IN THE SUPREME COURT OF THE STATE OF NEVADA

TYRONE JAMES, SR., Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 71935

RESPONDENT'S ANSWERING BRIEF

Appeal From Denial of Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

This appeal is not presumptively assigned to the Court of Appeals because it is a post-conviction appeal that involves a challenge to a judgment of conviction or sentence for offenses that are category A felonies. See NRAP 17(b)(3).

STATEMENT OF THE ISSUES

1. Whether the District Court erred in finding that James received effective assistance of counsel.

2. Whether the District Court erred in finding that James is not entitled to relief based upon a theory of cumulative ineffective assistance.

3. Whether the District Court abused its discretion in regard to the scope of the evidentiary hearing.

STATEMENT OF THE CASE

On June 23, 2010, Appellant Tyrone James, Sr. was charged by way of Information as follow: Counts 1 and 3 – Sexual Assault With a Minor under Sixteen Year of Age (Felony – NRS 200.364, 200.366), Counts 2 and 4 – Open or Gross Lewdness (Gross Misdemeanor – NRS 201.210), and Count 5- Battery With Intent to Commit a Crime (Felony – NRS 200.400). 1 Appellant's Appendix (AA) 42-44.

A three-day jury trial commenced on September 21, 2010. 1 AA 130, 1 AA 180, 2 AA 409. On September 23, 2010, the jury returned a verdict convicting James on all five counts contained in the Information. 2 AA 486-92. James was sentenced on January 19, 2011, as follows: on Count 1 to life with a minimum parole eligibility of 25 years; on Count 3 to life with a minimum parole eligibility of 25 years, to run concurrent with Count 1; and on Count 5 to life with a minimum parole eligibility of two years, to run concurrent with Counts 1 and 3.[1] 3 AA 504-06. James received 250 days credit for time served. Id. The Judgment of Conviction was entered on February 9, 2011. Id.

James filed a Notice of Appeal from the Judgment of Conviction and filed Appellant's Opening Brief on December 9, 2011. 3 AA 508-70. On October 31, 2012, the Nevada Supreme Court affirmed the Judgment. James v. State, Docket

[1] Counts 2 and 4 were dismissed.

No. 57178, (Order of Affirmance, October 31, 2012). Remittitur issued on November 30, 2012. 3 AA 592.

On March 14, 2013, James filed Petition for Writ of Habeas Corpus. 3 AA 594-609. On September 4, 2015, James, by and through newly appointed counsel, filed a Supplemental Petition for Writ of Habeas Corpus.[2] 1 AA 1-21. The State responded on April 21, 2016. 4 AA 770-90. James filed a reply on May 31, 2016. 4 AA 791-805.

On October 3, 2016, the District Court held an evidentiary hearing. 4 AA 808. Then, on November 8, 2016, the District Court entered its Findings of Fact, Conclusions of Law, and Order denying the Petition. 4 AA 848-61.

On December 8, 2016, James filed a Notice of Appeal from the denial. 4 AA 865. Appellant's Opening Brief was filed on May 18, 2017. The State now answers.

STATEMENT OF THE FACTS

The District Court described the facts of this case as follows:

> On May 14, 2010, 15-year-old T.H. was home alone sleeping when she awoke to find James in her home. Transcript Re: Trial by Jury Day 2 – Volume II, ("Transcript: Day 2, Vol II") filed April 29, 2011, 13-17. T.H. knew James because he was involved in a dating relationship with T.H.'s mother, Theresa Allen ("Theresa"). Id. at 8.

[2] James filed a supplement to the Supplemental Petition on January 15, 2016. 3 AA 699-711.

T.H. testified that while she was in her bedroom, she heard a noise and then James came into her bedroom and jumped on top of her. Id. at 17-19. When James jumped on top of T.H., she was trying to call her mother on her cell phone. Id. at 19. T.H.'s cell phone fell on the side of the bed and James picked it up and put it in his pocket. Id. T.H. then moved to her sister's bed, which was next to hers, and James again jumped on top of her and began to choke her. Id. at 20. When T.H. began to scream and cry, James told her to shut up or he would snap her neck. Id.

After James jumped on top of T.H., he took off her shirt and underwear and pulled her into the living room. Id. Once in the living room, James made T.H. lay on the floor and he sat on top of her. Id. at 21-22. While James was on top of T.H., he continued choking her. Id.

While James was on top of T.H. on the living room floor with his hand around her neck, he opened up T.H.'s legs and stuck his finger in her vagina. Id. T.H. noticed that James had a glove on the hand he used to digitally penetrate her vagina. Id. at 22-23. James then pulled his penis out from his pants and rubbed it inside T.H.'s vagina. Id. at 24-26. T.H. could not see James's penis but she felt something rubbing the inside of her vagina. Id. at 25.

