State v. Sheahan, 77 P.3d 956, 976 (Idaho 2003); State v. Savo, 108 P.3d 903, 916 (Alaska 2005); State v. Maestas, 299 P.3d 892, 990 (Utah 2012). In fact, logic dictates that cumulative error cannot exist where the defendant fails to show that any violation or deficiency existed under Strickland. McConnell, 125 Nev. at 259, 212 P.3d at 318; United States v. Franklin, 321 F.3d 1231, 1241 (9th Cir. 2003); Turner v. Quarterman, 481 F.3d 292, 301 (5th Cir. 2007); Pearson v. State, 12 P.3d 686, 692 (Wyo. 2000); Hester, 979 P.2d at 733. Further, in order to cumulate errors, the defendant must not only show that an error occurred regarding his counsel's representation, but that at least two errors occurred. Rolle v. State, 236 P.3d 259, 276-77 (Wyo. 2010); Hooks v. Workman, 689 F.3d 1148, 1194-95 (10th Cir. 2012).

James has failed to make a single showing that his counsel's representation was objectively unreasonable. Further, even if James had made such a showing, he has not shown that the cumulative effect of these errors was so prejudicial as to undermine the court's confidence in the outcome of his case. Collins, 742 F.3d at 542. Therefore, James's claim of cumulative error is without merit and is denied.

ORDER

THEREFORE, **IT IS HEREBY ORDERED** that the Petition for Writ of Habeas Corpus shall be, and is, DENIED.

DATED this 4th day of ~~October~~ November, 2016.

DISTRICT JUDGE

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY
STACEY L. KOLLINS
Chief Deputy District Attorney
Nevada Bar #005391

CERTIFICATE OF SERVICE

I hereby certify that service of the above and foregoing was made this 31ST day of OCTOBER 2016, to:

MARGARET MCLETCHIE, ESQ.
maggie@nvlitigation.com

BY /s/ HOWARD CONRAD
Secretary for the District Attorney's Office
Special Victims Unit

hjc/SVU

Howard Conrad

From: Howard Conrad
Sent: Monday, October 31, 2016 1:45 PM
To: 'Rose, Laura'
Cc: 'maggie@nvlitigation.com'
Subject: 10F09328-FCL-(James_Tyrone_10_03_2016)-001
Attachments: 10F09328-FCL-(James_Tyrone_10_03_2016)-001.pdf

THE STATE OF NEVADA,

Plaintiff,

-vs-

TYRONE JAMES,
#1303556

Defendant.

CASE NO: **10C265506**

DEPT NO: **XI**

FINDINGS OF FACT, CONCLUSIONS OF

LAW AND ORDER

DATE OF HEARING: OCTOBER 3, 2016
TIME OF HEARING: 9:00 AM

Electronically Filed
11/10/2016 10:00:34 AM

CLERK OF THE COURT

ORDR
Margaret A. McLetchie, Nevada Bar No. 10931
MCLETCHIE SHELL LLC
701 E. Bridger Avenue, Ste. 520
Las Vegas, NV 89101
(702)-728-5300
maggie@nvlitigation.com
Attorney for Petitioner

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

TYRONE JAMES, Petitioner, vs. THE STATE OF NEVADA, Respondent.	Case No.: 10C265506 Dept. No.: XI **[PROPOSED] ORDER APPOINTING MARGARET A. MCLETCHIE AS COURT-APPOINTED COUNSEL**

Pursuant to NRS 7.115 and NRS 34.750, it is hereby ordered that Margaret A. McLetchie, of the law firm McLetchie Shell LLC, be appointed to represent Defendant Tyrone James throughout the appeal from the denial of his Petition for Writ of Habeas Corpus.

This matter having come before the Court on October 3, 2016, to appoint Margaret A. McLetchie, of the law firm McLetchie Shell LLC, as Court-appointed counsel for Defendant Tyrone James;

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IT IS HEREBY ORDERED that MARGARET A. MCLETCHIE, of the law firm, McLetchie Shell LLC, is appointed as counsel to represent Defendant Tyrone James throughout the appeal from the denial of his Petition for Writ of Habeas Corpus.

The Honorable Judge Elizabeth Gonzalez

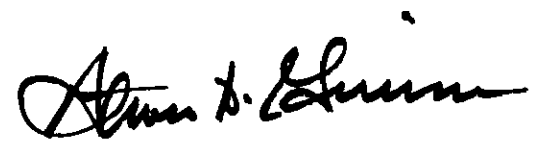
10/25/16
Date

Respectfully submitted,

Margaret A. McLetchie, Nevada Bar No. 10931
MCLETCHIE SHELL LLC
701 E. Bridger Avenue, Ste. 520
Las Vegas, NV 89101
(702)-728-5300
maggie@nvlitigation.com
Attorney for Petitioner

MCLETCHIE
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

Electronically Filed
12/08/2016 07:37:49 AM



CLERK OF THE COURT

NOAS
MARGARET A. MCLETCHIE, Nevada Bar No. 10931
MCLETCHIE SHELL LLC
701 East Bridger Ave., Suite 520
Las Vegas, Nevada 89101
Telephone: (702) 728-5300
Facsimile: (702) 425-8220
Email: maggie@nvlitigation.com
Attorney for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

TYRONE JAMES, Petitioner, vs. STATE OF NEVADA, Respondent.	CASE NO.: 10C265506 DEPT. NO.: XI **NOTICE OF APPEAL**

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that TYRONE JAMES, Petitioner in the above entitled case, by and through his counsel of record, MARGARET A. MCLETCHIE, of the law firm MCLETCHIE SHELL, LLC, hereby appeals to the Nevada Supreme Court from the denial of his Petition for Writ of Habeas Corpus on November 9, 2016 pursuant to Nevada Rule of Appellate Procedure 4(b)(1)(A).

DATED this 8th day of December, 2016.

/s/ Margaret A. McLetchie
MARGARET A. MCLETCHIE, Nevada Bar No. 10931
MCLETCHIE SHELL LLC
701 East Bridger Ave., Suite 520
Las Vegas, Nevada 89101
Telephone: (702) 728-5300
Attorney for Petitioner

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b)(2)(B) I hereby certify that on the 8th day of December, 2016, I electronically filed and mailed a true and correct copy of the foregoing NOTICE OF APPEAL by depositing the same in the United States mail, first-class postage pre-paid, to the following addresses:

ADAM LAXALT, Attorney General
10 North Carson Street
Carson City, NV 89701

STEVEN B. WOLFSON, District Attorney
JAMES SWEETIN, Chief Deputy District Attorney
200 Lewis Avenue
P.O. Box 552212
Las Vegas, Nevada 89155
Attorneys for Respondent, STATE OF NEVADA

TYRONE JAMES, ID # 1063523
High Desert State Prison
P.O. Box 650
Indian Springs, Nevada 89070
Petitioner

Certified by: */s/ Pharan Burchfield*
An Employee of McLetchie Shell, LLC

MCLETCHIE SHELL LLC
ATTORNEYS AT LAW
701 EAST BRIDGER AVE., SUITE 520
LAS VEGAS, NV 89101
(702)728-5300 (T) / (702)425-8220 (F)
WWW.NVLITIGATION.COM

REGISTER OF ACTIONS
CASE NO. 10C265506

State of Nevada vs Tyrone James

Case Type:	Felony/Gross Misdemeanor
Date Filed:	06/21/2010
Location:	Department 1
Cross-Reference Case Number:	C265506
Defendant's Scope ID #:	1303556
ITAG Booking Number:	1000026255
ITAG Case ID:	1152658
Lower Court Case # Root:	10F09328
Lower Court Case Number:	10F09328X
Supreme Court No.:	57178 71935

RELATED CASE INFORMATION

Related Cases
10F09328X (Bind Over Related Case)

PARTY INFORMATION

		Lead Attorneys
Defendant	James , Tyrone D Also Known As Tyrone, James	Alina Shell Retained 702-728-5300(W)
Plaintiff	State of Nevada	Steven B Wolfson 702-671-2700(W)

CHARGE INFORMATION

Charges: James , Tyrone D	Statute	Level	Date
1. SEXUAL ASSAULT	200.366	Felony	01/01/1900
1. SEXUAL ASSUALT	200.364	Felony	01/01/1900
2. OPEN OR GROSS LEWDNESS	201.210	Gross Misdemeanor	01/01/1900
3. SEXUAL ASSAULT	200.366	Felony	01/01/1900
3. SEXUAL ASSUALT	200.364	Felony	01/01/1900
4. OPEN OR GROSS LEWDNESS	201.210	Gross Misdemeanor	01/01/1900
5. ASSAULT AND BATTERY	200.400	Felony	01/01/1900

EVENTS & ORDERS OF THE COURT

	DISPOSITIONS
06/24/2010	(Judicial Officer: Bell, Linda Marie) 1. SEXUAL ASSAULT Not Guilty 1. SEXUAL ASSUALT Not Guilty 2. OPEN OR GROSS LEWDNESS Not Guilty 3. SEXUAL ASSAULT Not Guilty 3. SEXUAL ASSUALT Not Guilty 4. OPEN OR GROSS LEWDNESS Not Guilty 5. ASSAULT AND BATTERY Not Guilty
01/19/2011	(Judicial Officer: Bell, Linda Marie) 1. SEXUAL ASSAULT Guilty 1. SEXUAL ASSUALT Guilty 2. OPEN OR GROSS LEWDNESS Dismissed 3. SEXUAL ASSAULT Guilty 3. SEXUAL ASSUALT Guilty 4. OPEN OR GROSS LEWDNESS Dismissed 5. ASSAULT AND BATTERY Guilty

01/19/2011 (Judicial Officer: Bell, Linda Marie)
1. SEXUAL ASSAULT
Sentenced to Nevada Dept. of Corrections
Term: Life with the possibility of parole after:25 yrs Year

01/19/2011 (Judicial Officer: Bell, Linda Marie)
1. SEXUAL ASSUALT

01/19/2011 (Judicial Officer: Bell, Linda Marie)
3. SEXUAL ASSAULT
Sentenced to Nevada Dept. of Corrections
Term: Life with the possibility of parole after:25 yrs Year
Concurrent: Charge 1

01/19/2011 (Judicial Officer: Bell, Linda Marie)
3. SEXUAL ASSUALT

01/19/2011 (Judicial Officer: Bell, Linda Marie)
5. ASSAULT AND BATTERY
Sentenced to Nevada Dept. of Corrections
Term: Life with the possibility of parole after:2 yrs Year
Concurrent: Charge 1 & 3
Credit for Time Served: 250 Days
Condition
1. Lifetime Supervision
Fee Totals:

Administrative Assessment Fee $25	$25.00
DNA Analysis Fee $150	$150.00
Fee Totals $	$175.00

OTHER EVENTS AND HEARINGS

06/21/2010 Criminal Bindover
CRIMINAL BINDOVER Fee $0.00
10C2655060001.tif pages

06/21/2010 Hearing
INITIAL ARRAIGNMENT
10C2655060002.tif pages

06/23/2010 Information
INFORMATION
10C2655060004.tif pages

06/24/2010 Initial Arraignment (1:30 PM) ()
INITIAL ARRAIGNMENT Court Clerk: Sandra Harrell Relief Clerk: Nicole McDevitt /nm Reporter/Recorder: Kiara Schmidt Heard By: Randall Weed
Parties Present
Minutes
Result: Matter Heard

06/29/2010 Notice of Witnesses and/or Expert Witnesses
NOTICE OF WITNESSES AND/OR EXPERT WITNESSES
10C2655060007.tif pages

07/08/2010 Order
ORDER RELEASING ALL CONFIDENTIAL RECORDS FOR IN-CAMERA INSPECTION BY COURT COURT
10C2655060008.tif pages

07/27/2010 Reporters Transcript
Reporter's Transcript of Preliminary Hearing - Heard 06-17-10

08/05/2010 Motion
Discovery Motion

08/12/2010 Motion for Discovery (8:30 AM) (Judicial Officer Glass, Jackie)
Discovery Motion
Parties Present
Minutes
08/17/2010 Reset by Court to 08/12/2010
Result: Granted

08/16/2010 Notice of Motion
Notice of Motion and Motion to Admit Evidence of other Crimes, Wrongs or Acts

08/16/2010 Notice of Witnesses
Supplemental Notice of Witnesses and/or Expert Witnesses (NRS 174.231)

08/17/2010 CANCELED Calendar Call (8:30 AM) (Judicial Officer Glass, Jackie)
Vacated - per Judge
08/17/2010 Reset by Court to 08/17/2010

08/23/2010 CANCELED Jury Trial (10:00 AM) (Judicial Officer Glass, Jackie)
Vacated - per Judge
08/23/2010 Reset by Court to 08/23/2010

08/25/2010 Opposition
Opposition to State's Motion to Admit Evidence of Other Acts

08/26/2010 Motion to Admit Evidence (8:30 AM) (Judicial Officer Glass, Jackie)
08/26/2010, 09/10/2010
Motion for Clarification of Sentence
Minutes

	Result: Granted
09/08/2010	Motion in Limine Defendants Motion In Limine To Preclude Lay Opinion Testimony That The Complaining Witness' Behavior Is Consistent With That Of A Victim Of Sexual Abuse
09/10/2010	CANCELED Hearing (1:30 PM) (Judicial Officer Villani, Michael) Vacated - On In Error
09/10/2010	Hearing (1:30 PM) (Judicial Officer Glass, Jackie) PETROCELLI HEARING: STATE'S NOTICE OF MOTION AND MOTION TO ADMIT EVIDENCE OF OTHER CRIMES, WRONGS OR ACTS
	Result: Matter Heard
09/10/2010	Motion in Limine (1:30 PM) (Judicial Officer Glass, Jackie) Defendants Motion In Limine To Preclude Lay Opinion Testimony That The Complaining Witness' Behavior Is Consistent With That Of A Victim Of Sexual Abuse 09/21/2010 Reset by Court to 09/10/2010
	Result: Granted
09/10/2010	CANCELED All Pending Motions (1:30 PM) (Judicial Officer Glass, Jackie) Vacated
09/10/2010	All Pending Motions (1:30 PM) (Judicial Officer Glass, Jackie) ALL PENDING MOTIONS 9/10/10 Parties Present Minutes
	Result: Matter Heard
09/10/2010	Opposition to Motion State's Opposition to Defendant's Motion in Limine to Preclude lay Opinion Testimony that the Complainign Witness Behavior is Consistent with that of a Victim of Sexual Abuse
09/14/2010	Calendar Call (8:30 AM) (Judicial Officer Glass, Jackie) Parties Present Minutes
	Result: Matter Heard
09/16/2010	Transcript of Proceedings Transcript of Proceedings: Petrocelli hearing: State's Notice of Motion and Motion to Admit Evidence of other Crimes, Wrongs or Acts September 10, 2010
09/17/2010	Overflow (9:00 AM) (Judicial Officer Barker, David) Overflow (5) | C. Pandelis / B. Cox | 2-3 Days | 8-10 Witnesses / No Out Of State Witnesses Parties Present Minutes
	Result: Hearing Set
09/17/2010	Motion to Reconsider Defendant's Motion to Reconsider Motion To Admit Evidence of Other Crimes, Wrongs or Acts
09/20/2010	CANCELED Jury Trial (10:00 AM) (Judicial Officer Glass, Jackie) Vacated
09/21/2010	Jury Trial (9:30 AM) (Judicial Officer Bell, Linda Marie) 09/21/2010, 09/22/2010, 09/23/2010 Minutes 09/20/2010 Reset by Court to 09/21/2010
	Result: Trial Continues
09/21/2010	Motion to Reconsider (9:00 AM) (Judicial Officer Bell, Linda Marie) Defendant's Motion To Reconsider Motion To Admit Evidence Of Other Crimes, Wrongs Or Acts Minutes 09/21/2010 Reset by Court to 09/21/2010
	Result: Denied
09/21/2010	Jury List
09/23/2010	Amended Jury List
09/23/2010	Verdict
09/23/2010	Instructions to the Jury
10/22/2010	Notice of Appeal (criminal)
11/16/2010	Case Appeal Statement Case Appeal Statement
12/01/2010	Sentencing (8:45 AM) (Judicial Officer Bell, Linda Marie) 12/01/2010, 01/19/2011 Minutes
	Result: Continued
01/07/2011	PSI Supplemental PSI
02/09/2011	Judgment of Conviction Judgment Of Conviction (Jury Trial)
03/07/2011	Notice of Appeal (criminal)
03/07/2011	Case Appeal Statement
03/29/2011	Reporters Transcript Recorder's Transcript RE: Overflow Calendar Call - Heard 09/17/2010
04/06/2011	Transcript of Proceedings Transcript of Proceedings: Calendar Call - Heard September 14, 2010
04/06/2011	Transcript of Proceedings Transcript of Proceedings: Plaintiff's Notice of Motion and Motion to Admit Evidence of Other Crimes, Wrongs or Acts - Heard August 26, 2010
04/06/2011	Transcript of Proceedings Transcript of Proceedings: Defendant's Motion for Discovery - Heard August 12, 2010
04/22/2011	Recorders Transcript of Hearing Recorder's Transcript of Hearing Re: Arraignment - Heard Thursday, June 24, 2010
04/29/2011	Reporters Transcript

Transcript Re: Trial by Jury Day 2 - Volume II - Heard 09/22/2010

04/29/2011 Reporters Transcript
Transcript Re: Trial by Jury Day 3 - Volume III - Heard 09/23/2010

04/29/2011 Reporters Transcript
Transcript Re: Defendant's Motion to Reconsider Motion to Admit Evidence of Other Crimes, Wrong or Acts Trial by Jury Day 1 - Volume I - Heard 09/21/2010

04/29/2011 Reporters Transcript
Recorder's Transcript of Sentencing - Heard 01/19/2011

04/29/2011 Reporters Transcript
Recorder's Transcript of Sentencing - Heard 12/01/2010

08/06/2012 Case Reassigned to Department 9
Case reassigned from Judge Bell

11/30/2012 NV Supreme Court Clerks Certificate/Judgment - Affirmed
Nevada Supreme Court Clerk's Certificate Judgment - Affirmed

01/22/2013 Case Reassigned to Department 11
Case reassigned from Judge Jennifer Togliatti Dept 9

03/14/2013 Petition for Writ of Habeas Corpus
Petition for Writ of Habeas Corpus (Post - Conviction)

03/14/2013 Motion
Motion to Appoint Counsel

03/20/2013 Order for Petition for Writ of Habeas Corpus

05/07/2013 Response
Response to Defendant's Petition for Writ of Habeas Corpus

05/13/2013 Petition for Writ of Habeas Corpus (9:00 AM) (Judicial Officer Gonzalez, Elizabeth)
05/13/2013, 05/20/2013, 06/17/2013, 11/18/2015, 06/08/2016, 07/25/2016, 10/03/2016

Parties Present

Minutes

07/19/2013 Reset by Court to 04/14/2014
04/14/2014 Reset by Court to 06/18/2014
06/18/2014 Reset by Court to 11/12/2014
11/12/2014 Reset by Court to 01/21/2015
01/21/2015 Reset by Court to 03/09/2015
03/09/2015 Reset by Court to 07/20/2015
07/20/2015 Reset by Court to 11/18/2015

Result: Matter Continued

07/18/2013 Stipulation and Order
Stipulation and Order

07/23/2013 Notice of Entry of Order
Notice of Entry of Order

11/05/2013 Filed Under Seal
Ex Parte Motion for Expert-Motion for Supplemental fees.

11/05/2013 Ex Parte Order
Ex Parte Motion and Order to File Under Seal

12/03/2013 Notice of Entry of Order
Notice of Entry of Order

12/03/2013 Order
Stipulated Extension of Habeas Petition Dates and Propsed Order

02/26/2014 Stipulation and Order
Stipulated Extension of Habeas Petition Dates and Proposed Order

03/03/2014 Notice of Entry
Notice of Entry and Stipulation and Order

06/18/2014 CANCELED Status Check (9:00 AM) (Judicial Officer Togliatti, Jennifer)
Vacated - per Stipulation and Order
Status Check: Briefing Schedule

07/19/2013 Reset by Court to 04/14/2014
04/14/2014 Reset by Court to 06/18/2014

07/09/2014 Stipulation and Order
Stipulated Extension of Habeas Petition Dates and Proposed Order

07/09/2014 Notice of Entry of Order
Notice of Entry of Order

10/13/2014 Stipulation and Order
Stipulated Extension of Habeas Petition Dates and Proposed Order

10/24/2014 Notice of Entry of Order
Notice of Entry of Order

11/24/2014 Stipulation and Order
Stipulated Extension of Habeas Petition Dates and Proposed Order

11/24/2014 Notice of Entry of Order
Notice of Entry of Order

01/15/2015 Filed Under Seal
Ex-Parte Motion for Expert- Motion for Supplemental Fees

01/15/2015 Filed Under Seal
Ex Parte Motion and Order to File Under Seal

01/15/2015 Filed Under Seal
Proposed Order for Ex Parte Motion for Expert-Motion for Supplemental Fees

01/26/2015 Notice
Notice of Appearance

02/12/2015 Order to Release Medical Records
Proposed Order for Ex Parte Motion to Release Medical Records

02/12/2015 Notice of Entry of Order

	Notice of Entry of Order
03/12/2015	Filed Under Seal Ex Parte Motion and Order to File Under Seal
03/12/2015	Filed Under Seal Ex parte Motion for Paralegal Services-Motion for Supplemental Fees
03/12/2015	Filed Under Seal Proposed Order for Ex Parte Motion for Paralegal Services Motion for Supplemental Fees
03/12/2015	Motion Petitioner's Request for the Extension of Time to File Supplemental Petition (Seventh Request)
03/13/2015	Notice Notice of Change of Hearing
03/20/2015	Opposition Opposition to Defendant's Request For Extension Of Time To File Supplemental Petition (Seventh Request)
03/23/2015	Motion (9:00 AM) (Judicial Officer Gonzalez, Elizabeth) Petitioner's Request for Extension of Time to File Supplemental Petition (Seventh Request) Parties Present Minutes 04/17/2015 Reset by Court to 03/23/2015 Result: Granted
04/06/2015	Order for Production of Inmate Order for Production of Inmate
04/07/2015	Motion Motion for Order to Release Medical Records and LVMPD Reports
04/16/2015	Response Response to Defendant's Motion For Order To Release Medical Records And Lvmpd Records
04/20/2015	Motion (9:00 AM) (Judicial Officer Gonzalez, Elizabeth) 04/20/2015, 05/27/2015 Defendant's Motion for Order to Release Medical Records and LVMPD Reports Parties Present Minutes 05/04/2015 Reset by Court to 05/27/2015 Result: Matter Continued
04/22/2015	Amended Certificate of Mailing Amended Certificate of Service
04/24/2015	Reply Reply to State's Response in Opposition to Petitioner's Motion for Order to Release Medical Records and LVMPD Reports
05/04/2015	Response Department of Family Services Response to Defendant's Motion for Order to Release Medical Records and LVMPD Records
05/20/2015	Reply Reply to Department of Family Service's Response to Petitioner's Motion for Order to Release Medical Records
06/08/2015	Order Order Releasing Records For In Camera Inspection By Court
06/08/2015	Notice of Entry of Order Notice of Entry of Order
06/09/2015	Order Order Releasing Records for in Camera Inspection by Court
06/09/2015	Notice of Entry of Order Notice of Entry of Order
06/19/2015	Status Check (3:00 AM) (Judicial Officer Gonzalez, Elizabeth) 06/19/2015, 06/26/2015 Status Check: In Camera Review Minutes Result: Matter Continued
07/02/2015	Minute Order (3:00 PM) (Judicial Officer Gonzalez, Elizabeth) Minute Order re In Camera Review of Records from LVMPD Minutes Result: Minute Order - No Hearing Held
07/07/2015	Notice of Change of Firm Name Notice of Change of Law Firm Affiliation
08/04/2015	Notice of Change of Address Notice of Change of Address
09/04/2015	Motion for Order Renewed Motion for Order to Release Medical Records and LVMPD Reports
09/04/2015	Petition Supplemental Petition for Post-Conviction Writ of Habeas Corpus
09/14/2015	Motion to Release (9:00 AM) (Judicial Officer Gonzalez, Elizabeth) Defendant's Renewed Motion for Order to Release Medical Records and LVMPD Reports Parties Present Minutes Result: Matter Heard
09/17/2015	Response Las Vegas Metropolitan Police Department's Response to Defendant's Renewed Motion for Order to Release Medical Records and LVMPD Reports
09/18/2015	Motion Motion for a Subpoena to Sunrise Hospital to Release Medical Records
10/09/2015	Motion Motion and Notice of Motion to File Under Seal
10/15/2015	Order to Release Medical Records Ex Parte Motion for a Subpoena to Sunrise Hospital to Release Medical Records and [Proposed] Order

10/23/2015 Exhibits
Appendix of Exhibits to Petitioner's Supplement to Petition For Writ of Habeas Corpus
10/23/2015 Supplemental
Supplemental Motion to File Under Seal
10/28/2015 Motion to Seal/Redact Records (9:00 AM) (Judicial Officer Gonzalez, Elizabeth)
Motion and Notice of Motion to File Under Seal
Parties Present
Minutes
10/26/2015 Reset by Court to 10/28/2015
Result: Granted
11/02/2015 Exhibits
Second Amended Appendix of Exhibits to Petitioner's Supplement to Petition for Writ of Habeas Corpus
11/02/2015 Minute Order (3:00 PM) (Judicial Officer Gonzalez, Elizabeth)
Minute Order: In Camera Review
Minutes
Result: Minute Order - No Hearing Held
11/09/2015 Acknowledgment
11/18/2015 Status Check (9:00 AM) (Judicial Officer Gonzalez, Elizabeth)
Status Check: Records
Result: Off Calendar
11/18/2015 All Pending Motions (9:00 AM) (Judicial Officer Gonzalez, Elizabeth)
Parties Present
Minutes
Result: Matter Heard
12/30/2015 Order for Production of Inmate
Order for Production of Inmate
01/15/2016 Exhibits
Appendix of Exhibits to Supplement to Supplemental Petition for Writ of Habeas Corpus
01/15/2016 Supplement
Supplement to Supplemental Petition for Writ of Habeas Corpus
03/29/2016 Minute Order (10:15 AM) (Judicial Officer Gonzalez, Elizabeth)
Minute Order: In Camera Review
Minutes
Result: Minute Order - No Hearing Held
04/21/2016 Response
Response to Defendant's Supplemental Petition for Post-Conviction Writ of Habeas Corpus and Supplement to Supplemental Petition for Post-Conviction Writ of Habeas Corpus
05/27/2016 Request
Request for Extension of Time
05/31/2016 Reply
Reply to State's Response to Petitioner's Supplemental Petition for Post-Conviction Writ of Habeas Corpus
07/25/2016 Evidentiary Hearing (9:00 AM) (Judicial Officer Gonzalez, Elizabeth)
07/25/2016, 10/03/2016
Evidentiary Hearing: Expert Issue
Result: Matter Continued
07/25/2016 All Pending Motions (9:00 AM) (Judicial Officer Gonzalez, Elizabeth)
Parties Present
Minutes
Result: Matter Heard
08/01/2016 Order
Order for Supplemental Fees
10/03/2016 All Pending Motions (9:00 AM) (Judicial Officer Gonzalez, Elizabeth)
Parties Present
Minutes
Result: Matter Heard
10/11/2016 Order
Application and Order for Transcripts
10/19/2016 Recorders Transcript of Hearing
Recorder's Transcript re: Defendant's Petition for Writ of Habeas Corpus; Evidentiary Hearing: Expert Issue
11/08/2016 Findings of Fact, Conclusions of Law and Order
11/09/2016 Notice of Entry
Notice of Entry of Findings of Fact, Conclusions of Law and Order
11/10/2016 Order
Order Appointing Margaret A. McLetchie as Court-Appointed Counsel
11/10/2016 Notice of Entry of Order
Notice of Entry of Order
12/08/2016 Notice of Appeal (criminal)
Notice of Appeal
12/08/2016 Case Appeal Statement
Case Appeal Statement
12/28/2016 Request
Request for Transcripts of Proceedings
01/02/2017 Case Reassigned to Department 1
Case reassigned from Judge Elizabeth Gonzalez Dept 11
01/23/2017 Reporters Transcript
Transcript of Proceedings: Hearing on Petition for Writ of Habeas Corpus (Post-Conviction) May 13, 2013
01/23/2017 Reporters Transcript
Transcript of Proceedings: Hearing on Confirmation of Counsel May 20, 2013

01/23/2017	Reporters Transcript Transcript of Proceedings: Transcipt of Proceedings Hearing on Petition for Writ of Habeas Corpus (Post-Conviction) (Continued) June 17, 2013
01/23/2017	Reporters Transcript Transcript of Proceedings: Hearing on Petition for Writ of Habeas Corpus (Post-Conviction) June 8, 2016

Financial Information

	Defendant James , Tyrone D			
	Total Financial Assessment			175.00
	Total Payments and Credits			0.00
	Balance Due as of 05/15/2017			175.00
03/28/2012	Transaction Assessment			175.00

	Plaintiff State of Nevada			
	Total Financial Assessment			3.50
	Total Payments and Credits			3.50
	Balance Due as of 05/15/2017			0.00
09/18/2015	Transaction Assessment			3.50
09/18/2015	Efile Payment	Receipt # 2015-98861-CCCLK	State of Nevada	(3.50)

On March 7, 2011, James filed a Notice of Appeal. On October 31, 2012, the Nevada Supreme Court issued an Order of Affirmance. Remittitur issued on November 26, 2012.

On March 14, 2013, James filed a post-conviction Petition for Writ of Habeas Corpus and Motion to Appoint Counsel. The State filed its Response to James's Petition on May 7, 2013. On May 20, 2013, Robert Langford Esq., was appointed as counsel. On September 4, 2015, James filed a Supplemental Petition for Post-Conviction Writ of Habeas Corpus ("Supplement"). On January 15, 2016, James filed another Supplement to Supplemental Petition for Writ of Habeas Corpus ("Second Supplement"). On April 21, 2016, the State filed its Response to James's Second Supplement. On October 3, 2016, this Court heard sworn testimony from Bryan Cox, Esq., and Dr. Joyce Adams. This Court now orders that James's Petition be DENIED.

STATEMENT OF THE FACTS

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.

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.

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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.

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PETITION CLAIMS

I. JAMES RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment provides that, "[I]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. It has long been recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 706-707 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). To prove ineffectiveness, a claimant must show that his counsel was deficient and that that deficiency prejudiced the defense. Strickland, 466 U.S. at 687 (1984); Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). Deficient performance is representation that falls below an objective standard of reasonableness. Kirksey, 112 Nev. at 987, 923 P.2d at 1107. To show prejudice, the claimant must show a reasonable probability that but for counsel's errors the result of the proceeding would have been different. Id. This Court may consider either prong of the Strickland test, in any order, and need not consider both when a defendant's showing on either prong is insufficient. Kirksey, 112 Nev. at 987, 923 P.2d at 1107. "Effective 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 (1970).

The role of a reviewing court considering allegations of ineffective assistance 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).

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and 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) (citing

Strickland, 466 U.S. at 687, 104 S. Ct. at 2064).

Importantly, when raising a Strickland claim, the defendant bears the burden to demonstrate the underlying facts by a preponderance of the evidence. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). When ineffective assistance of counsel claims are asserted in a petition for post-conviction relief, the claims 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).

A. Counsel Was Reasonably Effective In Not Retaining An Expert Witness

James claims that counsel was ineffective for failing to retain an expert witness. However, this claim is denied because counsel was reasonably able to attack Dr. Vergara's expert testimony through cross-examination after requesting and reviewing the medical evidence. Transcript: Day 2, Vol II, 151-82. Bryan Cox, James's initial attorney, testified at James's evidentiary hearing that he has hired expert witnesses in past sexual assault cases but did not believe this case turned on physical evidence, and that he believed he could get Dr. Vergara to say that her findings were not conclusive and had an alternative explanation.. Reporter's Transcript ("RT") 6-7, 13, 15. Indeed, Dr. Vergara acknowledged as much on cross-examination. Such was a reasonable strategic decision.

Further, assuming *arguendo* that counsel was able to retain an expert who would have been able to testify to as Dr. Adams did at the evidentiary hearing, this Court nonetheless finds 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. As stated by Cox, this case did not hinge on physical findings by Dr. Vergara and the testimony of Defendant's other bad acts by N.H. was far more probative. James completely ignores N.F.'s damning testimony. N.F., just like T.H., met James because of his relationship with her

mother. Transcript: Day 2, Vol II at 187. Just like T.H., James sexually assaulted N.F. when her mother was at work. Id. at 194-98. Just like T.H., James tried choking N.F. to prevent her from getting help. Id. at 198. Just like T.H., James inserted his fingers in N.F.'s vagina and tried putting his penis in her vagina. Id. at 192-202. In N.F.'s case, James was caught touching N.F. inappropriately by his own mother. Id. at 207. 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. 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. Therefore, James fails to demonstrate that counsel was ineffective or that he suffered prejudiced. Accordingly, James's claim is denied.

B. Counsel Was Reasonably Effective In Not Challenging The Admission Of The Latex Gloves

This Court denies James's claim that counsel was ineffective for failing to challenge the admission of the latex gloves. James fails to show how a motion or objection to exclude the gloves would have been meritorious and James's claim that the evidence was more prejudicial than probative is unsupported by law.

The threshold question for the admissibility of evidence is relevance. Brown v. State, 107 Nev. 164, 168, 807 P.2d 1379, 1382 (1991). 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). "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).

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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. James neglects to provide any explanation why the evidence of the gloves was prejudicial. This Court finds 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 James's own exhibits, counsel investigated the gloves. See, Defense Exhibit 7, James 0089. Thus, any tactical decisions taken after investigation are unchallengeable. Dawson, 108 Nev. at 117, 825 P.2d at 596. Therefore, Defendant's claim is denied.

C. Counsel Was Not Ineffective In Investigating

This Court denies James's claim that counsel was ineffective for failing to conduct adequate investigation. The Nevada Supreme Court has made it clear that a defendant who contends that his attorney was ineffective because he did not adequately investigate the case must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d, 533, 538 (2004).

In this claim, James makes nothing more than a bare allegation that counsel failed to conduct a reasonable investigation. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Cox testified that he would not do anything differently if he had the opportunity to do the trial again. RT at 18. James fails to demonstrate what further investigation counsel should have done, much less how that investigation would have rendered a more favorable outcome. Such a bare allegation does not warrant relief. Therefore, James's claim is denied.

To the extent that James claims counsel was ineffective for not following up on his investigator's conversation with Theresa regarding the latex gloves, such a claim is without merit and denied. James fails to demonstrate what further investigation would have revealed and how it would have rendered a more favorable outcome. Similarly, James's claim that counsel was ineffective for not cross-examining Theresa about her statement to the defense investigator regarding where the gloves were found is meritless and denied. First, James

erroneously claims that Theresa told the investigator she found the gloves under her kitchen sink. Theresa stated that, "police seized a box of white latex gloves from under her bathroom sink." See Defense Exhibit 9, James 0091. Second, 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." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002). Accordingly, the cross-examination of witnesses is a strategic decision for counsel to make and this Court declines to challenge it. Id.; Dawson 108 Nev. at 117, 825 P.2d at 596.

Additionally, James fails to show a reasonable probability that, but for counsel's failure to cross-examine Theresa regarding her statement to the investigator, the result of the trial would have been different. McNelton, 115 Nev. at 403, 990 P.2d at 1268. Accordingly, James fails to demonstrate that counsel's representation fell below an objective standard of reasonableness or that he was prejudiced. Therefore, James's claim is denied.

D. Counsel Was Reasonably Effective In Not Objecting During The State's Closing Argument

This Court denies James's claim that counsel was ineffective for not objecting to the State's use of a PowerPoint slide during closing argument containing James's booking photograph with the word "GUILTY" superimposed across it. James's reliance on Watters v. State, 129 Nev. __, 313 P.3d 243 (2013), 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. However, 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).

Further, James fails to demonstrate that the outcome of the trial would have been different had the jury not viewed the State's slide. James fails to proffer how he was prejudiced. McNelton, 115 Nev. at 403, 990 P.2d at 1268. James makes nothing more than a bare conclusory statement that the prosecutor's visual proclamation of guilt affected the jury's verdict. As such, James's claim is a bare allegation that warrants no relief. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Because James fails to establish that counsel was objectively unreasonable or that he was prejudiced by counsel's failure to object, this claim is denied.

II. THERE WAS NO CUMULATIVE ERROR

This Court denies James's claim that the cumulative error of his trial counsel violated his right of due process, equal protection, and effective assistance of counsel. Without expressly endorsing an approach for cumulative error in the context of ineffective assistance of counsel claims, the Nevada Supreme Court has acknowledged that other courts have held that "multiple deficiencies in counsel's performance may be cumulated for purposes of the prejudice prong of the Strickland test when the individual deficiencies otherwise would not meet the prejudice prong." McConnell v. State, 125 Nev. 243, 259 n.17, 212 P.3d 307, 318 n.17 (2009) (utilizing this approach to note that the defendant is not entitled to relief). However, the doctrine of cumulative error is strictly applied, and a finding of cumulative error is extraordinarily rare. State v. Hester, 979 P.2d 729, 733 (N.M. 1999); Derden v. McNeel, 978 F.2d 1453, 1461 (5th Cir. 1992). Cumulative error review should not be utilized in the post-conviction context. Middleton v. Ruper, 455 F.3d 838, 851 (8th Cir. 2006) cert. denied 549 U.S. 1134, 1275 S.Ct. 980 (2007) ("habeas petitioner cannot build a showing of prejudice on a series of errors, none of which would by itself meet the prejudice tests").

Even if cumulative error review were available, a defendant must first make a threshold showing that his counsel's performance was deficient and counsel's representation fell below an objective standard of reasonableness. State v. Theil, 655 N.W.2d 305, 323 (Wis. 2003);

Finally, Defendant 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."[2] Defense Exhibit 5, JAMES 0054. To support his claim, Defendant cites to Dr. Adams' 2005 article discussing the form's appropriateness. Second Supplement 9-10. 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. Defense Exhibit 28, James 0694. 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.

Id. at 695.

