IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF IOWA

CENTRAL DIVISION

BRUCE E. MARTIN, Petitioner, vs. TERRY MAPES, Warden Newton Correctional Facility, Respondent.	No. 4:10-cv-00150-JAJ **ORDER**

This matter comes before the Court pursuant to Bruce E. Martin's ("Martin") April 2, 2010 Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. [Dkt. No. 1.] Martin filed an Amended Petition on April 26, 2010, and a First Amended Petition on May 25, 2010. [Dkt. Nos. 5 & 12.] Martin challenges a conviction in state court for one count of second-degree sexual abuse and one count of lascivious acts with a child. In his petition for relief, Martin claims that he was coerced into signing a confession admitting sexual abuse. He also claims that his trial counsel were ineffective in failing to: (a) move to suppress the confession; (b) pursue a defense of diminished capacity; (c) fully investigate the allegations upon which Martin was charged, such as obtaining possible exculpatory police and Department of Human Services ("DHS") reports; and (d) take more depositions. For the following reasons, the Court denies Martin's § 2254 application.

I. PROCEDURAL AND FACTUAL HISTORY[1]

A. Plea Agreement and Sentence

Martin was charged by trial information on December 1, 2003, with four counts of second-degree sexual abuse in violation of Iowa Code § 709.3(2), for sexually abusing his daughter, A.M., during the years of 1995 and 1996.[2] Trial Information, Dec. 1, 2003. The State filed an amended trial information on February 11, 2004, adding a charge of lascivious acts with a child, his daughter, in violation of Iowa Code § 709.8. Amended and Substituted Trial Information, Feb. 11, 2004. The victim was four years old at the time the crimes were committed.

Represented by Bruce Ingham, Martin entered a plea of guilty on February 11, 2004. Memo. of Plea Agmt., Feb. 11, 2004. Pursuant to the plea agreement, Martin pled guilty to second-degree sexual abuse in Count I and lascivious acts with a child in Count V. *Id.* The court found a factual basis for the pleas and sentencing was set for March 4, 2004. Plea Tr. at 22, Feb. 11, 2004. The State agreed to dismiss the other three counts, to make no recommendation as to whether the counts would run concurrently or consecutively, and to recommend that the sentence imposed run consecutive to an unrelated sentence he was currently serving.[3] Memo. of Plea Agmt., Feb. 11, 2004. The court informed Martin that any challenges to the pleas based on alleged defects in the proceedings must be raised in a motion in arrest of judgment or he would be prevented

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[1]The facts and evidence are summarized in the light most favorable to the prosecution. *Liggins v. Burger*, 422 F.3d 642, 647 (8th Cir. 2005); *Fenske v. Thalacker*, 60 F.3d 478, 480 (8th Cir. 1995).

[2]This case was assigned Scott County No. FECR 161642.

[3]Martin was charged on August 12, 1997, for third-degree sexual abuse and lascivious acts with a child. He pled guilty and was sentenced on January 26, 1998, to ten years on the sexual abuse charge and a consecutive five years on the lascivious acts charge. This was assigned Scott County No. FECR 205149. Martin was still incarcerated at the time he was charged with this instant offense.

from later raising such a challenge on appeal. Plea Tr. at 23.

Martin moved to withdraw his guilty plea, which the court granted on March 17, 2004. Order, Mar. 17, 2004. The court also appointed James Clements to serve as Martin's counsel. *Id.* But Martin then re-entered a guilty plea on June 10, 2004, for second-degree sexual abuse and lascivious acts with a child. Plea Tr., June 10, 2004. The plea agreement contained the same terms as the earlier plea agreement. Memo. of Plea Agmt., June 10, 2004. The court also found a factual basis for the guilty pleas based on the following exchange:

> THE COURT: Now, the State claims that back around January 1, 1995, here in Scott County, with respect to count I, that you did engage in a sex act with a person under twelve years of age. Is that true?
> THE DEFENDANT: Yes.
> THE COURT: What kind of sex act was it?
> THE DEFENDANT: Fondling. Fondled her vagina area, touched her vagina area.
> THE COURT: Did you touch her vagina with your hand or penis?
> THE DEFENDANT: With my hands, finger.
> . . .
> THE COURT: Then with respect to count 5, lascivious acts with a child, the State also claims that in that same time period you had some contact as I previously outlined with another child, is that true?
> THE DEFENDANT: Yes.
> THE COURT: Was the same child –
> THE DEFENDANT: No. Same child? Yes.
> THE COURT: Different occasion than the one you just described with the respect to the sex abuse?
> THE DEFENDANT: No, it was the same one. Is that the one you're talking about?
> . . .
> THE COURT: So with respect to the lascivious acts, you indicated that you had contact between your hand and the vaginal area of a child, is that correct?
> THE DEFENDANT: Right.

> THE COURT: And was that on separate occasion than the act that you talked about with respect to the sex abuse in count 1?
> THE DEFENDANT: Yes.

Plea Tr. at 10-11, June 10, 2004.

The court then set Martin's sentencing for July 1, 2004, and also reminded Martin about his inability to challenge his plea on appeal if he failed to first raise the challenge in a motion in arrest of judgment. *Id.* at 13-14. Pursuant to Iowa Rules of Criminal Procedure 2.24(3)(b), a motion in arrest of judgment must be filed not later than forty-five days after the guilty plea, "but in any case not later than five days before the date set for pronouncing judgment." Martin did not file a timely motion in arrest of judgment.