T.H. testified that once James stopped rubbing his penis in her vagina, he told her to get up and sit on the couch. Id. at 26. Then, James asked her why she did not like him. Id. at 26-27. Afterwards, T.H. got dressed for school and James drove her to school. Id. at 27. During the ride, James asked T.H. who she was going to tell and if she wanted him to buy her a new case for her cell phone. Id. at 28. T.H.'s phone case broke when it fell in her bedroom. Id. As soon as T.H. arrived at school she texted her sister Denise and told her what happened. Id. at 29. Denise then told their mother what happened. Id. Theresa, T.H.'s mother, immediately called T.H. who was still at school. Id. at 93. T.H. picked up the phone crying. Id. Because she was in class, T.H.'s teacher told her to hang up the

phone. Id. Theresa asked to speak to T.H.'s teacher and had T.H. sent to the office where Theresa could pick her up. Id. When Theresa picked T.H. up from school, T.H. was crying so hard that she was "gasping for air." Id. at 96-97. Once T.H. and Theresa were alone in their car, T.H. was able to tell Theresa what happened. Id. After T.H. told Theresa what happened, Theresa called James and told him what T.H. had said. Id. at 99-100. James accused T.H. of lying and asked Theresa where he could meet her. Id. at 100. She told James to meet her at the house. Id. When James came to the house, Theresa met him outside. Id. at 101. James continued accusing T.H. of lying. Id. T.H. looked James in the face and told him exactly what she told Theresa he had done to her. Id. at 100. After her conversation with James, Theresa called the police. Id. at 102.

Theresa testified that she had spoken to James earlier that day because he was supposed to pay her power bill for her. Id. at 88-89. However, despite James's contentions that he went to her house to drop off his dog and pick up the power bill, Theresa testified that she never gave James permission to go into her home that day for either purpose. Id. at 87-89. Theresa testified that there was no reason whatsoever for James to go to her home. Id. at 89.

Theresa testified that after the incident, T.H. did not want to stay at the house so they stayed with family members for a few weeks. Id. at 107-08. About a week after the assault, Theresa went to the home to get more clothes and shoes. Id. at 106-07. While looking under her bed for her shoes she found a box of rubber gloves, exactly the kind that T.H. had described James wearing during the assault. Id. Theresa contacted police who collected the gloves. Id. at 109. Theresa testified that T.H.'s behavior drastically changed after the assault; she did not want to sleep at home and Theresa had to sleep in the living room with her once they did return home. Id. at 109-11.

Dr. Theresa Vergara ("Dr. Vergara") examined T.H. after the assault. Id. at 155. Dr. Vergara testified that T.H. had no bruising to the externa genitalia. Id. at 158. However, there was generalized swelling to the introitus (vaginal opening), which could be caused from trauma. Id. at 158-59. Dr. Vergara testified that while other things, such as a urinary tract infection, could cause the swelling, the findings were consistent with T.H.'s complaint of sexual assault. Id. at 159. However, Dr. Vergara testified that the findings were categorized as "non-specific findings." Id. at 165.

At trial, pursuant to the State's Motion to Admit Other Bad ACTS, N.F. also testified about James sexually assaulting her. Id. at 187-207. N.F. met James when she was a little girl because he was married to her mother Tanisha. Id. at 187. Tanisha and James divorced when N.F. was twelve years old after he was caught touching her inappropriately. Id. at 189. One night when N.F. was about twelve years old, James came into her bedroom around midnight. Id. at 192. James took N.F. to another room and told her that he felt like "someone was touching her." Id. James instructed N.F. to lay on the bed and removed her pants. Id. at 194. Then, James inserted his finger in her vagina. Id. at 194. N.F. told James to stop, which he did. Id. Once James stopped, he told N.F. to go back to her room. Id. During another incident, James entered N.F.'s room again around midnight, while she was sleeping. Id. at 199-200. James jerked N.F. out of her bed and took her into the same room as the previous time. Id. at 200-01. James put N.F. on the bed and pulled her pants off. Id. at 201. N.F. could feel James's penis on her leg. Id. N.F. kept telling James to stop. Id. When N.F. tried to yell for help, James threatened to kill her family. Id. James tried inserting his penis in N.F.'s vagina but was unsuccessful because it would not fit. Id. at 202. James then inserted his penis in N.F.'s butt. Id. N.F. again asked James to stop, which he did. Id.

