No. _____

October Term, 2017

In the
Supreme Court of the United States

John Ingebretsen,

Petitioner,

v.

Jack Palmer, et al.

Respondent.

Motion for Leave to Proceed *In Forma Pauperis*

Rene Valladares
Federal Public Defender,
District of Nevada
*JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
Jonathan_Kirshbaum@fd.org

*Counsel for Ingebretsen

Petitioner John Ingebretsen respectfully asks for leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed *in forma pauperis*. Ingebretsen has been granted leave to so proceed in the District Court. Counsel was appointed by the United States District Court for the District of Nevada under 18 U.S.C. § 3599(a)(2). *See also* SUPREME COURT RULE 39.1 (authorizing leave to proceed in forma pauperis). Accordingly, no affidavit is attached

Dated September 5, 2018.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/Jonathan M. Kirshbaum
JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender

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On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Petition for Writ of Certiorari

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*Counsel for Ingebretsen

QUESTION PRESENTED

Whether the Ninth Circuit erred in denying a request for a certificate of appealability because reasonable jurists would find it debatable whether Ingebretsen could show cause and prejudice under *Martinez v. Ryan* to overcome the procedural default on the claim that trial counsel was ineffective for failing to investigate the facts or review the State's evidence prior to advising Ingebretsen to plead guilty?

LIST OF PARTIES

The only parties to this proceeding are those listed in the caption.

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Neven; Attorney General of the State of Nevada,
Respondents.

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PETITION FOR WRIT OF CERTIORARI

Petitioner John Ingebretsen respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit denying a Certificate of Appealability. See Appendix A.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit filed an unpublished order on June 25, 2018, denying Ingebretsen's request for a Certificate of Appealability. *See* Appendix A.

JURISDICTION

The United States District Court for the District of Nevada had original jurisdiction over this case, pursuant to 28 U.S.C. § 2254. The district court denied a

Certificate of Appealability. *See* Appendix C at 150. The Ninth Circuit denied Ingebretsen's request for a Certificate of Appealability. *See* Appendix A at 001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254. See also Sup. Ct. R. 13(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution guarantees the right to the assistance of counsel in a criminal prosecution.

STATEMENT OF THE CASE

Ingebretsen was arrested on May 8, 2001. In a second amended criminal complaint filed on May 24, 2001, he was charged with, *inter alia*, fifteen counts of possession of photos depicting sexual conduct of a child based on photos found on his computer and one count of use of a minor in production of pornography based on photos he took of a minor named S.R.

On May 30, 2001, an information was filed charging Ingebretsen with attempt use of a minor in production of pornography based on the S.R. photos, one count of possession of visual presentation depicting sexual conduct of a person under 16 years of age based on a photo on his computer and one count of open or gross lewdness.

Less than a month after he was arrested, Ingebretsen pled guilty on June 4, 2001, to all three charges set forth in an information.

Sentencing took place on August 8, 2001. S.R.'s mother read a victim-impact statement from S.R. in which she stated, "John took pictures of me when I was 12 and 13. I asked him if he was looking at me sexually, he said, 'No.' I found out now

that he was." Ex. E at 3-4.

During defense counsel's statement, the court expressed concerns because counsel allowed Ingebretsen to plead guilty to charges without counsel having reviewed the evidence:

> MR. CICHOSKI: . . . As you heard from the mother, what was happening was he was taking pictures for modeling or something like that and **we don't have those pictures**. I don't know what happened to the pictures. Nobody has ever been able to see them to know if they are pornographic or not except that he admitted, he pled guilty to Attempt Use of Minor in Production of Pornography.
>
> THE COURT: Were they pornographic, Mr. Kephart?
>
> MR. KEPHART: Yes, your Honor. We don't turn this type of contraband over to the defendants.
>
> THE COURT: They have a right to see evidence. You have heard of the Constitution, man?
>
> MR. KEPHART: There's a law, a specific statute in Nevada that will not allow them to have them because they possess them.
>
> THE COURT: The lawyer can look at the evidence.
>
> MR. CICHOSKI: Mr. Herndon told me at the time of preliminary that the photos did not exist.
>
> THE COURT: Well, why would you plead your client to something then if you don't think he was guilty of it? I don't know what the case says. You plead the guy to possession of pornography. You didn't see that?
>
> MR. CICHOSKI: Maybe we should have investigated that. Maybe we should set that over.
>
> MR. KEPHART: I would bring in and show you the photos.

THE COURT: Why would you have your client plead guilty if you didn't think it was pornographic?

MR. CICHOSKI: Your Honor, it was my understanding that there's no law in the State of Nevada as to whether pictures, whether the lack of pictures, whether a person can be convicted if there is no pictures. But there is some law in other states where even though there is no pictures, guys get convicted.

THE COURT: That's not the point. Oh God.

MR. CICHOSKI: That's what I was resting with, your Honor, that if the Court decided even though there's no pictures he can still be convicted –

THE COURT: The court has not decided anything. You guys came in here and entered a guilty plea. What am I supposed to do? I'm just - - you're telling me he pled guilty but you're not even sure it was pornographic?

MR. CICHOSKI: He admits 15 counts of possession of controlled pornography, all one-to-six's.

THE COURT: I know, but you tell me it probably was - -

MR. CICHOSKI: There was a computer which had pornography on it. We don't dispute that there was a computer and that had child porn on it but you tell me he is also charged with taking pornographic pictures of her which to my understanding do not exist and I have never seen.

MR. KEPHART: We don't have those, the ones he was charged with, the pornography in the computer.

MR. CICHOSKI: Count one charges him with taking pictures with Sara.

MR. KEPHART: Using picture of Sara. You don't have to have them for that but by the possession, he has them and he possessed child pornography.

THE COURT: Oh, God. And those, the photos, it says in the PSI - -

> MR. KEPHART: You want to pass it for us to bring them in so the Judge can see what he had?
>
> MR. CICHOSKI: They have computer pictures. **The pictures he is accused of taking of Sara do not exist.**
>
> THE COURT: So what is your point?
>
> MR. CICHOSKI: I was just pointing out, your Honor, **that we don't have those to decide whether those were pornographic or not**.
>
> THE COURT: **Why would you have your client plead guilty and come in and tell me they are not pornographic?** You said he pled guilty to them but then they weren't pornographic. I don't understand that.
>
> MR. CICHOSKI: Because other jurisdictions say that even if the State doesn't have that - -
>
> THE COURT: I know what other jurisdictions say but you are the man's lawyer.

Ex. E at 12-14.

Sentencing was continued so trial counsel could have an opportunity to review the evidence against his client.

Sentencing continued on August 15, 2001. Ex. F. Counsel informed the court that after viewing the photographs, he could not determine whether the photographs in questions were pornographic. *Id.* at 2. Also counsel took the position that the question of whether the photographs were pornographic was for a judge or jury to decide. *Id.* Counsel then informed the court that Ingebretsen did not want to withdraw from the negotiations and that he was ready to be sentenced. *Id.*

After the Nevada Supreme Court affirmed the conviction, Ingebretsen filed a pro se state post-conviction petition raising nine claims. Counsel was appointed to represent Ingebretsen and he moved for *in camera* review of the photographs.

At the May 9, 2005 hearing on this motion, counsel learned from the State the CD containing the hard drive of the defendant's computer was damaged, cracked in half; the hard drive was returned to the defendant's family, so they did not have any photographs to provide to counsel.

In response, counsel filed a Motion to Dismiss. He made a single argument, namely that the case should be dismissed because the State had lost or destroyed the evidence. On November 13, 2006, the court denied the motion and petition.

In his 28 U.S.C. § 2254 petition, Ingebretsen argued his attorney was ineffective for failing to investigate the facts or review the State's evidence prior to allowing Ingebretsen to plead guilty. *See* Appendix F at 201. After the district court concluded this ground was procedural defaulted, Ingebretsen argued he could overcome the default on that ground based on ineffective assistance of post-conviction counsel. Appendix D at 165-71. The district court rejected that argument. Appendix C at 146.

REASONS FOR GRANTING THE PETITION

In *Slack v. McDaniel* this Court had occasion to construe the language of 28 U.S.C. § 2253 through a post-AEDPA lens and concluded that Congress intended to employ the same test that was used in *Barefoot v. Estelle*, 463 U.S. 880 (1983). 529 U.S. 473, 483-84 (2000). The *Slack* court concluded to obtain a certificate of

appealability ("COA") under § 2253(c), a habeas prisoner must make "a substantial showing of the denial of a constitutional right," which was equivalent to "showing that reasonable jurists could debate" whether the petition "should have been resolved in a different manner" or that the issues presented were "adequate to deserve encouragement to proceed further." *Id.* (internal citation omitted).

Several years later the Court, in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), provided additional guidance to the lower federal courts concerning the proper standards to be applied when reviewing a COA application. A petitioner does not need to show "the appeal will succeed." *Id.* at 338. Nor should a court decline a COA "merely because it believes the applicant will not demonstrate an entitlement to relief." *Id.* The Court emphasized, "It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief." *Id.* At the COA stage, a court of appeals should "limit its examination to a threshold inquiry into the underlying mertis of the claims" and ask only if the District Court decision was debatable. *Id.* at 327; *accord Buck v. Davis*, 137 S. Ct. 759, 774 (2017).

This Court's precedent establish a COA request does not require the applicant to demonstrate a winning case. In fact, the bar is set much lower than that. A petitioner need only present good reasons for allowing him to continue his challenge to an appellate court.

Ingebretsen easily met this standard. His counsel was ineffective for failing to conduct a proper investigation and review the evidence against Ingebretsen. Further, his post-conviction counsel was ineffective for failing to pursue this claim.

Consequently, reasonable jurists would find it debatable whether Ingebretsen could overcome the procedural default and establish a constitutional violation. This Court should grant the petition, vacate the order denying a COA, and remand to the Court of Appeals with an order to grant a COA.

I. The Ninth Circuit should have granted a certificate of appealability on Petitioner's claim that he could overcome the procedural default under *Martinez v. Ryan* on the claim that trial counsel was ineffective for failing to investigate the facts or review the State's evidence prior to advising Ingebretsen to plead guilty

Because the analysis on the procedural default question is intertwined with the merits of the claim, Ingebretsen will first address the merits of the underlying ineffective assistance of counsel claim and then turn to the question of whether he received the ineffective assistance of post-conviction counsel to establish cause to overcome the default pursuant to *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

A. Trial counsel was ineffective for failing to investigate and review the state's evidence.

To bring a successful IAC claim, Ingebretsen must demonstrate that counsel's performance was deficient and he suffered prejudice as a result of that performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In cases where the defendant pled guilty, a defendant must show that the advice he received from counsel fell below an objective standard of reasonableness as measured by prevailing professional norms. *Hill v. Lockhart*, 474 U.S. 52, 56-57 (1985); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). Additionally, Ingebretsen must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill*, 474 U.S. at 59.

For a guilty plea to be valid, it must represent a "voluntary and intelligent choice among the alternative courses of action open to the defendant." *Id*. at 56, *quoting North Carolina v. Alford*, 400 U.S. 25, 31 (1970). To properly advise a defendant of these alternative courses of action, trial counsel must conduct a reasonable investigation. *Strickland,* 466 U.S. at 690; *Wiggins*, 539 U.S. at 533. Although there is a strong presumption that an attorney's conduct meets the standard for effectiveness, "`counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *Wiggins*, 539 U.S at 521 (*quoting Strickland*, 466 U.S. at 690-91).

The record here demonstrates that trial counsel failed to investigate or review the State's evidence prior to rushing Ingebretsen into a guilty plea. It is deficient performance for counsel to advise a client to plead guilty without even reviewing the State's evidence against the client. The trial judge rightfully expressed shock and disbelief that counsel would enter into negotiations without seeing the pictures or negotiate a guilty plea without properly investigating the charges. Ingebretsen could not have made a voluntary and intelligent choice about pleading guilty when his counsel never reviewed the evidence or discussed with him whether there were any available defenses based on counsel's assessment of the evidence.

Counsel's deficient performance prejudiced Ingebretsen. The record establishes that Ingebretsen had significant available defenses to the production and possession counts. In the first instance, it was clear that the State did not even possess the alleged photographs that Ingebretsen took of S.R. The fact that these

photos did not exist severely undermined the strength of the State's case against Ingebretsen on the production charge. The jury would have been required to assess S.R.'s descriptions of the photos to determine whether they were pornographic. There was no guarantee that the jury would have reached such a conclusion as S.R.'s statement at sentencing indicated that she did not originally believe that they were intended to be pornographic. According to Ingebretsen's attorney, they were for S.R.'s modeling portfolio.

Moreover, counsel admitted that, after reviewing the photographs that were found on Ingebretsen's computer, there was a question as to whether they were pornographic. Had counsel properly investigated the State's case against Ingebretsen, he would have been able to advise Ingebretsen that there was a question as to the sufficiency of the State's evidence as to the possession counts.

While Ingebretsen may have known the contents of what he possessed, he was not a lawyer and would not understand what challenges he could make to the State's evidence. He relied on his counsel to advise him so that he could make an informed decision as to how to proceed with his case. But counsel was not in a position to do that because he never looked at the evidence. However, once counsel actually took the time to view the photographs on the computer, he expressed a concern that they were not pornographic. This was an available defense to the charges.

Had counsel advised Ingebretsen that the evidence as to the possession counts was questionable, there is a reasonable probability that Ingebretsen would have insisted upon going to trial.

B. Ingebretsen Can Establish Cause and Prejudice to Overcome The Procedural Default Under *Martinez v. Ryan*.

A procedural default does not bar federal consideration of a claim if a petitioner can show cause and prejudice to excuse the default. Where a petitioner defaults his federal claims in state court pursuant to an adequate and independent state procedural rule, federal habeas relief may nevertheless be available where the petitioner demonstrates cause for the default and prejudice as a result of the alleged federal law violation or demonstrates that failure to consider the claims will result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (citing *Murray v. Carrier*, 477 U.S. 478, 485, 495 (1986)).

Ingebretsen can demonstrate cause and prejudice to overcome the procedural bar applied to Ground 2. In *Martinez v. Ryan*, 566 U.S. 1, 17 (2012), the United States Supreme Court held that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." The *Martinez* Court explained the limited exception was created "as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim." *Id*. at 13-14.

The Court reaffirmed and expanded the rule in *Trevino v. Thaler*, 569 U.S. 413 (2013). In *Trevino* the Supreme Court extended *Martinez's* application to situations where the "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful

opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." *Id.* at 417.

To establish cause under *Martinez/Trevino*, a petitioner must show: (1) the underlying ineffective assistance of trial counsel claim is "substantial" or has "some merit"; (2) the petitioner was not represented or had ineffective counsel under *Strickland v. Washington*, 466 U.S. 668 (1984) during the post-conviction review proceeding; (3) the state post-conviction review proceeding was the initial review proceeding; and (4) state law required (or forced as a practical matter) the petitioner to bring the claim in the initial review collateral proceeding. *Trevino*, 569 U.S. at 428-29.

C. Post-Conviction Counsel Was Ineffective for Failing to Raise Ingebretsen's Underlying Claim of Ineffective Assistance of Trial Counsel.

Ingebretsen can establish cause and prejudice to overcome the procedural bar to Ground 2. In *Martinez*, the Court determined that "[t]o overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." 566 U.S. at 13. As discussed at length in the preceding sections, this ground has clear merit. Thus, Ingebretsen meets the first requirement of *Martinez*. He can also meet the third and fourth, as this claim had to be raised in the initial post-conviction review proceeding.

Ingebretsen also meets the second requirement of *Martinez* where post-conviction counsel was ineffective for failing to raise this ground in the state post-

conviction petition. Although Ingebretsen raised this claim in his pro se petition, appointed counsel abandoned the claim. After counsel was assigned, counsel did not file a supplemental petition advancing this claim. Rather, counsel abandoned the entire petition and simply moved to dismiss the entire case based on the State either losing or destroying evidence. Counsel took no steps to have any other claims litigated. Had post-conviction counsel raised this claim, Ingebretsen would have been entitled to relief.

Post-conviction counsel's failure to raise this issue constituted ineffective assistance and establishes cause to excuse the procedural default. Furthermore, as outlined above, Ingebretsen suffered prejudice because he would have been entitled to relief had this claim been raised in his state post-conviction petition. The Ninth Circuit clearly erred in denying a COA on this ground. This Court should grant the petition and order that a COA be issued.

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/ / /

CONCLUSION

This Court should grant the petition, vacate the order of the Ninth Circuit, and remand the case to the Court of Appeals and order that court to grant a Certificate of Appealability.

Dated September 5, 2018.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/Jonathan M. Kirshbaum
JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I certify that on the September 5, 2018, I delivered the original and ten copies of the Petition for Writ of Certiorari and Motion to Proceed *In Forma Pauperis* in the above-entitled case to a third-party commercial carrier for delivery to the Clerk within three calendar days, in compliance with Rule 29.2.

I further certify that all parties required to be served have been served on this September 5, 2018, in accordance with Rule 29.4(a), one copy of the foregoing Petition for Writ of Certiorari and Motion to Proceed *In Forma Pauperis* by delivering said copy to a third-party commercial carrier for delivery, as addressed below.

I also further certify that in accordance with Rule 29.3, an electronic version of the foregoing was also served.

Solicitor General Room 5614 Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D.C. 20530-0001 Jeffrey M. Conner Assistant Solicitor General Office of the Attorney General 100 North Carson Street Carson City, Nevada 89701-4717	John Ingebretsen 211 Hoover Ave., Apt. B Las Vegas, NV 89101

/s/ Arielle Blanck
An Employee of the
Federal Public Defender

INDEX TO APPENDIX

APP. 001

FILED

JUN 25 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN INGEBRETSEN, Petitioner-Appellant, v. JACK PALMER and ATTORNEY GENERAL FOR THE STATE OF NEVADA, Respondents-Appellees.	No. 18-15436 D.C. No. 3:07-cv-00251-LRH-RAM District of Nevada, Reno ORDER

Before: PAEZ and RAWLINSON, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

APP. 002

Appeal No. 18-15436

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

***

JOHN INGEBRETSEN, Petitioner-Appellant, vs. JACK PALMER, et al., Respondents-Appellees.	D.C. No. 3:07-cv-00251-LRH-RAM (District of Nevada, Las Vegas) **APPLICATION FOR A CERTIFICATE OF APPEALABILITY**

Petitioner-Appellant John Ingebretsen, through his attorney, Jonathan M. Kirshbaum, Assistant Federal Public Defender, moves this Court, pursuant to 28 U.S.C. §2253(c)(2) and Circuit Rule 22-1(d), seeks an order granting a Certificate of Appealability from the district court's March 2, 2018 order denying Ingebretsen's 28 U.S.C. §2254 petition. *See* Ex. D, ECF No. 123. The district court denied Ingebretsen a certificate of appealability. *Id.*

This application is based on the attached Points and Authorities together with any and all pleadings and exhibits on file in this action.

APP. 003

Dated this 21st day of March, 2018.

Respectfully submitted,

RENE VALLADARES,
Federal Public Defender

/s/ Jonathan M. Kirshbaum
JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender
411 E. Bonneville Ave., Suite 250
Las Vegas, Nevada 89101
(702) 388-6577

Attorney for Appellant Ingebretsen

APP. 004

POINTS AND AUTHORITIES

I. ISSUES PRESENTED

1. Whether Reasonable Jurists Would Find It Debatable Whether Ingebretsen Could Show Cause and Prejudice to Overcome the Procedural Default on the Claim that Trial Counsel was Ineffective for Failing to Investigate the Facts or Review the State's Evidence Prior to Advising Ingebretsen to Plead Guilty?

2. Whether Reasonable Jurists Would Find It Debatable Whether Trial Counsel was Ineffective for Failing to Object to the Omission of an Element of the Crime of Sexual Portrayal in Counts I and II of the Information?

II. STATEMENT OF FACTS

Ingebretsen was arrested on May 8, 2001. In a second amended criminal complaint filed on May 24, 2001, he was charged with, inter alia, fifteen counts of possession of visual presentation depicting sexual conduct of a person under 16 years of age based on photos found on his computer and one count of use of a minor in production of pornography based on photos he took of a minor named S.R.

On May 30, 2001, an information was filed charging Ingebretsen with attempt use of a minor in production of pornography based on the S.R. photos, one count of possession of visual presentation depicting sexual conduct of a person under 16 years of age based on a photo on his computer and one count of open or gross lewdness.

Less than a month after he was arrested, Ingebretsen pled guilty on June 4, 2001, to all three charges set forth in an information.

The sentencing hearing took place on August 8, 2001. Ingebretsen was present with counsel. S.R.'s mother read a statement from S.R. in which she stated that "John, took pictures of me when I was 12 and 13. I asked him if he was looking at me sexually, he said, 'No.' I found out now that he was." Ex. E at 3-4.

During defense counsel's statement, the court expressed concerns because counsel allowed Ingebretsen to plead guilty to charges without counsel having reviewed the evidence:

> MR. CICHOSKI: . . . As you heard from the mother, what was happening was he was taking pictures for modeling or something like that and we don't have those pictures. I don't know what happened to the pictures. Nobody has ever been able to see them to know if they are pornographic or not except that he admitted, he pled guilty to Attempt Use of Minor in Production of Pornography.
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> THE COURT: Were they pornographic, Mr. Kephart?
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> THE COURT: They have a right to see evidence. You have heard of the Constitution, man?

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THE COURT: The lawyer can look at the evidence.

MR. CICHOSKI: Mr. Herndon told me at the time of preliminary that the photos did not exist.

THE COURT: Well, why would you plead your client to something then if you don't think he was guilty of it? I don't know what the case says. You plead the guy to possession of pornography. You didn't see that?

MR. CICHOSKI: Maybe we should have investigated that. Maybe we should set that over.

MR. KEPHART: I would bring in and show you the photos.

THE COURT: Why would you have your client plead guilty if you didn't think it was pornographic?

MR. CICHOSKI: Your Honor, it was my understanding that there's no law in the State of Nevada as to whether pictures, whether the lack of pictures, whether a person can be convicted if there is no pictures. But there is some law in other states where even though there is no pictures, guys get convicted.

THE COURT: That's not the point. Oh God.

MR. CICHOSKI: That's what I was resting with, your Honor, that if the Court decided even though there's no pictures he can still be convicted -

THE COURT: The court has not decided anything. You guys came in here and entered a guilty plea. What am I supposed to do? I'm just - - you're telling me he pled guilty but you're not even sure it was pornographic?

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THE COURT: I know, but you tell me it probably was - -

MR. CICHOSKI: There was a computer which had pornography on it. We don't dispute that there was a computer and that had child porn on it but you tell me he is also charged with taking pornographic pictures of her which to my understanding do not exist and I have never seen.

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MR. KEPHART: Using picture of Sara. You don't have to have them for that but by the possession, he has them and he possessed child pornography.

THE COURT: Oh, God. And those, the photos, it says in the PSI - -

MR. KEPHART: You want to pass it for us to bring them in so the Judge can see what he had?

MR. CICHOSKI: They have computer pictures. The pictures he is accused of taking of Sara do not exist.

THE COURT: So what is your point?

MR. CICHOSKI: I was just pointing out, your Honor, that we don't have those to decide whether those were pornographic or not.

THE COURT: Why would you have your client plead guilty and come in and tell me they are not pornographic? You said he pled guilty to them but then they weren't pornographic. I don't understand that.

> MR. CICHOSKI: Because other jurisdictions say that even if the State doesn't have that - -
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> THE COURT: I know what other jurisdictions say but you are the man's lawyer.

Ex. E at 12-14. The sentencing hearing was continued so trial counsel could have an opportunity to review the evidence against his client.

The sentencing hearing continued on August 15, 2001. Ex. F. Counsel informed the court that after viewing the photographs, he could not determine whether the photographs in questions were pornographic. *Id.* at 2. Also counsel took the position that the question of whether the photographs were pornographic was for a judge or jury to decide. *Id.* Counsel then informed the court that Ingebretsen did not want to withdraw from the negotiations and that he was ready to be sentenced. *Id.*

On direct appeal Ingebretsen raised two plea withdrawal claims, both arguing that the guilty plea was not knowing and voluntary. The Nevada Supreme Court dismissed the appeal, concluding that it did not permit a defendant to challenge the validity of a guilty plea on direct appeal. Instead, a defendant must raise a challenge to the validity of his guilty plea in the district court in the first instance, either by bringing a

motion to withdraw the guilty plea or by initiating a post-conviction proceeding.

After the Nevada Supreme Court affirmed the conviction, Ingebretsen filed a pro se state post-conviction petition raising nine claims. Counsel was appointed to represent Ingebretsen and he moved for in camera review of the photographs. At the May 9, 2005 hearing on this motion, counsel learned from the State the CD that contained the hard drive of the defendant's computer was damaged, cracked in half; the hard drive was returned to the defendant's family, so they did not have any photographs to provide to counsel.

In response, counsel filed a Supplemental Motion in Support of Defendant's Writ of Habeas Corpus (Post-Conviction) and Motion to Dismiss. He made a single argument, namely that the case should be dismissed because the State had lost or destroyed the evidence. On November 13, 2006, the court denied the motion and petition in a written order.

In his § 2254 petition, Ingebretsen argued under Ground 2 that his attorney was ineffective for failing to investigate the facts or review the State's evidence prior to allowing Ingebretsen to plead guilty and under

Ground 6 that his attorney was ineffective for failing to object to the omission of an element of the crime of sexual portrayal. Ex. A. After the district court concluded that Ground 2 was procedural defaulted, Ingebretsen argued that he could overcome the default on that ground based on ineffective assistance of post-conviction counsel. The district court rejected that argument. Ex. D. The court denied Ground 6 on the merits. *Id.*

III. ARGUMENT

A. Applicable Legal Standards

In order for a COA to lie, the petitioner must make a "substantial showing of the denial of a constitutional right". 28 U.S.C. §2253(c)(2). To meet that standard, a petitioner must "demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 483 (2000).

B. A Certificate of Appealability Should Issue on the Question of Whether Ingebretsen Could Show Cause and Prejudice to Overcome the Procedural Default on the Claim that Trial Counsel was Ineffective for Failing to Investigate the Facts or Review the State's Evidence Prior to Advising Ingebretsen to Plead Guilty.

Because the analysis on the procedural default question is intertwined with the merits of the claim, Ingebretsen will first address the merits of the underlying ineffective assistance of counsel claim and then turn to the question of whether he received the ineffective assistance of post-conviction counsel to establish cause to overcome the default pursuant to *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

1. Trial counsel was ineffective for failing to investigate and review the state's evidence.

To bring a successful IAC claim, Ingebretsen must demonstrate that counsel's performance was deficient and he suffered prejudice as a result of that performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In cases where the defendant pled guilty, a defendant must show that the advice he received from counsel fell below an objective standard of reasonableness as measured by prevailing professional norms. *Hill v. Lockhart*, 474 U.S. 52, 56-57 (1985); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). Additionally, Ingebretsen must show that there is a reasonable

probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill*, 474 U.S. at 59.

For a guilty plea to be valid, it must represent a "voluntary and intelligent choice among the alternative courses of action open to the defendant." *Id.* at 56, *quoting North Carolina v. Alford*, 400 U.S. 25, 31 (1970). To properly advise a defendant of these alternative courses of action, trial counsel must conduct a reasonable investigation. *Strickland,* 466 U.S. at 690; *Wiggins*, 539 U.S. at 533. Although there is a strong presumption that an attorney's conduct meets the standard for effectiveness, "`counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *Wiggins*, 539 U.S at 521 (*quoting Strickland*, 466 U.S. at 690-91).

The record here demonstrates that trial counsel failed to investigate or review the State's evidence prior to rushing Ingebretsen into a guilty plea. It is deficient performance for counsel to advise a client to plead guilty without even reviewing the State's evidence against the client. The trial judge rightfully expressed shock and disbelief that counsel would enter into negotiations without seeing the pictures or

negotiate a guilty plea without properly investigating the charges. Ingebretsen could not have made a voluntary and intelligent choice about pleading guilty when his counsel never reviewed the evidence or discussed with him whether there were any available defenses based on counsel's assessment of the evidence.

Counsel's deficient performance prejudiced Ingebretsen. The record establishes that Ingebretsen had significant available defenses to the production and possession counts. In the first instance, it was clear that the State did not even possess the alleged photographs that Ingebretsen took of S.K. The fact that these photos did not exist severely undermined the strength of the State's case against Ingebretsen on the production charge. The jury would have been required to assess S.R.'s descriptions of the photos to determine whether they were pornographic. There was no guarantee that the jury would have reached such a conclusion as S.R.'s statement at sentencing indicated that she did not originally believe that they were intended to be pornographic. According to Ingebretsen's attorney, they were for S.R.'s modeling portfolio.

Moreover, counsel admitted that, after reviewing the photographs that were found on Ingebretsen's computer, there was a question as to

whether they were pornographic. Had counsel properly investigated the State's case against Ingebretsen, he would have been able to advise Ingebretsen that there was a question as to the sufficiency of the State's evidence as to the possession counts.

While Ingebretsen may have known the contents of what he possessed, he was not a lawyer and would not understand what challenges he could make to the State's evidence. He relied on his counsel to advise him so that he could make an informed decision as to how to proceed with his case. But counsel was not in a position to do that because he never looked at the evidence. However, once counsel actually took the time to view the photographs on the computer, he expressed a concern that they were not pornographic. This was an available defense to the charges.

Had counsel advised Ingebretsen that the evidence as to the possession counts was questionable, there is a reasonable probability that Ingebretsen would have insisted upon going to trial.

2. Ingebretsen Can Establish Cause and Prejudice to Overcome The Procedural Default Under *Martinez v. Ryan.*

A procedural default does not bar federal consideration of a claim if a petitioner can show cause and prejudice to excuse the default. Where a petitioner defaults his federal claims in state court pursuant to an adequate and independent state procedural rule, federal habeas relief may nevertheless be available where the petitioner demonstrates cause for the default and prejudice as a result of the alleged federal law violation or demonstrates that failure to consider the claims will result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (citing *Murray v. Carrier*, 477 U.S. 478, 485, 495 (1986)).

Ingebretsen can demonstrate cause and prejudice to overcome the procedural bar applied to Ground 2. In *Martinez v. Ryan*, 132 S. Ct. 1309, 1320 (2012), the United States Supreme Court held that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." The *Martinez* Court explained the limited exception was created "as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel,

may not have been sufficient to ensure that proper consideration was given to a substantial claim." *Id.* at 1318.

The Court reaffirmed and expanded the rule in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). In *Trevino* the Supreme Court extended *Martinez's* application to situations where the "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." *Trevino*, 133 S. Ct. at 1921.

To establish cause under *Martinez/Trevino*, a petitioner must show: (1) the underlying ineffective assistance of trial counsel claim is "substantial" or has "some merit"; (2) the petitioner was not represented or had ineffective counsel under *Strickland v. Washington*, 466 U.S. 668 (1984) during the post-conviction review proceeding; (3) the state post-conviction review proceeding was the initial review proceeding; and (4) state law required (or forced as a practical matter) the petitioner to bring the claim in the initial review collateral proceeding. *Dickens v. Ryan*, 740 F.3d 1302, 1319 (9th Cir. 2014) (en banc) (citing *Trevino*, 133 S. Ct. at 1921).

3. Post-Conviction Counsel Was Ineffective for Failing to Raise Ingebretsen's Underlying Claim of Ineffective Assistance of Trial Counsel.

Ingebretsen can establish cause and prejudice to overcome the procedural bar to Ground 2. In *Martinez*, the Court determined that "[t]o overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Id.* at 1318. As discussed at length in the preceding sections, Ground Two has clear merit. Thus, Ingebretsen meets the first requirement of *Martinez*. He can also meet the third and fourth, as this claim had to be raised in the initial post-conviction review proceeding.

Ingebretsen also meets the second requirement of *Martinez* where post-conviction counsel was ineffective for failing to raise Ground Two in the state post-conviction petition. Although Ingebretsen raised this claim in his pro se petition, appointed counsel abandoned the claim. After counsel was assigned, counsel did not file a supplemental petition advancing this claim. Rather, counsel abandoned the entire petition and simply moved to dismiss the entire case based on the State either losing or destroying evidence. Counsel took no steps to have any other claims

litigated. Had post-conviction counsel raised this claim, Ingebretsen would have been entitled to relief.

Post-conviction counsel's failure to raise this issue constituted ineffective assistance and establishes cause to excuse the procedural default. Furthermore, as outlined above, Ingebretsen suffered prejudice because he would have been entitled to relief had this claim been raised in his state post-conviction petition. A Certificate of Appealability should issue.

C. A Certificate of Appealability Should Issue on the Question of Whether Trial Counsel Was Ineffective For Failing To Object To The Omission Of An Element Of The Crime Of Sexual Portrayal In Counts I And II Of The Information.

In Ground 6, Ingebretsen alleged that trial counsel was ineffective for failing to move to dismiss or otherwise object to the constitutionally deficient information. In Count I of the information, the state charged Ingebretsen with "attempted use of a minor in producing pornography," citing, e.g., Nev. Rev. Stat. 200.700 and 200.710. The information asserted that Ingebretsen "knowingly attempt[ed] to use . . . a minor . . . to be the subject of a sexual portrayal, to-wit: by the said Defendant posing the said [minor] in a variety of sexually provocative clothes and positions and then taking sexually suggestive photographs of her,

attempting to produce a pornographic performance that appealed to the Defendant's prurient interest in sex."

Yet the information failed to charge the element of the crime that the portrayal "not have serious literary, artistic, political or scientific value."

> . . . 4. 'Sexual portrayal' means the depiction of a person in a manner which appeals to the prurient interest in sex and which does not have serious literary, artistic, political or scientific value.

Nev. Rev. Stat. § 200.700(2). A "sexual portrayal" is also alleged in Count II without any allegation of the element that the portrayal "not have serious literary, artistic, political or scientific value."

An information must set forth each element of the crime charged and fairly inform a defendant of the charge against which he must defend. *Hamling v. United States*, 418 U.S. 87, 117 (1974). It is generally sufficient that an information set forth the offense in the words of the statute itself, as long as the words "'fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.'" *Hamling*, 418 U.S. at 117 (*quoting United States v. Carll*, 105 U.S. 611, 612 (1882)).

Since the information in this case omitted an element of the crime of "sexual portrayal," it failed to provide Ingebretsen with adequate notice so that he could knowingly and intelligently plead to Counts I and II or prepare a defense to them. Trial counsel should have moved to dismiss or otherwise object to the constitutionally deficient Information. Counsel's failure to challenge the defective information fell below the constitutionally required minimum for effective assistance of counsel and could have served no tactical or strategic purpose.

Ingebretsen suffered prejudice because he unknowingly and unintelligently pled guilty to crimes for which he could have presented a defense and elected to go to trial. Neither the court nor defense counsel informed Ingebretsen that the portrayal must "not have serious literary, artistic, political or scientific value." This was particularly prejudicial with respect to Count I because Ingebretsen took the photographs of S.R. for the purpose of "put[ting] together a portfolio to help her become a model." Counsel's deficient performance caused Ingebretsen to plead guilty to Counts I and II while ignorant of the potential defense that any portrayal that occurred had serious artistic value. Had Ingebretsen been

aware of this potential defense, he clearly would have chosen to go to trial.

The Nevada Supreme Court did not specifically analyze either prong of Strickland and instead simply affirmed the district court's conclusion that Ingebretsen received effective assistance of counsel. Ex. H at 3-4. The court held that the district court's finding was supported by substantial evidence and was not clearly wrong. *Id.*

That ruling was unreasonable. Here, the state district court found that based on the guilty plea agreement and plea canvass, "defendant made detailed admissions to all of the elements of the relevant offenses." Ex. G at 3. The court further found that Ingebretsen was rendered effective assistance of counsel in obtaining a favorable plea. *Id.*

The district court's findings are clearly wrong. First, Ingebretsen could not have made detailed admissions to all of the elements because he was never informed of the all of the elements of Counts I and II. And, as outlined above, Ingebretsen had a significant defense to the possession counts, so the plea deal was not favorable. Therefore, counsel was not effective in negotiating a "favorable plea" and the Nevada Supreme

Court's conclusion to the contrary was unreasonable. Accordingly, Ingebretsen is entitled to a Certificate of Appealability.

IV. CONCLUSION

Ingebretsen respectfully requests that this Court issue a COA on the following issues:

> 1. Whether Reasonable Jurists Would Find It Debatable Whether Ingebretsen Could Show Cause and Prejudice to Overcome the Procedural Default on the Claim that Trial Counsel was Ineffective for Failing to Investigate the Facts or Review the State's Evidence Prior to Allowing Ingebretsen to Plead Guilty?
>
> 2. Whether Reasonable Jurists Would Find It Debatable Whether Trial Counsel was Ineffective for Failing to Object to the Omission of an Element of the Crime of Sexual Portrayal in Counts I and II of the Information?

Dated this 21st day of March, 2018.

Respectfully submitted,

/s/ Jonathan M. Kirshbaum
JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender

APP. 023

CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing by First-Class Mail, postage pre-paid, or have dispatched it to a third-party commercial carrier for delivery within three calendar days, to the following non-CM/ECF participants:

John Ingebretsen
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/s/ Adam Dunn
An Employee of the
Federal Public Defender

APP. 024

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JOHN INGEBRETSEN, Petitioner, vs. JACK PALMER, et al., Respondents.	3:07-CV-00251-LRH-RAM **THIRD AMENDED PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY PURSUANT TO 28 U.S.C. § 2254**

COMES NOW, the Petitioner, John Ingebretsen ("Ingebretsen"), by and through his attorney of record, Paul G. Turner, Assistant Federal Public Defender, and hereby files this Third Amended Petition for Writ of Habeas Corpus by a Person in State Custody Pursuant to 28 U.S.C. § 2254.[1]

The Petition alleges:

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[1] The Exhibits referenced in this Third Amended Petition are identified as "Ex." Petitioner reserves the right to file supplemental exhibits as needed and relevant.

PETITION[2]

I.

PROCEDURAL BACKGROUND

1. Ingebretsen plead guilty and was convicted of Attempt Use of Minor in Producing Pornography (Count I), Possession of Visual Presentation Depicting Sexual Conduct of Person Under 16 Years of Age (Count II), and Open or Gross Lewdness (Count III). Ingebretsen was sentenced as follows: Count I - to a maximum term of 120 months with a minimum parole eligibility of 36 months; Count II - a maximum term of 48 months with a minimum parole eligibility of 12 months to be served concurrent to Count I; and Count III - to 12 months to be served concurrent with Counts I and II. (Ex. 13.) Ingebretsen has expired his prison sentences and is currently residing in Las Vegas, Nevada, serving his sentence of lifetime supervision which, given the nature of his conviction and Nevada's adoption of the Adam Walsh Act, requires him to register as a Tier 3 sex offender as of July 1, 2008.

2. A Judgment of Conviction in the case entitled State of Nevada v. John J. Ingebretsen, Case No. C175709, was entered on August 20, 2001. (Id.)

3. On May 29, 2001, Ingebretsen unconditionally waived his right to a preliminary hearing. (Ex. 7.) He was present with counsel, Deputy Public Defender Mark Cichoski, and the hearing was held before the Honorable James M. Bixler in the Justice Court in and for Clark County, Nevada. (Id.) Attorney Cichoski stated that the matter had been negotiated and that the State retained the right to argue at the time of sentencing. (Id.)

4. On May 30, 2001, the State filed an Information in the Eighth Judicial District Court in and for Clark County, Nevada, charging Ingebretsen with Attempt Use of a Minor in Producing Pornography, a violation of NRS 200.700, 200.710, 200.750, 193.330 (Count I); Possession of Visual Presentation Depicting Sexual Conduct of Person Under Sixteen Years of Age, a violation of NRS 200.700, 200.730 (Count II); and Open or Gross Lewdness, a violation of NRS 201.210 (Count III). (Ex. 8.)

5. The plea hearing took place on June 4, 2001, before the Honorable Lee Gates.

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[2] Counsel has sent Petitioner a verification and acknowledgment of the Third Amended Petition for Petitioner's signature and will file that pleading with this Court upon receipt from Petitioner.

