

AUG 26 2008

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

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES HENRY DIGIUSTO,

Petitioner-Appellant,

v.

CRAIG FARWELL, et al.,

Respondents-Appellees.

No. 07-15176

D.C. No. CV-04-0110-ECR

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Edward C. Reed, District Judge, Presiding

Argued and Submitted August 11, 2008
San Francisco, California

Before: THOMPSON and WARDLAW, Circuit Judges, and MOSKOWITZ,
District Judge.**

James Henry DiGiusto (“Petitioner”) appeals from the district court’s denial
of his petition for writ of habeas corpus under 28 U.S.C. § 2254. We affirm.

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

** The Honorable Barry Ted Moskowitz, United States District Judge
for the Southern District of California, sitting by designation.

The state court’s determination that Petitioner’s trial counsel’s performance was not deficient was not an objectively unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984). Based on what was known about the photographs – i.e., that they showed scantily-clad boys in various poses – there was a risk that the pictures would be found to depict “sexual conduct” under N.R.S. §§ 200.710(1), 200.700(3). *See, e.g., United States v. Knox*, 32 F.3d 733, 737 (3d Cir. 1994) (holding that under the federal child pornography statute, lascivious exhibition of the genitals does not contain any requirement of nudity); *People v. Kongs*, 30 Cal. App. 4th 1741, 1753 (1995) (holding that under California law, “sexual conduct” does not require a nude exhibition of the genitals). *But see Illinois v. Dailey*, 196 Ill. App. 3d 807, 812 (1990) (holding that “lewd exhibition of the genitals,” as used within Illinois statute, requires genitals to be unclothed). Therefore, it was reasonable for trial counsel to accept the plea agreement and not request an evidentiary hearing or conduct an investigation. By accepting the plea agreement, the number of counts was reduced from thirteen to three, and Petitioner’s sentencing exposure was reduced significantly.

Because Petitioner did not allege facts establishing a colorable claim of ineffective assistance of counsel, the district court did not err in denying the petition or failing to conduct an evidentiary hearing.

AFFIRMED.