

27
FILED

NOV 25 2019

Elizabeth A. Brown
CLERK OF COURT

Electronically Filed
Dec 04 2019 10:29 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

1 Joshua C. Shue 1133873
2 In Proper Person
3 P.O. Box 650 H.D.S.P.
4 Indian Springs, Nevada 89018

5 8th DISTRICT COURT
6 Clark COUNTY NEVADA

7
8 Joshua Caleb Shue,

9 Petitioner,

10 -v-

11 Brian E. Williams Sr.,

12 Respondent,

Case No. A-19-798713-W

Dept.No. XXI

Docket _____

13
14 NOTICE OF APPEAL

15 Notice is hereby given that the Petitioner, Joshua Caleb Shue
16 _____, by and through himself in proper person, does now appeal
17 to the Supreme Court of the State of Nevada, the decision of the District
18 Court to deny Petition for Writ of Habeas Corpus and Motion to Appoint Counsel.
19 _____
20 _____

21 Dated this date, 11-11-19.

22
23 Respectfully Submitted,

24 Joshua C. Shue

25 In Proper Person
26
27
28

RECEIVED
NOV 7 5 2019

CERTIFICATE OF SERVICE BY MAILING

I, Joshua Caleb Shue, hereby certify, pursuant to NRCP 5(b), that on this day of November, 2019, I mailed a true and correct copy of the foregoing, "Notice of Appeal" by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid, addressed as follows:

Clerk of the Court
200 Lewis Avenue, 3rd Floor
Las Vegas, NV 89155-1160

Steve Wolfson, DA
200 Lewis Avenue
Las Vegas, NV 89155

Aaron Ford, AG

Brian E. William Sr., Warden

CC: File NEFR 9(e) Clerk Distribution Requested

DATED: this day of November, 2019.

Joshua C. Shue
Joshua C. Shue #1133873
/In Propria Persona
Post Office box 650 [HDSP]
Indian Springs Nevada 89018

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Notice of

Appeal

(Title of Document)

filed in District Court Case number A-19-798713-W

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)

-or-

B. For the administration of a public program or for an application
for a federal or state grant.

Joshua C. Shue
Signature

11-11-19
Date

Joshua C. Shue
Print Name

Title

HDSP
P.O. Box 650

Indian Springs, NV 89070

Clerk of the Court
200 Lewis Avenue, 3rd Floor
Las Vegas, NV 89155-1160

LEGAL MAIL

[illegible]

RECEIVED
NOV 20 2019
LIBRARY OF THE
U.S. DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
1915 N. MEXICO AVE.
DENVER, CO 80202

NOV 20 2019
HIGH DESERT STATE PRISON
LAW LIBRARY





1 ASTA

2
3
4
5
6 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE**
7 **STATE OF NEVADA IN AND FOR**
8 **THE COUNTY OF CLARK**

9 JOSHUA CALEB SHUE,

10
11 Petitioner(s),

12 vs.

13 BRIAN E. WILLIAM, SR.,

14 Respondent(s),

Case No: A-19-798713-W

Dept No: XXI

15
16 **CASE APPEAL STATEMENT**
17

18 1. Appellant(s): Joshua C. Shue

19 2. Judge: Valerie Adair

20 3. Appellant(s): Joshua C. Shue

21 Counsel:

22 Joshua C. Shue #1133873
23 P.O. Box 650
24 Indian Springs, NV 89070

25 4. Respondent (s): Brian E. Williams, Sr.

26 Counsel:

27 Steven B. Wolfson, District Attorney
28 200 Lewis Ave.
Las Vegas, NV 89155-2212

1 5. Appellant(s)'s Attorney Licensed in Nevada: N/A
2 Permission Granted: N/A

3 Respondent(s)'s Attorney Licensed in Nevada: Yes
4 Permission Granted: N/A

5 6. Has Appellant Ever Been Represented by Appointed Counsel In District Court: No

6 7. Appellant Represented by Appointed Counsel On Appeal: N/A

7 8. Appellant Granted Leave to Proceed in Forma Pauperis**: Yes, September 9, 2019

8 **Expires 1 year from date filed

9 Appellant Filed Application to Proceed in Forma Pauperis: N/A

10 Date Application(s) filed: N/A

11 9. Date Commenced in District Court: July 15, 2019

12 10. Brief Description of the Nature of the Action: Civil Writ

13 Type of Judgment or Order Being Appealed: Civil Writ of Habeas Corpus

14 11. Previous Appeal: Yes

15 Supreme Court Docket Number(s): 79874

16 12. Child Custody or Visitation: N/A

17 13. Possibility of Settlement: Unknown

18 Dated This 27 day of November 2019.

19 Steven D. Grierson, Clerk of the Court

20 /s/ Amanda Hampton

21 Amanda Hampton, Deputy Clerk

22 200 Lewis Ave

23 PO Box 551601

24 Las Vegas, Nevada 89155-1601

25 (702) 671-0512

26 cc: Joshua C. Shue

CASE SUMMARY

CASE NO. A-19-798713-W

Joshua Shue, Plaintiff(s)
vs.
Brian E. Williams, Sr., Defendant(s)