> During a third incident, N.F. was in the house with only James and her younger sister; her mother had left for work. Id. at 194. James was chasing N.F. around the house and they ended up in the living room. Id. at 195. N.F. and James started to play wrestle but James began to get aggressive. Id. Every time N.F. tried to get up James would pull her back down. Id. N.F. kept telling James to leave her alone. Id. Eventually James let her go and told her to get in the shower. Id. N.F. stated that she did not want to get in the shower but James insisted stating that he was not going to do anything to her. Id. N.F. went into the bathroom and James locked the door stating, "See, I'm not going to do anything to you." Id. at 196. While N.F. was in the shower she heard a pop at the door and saw James enter the bathroom. Id. James told her to put her foot on top of the bathtub. Id. N.F. refused and James kept persisting. Id. Scared that James might hurt her, N.F. put her foot on top of the bathtub and James inserted his fingers into her vagina. Id. at 197. When N.F. tried calling for help, James put his hands on her neck to try to shut her up. Id. at 198. Afterwards, James instructed N.F. to get out of the shower. Id. at 197. James picked N.F. up and put her on the floor on her back. Id. James got on top of her and attempted to insert his penis into her vagina but was unable to because it would not fit. Id. During the last incident, James entered N.F.'s room while she was laying on her bed. Id. at 203. James attempted to pull her pants off. Id. at 203-04. While James was trying to pull her pants off, his mother Carol came into N.F.'s bedroom. Id. at 204. James jumped off the bed and hid in N.F.'s closet. Id. at 205. Carol began screaming to Tanisha that James was touching N.F. Id. Tanisha told James to get out of her house and took N.F. to Southwest Medical, where N.F. eventually talked to the police. Id. at 207.

4 AA 850-53.

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SUMMARY OF THE ARGUMENT

James received effective assistance of counsel. First, contrary to his contention, failure to consult a medical expert does not automatically qualify counsel's representation to be deemed ineffective. Rather, like with any ineffective assistance claim, this Court should review counsel's actions for reasonableness and any prejudicial effect the actions had on the client. Here, counsel made the virtually unchallengeable, strategic decision to discredit the testimony of the State's medical witness through cross-examination. Counsel was effective in revealing all the information that James suggests he should have sought from an expert. Further, James's preferred expert could not have offered the conclusive testimony he alleges. Lastly, James fails to allege in his brief how the outcome would have been different had that expert testified. Moreover, the overwhelming evidence in this case demonstrates that James was not prejudiced by this inaction and still would have been convicted.

Next, it would have bene futile for counsel to object to the admissibility of the latex gloves as James suggests should have been done. The gloves were highly probative as they corroborated T.H.'s account of the sexual assault. Moreover, James failed to provide any explanation as to why he believed the gloves to be prejudicial.

Third, James's claim regarding counsel's alleged failure to investigate was bare and naked and, thus, insufficient to warrant relief.

Lastly, counsel was not ineffective for failing to object to the State's PowerPoint slide. James cited irrelevant and non-binding case law when a case directly on point, Artiga-Morales v. State, 130 Nev. __, __, 335 P.3d 179, 182 (2014), makes it clear that the State's slide, which superimposed the word "GUILTY" over James's booking photograph, is permitted during closing arguments. Additionally, James failed to demonstrate how the outcome of the trial would have been different had that slide not been shown.

For all of these reasons, this Court was correct to deny James's ineffective assistance of counsel claims.

Further, this Court was correct to deny his claim of cumulative ineffective assistance of counsel. Such a thing as cumulative ineffective assistance of counsel does not, and cannot logically, exist. Ineffective assistance of counsel claims require, as an element, harm, or prejudice. The doctrine of cumulative error involves the accumulation of harmless errors. Because there can be no error of ineffective assistance that is harmless, there cannot be an accumulation of harmless ineffective assistance errors to result in reversal based on cumulative error.

Finally, the District Court did not abuse its discretion in limiting the scope of the evidentiary hearing. Each of James's claim, aside from his claim regarding

retaining an expert, was either bare and naked or contradicted by authority from this Court. The District Court had an obligation to deny those claims without holding a hearing and uselessly expanding the record. It was proper for it to do so.

For all of these reasons, this Court should affirm the District Court's Findings of Fact, Conclusions of Law, and Order denying James's Petition for Writ of Habeas Corpus.

ARGUMENT

I.

THE DISTRICT COURT DID NOT ERR IN FINDING THAT JAMES RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

James raises here, as he did below, four claims of ineffective assistance of trial counsel. Appellant's Opening Brief (OB) at 23-34. Specifically, he alleges that counsel was ineffective for (1) failing to retain an expert witness to review and rebut the opinion of the State's medical expert, (2) failing to challenge the admission of latex gloves, (3) failing to adequately investigate, and (4) failing to object to the use of a PowerPoint during the State's closing argument. Id. However, as the District Court found below, James has failed to demonstrate on any of his claims that counsel's performance was deficient and that he suffered prejudice as a result. Accordingly, this Court should affirm the District Court's order denying the Petition.

This Court gives deference to a district court's factual findings in habeas matters but reviews the court's application of the law to those facts de novo. State

v. Huebler, 128 Nev. ___, ___, 275 P.3d 91, 95 (2012), cert. denied, 133 S. Ct. 988 (2013).

Ineffective assistance of counsel claims are analyzed under a two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), wherein the petitioner must show: (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense.

