

IN THE SUPREME COURT OF THE STATE OF NEVADA

TYRONE JAMES, SR.,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

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Case No. 71935

APPELLANT'S OPENING BRIEF

Appeal from Eighth Judicial District Court, Clark County

The Honorable Elizabeth Gonzalez, District Judge

District Court Case No. 10-C-265506

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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JURISDICTIONAL STATEMENT

This is an appeal from the denial of a post-conviction petition for writ of habeas corpus. The district entered Findings of Fact and Conclusions of Law denying Appellant Tyrone James, Sr.’s petition on November 9, 2016. (4 PA847-862¹.) Mr. James submitted a timely notice of appeal on December 8, 2016. (4 JA807-08); *see also* Nevada Rule of Appellate Procedure (“NRAP”) 4(b)(1)(A) (mandating that a notice of appeal by a defendant or petitioner in a criminal case shall be filed with the district court clerk within 30 days after the entry of the judgment or order being appealed). This appeal is subject to this Court’s jurisdiction pursuant to Nev. Rev. Stat. § 34.575.

ROUTING STATEMENT

This case is presumptively retained by the Supreme Court because it is an appeal from the appeal is from the denial of post-conviction relief pursuant to an order filed by the district court. *See* Nevada Rule of Appellate Procedure 17(a)(2).

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¹ Citations to Petitioner’s Appendix (“PA”) are to both volume and page number(s). Hence, “4 PA847-862” refers to volume 4 of the Petitioner’s Appendix at pages 847 through 862. Pursuant to Nevada Rule of Appellate Procedure 30(a), counsel for Mr. James contacted counsel for the State to confer regarding the possibility of submitting a joint appendix. Counsel for the State, however, indicated that he preferred to submit separate appendices.

ISSUES PRESENTED FOR REVIEW

- A. Whether trial counsel provided ineffective assistance of counsel by, *inter alia*:
1. Failing to retain an expert witness to review the sexual assault examination of the victim in this matter, and failing to rebut testimony from the examining physician
 2. Failing to exclude highly attenuated and prejudicial evidence;
 3. Failing to object to the admission of attenuated and prejudicial evidence at trial;
 4. Failing to conduct adequate investigation; and
 5. Failing to object to the State's use of a highly prejudicial PowerPoint presentation during closing argument.
- B. Whether trial counsel's deficient performance warrants reversal as cumulative error.
- C. Whether the district court erred in limiting the scope of the evidentiary hearing on Mr. James' post-conviction petition for writ of habeas corpus.

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I. STATEMENT OF THE CASE

This is an appeal from a denial of Appellant Tyrone James, Sr.'s post-conviction petition for a writ of habeas corpus. On June 23, 2010, the State filed a five count information charging Mr. James with two counts of Sexual Assault With a Minor Under Sixteen Years of Age, in violation of Nev. Rev. Stat. §§ 200.364 and 200.366 (Counts One and Three); two counts of Open and Gross Lewdness, in violation of Nev. Rev. Stat. § 201.210 (Counts Two and Four); and one count of Battery With Intent to Commit a Crime, in violation of Nev. Rev. Stat. § 200.400 (Count Five). (1 PA042-44 (Criminal Information).) Counts One and Three carried a mandatory minimum sentence of twenty-five years to life. Nev. Rev. Stat. § 200.366(3)(b). Mr. James elected to proceed to a jury trial. Trial commenced on September 21, 2010, and lasted three days. (1 PA029 (Register of Actions).) On September 23, 2010, the jury entered a verdict finding Mr. James guilty of all five counts contained in the criminal information. (3 PA491-92 (verdict form).)

The district court sentenced Mr. James on January 19, 2011. (3 PA501-02.) At sentencing, the district court dismissed Counts Two and Four as lesser-included offenses of Counts One and Three. The Court then sentenced Mr. James to twenty-five years to life on Counts One and Three, and two years to life on Count Five, all to run concurrent. (*Id.*) The court entered a judgment of conviction on February 9, 2011. (3 PA504-06.)

Mr. James filed a timely notice of appeal on March 7, 2011. (1 PA029.) On December 9, 2011, Mr. James filed an opening brief with the Supreme Court of the State of Nevada. (3 PA508-70.) On October 31, 2012, this Court entered an order affirming Mr. James' convictions. (3 PA573-92 (Order of Affirmance and Remittitur).)

On March 14, 2013, Mr. James filed a pro se petition for a writ of habeas corpus. (3 PA594-610.) After the district court appointed counsel, Mr. James filed his Supplemental Petition for Writ of Habeas Corpus on September 9, 2015. (1 PA001-021 ("Supplemental Petition").)

In his Supplemental Petition, Mr. James asserted several claims for relief relating to ineffective assistance of trial counsel by failing to retain an expert to rebut testimony from the State's expert witness that the medical examination of the victim in this case, demonstrated Mr. James had committed sexual assault. Mr. James also asserted that trial counsel was ineffective because he failed to file any pretrial motions to exclude critical—but highly questionable—evidence from being introduced at trial, failed to conduct reasonable investigation prior to trial, and failed to object to the State's use of a highly prejudicial PowerPoint presentation during its closing argument.

Following the completion of briefing, the district court found that Mr. James was entitled to an evidentiary hearing only on trial counsel's failure to retain an

expert. That hearing occurred on October 3, 2016. (4 PA806 (minutes of hearing); 4 PA808-46 (transcript).) After that hearing, the district court entered an order denying all of Mr. James' claims. (4 PA847-862.) This appeal follows.