§
§
§
§
§
§

Location: **Department 21**
 Judicial Officer: **Adair, Valerie**
 Filed on: **07/15/2019**
 Cross-Reference Case Number: **A798713**
 Supreme Court No.: **79874**

CASE INFORMATION

Related Cases

C-13-288172-1 (Writ Related Case)

Case Type: **Writ of Habeas Corpus**

Case Status: **07/15/2019 Open**

DATE

CASE ASSIGNMENT

Current Case Assignment

Case Number A-19-798713-W
 Court Department 21
 Date Assigned 07/15/2019
 Judicial Officer Adair, Valerie

PARTY INFORMATION

Plaintiff

Shue, Joshua

Lead Attorneys

Pro Se

Defendant

Brian E. Williams, Sr.


Wolfson, Steven B
Retained
 702-671-2700(W)


DATE


EVENTS & ORDERS OF THE COURT


INDEX


EVENTS


07/15/2019  Inmate Filed - Petition for Writ of Habeas Corpus
 Party: Plaintiff Shue, Joshua
Post Conviction

07/15/2019  Motion for Appointment of Attorney
 Filed By: Plaintiff Shue, Joshua
Motion to Appoint Counsel


07/15/2019  Notice of Motion
 Filed By: Plaintiff Shue, Joshua

07/15/2019  Application to Proceed in Forma Pauperis
 Filed By: Plaintiff Shue, Joshua

07/31/2019  Order to Proceed In Forma Pauperis
 Granted for: Plaintiff Shue, Joshua
Order to Proceed In Forma Pauperis

08/02/2019  Order for Petition for Writ of Habeas Corpus
Order for Petition for Writ of Habeas Corpus

CASE SUMMARY
CASE NO. A-19-798713-W

08/02/2019	 Clerk's Notice of Hearing <i>Notice of Hearing</i>
08/23/2019	 Application to Proceed in Forma Pauperis Filed By: Plaintiff Shue, Joshua <i>Application to Proceed in Forma Pauperis</i>
09/04/2019	 Response Filed by: Plaintiff Shue, Joshua <i>State's Response to Defendant's Petition for Writ of Habeas Corpus (Post-Conviction) and Motion to Appoint Counsel</i>
09/09/2019	 Order to Proceed In Forma Pauperis Granted for: Plaintiff Shue, Joshua <i>Order to Proceed In Forma Pauperis</i>
10/17/2019	 Notice of Appeal Filed By: Plaintiff Shue, Joshua <i>Notice of Appeal</i>
10/18/2019	 Case Appeal Statement Filed By: Plaintiff Shue, Joshua <i>Case Appeal Statement</i>
10/31/2019	 Finding of Fact and Conclusions of Law Filed By: Plaintiff Shue, Joshua <i>Findings of Fact and Conclusions of Law</i>
11/04/2019	 Notice of Entry <i>Notice of Entry of Findings of Fact, Conclusions of Law and Order</i>
11/18/2019	 Motion for Appointment of Attorney Filed By: Plaintiff Shue, Joshua <i>Motion to Appoint Counsel</i>
11/18/2019	 Notice of Motion Filed By: Plaintiff Shue, Joshua <i>Notice of Motion</i>
11/25/2019	 Notice of Appeal Filed By: Plaintiff Shue, Joshua <i>Notice of Appeal</i>
11/27/2019	 Case Appeal Statement Filed By: Plaintiff Shue, Joshua <i>Case Appeal Statement</i>

HEARINGS

09/24/2019	Petition for Writ of Habeas Corpus (9:30 AM) (Judicial Officer: Adair, Valerie) Denied;
09/24/2019	Motion for Appointment of Attorney (9:30 AM) (Judicial Officer: Adair, Valerie) <i>Petitioner's Motion to Appoint Counsel</i> Denied;

CASE SUMMARY

CASE NO. A-19-798713-W

09/24/2019



All Pending Motions (9:30 AM) (Judicial Officer: Adair, Valerie)

Matter Heard;

Journal Entry Details:

PETITION FOR WRIT OF HABEAS CORPUS ... PETITIONER'S MOTION TO APPOINT COUNSEL PETITION FOR WRIT OF HABEAS CORPUS COURT ORDERED, motion DENIED for the reasons set forth in the State's opposition. PETITIONER'S MOTION TO APPOINT COUNSEL COURT ORDERED, motion DENIED. State to prepare the order.

CLERK S NOTE: A copy of this minute order has been mailed to: Joshua Shue, BAC #1133872 High Desert State Prison PO Box 650 Indian Springs, Nevada 89018 ;

DISTRICT COURT CIVIL COVER SHEET

A-19-798713-W

Dept. XXI

County, Nevada

Case No.