"Surmounting *Strickland*'s high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371, 130 S. Ct. 1473, 1485 (2010), because the issue is whether the attorney's representation amounted to incompetence under prevailing professional norms, "not whether it deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 88, 131 S. Ct. 770, 778 (2011). Further, "[e]ffective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449 (1970)).

A Court begins with a presumption of effectiveness and then must determine whether the petitioner has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011-12, 103 P.3d 25, 32-33 (2004). The role of a court in considering alleged ineffective assistance of

counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)).

In considering whether trial counsel was effective, this Court must determine whether counsel made a "sufficient inquiry into the information that is pertinent to his client's case," and then whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996) (citing Strickland, 466 U.S. at 690–91, 104 S. Ct. at 2066).

Counsel cannot be deemed ineffective for failing to make futile objections. Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006). Additionally, strategic and tactical decisions are "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280. Trial counsel "has the immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Wainwright v. Sykes, 433 U.S. 72, 93, 97 S. Ct. 2497, 2510 (1977); accord Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

The decision to obtain or not obtain an expert for the defense is a tactical issue, which is solely determined by Petitioner's counsel, and virtually unchallengeable.

Rhyne, 118 Nev. at 8, 38 P.3d at 167; Ford v. State, 105 Nev. 850, at 853, 784 P.2d at 953 (citing Strickland, 466 U.S. at 691, 104 S.Ct. at 2066). A petitioner claiming ineffective assistance of counsel from the failure to call or prepare expert witnesses must allege specifically what the experts could have done to make a different result reasonably probable, and allege with specificity what the evidence would have been had they been better prepared. Evans v. State, 117 Nev. 609, 28 P.3d 498 (2001).

A petitioner who contends that his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). In order to demonstrate a reasonable probability that, but for counsel's failure to investigate, the result would have been different, it must be clear from the "record what it was about the defense case that a more adequate investigation would have uncovered." Id.

Furthermore, this analysis does not indicate that a court should "second guess reasoned choices between trial tactics, nor does it mean that trial counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711 (citing Cooper, 551 F.2d at 1166 (9th Cir. 1977)). In essence, a court must "judge the reasonableness of counsel's challenged conduct on the facts of the

particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

In order to meet the "prejudice" prong of the test, the petitioner must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. Indeed, "it is not enough to show that the errors had some conceivable effect on the outcome of the proceeding." Harrington, 562 U.S. at 104, 131 S. Ct. at 787 (quotation and citation omitted). Instead, the defendant must demonstrate that but for counsel's incompetence the results of the proceeding would have been different:

> In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, Strickland asks whether it is reasonably likely the results would have been different. This does not require a showing that counsel's actions more likely than not altered the outcome, but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters only in the rarest case. The likelihood of a different result must be substantial, not just conceivable.

Id. at 111-12, 131 S. Ct. at 791-92 (internal quotation marks and citations omitted).

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A. Counsel Was Not Ineffective For Failing to Retain an Expert Witness.

James's first claim was that counsel was ineffective for failing to retain an expert medical witness. 1 AA 10, OB at 23. James contended that because there was "scant and inconclusive physical evidence indicating Mr. James sexually assaulted T.H.," it was unreasonable for counsel not to retain an expert witness. 1 AA 10, OB at 24.

James relied on an unbinding case, Gersten v. Senkowski, 426 F.3d 588 (2d Cir. 2005), for the proposition that counsel's failure to consult with a medical expert is indicative of ineffective assistance of counsel. 3 AA 704, OB at 24. However, James's reliance is misplaced. First, the court in Gersten noted that there is no per se rule that requires trial attorneys to seek out an expert. Id., 426 F.3d at 609. Moreover, the Court emphasized, "We do not even mean to hold that expert consultation is always necessary in order to provide effective assistance of counsel in child sexual abuse cases. . ." Id. In Gersten, the court found that counsel's failure was not justified as an objectively reasonable strategic choice in that specific case because counsel chose to concede the State's medical evidence without even requesting to examine colposcopic slides that were made part of the record of the physical evidence of the trauma observed by the medical expert. Id. In this case, unlike Gersten, counsel never conceded the State's medical evidence. To the contrary, counsel was able to attack Dr. Vergara's expert testimony through cross-

examination after requesting and reviewing the medical evidence. 2 AA 328-59. Therefore, James's reliance on Gersten is and was unpersuasive.

James claimed that if counsel had consulted with an expert such as Dr. Joyce Adams, he would have been able to question Dr. Vergara about whether she had eliminated other possible causes of the swelling she observed. 3 AA 708, OB at 25. James's claim is meritless because at trial, counsel did question Dr. Vergara regarding other possible causes of the swelling she observed. 2 AA 328-59. First, during direct examination Dr. Vergara testified that generalized swelling could be consistent with causes other than sexual penetration or rubbing. 2 AA 336. Afterwards, counsel cross-examined Dr. Vergara on whether during her examination of T.H. she was able to document other potential causes for the generalized swelling; causes that had nothing to do with sexual assault. 2 AA 345. Dr. Vergara testified that T.H. tested positive for a urinary tract infection "UTI" and a strep infection, which can both cause genital or vaginal swelling or redness. 2 AA 342-45. Dr. Vergara further testified that generalized swelling could be from anything, from urinary tract infection, from poor hygiene; it is a non-specific finding. 2 AA 354-55.

