

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Mark Zana — PETITIONER
(Your Name)

vs.

State of Nevada; — RESPONDENT(S)
Baker, Warden, Respondent
ON PETITION FOR A WRIT OF CERTIORARI TO

Ninth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Mark Zana #1013790
(Your Name) State Prisoner in Pro Se

1200 Prison Road
(Address)

Lovelock, Nevada 89419
(City, State, Zip Code)

N/A
(Phone Number)

QUESTIONS PRESENTED

Question 1:

At what point do numerous intentional material falsehoods in a search warrant affidavit and the refusal of the trial court to grant defendant's right to a Franks hearing deprive defendant of his Fourth Amendment rights?

Question 2:

When does a juror's independent internet research in criminal proceedings (done to aid their personal opinions regarding evidentiary matters at trial) rise to the level of depriving a defendant of his Fourteenth Amendment rights?

Question 3:

In criminal cases involving the possession of child pornography, at what point does an expert witness become necessary for proving that the person(s) depicted is actually underage when the person(s) depicted is not clearly or obviously underage and their identity is unknown?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

[] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the United States district court appears at Appendix E to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was October 30, 2017.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: November 20, 2017, and a copy of the order denying rehearing appears at Appendix B.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

Constitutional and Statutory Provisions Involved

The FOURTH AMENDMENT to the United States Constitution.

The FIFTH AMENDMENT to the United States Constitution.

The FOURTEENTH AMENDMENT to the United States Constitution.

The Nevada Constitution, Articles 1 and 18.

Statement of the Case

ISSUE 1: The Nevada Supreme Court unreasonably applied existing federal law when it failed to grant Mark Zana's (petitioner) appeal regarding the suppression of images seized from his computers in violation of the Fourth and Fourteenth Amendments to the United States Constitution. The Nevada Supreme Court applied an unreasonable application of Federal law, in direct conflict with the United States Supreme Court ruling in Franks v. Delaware, when it failed to recognize that the State District Court improperly elected to not hold a Franks hearing even after petitioner made a substantial showing and offer of proof that there were five intentional material falsehoods in the search warrant affidavit.

The state Supreme Court's ruling is in direct conflict with the United States Supreme Court's ruling (Franks v. Delaware) requiring an evidentiary hearing be held, at the defendant's request, so that the truthfulness of factual statements made in the affidavit may be challenged. In Franks v. Delaware, Franks had one material falsehood in his search warrant. This resulted in the dismissal of the search warrant, the exclusion of all evidence seized, and became the standard for all future search warrant challenges based on material falsehoods being used in search warrants. In the instant case, petitioner has proven there to be at least five intentional material falsehoods included in the search warrant affidavit and yet received no Franks hearing. Law enforcement needs to be held accountable for their official lawlessness. This was one of the purposes of the Fourth

Amendment.

On September 22, 2005, a search warrant was served on petitioner's residence. Petitioner was cooperative. Two computers were seized. A total of twelve pornographic images were found. One computer contained ten short video clips. The video files were downloaded on September 18, 2005 (4 days prior to the search warrant being executed).

On February 8, 2007, petitioner filed a Motion to Suppress the evidence seized from his computers. Additionally, petitioner requested a Franks hearing. On March 1, 2007, over the objection of the defense, the State District Court denied petitioner's Motion to Suppress and no Franks hearing was granted. The District Court erred when it failed to suppress the evidence seized based upon the failure to enunciate probable cause in the warrant and its affidavit in violation of the Fourth and Fourteenth Amendments.

As there was no evidentiary hearing held, petitioner relies upon the Motion to Suppress, witness statements, and preliminary hearing testimony. In the instant case, there was no probable cause provided to the magistrate to permit a search of petitioner's house or computers based upon information gathered and listed in the affidavit. Attached to petitioner's Motion to Suppress were the witness statements of Anne and Melissa Marcovecchio. Also attached was the application and affidavit of the search warrant. Lastly, attached were portions of petitioner's recorded statement to police, where he repeatedly denied accessing any child pornography.

websites.