On the date of his sentencing, Martin made a second request to withdraw his guilty plea and as a result, the sentencing was continued to July 9, 2004. Order, July 1, 2004. At sentencing, Martin stated that he had simply changed his mind and that he would "just like to take it to trial so I could prove to the State my innocence." Sentencing Tr. at 7, July 9, 2004. The court found no legal basis for Martin to withdraw his plea and denied his motion. *Id.* at 8. The court then sentenced Martin to twenty-five years in prison for second-degree sexual abuse and five years in prison for lascivious acts with a child, with the sentences to run concurrently to each other, but consecutive to the undischarged sentence Martin was currently serving. *Id.* at 13-14. He was also sentenced to an additional two-year term of parole or work release in connection with the sentence for lascivious acts. *Id.* at 14-15.

Martin filed a motion for reconsideration of sentence on August 9, 2004, which the court denied on the same day. Mtn. for Reconsideration, Aug. 9, 2004; Ruling, Aug. 9, 2004.

On July 12, 2004, Martin filed a notice of appeal to the Iowa Supreme Court. This was assigned number 04-1107. On November 1, 2004, the State and Martin's appellate counsel filed a joint motion to reverse and remand for re-sentencing because the district court improperly imposed an additional two-year term of parole or work release

following Marin's lascivious acts prison term. Jt. Mtn. to Reverse, Nov. 1, 2004. The Iowa Supreme Court granted the motion on December 16, 2004, and on January 3, 2005, the district court deleted the two-year term at issue. Order, Dec. 16, 2004; Sentencing Order, Jan. 3, 2005.

B. First Application for Post-Conviction Relief

Martin filed an application for post-conviction relief on January 6, 2005.[4] App. Postconviction Relief, Jan. 6, 2005. In his petition, Martin asserted that he had been coerced into giving a confession by a police officer and that his trial counsel had failed to investigate DHS and police department records for possible exculpatory evidence. *Id.* at 3. Martin's post-conviction relief counsel, Penelope Souhrada, filed an amended application on October 23, 2006, in which she alleged ineffective assistance of counsel for: (1) failing to move to suppress the confession; (2) failing to pursue a diminished capacity defense; (3) failing to fully investigate the allegations against him and obtain possible exculpatory evidence; and (4) failing to depose several witnesses. Am. App. Postconviction Relief, Oct. 23, 2006.

An evidentiary hearing on Martin's application was held on October 24, 2006. Hr'g Tr., Oct. 24, 2006. The trial lawyer, James Clements, testified that the trial court appointed him to represent Martin after Martin was allowed to withdraw his first guilty plea. *Id.* at 12. Mr. Clements then explained his investigation of the case:

> A: Well, I did the kind of investigation that is typically done in a serious case like this. I reviewed with him all of the allegations, reviewed everything that was in the Trial Information, discussed things that he disagreed with, discussed possible trial strategy. He had some issues that he felt things that had happened earlier that might

[4]This application was assigned case number PCCE 103767. Martin had separately filed a Motion for Correction of an Illegal Sentence on May 25, 2006, which the court denied on June 8, 2006. The court also denied a pro se motion for new trial on April 10, 2008.

> tend to prove exculpatory in this case, so I subpoenaed from the police department, the Davenport Police Department, all records that they had that referred to him regarding the matter.
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> Q: Did you obtain any records from the Department of Human Services?
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> . . .
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> A: I did not obtain any records. We – my client and I discussed obtaining records from them. It's a little bit more difficult than it is simply subpoenaing the records from the police department. The record that he wanted me to get my hands on, he believed that there would be a record in the Department of an earlier incident in which the alleged victim in this case had been examined by a doctor, and he asserted that at that time the doctor determined that there wasn't any evidence of any abuse. I felt if we actually went to trial, it might be – it might be useful. It wouldn't be dispositive of anything, but I did determine that we should try to find out how we might be able to get it. The problem I had was I didn't know exactly when this incident occurred, who was involved, you know , what caseworkers or anything like that.
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> . . .
>
> Q: Mr. Martin had signed a statement when he was interrogated by the Bettendorf Police Department which appeared to be a confession of certain acts that he's alleged to have committed. Did you make any effort to try and get that signed statement or confession suppressed?
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> A: I don't recall making any motions to do so. I don't believe that we had any grounds to do so. This was a discussion and a statement that was signed in front of a Bettendorf police officer, the detective, and also a counselor down at the prison. I–I recall, but not clearly, having a phone conversation with the prison counselor, but I–I couldn't remember the substance. . . .