(Assigned by Clerk's Office)

I. Party Information (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone): Joshua Shue	Defendant(s) (name/address/phone): Brian Williams , Sr.
Attorney (name/address/phone):	Attorney (name/address/phone):

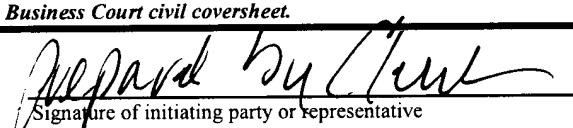
II. Nature of Controversy (please select the one most applicable filing type below)**Civil Case Filing Types**

Real Property Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant Title to Property <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Other Title to Property Other Real Property <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	Negligence <input type="checkbox"/> Auto <input type="checkbox"/> Premises Liability <input type="checkbox"/> Other Negligence Malpractice <input type="checkbox"/> Medical/Dental <input type="checkbox"/> Legal <input type="checkbox"/> Accounting <input type="checkbox"/> Other Malpractice	Torts Other Torts <input type="checkbox"/> Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Employment Tort <input type="checkbox"/> Insurance Tort <input type="checkbox"/> Other Tort
Probate Probate (select case type and estate value) <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside <input type="checkbox"/> Trust/Conservatorship <input type="checkbox"/> Other Probate Estate Value <input type="checkbox"/> Over \$200,000 <input type="checkbox"/> Between \$100,000 and \$200,000 <input type="checkbox"/> Under \$100,000 or Unknown <input type="checkbox"/> Under \$2,500	Construction Defect & Contract Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect Contract Case <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input type="checkbox"/> Other Contract	Judicial Review/Appeal Judicial Review <input type="checkbox"/> Foreclosure Mediation Case <input type="checkbox"/> Petition to Seal Records <input type="checkbox"/> Mental Competency Nevada State Agency Appeal <input type="checkbox"/> Department of Motor Vehicle <input type="checkbox"/> Worker's Compensation <input type="checkbox"/> Other Nevada State Agency Appeal Other <input type="checkbox"/> Appeal from Lower Court <input type="checkbox"/> Other Judicial Review/Appeal
Civil Writ Civil Writ <input checked="" type="checkbox"/> Writ of Habeas Corpus <input type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrant <input type="checkbox"/> Writ of Prohibition <input type="checkbox"/> Other Civil Writ		Other Civil Filing Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Other Civil Matters

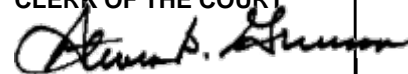
Business Court filings should be filed using the Business Court civil coversheet.

July 15, 2019

Date


 Signature of initiating party or representative

See other side for family-related case filings.



FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(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:

//

//

//

//

//

//

1 **POINTS AND AUTHORITIES**

2 **PROCEDURAL HISTORY**

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

9 On April 17, 2013, Defendant filed a pre-trial Petition for Writ of Habeas Corpus. The
10 State filed its Response on April 30, 2013. The Court denied Defendant's Petition on May 2,
11 2013.

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

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

19 Defendant's jury trial commenced on August 25, 2014. On August 29, 2015, the jury
20 returned a verdict of guilty on all charges. On January 15, 2015, Defendant was sentenced to
21 Nevada Department of Corrections as follows: Count 1 – minimum of 24 months and a
22 maximum of 72 months; Count 2 – life with the possibility of parole after 5 years, consecutive
23 to Count 1, plus a \$1,000.000 fine; Count 3, 6, 9, 12, 15, 18, 24, 27–38 – life with the
24 possibility of parole after 5 years, concurrent, plus \$1,000.000 fine for each count; Count 4
25 and 25 – life with the possibility of parole after 10 years, concurrent; Count 7, 10, 13, 16, 19,
26 21, 22 – life with the possibility of parole after 10 years, concurrent, plus \$1,000.00 fine for
27 each count; Count 5, 8, 11 – minimum of 12 months and a maximum of 36 months, concurrent;
28 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.”

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

3 “Surmounting Strickland’s high bar is never an easy task.” Padilla v. Kentucky, 559
4 U.S. 356, 371, 130 S. Ct. 1473, 1485 (2010). The question is whether an attorney’s
5 representations amounted to incompetence under prevailing professional norms, “not whether
6 it deviated from best practices or most common custom.” Harrington v. Richter, 562 U.S. 86,
7 88, 131 S. Ct. 770, 778 (2011). Further, “[e]ffective counsel does not mean errorless counsel,
8 but rather counsel whose assistance is ‘[w]ithin the range of competence demanded of
9 attorneys in criminal cases.’” Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537
10 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441,
11 1449 (1970)).