On September 21, 2005, nearly a year and a half after Melissa Marcovecchio left petitioner's fifth grade class and moved to Colorado, Anne Marcovecchio and her 12 year old daughter, Melissa, went to the Broomfield, Colorado Police Department to report that Melissa had been inappropriately touched by petitioner some 15 months earlier. Both Anne and Melissa provided handwritten "witness statements." The witness statement of Melissa described two alleged incidents where petitioner inappropriately touched her. Melissa made no mention of computer usage by petitioner nor any computer contact between her and petitioner. There was also no mention of child pornography in Melissa's statement. Anne Marcovecchio's statement also made no mention of any child pornography and no mention of any computer contact between petitioner and Melissa.

The next day, Thursday, September 22, 2005, Detective Rod Pera, of the Henderson Police Department, interviewed petitioner at Kesterson Elementary School in Henderson, Nevada. Detective Pera asked petitioner if he had been to any adult website or adult pornography sites on his computer. Petitioner admitted that he had been to an adult website. However, petitioner repeatedly denied accessing any child pornography websites. In fact, petitioner told Pera that there was only one adult website that he had gone to on occasion.

Later in the afternoon of Thursday, September 22, 2005, Detective Pera swore out his Application and

Affidavit For Search Warrant. Under the section entitled "Probable Cause", Pena referred to the witness statements of Anne and Melissa Marcovechio. Detective Pena swore in his Affidavit that Anne stated petitioner had used email to communicate with Melissa. Anne's statement makes no reference to email communication between petitioner and Melissa. Anne's statement referred to email between petitioner and her neighbor's daughter Angela. Pena also swore in his Affidavit that petitioner taught Melissa when she was in first grade as well as fifth grade. Anne's statement stated that Melissa was not in petitioner's first grade class. Pena's Application and Affidavit also states under oath that, when the alleged inappropriate touching occurred, petitioner's classroom was empty except for Melissa and one other female student (name unknown). Melissa's statement said that she was in petitioner's classroom with petitioner and a male student named Arlan. Pena's Affidavit continues on to state that Melissa's desk was next to petitioner's desk in the classroom. Melissa's statement made no reference to her desk being next to petitioner's desk. Melissa stated that she was "leaning up against his desk."

The balance of Pena's Affidavit relates to a conversation he had with Detective Leath of the Henderson Police Department and Pena's "training and experience" regarding sex offenders. At the preliminary hearing on December 13, 2005, Detective Leath testified that he did not prepare an affidavit. Leath admitted that he spoke to Pena over the phone and that he

was not present at petitioner's interview. Leath was provided with the witness statements of Melissa and Anne Marcovecchio by Pena. Leath admitted that there was nothing in those statements relating to child pornography. Leath also admitted that he was not on the telephone interview which occurred between Pena and the Marcovecchios. Leath further testified that he had no independent knowledge that petitioner was, in any way, involved with child pornography. Leath also admitted that everything he knew about the case had been obtained from Detective Pena.

Petitioner filed a Motion to Sever Counts to separate the lewdness charges from the child pornography charges as they were wholly unrelated. The State District Court denied said Motion as the State argued they needed the pornography charges to prove motive for the lewdness charges. Petitioner proceeded to trial and was convicted of 10 out of the 21 charges brought against him which included 6 of the 12 child pornography charges.

Petitioner contends there was no probable cause enunciated in the Affidavit for Search Warrant and no nexus between suspected criminal activity and the place to be searched. The warrant failed to establish what criminal activity petitioner was suspected of committing and the evidence related to such crime(s) that would be found at petitioner's residence. Detective Pena lied at least 5 times in his affidavit and such a substantial showing and offer of proof should have resulted in a Franks hearing and the suppression of all evidence

seized by way of the search warrant. The Nevada Supreme Court's ruling and that of the State District Court are in direct conflict with the United States Supreme Court's ruling, in Franks v. Delaware, requiring an evidentiary hearing be held at the defendant's request so that the truthfulness of factual statements made in the affidavit may be challenged. In Franks v. Delaware; Franks had one material falsehood in his search warrant. This resulted in the dismissal of the search warrant, the exclusion of all evidence seized, and became the standard for all future search warrant challenges based upon material falsehoods being used in search warrants. In the instant case, petitioner has proven there to be 5 intentional material falsehoods included in the search warrant affidavit and yet received no Franks hearing. Law enforcement needs to be accountable for their official lawlessness. Petitioner's Fourth and Fourteenth Amendment rights were clearly violated.