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. Defense Exhibit 26, James 0650. Based on her review, Dr. Adams did not conclude that Dr. Vergara actually used the form in any inappropriate way. Id. at 650-52. 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. Id. at 653. 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. Transcript: Day 2, Vol II, 150-52. 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. Id. at

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

170. Additionally, Dr. Vergara explained that her overall conclusion was based on T.H.'s history coupled with the physical examination. Id. at 169-173. 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, Defendant's claim should be denied.

Finally, assuming *arguendo* that counsel was able to retain an expert who would have been able to testify to what Dr. Adams speculates, he 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, Defendant attempts to minimize the evidence presented against him. In particular, Defendant completely ignores N.F.'s damning testimony. N.F., just like T.H., met Defendant because of his relationship with her mother. Transcript: Day 2, Vol II at 187. Just like T.H., Defendant sexually assaulted N.F. when her mother was at work. Id. at 194-98. Just like T.H., Defendant tried choking N.F. to prevent her from getting help. Id. at 198. Just like T.H., Defendant inserted his fingers in N.F.'s vagina and tried putting his penis in her vagina. Id. at 192-202. In N.F.'s case, Defendant was caught touching N.F. inappropriately by his own mother. Id. at 207. 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.[3] Based on the evidence presented at trial, Defendant 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. Therefore, Defendant fails to demonstrate that counsel was ineffective or that he suffered prejudiced. Accordingly, Defendant's claim should be denied.

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[3] 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." Defense Exhibit 26, JAMES 0695. 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.

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

Defendant claims counsel was ineffective for failing to challenge the admission of the latex gloves. Supplement p. 14. 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. Transcript Re – Trial by Jury, Day 1- Volume I ("Transcript: Day 1, Vol I"), filed April 29, 2011, p. 259. 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. Id. at 260. 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.

Defendant's claim that counsel was ineffective for not objecting to the admission of these gloves, whether in a form of a pre-trial motion to exclude or contemporaneous objection at trial, is without merit. Supplement p. 14. Defendant fails to show how such a motion or objection would have been meritorious. Defendant's claim that the evidence was more prejudicial than probative is unsupported by law.

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).

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, Defendant 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. See, Defense Exhibit 7, JAMES 0089. Thus, any tactical decisions taken after investigation are unchallengeable. Dawson, 108 Nev. at 117, 825 P.2d at 596. Therefore, Defendant's claim should be denied.

C. Counsel Was Not Ineffective For Failing to Investigate

Defendant claims that counsel was ineffective for failing to conduct adequate investigation. Supplement p. 15. The Nevada Supreme court has made it clear that a defendant who contends that his attorney was ineffective because he did not adequately investigate the case must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d, 533, 538 (2004). It is well established that a claim of ineffective assistance of counsel alleging a failure to properly investigate will fail where the evidence or testimony sought does not exonerate or exculpate the defendant. Ford v. State, 105 Nev. 850, 854, 784 P.2d 951, 953-54 (1989).

In this claim, Defendant makes nothing more than a bare allegation that counsel failed to conduct a reasonable investigation. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Defendant fails to demonstrate what further investigation counsel should have done, much less how that

investigation would have rendered a more favorable outcome. Such a bare allegation does not warrant relief. Therefore, Defendant's claim should be denied.

To the extent that Defendant claims counsel was ineffective for not following up on his investigator's conversation with Theresa regarding the latex gloves, such a claim is without merit. Supplement p. 15. Defendant fails to demonstrate what further investigation would have revealed and how it would have rendered a more favorable outcome. Similarly, Defendant's claim that counsel was ineffective for not cross-examining Theresa about her statement to the defense investigator regarding where the gloves were found is meritless. Supplement p. 15, footnote 6. First, Defendant erroneously claims that Theresa told the investigator she found the gloves under her kitchen sink. Theresa stated that, "police seized a box of white latex gloves from under her bathroom sink." See, Defense Exhibit 9, JAMES 0091. Second, 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." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002). Accordingly, the cross-examination of witnesses is a strategic decision for counsel to make. Id. Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable. Dawson 108 Nev. at 117, 825 P.2d at 596. At trial, Detective Tomaino corroborated the fact that the box was found under the bed. Detective Tomaino testified that he had received a call from T.H.'s mother and she stated that she found the box under her bed. Transcript: Day 1, Vol I, p. 259-60. When Detective Tomaino got to the house, the box was sitting on top of the bed. Id. Thus, Defendant fails to demonstrate that counsel's representation fell below an objective standard of reasonableness.

Additionally, Defendant fails to show a reasonable probability that, but for counsel's failure to cross-examine Theresa regarding her statement to the investigator, the result of the trial would have been different. McNelton, 115 Nev. at 403, 990 P.2d at 1268. Accordingly, Defendant fails to demonstrate that counsel's representation fell below an objective standard of reasonableness or that he was prejudiced. Therefore, Defendant's claim should be denied.

D. Counsel Was Not Ineffective For Failing to Object During the State's Closing Argument

Defendant claims that counsel was ineffective for not objecting to the State's use of a PowerPoint slide during closing argument containing Defendant's booking photograph with the word "GUILTY" superimposed across it. Supplement p. 17-18. To support his claim that counsel was ineffective Defendant cites to Watters v. State, 129 Nev. __, 313 P.3d 243 (2013). However, Defendant's 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).

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Defendant's reliance on a non-binding case In re Pers. Restraint of Glasmann, 175 Wash. 2d 696, 286 P.3d 673, (2012), is misplaced. Supplement p. 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.

Further, Defendant fails to demonstrate that the outcome of the trial would have been different had the jury not viewed the State's slide. Defendant fails to proffer how he was prejudiced. McNelton, 115 Nev. at 403, 990 P.2d at 1268. Defendant makes nothing more than a bare conclusory statement that the prosecutor's visual proclamation of guilt affected the jury's verdict. Supplement p. 18. As such, Defendant's claim is a bare allegation that warrants no relief. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Because Defendant fails to establish that counsel was objectively unreasonable or that he was prejudiced by counsel's failure to object this claim should be denied.

II. THERE WAS NO CUMULATIVE ERROR

Defendant claims that the cumulative error of his trial counsel violated his right of due process, equal protection, and effective assistance of counsel. Without expressly endorsing an approach for cumulative error in the context of ineffective assistance of counsel claims, the Nevada Supreme Court has acknowledged that other courts have held that "multiple deficiencies in counsel's performance may be cumulated for purposes of the prejudice prong of the Strickland test when the individual deficiencies otherwise would not meet the prejudice prong." McConnell v. State, 125 Nev. 243, 259 n.17, 212 P.3d 307, 318 n.17 (2009) (utilizing this approach to note that the defendant is not entitled to relief). However, the doctrine of

cumulative error is strictly applied, and a finding of cumulative error is extraordinarily rare. State v. Hester, 979 P.2d 729, 733 (N.M. 1999); Derden v. McNeel, 978 F.2d 1453, 1461 (5th Cir. 1992). Cumulative error review should not be utilized in the post-conviction context. Middleton v. Ruper, 455 F.3d 838, 851 (8th Cir. 2006) cert. denied 549 U.S. 1134, 1275 S.Ct. 980 (2007) ("habeas petitioner cannot build a showing of prejudice on a series of errors, none of which would by itself meet the prejudice tests").

Even if cumulative error review were available, a defendant must first make a threshold showing that his counsel's performance was deficient and counsel's representation fell below an objective standard of reasonableness. State v. Theil, 655 N.W.2d 305, 323 (Wis. 2003); State v. Sheahan, 77 P.3d 956, 976 (Idaho 2003); State v. Savo, 108 P.3d 903, 916 (Alaska 2005); State v. Maestas, 299 P.3d 892, 990 (Utah 2012). In fact, logic dictates that cumulative error cannot exist where the defendant fails to show that any violation or deficiency existed under Strickland. McConnell, 125 Nev. at 259, 212 P.3d at 318; United States v. Franklin, 321 F.3d 1231, 1241 (9th Cir. 2003); Turner v. Quarterman, 481 F.3d 292, 301 (5th Cir. 2007); Pearson v. State, 12 P.3d 686, 692 (Wyo. 2000); Hester, 979 P.2d at 733. Further, in order to cumulate errors, the defendant must not only show that an error occurred regarding his counsel's representation, but that at least two errors occurred. Rolle v. State, 236 P.3d 259, 276-77 (Wyo. 2010); Hooks v. Workman, 689 F.3d 1148, 1194-95 (10th Cir. 2012).

If the defendant can show that two or more errors existed in his counsel's representation, then he must next show that cumulatively, the errors prejudiced him. McConnel, 125 Nev. at 259 n.17, 212 P.3d at 318 n.17; Doyle v. State, 116 Nev. 148, 163, 995 P.2d 465, 474 (2000); State v. Novak, 124 P.3d 182, 189 (Mont. 2005); Savo, 108 P.l3d at 916; People v. Walton, 167 P.3d 163, 169 (Colo. App. 2007). A defendant only shows that prejudice exists when he has shown that the cumulative effect of the errors "were sufficiently significant to undermine [the court's] confidence in the outcome of the . . . trial." In re Jones, 917 P.2d 1175, 1193 (Cal. 1996); Collins v. Sec'y of Pennsylvania Dep't of Corr., 742 F.3d 528, 542 (3d Cir. 2014). "[M]ere allegations of error without proof of prejudice" are insufficient to demonstrate cumulative error. Novak, 124 P.3d at 189. Further, "in most cases

errors, even unreasonable errors, will not have a cumulative impact sufficient to undermine confidence in the outcome of the trial, especially if the evidence against the defendant remains compelling." Theil, 665 N.W.2d at 322-23; see also State v. Maestas, 299 P.3d at 990 (holding that errors resulting in no harm are insufficient to demonstrate cumulative error). Further, cumulative error is not appropriate when a review of "the record as a whole demonstrates that a defendant received a fair trial." State v. Martin, 686 P.2d 937, 943 (N.M. 1984).

Thus, in order to demonstrate cumulative error, a defendant must show: (1) his counsel made multiple errors that were objectively unreasonable, and (2) the cumulative effect of these errors prejudiced the defendant to the extent that the court's confidence in the outcome of the case is undermined.

As demonstrated above, Defendant has failed to make a single showing that his counsel's representation was objectively unreasonable. Further, even if Defendant had made such a showing, he has certainly not shown that the cumulative effect of these errors was so prejudicial as to undermine the court's confidence in the outcome of Defendant's case. Collins, 742 F.3d at 542. Therefore, Defendant's claim of cumulative error is without merit and should be denied.

III. DEFENDANT IS NOT ENTITLED TO AN EVIDENTIARY HEARING

Defendant requests an evidentiary hearing. However, Defendant is not entitled to an evidentiary hearing. NRS 34.770 determines when a defendant is entitled to an evidentiary hearing. It 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.

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The Nevada Supreme 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). However, 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. "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).

Here, an evidentiary hearing is unwarranted because the petition may be resolved without expanding the record. Mann, 118 Nev. at 356, 46 P.3d at1231; Marshall, 110 Nev. at 1331, 885 P.2d at 605. As demonstrated above, the record contradicts Defendant's claims of ineffective assistance of counsel. Further, Defendant cannot show prejudice as to any of his claims. Thus, even presuming Defendant was able to prove his allegations true at an evidentiary hearing, Defendant would still not be entitled to relief. Therefore, no evidentiary hearing is warranted in order to deny Defendant's claims. Hargrove, 100 Nev. at 503, 686 P.2d at 225. Accordingly, Defendant's request for an evidentiary hearing must be denied.

CONCLUSION

Based on the foregoing, the State respectfully requests that Defendant's Petition for Writ of Habeas Corpus be denied.

DATED this 21st day of April, 2016.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY /s/ JAMES R. SWEETIN
JAMES R. SWEETIN
Chief Deputy District Attorney
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CERTIFICATE OF SERVICE

I hereby certify that service of the above and foregoing was made this 21ST day of APRIL 2016, to:

MARGARET MCLETCHIE, ESQ.
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BY /s/ HOWARD CONRAD
Secretary for the District Attorney's Office
Special Victims Unit

hjc/SVU

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DISTRICT COURT

CLARK COUNTY, NEVADA

TYRONE JAMES,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

CASE NO.: 10C265506
DEPT. NO.: XI

REPLY TO STATE'S RESPONSE TO PETITIONER'S SUPPLEMENTAL PETITION FOR POST-CONVICTION WRIT OF HABEAS CORPUS AND SUPPLEMENT

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Comes now Petitioner Tyrone James, by and through his counsel of record, Margaret A. McLetchie of McLetchie Shell LLC, and hereby submits this Reply to the State's Response to his Supplemental Petition for Post-Conviction Writ of Habeas Corpus and his Supplement to that Petition.

This Reply is supported by the attached memorandum of points and authorities, all papers and pleading on file herein, and any oral argument presented at the hearing scheduled for June 8, 2016 at 9:00 a.m.

Respectfully submitted this 31st day of May, 2016.

/s/ Margaret A. McLetchie
MARGARET A. MCLETCHIE, Nevada Bar No. 10931
MCLETCHIE SHELL LLC
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I. INTRODUCTION

As set forth in Petitioner Tyrone James's Petition for Writ of Habeas Corpus, his Supplemental Petition, and his Supplement to that petition, Mr. James' prior counsel, Bryan Cox, 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 the victim demonstrated that Mr. James had committed the alleged sexual assault. As set forth below, an expert witness could have reviewed and assessed Dr. Vergara's examination and conclusions, and could have provide rebuttal testimony, or, at a minimum, assisted trial counsel in preparing an effective cross-examination of Dr. Vergara.

Second, trial counsel failing to challenge the admission of critical but highly questionable evidence—latex gloves allegedly similar to those the victim said Mr. James used during the alleged assault—from being introduced at trial. Third, trial counsel failed to conduct reasonable investigation prior to trial. Specifically, trial counsel failed to investigate the circumstances surrounding the "discovery" of the aforementioned latex gloves. Trial counsel also failed to investigate what happened to photographs Dr. Vergara took during her examination of the victim. Fourth, trial counsel failed to object to the State's use of a highly prejudicial PowerPoint presentation during its closing argument. Contrary to the arguments presented by the State in its Response, these failings by trial counsel—individually and collectively—deprived Mr. James of his Sixth Amendment right to adequate representation.

II. ARGUMENT

A. Trial Counsel's Failure to Retain an Expert Witness Deprived Mr. James of the Ability to Effectively Cross-Examine Dr. Vergara.

As explained in Mr. James' Supplement, trial counsel provided ineffective assistance of counsel by failing to hire an expert to review and rebut Dr. Vergara's finding that T.H. was sexually assaulted. The failure to hire an expert was objectively unreasonable in this case, particularly given the inconclusive results of Dr. Vergara's SCAN examination.

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The Report of Dr. Adams evidences this, and shows that a rebuttal expert was necessary in this case. Moreover, as the record in the post-conviction proceedings has established, trial counsel failed to obtain photographs Dr. Vergara took during her SCAN examination of T.H. This failure has deprived Mr. James of the ability to fully test the accuracy of Dr. Vergara's findings and the methodology she used in reaching those findings. The failure to retain an expert, as well as the failure to obtain the complete record of Dr. Vergara's SCAN examination, deprived Mr. James of his right to a fair trial.

1. Trial Counsel Should Have Retained an Expert to Review Dr. Vergara's SCAN Report to Provide Independent Medical Advice and Expert Testimony and/or Information Crucial for Effective Cross-Examination.

The State argues in its response that trial counsel's failure to retain an expert was not ineffective because Mr. Jams has failed to demonstrate that "but for counsel's decision not to retain an expert, the result of the trial would have been different." (Response at p. 12:19-20.) Contrary to the State's arguments, however, the record in this case demonstrates that the failure to retain an expert deprived Mr. James of his right to effective assistance of counsel, and rendered the outcome of his trial unfair. Although there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and "[j]udicial scrutiny of counsel's performance must be highly deferential," *Strickland*, 466 U.S. at 689, counsel must conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client. *Id.* at 691.) "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"). The failure to obtain and present 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)).

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As discussed in Mr. James' Supplement, following her alleged sexual assault, T.H. was examined by Dr. Theresa Vergara, an attending physician at Sunrise Children's Hospital. (Exh. 12; JAMES0292[1].) Dr. Vergara conducted a Suspected Child Abuse and Neglect (SCAN) examination on T.H. to determine whether she had been sexually assaulted. (Exh. 12; JAMES0293; JAMES0296.) Dr. Vergara testified that during her SCAN examination, she examined T.H.'s genital area. (Exh. 12; JAMES0298.) As part of that examination, Dr. Vergara used a colposcope examine T.H. for signs of sexual assault and collect photographic evidence. (Exh. 12; JAMES0299.)

Dr. Vergara testified she found no bruising, tearing, or bleeding in T.H.'s vaginal area during the examination, but did find some generalized swelling to the introitus of T.H.'s vagina. (Exh. 12; JAMES0300; JAMES0302.) Based on her observations, Dr. Vergara concluded that the generalized swelling she observed indicated "Probable Abuse." (Exh. 5; JAMES0028.) Dr. Vergara testified that this swelling was possibly caused by the trauma of penetration. (Exh. 12; JAMES0300-JAMES0301.) Although Dr. Vergara testified the generalized swelling she observed could be caused by trauma, she admitted it could be caused by other things. (Exh. 12; JAMES0301; JAMES0307.) 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. (Exh. 12; JAMES0306-JAMES0309.)

In expert report prepared by Dr. Joyce Adams (Exh. 26; JAMES0650-653), Dr. Adams demonstrates several ways in which Dr. Vergara's report and testimony could have been questioned at trial. First, as noted in Dr. Adams' report, T.H. had borderline diabetes. (JAMES0652.) 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.*)

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[1] The exhibits referenced herein were attached to Mr. James' Supplemental Petition and Supplement.

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Second, Dr. Adams noted 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.*) Third, and perhaps most significantly, Dr. Adams concluded that Dr. Vergara's finding of generalized swelling was 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.

The State discounts all of these findings by Dr. Adams. With regard to trial counsel's failure to inquire about T.H.'s yeast infection as a potential cause of T.H.'s vaginal swelling, the State asserts that by focusing on the UTI and strep infection Dr. Vergara found during her SCAN examination of T.H., trial counsel adequately presented "documented medical alternative cause" for the generalized swelling Dr. Vergara allegedly observed. (*See* Response at p.10:12-18.) Trial counsel's choice to focus on these two potential causes for the generalized swelling, the State asserts, was a "reasonable strategic decision." (Response at p.10:12-13.)

The State's argument, however, rests on a faulty assumption: namely, that trial counsel reviewed Dr. Vergara's SCAN examination report and made a conscientious and ***informed*** decision to ignore T.H.'s yeast infection as a potential alternative cause of the alleged generalized vaginal swelling. There is no evidence in the record, however, that trial counsel had the ability to make an informed decision without the assistance of a medical expert. There is no evidence that trial counsel had any medical training, nor is there anything in trial counsel's records of this case that he considered the evidence regarding T.H.'s yeast infection and chose to discount it as a possible alternative cause of the generalized swelling. Indeed, there is no indication trial counsel did anything more than obtain a copy of Dr. Vergara's report. Even then, however, trial counsel failed to obtain a complete copy of Dr.

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Vergara's report. As mentioned above and discussed more fully below, Dr. Vergara took photographs of T.H.'s vaginal area as a part of her SCAN examination. Yet, as the record of the instant post-conviction proceedings shows, trial counsel never obtained those photographs.

2. The Failure to Retain an Expert in a Case Built Upon Circumstantial Evidence Rendered Trial's Counsel Representation of Mr. James Ineffective.

Contrary to the State's argument (*see* Response at p. 9:16-20), other courts have held that trial counsel's failure to consult with an expert is not a "reasonable strategic decision" when the state's case relies on the credibility of the victim as opposed to conclusive physical evidence of sexual abuse. For example, in *Byrd v. Trombley*, the prosecution called a psychologist who evaluated the victim after the incident was reported and opined that the victim's "testimony, symptoms, and behavior in the courtroom were consistent with her having been the victim of sexual abuse." 580 F.Supp.2d 542, 558 (E.D. Mich.2008.) Defense counsel in that case conducted no independent investigation with regard to the psychologist's testimony. *Id.* The district court rejected the state court's conclusion that the decision not to present expert testimony on these matters was a strategic decision, reasoning that counsel could not have made a reasonable strategic decision not to call experts because he never even explored that option. *Id.* at 558 (citing *Strickland*, 466 U.S. at 691).

The court in *Byrd* concluded that "[t]he failure to even consult an expert violated counsel's duty to conduct a reasonable, diligent investigation of the case." *Id.* (citing *Wiggins v. Smith*, 539 U.S. 510, 522 (2003)); *see also Gersten v. Senkowski*, 426 F.3d 588, 607 (2nd Cir. 2005) ("failure to consult with or call a medical expert" is "particularly" indicative of ineffective assistance "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"); *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").

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Similarly here, contrary to the conclusory argument put forth by the State, there is no evidence Mr. James' trial counsel explored the option of retaining an expert to rebut Dr. Vergara's report. This was particularly indicative of ineffective assistance because—despite the State's assertions to the contrary—the case against Mr. James was largely circumstantial. For example, the State argues that even if trial counsel had retained an expert, the outcome of Mr. James' trial would not have been different because he had previously been accused of engaging in a similar assault by N.C., who testified at Mr. James' trial.[2] (*See* Response at p. 12:5-22.) However, the State "may not ... prove that the defendant is a bad person, simply to show that in all likelihood he acted criminally on the occasion at issue." *United States v. Martinez*, 182 F.3d 1107, 1111 (9th Cir. 1999). Rather, the legal system punishes people for proven violations of specific laws. And here, the evidence that Mr. James assaulted T.H. was rather thin, consisting primarily of T.H.'s testimony, Dr. Vergara's rather inconclusive SCAN examination, and a box of latex gloves provided to police by T.H.'s mother five days after the alleged assault. (JAMES0120.) Giving the paucity of concrete evidence, the need for an expert to assess and rebut Dr. Vergara's findings was particularly important. Thus, trial counsel's failure to retain an expert rendered his assistance ineffective.

Additionally, contrary to the State's arguments (*see* Response at pp. 11:24-12:4), trial counsel's failure to retain an expert deprived Mr. James of the ability to rebut the strength of Dr. Vergara's conclusions by showing that she had used an outmoded classification system in her SCAN examination report. (*See* JAMES0652 (Dr. Adams' explanation of the outdated classification system).) That report included a section which required an examiner to make a subjective, non-medical assessment of whether the physical symptoms the examiner observed were consistent with sexual abuse. (*Id.*; *See also* Exh. 28, JAMES0694.) Had trial counsel retained an expert, the expert could have provided testimony which highlighted potential problems and weaknesses of the classification system Dr. Vergara used, or assisted trial counsel in making that a topic of cross-examination.

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[2] The State identifies this witness as "N.F." (*See* Response at pp. 5:23-7:6.) However, as the record shows, the initials for that witness are actually N.C. (*See* JAMES0107.)

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Finally, it is worth noting that trial counsel's failure to retain an expert has negatively impacted these post-conviction proceedings. As discussed in Mr. James' Supplemental Petition and the subsequent Supplement, the case file obtained from prior counsel did not include the photographs Dr. Vergara took during her examination of T.H. (*See* Supplemental Petition at p. 11, n.4; *see also* Supplement at p. 3:24.) As described in the Supplement, Mr. James has made multiple efforts to obtain those photographs, all of which have been unsuccessful. Because these photographs have seemingly disappeared, Dr. Adams was unable to assess whether Dr. Vergara correctly concluded that T.H. was exhibiting vaginal swelling at the time of her SCAN examination.

The State points to this as evidence that Mr. James' claim must fail. (*See* Response at p. 10:23-28.) However, the absence of the photographs underscores how trial counsel failed to provide adequate representation, and that those failings redound to Mr. James' detriment today. Had trial counsel retained an expert to review T.H.'s medical records, the expert could have obtained the photographs to review and assess Dr. Vergara's findings, thus ensuring that the photographs became part of Mr. James case file. Instead, trial counsel did not take the steps necessary to test the validity of Dr. Vergara's findings. The failure to retain an expert and obtain the colposcope photographs has also hamstrung Mr. James' ability to obtain relief in the instant proceedings. All of this demonstrates that trial counsel was ineffective in failing to retain an expert, as Mr. James contends.

B. Trial Counsel Was Ineffective for Failing to Challenge the Admission of the Latex Gloves Police Recovered from T.H.'s Residence.

As discussed in Mr. James' Supplemental Petition (*see* Supplemental Petition at p. 4:25-26; *see also* JAMES0164-0166), T.H. testified Mr. James was wearing gloves on the morning of the assault. While T.H. and her mother Theresa Allen were at the hospital, LVMPD Detective Hatchett searched Ms. Allen's residence for evidence related to the alleged assault. (JAMES00115.) The detective did not find any gloves during his search. However, five days after the alleged assault, Ms. Allen called the lead detective assigned to the case, Daniel Tomaino, because she had allegedly found "a box of Michael Air Jordans

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[sic] that were sitting under her bed that had some rubber gloves inside." (JAMES0120.) The gloves did not appear to be in their original packaging; rather, they were just "loose gloves" in a shoebox. (JAMES0122.) According to Detective Tomaino, the shoebox was sitting on Ms. Allen's bed when he arrived at her residence to retrieve them. (*Id.*)

Initially, trial counsel recognized that the gloves T.H. described, if they existed, would be key evidence. (*See* JAMES0091.) To that end, trial counsel directed an investigator to question Ms. Allen about whether she kept the sort of gloves T.H. described in her home. (*Id.*) When the investigator spoke to Ms. Allen, she told the investigator police had seized a box of white latex gloves from under her bathroom sink—not in a shoebox as described by Detective Tomaino. (*Id.*) However, after receiving that information, trial counsel did nothing. Something more than the cursory investigation described above could have led trial counsel to either move to exclude the admission of the gloves given that they were found days after the alleged assault, and days after the police had searched the residence for evidence.

The State asserts that Mr. James has failed to establish that any motion to exclude the admission of the gloves would have been meritorious. (Response at p. 13:14-18.) In making this argument, the State has chosen to ignore that the circumstances surrounding the "discovery" and admission of the gloves raised serious questions about whether the gloves were properly admitted at trial. In this case, there was no evidence that Mr. James ever possessed the gloves Detective Tomaino took from T.H.'s residence. Instead, all that is known is that Ms. Allen "discovered" the gloves in a shoebox that allegedly belonged to Mr. James five days after the police failed to find latex gloves during their search of the residence. The fact that the gloves were turned over to the police five days after the alleged assault and the search of the residence raises substantial questions about chain of custody, potential contamination, and other issues that trial counsel simply failed to explore. For example, the gloves could have been brought into the residence by someone living there after the police finished their search. There is also no evidence that the gloves Detective Tomaino retrieved from Ms. Allen's residence were used in the alleged assault of T.H. There is also no evidence police attempted to test the gloves (or evidence the box they were in when Detective Tomaino

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recovered them) for forensic evidence linking them to Mr. James. Thus, the facts and circumstances surrounding the discovery of the gloves shows that a motion to exclude their introduction at trial would have been meritorious.

The failure of trial counsel to do anything to exclude admission of the gloves was particularly damaging because, as noted above, the case against Mr. James was so circumstantial. Had trial counsel successfully moved to exclude the gloves, he could have foreclosed the introduction of damaging evidence from Ms. Allen and Detective Tomaino. Trial counsel did not do so. Thus, his representation of Mr. James was ineffective.

C. Trial Counsel's Failure to Conduct Adequate Investigation in This Case Deprived Mr. James of Effective Assistance of Counsel.

The State asserts that Mr. James has failed to demonstrate that trial counsel's failure to conduct adequate investigation deprived Mr. James of a fair trial. (*See* Response at pp.14-15.) However, trial counsel's failure to conduct adequate investigation in two key areas demonstrates that, but for trial counsel's failings, the outcome of trial could have been different. Moreover, both areas of investigative failure are tied to Mr. James' assignments of error for failing to retain an expert and failing to challenge the admission of the latex gloves.

First, there is the matter of the colposcope photographs discussed above. Had trial counsel adequately reviewed Dr. Vergara's report, counsel would have noted that Dr. Vergara had taken photographs of the alleged swelling in T.H.'s vaginal area, and then would have noted that the report did not contain those photographs. Trial counsel could have then had an investigator find the photographs for review by an expert witness. Trial counsel did not do so. The failure to note the absence of the photographs and conduct adequate investigation to locate rendered trial counsel ineffective.

Second, as the State presages in its Response (*see* Response at p. 15:3-22), trial counsel was ineffective for failing to explore the circumstances surrounding Ms. Allen's alleged discovery of the latex gloves. As discussed above, police officers—all of whom were presumably trained in conducting searches of homes for physical evidence which might be connected to an alleged crime—searched Ms. Allen's home for the gloves but did not find

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them.[3] (JAMES0122.) The gloves were then allegedly found by Ms. Allen five days later. Then, as noted above, Ms. Allen gave inconsistent statements about where the gloves were located. In speaking to trial counsel's investigator, she stated that police "seized a box of white latex gloves from under her bathroom sink." (JAMES0091.) At trial, however, she testified that she found some gloves in a shoebox under her bed. (JAMES0248.) Had trial counsel conducted adequate investigation, he could have explored the inconsistencies in Ms. Allen's testimony to demonstrate that the gloves may have been brought into the residence by someone other than Mr. James.

Both of these failings were particularly damning for Mr. James. As discussed above, this was a case built largely on testimony and circumstantial evidence. Given the lack of direct evidence against Mr. James, it was crucial for trial counsel to conduct investigation to search for exculpatory evidence, evidence that missing from the case file, and potential impeachment evidence. The failure of trial counsel to do so therefore deprived Mr. James of a fair trial.

D. Trial Counsel Was Ineffective for Failing to Object to the State's Use of a Prejudicial PowerPoint Slide During Closing Argument Which Featured the Word "Guilty" Written Across Mr. James' Face.

As discussed in Mr. James' Supplemental Petition, 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. (JAMES0461.) While the State diminishes the issue, as explained in the Supplemental Petition, the Nevada Supreme Court has previously disapproved of the use of such imagery in front of the jury. (*See* Supplemental Petition at pp. 16:25-17:5 (citing *Watters v. State*, 129 Nev. Adv. Op. 94, 313 P.3d 243 (2013).) Thus, the use here was prejudicial.

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[3] Despite their presumed training in conducting searches, the police who conducted the consent search of Ms. Allen's residence did not appear to do a particularly thorough job, as they apparently did not search Ms. Allen's room. (JAMES0122-0123.) This was an odd choice given that Mr. James had been in Ms. Allen's residence for some time before and after the alleged assault, and thus could have accessed any room in the house during that time.

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The Supreme Court's decision in *Watters* relied on an en banc opinion from the Washington Supreme Court, *In re Glasmann*, 286 P.3d 673 (Wash. 2012), where the prosecutor utilized an inflammatory PowerPoint presentation during its closing argument. *Id.* at 702. The final slides of the presentation prominently featured the defendant's image with the word "GUILTY" superimposed over it. *Id.* at 702. Also as here, defense counsel did not object to the slides. (*Id.*) The Washington Supreme Court vacated and remanded Glasmann's case, 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).

The State first argues that *Glasmann* is "a non-binding" case. (Response at p. 17:1.) This argument, of course, ignores that the Supreme Court premised its decision in *Watters* primarily on the decision in *Glasmann*. Thus, while *Glasmann* may be out of state authority, it carries uniquely persuasive weight given the Supreme Court's reliance on it. The State also argues that Mr. James has failed to demonstrate that the outcome of his trial would have been different but for the use of that slide in the State's closing argument. (Response at p.17:12-13.) Once again, the State's argument ignores the circumstantial nature of its case against Mr. James. Given that there was no direct evidence demonstrating that Mr. James assaulted T.H., the State on indirect evidence such as T.H.'s testimony, the testimony of witnesses regarding other alleged bad acts, the inconclusive testimony of its expert witness, and the introduction of questionable evidence like the latex gloves to prove its case. Given the lack of direct evidence, and the highly prejudicial nature of some of the testimony introduced by the State, trial counsel had an obligation to object to the PowerPoint slide. The State presented this slide at a crucial time—immediately before the jury began its deliberations. Thus, if the jury had any doubts about whether the State had adequately proven its case against Mr. James, it is possible some of those doubts were erased by the State's explicit visual suggestion of guilt. Thus, trial counsel was ineffective for failing to object.

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D. The Cumulative Errors in This Case Warrant Relief.

"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 v. Runnels*, 505 F.3d 922, 927–28 (9th Cir. 2007).

The State ignores case law on point, and instead relies on an isolated and totally irrelevant quote from an opinion from the United States Court of Appeals for the Eighth Circuit, the State posits that "[c]umulative error should not be utilized in the post-conviction context." (Response at p. 18:3.) In fact, the case the State cites for that proposition, *Middleton v. Ruper*, 455 F.3d 838 (8th Cir. 2006), does not actually say that, nor does it even hint at such a novel legal proposition. All that *Middleton* says is that the particular petitioner in that case had failed to establish the cumulative effect of trial counsel's errors warranted habeas relief. *Id.* at 851.

Mr. James, on the other hand, has established trial counsel's errors warrant relief both individually and in the aggregate. 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 encouraged the jury to find Mr. James guilty. Although each assignment of error alone is enough to merit habeas relief, this Court may also find that the cumulative effect of these errors "'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 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). Here, such unfairness is evident.

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E. Mr. James Is Entitled to an Evidentiary Hearing.

Finally, the State asserts Mr. James is not entitled to an evidentiary hearing because the record "contradicts [Mr. James'] claims of ineffective assistance of counsel" and Mr. James "cannot show prejudice" as to any of his claims. For the reasons described above, however, and for the reasons described in Mr. James' Supplemental Petition and Supplement, an evidentiary hearing is warranted to expand the record in this matter.

III. CONCLUSION

For these reasons, and the reasons previously set forth in his Supplemental Petition, Mr. James was denied effective assistance of counsel in violation of his Sixth Amendment rights. Accordingly, Mr. James respectfully requests this Court grant his petition for a writ of habeas corpus.

Respectfully submitted this 31st day of May, 2016.

/s/ Margaret A. McLetchie
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b)(2)(B) I hereby certify that on the 31st day of May, 2016, I mailed a true and correct copy of the foregoing REPLY TO STATE'S RESPONSE TO PETITIONER'S SUPPLEMENTAL PETITION FOR POST-CONVICTION WRIT OF HABEAS CORPUS AND SUPPLEMENT by depositing the same in the United States mail, first-class postage pre-paid, to the following address:

ADAM LAXALT, Attorney General
10 North Carson Street
Carson City, NV 89701

JAMES SWEETIN, Chief Deputy District Attorney
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TYRONE JAMES, ID # 1063523
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Indian Springs, Nevada 89070
Petitioner

Certified by: */s/ Pharan Burchfield*
An Employee of McLetchie Shell LLC

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Register of Actions
Case No. 10C265506

State of Nevada vs Tyrone James

Case Type:	Felony/Gross Misdemeanor
Date Filed:	06/21/2010
Location:	Department 11
Cross-Reference Case Number:	C265506
Defendant's Scope ID #:	1303556
ITAG Booking Number:	1000026255
ITAG Case ID:	1152658
Lower Court Case # Root:	10F09328
Lower Court Case Number:	10F09328X
Supreme Court No.:	57178

Related Case Information

Related Cases
10F09328X (Bind Over Related Case)

Party Information

		Lead Attorneys
Defendant	James , Tyrone D Also Known As Tyrone, James	Alina Shell Retained 702-728-5300(W)
Plaintiff	State of Nevada	Steven B Wolfson 702-671-2700(W)

Charge Information

Charges: James , Tyrone D	Statute	Level	Date
1. SEXUAL ASSAULT	200.366	Felony	01/01/1900
1. SEXUAL ASSUALT	200.364	Felony	01/01/1900
2. OPEN OR GROSS LEWDNESS	201.210	Gross Misdemeanor	01/01/1900
3. SEXUAL ASSAULT	200.366	Felony	01/01/1900
3. SEXUAL ASSUALT	200.364	Felony	01/01/1900
4. OPEN OR GROSS LEWDNESS	201.210	Gross Misdemeanor	01/01/1900
5. ASSAULT AND BATTERY	200.400	Felony	01/01/1900

Events & Orders of the Court

10/03/2016 All Pending Motions (9:00 AM) (Judicial Officer Gonzalez, Elizabeth)

Minutes
10/03/2016 9:00 AM
- DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS...EVIDENTIARY HEARING: EXPERT ISSUE Ms. Shell advised she was under the impression the hearing would be today and her expert is out in the hallway; hearing anticipated to last between a half to a full hour. COURT ORDERED, matter TRAILED to the end of the calendar. Matter RECALLED. Bryan Cox and Joyce Adams, SWORN and TESTIFIED. Matter submitted on the briefing. COURT ORDERED, based upon the information presented in the lengthy, well-documented appendix as well as the testimony , it does not appear that the lack of an actual expert nor the lack of obtaining the photographs were sufficient to cause Mr. Cox to be ineffective; for that reason the Petition is DENIED. State to prepare the order. Ms. Shell inquired if she can continue as counsel for Deft on appeal. Court noted counsel usually just continue from the petition; to the extent counsel will need an order the Court will sign one after Mr. Drew Christensen's approval. NDC

Parties Present
Return to Register of Actions

Electronically Filed
10/19/2016 11:57:18 AM

CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. TYRONE D. JAMES, Defendant.	CASE NO. C265506 DEPT. XI

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

MONDAY, OCTOBER 3, 2016

DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS
EVIDENTIARY HEARING: EXPERT ISSUE

APPEARANCES:

For the State: STACEY L. KOLLINS, ESQ
Chief Deputy District Attorney

For the Defendant: ALINA SHELL, ESQ.

Recorded by: JILL HAWKINS, Court Recorder

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MONDAY, OCTOBER, 3, 2016, 9:15 A.M.

THE COURT: Morning.

MS. KOLLINS: This is 11 so.

MS. SHELL: Okay. I'm losing my mind here.

Good morning, Your Honor.

THE COURT: All right. So last I remember we were trying to make sure you got some medical expert testimony related to the expert you were able – the record you were able to get from the hospitals. How are we doing on that issue?

MS. SHELL: Your Honor, I was under the impression that today we were actually doing the evidentiary hearing. I have my expert out in the hall –

THE COURT: Okay.