II. STATEMENT OF FACTS

A. The Alleged Sexual Assault

In this case, the State alleged that Mr. James sexually assaulted T.H.,² the teenaged daughter of his ex-girlfriend, Theresa Allen. Mr. James began dating Ms. Allen in 2008. (21 PA258 (Jury Trial Day Two; testimony of Theresa Allen).) Ms. Allen had three minor children at the time, including T.H. (2 PA253.) For a time, Mr. James lived with Ms. Allen and her children. (2 PA261.) In either late January or early February of 2010, Mr. James moved out of Ms. Allen's residence and began living with his grandmother. (2 PA262.) Even after he moved out, Mr. James and Ms. Allen maintained some sort of romantic relationship. (*Id.*) In April 2010, Ms. Allen was in a car accident. (2 PA263.) As Ms. Allen was recovering from the accident, Mr. James assisted her by driving her to appointments and running errands. (*Id.*)

² Pursuant to Nev. Rev. Stat. § 200.3771(1), court records which reveal the identity of a victim of a sexual offense are considered confidential. To protect the confidentiality of the victim in this case, Mr. James refers to the victim only by her initials—T.H. In addition, Mr. James has redacted transcripts and filings including in the appendix to remove T.H.'s full name, as well as her personal identifying information, and the personal identifying information of T.H.'s family.

On or about May 14, 2010, Mr. James agreed to help Ms. Allen pay her power bill. (2 PA265.) According to Ms. Allen, Mr. James agreed to pawn his laptop to pay the bill; Ms. Allen intended to get Mr. James' laptop out of pawn when she received her paycheck. (*Id.*) On the morning of May 14, 2010, Ms. Allen spoke to Mr. James on the phone as she was getting ready for work. (2 PA266-67.) Ms. Allen testified that Mr. James told her he was planning to pay her power bill that morning, and then take his grandmother fishing. (2 PA266.)

Sometime after that conversation, Ms. Allen took her two younger children to school and went to work. (2 PA267.) T.H. was a high school sophomore at the time, planned to walk to school that morning. (2 PA186; 2 PA196.) According to T.H., she had planned on waking up at 9:20 a.m. that morning to allow herself enough time to get to school. (2 PA196.) However, according to T.H., she heard a noise that woke up before her alarm went off. (2 PA195-96.) That noise, T.H. testified, was made by Mr. James, who was standing in her room. (2 PA96-97.)

T.H. testified Mr. James jumped onto her bed. (2 PA198.) She testified that she then reached for her cell phone to call her mother, but the phone fell and Mr. James took it from her. (2 PA199.) T.H. testified she tried to escape Mr. James, but he jumped on her and grabbed her by the neck. (*Id.*) Mr. James then allegedly pulled down the shirt T.H. was wearing, and took off her underwear. (*Id.*) T.H. stated Mr. James pulled her into the living room by her arm. (2 PA199-200.) T.H. testified Mr.

James forced her to lie on the floor, and then penetrated her vagina with his finger for a few seconds. (2 PA201-02; 2 PA203.) According to T.H., Mr. James was wearing latex gloves. (2 PA201-02.) T.H. testified that Mr. James then “pulled out his penis and rubbed it inside [her] vagina like between the lips.” (2 PA203-05.) T.H. testified Mr. James had his hand on her neck during the entire encounter. (2 PA203.)

T.H. testified Mr. James then stopped, and directed her to sit on a couch in the living room. (2 PA205.) After a brief conversation, T.H. got dressed for school. (2 PA206.) Mr. James then returned her cell phone, and drove her to school. (*Id.*; 2 PA209.) Shortly after getting to school, T.H. texted her sister and a friend about what had happened. (2 PA223.) T.H.’s sister forwarded the text message to their mother, Ms. Allen. (*Id.*) Ms. Allen left work and went to T.H.’s school to pick T.H. up. (2 PA270.)

Ms. Allen later called 911 to report the alleged assault. (2 PA279.) 911 dispatched Las Vegas Metropolitan Police Department (“LVMPD”) officers to Ms. Allen’s house. (1 PA149-50.) After the officers took a police report, they drove Ms. Allen and T.H. to Sunrise Children’s Hospital for a sexual assault examination. (*Id.*)

B. The State’s Expert Witness

At the hospital, T.H. was examined by Dr. Theresa Vergara, an attending physician at Sunrise Children’s Hospital. (2 PA327; 2 PA331.) Dr. Vergara conducted a Suspected Child Abuse and Neglect (SCAN) examination on T.H. to

determine whether she had been sexually assaulted. (2 PA328; 2 PA 331.) Dr. Vergara testified that, consistent with a typical SCAN examination, she examined T.H. “from head to toe,” and then examined her genital area. (2 PA333; 2 PA335-38.) As part of her examination, Dr. Vergara used a colposcope—a lighted magnifying instrument used to examine and photograph the tissue of the vagina and cervix—to examine T.H. for signs of sexual assault and collect photographic evidence. (2 PA334; *see also* 1 PA061 (portion of SCAN Report indicating Dr. Vergara photographs of T.H.’s genital area).) Dr. Vergara also swabbed T.H.’s genitalia to test for other evidence, including DNA.³ (2 PA334; 1 PA061; 1 PA173 (Det. Tomaino testifies that DNA samples were taken during SCAN examination).) Dr. Vergara prepared a SCAN report documenting the findings of her examination. (1 PA0058-0071.)

During her examination, Dr. Vergara found no bruising, tearing, or bleeding in T.H.’s vaginal area, but did find some generalized swelling to the introitus of T.H.’s vagina. (2 PA335; 2 PA337.) Although Dr. Vergara testified the generalized swelling she observed could be caused by trauma, she admitted it could be caused by other things. (2 PA336; 2 PA342.) Dr. Vergara testified that she discovered T.H.

³ The police did not find Mr. James’ DNA in the samples Dr. Vergara obtained. (1 PA173-74.)

had a urinary tract infection, as well as a vaginal bacterial infection called streptococcus agalactiae, as well as another strep infection. (2 PA341-44.)

During her direct examination, Dr. Vergara testified the swelling she found was consistent with trauma. (2 PA335-36.) On cross-examination, however, Dr. Vergara admitted her findings were too non-specific to definitively conclude that the swelling was caused by the alleged assault. (1 PA173-74.) Despite the inconclusive results of Dr. Vergara's SCAN examination, Mr. James' trial counsel did not hire an expert to conduct an independent examination of Dr. Vergara's report, and did not conduct any other sort of investigation regarding the SCAN report. (4 PA813; 4 PA819-20 (testimony of trial counsel at hearing on post-conviction petition).)