ISSUE 2:

On Friday, August 10, 2007, petitioner's trial ended and the jury panel began deliberations. By the end of the day the jury had not come to a consensus on all counts and were discharged for the weekend. They were reminded by the Court not to do any independent research or experiments in regards to the case. During that weekend, one male juror did internet research regarding the possession of child pornography charges and an experiment regarding the lewdness charges. Two female jurors experimented with their abilities to correctly guess the

ages of girls they saw at church and at a casino. This was done in an effort to aid them in determining the ages of the girls in the video clips presented at trial as evidence and in contravention to Court commands.

On Monday, August 13, 2007, the jury returned to their deliberations at approximately 9:00 am. All three jurors shared the fact that they did research and/or experiments during the weekend to try and help them determine the ages of the girls depicted in the video clips. By approximately 11:00 am that same day, the jury returned with guilty and not guilty verdicts.

On August 30, 2007, juror Carol Marques contacted the chambers of the trial judge with information that jury misconduct occurred during jury deliberations. Ms. Marques waited for a time to complain to the Court because she was "bugged" by the situation. This is significant as it demonstrates that Ms. Marques was unable to carry on with her normal life. She felt compelled to inform the Court of the jury misconduct approximately two and a half weeks after the trial ended. Ms. Marques testified at the jury misconduct hearing "Well because I didn't think about it much but as I was going over the whole trial because I found it kind of traumatic, and then I thought: well did we really do the right thing?" Juror Thurman testified that he was of the opinion that there should be not guilty verdicts as to the child pornography charges yet he convicted petitioner of 6 of the 12 charges.

On September 10, 2007, petitioner filed a Motion for New Trial based upon juror misconduct. On October 8, 2007, the District Court held an evidentiary hearing where all of the deliberating jurors testified. Each one of the twelve jurors testified that they were aware of the jury misconduct and that it was discussed during their deliberations before they rendered a verdict.

It is rare for any instance of jury misconduct to come to light in a case let alone the amount of misconduct documented in the instant case. The internet is a vast resource of information readily available to any juror who chooses to ignore the Court's instructions and circumvent the legal system by conducting independent research online. At what point does this independent research reach the threshold of depriving a defendant his right to a fair trial? Petitioner's Fifth and Fourteenth Amendment rights were violated by all of the jury misconduct as petitioner did not have the opportunity to confront any of this extrinsic information that was shared with the jury but not presented at trial.

ISSUE 3:

At petitioner's trial, two photographs and ten short, poor quality video clips were introduced as evidence of possession of child pornography. At trial the State offered no evidence as to the ages of the girls in the images. The State did not allege that petitioner had visited any child pornography sites nor did they offer any evidence to that

Fact. The twelve images were seized from petitioner's computers pursuant to the illegal search warrant referenced as ISSUE 1 of this writ.

Before trial, the Court stated "I would think that there would have to be someone to come in and be able to distinguish a sixteen year old from a seventeen year old and some sort of testimony so that a -- and if they don't, then the State hasn't proven their case." The State failed to produce anyone who would do this.

The State called Dr. Zebregien as their expert witness. Dr. Zebregien was a pediatric emergency room doctor who admitted he had never visited an adult pornography site and was unaware that these sites used models who appeared to be under the age of 18. Dr. Zebregien was also unaware that many of these models shaved their pubic areas. Dr. Zebregien reviewed the twelve images the Saturday before his trial testimony. Dr. Zebregien based his opinions on the models' body size, body parts including the face and breast development. He testified that his opinions were not based on any degree of medical certainty. He was merely speculating. Dr. Zebregien's reliance upon the height and breast size of the individuals were, admittedly, unreliable as many women of varying ages are short in stature and have small breasts.

The defense called Dr. Hyman as their expert witness. He explained that, objectively, there is absolutely no accurate way to determine the ages of the models in the images. Dr. Hyman was a Board Certified Pediatrician who evaluated over

100,000 children in the course of his career. Dr. Hyman observed the testimony of the State's expert and determined that there was no objective evidence and that the State's expert was simply speculating. Dr. Hyman showed the jury a copy of a website entitled "Little April" that had very young looking models in it that were actually over 18 pursuant to 18 U.S.C. 2257. The doctor explained that there were thousands of these types of websites.