MS. SHELL: -- waiting for that, so.

THE COURT: How long is it going to take?

MS. KOLLINS: That's –

MS. SHELL: I anticipate maybe a half – I would say somewhere between a half an hour and an hour, Your Honor.

THE COURT: Okay. So let me trail it to the end of the calendar 'cause I'm not going to start the testimony 'til I finish everybody else.

Ms. Kollins.

MS. SHELL: Thank you.

MS. KOLLINS: Absolutely. I just wanted to check in with the Court, let you know that I have two other court appearances and I'll be back.

THE COURT: We'll see you when you get back.

MS. KOLLINS: Thank you.

THE COURT: Bye.

[Matter trailed 9:17 a.m and recalled, 10:43 a.m.]

THE COURT: Do you have a witness?

MS. SHELL: Your Honor, I have two witnesses. I was going to call Mr. – James' prior counsel, Bryan Cox first.

THE COURT: Okay. Mr. Cox.

THE WITNESS: I get M&Ms.

THE COURT: You do, you're a witness today.

BRYAN COX

[being first duly sworn, testified as follows:]

THE COURT CLERK: And please state and spell your name for the record.

THE WITNESS: My name is Bryan Cox, B-r-y-a-n C-o-x. I'm a Deputy Public Defender.

THE COURT: You may proceed. And, sir, as you noticed there are M&Ms for witnesses. Since you are a witness not a lawyer today, you can have those. And then if you need any water or coffee, let the marshal know. There's water in the pitcher. You may proceed, counsel.

THE WITNESS: Thank you, Your Honor. Your Honor that's my son in the back row, if we don't kick him out, I'd appreciate it.

THE COURT: All right.

THE WITNESS: Thank you.

THE COURT: Are you okay watching? [Son in audience, nods]. All right. Keep going.

DIRECT EXAMINATION

BY MS. SHELL:

Q Good morning, Mr. Cox.

A Good morning.

Q How are you this morning?

A Good. Thank you.

Q Thank you for coming in. Mr. Cox how are you currently employed?

A I'm employed with the Clark County Public Defender's office. I'm an attorney.

Q And how long have you been at the Public Defender's office?

A Since December of 1999.

Q And Mr. Cox are you acquainted with a Tyrone James?

A I am. He was my client.

Q And is that Mr. James over in the jury box in the orange jumpsuit?

A I believe it is, yes.

Q Okay. Thank you. And you said that Mr. James was your client?

A Yes.

Q Okay. Do you recall approximately what year you represented Mr. James?

A Not specifically. It's been a couple of years and I've had a few cases in between.

Q If I told you that it was in 2010, would you have any reason to disagree with me?

A I would agree with you on that.

Q Okay. Great. And do you recall the nature of the charges against Mr. James?

A Yes. Mr. James was accused of sex assault.

Q Now, prior to representing Mr. James did you have any experience handling sexual assault cases?

A I did, yes. When I was first employed, we only had two attorneys that handled the really more media related sex assault cases. And so as a track deputy when I first got hired, I handled sex assault cases early on. And then after I'd been an attorney for about ten years I was moved to actually a team that specialized in only sex assault cases and I was on that team when I defended Mr. James.

Q Okay. Can you give me a ballpark estimate of how many sexual assault cases you've handled while with the Clark County Public Defender's office?

A I couldn't. It wouldn't be accurate. I just handled many.

Q Many?

A Yes. Prior to Mr. James I'm guessing – I couldn't quantify it accurately. I mean that's not a statistic I keep personally.

Q That's all right, I just was checking to see if you remember. But it's fair to say that you've represented several clients charged with sexual assault?

A Many.

Q Many. Now in those cases do you ever retain the services of an expert in sexual assault or sexual abuse?

A I have.

Q Okay. Now, did you retain an expert in this case?

A I did not.

Q Okay. And why did you not retain an expert in this case?

A This case, like others, do not turn on – I believe did not turn on physical evidence. It's very rare that you have a case that anybody can point to and say conclusively this is evidence of sex assault.

Evidentiarly, I thought it was very thin, you know. You had some redness and that was, you know, the – not – the State's own report did not conclusively indicate that there was – that's evidence of abuse. And, in fact, there was – the report itself provided alternate theories how that could – the redness could be present.

Q And do you recall what alternate theories were in that report?

A You know the urinary tract infection stands out.

Q Okay. Anything else?

A I believe there was another illness as well, but we weren't able to get into it in trial.

Q Okay.

A But I was able to use urinary tract infection in cross-examination.

Q Now, you pre stated some of my questions, so you – did the victim in this case have a sexual assault examination performed on her?

A She did, yes.

Q Okay. And I take it based on your testimony that you had a chance to review those records prior to trial?

A I did.

Q Okay. And do you recall whether you subpoenaed those?

A You know, generally, to be honest with you those are provided just without me asking or if I want them more quickly they'll provide them. But I've never had a problem in my career of the State providing those reports in – with accompanying medical reports prior to trial –

Q Okay.

A -- or even preliminary hearing.

Q Now, in reviewing those medical records do you recall whether there was any references to photographs taken during that exam?

A I'd have to see the report. I don't recall if this one did or not off the top of my head.

Q And I have a copy of the report if you'd like to look at it.

A I would, thank you.

Q Okay. If I can find it, here it is. Sorry, it's a – may I approach Your Honor?

THE COURT: You may.

MS. KOLLINS: I have it.

MS. SHELL: Okay.

THE WITNESS: Thank you.

MS. SHELL:

Q Thank you. I'll direct your attention. Now, Mr. Cox, I've handed you a copy of the medical records in this case and they are Bates labeled as part of the appendices in our case, Your Honor. It's Bates labeled James 0016 through 0076.

And, Mr. Cox, if I could just turn your attention to page 25, right up at the –

THE COURT: These are documents that we've previously filed under seal because they're medical information?

MS. KOLLINS: That is correct.

MS. SHELL: That is correct, Your Honor.

THE COURT: Okay. So you don't want to admit it for purposes of this hearing since it's sealed, but you could certainly examine him about them.

MS. SHELL: That's correct, Your Honor. I wasn't intending to admit, I just

wanted to –

THE COURT: Okay.

MS. SHELL: -- question him, refresh his recollection.

THE WITNESS: I'm on page Bate stamp 25.

MS. SHELL:

Q Okay. And do you see right up at the top there's a section that's labeled progress and procedures?

MS. KOLLINS: My apologies. My copy is not Bate stamped, so if I can just see what counsel is looking at –

MS. SHELL: Here, I'll show you.

MS. KOLLINS: -- 'cause I didn't bring their whole appendices with me. I brought the original.

THE COURT: I had Jonathan carry it in.

MS. SHELL: Unfortunate – I hate to say this, it's not the smaller appendix I've ever submitted, Your Honor.

THE COURT: I know, it's –

MS. SHELL: But it – still it's, it was a hefty load of paper, I'll agree.

THE WITNESS: I have reviewed it.

MS. SHELL:

Q Okay. And do you see up at the top there's a reference to a digital photo colposcopy?

A Yes.

Q Okay. So based on your review of the records that I handed to you, does it appear that there were photographs taken during this examination?

A Yes. Sometimes that's a video, sometimes it's still photos. It just

depends on the case and who's doing it, I think

Q Now, do you recall whether you received photos in this case?

A I didn't, no.

Q You did not. And did you attempt to obtain those photos?

A No, I didn't.

Q Okay. Have you requested – are you familiar with what a colposcope is?

A I believe so, yes.

Q Okay. Based on your layman's understanding what is a colposcope?

A It's a camera that takes or videos of a girl or woman's vagina on the outside, and – mainly the entire. It's designed to penetrate the vagina to preserve the image of the state it was in at the time the photos are taken.

Q Okay. And in prior cases where you've represented clients charged with sexual assault have there been colposcope photos in those cases?

A Yes.

Q And have you requested photos in other cases?

A The ones I requested I think were video.

Q Okay.

A I think – well, maybe the photos accompanied it, but I have had videos sent to my own expert to review.

Q But you did not do that in this case?

A I did not, no.

Q And do you recall why you didn't do that in this case?

A I, from the top of my head, this case didn't turn on I believe physical evidence. The conclusions were not conclusive as to sex assault and the report

itself provided an alternative explanation. I believed from my experience that the nurse examiner would admit that it was not conclusive evidence of sex assault and that the urinary tract infection would be responsible for it. And, if I recall, I was successful in getting that evidence in.

Q Okay. Now with regards to – now, we keep talking about the conclusions that the doctor reached. Do you remember the name of the treating physician?

A I don't, no.

Q Okay. Now, with regards to the doctor's conclusions do you recall what her conclusions were about whether the victim in the case had been sexually assaulted? And I specifically would ask you to look at James 53 through 54. Do you see something that says genital anal medical exam findings up at the top?

A Yes.

Q Okay. Great.

A I've seen it.

Q Okay.

A I'm sorry, what was the question?

Q Do you recall what her – the doctor's conclusions were regarding whether the victim had been sexually assaulted?

A Well the report refreshes my memory and it is that nonspecific finding, swelling. And on – the probable abuse does not indicate physical, it indicates a spontaneous accusation, which to me does not reflect physical abuse. It does not refer to the physical findings at all.

Q It doesn't refer to the physical findings?

A Well, on page – based on 53 that is as to the specific. As to the

physical it's nonspecific and it circled swelling. And then on, based on 54, the probable abuse has nothing – from my reading of it and from my memory it had nothing to do with physical evidence. It has to do with what the examiner thought that because the girl had made a spontaneous – I'm just reading it here – spontaneous –

Q Um-huh.

A -- clear, detailed description that that indicated probable abuse, but that didn't turn on any physical findings of the examination.

Q Okay. Now, in the sexual assaults case – assault cases that you've handled previously, have you ever run into a report with similar conclusions?

A That's not uncommon. This finding is not uncommon.

Q And in those cases have you ever, where you've had a report which reached similar conclusions, have you ever retained the services of an expert?

A I'd have to look. Quite frankly, there's very few cases where, like I indicated, that there's physical findings where any professional could point to and say this is evidence of sex assault. But I have on previous cases had colposcopes examined, photos examined or a doctor testify or a nurse testify.

Q Okay. But that didn't happen in this case?

A It didn't, no.

Q Okay. Now, as you indicated this case went to trial, correct?

A It did.

Q Okay. And do you recall what you did to prepare for trial, specifically the cross-examination of the treating physician in this case?

A Well, I was lead counsel. If my memory serves me, I'm the one that handled that witness because I thought it was more key. You know, to be honest

with you, you know, at that point in my career I had enough experience that I knew which questions to ask and I had a good idea of what the answers would be. And if I remember right at trial it unfolded as I'd expected. I don't believe the case turned on physical evidence.

Q What do you believe the case turned on?

A Just the – prior to going into trial I thought our case was very strong with only the one girl complaining. Before trial, this judge allowed another girl to come and testify. Once that happened I thought that was very unfair that we had another case that a girl testified. And I believe her case was dismissed. Came in and I thought that the jury looked to that, but I can't look to the minds of what the jurors were thinking, but I thought that was a very unfair turn in the case. And, unfortunately, Mr. James was convicted.

Q Now, I just have a couple of more questions for you. Do you have any kind of medical training?

A No.

Q Do you have any training in interpreting medical reports?

A Just in my career, looking at them, I have had physicians or a physician's assistant assist me in looking through medical reports to indicate, you know, what I'm looking for. Reading the handwriting can be difficult sometimes, quite frankly. The best evidence I've gotten from medical reports that I didn't see was understanding what medications were and weren't prescribed. And I've also been to seminars where the key topics were, you know, preparing and handling sex assault cases.

Q Now, just one more question, well, it actually ends up being two questions. In sex assault cases where you don't retain an expert, have you ever just

consulted with an expert about a case?

A Yes, I have consulted experts in lots of cases. At that point in my career, you know, I had other attorneys I would consult with on my team that also just handled sex assault. And I would have, I don't know if I did in this case or not, but I've had friends who were with medical training review it just to see what they thought. In this case I concluded that I did not need an expert. That I could bring my own defense through the State's witness.

MS. SHELL: Okay.

Your Honor, I'll pass the witness at this time.

THE COURT: Cross-examination.

MS. KOLLINS: Very briefly, Judge.

CROSS-EXAMINATION

BY MS. KOLLINS:

Q Mr. Cox was it your understanding that there was a definitive finding of sexual abuse in the report provided by Dr. Vergara in this case?

A There was no definitive finding. It was probable and I believe at trial she admitted that it was probable and there was an alternative explanations.

Q And part of that probable abuse finding was the history coupled with the swelling, correct?

A Yes.

Q And that is not unusual in your experience?

A No, it's not unusual.

Q So part of that probable cause or likely abuse finding that is usually coupled – a history based on – plus physical findings, correct?

A Yes, and I do find, quite frankly, that nurse examiners or doctors will

generally put a probable finding just in deference to the report. And the reality is is that findings could be consistent with sex assault and not findings, they'll say not findings are consistent with sex assault. Findings are very rarely conclusive.

Q And in your experience doing these types of cases is it true that most findings in sexual assault examinations are nonspecific?

A The vast majority, yes.

Q Very rarely will you get a case with such a thing as a transected hymen or bleeding or bruising, something that is evidence of an acute sexual assault?

A Bleeding, very rare. That would be something to really stand out. But from my training, just a transected hymen by itself without bleeding or where they're indicating that there's fresh tear around the transected hymen, that can occur naturally in a young woman and through athletics or through no explanation at all. And I've never found a medical professional that can say that because the hymen is torn that that is evidence of sex assault by itself.

Q Without a history, right?

A Yes.

Q Okay. So in this case given that the only nonspecific finding that Dr. Vergara saw was some swelling, what was your strategy as a defense attorney?

A That I can – I believe, if I'm not mistaken, our office has handled Vergara, if not me personally other attorneys. And I believed in – that we would be able to get the conclusions out that I needed to at trial and that is that this is not conclusive. That there are other explanations why the redness is there and it's not conclusive of sex assault. And if I remember correctly, Vergara did in fact testify that it wasn't conclusive. And that the urinary tract infection alone could explain the

redness.

Q So you had an alternate explanation for the swelling, the urinary tract infection?

A Yes, it was provided to me. Yes.

Q Okay. And you did cross-examine her on that?

A I did.

MS. KOLLINS: Okay.

Your Honor, I would ask that the Court take Judicial Notice of pages 150 through I think the last page of her testimony is 182 from the second day of trial. If the Court needs another copy, I have that as well.

THE COURT: Is that in the supplemental appendix?

MS. SHELL: Your Honor –

MS. KOLLINS: Well, it's on file as court – it's a transcribed –

THE COURT: I know. But I'm also asking it, is it in the supplemental appendix?

MS. SHELL: It is in the appendix, Your Honor. It's at – it starts at Bates label James 0292 and final examination ends at James 0324.

THE COURT: Okay. I'm there. Thank you.

MS. KOLLINS:

Q Now, the child also had chlamydia is that correct?

A Yes.

Q And that was something that was not permissible at trial pursuant to Rape Shield, is that correct?

A That's correct.

Q Okay. So strategically, even if you wanted to, based on the Court's

ruling, you could not bring up that alternate explanation for anything?

A I wasn't able to but with the urinary tract infection I believed I had something that was very understandable to even male jurors.

Q And relatable?

A Yeah.

Q Defense counsel or post-conviction counsel asked you about the existence of photographs and why you didn't obtain those. Based on your knowledge of this report and your ability to cross-examine Dr. Vergara regarding the UTI, what would photos have done for you?

A Well to be honest with you, you know, we – if I request them, they don't go to me in the case I've had to request them, because they're – they fall under, of my understanding they're the same category as child porn. And so in the case I requested it, they've gone directly to my expert. But, you know, in this case if there's redness I think I would have seen redness. And I don't know what medical training I would need to see – to tell what – redness doesn't tell you what caused it.

Q More accurately in this case there was swelling, is that correct –

A Yes.

Q -- and not redness? Is that correct?

A Redness, swelling, yes.

Q Did you believe that the findings in this case were based on digital penetration?

A No.

Q Strategically, why did you not get an expert just one more time for the Court.

A Well, at trial if – my goal is to get the pertinent evidence in front of a

jury effectively and persuasively. If – there are situations where more witnesses is not a good thing, it can detract and it can draw attention to. I never believed this case turned on physical evidence. I still don't believe it turned on physical evidence. And for me to spend an inordinate amount of time on it or call a expert to highlight it, I think it would draw undue attention to it. I believed that I could get the State's own expert to admit that it wasn't conclusive and if my memory is right I believe I was successful in that.

Q If you recall, did you get Dr. Vergara to admit that there was an alternate explanation for the swelling, that being the UTI?

A That's my memory. I haven't reviewed that transcript but that's my memory from trial.

Q You have not reviewed that transcript for today?

A I haven't no.

Q If you had it to do over again, based on the facts of this case would you hire an expert under these circumstances knowing your ability to cross-examine Dr. Vergara?

A I wouldn't no.

MS. KOLLINS: No more questions, Your Honor.

THE COURT: Any redirect.

REDIRECT EXAMINATION

BY MS. SHELL:

Q Mr. Cox just a brief question. Now, you said that you felt that you were able to elicit an alternative explanation from Dr. Vergara, is that correct?

A Yes.

Q Okay.

A Or have her explain her explanation of the report and show the jury that there was evidence in her report indicated – explaining this redness or swelling.

Q And, again, you have no medical training, correct?

A You know what it just – just, you know, the – I think the First Aid merit badge as a Boy Scout is as far as it goes, but, yeah.

Q Okay. So if the doctor testified that the redness was caused by – do you recall that there was a strep B infection in this case?

A I remember a, an STD and I remember a urinary tract infection. I don't remember anything more specific than that.

MS. SHELL: Can you give me just one second, Your Honor, I apologize. Page 65. May I approach, Your Honor?

THE COURT: You may.

MS. SHELL: All right.

Mr. Cox, I'm going to hand you your examination of Dr. Vergara and we're on – I'm sorry, can you tell me what the Bate's label is on that?

THE WITNESS: The Bate stamp?

MS. SHELL:

Q Yes.

A Is 307.

Q Okay. 307, Your Honor.

Now in looking at that can you recall that there was a strep infection involved in this case? Hopefully, I've pointed you in the right direction.

A I'm on page – I'm just reading 307 right now.

Q And it goes on to – it goes through to Bate's 310.

A Would you like me to go to 310 now?

Q Well, I was just hoping you could look at it and refresh your recollection about whether there was a strep –

A I see that on page 308.

Q Okay. Now, if you look at page – if I could turn your attention to Bate's 309, which is page 167 of the testimony from trial day 2. If you look at lines – starting at line 19, you ask the doctor whether the strep B infection could cause redness at the introitus. Do you see where I am?

A On page 308?

Q Yeah, 309 at line 19.

A Oh, excuse me.

Q I'm sorry.

A Okay. I've read that. I'm sorry. Go ahead.

Q And she tested – you asked her whether the strep B infection could cause redness at the introitus, correct?

A Yes.

Q And she testified that it would?

A Yes.

Q Now –

A On line 21.

Q Thank you. And someone with any – with no medical training, did you have any ability to examine her or to challenge her on that?

A That she concluded that the strep can cause the swelling and redness?

Q That's correct.

A I don't know why I would because that provides my defense.

Q Okay. Fair enough.

A I don't know, I think I'd want to challenge that finding.

MS. SHELL: Fair enough.

Your Honor, I have no further questions.

THE COURT: Anything else, Ms. Kollins?

MS. KOLLINS: No, ma'am.

THE COURT: Thank you, Mr. Cox. Have a very nice day.

THE WITNESS: Thank you.

THE COURT: Thank you for being here watching [to gallery].

MS. SHELL: And, Your Honor, I'm going to go pull –

THE COURT: Ready for the next witness.

MS. SHELL: -- pull my expert. I'll go get her.

THE WITNESS: [Enters courtroom].

THE COURT: Yeah, keep coming.

MS. SHELL: Right up there.

THE COURT: No, just keep –

COURT MARHSAL: To the bench.

THE COURT: -- keep walking.

THE WITNESS: Oh, all right.

THE COURT: You'll see a metal handrail and then come up the stairs –

THE WITNESS: Um-huh.

THE COURT: -- and then this young lady [indicating] will swear you in.

THE WITNESS: All right.

JOYCE ADAMS

[being first duly sworn, testified as follows:]

THE COURT CLERK: Please state and spell your name for the record.

THE WITNESS: Joyce Adams, J-o-y-c-e A-d-a-m-s.

THE COURT: And, ma'am, you'll notice there's an M&M dispenser there, there's water in the pitcher. If you need some coffee let the marshal know.

THE WITNESS: Water is good.

DIRECT EXAMINATION

BY MS. SHELL:

Q Good morning, Dr. Adams.

A Good morning.

Q Dr. Adams, how are you currently employed?

A I'm a consultant with a program in Sacramento, California, that's funded by the State. It's called the California Clinical Forensic Medical Training Center. And I coordinate a training program for nurses and doctors who do child sexual abuse evaluation. We do it twice a year.

Q And did you go to medical school, Dr. Adams?

A Yes, I did.

Q And where did you go to school?

A I went to the University of Kansas School of Medicine.

Q And after medical school did you do a residency?

A Yes, I did.

Q Okay. And what was – where did you do that residency?

A Well, I did part of it in Kansas City at the medical center in pediatrics. And then part of it I transferred to New York to Monte Fiore Hospital in the Bronx in New York City and finished out my residency there.

Q And during the residency did you have any particular emphasis –

what was your residency in let me ask it that way?

A Well, it was in pediatrics, so it was all of pediatrics. Taking care of children from birth to age – we actually went up to age 21 at the hospital in New York.

Q That's a very large child.

A Yes.

Q Now, while you were doing your residency in social – you said pediatrics?

A Pediatrics. In New York the program was called the Residency in Social Pediatrics. It was just organized a little bit different and gave us exposure to social issues that our patients might be struggling with, helped us understand the communities that we worked in and some cultural sensitivity issues.

Q Now, when you were doing your residency in pediatrics, did you develop an interest in a particular area of pediatrics?

A Well, during my residency training my particular area of interest was adolescent medicine, actually taking care of teenagers. My interest in learning about sexual abuse and the medical evaluation of sexual abuse came a couple of years after I started my job in Kansas City as a pediatrician.

Q So have you – so it sounds like you have an interest – you had a particular interest in researching sexual abuse, is that correct?

A That's correct.

Q Okay. Now have you personally conducted sexual assault examinations?

A Yes, I have.

Q And on children?

A Yes, all ages of children.

Q All ages. And can you estimate how many sexual assault examinations you've conducted during your career?

A Probably between 3 and 4,000.

Q And I hate to date you this way but when did you start your residency after medical school?

A In 1977.

Q Okay. Have you – so you've done – you conducted sexual assault examinations. Have you published any scholarly works on sexual assault examination?

A Yes, I have.

Q Okay. And can you estimate how many publications you've had during your career?

A Altogether around 40 and, let me see 38 of those were on the topic of sexual abuse evaluation.

Q All right. And have you previously testified as an expert witness in the area of sexual abuse?

A Yes, I have.

Q Okay. And can you estimate how many times you've testified as an expert witness in that area?

A Somewhere around 300, 350 times.

Q Dr. Adams are you familiar with a medical device called a colposcope?

A Yes.

Q Okay. What is a colposcope?

A A colposcope is basically a magnifying device, like a microscope, that's on a stand and the way it's used in sexual abuse evaluations, it also is equipped with a camera. Either started out in early days a .35 millimeter camera. And we'd – used a ring flash on the camera in order to get better photos of the external genital tissues.

Q Now are colposcopes still something that are commonly used to conduct sexual assault examinations?

A They're used in some areas more than others. With the advent of high quality digital cameras that can take both still images and videotapes, video images, the colposcopes are used less often now than they were in the early days.

Q Now, I've retained you as an expert witness in this case, correct?

A Yes.

Q And did you prepare a report in this case?

A Yes, I did.

MS. SHELL: Okay.

Your Honor if I may approach and provide her with a copy of her report just in case she needs to refer to it?

THE COURT: You can.

MS. SHELL: Did you –

MS. KOLLINS: I have it. Thank you.

MS. SHELL: And Your Honor this was submitted as part of the supplemental appendix and it's Bate's labeled James 650 through 653. Now –

THE COURT: So it's with the jury, so it's the last number?

MS. SHELL: Yes, 653, Your Honor.

THE COURT: Thank you.

MS. SHELL:

Q Now, Dr. Adams, in preparing your report did you review any materials?

A Yes, I did.

Q Okay. And do you recall – and if you need to look at the report to refresh your recollection go ahead and do that, but do you recall what materials you reviewed in this case?

A Yes. I reviewed – well, there was a court order authorizing me to be retained. But I reviewed police reports from the case. I reviewed medical records. I reviewed a copy of the transcript of the testimony given in the trial by Dr. Theresa Vergara; and, also, a copy of the testimony that the young woman, TH, gave during the trial.

Q So you reviewed, as you said, you reviewed the medical records in this case, correct?

A Yes.

Q And in reviewing those medical records do you recall whether the doctor indicated that she used a colposcope in that – in the examination?

A Yes.

Q Okay. And she also indicated that she took photos with the colposcope?

A Yes.

Q Now were you ever able to see photos that were taken?

A No.

Q And would that have assisted you in preparing the report?

A Yes.

Q Okay. And can you briefly explain to us why that is?

A It would have assisted me in determining whether in my opinion there was any generalized swelling of the genital tissues. The doctor reported that but without good photo documentation I don't know that there was swelling. I would take her word for it, I guess. But to give a second opinion about a medical finding I need high quality photos to look at.

Q Now without being able to look at those photographs, do you believe based on your review of the materials that you've looked at, that the generalized swelling that the doctor reported was clinically indicative of sexual abuse?

MS. KOLLINS: Objection. She can't testify to a legal conclusion.

THE COURT: Overruled. You can answer.

THE WITNESS: Swelling is a very nonspecific finding, which means it can be caused by lots of different things. And in the context of sexual assault, swelling without accompanying signs of trauma, such as bruising or bleeding really doesn't have any significance with respect to abuse.

MS. SHELL:

Q Now, in reviewing your report, I mean, I'm sorry, in reviewing the medical report prepared by Dr. Vergara were there any other conditions noted in Dr. Vergara's report that might have caused the swelling that she reported?

A Well, there were other conditions that she was found to have. One was a bladder infection or a urinary tract infection and one – a result came back after the examination of a positive test for chlamydia, which is a sexually transmitted infection. That was obtained from a swab from the cervix and showed that there was chlamydia. So it's possible that either one of those could have caused some inflammation in the genital tissues.

Q Now, did you also – well, let me ask you this question first. Now, you said that if you had – I don't want to mischaracterize your testimony, so let me see if I can remember what you said.

So Dr. Vergara reported that there was generalized swelling correct?

A Correct.

Q And now had you been the victim's treating physician in this case and observed swelling, what would your protocol have been?

A To take photographs. Multiple photographs at different magnifications, which you can do with a colposcope and to have the patient come back in a week at least to see –

Q And what – oh, sorry.

A -- to see if what looked like maybe swelling was still there. And if it's still there after a week, it's not swelling. Swelling would be something that would be gone by then.

Q If it's not swelling what else could it possibly be?

A Just the normal appearance of her genitalia. There can be a fuller look to external genitalia in some women.

Q Now did you – I believe you also testified that you reviewed Dr. Vergara's testimony in this case?

A Yes.

Q Okay. Now, do you recall – and I can refresh your recollection if you need it with a copy of the transcript – but do you recall that she testified that the generalized swelling she observed could have been caused by digital penetration? Do you recall reading that?

A Yes.

Q Okay. And do you agree with that conclusion?

A I have never seen that even in cases where patients described digital penetration. I've never seen swelling. It's unlikely in my opinion that that would cause swelling.

Q And she also testified that the swelling that she observed could have been caused by penal insertion. Do you agree with that conclusion?

A I don't think you can say one way or the other that it was caused by that.

MS. SHELL: I just have – Your Honor, if I may approach, I'd like to –

THE COURT: Yeah.

MS. SHELL: I'm going to show her the medical records again.

MS. KOLLINS: Is there a question pending?

MS. SHELL: There is a question pending. I just thought I'd save myself the trip and walk up there.

MS. KOLLINS: Okay.

MS. SHELL:

Q So I'm going to ask you a question. If you can't remember, go ahead and look at that.

A Okay.

THE COURT: And which Bate's numbers did you give her to refresh her memory?

MS. SHELL: This is Bate's 16 through 76, Your Honor.

THE COURT: Okay. Thank you.

MS. SHELL:

Q Now, Dr. Adams, are you familiar with something called the Adams

Classification System?

A Oh, yes.

Q Okay. And what is the Adams Classification System?

A Well, it's a term that I have tried to get people to stop using, because it was never meant to be used in a forensic medical setting. It's a table that I developed, first published back in 1992, which was sort of to help people who are doing child abuse exams kind of get on the same page as far as mainly what the various things that you see during an examination, what they mean. What things are normal?

Q Um-huh.

A What things are caused by other conditions? What things we can say absolutely are caused by trauma? And, what infections, sexually transmitted infections should be considered highly indicative of sexual contact?

In the first versions of the table there were two parts. Part one was a list of the physical findings in different sections regarding possible significance with respect to abuse. And, part two was an overall assessment of the likelihood of abuse. And, that's where the possible, probable, definite categories came from.

Q And do you recall whether a version of the classification system was used by the treating physician in this case?

A It appeared that it was because it was part of the medical record.

Q And do you – now you mentioned that you revised the – I believe you said the original version –

A Yes.

Q -- of the – so was that system revised at some point?

A Yes, it was.

Q Okay. And when did you revise that system?

A It was in – 2005 was the first publication of the revised version, which got rid of part two.

Q And why did you get rid of the – now the part two is the conclusions portion?

A Right. The overall assessment, yes.

Q Okay. And why did you eliminate the second part of that classification system?

A Well, I found out that people were using it as a way to diagnose sexual abuse and write it down in the medical report. This is – I even have reviewed some medical documents where the conclusion is at the bottom sexual abuse according to Adams criteria.

And that's not what this tool was meant to do. It was to help coordinate people who are doing research on sexual abuse to kind of all talk the same language when they're comparing are there injuries seen in this type of case more than this type of case; based on the history from the child and other factors. So that's why it was removed.

Q But in this case it appears, based on your review of the medical records that the prior version of the classification system was implemented by the doctor?

A Yes.

MS. SHELL: Okay.

I'll pass the witness, Your Honor.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MS. KOLLINS:

Q Rarely is any nonspecific finding definitive of abuse, correct?

A What? Excuse me.

Q Rarely is a nonspecific finding definitive of sexual abuse?

A By definition it's not definitive.

Q Okay. So if you have a nonspecific finding, yourself, doing 3 or 4,000 exams, would call it just that; just like Dr. Vergara did, a nonspecific finding, right?

A Correct.

Q And when you do your sexual assault examinations and you have a nonspecific finding and you have a detailed disclosure, do you make note in your medical report of that detailed disclosure?

A Yes.

Q Is that part of your clinical observation?

A It is. If I'm the one getting the disclosure, yes.

Q Okay. So you take that into account before you write any clinical notes?

A Well, it's part of the clinical notes, yes.

Q Okay. So with or without that four part criteria, that chart that you say you've revised, a doctor is still free to include a nonspecific finding and the disclosure in their conclusions, correct; with or without that chart?

A That's correct.

Q Okay. No doctor, no matter how many examinations you've done could ever say definitively there was or was not sexual abuse, based on a nonspecific finding?

A Correct.

Q Okay. You said on direct examination that you have never seen swelling and I believe the doctor concluded redness, being the result of digital penetration?

A The cases that I see where the allegation is digital penetration almost a hundred percent of the time are completely normal.

Q Okay. Is it possible that the friction from digital penetration could cause a nonspecific finding, such as swelling and redness?

A So could wiping yourself real hard with the toilet tissue or rubbing yourself in the bath with a rough cloth, so –

Q So any type of friction could cause that –

A If it's extensive and prolonged –

Q Okay.

A -- possibly.

Q So the friction of a finger could cause that?

A Well, I think it's unlikely.

Q Okay. But it could?

A I've never seen it.

Q Okay. And the friction of a penis could cause a child's genital area to be red or swollen?

A Potentially.

Q With or without the photos you could never conclusively conclude sexual abuse happened or didn't happen?

A That's not my job to conclude.

Q Okay. But my question is with or without the photos you could never definitively say there was no sexual abuse or there was sexual abuse?

A Correct.

Q The table that you developed in 2005, that was published in a scholastic publication or that –

A Well, it was first published in a – actually, I wanted to get it out as soon as possible, so it went out in the newsletter of the American Professional Society on the Abuse of Children, 'cause it's widely distributed to doctors and nurses who do sexual assault exams.

Q Okay.

A It was later then in the publication in the Journal of Pediatric and Adolescent Gynecology in 2007.

Q And when the – when you – it first began being used it had to be adopted by every jurisdiction, correct?

A No, it didn't have to be adopted by any jurisdiction.

Q Then how does it come into use? Other than its publication in a newsletter and in a professional journal, how does it come into use in a particular hospital or CAC or other entity that does sexual assault examinations of children?

A It's somebody's decision to use it –

Q If they know –

A -- as part of the medial records.

THE COURT: You can't interrupt Ms. Kollins. You got to let her finish. Okay.

MS. KOLLINS:

Q If they know about it?

A If they want to – I mean if they know about it it's the particular hospital or CAC's, they would be the one making the decision to use it.

Q They would have to adopt it as part of their protocol in some fashion?

A They wouldn't have to; but if they decided to do it, they could do it.

Q The sexual assault examinations that you perform are those – do those cases go to court?

A Yes.

Q And you're subpoenaed on behalf of the prosecution?

A Yes.

Q How many times have you testified on behalf of the prosecution in those cases?

A About – I would say, out of say 350 overall or overall 80 percent of the time I've testified for the prosecution.

Q And those – some of those cases resulted in convictions?

A Some.

Q And some of those cases with nonspecific findings?

A Yes.

MS. KOLLINS: Okay.

No more questions, Judge.

THE COURT: Anything further?

MS. SHELL: I just have two very quick questions.

THE COURT: Okay.

REDIRECT EXAMINATION

BY MS. SHELL:

Q Just for the record you and Ms. Kollins both used an acronym CAC. I don't know what that stands for.

A Oh, Children's Advocacy Center. Child Advocacy Center.

Q Okay. Thank you. I just wanted to be sure for the record. Now, Ms. Kollins also asked you about whether digital penetration could cause the swelling and redness that Dr. Vergara observed. Do you remember that?

A Yes.

Q And do you remember saying it could be, but if it was extensive and prolonged?

A Yes.

MS. SHELL: Okay. Right.

No further questions, Your Honor.

THE COURT: Anything else, Ms. Kollins?

MS. KOLLINS: No, ma'am.

THE COURT: Thank you, ma'am. We appreciate your time.

Any additional witnesses?

MS. SHELL: No, I'm done, Your Honor.

THE COURT: Would you like to argue?

Ms. Kollins, you have any additional witnesses?

MS. KOLLINS: I do not, Your Honor.

THE COURT: Thank you, ma'am. Have a nice day.

THE WITNESS: Thank you.

THE COURT: Argue?

MS. SHELL: Your Honor, I don't know if – if Your Honor is not inclined, I actually have another matter in Federal Court that I have to get to. I think that we've sufficiently briefed the issue.

THE COURT: Ready for me to rule? 'Cause it was well-briefed and we had excellent testimony today from a number of different sources –

MS. SHELL: Your Honor –

THE COURT: -- so I'm happy to rule if you're ready.

MS. SHELL: -- I am –

THE COURT: Otherwise, if you got to get to Federal Court, I understand.

MS. SHELL: Your Honor, I feel that we briefed it sufficiently and I think that if I started talking about it I would just be talking about what I've already written down and Your Honor has already read that.

THE COURT: Okay.

Ms. Kollins is that okay if you guys just submit it on the briefing?

MS. KOLLINS: I'm prepared to submit it, Your Honor.

THE COURT: Based upon the information that's both been presented in the very lengthy, well-documented appendix and the testimony that's been presented, it does not appear that the lack of the actual expert nor the lack of obtaining the photographs were sufficient to cause Mr. Cox to be ineffective; for that reason the petition is denied.

MS. KOLLINS: Thank you, Your Honor.

THE COURT: Ms. Kollins, can you please prepare findings?

MS. KOLLINS: I will, Your Honor. Thank you.

THE COURT: Anything else?

MS. SHELL: Your Honor, I would just ask that we be appointed –

THE COURT: Excellent job.

MS. SHELL: Oh, thank you, Your Honor. I ask that we be appointed to represent Mr. James in his appeal of this?

THE COURT: Usually you just continue in that position –

MS. SHELL: Okay.

THE COURT: -- unless something happens, so.

MS. SHELL: All right. Your Honor, I just wanted to – you know, my –

THE COURT: I will –

MS. SHELL: -- my partner sometimes gets on me if I don't ask, so.

THE COURT: Yeah. So to the extent that you need an order signed by me to appoint you –

MS. SHELL: Um-huh.

THE COURT: -- I would be happy to sign it after Drew approves it.

MS. SHELL: All right. Thank you very much, Your Honor.

THE COURT: But it seems like it would be a waste of taxpayer resources to have a new person do the appeal after we've gone through this lengthy process.

Ms. Kollins.

MS. KOLLINS: I just had a question about an unrelated matter that we have scheduled in here –

THE COURT: Yes.

MS. KOLLINS: -- on Wednesday, are we still good?

THE COURT: We are.

MS. KOLLINS: Okay. That's all I need to know. Thank you.

THE COURT: Is it Wednesday? Yes, it's Wednesday, 10/5 at 10:00 a.m.

MS. KOLLINS: Yes, ma'am.

THE COURT: Thank you. Anything else?

MS. KOLLINS: I just – no, I have out-of-staters so I wanted to make sure we're still good.

THE COURT: Are they coming or are we video conferencing 'em?

. . .

MS. KOLLINS: This one's coming from California.

THE COURT: Okay.

[Proceedings concluded, 11:37 a.m.]