C. The Latex Gloves

As noted above, T.H. testified Mr. James was wearing gloves on the morning of the assault. While Ms. Allen and T.H. were at the hospital, LVMPD Detective Hatchett searched Ms. Allen's residence for evidence related to the alleged assault. (1 PA151.) The detective did not find any gloves during his search. However, on May 19, 2010—five days after the alleged assault—Ms. Allen called the lead detective assigned to the case, Detective Tomaino, because she had allegedly found “a box of Michael [sic] Air Jordans that were sitting under her bed that had some rubber gloves inside.” (1 PA156.) According to Detective Tomaino, the box was sitting on Ms. Allen's bed when he arrived at her residence to retrieve them. (*Id.*)

The State introduced the gloves as evidence during Mr. James’ trial. (1 PA157.) Although the evidentiary value of the gloves was highly suspect given the five-day delay between the alleged assault and Ms. Allen’s purported discovery of the gloves, trial counsel did not file any motions to preclude the introduction of the gloves at trial. Trial counsel also did not object to their introduction during Mr. James’ trial. (*See, e.g.*, 1 PA157 (trial counsel indicates no objection to introduction of gloves).) Both Detective Tomaino and Ms. Allen testified about the latex gloves. (1 PA156-58; *see also* 2 PA283-84; 2 PA296-97.)

Trial counsel’s failure to oppose the introduction of the gloves is troubling, given that on July 22, 2010, Mr. James’ counsel had written that he believed “the glove is key for several reasons,” and directed his investigator to contact Ms. Allen to determine whether “she kept any latex, or other, cleaning gloves in her home.” (1 PA121 (investigative task list).) On August 3, 2010, trial counsel’s investigator visited with Ms. Allen at her apartment. (1 PA125 (August 3, 2010 investigative memorandum).) According to the investigator, Ms. Allen stated “police seized a box of white latex gloves from under her bathroom sink.” (*Id.*)⁴ Despite his statement

⁴ This statement (that the box was found under the sink) conflicted with Ms. Allen’s and Detective Tomaino’s testimony at trial that Ms. Allen had found the gloves in a shoe box under her *bed*, but trial counsel did not explore this conflict. (*Compare* 1 PA156 (Detective Tomaino testifies Ms. Allen stated she found the gloves in a shoe box under her bed); 2 PA283 (Ms. Allen testifies she found the gloves in a shoe box under her bed).)

that the gloves were “key” evidence, however, and trial counsel conducted no further investigation.

D. Trial Counsel Failed to Object to the State’s Use of a Highly Prejudicial PowerPoint During its Closing Argument

Closing arguments in this case occurred on September 23, 2010. (3 PA445-78 (transcript of closing arguments; Jury Trial Day 3).) During its closing argument, the State used a PowerPoint presentation that was displayed to the jury. (3 PA494-99.) The PowerPoint served to emphasize certain points in the State’s Closing argument, including the alleged crimes outlined the criminal information (3 PA494-95), the definitions of certain terms the district court had included in its instructions to the jury (3 PA495-96), and the State’s summation of its evidence against Mr. James. (3 PA497-98.)

At the end of this presentation, the State told the jury: “Ladies and gentlemen, after you consider the evidence in this case, the State is confident you will return a verdict of guilty.” (3 PA456.) As the State was saying this to the jury, it was also displaying its final PowerPoint slide to the jury: a photography of Mr. James with the word “GUILTY” emblazoned across his face. (3 PA499.) Mr. James’ trial counsel did not object to the State’s use of this highly suggestive slide. Additionally, there is no indication trial counsel lodged any objection to the State’s use of the PowerPoint presentation prior to trial.

E. Trial Counsel's Failure to Conduct Adequate Investigation

In addition to failing to adequately investigate the issue regarding the latex gloves, the record in this case demonstrates trial counsel did virtually no investigation in the nearly four months leading up to Mr. James's trial. Aside from asking his investigator to ask Ms. Allen about the gloves, the investigative task list in this case indicates trial counsel conducted only two other investigative tasks: subpoenaing the 911 call Ms. Allen made on the day of the incident, and visiting Mr. James while he was in custody at the Clark County Detention Center. (1 PA121-27; *see also* 3 PA612-13; 3 PA618-19 (declarations from relatives that trial counsel did not contact them prior to trial).)

F. Post-Conviction Counsel Retains an Expert to Review Dr. Vergara's SCAN Report.

1. Mr. James' Post-Conviction Medical Expert Casts Doubts on Dr. Vergara's Conclusions.

Post-conviction counsel retained Dr. Joyce A. Adams to evaluate the records in this case. 4 PA701; *see also* 4 PA716-719 (Dr. Adams' report of evaluation). In her report, Dr. Adams contradicts Dr. Vergara's testimony and shows that it was susceptible to attack at trial. Dr. Adams' review of the available medical records indicate T.H. had a urinary tract infection and a genital infection caused by *Chlamydia trachomatis*. (4 PA717.) Dr. Adams notes that Dr. Vergara documented "no signs of redness, bruising, bleeding or lacerations" anywhere on T.H.'s body. (*Id.*) Indeed, Dr. Vergara's "only finding was described as 'generalized swelling' of

the genital tissues when the labia were separated.” (*Id.*) However, as Dr. Adams explains, the alleged swelling Dr. Vergara reported may not have been clinically significant.

Rather, the “generalized swelling” Dr. Vergara observed “is a very non-specific finding, meaning that it can have many different causes.” (4 PA717.) For example, Dr. Adams indicates that the swelling could have been caused by the hormone estrogen, because estrogen “affects the [vaginal] tissues differently in different women, causing tissues to have a fuller look.” (*Id.*) Other causes of the swelling can include a yeast infection or infection with the herpes virus. (4 PA718.) With regard to yeast infections, Dr. Adams observes that T.H. had borderline diabetes. (*Id.*) According to Dr. Adams, this condition can “pre-dispose a woman to yeast infections.” (*Id.*) Despite this predisposition, Dr. Vergara did not test T.H. for the presence of a yeast infection. (*Id.*) Dr. Adams further indicates that local irritation from “reaction to soap or other cleansers, rubbing of tight clothing, or vigorous wiping with tissues after toileting” could also cause the swelling Dr. Vergara allegedly observed. (*Id.*)

Significantly, Dr. Adams’ report indicates Dr. Vergara’s finding of generalized swelling is unsound because she did not re-examine T.H. at a later date to determine whether the swelling had abated. Dr. Adams notes that “[i]n practice, the best way to determine if swelling of a body part is present is to have the patient

return in several days to a week and see if the tissues look the same or different.” (*Id.*) There is no evidence in the record that Dr. Vergara or another physician examined T.H. after the initial SCAN examination to determine whether the swelling to T.H.’s vaginal area had gone away. Thus, it is unclear the generalized swelling Dr. Vergara reported actually existed.