Immediately following the State's expert testifying that he could not determine the ages of the people in the images to any degree of medical certainty, the Court changed its opinion that an expert would have to clearly determine the ages of the people in the images to that of allowing the jurors to decide for themselves what the ages of the people depicted were. This is tantamount to allowing jurors to compare DNA or fingerprints and determine on their own if they match.

This was Dr. Zebiegren's first time testifying as an expert on anything related to this and he did not prepare any type of report nor did he consult any specific study or literature on this subject prior to testifying for the State. Dr. Zebiegren and the State provided no objective evidence as to the actual ages of the people in the images let alone proof beyond a reasonable doubt. In fact, Dr. Zebiegren admitted the only real way to determine their ages would be to know their date of birth. There was insufficient evidence in the logit most favorable to the State to convict petitioner of these charges.

Reasons For Granting the Petition

ISSUE 1:

The Nevada Supreme Court erred when it summarily dismissed petitioner's argument that the District Court should not have permitted any evidence obtained from petitioner's computer to be used at trial because of the lack of trustworthy facts and circumstances, in its entirety, provides no substantial basis for the judge's finding approving the search warrant.

"A search warrant must be supported by probable cause, requiring more than a mere suspicion. Probable cause undoubtedly requires a nexus between suspected criminal activity and the place to be searched." United States v. Danbauer, 229 F.3d at 1006. The warrant obtained by Detective Pera failed to describe or allege what criminal activity petitioner was suspected of committing. The warrant also failed to establish probable cause because there was no nexus between alleged criminal activity and petitioner's residence.

The Nevada Constitution and the United States Constitution require all government searches to be reasonable and all warrants to be based on probable cause. Nevada Constitution Art. 1 § 18, - United States Constitution, Amendment IV. "No warrant shall be issued unless based upon probable cause, supported by oath or affirmation, particularly describing the place or places to be searched, and the person or persons and things to be seized." Nevada Constitution Art. 1 § 18; State v. Allen, 118 Nev. 842, 846, 60 P.2d 475 (2002). "Probable cause requires trustworthy facts and circumstances which would cause a person of reasonable caution to believe that it is more likely than not that the specific items to be searched

Per are subject to seizure and at the place to be searched."

Keesee v. State, 110 Nev. 997, 1002, 879 P.2d 63, 66 (1994).

The scope of the warrant was overly broad. In light of the open-ended language used in the search warrant to describe its purpose and scope, and its failure to specify what criminal activity was being investigated render it constitutionally defective. In the instant case, the application and affidavit in support of the search warrant did not have a sufficient statement of probable cause, in its entirety, to provide a substantial basis for the judge's finding. In review of Detective Pena's application and affidavit, the main target of the search warrant was petitioner's computer. There are four areas of information which Pena attempted to rely upon in establishing probable cause.

First are the witness statements of Anne and Melissa Marcovecchio. Neither Anne's nor Melissa's statements make any reference to child pornography in any way. In fact, Melissa's statement makes no reference to computer usage at all. The only reference to computer usage in Anne's statement is an allegation that the daughter of one of her neighbors exchanged emails with petitioner. However, that email is not described as pornographic in any way, shape, or form. The statements of Anne and Melissa simply describe allegations of inappropriate touching by petitioner. None of which involve computer usage or child pornography.

Secondly is the representation made by Pena that he believes petitioner may have accessed child pornography. However, the only factual information obtained by Pena as of September 22,

2005, proves exactly the opposite. During Pena's interview of petitioner, petitioner admitted to accessing one adult site on a couple of occasions. However, petitioner repeatedly denied any access of child pornography sites.

Thirdly, in his statement of probable cause, Pena attempts to rely upon the fact that petitioner took photographs of his students. The actual information obtained by Pena was that petitioner was in charge of preparing the yearbook for his elementary school and that he took pictures of all the students in the school all year long to place in the yearbook. While Pena sought to attach nefarious intent or criminal conduct to petitioner's photography taking, the evidence Pena had in his possession on September 22, 2005, when he swore out his affidavit, indicated exactly the opposite. In fact, Pena had verified that petitioner was in charge of the school yearbook and taking pictures for it when he interviewed student Summer Dano early in the afternoon on September 22, 2005.