12 The court begins with a presumption of effectiveness and then must determine whether
13 the defendant has demonstrated by a preponderance of the evidence that counsel was
14 ineffective. Means v. State, 120 Nev. 1001, 1011–12, 103 P.3d 25, 32–33 (2004). The role of
15 a court in considering alleged ineffective assistance of counsel is “not to pass upon the merits
16 of the action not taken but to determine whether, under the particular facts and circumstances
17 of the case, trial counsel failed to render reasonably effective assistance.” Donovan v. State,
18 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (citing Cooper v. Fitzharris, 551 F.2d 1162, 1166
19 (9th Cir. 1977)).

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

1 are virtually unchallengeable.” Id. at 691, 104 S. Ct. at 2064; Rhyne v. State, 118 Nev. 1, 8,
2 38 P.3d 163, 167 (2002). Further, counsel cannot be deemed ineffective for failing to make
3 futile objections, file futile motions, or for failing to make futile arguments. Ennis v. State,
4 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

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

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

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

21 Importantly, when raising any Strickland claim, the defendant bears the burden to
22 demonstrate the underlying facts by a preponderance of the evidence. Means, 120 Nev. at
23 1012, 103 P.3d at 33. “Bare” or “naked” allegations are not sufficient to show ineffectiveness
24 of counsel; claims asserted in a petition for post-conviction relief must be supported with
25 specific factual allegations which if true would entitle petitioner to relief. Hargrove v. State,
26 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

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

28 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.

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

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

20 Accordingly, this claim is denied on the merits.

21 B. Ground Two: Pre-Trial Investigation

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

1 unknown individual tampering with the videos and about the tangential family court case. But
2 these bare and naked allegations fail to demonstrate that a better result would have been likely
3 even had counsel presented that information to the jury. In fact, it is clear from the existing
4 record that this information was already presented to the jury in various forms and thus would
5 not have resulted in a better outcome. Defendant actually testified at trial that he did not take
6 the pictures and that other people used his computer; there was also testimony that, defense
7 counsel argued, suggested the victim may have taken these images herself. See Recorder's
8 Transcript, August 29, 2014, at 111–12, 116. Defendant cannot establish prejudice because
9 there is no reasonable likelihood of a better result even had counsel presented the information
10 Defendant claims would have been discovered in investigation. McNelson, 115 Nev. at 403,
11 990 P.2d at 1268. Accordingly, these claims are also denied on the merits.

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

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

17 Defendant’s complaints that counsel was ineffective in defining pornography and,
18 relatedly, for arguing that these images were not pornography are belied by the record. Petition
19 at 8, 12. In fact, counsel argued from the very beginning of the case about the legal definition
20 of pornography and asserted that these images did not meet that definition. See Court Minutes,
21 March 28, 2013, and May 2, 2013. During his closing argument, counsel argued that the photos
22 and videos did not meet the definition of pornography, did not appeal to prurient interest, and
23 may have had artistic value. See Recorder’s Transcript (“RT”), August 29, 2014, at 109–12.
24 Thus, Defendant’s claim that counsel did not make these challenges about the nature of
25 pornography and these particular images is belied by the record. Hargrove, 100 Nev. at 502,
26 686 P.2d at 225.

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

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

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

21 Defendant’s complaints about counsel’s conduct during trial—challenging, arguing
22 with, and/or interrupting the judge—also fail to establish that there was a reasonable likelihood
23 of a better outcome for Defendant had counsel acted differently. Petition at 12–13; McNelson,
24 115 Nev. at 403, 990 P.2d at 1268. Regardless of counsel’s conduct, a judge in Nevada is
25 presumed to be unbiased. Goldman v. Bryan, 104 Nev. 644, 764 P.2d 1296 (1988) (overturned
26 on other grounds by Halverson v. Hardcastle, 123 Nev. 29, 163 P.3d 428 (2007)). When
27 seeking to establish judicial bias justifying recusal, defendant must set “forth facts and reasons
28 sufficient to cause a reasonable person to question the judge’s impartiality.” Towbin Dodge,

1 LLC v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark, 121 Nev. 251, 260, 112 P.3d
2 1063, 1069 (2005). Defendant has failed to establish that, even if his allegations about
3 counsel's conduct are true, that conduct resulted in any bias on the judge's part. Defendant has
4 not offered any actions on the Court's part that would cause a reasonable person to question
5 the judge's impartiality. For example, that the Court denied certain jury instructions is not
6 evidence of bias, as "rulings and actions of a judge during the course of official judicial
7 proceedings do not establish legally cognizable grounds for disqualification." In re Petition to
8 Recall Dunleavy, 104 Nev. 784, 789, 769 P.2d 1271, 1275 (1988). Further, that the judge may
9 have "shrugged" at Defendant when he repeatedly asked a particular question does not
10 demonstrate bias. Accordingly, Defendant cannot establish prejudice. McNelson, 115 Nev. at
11 403, 990 P.2d at 1268.