Dr. Adams’ report further calls into question the methodology Dr. Vergara used in her examination of T.H. As described in Dr. Adams’ report, the SCAN examination form Dr. Vergara used included a “modified version of a classification system” Dr. Adams and her colleagues published in 1992. (4 PA718; *see also* 1 PA084 (portion of SCAN Examination labelled “Overall Impression”).) According to a 2005 paper authored by Dr. Adams, the classification system was “was intended to assist team members to arrive at sound conclusions from medical evaluations of children suspected of having been sexually abused, and to help achieve some consistency among these providers in interpreting their medical findings.” (4 PA762 (2005 article authored by Dr. Adams).)

The classification system included a section which required an examiner to make an overall assessment of whether the physical symptoms the examiner observed were consistent with sexual abuse. In her 2005 report, Dr. Adams explained this overall assessment category was determined to be clinically unreliable because providers were using it inappropriately:

The rating categories in the Overall Assessment table were “no evidence of abuse,” “possible abuse,” “probable abuse,” and “definitive evidence of penetrating injury or sexual contact.” To rate the first three categories required heavy reliance on historical information from the child and other professionals, behavior changes observed in the child, and direct observations from witnesses, in addition to medical and laboratory findings. *It had become clear that the Overall Assessment section was being inappropriately used by some programs as a checklist approach to the diagnosis of child sexual abuse, a use for which it was never intended.* It was also believed that inexperienced medical providers were using the tables as a substitute for a more thorough clinical assessment and determination of the likelihood of sexual abuse.

(4 PA762 (emphasis added).)

In response to the misuse of her classification system, Dr. Adams and other medical professionals revised the classification in 2007 to remove this subjective, non-medical assessment section from medical examinations for suspected sexual abuse. (4 PA762; *see also* 4 PA718 (portion of Adams report discussing same).) Dr. Adams and her colleagues recommended this alteration because “it is not the job of the medical provider to say that a child has ‘probably’ been abused.” (4 PA718.) Dr. Adams concludes that the older version of her assessment section “should not have been used in 2010, especially as part of a child’s medical record.” (4 PA719.) Thus, according to Dr. Adams, the reporting form Dr. Vergara used during her examination of T.H. was unreliable because it required Dr. Vergara to make a nonmedical assessment.

2. Trial Counsel's Failure to Obtain the Photographs Dr. Vergara Took During Her Examination of T.H. Negatively Impacted Post-Conviction Review.

A significant factor that limited Dr. Adams' review of Dr. Vergara's conclusion that T.H. was sexually assaulted was the absence of the colposcope photographs taken during the SCAN examination. As noted above, Dr. Vergara reported that she took photographs of T.H.'s genitals during the examination. (2 PA334; *see also* 1 PA061.) Undersigned counsel made multiple efforts to obtain the colposcope photographs for Dr. Adams' review. (*See, e.g.*, 4 PA701-702 (describing procedural history of post-conviction counsel's efforts to obtain photographs); 4 PA793 (discussing post-conviction counsel's inability to obtain photographs); 4 PA871 (portion of Register of Actions reflecting efforts to obtain medical records from LVMPD and Sunrise Hospital).) These efforts, however, were ultimately unsuccessful.

At the evidentiary hearing, Dr. Adams explained the photographs would have "assisted me in determining whether in my opinion there was any generalized swelling of the genital tissues." (4 PA834.) This was important because "[s]welling is a very nonspecific finding, which means it can be caused by lots of different things. And in the context of sexual abuse, swelling without accompanying signs of trauma such as bruising or bleeding doesn't really have any significance with respect to abuse." (*Id.*) The need to review the photographic evidence in this case was of

particular importance; Dr. Adams explained that in her experience, she had never seen genital swelling “even in cases where patients described digital penetration.” (4 PA836.) Dr. Adams also expressed doubt that the alleged swelling observed by Dr. Vergara would have been caused by penile penetration. (*Id.*)

Trial counsel testified that he did not recall receiving the colposcope photographs, and admitted that he did not attempt to obtain them. (4 PA817.) According to trial counsel, he did not request the photographs because he did not believe the case turned on physical evidence, and instead believed he could rely on his ability to cross-examine Dr. Vergara. (4 PA817-18.) Trial counsel did acknowledge that in other cases, he “had colposcopes examined, photos examined or a doctor testify or a nurse testify,” but he had not done so here. (4 PA819.)

G. Post-Conviction: The Court Grants Mr. James a Hearing Solely on His Claim That Trial Counsel Was Ineffective for Failing to Retain an Expert.

In the post-conviction proceedings before the district court, Mr. James submitted his Supplemental Petition on September 4, 2015. (1 PA001-021; *see also* 2 PA179-407; 3 PA408-624 (Second Amended Appendix to Supplemental Petition).) Mr. James also submitted a supplement to the Supplemental Petition on January 15, 2016 which included Dr. Adams’ report and conclusions. (4 PA699-711 (“Second Supplement”).) In his post-conviction pleadings, Mr. James outlined several areas in which trial counsel was deficient: (1) trial counsel’s failure to retain

an expert, (2) trial counsel's failure to make any attempt to exclude the latex gloves Ms. Allen reported finding under her bed, (3) trial counsel's failure to conduct adequate investigation, and (4) trial counsel's failure to object to the State's use of a prejudicial PowerPoint during closing arguments. (*See generally* 1 PA001-021 and 4 PA699-711.) Although the district court granted Mr. James' request for an evidentiary hearing, the court limited the scope of the hearing to only one claim: trial counsel's failure to retain an expert. (4 PA806 (minutes of October 3, 2016 hearing).)