Fourth is when Pena attempts to rely upon his conversation with fellow Detective, Daniel Leath. However, the only thing Leath provided Pena with was technical understanding of how computers operate and the procedures that Pena should follow in seizing petitioner's computer.

"A warrant's provision for the almost unrestricted seizure of items without describing the specific crimes suspected is constitutionally inadequate. Such warrants are suspect because nothing on the face of the warrant tells the officers for what crime the search is being undertaken."

United States v. George, 975 F.2d 72, 76 (2d Cir. 1992).

A probable cause finding should be overturned where the evidence, in its entirety, provides no substantial basis for the judge's finding. A close review of Pena's Application and Affidavit reveals that Pena reached the conclusion that petitioner's computer would contain images of child pornography based solely upon petitioner's statement that he had accessed one First Amendment protected adult-oriented pornography website. Nowhere in Pena's Application and Affidavit is there ~~any~~ factual foundation for the possession of child pornography by petitioner. There is nothing in the Marcovecchios' statements, nothing in the recorded statement of petitioner, and nothing from Detective Leath's involvement in the case. Pena simply made an incredible, illogical leap from a statement made by petitioner that he accessed one legal adult site to the conclusion that a person who accesses legal adult sites must also then access illegal child pornography sites.

If this is to be the standard, then anyone in the United States who has ever accessed a First Amendment protected legal, adult-oriented pornography site, is subject to having their home searched, their computer and cellphone seized and searched for evidence of child pornography. This is a very frightening prospect which violates the Fourth Amendment of the United States Constitution.

"It is familiar history that indiscriminate searches and seizures conducted under the authority of general warrants were the immediate evils that motivated the framing and

adoption of the Fourth Amendment." United States v. Alfred Gene Bridges.

In the instant case, Detective Pera's leap from the fact that a person who accessed a legal adult website must have also accessed a child pornography website does not provide the "trustworthy facts and circumstances" which would cause a person of reasonable caution to believe that it is more likely than not that the specific items to be searched for are seizable and will be found in the place to be searched. Kessee v. State, supra, at 1002. The probable cause finding in this case should be overturned because the evidence in the Application and Affidavit, in its entirety, provides no substantial basis for the judge's finding. Weber v. State, 121 Nev. Adv. Op. 57 pg 23 (Sept. 15, 2005).

These were intentional material falsehoods made by Detective Pera when preparing his affidavit. Pera did this with the intent of misleading the issuing judge into believing there was probable cause to issue the warrant when, in fact, Pera had no probable cause. Detective Pera has exhibited a pattern of illegal conduct in this case. Subsequent to petitioner's arrest, Pera seized and searched petitioner's cellphone without ever applying for or obtaining a warrant.

"when a defendant has made a preliminary showing and an offer of proof that there were intentional or reckless material falsehoods in the Affidavit, then the defendant is entitled to an evidentiary hearing under Franks v. Delaware; "supra; and Weber v. State, 121 Nev. Adv. Op. 57,

p. 25 (Sept. 15, 2005); see also Garrettson v. State, *supra*, at 1068.

Petitioner has established at least five instances of intentional or reckless material falsehoods in Detective Pena's Affidavit, which should have resulted in an evidentiary hearing and the exclusion of all evidence seized.

"Where a defendant in a criminal proceeding, subsequent to the ex-parte issuance of a search warrant, makes a substantiated preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by an affiant in his affidavit for the search warrant, and if the false statement is necessary to the finding of probable cause for the issuance of the warrant, the Fourth Amendment requires that a hearing be held at the defendant's request so that he may challenge the truthfulness of factual statements made in the affidavit." Franks v. Delaware.

Petitioner has established at least five instances of intentional or reckless material falsehoods in Detective Pena's affidavit, each one necessary for the showing of probable cause.

"The search warrant must be voided and the fruits of the search warrant excluded to the same extent as if probable cause was lacking on the face of the affidavit, where, at hearing, the defendant establishes, by a preponderance of the evidence, allegations of perjury, or reckless disregard, and where, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient

to establish probable cause." Franks v. Delaware.

"... if the officer applying for the warrant knew or had reason to know that the information was tainted and included it anyway without full disclosure and explanation, then suppressing the evidence seized pursuant to that warrant pays its way by deterring official lawlessness." United States v. Weener, 709 F.3d 527 (2013).