12 Defendant's complaint that counsel did not ask for a sentence structure jury instruction
13 is utterly without merit. Petition at 12. A jury is not to consider sentencing during the guilt
14 phase of trial. Jury Instructions, at 30. Thus, such a request on counsel's part would have been
15 futile, and counsel cannot be deemed ineffective for not making it. Ennis, 122 Nev. at 706,
16 137 P.3d at 1103.

17 Finally, Defendant's complaints about counsel's conduct at sentencing are without
18 merit. Petition at 13. Defendant's assertion that his credit for time served and restitution
19 calculations were incorrect are bare and naked, suitable only for summary denial. Hargrove,
20 100 Nev. at 502, 686 P.2d at 225. Further, Defendant's complaint that counsel did not offer
21 any "mitigation" evidence is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225.
22 In fact, at sentencing, counsel argued that Defendant was tested as a low-to-moderate risk to
23 reoffend, lacked any priors, served in the military, and had a regular job. RT, January 15, 2015,
24 at 14.

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

28 //

1 D. Ground Four: Consulting with Defendant on Appellate Matters

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

6 Regardless, it is clear that as required, appellate counsel properly winnowed out weaker
7 issues. Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983); Ford v. State, 105
8 Nev. 850, 853, 784 P.2d 953 (1989). On appeal, counsel focused on the constitutionality of
9 NRS 200.710 and .730, the redundancy of the convictions, the jury instructions, prosecutorial
10 misconduct, evidentiary rulings, the notice in the indictment, sexual portrayal and conduct,
11 and sufficiency of the evidence. See Appellant's Opening Brief, Nevada Supreme Court No.
12 67428. Thus, counsel did in fact address some of the issues Defendant complains were ignored,
13 such as contradictory evidence, the prosecutor's statements, the constitutionality of the child
14 pornography standards, and sexual interest. Any complaints that these issues were not
15 addressed are thus belied by the record and must be summarily denied. Hargrove, 100 Nev. at
16 502, 686 P.2d at 225. The other issues Defendant states should have been raised on appeal,
17 such as length of questioning, cruel and unusual punishment, lifetime supervision, and the
18 dismissal of the Open and Gross Lewdness charge would have been rejected as meritless and
19 thus would have been futile for appellate counsel to raise. Ennis, 122 Nev. at 706, 137 P.3d at
20 1103.

21 Accordingly, these claims are also denied.

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

23 Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-
24 conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566
25 (1991). In McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996), the Nevada
26 Supreme Court similarly observed that "[t]he Nevada Constitution...does not guarantee a right
27 to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to
28 counsel provision as being coextensive with the Sixth Amendment to the United States

1 Constitution.” McKague specifically held that with the exception of NRS 34.820(1)(a)
2 (entitling appointed counsel when petitioner is under a sentence of death), one does not have
3 “any constitutional or statutory right to counsel at all” in post-conviction proceedings. Id. at
4 164, 912 P.2d at 258.

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

8 1. A petition may allege that the Defendant is unable to pay the costs
9 of the proceedings or employ counsel. If the court is satisfied that the
10 allegation of indigency is true and the petition *is not dismissed*
11 *summarily*, the court may appoint counsel at the time the court orders
12 the filing of an answer and a return. In making its determination, the
13 court may consider whether:

- 11 (a) The issues are difficult;
- 12 (b) The Defendant is unable to comprehend the proceedings;
- 13 or
- 14 (c) Counsel is necessary to proceed with discovery.

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

16 This Court is not appointing counsel in this matter because Defendant’s case does not
17 satisfy the considerations under NRS 34.750. First, these issues are not difficult. NRS
18 34.750(1)(a). Issues of counsel’s contact with Defendant and of counsel’s investigation are
19 factual issues, not complex legal issues requiring counsel’s assistance. The rest of Defendant’s
20 complaints about what counsel failed to do are belied by the record and summarily dismissed,
21 as discussed *supra*. Second, Defendant does not allege that he does not understand these
22 proceedings. NRS 34.750(1)(b). See Motion to Appoint Counsel; Petition at 3. Finally, counsel
23 is not necessary to proceed with discovery. NRS 34.750(1)(c). Defendant could obtain all the
24 relevant discovery from his former attorney. Particularly because the issues he points to all
25 seem to revolve around counsel’s conduct, it does not seem that any further discovery would
26 be necessary—let alone that post-conviction counsel would be needed to assist in obtaining it.

27 Defendant’s request is denied.

28 //

ORDER

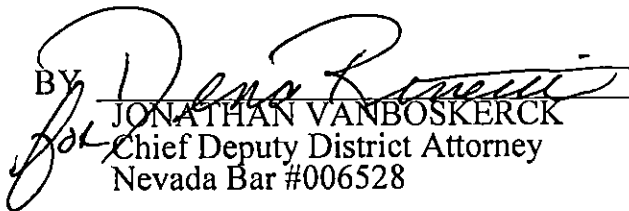
Based on the foregoing, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief and Motion to Appoint Counsel shall be, and are, hereby denied.