* * * * * * *

ATTEST: I hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Debra Winn

DEBRA WINN, Court Transcriber

Electronically Filed
11/09/2016 09:21:22 AM

CLERK OF THE COURT

NEO

DISTRICT COURT
CLARK COUNTY, NEVADA

TYRONE JAMES,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: 10C265506

Dept No: XI

NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PLEASE TAKE NOTICE that on November 8, 2016, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on November 9, 2016.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Heather Ungermann
Heather Ungermann, Deputy Clerk

CERTIFICATE OF MAILING

I hereby certify that on this 9 day of November 2016, I placed a copy of this Notice of Entry in:

☑ The bin(s) located in the Regional Justice Center of:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:

Tyrone James # 1063523
P.O. Box 650
Indian Springs, NV 89070

Alina Shell
701 E. Bridger Ave., Ste. 520
Las Vegas, NV 89101

Margaret McLetchie, Esq.
701 E. Bridger Ave., Ste. 520
Las Vegas, NV 89101

/s/ Heather Ungermann
Heather Ungermann, Deputy Clerk

ORIGINAL

Electronically Filed
11/08/2016 10:03:37 AM

CLERK OF THE COURT

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
STACEY L. KOLLINS
Chief Deputy District Attorney
Nevada Bar #005391
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

TYRONE JAMES,
#1303556

Defendant.

CASE NO: **10C265506**

DEPT NO: **XI**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: OCTOBER 3, 2016
TIME OF HEARING: 9:00 AM

THIS CAUSE having come on for hearing before the Honorable ELIZABETH GONZALEZ, District Judge, on the 3rd day of October, 2016; the Petitioner being present, represented by ALINA SHELL, ESQ.; the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through STACEY L. KOLLINS, Chief Deputy District Attorney; and having considered the matter, including briefs, transcripts, arguments of counsel and documents on file herein, the Court now therefore makes the following findings of fact and conclusions of law:

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11/01

FINDINGS OF FACT

CONCLUSIONS OF LAW

On June 23, 2010, TYRONE D. JAMES (hereinafter "James") was charged by way of Criminal Information with two counts of Sexual Assault With a Minor Under Sixteen Years of Age (Category A Felony - NRS 200.364, 200.366); two counts of Open or Gross Lewdness (Gross Misdemeanor – NRS 201.210); and one count of Battery with Intent to Commit a Crime (Category A Felony – NRS 200.400).

On August 16, 2010, the State filed a Motion to Admit Evidence of Other Crimes, Wrongs or Acts. On August 25, 2010, James filed his Opposition. On September 8, 2010, James filed a Motion in Limine to Preclude Lay Opinion Testimony that the Complaining Witness' Behavior is Consistent with that of a Victim of Sexual Abuse. On September 10, 2010, the State filed its Opposition to James's Motion in open court and the District Court conducted a Petrocelli hearing regarding the bad acts motion. The District Court granted both motions.

On September 17, 2010, James filed a Motion to Reconsider Motion to Admit Evidence of Other Crimes, Wrongs or Acts. The District Court denied James's motion on September 21, 2010.

James's jury trial commenced on September 21, 2010. On September 23, 2010, the jury found James guilty on all counts.

On January 19, 2011, James was sentenced to the Nevada Department of Corrections as follows: as to Count 1 – to a maximum term of life with a minimum parole eligibility after 25 years; as to Count 3 – to a maximum term of life with a minimum parole eligibility after 25 years, concurrent with Count 1; as to Count 5 – to a maximum term of Life with a Minimum parole eligibility after 2 years, concurrent with Counts 1 and 3. The Court further ordered a sentence of lifetime supervision to be imposed upon James's release from any term of probation, parole, or imprisonment. James received 250 days credit for time served. The Court dismissed Counts 2 and 4, as they were lesser-included offenses of Counts 1 and 3. Judgment of Conviction was filed February 9, 2011.

IN THE SUPREME COURT OF THE STATE OF NEVADA

TYRONE JAMES SR.,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 71935

APPELLANT'S APPENDIX VOLUME IV

Appeal from Eighth Judicial District Court, Clark County

The Honorable Elizabeth Gonzalez, District Judge

District Court Case No. 10C265506

MCLETCHIE SHELL LLC
Margaret A. McLetchie (Bar No. 10931)
701 East Bridger Ave., Suite 520
Las Vegas, Nevada 89101
Counsel for Appellant, Tyrone James, Sr.

INDEX TO APPELLANT'S APPENDIX

VOL	DOCUMENT	DATE	BATES NUMBERS
IV	Appendix of Exhibits to Supplement to Supplemental Petition for Writ of Habeas Corpus	01/15/2016	PA712 – PA768
IV	Minute Order: In Camera Review	11/2/2015	PA698
IV	Minute Order: In Camera Review	03/29/2016	PA769
IV	Minutes of Hearing on Petition for Writ of Habeas Corpus	10/03/2016	PA806 – PA807
IV	Notice of Appeal	12/08/2016	PA865 – PA866
IV	Notice of Entry of Findings of Fact and Conclusions of Law and Order	11/09/2016	PA847 – PA862
IV	Order Appointing Margaret A. McLetchie as Court-Appointed Counsel	11/10/2016	PA863 – PA864
IV	Petitioner's Reply to State's Response to Supplemental Petition for Writ of Habeas Corpus and Supplement	05/31/2016	PA791 – PA805
IV	Recorder's Transcript of Hearing on Petition for Writ of Habeas Corpus	10/03/2016	PA808 – PA846
IV	Register of Actions (District Court Case No. 10C265506)	05/12/2017	PA867 – PA873
I	Second Amended Appendix of Exhibits to Supplement to Petition for Writ of Habeas Corpus (including Exhibits 1-11)	11/02/2015	PA022 – PA178
II	Second Amended Appendix of Exhibits to Supplement to Petition for Writ of Habeas Corpus (Exhibit 12)	11/02/2015	PA179 – PA407
III	Second Amended Appendix of Exhibits to Supplement to Petition for Writ of Habeas Corpus (Exhibits 13-24)	11/02/2015	PA408 – PA624

VOL	DOCUMENT	DATE	BATES NUMBERS
IV	Second Amended Appendix of Exhibits to Supplement to Petition for Writ of Habeas Corpus (Exhibit 25)	11/02/2015	PA625 – PA697
IV	State's Response to Supplemental Petition for Writ of Habeas Corpus and Supplement to Supplemental Petition for Writ of Habeas Corpus	04/21/2016	PA770 – PA790
I	Supplemental Petition for Writ of Habeas Corpus	09/04/2015	PA001 – PA021
IV	Supplement to Supplemental Petition for Writ of Habeas Corpus	01/15/2016	PA699 – PA711

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 APPENDIX VOLUME IV 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:

STEVEN OWENS
Office of the District Attorney
200 Lewis Avenue, Third Floor
Las Vegas, NV 89155

ADAM P. LAXALT
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701

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

TYRONE JAMES, SR., ID # 1063523
HIGH DESERT STATE PRISON
P.O. Box 650
Indian Springs, NV 89070
Appellant

/s/ Pharan Burchfield
Employee, McLetchie Shell LLC

EXHIBIT 25

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE REVIEW OF ISSUES CONCERNING REPRESENTATION OF INDIGENT DEFENDANTS IN CRIMINAL AND JUVENILE DELINQUENCY CASES.

ADKT No. 411

FILED

JAN 04 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER

WHEREAS, the United States and Nevada constitutions provide that every individual charged with a serious crime is entitled to legal representation, even if that individual cannot afford counsel, and competent representation of indigents is vital to our system of justice; and

WHEREAS, on April 26, 2007, the Nevada Supreme Court ordered that the Indigent Defense Commission be created for the purposes of studying the issues and concerns with respect to the selection, appointment, compensation, qualifications, performance standards and caseloads of counsel assigned to represent indigent defendants in criminal and juvenile delinquency cases throughout Nevada and designated the Honorable Michael A. Cherry, Associate Justice, as chair of the Commission; and

WHEREAS, the Commission conducted a statewide survey of indigent defense services in June and July 2007, met numerous times between May 2007 and October 2007, formed subcommittees, and completed a report on the matter; and

WHEREAS, on November 20, 2007, the Commission filed its report with this court making numerous unanimous recommendations to promote the independence of the court-appointed public defense system,

establish performance and caseload standards for public defenders,[1] and ensure the consistency of indigent defense in the rural counties; and

WHEREAS, this court conducted public hearings on December 14, 2007, and December 20, 2007, to consider the Commission's report and hear public comment on the issues concerning the defense of indigents; accordingly,

IT IS HEREBY ORDERED that the following recommendations from the Commission's report are adopted.

Determination of Indigency

WHEREAS, any defendant charged with a public offense who is indigent may request the appointment of counsel by showing that he is without means to employ an attorney and suffers a financial disability;[2] and

WHEREAS, the methods utilized in Nevada's courts and public defender offices to determine who is eligible for defense services at public expense vary widely;

IT IS HEREBY ORDERED that effective immediately, the standard for determining indigency shall be:

> A person will be deemed 'indigent' who is unable, without substantial hardship to himself or his dependents, to obtain competent, qualified legal counsel on his or her own. 'Substantial hardship' is presumptively determined to include all defendants who receive public assistance, such as Food Stamps, Temporary Assistance for Needy Families, Medicaid,

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[1]The Commission's report included two separate minority reports specifically relating to uniform caseload standards and opposing the imposition of such standards.

[2]NRS 171.188

Disability Insurance, reside in public housing, or earn less than 200 percent of the Federal Poverty Guideline. A defendant is presumed to have a substantial hardship if he or she is currently serving a sentence in a correctional institution or housed in a mental health facility.

Defendants not falling below the presumptive threshold will be subjected to a more rigorous screening process to determine if their particular circumstances, including seriousness of charges being faced, monthly expenses, and local private counsel rates, would result in a substantial hardship were they to seek to retain private counsel.

Independence of the Court-Appointed Public Defense System from the Judiciary

WHEREAS, participation by the trial judge in the appointment of counsel, other than public defenders and special public defenders, and in the approval of expert witness fees and attorney fees creates an appearance of impropriety; and

WHEREAS, the appointment of counsel, approval of fees, and determination of indigency should be performed by an independent board, agency, or committee, or by judges not directly involved in the case;

WHEREAS, the selection of lawyers, other than public defenders and special public defenders, to represent indigent defendants should be made by the administrators of an indigent defense program; and

WHEREAS, the unique circumstances and case management systems existent in the various judicial districts require particularized administrative plans to carry out the recommendations of the Commission contained on page 11 of the Report;

IT IS HEREBY ORDERED that each judicial district shall formulate and submit to the Nevada Supreme Court for approval by May 1,

2008, an administrative plan that excludes the trial judge or justice of the peace hearing the case and provides for: (1) the appointment of trial counsel, appellate counsel in appeals not subject to the provisions of Nevada Rule of Appellate Procedure 3C, and counsel in post-conviction matters; (2) the approval of expert witness fees, investigation fees, and attorney fees; and (3) the determination of a defendant's indigency in the courts within the district; and

IT IS FURTHER ORDERED that each municipal court shall submit any existing administrative plan or formulate and submit to the Nevada Supreme Court for approval by May 1, 2008, an administrative plan that excludes the trial judge or justice of the peace hearing the case and provides for: (1) the appointment of trial counsel and appellate counsel; (2) the approval of expert witness fees, investigation fees, and attorney fees; and (3) the determination of a defendant's indigency in each of their courts.

Performance Standards

WHEREAS, the paramount obligation of criminal defense counsel in indigent defense cases is to provide zealous and quality representation at all stages of criminal proceedings, adhere to ethical norms, and abide by the rules of the court; and

WHEREAS, the performance standards unanimously recommended by the Commission provide guidelines that will promote effective representation by appointed counsel;

IT IS HEREBY ORDERED that the performance standards contained in Exhibit A to this order are to be implemented effective April 1, 2008.

Caseload Standards

WHEREAS, the average caseload for attorneys in the Clark County Public Defender's Office was 364 felony and gross misdemeanor cases in 2006, and the average caseload for attorneys in the Washoe County Public Defender's Office was 327 felony and gross misdemeanors; and

WHEREAS, the National Legal Aid and Defender Association has set the recommended caseload standard for attorneys handling felony cases at 150 per attorney;[3] and

WHEREAS, a majority of the Commission concludes that caseloads in Clark County and Washoe County substantially exceed recommended caseloads and that a caseload standard of no more than 192 felony and gross misdemeanors per attorney should be implemented; and

WHEREAS, by any reasonable standard, there is currently a crisis in the size of the caseloads for public defenders in Clark County[4] and Washoe County; and

WHEREAS, Nevada Rule of Professional Conduct 6.2(a) provides that good cause exists for a lawyer to seek to avoid appointment to represent a person where accepting the appointment is likely to result in violation of the Rules of Professional Conduct or other law; and

WHEREAS, Nevada Rules of Professional Conduct 1.1 and 1.3 require a lawyer to refrain from taking on more cases than he or she can competently and diligently handle; and

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[3]We note that, contrary to the statement in the Commission's report, the American Bar Association has not adopted the NLADA's standards, which have been in existence since 1973 without any material change.

[4]Notwithstanding the excessive caseload for public defenders in Clark County, we note that the Clark County Commission added only a single deputy public defender position in the most recent budget.

WHEREAS, the public defenders in Clark County and Washoe County have deferred advising the county commissioners of their unavailability to accept appointments even if accepting further appointments might compromise the ability of the public defenders to represent their clients; and

WHEREAS, Clark County and Washoe County requested the opportunity to perform and have agreed to fund a weighted caseload study prior to the adoption of any uniform caseload standards; and

WHEREAS, the court believes such a study would benefit the Nevada State Public Defender's Office; and

WHEREAS, the performance of a recognized weighted caseload study requires extensive timekeeping which will impose additional work on the public defenders, further limiting the public defender's ability to represent indigent defendants in criminal and juvenile delinquency cases;[5] and

WHEREAS, the public defenders recognize that the adoption of uniform caseload standards would require a period of gradual implementation; accordingly,

IT IS HEREBY ORDERED that the public defenders in Clark County and Washoe County shall advise the county commissioners of their respective counties when they are unavailable to accept further appointments based on ethical considerations relating to the their ability to comply with the performance standards contained in Exhibit A to this order and to represent their clients in accordance with the Rules of Professional Conduct, and that

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[5]The Nevada State Public Defender's Office already maintains timekeeping records from which a weighted case study can be prepared for that office.

the decision to advise the county commissioners of unavailability shall take into consideration any additional requirements placed on the public defenders' offices in order to prepare a weighted caseload study; and

IT IS FURTHER ORDERED that the Clark County Public Defender and the Washoe County Public defender shall each perform weighted caseload studies for their offices according to a recognized protocol for both criminal and juvenile delinquency cases, taking into consideration the approved performance standards, and submit the results to the Nevada Supreme Court by July 15, 2008; and

IT IS FURTHER ORDERED that the Nevada State Public Defender's Office shall perform a weighted caseload study according to a recognized protocol for both criminal and juvenile delinquency cases, taking into consideration the approved performance standards, and submit the results to the Nevada Supreme Court by July 15, 2008;[6] and

IT IS FURTHER ORDERED that consideration of the implementation of caseload standards will be continued at a hearing to be held at 2:00 p.m. on Friday, September 5, 2008; and

IT IS FURTHER ORDERED that the Administrative Office of the Courts shall develop a method of retrieving uniform statistics regarding the nature and quality of services to indigent defendants including, but not necessarily limited to, demographic data regarding the age, sex, race and ethnicity of each defendant represented; and

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[6]The Commission unanimously recommended that indigent defendants in all counties, except Clark, Elko and Washoe, be represented by the Nevada State Public Defender's Office, which office should be funded entirely by the state general fund. The court has directed supplemental briefing from the Nevada State Public Defender's Office on this issue and will further consider the Commission's recommendation on August 26, 2008.

IT IS FURTHER ORDERED that a permanent statewide commission for the oversight of indigent defense shall be established and appointed by the Nevada Supreme Court with the advice of the Indigent Defense Commission.

Dated this 4th day of January, 2008.

Hardesty, J.
Hardesty

We concur:

Gibbons, J.
Gibbons

Parraguirre, J.
Parraguirre

Douglas, J.
Douglas

MAUPIN, C.J., with whom CHERRY and SAITTA, JJ., agree, dissenting in part:

I agree with the majority with one exception. Based upon my own experience as a practicing lawyer and a former public defender, I believe that any weighted caseload study will confirm the validity of the Commission's recommendations for the implementation of caseload standards. In my view, these standards should be adopted effective July 1, 2008.[7]

_____, C.J.
Maupin

We concur:

_____, J.
Cherry

_____, J.
Saitta

cc: Members of the Indigent Defense Commission
Kathy A. Hardcastle, Chief Judge, Eighth Judicial District
Charles J. Short, Court Executive Officer
Hon. Jerome M. Polaha, Chief Judge
Howard W. Conyers, Washoe District Court Clerk
All District Court Judges
Administrative Office of the Courts

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[7]In this, I suspect that the caseload standards may actually be too rigorous to satisfy the Sixth Amendment to the United States Constitution.

NEVADA INDIGENT DEFENSE
STANDARDS OF PERFORMANCE

CAPITAL CASE REPRESENTATION

Standard 1: The Defense Team and Services of Experts in Capital Cases

(a) The Defense Team

The defense team should:

1. consist of no fewer than two attorneys qualified in accordance with Standard 2, an investigator, and a mitigation specialist; and
2. contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.

(b) Expert and Ancillary Services

1. Counsel should:
   (A) secure the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high-quality legal representation at every stage of the proceedings;
   (B) have the right to have such services provided by persons independent of the government; and
   (C) have the right to protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds.
2. The appointing authority should specifically ensure provision of such services to private attorneys whose clients are financially unable to afford them.

Standard 2: Appointment, Retention, and Removal of Defense Counsel

(a) Qualifications of Defense Counsel

1. The appointing authority should develop and publish qualification standards for defense counsel in capital cases. These standards should be

construed and applied in such a way as to further the overriding goal of providing each client with high-quality legal representation.

2. In formulating qualification standards, the appointing authority should ensure that every attorney representing a capital defendant has:
   (A) obtained a license or permission to practice in the jurisdiction;
   (B) demonstrated a commitment to providing zealous advocacy and high-quality legal representation in the defense of capital cases; and
   (C) satisfied the training requirements set forth in Standard 3.
3. The appointing authority should ensure that the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high-quality legal representation. Accordingly, the qualification standards should ensure that the pool includes sufficient numbers of attorneys who have demonstrated:
   (A) substantial knowledge and understanding of the relevant state, federal, and international law, both procedural and substantive, governing capital cases and skill in the management and conduct of complex negotiations and litigation;
   (B) skill in legal research, analysis, and the drafting of litigation documents;
   (C) skill in oral advocacy;
   (D) skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;
   (E) skill in the investigation, preparation, and presentation of evidence bearing upon mental status;
   (F) skill in the investigation, preparation, and presentation of mitigating evidence; and
   (G) skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

(b) Workload

The appointing authority should implement effectual mechanisms to ensure that the workload of attorneys representing defendants in death penalty cases is maintained at a level that enables counsel to provide each client with

high-quality legal representation in accordance with the Nevada Indigent Defense Standards of Performance.

(c) Monitoring; Removal

1. The appointing authority should monitor the performance of all defense counsel to ensure that the client is receiving high-quality legal representation. Where there is evidence that an attorney is not providing high-quality legal representation, the responsible agency should take appropriate action to protect the interests of the attorney's current and potential clients.
2. The appointing authority should establish and publicize a regular procedure for investigating and resolving any complaints made by judges, clients, attorneys, or others that defense counsel failed to provide high-quality legal representation.
3. The appointing authority should periodically review the rosters of attorneys who have been certified to accept appointments in capital cases to ensure that those attorneys remain capable of providing high-quality legal representation. Where there is evidence that an attorney has failed to provide high-quality legal representation, the attorney should not receive additional appointments and should be removed from the roster. Where there is evidence that a systemic defect in a defender office has caused the office to fail to provide high-quality legal representation, the office should not receive additional appointments.
4. Before taking final action making an attorney or a defender office ineligible to receive additional appointments, the appointing authority should provide written notice that such action is being contemplated and give the attorney or defender office an opportunity to respond in writing.
5. An attorney or defender office sanctioned pursuant to this Standard should be restored to the roster only in exceptional circumstances.
6. The appointing authority should ensure that this standard is implemented consistently with standard 2, so that an attorney's zealous representation of a client cannot be cause for the imposition or threatened imposition of sanctions pursuant to this guideline.

Standard 3: Training

(a) Funds should be made available for the effective training, professional development, and continuing education of all members of the defense team, whether the members are employed by an institutional defender or are employed or retained by counsel appointed by the court.

(b) Attorneys seeking to qualify to receive appointments should be required to satisfactorily complete a comprehensive training program in the defense of capital cases. Such a program should include, but not be limited to, presentations and training in the following areas:

1. relevant state, federal, and international law;
2. pleading and motion practice;
3. pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;
4. jury selection;
5. trial preparation and presentation, including the use of experts;
6. ethical considerations particular to capital defense representation;
7. preservation of the record and of issues for post-conviction review;
8. counsel's relationship with the client and his family;
9. post-conviction litigation in state and federal courts; and
10. the presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science.

(c) Attorneys seeking to remain on the appointment roster should be required to attend and successfully complete, at least once every 2 years, a specialized training program that focuses on the defense of death penalty cases.

Standard 4: Funding and Compensation

(a) The appointing authority must ensure funding for the full cost of high-quality legal representation by the defense team and outside experts selected by counsel, as defined by these guidelines,.

(b) Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high-quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.

1. Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.
2. Attorneys employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction.
3. Appointed counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.

(c) Non-attorney members of the defense team should be fully compensated at a rate that is commensurate with the provision of legal representation and reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases.

1. Investigators employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction.
2. Mitigation specialists and experts employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale for comparable expert services in the private sector.
3. Members of the defense team assisting private counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with prevailing rates paid by retained counsel in the jurisdiction for similar services, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.

(d) Additional compensation should be provided in unusually protracted or extraordinary cases.

(e) Counsel and members of the defense team should be fully reimbursed for reasonable incidental expenses.

Standard 5: Obligations of Counsel Respecting Workload

Counsel representing clients in death penalty cases should limit their caseloads to the level needed to provide each client with high-quality legal representation in compliance with the Nevada Indigent Defense Standards of Performance.

Standard 6: Role of the Defense Team

As soon as possible after appointment, counsel should assemble a defense team by selecting and making any appropriate contractual agreements with non-attorney team members in such a way that the team includes:

(a) at least one mitigation specialist and one fact investigator;

(b) at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments;

(c) any other members needed to provide high-quality legal representation; and

(d) at all stages demanding on behalf of the client all resources necessary to provide high-quality legal representation. If such resources are denied, counsel should make an adequate record to preserve the issue for further review.

Standard 7: Relationship With the Client

(a) Counsel at all stages of the case should:

1. make every appropriate effort to establish a relationship of trust with the client and should maintain close contact with the client;
2. conduct an interview of the client within 24 hours of initial counsel's entry into the case, barring exceptional circumstances;
3. promptly communicate in an appropriate manner with both the client and the prosecution regarding the protection of the client's rights

3. promptly communicate in an appropriate manner with both the client and the prosecution regarding the protection of the client's rights against self-incrimination, to the effective assistance of counsel, and to preservation of the attorney-client privilege and similar safeguards; and

4. at all stages of the case, re-advise the client and the prosecution regarding these matters as appropriate.

(b) Counsel at all stages of the case should engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case, such as:

1. the progress of and prospects for the factual investigation, and what assistance the client might provide to it;
2. current or potential legal issues;
3. the development of a defense theory;
4. presentation of the defense case;
5. potential agreed-upon dispositions of the case;
6. litigation deadlines and the projected schedule of case-related events; and
7. relevant aspects of the client's relationship with correctional, parole, or other governmental agents (e.g., prison medical providers or state psychiatrists).

Standard 8: Additional Obligations of Counsel Representing a Foreign National

(a) Counsel at every stage of the case should make appropriate efforts to determine whether any foreign country might consider the client to be one of its nationals.

(b) Unless predecessor counsel has already done so, counsel representing a foreign national should:

1. immediately advise the client of his or her right to communicate with the relevant consular office; and

2. obtain the consent of the client to contact the consular office. After obtaining consent, counsel should immediately contact the client's consular office and inform it of the client's detention or arrest.

Standard 9: Investigation

(a) Counsel at every stage has an obligation to conduct a thorough and independent investigation relating to the issues of both guilt and penalty.

1. The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented.
2. The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.

(b) Post-conviction counsel has an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes at minimum interviewing prior counsel and members of the defense team and examining the files of prior counsel.

(c) Counsel at every stage has an obligation to assure that the official record of the proceedings is complete and to supplement the record as appropriate.

Standard 10: Duty to Assert Legal Claims

(a) Counsel at every stage of the case, exercising professional judgment in accordance with these standards, should:

1. consider all legal claims potentially available;
2. thoroughly investigate the basis for each potential claim before reaching a conclusion as to whether it should be asserted; and
3. evaluate each potential claim in light of:
   (A) the unique characteristics of death penalty law and practice; and

(B) the near certainty that all available avenues of post-conviction relief will be pursued in the event of conviction and imposition of a death sentence;

(C) the importance of protecting the client's rights against later contentions by the government that the claim has been waived defaulted, not exhausted, or otherwise forfeited; and

(D) any other professionally appropriate risks and benefits to the assertion of the claim.

(b) Counsel who decide to assert a particular legal claim should:

1. present the claim as forcefully as possible, tailoring the presentation to the particular facts and circumstances in the client's case and the applicable law in the particular jurisdiction; and
2. ensure that a full record is made of all legal proceedings in connection with the claim.

Standard 11: Duty to Seek an Agreed-Upon Disposition

(a) Counsel at every stage of the case has an obligation to take all steps that may be appropriate in the exercise of professional judgment in accordance with these standards to achieve an agreed-upon disposition.

(b) Counsel at every stage of the case should explore with the client the possibility and desirability of reaching an agreed-upon disposition. In so doing, counsel should fully explain the rights that would be waived, the possible collateral consequences, and the legal, factual, and contextual considerations that bear upon the decision. Specifically, counsel should know and fully explain to the client:

1. the maximum penalty that may be imposed for the charged offense(s) and any possible lesser-included or alternative offenses;
2. any collateral consequences of potential penalties less than death, such as forfeiture of assets, deportation, civil liabilities, and the use of the disposition adversely to the client in penalty phase proceedings of other prosecutions of the client as well as any direct consequences of

potential penalties less than death, such as the possibility and likelihood of parole, place of confinement, and good-time credits;

3. the general range of sentences for similar offenses committed by defendants with similar backgrounds and the impact of any applicable sentencing guidelines or mandatory sentencing requirements;

4. the governing legal regime, including, but not limited to, whatever choices the client may have as to the fact-finder and/or sentencer;

5. the types of pleas that may be agreed to, such as a plea of guilty, a conditional plea of guilty, or a plea of nolo contendere, or other plea that does not require the client to personally acknowledge guilt, along with the advantages and disadvantages of each;

6. whether any agreement negotiated can be made binding on the court, penal/parole authorities, and any others who may be involved;

7. the practices, policies, and concerns of the particular jurisdiction, the judge and prosecuting authority, the family of the victim, and any other persons or entities that may affect the content and likely results of plea negotiations;

8. Concessions that the client might offer, such as:

   (A) an agreement to waive trial and to plead guilty to particular charges;

   (B) an agreement to permit a judge to perform functions relative to guilt or sentence that would otherwise be performed by a jury or vice versa;

   (C) an agreement regarding future custodial status, such as one to be confined in a more onerous category of institution than would otherwise be the case;

   (D) an agreement to forgo in whole or part legal remedies such as appeals, motions for post-conviction relief, and/or parole or clemency applications;

   (E) an agreement to provide the prosecution with assistance in investigating or prosecuting the present case or other alleged criminal activity;

(F) an agreement to engage in or refrain from any particular conduct, as appropriate to the case;

(G) an agreement with the victim's family, which may include matters such as a meeting between the victim's family and the client, a promise not to publicize or profit from the offense, the issuance or delivery of a public statement of remorse by the client, or restitution; and

(H) agreements such as those described in the foregoing subsections respecting actual or potential charges in another jurisdiction.

9. Benefits the client might obtain from a negotiated settlement, including:

(A) a guarantee that the death penalty will not be imposed;

(B) an agreement that the defendant will receive a specified sentence;

(C) an agreement that the prosecutor will not advocate a certain sentence, will not present certain information to the court, or will engage in or refrain from engaging in other actions with regard to sentencing;

(D) an agreement that one or more of multiple charges will be reduced or dismissed;

(E) an agreement that the client will not be subject to further investigation or prosecution for uncharged alleged or suspected criminal conduct;

(F) an agreement that the client may enter a conditional plea to preserve the right to further contest certain legal issues;

(G) an agreement that the court or prosecutor will make specific recommendations to correctional or parole authorities regarding the terms of the client's confinement; and

(H) agreements such as those described in the foregoing subsections respecting actual or potential charges in another jurisdiction.

(c) Counsel should keep the client fully informed of any negotiations for a disposition, convey to the client any offers made by the prosecution, and discuss with the client possible negotiation strategies.

(d) Counsel should inform the client of any tentative negotiated agreement reached with the prosecution and explain to the client the full content of the agreement along with the advantages, disadvantages, and potential consequences of the agreement.

(e) If a negotiated disposition would be in the best interest of the client, initial refusals by the prosecutor to negotiate should not prevent counsel from making further efforts to negotiate. Similarly, a client's initial opposition should not prevent counsel from engaging in an ongoing effort to persuade the client to accept an offer of resolution that is in the client's best interest.

(f) Counsel should not accept any agreed-upon disposition without the client's express authorization.

(g) The existence of ongoing negotiations with the prosecution does not in any way diminish the obligations of defense counsel respecting litigation.

Standard 12: Entry of a Plea of Guilty

(a) The informed decision whether to enter a plea of guilty lies with the client.

(b) In the event the client determines to enter a plea of guilty, prior to the entry of the plea, counsel should:

1. make certain that the client understands the rights to be waived by entering the plea and that the client's decision to waive those rights is knowing, voluntary, and intelligent;
2. ensure that the client understands the conditions and limits of the plea agreement and the maximum punishment, sanctions, and other consequences to which he or she will be exposed by entering the plea; and
3. explain to the client the nature of the plea hearing and prepare the client for the role he or she will play in the hearing, including answering questions in court, and providing a statement concerning the offense.

(c) During entry of the plea, counsel should make sure that the full content and conditions of any agreements with the government are placed on the record.

Standard 13: Trial Preparation Overall

As the investigations mandated by Standard 7 produce information, trial counsel should formulate a defense theory. Counsel should seek a theory that will be effective in connection with both guilt and penalty, and should seek to minimize any inconsistencies.

Standard 14: Voir Dire and Jury Selection

(a) Counsel should consider, along with potential legal challenges to the procedures for selecting the jury that would be available in any criminal case (particularly those relating to bias on the basis of race or gender), whether any procedures have been instituted for selection of juries in capital cases that present particular legal bases for challenge. Such challenges may include challenges to the selection of the grand jury and grand jury forepersons, as well as to the selection of the petit jury venire.

(b) Counsel should be familiar with the precedents relating to questioning and challenging of potential jurors, including the procedures surrounding "death qualification" concerning any potential juror's beliefs about the death penalty. Counsel should be familiar with techniques:

1. for exposing those prospective jurors who would automatically impose the death penalty following a murder conviction or finding that the defendant is death-eligible, regardless of the individual circumstances of the case;
2. for uncovering those prospective jurors who are unable to give meaningful consideration to mitigating evidence; and
3. for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable.

(c) Counsel should consider seeking expert assistance in the jury selection process.

Standard 15: Defense Case Concerning Penalty

(a) As set out in Standard 7, counsel at every stage of the case has a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation.

(b) Counsel should discuss with the client early in the case the sentencing alternatives available and the relationship between the strategy for the sentencing phase and for the guilt/innocence phase.

(c) Prior to the sentencing phase, trial counsel should discuss with the client the specific sentencing phase procedures of the jurisdiction and advise the client of steps being taken in preparation for sentencing.

(d) Counsel at every stage of the case should discuss with the client the content and purpose of the information concerning penalty that they intend to present to the sentencing or reviewing body or individual, means by which the mitigation presentation might be strengthened, and the strategy for meeting the prosecution's case in aggravation.

(e) Counsel should consider, and discuss with the client, the possible consequences of having the client testify or make a statement to the sentencing or reviewing body or individual.

(f) In deciding which witnesses and evidence to prepare concerning penalty, the areas counsel should consider include the following:

1. witnesses familiar with and evidence relating to the client's life and development, from conception to the time of sentencing, that would be explanatory of the offense(s) for which the client is being sentenced, would rebut or explain evidence presented by the prosecutor, would present positive aspects of the client's life, or would otherwise support a sentence less than death;

2. expert and lay witnesses along with supporting documentation (e.g., school records, military records) to provide medical, psychological, sociological, cultural, or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s); to give a favorable opinion as to the client's capacity for rehabilitation or adaptation to prison; to

explain possible treatment programs; or otherwise support a sentence less than death; and/or to rebut or explain evidence presented by the prosecutor;

3. witnesses who can testify about the applicable alternative to a death sentence and/or the conditions under which the alternative sentence would be served;
4. witnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones; and
5. demonstrative evidence, such as photos, videos, and physical objects (e.g., trophies, artwork, military medals), and documents that humanize the client or portray him positively, such as certificates of earned awards, favorable press accounts, and letters of praise or reference.

(g) In determining what presentation to make concerning penalty, counsel should consider whether any portion of the defense case will open the door to the prosecution's presentation of otherwise inadmissible aggravating evidence. Counsel should pursue all appropriate means (e.g., motions in limine) to ensure that the defense case concerning penalty is constricted as little as possible by this consideration and should make a full record in order to support any subsequent challenges.

(h) Trial counsel should determine at the earliest possible time what aggravating factors the prosecution will rely upon in seeking the death penalty and what evidence will be offered in support thereof. If the jurisdiction has rules regarding notification of these factors, counsel at all stages of the case should object to any noncompliance, and if such rules are inadequate, counsel at all stages of the case should challenge the adequacy of the rules.

(i) Counsel at all stages of the case should carefully consider whether all or part of the aggravating evidence may appropriately be challenged as improper, inaccurate, misleading, or not legally admissible.

(j) If the prosecution is granted leave at any stage of the case to have the client interviewed by witnesses associated with the government, defense counsel should:

1. consider what legal challenges may appropriately be made to the interview or the conditions surrounding it;
2. consider the legal and strategic issues implicated by the client's cooperation or noncooperation;
3. ensure that the client understands the significance of any statements made during such an interview; and
4. attend the interview.

(k) Trial counsel should request jury instructions and verdict forms that ensure that jurors will be able to consider and give effect to all relevant mitigating evidence. Trial counsel should object to instructions or verdict forms that are constitutionally flawed, inaccurate, or confusing and should offer alternative instructions. Post-conviction counsel should pursue these issues through factual investigation and legal argument.

(l) Counsel at every stage of the case should take advantage of all appropriate opportunities to argue why death is not suitable punishment for their particular client.

Standard 16: Official Presentence Report

If an official presentence report or similar document may or will be presented to the court at any time, counsel should become familiar with the procedures governing preparation, submission, and verification of the report. In addition, counsel should:

(a) where preparation of the report is optional, consider the strategic implications of requesting that a report be prepared;

(b) provide to the report preparer information favorable to the client. In this regard, counsel should consider whether the client should speak with the person preparing the report; if the determination is made to do so, counsel should discuss the interview in advance with the client and attend it;

(c) review the completed report;

(d) take appropriate steps to ensure that improper, incorrect, or misleading information that may harm the client is deleted from the report; and

(e) take steps to preserve and protect the client's interests where the defense considers information in the presentence report to be improper, inaccurate, or misleading.

Standard 17: Duty to Facilitate the Work of Successor Counsel

In accordance with professional norms, all persons who are or have been members of the defense team have a continuing duty to safeguard the interests of the client and should cooperate fully with successor counsel. This duty includes, but is not limited to:

(a) maintaining the records of the case in a manner that will inform successor counsel of all significant developments relevant to the litigation;

(b) providing the client's files, as well as information regarding all aspects of the representation, to successor counsel;

(c) sharing potential further areas of legal and factual research with successor counsel; and

(d) cooperating with such professionally appropriate legal strategies as may be chosen by successor counsel.

Standard 18: Duties of Trial Counsel After Conviction

Trial counsel should:

(a) be familiar with all state and federal post-conviction options available to the client. Trial counsel should discuss with the client the post-conviction procedures that will or may follow imposition of the death sentence;

(b) take whatever action(s), such as filing a notice of appeal and/or motion for a new trial, will maximize the client's ability to obtain post-conviction relief;

(c) not cease acting on the client's behalf until successor counsel has entered the case or trial counsel's representation has been formally terminated. Until that time, Standard 17 applies in its entirety; and

(d) take all appropriate action to ensure that the client obtains successor counsel as soon as possible.

Standard 19: Duties of Post-Conviction Counsel

(a) Counsel representing a capital client at any point after conviction should be familiar with the jurisdiction's procedures for setting execution dates and providing notice of them. Post-conviction counsel should also be thoroughly familiar with all available procedures for seeking a stay of execution.

(b) If an execution date is set, post-conviction counsel should immediately take all appropriate steps to secure a stay of execution and pursue those efforts through all available forms.

(c) Post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high-quality capital defense representation, including challenges to any overly restrictive procedural rules. Counsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review.

(d) The duties of the counsel representing the client on direct appeal should include filing a petition for certiorari in the Supreme Court of the United States. If appellate counsel does not intend to file such a petition, he or she should immediately notify successor counsel if known and the responsible agency.

(e) Post-conviction counsel should fully discharge the ongoing obligations imposed by these standards, including the obligations to:

1. maintain close contact with the client regarding litigation developments;
2. continually monitor the client's mental, physical, and emotional condition for effects on the client's legal position;
3. keep under continuing review the desirability of modifying prior counsel's theory of the case in light of subsequent developments; and
4. continue an aggressive investigation of all aspects of the case.