Id. at 13-16. Mr. Clements also testified that he did not file a motion in arrest of judgment because "As I indicated, I don't recall him wanting to withdraw the plea." *Id.* at 17. He further testified that it was Martin's own decision to plead guilty and not

proceed to trial:

> Q: Were you willing during your representation of Mr. Martin to actually take this case to trial rather than see the defendant plead guilty?
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> A: Certainly. That was the main purpose for me coming into the case. At the time that Mr. Ingham was released from representing Mr. Martin, Mr. Martin was insisting that he wanted a trial. I was brought in to do the trial. We started preparation for in fact doing a trial, and it was only because he didn't want to face the penalties that he would face if he lost that we didn't go to trial.
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> Q: In fact, did you have to visit with me [prosecutor] and request of me that, although many things had happened in this case, including Mr. Martin withdrawing his plea on one occasion, did you come to me and ask that I offer him the opportunity to plead again to the original plea?
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> A: Yes. That was one of our issues in talking about going to trial or entering a plea, as it eventually happened, was that at that time it wasn't clear that you would be willing to offer him that plea again, since he had already entered into it and withdrawn from it, and he might not have the same opportunity any more for reduced penalties.
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> Q: But nonetheless, you came to me and made that request, that he be able to plead to the original plea, and you did that at the request of Mr. Martin?
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> A: Yes. I did that following a discussion with him about his options and his indication that he wanted to plead guilty and not take his chance at trial.

Id. at 17-18.

In a ruling on October 25, 2006, the court found that Martin's guilty plea had waived his suppression claims, that he had failed to file a motion in arrest of judgment and was precluded from bringing these challenges without a showing that the pleas were not knowing and not voluntary, and that he had failed to establish that the pleas were invalid. Ruling on App. Postconviction Relief at 8, Oct. 25, 2006. The court concluded that "the applicant has failed to produce any evidence on relevant issues upon which this Court could find that the entry of his pleas were not voluntary and intelligently entered."

Id. The court accordingly denied his application for post-conviction relief.

Martin appealed this ruling on November 7, 2006. Subsequently, Martin's appellate counsel, Thomas Preacher, filed a motion to withdraw pursuant to Iowa Rule of Appellate Procedure 6.104 on May 18, 2007. Counsel concluded that there was no basis for Martin to show that his pleas were not voluntary and intelligently entered. Martin resisted his counsel's motion to withdraw. On March 28, 2008, the Iowa Supreme Court granted appellate counsel's motion to withdraw and also dismissed the appeal as frivolous. The court issued procedendo on April 1, 2008.

C. Second Application for Post-Conviction Relief

Martin wrote a letter to the Iowa District court on June 1, 2007. In an order dated June 1, 2007, the court interpreted the letter as Martin "asking for another post-conviction relief proceeding based on newly discovered evidence." Order, June 1, 2007. This case was assigned file number PCCE 108629.

On September 10, 2008, Martin filed a renewed petition for post-conviction relief under file number PCCE 108629. Pet. Postconviction Relief, Sep. 10, 2008. In his petition, Martin stated that his trial counsel and Ms. Souhrada had failed to investigate "numerous documents from 1995 to 2003." *Id.* at 1. He asserted that these documents would "demonstrate his innocence in that no reports with regard to his asserted sexual abuse of his daughter surfaced until 2002 or 2003 relating to acts supposedly taking place in 1995 or 1996." *Id.* Martin alleged that another male family relative was the "perpetrator of the sexual abuse" and that none of his attorneys had "pursued an investigation of this defense." *Id.* at 2. Lastly, Martin alleged that he had made all of this information available to Ms. Souhrada and that her failure to investigate his claims "cast[s] doubt on the first post conviction relief action." *Id.*

The State filed a motion for summary judgment and argued that his new petition "raises no new issues and is merely another attempt at obtaining relief via efforts that

have already been thoroughly reviewed by the Court after which rulings were entered in favor of the State." The court then held a hearing on November 18, 2008. Hr'g Tr., Nov. 18, 2008. Martin's counsel, Robert Phelps, argued that "a huge number of documents" showed that Martin was "an innocent man." *Id.* at 3.

On December 11, 2008, the court found in favor of the State, granted summary judgment and dismissed the petition. Ruling, Dec. 11, 2008. The court held that Martin had failed to demonstrate that his representation by Mr. Ingham and Mr. Clements was inadequate. *Id.* at 7-8. As to Ms. Souhrada, the court stated that Martin could "draw[] no factual connection between the investigation or presentation of these [DHS and police department] reports and the validity of his guilty pleas. . . . The fact that reports from 1994 and 1998 do not specifically identify him as perpetrating sexual abuse against his daughter simply has no bearing on whether his guilty pleas were entered in a knowing and voluntary manner." *Id.* at 7. The court likewise concluded that Martin's trial counsel were not ineffective. It noted that "his trial counsels' decisions not to investigate the police and DHS reports did not undermine the validity of his guilty pleas." *Id.* at 8. Furthermore, because the Court of Appeals had dismissed his first post-conviction appeal as frivolous, the court "has adjudicated the Applicant's claim that his trial counsel were ineffective . . . [and] Iowa Code section 822.8 precludes the Applicant from continuing to re-assert this issue as grounds for post-conviction relief." *Id.*

Martin appealed on December 31, 2008. His appellate counsel argued that it was improper to grant summary judgment when the court did not review the evidence Martin claimed demonstrated his innocence or evidence which may have influenced his decision to plead guilty. The Iowa Court of Appeals affirmed the grant of summary judgment on December 30, 2009. *Martin v. State*, No. 09-0014, 2009 WL 5126344, at *2 (Iowa Ct. App. 2009). The court held that "Martin's claims of his innocence do not undermine the validity of his guilty plea. Martin failed to show that but for the alleged ineffectiveness he would not have pleaded guilty. Martin therefore suffered no breach of duty by his

trial or postconviction counsel, nor resulting prejudice." *Id.* (citation omitted).