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

1 CERTIFICATE OF SERVICE

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

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

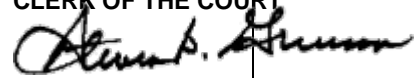
8
9 BY



J. ROBERTSON

Secretary for the District Attorney's Office

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28 12F13527X//JVB/bg/jr/L-1



NEO

**DISTRICT COURT
CLARK COUNTY, NEVADA**

JOSHUA SHUE,

Petitioner,

vs.

BRIAN E. WILLIAMS, SR.,

Respondent,

Case No: A-19-798713-W

Dept No: XXI

**NOTICE OF ENTRY OF FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

PLEASE TAKE NOTICE that on October 31, 2019, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on November 4, 2019.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Debra Donaldson

Debra Donaldson, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 4 day of November 2019, I served a copy of this Notice of Entry on the following:

☒ By e-mail:

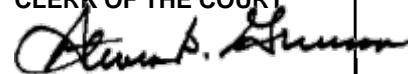
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☒ The United States mail addressed as follows:

Joshua Shue # 1133873
P.O. Box 650
Indian Springs, NV 89070

/s/ Debra Donaldson

Debra Donaldson, Deputy Clerk



FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(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:

//

//

//

//

//

//

1 **POINTS AND AUTHORITIES**

2 **PROCEDURAL HISTORY**

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

9 On April 17, 2013, Defendant filed a pre-trial Petition for Writ of Habeas Corpus. The
10 State filed its Response on April 30, 2013. The Court denied Defendant's Petition on May 2,
11 2013.

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

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

19 Defendant's jury trial commenced on August 25, 2014. On August 29, 2015, the jury
20 returned a verdict of guilty on all charges. On January 15, 2015, Defendant was sentenced to
21 Nevada Department of Corrections as follows: Count 1 – minimum of 24 months and a
22 maximum of 72 months; Count 2 – life with the possibility of parole after 5 years, consecutive
23 to Count 1, plus a \$1,000.000 fine; Count 3, 6, 9, 12, 15, 18, 24, 27–38 – life with the
24 possibility of parole after 5 years, concurrent, plus \$1,000.000 fine for each count; Count 4
25 and 25 – life with the possibility of parole after 10 years, concurrent; Count 7, 10, 13, 16, 19,
26 21, 22 – life with the possibility of parole after 10 years, concurrent, plus \$1,000.00 fine for
27 each count; Count 5, 8, 11 – minimum of 12 months and a maximum of 36 months, concurrent;
28 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.”

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

3 “Surmounting Strickland’s high bar is never an easy task.” Padilla v. Kentucky, 559
4 U.S. 356, 371, 130 S. Ct. 1473, 1485 (2010). The question is whether an attorney’s
5 representations amounted to incompetence under prevailing professional norms, “not whether
6 it deviated from best practices or most common custom.” Harrington v. Richter, 562 U.S. 86,
7 88, 131 S. Ct. 770, 778 (2011). Further, “[e]ffective counsel does not mean errorless counsel,
8 but rather counsel whose assistance is ‘[w]ithin the range of competence demanded of
9 attorneys in criminal cases.’” Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537
10 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441,
11 1449 (1970)).

12 The court begins with a presumption of effectiveness and then must determine whether
13 the defendant has demonstrated by a preponderance of the evidence that counsel was
14 ineffective. Means v. State, 120 Nev. 1001, 1011–12, 103 P.3d 25, 32–33 (2004). The role of
15 a court in considering alleged ineffective assistance of counsel is “not to pass upon the merits
16 of the action not taken but to determine whether, under the particular facts and circumstances
17 of the case, trial counsel failed to render reasonably effective assistance.” Donovan v. State,
18 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (citing Cooper v. Fitzharris, 551 F.2d 1162, 1166
19 (9th Cir. 1977)).

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

1 are virtually unchallengeable.” Id. at 691, 104 S. Ct. at 2064; Rhyne v. State, 118 Nev. 1, 8,
2 38 P.3d 163, 167 (2002). Further, counsel cannot be deemed ineffective for failing to make
3 futile objections, file futile motions, or for failing to make futile arguments. Ennis v. State,
4 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

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

8 In assessing prejudice under Strickland, the question is not whether a court
9 can be certain counsel’s performance had no effect on the outcome or
10 whether it is possible a reasonable doubt might have been established if
11 counsel acted differently. Instead, Strickland asks whether it is reasonably
12 likely the results would have been different. This does not require a
13 showing that counsel’s actions more likely than not altered the outcome,
14 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.