Standard 20: Duties of Clemency Counsel

Clemency counsel should:

1. be familiar with the procedures for and permissible substantive content of a request for clemency;
2. conduct an investigation in accordance with Standard 7;
3. ensure that clemency is sought in as timely and persuasive a manner as possible, tailoring the presentation to the characteristics of the particular client, case, and jurisdiction; and
4. ensure that the process governing consideration of the client's application is substantively and procedurally just, and if not, should seek appropriate redress.

APPELLATE AND POST-CONVICTION REPRESENTATION

Standard 1: Role of Appellate Defense Counsel

The paramount obligation of appellate criminal defense counsel is to provide zealous and quality representation to their clients at all stages of the appellate process. Attorneys also have an obligation to abide by ethical norms and act in accordance with the rules of the court. Trial counsel must advise the client of his or her right to appeal and any limits on that right. If the client chooses to proceed with an appeal, even if the attorney believes that the appeal is without merit or is not cognizable, trial counsel will assure that a Notice of Appeal is filed. If the client wishes to proceed with the appeal, against the advice of counsel, counsel should present the case, so long as such advocacy does not involve deception of the court.

Standard 2: Identification of issues on appeal

In selecting issues to be presented on appeal, counsel should:

(a) conduct a thorough review of the trial transcript, the pleadings, and docket entries in the case;

(b) investigate potentially meritorious claims of error not reflected in the trial record when he or she is informed or has reason to believe that facts in support of such claims exist;

(c) assert claims of error that are supported by facts of record that will benefit the defendant if successful, that possess arguable legal merit, and that should be recognizable by a practitioner familiar with criminal law and procedure who engages in diligent legal research;

(d) not hesitate to assert claims that may be complex, unique, or controversial in nature, such as issues of first impression or arguments for change in the existing law;

(e) inform the client when counsel has decided not to raise issues that the client desires to be raised and the reasons why the issues were not raised; and

(f) consider whether there are federal constitutional claims that, in the event that relief is denied in the state appellate court, would form the basis for a

writ of habeas corpus in federal district court. Such claims should raise and argue the federal constitutional claims, unless counsel concludes that there is a tactical basis for not including such claims and the client assents.

Standard 3: Diligence and Accuracy

In presenting the appeal, counsel should:

(a) be diligent in perfecting appeals and expediting prompt submission to the appellate court;

(b) be accurate in referring to the record and the authorities upon which counsel relies in the presentation to the court of briefs and oral argument; and

(c) not intentionally refer to or argue on the basis of facts outside the record on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.

Standard 4: Duty to Meet With Trial Lawyers

In preparing the appeal, counsel should consult trial counsel in order to assist appellate counsel in understanding and presenting the client's issues on appeal.

Standard 5: Duty to Confer and Communicate With Client

In preparing and processing the appeal, counsel should:

(a) assure that the client is able to contact appellate counsel telephonically during the pendency of the appeal including arrangements for the acceptance of collect telephone calls. Promptly after appointment or assignment to the appeal, counsel shall provide advice to the client, in writing, as to the method(s) which the client can employ to discuss the appeal with counsel;

(b) discuss the merits, strategy, and ramifications of the proposed appeal with each client prior to the perfection and completion thereof. When possible, appellate counsel should meet in person with the client, and in all instances, counsel should provide a written summary of the merits and strategy to be

employed in the appeal along with a statement of the reasons certain issues will not be raised, if any. It is the obligation of the appellate counsel to provide the client with his or her best professional judgment as to whether the appeal should be pursued in view of the possible consequences and strategic considerations;

(c) inform the client of the status of the case at each step in the appellate process, explain any delays, and provide general information to the client regarding the process and procedures that will be taken in the matter, and the anticipated timeframe for such processing;

(d) provide the client with a copy of each substantive document filed in the case by both the prosecution and defense;

(e) respond in a timely manner to all correspondence from clients, provided that the client correspondence is of a reasonable number and at a reasonable interval; and

(f) promptly and accurately inform the client of the courses of action that may be pursued as a result of any disposition of the appeal and the scope of any further representation counsel will provide.

Standard 6: Duty to Seek Release during Appeal

Appellate counsel should file appropriate motions seeking release pending appeal when the granting of such motions is reasonably possible.

Standard 7: Responsibilities in "Fast Track" Appeals

If the conviction qualifies for "fast track" treatment under NRAP 3C, counsel shall fulfill the responsibilities set forth in the rule. In preparing the "fast track" statement, counsel should:

(a) order a rough draft of those portions of the transcript provided for in NRAP 3C(d) in all cases in which trial counsel is not handling the appeal and in all other cases in which information from the proceedings is necessary for a fair determination of the issues to be raised on appeal;

(b) thoroughly research the issues in the case and shall set forth all viable issues in the "fast track" statement provided for by NRAP 3C(e); and

(c) consult with the client as to which issues should be presented in the statement.

Standard 8: Post-Decision Responsibilities

If the decision of the appellate court is adverse to the client, appellate counsel should:

(a) promptly inform the client of the decision and confer with the client with regard to the availability of rehearing or en banc reconsideration and the benefits or disadvantages of filing such a motion;

(b) file a Motion for Rehearing and/or Request for en banc reconsideration if grounds for such a motion and/or request exist;

(c) advise the client whether a petition for writ of certiorari to the United States Supreme Court is warranted and determine whether such a petition will be filed;

(d) promptly advise the client of any remedies that are available in state or federal court for post-conviction review and shall advise the client of the applicable statute of limitations for filing for such relief;

(e) advise the client of any claims such as ineffective assistance of counsel that may be available to the client but that will not be pursued by appellate counsel;

(f) provide the client with any available forms for post-conviction relief and appointment of counsel; and

(g) cooperate with the client and with post-conviction counsel in securing the trial and appellate record and investigation of potential claims for post-conviction relief.

Standard 9: Post-Conviction Representation

Counsel appointed to represent a defendant in post-conviction proceedings should:

(a) assure that the client is able to contact post-conviction counsel telephonically during the pendency of the appeal including arrangements for the acceptance of collect telephone calls. Promptly after appointment or assignment to the post-conviction case, counsel shall provide advice to the client, in writing, as to the method(s) that the client can employ to discuss the post-conviction proceeding with counsel;

(b) consult with trial/appellate counsel and secure the entire trial and appeal file;

(c) seek to litigate all issues, whether or not previously presented, that are arguably meritorious;

(d) maintain close contact with the client and consult with the client on all decisions with regard to the content of any pleadings seeking collateral or post-conviction relief prior to the filing of any petition for post-conviction relief. When possible, post-conviction counsel should meet in person with the client and in all instances, counsel should provide a written summary of the merits and strategy to be employed in the post-conviction proceeding along with a statement of the reasons certain issues will not be raised, if any;

(e) investigate all potentially meritorious claims that require factual support;

(f) secure the services of investigators or experts where necessary to develop claims to be raised in the post-conviction petition;

(g) raise all federal constitutional claims, along with appropriate citations, that are arguably meritorious; and

(h) advise the client of remedies that may be available should post-conviction relief not be granted, including appeal from the denial and federal habeas corpus along with any applicable time limits for seeking such relief. Post-conviction counsel shall advise the client in writing if counsel will not be representing the client in any subsequent proceedings and shall provide advice on the steps that must be taken and the time limits that are applicable to appeals or the seeking of relief in the federal courts.

FELONY AND MISDEMEANOR TRIAL CASES

Standard 1: Role of Defense Counsel

The paramount obligation of criminal defense counsel is to provide zealous and quality representation to their clients at all stages of the criminal process. Attorneys also have an obligation to abide by ethical norms and act in accordance with the rules of the court.

Standard 2: Education, Training, and Experience of Defense Counsel

(a) To provide quality representation, counsel must be familiar with the substantive criminal law and the law of criminal procedure and its application in the courts of Nevada. Counsel has a continuing obligation to stay abreast of changes and developments in the law. Where appropriate, counsel should also be informed of the practice of the specific judge before whom a case is pending.

(b) Prior to handling a criminal matter, counsel should have sufficient experience or training to provide quality representation and should move to be relieved as counsel should counsel determine at a later point that he or she does not possess sufficient experience or training to handle the case assigned.

Standard 3: Adequate Time and Resources

Counsel has an obligation to make available sufficient time, resources, knowledge, and experience to afford competent representation of a client in a particular matter before agreeing to act as counsel or accepting appointment. Counsel must maintain an appropriate, professional office in which to consult with clients and witnesses, and must maintain a system for receiving collect telephone calls from incarcerated clients.

Standard 4: Initial Client Interview

(a) Preparing for Initial Interview: Prior to conducting the initial interview, the attorney should:

1. be familiar with the elements of each offense charged and the potential punishment;
2. obtain copies of relevant documents that are available, including copies of any charging documents, recommendations, and reports made by agencies concerning pretrial release, and law enforcement reports;
3. be familiar with legal criteria for determining pretrial release and the procedures that will be followed in setting those conditions;
4. be familiar with the different types of pretrial release conditions the court may set; and
5. be familiar with any procedures available for reviewing the judge's setting of bail.

(b) Timing of the Initial Interview: Counsel should conduct the initial interview with the client as soon as practicable and sufficiently before any court proceeding so as to be prepared for that proceeding. When the client is in custody, counsel should attempt to conduct the interview within 48 hours of appointment to the case. The initial interview should be conducted in a confidential setting.

(c) Contents of the Initial Interview: The purpose of the initial interview is both to inform the client of the charges/penalties and to acquire information from the client concerning pretrial release. Counsel should ensure at this and all successive interviews and proceedings that barriers to communication, such as differences in language or literacy are overcome. Information that counsel should consider acquiring from the client includes, but is not limited to:

1. the client's ties to the community, including the length of time in the community, family relationships, immigration status, and employment record and history;
2. the client's physical and mental health, education, and armed services record;

3. the client's immediate medical needs;
4. the client's criminal history and a determination of whether the client has other pending charges or is on supervision;
5. the ability of the client to meet any financial conditions of release; and
6. sources of verification (counsel should obtain permission from the client before contacting such sources).

(d) The following information should be provided to the client in the initial interview:

1. an explanation of the procedures that will be followed in setting the conditions of pretrial release;
2. an explanation of the type of information that will be requested in any interview that may be conducted by a pretrial release agency and an explanation that the client should not make any statements regarding the offense;
3. an explanation of the attorney-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the attorney;
4. the charges and the potential penalties;
5. a general procedural overview of the progression of the case;
6. how and when counsel can be reached;
7. when counsel will see the client next;
8. realistic answers, where possible, to the client's most urgent questions; and
9. what arrangements will be made or attempted for the satisfaction of the client's most pressing needs, e.g., medical or mental health attention, contact with family or employers.

Standard 5: Pretrial Release Proceedings

When a client is in custody, counsel should explore with the client the pretrial release of the client under the conditions most favorable to the client and attempt to secure that release. Counsel should:

(a) present to the appropriate judicial officer information about the client's circumstances and the legal criteria supporting release. Where appropriate, counsel should make a proposal concerning conditions of release that are least restrictive with regard to the client. Counsel should arrange for contact with or the appearance of parents, spouse, relatives, or other persons who may take custody of the client or provide third-party surety;

(b) consider pursuing modification of the conditions of release under available procedures when the client is not able to obtain release under the conditions set by the court; and

(c) explain to the client and any third party the available options, procedures, and risks in posting security if the court sets conditions of release.

Standard 6: Preliminary Hearings/Grand Jury Representation

(a) Where the client is entitled to a preliminary hearing, the attorney should take steps to see that the hearing is conducted timely unless there are strategic reasons for not doing so.

(b) In preparing for the preliminary hearing, the attorney should consider:

1. the elements of each offense charged;
2. the law for establishing probable cause;
3. the factual information that is available concerning probable cause;
4. the tactics of calling witnesses or calling the defendant as a witness and the potential for later use of the testimony; and
5. the tactics of proceeding without full discovery.

(c) Counsel should meet with the client prior to the preliminary hearing. The client has the sole right to waive a preliminary hearing. Counsel must evaluate and advise the client regarding the consequences of such waiver and the tactics of full or partial cross-examination.

(d) Where counsel becomes aware that his or her client is the subject of a grand jury investigation, appointed counsel should consult with the client to discuss the grand jury process, including the advisability and ramifications of the client testifying. Counsel should examine the facts in the case and determine whether the prosecution has fulfilled its obligation under Nevada law to

present exculpatory evidence and should make an appropriate record in that regard. Upon return of an indictment, counsel should determine if proper notice of the proceedings was provided and should obtain the record of the proceeding to determine if procedural irregularities or errors occurred that might warrant a challenge to the proceedings such as a writ of habeas corpus or a motion to quash the indictment.

Standard 7: Case Preparation and Investigation

(a) Counsel 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 accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

(b) Counsel should:

1. obtain and examine all charging documents, pleadings, and discovery;
2. research and review the relevant statutes and caselaw to identify elements of the charged offense(s); defects in the prosecution such as statute of limitations or double jeopardy; and available defenses and required notices of those defenses;
3. conduct an in-depth interview of the client to assist in shaping the investigation;
4. attempt to locate all potential witnesses and have them interviewed. (If counsel conducts a witness interview, counsel should do so in the presence of a third person who can be called as a witness);
5. request and secure discovery including exculpatory/impeaching information; names and addresses of prosecution witnesses and their prior statements and criminal records; the prior statements of the client and his or her criminal history; all papers, tapes, or electronic recordings relevant to the case; expert reports and data upon which they are based, statements of co-defendants, an inspection of physical evidence, all documents relevant to any searches conducted, 911 tapes

and dispatch reports, mental health, drug treatment, or other records of the client, victim, or witnesses and records of police officers as appropriate;

6. inspect the scene of the offense as appropriate; and
7. obtain the assistance of such experts as are appropriate to the facts of the case.

Standard 8: Pretrial Motions and Writs

(a) Counsel should consider filing an appropriate motion whenever there exists a good-faith reason to believe that the applicable law may entitle the defendant to relief, which the court has discretion to grant.

(b) The decision to file pretrial motions should be made after thorough investigation and after considering the applicable law in light of the circumstances of the case. Among the issues that counsel should consider addressing in a pretrial motion are:

1. the pretrial custody of the client;
2. the constitutionality of the implicated statute(s);
3. any defects in the charging process or the charging document;
4. severance of charges or defendants;
5. discovery issues;
6. suppression of evidence or statements;
7. speedy trial issues; and
8. evidentiary issues.

(c) Counsel should determine whether a pretrial writ should be filed challenging the determination that probable cause exists. The decision whether to file a pretrial writ should be made based upon an examination of the preliminary hearing or grand jury transcripts. If transcripts are not available at the time of arraignment, appropriate steps should be taken to secure an extension of time to prepare the writ after the transcripts are received pursuant to NRS 34.700. Counsel shall advise the client as to the effect of filing a pretrial writ on his speedy trial rights and provide an evaluation of the likelihood of

success to assist in the decision, which rests with the client, after consultation with counsel.

(d) Counsel should only withdraw or decide not to file a motion after careful consideration, and only after determining whether the filing of a motion may be necessary to protect the defendant's rights against later claims of waiver or procedural default.

(e) Motions should be filed in a timely manner and with an awareness of the effect of filing the motion on the defendant's speedy trial rights. When an evidentiary hearing is scheduled on a motion, counsel's preparation for the hearing should include:

1. investigation, discovery, and research relevant to the claim advanced;
2. subpoenaing of all helpful evidence and witnesses; and
3. full understanding of the burdens of proof, evidentiary principles, and trial court procedures applying to the hearing, including the benefits and costs of having the client testify.

(f) Requests or agreements to continue a trial date shall not be made without consultation with the client.

(g) Motions and writs should include citation to applicable state and federal law in order to protect the record for collateral review in federal courts.

Standard 9: Plea Negotiations

(a) Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.

(b) Counsel should:

1. with the consent of the client explore diversion and other informal and formal admission or disposition agreements with regard to the allegations;
2. fully explain to the client the rights that would be waived by a decision to enter into any admission or disposition agreement;
3. keep the client fully informed of the progress of the negotiations;

4. convey to the client any offers made by the prosecution and the advantages and disadvantages of accepting the offers;

5. continue to preserve the client's rights and prepare the defense notwithstanding ongoing negotiations; and

6. not enter into any admission or disposition agreement on behalf of the client without the client's authorization.

(c) In developing a negotiation strategy, counsel must be completely familiar with:

1. Concessions that the client might offer the prosecution as part of a negotiated settlement, including, but not limited to: not to proceed to trial on the merits of the charges; to decline from asserting or litigating any particular pretrial motions; an agreement to fulfill specified restitution conditions and/or participation in community work or service programs, or in rehabilitation or other programs; and providing the prosecution with assistance in prosecuting or investigating the present case or other alleged criminal activity.

2. Benefits the client might obtain from a negotiated settlement, including, but not limited to, an agreement: that the prosecution will not oppose the client's release on bail pending sentencing or appeal; that the defendant may enter a conditional plea to preserve the right to litigate and contest certain issues affecting the validity of the conviction; to dismiss or reduce one or more of the charged offenses either immediately or upon completion of a deferred prosecution agreement; that the defendant will not be subject to further investigation or prosecution for uncharged alleged criminal conduct; that the defendant will receive, with the agreement of the court, a specified sentence or sanction or a sentence or sanction within a specified range; that the prosecution will take, or refrain from taking, at the time of sentencing and/or in communications with the Division of Parole and Probation, a specified position with respect to the sanction to be imposed on the client by the court; and that the defendant will receive, or the prosecution will recommend, specific

benefits concerning the accused's place and/or manner of confinement and/or release on parole.

(d) In the decision-making process, counsel should:

1. inform the client of any tentative negotiated agreement reached with the prosecution, explain to the client the full content of the agreement, and explain advantages, disadvantages, and potential consequences of the agreement; and
2. not attempt to unduly influence the decision, as the decision to enter a plea of guilty rests solely with the client. Where counsel reasonably believes that acceptance of a plea offer is in the best interest of the client, counsel should advise the client of the benefits of this course of action.

(e) Prior to the entry of the plea, counsel should meet with the client in a confidential setting that fosters full communication and:

1. make certain that the client understands the rights he or she will waive by entering the plea and that the client's decision to waive those rights is knowing, voluntary, and intelligent;
2. make certain that the client fully and completely understands the conditions and limits of the plea agreement and the maximum punishment, sanctions, and other consequences the client will be exposed to by entering the plea; and
3. explain to the client the nature of the plea hearing and prepare the client for the role he or she will play in the hearing, including answering questions of the judge and providing a statement concerning the offense.

(f) After entry of the plea, counsel should:

1. be prepared to address the issue of release pending sentencing. Where the client has been released pretrial, counsel should be prepared to argue and persuade the court that the client's continued release is warranted and appropriate. Where the client is in custody prior to the entry of the plea, counsel should, where practicable, advocate for the client's release on bail pending sentencing; and

2. make every effort to review and explain the plea proceedings with the client and to respond to any client questions and concerns.

Standard 10: Trial Preparation

(a) The decision to proceed to trial with or without a jury rests solely with the client. Counsel should discuss the relevant strategic considerations of this decision with the client.

(b) Where appropriate, counsel should have the following materials available at the time of trial:

1. copies of all relevant documents filed in the case;
2. relevant documents prepared by investigators;
3. voir dire questions;
4. outline or draft of opening statement;
5. cross-examination plans for all prospective prosecution witnesses;
6. direct examination plans for all prospective defense witnesses;
7. copies of defense subpoenas;
8. prior statements of all prosecution witnesses (e.g., preliminary hearing/grand jury transcripts, police reports/statements);
9. prior statements of all defense witnesses;
10. reports from all experts;
11. a list and copies or originals of defense and prosecution exhibits;
12. proposed jury instructions with supporting authority;
13. copies of all relevant statutes or cases; and
14. outline or draft of closing argument.

(c) Counsel should be fully informed as to the rules of evidence and the law relating to all stages of the trial process, and should be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the trial.

(d) Counsel should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (e.g., admissibility of evidence, use of prior convictions of defendant) and, where appropriate, counsel should prepare motions and memoranda in support of the defendant's position.

(e) Throughout the trial process, counsel should endeavor to establish a proper record for appellate review. As part of this effort, counsel should request, whenever necessary, that all discussions and rulings be made on the record.

(f) Counsel should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated or is not able to secure appropriate clothing for trial, counsel shall arrange for the provision of appropriate clothing for the client to wear in the courtroom.

(g) Counsel should plan with the client the most convenient system for conferring throughout the trial. Where necessary, counsel should seek an order to facilitate conferences with the client.

(h) If, during the trial, it appears to counsel that concessions to facts or offenses are strategically indicated, such concessions may only be made in consultation with, and with the consent of, the client.

(i) Throughout preparation and trial, counsel should consider the potential effects that particular actions may have upon sentencing if there is a finding of guilt.

Standard 11: Voir Dire and Jury Selection

In preparing for and conducting jury selection, counsel should:

(a) be familiar with the law governing selection of the jury venire. Counsel should also be alert to any potential legal challenges to the composition or selection of the venire;

(b) be familiar with the local practices and the individual trial judge's procedures for selecting a jury and should be alert to any potential legal challenges to these procedures;

(c) seek access to any jury questionnaires that have been completed by jurors and should petition the court to use a special questionnaire when appropriate due to unique issues in the case;

(d) should seek attorney-conducted voir dire and should develop, support, and file written voir dire questions if the court restricts attorney-conducted voir dire;

(e) consider whether additional peremptory challenges should be requested due to the circumstances present in the case;

(f) consider whether sensitive or unusual facts or circumstances of the case support sequestered voir dire of jurors;

(g) consider challenging for cause all persons about whom a legitimate argument can be made for actual prejudice or bias relevant to the case when it is likely to benefit the client; and

(h) object to and preserve all issues relating to the unconstitutional exclusion of jurors by the prosecutor.

Standard 12: Defense Strategy

Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not putting on a defense case and instead relying on the prosecution's failure to meet its constitutional burden of proving each element beyond a reasonable doubt.

Standard 13: Trial

(a) Counsel should anticipate weaknesses in the prosecution's proof and consider appropriate motions for judgment of acquittal at all appropriate stages of the litigation.

(b) Counsel should consider the strategic advantages and disadvantages of entering into any stipulations.

(c) In preparing for cross-examination, counsel should:

1. be prepared to question witnesses as to the existence of prior statements that they may have made or adopted;
2. consider the need to integrate cross-examination, theory, and theme of the defense;
3. avoid asking unnecessary questions that may hurt the defense case;
4. anticipate witnesses that the prosecution may call in its case-in-chief and on rebuttal;

5. create a cross-examination plan for all anticipated witnesses;
6. review all prior statements and testimony of the witnesses in order to be aware of all inconsistencies or variances;
7. review relevant statutes, regulations, and policies applicable to police witnesses; and
8. consider a pretrial motion or voir dire examination of prosecution experts to determine qualifications of the expert or reliability of the anticipated opinion.

Standard 14: Presenting the Defendant's Case

(a) Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not putting on a defense case and instead relying on the prosecution's failure to meet its constitutional burden of proving each element beyond a reasonable doubt.

(b) Counsel should discuss with the client all of the considerations relevant to the client's decision to testify. Counsel should also be familiar with his or her ethical responsibilities that may be applicable if the client insists on testifying untruthfully. Counsel should maintain a record of the advice provided to the client and the client's decision concerning whether to testify.

(c) Counsel should be aware of the elements of any affirmative defense and know whether, under the applicable law of the jurisdiction, the client bears a burden of persuasion or a burden of production.

(d) In preparing for presentation of a defense case, counsel should, where appropriate, do the following:

1. develop a plan for direct examination of each potential defense witness;
2. determine the implications that the order of witnesses may have on the defense case;
3. determine which facts necessary for the defense case can be elicited through the cross-examination of the prosecution's witnesses;
4. consider the possible use of character witnesses;

5. consider the need for expert witnesses and what evidence must be submitted to lay the foundation for the expert's testimony;
6. review all documentary evidence that must be presented; and,
7. review all tangible evidence that must be presented.

(e) In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecutor.

(f) Counsel should prepare all witnesses for direct and possible cross-examination. Where appropriate, counsel should also advise witnesses of suitable courtroom dress and demeanor.

(g) Counsel should conduct redirect examination as appropriate.

(h) At the close of the defense case, counsel should seek an advisory instruction directing the jury to acquit when appropriate.

Standard 15: Jury Instructions

(a) Counsel should be familiar with the appropriate rules of the court and the individual judge's practices concerning ruling on proposed instructions, charging the jury, use of instructions typically given, and preserving objections to the instructions.

(b) Counsel should always submit proposed jury instructions in writing.

(c) Where appropriate, counsel should submit modifications to instructions proposed by the State or the court in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser-included offense. Counsel should provide citations to appropriate law in support of the proposed instructions.

(d) Where appropriate, counsel should object to and argue against improper instructions proposed by the prosecution.

(e) If the court refuses to adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record, including ensuring that a written copy of proposed instructions is included in the record along with counsel's objection.

(f) During delivery of the charge, counsel should be alert to any deviations from the judge's planned instruction, object to deviations unfavorable to the client, and if necessary, request additional or curative instructions.

(g) If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, counsel should request that the judge state the proposed charge to counsel before it is delivered to the jury. Counsel should renew or make new objections to any additional instructions given to the jurors after the jurors have begun their deliberations.

Standard 16: Obligations of Counsel in Final Sentencing Hearings

Among counsel's obligations in the sentencing process are:

(a) To correct inaccurate information that is potentially detrimental to the client and to object to information that is not properly before the Court in determining sentence. Counsel should further correct or move to strike any improper and harmful information from the text of the presentence report.

(b) To present to the court all known and reasonably available mitigating and favorable information, including relevant expert testimony or reports.

(c) To develop a plan that seeks to achieve the least restrictive and burdensome sentencing alternative that is most favorable to the client and that can reasonably be obtained based on the facts and circumstances of the offense, the client's background, the applicable sentencing provisions, and other information pertinent to the sentencing decision.

Standard 17: Preparation for Sentencing

In preparing for sentencing, counsel shall:

(a) inform the client of the applicable sentencing requirements, options, alternatives, and the discretionary nature of sentencing guidelines including the rules concerning parole eligibility;

(b) maintain contact with the client prior to the sentencing hearing and inform the client of the steps being taken in preparation for sentencing;

(c) obtain from the client relevant information concerning his or her background and personal history, prior criminal record, employment history, skills, education, medical history and condition, and financial status and obtain from the client sources that can corroborate the information provided by the client;

(d) request any necessary and appropriate client evaluations, including those for mental health and substance abuse;

(e) ensure the client has an opportunity to examine the presentence report;

(f) inform the client of his or her right to speak at the sentencing proceeding and assist the client in preparing the statement, if any, to deliver to the court;

(g) inform the client of the effects that admissions and other statements may have upon an appeal, retrial, or other judicial proceedings, such as forfeiture or restitution proceedings;

(h) inform the client of the sentence or range of sentences counsel will ask the court to consider;

(i) where appropriate, collect affidavits to support the defense position and, where relevant, prepare witnesses to testify at the sentencing hearing; where necessary, counsel should specifically request the opportunity to present tangible and testimonial evidence;

(j) prepare to address victim participation either through the victim impact statements or by direct testimony at sentencing; and

(k) advise the client of the difference between testimony and allocution. If the client elects to testify, counsel should prepare the client for possible cross-examination by the prosecution where applicable.

Standard 18: Official Presentence Report

(a) Counsel should prepare the client for the interview with the official preparing the presentence report.

(b) Counsel has a duty to become familiar with the procedures concerning the preparation, submission, and verification of the presentence investigation report. In addition, counsel shall:

1. determine whether a presentence report will be prepared and submitted to the court prior to sentencing; where preparation of the report is optional, counsel should consider the strategic implications of waiving the report;
2. provide to the official preparing the report relevant information favorable to the client, including, where appropriate, the client's version of the offense;
3. attend any interview of the client by an agency presentence investigator where appropriate;
4. review the completed report prior to sentencing;
5. take appropriate steps to ensure that erroneous or misleading information that may harm the client is deleted from the report;
6. take appropriate steps to preserve and protect the client's interests where the defense challenges information in the presentence report as being erroneous or misleading; and
7. make sure that, if there is a significant change in the information contained in the report by the judge at the sentencing hearing, counsel takes reasonable steps to ensure that a corrected copy is sent to corrections officials.

Standard 19: Sentencing Hearing

(a) At the sentencing proceeding, counsel shall take steps necessary to advocate fully for the requested sentence and to protect the client's interest.

(b) Counsel shall endeavor to present supporting evidence, including testimony of witnesses, to establish the facts favorable to the client.

(c) Where appropriate, counsel shall request specific orders or recommendations from the court concerning alternative sentences and forms of incarceration.

(d) Counsel should obtain a copy of the judgment and review it promptly to determine that it is accurate or to take steps to correct any errors.

Standard 20: Post-Disposition Responsibilities

Counsel should be familiar with the procedures available to the client after disposition. Counsel should:

(a) be familiar with the procedures to request a new trial, including the time period for filing such a motion, the effect it has upon the time to file a notice of appeal, and the grounds that can be raised;

(b) inform the client of his or her right to appeal a conviction after trial, after a conditional plea or after a guilty plea that was not entered in a knowing, intelligent, and voluntary manner. Counsel should also advise the client of the legal effect of filing or waiving an appeal, and counsel should document the client's decision. If the client wishes to appeal after consultation with counsel, even if counsel believes that an appeal will not be successful or is not cognizable, the attorney should file the notice in accordance with the rules of the court and take such other steps as are necessary to preserve the client's right to appeal;

(c) fulfill the responsibilities set forth in NRAP 3C if the conviction qualifies for "fast track" treatment under the rule. Counsel shall order a rough draft of those portions of the transcript provided for in NRAP 3C(d) in all cases in which trial counsel is not handling the appeal and in all other cases in which information from the proceedings is necessary for a fair determination of the issues to be raised on appeal. Counsel shall thoroughly research the issues in the case and shall set forth all viable issues in the "fast track" statement provided for by NRAP 3C(e);

(d) timely respond to requests from appellate counsel for information about or documents from the case, when appellate counsel was not trial counsel;

(e) inform the client of any right that may exist to be released pending disposition of the appeal;

(f) consider requesting a stay of execution of the judgment to permit the client to report directly to the place of confinement, if a custodial sentence is imposed;

(g) include in the advice to the client an explanation of the limited nature of the relief available on direct appeal and, where appropriate, an explanation of the remedies available to him or her in post-conviction proceedings. Counsel

should provide a pro se habeas packet to any client who needs assistance in preparing his or her pro se habeas corpus petition. Counsel should advise the client of the relevant time frames for filing state and federal habeas corpus petitions and provide information and advice necessary to protect a client's right to post-conviction relief; and

(h) inform the client of any procedures available for requesting that the record of conviction be expunged or sealed.

JUVENILE DELINQUENCY CASES

Counsel for juveniles in delinquency proceedings should abide by the Nevada Indigent Defense Standards of Performance applicable to felony and misdemeanor cases where applicable. The performance standards set forth below recognize the need to meet some concerns particular to representation of juveniles in delinquency proceedings.

Standard 1: The Role of Defense Counsel

(a) The role of counsel in delinquency cases is to be an advocate for the child. Counsel should:

1. Ensure that the interests and rights of the client are fully protected and advanced irrespective of counsel's opinion of the client's culpability;
2. fully explain to the juvenile the nature and purpose of the proceedings and the general consequences of the proceeding, seeking all possible aid from the juvenile on decisions regarding court proceedings;
3. make sure the juvenile fully understands all court proceedings, as well as all his or her rights and defenses;
4. upon appointment, counsel should first seek to meet separately with the juvenile out of the presence of the parent;[1]
5. not discuss any attorney-client privileged communications with the parent, or any other person, without the express permission of the juvenile;
6. fully inform both the juvenile and juvenile's parents about counsel's role, especially clarifying the lawyer's obligation regarding confidential communications;

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[1]The use of the word "parent" in these Standards refers to parent, guardian, custodial adult, or person assuming legal responsibility for the child.

7. present the juvenile with comprehensible choices, help the juvenile reach his or her own decisions, and advocate the juvenile's viewpoint and wishes to the court; and

8. refrain from waiving substantial rights or substituting counsel's own view, or the parents' wishes, for the position of the juvenile.

(b) Counsel may request the appointment of a guardian ad litem, or may elect not to oppose such an appointment, only when very unusual circumstances warrant such an appointment. Every effort should be made to limit the role of the guardian ad litem to the minimum required for him/her to accomplish the purpose for which the appointment was made. In most cases, both the guardian and the client should be instructed not to discuss the facts of the case as this discussion may not be privileged.

Standard 2: Education, Training, and Experience of Defense Counsel

(a) Counsel who undertake the representation of a client in a juvenile delinquency proceeding shall have the knowledge and experience necessary to represent a child diligently and effectively.

(b) Counsel should consider working with an experienced juvenile delinquency practitioner as a mentor when beginning to represent clients in delinquency cases.

(c) At a minimum, counsel should attend 4 hours of CLE relevant to juvenile defense annually.

(d) Counsel shall familiarize themselves with Nevada statutes relating to delinquency proceedings, as well as the Nevada Rules of Criminal Procedure, Nevada Rules of Evidence, Nevada Rules of Appellate Procedure, relevant caselaw, and any relevant local court rules. Counsel should be knowledgeable about and seek ongoing formal and informal training in the following areas:

1. Competency and Developmental Issues:
   (A) Child and adolescent development;
   (B) Brain development;

(C) Mental health issues, common childhood diagnoses, and other disabilities; and

(D) Competency issues and the filing and processing of motion for competency evaluations.

2. Attorney/Client Interaction:

(A) Interviewing and communication techniques for interviewing and communicating with children, including police interrogations and Miranda considerations;

(B) Ethical issues surrounding the representation of children and awareness of the role of the attorney; and

(C) Awareness of the role of the attorney versus the role of the guardian ad litem, including knowledge of how to work with a guardian ad litem

3. Department of Juvenile Justice Services/Other State and Local Programs:

(A) Diversion services available through the court and probation;

(B) The child welfare system and services offered by the child welfare system;

(C) Nevada Department of Child and Family Services facility operations, release authority, and parole policies;

(D) Community resources and service providers for children and all alternatives to incarceration available in the community for children;

(E) Intake, programming, and education policies of local detention facility;

(F) Probation department policies and practices; and

(G) Gender specific programming available in the community.

4. Specific Areas of Concern:

(A) Police interrogation techniques and Miranda consideration, as well as other Fourth, Fifth, and Sixth Amendment issues as they relate to children and adolescents;

(B) Substance abuse issues in children and adolescents;

(C) Special education laws, rights, and remedies;

(D) Cultural diversity;

(E) Immigration issues regarding children;

(F) Gang involvement and activity;

(G) School-related conduct and zero tolerance policies ("school to prison pipeline" research, search and seizure issues in the school setting);

(H) What factors lead children to delinquent behaviors;

(I) Signs of abuse and/or neglect;

(J) Issues pertaining to status offenders; and

(K) Scientific technologies and evidence collection.

Standard 3: Adequate Time and Resources

Counsel should not carry a workload that by reason of its excessive size or representation requirements interfere with the rendering of quality legal service, endangers the juvenile's interest in the speedy disposition of charges, or risks breach of professional obligations. Before agreeing to act as counsel or accepting appointment by a court, counsel has an obligation to make sure that he or she has sufficient time, knowledge, and experience and will pursue adequate resources to offer quality legal services in a particular matter. If, after accepting an appointment, counsel finds he or she is unable to continue effective representation, counsel should consider appropriate caselaw and ethical standards in deciding whether to move to withdraw or take other appropriate action. Counsel must maintain an appropriate, professional office in which to consult with clients and witnesses and must maintain a system for receiving collect telephone calls from incarcerated clients.

Standard 4: Initial Client Interview

(a) Preparing for the Initial Interview: Prior to conducting the initial interview, the attorney should:

1. be familiar with the elements of the offense and the potential punishment;

2. obtain copies of relevant documents that are available, including copies of any charging documents, recommendations, and reports made by the Department of Juvenile Justice and law enforcement;
3. be familiar with detention alternatives and the procedures that will be followed in setting those conditions;
4. consider all possible defenses and affirmative defenses and any lesser-included offenses that may be available;
5. consider the collateral consequences attaching to any possible sentencing, for example parole or probation revocation, immigration consequences, sex offender registration and reporting provisions, loss of driving privileges, DNA collection, school suspension or expulsion, consequences relating to public housing, etc.; and
6. review the petition for any defects.

(b) Counsel shall make every effort to conduct a face-to-face interview with the client as soon as practicable and sufficiently in advance of any court proceedings. In cases where the client is detained or in custody, counsel should make efforts to visit with the client within 24-48 hours after receiving the appointment. Counsel should:

1. interview the client in a setting that is conducive to maintaining the confidentiality of communications between attorney and client;
2. maintain ongoing communications and/or meetings with the client, which are essential to establishing a relationship of trust between the attorney and client;
3. provide the client with a method to contact the attorney, including information on calling collect from detention facilities;
4. utilize the assistance of an interpreter as necessary and seek funding for such interpreting services from the court;
5. work cooperatively with the parents, guardian, and/or other person with custody of the child to the extent possible without jeopardizing the legal interests of the child;
6. consider the client's age, developmental stage, mental retardation, and mental health diagnoses in all cases, understand the nature and

consequences of a competency proceeding, and resolve issues of raising or not raising competency in consultation with the client; and

7. be alert to issues that may impede effective communication between counsel and client and ensure that communication issues such as language, literacy, mental or physical disability, or impairment are effectively addressed to enable the client to fully participate in all interviews and proceedings. Appropriate accommodations should be provided during all interviews, preparation, and proceedings, which might include the use of interpreters, mechanical or technological supports, or expert assistance.

Standard 5: Detention Hearing

(a) When appropriate, counsel shall attempt to obtain the pretrial release of any client. Counsel shall advocate for the use of alternatives to detention for the youth at the detention hearing. Such alternatives might include electronic home monitoring, day or evening reporting centers, utilization of other community-based services such as after school programming, etc. If counsel is appointed after the initial detention hearing or if the youth remains detained after the initial detention hearing, counsel shall consider the filing of a motion to review the detention decision.