Trial counsel testified at the evidentiary hearing (4 PA811-28), as did Dr. Adams. (4 PA829-43.) As noted above, trial counsel readily acknowledged that he did not retain an expert to assist him in this case. (4 PA813.) According to trial counsel, he did not feel he needed an expert because he did not believe the case "turn[ed] on physical evidence." (*Id.*; *see also* 4 PA 817 (same).) Instead, trial counsel felt he could his experience defending sexual assault cases to elicit information to provide an alternative explanation for Dr. Vergara's observations during her examination of T.H. (4 PA818; 4 PA819-20; *see also id.*) Trial counsel admitted, however, that he had retained experts in other sexual assault cases, but felt that "I could bring my own defense through the State's witness." (4 PA821.)

At the conclusion of the hearing, the district court ruled that it "[did] not appear that the lack of the actual expert . . . [was] sufficient to cause 'trial counsel] to be ineffective,'" and denied Mr. James' petition. (4 PA844.) On November 8,

2016, the district entered Findings of Fact, Conclusion of Law, and an Order denying all the claims raised in Mr. James' petition and supplements. (4 PA847-62.)

III. SUMMARY OF THE ARGUMENT

Mr. James' trial counsel provided ineffective assistance of counsel during Mr. James' trial for sexual assault of a minor. Trial counsel's representation of Mr. James at trial fell below an objective standard of reasonableness for several reasons. First, trial counsel failed to retain an expert to rebut testimony from the State's expert witness that her medical examination of T.H. demonstrated Mr. James had sexually assaulted T.H. Second, trial counsel failed to file any pretrial motions to exclude critical—but highly questionable—evidence from being introduced at trial. Third, trial counsel failed to conduct reasonable investigation prior to trial. Fourth, trial counsel failed to object to the State's use of a highly prejudicial PowerPoint presentation during its closing argument. These failings by trial counsel—individually and collectively—deprived Mr. James of his Sixth Amendment right to adequate representation.

Given the cumulative impact of trial counsel's errors, the district court abused its discretion in limiting the scope of the evidentiary hearing on Mr. James' post-conviction petition to only the question of whether trial counsel was deficient for failing to retain an expert on sexual assault to rebut the State's expert witness, examining physician Theresa Vergara.

IV. ARGUMENT

A. Trial Counsel Provided Ineffective Assistance of Counsel

1. Legal Standard

“A claim of ineffective assistance of counsel presents a mixed question of law and fact and is therefore subject to independent review” by this Court. *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citation omitted); *accord Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

Claims of ineffective assistance of counsel are evaluated pursuant to the two-part test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *accord Means v. State*, 120 Nev. 1001, 1011, 103 P.3d 25, 32-33 (2004). To establish ineffective assistance of counsel, a petitioner must show that (1) counsel’s performance was deficient and (2) that the petitioner was prejudiced as a result of this performance. *Strickland*, 466 U.S. at 687. As to the first prong, a petitioner must show that counsel’s representation fell below an objective standard of reasonableness. *Id.* at 688; *accord Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). As to the second prong, the petitioner “must then establish that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *United States v. Quintero–Barraza*, 78 F.3d 1344, 1348 (9th Cir. 1995)

(citing *Strickland*, 466 U.S. at 688–89); see also *McConnell v. State*, 125 Nev. 243, 252, 212 P.3d 307, 313 (2009).

This Court has held that, in order to prevail in a habeas petition, an appellant must “present relevant authority and cogent argument; issues not so presented need not be addressed by this court.” *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). While judicial review of a lawyer’s representation is deferential, a defendant may overcome the presumption that the challenged action should be considered sound strategy by identifying the acts or omissions of counsel that the defendant alleges were not the result of reasonable professional judgment. *Strickland*, 466 U.S. at 690; accord *Foster v. State*, 121 Nev. 165, 169-70, 111 P.3d 1083, 1085-86 (2005).

Counsel must make a sufficient inquiry into the relevant facts of his client’s case and then make reasonable strategy decisions on how to proceed. *Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280 (1996). In evaluating habeas claims, the court thus determines whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance. *Kirksey v. State*, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996). The reviewing court must evaluate the complained of conduct under the circumstances and from counsel’s perspective at the time. *Id.*

A defendant not need to show that counsel's deficient conduct more likely than not altered the outcome in the case. *Strickland*, 466 U.S. at 693. A claim for ineffective assistance of counsel asserts the absence of one of the crucial assurances that the result of the proceeding was reliable. *Id.* at 694. As a result, the outcome of a proceeding can be rendered unreliable, and the proceeding itself unfair, "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.*

Typically, courts accord deference to trial counsel's performance. *Lambright v. Schriro*, 490 F.3d 1103, 1116 (9th Cir. 2007) (citing *Strickland*, 466 U.S. at 689). "[S]trategic choices made after *thorough investigation* of [the relevant] law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690 (emphasis added). However,

[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances . . .

Id. at 690-91; *see also Wiggins v. Smith*, 539 U.S. 510, 521 (2003)). Similarly, a decision not to present a particular defense or not to offer particular mitigating evidence is unreasonable unless counsel has explored the issue sufficiently to discover the facts that might be relevant to his making an informed decision.

Wiggins, 539 U.S. at 522-23; *Stankewitz v. Woodford*, 365 F.3d 706, 719 (9th Cir. 2004).

2. Trial Counsel Provided Ineffective Assistance of Counsel by Failing to Retain an Expert Witness to Review Dr. Vergara's Examination of T.H. and Rebut Her Testimony that Her Examination Indicated T.H. Was Sexually Assaulted.

In its order denying Mr. James' petition, the district court found that trial counsel was not ineffective for failing to retain an expert witness because "counsel was reasonably able to attack Dr. Vergara's expert testimony through cross-examination and reviewing the medical evidence." (4 PA855.) Contrary to the district court's findings, however, trial counsel's failure to hire an expert was objectively unreasonable in this case given the inconclusive results of Dr. Vergara's SCAN examination.