"Evidence should be suppressed if the issuing magistrate was misled by an affidavit containing false information that the affiant would have known was false if not for his reckless disregard of the truth. The good-faith exception does not apply when the affidavit in support of the warrant is so lacking of indicia of probable cause as to render official belief in its existence entirely unreasonable." United States v. Danhauser, 229 F.3d at 1006. Leon, 468 U.S. 923-24, 104 S.Ct. at 3421.

"When the Fourth Amendment demands a factual showing sufficient to comprise probable cause; the obvious assumption is that there will be a truthful showing." United States v. Halsey, 257 F.Supp 1002, 1005 <pg. 678> (SDNY 1966).

It was unreasonable for the Nevada Supreme Court to summarily dismiss petitioner's argument without any meaningful discussion. It was a violation of the Fourth Amendment for the State District Court to deny petitioner's right to a Franks hearing. There was no probable cause enunciated in the affidavit to justify the issuing of the search warrant. Petitioner's Fourth and Fourteenth Amendment rights were violated. The cumulative effects of these Constitutional

violations resulted in an unfair trial of petitioner.

ISSUE 2:

Both the Nevada Supreme Court and the Ninth Circuit Court of Appeals have acknowledged that juror Thurman's internet research constituted juror misconduct under clearly established Supreme Court precedent. But both courts incorrectly based their conclusions, that the internet research was fruitless and therefore not prejudicial, on the misconception that juror Thurman only searched the internet for the one website referenced at trial ("Little April") and was unsuccessful in locating that one website. In fact, the testimony of all twelve jurors disproves that misconception and clearly proves that juror Thurman successfully accessed numerous pornographic websites, viewed numerous pictures of girls, compared those girls to the girls in the video clips introduced as evidence at trial, and then shared his findings with the jury panel less than two hours before rendering a verdict. All twelve jurors testified, under oath, a combined twenty-one times to these facts. The jury panel discussed juror Thurman's findings for approximately twenty minutes, which at times became heated as one juror testified that several jurors were "barking" at each other.

In juror Thurman's testimony he stated he was of the opinion that there should be a not guilty verdict as to the child pornography charges. However, within two hours the jury had returned guilty verdicts, exposing petitioner to

multiple life sentences. Juror Thurman's conduct of performing successful internet research and discussing it with the jury panel less than two hours before rendering a verdict constitutes prejudicial juror misconduct, in direct violation of the confrontation clause of the United States Constitution, and therefore entitles petitioner to a new trial due to petitioner not having the opportunity to confront the information juror Thurman shared with the jury panel.

Each and every juror testified, under oath, to the numerous and successful internet searches juror Thurman conducted as is cited below from the juror misconduct hearing transcripts.
(APPENDIX G)

Juror Chris Thurman testified; "... I looked at some pornography sites but nothing with child porn" (p. 22, line 10) "I looked at pornography websites ..." (p. 23, line 10) "I looked for the website, I was looking for some websites with young girls on it because I felt the pictures ..." (p. 23-24, lines 25 and 1) "... I said I saw some websites with younger girls but not child websites ..." (p. 24, lines 13-14) Q. "Right, and then you looked and you found other websites?" A. "Other normal websites, yes." (p. 31, lines 9-10)

Juror Carol Marques testified; "... it was regarding the video, that they had gone on the internet to research it to see if they could tell the ages, and they couldn't come up with a conclusion of what the ages of the person, or persons were; ..." (p. 4, lines 13-15)

Juror Judy Sheets testified; "He went and looked at

pictures of young girls." (p. 36, line 16)

Juror Loren Becker testified; "I do remember one gentleman who looked at in -- pictures, or tried to research pornography pictures to determine ages." (p. 43, lines 22-23) "--- when he returned he said that he looked at pictures on the internet and based on him looking at pictures on the internet he felt like a lot of the sites had what appeared to be young women in the pictures, and that it was hard for him to make a decision on the pictures we had to look at." (p. 44, lines 11-14)

Juror Alvin Yango testified; "Just -- I guess, if I can recall, is research on determining ages I believe." (p. 47, lines 7-8) "The internet." (p. 47, line 10)