In short, counsel made a virtually unchallengeable, strategic decision to discredit Dr. Vergara through cross-examination. And based on the facts *supra*,

James failed to demonstrate that counsel's representation fell below an objective standard of reasonableness and his claim was properly denied.

Additionally, James claimed that counsel was ineffective for not consulting an expert because counsel could have cross-examined Dr. Vergara regarding T.H.'s predisposition for yeast infections and her failure to test her for one. 3 AA 709. However, such a claim is without merit. In this case, it was a reasonable strategic decision to focus on the presence of a UTI and a strep infection in T.H.'s system, rather than focus on a lack of testing for a speculative yeast infection. By focusing on the presence of both the UTI and a strep infection in T.H.'s system, counsel was able to present a documented medical alternative cause for the generalized swelling observed by Dr. Vergara. Thus, this was a reasonable strategic decision that is virtually unchallengeable. See, Doleman, 112 Nev. at 846, 921 P.2d at 280.

Next, James claimed that counsel was ineffective for not consulting an expert because it is unclear whether the generalized swelling Dr. Vergara reported actually existed. 3 AA 707. James cited to Dr. Adams' report, which states her opinion that the best practice to determine if swelling is present is to have the patient return in several days. Id. However, in her report Dr. Adams concedes that without a review of the photographs of the generalized swelling, it is impossible to say whether a different expert would have agreed or disagreed that there was actually generalized swelling. 3 AA 717. Thus, Dr. Adams could not have concluded and testified that

Dr. Vergara could not have properly determined the presence of swelling without having T.H. return for a follow up examination. Therefore, James's claim was properly denied.

Finally, James contends that an expert witness could have raised questions regarding the reliability of a form Dr. Vergara used. Second Supplement p. 11. The form Defendant refers to is the portion of the SCAN examination titled "Overall Impression."[3] 1 AA 84. To support his claim, James cites to Dr. Adams' 2005 article discussing the form's appropriateness. 3 AA 707-08. In her article, Dr. Adams stated that the Overall Assessment, which is similar to the form used by Dr. Vergara, was being inappropriately used by some medical examiners as a checklist approach to the diagnostic of child sexual abuse. 4 AA 762. Furthermore, Dr. Adams stated the concern 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. Id. However, in the article, Dr. Adams concluded:

> The history provided by the child, the child's medical history, the history as reported by parents or other caregivers regarding behavioral or emotional changes in a child, and the results of a careful physical examination must all be integrated into a comprehensive assessment by those individuals with responsibility to perform these evaluations.

4 AA 763.

[3] It should be noted that the form Jones refers to was never admitted as evidence.

As part of her report in this case, Dr. Adams reviewed Dr. Vergara's testimony at trial and the medical records from Sunrise Hospital, which included evaluation and treatment of T.H. 2 AA 716. Based on her review, Dr. Adams did not conclude that Dr. Vergara actually used the form in any inappropriate way. 2 AA 716-18. Nor does Dr. Adams actually challenge the examination itself. Id. Rather, Dr. Adams' only criticism is that the form should not have been used as part of T.H.'s medical record. 2 AA 718. Moreover, Dr. Adams does not conclude that Dr. Vergara would have come to a different conclusion if she used the more recent form in her evaluation.

In this case, Dr. Vergara was not an inexperienced medical provider, but an experienced doctor of eleven years, specifically trained to perform SCAN exams. 2 AA 327-29. At trial, Dr. Vergara confirmed that it could not be conclusively stated that a documented trauma is a product of sexual assault; only that sexual assault is suspected. 2 AA 347. Additionally, Dr. Vergara explained that her overall conclusion was based on T.H.'s history coupled with the physical examination. 2 AA 346-50. The record reflects that even though Dr. Vergara might have used an older form, her overall methodology for conducting T.H.'s medical examination was appropriate. Therefore, James's claim was correctly denied.