The failure to obtain and present appropriate independent expert testimony and independent medical evidence constitutes ineffective assistance of counsel. *Hays v. Farwell*, 482 F. Supp. 2d 1180, 1197 (D. Nev. 2007) (citing *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994)). This is particularly true in cases where, as here, there is little in the way of conclusive physical evidence. As the Second Circuit has observed, "[i]n sexual abuse cases, because of the centrality of medical testimony, the failure to consult with or call a medical expert is often indicative of ineffective assistance of counsel. This is particularly so where the prosecution's case, beyond the purported medical evidence of abuse, rests on the credibility of the

alleged victim, as opposed to direct physical evidence such as DNA, or third party eyewitness testimony.” *Gersten v. Senkowski*, 426 F.3d 588, 607 (2d Cir. 2005) (citations omitted); *see also Eze v. Senkowski*, 321 F.3d 110, 128 (2nd Cir. 2003) (noting that the “importance of [expert] consultation and pretrial investigation is heightened where, as here, the physical evidence is less than conclusive and open to interpretation”); *cf. Miller v. Anderson*, 255 F.3d 455, 459 (7th Cir.2001) (finding deficient performance when counsel failed to hire an expert to rebut the prosecution’s expert testimony about physical evidence linking defendant to the crime scene when the defense theory was that defendant was not at the crime scene), *remand order modified by stipulation, Miller v. Anderson*, 268 F.3d 485 (7th Cir.2001) (vacated at request of parties when settlement was reached).

Here, there was scant and inconclusive physical evidence indicating Mr. James sexually assaulted T.H. Indeed, as trial counsel noted at the evidentiary hearing, Dr. Vergara’s report was “not conclusive as to sex assault.” (4 PA817.) Dr. Vergara testified she found no bruising, tearing, or bleeding in T.H.’s vaginal area. (2 PA335; 2 PA337.) Dr. Vergara did find some generalized swelling to the introitus of T.H.’s vagina, (2 PA337), but that could be caused by other things. For example, Dr. Vergara testified that she discovered T.H. had a urinary tract infection, as well as a vaginal bacterial infection called strep agalactiae, as well as another strep infection. (2 PA341-344.) Dr. Vergara also testified “generalize swelling” could be

caused by digital and penile penetration, and that the swelling was consistent with trauma. (2 PA335-36.) On cross-examination, however, Dr. Vergara admitted her findings were too non-specific to conclude that the swelling was caused by the alleged assault. (2 PA336; 2 PA341-42.)

As discussed above in Section II(F), Dr. Adams' findings contradicted the testimony from Dr. Vergara, and undermined the reliability of the methods Dr. Vergara used to assess T.H. Had trial counsel retained an expert, he could have—at a minimum—used the expert's findings to effectively cross-examine Dr. Vergara. For example, if trial counsel had consulted with an expert such as Dr. Adams, he would have been able to elicit testimony that the swelling Dr. Vergara reported was of little clinical significance without a follow-up examination to determine whether the swelling had abated.

Trial counsel could have also questioned Dr. Vergara about whether she had eliminated other possible causes of the swelling she observed, including the possibility of a yeast infection. Trial counsel could also have questioned Dr. Vergara about whether yeast infections could cause genital swelling, T.H.'s predisposition for yeast infections, and why she did not have T.H. tested for a yeast infection. Trial counsel could also have introduced testimony from a medical expert to present the jury with the alternative explanations for the generalized swelling described by Dr. Adams. Moreover, had trial counsel retained an expert, he would have been able to

raise serious questions about the reliability of the form Dr. Vergara relied on when conducting her examination.

Additionally, an expert witness would have assisted Mr. James in presenting his theory of innocence. The case against Mr. James was largely based on circumstantial evidence. Aside from T.H.'s testimony and Ms. Allen's belated "discovery" of latex gloves which were never directly tied to the incident, there is virtually no evidence demonstrating beyond a reasonable doubt that Mr. James assaulted T.H. Thus, the State had to rely heavily on Dr. Vergara's assertions that the generalized vaginal swelling she observed was the result of a sexual assault in meeting its burden of proof. Even then, Dr. Vergara's testimony was inconsistent. She testified the swelling could have been caused by a number of other things, including bacterial infections. A defense expert could have rebutted this testimony, and given the jury adequate information to determine the State had failed to prove beyond a reasonable doubt that Mr. James sexually assaulted T.H. Trial counsel's failure to retain an expert was therefore objectively unreasonable, and deprived Mr. James of his right to a fair trial.

Relatedly, trial counsel was also deficient for failing to obtain the colposcope photographs discussed in Dr. Vergara's SCAN report. Despite being aware that Dr. Vergara had taken colposcope photographs during her examination of T.H., trial counsel did nothing to obtain those photographs. (4 PA817.) In addition to depriving

Mr. James of his right to effective assistance of counsel at trial, counsel's failure to obtain the photographs has also impacted Mr. James' ability to obtain post-conviction relief. As discussed above, the absence of the photographs impaired Dr. Adams' review of Dr. Vergara's report and conclusions. Without the photographs, Dr. Adams could not truly determine whether Dr. Vergara had correctly reported her observations of alleged genital swelling.

The facts of *Hays v. Farwell* illustrate why the absence of photographic evidence negatively affected Mr. James' post-conviction proceedings. In that case, the petitioner was convicted of four counts sexual assault of a minor and four counts of Lewdness with a Minor on charges that he sexually abused his then eight-year old daughter. *Hays*, 482 F.Supp.2d at 1183. As in this, photographs were taken of the alleged victim's genital area. *Id.* at 1189. At trial, the nurse who examined the petitioner's daughter for signs of sexual assault "testified that it was the worst case of assault she had ever observed." *Id.* At the post-conviction proceedings, however, experts for both the petitioner and the State who reviewed the photographs "concluded that there was no physical evidence of sexual penetration and that the nurse's trial testimony was in no way supported by the photographs." *Id.*

Here, by contrast, because trial counsel did not obtain the colposcope photographs, Mr. James was deprived of the opportunity to subject Dr. Vergara's medical conclusions to the same rigorous post-conviction review. Thus, trial

counsel's performance was fundamentally deficient.