The Supreme Court of Iowa denied Martin's application for further review on March 10, 2010, and issued procedendo on March 23, 2010.[5]

D. Federal Application for a Writ of Habeas Corpus

On April 2, 2010, Martin filed a Petition in this court, which he amended on May 25, 2010. In his Petition, Martin asserts two grounds for relief in support of his writ: (1) he claims that he was coerced into signing a confession admitting sexual abuse; and (2) that his trial counsel were ineffective. In Martin's brief, he appears to expand his allegation that trial counsel were ineffective in the following ways: (1) misadvice as to the amount of imprisonment Martin faced if he went to trial; (2) a failure to investigate possible recantation by the victim; and (3) a failure to investigate possible exonerating DNA evidence.

The Court conducted an initial review on April 9, 2010. [Dkt. No. 4.] Martin filed a brief on the merits on July 19, 2010. [Dkt. No. 15.] On September 24, 2010, the Respondent filed a response to Martin's Petition and a brief on the merits. [Dkt. No. 26.] The Respondent also filed an appendix of relevant state court opinions and rulings on August 4, 2010. [Dkt. No. 17.] The Court finds that the Petition is fully submitted.

II. Standards of Review

A court shall allow an application for a writ of habeas corpus in certain circumstances. Title 28 U.S.C. § 2254(d) provides:

> (d) An application for a writ of habeas corpus on behalf of a

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[5]Martin has addressed pro se letters to the district court since the filing of this application for relief. On the basis of these letters, the district court has opened a third application for post-conviction relief, assigned Scott County PCCE 115153.

> 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--
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> (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.

Accordingly, "[s]ection 2254(d) distinguishes between two types of erroneous decisions—those of law and those of fact—and treats each in separate subparagraphs." *Weaver v. Bowersox*, 241 F.3d 1024, 1029 (8th Cir. 2001). Claims involving legal error are subject to a (d)(1) analysis, whereas factual error claims are governed by the standard in (d)(2). *Id.* at 1030. Section (e)(1) then subjects the analysis to a "presumption of correctness in favor of state court findings of fact." *Id.*

A. Standard of Review Under 28 U.S.C. § 2254(d)(1)

If a claim was adjudicated on the merits in state court, a federal court may grant a state habeas petitioner relief for a claim if that adjudication "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." *Mitchell v. Esparza*, 540 U.S. 12, 15–16 (2003) (per curiam) (quoting 28 U.S.C. § 2254(d)(1)); *see also Honeycutt v. Roper*, 426 F.3d 957, 960 (8th Cir. 2005). The Supreme Court held that district courts should defer to the state court decisions on the merits. *See generally Rompilla v. Beard*, 545 U.S. 374, (2005); *Williams v. Taylor*, 529 U.S. 362 (2000); *Bucklew v. Luebbers*, 436 F.3d 1010, 1015–16 (8th Cir. 2006). Courts should "undertake only a limited and deferential review of underlying state court decisions." *Taylor v. Roper*, 561 F.3d 859, 862 (8th Cir. 2009); *Collier v. Norris*, 485 F.3d 415, 421 (8th Cir. 2007).

Williams established that a state court decision can be "contrary to" Supreme

Court precedent in one or two ways: (1) "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law" or (2) "if the state court confronts [a group of] facts that are materially indistinguishable from a [decision of the Supreme Court] and [nevertheless] arrives at a result [in discord from that precedent]." *Williams*, 529 U.S. at 405–06. In this case, the decision of the Iowa Court of Appeals would be "contrary to" clearly established federal law if the controlling Supreme Court cases require a "different outcome" or a "particular result." *See Long v. Humphrey*, 184 F.3d 758, 760 (8th Cir. 1999); *see also McReynolds v. Kemna*, 208 F.3d 721, 723 (8th Cir. 2000) (citing *Long*).

There are two ways in which an "unreasonable application" of Supreme Court precedent can occur, as the Supreme Court explained:

> First, a state-court decision involves an unreasonable application of [the Supreme Court's] precedent if the state court identifies the correct governing legal rule from [the Supreme Court's] cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a state-court decision also involves an unreasonable application of [the Supreme Court's] precedent if the state court either unreasonably extends a legal principle from [the Supreme Court's] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.

Williams, 529 U.S. at 407 (citations omitted); *see also Rompilla*, 545 U.S. at 380 (citations omitted) (discussing the "unreasonable application" prong of *Williams*); *Wiggins v. Smith*, 539 U.S. 510, 520 (2003) (citations omitted) (same); *Bucklew*, 436 F.3d at 1016 (citations omitted) (same). Courts should refer to the holdings, instead of the dicta, in the Supreme Court's decision. *Yanez v. Minn.*, 562 F.3d 958, 962 (8th Cir. 2009) (quoting *Carey v. Musladin*, 549 U.S. 70, 74 (2006)).