(b) If the youth's release from secure detention is ordered by the court, counsel shall carefully explain to the juvenile the conditions of release from detention and any obligations of reporting or participation in programming. Counsel should take steps to secure appointment of counsel to juveniles prior to the detention hearing.

Standard 6: Informal Supervision/Diversion

Counsel shall be familiar with all available alternatives offered by the court or available in the community. Such programs may include diversion, mediation, or other informal programming that could result in a juvenile's case being dismissed, handled informally, or referred to other community programming. When appropriate

and available, counsel shall advocate for the use of informal mechanisms that could steer the juvenile's case away from the formal court process.

Standard 7: Case Preparation and Investigation

A thorough investigation by defense counsel is essential for competent representation of youth in delinquency proceedings. The duty to investigate exists regardless of the youth's admissions or statements to defense counsel of facts or the youth's stated desire to plead guilty. Counsel should:

(a) obtain and examine all charging documents, pleadings, and discovery;

(b) request and secure discovery, including exculpatory/impeaching information;

(c) request the names and addresses of prosecution witnesses, their prior statements, and criminal records;

(d) obtain the prior statements of the client and his or her delinquency history; all papers, tapes, or electronic recordings relevant to the case; expert reports and data upon which they are based, statements of co-defendants, an inspection of physical evidence, all documents relevant to any searches conducted, 911 tapes and dispatch reports, records of the client, including, but not limited to, educational, psychological, psychiatric, substance abuse treatment, children services records, court files, and prior delinquency records and be prepared to execute any needed releases of information or obtain any necessary court orders to obtain these records;

(e) research and review the relevant statutes and caselaw to identify elements of the charged offense(s), defects in the prosecution, and available defenses;

(f) conduct an in-depth interview of the client to assist in shaping the investigation;

(g) consider seeking the assistance of an investigator when necessary and consider moving the court for funding to pay for the use of an investigator;

(h) attempt to locate all potential witnesses and have them interviewed (if counsel conducts a witness interview, counsel should do so in the presence of a third person who can be called as a witness);

(i) obtain the assistance of such experts as are appropriate to the facts of the case;

(j) consider going to the scene of the alleged offense or offenses in a timely manner;

(k) consider the preservation of evidence and document such by using photographs, measurements, and other means; and

(l) be mindful of all requirements for reciprocal discovery and be sure to provide such in a timely manner.

Standard 8: Pretrial Motions

Counsel should consider filing an appropriate motion whenever there exists a good-faith reason to believe that the applicable law may entitle the client to relief that the court has discretion to grant. Counsel shall review all statements, reports, and other evidence and interview the client to determine whether any motions are appropriate. Counsel should timely file all appropriate pretrial motions and participate in all pretrial proceedings.

(a) The decision to file pretrial motions should be made after thorough investigation and after considering the applicable law in light of the circumstances of the case. Among the issues that counsel should consider addressing in a pretrial motion are:

1. the pretrial detention of the client;
2. the constitutionality of the implicated statute(s);
3. defects in the charging process or the charging document;
4. severance of charges or defendants;
5. discovery issues;
6. suppression of evidence or statements;
7. speedy trial issues; and
8. evidentiary issues.

(b) Counsel should only withdraw or decide not to file a motion after careful consideration, and only after determining whether the filing of a motion may be necessary to protect the client's rights against later claims of waiver or procedural default.

(c) Motions should be filed in a timely manner and with an awareness of the effect of filing the motion on the client's speedy trial rights. When an evidentiary hearing is scheduled on a motion, counsel's preparation for the hearing should include:

1. investigation, discovery, and research relevant to the claim advanced;
2. subpoenaing of all helpful evidence and witnesses; and
3. full understanding of the burdens of proof, evidentiary principles, and trial court procedures applying to that hearing, including the benefits and costs of having the client testify.

(d) Requests or agreements to continue a contested hearing date shall not be made without consultation with the client. Counsel shall diligently work to complete the investigation and preparation in order to be fully prepared for all court proceedings. In the event that counsel finds it necessary to seek additional time to adequately prepare for a proceeding, counsel should consult with the client and discuss seeking a continuance of the upcoming proceeding. Whenever possible, written motions for continuance made in advance of the proceeding are preferable to oral requests for continuance. All requests for a continuance should be supported by well-articulated reasons on the record in the event it becomes an appealable issue.

Standard 9: Plea Negotiations

(a) Under no circumstances should defense counsel recommend to a client acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.

(b) Counsel should:

1. with the consent of the client, explore diversion and other informal and formal admission of disposition agreements with regard to the allegations;
2. fully explain to the client the rights that would be waived by a decision to enter into any admission or disposition agreement;
3. keep the client fully informed of the progress of the negotiations;

4. convey to the client any offers made by the prosecution and the advantages and disadvantages of accepting the offers;

5. continue to preserve the client's rights and prepare the defense notwithstanding ongoing negotiations; and

6. not enter into any admission or disposition agreement on behalf of the client without the client's authorization.

(c) In developing a negotiation strategy, counsel must be completely familiar with:

1. concessions that the client might offer the prosecution as part of a negotiated settlement, including, but not limited to:

(A) not to proceed to trial on the merits of the charges;

(B) to decline from asserting or litigating particular pretrial motions;

(C) an agreement to fulfill specified restitution conditions and/or participation in community work or service programs, or in rehabilitation or other programs; and

(D) providing the prosecution with assistance in prosecuting or investigating the present case or other alleged criminal/delinquent activity.

2. benefits the client might obtain from a negotiated settlement, including, but not limited to:

(A) that the prosecution will not oppose the client's release pending disposition or appeal;

(B) that the client may enter a conditional plea to preserve the right to litigate and contest certain issues affecting the validity of the conviction;

(C) that one or more of the charged offenses may be dismissed or reduced either immediately or upon completion of a deferred prosecution agreement;

(D) that the client will not be subject to further investigation or prosecution for uncharged alleged delinquent conduct;

(E) that the client will receive, with the agreement of the court, a specified sentence or sanction;

(F) that the prosecution will take, or refrain from taking, at the time of disposition and/or in communications with the probation department a specified position with respect to the sanction to be imposed on the client by the court; and

(G) that the client will receive, or the prosecution will recommend, specific benefits concerning the client's place and /or manner of confinement and/or release on probation.

(d) In the decision-making process, counsel should:

1. inform the client of any tentative negotiated agreement reached with the prosecution, explain to the client the full content of the agreement, and explain advantages, disadvantages, and potential consequences of the agreement; and

2. not attempt to unduly influence the decision, as the decision to enter a plea of guilty rests solely with the client; where counsel reasonably believes that acceptance of a plea offer is in the best interest of the client, counsel should advise the client of the benefits of this course of action.

(e) Prior to the entry of the plea, counsel should meet with the client in a confidential setting that fosters full communication and:

1. make certain that the client understands the rights he or she will waive by entering the plea and that the client's decision to waive those rights is knowing, voluntary, and intelligently made;

2. make certain that the client fully and completely understands the conditions and limits of the plea agreement and the maximum punishment, sanctions, and other consequences the client will be exposed to by entering the plea; and

3. explain to the client the nature of the plea hearing and prepare the client for the role he or she will play in the hearing, including answering questions of the judge, and providing a statement concerning the offense.

(f) After entry of the plea, counsel should:

1. be prepared to address the issue of release pending disposition hearing. Where the client has been released, counsel should be

prepared to argue and persuade the court that the client's continued release is warranted and appropriate. Where the client is in custody prior to the entry of the plea, counsel should, where practicable, advocate for the client's release pending disposition; and

2. make every effort to review and explain the plea proceedings with the client and to respond to any client questions and concerns.

Standard 10: Adjudicatory Hearing

(a) Counsel should develop a theory of the case in advance of the adjudicatory hearing. Counsel shall issue subpoenas and obtain court orders for all necessary evidence to ensure the evidence's availability at the adjudicatory hearing. Sufficiently in advance of the hearing, counsel shall subpoena all potential witnesses. Where appropriate, counsel should have the following materials available at the time of the contested hearing:

1. copies of all relevant documents filed in the case;
2. relevant documents prepared by investigators;
3. outline or draft of opening statement;
4. cross-examination plans for all prospective prosecution witnesses;
5. direct examination plans for all prospective defense witnesses;
6. copies of defense subpoenas;
7. prior statements of all prosecution witnesses;
8. prior statements of all defense witnesses;
9. reports from all experts;
10. a list and copies of originals of defense and prosecution exhibits;
11. copies of all relevant statutes or cases; and
12. outline or draft of closing argument.

(b) Counsel should be fully informed as to the rules of evidence and the law relating to all stages of the trial process and should be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the trial.

(c) Counsel should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (e.g., admissibility of evidence), and where appropriate,

counsel should prepare motions and memoranda in support of the client's position.

(d) Throughout the adjudicatory process, counsel should endeavor to establish a proper record for appellate review. As part of this effort, counsel should request, whenever necessary, that all discussions and rulings be made on the record.

(e) Counsel should advise the client as to suitable courtroom dress and demeanor.

(f) Counsel should plan with the client the most convenient system for conferring throughout the contested hearing.

(g) During the adjudicatory hearing, counsel shall raise objections on the record to any evidentiary issues; in order to best preserve a client's appellate rights, counsel shall object on the record and state the grounds for such objection following the courts denial of any defense motion.

(h) Counsel shall ensure that an official court record is made and preserved of any pretrial hearings and the adjudicatory hearing.

(i) Counsel shall utilize expert services when appropriate and petition the court for assistance in obtaining expert services when necessary.

(j) Counsel should anticipate weaknesses in the prosecution's proof and consider appropriate motions for judgment of acquittal at all appropriate stages of the litigation.

(k) Counsel should consider the strategic advantages and disadvantages of entering into any stipulations.

(l) In preparing for cross-examination, counsel should:

1. be prepared to question witnesses as to the existence of prior statements that they may have made or adopted;
2. consider the need to integrate cross-examination, theory, and theme of the defense;
3. avoid asking unnecessary questions that may hurt the defense case;
4. anticipate evidence that the prosecution may call in its case-in-chief and on rebuttal;
5. create a cross-examination plan for all anticipated witnesses;

6. review all prior statements and testimony of the witnesses in order to be aware of all inconsistencies or variances; and
7. review relevant statutes, regulations, and policies applicable to police witnesses and consider a pretrial motion or voir dire examination of prosecution experts to determine qualifications of experts or reliability of the anticipated opinion.

Standard 11: Presenting the Client's Case

(a) Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not putting on a defense case and instead relying on the prosecution's failure to meet its constitutional burden of proving each element beyond a reasonable doubt.

(b) Counsel should discuss with the client all of the considerations relevant to the client's decision to testify. Counsel should also be familiar with his or her ethical responsibilities that may be applicable if the client insists on testifying untruthfully. Counsel should maintain a record of the advice provided to the client and the client's decision concerning whether to testify.

(c) Counsel should be aware of the elements of any affirmative defense and know whether, under the applicable law of the jurisdiction, the client bears a burden of persuasion or a burden of production.

(d) In preparing for presentation of a defense case, counsel should, where appropriate, do the following:

1. develop a plan for direct examination of each potential witness;
2. determine the implications that the order of witnesses may have on the defense case;
3. determine which facts necessary for the defense case can be elicited through the cross-examination of the prosecution's witnesses;
4. consider the possible use of character witnesses;
5. consider the need for expert witnesses and what evidence must be submitted to lay the foundation for the expert's testimony;
6. review all documentary evidence that must be presented; and

7. review all tangible evidence that must be presented.

(e) In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecutor.

(f) Counsel should prepare all witnesses for direct and possible cross-examination. Where appropriate, counsel should also advise witnesses of suitable courtroom dress and demeanor.

(g) Counsel should conduct redirect examination as appropriate.

Standard 12: Objections to the Hearing Master's Recommendations

Counsel shall advise client of the role of the Hearing Master and the procedure and purpose of filing objections to the Hearing Master's findings and recommendations. Counsel shall review the Hearing Master's decision for possible meritorious grounds for objection. If the Hearing Master's decision does not contain findings of facts and conclusions of law, counsel shall request in writing such findings of facts and conclusions of law in accordance with NRS 62B.030(3) Counsel shall ensure that the transcript of the proceeding is timely obtained and objections are timely filed in accordance with NRS 62B.030(4). Counsel shall draft and file objections and supplemental points and authorities with specificity and particularity and participate in the oral argument if scheduled.

Standard 13: Preparation for the Disposition Hearing

Preparation for disposition should begin upon appointment. Counsel should:

(a) be knowledgeable of available dispositional alternatives both locally and outside of the community;

(b) review, in advance of the dispositional hearing, the recommendations of the probation department or other court department responsible for making dispositional recommendations to the court;

(c) inform their client of these recommendations and other available dispositional alternatives; and

(d) be familiar with potential support systems of the client such as school, family, and community programs and consider whether such supportive services could be part of a dispositional plan.

Standard 14: The Disposition Process

During the disposition process, counsel should:

(a) correct inaccurate information that may be detrimental to the client and object to information that is not properly before the court in determining the disposition;

(b) present to the Court all known and reasonably available mitigating and favorable information, including relevant expert testimony or reports;

(c) develop a plan that seeks to achieve the least restrictive and burdensome disposition alternative and that can reasonably be obtained based on the facts and circumstances of the offense, the client's background, the applicable disposition and alternatives, and other information pertinent to the disposition decision;

(d) consider filing a memorandum setting forth the defense position with the court prior to the dispositional hearing;

(e) maintain contact with the client prior to the disposition hearing and inform the client of the steps being taken in preparation for sentencing;

(f) obtain from the client and/or the client's family relevant information concerning his or her background and personal history, prior delinquency record, employment history, education, and medical history and condition and obtain from the client sources that can corroborate the information provided;

(g) request any necessary and appropriate client evaluations, including those for mental health and substance abuse;

(h) ensure the client has an opportunity to examine the disposition report;

(i) inform the client of his or her right to speak at the disposition hearing and assist the client in preparing the statement, if any, to deliver to the court;

(j) inform the client of the effects that admissions and other statements may have upon an appeal, retrial, or other judicial proceedings;

(k) collect affidavits to support the defense position when appropriate and prepare witnesses to testify at the sentencing hearing and request the opportunity to present tangible and testimonial evidence;

(l) prepare to address victim participation either through the victim impact statement or by direct testimony at the disposition hearing; and

(m) ensure that an official court record is made and preserved of any disposition hearing.

Standard 15: The Disposition Report

Counsel should:

(a) become familiar with the procedures concerning the preparation, submission, and verification of the disposition report;

(b) prepare the client for the interview with the official preparing the disposition report;

(c) determine whether a written disposition report will be prepared and submitted to the court prior to the disposition hearing; where preparation of the report is optional, counsel should consider the strategic implications of requesting report;

(d) provide to the official preparing the report relevant information favorable to the client, including, where appropriate, the client's version of the offense;

(e) attend any interview of the client by an agency disposition investigator where appropriate; review the completed report prior to sentencing;

(f) take appropriate steps to ensure that erroneous or misleading information that may harm the client is deleted from the report; and

(g) take reasonable steps to ensure that a corrected copy of the report is sent to corrections officials if there are any amendments made to the report by the court.

Standard 16: Post-Disposition Responsibilities/Advocacy

Following the disposition hearing, counsel should:

(a) review the disposition order to ensure that the sentence is clearly and accurately recorded and take steps to correct any errors and ensure that it includes language regarding detention credits and plea agreements;

(b) be aware of sex offender registration requirements and other requirements, both state and federal, imposed on sex offenders and communicate those requirements to the client;

(c) be familiar with the procedure for sealing and expunging records, advise the client of those procedures, and utilize those procedures when available;

(d) be familiar with the procedures to request a new contested hearing, including the time period for filing such a motion, the effect it has upon the time to file a notice of appeal, and the grounds that can be raised and advise the client of his or her rights with regard to those procedures;

(e) inform the client of his or her rights to representation and to appeal an adjudication after a contested hearing, after a conditional plea or after an admission that was not entered in a knowing, intelligent, and voluntary manner and document the client's decision regarding appeal;

(f) ensure that the notice of appeal and request for appointment of counsel is filed, or that the client has obtained or the court has appointed, appellate counsel in a timely manner even if counsel believes that an appeal will not be successful or is not cognizable;

(g) timely respond to requests from appellate counsel for information about or documents from the case, when appellate counsel was not trial counsel;

(h) inform the client of any right that may exist to be released pending disposition of the appeal;

(i) consider requesting a stay of execution of the judgment to permit the client to report directly to the place of confinement, if a custodial sentence is imposed; and

(j) include in the advice to the client, an explanation of the limited nature of the relief available on direct appeal and, where appropriate, an explanation of the remedies available to him or her in post-adjudication proceedings.

Standard 17: Transfer Proceedings to Adult Court

(a) Transfer proceedings require special knowledge and skill due to the severity of the consequence of the proceedings. Counsel shall not undertake representation of children in these areas without sufficient experience, knowledge, and training in these unique areas. It is recommended that counsel representing children in transfer proceedings have litigated at least 2 criminal jury trials or be assisted by co-counsel with the requisite experience.

(b) Counsel representing juveniles in transfer proceedings should:

1. be fully knowledgeable of adult criminal procedures and sentencing;
2. be fully knowledgeable of the legal issues regarding probable cause hearings and transfer proceedings;
3. investigate the social, psychological, and educational history of the child;
4. retain or employ experts including psychologists, social workers, and investigators in order to provide the court with a comprehensive analysis of the child's strengths and weaknesses in support of retention of juvenile jurisdiction;
5. be knowledgeable of the statutory findings the court must make before transferring jurisdiction to the criminal court and any caselaw affecting the decision;
6. be prepared to present evidence and testimony to prevent transfer, including testimony from teachers, counselors, psychologists, community members, probation officers, religious associates, employers, or other persons who can assist the court in determining that juvenile jurisdiction should be retained;
7. ensure that all transfer hearing proceedings are recorded;
8. preserve all issues for appeal; and

9. investigate possible placements for the client if the case remains in juvenile court.

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor	COURT MINUTES	November 02, 2015

10C265506 State of Nevada
vs
Tyrone James

November 02, 2015 **3:00 PM** **Minute Order: In Camera Review**

HEARD BY: Gonzalez, Elizabeth **COURTROOM:** RJC Courtroom 14C

COURT CLERK: Dulce Romea

PARTIES PRESENT: None. Minute order only – no hearing held.

JOURNAL ENTRIES

- Court reviewed records submitted for in camera review. Pages numbered 1-13 and CD containing medical records printed and numbered as 14-52 are relevant to Defense's investigation. Therefore, 1-13 are ORDERED released and 14-52 released with an acknowledgment that these records include information protected by HIPPA and counsel acknowledges any disclosure must be limited to the expert who will keep records confidential and any filings to be submitted with an appropriate motion to seal those records. Court RETAINS original of submission as SEALED Court's Exhibit 1. CD containing medical records is available for review and comparison if deemed necessary by counsel. Documents numbered as 1-13 are marked as Court's Exhibit 2. Documents numbered as 14-52 are marked as Court's Exhibit 3 and SEALED.

NDC

CLERK'S NOTE: Exhibits LODGED with the Vault. (See worksheet.) A copy of this minute order was distributed via electronic mail to Deputy District Attorney Ryan MacDonald and to Attorney Margaret McLetchie for the Petitioner. / dr 11-2-15

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

TYRONE JAMES,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

CASE NO.: 10C265506
DEPT. NO.: XI

SUPPLEMENT TO SUPPLEMENTAL PETITION FOR POST-CONVICTION WRIT OF HABEAS CORPUS

Comes now Petitioner Tyrone James, by and through his counsel of record, Margaret A. McLetchie of McLetchie Shell LLC, and hereby submits this Supplement to his Supplemental Petition for Post-Conviction Writ of Habeas Corpus, supplementing his previously filed Petition for Writ of Habeas Corpus, pursuant to Nev. Rev. Stat. § 44.270 et seq., and order of this honorable Court.

Respectfully submitted this 15th day of January, 2016.

MARGARET A. MCLETCHIE, Nevada Bar No. 10931
MCLETCHIE SHELL LLC
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Telephone: (702) 728-5300
Attorney for Petitioner

I. INTRODUCTION

On September 23, 2010, after a three-day trial, a jury found Petitioner Tyrone James guilty of two counts of Sexual Assault With a Minor Under Sixteen Years of Age, in violation of Nev. Rev. Stat. §§ 200.364 and 200.366; two counts of Open and Gross Lewdness, in violation of Nev. Rev. Stat. § 201.210; and one count of Battery With Intent to Commit a Crime, in violation of Nev. Rev. Stat. § 200.400 in connection with the alleged sexual assault of T.H., a fifteen-year-old girl. [1] (*See* Exh. 14; JAMES0454 (verdict form).)

As set forth in Mr. James' Supplemental Petition for Post-Conviction Writ of Habeas Corpus ("Supplemental Petition"), Mr. James' trial counsel provided ineffective assistance of counsel by failing to retain an expert to rebut testimony from the State's expert witness that her medical examination of T.H., the victim in this case, demonstrated Mr. James had sexually assaulted T.H. The State's expert, Dr. Theresa Vergara was an attending physician at Sunrise Children's Hospital who conducted a Suspected Child Abuse and Neglect (SCAN) examination on T.H. to determine whether she had been sexually assaulted. The need to rebut her testimony that T.H. had been assaulted was clear because Dr. Vergara's testimony was central to the State's case. Additionally, as described in the Supplemental Petition and explored in Mr. James' expert report discussed below, Dr. Vergara's medical observations were too non-specific to definitively indicate T.H. had been sexually assaulted. Moreover, as the expert report explains, the examination form Dr. Vergara used during her examination of T.H. has been rejected by the medical community.

Dr. Vergara testified that the only physical anomaly she observed during her examination of T.H. was "generalized swelling" of the introitus of T.H.'s vagina. (*See* Supplemental Petition at p. 6:3-5; *see also* Exh. 12; JAMES0300; JAMES0302.) Although she testified that this swelling was consistent with trauma (*see* Exh. 12; JAMES0301; JAMES0307), she admitted on cross-examination that her findings were too non-specific to

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[1] Pursuant to Nev. Rev. Stat. § 200.3771(1), court records which reveal the identity of a victim of a sexual offense are considered confidential. Thus, to protect the confidentiality of the victim in this case, Mr. James refers to the victim only by her initials. Additionally, to comply with § 200.3771, Mr. James also submits the appendix to this supplemental petition under seal.

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definitively conclude that the swelling was caused by a sexual assault. (Exh. 12; JAMES0306-JAMES0307.)

The expert report attached to this Second Supplemental Petition (*see* Exh. 26) confirms that the swelling Dr. Vergara observed was too non-specific for Dr. Vergara to definitively conclude that it was caused by sexual assault. It also illustrates that the SCAN examination form Dr. Vergara used during her assessment of T.H. included an overall assessment section that the medical community has rejected. Rather than confining a medical provider to making findings based on clinical observations, the improper form Dr. Vergara used permits sexual assault examiners to make subjective findings about sexual abuse. (*See* Exh. 5 to Supplemental Petition; JAMES0054.) Thus, had trial counsel retained an expert to review Dr. Vergara's report, trial counsel could have rebutted not just Dr. Vergara's findings and testimony, but also the methodology she relied on in reaching her findings. For these reasons, and for the reasons set forth in Mr. James' Supplemental Petition, Mr. James was denied effective assistance of counsel in violation of his Sixth Amendment rights.

II. RELEVANT PROCEDURAL HISTORY

On March 14, 2013, Mr. James filed a pro se petition for a writ of habeas corpus. (*See* Exh. 20 to Supplemental Petition; JAMES0551.) This Court subsequently appointed undersigned counsel to represent Mr. James. After appointment to this case, undersigned counsel moved this Court for an order permitting Mr. James to retain an expert witness to conduct an independent examination of Dr. Vergara's SCAN examination report. The Court entered an order granting that motion on January 15, 2015. Mr. James then retained Dr. Joyce A. Adams to evaluate the records in this case. On February 6, 2015, the Court issued an order to Sunrise Hospital directing it to release all medical records pertaining to T.H.

As discussed in Mr. James' Supplemental Petition, which was filed with this Court on September 4, 2015, the records Sunrise Hospital released did not include photographs.(*see* Supplemental Petition at p.11, n.4) Mr. James made several efforts to obtain the photographic evidence discussed in Dr. Vergara's report. On April 7, 2015, after efforts to obtain the photos or videos from Sunrise Hospital failed, Mr. James filed a motion requesting this Court

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enter an order directing the Las Vegas Metropolitan Police Department (LVMPD) and the Clark County Department of Family Services/Child Protective Services (DFS/CPS) to release all medical records pertaining to the medical examination of T.H. to counsel.

On June 8, 2015, the Court entered an order directing the Department of Family Services to release the requested medical examination records, under seal, to the Court for in camera inspection. The Court entered another order that same day also directing LVMPD to release all records pertaining to Ms. H[redacted]' medical examination to the Court, under seal, for in camera inspection. The Court then released the records to undersigned counsel. Once again, however, the records did not contain photographs or video.

On October 15, 2015, after filing his Supplemental Petition, Mr. James moved this Court to issue a subpoena to Sunrise Hospital to produce all medical records pertaining to T.H.'s examination to the Court for an *in camera* review. The Court entered the order the same day. On November 2, 2015, the Court issued a minute order releasing those records to counsel for Mr. James.

Once more, the records release by Sunrise Hospital did not include any photographic evidence. However, even in the absence of the photographic evidence, Dr. Adams was able to review medical records pertinent to Dr. Vergara's examination of T.H. and prepare a report. (*See* Exh. 26 (Report of Dr. Joyce A. Adams).)

As indicated above and discussed in detail below, Dr. Adams' report indicates that Dr. Vergara's finding of swelling in T.H.'s vaginal area was too non-specific to lead to a definitive conclusion that Mr. James sexually assaulted T.H., and further indicates that Dr. Vergara relied on an evaluation which has been rejected as unreliable by members of the medical community.

III. ARGUMENT

A. Legal Standard: A Petitioner Must Demonstrate Deficient Performance and Prejudice to Establish Ineffective Assistance of Counsel.

As detailed in Mr. James' Supplemental Petition, a claim of ineffective assistance of counsel is evaluated pursuant to the two-part test set forth in *Strickland v. Washington*,

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466 U.S. 668, 687 (1984); a*ccord Warden v. Lyons*, 100 Nev. 430 (1984). First, a petitioner must demonstrate deficient performance and second, resulting prejudice. *Strickland*, 466 U.S. at 687. Deficient performance is that which falls below an objective standard of reasonableness. *Id.* Second, prejudice is found where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

The Nevada Supreme Court has held that in order to prevail in a habeas petition, a petitioner 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 (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. *Larson v. St*ate, 104 Nev. 691, 689-90 (1988).

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 (1996). In evaluating habeas claims, a court thus determines whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance. *Id.* at 690. The reviewing court must evaluate the complained of conduct under the circumstances and from counsel's perspective at the time. *Kirksey v. State*, 112 Nev. 980, 987-88 (1996).

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

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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) (quoting Strickland, 466 U.S. at 690-91). 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).

Although the Supreme Court has declined to articulate specific guidelines for appropriate attorney conduct, "general principles have emerged regarding the duties of criminal defense attorneys that inform our view as to the 'objective standard of reasonableness' by which we assess attorney performance, particularly with respect to the duty to investigate." *Summerlin v. Schriro*, 427 F.3d 623, 629 (9th Cir. 2005) (en banc).

"In 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." *Gersten v. Senkowski*, 426 F.3d 588, 607 (2d Cir. 2005) (citations omitted). "It is difficult to imagine a child abuse cases . . . where the defense would not be aided by the assistance of an expert." Beth A. Townsend, *Defending the "Indefensible": A primer to Defending Allegations of Child Abuse*, 45 A.F.L. Rev. 265, 270 (1998) (Attached hereto as Exhibit 27.) As explained in *Defending the Indefensible*:

> In a case involving physical allegations, the defense counsel should have a dedicated defense expert review the evidence. This expert can assist the defense with cross-examination of the government's expert, provide alternative explanations for the physical findings, and may assist in ensuring the government expert's testimony is accurate.

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(Exh 27, JAMES0664.) Expert assistance is particularly necessary where, as here, the physical evidence against Mr. James was so scant. Had trial counsel consulted with an medical expert, trial counsel could have questioned Dr. Vergara about the methodology she used to conclude that T.H. was abused, as well as the inconclusiveness of her assessment. Had trial counsel done so, there is a probability that the jury may have found there was insufficient evidence that Mr. James sexually assaulted T.H.

B. 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 Regarding Her Conclusion That T.H. Was Sexually Abused.

Trial counsel provided ineffective assistance of counsel by failing to hire an expert to review and rebut Dr. Vergara's finding that T.H. was sexually assaulted. The failure to hire an expert was objectively unreasonable in this case, particularly given the inconclusive results of Dr. Vergara's SCAN examination. The Report of Dr. Adams evidences this, and shows that a rebuttal expert was necessary in this case. The failure to retain an expert therefore deprived Mr. James of his right to a fair trial.

1. Dr. Vergara's Report and Testimony

Following her alleged sexual assault, T.H. was examined by Dr. Theresa Vergara, an attending physician at Sunrise Children's Hospital. (Exh. 12; JAMES0292.) Dr. Vergara conducted a Suspected Child Abuse and Neglect (SCAN) examination on T.H. to determine whether she had been sexually assaulted. (Exh. 12; JAMES0293; JAMES0296.) Dr. Vergara testified that, consistent with a typical SCAN examination, she examined T.H. "from head to toe," and then examined her genital area. (Exh. 12; JAMES0298.) 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. (Exh. 12; JAMES0299.) Dr. Vergara also swabbed T.H.'s genitalia to test for other evidence, including DNA.[2] (*Id.*; *see also* Exh. 11;

[2] The police did not find Mr. James' DNA in the samples Dr. Vergara obtained. (Exh. 11; JAMES0137-JAMES0138.)

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JAMES0137 (Det. Tamaino testifies that DNA samples were taken during SCAN examination).) Dr. Vergara prepared a lengthy report documenting the findings of her examination. (Exh. 5; JAMES0016.)

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. (Exh. 12; JAMES0300; JAMES0302.) Based on her observations, Dr. Vergara concluded that the generalized swelling she observed indicated "Probable Abuse." (Exh. 5; JAMES0028.) Dr. Vergara testified that this swelling was possibly caused by the trauma of penetration. (Exh. 12; JAMES0300-JAMES0301.)

Although Dr. Vergara testified the generalized swelling she observed could be caused by trauma, she admitted it could be caused by other things. (Exh. 12; JAMES0301; JAMES0307.) 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. (Exh. 12; JAMES0306-JAMES0309.)

2. Dr. Adams' Report Rebuts Dr. Vergara's Testimony That T.H. Was Sexually Abused.

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. (Exh. 26, JAMES0651.) 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." (Exh. 26, JAMES0651.) 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,

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causing tissues to have a fuller look." (*Id.*) Other causes of the swelling can include a yeast infection or infection with the herpes virus. (Exh. 26, JAMES0652.) 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. (*Id.*; *see also* Exh. 5, JAMES0054 (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." (Exh. 28, JAMES0694.)

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

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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.

(*See* Exh. 28, JAMES0694) (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. (*See id.*; *see also* Exh. 26, JAMES0652.) 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." (*Id.*) 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." (Exh. 26, JAMES0653.) 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.

In sum, Dr. Adams' findings contradict the testimony from Dr. Vergara, and undermine the reliability of the methods she used to assess T.H. Had trial counsel retained an expert, he could have, at the very least, 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

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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. As explained in the Supplemental Petition, this case 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 very 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. Defense counsel's failure to retain an expert was therefore objectively unreasonable, and deprived Mr. James of his right to a fair trial.

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IV. CONCLUSION

For these reasons, and the reasons previously set forth in his Supplemental Petition, Mr. James was denied effective assistance of counsel in violation of his Sixth Amendment rights. Accordingly, Mr. James respectfully requests this Court grant his petition for a writ of habeas corpus.

Respectfully submitted this 15th day of January, 2016.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b)(2)(B) I hereby certify that on the 15th day of January, 2015, I mailed a true and correct copy of the foregoing SUPPLEMENT TO SUPPLEMENTAL PETITION FOR POST-CONVICTION WRIT OF HABEAS CORPUS by depositing the same in the United States mail, first-class postage pre-paid, to the following address:

ADAM LAXALT, ESQ., Attorney General
100 North Carson Street
Carson City, NV 89701

RYAN MACDONALD, ESQ., Deputy District Attorney
RACHEL O'HALLORAN, ESQ., Deputy District Attorney
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TYRONE JAMES, ID # 1063523
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Petitioner

Certified by: _____
An Employee of McLetchie Shell LLC

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CLERK OF THE COURT

APEN
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DISTRICT COURT

CLARK COUNTY, NEVADA

TYRONE JAMES,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

CASE NO.: 10C265506

DEPT. NO.: XI

APPENDIX OF EXHIBITS TO SUPPLEMENT TO SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS

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This appendix contains the following exhibits to the Supplement to Supplemental Petition for Writ of Habeas Corpus:

Exhibit No.	Exhibit Title / Docuemnt	Bates No.
26	Dr. Joyce Adams, MD's report, dated December 15, 2015 (redacted).	JAMES0650 – JAMES0653
27	Major Beth A. Townsend, USAF, *Defending the "Indefensible": A Primer to Defending Allegations of Child Abuse*, 45 A. F. L. Rev. (1998).	JAMES0654 – JAMES0693

Exhibit No.	Exhibit Title / Docuemnt	Bates No.
28	Dr. Joyce A. Adams, MD, *Approach to the Interpretation of Medical and Laboratory Findings in Suspected Child Abuse: A 2005 Revision*, The APSAC Advisor (Summer 2005).	JAMES0694 – JAMES0700

DATED this 15th day of January, 2016.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b)(2)(B) I hereby certify that on the 15th day of January, 2016, I mailed a true and correct copy of the foregoing APPENDIX OF EXHIBITS TO SUPPLEMT TO SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS by depositing the same in the United States mail, first-class postage pre-paid, to the following address:

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EXHIBIT 26

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RE: Tyrone James v. The State of Nevada (10C265506

December 15, 2015

Dear Ms. McLetchie,

This report summarizes my review of the materials in the above case, which were mailed to me in March of 2015. I reviewed the following material:

1) A copy of the court order authorizing additional payment for my services, up to $1,500,00

2) Police reports concerning the case

3) Copy of the statement given to the police by T[redacted] H[redacted] (TH)

4) Copy of the transcript of the testimony of TH, dated 9/22/2010

5) Copy of the transcript of the testimony of Dr. Therese Vergara on 9/22/2010

6) Copy of the medical records from Sunrise Hospital, Las Vegas, of the evaluation and treatment of TH on 5/14/2010

Multiple attempts were apparently made to try to obtain a copy of the colposcopic photos of the examination of TH done by Dr. Vergara on 5/14/2010, but no recordings could be located. This is unfortunate, since the main reason for my consultation was to review medical records, including photo documentation of the anogenital examination of T[redacted] H[redacted]. I was asked to give an opinion about the findings and discuss other possible causes of the

patient's "generalized swelling" that was reported by Dr. Vergara in her report. The report states in several places that the patient's anogenital examination was done using a colposcope and that photographs of the examination findings were taken.

The medical records indicate that not only did TH have a urinary tract infection at the time of her examination; she also had a genital infection caused by Chlamydia trachomatis. Dr. Vergara took swabs from the patient's cervix to test for Gonorrhea and for Chlamydia, and the test came back positive for Chlamydia. Chlamydia is a sexually transmitted infection that can be present for some time without the patient showing any signs or symptoms of disease. The Chlamydia was already present at the time of her examination, so she acquired the infection some time before that. After exposure to the disease during sexual intercourse, it takes 7 to 10 days before a test would come back positive. The patient had told the nurse that she was previously sexually active, twice, about 1 year prior, which could have resulted in her being infected with Chlamydia.

Dr. Vergara documented that TH had no signs of redness, bruising, abrasions, bleeding or lacerations anywhere on her body. Her only finding was described as "generalized swelling" of the genital tissues when the labia were separated. Since an outside expert was not consulted to review the photographs before the case went to court, it is not possible to say whether or not a different expert would agree that the photographs actually showed swelling. In 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. This is especially true of the genital area in a woman after puberty, since the hormone estrogen affects the tissues differently in different women, causing tissues to have a fuller look.

Even if swelling was present, this is a very non-specific finding, meaning it can have many different causes.

a) Vaginitis caused by Candida albicans (yeast) can cause swelling, as well as itching and discharge. The patient's medical record indicated that she had a diagnosis of "Borderline diabetes", which can pre-dispose a woman to yeast infections. No testing for yeast infection was done at the time of TH's examination.

b) Infection with Herpes virus can cause severe pain and swelling of the genital tissues, but the patient was not complaining of pain and Dr. Vergara did not describe any skin lesions to suggest Herpes infection.

c) Local irritation of the genital area can cause swelling. This could have many causes, such as reaction to soap or other cleansers, rubbing of tight clothing, or vigorous wiping with tissues after toileting.

Without being able to actually view the photographs taken during the examination of TH, I cannot say whether there were signs of swelling of the genital area the day of the reported assault. In any case, swelling without redness or pain is so non-specific as to be of little forensic significance.

In addition, I noticed that the medical report from Sunrise Hospital used a modified version of a classification system that my colleagues and I first published in 1992.[1] Until 2004, updated versions of the tables continued to list medical findings (Part 1) and an overall assessment of the likelihood of abuse (Part 2). Following a consensus conference with other physician experts in child sexual abuse medical evaluation in 2005, I removed Part 2 from the table. [2] The reason for this change is that medical providers appeared to be using Part 2 (No indication of abuse, Possible abuse, Probable abuse, Definite evidence of abuse or sexual contact) as a kind of checklist to make a diagnosis of child sexual abuse. This was never the intention of the 2-part table.

In 2007, the revised version of the table, titled "Approach to Interpreting physical and laboratory findings in suspected child sexual abuse" was published.[3] It did not include a Part 2. In trainings of medical providers and speaking at conferences, I recommended that older versions of the 2-part table should no longer be used. In my view, it is not the job of the medical provider to say that a child has "probably" been abused. The suggested approach to interpreting medical findings is based on published research studies, as much as possible, and

on expert consensus when there is insufficient data from the medical literature to support an interpretation of a finding as being clearly due to abuse. Older versions of the table should not have been used in 2010, especially as part of a child's medical record.