Ingebretsen was present with counsel. (Ex. 9.) The Guilty Plea Agreement was signed and filed in open court that same day. (Ex. 10.)

6. The sentencing hearing took place on August 8, 2001, before Judge Gates. (Ex. 11.) Ingebretsen was present with counsel Cichoski. During this hearing the court had concerns about counsel allowing his client to plead guilty to charges that he was not certain his client committed. The following colloquy occurred:

> MR. CICHOSKI: . . . As you heard from the mother, what was happening was he was taking pictures for modeling or something like that and we don't have those picture. I don't know what happened to the pictures. Nobody has ever been able to see them to know if they are pornographic or not except that he admitted, he pled guilty to Attempt Use of Minor in Production of Pornography.
>
> THE COURT: Were they pornographic, Mr. Kephart?
>
> MR. KEPHART Yes, your Honor. We don't turn this type of contraband over to the defendants.
>
> THE COURT: They have a right to see evidence. You have heard of the Constitution, man?
>
> MR. KEPHART: There's a law, a specific statute in Nevada that will not allow them to have them because they possess them.
>
> THE COURT: The lawyer can look at the evidence.
>
> MR. CICHOSKI: Mr. Herndon told me at the time of preliminary that the photos did not exist.
>
> THE COURT: Well, why would you plead your client to something then if you don't think he was guilty of it? I don't know what the case says. You plead the guy to possession of pornography. You didn't see that?
>
> MR. CICHOSKI: Maybe we should have investigated that. Maybe we should set that over.
>
> MR. KEPHART: I would bring in and show you the photos.
>
> THE COURT: Why would you have your client plead guilty if you didn't think it was pornographic?
>
> MR. CICHOSKI: Your Honor, it was my understanding that there's no law in the State of Nevada as to whether pictures, whether the lack of pictures, whether a person can be convicted if there is no pictures. But there is some law in other states where even though there is no pictures, guys get convicted.
>
> THE COURT: That's not the point. Oh God.

MR. CICHOSKI: That's what I was resting with, your Honor, that if the Court decided even though there's no pictures he can still be convicted - -

THE COURT: The court has not decided anything. You guys came in here and entered a guilty plea. What am I supposed to do? I'm just - - you're telling me he pled guilty but you're not even sure it was pornographic?

MR. CICHOSKI: He admits 15 counts of possession of controlled pornography, all one-to-six's.

THE COURT: I know, but you tell me it probably was - -

MR. CICHOSKI: There was a computer which had pornography on it. We don't dispute that there was a computer and that had child pron on it but you tell me he is also charged with taking pornographic pictures of her which to my understanding do not exist and I have never seen.

MR. KEPHART: We don't have those, the ones he was charged with, the pornography in the computer.

MR. CICHOSKI: Count one charges him with taking pictures with Sara.

MR. KEPHART: Using picture of Sara. You don't have to have them for that but by th possession, he has them and he possessed child pornography.

THE COURT: Oh, God. And those, the photos, it says in the PSI - -

MR. KEPHART: You want to pass it for us to bring them in so the Judge can see what he had?

MR. CICHOSKI: They have computer pictures. The pictures he is accused of taking of Sara do not exist.

THE COURT: So what is your point?

MR. CICHOSKI: I was just pointing out, your Honor, that we don't have those to decide whether those were pornographic or not.

THE COURT: Why would you have your client plead guilty and come in and tell me they are not pornographic? You said he pled guilty to them but then they weren't pornographic. I don't understand that.

MR. CICHOSKI: Because other jurisdictions say that even if the State doesn't have that - -

THE COURT: I know what other jurisdictions say but you are the man's lawyer.

(Id. at 12-14.) The sentencing hearing was continued so trial counsel could have an opportunity to review the evidence against his client.

/ / /

7. The sentencing hearing continued on August 15, 2001. (Ex. 12.) Cichoski informed the court that he did see the photographs but the question as to whether they were pornographic or not was for a judge or jury to decide, and that Ingebretsen did not want to withdraw from the negotiations and that he was ready to be sentenced. (Id. at 2.) Ingebretsen's sentence is set forth above in the first paragraph. The Judgment of Conviction was entered on August 20, 2001. (Ex. 13.)

DIRECT APPEAL

8. Ingebretsen's proper person Notice of Appeal was timely filed on August 23, 2001. (Ex. 14.) The Nevada Supreme Court docketed this appeal as Case No. 38391.

9. On December 3, 2001, Ingebretsen, through counsel Cichoski, filed Appellant's Fast Track Statement in the Nevada Supreme Court. (Ex. 21.) The following assignments of error were raised:

> I. THE DEFENDANT'S PLEA WAS NOT FREELY AND VOLUNTARILY ENTERED INTO DUE TO THE COURT'S FAILURE TO CANVASS THE DEFENDANT CONCERNING THE 40 PERCENT RULE.
>
> II. THE DEFENDANT'S PLEA OF GUILTY WAS NOT FREELY AND VOLUNTARILY ENTERED INTO DUE TO THE COURT'S FAILURE TO ADEQUATELY EXPLAIN THE CONSEQUENCES OF LIFETIME SUPERVISION FOR A SEXUAL OFFENDER.

10. The Nevada Supreme Court filed its Order Dismissing Appeal in Case No. 38391 on January 23, 2002. (Ex. 24.) Remittitur issued on February 19, 2002. (Ex. 27.)

STATE POST-CONVICTION PETITION (2002-2007)

11. On July 8, 2002, Ingebretsen, in proper person, filed a Petition for Writ of Habeas Corpus (Post-Conviction). (Ex. 30.) The following assignments of error were raised in his petition:

> I. PETITIONER'S PLEA WAS NOT KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY ENTERED, AS THE PROSECUTION KNOWINGLY, WITHHELD MATERIAL AND EXCULPATORY EVIDENCE, A "BRADY" VIOLATION, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE NEVADA AND U.S. CONSTITUTION.
>
> II. PETITIONER'S PLEA WAS NOT KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY ENTERED, AS IT WAS A PRODUCT OF COERCION, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENT TO THE NEVADA AND UNITED STATES CONSTITUTION.

III. PETITIONER'S PLEA WAS NOT KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY ENTERED DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO PROPERLY INVESTIGATE AND OTHER CUMULATIVE ERRORS, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENT TO THE NEVADA AND U.S. CONSTITUTION.

A. FAILURE TO PROPERLY AND THOROUGHLY INVESTIGATE

B. MOTION FOR DISCOVERY

C. FAILURE TO CONDUCT PSYCHOLOGICAL EXAMINATION

D. FAILURE TO PERSONALLY INTERVIEW WITNESSES

E. FAILURE TO FILE PRE-TRIAL MOTION

IV. THE PETITIONER'S 5TH, 6TH, 8TH, 14TH AMENDMENT CONSTITUTION RIGHTS WERE VIOLATED BY THE COURT/JUDGE NOT TELLING HIM THAT HE WOULD BE ON A "LIFETIME" SUPERVISION WITH THE DEPT OF PAROLE AND PROBATION AS A RESULT OF HIS ENTERING A PLEA OF GUILTY, CAUSING HIM TO ENTER A PLEA THAT WAS UNKNOWING AND VERY UNINTELLIGENT.

V. THE PETITIONER'S 6TH AMENDMENT CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED.

VI. THE PETITIONER'S 1ST, 5TH, 6TH, 8TH, 14TH AMENDMENT CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE JUDGE/COURT 1) ALLOWING PETITIONER TO "PLEAD GUILTY" TO WHAT AND IS NOT A CRIME, 2) ACCEPTING AN INVALID/ILLEGAL GUILTY PLEA AND MEMORANDUM, 3) NOT PROPERLY CANVASSING THE PETITION ON HIS PLEA, 4) NOT VIEWING ANY PHOTO/IMAGE/EVIDENCE.

VII. THE PETITIONER'S 1ST, 5TH, 6TH, 8TH, 14TH AMENDMENT OF HIS CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE COURT/ JUDGE NOT PROTECTING AND LETTING THE PETITIONER ABANDON HIS FIRST AMENDMENT RIGHTS UNKNOWINGLY.

VIII. THE PETITIONER'S 5TH, 6TH, 8TH, 14TH AMENDMENT CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE INDICTMENT/INFORMATION BEING ILLEGAL, INVALID AND/OR UNCONSTITUTIONAL.

IX. PETITIONER'S PLEA WAS NOT KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY ENTERED, AS COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE AMENDED INFORMATION AND THE LIFETIME SUPERVISION WHICH THE COURT FAILED TO CANVASS PETITIONER ON, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE NEVADA AND U.S. CONSTITUTION.

12. On October 17, 2002, Travis E. Shetler was appointed to represent Ingebretsen in his state habeas proceedings. (Ex. 40.)

13. Ingebretsen, through counsel Shetler, filed A Motion to Withdraw Guilty Plea on December 19, 2002 (Ex. 41). Judge Gates held a hearing on this motion on March 5, 2003. (Ex. 43.) Ingebretsen was present with counsel Shetler. (Id.) The motion was ultimately denied and the written order was filed on March 6, 2003. (Ex. 44.)

14. Ingebretsen filed a proper person Motion to Discharge Attorney on March 4, 2004 (Ex. 45), which the trial court granted on March 23, 2004 (Ex. 47).

15. On March 22, 2004, Ingebretsen, in proper person, filed a Notice of Appeal concerning the denial of his state post-conviction petition. (Ex. 46.) On August 26, 2004, the Nevada Supreme Court, under Case No. 43051, dismissed this appeal once it determined that the district court had not entered a final order resolving the proceedings initiated by appellant's July 8, 2002, habeas corpus petition. (Ex. 55 at 2.)

16. On August 30, 2004, Ingebretsen filed a proper person Petition for Writ of Mandamus with the Nevada Supreme Court under Case No. 43843. (Ex. 57.) The Nevada Supreme Court entered its Order Denying Petition on September 22, 2004. (Ex. 61.)

17. The district court appointed Christopher R. Oram to represent Ingebretsen in his Petition for Writ of Habeas Corpus on December 3, 2004. (Ex. 63.)

18. Oram filed a Motion for In Camera Review of Photographs on March 14, 2005. (Ex. 64.) At the May 9, 2005, hearing on this motion, counsel learned from the State that the CD that contained the hard drive of the defendant's computer was damaged, cracked in half and the hard drive was returned to the defendant's family so they do not have any photographs to provide to defense counsel. (Ex. 65 at 3, ll. 13-23.) The court ordered additional briefing concerning this issue. (Id.; Ex. 66.)

19. On August 12, 2005, Oram filed a Supplemental Motion in Support of Defendant's Writ of Habeas Corpus (Post-Conviction) and Motion to Dismiss. (Ex. 67.) He raised the following argument:

> I. MR. INGEBRETSEN'S CASE SHOULD BE DISMISSED AS THE STATE HAS INEXPLICABLY LOST OR DESTROYED THE PHOTOGRAPHS, THE SUBJECT OF WHICH IS THE ALLEGED EVIDENCE OF GUILT IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

20. On February 27, 2006, Judge Gates held a hearing on the state petition at which Ingebretsen was present with attorney Oram. (Ex. 71.) After hearing arguments of counsel, Judge Gates took the matter under advisement. (Id.) The written order summarily denying the state petition was filed on May 24, 2006. (Ex. 77.)

21. On April 10, 2006, Ingebretsen timely filed a Notice of Appeal. (Ex. 72.) The Nevada Supreme Court docketed this appeal as Case No. 47114.

22. On August 10, 2006, attorney Oram filed a Fast Track Statement (Ex. 83) with the Nevada Supreme Court raising the following issues:

> I. MR. INGEBRETSEN'S CASE SHOULD BE DISMISSED AS THE STATE HAS INEXPLICABLY LOST OR DESTROYED THE PHOTOGRAPHS, THE SUBJECT OF WHICH IS THE ALLEGED EVIDENCE OF GUILT IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.
>
> II. THE DISTRICT COURT ERRED IN DENYING MR. INGEBRETSEN'S REQUEST FOR AN EVIDENTIARY HEARING.
>
> III. MR. INGEBRETSEN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND HE SHOULD BE PERMITTED TO WITHDRAW HIS PLEA AS THE PLEA AGREEMENT DOES NOT STATE A CRIME.

23. On October 25, 2006, the Nevada Supreme Court issued an Order of Limited Remand for the purposes of allowing the district court to comply with NRS 34.830(1) by preparing findings of fact, conclusions of law and order. (Ex. 86.) The district court complied on November 16, 2006, by entering its Findings of Fact, Conclusions of Law and Order. (Exs. 87 & 88.)

24. The Nevada Supreme Court entered its Order of Affirmance on January 9, 2007. (Ex. 89.) Remittitur issued on February 6, 2007. (Ex. 91.)

FEDERAL ACTION

25. Ingebretsen mailed his Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 Petition By a Person in State Custody in or around May 23, 2007. His First and Second Amended Petitions were filed July 14, 2008 (CR 31) and March 19, 2009 (CR 44), respectively. The instant Third Amended Petition follows.

STATE POST-CONVICTION PETITION (2008-2010)

26. On November 26, 2008, Ingebretsen filed a proper person petition for writ of habeas

corpus in the state district court, State of Nevada v. John Ingebretsen, Case No. C175709 (Ex. 93)[3] wherein he alleged that the lifetime supervision agreement's conditions (see Ex. 92) violate his due process rights under the United States Constitution and the Nevada Constitution and his right to protection from *ex post facto* laws and the impairment of contracts. He further asserts "[t]hey are also unconstitutional to the extent they seek to implement provisions of the Adam Walsh federal legislation against petitioner[,]" Ex. 93, p. 12, ll. 2-4, and answers Question 17 of Nevada's post-conviction petition form as follows:

> 17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? If so, identify: **Petitioner has asserted in his federal petition that Nevada's implementation of the Adam Walsh federal legislation was unconstitutional.**

27. Following the state's response (Ex. 94), Ingebretsen's reply (Ex. 95) and a hearing (Ex. 96) on February 20, 2009, the state district court entered its Findings of Fact, Conclusions of Law and Order denying the petition. Ex. 97. Ingebretsen timely appealed the denial (Ex. 102), and the Nevada Supreme Court docketed the appeal as Case No. 53464.

28. On February 4, 2010, the Nevada Supreme Court affirmed the district court's denial of the state petition. Ex. 98. Ingebretsen thereafter filed a Petition For Rehearing (Ex. 99) which was denied April 7, 2010 (Ex.100), remittitur issuing May 3, 2010 (Ex. 101).

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[3] Supplemental exhibits 93-103 have been contemporaneously submitted to the Court by motion to expand the record. The previously filed exhibits (1-92) are found at CR 32-34. Supplemental Ex. 93 was previously attached to the opposition to motion to dismiss (CR 55) as "Ex. B."

II.

GROUNDS FOR RELIEF

GROUND ONE

INGEBRETSEN'S GUILTY PLEA TO COUNTS I AND II WAS INVOLUNTARY IN VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW BECAUSE (1) HE NEVER SAW THE PHOTOGRAPHS UPON WHICH THE CHARGE WAS BASED AND (2) THE TRIAL COURT IN ITS PLEA CANVASS FAILED TO EXPLAIN THE ELEMENTS OF THE CRIME CHARGED.

Statement of Exhaustion: This claim was raised on appeal of the denial of petitioner's state petition. See Ex. 83.

1. Ingebretsen was arrested on May 8, 2001, (Ex. 2) and pled guilty less than a month later on June 4, 2001 (Ex. 9 & 10).

2. In Count I of the Information (Ex. 8) the state asserted that Ingebretsen "knowingly attempt[ed] to use . . . a minor . . . to be the subject of a sexual portrayal, to-wit: by the said Defendant posing the said [minor] in a variety of sexually provocative clothes and positions and then taking sexually suggestive photographs of her, attempting to produce a pornographic performance that appealed to the Defendant's prurient interest in sex" in violation of Nev. Rev. Stat. §§ 200.710 and 200.700. Section 200.710 states in pertinent part:

> **200.710.** Unlawful to use minor in producing pornography or as subject of sexual portrayal in performance
>
> . . . . .
>
> 2. A person who knowingly uses . . . a minor to be the subject of a "sexual portrayal in a performance is guilty of a category A felony and shall be punished as provided in NRS 200.750 . . . .

§ 200.710(2)(emphasis added). In Count II the state asserted that Ingebretsen possessed a photograph of a "sexual portrayal" or of "sexual conduct." Ex. 8. "Performance" includes a "photograph," and "sexual portrayal" means "the depiction of a person in a manner which appeals to the prurient interest in sex and which does not have serious literary, artistic, political or scientific value." Nev. Rev. Stat. § 200.700(4).

/ / /

3. At the time of Ingebretsen's arrest the police seized certain photographs and the computer he had been using, which property remained in the state's exclusive control up to the time of Ingebretsen's guilty plea. On or about June 4, 2001, Ingebretsen signed a Guilty Plea Agreement wherein, among other things, he agreed to plead guilty to Count I. See Ex. 10. At a June 4, 2001, plea hearing the state court accepted Ingebretsen's plea. See Ex. 9. When the parties reconvened for sentencing on August 8, 2001, the court discovered that neither counsel nor Ingebretsen had seen the specific photographs upon which the Count I charge was based.

> MR. CHICOSKI [defense counsel] . . . As you heard from the mother, what was happening was that he was taking pictures for modeling or something like that and we don't have those pictures. I don't know what happened to the pictures. Nobody has ever been able to see them to know if they are pornographic or not except that he admitted, he pled guilty to Attempt Use of Minor in Production of Pornography.

Ex. 11, p. 11, ll. 11-17 (emphasis added). The state thereafter revealed that, based on a state statute forbidding the possession of pornographic materials, it had a policy of not revealing such factual evidence to the defense.

> MR. KEPHART [the prosecutor] . . . We don't turn this type of contraband over to the defendants.
>
> THE COURT: They have a right to see evidence. You have heard of the Constitution, man?
>
> MR. KEPHART: There's a law, a specific statute in Nevada that will not allow them to have them because they possess them.

Ex. 11, p. 11, 19-25. A few year's later the state's policy was found to be unconstitutional.

> Because nothing in NRS 174.235 or NRS 200.710 to 200.735 precludes child pornography from being copied for the purpose of defending criminal charges, we hold that the district court did not abuse its discretion in ordering the State to provide Epperson defendants with a copy of the videotape to adequately prepare their defense.
>
> Additionally, as the California court noted, denying defense counsel copies of the child pornography hinders the defendant's right to effective assistance of counsel. The Epperson defendants' constitutional rights trump any prohibition of NRS 200.710 to 200.735. Therefore, we follow California and Arizona an allow defense counsel to have a copy of the videotape, with certain specific restrictions[, e.g.]. . .

(1) the defendant cannot possess a copy of the videotape; however; the defendant may view it with counsel in preparing the defense;

State v. Second Judicial Dist. Ct., 89 P.3d 663, 668 (Nev. 2004) (emphasis added).

4. The state judge was shocked that a lawyer would engage in the process of pleading his client guilty while not having seen the evidence upon which such guilt was purportedly based.

> THE COURT: Well, why would you plead your client to something then if you don't think he was guilty of it? I don't know what the case says. You plead the guy to possession of pornography. You didn't see that?
>
> MR. CICHOSKI: Maybe we should have investigated that. Maybe we should set that over.
>
> MR. KEPHART: I would bring in and show you the photos.
>
> THE COURT: Why would you have your client plead guilty if you didn't think it was pornographic?
>
> MR. CICHOSKI: Your honor, it was my understanding that there's no law in the State of Nevada as to whether pictures, whether the lack of pictures, whether a person can be convicted if there is no pictures. But there is some law in other states where even though there is no pictures, guys get convicted.
>
> THE COURT: That's not the point. Oh God.

Ex. 11, p. 12, ll. 4-20.

5. It was generally agreed that the pictures supporting the Count I and II charges did not exist.

> MR. CICHOSKI: There was a computer which had pornography on it. We don't dispute that there was a computer and that had child porn on it but you tell me he is also charged with taking pornographic pictures of her which to my understanding do not exist and I have never seen.
>
> MR. KEPHART: We don't have those, the ones he was charged with, the pornography in the computer.
>
> MR. CICHOSKI: Count one charges him with taking pictures of [the alleged minor].
>
> MR. KEPHART: Using pictures of [the alleged minor]. You don't have to have them for that but by the possession, he has them and he possessed child pornography.

Ex. 11, p. 13, ll. 7-18. Faced with such lack of foundation for a guilty plea to Counts I, the court continued the case. Ex. 11, p. 15, ll. 8-10.

6. When the parties and court reconvened on August 15, 2001, defense counsel indicated he had been shown some photographs which he could not conclude were pornographic but his client still wanted to plead guilty.

> MR. CICHOSKI: . . . They have since showed me photos again. Whether those photos are pornographic or not is a question for either a judge or a jury but we don't - - I've been over to the jail and talked to my client and we do not wish to withdraw from the negotiations in this case and we're ready to be sentenced.

Ex. 12, p. 2, ll. 6-17 (emphasis added). There is no indication in the record that either the judge or the defendant ever saw the particular photographs upon which the charge and, therefore, the Count I plea was based. Believing that defense counsel had performed deficiently, the court asked Ingebretsen to "waive any defect or any claim of ineffective assistance of counsel arising out of the pleading to Count I, Attempt Use of a Minor to Produce Pornography" but got no response. Ex. 12, p. 2, ll. 18-24.

> THE COURT: All right, but last time counsel said he hadn't seen the pictures and I wanted to know why he entered into a negotiation without seeing the pictures, negotiated without investigating properly that particular count.

Ex. 12, p. 3, ll. 5-9 (emphasis added).

7. Although never obtaining a waiver from Ingebretsen, the state judge accepted the plea based on Ingebretsen's statement that "I want to proceed" and acknowledgment that he was pleading guilty because the state had threatened to pursue additional charges at trial. See Ex. 12, p. 3, ll. 10-12; p. 3, l. 19 – p. 4, l. 3. Since neither the judge nor Ingebretsen had ever seen the particular photographs upon which the prosecution based the Count I charge, there was no factual basis for the Count I guilty plea.

8. Since the court never had the factual basis for the Count I and Count II guilty plea before it, it is not surprising that it never reviewed any of the elements of the crime, e.g. what it means in Nev. Rev. Stat. § 200.700 to "depict[ion] . . . 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[,]" with Ingebretsen. Since neither the court nor Ingebretsen ever knew what the facts were supporting the plea and the court

never reviewed the crime's elements with Ingebretsen, Ingebretsen could not have had an understanding of the law in relation to the facts with respect to Counts I and II. His plea was, therefore, involuntary and the writ should be granted, vacating the Count I and Count II conviction.

GROUND TWO

INGEBRETSEN WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE RUSHED INGEBRETSEN INTO A GUILTY PLEA TO COUNTS I AND II WITHOUT PROPERLY INVESTIGATING THE FACTS AND LAW OF THE CASE AND INSISTING THAT THE STATE ALLOW HIM AND HIS CLIENT TO REVIEW THE PHOTOGRAPHS USED TO SUPPORT THE COUNT I AND COUNT II CHARGES PRIOR TO ANY AGREEMENT TO PLEAD GUILTY TO THEM.

Statement of Exhaustion: This claim was raised on appeal of the denial of petitioner's state petition. See Ex. 83.

1. Ingebretsen was arrested on May 8, 2001, (Ex. 2) and pled guilty less than a month later on June 4, 2001 (Ex. 9 & 10).

2. In Count I of the Information (Ex. 8) the state asserted that Ingebretsen "knowingly attempt[ed] to use . . . a minor . . . to be the subject of a sexual portrayal, to-wit: by the said Defendant posing the said [minor] in a variety of sexually provocative clothes and positions and then taking sexually suggestive photographs of her, attempting to produce a pornographic performance that appealed to the Defendant's prurient interest in sex" in violation of Nev. Rev. Stat. §§ 200.710 and 200.700. Section 200.710 states in pertinent part:

> **200.710.** Unlawful to use minor in producing pornography or as subject of sexual portrayal in performance
>
> . . . . .
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> 2. A person who knowingly uses . . . a minor to be the subject of a "sexual portrayal in a performance is guilty of a category A felony and shall be punished as provided in NRS 200.750 . . . .

§ 200.710(2)(emphasis added). In Count II the state asserted that Ingebretsen possessed a photograph of a "sexual portrayal" or of "sexual conduct." Ex. 8. "Performance" includes a "photograph," and "sexual portrayal" means "the depiction of a person in a manner which appeals to the prurient interest

in sex and which does not have serious literary, artistic, political or scientific value." Nev. Rev. Stat. § 200.700(4).

3. At the time of Ingebretsen's arrest the police seized certain photographs and the computer he had been using, which property remained in the state's exclusive control up to the time of Ingebretsen's guilty plea. On or about June 4, 2001, Ingebretsen signed a Guilty Plea Agreement wherein, among other things, he agreed to plead guilty to Count I. See Ex. 10. At a June 4, 2001, plea hearing the state court accepted Ingebretsen's plea. See Ex. 9. When the parties reconvened for sentencing on August 8, 2001, the court discovered that neither counsel nor Ingebretsen had seen the specific photographs upon which the Count I charge was based.

> MR. CHICOSKI [defense counsel] . . . As you heard from the mother, what was happening was that he was taking pictures for modeling or something like that and we don't have those pictures. I don't know what happened to the pictures. Nobody has ever been able to see them to know if they are pornographic or not except that he admitted, he pled guilty to Attempt Use of Minor in Production of Pornography.

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> MR. KEPHART [the prosecutor] . . . We don't turn this type of contraband over to the defendants.
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> THE COURT: They have a right to see evidence. You have heard of the Constitution, man?
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> MR. KEPHART: There's a law, a specific statute in Nevada that will not allow them to have them because they possess them.

Ex. 11, p. 11, 19-25. A few year's later state's policy was found to be unconstitutional.

> Because nothing in NRS 174.235 or NRS 200.710 to 200.735 precludes child pornography from being copied for the purpose of defending criminal charges, we hold that the district court did not abuse its discretion in ordering the State to prove Epperson defendants with a copy of the videotape to adequately prepare their defense.
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> Additionally, as the California court noted, denying defense counsel copies of the child pornography hinders the defendant's right to effective assistance of counsel. The Epperson defendants' constitutional rights trump any prohibition of NRS 200.710 to 200.735. Therefore, we follow California and Arizona an allow defense counsel to have a copy of the

videotape, with certain specific restrictions[, e.g.]. . .

(1) the defendant cannot possess a copy of the videotape; however; the defendant may view it with counsel in preparing the defense;

State v. Second Judicial Dist. Ct., 89 P.3d 663, 668 (Nev. 2004).

4. The state judge was shocked that a lawyer would engage in the process of pleading his client guilty while not having seen the evidence upon which such guilt was purportedly based.

THE COURT: Well, why would you plead your client to something then if you don't think he was guilty of it? I don't know what the case says. You plead the guy to possession of pornography. You didn't see that?

MR. CICHOSKI: Maybe we should have investigated that. Maybe we should set that over.

MR. KEPHART: I would bring in and show you the photos.

THE COURT: Why would you have your client plead guilty if you didn't think it was pornographic?

MR. CICHOSKI: Your honor, it was my understanding that there's no law in the State of Nevada as to whether pictures, whether the lack of pictures, whether a person can be convicted if there is no pictures. But there is some law in other states where even though there is no pictures, guys get convicted.

THE COURT: That's not the point. Oh God.

Ex. 11, p. 12, ll. 4-20.

5. It was generally agreed that the pictures supporting the Count I and II charges did not exist.

MR. CICHOSKI: There was a computer which had pornography on it. We don't dispute that there was a computer and that had child porn on it but you tell me he is also charged with taking pornographic pictures of her which to my understanding do not exist and I have never seen.

MR. KEPHART: We don't have those, the ones he was charged with, the pornography in the computer.

MR. CICHOSKI: Count one charges him with taking pictures of [the alleged minor].

MR. KEPHART: Using pictures of [the alleged minor]. You don't have to have them for that but by the possession, he has them and he

possessed child pornography.

Ex. 11, p. 13, ll. 7-18. Faced with such lack of foundation for a guilty plea to Count I, the court continued the case. Ex. 11, p. 15, ll. 8-10.

6. When the parties and court reconvened on August 15, 2001, defense counsel indicated he had been shown some photographs which he could not conclude were pornographic but his client still wanted to plead guilty.

> MR. CICHOSKI: . . . They have since showed me photos again. Whether those photos are pornographic or not is a question for either a judge or a jury but we don't - - I've been over to the jail and talked to my client and we do not wish to withdraw from the negotiations in this case and we're ready to be sentenced.

Ex. 12, p. 2, ll. 6-17 (emphasis added). There is no indication in the record that either the judge or the defendant ever saw the particular photographs upon which the charge and, therefore, the Count I plea was based. Believing that defense counsel had performed deficiently, the court asked Ingebretsen to "waive any defect or any claim of ineffective assistance of counsel arising out of the pleading to Count I, Attempt Use of a Minor to Produce Pornography" but got no response. Ex. 12, p. 2, ll. 18-24.

> THE COURT: All right, but last time counsel said he hadn't seen the pictures and I wanted to know why he entered into a negotiation without seeing the pictures, negotiated without investigating properly that particular count.

Ex. 12, p. 3, ll. 5-9 (emphasis added).

7. Although never obtaining a waiver from Ingebretsen, the state judge accepted the plea based on Ingebretsen's statement that "I want to proceed" and acknowledgment that he was pleading guilty because the state had threatened to pursue additional charges at trial. See Ex. 12, p. 3, ll. 10-12; p. 3, l. 19 – p. 4, l. 3. Since neither the judge nor Ingebretsen had ever seen the particular photographs upon which the prosecution based the Count I charge, there was no factual basis for the Count I guilty plea.

8. Defense counsel performed deficiently in the following particulars: (a) he urged his client to plead guilty and allowed him to sign a guilty plea agreement (Ex. 10) without ever reviewing himself or with his client the photographs upon which the child pornography charges to which he pled were based; (b) even after the court voiced serious constitutional concerns, defense counsel still did not seek

to stop the guilty plea, even though counsel was unsure the photographs were pornographic and neither his client nor the court had seen them. Ingebretsen was severely prejudiced by the guilty plea in being labeled a sex offender, sentenced to prison and exposed to the regimen of lifetime supervision. Since petitioner received ineffective assistance of counsel with respect to his guilty plea the writ should be granted and the Count I and Count II convictions vacated.

GROUND THREE

INGEBRETSEN'S GUILTY PLEA TO COUNTS I AND II WAS INVOLUNTARY IN VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW BECAUSE HE PLED GUILTY TO CONDUCT WHICH WAS NOT A CRIME.

Statement of Exhaustion: This claim was raised on appeal of the denial of petitioner's state petition. See Ex. 83.

1. In Count I of the Information (Ex. 8) the state asserts that Ingebretsen "knowingly attempt[ed] to use . . . a minor . . . to be the subject of a sexual portrayal, to-wit: by the said Defendant posing the said [minor] in a variety of sexually provocative clothes and positions and then taking sexually suggestive photographs of her, attempting to produce a pornographic performance that appealed to the Defendant's prurient interest in sex" in violation of Nev. Rev. Stat. §§ 200.710 and 200.700. Section 200.710 states in pertinent part:

> **200.710.** Unlawful to use minor in producing pornography or as subject of sexual portrayal in performance
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> . . . . .
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> 2. A person who knowingly uses . . . a minor to be the subject of a "sexual portrayal in a performance is guilty of a category A felony and shall be punished as provided in NRS 200.750 . . . .

§ 200.710(2)(emphasis added). In Count II the state asserted that Ingebretsen possessed a photograph of a "sexual portrayal" or of "sexual conduct." Ex. 8. "Performance" includes a "photograph," and "sexual portrayal" means "the depiction of a person in a manner which appeals to the prurient interest in sex and which does not have serious literary, artistic, political or scientific value." Nev. Rev. Stat. § 200.700(4).

2. In 1982 the United States Supreme Court held in New York v. Ferber, 458 U.S. 747

(1982), that a state did not need to meet the obscenity standard of Miller v. California, 413 U.S. 15 (1973), in order to regulate child pornography. However, the Supreme Court made it clear that there were limits to such regulation.

> There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed. Here the nature of the harm to be combated requires that the state offense be limited to works that *visually* depict sexual conduct by children below a specified age. The category of 'sexual conduct' proscribed must also be suitably limited and described.

Responding to the Ferber decision the Nevada legislature enacted the first section of what is now Nev. Rev. Stat. § 200.710 (then § 200.509), which reads as follows in pertinent part:

> 1. A person who knowingly uses . . . a minor to simulate or engage in or assist others to simulate or engage in sexual conduct to produce a performance is guilty of a category A felony and shall be punished as provided in NRS 200.750.

Nev. Rev. Stat. § 200.710(1)(emphasis added). "Sexual conduct" is defined as:

> sexual intercourse, lewd exhibition of the genitals, fellatio, cunnilingus, bestiality, anal intercourse, excretion, sadomasochistic abuse, masturbation, or the penetration of any part of a person's body or of any object manipulated or inserted by a person into the genital or anal opening of the body of another.

Nev. Rev. Stat. § 200.700(3). In other words, consistent with the Supreme Court in Ferber, Nevada limited its regulation of child pornography to sexual conduct. In 1995 Nevada added a second section to § 200.710 regulating something other than sexual conduct called "sexual portrayal," which is the subject of Ingebretsen's Count I conviction and is also included in the Count II possession charges under Nev. Rev. Stat. § 200.730. Ex. 8. See the discussion of § 200.710's language in paragraph 1 supra. Since § 200.710(2)("sexual portrayal") and § 200.730 ("sexual portrayal") regulate beyond the sexual conduct allowed by Ferber and addressed in § 200.710(1), they violate the First Amendment and, under Ferber, are nullities.

3. The activities alleged in Count I to which Ingebretsen pled are posing a minor in "sexually provocative clothes and positions" and taking "sexually suggestive" photographs. Such alleged activities are not "sexual conduct" as defined above.

4. Since neither the statutory section under which Ingebretsen pled, § 200.710(2), nor the Count I allegations themselves (see Ex. 8) set forth a crime under the controlling Supreme Court precedent, Ingebretsen pled guilty to conduct that was not a crime. Likewise, with respect to Count II he pled guilty to "sexual portrayal" or conduct far short of the § 700.710(1) definition. Therefore, his guilty pleas to Count I and II were not voluntary, the writ should be granted and his Count I and Count II convictions vacated.

GROUND FOUR

THE TRIAL COURT'S ACCEPTANCE OF PETITIONER'S GUILTY PLEAS TO COUNTS ONE AND TWO WITHOUT ADVISING HIM OF THE SPECIFIC CONSEQUENCES OF LIFETIME SUPERVISION DENIED HIM DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS SUCH PLEA IS NOT INTELLIGENT AND VOLUNTARY.

Statement of Exhaustion: This claim was raised on appeal of the denial of petitioner's state petition. See Ex. 83.

1. On or about June 4, 2001, Ingebretsen signed a Guilty Plea Agreement wherein he agreed to plead guilty to Counts I, II and III of an attached Information (Exs. 8 & 10). While "lifetime supervision" was identified in the plea agreement as a consequence of the plea (Ex. 10, p. 2.), there was no explanation in the agreement of what the term meant.

2. Ingebretsen's plea was accepted following a series of court hearings on June 4, August 4 and August 15, 2001. Ex. 9, 11 & 12. The term "lifetime supervision" was never mentioned in such hearings, and the court never explained the specific conditions of such supervision to petitioner.

3. Ingebretsen did not learn what lifetime supervision entailed until his release from prison on or about November 27, 2007. At that time he learned for the first time some of the onerous particulars of lifetime supervision. See Ex. 92. He later learned that some of the conditions, e.g., counseling, could be extremely punitive in, for example, exposing him, a 64 year old person living on social security, to very substantial counseling fees and charges of up to $250.00 for required polygraph examinations. He also learned that the rigid controls over his life that already existed would soon be increased many times over upon the implementation of the Adams Walsh Act in Nevada (see Ground Five below).

4. Since Ingebretsen was not informed of the scope of the punishment that would be inflicted upon him under the aegis of "lifetime supervision" at the time of the acceptance of his guilty plea, his plea was unintelligent and involuntary and his sentence was imposed without due process of law as guaranteed to him under the Fifth and Fourteenth Amendments to the United States Constitution. The writ should be granted and Ingebretsen's convictions and sentence vacated.

GROUND FIVE

APPLICATION OF THE NEW SEX OFFENDER LAWS TO PETITIONER VIOLATES (1) HIS RIGHTS UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION SINCE SUCH LAWS DENY DUE PROCESS OF LAW AND FREEDOM FROM DOUBLE JEOPARDY AND CRUEL AND UNUSUAL PUNISHMENT, AND (2) HIS RIGHT TO PROTECTION FROM *EX POST FACTO* LAWS AND THE IMPAIRMENT OF CONTRACTS.

Statement of Exhaustion: This claim has not been previously raised since Nevada's new sexual offender laws did not become effective until July 1, 2008 (enforcement has been permanently enjoined; see footnote 3 infra).

1. In June, 2007, Nevada enacted AB579 and SB471 (hereinafter the "new sex offender laws") into law which were scheduled to be implemented in their entirety on July 1, 2008.[4] Such new sex offender laws, modeled on the Adam Walsh federal legislation, dramatically change how sex offenders are defined and classified in Nevada and what restrictions and requirements apply to them. The current system is based upon an individualized assessment of risk of recidivism. Nev. Rev. Stat. §§ 179D113, 179D.115, and 179D.117, addressing tier level registration, as amended by AB579 and AB579, replace such individualized, risk-based system with a tier assignment dictated only by the crime committed by the offender and which now include offenders who committed any crime with any "sexual element" or that is "sexually motivated" since July 1, 1956. Upon information and belief, the State of Nevada intends to impose these restrictions retroactively, regardless of the limitations imposed - or not imposed - on offenders at sentencing. Ingebretsen has been told that the new sex offender laws will be applied to him.

[4] A permanent injunction staying their implementation was issued on September 10, 2008, in ACLU v. MASTO, United States District Court for the District of Nevada, Case No. 2:08-cv-00822-JCM(PAL). Clerk's Record (CR) 70.

2. Nev. Rev. Stat. §§ 176A.410, 213.1243, 213.1245 and 213.1255[5] now establish movement and residence limitations on: (a) persons convicted of sexual offenses and granted probation and suspended sentences; (b) persons on lifetime supervision such as Ingebretsen; and (c) prisoners released on parole. Nev. Rev. Stat. §§ 176A.410, 213.1243 and 213.1245 all state a defendant may not

> knowingly be within 500 feet of any place, or if the place is a structure, within 500 feet of the actual structure, that is designed primarily for use by or for children, including, without limitation, a public school, a school bus stop, a center or facility that provides day care services, a video arcade, an amusement park, a playground, a park, an athletic field or a facility for youth sports, or a motion picture theater. The provisions of this subsection apply only to a sex offender who is a Tier 3 offender.

Ingebretsen is currently classified as a Tier 2 offender but would move to Tier 3 if the new sex offender laws are enforced.

4. As applied generally and to Ingebretsen the new sex offender laws are vague and ambiguous and fail to sufficiently define who is subject to the laws, what their effects are and what the penalties for failure to comply with them are, in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. They also violate the Due Process Clauses because they reassess offenders and subject them to new restrictions and requirements, regardless of any actual risk to society, without the possibility of any hearing and without any requirement by the State of Nevada to provide offenders with any notice of their classification or any new prohibitions or requirements and fail to rationally further any legitimate governmental purpose. They also violate the Due Process Clauses because they vary the terms contained in plea agreements, including Ingebretsen's (see Ex. 10).

5. The new sex offender laws impose punishment, both on persons previously convicted of sexual offenses such as Ingebretsen and prospectively, excessive in relation to the crimes of which offenders such as Ingebretsen are convicted. For example, anyone convicted of any crime with any "sexual element" or any crime that is "sexually motivated" since July 1, 1956, is considered a sex offender under the new sex offender laws and is subject to community notification and registration requirements.