Juror Shane Kohler testified; "A juror came back on that Monday and said he went home, looked on the internet, compared young girls' faces that they said were over the age of 18, and he said they looked younger than the ones that are in the computer disk ---" (p. 50, lines 10-13) Q. "And he compared the -- what the girls on those sites looked like to the girls on the computer disk that was admitted as evidence during the trial?" (p. 52, lines 23-25) A. "Yes, correct." (p. 53, line 1) Q. "And the girls on the internet sites appeared to be even younger than the girls on the disks that -- for evidence that was admitted at trial, is that right?" (p. 53, lines 2-4) A. "Yes, true." (p. 53, line 5)

Juror Nancy Davis testified; "He basically stated that he was kind of just playing online on some sites just to see if he could determine whether or not females were underage

based on what the advertisement was on that particular site."

(p. 55, lines 6-8)

Juror Geraldine Benging testified; "I know that one juror said he watched pornography over the weekend because he wanted to see how young the girls actually looked." (p. 57, lines 18-20)

Juror Sondra Michael testified; "... and that he looked at some sites..." (p. 63, line 5) Q. "... do you recall what the juror said regarding his internet viewing over the weekend?" (p. 64, line 25 and p. 65, line 1) A. "He said he couldn't tell the ages of the girls." (p. 65, line 2)

Juror Jessie Ruelas testified; "He said he looked at pictures of girls to determine the ages." (p. 66, lines 18-19)

Juror David Paracuelle testified; "Okay, from what I can recall that the real estate guy said that he went on the computer over the weekend and went on to porno sites just to make comparisons of - in models." (p. 72, lines 20-22)

The State admitted that "had the juror been successful in accessing the internet website, this case would be vastly different." Juror Thurman admitted he successfully accessed numerous websites, compared girls from these sites to the ones admitted as evidence at trial, and shared this information with the jury panel at the beginning of jury deliberations the day the jury rendered its verdict. These are clear violations of the Confrontation clause as petitioner was not given the opportunity to confront this extrinsic information at trial.

In conducting their deliberations, "jurors have a

duty to consider only the evidence which is presented to them in open court." Bayramoglu v. Estelle, 806 F.2d 880, 887 (9th Cir. 1986) (citing Turner v. Louisiana, 379 U.S. 466, 472-73, 85 S.Ct. 546, 13 L.Ed. 2d 424 (1965): United States v. Bagnard, 665 F.2d 877, 884 (9th Cir. 1981) (per curiam), cert. denied, 456 U.S. 962, 102 S.Ct. 2040, 72 L.Ed. 2d 487 (1982). "Evidence not presented at trial, acquired through out-of-court experiments or otherwise, is deemed "extrinsic." Marino v. Vasquez, 812 F.2d 499, 504 (9th Cir. 1987); cf. United States v. Brewer, 783 F.2d 841, 843 (9th Cir.) when extrinsic evidence is presented to a jury that is considering a criminal case, the defendant is entitled to a new trial "if there exist(s) a reasonable possibility that the extrinsic material could have affected the verdict." United States v. Vasquez, 597 F.2d 192, 193 (9th Cir. 1979); see also United States v. Brodie, 858 F.2d 492, 495 (9th Cir. 1988). Such a possibility exists if the extrinsic evidence may have affected the reasoning of even one juror. United States v. Vasquez, 597 F.2d at 194; U.S. v. Hendrix, 549 F.2d 1225, 1227 (9th Cir. 1977). "The 'reasonable possibility' test of United States v. Vasquez, is equivalent in severity to the harmless error rule applicable to constitutional errors under Chapman v. California, 386 U.S. 18, 81 S.Ct. 824, 17 L.Ed. 2d 705 (1967)." Gibson v. Clanton, 633 F.2d 851, 853 (9th Cir. 1980), cert. denied 450 U.S. 1035, 101 S.Ct. 1749, 68 L.Ed. 2d 231 (1981). The proper inquiry is whether the prosecution has shown beyond a reasonable doubt

that the extrinsic evidence did not affect the verdict. Chapman, 386 U.S. at 24; see also Marino v Vasquez, 812 F.2d at 504. United States v. Navarro-Garcia, 926 F.2d 818 (1991).