Additionally, pursuant to § 2254(d)(1)'s "unreasonable application" clause, a federal court is constrained from issuing a "writ simply because that court concludes in

its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be *unreasonable*." *Williams*, 529 U.S. at 411 (emphasis added). "To be unreasonable, the state court's application of Supreme Court precedent 'must have been more than incorrect or erroneous.'" *Garcia v. Mathes*, 474 F.3d 1014, 1017 (8th Cir. 2007) (quoting *Wiggins*, 539 U.S. at 520–21); *see also Losh v. Fabian*, 2010 WL 6100, at *2 (8th Cir. Jan. 4, 2010) (citing *Evenstad v. Carlson*, 470 F.3d 777, 784 (8th Cir. 2006) ("for a state court does not act contrary to or unreasonably apply clearly established federal law if there is no controlling Supreme Court holding on the point")). Rather, the state court's application of the law "must be objectively unreasonable." *Christian v. Dingle*, 577 F.3d 907, 911 (8th Cir. 2009) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (state court's determination "of clearly established law must be objectively unreasonable.")); *Page v. Burger*, 406 F.3d 489, 493 (8th Cir. 2005) (citing *Green v. Norris*, 394 F.3d 1027, 1029 (8th Cir. 2005)); *Garcia*, 474 F.3d at 1017.

The Court must apply these standards to Martin's claim and inquire whether the state court reached a decision contrary to that reached by the Supreme Court on a question of law, or alternatively, whether the court correctly identified the applicable principles of federal law but then unreasonably applied that law to the facts of Martin's claims. *See, e.g., Rousan v. Roper*, 436 F.3d 951, 955–56 (8th Cir. 2006) (discussing the applicable standards). Because the Iowa Supreme Court denied Martin review, the Court applies the standards herein to the decision of the Iowa Court of Appeals, because it is the "last reasoned decision" of the state courts. *Mark v. Ault*, 498 F.3d 775, 783 (8th Cir. 2007) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803–04 (1991)).

B. Standard of Review Under 28 U.S.C. § 2254(d)(2)

Federal habeas corpus relief may also be granted if a state court proceeding "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." *Beck v. Bowersox*, 257 F.3d 900, 901 (8th Cir. 2001) (quoting 28 U.S.C. § 2254(d)(2)). State court findings enjoy a presumption of correctness. *Id.* (citing § 2254(e)(1)). "[I]t is well established that the factual determinations of the state court, including those by the state appellate court, are presumed to be correct." *de la Garza v. Fabian*, 574 F.3d 998, 1002–03 (8th Cir. 2009) (citing *Smulls v. Roper*, 535 F.3d 853, 864 (8th Cir. 2008)); *see also Perry v. Kemna*, 356 F.3d 880, 883 (8th Cir. 2004) ("The statute makes no distinction between the factual determinations of a state trial court and those of a state appellate court.") (quoting *King v. Bowersox*, 291 F.3d 539, 540 (8th Cir. 2002))).

Moreover, the petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. § 2254(e)(1); *see also Middleton v. Roper*, 455 F.3d 838, 845 (8th Cir. 2006) (the court "bestow[s] a presumption of correctness on the factual findings of the state courts, and absent procedural error, [the court] may set such findings aside only if they are not fairly supported by the record."); *Cox v. Burger*, 398 F.3d 1025, 1028–29 (8th Cir. 2005) (quoting *Whitfield v. Bowersox*, 324 F.3d 1009, 1012 (8th Cir. 2003)). "It bears repeating that even erroneous fact-finding by the [state] courts will not justify granting a writ if those courts erred 'reasonably.'" *Weaver*, 241 F.3d at 1030; *see also Guinn v. Kemna*, 489 F.3d 351, 359 (8th Cir. 2007) ("invocation of the statutory language in a wrap-up paragraph does not meet [the] burden to rebut with clear and convincing evidence the presumption that the state court's findings are correct."). The petitioner must show by clear and convincing evidence "that the state court's presumptively correct factual findings do not enjoy support in the record." *Lomholt v. Iowa*, 327 F.3d 748, 752 (8th Cir. 2003) (citing *Boyd v. Minn.*, 274 F.3d 497, 501 n.4 (8th Cir. 2001)).

C. Requirement of Exhaustion

Before a petitioner may obtain federal habeas corpus review of his state

confinement, the petitioner must first "exhaust" his federal claims in the appropriate state forum. 28 U.S.C. § 2254(b)(1);[6] *see also Coleman v. Thompson*, 501 U.S. 722, 731 (1991) ("[A] state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims."); *Clay v. Norris*, 485 F.3d 1037, 1039 (8th Cir. 2007) (same); *Echols v. Kemna*, 511 F.3d 783, 785 (8th Cir. 2007) (same). State remedies are exhausted when the petitioner has provided the highest state court with a full and fair opportunity to consider all the claims before presenting them to the federal court. *Vasquez v. Hillery*, 474 U.S. 254, 257 (1986); *Armstrong v. Iowa*, 418 F.3d 924, 925 (8th Cir. 2005); *Miller v. Lock*, 108 F.3d 868, 871 (8th Cir. 1997); *see also* 28 U.S.C. § 2254(c).[7] In order to exhaust all remedies in Iowa, a petitioner must seek discretionary review from the Iowa Supreme Court after the Iowa Court of Appeals rejects an argument on direct appeal. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 845–48 (1999), *abrogating Dolny v. Erickson*, 32 F.3d 381 (8th Cir. 1994)); *Randolph v. Kemna*, 276 F.3d 401, 403 (8th Cir. 2002).