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[5] SB471, sec. 2, 8 and 9, modified these provisions.

6. The effect and intent of the new sex offender laws are punitive, and they impose new punishments for persons such as Ingebretsen convicted before their enactment in violation of the *Ex Post Facto* Clause of Article I, § 10, of the United States Constitution and the Fourteenth Amendment.

7. The new sex offender laws impose new punishments on persons previously convicted, such as Ingebretsen, and impose registration duties, community notification and movement and residence restrictions based on the crime originally committed rather than any actual risk of recidivism, in violation of the Fifth Amendment's Double Jeopardy Clause as applied to the states through the Fourteenth Amendment to the United States Constitution.

8. The New Sex Offender Laws operate as a substantial impairment to the preexisting contractual relationship between the state and Ingebretsen as set forth in his Guilty Plea Agreement (Ex. 10) by imposing new terms not negotiated with drastically increased lifetime supervision, registration and community notification requirements in violation of Article I, §10, of the United States Constitution.

9. In light of the aforementioned constitutional violations the writ should be granted and Ingebretsen released from subjection to Nevada's new sex offender laws, including all lifetime supervision conditions added to existing law.

GROUND SIX

INGEBRETSEN WAS DENIED HIS SIXTH AND FOURTEENTH RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO OBJECT TO THE INFORMATION'S OMISSION IN COUNTS ONE AND TWO OF AN ELEMENT OF THE CRIME OF "SEXUAL PORTRAYAL" AND INFORM HIS CLIENT OF THE NATURE OF SUCH MISSING ELEMENT.

Statement of Exhaustion: This claim was presented to the Nevada Supreme Court in the Fast Track Statement submitted on post-conviction appeal. See Ex. 83, pp.11-13.

1. In Count I of the Information (Ex. 8) (emphasis added) the state charged "attempted use of a minor in producing pornography, citing, e.g., Nev. Rev. Stat. 200.700 and 200.710. The Information asserted that Ingebretsen "knowingly attempt[ed] to use . . . a minor . . . to be the subject of a sexual portrayal, to-wit: by the said Defendant posing the said [minor] in a variety of sexually provocative clothes and positions and then taking sexually suggestive photographs of her, attempting to produce a pornographic performance that appealed to the Defendant's prurient interest in sex." In

doing so the state failed to charge the element of the crime that the portrayal "not have serious literary, artistic, political or scientific value."

. . . . .

> . . . 4. 'Sexual portrayal' means the depiction of a person in a manner which appeals to the prurient interest in sex and which does not have serious literary, artistic, political or scientific value.

Nev. Rev. Stat. § 200.700(2)(emphasis added). A "sexual portrayal" is also alleged in Count II, Ex. 8, p. 2, again without any allegation of the element that the portrayal "not have serious literary, artistic, political or scientific value."

2. Prior to the trial court's final acceptance of the plea on August 15, 2001, it was known by defense counsel and the court that Ingebretsen had used some photographs to "put[ting] together a portfolio to help [the alleged victim] become a model." See Ex. 11, p. 7, ll. 3-5. Indeed, defense counsel noted that fact on the record.

> MR. CHICOSKI: . . . As your heard from the mother, what was happening was he was taking pictures for modeling or something like that and we don't have those pictures . . . .

Ex. 11, p. 11, ll. 11-13.

3. Under the Sixth Amendment to the United States Constitution Ingebretsen was entitled "to be informed of the nature and cause of the accusation" against him. Since the Information omitted an element of the crime of "sexual portrayal," it did not provide adequate notice so that Ingebretsen could knowingly and intelligently plead to the Count I and II charges or prepare a defense to them. This was particularly prejudicial to Ingebretsen since neither the court nor defense counsel informed him that the portrayal must "not have serious literary, artistic, political or scientific value." As a result, Ingebretsen pled guilty to Counts I and II while ignorant of the potential defense that any portrayal that occurred had serious artistic value.

4. Defense counsel did not move to dismiss or otherwise object to the constitutionally deficient Information (Ex. 8). Counsel's failures to challenge the defective information and otherwise advise Ingebretsen of all the elements of the crime of "sexual portrayal" fell below the constitutionally required minimum for effective assistance of counsel and could have served no tactical or strategic purpose. Ingebretsen suffered prejudice from such omissions because he unknowingly and

unintelligently pled guilty to crimes for which he could have presented a defense and elected to go to trial. The writ should be granted and Ingebretsen's Count I and II convictions vacated.

GROUND SEVEN

APPLICATION OF THE "LIFETIME SUPERVISION AGREEMENT" CONDITIONS TO PETITIONER VIOLATE (1) HIS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION TO DUE PROCESS OF LAW AND (2) HIS RIGHT TO PROTECTION FROM *EX POST FACTO* LAWS AND THE IMPAIRMENT OF CONTRACTS UNDER ART. 1, §10 OF THE UNITED STATES CONSTITUTION.

Statement of Exhaustion: This claim was presented to the Nevada Supreme Court on appeal of the denial of the state petition. See Ex. 93-103.

1. On or about June 4, 2001, Ingebretsen signed a Guilty Plea Agreement (Ex. 10) wherein he agreed to plead guilty to Counts I, II and III of an attached Information. While "lifetime supervision" was identified in the plea agreement as a consequence of the plea (page 2), there was no explanation in the agreement of what the term meant.

2. Ingebretsen's plea was accepted following a series of court hearings on June 4 (Ex. 9), August 8 (Ex. 11) and August 15, 2001 (Ex. 12). The term "lifetime supervision" was never mentioned in such hearings, and the court never explained the specific conditions of such supervision to petitioner.

3. When petitioner's pleas were accepted, his sentencing hearing held and judgment entered in 2001 (Ex. 13), the applicable lifetime supervision statute was as follows:

> 1. The board shall establish by regulation a program of lifetime supervision of sex offenders to commence after any period of probation or any term of imprisonment and any period of release on parole. The program must provide for the lifetime supervision of sex offenders by parole and probation officers.
>
> 2. Lifetime supervision shall be deemed a form of parole for the limited purpose of the applicability of the provisions of NRS 213.1076, subsection 9 of NRS 213.095, NRS 213.1096 and subsection 2 of NRS 213.110.
>
> 3. A person who violates a condition imposed on him pursuant to the program of lifetime supervision is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years, and may be further punished by a fine of not more than $5,000.

Nev. Rev. Stat. § 213.1243. Notably, no condition of lifetime supervision is identified in the statute, the statute providing no notice at all of what such conditions will ultimately be.

4. Ingebretsen did not learn what lifetime supervision entailed until his release from prison. At that time, a "Lifetime Supervision Agreement" activated November 27, 2007 (Ex. 92)), imposed twenty-one (21) special conditions on him concerning such subjects as residence (#2), curfew (#12), counseling (#13), polygraph examination (#14), no contact with persons under 18 years old (#18), and not being in or near a playground, school or school grounds, motion picture theatre and a business catering to children (#19), all of which the Board of Parole Commissioners could modify at any time. He later learned that some of the conditions, e.g., counseling and polygraphing, exposed him, a 65 year old person living on social security, to very substantial counseling fees and charges of up to $250.00 for required polygraph examinations and also, in the case of counseling, to additional, more onerous, conditions beyond those in the Lifetime Supervision Agreement itself. As his post-release supervision has evolved his assigned officers from the Division of Parole and Probation have imposed other conditions restricting Ingebretsen's freedom of movement in a variety of ways including, but not limited to, (1) requiring him to live in approved housing and thereby denying Ingebretsen the opportunity to reside in halfway houses with in-house employment opportunities, which are not "zoned" in a category allowing his residence; (2) imposing a 9:00 p.m. curfew; (3) excluding him from seeking counseling from recognized counseling agencies significantly more economical (50% less cost) than those otherwise approved; (4) assigned officer conducting a surprise visit this past Halloween (October 2009) to impose a 4:00 p.m. curfew, thereby substantially restricting access to family and friends during that holiday.

5. The conditions of lifetime supervision are not established until just prior to an inmate sex offender's release, see Nev. Rev. Stat. §§213.290(1) & (2) and Nev. Admin. Code ch. 213, § 290, at which time, pursuant to Nevada statutory administrative law, the Nevada Department of Parole and Probation establishes such conditions as follows:

> 3. Upon receipt of written notification pursuant to subsection 2, the Board will schedule a hearing to establish the conditions of lifetime supervision for the sex offender. The Board will:

> (a) Determine an appropriate location for the hearing that may include, without limitation, the institution or facility at which the sex offender is housed or an office of the Board; and
>
> (b) Appoint a panel pursuant to NRS 213.133 to conduct the hearing.
>
> The Board may establish the conditions of lifetime supervision for more than one sex offender at a hearing.
>
> 4. At least 30 days before the date on which a hearing is scheduled pursuant to subsection 3, the Division shall provide to the Board a report on the status of the sex offender who is the subject of the hearing. The report must include, without limitation:
>
> (a) A summary of the progress of the sex offender, while on parole or probation or in an institution or facility of the Department, as applicable; and
>
> (b) Recommendations for conditions of lifetime supervision for the sex offender . . . .

Nev. Rev. Stat. § 213.290; Nev. Admin. Code ch. 213, § 290. To the extent any such hearing was held, and petitioner does not know if such hearing was held, petitioner had no notice of such hearing or opportunity to participate in it.

6. Nevada's lifetime supervision laws are void for vagueness since they fail to provide fair notice to a defendant such as Ingebretsen of the conditions that will be imposed upon him until after he has served his prison sentence and, therefore, violate the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. They also violate the Due Process Clauses because they subject offenders to new restrictions and requirements without the possibility of a hearing at which the defender could challenge specific conditions, unconstitutionally restrict an individual's right of free movement and right to freedom of association and further violate the constitutional prohibitions against *ex post facto* laws and impairment of contracts, see U.S. Const. Art. 1, §10, because they retroactively vary the terms contained in plea bargains, including Ingebretsen's. They are also unconstitutional to the extent they seek to implement provisions of the Adam Walsh federal legislation against petitioner.

7. The effect and intent of the lifetime supervision conditions are punitive, and they impose new punishments for persons such as Ingebretsen convicted before the conditions are adopted in

violation of the *Ex Post Facto* Clause of Article I, § 10, of the United States Constitution and the Fourteenth Amendment.

8. The lifetime supervision conditions operate as a substantial impairment to the preexisting contractual relationship between the state and Ingebretsen as set forth in his plea bargain by imposing new terms not negotiated with drastically increased lifetime supervision conditions in violation of Article I, §10, of the United States Constitution.

9. In light of the aforementioned constitutional violations the writ should be granted and Ingebretsen released from subjection to the conditions imposed under the Lifetime supervision Agreement after Ingebretsen's release from prison.

III.

PRAYER FOR RELIEF

Accordingly, Petitioner respectfully requests that this Court:

1. Issue a writ of habeas corpus to have Ingebretsen brought before the Court so that he may be discharged from his unconstitutional confinement and sentence;

2. Conduct an evidentiary hearing at which proof may be offered concerning the allegations in this Third Amended Petition and any defenses that may be raised by respondents and;

3. Grant such other and further relief as, in the interests of justice, may be appropriate.

DATED this 28th day of September, 2010.

LAW OFFICES OF THE
FEDERAL PUBLIC DEFENDER

By: */s/ Paul G. Turner*
PAUL G. TURNER
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on September 28, 2010, she served a true and accurate copy of the foregoing to the United States District Court, who will e-serve the following addressee:

Alicia L. Lerud
Deputy Attorney General
Bureau of Criminal Justice
100 North Carson Street
Carson City, Nevada 89701-4717

/s/ Leianna Montoya
An Employee of the Federal Public Defender's Office

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

JOHN INGEBRETSEN, Petitioner, vs. JACK PALMER, *et al.*, Respondents.	Case No. 3:07-cv-00251-LRH-RAM **ANSWER**

After ruling on Respondents' motion to dismiss, granting it in part, this Court ordered Respondents to address ground 2 and ground 6 of the third-amended petition on the merits. (ECF No. 116.) For the reasons addressed in the memorandum of points and authorities below, this Court should dismiss ground 2 as procedurally defaulted and deny ground 6 on the merits.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Ingebretsen seeks federal habeas relief from a Nevada judgment of conviction finding him guilty of one count of attempt use of minor in producing pornography, possession of visual presentation depicting sexual conduct of person under 16 years of age, and open or gross lewdness. (ECF No. 87.) In particular, despite the state district court's initial concern that counsel advised Ingebretsen to plead guilty without looking at photographs that provided the underlying basis for counts 1 and 2 of the information, Ingebretsen expressly noted his desire to move forward with sentencing under the guilty plea agreement he entered with the state in order to avoid prosecution for a number of other offenses

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after counsel had time to review the photos and discuss the matter with Ingebretsen. (Exhibit 12 at 3 ("THE COURT: …. And now do you want to withdraw your plea or do you want to proceed? THE DEFENDANT: I want to proceed. THE COURT: All right. And are you guilty of this or not guilty of this? THE DEFENDANT: I'm guilty.").)

Ingebretsen now challenges the validity of his guilty plea, arguing that it was the result of ineffective assistance of counsel. (ECF No. 87 at 15-18, 23-25.) Ingebretsen's allegations are belied by the record and/or completely undermined by factual determinations made by the state courts. Accordingly, for the reasons addressed below, Respondents respectfully request that this Court issue an order dismissing ground 2 as procedurally defaulted and denying ground 6 on the merits.

II. PROCEDURAL BACKGROUND

While investigating a report of sexual abuse of a minor, Las Vegas Metropolitan Police Department learned that Ingebretsen was sexually abusing his stepdaughter and taking lewd photographs of her in the process. (Exhibit 2 at 4-6 (arrest report).) When the investigation revealed that Ingebretsen had admitted to viewing child pornography on the internet, the State conducted a search of the hard drive of a computer owned by Ingebretsen's family and discovered additional images of child pornography that were not attributable to anyone else that had access to the computer. (Exhibit 2 at 5.)

As a result of the foregoing, the State of Nevada filed a criminal complaint in the local justice court charging Ingebretsen with multiple counts of possession of visual presentation depicting sexual conduct of a person under 16 years of age; open or gross lewdness; and child abuse and neglect. (Exhibit 4.) The State twice amended the complaint, ultimately charging Ingebretsen with a single count of use of a minor in production of pornography; fifteen counts of possession of visual presentation depicting sexual conduct of a person under 16 years of age; four counts of open or gross lewdness; and a single count of child abuse and neglect. (Exhibit 6.) But, at the time set for his preliminary hearing, Ingebretsen agreed to unconditionally waive his right to that hearing and agreed to enter a guilty plea to "one count of attempt use of a minor in production of pornography; one count of possession of a visual presentation of a minor; and one count of open and gross lewdness…." (Exhibit 7 at 2.)

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The State then filed an information in the state district court charging Ingebretsen—in accordance with the plea agreement—with single counts of attempt use of minor in production of pornography; possession of visual presentation depicting sexual conduct of a person under 16 years of age; and open or gross lewdness. (Exhibit 8.) The state district court arraigned Ingebretsen on the information and conducted a thorough plea canvass to ensure that Ingebretsen was "in fact, guilty of these crimes." (Exhibit 9 at 7.) That court conducted a full, thorough plea canvass ensuring that Ingebretsen understood the rights he was waiving, that he understood the penalties he was facing, that he and his attorney discussed the nature of the charges and any possible defenses and discussed the individual charges in the information with Ingebretsen, and finally that Ingebretsen read and understood the plea agreement. (Exhibit 9.) The state district court accepted the plea and set the matter for sentencing. (Exhibit 9 at 11.)

At sentencing, the sentencing judge raised a concern about whether Ingebretsen's attorney properly investigated the case because he had not viewed the photographs that gave rise to the charges in the case prior to advising acceptance of the plea. (Exhibit 11 at 11-15.) As a result, the state district court continued the matter. (Exhibit 11 at 15.)

When the parties reconvened with the trial court, defense counsel acknowledged that he had seen the photographs and equivocated about whether the pictures would meet the standard for pornography. (Exhibit 12 at 2.) Nonetheless, while fully aware of the possibility that the images of his stepdaughter may or may not have been deemed unlawful at trial, Ingebretsen insisted on going forward with the plea, knowing that he was avoiding multiple other counts of possession of child pornography related to other images that were found on his computer. (Exhibit 12 at 3-4 ("THE COURT: Is one of the reasons you are pleading guilty to this charge or pled guilty to these charges is to avoid a harsher penalty should you have gone to trial on the original charges. THE DEFENDANT: Yes.").) Accordingly, the state district court noted that Ingebretsen "waived any defects in the plea agreement and waived his right to claim ineffective assistance of counsel," and sentenced him accordingly. (Exhibit 1 at 2; Exhibit 12 at 2-4.)

Ingebretsen later challenged his conviction on appeal, but the Nevada Supreme Court dismissed the appeal, directing Ingebretsen to challenge his plea through a petition for writ of habeas corpus (post-

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conviction). (Exhibit 24.) Ingebretsen did so, arguing that his plea was the result of ineffective assistance of counsel. In that proceeding, Ingebretsen asserted that his case should be dismissed because the State no longer had the evidence that gave rise to the charges in this case. (Exhibit 67.) Additionally, Ingebretsen alleged that counsel was ineffective for not objecting to the fact that the information did not include an element of the offense for attempt use of a minor in production of pornography regarding the definition of a "sexual portrayal," which requires that the image "not have serious literary, artistic, political or scientific value." (Exhibit 30 at 51-52.)

After holding a hearing on the matter of whether the state courts should reverse Ingebretsen's conviction because the state had not preserved the underlying evidence, (Exhibit 71), the state district court denied Ingebretsen's petition, (Exhibit 87). In particular, the state district court made specific findings that: (1) "The Defendant freely and voluntarily entered his plea of guilty via signed Guilty Plea Agreement;" (2) "The Defendant was properly canvassed by the Court as to the consequences of his plea, including the advisement of his constitutional rights and the waiver of such as a result of his guilty plea;" (3) "Based upon the Defendant's Guilty Plea Agreement and plea canvass, the Defendant made detailed admissions to all of the elements of the relevant offenses;" (4) "The Defendant was rendered effective assistance of counsel in obtaining the favorable plea agreement;" (5) "Defense counsel viewed the photographs in question prior to the Defendant's plea and the Defendant admitted that such were obscene and prohibited by law;"[1] and (6) "The photographs in question were not exculpatory in nature." (Exhibit 87 at 3-4.) The state district court then articulated the governing standards for claims of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), and ordered that the petition be denied. (Exhibit 87 at 5-8.)

Ingebretsen appealed the denial of his petition, asserting that the state district court erred in finding the case should not be dismissed because the State allegedly failed to preserve evidence and that his attorney was ineffective because this information did not include a statement that the State would bear the burden of proving Ingebretsen's photographs lacked any "serious literary, artistic, political or

[1] To the extent the record undermines any finding that counsel viewed the photographs prior to entry of the plea, that factual finding is not determinative of the issues in this case: Counsel did view the photographs after entry of the plea, and despite counsel's equivocal position on whether the images in question were pornographic, Ingebretsen declined the state district court's offer to allow him to with draw his plea and insisted on moving forward with sentencing. (Exhibit 12 at 2-4.)

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scientific value." (Exhibit 83.) However, the Nevada Supreme Court affirmed the denial of the underlying state petition. (Exhibit 89.) The court did not engage in an explicit analysis of either prong of *Strickland* but merely found that the state district court's finding that Ingebretsen did not receive ineffective counsel was "supported by substantial evidence and is not clearly wrong." (Exhibit 89 at 3-4.)

After the parties litigated a number of procedural issues in this proceeding, this Court ultimately dismissed ground 1, ground 3, ground 4, ground 5, and ground 7 of the third-amended petition. (ECF No. 116 at 8.) This court further reserved ruling on the issue of whether ground 2 should be dismissed as procedurally defaulted, and directed Respondents to address the merits of the underlying claim. (ECF No. 116 at 6-8.) Accordingly, with ground 2 and ground 6 remaining pending at this time, Respondents address those claims below, and respectfully request that this Court issue an order dismissing ground 2 as procedurally defaulted and deny ground 6 on the merits.

III. LEGAL ANALYSIS

In his third-amended petition, Ingebretsen alleges that his plea was the result of ineffective assistance of counsel because (1) counsel did not request to review photographs that gave rise to counts 1 and 2 of the information, and (2) counsel did not object to the lack of a statement in the information that the images must lack "serious literary, artistic, political or scientific value," in order to be a "sexual portrayal." (ECF No. 87 at 15-18, 23-25.) Ingebretsen fails to show he is entitled to relief on these claims.

A. Ground 2 is Procedurally Defaulted

In ground 2, Ingebretsen alleges that his plea to the first count in the information—attempt use of a minor in production of pornography—was the result of ineffective assistance of counsel. In particular, Ingebretsen alleges his attorney was ineffective for failing to investigate the nature of the photographs for count 1 to determine if they were pornographic in nature. (ECF No. 87 at 15-18.) This claim is not a substantial claim of ineffective assistance of counsel that would serve to establish cause for a procedural default under *Martinez v. Ryan*, 132 S.Ct. 1309, 1318-19 (2012), nor has Ingebretsen shown actual prejudice. Accordingly, for the reasons addressed herein, this Court should dismiss ground 2 as procedurally defaulted.

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1. Ineffective assistance of counsel in general

For a habeas petitioner to prevail on a claim of ineffective assistance of counsel, he must demonstrate that his trial counsel's representation fell below an objective standard of reasonableness and that, but for any errors, the results would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A defendant is required to prove both prongs of the *Strickland* test before relief can be granted. *United States v. Sanchez-Cervantes*, 282 F.3d 664, 672 (9th Cir. 2002) (citation omitted). "Without proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction 'resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable.'" *Bell v. Cone*, 535 U.S. 685, 695 (2002) (citation omitted).

To prove the first prong, the challenger bears the burden of showing that counsel's errors were so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Strickland*, 466 U.S. at 687. Review of an attorney's performance must be "highly deferential," and must adopt counsel's perspective at the time of the challenged conduct to avoid the "distorting effects of hindsight." *Id*. at 689. A court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id*. (citation omitted); *see also Beardslee v. Woodford*, 358 F.3d 560, 569 (9th Cir. 2004) (citation omitted). It is inappropriate to focus on what counsel might have done better, rather than focusing on the reasonableness of what counsel did. *Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 1998).

As to prejudice, it is not enough to show that the errors had some conceivable effect on the outcome of the proceedings. Rather, the errors must be so serious they deprive the defendant of a fair trial, "a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 693. The likelihood of a different result must be substantial, not just conceivable. *Id*. at 693. When a petitioner entered a guilty plea, to establish prejudice he must show he would not have entered his guilty plea and insisted on going to trial in the absence of counsel's alleged deficient performance. *Hill v. Lockhart*, 474 U.S. 52 (1985) (addressing *Strickland* standard in the context of a guilty plea); *Bragg v. Galaza*, 242 F.3d 1082, 1088 (9th Cir. 2001).

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2. Ground 2 is not a substantial claim of ineffective assistance of counsel

Ground 2 alleges that counsel was ineffective for failing to investigate the nature of the photographs Ingebretsen took of his step-daughter to determine whether they were pornographic in nature. (ECF No. 87 at 15-18.) For the reasons addressed below, Ingebretsen fails to show that counsel's investigation was insufficient, and he fails to show that he suffered actual prejudice.

a. Ingebretsen has not shown that his attorney's conduct was objectively unreasonable

Counsel does not have a duty to complete an exhaustive investigation of every possible lead; counsel has a duty to conduct an investigation based on reasoned judgment in light of the facts of the case presented to them. *Bragg*, 242 F.3d at 1088. Here, there was no need to conduct further investigation. As the record clearly bears out, the plea in this case was the result of a negotiation to avoid multiple charges on multiple other counts: there was no dispute that Ingebretsen had a number of images of child pornography on his computer, and he pleaded guilty to avoid criminal liability for possessing those images. (Exhibit 11 at 13 ("We don't dispute that there was a computer and that had child porn on it…."); Exhibit 12 at 3-4 (acknowledging that the decision to plead guilty was at least in part based on a desire to avoid prosecution on the charges the state withdrew as a result of the plea agreement.) Ingebretsen's admissions with regard to those images, and his desire to avoid criminal liability for possessing them foreclosed the need for defense counsel to conduct any further investigation in this matter. To the contrary, as the state district court found, counsel effectively negotiated a very favorable plea deal for his client. (Exhibit 87 at 3.) Accordingly, Ingebretsen fails to satisfy the deficient performance prong of *Strickland*.

b. Ingebretsen has not shown actual prejudice under the *Hill* standard for ineffective assistance of counsel claims made when a petitioner entered a guilty plea

Additionally, Ingebretsen must make a showing of actual prejudice, which in this context requires Ingebretsen to show that counsel failed to uncover something through his investigation that gives rise to a reasonable likelihood that Ingebretsen would have rejected the plea agreement and insisted on going to trial. Ingebretsen's failure to make this showing is overwhelming. *Hill*, 474 U.S. at 59; *Bragg*, 242 F.3d at 1088.

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First, there is no reasonable question that Ingebretsen was familiar with the contents of the photographs of his stepdaughter: he took the photographs himself, and he knew that they were improper when he entered his plea. (Exhibit 9 at 7-9.) But, even assuming the photographs of Ingebretsen's stepdaughter could have been deemed lawful—a decision that would have been in the hands of a judge or jury had Ingebretsen not waived his right to go to trial—Ingebretsen obtained a substantial benefit as a result of the guilty plea agreement, avoiding fourteen additional counts of possession of child pornography, three additional counts of open or gross lewdness, and a count of child abuse or neglect as a result of his plea agreement with the State. (*Compare* Exhibit 6, *with* Exhibit 8.) And, Ingebretsen expressly acknowledged that his decision to plead guilty was to avoid prosecution on the additional charges. (Exhibit 12 at 3-4.) That a petitioner pleads guilty to a fictional charge in order to avoid prosecution on other offenses does not render his plea involuntary; to the contrary, it demonstrates he made a rationale choice to waive his right to a trial on the original charges to avoid the possibility of receiving a greater punishment, which is constitutionally permissible. *See, e.g., North Carolina v. Alford*, 400 U.S. 25, 31 (1970) (a valid guilty plea "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant"); *id*. at 37 "[W]hile most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty"); *id*. at 39 ("The States in their wisdom…may prohibit the practice of accepting pleas to lesser included offenses under any circumstances. But this is not the mandate of the Fourteenth Amendment of the Bill of Rights." (footnote omitted)).

Accordingly, Ingebretsen fails to show a reasonable likelihood that further investigation by counsel would have resulted in Ingebretsen insisting on going to trial. Quite to the contrary, when defense counsel acknowledged that the issue of whether those images would satisfy the elements of the offense, Ingebretsen expressly insisted on going forward with the negotiation. (Exhibit 12 at 2-4.) As a result, ground 2 lacks merit, and should be dismissed as procedurally defaulted because it is not a substantial claim of ineffective assistance of counsel.

3. Ingebretsen fails to show actual prejudice

Even assuming this Court were to find Ingebretsen could satisfy the "substantial claim" standard for showing cause under *Martinez*, he must also show actual prejudice to overcome his default. As to

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prejudice, the petitioner bears "the burden of showing not merely that the errors [complained of] constituted a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire [proceeding] with errors of constitutional dimension." *White v. Lewis*, 874 F.2d 599, 603 (9th Cir. 1989) (citation omitted). Ingebretsen fails to meet this standard: for the same reasons Ingebretsen fails to show his claim of ineffective assistance of counsel in not substantial, he fails to show actual prejudice. Accordingly, because Ingebretsen has not shown actual prejudice, ground 2 should be dismissed as procedurally defaulted.

B. Ground 6 is Without Merit

In ground 6, Ingebretsen alleges that his plea was the result of ineffective assistance of counsel because counsel failed to object to the fact that the information did not include a statement that the images in question must lack "serious literary, artistic, political or scientific value," in order to be considered a "sexual portrayal." (ECF No. 87 at 23-25.) This claim, which is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), is without merit and should be denied accordingly.

1. The AEDPA standard

This action is governed by AEDPA, which limits the authority of federal courts to grant habeas corpus relief to a state prisoner except "where there is no possibility fair-minded jurists could disagree that the state court's decision conflicts with [Supreme Court] precedents." *See Harrington v. Richter*, 562 U.S. 86, 102 (2011); *see also Johnson v. Williams*, 133 S. Ct. 1088 (extending *Harrington*'s presumption of a denial on the merits to cases with reasoned decisions); *Early v. Packer*, 537 U.S. 3, 8 (2003) (acknowledging that 28 U.S.C. § 2254(d) "does not require citation of our cases—indeed, it does not even require *awareness* of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." (emphasis original)).

In particular, 28 U.S.C. § 2254(d) states:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
> (1) Resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

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> (2) Resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

And, 28 U.S.C. § 2254(e)(1) states:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

In light of this deferential standard, before a state prisoner can receive habeas corpus relief from a federal court, the "state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law *beyond any possibility for fair-minded disagreement*." *Id*., 562 U.S. at 102-03 (emphasis added). This heightened standard reflects the view that habeas corpus is reserved as "'a guard against *extreme malfunctions* in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979)) (emphasis added); *see also id*. ("If [the AEDPA] standard is difficult to meet, that is because it was meant to be.").

The phrase "clearly established Federal law" within 28 U.S.C. § 2254(d)(1) "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. at 412. In other words, "clearly established Federal law" under 28 U.S.C. § 2254(d)(1) is the governing principle or principles set forth by the Supreme Court at the time the state court renders its decision. *Id*. at 405; *see also Parker v. Matthews*, __ U.S. __, 132 S. Ct. 2148, 2155-56 (2012) (acknowledging that circuit precedent is not clearly established federal law). Additionally, the application of 28 U.S.C. § 2254(d)(1) is limited to review of the record presented to the state court at the time it renders its decision on the merits. *Cullen v. Pinholster*, __U.S. __, 131 S. Ct. 1388 (2011).

A state decision is "contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court *and* nevertheless arrives at a result different from [the Supreme Court's] precedent."

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Taylor, 529 U.S. at 405-06 (emphasis added); *see also Bell v. Cone*, 535 U.S. 685, 694 (2002). A petitioner is not entitled to relief under 28 U.S.C. § 2254(d)(1) simply because the state court fails to cite Supreme Court cases applying the correct clearly established federal law. *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003). Indeed, AEDPA does not require state courts to be aware of the controlling Supreme Court cases, so long as the reasoning and result set forth by the state court does not contradict existing Supreme Court precedent. *Early v. Packer*, 537 U.S. 3, 8 (2003). In other words, review under the "contrary to" clause of 28 U.S.C. § 2254(d)(1) looks at whether the state courts' application of some legal principle other than that required by clearly established Supreme Court precedent resulted in the state court reaching a conclusion that no reasonable jurist could reach when applying the appropriate clearly established Supreme Court precedent to the same set of facts.

"Under the 'unreasonable application' clause, a federal court may grant a writ if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Taylor*, 529 U.S. at 413. The "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous. *Id*. at 410. The state court's application of clearly established law must be objectively unreasonable. *Id*. at 409. And, claims with deferential constitutional standards are given double deference under AEDPA. *Pinholster*, 131 S. Ct. at 1403 (claims of ineffective assistance of counsel are accorded double deference under AEDPA); *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005) (acknowledging that AEDPA cloaks the deferential standard for reviewing a claim of sufficiency of the evidence under *Jackson v. Virginia*, 443 U.S. 307 (1979), "with an additional layer of deference").

Furthermore, "[w]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Harrington*, 562 U.S. at 98; *see also Johnson*, 133 S. Ct. 1088. Under 28 U.S.C. § 2254(d)'s "highly deferential standard for evaluating state-court rulings demands that state court decisions are to be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). And, if habeas relief depends upon the resolution of an open question in Supreme Court jurisprudence, habeas relief is precluded. *Carey v. Musladin*, 549 U.S. 70, 76-77 (2006); *see also White v. Woodall*, __ U.S. __, 134 S.Ct. 1697 (2014).

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Finally, 28 U.S.C. § 2254(d)(2) permits a petitioner to challenge any factual findings made by the state courts; however, "'[t]he question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold.'" *Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012) (quoting *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007)). To obtain relief under 28 U.S.C. § 2254(d)(2), the petitioner must convince the federal court "that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record." *Id.* (quoting *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004)) (internal quotations omitted). Additionally, any factual findings made by the Nevada courts are entitled to a presumption of correctness under 28 U.S.C. § 2254(e)(1).

2. Ingebretsen fails to show that the denial of ground 6 was objectively unreasonable

To obtain relief on ground 6, Ingebretsen must show that the Nevada Supreme Court's denial of relief on the *Strickland* claim raised in ground 6 was objectively unreasonable, which is a doubly deferential review. *Burt v. Titlow*, 134 S.Ct. 10, 13 (2013). Ground 6 alleges that counsel was ineffective for failing to object to the lack of a statement in the information that the State would have to carry the burden of proving the images that gave rise to counts 1 and 2 of the information lacked "serious literary, artistic, political or scientific value." (ECF No. 87 at 23-25.)

First, Ingebretsen fails to show that counsel's performance was deficient: counsel negotiated a plea deal that allowed Ingebretsen to avoid a significant number of counts for possession of child pornography, and Ingebretsen admitted his own guilt. (*Compare* Exhibit 6, *with* Exhibit 8; *see also* Exhibit 2.) As a result, it was not objectively unreasonable for counsel to negotiate a plea. *See, e.g., Premo v. Moore*, 562 U.S. 115, 125 (2011) ("The art of negotiation is at least as nuanced as the art of trial advocacy, and it presents questions farther removed from immediate judicial supervision. There are, moreover, special difficulties in evaluating the basis for counsel's judgment: An attorney often has insights borne of past dealings with the same prosecutor or court, and the record at the pretrial stage is never as full as it is after a trial."). Accordingly, Ingebretsen fails to show that it was objectively unreasonable the Nevada Supreme Court to find that Ingebretsen failed to show it was objectively unreasonable for counsel to advise Ingebretsen to plead guilty in the face of the information lacking a

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statement that the State was required to prove that the images lacked "serious literary, artistic, political or scientific value."

Second, Ingebretsen fails to show there is a reasonable probability he would have rejected the plea agreement and insisted on going to trial if counsel had objected to the information lacking a statement that the State would be required to carry the burden of showing Ingebretsen's photographs lacked "serious literary, artistic, political or scientific value." *See Hill*, 474 U.S. at 59 (regarding the *Strickland* prejudice standard for guilty pleas). The state district court continued the sentencing hearing to allow defense counsel to review the photographs, and although counsel was equivocal about whether those pictures would be considered pornographic—acknowledging that the determination of whether the photographs were pornographic would be a factual issue to be decided at trial—Ingebretsen insisted on going forward. (Exhibit 12 at 2-4.) Furthermore, in addition to the overwhelming evidence that Ingebretsen insisted on going forward with the negotiation after his attorney equivocated on whether a finder of fact would find the photographs to be pornographic, the state district court found that "[t]he photographs in question were not exculpatory in nature." (Exhibit 83 at 4.)

In ruling on the claim, the Nevada Supreme Court and the state district court cited to the correct legal standards for evaluating Ingebretsen's claim. (Exhibit 87 at 5-7; Exhibit 89 at 3-4.) Furthermore, the factual findings of the state district court—which are entitled to a presumption of correctness—undermine Ingebretsen's claim on both prongs of *Strickland*. (Exhibit 87 at 3.) Accordingly, Ingebretsen fails to show that the Nevada Supreme Court's denial of relief "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement.

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IV. CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court issue an order dismissing ground 2 as procedurally defaulted and denying ground 6 on the merits.

RESPECTFULLY SUBMITTED this 11th day of January, 2016.

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Attorney General

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 11th day of January, 2016, I served a copy of the foregoing ANSWER, by U.S. District Court CM/ECF electronic filing to:

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JOHN INGEBRETSEN,

Petitioner,

v.

JACK PALMER, et al.,

Respondents.

Case No. 3:07-cv-00251-LRH-RAM

REPLY TO ANSWER (ECF NO. 119)

Petitioner John Ingebretsen ("Ingebretsen"), by and through his attorney, Assistant Federal Public Defender Jonathan Kirshbaum, hereby files this Reply to the Answer filed by Respondents (ECF No. 119). This Reply is based upon the attached points and authorities, and all pleadings, documents and exhibits on file herein.

DATED this 28 day of March, 2016.

Respectfully submitted,
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Federal Public Defender

/s/Jonathan M. Kirshbaum
JONATHAN M. KIRSHBAUM
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/s/Jennifer Yim
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POINTS AND AUTHORITIES

I.

INTRODUCTION

On September 28, 2010, Ingebretsen filed his Third Amended Petition, asserting seven grounds for relief. CR 87. On January 20, 2015, Respondents filed a Motion to Dismiss. CR 109. On September 9, 2015, this Court granted, in part, and denied, in part, Respondents motion to dismiss, dismissing Grounds 1, 3, 4, 5 and 7. CR 116. This Court ordered Respondents to answer the remaining claims, Grounds 2 and 6. CR 116. Respondents filed their answer on January 11, 2016. CR 119. Respondents argue Ingebretsen cannot establish cause and prejudice to overcome the procedural default of Ground 2 because it is not a substantial claim of ineffective assistance of counsel. *Id.* at 7-9. Respondents further argue Ground 6 lacks merit. *Id.* Respondents' procedural default arguments should be rejected. Specifically, Ground 2 is not procedurally defaulted because Ingebretsen has raised a substantial claim of ineffective assistance of trial counsel and can establish prejudice to excuse any default. He can also establish that both Ground 2 and 6 are meritorious claims of ineffective assistance of trial counsel.

II.

STANDARD OF REVIEW

This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d), which permits a federal court to grant habeas relief affecting a state prisoner if the state court's ruling:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A state court's decision is "contrary to" federal law if it: (1) "applies a rule that contradicts the governing law" set forth in Supreme Court case authority, or (2) applies controlling law to a set of facts that is "materially indistinguishable" from a Supreme Court decision but nevertheless reaches a different result. *See Riley v. Payne*, 352 F.3d 1313, 1317 (9th Cir. 2003), *citing Lockyer v. Andrade*, 538 U.S. 63, 74 (2003). When a state court's decision is "contrary to" federal law, no deference under the AEDPA is appropriate and the claim should be reviewed *de novo*. *Lafler v. Cooper*, 132 S. Ct. 1376, 1390 (2012).

A state court's decision is an "unreasonable application" of federal law if it is "objectively unreasonable." *Lockyer*, 538 U.S. at 75. Federal courts generally defer to the state court's application of controlling federal law unless it was "objectively unreasonable." *Williams v. Taylor*, 529 U.S. 363 (2000). Section 2254(d)(2)

authorizes federal courts to grant habeas relief in cases where the state-court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." The unreasonable determination clause applies more commonly to situations where a petitioner challenges a state court's findings based solely on the state court record. *See Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004). In conducting this type of "intrinsic review," a federal court must be deferential to state fact-finding that is supported by the state record. *Id.* However, a petitioner may successfully challenge a state court's findings based on a claim that the finding "is unsupported by sufficient evidence," "the process employed by the state was defective" or "that no finding was made by the state court at all." *Id.*, *citing Wiggins v. Smith*, 539 U.S. 510, 529-33 (2003); *Weaver v. Thompson*, 197 F.3d 359, 363 (9th Cir. 1999).

The Supreme Court has reaffirmed the extensive deference owed a state court decision observing: "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 131 S. Ct. 770, 786-87 (2011).

The Ninth Circuit has clarified how the fairminded jurist standards should be applied, explaining that the focus remains on whether or not the state court's decision was unreasonable:

> The "fairminded jurist" standard is an objective standard of law, not a reference to the quality of the judge making the decision. The standard, therefore, does not require us to evaluate whether the individual jurists are "fairminded" in the sense that they are generally impartial and honest adjudicators, but rather whether there could objectively be fairminded disagreement as to the outcome dictated by the Supreme Court's clearly established law. Fairminded jurists can make mistakes in legal reasoning or judgment, and if such a mistake is beyond reasonable legal disagreement, the "fairminded jurist" standard is satisfied. Were we to apply a fairminded jurist standard literally, a federal court could never reverse a state court's habeas decision. For every state appellate court contains at least one fairminded jurist, if not a majority of its supreme court or appellate court members who voted to reject the petitioner's arguments. When we reverse a state court's habeas decision we are surely not saying that all the state court justices whom we are reversing are not fairminded jurists, but rather that objectively the answer is one that a fairminded jurist should reach.