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

19 Importantly, when raising any Strickland claim, the defendant bears the burden to
20 demonstrate the underlying facts by a preponderance of the evidence. Means, 120 Nev. at
21 1012, 103 P.3d at 33. “Bare” or “naked” allegations are not sufficient to show ineffectiveness
22 of counsel; claims asserted in a petition for post-conviction relief must be supported with
23 specific factual allegations which if true would entitle petitioner to relief. Hargrove v. State,
24 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

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

26 A. Ground One: Accepting the State’s Offer

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

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

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

20 Accordingly, this claim is denied on the merits.

21 B. Ground Two: Pre-Trial Investigation

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

1 unknown individual tampering with the videos and about the tangential family court case. But
2 these bare and naked allegations fail to demonstrate that a better result would have been likely
3 even had counsel presented that information to the jury. In fact, it is clear from the existing
4 record that this information was already presented to the jury in various forms and thus would
5 not have resulted in a better outcome. Defendant actually testified at trial that he did not take
6 the pictures and that other people used his computer; there was also testimony that, defense
7 counsel argued, suggested the victim may have taken these images herself. See Recorder's
8 Transcript, August 29, 2014, at 111–12, 116. Defendant cannot establish prejudice because
9 there is no reasonable likelihood of a better result even had counsel presented the information
10 Defendant claims would have been discovered in investigation. McNelson, 115 Nev. at 403,
11 990 P.2d at 1268. Accordingly, these claims are also denied on the merits.

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

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

17 Defendant’s complaints that counsel was ineffective in defining pornography and,
18 relatedly, for arguing that these images were not pornography are belied by the record. Petition
19 at 8, 12. In fact, counsel argued from the very beginning of the case about the legal definition
20 of pornography and asserted that these images did not meet that definition. See Court Minutes,
21 March 28, 2013, and May 2, 2013. During his closing argument, counsel argued that the photos
22 and videos did not meet the definition of pornography, did not appeal to prurient interest, and
23 may have had artistic value. See Recorder’s Transcript (“RT”), August 29, 2014, at 109–12.
24 Thus, Defendant’s claim that counsel did not make these challenges about the nature of
25 pornography and these particular images is belied by the record. Hargrove, 100 Nev. at 502,
26 686 P.2d at 225.

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

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

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

21 Defendant’s complaints about counsel’s conduct during trial—challenging, arguing
22 with, and/or interrupting the judge—also fail to establish that there was a reasonable likelihood
23 of a better outcome for Defendant had counsel acted differently. Petition at 12–13; McNelson,
24 115 Nev. at 403, 990 P.2d at 1268. Regardless of counsel’s conduct, a judge in Nevada is
25 presumed to be unbiased. Goldman v. Bryan, 104 Nev. 644, 764 P.2d 1296 (1988) (overturned
26 on other grounds by Halverson v. Hardcastle, 123 Nev. 29, 163 P.3d 428 (2007)). When
27 seeking to establish judicial bias justifying recusal, defendant must set “forth facts and reasons
28 sufficient to cause a reasonable person to question the judge’s impartiality.” Towbin Dodge,

1 LLC v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark, 121 Nev. 251, 260, 112 P.3d
2 1063, 1069 (2005). Defendant has failed to establish that, even if his allegations about
3 counsel's conduct are true, that conduct resulted in any bias on the judge's part. Defendant has
4 not offered any actions on the Court's part that would cause a reasonable person to question
5 the judge's impartiality. For example, that the Court denied certain jury instructions is not
6 evidence of bias, as "rulings and actions of a judge during the course of official judicial
7 proceedings do not establish legally cognizable grounds for disqualification." In re Petition to
8 Recall Dunleavy, 104 Nev. 784, 789, 769 P.2d 1271, 1275 (1988). Further, that the judge may
9 have "shrugged" at Defendant when he repeatedly asked a particular question does not
10 demonstrate bias. Accordingly, Defendant cannot establish prejudice. McNelson, 115 Nev. at
11 403, 990 P.2d at 1268.

12 Defendant's complaint that counsel did not ask for a sentence structure jury instruction
13 is utterly without merit. Petition at 12. A jury is not to consider sentencing during the guilt
14 phase of trial. Jury Instructions, at 30. Thus, such a request on counsel's part would have been
15 futile, and counsel cannot be deemed ineffective for not making it. Ennis, 122 Nev. at 706,
16 137 P.3d at 1103.

17 Finally, Defendant's complaints about counsel's conduct at sentencing are without
18 merit. Petition at 13. Defendant's assertion that his credit for time served and restitution
19 calculations were incorrect are bare and naked, suitable only for summary denial. Hargrove,
20 100 Nev. at 502, 686 P.2d at 225. Further, Defendant's complaint that counsel did not offer
21 any "mitigation" evidence is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225.
22 In fact, at sentencing, counsel argued that Defendant was tested as a low-to-moderate risk to
23 reoffend, lacked any priors, served in the military, and had a regular job. RT, January 15, 2015,
24 at 14.