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[6]Title 28, United States Code, Section 2254(b)(1) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to to the judgment of a State court shall not be granted unless it appears that–
> (A) the applicant has exhausted the remedies available in the courts of the State, or
> (B) (i) there is an absence of available State corrective process; or
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

[7]Title 28, United States Code, Section 2254(c) provides:

> An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

28 U.S.C. § 2254(c).

To satisfy the fair presentment prong of the exhaustion requirement, a petitioner must "refer to a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent federal constitutional issue." *Abdullah v. Groose*, 75 F.3d 408, 412 (8th Cir. 1996). In order to be considered properly raised in state court proceedings, a petitioner must present a claim to the state courts on the same factual grounds and legal theories asserted in the applicant's federal habeas corpus application. *Keithley v. Hopkins*, 43 F.3d 1216, 1217 (8th Cir. 1995); *see also Interiano v. Dormire,* 471 F.3d 854, 856 (8th Cir. 2006); *Kerns v. Ault*, 408 F.3d 447, 449 n.3 (8th Cir. 2005) ("Kerns need not have cited to any particular federal case, but must have fairly apprized the state court of the facts and the substance of the federal claim.") (internal quotations omitted); *Barrett v. Acevedo*, 169 F.3d 1155, 1162 (8th Cir. 1999) ("Presenting a claim that is merely similar to the federal habeas claim is not sufficient to satisfy the fairly presented requirements."). The habeas claim presented need not be an "exact duplicate" of the one raised in the state court proceeding, but the "federal claim cannot contain significant additional facts such that the claim was not fairly presented to the state court . . . ." *Ward v. Norris*, 577 F.3d 925, 935 (8th Cir. 2009) (citations omitted).

"[The] exhaustion of state remedies requires that petitioners fairly present federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (internal quotations omitted). Claims are barred in federal court and must be dismissed if a petitioner has not fully presented his federal claims in state court, unless the application can demonstrate either good cause for his failure to present the claims and actual prejudice as a result of the alleged constitutional violation, or demonstrate that failure to review the claim would result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750; *see also Interiano*, 471 F.3d at 856 (quoting *Winfield v. Roper*, 460 F.3d 1026, 1034 (8th Cir. 2006)); *Keithley*, 43 F.3d at 1218.

Here, the State argues that Martin has not exhausted the following claims: (1) misadvice as to the amount of imprisonment Martin faced if he went to trial; (2) possible recantation by the victim; and (3) possible exonerating DNA evidence. Martin did not plead these claims in his Amended Petition before this Court, and raised these claims for the first time in his accompanying brief. [Dkt. No. 12 at 5-8; Dkt. No. 15 at 7-8.] Martin did not raise these claims in the state court and he has not satisfied the exhaustion requirement as to these issues. *See Coleman*, 501 U.S. at 750. Additionally, the Court need not consider these claims because Martin has not shown good cause for his failure to present the claims and actual prejudice as a result of the alleged constitutional violation. *Id.*

However, Martin has presented the same issues as he presented to the Iowa Court of Appeals as to both the involuntariness of the guilty plea and his allegations relating to the ineffective assistance of counsel. Therefore, he satisfies both prongs of the exhaustion requirement—he has appealed to the highest state court necessary and has presented the same claims to the federal court as he did to the state court. The Court considers these claims in turn.

IV. DISCUSSION

A. Guilty Plea

The Court first considers whether Martin's guilty plea waives further attack on his conviction under Iowa law, if there is no showing his pleas were not knowing and voluntary. Martin asserts that he was coerced by Bettendorf Police Officer Raymond "Ted" Heitz into signing a confession admitting sexual abuse. The State argues that Martin has procedurally defaulted on this claim because he failed to file a motion in arrest of judgment.

In Iowa, "a guilty plea waives all defenses and objections which are not intrinsic to the plea." *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2009) (citing *State v.*

Antenucci, 608 N.W.2d 19, 19 (Iowa 2000)). Furthermore, "[c]laims arising from the denial of a motion to suppress or from counsel's failure to investigate or file a motion to suppress do not survive the entry of a guilty plea." *Speed v. State*, 616 N.W.2d 158, 159 (Iowa 2000). An exception to this rule includes irregularities that "bear on the knowing and voluntary nature of the plea," *Wise v. State*, 708 N.W.2d 66, 70 (Iowa 2006) (citing *Manning v. State*, 654 N.W.2d 555, 561 (Iowa 2002)), such as ineffective assistance of counsel claims. *Carroll*, 767 N.W.2d at 641; *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001). "To preserve error for appeal, generally, defendants challenging a guilty plea must file a motion in arrest of judgment prior to sentencing." *State v. Ortiz*, 789 N.W.2d 761, 764 (Iowa 2010) (citing *State v. Gant*, 597 N.W.2d 501, 503-04 (Iowa 1999)); Iowa R. Crim. P. 2.24(3)(a) ("A defendant's failure to challenge the adequacy of a guilty plea proceeding by motion in arrest of judgment shall preclude the defendant's right to assert such challenge on appeal."). A failure to file a motion in arrest of judgment will not preserve error on this issue for appellate review. *State v. Nosa*, 738 N.W.2d 658, 661 (Iowa Ct. App. 2007). A petitioner who fails to file a motion in arrest of judgment may be excused if the failure is due to ineffective assistance of counsel. *State v. Bearse*, 748 N.W.2d 211, 218 (Iowa 2008).