3. Trial Counsel's Failure to Challenge the State's Admission of the Latex Gloves Renders His Performance Deficient.

Trial counsel's performance also fell below an objective standard of reasonableness because he failed to challenge the admission of the latex gloves. *See Strickland*, 466 U.S. at 687. The State's introduction of evidence—and trial counsel's failure to challenge it—also prejudiced Mr. James because it likely confused the issues, misled the jury and was more prejudicial than probative of any material fact. *Id.*; *see also* Nev. Rev. Stat. § 48.035. “To show prejudice under *Strickland* from failure to file a motion, petitioner must show, in part, that “had his counsel filed the motion, it is reasonable that the trial court would have granted it as meritorious.” *Wilson v. Henry*, 185 F.3d 986, 990 (9th Cir. 1999).

Initially, trial counsel appeared to recognize that the gloves were potentially significant evidence. (*See, e.g.*, 1 PA121 (investigation task list noting that the “glove is key”).) However, trial counsel failed to investigate the issue beyond one visit to Ms. Allen's home (1 PA123), and then failed move the court prior to trial to exclude the gloves. This was ineffective.

It is probable the court would have granted a motion to exclude the gloves. As noted above, police did not find any latex gloves during the search of Ms. Allen's residence on May 14, 2010. Instead, the gloves were “discovered” five days later by Ms. Allen. (1 PA156; 2 PA283.) There was no evidence—aside from Ms. Allen's

statement that she found them in a shoe box belonging to Mr. James—that Mr. James ever possessed the gloves. There is also no evidence that the gloves were used in the alleged assault of T.H. Moreover, the fact that the gloves were turned over to the police five days after the alleged assault raises substantial questions about chain of custody, potential contamination, and other issues.

Thus, the gloves served only as highly attenuated and prejudicial evidence that did nothing to prove Mr. James sexually assaulted T.H. At most, they demonstrated that someone in the Allen household at some point purchased and possessed latex gloves. Trial counsel's failure to move to exclude this piece of evidence prior to trial was therefore objectively unreasonably. Additionally, trial counsel also provided ineffective assistance by failing to object to the admission of the gloves at trial. Although a motion to exclude would have been the best vehicle for excluding this highly prejudicial evidence, trial counsel could have objected when the State introduced them. The failure to object to the gloves' admission in any way was patently ineffective. Further, the conflicting statements from Ms. Allen regarding where she found the gloves strongly suggest fabrication.

4. Trial Counsel Provided Ineffective Assistance by Failing to Conduct Adequate Investigation.

The two claims presented *supra* are the most egregious examples of trial counsel's general failure to conduct adequate investigation in this case. As discussed above, trial counsel conducted virtually no investigation in this case. He asked his

investigator to talk to Ms. Allen about the latex gloves, but did nothing to follow up on the investigator's report. The other investigation consisted of subpoenaing Ms. Allen's 911 call, and an initial interview with Mr. James. (*See* 1 PA123; 1 PA127.) Given the twenty-five-year mandatory minimum sentence Mr. James faced on the sexual assault counts, this complete absence of meaningful investigation is particularly troubling.

Trial counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. As the Supreme Court explained in *Strickland*,

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690-91.

In this case, trial counsel's decision not to conduct further investigation is not entitled to deference because the absence of meaningful investigation contradicts any presumption that trial counsel made reasonable strategic decisions regarding investigation. In Nevada, attorneys in felony cases should:

conduct, or secure the resources to conduct, a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The duty to investigate exists regardless of the client's admissions or statements to defense counsel of facts constituting guilt or the client's stated desire to plead guilty

(4 PA663 (ADKT 411 Standard 7(a): Case Preparation and Investigation).)

Investigation is necessary to make an informed decision about whether to counsel a client to take a plea. *Strickland*, 466 U.S. 690-91 (“counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary”).

As noted above, there was virtually no investigation in this case. Trial counsel had a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. By doing neither, his performance fell below an objective standard of reasonableness. *Kirksey*, 112 Nev. at 987, 923 P.2d at 1107; *Strickland*, 466 U.S. at 687.

5. Trial Counsel Provided Ineffective Assistance by Failing to Object to the State's Use of a Highly Prejudicial PowerPoint During Closing Argument.

The last slide in the PowerPoint presentation the State used to augment its closing argument included a photograph of Mr. James with the word “GUILTY” plastered across his face. (3 PA499.) This Court explicitly disapproved of substantially similar PowerPoint slide used in the State's opening argument in *Watters v. State*, 129 Nev. Adv. Op. 94, 313 P.3d 243 (2013). In that case, the

prosecutor used a PowerPoint presentation to support its opening statement to the jury. *Id.* at 245. The presentation included Watters' booking photograph with the word "GUILTY" plastered across his face. Unlike here, defense counsel reviewed and objected to the PowerPoint slide before arguments began. *Id.* at 246.

The Supreme Court vacated Watters new trial because the use of the "GUILTY" slide "undermined the presumption of innocence." *Id.* at 248 (citations omitted). The Court concluded the slide "declared Watters guilty before the first witness was called and should not have been allowed." *Id.* at 247. The Court further found that the prosecutor use of the slide to indicate guilt was even more prejudicial than if the prosecutor had simply stated Watters was guilty:

The prosecution could not orally declare the defendant guilty in opening statement. Doing so would amount to improper argument and the expression of personal opinion on the defendant's guilt, which is forbidden. *See Collier v. State*, 101 Nev. 473, 480, 705 P.2d 1126, 1130 (1985) (a prosecutor should not express her personal opinion on the defendant's guilt; "[b]y stepping out of the prosecutor's role, which is to seek justice, and by invoking the authority of ... her own supposedly greater experience and knowledge, a prosecutor invites undue jury reliance on the conclusions personally endorsed by the prosecuting attorney" (citation omitted)). Making this improper argument "visually through use of slides showing [Watters's] battered face and superimposing ... capital letters" spelling out GUILTY "is even more prejudicial" than doing so orally. *[In re] Glasmann*, 286 P.3d [673] at 680. "[W]ith visual information, people believe what they see and will not step back and critically examine the conclusions they reach, unless they are explicitly motivated to do so. Thus, the alacrity by which we process and make decisions based on visual information conflicts with a bedrock principle of our legal system—that reasoned deliberation is necessary for a fair justice system." *Id.* (quoting Lucille A. Jewell, *Through a Glass Darkly: Using Brain Science and Visual Rhetoric to*

Gain a Professional Perspective on Visual Advocacy, 19 S. Cal. Interdisc. L.J. 237, 293 (2010))

Id. at 248.