Lastly, assuming *arguendo* that counsel was able to retain an expert who would have been able to testify to what Dr. Adams speculates, James still cannot

show a reasonable likelihood of a different outcome at trial based on the other overwhelming evidence against him. See McNelton, 115 Nev. at 403, 990 P.2d at 1268. In his Petition, James attempts to minimize the evidence presented against him. In particular, James completely ignores N.F.'s damning testimony. N.F., just like T.H., met James because of his relationship with her mother. 2 AA 364. Just like he did to T.H., James sexually assaulted N.F. when her mother was at work. 2 AA 372-75. Just like he did to T.H., James tried choking N.F. to prevent her from getting help. 2 AA 375. Just like to T.H., James inserted his fingers in N.F.'s vagina and tried putting his penis in her vagina. 2 AA 369-79. And in N.F.'s case, James was caught touching N.F. inappropriately by his own mother. 2 AA 384. Thus, even if trial counsel had consulted and/or spoken to a medical expert and entirely neutralized the State's expert, the overwhelming corroboration of T.H's testimony by evidence related to N.F.'s sexual abuse would have led to the same result.[4] Based on the evidence presented at trial, James fails to demonstrate a reasonable probability that, but for counsel's decision not to retain an expert, the result of the trial would have been different. In fact, he fails to even make such an allegation in his opening

[4] This is especially true given that Dr. Adams' article provided as an Exhibit in the pending Petition states that only 4 to 5% of children reporting sexual abuse have "abnormal physical examination findings." 4 AA 763. Because in most sexual assault cases there is not going to be abnormal physical examination findings, and because Dr. Vergara admitted under cross-examination that her findings were non-specific, Defendant's claim that the medical testimony was crucial to the State's case is inaccurate and without merit.

brief. See OB *passim*. Therefore, James failed to demonstrate that counsel was ineffective below, and fails to show this Court that the denial was erroneous. Accordingly, this Court should affirm the denial of this claim.

B. Counsel Was Not Ineffective For Failing to Object to the Admission of the Latex Gloves.

Next, James claimed that counsel was ineffective for failing to object to the admission of the latex gloves. 1 AA 14, OB at 28. James claims that there was "no evidence" that the gloves were used when he sexually assaulted T.H., and that the gloves were "highly attenuated and prejudicial evidence" that were not probative. 1 AA 14-15, OB at 29. However, it would have been futile for counsel to object to the admission of the gloves.

The threshold question for the admissibility of evidence is relevance. Brown v. State, 107 Nev. 164, 168, 807 P.2d 1379, 1382 (1991). NRS 48.025(1) provides "all relevant evidence is admissible." NRS 48.015 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Under NRS 48.035(1), relevant evidence is inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice." Because all evidence against a defendant will on some level "prejudice" (i.e., harm) the defense, NRS 48.035(1) focuses on "unfair" prejudice. State v. Eighth Judicial Dist. Court of Nev., 127 Nev. __, __, 267 P.3d 777, 781 (2011). The Nevada

Supreme Court has defined "unfair prejudice" under NRS 48.035 as an appeal to "the emotional and sympathetic tendencies of a jury, rather than the jury's intellectual ability to evaluate evidence." Krause Inc. v. Little, 117 Nev. 929, 935, 34 P.3d 566, 570 (2001). "By requiring the prejudicial effect of evidence to 'substantially outweigh' its probative value, NRS 48.035 implies a favoritism toward admissibility." Schlotfeldt v. Charter Hosp. of Las Vegas, 112 Nev. 42 ,45-46, 910 P.2d 271, 273 (1996).

At trial, Detective Daniel Tomaino ("Detective Tomaino"), the investigator assigned to the underlying case, testified that the victim had stated in interviews that Defendant had worn gloves during the assault. 1 AA 156. During the investigation, Detective Tomaino received a call from T.H.'s mother, who informed him that she had found a box of Michael Air Jordans sitting under her bed that had rubber gloves inside. Id. Detective Tomaino went over to T.H.'s house, located the box and impounded the gloves. Id. At trial, the State introduced the gloves as evidence. 1 AA 157. Detective Tomaino confirmed the authenticity of the evidence and established a chain of custody. Id. The State moved to admit the gloves and counsel did not object to their admission. Id.

In this case, the gloves were relevant as they tended to corroborate T.H.'s recounting of the assault and the State laid sufficient foundation for their introduction through a proper witness. Additionally, James neglects to provide any

explanation why the evidence of the gloves was prejudicial. The evidence did not appeal to the emotional tendencies of the jury. Rather, the jury was able to evaluate the evidence and make its own determination and inference regarding the gloves. Accordingly, any objection to the admissibility of the gloves would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Furthermore, as demonstrated by Defendant's own exhibits, counsel investigated the gloves. 1 AA 121. Thus, any decision not to challenge the admissibility was strategic. See Doleman, 112 Nev. at 846, 921 P.2d at 280. Therefore, James's claim was properly denied.

C. Counsel Was Not Ineffective For Failing to Investigate.

Next, James complained that his attorney did not adequately investigate. 1 AA 15, OB at 29. However, this claim was bare and naked and insufficient to warrant relief.

To show that his attorney was ineffective because he did not adequately investigate, James must demonstrate how a better investigation would have rendered a more favorable outcome. Molina, 120 Nev. at 192, 87 P.3d at 538 (2004). In order to demonstrate a reasonable probability that, but for counsel's failure to investigate, the result would have been different, it must be clear from the "record what it was about the defense case that a more adequate investigation would have uncovered." Id.