Dow v. Virga, 729 F.3d 1041, 1051 n.8 (9th Cir. 2013).

If a claim was not "adjudicated on the merits" in state court, no deference is necessary under § 2254(d) and the review is *de novo*. *Amado v. Gonzalez*, 758 F.3d 1119, 1130 (9th Cir. 2014). And where a state court has adjudicated a claim on the merits denying relief based on only one element of the claim and does not reach the others, federal courts should give § 2254(d) deference to the element on which the state court ruled and review the elements on which the state court did not rule *de novo*. *Amado*, 758 F.3d at 1131. If a federal constitutional claim was presented to the state court and the state court denied all relief, there is a presumption that the state court adjudicated the federal constitutional claim on the merits, even if the opinion itself does not address the federal constitutional claim. *Johnson v. Williams*, 133 S. Ct. 1088, 1094-96 (2013). However, this presumption is rebuttable if "the state

standard is quite different from the federal standard," "the state standard is *less* protective," "or if a provision of the Federal Constitution or a federal precedent was simply mentioned in passing in a footnote or was buried in a string cite." *Johnson*, 133 S. Ct. at 1096 (emphasis in original); *accord Amado*, 758 F.3d at 1131.

III.

ARGUMENT

A. Trial Counsel was Ineffective for Failing to Investigate the Facts or Review the State's Evidence Prior to Allowing Ingebretsen to Plead Guilty.

Respondents argue Ground Two is procedurally defaulted and Ingebretsen cannot overcome the state procedural default under *Martinez v. Ryan,* 132 S. Ct. 1309 (2012). This Court has already determined that the last two requirements of *Martinez* have been met. *See* CR 116 at 7. In its order ruling on Respondents' motion to dismiss, the Court noted that "the cause and prejudice determination with respect to Ground Two is intertwined, to some extent, with the analysis on the merits of the claim" and deferred ruling on the cause and prejudice issue until the merits of Ground 2 are briefed. *Id.* Accordingly, Ingebretsen will first address the merits of Ground 2 before turning to cause and prejudice under *Martinez*.

1. Factual Background

Ingebretsen was arrested on May 8, 2001. Ex. 2. In a second amended criminal complaint filed on May 24, 2001, he was charged with, *inter alia*, fifteen counts of possession of visual presentation depicting sexual conduct of a person under

16 years of age based on photos found on his computer and one count of use of a minor in production of pornography based on photos he took of a minor named S.R. Ex. 6.

On May 30, 2001, an information was filed charging Ingebretsen with attempt use of a minor in production of pornography based on the S.R. photos, one count of possession of visual presentation depicting sexual conduct of a person under 16 years of age based on a photo on his computer and one count of open or gross lewdness. Ex. 7.

Less than a month after he was arrested, Ingebretsen pled guilty on June 4, 2001, to all three charges set forth in an information. Exs. 9 & 10.

The sentencing hearing took place on August 8, 2001. Ex. 11. Ingebretsen was present with counsel. S.R.'s mother read a statement from S.R. in which she stated that "John, took pictures of me when I was 12 and 13. I asked him if he was looking at me sexually, he said, 'No.' I found out now that he was." Ex. 11 at 3-4.

During defense counsel's statement, the court expressed concerns because counsel allowed Ingebretsen to plead guilty to charges without counsel having reviewed the evidence:

> MR. CICHOSKI: . . . As you heard from the mother, what was happening was he was taking pictures for modeling or something like that and we don't have those pictures. I don't know what happened to the pictures. Nobody has ever been able to see them to know if they are pornographic or not except that he admitted, he pled guilty to Attempt Use of Minor in Production of Pornography.
>
> THE COURT: Were they pornographic, Mr. Kephart?

MR. KEPHART: Yes, your Honor. We don't turn this type of contraband over to the defendants.

THE COURT: They have a right to see evidence. You have heard of the Constitution, man?

MR. KEPHART: There's a law, a specific statute in Nevada that will not allow them to have them because they possess them.

THE COURT: The lawyer can look at the evidence.

MR. CICHOSKI: Mr. Herndon told me at the time of preliminary that the photos did not exist.

THE COURT: Well, why would you plead your client to something then if you don't think he was guilty of it? I don't know what the case says. You plead the guy to possession of pornography. You didn't see that?

MR. CICHOSKI: Maybe we should have investigated that. Maybe we should set that over.

MR. KEPHART: I would bring in and show you the photos.

THE COURT: Why would you have your client plead guilty if you didn't think it was pornographic?

MR. CICHOSKI: Your Honor, it was my understanding that there's no law in the State of Nevada as to whether pictures, whether the lack of pictures, whether a person can be convicted if there is no pictures. But there is some law in other states where even though there is no pictures, guys get convicted.

THE COURT: That's not the point. Oh God.

MR. CICHOSKI: That's what I was resting with, your Honor, that if the Court decided even though there's no pictures he can still be convicted -

THE COURT: The court has not decided anything. You guys came in here and entered a guilty plea. What am I supposed to do? I'm just - - you're telling me he pled guilty but you're not even sure it was pornographic?

MR. CICHOSKI: He admits 15 counts of possession of controlled pornography, all one-to-six's.

THE COURT: I know, but you tell me it probably was - -

MR. CICHOSKI: There was a computer which had pornography on it. We don't dispute that there was a computer and that had child porn on

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it but you tell me he is also charged with taking pornographic pictures of her which to my understanding do not exist and I have never seen.

MR. KEPHART: We don't have those, the ones he was charged with, the pornography in the computer.

MR. CICHOSKI: Count one charges him with taking pictures with Sara.

MR. KEPHART: Using picture of Sara. You don't have to have them for that but by the possession, he has them and he possessed child pornography.

THE COURT: Oh, God. And those, the photos, it says in the PSI - -

MR. KEPHART: You want to pass it for us to bring them in so the Judge can see what he had?

MR. CICHOSKI: They have computer pictures. The pictures he is accused of taking of Sara do not exist.

THE COURT: So what is your point?

MR. CICHOSKI: I was just pointing out, your Honor, that we don't have those to decide whether those were pornographic or not.

THE COURT: Why would you have your client plead guilty and come in and tell me they are not pornographic? You said he pled guilty to them but then they weren't pornographic. I don't understand that.

MR. CICHOSKI: Because other jurisdictions say that even if the State doesn't have that - -

THE COURT: I know what other jurisdictions say but you are the man's lawyer.

Ex. 11 at 12-14. The sentencing hearing was continued so trial counsel could have an opportunity to review the evidence against his client.

The sentencing hearing continued on August 15, 2001. Ex. 12. Counsel informed the court that after viewing the photographs, he could not determine whether the photographs in questions were pornographic. *Id.* at 2. Also counsel took the position that the question of whether the photographs were pornographic was for a judge or jury to decide. *Id.* Counsel then informed the court that Ingebretsen did

not want to withdraw from the negotiations and that he was ready to be sentenced. *Id.*

On direct appeal Ingebretsen raised two plea withdrawal claims, both arguing that the guilty plea was not knowing and voluntary. Ex. 21. The Nevada Supreme Court dismissed the appeal, concluding that it did not permit a defendant to challenge the validity of a guilty plea on direct appeal. Ex. 24 at 1-2. Instead, a defendant must raise a challenge to the validity of his guilty plea in the district court in the first instance, either by bringing a motion to withdraw the guilty plea or by initiating a post-conviction proceeding. *Id.* at 2.

After the Nevada Supreme Court affirmed the conviction, Ingebretsen filed a *pro se* state post-conviction petition raising nine claims. Ex. 30. Counsel was appointed to represent Ingebretsen and he moved for in camera review of the photographs. Ex. 64. At the May 9, 2005 hearing on this motion, counsel learned from the State the CD that contained the hard drive of the defendant's computer was damaged, cracked in half; the hard drive was returned to the defendant's family, so they did not have any photographs to provide to counsel. Ex. 65. In response, counsel filed a Supplemental Motion in Support of Defendant's Writ of Habeas Corpus (Post-Conviction) and Motion to Dismiss. Ex. 67. He made a single argument, namely that the case should be dismissed because the State had lost or destroyed the evidence. *Id.* On November 13, 2006, the court denied the motion and petition in a written order. Ex. 87.

2. Trial counsel was ineffective for failing to investigate and review the state's evidence.

To bring a successful IAC claim, Ingebretsen must demonstrate that counsel's performance was deficient and he suffered prejudice as a result of that performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In cases where the defendant

pled guilty, a defendant must show that the advice he received from counsel fell below an objective standard of reasonableness as measured by prevailing professional norms. *Hill v. Lockhart*, 474 U.S. 52, 56-57 (1985); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). Additionally, Ingebretsen must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill*, 474 U.S. at 59.

For a guilty plea to be valid, it must represent a "voluntary and intelligent choice among the alternative courses of action open to the defendant." *Id.* at 56, *quoting North Carolina v. Alford*, 400 U.S. 25, 31 (1970). To properly advise a defendant of these alternative courses of action, trial counsel must conduct a reasonable investigation. *Strickland*, 466 U.S. at 690, *Wiggins*, 539 U.S. at 533. Although there is a strong presumption that an attorney's conduct meets the standard for effectiveness, "`counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *Wiggins*, 539 U.S at 521, *quoting Strickland*, 466 U.S. at 690-91.

The record here demonstrates that trial counsel failed to investigate or review the State's evidence prior to rushing Ingebretsen into a guilty plea. It is deficient performance for counsel to advise a client to plead guilty without even reviewing the State's evidence against the client. The trial judge rightfully expressed shock and disbelief that counsel would enter into negotiations without seeing the pictures or negotiate a guilty plea without properly investigating the charges. Ex. 11 at 13-14;

Ex. 12 at 3. Ingebretsen could not have made a voluntary and intelligent choice about pleading guilty when his counsel never reviewed the evidence or discussed with him whether there were any available defenses based on counsel's assessment of the evidence.

Counsel's deficient performance prejudiced Ingebretsen. The decision to plead guilty is a fundamental matter for a defendant. Indeed, it is one of the few decisions that is fully left up to the defendant to make. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) (It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal . . .). Had counsel properly investigated the State's case against Ingebretsen, counsel would have advised him that there was a question as to whether the photographs found on the computer were pornographic—thus, raising an issue as to the sufficiency of the State's evidence as to the counts charging him with possession of child pornography.[1] Without this information, Ingebretsen was unable to make a fully informed decision about his case.

Respondents argue Ingebretsen suffered no prejudice because he took the photographs and was therefore familiar with their contents when he pled guilty. Respondents' argument misses the point. The photos that Ingebretsen allegedly took

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[1] At the August 8 sentencing hearing, counsel made clear that the prosecution did not possess the photos taken of S.R., only those found on the computer. Thus, the photos that counsel reviewed had to have been those that formed the basis of the possession counts.

did not exist. The fact the State did not possess those photos severely undermined the strength of their case against Ingebretsen on that charge. The jury would have been required to assess S.R.'s descriptions of the photos to determine whether they were pornographic. There was no guarantee that the jury would have reached such a conclusion as S.R.'s statement at sentencing indicated that she did not originally believe that they were intended to be pornographic. According to Ingebretsen's attorney, they were for S.R.'s modeling portfolio. *See infra* Section III.B.

Because Ingebretsen had significant means to challenge the attempt production count, the strength of the State's evidence as to the possession counts was critically important to determine whether Ingebretsen should have accepted the deal or go to trial. Indeed, Respondents acknowledge in their Answer that the deal was allegedly favorable to Ingebretsen because it allowed him to avoid the possession counts. However, counsel simply was not in a position to give Ingebretsen advice as to those counts without first reviewing those photos. Ingebretsen is not a lawyer and would not understand what challenges to make to the State's evidence. He relied on his counsel to advise him so that he could make an informed decision as to how to proceed with his case. Once defense counsel actually took the time to view the photographs on the computer, he expressed a concern that they were not pornographic. This was an available defense to the charges. Had he advised Ingebretsen that the evidence as to the possession counts was questionable, it is clear that Ingebretsen would have insisted upon going to trial.

Counsel's deficient performance prejudiced Ingebretsen because he unknowingly and unintelligently pled guilty to crimes for which he could have presented a defense and elected to go to trial.

3. Ingebretsen can establish cause and prejudice to overcome the procedural default under *Martinez v. Ryan.*

A procedural default does not bar federal consideration of a claim if a petitioner can show cause and prejudice to excuse the default. Where a petitioner defaults his federal claims in state court pursuant to an adequate and independent state procedural rule, federal habeas relief may nevertheless be available where the petitioner demonstrates cause for the default and prejudice as a result of the alleged federal law violation or demonstrates that failure to consider the claims will result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991), *citing Murray v. Carrier*, 477 U.S. 478, 485, 495 (1986).

Ingebretsen can demonstrate cause and prejudice to overcome the procedural bar applied to Ground Two. In *Martinez v. Ryan*, 132 S. Ct 1309, 1320 (2012), the United States Supreme Court held that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." The *Martinez* Court explained the limited exception was created "as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim." *Id.* at 1318.

The Court reaffirmed and expanded the rule in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). In *Trevino* the Supreme Court extended *Martinez's* application to situations where the "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." *Trevino*, 133 S. Ct. at 1921.

To establish cause under *Martinez/Trevino*, a petitioner must show: (1) the underlying ineffective assistance of trial counsel claim is "substantial" or has "some merit"; (2) the petitioner was not represented or had ineffective counsel under *Strickland v. Washington*, 466 U.S. 668 (1984) during the post-conviction review proceeding; (3) the state post-conviction review proceeding was the initial review proceeding; and (4) state law required (or forced as a practical matter) the petitioner to bring the claim in the initial review collateral proceeding. *Dickens v. Ryan*, 740 F.3d 1302, 1319 (9th Cir. 2014) (en banc), *citing Trevino*, 133 S. Ct. at 1921.

a. Post-conviction counsel was ineffective for failing to raise Ingebretsen's underlying claim of ineffective assistance of trial counsel.

Ingebretsen can establish cause and prejudice to overcome the procedural bar to Ground Two. In *Martinez*, the Court determined that "[t]o overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Id.* at 1318. As discussed at length in the preceding

sections, Ground Two has clear merit. Thus, Ingebretsen meets the first requirement of *Martinez*.

Ingebretsen also meets the second requirement of *Martinez* where post-conviction counsel was ineffective for failing to raise Ground Two in the state post-conviction petition. Although Ingebretsen raised this claim in his *pro se* petition (Ex. 30 at 29-42), appointed counsel abandoned the claim. After counsel was assigned, counsel did not file a supplemental petition advancing this claim. Rather, counsel abandoned the entire petition and simply moved to dismiss the entire case based on the State either losing or destroying evidence. *See* Ex. 67. Counsel took no steps to have any other claims litigated. Had post-conviction counsel raised this claim, Ingebretsen would have been entitled to relief.

Post-conviction counsel's failure to raise this issue constituted ineffective assistance and establishes cause to excuse the procedural default. Furthermore, as outlined above, Ingebretsen suffered prejudice because he would have been entitled to relief had this claim been raised in his state post-conviction petition. Accordingly, the writ should be granted.

B. Trial counsel was ineffective for failing to object to the omission of an element of the crime of sexual portrayal in Counts I and II of the information.

In Ground Six, Ingebretsen alleges that trial counsel was ineffective for failing to move to dismiss or otherwise object to the constitutionally deficient information. In Count I of the information, the state charged Ingebretsen with "attempted use of a minor in producing pornography," citing, e.g., Nev. Rev. Stat. 200.700 and 200.710.

Ex. 8. The information asserted that Ingebretsen "knowingly attempt[ed] to use . . . a minor . . . to be the subject of a sexual portrayal, to-wit: by the said Defendant posing the said [minor] in a variety of sexually provocative clothes and positions and then taking sexually suggestive photographs of her, attempting to produce a pornographic performance that appealed to the Defendant's prurient interest in sex." *Id.* Yet the information failed to charge the element of the crime that the portrayal "not have serious literary, artistic, political or scientific value."

> . . . 4. 'Sexual portrayal' means the depiction of a person in a manner which appeals to the prurient interest in sex and which does not have serious literary, artistic, political or scientific value.

Nev. Rev. Stat. § 200.700(2). A "sexual portrayal" is also alleged in Count II without any allegation of the element that the portrayal "not have serious literary, artistic, political or scientific value." Ex. 8 at 2.

An information must set forth each element of the crime charged and fairly inform a defendant of the charge against which he must defend. *Hamling v. United States*, 418 U.S. 87, 117 (1974). It is generally sufficient that an information set forth the offense in the words of the statute itself, as long that the words "'fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.'" *Hamling*, 418 U.S. at 117, *quoting United States v. Carll*, 105 U.S. 611, 612 (1882).

Since the information in this case omitted an element of the crime of "sexual portrayal," it failed to provide Ingebretsen with adequate notice so that he could

knowingly and intelligently plead to Counts I and II or prepare a defense to them. Trial counsel should have moved to dismiss or otherwise object to the constitutionally deficient Information. Counsel's failure to challenge the defective information fell below the constitutionally required minimum for effective assistance of counsel and could have served no tactical or strategic purpose.

Ingebretsen suffered prejudice because he unknowingly and unintelligently pled guilty to crimes for which he could have presented a defense and elected to go to trial. Neither the court nor defense counsel informed Ingebretsen that the portrayal must "not have serious literary, artistic, political or scientific value." This was particularly prejudicial with respect to Count I because Ingebretsen took the photographs of S.R. for the purpose of "put[ting] together a portfolio to help her become a model." Ex. 11 at 7. Counsel's deficient performance caused Ingebretsen to plead guilty to Counts I and II while ignorant of the potential defense that any portrayal that occurred had serious artistic value.

Respondents argue Ground Six lacks merit because counsel negotiated a plea deal that allowed Ingebretsen to avoid a significant number of counts for possession of child pornography and he fails to show that there is a reasonable probability that he would have rejected the plea deal had counsel moved to dismiss the State's information. CR 119 at 12-13. Respondents' argument should be rejected. With respect to Count I, had Ingebretsen been adequately informed of every element of the offense, he would have realized that he had a defense to the charge based on the

photographs' artistic value. More important, counsel's statement at sentencing questioning whether the photos on the computer were pornographic demonstrates that counsel did not obtain a favorable deal for Ingebretsen. According to counsel, Ingebretsen had a legitimate defense to all of the possession counts. Thus, it was not favorable for Ingebretsen to plead guilty to avoid those counts when the State's evidence on those counts was questionable.

The Nevada Supreme Court did not specifically analyze either prong of *Strickland* and instead simply affirmed the district court's conclusion that Ingebretsen received effective assistance of counsel. Ex. 89 at 3-4. The court held that the district court's finding was supported by substantial evidence and was not clearly wrong. *Id.* That ruling was unreasonable. Here, the district court found that based on the guilty plea agreement and plea canvass, "defendant made detailed admissions to all of the elements of the relevant offenses." Ex. 87 at 3. The court further found that Ingebretsen was rendered effective assistance of counsel in obtaining a favorable plea. The district court's findings are clearly wrong. First, Ingebretsen could not have made detailed admissions to all of the elements because he was never informed of the all of the elements of Counts I and II. And, as outlined above, Ingebretsen had a significant defense to the possession counts, so the plea deal was not favorable. Therefore, counsel was not effective in negotiating a "favorable plea" and the Nevada Supreme Court's conclusion to the contrary was unreasonable.

Accordingly, Ingebretsen is entitled to relief on Ground Six and the writ should be granted.

IV.

CONCLUSION

For the reasons stated herein and in the Third Amended Petition for Writ of Habeas Corpus, Ingebretsen respectfully requests that this Court grant the Writ of Habeas Corpus or, alternatively, conduct an evidentiary hearing so that his claims may be properly reviewed and determined on their merits.

DATED this 28th day of March, 2016.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/Jonathan M. Kirshbaum
JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender

/s/Jennifer Yim
JENNIFER YIM
Research and Writing Attorney

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on March 28, 2016, she served a true and accurate copy of the foregoing to the United States District Court, who will e-serve the following addressee:

Jeffrey M. Conner
Deputy Attorney General
Nevada Attorney General's Office
100 North Carson Street
Carson City, NV 89701
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/s/ Jineen DeAngelis
An Employee of the Federal Public Defender, District of Nevada

APP. 090

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JOHN INGEBRETSEN,

Petitioner,

vs.

JACK PALMER, *et al.*,

Respondents.

3:07-cv-00251-LRH-RAM

ORDER

Before the court for a decision on the merits is an application for a writ of habeas corpus filed by John Ingebretsen, a Nevada prisoner. ECF No. 87.

I. BACKGROUND

Pursuant to a plea agreement, Ingebretsen was convicted in the Eighth Judicial District Court for the State of Nevada of attempted use of a minor in producing pornography (Count I), possession of child pornography (Count II), and open or gross lewdness (Count III). The following exchange at Ingebretsen's plea canvass sets forth the factual circumstances supporting his convictions:

> THE COURT: I need to be assured that you are, in fact, guilty of these crimes. Now, in Count I they said you committed the crime of Attempt Use of a Minor in the Production of Pornography between October 1st , 1997, and May 8th, 2001.
>
> DEFENDANT: Yes.
>
> THE COURT: And who is Sara [R.]?
>
> DEFENDANT: My stepdaughter.

THE COURT: . . . How old was Sara [R.] at the time?

DEFENDANT: She was – she will be 18 this month.

THE COURT: So she was – back in '97 that was what? She was – four and half years ago. So she would have been like 14 or so?

DEFENDANT: 14 and a half.

THE COURT: So you had her pose in a variety of sexually provocative clothing and positions and took sexually suggestive pictures of her; is that true?

DEFENDANT: Yes.

THE COURT: And you were attempting to produce a pornographic performance that appealed to a prurient interest in sex?

DEFENDANT: Yes.

THE COURT: And you encouraged and knowingly used and enticed her to do this sort of thing?

DEFENDANT: Yes.

THE COURT: And also between January the 1st of 2001 and May 8th of 2001, did you knowingly and willfully have in your possession photography depicting someone under 16 years of age –

DEFENDANT: Yes.

THE COURT: And it says here you have – what was it? A picture or a movie or what?

DEFENDANT: I don't know what they picked up out of the computer. I had pictures in there.

THE COURT: It was pictures of something? Pictures that was on a computer.

DEFENDANT: Yeah.

THE COURT: It was a person under the age of 16 engaging in sexual or simulating sexual conduct? It says here, "pictures of a female child under 16 with a breast and genitals and buttocks exposed." Is that true? You had that on your computer?

DEFENDANT: Yes.

THE COURT: And that was here in Clark County, Nevada?

DEFENDANT: Yes.

THE COURT: And they also said in January of – between January 1st of 1999 and May 8th of 2001 that you committed an open and gross lewd act with Sara [R.]; is that true?

DEFENDANT: Yes.

THE COURT: Did you have her lay down naked in the bed and you fondled her breasts and pubic area?

DEFENDANT: Yes.

THE COURT: And all this happened in Clark County, Nevada?

DEFENDANT: Yes.

THE COURT: And you did this against her will?

DEFENDANT: Yes.

ECF No. 32-10, p. 8-10.

The state district court sentenced Ingebretsen to a prison term of three to ten years on Count I, a term of one to four years on Count II, and a term of one year on Count III, all to be served concurrently. A judgment of conviction was entered on August 20, 2001. Ingebretsen appealed.

On direct appeal, Ingebretsen argued that his guilty pleas to these charges were not knowing and voluntary. The Nevada Supreme Court dismissed the appeal, noting that challenges to the validity of a guilty plea must be first presented in either a motion to withdraw the plea or a post-conviction petition.

Ingebretsen then filed a petition for a writ of habeas corpus in the state district court. The court appointed counsel, who filed a motion to withdraw Ingebretsen's guilty pleas. After a hearing, the court denied that motion. After appointment of new counsel, Ingebretsen filed a supplement to the habeas corpus petition. The district court denied the petition. On appeal, the Nevada Supreme Court affirmed.

Ingebretsen then initiated this proceeding in May of 2007. In November of 2008, while this proceeding was pending, he filed a second state post-conviction petition. That proceeding concluded in February 2010, with the Nevada Supreme Court affirming the lower court's decision that

Ingebretsen did not meet the custody requirements for a state habeas proceeding because he had discharged his sentence and been released. In the meantime, Ingebretsen had filed a first amended petition in this proceeding, followed by a second amended petition in March of 2009.

The State moved to dismiss the second amended petition, arguing, inter alia, that Grounds 1 through 4 were unexhausted and that Ground 5 was not cognizable in a federal habeas proceeding This court granted the motion, concluding that Grounds 1 through 4 were unexhausted. It further concluded that Ground 5 was not justiciable because it challenged the validity of amendments to Nevada laws requiring sex offenders to register and those laws do not amount to custody for the purpose of habeas corpus jurisdiction.

After Ingebretsen moved for reconsideration, this court concluded that Ground 5 was cognizable after all because restrictions imposed on him by the amendments to the sex offender laws served to distinguish this case from cases in which the Ninth Circuit had concluded that sex-offender registration requirements are not a significant enough restraint on one's liberty to amount to custody. Ingebretsen was also permitted to file a third amended petition, which added Ground 7. This court subsequently granted Ingebretsen's request for a stay to return to state court to exhaust Grounds 1 through 4.

After obtaining the stay, Ingebretsen attempted to present the unexhausted claims to the Nevada courts. The state district court again denied relief after finding that Ingebretsen was no longer under a sentence of imprisonment, and his claims were otherwise procedurally defaulted. On appeal, the Nevada Supreme Court affirmed the state district court's ruling, finding that Ingebretsen was not eligible for post-conviction habeas relief because he did not meet the imprisonment requirement of Nev. Rev. Stat. § 34.724.

In October of 2014, this court granted Ingebretsen's request to re-open these proceedings. Respondents subsequently filed the motion to dismiss, which this court granted in part and denied in part. In particular, the court concluded that Grounds 1-4 are procedurally defaulted and that Grounds 5 and 7 are not cognizable as habeas claims because they challenge conditions of confinement, not

the fact or duration of confinement. With respect to Ground 2, however, the court deferred dismissal of the claim pending a determination whether the default might be excused under *Martinez v. Ryan*, 566 U.S. 1 (2012).

Thus, Ground 2 and Ground 6 are before the court for a final decision.

II. GROUND 2

In Ground 2, Ingebretsen alleges that he received ineffective assistance of trial counsel because counsel rushed him into entering guilty pleas without properly investigating the facts and law of the case and failed to insist, prior to the entry of the guilty pleas, that the State allow the defense to review the photographs supporting Counts I and II. At Ingebretsen's sentencing hearing, the following exchange occurred between defense counsel (Cichoski), the state district court, and the prosecutor (Kephart):

> MR. CICHOSKI: . . . As you heard from the mother, what was happening was he was taking pictures for modeling or something like that and we don't have those pictures. I don't know what happened to the pictures. Nobody has ever been able to see them to know if they are pornographic or not except that he admitted, he pled guilty to Attempt Use of Minor in Production of Pornography.
>
> THE COURT: Were they pornographic, Mr. Kephart?
>
> MR. KEPHART: Yes, your Honor. We don't turn this type of contraband over to the defendants.
>
> THE COURT: They have a right to see evidence. You have heard of the Constitution, man?
>
> MR. KEPHART: There's a law, a specific statute in Nevada that will not allow them to have them because they possess them.
>
> THE COURT: The lawyer can look at the evidence.
>
> MR. CICHOSKI: Mr. Herndon told me at the time of preliminary that the photos did not exist.
>
> THE COURT: Well, why would you plead your client to something then if you don't think he was guilty of it? I don't know what the case says. You plead the guy to possession of pornography. You didn't see that?
>
> MR. CICHOSKI: Maybe we should have investigated that. Maybe we should set that over.

MR. KEPHART: I would bring in and show you the photos.

THE COURT: Why would you have your client plead guilty if you didn't think it was pornographic?

MR. CICHOSKI: Your Honor, it was my understanding that there's no law in the State of Nevada as to whether pictures, whether the lack of pictures, whether a person can be convicted if there is no pictures. But there is some law in other states where even though there is no pictures, guys get convicted.

THE COURT: That's not the point. Oh God.

MR. CICHOSKI: That's what I was resting with, your Honor, that if the Court decided even though there's no pictures he can still be convicted –

THE COURT: The court has not decided anything. You guys came in here and entered a guilty plea. What am I supposed to do? I'm just - - you're telling me he pled guilty but you're not even sure it was pornographic?

MR. CICHOSKI: He admits 15 counts of possession of controlled pornography, all one-to-six's.

THE COURT: I know, but you tell me it probably was - -

MR. CICHOSKI: There was a computer which had pornography on it. We don't dispute that there was a computer and that had child porn on it but you tell me he is also charged with taking pornographic pictures of her which to my understanding do not exist and I have never seen.

MR. KEPHART: We don't have those, the ones he was charged with, the pornography in the computer.

MR. CICHOSKI: Count one charges him with taking pictures with Sara.

MR. KEPHART: Using pictures of Sara. You don't have to have them for that but by the possession, he has them and he possessed child pornography.

THE COURT: Oh, God. And those, the photos, it says in the PSI - -

MR. KEPHART: You want to pass it for us to bring them in so the Judge can see what he had?

MR. CICHOSKI: They have computer pictures. The pictures he is accused of taking of Sara do not exist.

THE COURT: So what is your point?

MR. CICHOSKI: I was just pointing out, your Honor, that we don't have those to decide whether those were pornographic or not.

THE COURT: Why would you have your client plead guilty and come in and tell me they are not pornographic? You said he pled guilty to them but then they weren't pornographic. I don't understand that.

MR. CICHOSKI: Because other jurisdictions say that even if the State doesn't have that - -

THE COURT: I know what other jurisdictions say but you are the man's lawyer.

ECF No. 32-12, p. 12-15. The sentencing hearing was continued to allow defense counsel to review the photographs. *Id*., p. 15-16.

At the continued sentencing hearing the following week, defense counsel indicated that he had reviewed the photographs. ECF No. 32-13, p. 3. He also indicated that the question of whether the photographs were pornographic or not was a question for a judge or jury to decide, but that after consulting with his client, they did not want to withdraw the guilty plea. *Id.*

Ingebretsen claims his counsel was ineffective because counsel urged him to plead guilty and allowed him to sign a guilty plea agreement without ever reviewing the photographs upon which the child pornography charges to which he pled were based. To demonstrate ineffective assistance of counsel (IAC) in violation of the Sixth and Fourteenth Amendments, a convicted defendant must show that 1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms in light of all the circumstances of the particular case; and 2) unless prejudice is presumed, it is reasonably probable that, but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–94 (1984). To demonstrate ineffective assistance of counsel in the context of a challenge to a guilty plea, a petitioner must show both that counsel's advice fell below an objective standard of reasonableness as well as a "reasonable probability" that, but for counsel's errors, the petitioner would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58–59 (1985) (holding that the two-part *Strickland* test applies to challenges to guilty pleas based on the ineffective assistance of counsel).

///

As noted above, Ground 2 is procedurally defaulted, but this court reserved judgment as to whether the default might be excused under *Martinez v. Ryan*. The court may find "cause" under *Martinez* exists "where (1) the claim of 'ineffective assistance of trial counsel' was a 'substantial' claim; (2) the 'cause' consisted of there being 'no counsel' or only 'ineffective' counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the 'initial' review proceeding in respect to the 'ineffective-assistance-of-trial-counsel claim'; and (4) state law requires that an 'ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding.'" *Trevino v. Thaler*, 569 U.S. 413, 423 (2013).

It is not disputed that the last two requirements are met, so the focus here is whether Ground 2 is a substantial claim – i.e., that the claim "has some merit." *Martinez*, 566 U.S. at 14. A claim is considered "insubstantial" if "it does not have any merit or . . . is wholly without factual support." *Id* at 15.

As an initial matter, the record is not entirely clear whether the photographs defense counsel reviewed between the two hearings formed the basis for Count I or Count II or both. In his reply, Ingebretsen insists that the transcript of the first hearing (excerpted above) shows that they were the photographs supporting the possession count (Count II) and that the prosecution did not possess the photographs Ingebretsen took of his stepdaughter – i.e, the photographs related to the attempted production count (Count I). Even assuming (without deciding) that is the case, however, this court is unable to conclude that Ground 2 presents a substantial claim of ineffective assistance of counsel.

Ingebretsen personally admitted during his plea canvass that he had pornographic photographs of children on his computer. His counsel confirmed at the first sentencing hearing that he and his client did not dispute that the computer "had child porn on it." ECF No. 32-12, p. 14. While defense counsel expressed uncertainty at the continued sentencing hearing as to whether the photographs qualified as pornography, he noted that he had consulted with Ingebretsen and that they did not wish to withdraw the guilty plea. No. 32-13, p. 3. Ingebretsen then confirmed in open court that he was guilty and that, having been charged with 15 counts of possession, one of the reasons he

was entering a guilty plea was to avoid the harsher penalty that may have resulted in going to trial on the original charges. *Id*., p. 4-5.

Ingebretsen also personally admitted during his plea canvass that he had his stepdaughter pose in sexually provocative clothing and positions, that he took sexually suggestive pictures of her, and that he was attempting to produce a pornographic performance that appealed to a prurient interest in sex. ECF No. 32-10, p. 9. Even if counsel did not see the photographs, Ingebretsen was personally aware of the nature of the photographs he had taken. There is no evidence in the record, nor does Ingebretsen claim, that he and counsel did not discuss the circumstances surrounding the photographs prior to deciding to enter a guilty plea.

In light of the foregoing, Ingebretsen has not established that counsel's performance fell below the *Strickland* standard. Ingebretsen's showing as to prejudice is even less impressive – i.e., there is no evidence that, but for counsel's alleged deficient performance, there is a reasonable probability that Ingebretsen would not have pled guilty and would have insisted on going to trial. He confirmed in his plea canvass and in his guilty plea agreement that his counsel had discussed with him all the elements of the crimes to which he was pleading guilty and that he understood that the State would have to prove all of those elements at trial. ECF Nos. 32-10, pp.4-5, 8, and 32-11, p. 5.

Ingebretsen faced fifteen counts of possession of child pornography, each carrying a possible sentence of one to six years. *See* Nev. Rev. Stat. § 200.730. At no point in either the plea canvass or the sentencing hearings did Ingebretsen express any equivocation about his guilt or his decision to plead guilty.[1] At the sentencing hearing *after* counsel had reviewed the photographs, the following exchange occurred:

> THE COURT: . . . And now do you want to withdraw your guilty plea or do you want to proceed?
>
> DEFENDANT: I want to proceed.

[1] When asked for his statement at the first sentencing hearing, Ingebretsen's response was "I deserve what I get." ECF No. 32-11, p. 11.

THE COURT: All right. And are you guilty of this or not guilty of this?

DEFENDANT: I'm guilty.

THE COURT: You discussed this charge thoroughly with your lawyer?

DEFENDANT: Yes.

ECF No. 32-13, p. 4. It is clear from the record that, with full knowledge of the charges and the evidence against him, Ingebretsen was firmly unwilling to risk the outcome of a trial. Accordingly, he has not presented, for the purposes of *Martinez*, a substantial claim that he was prejudiced by counsel's alleged deficient performance.

Ground 2 is dismissed as procedurally defaulted.

III. GROUND 6

In Ground 6, Ingebretsen claims that he was denied effective assistance of counsel, in violation of his constitutional rights, because counsel failed to object that the information (charging document) filed against Ingebretsen omitted an element of Counts I and II – i.e., that the images in question did "not have serious literary, artistic, political or scientific value." Ingebretsen claims that neither the court nor his counsel informed him of the element so the omission caused him to unknowingly and unintelligently enter guilty pleas to crimes for which he could have presented a defense.

As with Ground 2, this claim is governed by the *Strickland/Hill* standard. Unlike Ground 2, however, this claim was adjudicated on the merits by the Nevada courts. ECF Nos. 34-27 and 34-29, p. 4-5. Thus, this court's ability to grant habeas relief is governed by 28 U.S.C. § 2254(d).

Title 28 U.S.C. § 2254(d) provides as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

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(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

A state court acts "contrary to" clearly established Federal law if it applies a rule contradicting the relevant holdings or reaches a different conclusion on materially indistinguishable facts. *Price v. Vincent*, 538 U.S. 634, 640 (2003). A state court "unreasonably appli[es]" clearly established Federal law if it engages in an "objectively unreasonable" application of the correct governing legal rule to the facts at hand; however, Section 2254(d)(1) "does not require state courts to extend that precedent or license federal courts to treat the failure to do so as error." *White v. Woodall*, 134 S. Ct. 1697, 1705–07 (2014). "And an 'unreasonable application of' [the Supreme Court's] holdings must be 'objectively unreasonable,' not merely wrong; even 'clear error' will not suffice." *Wood v. McDonald*, 135 S. Ct. 1372, 1376 (2015) (per curiam) (citation omitted). "The question . . . is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007).

Habeas relief may not issue unless "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). As "a condition for obtaining habeas relief," a petitioner "must show that" the state decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id*. at 103. This standard is "difficult to meet," *Metrish v. Lancaster*, 569 U.S. 351, 357–58 (2013), as even a "strong case for relief does not mean the state court's contrary conclusion was unreasonable," *Richte*r, 562 U.S. at 102. "[S]o long as 'fairminded jurists could disagree' on the correctness of the state court's decision," habeas relief is precluded by Section 2254(d). *Id*. at 101 (citation omitted). "AEDPA thus imposes a 'highly deferential standard for evaluating state-court rulings,' ... and 'demands that state-court decisions be given the benefit of the doubt.'" *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citations omitted).

APP. 101

The Nevada courts applied the correct federal law standards in denying the claim Ingebretsen presents to this court as Ground 6. ECF Nos. 34-27 and 34-29, p. 4-5. The Nevada Supreme Court's decision did not explain which element(s) of the *Strickland/Hill* test Ingebretsen failed to satisfy, but that does not mean § 2254(d) does not apply. *See Richter*, 562 U.S. at 98. Instead, Ingebretsen must show "there was no reasonable basis for the state court to deny relief." *Id*. This, he cannot do.

The Constitution is satisfied if the charging document states "the elements of an offense charged with sufficient clarity to apprise a defendant of what to defend against." *Russell v. United States*, 369 U.S. 749, 763-64 (1962). *See also James v. Borg*, 24 F.3d 20, 24 (9th Cir.1994) ("The principal purpose of the information is to provide the defendant with a description of the charges against him in sufficient detail to enable him to prepare his defense."). In addition to describing the specific facts giving rise to the charges, the information charging Ingebretsen cited to the specific criminal statutes he was charged with violating and defined, almost verbatim from the relevant statutes, the elements of each crime. *Compare* ECF No. 32-9, *with* Nev. Rev. Stat. §§ 200.710 and 200.730.

The existence of a "sexual portrayal" was an element of both Count I and Count II, and was included in the information for each count. In the definitions section of Nevada's child pornography statues, a "sexual portrayal" is defined as "the depiction of a person in a manner which appeals to the prurient interest in sex and which does not have serious literary, artistic, political or scientific value." *See* Nev. Rev. Stat. Ann. § 200.700. While the information did not contain this definition written out in full, it cited to the statutory section. The information's descriptions of the offenses, which included the "sexual portrayal" element, combined with its "explicit citation[s] to the precise statute[s]" were more than sufficient to notify Ingebretsen of the charged crimes. *See Gautt v. Lewis*, 489 F.3d 993, 1003-04 (9th Cir. 2007).