In reaching this conclusion, this Court relied on an *en banc* opinion from the Washington Supreme Court, *In re Glasmann*, 286 P.3d 673 (Wash. 2012). Much like this case, the prosecutor there utilized an inflammatory PowerPoint presentation during its closing argument. *Id.* at 702. In addition to many other prejudicial and inflammatory slides, the final slides of the presentation prominently featured the defendant's image with the word "GUILTY" superimposed over it. *Id.* at 702. And as here, defense counsel did not object to the slides. (*Id.*)

The Washington Supreme Court vacated and remanded the matter, holding that "[h]ighly prejudicial images may sway a jury in ways that words cannot. Such imagery, then, may be very difficult to overcome with an instruction." *Id.* at 707 (citations omitted). Moreover, the Court cautioned that "[p]rejudicial imagery may become all the more problematic when displayed in the closing arguments of a trial, when the jury members may be particularly aware of, and susceptible to, the arguments being presented." *Id.* at 707-08. The Court concluded there was substantial likelihood the "improper visual 'shouts' of GUILTY" affected the jury's verdict. *Id.* at 710.

In this case, as in *Glasmann*, there is a strong likelihood that the prosecutor's visual proclamation of guilt affected the jury's verdict. The evidence in

this case, as discussed above, was highly circumstantial, and what little physical evidence the prosecution was able to muster—such as Dr. Vergara’s inconclusive SCAN examination—was insufficient to meet the State’s burden of proof. By visually prompting the jury to conclude Mr. James was guilty, however, the State improperly influenced the jury’s decisionmaking process. Thus, it was incumbent on trial counsel to object to this improper closing argument. The failure to do therefore deprived Mr. James of a fair trial.

B. The Cumulative Failings By Trial Counsel Deprived Mr. James of Effective Assistance of Counsel.

In some cases, although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant.” *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996) (citing *United States v. Green*, 648 F.2d 587 (9th Cir. 1981)); *see also Hernandez v. State*, 118 Nev. 513, 534, 50 P.3d 1100 (2002); *Sipsas v. State*, 102 Nev. 119, 716 P.2d 231 (1986); *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). “Under traditional due process principles, cumulative error warrants habeas relief only where the errors have ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process.’” *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *see also Chambers v. Mississippi*, 410 U.S. 284, 302–03 (1973) (combined

effect of individual errors “denied [Chambers] a trial in accord with traditional and fundamental standards of due process” and “deprived Chambers of a fair trial”).

“Cumulative error applies where, ‘although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant.’” *Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002) (quoting *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir.1996)). “In evaluating a due process challenge based on the cumulative effect of multiple trial errors, a reviewing court must determine the relative harm caused by the errors.” *Parle*, 505 F.3d at 927–28.

The record in this case is replete with examples of trial counsel’s deficient performance. Trial counsel failed to retain an expert witness. Trial counsel also failed to object to the introduction of highly questionable and prejudicial physical evidence, and failed to conduct adequate investigation prior to trial. Finally, trial counsel failed to object to the State’s improper use of a PowerPoint slide which visually exhorted the jury to find Mr. James “GUILTY.” Each one of these failings, standing alone, is enough to merit habeas relief. However, even if this Court finds that no single error merits relief, the multiple errors committed by trial counsel have ““so infected the trial with unfairness as to make the resulting conviction a denial of due process.”” *Parle v. Runnels*, 505 F.3d at 927 (quotation omitted).

C. The District Court Erred in Limiting the Scope of the Evidentiary Hearing on Mr. James' Post-Conviction Petition.

“When a petition for post-conviction relief raises claims supported by specific factual allegations which, if true, would entitle the petitioner to relief the petitioner is entitled to an evidentiary hearing unless those claims are repelled by the record.” *Marshall v. State*, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994). In this case, Mr. James presented numerous claims that were not “repelled by the record,” including claims that his counsel failed to conduct adequate investigation, failed to challenge the admission of questionable evidence, and failed to object to a prejudicial PowerPoint presentation used by the State in closing argument. Given that these failings when combined with trial counsel’s failure to retain an expert cumulatively impaired Mr. James’ right to adequate representation, the district court abused its discretion in limiting the scope of the hearing to solely the expert witness issue. Thus, at a minimum, remand is necessary for a full hearing on all of the claims raised in Mr. James’ Petition for post-conviction relief to determine whether trial counsel’s errors constituted ineffective assistance of counsel.

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V. CONCLUSION

Based on the foregoing, Appellant Tyrone James, Sr. respectfully requests this Honorable Court reverse the district court's denial of his Petition for Writ of Habeas Corpus.

RESPECTFULLY SUBMITTED this the 17th day of May, 2017.

/s/ Margaret A. McLetchie

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CERTIFICATE OF COMPLIANCE

Pursuant to Nev. R. App. P. 28.2:

I hereby certify that this brief complies with the formatting requirements of Nev. R. App. P. 32(a)(4), the typeface requirements of Nev. R. App. P. 32(a)(5) and the type style requirements of Nev. R. App. P. 32(a)(6) because the Opening Brief has been prepared in a proportionally spaced typeface (14 point Times New Roman font).

I further certify that this Opening Brief complies with the type-volume limitation of Nev. R. App. P. 32(a)(7)(A)(ii) because it contains 9,409 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R. App. P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 17th day of May, 2017.

/s/ Margaret A. McLetchie

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CERTIFICATE OF SERVICE

I certify that I am an employee of McLetchie Shell LLC and that on this 17th day of May, 2017 the APPELLANT'S OPENING BRIEF was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the Master Service List as follows:

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I hereby further certify that the foregoing APPELLANT'S OPENING BRIEF was served by first class U.S. mail on May 17, 2017 to the following:

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/s/ Pharan Burchfield
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