Moreover, this Court has held that claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part, "[Petitioner] *must* allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed." (emphasis added).

In the Supplemental Petition and in his Appellant's Opening Brief, filed after an evidentiary hearing, James does not provide any information aside from relevant case law and the investigative actions that counsel *did* undertake. He does not make any specific allegations as to what counsel should have investigated and what that investigation would have revealed. 1 AA 15-16, OB at 29-31. All James provided the District Court, and all he has provided his Court is a bare and naked claim. For those reasons, this pleading is wanting and the District Court was correct to deny it. This Court should affirm.

D. Counsel Was Not Ineffective For Failing to Object to the State's PowerPoint.

James's final allegation of ineffective assistance is that his attorney was ineffective for failing to object to a PowerPoint used during the State's closing. 1 AA 8, OB at 31. Specifically, James complains of the State using a PowerPoint slide

that had the word "GUILTY" superimposed across his booking photograph. 1 AA 17-18.

To support his claim that counsel was ineffective James cited to Watters v. State, 129 Nev. __, 313 P.3d 243 (2013). However, his reliance on Watters is misplaced. In Watters, the Nevada Supreme Court held that the State's use of a PowerPoint during *opening* statement that included a slide of defendant's booking photo with the word "GUILTY" superimposed across it constituted improper advocacy and undermined the presumption of innocence essential to a fair trial. Id. at __, 313 P.3d at 249 (emphasis added). However, in finding the use of the slide improper, the Nevada Supreme Court stated:

> The booking-photo slide sequence declared Watters guilty before the first witness was called and should not have been allowed. An opening statement outlines what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument.

Id. at __, 313 P.3d at 247. (Internal quotations omitted).

In this case, unlike Watters, the photo was briefly used during the State's *closing argument*. Unlike opening statements, closing arguments are made after all the evidence has been presented and are an entirely appropriate occasion for argument. See Morales v. State, 122 Nev. 966, 972, 143 P.3d 463, 467 (2006)(finding that the State can contend during closing argument that the

"presumption of innocence has been overcome"; State v. Green, 81 Nev. 173, 176, 400 P.2d 766, 767 (1965)("[A] prosecutor has the right to state fully his views as to what the evidence shows"). Moreover, in Artiga-Morales v. State, the Nevada Supreme Court found no impropriety and prejudice of the sort demonstrated in Watters, where the State used defendant's photograph during closing argument with the word "GUILTY" superimposed on it. 130 Nev. __, __, 335 P.3d 179, 182 (2014).

James's reliance on a non-binding case In re Pers. Restraint of Glasmann, 175 Wash. 2d 696, 286 P.3d 673, (2012), is also misplaced. 1 AA 17. In Glasmann, the court held that the State's PowerPoint presentation containing the defendant's booking photo along with the word "GUILTY" superimposed on the photo *three different times* deprived the defendant of a fair trial. Id. at 710, 286 P.3d at 680 (emphasis added). In the photo, defendant appeared "unkempt and bloody." Id. at 705, 286 P. 3d at 678. The court found the State's repeated use of the photo showing Glasmann's "battered face" and the word "GUILTY" superimposed three different times to be prejudicial. Id. at 708, 286 P. 3d at 680. Here, the photo of Defendant was not inherently prejudicial, as Defendant was neither bloody nor unkempt. Additionally, unlike the photo in Glasmann, the word "GUILTY" was displayed only once on the photo.

Lastly, James failed to demonstrate that the outcome of the trial would have been different had the jury not viewed the State's slide. James failed to proffer below

how he was prejudiced. McNelton, 115 Nev. at 403, 990 P.2d at 1268. James made nothing more than a bare conclusory statement that the prosecutor's visual proclamation of guilt affected the jury's verdict. 1 AA 18. As such, James's claim was a bare allegation that warranted no relief. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Here, he has added only another conclusory statement that the PowerPoint deprived him of the right to a fair trial. OB at 34. This, too, is insufficient to warrant relief. Accordingly, the District Court was correct to deny the claim and this Court should affirm that denial.

For all of these reasons, James failed to demonstrate in the District Court that he received ineffective assistance of counsel. Thus, it was appropriate for the District Court to deny his claim. Therefore, this Court should affirm.

II.
THE DISTRICT COURT DID NOT ERR IN FINDING THAT JAMES IS NOT ENTTITLED TO RELIEF BASED UPON CUMULATIVE INEFFECTIVE ASSISTANCE.

James also argued below and here that he is entitled to relief based upon a theory of cumulative ineffective assistance of counsel. 1 AA 18, OB at 34-35. He alleges that there were several examples of deficient performance in this case and that those "errors" accumulated and he, therefore, should receive a new trial. 1 AA 18, OB at 35. However, no such doctrine of "cumulative ineffective assistance of counsel" can logically exists and the District Court was correct to deny this claim.