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

28 //

1 D. Ground Four: Consulting with Defendant on Appellate Matters

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

6 Regardless, it is clear that as required, appellate counsel properly winnowed out weaker
7 issues. Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983); Ford v. State, 105
8 Nev. 850, 853, 784 P.2d 953 (1989). On appeal, counsel focused on the constitutionality of
9 NRS 200.710 and .730, the redundancy of the convictions, the jury instructions, prosecutorial
10 misconduct, evidentiary rulings, the notice in the indictment, sexual portrayal and conduct,
11 and sufficiency of the evidence. See Appellant's Opening Brief, Nevada Supreme Court No.
12 67428. Thus, counsel did in fact address some of the issues Defendant complains were ignored,
13 such as contradictory evidence, the prosecutor's statements, the constitutionality of the child
14 pornography standards, and sexual interest. Any complaints that these issues were not
15 addressed are thus belied by the record and must be summarily denied. Hargrove, 100 Nev. at
16 502, 686 P.2d at 225. The other issues Defendant states should have been raised on appeal,
17 such as length of questioning, cruel and unusual punishment, lifetime supervision, and the
18 dismissal of the Open and Gross Lewdness charge would have been rejected as meritless and
19 thus would have been futile for appellate counsel to raise. Ennis, 122 Nev. at 706, 137 P.3d at
20 1103.

21 Accordingly, these claims are also denied.

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

23 Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-
24 conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566
25 (1991). In McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996), the Nevada
26 Supreme Court similarly observed that "[t]he Nevada Constitution...does not guarantee a right
27 to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to
28 counsel provision as being coextensive with the Sixth Amendment to the United States

1 Constitution.” McKague specifically held that with the exception of NRS 34.820(1)(a)
2 (entitling appointed counsel when petitioner is under a sentence of death), one does not have
3 “any constitutional or statutory right to counsel at all” in post-conviction proceedings. Id. at
4 164, 912 P.2d at 258.

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

8 1. A petition may allege that the Defendant is unable to pay the costs
9 of the proceedings or employ counsel. If the court is satisfied that the
10 allegation of indigency is true and the petition *is not dismissed*
11 *summarily*, the court may appoint counsel at the time the court orders
12 the filing of an answer and a return. In making its determination, the
13 court may consider whether:

- 11 (a) The issues are difficult;
12 (b) The Defendant is unable to comprehend the proceedings;
13 or
14 (c) Counsel is necessary to proceed with discovery.

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

16 This Court is not appointing counsel in this matter because Defendant’s case does not
17 satisfy the considerations under NRS 34.750. First, these issues are not difficult. NRS
18 34.750(1)(a). Issues of counsel’s contact with Defendant and of counsel’s investigation are
19 factual issues, not complex legal issues requiring counsel’s assistance. The rest of Defendant’s
20 complaints about what counsel failed to do are belied by the record and summarily dismissed,
21 as discussed *supra*. Second, Defendant does not allege that he does not understand these
22 proceedings. NRS 34.750(1)(b). See Motion to Appoint Counsel; Petition at 3. Finally, counsel
23 is not necessary to proceed with discovery. NRS 34.750(1)(c). Defendant could obtain all the
24 relevant discovery from his former attorney. Particularly because the issues he points to all
25 seem to revolve around counsel’s conduct, it does not seem that any further discovery would
26 be necessary—let alone that post-conviction counsel would be needed to assist in obtaining it.

27 Defendant’s request is denied.

28 //

ORDER

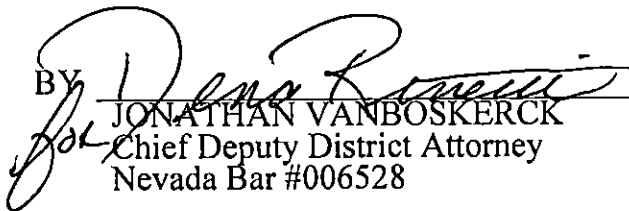
Based on the foregoing, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief and Motion to Appoint Counsel shall be, and are, hereby denied.

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

1 CERTIFICATE OF SERVICE

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

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

8
9 BY



10 J. ROBERTSON
11 Secretary for the District Attorney's Office
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

28 12F13527X//JVB/bg/jr/L-1

September 24, 2019

PRINT DATE: 11/27/2019 Page 1 of 1 Minutes Date: September 24, 2019

Certification of Copy

State of Nevada }
County of Clark } SS:

I, 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):

NOTICE OF APPEAL; CASE APPEAL STATEMENT; DISTRICT COURT
DOCKET ENTRIES; CIVIL COVER SHEET; FINDINGS OF FACT AND CONCLUSIONS OF LAW;
NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER; DISTRICT
COURT MINUTES

JOSHUA CALEB SHUE,

Petitioner(s),

vs.

BRIAN E. WILLIAM, SR.,

Respondent(s),

Case No: A-19-798713-W

Dept No: XXI

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 27 day of November 2019.

Steven D. Grierson, Clerk of the Court



Amanda Hampton, Deputy Clerk