All of the jurors were specifically instructed, by the Court, not to do any outside research or experiments. Juror Thurman's successful internet research was a clear violation of these instructions. Juror Thurman's accessing of numerous pornography sites, comparing the girls from those sites to the girls from the video clips introduced at trial as evidence, and sharing his findings with the jury panel less than two hours before rendering a verdict clearly constitutes prejudicial juror misconduct and warrants the issuing of a new trial in this case as petitioner's Fifth and Fourteenth Amendment rights were violated.

ISSUE 3:

The State's duty is to prove, beyond a reasonable doubt, all charges by providing evidence. The State failed to provide any evidence that the models in the images introduced at trial were under the age of 16 and thus were child pornography. Before trial the Court admitted that the State would have to produce someone who would have to explain the difference between a 16 year old and a 17 year old. And if the State didn't do this "then the State hasn't proven their case." The State did not produce anyone to do this and thus did not prove their case.

The State's expert, Dr. Zebriegren, clearly testified that he could not determine the ages of the girls in the images to any degree of medical certainty. There was no evidence

introduced at trial by the state's expert as to the chronological ages of the individuals depicted in the images.

The defense's expert, Dr. Hyman, prepared a report before trial. Dr. Hyman also consulted the Tanner staging maturation scale and he observed adult pornography sites before testifying to the fact that legal adult pornography websites use models who appear to be younger than 18 years old. Dr. Hyman explained, in detail, that the use of height and breast size to determine the age of a woman is unreliable. Dr. Hyman concluded that the chronological ages of the individuals depicted in the images could not be ascertained to any degree of medical certainty and the only way to determine their ages was to know their date of birth.

In the Federal District Court's order finding sufficient evidence, the Court explained that a pediatrician testified; "he based his testimony on a reasonable degree of medical certainty." This statement is belied by the record as the State's expert clearly testified that he was unable to determine the ages of the girls to any ~~reasonable~~ degree of medical certainty. The state's expert admitted that his opinion was not based on any objective scientific or medical evidence.

The Due Process Clause of the Fourteenth Amendment forbids conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which a defendant is charged.

"No reasonable jury could find a defendant guilty of an offense where the evidence gives equal or nearly equal

circumstantial support to a theory of guilt, as well as to a theory of innocence. Convictions based on such evidence must be reversed." U.S. v. Ferguson, 211 F.3d 878, 882-83 (5th Cir. 2000).

"A verdict may not rest on mere suspicion, speculation, or conjecture, or an overly attenuated piling of inference on inference." U.S. v. Rojas Alvarez, 451 F.3d 320, 333 (5th Cir. 2006).

"courts cannot credit inferences within the realm of possibility when those inferences are unreasonable." U.S. v. Quattrone, 441 F.3d 153, 169 (2d Cir. 2006).

"No reasonable jury could convict a defendant where the government has done nothing more than pile inference upon inference to prove guilt. The government must do more to support a conviction." McDowell, 498 F.3d at 314.

The State sent the twelve images to the FBI for verification that these images were of child pornography. The State received no such verification from the FBI. These twelve images were downloaded four days prior to the execution of the search warrant. The State never proved that petitioner knowingly and willingly possessed them and never proved that they were ever viewed by petitioner. Both the State's and the defense's experts testified that the ages of the models in the images could not be determined to any degree of medical certainty, and that the only way to accurately determine their actual ages would be to know their date of birth. The State offered no proof as to the ages of the models, let

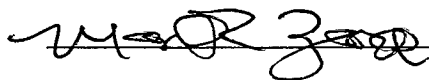
alone proof beyond a reasonable doubt. The State simply made unsubstantiated suppositions as to the ages of the models. Imagine if it were left to jurors to determine if DNA or fingerprints in a case matched. In the instant case the models were not obviously underage and thus should have been proven to be so in order to secure guilty verdicts. There was insufficient evidence in the light most favorable to the State to convict petitioner of the possession of child pornography counts. Petitioner should receive a new trial due to the State using the pornography charges to prove motive in the lewdness charges and to simply bias the jury against petitioner.

The cumulative effects of these constitutional violations resulted in an unfair trial of petitioner. The remedies sought by petitioner are for the search warrant to be overturned, all evidence seized pursuant to said warrant be excluded, the possession of child pornography charges be dismissed, and a new, fair trial be ordered.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

 Mark Zana

Date: January 23, 2018