While there is no evidence in the record that counsel discussed the definition of "sexual portrayal" with Ingebretsen, there is also no evidence that he did not. Moreover, there is no evidence in the record that the images giving rise to the possession charge had "serious literary, artistic,

political or scientific value." With respect to the attempted production charge, Ingebretsen points to the testimony of his stepdaughter's mother at the sentencing hearing, during which she mentioned that Ingebretsen was taking the photographs for the purpose of "putting together a portfolio to help her become a model." ECF No. 32-12, p. 8. However, any argument that he was not attempting to use his stepdaughter as "the subject of a sexual portrayal," as defined in the Nevada statute, is belied by his admissions during his plea canvass that he "had her pose in a variety of sexually provocative clothing and positions and took sexually suggestive pictures of her" and that he was "attempting to produce a pornographic performance that appealed to a prurient interest in sex." ECF No. 32-10, p. 9.

In addition, there is not a reasonable probability that, but for counsel's alleged failure to notify him of the specific definition of "sexual portrayal," Ingebretsen would not have pled guilty and would have insisted on going to trial. The same prejudice considerations discussed above in relation to Ground 2 apply with equal force here. And, because the Nevada courts rejected this claim on the merits, the standard of review is highly deferential. Simply put, Ingebretsen cannot demonstrate that the Nevada Supreme Court's rejection of the claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103.

Ground 6 is denied.

IV. CONCLUSION

For the foregoing reasons, Ingebretsen's petition for federal habeas relief shall be denied.

Certificate of Appealability

This is a final order adverse to the petitioner. As such, Rule 11 of the Rules Governing Section 2254 Cases requires this court to issue or deny a certificate of appealability (COA). Accordingly, the court has *sua sponte* evaluated the claims within the petition for suitability for the issuance of a COA. *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

APP. 103

Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." With respect to claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate (1) whether the petition states a valid claim of the denial of a constitutional right and (2) whether the court's procedural ruling was correct. *Id.*

Having reviewed its determinations and rulings in adjudicating Ingebretsen's petition, the court declines to issue a certificate of appealability for its resolution of any procedural issues or any of Ingebretsen's habeas claims.

IT IS THEREFORE ORDERED that the third amended petition for writ of habeas corpus (ECF No. 87) is DENIED. The Clerk shall enter judgment accordingly.

IT IS FURTHER ORDERED that a certificate of appealability is DENIED.

Dated this 2nd day of March, 2018.

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff(s),
vs.
JOHN INGEBRETSON,
Defendant(s).

CASE NO: 01-C-175709
DEPT NO: IIX

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HON. LEE GATES, JUDGE
Taken on August 8th, 2001
9:00 A.M.

APPEARANCES:

FOR THE STATE

BILL KEPHART, ESQ.
Deputy District Attorney
200 South Third Street
Las Vegas, NV 89155

FOR THE DEFENDANT

MARK D. CICHOSKI, ESQ.
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309 South Third Street #226
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Reported By Dina Dee Dalton, CCR 519, RPR

0645

DISTRICT COURT, CLARK COUNTY, NEVADA

WEDNESDAY, AUGUST 8, 2001, 9:00 A.M.

THE COURT: Mr. Ingebretsen, on 6-4 of 2001, you pled guilty to Count I, Attempt Use of a Minor to Produce Pornography, a category B felony; Count II, Possession of visual presentation of sexual conduct of a person under 16 years of age, a category B felony; and Count III, Open or Gross Lewdness, a gross misdemeanor.

All right. You have any reason to consider that judgment not be pronounced against you at this time?

THE DEFENDANT: No.

THE COURT: You're hereby adjudged guilty of said crimes. Does the Division have anything to add to its report?

MS. WOLF: No, your Honor.

THE COURT: Okay. All right. State?

MR. KEPHART: Your Honor, may I approach the bench?

THE COURT: Yeah.

MR. KEPHART: Your Honor, we -- there's a couple of speakers here today. They have made the decision only one wanted to speak and it's Sara's mom, Terri, the defendant's wife.

MR. CICHOSKI: I don't know what the Court's

position is on speakers. Sara is the victim.

THE COURT: Who is it? Her mother? They are asking for her mother to speak? The Supreme Court has already noted that mothers can speak.

MR. CICHOSKI: Sara is 16 years old.

THE COURT: The Court said they can do it. It's considered family.

THE CLERK: Do you solemnly swear that in the testimony you are about to give in the matter now pending before this Court shall be the truth, the whole truth and nothing but the truth, so help you God?

THE SPEAKER: Yes.

THE CLERK: Please state your name for the record and spell it.

THE SPEAKER: Terri Ingebretsen, I-N-G-R-E-B-R-E-T-S-O-N.

TERRI INGREBRETSON,

after having been duly sworn, did speak as follows:

MS. INGREBRETSON: Sara wrote something. She is too emotional to say something so she asked me to read it and I have something that I wrote also.

"John, took pictures of me when I was 12 and 13. I asked him if he was looking at me sexually. He said, "No."

I found out now that he was.

John taught me to drive and made me wear a button shirt so he could unbutton it if I made a mistake. He would look at my breast. It stopped after I got my licence since I didn't drive with him anymore.

Just recently I made a deal with him and my end was to sleep naked. When he woke me up for school, he rubbed my back and made me turn over and rubbed my inner thighs and breasts. It was too much to take. I withdrew from friends and family and my grades fell in school. I told my family what was going on. John doesn't think it's wrong. He has done it before and he will do it again."

That's what Sara wrote and I just wrote a little history of -- John knew me within a fellowship of people and then he knew about me and my family and I think that's what attracted him to me. I had three children and she was 12 and 13. He treated her special and I thought he was making amends to his other daughters when he did this, when he was being special to her.

He was not close to my other children. There were times over the years when Nicky wanted to move back home, my oldest daughter, that would have mutually benefitted both of us and John was always adamant against it because he couldn't get away with it. He has a long membership in our fellowship, was looked up to and respected and I believed.

We became engaged and he lived with us a year before the wedding. He would take Sara to school so she didn't have to ride the bus. I never thought about it once. I was believing he was being a wonderful husband, letting me sleep later and the dad Sara never had that she desperately needed and wanted.

John began being on the computer later and later every night. We argued about the computer porn but I didn't he was looking at child porn. He would get up late. When Sara came to me to tell me he had been touching her, I asked him if it was true and he said he had been manipulating Sara, in other words, to see her and feel her one way or the other.

I asked him to move out and he did. I wanted him to get out and my daughter to get help. We talked on the phone a few times after. We never called the police to report it. I knew that would happen when Sara went to counseling. Sara never gave me the details of what happened. I never knew any details until I got to Court.

John told me he had a history of this but I thought he had it under control. He was not honest with me or anyone in the fellowship. Before he ever was, he moved out. That says to me he didn't want help but I told him I wanted to tell the daughter the truth. I was worried about his grandaughter but he said he didn't know what Sara told me but it was never that bad and he would never do it to his whole

family.

During my entire relationship, I believed my children were his family and trusted him in that way. I was talking to him about going to counseling, letting him get whatever he needed out of the house. I had not even considered divorce. I wanted Sara to be safe and happy and John to get whatever help he needed. I gave him permission to be in my house and get whatever he needed.

He violated us more by reading my journal and overdosing on my son's medication. It wasn't enough to kill him or make him sick. He was medically released in two hours for the charges. He was selfish to take the pills. Those were my son's antipsychotic medication. There was plenty of pain pills in the house. It was extremely hard to get Paul's medicine released because of our insurance and, of course, his insurance ended and Paul, who was mentally ill, he come home and read the note. Luckily he knew well enough to call me at work and I came right away. He left a note or something, an addendum that he thought would help. He had been taking money out of the account so my car insurance never got paid which is also very selfish.

He sent Sara a birthday card from jail and how does he think that made her feel as though if they are in a relationship. He said he worried about her friends and depression from school and I think he worried about getting

caught when he made deals to Sara to me about her own behavior. He imagined that made it consensual for getting what he was after. He was a father to her. When John put pictures of Sara -- he was putting together a portfolio to help her become a model. I trusted and believed him.

THE COURT: Ma'am, ma'am, ma'am, ma'am, how long is that?

THE SPEAKER: I'm almost done. I'm on the last two paragraphs.

THE COURT: You got like a whole notebook there so -- go on. I just wanted to see how long it was. I was going to maybe do it later but go on.

THE SPEAKER: I don't know that I can say what his sentence should be or what should happen but if he had real consequences or had gotten real help, this wouldn't have happened to Sara. Taking away her piece of mind was the worst thing anybody could do. I trusted and believed he was in love with me. I trusted and believed he wanted to be a part of my family, stepfather to my children. Now I feel like it was all a lie to get to Sara.

How will I ever believe I can be loved, trust someone again? He not only destroyed our relationship and his relationship with my children, he has affected the lives of his own children and a whole fellowship who believed he was an honest person.

THE COURT: Thank you, ma'am.

MR. KEPHART: Your Honor, this morning when we addressed them, talking to the Court how this affected the family, Sara broke down into tears and you saw her and her mom believes this was a good thing for her to come here and have the Court see her and have the defendant see her, to know that this isn't something that she was certainly agreeing to.

And it's interesting. When you read the defendant's own statement, how he talks about how it started and how he started manipulating her, in his own words he said that she became uncomfortable with it and so it stopped. But he made it clear to her that if she wanted anything from him, like money, clothes, etcetera, that a few revealing pictures would do it.

And he realized pictures weren't enough. He wanted more favors. He wanted to be able to touch her. He wanted to be able to look at her and it got to the point where it led to this case and that's why we're here before you now.

He openly admits his behavior, openly admitted it to his psychosexual evaluator. He admitted it in the long statement, nine pages, to the Court. And I'll submit to the Court, your Honor, that what he is telling you is basically what somebody that has interest in young girls, as the psychosexual evaluator would tell you, he would be dangerous

to young adolescent females. That's what he is interested in. He wants to rub the material across her nipples, trying to make them hard. He wants to reveal. He wants to see that type of thing.

He got to the point where he says in his own statement he wasn't getting enough and he didn't think -- he didn't see enough to satisfy him. He started dabbling with child pornography and started seeing what he could get off of the internet and then we end up with this case here that he has pled guilty to.

The Department of Parole and Probation has recommended to the Court a series of times that will represent punishment for this type of behavior the defendant was involved in and tell the Court he negotiated this case highly favorable for Mr. Cichoski. It's a very limited amount of time in light of the fact he was using Sara to make photographs and the porngraphic nature of those photographs would possibly have put him in prison for life.

But I imagine because of his age, there was some reason for the negotiations and he realises he does need to spend some time in prison. The Department of Parole and Probation recognizes that. This isn't a case where he needs to get probation or he deserves probation. This is a case where he has told you how he manipulates. He has told you the advantage he has taken of this young girl and you have

seen her.

And I tell you, your Honor, it's getting disheartening when we're meeting kids all of the time, when people of their own selfishness have to do this and hurt young girls, young boys, so be it, whoever is involved in the case. She has to deal with this and she wants to get on with her life. This is a closure for her. Punishment in the form of putting him in prison will be a closure for her. She will go on in her future. She will remember this. She will never forget it. It's a devastating thing and short of actually beating her or doing something like that, the Court would certainly say it deserves some type of prison time.

He has taken photos of her, taken her innocence and admitting it, almost in a flippant manner in my opinion.

THE COURT: Mr. Kephart, I have heard enough. Time is running out here. What do you want to say Mr. Ingrebretson?

THE DEFENDANT: I deserve what I get.

MR. CICHOSKI: Your Honor, I agree with the State that ever since I met John, he has openly admitted to what he did in this case. In fact, he was going to therapy at the time he was arrested, when he was confronted by his wife. She told you he had admitted to her what happened. She said, "You need therapy." She went out and got therapy.

Dr. Packalt, the guy who prepares the psychosexual

evaluations for the State, took that into consideration when he thought and felt that he's a moderate to low chance of reoffending and does not recommend against probation in this case. He thinks he would not -- that he could be placed on probation.

We also have the recommendation of Dr. Harter, another psychiatrist who interviewed him, who found because of his being open and admitting to everything, he is amenable to counseling and being able to be rehabilitated and not be a danger to the health, safety and morals of others.

As you heard from the mother, what was happening was he was taking pictures for modeling or something like that and we don't have those pictures. I don't know what happened to the pictures. Nobody has ever been able to see them to know if they are pornographic or not except that he admitted, he pled guilty to Attempt Use of Minor in Production of Pornography.

THE COURT: Were they pornographic, Mr. Kephart?

MR. KEPHART: Yes, your Honor. We don't turn this type of contraband over to the defendants.

THE COURT: They have a right to see evidence. You have heard of the Constitution, man?

MR. KEPHART: There's a law, a specific statute in Nevada that will not allow them to have them because they possess them.

THE COURT: The lawyer can look at the evidence.

MR. CICHOSKI: Mr. Herndon told me at the time of preliminary that the photos did not exist.

THE COURT: Well, why would you plead your client to something then if you don't think he was guilty of it? I don't know what the case says. You plead the guy to possession of pornography. You didn't see that?

MR. CICHOSKI: Maybe we should have investigated that. Maybe we should set that over.

MR. KEPHART: I would bring in and show you the photos.

THE COURT: Why would you have your client plead guilty if you didn't think it was pornographic?

MR. CICHOSKI: Your Honor, it was my understanding that there's no law in the State of Nevada as to whether pictures, whether the lack of pictures, whether a person can be convicted if there is no pictures. But there is some law in other states where even though there is no pictures, guys get convicted.

THE COURT: That's not the point. Oh God.

MR. CICHOSKI: That's what I was resting with, your Honor, that if the Court decided even though there's no pictures he can still be convicted --

THE COURT: The Court has not decided anything. You guys came in here and entered a guilty plea. What am I

supposed to do? I'm just -- you're telling me he pled guilty but you're not even sure it was pornographic?

MR. CICHOSKI: He admits 15 counts of possession of controlled pornography, all one-to-six's.

THE COURT: I know, but you tell me it probably was --

MR. CICHOSKI: There was a computer which had pornography on it. We don't dispute that there was a computer and that had child porn on it but you tell me he is also chargeed with taking pornographic pictures of her which to my understanding do not exist and I have never seen.

MR. KEPHART: We don't have those, the ones he was charged with, the pornography in the computer.

MR. CICHOSKI: Count one charges him with taking pictures with Sara.

MR. KEPHART: Using pictures of Sara. You don't have to have them for that but by the possession, he has them and he possessed child pornography.

THE COURT: Oh, God. And those, the photos, it says in the PSI --

MR. KEPHART: You want to pass it for us to bring them in so the Judge can see what he had?

MR. CICHOSKI: They have computer pictures. The pictures he is accused of taking of Sara do not exist.

THE COURT: So what is your point?

MR. CICHOSKI: I was just pointing out, your Ho... that we don't have those to decide whether those were pornographic or not.

THE COURT: Why would you have your client plead guilty and come in and tell me they are not pornographic? You said he pled guilty to them but then they weren't pornographic. I don't understand that.

MR. CICHOSKI: Because other jurisdictions say that even if the State doesn't have that --

THE COURT: I know what other jurisdictions say but you are the man's lawyer.

MR. CICHOSKI: I would just point out he has no prior convictions, felony convictions, a couple of misdemeanors that are 36 years old, never been in trouble, basically, in his life. He is 57 years old and willing to go to counseling. The Department of Parole and Probation finds he is a marginal candidate for supervision and the psychiatrist says that he could make it on probation and we would ask the Court to consider granting him a suspended sentencen and placing him on probation in this case.

THE COURT: Mr. Ingrebretson, in Count I you are accused of Attempted Use of a Minor for the Production of Pornography, which is of the victim. Now you -- what kind of pictures did you take of her.

THE DEFENDANT: They were pictures of her in

bikinis, skimpy clothing, blouses that were open slightly.

THE COURT: Any of them nude photos?

THE DEFENDANT: No nude photos.

THE COURT: No photos of her --

THE DEFENDANT: The reason I plead guilty to that was because I wanted to take the pictures. I was afraid to take them, the ones that showed something.

THE COURT: Okay. I'm going to continue this over. Approach the bench, Counsel. I'm continuing this over for a week. All right? One week.

THE CLERK: August 15th at 9:00 o'clock.

ATTEST: True, full and complete transcript of proceedings before the Hon. Lee Gates, District Court Judge, Department 8, Clark County, Nevada.

SIGNED: _____
Dina Dee Dalton, CCR 519, RPR

DATED: _____

APP. 119

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Shirley B. Parraguirre
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff(s),
vs.
JOHN INGEBRETSON,
Defendant(s).

CASE NO: 01-C-175709
DEPT NO: IIX

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HON. LEE GATES, JUDGE
Taken on August 15, 2001
9:00 A.M.

APPEARANCES:

FOR THE STATE

BILL KEPHART, ESQ.
Deputy District Attorney
200 South Third Street
Las Vegas, NV 89155

FOR THE DEFENDANT

MARK D. CICHOSKI, ESQ.
Deputy Public Defender
309 South Third Street #226
Las Vegas, NV 89155

RECEIVED
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Reported By Dina Dee Dalton, CCR 519, RPR

DISTRICT COURT, CLARK COUNTY, NEVADA

WEDNESDAY, AUGUST 15, 2001, 9:00 A.M.

THE COURT: State versus John Ingebretsen. All right. Did we have any speakers on this thing?

MR. CICHOSKI: Your Honor, we had a speaker last week. They spoke. The District Attorney addressed the Court. My client had adressed the Court and I was addressing the Court. I told the Court there were some photos in this case and so I didn't know if those photos had to do with the count of Attempt Use of a Minor in the production of pornography. They have since showed me photos again. Whether those photos are pornographic or not is a question for either a judge or a jury but we don't -- I've been over to the jail and talked to my client and we do not wish to withdraw from the negotiations in this case and we're ready to be sentenced.

THE COURT: You waive any defect or any claim of ineffective assistance of counsel arising out of the pleading to Count I, Attempt Use of a Minor to Produce Pornography?

THE DEFENDANT: Would you repeat that, please? I didn't understand.

MR. CICHOSKI: You want me to talk to him for just a minute?

THE COURT: What I'm telling you is that -- how did

this get back on today anyway?

MR. KEPHART: You wanted us to show the evidence. I made the representation to the Court that we had it and you wanted to show it to him.

THE COURT: All right, but last time counsel said he hadn't seen the pictures and I wanted to know why he entered into a negotiation without seeing the pictures, negotiated without investigating properly that particular count.

And now do you want to withdraw your plea or do you want to proceed?

THE DEFENDANT: I want to proceed.

THE COURT: All right. And are you guilty of this or not guilty of this?

THE DEFENDANT: I'm guilty.

THE COURT: You discussed this charge thoroughly with your lawyer?

THE DEFENDANT: Yes.

THE COURT: What were the original charges?

MR. KEPHART: He was originally charged with Use of a Minor in the Production of Pornography and possession.

THE COURT: How many counts?

MR. CICHOSKI: 15 counts of possession.

THE COURT: Is one of the reasons you are pleading guilty to this charge or pled guilty to these charges is to

avoid a harsher penalty should you have gone to trial on the original charges?

THE DEFENDANT: Yes.

THE COURT: All right. Anything else? Counsel, you want to add anything?

MR. KEPHART: Your Honor, I would like to just point out to the Court, your Honor, that in the defendant's own statements, in the defendant's own statements to the evaluator, he talks about how his interest started when he was a young kid, started out like just looking. And my point will be clear here in a minute. He was just looking at pornographic magazines and it got to the point where he started having his wife pose for him and then he would use that for purposes of his own sexual gratification. And he got to the point where he was actually taking photos starting out with his 12-year-old and he even indicated that --

THE COURT: Mr. Kephart, didn't you already argue this?

MR. KEPHART: I want to point out to the Court --

THE COURT: I don't want you to argue again. I heard you argue, a speaker, opposing counsel, and I heard him. The only reason I continued this is because counsel got up there and tried to say the guy wasn't guilty of this stuff. Go ahead and go on.

MR. CICHOSKI: Your Honor?

THE COURT: Yeah?

MR. CICHOSKI: I would point out he worked at the Horseshoe Sports Book for ten years, has family support. They are here in the courtroom today. He has been seen by two separate psychiatrists. One that says he would not be a menace to the health, safety and morals of others and the other said he is a low risk to reoffend. He's a low risk for violence and a good candidate for counseling. I believe that he had good motivation for treatment and because of that, your Honor, I would ask the Court, strongly urge the Court to consider probation in this case with all of the attending conditions that go with the probation.

As the Court is aware, there are some 20 things that people can and cannot do when they get sentenced on a crime such as this and I believe that he would be able to successfully complete the term of probation.

THE COURT: I don't think probation is appropriate in a case like this involving a child and the length of the period it went on. $25 administrative assessment fee, $250 analysis fee payable to the County Clerk, $600 psychosexual analysis fee.

Count I, Attempt Use of a Minor to Produce Pornography, the maximum term of 124 months with minimum parole -- excuse me -- 120 months with the minimum parole eligibility of 36 months in the Nevada Department of Prisons

and a term of lifetime supervision to commence upon completion of his term, of completion of parole. And you are to submit to a test for the purpose of genetic markers.

Count II, Possession of Visual Presentation Depicting Sexual Conduct of a Person Under 16 years of Age, to a maximum term of 48 months with minimum parole eligibility of 12 months in the Nevada Department of Prisons, concurrent with Countu I.

Count III, Open or Gross Lewdness, 12 of 12 months in the Clark County Detention Center and this runs concurrent with Counts I and II and he is given --

MR. CICHOSKI: I think it's 99 days, your Honor, today.

THE COURT: 99 days credit time served.

ATTEST: True, full and complete transcript of proceedings before the Hon. Lee Gates, District Court Judge, Department 8, Clark County, Nevada.

SIGNED: _____
Dina Dee Dalton, CCR 519, RPR

DATED: _____

ORIGINAL

ORDR
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FILED IN OPEN COURT
NOV 13 2006
SHARON COFFMAN

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-

JOHN INGEBRETSEN,
#1026988

Defendant.

CASE NO: C175709
DEPT NO: VIII

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: 02/27/06
TIME OF HEARING: 9:00 A.M.

THIS MATTER having come on for hearing before the Honorable Lee Gates, District Judge, on the 27th day of February, 2006, the Petitioner being present, represented by Christopher Oram, ESQ., the Respondent being represented by DAVID ROGER, District Attorney, by and through James Sweetin, Chief Deputy District Attorney, and the Court having heard the arguments of counsel and taking the matter under advisement until March 28, 2006, the Court makes the following findings of fact and conclusions of law:

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FINDINGS OF FACT

1. On May 8, 2001, John Ingebretsen (hereinafter "Defendant") was arrested and a Second Amended Complaint filed on May 24, 2001 charged him with: 1 Count of Use of a Minor in Production of Pornography (Felony – NRS 200.710), 15 Counts of Possession of Visual Presentation Depicting Sexual Conduct of a Person Under Sixteen Years of Age (Felony – NRS 200.700, 200.730), 4 Counts of Open or Gross Lewdness (Gross Misdemeanor – NRS 201.210), and 1 Count of Child Abuse and Neglect (Gross Misdemeanor – NRS 200.508).

2. An Information was subsequently filed on May 30, 2001 charging the Defendant with: Count I – Attempt Use of a Minor in Producing Pornography (Felony – NRS 200.700, 200.710, 200.750, 193.330); Count II – Possession of Visual Presentation Depicting Sexual Conduct of a Person Under Sixteen Years of Age (Felony – NRS 200.700, 200.730); and Count III – Open or Gross Lewdness (Gross Misdemeanor – NRS 201.210).

3. On June 6, 2001, the Defendant pled guilty via Guilty Plea Agreement to the charges contained in the Information.

4. A Judgment of Conviction was filed on August 20, 2001, sentencing Defendant to: Count I – a maximum of 120 months with a minimum parole eligibility of 36 months; Count II – a maximum of 48 months with a minimum parole eligibility of 12 months, Count II to run concurrently with Count I; Count III – 12 months to run concurrently with Counts I and II; Special Sentence of Lifetime Supervision upon completion of any term of probation, imprisonment or parole; and 99 days credit for time served. The Defendant was ordered to pay a $25.00 Administrative Assessment Fee, a $250.00 DNA Analysis Fee, and a $600.00 Psychosexual Evaluation Fee. The Defendant was also ordered to submit to genetic marker testing.

5. A Notice of Appeal was filed by the Defendant on August 23, 2001.

6. The Appeal was dismissed by the Nevada Supreme Court on January 23, 2002, and Remittitur was issued on February 19, 2002.

7. On July 8, 2002, the Defendant filed a Petition for Writ of Habeas Corpus (Post-Conviction).

8. On December 19, 2002, the Defendant filed a Motion to Withdraw his Guilty Plea which was denied on March 6, 2003.

9. On March 22, 2004, the Defendant filed a second Notice of Appeal.

10. On July 6, 2004, the Defendant filed a Motion for Transcripts at State Expense. This Motion was denied on August 2, 2004.

11. The Supreme Court dismissed the Defendant's appeal on August 26, 2004 stating that the appeal was premature because the district court had not entered a decision denying the Habeas Corpus Petition filed by the Defendant on July 8, 2002. Remittitur was issued on September 2, 2004.

12. The Defendant filed a Supplemental Motion in Support of Defendant's Writ of Habeas Corpus (Post-Conviction) and Motion to Dismiss on August 12, 2005. Such was denied on March 38, 2006.

13. The Defendant freely and voluntarily entered his plea of guilty via signed Guilty Plea Agreement.

14. The Defendant was properly canvassed by the Court as to the consequences of his plea, including the advisement of his constitutional rights and the waiver of such as a result of his guilty plea.

15. The Defendant understood the he was subject to the imposition of Lifetime Supervision as set forth in the signed Guilty Plea Agreement.

16. Based upon the Defendant's Guilty Plea Agreement and plea canvass, the Defendant made detailed admissions to all of the elements of the relevant offenses.

17. The Defendant was rendered effective assistance of counsel in obtaining the favorable plea agreement.

18. Defense counsel viewed the photographs in question prior to the Defendant's plea and the Defendant admitted that such were obscene and prohibited by law.

19. The State did not act in bad faith by either losing or destroying the evidence of the photographs or the computer on which the photographs were found.

20. The photographs in question were not exculpatory in nature.

21. The Defendant's request for the photographs and the computer on which the photographs were found would not have led to any exculpatory evidence.

22. Since the photographs and computer containing the photographs would not have affected the outcome of Defendant's case, they are immaterial and do not result in prejudice to the Defendant.

23. The Defendant has not been prejudiced by the unavailability of the photographs and computer because he pled guilty to the charges contained in the Guilty Plea Agreement.

24. Grounds Six, Seven, and Eight not cognizable by the Court.

CONCLUSIONS OF LAW

1. The law in Nevada directs that "[t]he trial court should view the guilty plea as presumptively valid and the burden should be on the defendant to establish that the plea was not entered knowingly and intelligently." *Bryant v. State*, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986). Further, a guilty plea should not be invalidated "as long as the totality of the circumstances, as shown by the record, demonstrates that the plea was knowingly and voluntarily made and that the defendant understood the nature of the offense and the consequences of the plea." *State v. Freese*, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000).

2. "To properly accept a guilty plea, a court must sufficiently canvass a defendant to determine if the defendant knowingly and intelligently entered into the plea." *Williams v. State*, 103 Nev. 227, 230, 737 P.2d 508, 510 (1987). In *Hanley v. State*, the Court stated:

> [I]n cases where a guilty plea is accepted, the record should affirmatively show that certain minimal requirements are met. These are generally:
>
> 1. an understanding waiver of constitutional rights and privileges;
> 2. absence of coercion by threat or promise of leniency;
> 3. understanding of the consequences of the plea, the range of punishments; and

4. an understanding of the charge, the elements of the offense.

97 Nev. 130, 133, 624 P.2d 1387, 1389 (1981)(*internal citations omitted*).

3. In order to assert a claim for ineffective assistance of counsel a defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of *Strickland v. Washington*, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2063-64 (1984). *See State v. Love*, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under this test, the Defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. *Strickland*, 466 U.S. at 687-88, 694, 104 S.Ct. at 2065, 2068; *Warden, Nevada State Prison v. Lyons*, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting *Strickland* two-part test in Nevada). "Effective 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)).

4. In considering whether trial counsel has met this standard, the court should first determine whether counsel made a "sufficient inquiry into the information that is pertinent to his client's case." *Doleman v. State*, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996) (*citing Strickland*, 466 U.S. at 690-691, 104 S.Ct. at 2066). Once such a reasonable inquiry has been made by counsel, the court should consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." *Doleman*, 112 Nev. at 846, 921 P.2d at 280 (*citing Strickland*, 466 U.S. at 690-691, 104 S.Ct. at 2066). Finally, counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." *Doleman*, 112 Nev. at 846, 921 P.2d at 280; *Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066.

5. The reviewing court must begin with the presumption of effectiveness and then must determine whether or not the defendant has demonstrated by "strong and convincing

proof" that counsel was ineffective. *Homick v State*, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996) (*citing Lenz v. State*, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981)); *Davis v. State*, 107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991). The role of a court in considering allegations of 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)).

6. This analysis does not mean 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. 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.

7. "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." *Dawson v. State*, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992), (*citing Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066); *see also Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

8. Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *McNelton v. State*, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (*citing Strickland*, 466 U.S. at 687). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (*citing Strickland*, 466 U.S. at 687-89, 694).

9. A defendant who claims that his counsel failed to investigate most show specifically how a more thorough investigation would have changed the outcome of his case. *Molina v. State*, 120 Nev. 185, 87 P.3d 533 (2004).

10. "[T]he duty to investigate and prepare a defense is not limitless: it does not necessarily require that every conceivable witness be interviewed or that counsel must pursue 'every path until it bears fruit or until all conceivable hope withers.'" *United States v. Tucker*, 716 F.2d 576 (9th Cir. 1983) (*quoting Lovett v. Florida*, 627 F.2d 706, 708 (5th Cir. 1980)).

11. A defendant must show bad faith on the part of the State when the loss or destruction of evidence occurs. *See Johnson v. State*, 117 Nev. 153, 168, 17 P.3d 1008, 1018 (2001).

12. "Loss or destruction of evidence by the State violates due process 'only if the defendant shows either that the State acted in bad faith or that the defendant suffered undue prejudice and the exculpatory value of the evidence was apparent before it was lost or destroyed.'" *Daniel v. State*, 119 Nev. 498, 520, 78 P.3d 890, 905 (2003) (*quoting Leonard v. State*, 117 Nev. 53, 68, 17 P.3d 397, 407 (2001)).

13. A defendant must show prejudice as a result of the unavailable evidence. "'To establish prejudice, the defendant must show that it could be reasonably anticipated that the evidence would have been exculpatory and material to the defense." *Leonard*, 119 Nev. at 520, 78 P.3d at 905 (*quoting Cook v. State*, 114 Nev. 120, 125, 953 P.2d 712, 715 (1998)).

14. "[Evidence] is material only if there is a reasonable probability that had the evidence been available to the defense, the result of [the defendant's] trial would have been different." *Gallimort v. State*, 116 Nev. 315, 320, 997 P.2d 796, 799 (2000).

15. Unavailable evidence that would not have affected the outcome of a defendant's case is immaterial and does not result in prejudice to the Defendant. *See Wilson v. State*, 121 Nev. 345, ---, 114 P.3d 285, 296 (2005) *and State v. Second Judicial District Court*, 120 Nev. 254, 259, 89 P.3d 663, 666 (2004).

16. "[A]ll ... claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings." *Franklin v. State*, 110 Nev. 750, 877 P.2d 1058 (1994) (*overruled on other grounds by Thomas v. State*, 115 Nev. 148, 979 P.2d 222 (1999).

17. NRS 34.810 provides:

> 1. The court shall dismiss a petition if the court determines that:
>
> (a) The petitioner's conviction was upon a plea of guilty and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition and Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) shall be, and are, hereby DENIED.

DATED this 13 day of November, 2006.

DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY _____
GLEN O'BRIEN
Chief Deputy District Attorney
Nevada Bar #007849

mmw/SVU

APP. 133

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN INGEBRETSEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47114

FILED

JAN 09 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant John Ingebretsen's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

The district court convicted Ingebretsen, pursuant to a guilty plea, of one count of attempting to use a minor in the production of pornography, one count of possession of a visual presentation depicting the sexual conduct of a person under 16 years of age, and one count of open or gross lewdness. The district court sentenced Ingebretsen to various concurrent terms of imprisonment, amounting to 36 to 120 months. We affirmed the judgment of conviction on direct appeal.[1]

Ingebretsen filed a timely proper person post-conviction petition for a writ of habeas corpus. The district court appointed counsel, counsel supplemented Ingebretsen's habeas petition, and the State responded to both the petition and the supplement. Thereafter, the

[1]Ingebretsen v. State, Docket No. 38391 (Order Dismissing Appeal, January 23, 2002).

district court heard arguments and denied Ingebretsen's petition. This appeal follows.

First, Ingebretsen contends that the district court erred by not dismissing his case when it learned that the State had lost or destroyed the photographic evidence of his crimes.

> In order to establish a due process violation resulting from the state's loss or destruction of evidence, a defendant must demonstrate either (1) that the state lost or destroyed the evidence in bad faith, or (2) that the loss unduly prejudiced the defendant's case and the evidence possessed an exculpatory value that was apparent before the evidence was destroyed.[2]

Here, the district court found that the State had not acted in bad faith and that the photographs were not exculpatory in nature. Our review of the record reveals that the district court's findings are supported by substantial evidence and are not clearly wrong.

Second, Ingebretsen contends that the district court erred by denying his request for an evidentiary hearing. He specifically asserts that an evidentiary hearing was necessary to review the photographs seized by the State and determine whether they constituted evidence of the crimes for which he pled guilty. "A post-conviction habeas petitioner is entitled to an evidentiary hearing 'only if he supports his claims with specific factual allegations that if true would entitle him to relief.' However, if the record belies the petitioner's factual allegations, the

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[2]State v. Hall, 105 Nev. 7, 9, 768 P.2d 349, 350 (1989).

petitioner is not entitled to an evidentiary hearing."[3] Here, Ingebretsen's claim that the photographs do not constitute evidence of crimes is belied by statements that he made during the plea canvass and at the sentencing hearing.

Third, Ingebretsen contends that the district court erred by concluding that counsel was effective. Ingebretsen claims that counsel was ineffective for failing to inform him that the State's information did not contain all of the elements necessary to constitute the crimes of attempting to use a minor in the production of pornography and possession of child pornography. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient, and that the petitioner was prejudiced by counsel's performance.[4] To show prejudice, a petitioner who has entered a guilty plea must demonstrate "'a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'"[5] The court need not consider both prongs of this test if the petitioner makes an insufficient showing on either prong.[6] Here, the district court found that Ingebretsen received effective assistance of counsel. Our review of the record reveals that the

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[3]Means v. State, 120 Nev. 1001, 1016, 103 P.3d 25, 35 (2004) (quoting Thomas v. State, 120 Nev. 37, 44, 83 P.3d 818, 823 (2004)).

[4]Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687 (1987)).

[5]Id. at 988, 923 P.2d at 1107 (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)).

[6]See Strickland, 466 U.S. at 697.

district court's finding is supported by substantial evidence and is not clearly wrong.

Having considered Ingebretsen's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

Parraguirre, J.

Hardesty, J.

Saitta, J.

cc: Hon. Lee A. Gates, District Judge
Christopher R. Oram
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

APP. 137

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JOHN INGEBRETSEN,

Petitioner,

vs.

JACK PALMER, *et al.*,

Respondents.

3:07-cv-00251-LRH-RAM

ORDER

Before the court for a decision on the merits is an application for a writ of habeas corpus filed by John Ingebretsen, a Nevada prisoner. ECF No. 87.

I. BACKGROUND

Pursuant to a plea agreement, Ingebretsen was convicted in the Eighth Judicial District Court for the State of Nevada of attempted use of a minor in producing pornography (Count I), possession of child pornography (Count II), and open or gross lewdness (Count III). The following exchange at Ingebretsen's plea canvass sets forth the factual circumstances supporting his convictions:

> THE COURT: I need to be assured that you are, in fact, guilty of these crimes. Now, in Count I they said you committed the crime of Attempt Use of a Minor in the Production of Pornography between October 1st , 1997, and May 8th, 2001.
>
> DEFENDANT: Yes.
>
> THE COURT: And who is Sara [R.]?
>
> DEFENDANT: My stepdaughter.

APP. 138

THE COURT: . . . How old was Sara [R.] at the time?

DEFENDANT: She was – she will be 18 this month.

THE COURT: So she was – back in '97 that was what? She was – four and half years ago. So she would have been like 14 or so?

DEFENDANT: 14 and a half.

THE COURT: So you had her pose in a variety of sexually provocative clothing and positions and took sexually suggestive pictures of her; is that true?

DEFENDANT: Yes.

THE COURT: And you were attempting to produce a pornographic performance that appealed to a prurient interest in sex?

DEFENDANT: Yes.

THE COURT: And you encouraged and knowingly used and enticed her to do this sort of thing?

DEFENDANT: Yes.

THE COURT: And also between January the 1st of 2001 and May 8th of 2001, did you knowingly and willfully have in your possession photography depicting someone under 16 years of age –

DEFENDANT: Yes.

THE COURT: And it says here you have – what was it? A picture or a movie or what?

DEFENDANT: I don't know what they picked up out of the computer. I had pictures in there.

THE COURT: It was pictures of something? Pictures that was on a computer.

DEFENDANT: Yeah.

THE COURT: It was a person under the age of 16 engaging in sexual or simulating sexual conduct? It says here, "pictures of a female child under 16 with a breast and genitals and buttocks exposed." Is that true? You had that on your computer?

DEFENDANT: Yes.

THE COURT: And that was here in Clark County, Nevada?

DEFENDANT: Yes.

> THE COURT: And they also said in January of – between January 1st of 1999 and May 8th of 2001 that you committed an open and gross lewd act with Sara [R.]; is that true?
>
> DEFENDANT: Yes.
>
> THE COURT: Did you have her lay down naked in the bed and you fondled her breasts and pubic area?
>
> DEFENDANT: Yes.
>
> THE COURT: And all this happened in Clark County, Nevada?
>
> DEFENDANT: Yes.
>
> THE COURT: And you did this against her will?
>
> DEFENDANT: Yes.

ECF No. 32-10, p. 8-10.

The state district court sentenced Ingebretsen to a prison term of three to ten years on Count I, a term of one to four years on Count II, and a term of one year on Count III, all to be served concurrently. A judgment of conviction was entered on August 20, 2001. Ingebretsen appealed.

On direct appeal, Ingebretsen argued that his guilty pleas to these charges were not knowing and voluntary. The Nevada Supreme Court dismissed the appeal, noting that challenges to the validity of a guilty plea must be first presented in either a motion to withdraw the plea or a post-conviction petition.

Ingebretsen then filed a petition for a writ of habeas corpus in the state district court. The court appointed counsel, who filed a motion to withdraw Ingebretsen's guilty pleas. After a hearing, the court denied that motion. After appointment of new counsel, Ingebretsen filed a supplement to the habeas corpus petition. The district court denied the petition. On appeal, the Nevada Supreme Court affirmed.

Ingebretsen then initiated this proceeding in May of 2007. In November of 2008, while this proceeding was pending, he filed a second state post-conviction petition. That proceeding concluded in February 2010, with the Nevada Supreme Court affirming the lower court's decision that

Ingebretsen did not meet the custody requirements for a state habeas proceeding because he had discharged his sentence and been released. In the meantime, Ingebretsen had filed a first amended petition in this proceeding, followed by a second amended petition in March of 2009.

The State moved to dismiss the second amended petition, arguing, inter alia, that Grounds 1 through 4 were unexhausted and that Ground 5 was not cognizable in a federal habeas proceeding This court granted the motion, concluding that Grounds 1 through 4 were unexhausted. It further concluded that Ground 5 was not justiciable because it challenged the validity of amendments to Nevada laws requiring sex offenders to register and those laws do not amount to custody for the purpose of habeas corpus jurisdiction.

After Ingebretsen moved for reconsideration, this court concluded that Ground 5 was cognizable after all because restrictions imposed on him by the amendments to the sex offender laws served to distinguish this case from cases in which the Ninth Circuit had concluded that sex-offender registration requirements are not a significant enough restraint on one's liberty to amount to custody. Ingebretsen was also permitted to file a third amended petition, which added Ground 7. This court subsequently granted Ingebretsen's request for a stay to return to state court to exhaust Grounds 1 through 4.