But a federal district court may not consider a "habeas corpus claim that a state court has disposed of on independent and adequate non-federal grounds, including state procedural grounds." *Clemons v. Luebbers*, 381 F.3d 744, 750 (8th Cir. 2004), *cert. denied*, 546 U.S. 828 (2005) (citing *Reagan v. Norris*, 279 F.3d 651, 656 (8th Cir. 2002)). *See also Gray v. Netherland*, 581 U.S. 152, 162 (1996). "If the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar, a federal habeas court is precluded from reviewing the claim." *Oglesby v. Bowersox*, 592 F.3d 922, 924 (8th Cir. 2010) (citing *Harris v. Reed*, 489 U.S. 255 (1989)) (quotations omitted). "The proper inquiry . . . is not whether a default occurred, but whether [the petitioner] has met the standard for disregarding a state

procedural default." *Hunt v. Houston*, 563 F.3d 695, 703 (8th Cir. 2009). In order to overcome the procedural bar to further review, the petitioner must show cause and prejudice. *See Welch v. Lund*, 616 F.3d 756, 760 (8th Cir. 2010).

Here, the state district court found on October 25, 2006, that Martin had waived his claims related to his guilty plea because he had not filed a motion in arrest of judgment. The court still undertook an analysis to determine whether his plea was knowing and voluntary and found that it satisfied the requirements for taking a guilty plea.[8] The Court of Appeals found Martin's appeal to be frivolous and affirmed the district court's holding on March 28, 2008.

As a result, this Court finds that the judgment in the district court did "clearly and expressly state" that the judgment rested on a state procedural bar. *Oglesby*, 592 F.3d at 924. The failure to file a motion in arrest of judgment is a state procedural bar based on independent and adequate state grounds for this Court to decline to consider this claim. *Clemons*, 381 F.3d at 750. Martin was represented by trial counsel throughout the taking of his plea and based on Iowa law, Martin had to challenge his plea by filing a motion in arrest of judgment. He did not file the required motion in arrest of judgment and Martin cannot show cause or prejudice to overcome this procedural bar. *See Welch*, 616 F.3d at 760. The Court therefore denies Martin's claim for relief on this ground.

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[8]In the district court's order of October 25, 2006, the court stated:

> The applicant in this case has failed to establish that his plea was not knowingly made and voluntarily entered. He was represented by counsel throughout the underlying criminal cause and he has failed in this hearing to establish that counsel's advice was 'outside the range of competence demanded of attorneys practicing in criminal cases.' Further his guilty pleas waived all defenses and irregularities that he now claims in his Amended Application for Post Conviction Relief.
>
> It is clear to this Court that the applicant has failed to produce any evidence on relevant issues upon which this Court could find that the entry of his pleas was not voluntary and intelligently entered.

B. Ineffective Assistance of Counsel

Martin also claims that he received ineffective assistance of trial counsel for several reasons. He alleges that his trial counsel were ineffective in failing to: (a) move to suppress the confession; (b) pursue a defense of diminished capacity; (c) fully investigate the allegations upon which Martin was charged, such as obtaining possible exculpatory police and Department of Human Services ("DHS") reports; and (d) take all depositions. The State argues that none of these matters "has been demonstrated to have had an actual impact on Petitioner's decision to plead guilty." It asserts that Martin's summary complaints and lack of "concrete evidence that he otherwise would have proceeded to trial" results in a failure of proof.

To establish a claim of ineffective assistance of counsel, Martin must demonstrate that "counsel's performance was 'deficient,' and that the deficiency caused actual prejudice." *Simmons v. State Public Defender*, 791 N.W.2d 69, 75-76 (Iowa 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). The claim fails if both prongs of the test are not met. *State v. Fountain*, 786 N.W.2d 260, 266 (Iowa 2010). Performance is deficient if it falls "below an objective standard of reasonableness . . . under prevailing professional norms." *Simmons*, 786 N.W.2d at 76 (citing *Strickland*, 466 U.S. at 688). Likewise, a petitioner meets the prejudice prong when the defendant shows "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (citing *Strickland*, 466 U.S. at 694). "A presumption exists that counsel is competent and that counsel's conduct falls within the wide range of reasonable professional assistance." *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995) (citation omitted).

The two-part *Strickland* test also applies to guilty pleas challenged on the basis of ineffective assistance of counsel. *United States v. Davis*, 583 F.3d 1081, 1091 (8th Cir. 2009) (quoting *Hill v. Lockhart*, 474 U.S. 52, 58 (1985)). The performance prong of the

test remains unchanged, but to establish prejudice, a petitioner must show that "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." *Garmon v. Lockhart*, 938 F.2d 120, 121 (8th Cir. 1991) (alteration in original) (quoting *Hill*, 474 U.S. at 58). A guilty plea entered on the advice of counsel is voluntary and intelligent if the "counsel's advice was within the range of competence demanded of attorneys in criminal cases." *Brewer v. State of Iowa*, 19 F.3d 1248, 1250 (8th Cir. 1994) (quoting *Hill*, 474 U.S. at 56).