Please let me know if you have any additional questions. I will send an invoice for my time at a later date.

Sincerely,

Joyce A. Adams, MD

1) Adams J, Harper K, Knudson S: A proposed system for the classification of anogenital findings in children with suspected sexual abuse. Adol and Pediatr Gynecol, 1992; 5:73-75.

2) Adams JA. Approach to the interpretation of medical and laboratory findings in suspected child sexual abuse: A 2005 revision. The APSAC Advisor, summer, 2005;17 (3):7-13. (Published by the American Professional Society on the Abuse of Children)

3) Adams JA, Kaplan R, Starling SP, et al. Guidelines for medical care for children who may have been sexually abused. J Pediatr Adolesc Gynecol, 2007;20:163-172

EXHIBIT 27

Defending the "Indefensible": A Primer to Defending Allegations of Child Abuse

MAJOR BETH A. TOWNSEND, USAF*

Perhaps the most valuable result of all education is the ability to make yourself do the thing you have to do when it ought to be done, whether you like it or not; it is the first lesson that ought to be learned; and however early a man's training begins, it is probably the last lesson that he learns thoroughly.
-Thomas Huxley

I. INTRODUCTION

At some point in a tour as a defense counsel, many Air Force attorneys will encounter a client accused of abusing a child, either physically or sexually. These same defense counsel may field questions or remarks from their peers, family and friends, questioning how they could defend such clients. It goes without saying that any abuse of a child is deplorable and that these cases evoke a great deal of strong emotional responses. Defending a case involving allegations of child abuse not only challenges a defense counsel as an advocate, but also tests the ability of a defense counsel to defend a case in spite of personal feelings regarding the case or the accused. While many counsel will encounter these cases, it is not often that they will have sufficient experience to overcome the steep learning curve involved in mounting a successful defense. The purpose of this article is to provide the "nuts and bolts" for the novice in defending allegations of child abuse. It is designed to take the defense counsel from the initial meeting with the client through the sentencing phase of trial. While not all encompassing, it hopefully provides a basic framework with which to begin preparing a defense of such allegations as well as strategies to consider when reviewing the client's options and various approaches to trial. This article takes the defense counsel through a case beginning with pretrial matters such as initial advice for the client, discovery issues, expert assistance, and the Article 32 hearing. The trial section includes guidance regarding motion practice, voir dire, cross-examination of the child, dealing with expert testimony and closing argument.

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* *Major Townsend (B.S., University of Nebraska-Kearney; J.D. University of Nebraska-Lincoln) is the Chief of Military Justice, United States Air Force Academy, Colorado. She is a member of the Nebraska state bar association.*

The article concludes with a brief review of sentencing strategies and tips on preparing a client for a guilty plea inquiry.

II. PRETRIAL MATTERS

A. First Contact

Once a client enters the defense counsel's office and informs him that he[1] is accused of abusing a child, one of the first things that the defense counsel should do is determine what, if any, statements the client has made to any third party regarding the allegations. At the outset of representation, it is better to wait to ask the client for information regarding the allegations. While the defense counsel is required to ask the client what he knows about the allegations,[2] before those conversations takes place, the attorney can save time and energy by determining the specific allegations and gathering all the information the government has. A prudent defense counsel will wait until later in the process to have these discussions with the accused. This will assist the counsel in asking the relevant and necessary questions.

B. Pretrial Statements

Barring some extraordinary circumstances, the defense counsel should advise the client to remain silent and to refrain from any conversations with any third party about the allegations. This is especially important if the client has not made any previous statements. At this time, the defense counsel should inform the client of the various agencies that will contact him simply as a result of the allegations that have been made. These agencies include the Office of Special Investigation (OSI), Family Advocacy, Mental Health, and various civilian agencies like child protective services. He should inform the client that while he may be required to attend various appointments with these

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[1] The author uses the male vernacular because it has been the author's experience that the majority of the accuseds are men. However, the principles are the same for women who are also so accused.

[2] Standard 4-3.2(a) and (b), Air Force Standards for Criminal Justice, The Judge Advocate General (TJAG) Policy No. 26 (6 January 1995). The standard states:

> (a) As soon as practicable the defense counsel should seek to determine all relevant facts known to the accused. In so doing, counsel should probe for all legally relevant information without seeking to influence the direction of the client's responses.
> (b) It is unprofessional conduct for the defense counsel to instruct the client or to intimate to the client any way that the client should not be candid In revealing facts so as to afford the defense counsel free rein to take action which would be precluded by counsel's knowing of such facts.

agencies (other than OSI), anything he says, can and will be used against him, often without Article 31 rights advisement.[3]

C. Statements to Mental Health Providers

The client should be advised that statements made voluntarily to mental health providers may be introduced against him.[4] The Air Force has provided limited confidentiality to members through the Limited Privilege Suicide Prevention Program.[5] However, this limited privilege applies only after the commander has offered non-judicial punishment or the preferral of charges[6] and only if a mental health provider[7] determines the members to be a suicide risk. Once the risk of suicide is no longer present, the privilege ceases to apply.[8] There appears to be a move in the appellate courts to recognize a

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[3] In United States v. Dudley, 42 M.J. 528, 531 (N.M.Ct.Crim.App. 1995) statements by the accused to a psychiatrist were held to be admissible without an Article 31 rights advisement despite the psychiatrist's knowledge that the accused was under investigation.

> We believe that although the case at bar involves a closer question . . . due to [doctor] superior military status, the location of the interview aboard ship, [the doctor's] close friendship with [NCIS agent], and the fact that the appellant did not seek out the doctor for treatment. Nevertheless, we find that the inquiry did not merge with the law enforcement investigation because it was conducted solely for diagnostic and psychiatric care purposes. [The doctor] was not acting as the alter ego of the NCIS. . . . Moreover, [his] testimony concerning the need for progression in mental health patients to overcome the denial stage convinces us that his question "Well, did you do it?" was motivated for non-law enforcement reasons and to help the appellant psychiatrically through what must have been a difficult period.

Id. at 531. *See also* United States v. Rios, 45 M.J. 558 (A.F.Ct.Crim.App. 1997) (holding statement made to civilian child protective services worker was admissible because civilian was not subject to UCMJ, not required to give Article 31 rights advisement and not working in connection with military); United States v. Bowerman, 39 M.J. 219, 221 (C.M.A. 1994) (stating military physician who suspected abuse not required to give Article 31 rights when questioning accused regarding injuries) ("Even if [doctor] thought that child abuse was a "distinct possibility," her questioning of appellant "to ascertain the facts for protective measures and curative purposes" did not violate Article 31." (cites omitted)); United States v. Pittman, 36 M.J. 404 (C.M.A. 1993) (explaining statement by accused to supervisor who was escorting accused home were admissible and were not the product of an interrogation or a request for a statement within the meaning of Article 31).

[4] *See* United States v. Raymond, 38 M.J. 136 (C.M.A. 1993) (holding statements made by the accused who voluntarily sought the services of a psychiatrist were admissible, psychiatrist not required to give Article 31 rights advisement because not acting as an investigator and had no intent of turning over statements).

[5] Air Force Instruction [hereinafter AFI] 44-109, Mental Health and Military Law (1 Mar 97).

[6] *Id.*, para 3.2.

[7] *Id.*, para 3.4.

[8] *Id.*, para 3.4.

psychotherapist-patient privilege;[9] however, until that happens, the client is better served to remain silent. Unless the client has already confessed to the OSI or child protective services, or has a strong desire to plead guilty, it may be best for him to refuse to answer questions with regard to the allegations when dealing with any outside agency. The defense counsel should recognize the investigation and legal process could be a long and stressful ordeal for the client. One of the best sources to refer him to for assistance is the Air Force chaplaincy. Chaplains are the only Air Force members, other than the defense counsel, who can provide a recognized privilege[10] as well as invaluable support for the client. However, before sending the client to see the chaplain, the defense counsel should establish the limits of the privilege.[11]

D. Pretext Phone Calls

The defense counsel should also advise the client against discussing the allegations with the accusers. One investigative tool used by the OSI is a pretext phone call. Essentially the OSI will have the victim call the client and attempt to obtain incriminating statements from the accused in the course of a taped phone call. Statements obtained in such a manner are generally admissible against the client[12] and can be very damaging, especially if he has not yet made any statements.

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[9] *See* United States v. Demmings, 46 M.J. 877 (Army Ct.Crim.App. 1997) (citing Jaffee v. Redmond, 58 U.S. 1, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996)), (stating psychotherapist-patient privilege could apply to courts-martial, however defense waived the issue by failing to object to applicable statements at trial).

[10] MANUAL FOR COURTS-MARTIAL, United States (1995 ed.) [hereinafter MCM] Military Rules of Evidence [hereinafter Mil. R. Evid.] 503.

[11] *See* United States v. Napolean, 44 M.J. 537, 543 (A.F.Ct.Crim.App. 1996), *aff'd.*, 46 M.J. 279 (1997). Here the court held the privilege did not exist between the accused and a lay minister. "Its foundation contains three elements: (1) the communication must be made either as a formal act of religion or as a matter of conscience; (2) it must be made to a clergyman in his capacity as a spiritual advisor; and (3) the communication must be intended to be confidential." *See also* United States v. Coleman, 26 M.J. 407 (C.M.A. 1988) (holding accused's statements to father-in-law who was also a minister that he had taken liberties with his daughter were not privileged because they were not made for purposes of his religion, but rather to obtain emotional support from his father-in-law).

[12] *See* United States v. Rios, 45 M.J. 558, 564 (A.F.Ct.Crim.App. 1997). The court found that accused's statements during a pretext phone call were admissible and minors can consent to taped phone conversations. "Investigators monitoring a telephone conversation involving a suspect, with the consent of one of the parties, where the party acts as an agent for the AFOSI, is a 'routine and permissible undercover technique.'" quoting U.S. v. Parillo, 31 M.J. 886 (C.M.A. 1992). Additionally, with the growth of electronic mail use, clients should be advised not to discuss matters with anyone by e-mail, in electronic chat rooms, etc. This is particularly true if a client uses a government, business, or city/state library computer since use of such systems usually include "prior consent" by the user for monitoring and interception by law enforcement officials. *See* Jarrod J. White, *E-Mail @ Work.Com: Employer Monitoring of Employee E-Mail,* 48 ALA. L. REV. 1079, 1083-1084 (1997).

E. Strategies When The Client Has Provided A Confession

If the client has made a confession, it will be helpful to ask him at the first meeting exactly what the confession contained and the circumstances surrounding the taking of the confession in order to determine the voluntariness of the statement. Issues to be investigated include whether the interrogation contained discussions regarding civilian prosecution, as well as military action, either by the military law enforcement agents[13] or by social workers.[14] It is important to do the legwork and research ahead of time, as any challenge to the voluntariness of the confession before the members must first

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[13] *See* United States v. Bubonics, 45 M.J. 93 (1996) (stating threat of civilian prosecution combined with good cop/bad cop interrogation technique overcame free will of sailor with two years active duty service and no experience with military justice system).

[14] *See* United States v. Murray, 45 M.J. 554 (N.M.Ct.Crim.App. 1996) (holding statement does not become involuntary because interrogator discussed possible loss of unborn child or jailing of spouse as possible adverse consequences facing accused for allegations of child abuse); The court held in United States v. Moreno, 36 M.J. 107 (C.M.A. 1992) (Sullivan, Chief Judge, dissenting) that statements of accused were not involuntary when state social worker discussed options and possible adverse consequences if accused did not cooperate with state authorities.

> Admittedly, appellant was faced with a choice. On the one hand, he was offered the opportunity of enlisting the aid and support of the Texas Department of Human Services [DHS] in trying to keep his family together, in helping himself to overcome his personal problem, and in siding with him in the event of a criminal prosecution. On the other hand, as he well knew, by cooperating with DHS he risked the possibility that his statements would be discovered by prosecutorial forces and used against him at a trial. If he did not cooperate with DHS, however, the risk of losing his children was presumably increased and the risk of criminal prosecution remained-without the benefit of significant DHS influence. It is something of a dilemma to be sure, but it was a dilemma of his own causing. When people abuse children in this society, two distinct processes are triggered. One is the criminal process, which focuses on the proper way to deal with the perpetrator. The other is the child protective process, which focuses on the best interests of the child-victim. In appellant's case, both of these processes were well set in motion by the information initially reported to the authorities. Each of these processes is going to play itself out, one way or another, whether appellant wanted it and whether he took affirmative steps to affect the processes. In effect [DHS] merely apprised appellant where he stood in the great flow of things and obviously in the best of faith, she offered him a very plausible scenario that might improve his personal and family prospects.

Id. at 112. However, according to Chief Judge Sullivan: "Substantial constitutional error occurred in this case. (cites omitted) Appellant's incriminating admissions were made in response to direct questioning by [DHS employee]. This deliberate elicitation of incriminating statements occurred after his Sixth Amendment right to counsel had attached and without a proper waiver of that right." (cites omitted).

be made on motion to the military judge.[15] The defense counsel may also face a situation where the client has confessed but subsequently recants. While the initial response to the recantation may be skepticism by the defense counsel, there is a developing body of research that addresses situations in which innocent people confess to crimes they didn't commit.[16] This research may be helpful in explaining either to the judge or members why the confession is unreliable.[17]

If the client has confessed and there is no issue regarding voluntariness, the defense counsel should begin to evaluate all options available to the client. These include resignation or administrative discharge in lieu of court-martial, and pretrial agreement negotiations. When it appears that the facts will not be disputed in the case, clients should begin therapy, voluntarily, as soon as practicable. Every effort must be made at the earliest date to determine the extent and content of the defense's sentencing case.[18] Any and all actions that the client can take that can be introduced in extenuation and mitigation should be identified, coordinated and undertaken. A client who can demonstrate that he is truly remorseful, has spared the child from going through any public questioning, and who has taken steps to learn to deal with his problem, will only assist himself when it comes to sentencing. This may also help to mend fences within the family and lead to legitimate support from the family at the time of trial.

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[15] Mil. R. Evid. 304(a) & (d)(2)(A). MCM, *supra* note 10. Mil. R.Evid. 304(d)(2)(A) provides

> Motions to suppress or objections under this rule or M.R.E. 302 or 305 to statements that have been disclosed shall be made by the defense prior to submission of a plea. In the absence of such motion or objection, the defense may not raise the issue at a later time except as permitted by the military judge for good cause shown. Failure to so move or object constitutes a waiver of the objection.

[16] *See generally* Richard J. Ofshe and Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions,* 16 STUDIES IN LAW, POLITICS AND SOCIETY, 189 (1997).

[17] Presentation of this evidence will generally require the services of an expert witness with familiarity of the subject and research in this area.

[18] This includes deciding whether to waive the Article 32 hearing, submitting a resignation in lieu of court-martial, production of witnesses to testify on behalf of the accused, and establishing the potential of expert testimony regarding the client's progress in therapy.

F. Proof Analysis

Once the charges are preferred, one of the first steps the defense counsel should take is to prepare a detailed proof analysis. If prepared in a format that is workable for the defense counsel, the proof analysis will assist him in all phases of the trial. While preparing for the Article 32 hearing, it may help focus the line of attack. A proof analysis can also assist the defense counsel in identifying the proper discovery to request, assessing the weaknesses in the government case, finding any drafting errors he can exploit, or even providing a tool that can later be used to format the closing argument. The value of a thorough and complete proof analysis will become apparent as he uses it to prepare throughout every facet of the case.

G. Discovery Issues

Discovery issues in child abuse cases can be complex and proper discovery can produce voluminous amounts of records. The defense counsel should take advantage of the military's liberal discovery standard.[19] To facilitate collection of all appropriate discovery, the defense counsel should use a well-conceived and thorough discovery request. A canned discovery request may be insufficient. It may even result in untimely requests and ultimately in not receiving discovery. The request should, to the best of counsel's ability, articulate a basis for the requested records.[20] Records that should be requested routinely include, but are not limited to:

1. All records from child protective services, to include any other records concerning the particular child making the allegations, as well as other children living in the same household;[21]

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[19] MCM, *supra* note 10, Part II, Rules for Courts-Martial [hereinafter R.C.M.] 701(e) states "Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence." *See* United States v. Hart, 29 M.J. 407 (C.M.A. 1990)(explaining discovery available to accused in courts-martial is broader than the discovery provided most civilian defendants). For a good introduction to the discovery process, see LeEllen Coacher, *Discovery in Courts-Martial*, 39 A. F. L. Rev. 103 (1996).

[20] In *United States v. Reece*, 25 M.J. 93, 95 (C.M.A. 1987), the defense counsel described medical records and relevancy sufficiently despite not knowing the exact contents. "The Military Rules of Evidence establish 'a low threshold of relevance'. . . ." (citation omitted). *But see* United States v. Briggs, 46 M.J. 699, 702 (A.F.Ct.Crim.App. 1996) (holding military judge did not err by denying defense motion to compel production of rape victim's medical records) ("A general description of the material sought or a conclusory argument as to their materiality is insufficient.").

[21] Records of previous allegations of abuse may provide fertile areas for defense to explore in defending the case by providing other sources of alleged abuse or injuries. For admissibility requirements of such evidence *see* United States v. Woolheater, 40 M.J. 170, 173 (C.M.A.

2. All records from Family Advocacy concerning this child and family, as well as records concerning the client;
3. All records from Mental Health concerning this child and family as well as the client;
4. All records kept by any mental health provider, social workers, therapists, counselors, nurses, or doctors, who have seen the child;[22]
5. Medical records of the child and any other children in the family.
6. School records;
7. Videotape interviews, whether by OSI agents or civilian agencies;
8. Notes made by interviewers or observers of an interview of the child;
9. Notice of all previous statements made by the victim or any witness;[23]

1994). In *Woolheater* a conviction was reversed for failure to allow the defense to present evidence that another person had motive, knowledge and opportunity to commit the crime. "The right to present defense evidence tending to rebut an element of proof such as the identity of the perpetrator is a fundamental Constitutional right." In *United States v. Gray*, 40 M.J. 70 (C.M.A. 1994), a conviction was reversed because the military judge improperly excluded evidence of possible sexual conduct involving the victim and another child.

> A child-victim's sexual activity with someone other than an accused may be relevant to show that the alleged victim had knowledge beyond her tender years before the alleged encounter with the accused. . . .By excluding the evidence, the military judge deprived appellant of evidence which could have made his otherwise incredible explanation believable.

Id. at 80. *But see* United States v. Shaffer, 46 M.J. 94 (1997); United States v. Gober, 43 M.J. 52 (1995).

[22] Reece, 25 M.J. at 95 (C.M.A. 1987)

> At trial, defense counsel established that, as there were no eyewitnesses to the alleged offenses, the credibility of the two girls would be a key issue in the case. He argued that Miss D's history of alcohol and drug treatment was relevant to her ability to perceive and remember events, especially as she had admitted that she had consumed alcohol before each of the alleged incidents. With respect to Miss B, he argued that her counseling records would contain evidence of her behavioral problems. He made as specific a showing of relevance as possible, given that he was denied all access to the documents. Some forms of emotional or mental defects have been held to 'have high probative value on the issue of credibility . . . . [A] conservative list of such defects would have to include . . . most or all of the neuroses, . . . alcoholism, drug addiction, and psychopathic personality'" (citations omitted).

[23] *See* United States v. Romeno, 46 M.J. 269 (1997) (case reversed for failure of the prosecutor to provide discovery of exculpatory statements made by main witness against accused).

10. Notice of all previous statements made by the accused; and,
11. A copy of any photographs taken of the injuries.

One of the easiest ways for the defense counsel to determine the appropriate records to request is to construct a timeline regarding the chronology of the disclosure. The timeline will assist him in determining whether he has requested the right discovery, or what records exist and what agency has them. For instance, if a child reports to a school official that she has been abused by her neighbor, the child is probably then interviewed by her teacher, the school psychologist or guidance counselor, the civilian law enforcement agent and the child protective services worker assigned to the case. In such a case, the defense counsel should request a copy of the records, notes and reports generated by all of these witnesses. He should begin the timeline with the initial disclosure, continuing through trial, annotating each agency and person that had contact with the child and the statements made by the child. This will also assist the defense counsel in ensuring he has received all records that are created during this process up through the time of trial.

When the defense counsel receives the various records, it is important he review them thoroughly. For example, it is important to determine if the child is on any medication that may affect his or her ability to perceive and recall. For instance, the medical records may indicate that the child has been diagnosed with Attention Deficit Disorder (ADD) or Attention Deficit Hyperactivity Disorder (ADHD). Children who have been diagnosed with those disorders may have then been prescribed Ritalin or some other drug to deal with this problem. The defense counsel should carefully review the pharmacology of any medication and the interactions of any medications given to the child before, during or after the time the child disclosed the alleged offenses.[24] The medical records may also indicate that the child has been seen for a medical condition that is relevant to the allegations. For instance, if the child had been diagnosed with a sexually transmitted disease such as chlamydia that predates the allegations (assuming the accused did not have access to the child during this time), the defense counsel now has evidence that the child may have been abused by someone else.[25] If the initial examination of the victim produced evidence of physical findings such as hymeneal tears, notches, or clefts, there is research that indicates the presence of these findings

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[24] A good source for this type of information is The Physicians' Desk Reference. PHYSICIANS' DESK REFERENCE (51st ed. 1997). Additionally, most health care providers have access to on-line services which catalogue published articles relating to the particular drugs being researched. These services are also usually available at larger military medical facilities and local libraries.

[25] *See* Jan Bays and David Chadwick, *Medical Diagnosis of the Sexually Abused Child*, 17 CHILD ABUSE & NEGLECT 91, 99 (1993). "Transmission of sexually transmitted diseases outside the perinatal area by nonsexual means is a rare occurrence."

in nonabused girls.[26] A review of the medical records may show these findings were annotated at a time that predates the allegations. Conversely, the lack of physical evidence can be inconsistent with the child's allegations and the type of injuries one would expect, depending on the timing of the disclosure.[27] Family advocacy or mental health records may indicate a long-standing problem with the child that would also explain the allegations or provide a motive for the child to fabricate. The defense counsel should also check the parents' medical records for any of the child's records that may have been misfiled.

H. Expert Assistance

It is difficult to imagine a child abuse case, whether it involves physical or sexual abuse, where the defense would not be aided by the assistance of an expert.[28] An expert can provide assistance in a number of ways. As stated in *United States v. Turner,* [29]

> To assure that indigent defendants will not be at a disadvantage in trials where expert testimony is central to the outcome, the Supreme Court has ruled that a defendant must be furnished expert assistance in preparing his defense. . . . An expert may be of assistance to the defense in two ways. The first is as a witness to testify at trial. . . . An expert also may be of assistance to the defense as a consultant to advise the accused and his counsel as to the strength of the government case and suggest questions to be asked of prosecution witnesses, evidence to be offered by the defense, and arguments to be made. [30]

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[26] *See generally* John McCann, MD, et al., *Genital Findings in Prepubertal Girls Selected for Nonabuse: A Descriptive Study*, PEDIATRICS, Volume 86, No. 3, at 428 (3 September 1990); *see also* Bays and Chadwick, *supra* note 25, at 92, 94-97.

[27] Bays and Chadwick, *supra* note 25, at 103-107.

[28] *See* United States v. Tornowski, 29 M.J. 578 (A.F.C.M.R. 1989)

> There is little question that child sexual abuse cases often present a fertile, indeed, a necessary, area for expert assistance (cites omitted). Particularly when . . . the prosecution utilizes the assistance of experts, the defense can make a valid and plausible argument for expert assistance of its own to aid in properly evaluating the factual issues and providing adequate legal representation for an accused. . . . From our review of the record, the defense team in this case articulated a number of areas in which a child psychologist might have provided valuable insights and guidance. For instance, certain information suggested that the seven year old victim might have possessed an unusual degree of sexual awareness for a child of tender years. Might this have caused her to make sexual allegations against the appellant that another child of the same age could not have fabricated? *Id.* at 580.

[29] United States v. Turner, 28 M.J. 487 (C.M.A. 1989) (citations omitted).

[30] *Id.* at 488.

In a case involving physical allegations, the defense counsel should have a dedicated defense expert review the evidence. This expert can assist the defense with cross-examination of the government's expert, provide alternative explanations for the physical findings, and may assist in ensuring the government expert's testimony is accurate. The expert can also provide assistance in evaluating the evidence to determine whether the parental-discipline defense is available. In cases involving parental-discipline, the defense must show three things: the appropriate person administered the discipline or force, for a proper purpose, with a reasonable amount of force.[31] Experts can provide assistance in determining whether the facts of the case, and those disclosed by the client, will satisfy the test and how best to present the case. They may also be required to provide expert testimony on these issues.

I. Expert Consultant

A good rule of thumb for the defense counsel is to request that the expert be appointed as a consultant so that he and the expert will have the benefit of the attorney-client privilege.[32] In *Turner*[33], the court articulated how the defense counsel can benefit from the privilege given to expert consultants.

> In performing this function [as a consultant], the expert often will receive confidential communications from the accused and his counsel; and he may have occasion to learn about the tactics the defense plans to employ. If the expert consultant were free to disclose such information to the prosecutor prior to trial, the defense counsel would be placed at a great disadvantage;

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[31] *See* United States v. Brown, 26 M.J. 148, 150 (C.M.A. 1988); United States v. Robertson, 36 M.J. 190, 191 (C.M.A. 1992). Both cases adopted the test for the parental discipline defense given in the MODEL PENAL CODE, Section 3.08(1) (1985).

> The use of force upon or toward the person of another is justified if: (1) the actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor or a person acting at the request of such parent, guardian or other responsible person and: (a) the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and (b) the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation. . . .

[32] *See* Mil. R. Evid. 502, *supra* note 10; United States v. Turner, 28 M.J. 487 (C.M.A. 1989); United States v. Gordon, 27 M.J. 331, 332 (C.M.A. 1989); and United States v. Toledo, 25 M.J. 270, 275 (C.M.A. 1987). *See also* Will A. Gunn, *Supplementing the Defense Team: A Primer on Requesting and Obtaining Expert Assistance*, 39 A. F. L. Rev. 143 (1996).
[33] United States v. Turner, 28 M.J. 487 (C.M.A. 1989).

> and, indeed, he might hesitate to consult with the expert. The result would be impairment of the accused's right to counsel, because his attorney would be inhibited in the performance of his duties and unable fully to utilize the assistance contemplated by *Ake*.[34]

The defense counsel should be aware that in order to obtain the benefit of the attorney-client privilege, the consultant must be either employed by the accused to assist him or be appointed to provide such assistance.[35] According to Mil. R. Evid. 502, "representative" is specifically defined as ". . . a person employed by or assigned to assist a lawyer in providing professional legal services."[36] In *United States v. Toledo*,[37] the defense counsel asked a clinical psychologist to examine his client "off the record." The psychologist was later called as a government witness to testify as to his opinion regarding the accused's character for truthfulness. The defense objected and asserted a privilege. The Court of Military Appeals held no privilege existed because the defense had not used the proper procedure for making the psychologist a representative of the lawyer.

> Had the defense procured medical assistance for the preparation of its defense at its own expense, we would have held that communications between appellant and that expert were within the attorney-client relationship, at least unless a mental-responsibility defense was presented. . . By the same token, a servicemember has no right simply to help himself to government experts and bring them into the attorney-client relationship, bypassing the proper appointing authorities.[38]

J. Making an Adequate Request for Assistance

As with the discovery request, the request for expert assistance must be specific regarding the issues that require expert assistance. In *United States v. Garries*,[39] the Court of Military Appeals held that "When an accused applies for the employment of an expert, he must demonstrate the necessity for the services."[40] The court further held that it would be inappropriate for the military judge to hold an *ex parte* hearing in order to protect disclosure of defense theories when requesting expert assistance. "Use of an *ex parte* hearing to obtain expert services would rarely be appropriate in the military context because funding must be provided by the convening authority and such a procedure would deprive the Government of the opportunity to consider and

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[34] *Id.* at 488, 489. Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985).
[35] Mil. R. Evid. 502, *supra* note 10.
[36] Mil. R. Evid. 502(b)(3), *supra* note 10.
[37] United States v. Toledo, 25 M.J. 270 (C.M.A. 1987).
[38] *Id.* at 276.
[39] United States v. Garries, 22 M.J. 288 (C.M.A. 1986), *cert. denied*, 479 U.S. 985, 107 S. Ct. 575, 93 L. Ed. 2d 578 (1986).
[40] *Id.* at 291.

arrange alternatives for the requested expert services."[41] In *United States v. Tornoswski*,[42] the Air Force Court of Military Review addressed the difficulty in articulating a need for expert assistance. Citing *Moore v. Kemp*,[43] the Court stated:

> We recognize that the defense counsel may be unfamiliar with the specific scientific theories implicated in a case and therefore cannot be expected to provide the court with detailed analysis of the assistance an appointed expert might provide. We do believe, however, that the defense counsel is obligated to inform himself about the specific scientific area in question and to provide the court with as much information as possible concerning the usefulness of the requested expert to defense's case.[44]

In *United States v. Gonzalez*,[45] the Court of Military Appeals established a three-prong test the defense must meet in order to show necessity for expert assistance. "There are three aspects of showing necessity. First, why the expert assistance is needed. Second, what would the expert assistance accomplish for the accused. Third, why is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop."[46] Thus, to the best of his ability, the defense counsel must establish in the request the necessity of expert assistance. Additionally, the defense is not entitled to a specific expert.[47] However, this does not suggest that it is permissible for the government to provide the defense with an expert who is

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[41] *Id.* at 291. In *United States v. Kaspers*, 47 M.J. 176, 180 (1997), the appellant asked for an *ex parte* hearing to protect attorney client privileged information which formed the basis of the expert request. The Court explained that:

> Here, we examine our own rule, which requires disclosure by the defense if it desires government funding. See R.C.M. 703(d). Using our rule, the judge did not abuse his wide discretion in denying the *ex parte* hearing because appellant did not establish "unusual circumstances" [cite omitted]. . . . We realize that, while our rule may burden the defense to make a choice between justifying necessary expert assistance and disclosing valuable trial strategy, the defense is not without a remedy. The military judge has broad discretion to protect the rights of the military accused.

[42] United States v. Tornowski, 29 M.J. 578 (A.F.C.M.R. 1989).
[43] Moore v. Kemp, 809 F.2d 702, 712 (11th Cir.1987).
[44] United States v. Tornowski, 29 M.J. 578, 580 (A.F.C.M.R. 1989).
[45] United States v. Gonzalez, 39 M.J. 459 (C.M.A. 1994).
[46] *Id.* at 461, citing United States v. Allen, 31 M.J. 572, 623 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 209 (C.M.A. 1991).
[47] United States v. Ingham, 42 M.J. 218, 226 (1995). "[A]ppellant's right, upon a minimal showing of need, is to expert assistance (cites omitted). He does not have a right to compel the Government to purchase for him any particular expert or any particular opinion." *See also* United States v. Garries, 22 M.J. 288 (C.M.A. 1986), *cert. denied*, 479 U.S. 985, 107 S. Ct. 575, 93 L. Ed. 2d 578 (1986); United States v. Tharpe, 38 M.J. 8, 14 (C.M.A. 1993).

less qualified than the government expert[48] or one who is unqualified to provide competent assistance to the defense.[49]

When the defense counsel requests any expert, it is always helpful if he has done the legwork for the government to find a qualified expert to recommend to the convening authority. The defense counsel should avoid any potential conflict issues by recommending someone other than a member assigned to the same medical group as the government expert. He should discover the qualifications of the government expert witness and use those as a minimum for the defense requested expert.[50]

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[48] United States v. Burnette, 29 M.J. 473, 475-76 (C.M.A. 1990) (holding the government is required to provide competent expert and simply providing access to government expert may not be sufficient) (citations omitted).

> All that is required is that competent assistance be made available. . . . In retrospect it is clear that [the government expert] would not have been an adequate substitute for such independent assistance. . . . [The government expert] was presenting incriminating evidence against appellant on behalf of the prosecution. If there remained a genuine question regarding the test procedures and conclusions, it would hardly be fair to expect the defense to extract its ammunition from one of the very witnesses whose conclusions it was attacking.

[49] *See* United States v. Robinson, 43 M.J. 501, 505 (A.F.Ct.Crim.App. 1995) (explaining it was not error to deny defense motion for civilian expert who had more experience in treatment of sex offenders than initial defense approved expert). ("[A]n accused is not entitled to have the government pay for the best expert witness available since the government may always provide an adequate substitute. R.C.M. 703(d). Of course, a government-selected expert is not an 'adequate substitute' when that expert and the defense requested one hold divergent scientific views."); United States v. Van Horn, 26 M.J. 434, 438 (C.M.A. 1988) (citations omitted) (reversing based on military judge's denial of defense requested expert and erroneous finding that government expert was an adequate substitute).

> We have no doubt that [the government expert] was an expert in his field. However, the fact remains that [the defense expert], also an expert, had no connection with the challenged laboratory and had examined its reports which were used by the prosecution. More importantly, he had a contrary opinion concerning reliability of the test procedures used, results reached, and conclusions based thereon. In short, his testimony favored the defense and could not reasonably be considered cumulative of [the government expert] or replaceable by his testimony. . . . To deny the defense a meaningful opportunity to present its evidence, which challenged the Government's scientific proof, its reliability, and its interpretation, denied appellant a fair trial.

[50] Often, the government will use the physician that initially examined the child. This physician may be one with limited experience in the child abuse arena. Finding a physician with more experience and better credentials will impress the members should the defense expert testify. It may also have the effect of educating the government expert regarding the

It is important to remain diligent in defense efforts to obtain expert assistance. The defense counsel should receive a written response to the request. A motion to compel the production of an expert should follow any denial of the request.[51] If the defense counsel believes the proposed expert is not competent to provide adequate assistance, he should begin to address the problem by thoroughly interviewing the proposed expert. Often the trial counsel may not provide the proposed expert adequate information regarding what the defense counsel requires and expects from the expert. Once the defense counsel explains this to the expert, the expert can then tell him whether he believes he has the appropriate qualifications. Before filing a motion to compel, it may be useful for the defense counsel to attempt to work with trial counsel to find another qualified expert.

In the event the defense believes the proposed expert is inadequate and if the government refuses to approve another expert, the defense must then show that the expert is not qualified. In *United States v. Ndanyi*,[52] the Court of Military Appeals held that the defense did not make an adequate showing that the experts the government offered to provide were inadequate. "[A]bsent a showing by appellant at trial that his case was unusual, i.e., the proffered scientific experts . . . were unqualified, incompetent, partial, or unavailable, his motion for government-funded expert assistance was properly denied."[53]

The defense counsel should include in his request an appropriate number of days of preparation time with his expert prior to trial. He should also seek to have the consultant present throughout the trial, including sentencing, if the government intends to put on expert testimony. The pretrial preparation with the expert should include a records review prior to the expert's arrival at trial, as well as several days to assist in interviewing the relevant witnesses prior to trial. The relevant witnesses include the government expert witness, the alleged victim, and those witnesses who had initial contact with the child upon disclosure. Generally, the expert does not need to be present for the interview of all the witnesses, provided the defense counsel gives the expert a good summary of the peripheral witnesses.

K. Potential Issues Requiring Expert Assistance

Issues that arise in a case of sexual abuse allegations that may require the assistance of a psychologist/psychiatrist, preferably one with forensic experience,[54] include:

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current state of research in the relevant subject area which should keep the government expert from exceeding limits of his/her expert opinion.

[51] R.C.M. 906(b)(7), *supra* note 19.

[52] United States v. Ndanyi, 45 M.J. 315 (1996).

[53] *Id.* at 320. *See also* Van Horn, 26 M.J. at 468.

[54] A forensic psychologist/psychiatrist has experience dealing with legal issues as they relate to the field of psychology, may have previously testified as an expert witness, and should have

a. delayed reporting by the victim;
b. evaluation of cognitive abilities, development of the child, memory capacity;[55]
c. analysis of statements by the child for age appropriate vocabulary and whether the child displays age appropriate behavior;[56]
d. effects of family problems including significance of a pending divorce and custody battle;
e. whether the child is susceptible to suggestion or influence by authority figures; [57]
f. whether the statements have been tainted by contact with investigators, therapists, doctors, or prosecutors;[58]

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experience in analyzing evidence in a criminal trial for issues related to his field of expertise. Employing an expert with forensic experience may reduce the amount of preparation time as well as increase the use of the expert given this specialized knowledge.

[55] In United States v. Sojfer, 47 M.J. 425, 427-28 (1998) (citations and footnotes omitted) the court discussed admissibility of evidence related to a witness' competency in terms of an ability to perceive a situation.

> There are similarities between bias and capacity to observe, remember and recollect. Both are grounds for impeachment, and both may be proven by extrinsic evidence. However, before the proponent may introduce evidence under either theory, he or she must lay a foundation that establishes the legal and logical relevance of the impeaching. How a witness "views" an event, in terms of her five senses, depends on her background, including family life, education and day-to-day experiences. Witnesses "behave according to what [they] bring to the occasion, and what each of [them] brings to the occasion is more or less unique. In that sense, each witness has a bias. Additionally a witness's interpretation of an event depends on whether her perception is impaired. For example, the individual may be hearing-impaired or may not have been wearing corrective lenses at the time of the crime. A past or present mental condition also may impact on a person's ability to perceive.

This language could also be used to support a motion to compel discovery of certain mental health and medical records.

[56] For a discussion on a suggested approach for assessing the validity of statements regarding sexual abuse, *see* David R. Raskin and Phillip W. Esplin, *Statement Validity Assessment: Interview Procedures and Content Analysis of Children's Statements of Sexual Abuse,* 13 BEHAVIORAL ASSESSMENT 265 (1991). Concerned over increased questioning of the reliability of assessment procedures for examining abuse, the American Academy of Child and Adolescent Psychiatry (AACAP) issued recommended guidelines in 1988. *See* AACAP, *Guidelines for the Clinical EVALUATION OF CHILD AND ADOLESCENT SEXUAL ABUSE,* 25 J. Am. Acad. Child & Adolescent Psychiatry 655 (1988).

[57] *See generally*, THE SUGGESTABILITY OF CHILDREN'S RECOLLECTIONS: IMPLICATIONS FOR EYEWITNESS TESTIMONY (John Doris ed., American Psychological Association 1991).