This Court has held that under the doctrine of cumulative error, "although individual errors may be harmless, the cumulative effect of multiple errors may deprive an appellant of the constitutional right to a fair trial." Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994) (citing Sipsas v. State, 102 Nev. 119, 716 P.2d 231 (1986); see also Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985).

However, the doctrine of cumulative error should not be applied to ineffective assistance of counsel claims, and this Court has stated its hesitance to do so. In McConnell v. State, when the defendant argued that his claims of ineffective assistance of counsel amounted to cumulative error, this Court plainly said about the application of the cumulative error standard to ineffective assistance claims, even after acknowledging that some courts have applied that doctrine, "We are not convinced that this is the correct standard." McConnell v. State, 125 Nev. 243, at 259, 212 P.3d 307, at 318.

Ineffective assistance of counsel claims are a rare breed of claims in that harm is an element of the alleged error. That is to say, there can be no harmless ineffective assistance of counsel error because prejudice (or harm) is a required element of proving the ineffective assistance in the first place. Deficient performance, in and of itself, is not an error without accompanying prejudice. And if prejudice exists, a reversal of the verdict is automatic.

Since there can be no harmless ineffective assistance of counsel, it stands to reason that there cannot be cumulative error when the defendant's only claims are those of the ineffective assistance variety. Each claim of constitutional deprivation must stand on its own or fall on its own. Lee v. Lockhart, 754 F.2d 277, at 279 (cited by McConnell, at FN 17). And when a claim falls on its own, it cannot possibly be considered part of a cumulative error. Nor should cumulative error apply on post-conviction review. Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006), cert. denial, 549 U.S. 1134, 1275 S. Ct. 980 (2007) ("a habeas petitioner cannot build a showing of prejudice on series of errors, none of which would by itself meet the prejudice test.").

In Doyle v. State, 116 Nev. 148, 995 P.2d 465 (2000), without acknowledging that cumulative error applies to ineffective assistance claims, this Court quickly dismissed the defendant's claim of cumulative error after finding that he had "failed to demonstrate that he was prejudiced by deficient representation." Doyle, 116 Nev. at 163, 995 P.2d at 474. Here, James has failed in the same manner. Accordingly, this Court should dispose of this claim just as quickly.

III.
THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN LIMITING THE SCOPE OF THE EVIDENTIARY HEARING.

Lastly, James contends that the District Court abused its discretion in limiting the scope of the evidentiary hearing to the matter of whether counsel should have

retained an expert. OB at 36. James asks this Court to remand this case for a new evidentiary hearing without limitations on the scope. Id. However, the District Court was not obligated to hold an evidentiary hearing on any other claim.

NRS 34.770, governing when a defendant is entitled to an evidentiary hearing, reads:

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent *unless an evidentiary hearing is held.*
>
> 2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
>
> 3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

(emphasis added). This Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that "[a] defendant seeking post-conviction relief is not entitled to

an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002). It is improper for district courts to hold an evidentiary hearing simply to make a complete record. See State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The district court considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing.").

Further, the United States Supreme Court has held that an evidentiary hearing is not required simply because counsel's actions are challenged as being unreasonable strategic decisions. Harrington, 131 S. Ct. at 788. Although courts may not indulge *post hoc* rationalization for counsel's decision making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (citing Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the *objective* reasonableness of counsel's performance, not counsel's *subjective* state of mind. 466 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1994).

There was no reason for the District Court to expand the record on James's final three claims of ineffective assistance of counsel, or on his claim of cumulative ineffective assistance, for the same reasons the State has demonstrated the claims were properly denied.

First, it is readily apparent from a review of the record that it would have been futile for counsel to object to the admission of the latex gloves. Second, James's claim that counsel failed to investigate was bare and naked. Third, James relied on wholly irrelevant or non-binding case law on his PowerPoint claim. The State provided the District Court with a citation to Artiga-Morales, a case directly on point with the State's position on this claim.

On each of the three ineffective claims, the State effectively demonstrated in its response below that there was no deficient performance. Authority handed down from this Court made it clear that on none of the three ineffective claims, regardless of whether the record was expanded or not, could James satisfy both prongs of Strickland. Accordingly, not only was the District Court not obligated to allow those issues to be explored at an evidentiary hearing, it had a duty to deny the claims without such a hearing. Cf. NRS 34.770.

For these reasons, the District Court was correct to limit the scope of the hearing. James is not entitled to the requested remand. Therefore, this Court should affirm.

CONCLUSION

For the foregoing reasons, this Court should affirm the order of the District Court denying James's Petition for Writ of Habeas Corpus.

Dated this 27th day of June, 2017.

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 8,160 words.
3. **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 NRAP 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. 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 27th day of June, 2017.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 27th day of June, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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