The Court looks to the Iowa Court of Appeals' well-reasoned decision on December 30, 2008, which the Iowa Supreme Court denied further review on March 10, 2010:

> Martin maintains his trial and second postconviction counsel did not investigate his claims that another male family member was the actual perpetrator, nor did counsel investigate numerous documents Martin claims existed supporting his innocence. He now asserts trial counsel's failures bore on his decision to plead guilty. The second postconviction court addressed Martin's assertions, as did the third postconviction court, which specifically found,
>
> 'The Applicant may only be granted relief from his conviction by showing the guilty pleas he entered on June 10, 2004 were either unknowing or involuntary. . . . The Applicant draws no factual connection between the investigation or presentation of these reports and the validity of his guilty pleas. The Applicant states only that "these documents demonstrate his innocence in that no reports with regard to his asserted sexual abuse of his daughter surfaced until 2002 or 2003 relating to acts supposedly taking place in 1995 or 1996." . . . This assertion is untenable. The fact that reports from 1994 and 1995 do not specifically identify him as perpetrating sexual abuse against his daughter simply has no bearing on whether his guilty pleas were entered in a knowing and voluntary manner.'
>
> We agree with the postconviction court's findings that

> summary disposition was appropriate because Martin's claims of his innocence do not undermine the validity of his guilty plea. Martin failed to show that but for the alleged ineffectiveness he would not have pleaded guilty. *See* [*State v.*] *Straw*, 709 N.W.2d [128,] 136 [(Iowa 2006)]. Martin therefore suffered no breach of duty by his trial or postconviction counsel, nor resulting prejudice.

Martin, 2009 WL 5126344, at *2-3.

The Court finds this decision is supported by the evidence in the record and is binding. The Court also finds that as to his trial counsels' alleged failure to move to suppress the confess, Martin has not shown that there is a reasonable probability that the result of the proceeding would have been different. Martin also asserts that his counsel were deficient because they failed to pursue a diminished capacity defense. But a decision not to use such a defense, based on the evidence, may be a reasonable strategic decision for the attorneys. *See Lyons v. Luebbers*, 403 F.3d 585, 594 (8th Cir. 2005); *Simmons v. State of Iowa*, 28 F.3d 1478, 1481 (8th Cir. 1994). Furthermore, Martin has presented no evidence and can point to no support in the record to indicate that a diminished capacity defense would have been successful. On the contrary, the record shows that Martin, during both plea-taking colloquoys, stated that he understood the charges against him and the benefits of pleading versus going to trial. The Court finds that Martin fails to show the outcome would have been different if counsel had pursued a diminished capacity defense. *Hill*, 474 U.S. at 58

Last, Martin argues that his counsels' failure to investigate possible exculpatory conduct and take certain depositions resulted in prejudice. The Court finds there is no indication, however, that a more thorough investigation or taking of more depositions would have revealed exculpatory evidence. Trial counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Christenson v. Ault*, 598 F.3d 990, 996 (8th Cir. 2010). Here, Martin summarily argues that exonerating evidence exists that his attorneys failed to investigate.

"Unsupported speculation about the possible existence of some yet undiscovered malfeasance does not establish prejudice." *Hunt v. Houston*, 563 F.3d 695, 705 (8th Cir. 2009). Martin also does not explain what the exculpatory evidence is or how additional depositions would support his allegations. The Court finds that, as to this claim, Martin again cannot show prejudice. *Hill*, 474 U.S. at 58.

C. Request for Evidentiary Hearing

Under 28 U.S.C. § 2254(e)(2), "[a] habeas petitioner must develop the factual basis of his claim in the state court proceedings rather than in a federal evidentiary hearing unless he shows that his claim relies upon a new, retroactive law, or due diligence could not have previously discovered the facts." *Cox v. Burger*, 398 F.3d 1025, 1030 (8th Cir. 2005) (citing § 2254(e)(2)). The petitioner must also "show that the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense. *Mark v. Ault*, 498 F.3d 775, 788 (8th Cir. 2007) (quoting *Perry v. Kamna*, 356 F.3d 880, 889 (8th Cir. 2004)).

The Court finds that Martin's bare allegations regarding exonerating DNA evidence, his innocence because he was in prison for an unrelated sex crime when the crimes in this case were committed, and possible recantation by the victim are insufficient to warrant an evidentiary hearing or expansion of the record. *See Cox*, 398 F.3d at 1030; *Sweet v. Delo*, 125 F.3d 1144, 1152 n,9 (8th Cir. 1997) (citing *Weeks v. Bowersox*, 119 F.3d 1342, 1352-55 (8th Cir. 1997) (en banc)) ("a bare, conclusory assertion' that a petitioner is actually innocent is insufficient to excuse a procedural default, and we also have rejected the argument that a prisoner is entitled to a hearing to assist him in developing evidence of actual innocence.").

Accordingly, Martin's request for an evidentiary hearing is denied.

V. CONCLUSION

The Court finds that Martin is not entitled to relief pursuant to 28 U.S.C. § 2254, according to the deferential standard the Court must apply. *Barnett*, 541 F.3d at 814. The Iowa courts' adjudication of Martin's claims neither resulted in a decision contrary to, nor an unreasonable application of clearly established federal law. Likewise, the court's adjudication did not result in a decision based on an unreasonable determination of the facts in light of the evidence presented. The Clerk of Court is directed to enter judgment in favor of the respondent.

Upon the foregoing,

IT IS ORDERED

That the Petitioner's April 2, 2010 Petition for Writ of Habeas Corpus [Dkt. No. 1] is denied. The Clerk shall enter judgment for the Respondent.

DATED this 10th day of February, 2011.

JOHN A. JARVEY
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF IOWA