After obtaining the stay, Ingebretsen attempted to present the unexhausted claims to the Nevada courts. The state district court again denied relief after finding that Ingebretsen was no longer under a sentence of imprisonment, and his claims were otherwise procedurally defaulted. On appeal, the Nevada Supreme Court affirmed the state district court's ruling, finding that Ingebretsen was not eligible for post-conviction habeas relief because he did not meet the imprisonment requirement of Nev. Rev. Stat. § 34.724.

In October of 2014, this court granted Ingebretsen's request to re-open these proceedings. Respondents subsequently filed the motion to dismiss, which this court granted in part and denied in part. In particular, the court concluded that Grounds 1-4 are procedurally defaulted and that Grounds 5 and 7 are not cognizable as habeas claims because they challenge conditions of confinement, not

the fact or duration of confinement. With respect to Ground 2, however, the court deferred dismissal of the claim pending a determination whether the default might be excused under *Martinez v. Ryan*, 566 U.S. 1 (2012).

Thus, Ground 2 and Ground 6 are before the court for a final decision.

II. GROUND 2

In Ground 2, Ingebretsen alleges that he received ineffective assistance of trial counsel because counsel rushed him into entering guilty pleas without properly investigating the facts and law of the case and failed to insist, prior to the entry of the guilty pleas, that the State allow the defense to review the photographs supporting Counts I and II. At Ingebretsen's sentencing hearing, the following exchange occurred between defense counsel (Cichoski), the state district court, and the prosecutor (Kephart):

> MR. CICHOSKI: . . . As you heard from the mother, what was happening was he was taking pictures for modeling or something like that and we don't have those pictures. I don't know what happened to the pictures. Nobody has ever been able to see them to know if they are pornographic or not except that he admitted, he pled guilty to Attempt Use of Minor in Production of Pornography.
>
> THE COURT: Were they pornographic, Mr. Kephart?
>
> MR. KEPHART: Yes, your Honor. We don't turn this type of contraband over to the defendants.
>
> THE COURT: They have a right to see evidence. You have heard of the Constitution, man?
>
> MR. KEPHART: There's a law, a specific statute in Nevada that will not allow them to have them because they possess them.
>
> THE COURT: The lawyer can look at the evidence.
>
> MR. CICHOSKI: Mr. Herndon told me at the time of preliminary that the photos did not exist.
>
> THE COURT: Well, why would you plead your client to something then if you don't think he was guilty of it? I don't know what the case says. You plead the guy to possession of pornography. You didn't see that?
>
> MR. CICHOSKI: Maybe we should have investigated that. Maybe we should set that over.

MR. KEPHART: I would bring in and show you the photos.

THE COURT: Why would you have your client plead guilty if you didn't think it was pornographic?

MR. CICHOSKI: Your Honor, it was my understanding that there's no law in the State of Nevada as to whether pictures, whether the lack of pictures, whether a person can be convicted if there is no pictures. But there is some law in other states where even though there is no pictures, guys get convicted.

THE COURT: That's not the point. Oh God.

MR. CICHOSKI: That's what I was resting with, your Honor, that if the Court decided even though there's no pictures he can still be convicted –

THE COURT: The court has not decided anything. You guys came in here and entered a guilty plea. What am I supposed to do? I'm just - - you're telling me he pled guilty but you're not even sure it was pornographic?

MR. CICHOSKI: He admits 15 counts of possession of controlled pornography, all one-to-six's.

THE COURT: I know, but you tell me it probably was - -

MR. CICHOSKI: There was a computer which had pornography on it. We don't dispute that there was a computer and that had child porn on it but you tell me he is also charged with taking pornographic pictures of her which to my understanding do not exist and I have never seen.

MR. KEPHART: We don't have those, the ones he was charged with, the pornography in the computer.

MR. CICHOSKI: Count one charges him with taking pictures with Sara.

MR. KEPHART: Using pictures of Sara. You don't have to have them for that but by the possession, he has them and he possessed child pornography.

THE COURT: Oh, God. And those, the photos, it says in the PSI - -

MR. KEPHART: You want to pass it for us to bring them in so the Judge can see what he had?

MR. CICHOSKI: They have computer pictures. The pictures he is accused of taking of Sara do not exist.

THE COURT: So what is your point?

MR. CICHOSKI: I was just pointing out, your Honor, that we don't have those to decide whether those were pornographic or not.

> THE COURT: Why would you have your client plead guilty and come in and tell me they are not pornographic? You said he pled guilty to them but then they weren't pornographic. I don't understand that.
>
> MR. CICHOSKI: Because other jurisdictions say that even if the State doesn't have that - -
>
> THE COURT: I know what other jurisdictions say but you are the man's lawyer.

ECF No. 32-12, p. 12-15. The sentencing hearing was continued to allow defense counsel to review the photographs. *Id*., p. 15-16.

At the continued sentencing hearing the following week, defense counsel indicated that he had reviewed the photographs. ECF No. 32-13, p. 3. He also indicated that the question of whether the photographs were pornographic or not was a question for a judge or jury to decide, but that after consulting with his client, they did not want to withdraw the guilty plea. *Id.*

Ingebretsen claims his counsel was ineffective because counsel urged him to plead guilty and allowed him to sign a guilty plea agreement without ever reviewing the photographs upon which the child pornography charges to which he pled were based. To demonstrate ineffective assistance of counsel (IAC) in violation of the Sixth and Fourteenth Amendments, a convicted defendant must show that 1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms in light of all the circumstances of the particular case; and 2) unless prejudice is presumed, it is reasonably probable that, but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–94 (1984). To demonstrate ineffective assistance of counsel in the context of a challenge to a guilty plea, a petitioner must show both that counsel's advice fell below an objective standard of reasonableness as well as a "reasonable probability" that, but for counsel's errors, the petitioner would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58–59 (1985) (holding that the two-part *Strickland* test applies to challenges to guilty pleas based on the ineffective assistance of counsel).

///

As noted above, Ground 2 is procedurally defaulted, but this court reserved judgment as to whether the default might be excused under *Martinez v. Ryan*. The court may find "cause" under *Martinez* exists "where (1) the claim of 'ineffective assistance of trial counsel' was a 'substantial' claim; (2) the 'cause' consisted of there being 'no counsel' or only 'ineffective' counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the 'initial' review proceeding in respect to the 'ineffective-assistance-of-trial-counsel claim'; and (4) state law requires that an 'ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding.'" *Trevino v. Thaler*, 569 U.S. 413, 423 (2013).

It is not disputed that the last two requirements are met, so the focus here is whether Ground 2 is a substantial claim – i.e., that the claim "has some merit." *Martinez*, 566 U.S. at 14. A claim is considered "insubstantial" if "it does not have any merit or . . . is wholly without factual support." *Id* at 15.

As an initial matter, the record is not entirely clear whether the photographs defense counsel reviewed between the two hearings formed the basis for Count I or Count II or both. In his reply, Ingebretsen insists that the transcript of the first hearing (excerpted above) shows that they were the photographs supporting the possession count (Count II) and that the prosecution did not possess the photographs Ingebretsen took of his stepdaughter – i.e, the photographs related to the attempted production count (Count I). Even assuming (without deciding) that is the case, however, this court is unable to conclude that Ground 2 presents a substantial claim of ineffective assistance of counsel.

Ingebretsen personally admitted during his plea canvass that he had pornographic photographs of children on his computer. His counsel confirmed at the first sentencing hearing that he and his client did not dispute that the computer "had child porn on it." ECF No. 32-12, p. 14. While defense counsel expressed uncertainty at the continued sentencing hearing as to whether the photographs qualified as pornography, he noted that he had consulted with Ingebretsen and that they did not wish to withdraw the guilty plea. No. 32-13, p. 3. Ingebretsen then confirmed in open court that he was guilty and that, having been charged with 15 counts of possession, one of the reasons he

was entering a guilty plea was to avoid the harsher penalty that may have resulted in going to trial on the original charges. *Id*., p. 4-5.

Ingebretsen also personally admitted during his plea canvass that he had his stepdaughter pose in sexually provocative clothing and positions, that he took sexually suggestive pictures of her, and that he was attempting to produce a pornographic performance that appealed to a prurient interest in sex. ECF No. 32-10, p. 9. Even if counsel did not see the photographs, Ingebretsen was personally aware of the nature of the photographs he had taken. There is no evidence in the record, nor does Ingebretsen claim, that he and counsel did not discuss the circumstances surrounding the photographs prior to deciding to enter a guilty plea.

In light of the foregoing, Ingebretsen has not established that counsel's performance fell below the *Strickland* standard. Ingebretsen's showing as to prejudice is even less impressive – i.e., there is no evidence that, but for counsel's alleged deficient performance, there is a reasonable probability that Ingebretsen would not have pled guilty and would have insisted on going to trial. He confirmed in his plea canvass and in his guilty plea agreement that his counsel had discussed with him all the elements of the crimes to which he was pleading guilty and that he understood that the State would have to prove all of those elements at trial. ECF Nos. 32-10, pp.4-5, 8, and 32-11, p. 5.

Ingebretsen faced fifteen counts of possession of child pornography, each carrying a possible sentence of one to six years. *See* Nev. Rev. Stat. § 200.730. At no point in either the plea canvass or the sentencing hearings did Ingebretsen express any equivocation about his guilt or his decision to plead guilty.[1] At the sentencing hearing *after* counsel had reviewed the photographs, the following exchange occurred:

> THE COURT: . . . And now do you want to withdraw your guilty plea or do you want to proceed?
>
> DEFENDANT: I want to proceed.

[1] When asked for his statement at the first sentencing hearing, Ingebretsen's response was "I deserve what I get." ECF No. 32-11, p. 11.

THE COURT: All right. And are you guilty of this or not guilty of this?

DEFENDANT: I'm guilty.

THE COURT: You discussed this charge thoroughly with your lawyer?

DEFENDANT: Yes.

ECF No. 32-13, p. 4. It is clear from the record that, with full knowledge of the charges and the evidence against him, Ingebretsen was firmly unwilling to risk the outcome of a trial. Accordingly, he has not presented, for the purposes of *Martinez*, a substantial claim that he was prejudiced by counsel's alleged deficient performance.

Ground 2 is dismissed as procedurally defaulted.

III. GROUND 6

In Ground 6, Ingebretsen claims that he was denied effective assistance of counsel, in violation of his constitutional rights, because counsel failed to object that the information (charging document) filed against Ingebretsen omitted an element of Counts I and II – i.e., that the images in question did "not have serious literary, artistic, political or scientific value." Ingebretsen claims that neither the court nor his counsel informed him of the element so the omission caused him to unknowingly and unintelligently enter guilty pleas to crimes for which he could have presented a defense.

As with Ground 2, this claim is governed by the *Strickland/Hill* standard. Unlike Ground 2, however, this claim was adjudicated on the merits by the Nevada courts. ECF Nos. 34-27 and 34-29, p. 4-5. Thus, this court's ability to grant habeas relief is governed by 28 U.S.C. § 2254(d).

Title 28 U.S.C. § 2254(d) provides as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

A state court acts "contrary to" clearly established Federal law if it applies a rule contradicting the relevant holdings or reaches a different conclusion on materially indistinguishable facts. *Price v. Vincent*, 538 U.S. 634, 640 (2003). A state court "unreasonably appli[es]" clearly established Federal law if it engages in an "objectively unreasonable" application of the correct governing legal rule to the facts at hand; however, Section 2254(d)(1) "does not require state courts to extend that precedent or license federal courts to treat the failure to do so as error." *White v. Woodall*, 134 S. Ct. 1697, 1705–07 (2014). "And an 'unreasonable application of' [the Supreme Court's] holdings must be 'objectively unreasonable,' not merely wrong; even 'clear error' will not suffice." *Wood v. McDonald*, 135 S. Ct. 1372, 1376 (2015) (per curiam) (citation omitted). "The question . . . is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007).

Habeas relief may not issue unless "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). As "a condition for obtaining habeas relief," a petitioner "must show that" the state decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id*. at 103. This standard is "difficult to meet," *Metrish v. Lancaster*, 569 U.S. 351, 357–58 (2013), as even a "strong case for relief does not mean the state court's contrary conclusion was unreasonable," *Richte*r, 562 U.S. at 102. "[S]o long as 'fairminded jurists could disagree' on the correctness of the state court's decision," habeas relief is precluded by Section 2254(d). *Id*. at 101 (citation omitted). "AEDPA thus imposes a 'highly deferential standard for evaluating state-court rulings,' ... and 'demands that state-court decisions be given the benefit of the doubt.'" *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citations omitted).

The Nevada courts applied the correct federal law standards in denying the claim Ingebretsen presents to this court as Ground 6. ECF Nos. 34-27 and 34-29, p. 4-5. The Nevada Supreme Court's decision did not explain which element(s) of the *Strickland/Hill* test Ingebretsen failed to satisfy, but that does not mean § 2254(d) does not apply. *See Richter*, 562 U.S. at 98. Instead, Ingebretsen must show "there was no reasonable basis for the state court to deny relief." *Id*. This, he cannot do.

The Constitution is satisfied if the charging document states "the elements of an offense charged with sufficient clarity to apprise a defendant of what to defend against." *Russell v. United States*, 369 U.S. 749, 763-64 (1962). *See also James v. Borg*, 24 F.3d 20, 24 (9th Cir.1994) ("The principal purpose of the information is to provide the defendant with a description of the charges against him in sufficient detail to enable him to prepare his defense."). In addition to describing the specific facts giving rise to the charges, the information charging Ingebretsen cited to the specific criminal statutes he was charged with violating and defined, almost verbatim from the relevant statutes, the elements of each crime. *Compare* ECF No. 32-9, *with* Nev. Rev. Stat. §§ 200.710 and 200.730.

The existence of a "sexual portrayal" was an element of both Count I and Count II, and was included in the information for each count. In the definitions section of Nevada's child pornography statues, a "sexual portrayal" is defined as "the depiction of a person in a manner which appeals to the prurient interest in sex and which does not have serious literary, artistic, political or scientific value." *See* Nev. Rev. Stat. Ann. § 200.700. While the information did not contain this definition written out in full, it cited to the statutory section. The information's descriptions of the offenses, which included the "sexual portrayal" element, combined with its "explicit citation[s] to the precise statute[s]" were more than sufficient to notify Ingebretsen of the charged crimes. *See Gautt v. Lewis*, 489 F.3d 993, 1003-04 (9th Cir. 2007).

While there is no evidence in the record that counsel discussed the definition of "sexual portrayal" with Ingebretsen, there is also no evidence that he did not. Moreover, there is no evidence in the record that the images giving rise to the possession charge had "serious literary, artistic,

political or scientific value." With respect to the attempted production charge, Ingebretsen points to the testimony of his stepdaughter's mother at the sentencing hearing, during which she mentioned that Ingebretsen was taking the photographs for the purpose of "putting together a portfolio to help her become a model." ECF No. 32-12, p. 8. However, any argument that he was not attempting to use his stepdaughter as "the subject of a sexual portrayal," as defined in the Nevada statute, is belied by his admissions during his plea canvass that he "had her pose in a variety of sexually provocative clothing and positions and took sexually suggestive pictures of her" and that he was "attempting to produce a pornographic performance that appealed to a prurient interest in sex." ECF No. 32-10, p. 9.

In addition, there is not a reasonable probability that, but for counsel's alleged failure to notify him of the specific definition of "sexual portrayal," Ingebretsen would not have pled guilty and would have insisted on going to trial. The same prejudice considerations discussed above in relation to Ground 2 apply with equal force here. And, because the Nevada courts rejected this claim on the merits, the standard of review is highly deferential. Simply put, Ingebretsen cannot demonstrate that the Nevada Supreme Court's rejection of the claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103.

Ground 6 is denied.

IV. CONCLUSION

For the foregoing reasons, Ingebretsen's petition for federal habeas relief shall be denied.

Certificate of Appealability

This is a final order adverse to the petitioner. As such, Rule 11 of the Rules Governing Section 2254 Cases requires this court to issue or deny a certificate of appealability (COA). Accordingly, the court has *sua sponte* evaluated the claims within the petition for suitability for the issuance of a COA. *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

APP. 150

Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." With respect to claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate (1) whether the petition states a valid claim of the denial of a constitutional right and (2) whether the court's procedural ruling was correct. *Id.*

Having reviewed its determinations and rulings in adjudicating Ingebretsen's petition, the court declines to issue a certificate of appealability for its resolution of any procedural issues or any of Ingebretsen's habeas claims.

IT IS THEREFORE ORDERED that the third amended petition for writ of habeas corpus (ECF No. 87) is DENIED. The Clerk shall enter judgment accordingly.

IT IS FURTHER ORDERED that a certificate of appealability is DENIED.

Dated this 2nd day of March, 2018.

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JOHN INGEBRETSEN,

Petitioner,

v.

JACK PALMER, et al.,

Respondents.

Case No. 3:07-cv-00251-LRH-RAM

REPLY TO ANSWER (ECF NO. 119)

Petitioner John Ingebretsen ("Ingebretsen"), by and through his attorney, Assistant Federal Public Defender Jonathan Kirshbaum, hereby files this Reply to the Answer filed by Respondents (ECF No. 119). This Reply is based upon the attached points and authorities, and all pleadings, documents and exhibits on file herein.

DATED this 28 day of March, 2016.

Respectfully submitted,
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POINTS AND AUTHORITIES

I.

INTRODUCTION

On September 28, 2010, Ingebretsen filed his Third Amended Petition, asserting seven grounds for relief. CR 87. On January 20, 2015, Respondents filed a Motion to Dismiss. CR 109. On September 9, 2015, this Court granted, in part, and denied, in part, Respondents motion to dismiss, dismissing Grounds 1, 3, 4, 5 and 7. CR 116. This Court ordered Respondents to answer the remaining claims, Grounds 2 and 6. CR 116. Respondents filed their answer on January 11, 2016. CR 119. Respondents argue Ingebretsen cannot establish cause and prejudice to overcome the procedural default of Ground 2 because it is not a substantial claim of ineffective assistance of counsel. *Id.* at 7-9. Respondents further argue Ground 6 lacks merit. *Id.* Respondents' procedural default arguments should be rejected. Specifically, Ground 2 is not procedurally defaulted because Ingebretsen has raised a substantial claim of ineffective assistance of trial counsel and can establish prejudice to excuse any default. He can also establish that both Ground 2 and 6 are meritorious claims of ineffective assistance of trial counsel.

II.

STANDARD OF REVIEW

This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d), which permits a federal court to grant habeas relief affecting a state prisoner if the state court's ruling:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A state court's decision is "contrary to" federal law if it: (1) "applies a rule that contradicts the governing law" set forth in Supreme Court case authority, or (2) applies controlling law to a set of facts that is "materially indistinguishable" from a Supreme Court decision but nevertheless reaches a different result. *See Riley v. Payne*, 352 F.3d 1313, 1317 (9th Cir. 2003), *citing Lockyer v. Andrade*, 538 U.S. 63, 74 (2003). When a state court's decision is "contrary to" federal law, no deference under the AEDPA is appropriate and the claim should be reviewed *de novo*. *Lafler v. Cooper*, 132 S. Ct. 1376, 1390 (2012).

A state court's decision is an "unreasonable application" of federal law if it is "objectively unreasonable." *Lockyer*, 538 U.S. at 75. Federal courts generally defer to the state court's application of controlling federal law unless it was "objectively unreasonable." *Williams v. Taylor*, 529 U.S. 363 (2000). Section 2254(d)(2)

authorizes federal courts to grant habeas relief in cases where the state-court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." The unreasonable determination clause applies more commonly to situations where a petitioner challenges a state court's findings based solely on the state court record. *See Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004). In conducting this type of "intrinsic review," a federal court must be deferential to state fact-finding that is supported by the state record. *Id.* However, a petitioner may successfully challenge a state court's findings based on a claim that the finding "is unsupported by sufficient evidence," "the process employed by the state was defective" or "that no finding was made by the state court at all." *Id.*, *citing Wiggins v. Smith*, 539 U.S. 510, 529-33 (2003); *Weaver v. Thompson*, 197 F.3d 359, 363 (9th Cir. 1999).

The Supreme Court has reaffirmed the extensive deference owed a state court decision observing: "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 131 S. Ct. 770, 786-87 (2011).

The Ninth Circuit has clarified how the fairminded jurist standards should be applied, explaining that the focus remains on whether or not the state court's decision was unreasonable:

> The "fairminded jurist" standard is an objective standard of law, not a reference to the quality of the judge making the decision. The standard, therefore, does not require us to evaluate whether the individual jurists are "fairminded" in the sense that they are generally impartial and honest adjudicators, but rather whether there could objectively be fairminded disagreement as to the outcome dictated by the Supreme Court's clearly established law. Fairminded jurists can make mistakes in legal reasoning or judgment, and if such a mistake is beyond reasonable legal disagreement, the "fairminded jurist" standard is satisfied. Were we to apply a fairminded jurist standard literally, a federal court could never reverse a state court's habeas decision. For every state appellate court contains at least one fairminded jurist, if not a majority of its supreme court or appellate court members who voted to reject the petitioner's arguments. When we reverse a state court's habeas decision we are surely not saying that all the state court justices whom we are reversing are not fairminded jurists, but rather that objectively the answer is one that a fairminded jurist should reach.

Dow v. Virga, 729 F.3d 1041, 1051 n.8 (9th Cir. 2013).

If a claim was not "adjudicated on the merits" in state court, no deference is necessary under § 2254(d) and the review is *de novo*. *Amado v. Gonzalez*, 758 F.3d 1119, 1130 (9th Cir. 2014). And where a state court has adjudicated a claim on the merits denying relief based on only one element of the claim and does not reach the others, federal courts should give § 2254(d) deference to the element on which the state court ruled and review the elements on which the state court did not rule *de novo*. *Amado*, 758 F.3d at 1131. If a federal constitutional claim was presented to the state court and the state court denied all relief, there is a presumption that the state court adjudicated the federal constitutional claim on the merits, even if the opinion itself does not address the federal constitutional claim. *Johnson v. Williams*, 133 S. Ct. 1088, 1094-96 (2013). However, this presumption is rebuttable if "the state

standard is quite different from the federal standard," "the state standard is *less* protective," "or if a provision of the Federal Constitution or a federal precedent was simply mentioned in passing in a footnote or was buried in a string cite." *Johnson*, 133 S. Ct. at 1096 (emphasis in original); *accord Amado*, 758 F.3d at 1131.

III.

ARGUMENT

A. Trial Counsel was Ineffective for Failing to Investigate the Facts or Review the State's Evidence Prior to Allowing Ingebretsen to Plead Guilty.

Respondents argue Ground Two is procedurally defaulted and Ingebretsen cannot overcome the state procedural default under *Martinez v. Ryan,* 132 S. Ct. 1309 (2012). This Court has already determined that the last two requirements of *Martinez* have been met. *See* CR 116 at 7. In its order ruling on Respondents' motion to dismiss, the Court noted that "the cause and prejudice determination with respect to Ground Two is intertwined, to some extent, with the analysis on the merits of the claim" and deferred ruling on the cause and prejudice issue until the merits of Ground 2 are briefed. *Id.* Accordingly, Ingebretsen will first address the merits of Ground 2 before turning to cause and prejudice under *Martinez*.

1. Factual Background

Ingebretsen was arrested on May 8, 2001. Ex. 2. In a second amended criminal complaint filed on May 24, 2001, he was charged with, *inter alia*, fifteen counts of possession of visual presentation depicting sexual conduct of a person under

16 years of age based on photos found on his computer and one count of use of a minor in production of pornography based on photos he took of a minor named S.R. Ex. 6.

On May 30, 2001, an information was filed charging Ingebretsen with attempt use of a minor in production of pornography based on the S.R. photos, one count of possession of visual presentation depicting sexual conduct of a person under 16 years of age based on a photo on his computer and one count of open or gross lewdness. Ex. 7.

Less than a month after he was arrested, Ingebretsen pled guilty on June 4, 2001, to all three charges set forth in an information. Exs. 9 & 10.

The sentencing hearing took place on August 8, 2001. Ex. 11. Ingebretsen was present with counsel. S.R.'s mother read a statement from S.R. in which she stated that "John, took pictures of me when I was 12 and 13. I asked him if he was looking at me sexually, he said, 'No.' I found out now that he was." Ex. 11 at 3-4.

During defense counsel's statement, the court expressed concerns because counsel allowed Ingebretsen to plead guilty to charges without counsel having reviewed the evidence:

> MR. CICHOSKI: . . . As you heard from the mother, what was happening was he was taking pictures for modeling or something like that and we don't have those pictures. I don't know what happened to the pictures. Nobody has ever been able to see them to know if they are pornographic or not except that he admitted, he pled guilty to Attempt Use of Minor in Production of Pornography.
>
> THE COURT: Were they pornographic, Mr. Kephart?

MR. KEPHART: Yes, your Honor. We don't turn this type of contraband over to the defendants.

THE COURT: They have a right to see evidence. You have heard of the Constitution, man?

MR. KEPHART: There's a law, a specific statute in Nevada that will not allow them to have them because they possess them.

THE COURT: The lawyer can look at the evidence.

MR. CICHOSKI: Mr. Herndon told me at the time of preliminary that the photos did not exist.

THE COURT: Well, why would you plead your client to something then if you don't think he was guilty of it? I don't know what the case says. You plead the guy to possession of pornography. You didn't see that?

MR. CICHOSKI: Maybe we should have investigated that. Maybe we should set that over.

MR. KEPHART: I would bring in and show you the photos.

THE COURT: Why would you have your client plead guilty if you didn't think it was pornographic?

MR. CICHOSKI: Your Honor, it was my understanding that there's no law in the State of Nevada as to whether pictures, whether the lack of pictures, whether a person can be convicted if there is no pictures. But there is some law in other states where even though there is no pictures, guys get convicted.

THE COURT: That's not the point. Oh God.

MR. CICHOSKI: That's what I was resting with, your Honor, that if the Court decided even though there's no pictures he can still be convicted -

THE COURT: The court has not decided anything. You guys came in here and entered a guilty plea. What am I supposed to do? I'm just - - you're telling me he pled guilty but you're not even sure it was pornographic?

MR. CICHOSKI: He admits 15 counts of possession of controlled pornography, all one-to-six's.

THE COURT: I know, but you tell me it probably was - -

MR. CICHOSKI: There was a computer which had pornography on it. We don't dispute that there was a computer and that had child porn on

> it but you tell me he is also charged with taking pornographic pictures of her which to my understanding do not exist and I have never seen.
>
> MR. KEPHART: We don't have those, the ones he was charged with, the pornography in the computer.
>
> MR. CICHOSKI: Count one charges him with taking pictures with Sara.
>
> MR. KEPHART: Using picture of Sara. You don't have to have them for that but by the possession, he has them and he possessed child pornography.
>
> THE COURT: Oh, God. And those, the photos, it says in the PSI - -
>
> MR. KEPHART: You want to pass it for us to bring them in so the Judge can see what he had?
>
> MR. CICHOSKI: They have computer pictures. The pictures he is accused of taking of Sara do not exist.
>
> THE COURT: So what is your point?
>
> MR. CICHOSKI: I was just pointing out, your Honor, that we don't have those to decide whether those were pornographic or not.
>
> THE COURT: Why would you have your client plead guilty and come in and tell me they are not pornographic? You said he pled guilty to them but then they weren't pornographic. I don't understand that.
>
> MR. CICHOSKI: Because other jurisdictions say that even if the State doesn't have that - -
>
> THE COURT: I know what other jurisdictions say but you are the man's lawyer.

Ex. 11 at 12-14. The sentencing hearing was continued so trial counsel could have an opportunity to review the evidence against his client.

The sentencing hearing continued on August 15, 2001. Ex. 12. Counsel informed the court that after viewing the photographs, he could not determine whether the photographs in questions were pornographic. *Id.* at 2. Also counsel took the position that the question of whether the photographs were pornographic was for a judge or jury to decide. *Id.* Counsel then informed the court that Ingebretsen did

not want to withdraw from the negotiations and that he was ready to be sentenced. *Id.*

On direct appeal Ingebretsen raised two plea withdrawal claims, both arguing that the guilty plea was not knowing and voluntary. Ex. 21. The Nevada Supreme Court dismissed the appeal, concluding that it did not permit a defendant to challenge the validity of a guilty plea on direct appeal. Ex. 24 at 1-2. Instead, a defendant must raise a challenge to the validity of his guilty plea in the district court in the first instance, either by bringing a motion to withdraw the guilty plea or by initiating a post-conviction proceeding. *Id.* at 2.

After the Nevada Supreme Court affirmed the conviction, Ingebretsen filed a *pro se* state post-conviction petition raising nine claims. Ex. 30. Counsel was appointed to represent Ingebretsen and he moved for in camera review of the photographs. Ex. 64. At the May 9, 2005 hearing on this motion, counsel learned from the State the CD that contained the hard drive of the defendant's computer was damaged, cracked in half; the hard drive was returned to the defendant's family, so they did not have any photographs to provide to counsel. Ex. 65. In response, counsel filed a Supplemental Motion in Support of Defendant's Writ of Habeas Corpus (Post-Conviction) and Motion to Dismiss. Ex. 67. He made a single argument, namely that the case should be dismissed because the State had lost or destroyed the evidence. *Id.* On November 13, 2006, the court denied the motion and petition in a written order. Ex. 87.

2. Trial counsel was ineffective for failing to investigate and review the state's evidence.

To bring a successful IAC claim, Ingebretsen must demonstrate that counsel's performance was deficient and he suffered prejudice as a result of that performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In cases where the defendant

pled guilty, a defendant must show that the advice he received from counsel fell below an objective standard of reasonableness as measured by prevailing professional norms. *Hill v. Lockhart*, 474 U.S. 52, 56-57 (1985); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). Additionally, Ingebretsen must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill*, 474 U.S. at 59.

For a guilty plea to be valid, it must represent a "voluntary and intelligent choice among the alternative courses of action open to the defendant." *Id.* at 56, *quoting North Carolina v. Alford*, 400 U.S. 25, 31 (1970). To properly advise a defendant of these alternative courses of action, trial counsel must conduct a reasonable investigation. *Strickland*, 466 U.S. at 690, *Wiggins*, 539 U.S. at 533. Although there is a strong presumption that an attorney's conduct meets the standard for effectiveness, "`counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *Wiggins*, 539 U.S at 521, *quoting Strickland*, 466 U.S. at 690-91.

The record here demonstrates that trial counsel failed to investigate or review the State's evidence prior to rushing Ingebretsen into a guilty plea. It is deficient performance for counsel to advise a client to plead guilty without even reviewing the State's evidence against the client. The trial judge rightfully expressed shock and disbelief that counsel would enter into negotiations without seeing the pictures or negotiate a guilty plea without properly investigating the charges. Ex. 11 at 13-14;

Ex. 12 at 3. Ingebretsen could not have made a voluntary and intelligent choice about pleading guilty when his counsel never reviewed the evidence or discussed with him whether there were any available defenses based on counsel's assessment of the evidence.

Counsel's deficient performance prejudiced Ingebretsen. The decision to plead guilty is a fundamental matter for a defendant. Indeed, it is one of the few decisions that is fully left up to the defendant to make. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) (It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal . . .). Had counsel properly investigated the State's case against Ingebretsen, counsel would have advised him that there was a question as to whether the photographs found on the computer were pornographic—thus, raising an issue as to the sufficiency of the State's evidence as to the counts charging him with possession of child pornography.[1] Without this information, Ingebretsen was unable to make a fully informed decision about his case.

Respondents argue Ingebretsen suffered no prejudice because he took the photographs and was therefore familiar with their contents when he pled guilty. Respondents' argument misses the point. The photos that Ingebretsen allegedly took

[1] At the August 8 sentencing hearing, counsel made clear that the prosecution did not possess the photos taken of S.R., only those found on the computer. Thus, the photos that counsel reviewed had to have been those that formed the basis of the possession counts.

did not exist. The fact the State did not possess those photos severely undermined the strength of their case against Ingebretsen on that charge. The jury would have been required to assess S.R.'s descriptions of the photos to determine whether they were pornographic. There was no guarantee that the jury would have reached such a conclusion as S.R.'s statement at sentencing indicated that she did not originally believe that they were intended to be pornographic. According to Ingebretsen's attorney, they were for S.R.'s modeling portfolio. *See infra* Section III.B.

Because Ingebretsen had significant means to challenge the attempt production count, the strength of the State's evidence as to the possession counts was critically important to determine whether Ingebretsen should have accepted the deal or go to trial. Indeed, Respondents acknowledge in their Answer that the deal was allegedly favorable to Ingebretsen because it allowed him to avoid the possession counts. However, counsel simply was not in a position to give Ingebretsen advice as to those counts without first reviewing those photos. Ingebretsen is not a lawyer and would not understand what challenges to make to the State's evidence. He relied on his counsel to advise him so that he could make an informed decision as to how to proceed with his case. Once defense counsel actually took the time to view the photographs on the computer, he expressed a concern that they were not pornographic. This was an available defense to the charges. Had he advised Ingebretsen that the evidence as to the possession counts was questionable, it is clear that Ingebretsen would have insisted upon going to trial.

Counsel's deficient performance prejudiced Ingebretsen because he unknowingly and unintelligently pled guilty to crimes for which he could have presented a defense and elected to go to trial.

3. Ingebretsen can establish cause and prejudice to overcome the procedural default under *Martinez v. Ryan.*

A procedural default does not bar federal consideration of a claim if a petitioner can show cause and prejudice to excuse the default. Where a petitioner defaults his federal claims in state court pursuant to an adequate and independent state procedural rule, federal habeas relief may nevertheless be available where the petitioner demonstrates cause for the default and prejudice as a result of the alleged federal law violation or demonstrates that failure to consider the claims will result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991), *citing Murray v. Carrier*, 477 U.S. 478, 485, 495 (1986).

Ingebretsen can demonstrate cause and prejudice to overcome the procedural bar applied to Ground Two. In *Martinez v. Ryan*, 132 S. Ct 1309, 1320 (2012), the United States Supreme Court held that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." The *Martinez* Court explained the limited exception was created "as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim." *Id.* at 1318.

The Court reaffirmed and expanded the rule in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). In *Trevino* the Supreme Court extended *Martinez's* application to situations where the "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." *Trevino*, 133 S. Ct. at 1921.

To establish cause under *Martinez/Trevino*, a petitioner must show: (1) the underlying ineffective assistance of trial counsel claim is "substantial" or has "some merit"; (2) the petitioner was not represented or had ineffective counsel under *Strickland v. Washington*, 466 U.S. 668 (1984) during the post-conviction review proceeding; (3) the state post-conviction review proceeding was the initial review proceeding; and (4) state law required (or forced as a practical matter) the petitioner to bring the claim in the initial review collateral proceeding. *Dickens v. Ryan*, 740 F.3d 1302, 1319 (9th Cir. 2014) (en banc), *citing Trevino*, 133 S. Ct. at 1921.

a. Post-conviction counsel was ineffective for failing to raise Ingebretsen's underlying claim of ineffective assistance of trial counsel.

Ingebretsen can establish cause and prejudice to overcome the procedural bar to Ground Two. In *Martinez*, the Court determined that "[t]o overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Id.* at 1318. As discussed at length in the preceding

sections, Ground Two has clear merit. Thus, Ingebretsen meets the first requirement of *Martinez*.

Ingebretsen also meets the second requirement of *Martinez* where post-conviction counsel was ineffective for failing to raise Ground Two in the state post-conviction petition. Although Ingebretsen raised this claim in his *pro se* petition (Ex. 30 at 29-42), appointed counsel abandoned the claim. After counsel was assigned, counsel did not file a supplemental petition advancing this claim. Rather, counsel abandoned the entire petition and simply moved to dismiss the entire case based on the State either losing or destroying evidence. *See* Ex. 67. Counsel took no steps to have any other claims litigated. Had post-conviction counsel raised this claim, Ingebretsen would have been entitled to relief.

Post-conviction counsel's failure to raise this issue constituted ineffective assistance and establishes cause to excuse the procedural default. Furthermore, as outlined above, Ingebretsen suffered prejudice because he would have been entitled to relief had this claim been raised in his state post-conviction petition. Accordingly, the writ should be granted.

B. Trial counsel was ineffective for failing to object to the omission of an element of the crime of sexual portrayal in Counts I and II of the information.

In Ground Six, Ingebretsen alleges that trial counsel was ineffective for failing to move to dismiss or otherwise object to the constitutionally deficient information. In Count I of the information, the state charged Ingebretsen with "attempted use of a minor in producing pornography," citing, e.g., Nev. Rev. Stat. 200.700 and 200.710.

Ex. 8. The information asserted that Ingebretsen "knowingly attempt[ed] to use . . . a minor . . . to be the subject of a sexual portrayal, to-wit: by the said Defendant posing the said [minor] in a variety of sexually provocative clothes and positions and then taking sexually suggestive photographs of her, attempting to produce a pornographic performance that appealed to the Defendant's prurient interest in sex." *Id.* Yet the information failed to charge the element of the crime that the portrayal "not have serious literary, artistic, political or scientific value."

> . . . 4. 'Sexual portrayal' means the depiction of a person in a manner which appeals to the prurient interest in sex and which does not have serious literary, artistic, political or scientific value.

Nev. Rev. Stat. § 200.700(2). A "sexual portrayal" is also alleged in Count II without any allegation of the element that the portrayal "not have serious literary, artistic, political or scientific value." Ex. 8 at 2.

An information must set forth each element of the crime charged and fairly inform a defendant of the charge against which he must defend. *Hamling v. United States*, 418 U.S. 87, 117 (1974). It is generally sufficient that an information set forth the offense in the words of the statute itself, as long that the words "'fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.'" *Hamling*, 418 U.S. at 117, *quoting United States v. Carll*, 105 U.S. 611, 612 (1882).

Since the information in this case omitted an element of the crime of "sexual portrayal," it failed to provide Ingebretsen with adequate notice so that he could

knowingly and intelligently plead to Counts I and II or prepare a defense to them. Trial counsel should have moved to dismiss or otherwise object to the constitutionally deficient Information. Counsel's failure to challenge the defective information fell below the constitutionally required minimum for effective assistance of counsel and could have served no tactical or strategic purpose.

Ingebretsen suffered prejudice because he unknowingly and unintelligently pled guilty to crimes for which he could have presented a defense and elected to go to trial. Neither the court nor defense counsel informed Ingebretsen that the portrayal must "not have serious literary, artistic, political or scientific value." This was particularly prejudicial with respect to Count I because Ingebretsen took the photographs of S.R. for the purpose of "put[ting] together a portfolio to help her become a model." Ex. 11 at 7. Counsel's deficient performance caused Ingebretsen to plead guilty to Counts I and II while ignorant of the potential defense that any portrayal that occurred had serious artistic value.

Respondents argue Ground Six lacks merit because counsel negotiated a plea deal that allowed Ingebretsen to avoid a significant number of counts for possession of child pornography and he fails to show that there is a reasonable probability that he would have rejected the plea deal had counsel moved to dismiss the State's information. CR 119 at 12-13. Respondents' argument should be rejected. With respect to Count I, had Ingebretsen been adequately informed of every element of the offense, he would have realized that he had a defense to the charge based on the

photographs' artistic value. More important, counsel's statement at sentencing questioning whether the photos on the computer were pornographic demonstrates that counsel did not obtain a favorable deal for Ingebretsen. According to counsel, Ingebretsen had a legitimate defense to all of the possession counts. Thus, it was not favorable for Ingebretsen to plead guilty to avoid those counts when the State's evidence on those counts was questionable.

