a reasonable person to question the judge's impartiality. For example, that the Court denied certain jury instructions is not evidence of bias, as "rulings and actions of a judge during the course of official judicial proceedings do not establish legally cognizable grounds for disqualification." In re Petition to Recall Dunleavy, 104 Nev. 784, 789, 769 P.2d 1271, 1275 (1988). Further, that the judge may have "shrugged" at Defendant when he repeatedly asked a particular question does not demonstrate bias. Accordingly, Defendant cannot establish prejudice. McNelton, 115 Nev. at 403, 990 P.2d at 1268.

Defendant's complaint that counsel did not ask for a sentence structure jury instruction is utterly without merit. Petition at 12. A jury is not to consider sentencing during the guilt phase of trial. Jury Instructions, at 30. Thus, such a request on counsel's part would have been futile, and counsel cannot be deemed ineffective for not making it. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

Finally, Defendant's complaints about counsel's conduct at sentencing are without merit. Petition at 13. Defendant's assertion that his credit for time served and restitution calculations were incorrect are bare and naked, suitable only for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Further, Defendant's complaint that counsel did not offer any "mitigation" evidence is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. In fact, at sentencing, counsel argued that Defendant was tested as a low-to-moderate risk to reoffend, lacked any priors, served in the military, and had a regular job. RT, January 15, 2015, at 14.

Thus, with regard to all of these assorted complaints, Defendant has failed to articulate how counsel was deficient or how counsel's actions prejudiced him. Accordingly, these claims are also denied on the merits.

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D. Ground Four: Consulting with Defendant on Appellate Matters

Fourth, Defendant complains appellate counsel was ineffective for failing to consult with Defendant or address all issues on appeal. Petition at 9. However, Defendant was not entitled to a particular relationship with counsel. Morris v. Slappy, 461 U.S. 1, 13 – 14, 103 S.Ct. 1610, 1616 (1983).

Regardless, it is clear that as required, appellate counsel properly winnowed out weaker issues. Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983); Ford v. State, 105 Nev. 850, 853, 784 P.2d 953 (1989). On appeal, counsel focused on the constitutionality of NRS 200.710 and .730, the redundancy of the convictions, the jury instructions, prosecutorial misconduct, evidentiary rulings, the notice in the indictment, sexual portrayal and conduct, and sufficiency of the evidence. See Appellant's Opening Brief, Nevada Supreme Court No. 67428. Thus, counsel did in fact address some of the issues Defendant complains were ignored, such as contradictory evidence, the prosecutor's statements, the constitutionality of the child pornography standards, and sexual interest. Any complaints that these issues were not addressed are thus belied by the record and must be summarily denied. Hargrove, 100 Nev. at 502, 686 P.2d at 225. The other issues Defendant states should have been raised on appeal, such as length of questioning, cruel and unusual punishment, lifetime supervision, and the dismissal of the Open and Gross Lewdness charge would have been rejected as meritless and thus would have been futile for appellate counsel to raise. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

Accordingly, these claims are also denied.

**II. DEFENDANT IS NOT ENTITLED TO COUNSEL**

Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566 (1991). In McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996), the Nevada Supreme Court similarly observed that "[t]he Nevada Constitution...does not guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision as being coextensive with the Sixth Amendment to the United States

Constitution." McKague specifically held that with the exception of NRS 34.820(1)(a) (entitling appointed counsel when petitioner is under a sentence of death), one does not have "any constitutional or statutory right to counsel at all" in post-conviction proceedings. Id. at 164, 912 P.2d at 258.

The Nevada Legislature has, however, given courts the discretion to appoint post-conviction counsel so long as "the court is satisfied that the allegation of indigency is true and the petition is not dismissed summarily." NRS 34.750(1). The relevant statute states:

> 1. A petition may allege that the Defendant is unable to pay the costs of the proceedings or employ counsel. If the court is satisfied that the allegation of indigency is true and the petition *is not dismissed summarily*, the court may appoint counsel at the time the court orders the filing of an answer and a return. In making its determination, the court may consider whether:
>
> (a) The issues are difficult;
>
> (b) The Defendant is unable to comprehend the proceedings; or
>
> (c) Counsel is necessary to proceed with discovery.

NRS 34.750 (emphasis added). Thus, the court has discretion in determining whether to appoint counsel "at the time the court orders the filing of an answer and a return." Id.

This Court is not appointing counsel in this matter because Defendant's case does not satisfy the considerations under NRS 34.750. First, these issues are not difficult. NRS 34.750(1)(a). Issues of counsel's contact with Defendant and of counsel's investigation are factual issues, not complex legal issues requiring counsel's assistance. The rest of Defendant's complaints about what counsel failed to do are belied by the record and summarily dismissed, as discussed *supra*. Second, Defendant does not allege that he does not understand these proceedings. NRS 34.750(1)(b). See Motion to Appoint Counsel; Petition at 3. Finally, counsel is not necessary to proceed with discovery. NRS 34.750(1)(c). Defendant could obtain all the relevant discovery from his former attorney. Particularly because the issues he points to all seem to revolve around counsel's conduct, it does not seem that any further discovery would be necessary—let alone that post-conviction counsel would be needed to assist in obtaining it.

Defendant's request is denied.

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**ORDER**

Based on the foregoing, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief and Motion to Appoint Counsel shall be, and are, hereby denied.

DATED this 14th day of October, 2019.

DISTRICT JUDGE

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

BY
JONATHAN VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528

CERTIFICATE OF SERVICE

I certify that on the 9th day of Oct., 2019, I mailed a copy of the foregoing proposed Findings of Fact, Conclusions of Law, and Order to:

JOSHUA SHUE BAC #1133872
HIGH DESERT STATE PRISON
P.O. BOX 650
INDIAN SPRINGS, NEVADA 89018

BY J. Robertson
J. ROBERTSON
Secretary for the District Attorney's Office

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*Clerk of the Courts*
*Steven D. Grierson*

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November 15, 2019 Case No.: A-19-798713-W

# CERTIFICATION OF COPY

**Steven D. Grierson**, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full, and correct copy of the hereinafter stated original document(s):

Findings of Fact and Conclusions of Law filed 10/31/2019



now on file and of

**In witness whereof,** I have hereunto set my hand and affixed the seal of the Eighth Judicial District Court at my office, Las Vegas, Nevada, at 12:46 PM on November 15, 2019.

**STEVEN D. GRIERSON, CLERK OF THE COURT**