The Nevada Supreme Court did not specifically analyze either prong of *Strickland* and instead simply affirmed the district court's conclusion that Ingebretsen received effective assistance of counsel. Ex. 89 at 3-4. The court held that the district court's finding was supported by substantial evidence and was not clearly wrong. *Id.* That ruling was unreasonable. Here, the district court found that based on the guilty plea agreement and plea canvass, "defendant made detailed admissions to all of the elements of the relevant offenses." Ex. 87 at 3. The court further found that Ingebretsen was rendered effective assistance of counsel in obtaining a favorable plea. The district court's findings are clearly wrong. First, Ingebretsen could not have made detailed admissions to all of the elements because he was never informed of the all of the elements of Counts I and II. And, as outlined above, Ingebretsen had a significant defense to the possession counts, so the plea deal was not favorable. Therefore, counsel was not effective in negotiating a "favorable plea" and the Nevada Supreme Court's conclusion to the contrary was unreasonable.

Accordingly, Ingebretsen is entitled to relief on Ground Six and the writ should be granted.

IV.

CONCLUSION

For the reasons stated herein and in the Third Amended Petition for Writ of Habeas Corpus, Ingebretsen respectfully requests that this Court grant the Writ of Habeas Corpus or, alternatively, conduct an evidentiary hearing so that his claims may be properly reviewed and determined on their merits.

DATED this 28th day of March, 2016.

Respectfully submitted,
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/s/Jennifer Yim
JENNIFER YIM
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on March 28, 2016, she served a true and accurate copy of the foregoing to the United States District Court, who will e-serve the following addressee:

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

JOHN INGEBRETSEN,

Petitioner,

vs.

JACK PALMER, *et al.*,

Respondents.

Case No. 3:07-cv-00251-LRH-RAM

ANSWER

After ruling on Respondents' motion to dismiss, granting it in part, this Court ordered Respondents to address ground 2 and ground 6 of the third-amended petition on the merits. (ECF No. 116.) For the reasons addressed in the memorandum of points and authorities below, this Court should dismiss ground 2 as procedurally defaulted and deny ground 6 on the merits.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Ingebretsen seeks federal habeas relief from a Nevada judgment of conviction finding him guilty of one count of attempt use of minor in producing pornography, possession of visual presentation depicting sexual conduct of person under 16 years of age, and open or gross lewdness. (ECF No. 87.) In particular, despite the state district court's initial concern that counsel advised Ingebretsen to plead guilty without looking at photographs that provided the underlying basis for counts 1 and 2 of the information, Ingebretsen expressly noted his desire to move forward with sentencing under the guilty plea agreement he entered with the state in order to avoid prosecution for a number of other offenses

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after counsel had time to review the photos and discuss the matter with Ingebretsen. (Exhibit 12 at 3 ("THE COURT: …. And now do you want to withdraw your plea or do you want to proceed? THE DEFENDANT: I want to proceed. THE COURT: All right. And are you guilty of this or not guilty of this? THE DEFENDANT: I'm guilty.").)

Ingebretsen now challenges the validity of his guilty plea, arguing that it was the result of ineffective assistance of counsel. (ECF No. 87 at 15-18, 23-25.) Ingebretsen's allegations are belied by the record and/or completely undermined by factual determinations made by the state courts. Accordingly, for the reasons addressed below, Respondents respectfully request that this Court issue an order dismissing ground 2 as procedurally defaulted and denying ground 6 on the merits.

II. PROCEDURAL BACKGROUND

While investigating a report of sexual abuse of a minor, Las Vegas Metropolitan Police Department learned that Ingebretsen was sexually abusing his stepdaughter and taking lewd photographs of her in the process. (Exhibit 2 at 4-6 (arrest report).) When the investigation revealed that Ingebretsen had admitted to viewing child pornography on the internet, the State conducted a search of the hard drive of a computer owned by Ingebretsen's family and discovered additional images of child pornography that were not attributable to anyone else that had access to the computer. (Exhibit 2 at 5.)

As a result of the foregoing, the State of Nevada filed a criminal complaint in the local justice court charging Ingebretsen with multiple counts of possession of visual presentation depicting sexual conduct of a person under 16 years of age; open or gross lewdness; and child abuse and neglect. (Exhibit 4.) The State twice amended the complaint, ultimately charging Ingebretsen with a single count of use of a minor in production of pornography; fifteen counts of possession of visual presentation depicting sexual conduct of a person under 16 years of age; four counts of open or gross lewdness; and a single count of child abuse and neglect. (Exhibit 6.) But, at the time set for his preliminary hearing, Ingebretsen agreed to unconditionally waive his right to that hearing and agreed to enter a guilty plea to "one count of attempt use of a minor in production of pornography; one count of possession of a visual presentation of a minor; and one count of open and gross lewdness…." (Exhibit 7 at 2.)

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The State then filed an information in the state district court charging Ingebretsen—in accordance with the plea agreement—with single counts of attempt use of minor in production of pornography; possession of visual presentation depicting sexual conduct of a person under 16 years of age; and open or gross lewdness. (Exhibit 8.) The state district court arraigned Ingebretsen on the information and conducted a thorough plea canvass to ensure that Ingebretsen was "in fact, guilty of these crimes." (Exhibit 9 at 7.) That court conducted a full, thorough plea canvass ensuring that Ingebretsen understood the rights he was waiving, that he understood the penalties he was facing, that he and his attorney discussed the nature of the charges and any possible defenses and discussed the individual charges in the information with Ingebretsen, and finally that Ingebretsen read and understood the plea agreement. (Exhibit 9.) The state district court accepted the plea and set the matter for sentencing. (Exhibit 9 at 11.)

At sentencing, the sentencing judge raised a concern about whether Ingebretsen's attorney properly investigated the case because he had not viewed the photographs that gave rise to the charges in the case prior to advising acceptance of the plea. (Exhibit 11 at 11-15.) As a result, the state district court continued the matter. (Exhibit 11 at 15.)

When the parties reconvened with the trial court, defense counsel acknowledged that he had seen the photographs and equivocated about whether the pictures would meet the standard for pornography. (Exhibit 12 at 2.) Nonetheless, while fully aware of the possibility that the images of his stepdaughter may or may not have been deemed unlawful at trial, Ingebretsen insisted on going forward with the plea, knowing that he was avoiding multiple other counts of possession of child pornography related to other images that were found on his computer. (Exhibit 12 at 3-4 ("THE COURT: Is one of the reasons you are pleading guilty to this charge or pled guilty to these charges is to avoid a harsher penalty should you have gone to trial on the original charges. THE DEFENDANT: Yes.").) Accordingly, the state district court noted that Ingebretsen "waived any defects in the plea agreement and waived his right to claim ineffective assistance of counsel," and sentenced him accordingly. (Exhibit 1 at 2; Exhibit 12 at 2-4.)

Ingebretsen later challenged his conviction on appeal, but the Nevada Supreme Court dismissed the appeal, directing Ingebretsen to challenge his plea through a petition for writ of habeas corpus (post-

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conviction). (Exhibit 24.) Ingebretsen did so, arguing that his plea was the result of ineffective assistance of counsel. In that proceeding, Ingebretsen asserted that his case should be dismissed because the State no longer had the evidence that gave rise to the charges in this case. (Exhibit 67.) Additionally, Ingebretsen alleged that counsel was ineffective for not objecting to the fact that the information did not include an element of the offense for attempt use of a minor in production of pornography regarding the definition of a "sexual portrayal," which requires that the image "not have serious literary, artistic, political or scientific value." (Exhibit 30 at 51-52.)

After holding a hearing on the matter of whether the state courts should reverse Ingebretsen's conviction because the state had not preserved the underlying evidence, (Exhibit 71), the state district court denied Ingebretsen's petition, (Exhibit 87). In particular, the state district court made specific findings that: (1) "The Defendant freely and voluntarily entered his plea of guilty via signed Guilty Plea Agreement;" (2) "The Defendant was properly canvassed by the Court as to the consequences of his plea, including the advisement of his constitutional rights and the waiver of such as a result of his guilty plea;" (3) "Based upon the Defendant's Guilty Plea Agreement and plea canvass, the Defendant made detailed admissions to all of the elements of the relevant offenses;" (4) "The Defendant was rendered effective assistance of counsel in obtaining the favorable plea agreement;" (5) "Defense counsel viewed the photographs in question prior to the Defendant's plea and the Defendant admitted that such were obscene and prohibited by law;"[1] and (6) "The photographs in question were not exculpatory in nature." (Exhibit 87 at 3-4.) The state district court then articulated the governing standards for claims of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), and ordered that the petition be denied. (Exhibit 87 at 5-8.)

Ingebretsen appealed the denial of his petition, asserting that the state district court erred in finding the case should not be dismissed because the State allegedly failed to preserve evidence and that his attorney was ineffective because this information did not include a statement that the State would bear the burden of proving Ingebretsen's photographs lacked any "serious literary, artistic, political or

[1] To the extent the record undermines any finding that counsel viewed the photographs prior to entry of the plea, that factual finding is not determinative of the issues in this case: Counsel did view the photographs after entry of the plea, and despite counsel's equivocal position on whether the images in question were pornographic, Ingebretsen declined the state district court's offer to allow him to with draw his plea and insisted on moving forward with sentencing. (Exhibit 12 at 2-4.)

scientific value." (Exhibit 83.) However, the Nevada Supreme Court affirmed the denial of the underlying state petition. (Exhibit 89.) The court did not engage in an explicit analysis of either prong of *Strickland* but merely found that the state district court's finding that Ingebretsen did not receive ineffective counsel was "supported by substantial evidence and is not clearly wrong." (Exhibit 89 at 3-4.)

After the parties litigated a number of procedural issues in this proceeding, this Court ultimately dismissed ground 1, ground 3, ground 4, ground 5, and ground 7 of the third-amended petition. (ECF No. 116 at 8.) This court further reserved ruling on the issue of whether ground 2 should be dismissed as procedurally defaulted, and directed Respondents to address the merits of the underlying claim. (ECF No. 116 at 6-8.) Accordingly, with ground 2 and ground 6 remaining pending at this time, Respondents address those claims below, and respectfully request that this Court issue an order dismissing ground 2 as procedurally defaulted and deny ground 6 on the merits.

III. LEGAL ANALYSIS

In his third-amended petition, Ingebretsen alleges that his plea was the result of ineffective assistance of counsel because (1) counsel did not request to review photographs that gave rise to counts 1 and 2 of the information, and (2) counsel did not object to the lack of a statement in the information that the images must lack "serious literary, artistic, political or scientific value," in order to be a "sexual portrayal." (ECF No. 87 at 15-18, 23-25.) Ingebretsen fails to show he is entitled to relief on these claims.

A. Ground 2 is Procedurally Defaulted

In ground 2, Ingebretsen alleges that his plea to the first count in the information—attempt use of a minor in production of pornography—was the result of ineffective assistance of counsel. In particular, Ingebretsen alleges his attorney was ineffective for failing to investigate the nature of the photographs for count 1 to determine if they were pornographic in nature. (ECF No. 87 at 15-18.) This claim is not a substantial claim of ineffective assistance of counsel that would serve to establish cause for a procedural default under *Martinez v. Ryan*, 132 S.Ct. 1309, 1318-19 (2012), nor has Ingebretsen shown actual prejudice. Accordingly, for the reasons addressed herein, this Court should dismiss ground 2 as procedurally defaulted.

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1. Ineffective assistance of counsel in general

For a habeas petitioner to prevail on a claim of ineffective assistance of counsel, he must demonstrate that his trial counsel's representation fell below an objective standard of reasonableness and that, but for any errors, the results would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A defendant is required to prove both prongs of the *Strickland* test before relief can be granted. *United States v. Sanchez-Cervantes*, 282 F.3d 664, 672 (9th Cir. 2002) (citation omitted). "Without proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction 'resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable.'" *Bell v. Cone*, 535 U.S. 685, 695 (2002) (citation omitted).

To prove the first prong, the challenger bears the burden of showing that counsel's errors were so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Strickland*, 466 U.S. at 687. Review of an attorney's performance must be "highly deferential," and must adopt counsel's perspective at the time of the challenged conduct to avoid the "distorting effects of hindsight." *Id*. at 689. A court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id*. (citation omitted); *see also Beardslee v. Woodford*, 358 F.3d 560, 569 (9th Cir. 2004) (citation omitted). It is inappropriate to focus on what counsel might have done better, rather than focusing on the reasonableness of what counsel did. *Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 1998).

As to prejudice, it is not enough to show that the errors had some conceivable effect on the outcome of the proceedings. Rather, the errors must be so serious they deprive the defendant of a fair trial, "a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 693. The likelihood of a different result must be substantial, not just conceivable. *Id*. at 693. When a petitioner entered a guilty plea, to establish prejudice he must show he would not have entered his guilty plea and insisted on going to trial in the absence of counsel's alleged deficient performance. *Hill v. Lockhart*, 474 U.S. 52 (1985) (addressing *Strickland* standard in the context of a guilty plea); *Bragg v. Galaza*, 242 F.3d 1082, 1088 (9th Cir. 2001).

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2. Ground 2 is not a substantial claim of ineffective assistance of counsel

Ground 2 alleges that counsel was ineffective for failing to investigate the nature of the photographs Ingebretsen took of his step-daughter to determine whether they were pornographic in nature. (ECF No. 87 at 15-18.) For the reasons addressed below, Ingebretsen fails to show that counsel's investigation was insufficient, and he fails to show that he suffered actual prejudice.

a. Ingebretsen has not shown that his attorney's conduct was objectively unreasonable

Counsel does not have a duty to complete an exhaustive investigation of every possible lead; counsel has a duty to conduct an investigation based on reasoned judgment in light of the facts of the case presented to them. *Bragg*, 242 F.3d at 1088. Here, there was no need to conduct further investigation. As the record clearly bears out, the plea in this case was the result of a negotiation to avoid multiple charges on multiple other counts: there was no dispute that Ingebretsen had a number of images of child pornography on his computer, and he pleaded guilty to avoid criminal liability for possessing those images. (Exhibit 11 at 13 ("We don't dispute that there was a computer and that had child porn on it…."); Exhibit 12 at 3-4 (acknowledging that the decision to plead guilty was at least in part based on a desire to avoid prosecution on the charges the state withdrew as a result of the plea agreement.) Ingebretsen's admissions with regard to those images, and his desire to avoid criminal liability for possessing them foreclosed the need for defense counsel to conduct any further investigation in this matter. To the contrary, as the state district court found, counsel effectively negotiated a very favorable plea deal for his client. (Exhibit 87 at 3.) Accordingly, Ingebretsen fails to satisfy the deficient performance prong of *Strickland*.

b. Ingebretsen has not shown actual prejudice under the *Hill* standard for ineffective assistance of counsel claims made when a petitioner entered a guilty plea

Additionally, Ingebretsen must make a showing of actual prejudice, which in this context requires Ingebretsen to show that counsel failed to uncover something through his investigation that gives rise to a reasonable likelihood that Ingebretsen would have rejected the plea agreement and insisted on going to trial. Ingebretsen's failure to make this showing is overwhelming. *Hill*, 474 U.S. at 59; *Bragg*, 242 F.3d at 1088.

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First, there is no reasonable question that Ingebretsen was familiar with the contents of the photographs of his stepdaughter: he took the photographs himself, and he knew that they were improper when he entered his plea. (Exhibit 9 at 7-9.) But, even assuming the photographs of Ingebretsen's stepdaughter could have been deemed lawful—a decision that would have been in the hands of a judge or jury had Ingebretsen not waived his right to go to trial—Ingebretsen obtained a substantial benefit as a result of the guilty plea agreement, avoiding fourteen additional counts of possession of child pornography, three additional counts of open or gross lewdness, and a count of child abuse or neglect as a result of his plea agreement with the State. (*Compare* Exhibit 6, *with* Exhibit 8.) And, Ingebretsen expressly acknowledged that his decision to plead guilty was to avoid prosecution on the additional charges. (Exhibit 12 at 3-4.) That a petitioner pleads guilty to a fictional charge in order to avoid prosecution on other offenses does not render his plea involuntary; to the contrary, it demonstrates he made a rationale choice to waive his right to a trial on the original charges to avoid the possibility of receiving a greater punishment, which is constitutionally permissible. *See, e.g., North Carolina v. Alford*, 400 U.S. 25, 31 (1970) (a valid guilty plea "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant"); *id.* at 37 "[W]hile most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty"); *id.* at 39 ("The States in their wisdom…may prohibit the practice of accepting pleas to lesser included offenses under any circumstances. But this is not the mandate of the Fourteenth Amendment of the Bill of Rights." (footnote omitted)).

Accordingly, Ingebretsen fails to show a reasonable likelihood that further investigation by counsel would have resulted in Ingebretsen insisting on going to trial. Quite to the contrary, when defense counsel acknowledged that the issue of whether those images would satisfy the elements of the offense, Ingebretsen expressly insisted on going forward with the negotiation. (Exhibit 12 at 2-4.) As a result, ground 2 lacks merit, and should be dismissed as procedurally defaulted because it is not a substantial claim of ineffective assistance of counsel.

3. Ingebretsen fails to show actual prejudice

Even assuming this Court were to find Ingebretsen could satisfy the "substantial claim" standard for showing cause under *Martinez*, he must also show actual prejudice to overcome his default. As to

prejudice, the petitioner bears "the burden of showing not merely that the errors [complained of] constituted a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire [proceeding] with errors of constitutional dimension." *White v. Lewis*, 874 F.2d 599, 603 (9th Cir. 1989) (citation omitted). Ingebretsen fails to meet this standard: for the same reasons Ingebretsen fails to show his claim of ineffective assistance of counsel in not substantial, he fails to show actual prejudice. Accordingly, because Ingebretsen has not shown actual prejudice, ground 2 should be dismissed as procedurally defaulted.

B. Ground 6 is Without Merit

In ground 6, Ingebretsen alleges that his plea was the result of ineffective assistance of counsel because counsel failed to object to the fact that the information did not include a statement that the images in question must lack "serious literary, artistic, political or scientific value," in order to be considered a "sexual portrayal." (ECF No. 87 at 23-25.) This claim, which is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), is without merit and should be denied accordingly.

1. The AEDPA standard

This action is governed by AEDPA, which limits the authority of federal courts to grant habeas corpus relief to a state prisoner except "where there is no possibility fair-minded jurists could disagree that the state court's decision conflicts with [Supreme Court] precedents." *See Harrington v. Richter*, 562 U.S. 86, 102 (2011); *see also Johnson v. Williams*, 133 S. Ct. 1088 (extending *Harrington*'s presumption of a denial on the merits to cases with reasoned decisions); *Early v. Packer*, 537 U.S. 3, 8 (2003) (acknowledging that 28 U.S.C. § 2254(d) "does not require citation of our cases—indeed, it does not even require *awareness* of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." (emphasis original)).

In particular, 28 U.S.C. § 2254(d) states:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
> (1) Resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

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> (2) Resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

And, 28 U.S.C. § 2254(e)(1) states:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

In light of this deferential standard, before a state prisoner can receive habeas corpus relief from a federal court, the "state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law *beyond any possibility for fair-minded disagreement*." *Id.*, 562 U.S. at 102-03 (emphasis added). This heightened standard reflects the view that habeas corpus is reserved as "'a guard against *extreme malfunctions* in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979)) (emphasis added); *see also id.* ("If [the AEDPA] standard is difficult to meet, that is because it was meant to be.").

The phrase "clearly established Federal law" within 28 U.S.C. § 2254(d)(1) "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. at 412. In other words, "clearly established Federal law" under 28 U.S.C. § 2254(d)(1) is the governing principle or principles set forth by the Supreme Court at the time the state court renders its decision. *Id.* at 405; *see also Parker v. Matthews*, __ U.S. __, 132 S. Ct. 2148, 2155-56 (2012) (acknowledging that circuit precedent is not clearly established federal law). Additionally, the application of 28 U.S.C. § 2254(d)(1) is limited to review of the record presented to the state court at the time it renders its decision on the merits. *Cullen v. Pinholster*, __U.S. __, 131 S. Ct. 1388 (2011).

A state decision is "contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court *and* nevertheless arrives at a result different from [the Supreme Court's] precedent."

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Taylor, 529 U.S. at 405-06 (emphasis added); *see also Bell v. Cone*, 535 U.S. 685, 694 (2002). A petitioner is not entitled to relief under 28 U.S.C. § 2254(d)(1) simply because the state court fails to cite Supreme Court cases applying the correct clearly established federal law. *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003). Indeed, AEDPA does not require state courts to be aware of the controlling Supreme Court cases, so long as the reasoning and result set forth by the state court does not contradict existing Supreme Court precedent. *Early v. Packer*, 537 U.S. 3, 8 (2003). In other words, review under the "contrary to" clause of 28 U.S.C. § 2254(d)(1) looks at whether the state courts' application of some legal principle other than that required by clearly established Supreme Court precedent resulted in the state court reaching a conclusion that no reasonable jurist could reach when applying the appropriate clearly established Supreme Court precedent to the same set of facts.

"Under the 'unreasonable application' clause, a federal court may grant a writ if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Taylor*, 529 U.S. at 413. The "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous. *Id*. at 410. The state court's application of clearly established law must be objectively unreasonable. *Id*. at 409. And, claims with deferential constitutional standards are given double deference under AEDPA. *Pinholster*, 131 S. Ct. at 1403 (claims of ineffective assistance of counsel are accorded double deference under AEDPA); *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005) (acknowledging that AEDPA cloaks the deferential standard for reviewing a claim of sufficiency of the evidence under *Jackson v. Virginia*, 443 U.S. 307 (1979), "with an additional layer of deference").

Furthermore, "[w]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Harrington*, 562 U.S. at 98; *see also Johnson*, 133 S. Ct. 1088. Under 28 U.S.C. § 2254(d)'s "highly deferential standard for evaluating state-court rulings demands that state court decisions are to be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). And, if habeas relief depends upon the resolution of an open question in Supreme Court jurisprudence, habeas relief is precluded. *Carey v. Musladin*, 549 U.S. 70, 76-77 (2006); *see also White v. Woodall*, __ U.S. __, 134 S.Ct. 1697 (2014).

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Finally, 28 U.S.C. § 2254(d)(2) permits a petitioner to challenge any factual findings made by the state courts; however, "'[t]he question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold.'" *Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012) (quoting *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007)). To obtain relief under 28 U.S.C. § 2254(d)(2), the petitioner must convince the federal court "that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record." *Id.* (quoting *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004)) (internal quotations omitted). Additionally, any factual findings made by the Nevada courts are entitled to a presumption of correctness under 28 U.S.C. § 2254(e)(1).

2. Ingebretsen fails to show that the denial of ground 6 was objectively unreasonable

To obtain relief on ground 6, Ingebretsen must show that the Nevada Supreme Court's denial of relief on the *Strickland* claim raised in ground 6 was objectively unreasonable, which is a doubly deferential review. *Burt v. Titlow*, 134 S.Ct. 10, 13 (2013). Ground 6 alleges that counsel was ineffective for failing to object to the lack of a statement in the information that the State would have to carry the burden of proving the images that gave rise to counts 1 and 2 of the information lacked "serious literary, artistic, political or scientific value." (ECF No. 87 at 23-25.)

First, Ingebretsen fails to show that counsel's performance was deficient: counsel negotiated a plea deal that allowed Ingebretsen to avoid a significant number of counts for possession of child pornography, and Ingebretsen admitted his own guilt. (*Compare* Exhibit 6, *with* Exhibit 8; *see also* Exhibit 2.) As a result, it was not objectively unreasonable for counsel to negotiate a plea. *See, e.g., Premo v. Moore*, 562 U.S. 115, 125 (2011) ("The art of negotiation is at least as nuanced as the art of trial advocacy, and it presents questions farther removed from immediate judicial supervision. There are, moreover, special difficulties in evaluating the basis for counsel's judgment: An attorney often has insights borne of past dealings with the same prosecutor or court, and the record at the pretrial stage is never as full as it is after a trial."). Accordingly, Ingebretsen fails to show that it was objectively unreasonable the Nevada Supreme Court to find that Ingebretsen failed to show it was objectively unreasonable for counsel to advise Ingebretsen to plead guilty in the face of the information lacking a

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statement that the State was required to prove that the images lacked "serious literary, artistic, political or scientific value."

Second, Ingebretsen fails to show there is a reasonable probability he would have rejected the plea agreement and insisted on going to trial if counsel had objected to the information lacking a statement that the State would be required to carry the burden of showing Ingebretsen's photographs lacked "serious literary, artistic, political or scientific value." *See Hill*, 474 U.S. at 59 (regarding the *Strickland* prejudice standard for guilty pleas). The state district court continued the sentencing hearing to allow defense counsel to review the photographs, and although counsel was equivocal about whether those pictures would be considered pornographic—acknowledging that the determination of whether the photographs were pornographic would be a factual issue to be decided at trial—Ingebretsen insisted on going forward. (Exhibit 12 at 2-4.) Furthermore, in addition to the overwhelming evidence that Ingebretsen insisted on going forward with the negotiation after his attorney equivocated on whether a finder of fact would find the photographs to be pornographic, the state district court found that "[t]he photographs in question were not exculpatory in nature." (Exhibit 83 at 4.)

In ruling on the claim, the Nevada Supreme Court and the state district court cited to the correct legal standards for evaluating Ingebretsen's claim. (Exhibit 87 at 5-7; Exhibit 89 at 3-4.) Furthermore, the factual findings of the state district court—which are entitled to a presumption of correctness—undermine Ingebretsen's claim on both prongs of *Strickland*. (Exhibit 87 at 3.) Accordingly, Ingebretsen fails to show that the Nevada Supreme Court's denial of relief "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement.

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IV. CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court issue an order dismissing ground 2 as procedurally defaulted and denying ground 6 on the merits.

RESPECTFULLY SUBMITTED this 11th day of January, 2016.

ADAM PAUL LAXALT
Attorney General

By: /s/ Jeffrey M. Conner
JEFFREY M. CONNER
Assistant Solicitor General

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 11th day of January, 2016, I served a copy of the foregoing ANSWER, by U.S. District Court CM/ECF electronic filing to:

JONATHAN M. KIRSHBAUM
Assistant Federal Public Defenders
411 East Bonneville Avenue, Suite 250
Las Vegas, Nevada 89101

/s/ Bonnie L. Hunt

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JOHN INGEBRETSEN, Petitioner, vs. JACK PALMER, et al., Respondents.	3:07-CV-00251-LRH-RAM **THIRD AMENDED PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY PURSUANT TO 28 U.S.C. § 2254**

COMES NOW, the Petitioner, John Ingebretsen ("Ingebretsen"), by and through his attorney of record, Paul G. Turner, Assistant Federal Public Defender, and hereby files this Third Amended Petition for Writ of Habeas Corpus by a Person in State Custody Pursuant to 28 U.S.C. § 2254.[1]

The Petition alleges:

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[1] The Exhibits referenced in this Third Amended Petition are identified as "Ex." Petitioner reserves the right to file supplemental exhibits as needed and relevant.

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PETITION[2]

I.

PROCEDURAL BACKGROUND

1. Ingebretsen plead guilty and was convicted of Attempt Use of Minor in Producing Pornography (Count I), Possession of Visual Presentation Depicting Sexual Conduct of Person Under 16 Years of Age (Count II), and Open or Gross Lewdness (Count III). Ingebretsen was sentenced as follows: Count I - to a maximum term of 120 months with a minimum parole eligibility of 36 months; Count II - a maximum term of 48 months with a minimum parole eligibility of 12 months to be served concurrent to Count I; and Count III - to 12 months to be served concurrent with Counts I and II. (Ex. 13.) Ingebretsen has expired his prison sentences and is currently residing in Las Vegas, Nevada, serving his sentence of lifetime supervision which, given the nature of his conviction and Nevada's adoption of the Adam Walsh Act, requires him to register as a Tier 3 sex offender as of July 1, 2008.

2. A Judgment of Conviction in the case entitled State of Nevada v. John J. Ingebretsen, Case No. C175709, was entered on August 20, 2001. (Id.)

3. On May 29, 2001, Ingebretsen unconditionally waived his right to a preliminary hearing. (Ex. 7.) He was present with counsel, Deputy Public Defender Mark Cichoski, and the hearing was held before the Honorable James M. Bixler in the Justice Court in and for Clark County, Nevada. (Id.) Attorney Cichoski stated that the matter had been negotiated and that the State retained the right to argue at the time of sentencing. (Id.)

4. On May 30, 2001, the State filed an Information in the Eighth Judicial District Court in and for Clark County, Nevada, charging Ingebretsen with Attempt Use of a Minor in Producing Pornography, a violation of NRS 200.700, 200.710, 200.750, 193.330 (Count I); Possession of Visual Presentation Depicting Sexual Conduct of Person Under Sixteen Years of Age, a violation of NRS 200.700, 200.730 (Count II); and Open or Gross Lewdness, a violation of NRS 201.210 (Count III). (Ex. 8.)

5. The plea hearing took place on June 4, 2001, before the Honorable Lee Gates.

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[2] Counsel has sent Petitioner a verification and acknowledgment of the Third Amended Petition for Petitioner's signature and will file that pleading with this Court upon receipt from Petitioner.

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Ingebretsen was present with counsel. (Ex. 9.) The Guilty Plea Agreement was signed and filed in open court that same day. (Ex. 10.)

6. The sentencing hearing took place on August 8, 2001, before Judge Gates. (Ex. 11.) Ingebretsen was present with counsel Cichoski. During this hearing the court had concerns about counsel allowing his client to plead guilty to charges that he was not certain his client committed. The following colloquy occurred:

> MR. CICHOSKI: . . . As you heard from the mother, what was happening was he was taking pictures for modeling or something like that and we don't have those picture. I don't know what happened to the pictures. Nobody has ever been able to see them to know if they are pornographic or not except that he admitted, he pled guilty to Attempt Use of Minor in Production of Pornography.
>
> THE COURT: Were they pornographic, Mr. Kephart?
>
> MR. KEPHART Yes, your Honor. We don't turn this type of contraband over to the defendants.
>
> THE COURT: They have a right to see evidence. You have heard of the Constitution, man?
>
> MR. KEPHART: There's a law, a specific statute in Nevada that will not allow them to have them because they possess them.
>
> THE COURT: The lawyer can look at the evidence.
>
> MR. CICHOSKI: Mr. Herndon told me at the time of preliminary that the photos did not exist.
>
> THE COURT: Well, why would you plead your client to something then if you don't think he was guilty of it? I don't know what the case says. You plead the guy to possession of pornography. You didn't see that?
>
> MR. CICHOSKI: Maybe we should have investigated that. Maybe we should set that over.
>
> MR. KEPHART: I would bring in and show you the photos.
>
> THE COURT: Why would you have your client plead guilty if you didn't think it was pornographic?
>
> MR. CICHOSKI: Your Honor, it was my understanding that there's no law in the State of Nevada as to whether pictures, whether the lack of pictures, whether a person can be convicted if there is no pictures. But there is some law in other states where even though there is no pictures, guys get convicted.
>
> THE COURT: That's not the point. Oh God.

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> MR. CICHOSKI: That's what I was resting with, your Honor, that if the Court decided even though there's no pictures he can still be convicted - -
>
> THE COURT: The court has not decided anything. You guys came in here and entered a guilty plea. What am I supposed to do? I'm just - - you're telling me he pled guilty but you're not even sure it was pornographic?
>
> MR. CICHOSKI: He admits 15 counts of possession of controlled pornography, all one-to-six's.
>
> THE COURT: I know, but you tell me it probably was - -
>
> MR. CICHOSKI: There was a computer which had pornography on it. We don't dispute that there was a computer and that had child pron on it but you tell me he is also charged with taking pornographic pictures of her which to my understanding do not exist and I have never seen.
>
> MR. KEPHART: We don't have those, the ones he was charged with, the pornography in the computer.
>
> MR. CICHOSKI: Count one charges him with taking pictures with Sara.
>
> MR. KEPHART: Using picture of Sara. You don't have to have them for that but by th possession, he has them and he possessed child pornography.
>
> THE COURT: Oh, God. And those, the photos, it says in the PSI - -
>
> MR. KEPHART: You want to pass it for us to bring them in so the Judge can see what he had?
>
> MR. CICHOSKI: They have computer pictures. The pictures he is accused of taking of Sara do not exist.
>
> THE COURT: So what is your point?
>
> MR. CICHOSKI: I was just pointing out, your Honor, that we don't have those to decide whether those were pornographic or not.
>
> THE COURT: Why would you have your client plead guilty and come in and tell me they are not pornographic? You said he pled guilty to them but then they weren't pornographic. I don't understand that.
>
> MR. CICHOSKI: Because other jurisdictions say that even if the State doesn't have that - -
>
> THE COURT: I know what other jurisdictions say but you are the man's lawyer.

(Id. at 12-14.) The sentencing hearing was continued so trial counsel could have an opportunity to review the evidence against his client.

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7. The sentencing hearing continued on August 15, 2001. (Ex. 12.) Cichoski informed the court that he did see the photographs but the question as to whether they were pornographic or not was for a judge or jury to decide, and that Ingebretsen did not want to withdraw from the negotiations and that he was ready to be sentenced. (Id. at 2.) Ingebretsen's sentence is set forth above in the first paragraph. The Judgment of Conviction was entered on August 20, 2001. (Ex. 13.)

DIRECT APPEAL

8. Ingebretsen's proper person Notice of Appeal was timely filed on August 23, 2001. (Ex. 14.) The Nevada Supreme Court docketed this appeal as Case No. 38391.

9. On December 3, 2001, Ingebretsen, through counsel Cichoski, filed Appellant's Fast Track Statement in the Nevada Supreme Court. (Ex. 21.) The following assignments of error were raised:

> I. THE DEFENDANT'S PLEA WAS NOT FREELY AND VOLUNTARILY ENTERED INTO DUE TO THE COURT'S FAILURE TO CANVASS THE DEFENDANT CONCERNING THE 40 PERCENT RULE.
>
> II. THE DEFENDANT'S PLEA OF GUILTY WAS NOT FREELY AND VOLUNTARILY ENTERED INTO DUE TO THE COURT'S FAILURE TO ADEQUATELY EXPLAIN THE CONSEQUENCES OF LIFETIME SUPERVISION FOR A SEXUAL OFFENDER.

10. The Nevada Supreme Court filed its Order Dismissing Appeal in Case No. 38391 on January 23, 2002. (Ex. 24.) Remittitur issued on February 19, 2002. (Ex. 27.)

STATE POST-CONVICTION PETITION (2002-2007)

11. On July 8, 2002, Ingebretsen, in proper person, filed a Petition for Writ of Habeas Corpus (Post-Conviction). (Ex. 30.) The following assignments of error were raised in his petition:

> I. PETITIONER'S PLEA WAS NOT KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY ENTERED, AS THE PROSECUTION KNOWINGLY, WITHHELD MATERIAL AND EXCULPATORY EVIDENCE, A "BRADY" VIOLATION, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE NEVADA AND U.S. CONSTITUTION.
>
> II. PETITIONER'S PLEA WAS NOT KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY ENTERED, AS IT WAS A PRODUCT OF COERCION, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENT TO THE NEVADA AND UNITED STATES CONSTITUTION.

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III. PETITIONER'S PLEA WAS NOT KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY ENTERED DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO PROPERLY INVESTIGATE AND OTHER CUMULATIVE ERRORS, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENT TO THE NEVADA AND U.S. CONSTITUTION.

A. FAILURE TO PROPERLY AND THOROUGHLY INVESTIGATE

B. MOTION FOR DISCOVERY

C. FAILURE TO CONDUCT PSYCHOLOGICAL EXAMINATION

D. FAILURE TO PERSONALLY INTERVIEW WITNESSES

E. FAILURE TO FILE PRE-TRIAL MOTION

IV. THE PETITIONER'S 5TH, 6TH, 8TH, 14TH AMENDMENT CONSTITUTION RIGHTS WERE VIOLATED BY THE COURT/JUDGE NOT TELLING HIM THAT HE WOULD BE ON A "LIFETIME" SUPERVISION WITH THE DEPT OF PAROLE AND PROBATION AS A RESULT OF HIS ENTERING A PLEA OF GUILTY, CAUSING HIM TO ENTER A PLEA THAT WAS UNKNOWING AND VERY UNINTELLIGENT.

V. THE PETITIONER'S 6TH AMENDMENT CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED.

VI. THE PETITIONER'S 1ST, 5TH, 6TH, 8TH, 14TH AMENDMENT CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE JUDGE/COURT 1) ALLOWING PETITIONER TO "PLEAD GUILTY" TO WHAT AND IS NOT A CRIME, 2) ACCEPTING AN INVALID/ILLEGAL GUILTY PLEA AND MEMORANDUM, 3) NOT PROPERLY CANVASSING THE PETITION ON HIS PLEA, 4) NOT VIEWING ANY PHOTO/IMAGE/EVIDENCE.

VII. THE PETITIONER'S 1ST, 5TH, 6TH, 8TH, 14TH AMENDMENT OF HIS CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE COURT/ JUDGE NOT PROTECTING AND LETTING THE PETITIONER ABANDON HIS FIRST AMENDMENT RIGHTS UNKNOWINGLY.

VIII. THE PETITIONER'S 5TH, 6TH, 8TH, 14TH AMENDMENT CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE INDICTMENT/INFORMATION BEING ILLEGAL, INVALID AND/OR UNCONSTITUTIONAL.

IX. PETITIONER'S PLEA WAS NOT KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY ENTERED, AS COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE AMENDED INFORMATION AND THE LIFETIME SUPERVISION WHICH THE COURT FAILED TO CANVASS PETITIONER ON, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE NEVADA AND U.S. CONSTITUTION.

12. On October 17, 2002, Travis E. Shetler was appointed to represent Ingebretsen in his state habeas proceedings. (Ex. 40.)

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13. Ingebretsen, through counsel Shetler, filed A Motion to Withdraw Guilty Plea on December 19, 2002 (Ex. 41). Judge Gates held a hearing on this motion on March 5, 2003. (Ex. 43.) Ingebretsen was present with counsel Shetler. (Id.) The motion was ultimately denied and the written order was filed on March 6, 2003. (Ex. 44.)

14. Ingebretsen filed a proper person Motion to Discharge Attorney on March 4, 2004 (Ex. 45), which the trial court granted on March 23, 2004 (Ex. 47).

15. On March 22, 2004, Ingebretsen, in proper person, filed a Notice of Appeal concerning the denial of his state post-conviction petition. (Ex. 46.) On August 26, 2004, the Nevada Supreme Court, under Case No. 43051, dismissed this appeal once it determined that the district court had not entered a final order resolving the proceedings initiated by appellant's July 8, 2002, habeas corpus petition. (Ex. 55 at 2.)

16. On August 30, 2004, Ingebretsen filed a proper person Petition for Writ of Mandamus with the Nevada Supreme Court under Case No. 43843. (Ex. 57.) The Nevada Supreme Court entered its Order Denying Petition on September 22, 2004. (Ex. 61.)

17. The district court appointed Christopher R. Oram to represent Ingebretsen in his Petition for Writ of Habeas Corpus on December 3, 2004. (Ex. 63.)

18. Oram filed a Motion for In Camera Review of Photographs on March 14, 2005. (Ex. 64.) At the May 9, 2005, hearing on this motion, counsel learned from the State that the CD that contained the hard drive of the defendant's computer was damaged, cracked in half and the hard drive was returned to the defendant's family so they do not have any photographs to provide to defense counsel. (Ex. 65 at 3, ll. 13-23.) The court ordered additional briefing concerning this issue. (Id.; Ex. 66.)

19. On August 12, 2005, Oram filed a Supplemental Motion in Support of Defendant's Writ of Habeas Corpus (Post-Conviction) and Motion to Dismiss. (Ex. 67.) He raised the following argument:

> I. MR. INGEBRETSEN'S CASE SHOULD BE DISMISSED AS THE STATE HAS INEXPLICABLY LOST OR DESTROYED THE PHOTOGRAPHS, THE SUBJECT OF WHICH IS THE ALLEGED EVIDENCE OF GUILT IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

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20. On February 27, 2006, Judge Gates held a hearing on the state petition at which Ingebretsen was present with attorney Oram. (Ex. 71.) After hearing arguments of counsel, Judge Gates took the matter under advisement. (Id.) The written order summarily denying the state petition was filed on May 24, 2006. (Ex. 77.)

21. On April 10, 2006, Ingebretsen timely filed a Notice of Appeal. (Ex. 72.) The Nevada Supreme Court docketed this appeal as Case No. 47114.

22. On August 10, 2006, attorney Oram filed a Fast Track Statement (Ex. 83) with the Nevada Supreme Court raising the following issues:

> I. MR. INGEBRETSEN'S CASE SHOULD BE DISMISSED AS THE STATE HAS INEXPLICABLY LOST OR DESTROYED THE PHOTOGRAPHS, THE SUBJECT OF WHICH IS THE ALLEGED EVIDENCE OF GUILT IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.
>
> II. THE DISTRICT COURT ERRED IN DENYING MR. INGEBRETSEN'S REQUEST FOR AN EVIDENTIARY HEARING.
>
> III. MR. INGEBRETSEN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND HE SHOULD BE PERMITTED TO WITHDRAW HIS PLEA AS THE PLEA AGREEMENT DOES NOT STATE A CRIME.

23. On October 25, 2006, the Nevada Supreme Court issued an Order of Limited Remand for the purposes of allowing the district court to comply with NRS 34.830(1) by preparing findings of fact, conclusions of law and order. (Ex. 86.) The district court complied on November 16, 2006, by entering its Findings of Fact, Conclusions of Law and Order. (Exs. 87 & 88.)

24. The Nevada Supreme Court entered its Order of Affirmance on January 9, 2007. (Ex. 89.) Remittitur issued on February 6, 2007. (Ex. 91.)

FEDERAL ACTION

25. Ingebretsen mailed his Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 Petition By a Person in State Custody in or around May 23, 2007. His First and Second Amended Petitions were filed July 14, 2008 (CR 31) and March 19, 2009 (CR 44), respectively. The instant Third Amended Petition follows.

STATE POST-CONVICTION PETITION (2008-2010)

26. On November 26, 2008, Ingebretsen filed a proper person petition for writ of habeas

corpus in the state district court, State of Nevada v. John Ingebretsen, Case No. C175709 (Ex. 93)[3] wherein he alleged that the lifetime supervision agreement's conditions (see Ex. 92) violate his due process rights under the United States Constitution and the Nevada Constitution and his right to protection from *ex post facto* laws and the impairment of contracts. He further asserts "[t]hey are also unconstitutional to the extent they seek to implement provisions of the Adam Walsh federal legislation against petitioner[,]" Ex. 93, p. 12, ll. 2-4, and answers Question 17 of Nevada's post-conviction petition form as follows:

> 17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? If so, identify: **Petitioner has asserted in his federal petition that Nevada's implementation of the Adam Walsh federal legislation was unconstitutional.**

27. Following the state's response (Ex. 94), Ingebretsen's reply (Ex. 95) and a hearing (Ex. 96) on February 20, 2009, the state district court entered its Findings of Fact, Conclusions of Law and Order denying the petition. Ex. 97. Ingebretsen timely appealed the denial (Ex. 102), and the Nevada Supreme Court docketed the appeal as Case No. 53464.

28. On February 4, 2010, the Nevada Supreme Court affirmed the district court's denial of the state petition. Ex. 98. Ingebretsen thereafter filed a Petition For Rehearing (Ex. 99) which was denied April 7, 2010 (Ex.100), remittitur issuing May 3, 2010 (Ex. 101).

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[3] Supplemental exhibits 93-103 have been contemporaneously submitted to the Court by motion to expand the record. The previously filed exhibits (1-92) are found at CR 32-34. Supplemental Ex. 93 was previously attached to the opposition to motion to dismiss (CR 55) as "Ex. B."

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II.

GROUNDS FOR RELIEF

GROUND ONE

INGEBRETSEN'S GUILTY PLEA TO COUNTS I AND II WAS INVOLUNTARY IN VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW BECAUSE (1) HE NEVER SAW THE PHOTOGRAPHS UPON WHICH THE CHARGE WAS BASED AND (2) THE TRIAL COURT IN ITS PLEA CANVASS FAILED TO EXPLAIN THE ELEMENTS OF THE CRIME CHARGED.

Statement of Exhaustion: This claim was raised on appeal of the denial of petitioner's state petition. See Ex. 83.

1. Ingebretsen was arrested on May 8, 2001, (Ex. 2) and pled guilty less than a month later on June 4, 2001 (Ex. 9 & 10).

2. In Count I of the Information (Ex. 8) the state asserted that Ingebretsen "knowingly attempt[ed] to use . . . a minor . . . to be the subject of a sexual portrayal, to-wit: by the said Defendant posing the said [minor] in a variety of sexually provocative clothes and positions and then taking sexually suggestive photographs of her, attempting to produce a pornographic performance that appealed to the Defendant's prurient interest in sex" in violation of Nev. Rev. Stat. §§ 200.710 and 200.700. Section 200.710 states in pertinent part:

> **200.710.** Unlawful to use minor in producing pornography or as subject of sexual portrayal in performance
>
> . . . . .
>
> 2. A person who knowingly uses . . . a minor to be the subject of a "sexual portrayal in a performance is guilty of a category A felony and shall be punished as provided in NRS 200.750 . . . .

§ 200.710(2)(emphasis added). In Count II the state asserted that Ingebretsen possessed a photograph of a "sexual portrayal" or of "sexual conduct." Ex. 8. "Performance" includes a "photograph," and "sexual portrayal" means "the depiction of a person in a manner which appeals to the prurient interest in sex and which does not have serious literary, artistic, political or scientific value." Nev. Rev. Stat. § 200.700(4).

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3. At the time of Ingebretsen's arrest the police seized certain photographs and the computer he had been using, which property remained in the state's exclusive control up to the time of Ingebretsen's guilty plea. On or about June 4, 2001, Ingebretsen signed a Guilty Plea Agreement wherein, among other things, he agreed to plead guilty to Count I. See Ex. 10. At a June 4, 2001, plea hearing the state court accepted Ingebretsen's plea. See Ex. 9. When the parties reconvened for sentencing on August 8, 2001, the court discovered that neither counsel nor Ingebretsen had seen the specific photographs upon which the Count I charge was based.

> MR. CHICOSKI [defense counsel] . . . As you heard from the mother, what was happening was that he was taking pictures for modeling or something like that and we don't have those pictures. I don't know what happened to the pictures. Nobody has ever been able to see them to know if they are pornographic or not except that he admitted, he pled guilty to Attempt Use of Minor in Production of Pornography.

Ex. 11, p. 11, ll. 11-17 (emphasis added). The state thereafter revealed that, based on a state statute forbidding the possession of pornographic materials, it had a policy of not revealing such factual evidence to the defense.

> MR. KEPHART [the prosecutor] . . . We don't turn this type of contraband over to the defendants.
>
> THE COURT: They have a right to see evidence. You have heard of the Constitution, man?
>
> MR. KEPHART: There's a law, a specific statute in Nevada that will not allow them to have them because they possess them.

Ex. 11, p. 11, 19-25. A few year's later the state's policy was found to be unconstitutional.

> Because nothing in NRS 174.235 or NRS 200.710 to 200.735 precludes child pornography from being copied for the purpose of defending criminal charges, we hold that the district court did not abuse its discretion in ordering the State to provide Epperson defendants with a copy of the videotape to adequately prepare their defense.
>
> Additionally, as the California court noted, denying defense counsel copies of the child pornography hinders the defendant's right to effective assistance of counsel. The Epperson defendants' constitutional rights trump any prohibition of NRS 200.710 to 200.735. Therefore, we follow California and Arizona an allow defense counsel to have a copy of the videotape, with certain specific restrictions[, e.g.]. . .

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> (1) the defendant cannot possess a copy of the videotape; however; the defendant may view it with counsel in preparing the defense;

State v. Second Judicial Dist. Ct., 89 P.3d 663, 668 (Nev. 2004) (emphasis added).

4. The state judge was shocked that a lawyer would engage in the process of pleading his client guilty while not having seen the evidence upon which such guilt was purportedly based.

> THE COURT: Well, why would you plead your client to something then if you don't think he was guilty of it? I don't know what the case says. You plead the guy to possession of pornography. You didn't see that?
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> MR. CICHOSKI: Maybe we should have investigated that. Maybe we should set that over.
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> MR. KEPHART: I would bring in and show you the photos.
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> THE COURT: Why would you have your client plead guilty if you didn't think it was pornographic?
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> MR. CICHOSKI: Your honor, it was my understanding that there's no law in the State of Nevada as to whether pictures, whether the lack of pictures, whether a person can be convicted if there is no pictures. But there is some law in other states where even though there is no pictures, guys get convicted.
>
> THE COURT: That's not the point. Oh God.

Ex. 11, p. 12, ll. 4-20.

5. It was generally agreed that the pictures supporting the Count I and II charges did not exist.

> MR. CICHOSKI: There was a computer which had pornography on it. We don't dispute that there was a computer and that had child porn on it but you tell me he is also charged with taking pornographic pictures of her which to my understanding do not exist and I have never seen.
>
> MR. KEPHART: We don't have those, the ones he was charged with, the pornography in the computer.
>
> MR. CICHOSKI: Count one charges him with taking pictures of [the alleged minor].
>
> MR. KEPHART: Using pictures of [the alleged minor]. You don't have to have them for that but by the possession, he has them and he possessed child pornography.

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Ex. 11, p. 13, ll. 7-18. Faced with such lack of foundation for a guilty plea to Counts I, the court continued the case. Ex. 11, p. 15, ll. 8-10.

6. When the parties and court reconvened on August 15, 2001, defense counsel indicated he had been shown some photographs which he could not conclude were pornographic but his client still wanted to plead guilty.

> MR. CICHOSKI: . . . They have since showed me photos again. Whether those photos are pornographic or not is a question for either a judge or a jury but we don't - - I've been over to the jail and talked to my client and we do not wish to withdraw from the negotiations in this case and we're ready to be sentenced.

Ex. 12, p. 2, ll. 6-17 (emphasis added). There is no indication in the record that either the judge or the defendant ever saw the particular photographs upon which the charge and, therefore, the Count I plea was based. Believing that defense counsel had performed deficiently, the court asked Ingebretsen to "waive any defect or any claim of ineffective assistance of counsel arising out of the pleading to Count I, Attempt Use of a Minor to Produce Pornography" but got no response. Ex. 12, p. 2, ll. 18-24.

> THE COURT: All right, but last time counsel said he hadn't seen the pictures and I wanted to know why he entered into a negotiation without seeing the pictures, negotiated without investigating properly that particular count.

Ex. 12, p. 3, ll. 5-9 (emphasis added).

7. Although never obtaining a waiver from Ingebretsen, the state judge accepted the plea based on Ingebretsen's statement that "I want to proceed" and acknowledgment that he was pleading guilty because the state had threatened to pursue additional charges at trial. See Ex. 12, p. 3, ll. 10-12; p. 3, l. 19 – p. 4, l. 3. Since neither the judge nor Ingebretsen had ever seen the particular photographs upon which the prosecution based the Count I charge, there was no factual basis for the Count I guilty plea.

8. Since the court never had the factual basis for the Count I and Count II guilty plea before it, it is not surprising that it never reviewed any of the elements of the crime, e.g. what it means in Nev. Rev. Stat. § 200.700 to "depict[ion] . . . 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[,]" with Ingebretsen. Since neither the court nor Ingebretsen ever knew what the facts were supporting the plea and the court

never reviewed the crime's elements with Ingebretsen, Ingebretsen could not have had an understanding of the law in relation to the facts with respect to Counts I and II. His plea was, therefore, involuntary and the writ should be granted, vacating the Count I and Count II conviction.

GROUND TWO

INGEBRETSEN WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE RUSHED INGEBRETSEN INTO A GUILTY PLEA TO COUNTS I AND II WITHOUT PROPERLY INVESTIGATING THE FACTS AND LAW OF THE CASE AND INSISTING THAT THE STATE ALLOW HIM AND HIS CLIENT TO REVIEW THE PHOTOGRAPHS USED TO SUPPORT THE COUNT I AND COUNT II CHARGES PRIOR TO ANY AGREEMENT TO PLEAD GUILTY TO THEM.

Statement of Exhaustion: This claim was raised on appeal of the denial of petitioner's state petition. See Ex. 83.

1. Ingebretsen was arrested on May 8, 2001, (Ex. 2) and pled guilty less than a month later on June 4, 2001 (Ex. 9 & 10).

2. In Count I of the Information (Ex. 8) the state asserted that Ingebretsen "knowingly attempt[ed] to use . . . a minor . . . to be the subject of a sexual portrayal, to-wit: by the said Defendant posing the said [minor] in a variety of sexually provocative clothes and positions and then taking sexually suggestive photographs of her, attempting to produce a pornographic performance that appealed to the Defendant's prurient interest in sex" in violation of Nev. Rev. Stat. §§ 200.710 and 200.700. Section 200.710 states in pertinent part:

> **200.710.** Unlawful to use minor in producing pornography or as subject of sexual portrayal in performance
>
> . . . . .
>
> 2. A person who knowingly uses . . . a minor to be the subject of a "sexual portrayal in a performance is guilty of a category A felony and shall be punished as provided in NRS 200.750 . . . .

§ 200.710(2)(emphasis added). In Count II the state asserted that Ingebretsen possessed a photograph of a "sexual portrayal" or of "sexual conduct." Ex. 8. "Performance" includes a "photograph," and "sexual portrayal" means "the depiction of a person in a manner which appeals to the prurient interest

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in sex and which does not have serious literary, artistic, political or scientific value." Nev. Rev. Stat. § 200.700(4).

3. At the time of Ingebretsen's arrest the police seized certain photographs and the computer he had been using, which property remained in the state's exclusive control up to the time of Ingebretsen's guilty plea. On or about June 4, 2001, Ingebretsen signed a Guilty Plea Agreement wherein, among other things, he agreed to plead guilty to Count I. See Ex. 10. At a June 4, 2001, plea hearing the state court accepted Ingebretsen's plea. See Ex. 9. When the parties reconvened for sentencing on August 8, 2001, the court discovered that neither counsel nor Ingebretsen had seen the specific photographs upon which the Count I charge was based.

> MR. CHICOSKI [defense counsel] . . . As you heard from the mother, what was happening was that he was taking pictures for modeling or something like that and we don't have those pictures. I don't know what happened to the pictures. Nobody has ever been able to see them to know if they are pornographic or not except that he admitted, he pled guilty to Attempt Use of Minor in Production of Pornography.

Ex. 11, p. 11, ll. 11-17 (emphasis added). The state thereafter revealed that, based on a state statute forbidding the possession of pornographic materials, it had a policy of not revealing such factual evidence to the defense.

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> THE COURT: They have a right to see evidence. You have heard of the Constitution, man?
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> MR. KEPHART: There's a law, a specific statute in Nevada that will not allow them to have them because they possess them.

Ex. 11, p. 11, 19-25. A few year's later state's policy was found to be unconstitutional.

> Because nothing in NRS 174.235 or NRS 200.710 to 200.735 precludes child pornography from being copied for the purpose of defending criminal charges, we hold that the district court did not abuse its discretion in ordering the State to prove Epperson defendants with a copy of the videotape to adequately prepare their defense.
>
> Additionally, as the California court noted, denying defense counsel copies of the child pornography hinders the defendant's right to effective assistance of counsel. The Epperson defendants' constitutional rights trump any prohibition of NRS 200.710 to 200.735. Therefore, we follow California and Arizona an allow defense counsel to have a copy of the

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> videotape, with certain specific restrictions[, e.g.]. . .
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> (1) the defendant cannot possess a copy of the videotape; however; the defendant may view it with counsel in preparing the defense;

State v. Second Judicial Dist. Ct., 89 P.3d 663, 668 (Nev. 2004).

4. The state judge was shocked that a lawyer would engage in the process of pleading his client guilty while not having seen the evidence upon which such guilt was purportedly based.

> THE COURT: Well, why would you plead your client to something then if you don't think he was guilty of it? I don't know what the case says. You plead the guy to possession of pornography. You didn't see that?
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> MR. CICHOSKI: Maybe we should have investigated that. Maybe we should set that over.
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> MR. KEPHART: I would bring in and show you the photos.
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> THE COURT: That's not the point. Oh God.

Ex. 11, p. 12, ll. 4-20.

5. It was generally agreed that the pictures supporting the Count I and II charges did not exist.

> MR. CICHOSKI: There was a computer which had pornography on it. We don't dispute that there was a computer and that had child porn on it but you tell me he is also charged with taking pornographic pictures of her which to my understanding do not exist and I have never seen.
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> MR. KEPHART: We don't have those, the ones he was charged with, the pornography in the computer.
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> MR. CICHOSKI: Count one charges him with taking pictures of [the alleged minor].
>
> MR. KEPHART: Using pictures of [the alleged minor]. You don't have to have them for that but by the possession, he has them and he

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possessed child pornography.

Ex. 11, p. 13, ll. 7-18. Faced with such lack of foundation for a guilty plea to Count I, the court continued the case. Ex. 11, p. 15, ll. 8-10.

6. When the parties and court reconvened on August 15, 2001, defense counsel indicated he had been shown some photographs which he could not conclude were pornographic but his client still wanted to plead guilty.

> MR. CICHOSKI: . . . They have since showed me photos again. Whether those photos are pornographic or not is a question for either a judge or a jury but we don't - - I've been over to the jail and talked to my client and we do not wish to withdraw from the negotiations in this case and we're ready to be sentenced.

Ex. 12, p. 2, ll. 6-17 (emphasis added). There is no indication in the record that either the judge or the defendant ever saw the particular photographs upon which the charge and, therefore, the Count I plea was based. Believing that defense counsel had performed deficiently, the court asked Ingebretsen to "waive any defect or any claim of ineffective assistance of counsel arising out of the pleading to Count I, Attempt Use of a Minor to Produce Pornography" but got no response. Ex. 12, p. 2, ll. 18-24.

> THE COURT: All right, but last time counsel said he hadn't seen the pictures and I wanted to know why he entered into a negotiation without seeing the pictures, negotiated without investigating properly that particular count.

Ex. 12, p. 3, ll. 5-9 (emphasis added).

7. Although never obtaining a waiver from Ingebretsen, the state judge accepted the plea based on Ingebretsen's statement that "I want to proceed" and acknowledgment that he was pleading guilty because the state had threatened to pursue additional charges at trial. See Ex. 12, p. 3, ll. 10-12; p. 3, l. 19 – p. 4, l. 3. Since neither the judge nor Ingebretsen had ever seen the particular photographs upon which the prosecution based the Count I charge, there was no factual basis for the Count I guilty plea.

8. Defense counsel performed deficiently in the following particulars: (a) he urged his client to plead guilty and allowed him to sign a guilty plea agreement (Ex. 10) without ever reviewing himself or with his client the photographs upon which the child pornography charges to which he pled were based; (b) even after the court voiced serious constitutional concerns, defense counsel still did not seek

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to stop the guilty plea, even though counsel was unsure the photographs were pornographic and neither his client nor the court had seen them. Ingebretsen was severely prejudiced by the guilty plea in being labeled a sex offender, sentenced to prison and exposed to the regimen of lifetime supervision. Since petitioner received ineffective assistance of counsel with respect to his guilty plea the writ should be granted and the Count I and Count II convictions vacated.

GROUND THREE

INGEBRETSEN'S GUILTY PLEA TO COUNTS I AND II WAS INVOLUNTARY IN VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW BECAUSE HE PLED GUILTY TO CONDUCT WHICH WAS NOT A CRIME.

Statement of Exhaustion: This claim was raised on appeal of the denial of petitioner's state petition. See Ex. 83.

1. In Count I of the Information (Ex. 8) the state asserts that Ingebretsen "knowingly attempt[ed] to use . . . a minor . . . to be the subject of a sexual portrayal, to-wit: by the said Defendant posing the said [minor] in a variety of sexually provocative clothes and positions and then taking sexually suggestive photographs of her, attempting to produce a pornographic performance that appealed to the Defendant's prurient interest in sex" in violation of Nev. Rev. Stat. §§ 200.710 and 200.700. Section 200.710 states in pertinent part:

> **200.710.** Unlawful to use minor in producing pornography or as subject of sexual portrayal in performance
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> . . . . .
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> 2. A person who knowingly uses . . . a minor to be the subject of a "sexual portrayal in a performance is guilty of a category A felony and shall be punished as provided in NRS 200.750 . . . .

§ 200.710(2)(emphasis added). In Count II the state asserted that Ingebretsen possessed a photograph of a "sexual portrayal" or of "sexual conduct." Ex. 8. "Performance" includes a "photograph," and "sexual portrayal" means "the depiction of a person in a manner which appeals to the prurient interest in sex and which does not have serious literary, artistic, political or scientific value." Nev. Rev. Stat. § 200.700(4).

2. In 1982 the United States Supreme Court held in New York v. Ferber, 458 U.S. 747

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(1982), that a state did not need to meet the obscenity standard of Miller v. California, 413 U.S. 15 (1973), in order to regulate child pornography. However, the Supreme Court made it clear that there were limits to such regulation.

> There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed. Here the nature of the harm to be combated requires that the state offense be limited to works that *visually* depict sexual conduct by children below a specified age. The category of 'sexual conduct' proscribed must also be suitably limited and described.

Responding to the Ferber decision the Nevada legislature enacted the first section of what is now Nev. Rev. Stat. § 200.710 (then § 200.509), which reads as follows in pertinent part:

> 1. A person who knowingly uses . . . a minor to simulate or engage in or assist others to simulate or engage in sexual conduct to produce a performance is guilty of a category A felony and shall be punished as provided in NRS 200.750.

Nev. Rev. Stat. § 200.710(1)(emphasis added). "Sexual conduct" is defined as:

> sexual intercourse, lewd exhibition of the genitals, fellatio, cunnilingus, bestiality, anal intercourse, excretion, sadomasochistic abuse, masturbation, or the penetration of any part of a person's body or of any object manipulated or inserted by a person into the genital or anal opening of the body of another.

Nev. Rev. Stat. § 200.700(3). In other words, consistent with the Supreme Court in Ferber, Nevada limited its regulation of child pornography to sexual conduct. In 1995 Nevada added a second section to § 200.710 regulating something other than sexual conduct called "sexual portrayal," which is the subject of Ingebretsen's Count I conviction and is also included in the Count II possession charges under Nev. Rev. Stat. § 200.730. Ex. 8. See the discussion of § 200.710's language in paragraph 1 supra. Since § 200.710(2)("sexual portrayal") and § 200.730 ("sexual portrayal") regulate beyond the sexual conduct allowed by Ferber and addressed in § 200.710(1), they violate the First Amendment and, under Ferber, are nullities.

3. The activities alleged in Count I to which Ingebretsen pled are posing a minor in "sexually provocative clothes and positions" and taking "sexually suggestive" photographs. Such alleged activities are not "sexual conduct" as defined above.

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4. Since neither the statutory section under which Ingebretsen pled, § 200.710(2), nor the Count I allegations themselves (see Ex. 8) set forth a crime under the controlling Supreme Court precedent, Ingebretsen pled guilty to conduct that was not a crime. Likewise, with respect to Count II he pled guilty to "sexual portrayal" or conduct far short of the § 700.710(1) definition. Therefore, his guilty pleas to Count I and II were not voluntary, the writ should be granted and his Count I and Count II convictions vacated.

GROUND FOUR

THE TRIAL COURT'S ACCEPTANCE OF PETITIONER'S GUILTY PLEAS TO COUNTS ONE AND TWO WITHOUT ADVISING HIM OF THE SPECIFIC CONSEQUENCES OF LIFETIME SUPERVISION DENIED HIM DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS SUCH PLEA IS NOT INTELLIGENT AND VOLUNTARY.

Statement of Exhaustion: This claim was raised on appeal of the denial of petitioner's state petition. See Ex. 83.

1. On or about June 4, 2001, Ingebretsen signed a Guilty Plea Agreement wherein he agreed to plead guilty to Counts I, II and III of an attached Information (Exs. 8 & 10). While "lifetime supervision" was identified in the plea agreement as a consequence of the plea (Ex. 10, p. 2.), there was no explanation in the agreement of what the term meant.

2. Ingebretsen's plea was accepted following a series of court hearings on June 4, August 4 and August 15, 2001. Ex. 9, 11 & 12. The term "lifetime supervision" was never mentioned in such hearings, and the court never explained the specific conditions of such supervision to petitioner.

3. Ingebretsen did not learn what lifetime supervision entailed until his release from prison on or about November 27, 2007. At that time he learned for the first time some of the onerous particulars of lifetime supervision. See Ex. 92. He later learned that some of the conditions, e.g., counseling, could be extremely punitive in, for example, exposing him, a 64 year old person living on social security, to very substantial counseling fees and charges of up to $250.00 for required polygraph examinations. He also learned that the rigid controls over his life that already existed would soon be increased many times over upon the implementation of the Adams Walsh Act in Nevada (see Ground Five below).

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4. Since Ingebretsen was not informed of the scope of the punishment that would be inflicted upon him under the aegis of "lifetime supervision" at the time of the acceptance of his guilty plea, his plea was unintelligent and involuntary and his sentence was imposed without due process of law as guaranteed to him under the Fifth and Fourteenth Amendments to the United States Constitution. The writ should be granted and Ingebretsen's convictions and sentence vacated.

GROUND FIVE

APPLICATION OF THE NEW SEX OFFENDER LAWS TO PETITIONER VIOLATES (1) HIS RIGHTS UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION SINCE SUCH LAWS DENY DUE PROCESS OF LAW AND FREEDOM FROM DOUBLE JEOPARDY AND CRUEL AND UNUSUAL PUNISHMENT, AND (2) HIS RIGHT TO PROTECTION FROM *EX POST FACTO* LAWS AND THE IMPAIRMENT OF CONTRACTS.

Statement of Exhaustion: This claim has not been previously raised since Nevada's new sexual offender laws did not become effective until July 1, 2008 (enforcement has been permanently enjoined; see footnote 3 infra).

1. In June, 2007, Nevada enacted AB579 and SB471 (hereinafter the "new sex offender laws") into law which were scheduled to be implemented in their entirety on July 1, 2008.[4] Such new sex offender laws, modeled on the Adam Walsh federal legislation, dramatically change how sex offenders are defined and classified in Nevada and what restrictions and requirements apply to them. The current system is based upon an individualized assessment of risk of recidivism. Nev. Rev. Stat. §§ 179D113, 179D.115, and 179D.117, addressing tier level registration, as amended by AB579 and AB579, replace such individualized, risk-based system with a tier assignment dictated only by the crime committed by the offender and which now include offenders who committed any crime with any "sexual element" or that is "sexually motivated" since July 1, 1956. Upon information and belief, the State of Nevada intends to impose these restrictions retroactively, regardless of the limitations imposed - or not imposed - on offenders at sentencing. Ingebretsen has been told that the new sex offender laws will be applied to him.

[4] A permanent injunction staying their implementation was issued on September 10, 2008, in ACLU v. MASTO, United States District Court for the District of Nevada, Case No. 2:08-cv-00822-JCM(PAL). Clerk's Record (CR) 70.

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2. Nev. Rev. Stat. §§ 176A.410, 213.1243, 213.1245 and 213.1255[5] now establish movement and residence limitations on: (a) persons convicted of sexual offenses and granted probation and suspended sentences; (b) persons on lifetime supervision such as Ingebretsen; and (c) prisoners released on parole. Nev. Rev. Stat. §§ 176A.410, 213.1243 and 213.1245 all state a defendant may not

> knowingly be within 500 feet of any place, or if the place is a structure, within 500 feet of the actual structure, that is designed primarily for use by or for children, including, without limitation, a public school, a school bus stop, a center or facility that provides day care services, a video arcade, an amusement park, a playground, a park, an athletic field or a facility for youth sports, or a motion picture theater. The provisions of this subsection apply only to a sex offender who is a Tier 3 offender.

Ingebretsen is currently classified as a Tier 2 offender but would move to Tier 3 if the new sex offender laws are enforced.

4. As applied generally and to Ingebretsen the new sex offender laws are vague and ambiguous and fail to sufficiently define who is subject to the laws, what their effects are and what the penalties for failure to comply with them are, in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. They also violate the Due Process Clauses because they reassess offenders and subject them to new restrictions and requirements, regardless of any actual risk to society, without the possibility of any hearing and without any requirement by the State of Nevada to provide offenders with any notice of their classification or any new prohibitions or requirements and fail to rationally further any legitimate governmental purpose. They also violate the Due Process Clauses because they vary the terms contained in plea agreements, including Ingebretsen's (see Ex. 10).

5. The new sex offender laws impose punishment, both on persons previously convicted of sexual offenses such as Ingebretsen and prospectively, excessive in relation to the crimes of which offenders such as Ingebretsen are convicted. For example, anyone convicted of any crime with any "sexual element" or any crime that is "sexually motivated" since July 1, 1956, is considered a sex offender under the new sex offender laws and is subject to community notification and registration requirements.

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[5] SB471, sec. 2, 8 and 9, modified these provisions.

6. The effect and intent of the new sex offender laws are punitive, and they impose new punishments for persons such as Ingebretsen convicted before their enactment in violation of the *Ex Post Facto* Clause of Article I, § 10, of the United States Constitution and the Fourteenth Amendment.

7. The new sex offender laws impose new punishments on persons previously convicted, such as Ingebretsen, and impose registration duties, community notification and movement and residence restrictions based on the crime originally committed rather than any actual risk of recidivism, in violation of the Fifth Amendment's Double Jeopardy Clause as applied to the states through the Fourteenth Amendment to the United States Constitution.

8. The New Sex Offender Laws operate as a substantial impairment to the preexisting contractual relationship between the state and Ingebretsen as set forth in his Guilty Plea Agreement (Ex. 10) by imposing new terms not negotiated with drastically increased lifetime supervision, registration and community notification requirements in violation of Article I, §10, of the United States Constitution.

9. In light of the aforementioned constitutional violations the writ should be granted and Ingebretsen released from subjection to Nevada's new sex offender laws, including all lifetime supervision conditions added to existing law.

GROUND SIX

INGEBRETSEN WAS DENIED HIS SIXTH AND FOURTEENTH RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO OBJECT TO THE INFORMATION'S OMISSION IN COUNTS ONE AND TWO OF AN ELEMENT OF THE CRIME OF "SEXUAL PORTRAYAL" AND INFORM HIS CLIENT OF THE NATURE OF SUCH MISSING ELEMENT.

Statement of Exhaustion: This claim was presented to the Nevada Supreme Court in the Fast Track Statement submitted on post-conviction appeal. See Ex. 83, pp.11-13.

1. In Count I of the Information (Ex. 8) (emphasis added) the state charged "attempted use of a minor in producing pornography, citing, e.g., Nev. Rev. Stat. 200.700 and 200.710. The Information asserted that Ingebretsen "knowingly attempt[ed] to use . . . a minor . . . to be the subject of a sexual portrayal, to-wit: by the said Defendant posing the said [minor] in a variety of sexually provocative clothes and positions and then taking sexually suggestive photographs of her, attempting to produce a pornographic performance that appealed to the Defendant's prurient interest in sex." In

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doing so the state failed to charge the element of the crime that the portrayal "not have serious literary, artistic, political or scientific value."

. . . . .

> . . . 4. 'Sexual portrayal' means the depiction of a person in a manner which appeals to the prurient interest in sex and which does not have serious literary, artistic, political or scientific value.

Nev. Rev. Stat. § 200.700(2)(emphasis added). A "sexual portrayal" is also alleged in Count II, Ex. 8, p. 2, again without any allegation of the element that the portrayal "not have serious literary, artistic, political or scientific value."

2. Prior to the trial court's final acceptance of the plea on August 15, 2001, it was known by defense counsel and the court that Ingebretsen had used some photographs to "put[ting] together a portfolio to help [the alleged victim] become a model." See Ex. 11, p. 7, ll. 3-5. Indeed, defense counsel noted that fact on the record.

> MR. CHICOSKI: . . . As your heard from the mother, what was happening was he was taking pictures for modeling or something like that and we don't have those pictures . . . .

Ex. 11, p. 11, ll. 11-13.

3. Under the Sixth Amendment to the United States Constitution Ingebretsen was entitled "to be informed of the nature and cause of the accusation" against him. Since the Information omitted an element of the crime of "sexual portrayal," it did not provide adequate notice so that Ingebretsen could knowingly and intelligently plead to the Count I and II charges or prepare a defense to them. This was particularly prejudicial to Ingebretsen since neither the court nor defense counsel informed him that the portrayal must "not have serious literary, artistic, political or scientific value." As a result, Ingebretsen pled guilty to Counts I and II while ignorant of the potential defense that any portrayal that occurred had serious artistic value.

4. Defense counsel did not move to dismiss or otherwise object to the constitutionally deficient Information (Ex. 8). Counsel's failures to challenge the defective information and otherwise advise Ingebretsen of all the elements of the crime of "sexual portrayal" fell below the constitutionally required minimum for effective assistance of counsel and could have served no tactical or strategic purpose. Ingebretsen suffered prejudice from such omissions because he unknowingly and

unintelligently pled guilty to crimes for which he could have presented a defense and elected to go to trial. The writ should be granted and Ingebretsen's Count I and II convictions vacated.

GROUND SEVEN

APPLICATION OF THE "LIFETIME SUPERVISION AGREEMENT" CONDITIONS TO PETITIONER VIOLATE (1) HIS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION TO DUE PROCESS OF LAW AND (2) HIS RIGHT TO PROTECTION FROM *EX POST FACTO* LAWS AND THE IMPAIRMENT OF CONTRACTS UNDER ART. 1, §10 OF THE UNITED STATES CONSTITUTION.

Statement of Exhaustion: This claim was presented to the Nevada Supreme Court on appeal of the denial of the state petition. See Ex. 93-103.

1. On or about June 4, 2001, Ingebretsen signed a Guilty Plea Agreement (Ex. 10) wherein he agreed to plead guilty to Counts I, II and III of an attached Information. While "lifetime supervision" was identified in the plea agreement as a consequence of the plea (page 2), there was no explanation in the agreement of what the term meant.

2. Ingebretsen's plea was accepted following a series of court hearings on June 4 (Ex. 9), August 8 (Ex. 11) and August 15, 2001 (Ex. 12). The term "lifetime supervision" was never mentioned in such hearings, and the court never explained the specific conditions of such supervision to petitioner.

3. When petitioner's pleas were accepted, his sentencing hearing held and judgment entered in 2001 (Ex. 13), the applicable lifetime supervision statute was as follows:

> 1. The board shall establish by regulation a program of lifetime supervision of sex offenders to commence after any period of probation or any term of imprisonment and any period of release on parole. The program must provide for the lifetime supervision of sex offenders by parole and probation officers.
>
> 2. Lifetime supervision shall be deemed a form of parole for the limited purpose of the applicability of the provisions of NRS 213.1076, subsection 9 of NRS 213.095, NRS 213.1096 and subsection 2 of NRS 213.110.
>
> 3. A person who violates a condition imposed on him pursuant to the program of lifetime supervision is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years, and may be further punished by a fine of not more than $5,000.

Nev. Rev. Stat. § 213.1243. Notably, no condition of lifetime supervision is identified in the statute, the statute providing no notice at all of what such conditions will ultimately be.

4. Ingebretsen did not learn what lifetime supervision entailed until his release from prison. At that time, a "Lifetime Supervision Agreement" activated November 27, 2007 (Ex. 92)), imposed twenty-one (21) special conditions on him concerning such subjects as residence (#2), curfew (#12), counseling (#13), polygraph examination (#14), no contact with persons under 18 years old (#18), and not being in or near a playground, school or school grounds, motion picture theatre and a business catering to children (#19), all of which the Board of Parole Commissioners could modify at any time. He later learned that some of the conditions, e.g., counseling and polygraphing, exposed him, a 65 year old person living on social security, to very substantial counseling fees and charges of up to $250.00 for required polygraph examinations and also, in the case of counseling, to additional, more onerous, conditions beyond those in the Lifetime Supervision Agreement itself. As his post-release supervision has evolved his assigned officers from the Division of Parole and Probation have imposed other conditions restricting Ingebretsen's freedom of movement in a variety of ways including, but not limited to, (1) requiring him to live in approved housing and thereby denying Ingebretsen the opportunity to reside in halfway houses with in-house employment opportunities, which are not "zoned" in a category allowing his residence; (2) imposing a 9:00 p.m. curfew; (3) excluding him from seeking counseling from recognized counseling agencies significantly more economical (50% less cost) than those otherwise approved; (4) assigned officer conducting a surprise visit this past Halloween (October 2009) to impose a 4:00 p.m. curfew, thereby substantially restricting access to family and friends during that holiday.

5. The conditions of lifetime supervision are not established until just prior to an inmate sex offender's release, see Nev. Rev. Stat. §§213.290(1) & (2) and Nev. Admin. Code ch. 213, § 290, at which time, pursuant to Nevada statutory administrative law, the Nevada Department of Parole and Probation establishes such conditions as follows:

> 3. Upon receipt of written notification pursuant to subsection 2, the Board will schedule a hearing to establish the conditions of lifetime supervision for the sex offender. The Board will:

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> (a) Determine an appropriate location for the hearing that may include, without limitation, the institution or facility at which the sex offender is housed or an office of the Board; and
>
> (b) Appoint a panel pursuant to NRS 213.133 to conduct the hearing.
>
> The Board may establish the conditions of lifetime supervision for more than one sex offender at a hearing.

> 4. At least 30 days before the date on which a hearing is scheduled pursuant to subsection 3, the Division shall provide to the Board a report on the status of the sex offender who is the subject of the hearing. The report must include, without limitation:
>
> > (a) A summary of the progress of the sex offender, while on parole or probation or in an institution or facility of the Department, as applicable; and
> >
> > (b) Recommendations for conditions of lifetime supervision for the sex offender . . . .

Nev. Rev. Stat. § 213.290; Nev. Admin. Code ch. 213, § 290. To the extent any such hearing was held, and petitioner does not know if such hearing was held, petitioner had no notice of such hearing or opportunity to participate in it.

6. Nevada's lifetime supervision laws are void for vagueness since they fail to provide fair notice to a defendant such as Ingebretsen of the conditions that will be imposed upon him until after he has served his prison sentence and, therefore, violate the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. They also violate the Due Process Clauses because they subject offenders to new restrictions and requirements without the possibility of a hearing at which the defender could challenge specific conditions, unconstitutionally restrict an individual's right of free movement and right to freedom of association and further violate the constitutional prohibitions against *ex post facto* laws and impairment of contracts, see U.S. Const. Art. 1, §10, because they retroactively vary the terms contained in plea bargains, including Ingebretsen's. They are also unconstitutional to the extent they seek to implement provisions of the Adam Walsh federal legislation against petitioner.

7. The effect and intent of the lifetime supervision conditions are punitive, and they impose new punishments for persons such as Ingebretsen convicted before the conditions are adopted in

violation of the *Ex Post Facto* Clause of Article I, § 10, of the United States Constitution and the Fourteenth Amendment.

8. The lifetime supervision conditions operate as a substantial impairment to the preexisting contractual relationship between the state and Ingebretsen as set forth in his plea bargain by imposing new terms not negotiated with drastically increased lifetime supervision conditions in violation of Article I, §10, of the United States Constitution.

9. In light of the aforementioned constitutional violations the writ should be granted and Ingebretsen released from subjection to the conditions imposed under the Lifetime supervision Agreement after Ingebretsen's release from prison.

III.

PRAYER FOR RELIEF

Accordingly, Petitioner respectfully requests that this Court:

1. Issue a writ of habeas corpus to have Ingebretsen brought before the Court so that he may be discharged from his unconstitutional confinement and sentence;

2. Conduct an evidentiary hearing at which proof may be offered concerning the allegations in this Third Amended Petition and any defenses that may be raised by respondents and;

3. Grant such other and further relief as, in the interests of justice, may be appropriate.

DATED this 28th day of September, 2010.

LAW OFFICES OF THE
FEDERAL PUBLIC DEFENDER

By: */s/ Paul G. Turner*
PAUL G. TURNER
Assistant Federal Public Defender

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on September 28, 2010, she served a true and accurate copy of the foregoing to the United States District Court, who will e-serve the following addressee:

Alicia L. Lerud
Deputy Attorney General
Bureau of Criminal Justice
100 North Carson Street
Carson City, Nevada 89701-4717

/s/ Leianna Montoya
An Employee of the Federal Public Defender's Office

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