[58] For a discussion regarding the possible effects of repeated or leading questions or multiple interviews, see John B. Meyers, et al., *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 27 PACIFIC L.J. 1, 12, 25 (1996).

g. forensic evaluation of the allegations of abuse;[59]
h. occurrence of fabrication of allegations by children;[60]
i. evaluation of any diagnosis for personality disorders, adjustment disorders, or psychological problems which might indicate an inability to accurately perceive, recall or report;
j. effect of use of anatomically correct dolls by government expert or initial interviewer;[61] and
k. assistance in preparation of how to interview and prepare cross-examination of the child witness.

L. Expert Contact with the Accused – Setting The Boundaries

Once the defense counsel has an expert consultant, he must decide how much contact the expert should have with the client. This may depend in large part on how the defense counsel plans to use his expert. Factors the defense counsel should consider include whether the expert consultant will testify during the trial. If so, the defense counsel should be aware of the limits of what the consultant must disclose. In *United States v. Turner*,[62] trial counsel interviewed the defense expert prior to trial. The Court of Military Appeals held this was error because the defense expert had not been declared as an expert witness prior to trial. In footnote 3, the Court noted the safeguards the defense would have even if they had declared him an expert witness at some point in the trial.

> If the defense counsel also planned to use [defense expert] as a witness, trial counsel could properly have interviewed him as to the matters about which he could testify. However, in that event, the expert witness should have been advised carefully that he could not reveal any discussions with the accused or with the defense counsel, or impart information to trial counsel which was not already available to him. Moreover, the defense counsel could properly have insisted on being present during the interview of his own expert witness in order to assure that trial counsel did not stray into forbidden territory.[63]

In *United States v. Mansfield*,[64] the Court of Military Appeals specifically held that

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[59] *See generally*, William Bernet, M.D., *Practice Parameters for the Forensic Evaluation of Children and Adolescents Who May Have Been Physically or Sexually Abused*, 36:3 J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY, 423 (March 1997).
[60] *See generally*, DR. STEVEN CECI & DR. MAGGIE BRUCK, JEOPARDY IN THE COURTROOM: A SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY 30-33 (1995).
[61] For a review of the pros and cons of the use of anatomically correct dolls in child interviews, see generally CECI AND BRUCK, *supra* note 60, at 161.
[62] United States v. Turner, 28 M.J. 487 (C.M.A. 1989).
[63] *Id.* at 489 n.3.
[64] United States v. Mansfield, 38 M.J. 415 (C.M.A. 1993).

> [W]hen such experts are called as a witness on behalf of an accused and the witness has relied upon statements of the accused in formulating an opinion, the attorney-client privilege terminates with respect to those matters placed in issue by the expert's testimony. Further, any expert who offers a testimonial opinion is subject, at the request of the party-opponent "to disclose the underlying facts or data on cross-examination."[65]

Thus, examination of the accused and presentation of evidence on the issue is another factor to be considered. If the expert does examine the accused, as articulated in the request for expert assistance, the defense counsel should know the limits of what the expert must disclose if he later testifies. An alternative to using the expert consultant to examine the accused would simply be to request a sanity board.[66] If the defense counsel has done this, and/or intends to contest the findings of the sanity board to put forward a lack of mental responsibility defense, he must be aware of the exposure of the client's statements when the expert testifies.

M. Article 32 Strategies

The defense counsel should prepare extensively for the Article 32 hearing. The Article 32 hearing is often where the defense counsel lays the groundwork for cross-examination at trial of the alleged victim. This cannot be properly done unless the defense counsel has done his homework first. The hearing will also give him a chance to evaluate how well the child testifies. This will help him to determine his strategy at trial and whether the defense counsel should litigate or pursue other options either to avoid trial, or obtain a favorable pretrial agreement for his client.

When preparing for the hearing, a good source of information may be the primary caregiver. The defense counsel is looking for indications the child has a problem distinguishing between fantasy and reality, has an overactive imagination, tells lies as a way to get attention, is melodramatic or histrionic, has ADD/ADHD, is physically active and always has bruises, or is difficult to control. Presenting the testimony at the Article 32 that calls into question the reliability of the allegations may result in the government taking a second look at whether the case should be referred to trial. It may also put the defense counsel in a position to obtain an alternative disposition for the client. While the "conventional wisdom" may be to play his cards close to the vest, the astute defense counsel will not overlook any opportunities to keep his client out of the courtroom. If the child has serious problems, like lying or distinguishing between fantasy and reality, or if other plausible explanations for injuries exist, bringing these problems to the attention of the prosecution

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[65] *Id.* at 418.
[66] R.C.M. 706.

early on may strengthen the defense position with regard to alternative disposition.

The Article 32 hearing also provides the defense counsel an opportunity to interview the child in person. When interviewing the child, he should avoid suggesting answers to the child or contributing to the taint of the child's testimony by asking leading questions.[67] He should use the interview to gather as much background information as he can about the child and her history with the client, before and after disclosure. The defense counsel should inquire whether the child keeps a journal, diary, or has written anything about the incidents, either before or after the allegations. The child's writings may contain information that is invaluable to the defense.[68]

If the victim is going to testify, the defense counsel should request a verbatim transcript. While there is always the concern that the victim may be unavailable at trial, having a witness declared unavailable is a high standard.[69] A verbatim record is important for the defense counsel because it will help him to develop the inconsistencies in the child's testimony, as well as get the child committed to areas he hopes to use as impeachment at trial. The Investigating Officer (IO) may not recognize the value of areas the defense counsel is examining the witness about and may not incorporate the information into a summary. Because the IO is not obligated to prepare a summary[70] there is essentially no relief for a defense counsel when this occurs.[71] Thus, a

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[67] Even the military courts have recognized the difficulty in interviewing child witnesses. In United States v. Dunlap, 39 M.J. 835, 839 n.6 (A.C.M.R. 1994), the Army Court of Military Review set aside the conviction because of the improper admission of the child's hearsay statements which were the product of a suggestive puppet show dealing with child abuse. The court noted

> This case points up a very important aspect of developing child abuse cases- the need for a trained professional. If a school or other organization is going to use a puppet show or other device to surface cases of abuse, then it had better also have personnel specifically trained in dealing with child abuse problems to do the follow-up counseling.

[68] If the child indicates that they have such writings, it may be prudent for the defense counsel to call the trial counsel and ask that an adult, other than the parents, accompany the child to pick up the diary. This will avoid destruction of the writings by the child or a misguided parent or social worker.

[69] M.R.E. 804(a) *supra* note 10, and R.C.M. 703(b)(3) *supra* note 19.

[70] R.C.M. 405(j)(2)(B), *supra* note 19. *See also* Discussion to R.C.M. 405(h)(1)(A) at Part II, page 38, which suggests that the IO prepare a summary of the testimony and have the witness swear to it again. However, the analysis acknowledges that the IO is not required to do this to complete the report.

[71] *But see* Discussion to R.C.M. 405(h)(1)(A) at Part II, page 38, *supra* note 19, which indicates that any notes or recordings of the testimony should be preserved until the end of the trial. These recordings should then be available to the defense and could be used to impeach the witness with the prior inconsistent statement.

verbatim transcript would best ensure that the lines of questioning pursued by the defense counsel are preserved for trial.

If the IO determines that the child is unavailable for the hearing, the defense counsel should make sure the IO has performed the correct analysis. In *United States v. Marrie*,[72] the Air Force Court of Military Review held that R.C.M. 405(g)(1)(A)[73] does not establish a *per se* rule of unavailability if the witness is located more than 100 miles from the site of the hearing.[74] The IO is required to perform a balancing test that weighs the necessity of the witness's testimony against the expense and trouble in producing the witness.[75] In order to preserve the right of personal attendance at an Article 32 hearing the defense counsel must move to take the witness's testimony by deposition.[76] Often, the child is in the local area, but doesn't want to testify. While the IO cannot compel the witness to attend the hearing, the defense counsel should not agree to a finding of unavailability unless the government has taken sufficient steps to procure the testimony.[77] If the child is legitimately unavailable, or the client has already decided to enter a plea and attempt to negotiate a pretrial agreement with the convening authority, the defense counsel should consider waiving the Article 32 hearing. There is nothing for him to gain by going through the motions of an Article 32. Waiving the hearing may be good extenuation and mitigation at trial if the defense can argue the client waived the hearing in an effort to ease the burden of the ordeal on the child. If the child testifies at the hearing, the defense counsel should object to the child adopting any prior statements as part of the Article 32 testimony[78] unless the statements are inconsistent and consideration by the IO will favor the defense.

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[72] United States v. Marrie, 39 M.J. 993 (A.F.C.M.R. 1994), *aff'd*, 43 M.J. 35 (1995).

[73] *See supra* note 19. The rule provides

> Except as provided in subsection (g)(4)(A) of this rule, any witness whose testimony would be relevant to the investigation and not cumulative, shall be produced if reasonably available. This includes witnesses requested by the accused, if the request is timely. A witness is "reasonably available" when the witness is located within 100 miles of the situs of the investigation and the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness' appearance. A witness who is unavailable under Mil. R. of Evid. 804 (a)(1-6) is not "reasonably available."

[74] *Marrie*, *supra* note 72, at 997.

[75] R.C.M. 405(g)(1(A), *supra* note 19.

[76] United States v. Simoy, 46 M.J. 592, 608 (A.F.Ct.Crim.App. 1996).

[77] *See* Discussion to R.C.M. 405(g)(2)(B), *supra* note 19, at Part II, page 36.

[78] *See* United States v. Oritz, 33 M.J. 549 (A.C.M.R. 1991) and United States v. Rudolph, 35 M.J. 622 (A.C.M.R. 1992). This is especially important if there are legitimate concerns about the availability of the child at trial.

Matters that should be presented by the defense at the Article 32 hearing include any and all "atta-boy" papers that the client may have. This is especially important in a "close" case. Generally, the client should not testify at the Article 32 hearing. The risk of committing the client to testimony that is sworn and available to the government, months prior to trial, allows the government to work on discrediting the client. It also provides the trial counsel with a rare opportunity to actually prepare a cross-examination of the accused based on this prior statement. If he wants to make a statement, the rules provide for an unsworn statement[79] and it may not be a bad idea to have the client make a generalized statement denying any wrongdoing.

The responsibilities of the defense counsel do not end after the report is served on the accused. He must file his objections in a timely manner[80] or the issues are considered waived.[81] The defense counsel should ensure that they have carefully read the report, reviewed the summary of testimony, and filed any written objections in a timely fashion.

III. TRIAL

A. Motions To Compel

Motion practice in a case involving child abuse allegations may be complex and require the defense counsel to determine which motions he intends to file well in advance of the trial. Assuming witness and discovery requests are made in a timely manner,[82] the defense counsel should file a motion to compel as soon as he has notice from the prosecution that the government will not turn over certain documents, produce an expert or other witnesses.[83]

In *United States v. Reece*,[84] the Court of Military Appeals held that the military judge abused his discretion by failing, at a minimum, to review the requested records *in camera*. The Court based its ruling on its finding that "Military law provides a much more direct and generally broader means of discovery by an accused than is normally available to him in civilian courts."[85]

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[79] R.C.M. 405(f)(12), *supra* note 19.
[80] R.C.M.405(j)(4), *supra* note 19.
[81] *See* United States v. Argo, 46 M.J. 454 (1997) (holding where defense did not raise issue of nondisclosure of impeachment evidence of a government witness in objections to the Article 32 report within 5 days, was waived for the issue at trial).
[82] R.C.M. 703(c)(2)(C), *supra* note 19.
[83] R.C.M. 905(b)(4), 906(b)(7), and 914, *supra* note 19.
[84] United States v. Reece, 25 M.J. 93 (C.M.A. 1987).
[85] *Id.* at 94, quoting United States v. Mougenel, 6 M.J. 589, 591 (A.F.C.M.R. 1978), *pet denied*, 6 M.J. 194 (1979).

The Court went on to further hold that "The Military Rules of Evidence establish 'a low threshold of relevance' . . . ."[86]

In *United States v. Tangpuz*,[87] the Court of Military Appeals articulated several factors to be considered when determining whether to produce a witness requested by the defense.

> The Court has never fashioned an inelastic rule to determine whether an accused is entitled to the personal attendance of a witness. It has, however, identified some relevant factors, such as: the issues involved in the case and the importance of the requested witness as to those issues; whether the witness is desired on the merits or the sentencing portion of the trial; whether the witness' testimony would be merely cumulative; and the availability of alternatives to the personal appearance of the witness, such as deposition, interrogatories or previous testimony. . . . If adverse to the accused, the ruling is subject to review and reversal if there has been an abuse of discretion.[88]

The Court went on to state that all parties should recognize the need for the accused to have equal access to witnesses and the use of compulsory power. Citing *United States v. Manos,* [89] the court stated

> We are, however, concerned with impressing on all concerned the undoubted right of the accused to secure the attendance of witnesses in his own behalf; the need for seriously considering the request; and taking necessary measures to comply therewith if such can be done without manifest injury to the service. That is what we meant in *Sweeney,*[90] in speaking of weighing the relative responsibility of the parties against the equities of the situation.[91]

Failure to request witnesses or experts in a timely fashion may result in loss of these witnesses.[92] Filing the motion early may help to resolve these issues prior to the trial and avoid undue delay. If not, the defense counsel may face the prospect of a delay in the proceedings because the documents in question may be difficult to obtain quickly, witnesses become unavailable, and experts make other commitments.

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[86] *Id.* at 95 (citations omitted).
[87] United States v. Tangpuz, 5 M.J. 426 (C.M.A. 1978).
[88] *Id.* at 429.
[89] United States v. Manos, 17 U.S.C.M.A. 10, 15, 37 C.M.R. 274, 279 (1967).
[90] United States v. Sweeney, 14 U.S.C.M.A. 599, 605, 34 C.M.R. 379, 385 (1964) (holding accused prejudiced when the military judge denied motion to compel two character witnesses who would have testified on the merits).
[91] 5 M.J. at 430, citing United States v. Manos, 17 U.S.C.M.A. at 15, 37 C.M.R. at 279.
[92] *See* United States v. Brown, 28 M.J. 644 (A.C.M.R. 1989). "Although timeliness is not *per se* grounds for denying a request for a witness, timeliness of a defense request for a witness may be considered." *Id.* at 647.

B. Motions for a New Article 32 Hearing

One motion for the defense counsel to consider is a motion for a new Article 32 hearing.[93] This will be important if the child witness was not produced at the hearing and the basis for finding him/her unavailable is insufficient.[94] Another issue may be that the IO improperly considered statements or alternatives to evidence over defense objection.[95] The defense counsel should, however, pay special attention to the axiom, "be careful what you ask for, you just may get it." He should carefully weigh the benefit of another hearing with consideration as to how well his client is holding up in the process. If an extended delay will result in further deterioration of the client, the benefits may be outweighed by the risks.

C. Motions in Limine – Residual Hearsay Issues

In cases dealing with child abuse allegations, the prosecution may seek to introduce hearsay statements of the victim. Motions in limine may prevent the prosecution from doing this and allow the defense counsel to try his case. One of the more common avenues that the prosecution attempts to take in admitting out of court statements is M.R.E. 803(24).[96] The standard for

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[93] R.C.M. 905(b)(1) and 906(b)(3), *supra* note 19.

[94] *See* United States v. Marrie, 39 M.J. 993 (A.F.C.M.R. 1994), *aff'd*, 43 M.J. 35 (1995).

[95] While the author's research found no cases directly on point, a due process argument could be made based on R.C.M. 405(g)(4)(A), *supra* note 19. *See also* United States v. Pazdernik, 22 M.J. 690 (A.F.C.M.R. 1986) (stating purpose of the Article 32 hearing is to insure the accused receives a thorough and impartial investigation); United States v. Bramel, 29 M.J. 958 (A.C.M.R.) (stating primary purpose of Article 32 investigation is to obtain impartial recommendation of the charges); and United States v. Chestnut, 2 M.J. 84, 85 n.4 (C.M.A. 1976). ("[T]his court once again must emphasize that an accused is entitled to the enforcement of his pretrial rights without regard to whether such enforcement will benefit him at trial.").

[96] M.R.E. 803, *supra* note 10, provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

admissibility of statements under the residual hearsay rules is the United States Supreme Court decision in *Idaho v. Wright.*[97] In *Wright*, The Supreme Court held that a statement offered under the residual hearsay exception should only be admitted "if it bears adequate 'indicia of reliability.'"[98] This requirement can only be met "by a showing of particularized guarantees of trustworthiness."[99] To determine whether these guarantees exist, the court must look at "the totality of circumstances . . . [t]he only relevant circumstances, however are 'those that surround the making of the statement and that render the declarant particularly worthy of belief.'"[100]

In *United States v. Kelley,*[101] the Court of Appeals for the Armed Forces[102] addressed the issue of admissibility of statements offered under the residual hearsay exception. "The residual-hearsay rule sets out three requirements for admissibility: (1) materiality, (2) necessity, and (3) reliability."[103] The Court went on to state that the exception should be rarely used, but that in cases involving child abuse allegations, the necessity prong is more liberally construed. The Court explained that:

> Federal courts have recognized that "one such exceptional circumstance generally exists when a child abuse victim relates to an adult the details of the abusive events." The more liberal approach in child abuse cases extends to the "necessity" requirement. Even though residual hearsay may be "somewhat cumulative, it may be important in evaluating other evidence and arriving at the truth so that the 'more probative' requirement can not be interpreted with cast iron rigidity."[104]

Under this standard, it appears that the best line of attack for the defense counsel will be the reliability prong of the test. If the statement is made to a law enforcement agent, the defense counsel can attack the reliability of the statement based on this fact.[105] In *United States v. Hines,*[106] the Court of Military Appeals addressed the issue of reliability of statements of

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[97] Idaho v. Wright, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d. 638 (1990).
[98] *Id.* 497 U.S. at 814-15, 110 S. Ct. at 3141.
[99] *Id.* 497 U.S. at 815, 110 S. Ct. at 3142.
[100] United States v. Clark, 35 M.J. 98, 106 (C.M.A. 1992) citing Idaho v. Wright, 497 U.S. at 819, 110 S. Ct. at 3142.
[101] United States v. Kelley, 45 M.J. 275 (1996).
[102] Formerly the Court of Military Appeals.
[103] 45 M.J. at 280.
[104] *Id.* (citations omitted).
[105] *See generally* United States v. Cordero, 22 M.J. 216 (C.M.A. 1986); United States v. Murphy, 30 M.J. 1040 (A.C.M.R. 1990) (citing cases holding that statements made to law enforcement agents are inherently suspect); and United States v. Quarles, 25 M.J. 761 (N.M.C.M.R. 1987) (explaining admission of hearsay statements error because they were unreliable).
[106] United States v. Hines, 23 M.J. 125 (C.M.A. 1986).

unavailable witnesses made to law enforcement agents and whether the statements would satisfy the Confrontation Clause.

> Our concern . . . is whether *ex parte* statements to law enforcement officers are obtained with such a degree of bipartisanship that an accused cannot reasonably contend that the purposes of cross-examination have not been served? . . . Since [the agent's] questioning is proffered as a replacement for cross-examination, was it equivalent to cross-examination? In other words, was [the agent] as zealous at uncovering the weaknesses in the prosecution's case . . . as defense counsel would have been? Was he intent on exploring all possibilities of reasonable doubt as to guilt, or was he, in effect, content with making out a *prima facie* case? On this record we think that the investigative process was not equivalent to the judicial process, and we would not ordinarily expect it to be. Hence we do not believe that [the agent's] examination of the declarants by itself comported with the substance of the constitutional protection.[107]

D. Motions in Limine – Uncharged Misconduct

In light of M.R.E.s 413[108] and 414,[109] it may be difficult for the defense counsel to limit uncharged misconduct of sexual assaults by his client. As his first line of attack, the defense counsel should consider challenging the constitutionality of these rules of evidence. If this fails, he should ask the judge to perform an M.R.E. 403[110] balancing test. Of course, if the government intends to offer this evidence, make sure they have complied with the notice requirements. If the military judge allows the evidence to be

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[107] *Id.* at 137 (cites omitted).

[108] Mil. R. Evid. 413, *supra* note 10, allows the prosecution, in the case of sexual assault, to present evidence of any other sexual assault committed by the accused for any relevant purpose. The prosecution must provide notice of its intent at least 15 days prior to trial date. (The Air Force has proposed an amendment to the current rules, changing the notice requirement to 5 days. It is expected this change will be approved and implemented in the near future.)

[109] Mil. R. Evid. 414, *supra* note 10, allows the prosecution, in a case of child sexual molestation, to present evidence of any other sexual assault on a child for any relevant purpose. The prosecution must provide notice of its intent at least 15 days prior to trial date. (The Air Force has proposed an amendment to the current rules, changing the notice requirement to 5 days. It is expected this change will be approved and implemented in the near future.) For a good overview of the new rules, see Stephen R. Henley, *Caveat Criminale: The Impact of the New Military Rules of Evidence in Sexual Offense and Child Molestation Cases*, THE ARMY LAWYER, 82 (Mar 1996).

[110] The rule states "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *See also* United States v. Hughes, __ M.J. __, ACM 32359 1998 CCA LEXIS 227 (AFCCA 1998) (holding that in cases of evidence offered under Mil. R. Evid. 414, a judge must still find the evidence to be relevant under Mil. R. Evid. 401 and must perform the balancing test under Mil. R. Evid. 403.

introduced, the defense counsel should seek a limiting instruction regarding how the members can use the evidence.[111]

In dealing with uncharged misconduct unrelated to sexual assaults, the defense counsel should move to limit the government's use of the evidence. In determining whether uncharged misconduct is admissible, the courts have established a three-prong test. First, the quality of the evidence must be assessed for its ability to prove the extrinsic offenses; second, is the evidence relevant to prove something other than a predisposition to commit crimes; third, regardless of the findings relating to the first two prongs, a balancing test must be performed under M.R.E. 403.[112] In *United States v. Franklin*,[113] the Court of Military Appeals addressed the issue of whether uncharged misconduct offered to prove intent was properly admitted. The Court recognized the inherent difficulty in distinguishing "between the intent to do an act and the predisposition to do it."[114] In *United States v. Gamble*,[115] the Court of Military Appeals reversed a conviction of rape because the military judge had erroneously admitted uncharged misconduct. The issue in the case was consent of the victim. The prosecution offered evidence of another assault as evidence of intent, plan, preparation and absence of mistake. The Court, quoting from the Military Rules of Evidence Manual,[116] stated:

> It is common for the prosecution to use short-hand expressions like modus operandi, common plan or scheme, etc., to account for an offer of evidence of other acts. A trial judge must be certain to make the prosecution state exactly what issue it is trying to prove in order to see whether the evidence is probative, how probative it is, and whether it should be admitted in light of the other evidence in the case and the ever present danger of prejudice.[117]

While the advent of the new rules of military evidence relating to uncharged misconduct in these kinds of cases may make it more difficult to keep the evidence from the members, the defense counsel should still make every effort and use every avenue to prevent it.

E. Dealing with Statements Offered under Medical Diagnosis Exception

Another avenue prosecutors will commonly use to have out of court statements of the child admitted is the medical diagnosis exception to M.R.E.

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[111] Mil. R. Evid. 105, *supra* note 10.
[112] *See generally* United States v. Loving, 41 M.J. 213 (1994); United States v. Reynolds, 29 M.J. 105 (C.M.A. 1989); United States v. Mirandes-Gonzalez, 26 M.J. 411 (C.M.A. 1989); and United States v. White, 23 M.J. 84 (C.M.A. 1986).
[113] United States v. Franklin, 35 M.J. 311 (C.M.A. 1992).
[114] *Id.* at 316.
[115] United States v. Gamble, 27 M.J. 298 (C.M.A. 1988).
[116] S. SALTZBURG, ET AL., MILITARY RULES OF EVIDENCE MANUAL, at 361 (2d ed. 1986).
[117] 27 M.J. at 304.

803.[118] Statements offered under this exception must meet two requirements. First the person making the statement must have "some expectation of promoting his well-being and thus an incentive to be truthful. Second, the statement must be made by a declarant for the purpose of medical diagnosis and treatment."[119] In *United States v. Siroky,*[120] the Court of Appeals for the Armed Forces affirmed the Air Force Court of Criminal Appeals finding that a child's testimony did not meet the test for admissibility. The Court found that there was insufficient evidence in the record to indicate that the 2 1/2-year-old child had an expectation of treatment when she visited the psychotherapist.

The defense counsel should be alert to situations in which the statements being offered were taken in conjunction with investigations rather than treatment. In *United States v. Faciane,*[121] the Court of Military Appeals reversed a conviction of indecent acts because statements by the alleged victim were improperly admitted under the medical diagnosis exception. The Court found that there was insufficient evidence to meet the second prong of the test when the child was interviewed by a child protective services worker at the hospital.

> Although the child may have associated a hospital with treatment and may have known that she was in a hospital when she talked to Mrs. Thorton, there is no evidence indicating that the child knew that her conversation "with a lady" in playroom surroundings was in any way related to medical diagnosis or treatment. Mrs. Thorton testified that she did not present herself as a doctor or do anything medical. There is no evidence that Mrs. Thorton was dressed or otherwise identified as a medical professional. The interview took place in a room filled with toys. There is nothing suggesting that the child made the statements with the expectation that if she would be truthful, she would be helped.[122]

The Court of Military Appeals set out five foundational requirements that may provide additional grounds for the defense to attack admissibility of

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[118] Mil. R. Evid. 803(4), *supra* note 10, provides

> (4) *Statements for purposes of medical diagnosis or treatment.* Statements made for purposes of medical diagnosis or treatment and described medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

[119] United States v. Armstrong, 36 M.J. 311, 313 (C.M.A. 1993). *See also* United States v. Quigley, 35 M.J. 345, 346-47 (C.M.A. 1992).
[120] United States v. Siroky, 42 M.J. 707 (A.F.Ct.Crim.App. 1996), *aff'd.*, 44 M.J. 394 (1996).
[121] United States v. Faciane, 40 M.J. 399 (C.M.A. 1994).
[122] *Id.* at 403. See also *United States v. Dunlap*, 39 M.J. 835 (A.C.M.R. 1994) (holding it error to admit statements under M.R.E. 803(4) as there was no evidence that witness recognized that person making statement to could provide treatment, or that witness expected to receive treatment).

these statement in *United States v. Quigley.*[123] In *Quigley,* the Court found that:

> [T]he foundational facts required by M.R.E. 803(4) are that a statement (1) was made; (2) near the pivotal time of the events; (3) to an individual who could render medical diagnosis or treatment; (4) by an individual who had an expectation of receiving treatment from the recipient of the statement; and (5) refers to the person's mental and emotional condition.[124]

The defense counsel should also be familiar with who was present at the interview and the circumstances surrounding the taking of the statements. In *United States v. Armstrong,*[125] the court reversed a conviction for sodomy that was based on statements made to trial counsel in the presence of a psychologist. The Court found that the statements did not fit the exception because they were made to the trial counsel for purposes of preparing for trial. The Court recognized that the relationship between the witness and the psychologist who was present during the interview was for an appropriate purpose and the therapeutic value of all the statements made to the psychologist. "However, even untrue statements contribute to the psychologist's understanding of his or her patient's problems; thus the mere fact that a patient made a statement to a psychologist does not necessarily make the statement admissible under this rule."[126] In *United States v. Henry,*[127] the Army Court of Criminal Appeals[128] held that statements of the alleged victim were not made for medical diagnosis "but rather the statements were made for the purpose of facilitating the collection of evidence relevant to the criminal investigation of her rape allegation."[129] In *Henry* the investigators had arranged for the examination after they interviewed the witness. The witness testified that she did not request the examination and her understanding of the reason for the exam was to determine if she had been raped.[130]

Cases involving child abuse can raise difficult evidentiary issues. The defense counsel must be vigilant and aggressive to ensure the government operates within, and the courts properly apply, the evidentiary rules. Recently in *United States v. Knox,*[131] the Navy-Marine Corps Court of Criminal Appeals[132] reversed a conviction of rape and forcible sodomy with a child

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[123] *Quigley*, 35 M.J. at 346-347.
[124] *Id.*
[125] United States v. Armstrong, 36 M.J. 311 (C.M.A. 1993).
[126] *Id.* at 314.
[127] United States v. Henry, 42 M.J. 593 (Army Ct.Crim.App. 1995).
[128] Formerly the Army Court of Military Review.
[129] 52 M.J. at 597-98.
[130] *Id.* at 596.
[131] United States v. Knox, 46 M.J. 688 (N.M.Ct.Crim.App. 1997).
[132] Formerly the Navy Marine Court of Military Review.

under age 16 in part because of the improper admission of hearsay testimony. At the conclusion of the opinion the Court cautioned trial practitioners about circumvention of the military rules of evidence in the name of justice.

> Optimally, every person who criminally abuses a child, physically or sexually, would be caught, convicted, and punished appropriately for the offense. As a result, the certainty of detection, conviction, and punishment would act as a strong deterrent, protecting children from such abuse. But the rules of evidence have been developed painstakingly over centuries to ensure, to the extent it is humanly possible, the reliability of convictions. The rules of evidence cannot be overlooked, set aside, or circumvented in the zeal to prosecute any crime, no matter how heinous. In a court of law the ends never justify the means. It is our responsibility to overturn the results of well-meaning efforts to use manners of proof which do not meet the standards of admissibility established by the rules of evidence regardless of the nature of the offense. As recently stated by the U.S. Supreme Court: "Courts must be sensitive to the difficulties attendant upon the prosecution of alleged child abusers. In almost all cases a youth is the prosecution's only eye witness. But 'this Court cannot alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases.'"[133]

F. Developing a Theme and Theory

Developing a theme and theory for the case is critical to defense counsel in cases involving allegations of abuse. As may often be the case in dealing with child abuse allegations, "The case . . .[is] . . . in essence, the damning accusation of a sympathetic victim cloaked in the presumptive innocence of tender years."[134] Defense counsel need to overcome this presumption by providing the members with a plausible explanation, other than the accused's guilt, to explain the allegations or convince the members the testimony is unreliable. In *United States v. Woolheater*,[135] the Court of Military Appeals discussed theme and theory in defense cases and held that the military judge improperly limited the defense from introducing evidence that would have indicated someone else was responsible for the charged offense. The Court explained how and why the defense develops a case theory and discussed how the defense counsel, in *Woolheater*, attempted to establish the evidence to support the case theory.

> In setting up a defense strategy for a case, counsel adopts a coherent theme and theory under which to present the case. The theme and theory usually take into consideration the strengths and weaknesses of the evidence that is both favorable and unfavorable to the accused. The defense theory of the

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[133] *Id.* at 696, citing Tome v. United States, 513 U.S. 150, 165-67, 115 S. Ct. 696, 705, 130 L. Ed. 2d 574 (1995).
[134] United States v. Buenaventura, 40 M.J. 519, 528 (A.C.M.R. 1994) (Hostler, concurring in part, dissenting in part).
[135] United States v. Woolheater, 40 M.J. 170 (C.M.A. 1994).

case can be most helpful in explaining the weaknesses so as to be consistent with all or most of the evidence presented. In this case, the defense counsel was persistent in the defense theory that Shaner committed the arson. The defense also recognized that the most unfavorable and damaging evidence to appellant was his voluntary and detailed confession describing many of the particulars surrounding the cause of the fire. The defense attempted to negate or lessen the impact of appellant's confession by introducing psychiatric evidence of a plausible explanation for the confession. Dr. Parker presented evidence explaining appellant's reaction to stressful situations such as a series of NIS interrogations. . . . Attacking the reliability of the confession was the first prong of a two-pronged defense strategy. Even though the confession was detailed, voluntary, and properly before the finders of fact, the members were still free to determine the reliability of that confession. . . . The second prong was to present plausible evidence that another individual, Shaner, had the motive, knowledge, and opportunity to commit the crime.[136]

As *Woolheater*[137] shows, it is crucial that the defense theory and theme are clear. Thus the defense counsel must start to explain the theory of the case to the members at the earliest possible time.

When developing a theme and theory the defense counsel may want to consider other possibilities besides the oft-used "the child is lying."[138] For instance, the defense counsel may be able to argue that the allegations are a cry for attention because the parents were so caught up in their own problems that they have ignored this child for months. This may be more plausible if the parents are having serious marital problems. Or, the defense counsel may show the jury that the child has a history of problems distinguishing between dreams and reality or is on some type of medication that produces bizarre dreams which the child has confused with reality. From the beginning of the trial, the defense counsel must show that he has a plausible theory, that the evidence will support his theory, and that the theory raises reasonable doubt regarding the allegations.

G. Voir Dire/Challenging Members

While voir dire can be difficult to handle effectively, if done correctly, it can be the "beginning of a beautiful friendship"[139] between the defense counsel and the jury. The purpose of voir dire is to "obtain information for the

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[136] *Id.* at 173-74.
[137] *Id.*
[138] In many instances the child may not so much be lying but rather is being pushed into a story by a parent with their own agenda. This type of false accusation case happens quite often in bitter divorce proceedings. *See* Thomas M. Horner & Melvin J. Guyer, *Prediction, Prevention, and Clinical Expertise in Child Custody Cases in Which Allegations of Child Sexual Abuse Have Been Made: I. Predictable Rates of Diagnostic Error in Relation to Various Clinical Decisionmaking Srategies*, 25 FAM. L. Q. 217, 219-220 (1991).
[139] Humphrey Bogart, CASABLANCA (Metro-Goldwyn-Mayer 1942).

intelligent exercise of challenges."[140] R.C.M. 912 establishes fourteen separate grounds for challenge against a military member.[141] "Military judges must follow the liberal-grant mandate in ruling on challenges for cause."[142] In *United States v. Daulton*,[143] a case involving indecent acts with a child, the Court of Appeals for the Armed Forces reversed a conviction in part because the military judge abused his discretion when he denied a challenge for cause against a court member whose sister and mother had been sexually abused. The Court did not rule that members are *per se* disqualified because they, or someone close to them, has been a victim of a similar crime, unless they have been victims of similar violent or traumatic crimes.[144] Instead, the Court's decision was based on implied bias. "Implied bias exists when most people in the same position would be prejudiced. Implied bias is not viewed through the

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[140] Discussion to R.C.M. 912(d), *supra* note 19.
[141] R.C.M. 912(f), *supra* note 19, provides

> (f) *Challenges and removal for cause.*
> (1) *Grounds.* A member shall be excused for cause whenever it appears that the member:
> (A) Is not competent to serve as a member under Article 25(a), (b), or (c);
> (B) Has not been properly detailed as a member of the court-martial;
> (C) Is an accuser as to any offense charged;
> (D) Will be a witness in the court-martial;
> (E) Has acted as counsel for any party as to any offense charged;
> (F) Has been an investigating officer as to any offense charged;
> (G) Has acted in the same case as convening authority or as the legal officer or staff judge advocate to the convening authority;
> (H) Will act in the same case as reviewing authority or as the legal officer or staff judge advocate to the reviewing authority;
> (I) Has forwarded charges in the case with a personal recommendation as to disposition;
> (J) Upon a rehearing or new or other trial of the case, was a member of the court-martial which heard the case before;
> (K) Is junior to the accused in grade or rank, unless it is established that this could not be avoided;
> (L) Is in arrest or confinement;
> (M) Has informed or expressed a definite opinion as to the guilt or innocence of the accused as to the offense charged;
> (N) Should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.

[142] *See generally* United States v. White, 36 M.J. 284, 287 (C.M.A. 1993); United States v. Daulton, 45 M.J. 212, 217 (1996).
[143] 45 M.J. at 218.
[144] *Id.* at 217. *See also* United States v. Smart, 21 M.J. 15 (C.M.A. 1985) (stating military judge abused his discretion when he failed to grant challenge against a victim of multiple armed robberies in a case of robbery).

eyes of the military judge or the court members, but through the eyes of the public."[145] Interestingly, the Court held that the judge did not abuse his discretion when he denied a challenge against a medical doctor with some experience dealing with child abuse.[146]

The defense counsel should listen carefully to the members' responses. He should also pay attention to the body language and nonverbal cues members may be giving. While the member may be answering the questions in an acceptable manner, his body language may indicate a complete dislike for the subject or the accused, which may evidence an inelasticity for findings or sentencing. This must be explored completely in individual voir dire, which should enable the defense counsel to establish a sufficient basis for a challenge for cause.[147]

Voir dire will requires the defense counsel to pay careful attention to each question asked. One area to consider further questioning may be whether any member knows someone who is a victim or accused of any type of sexual misconduct or assault. Another area the defense counsel may want to address in voir dire concerns members' attitudes regarding whether children lie about these types of allegations. The attorney should ask whether members will consider that children may often be easily influenced and incorporate into the own memory information that they get from the therapists, law enforcement agents, parents, or trial counsel who question them about the incidents.[148] Selecting a fair and impartial panel is crucial, and a defense counsel must be vigilant in his efforts to ensure he has ferreted out any members who should be challenged.[149]

H. Opening Statement

In a case involving child abuse, opening statements are critical to the defense. It is easy to imagine the trial counsel's opening statement as it will most likely include a grisly description of the testimony that the trial counsel hopes the child will provide. This type of opening statement can be very effective, dramatic and the members may agree early on that the accused is

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[145] *See* 45 M.J. at 217.
[146] *Id.*.
[147] To preserve the issue on appeal, the defense counsel must clearly describe the body language that concerned him, as well as when the member exhibited the body language. For instance "While answering that she could consider all available forms of punishment, MSgt Doe crossed her arms in front of herself and visibly sat back in her chair. Additionally she was shaking her head no, while saying yes."
[148] *See* CECI AND BRUCK, *supra* note 60, at 107.
[149] *See also* United States v. Mosqueda, 43 M.J. 491 (1996) (holding member should have been excused after he consulted a physician about child abuse after trial had begun); United States v. Kelley, 40 M.J. 515 (A.C.M.R. 1994) (stating member whose family member had been raped should have been excused because incident left him angry and resentful).

really a monster sitting at the table with the defense counsel. It is therefore important that the defense counsel diffuse the statement from the beginning. Whatever theory the defense counsel has to explain why the allegations are untrue, he should lay it out for the members and advise them what evidence to look for in support of this theory. This does not mean that the defense counsel should make promises that he can't keep. It is important to review the anticipated evidence to ascertain what he realistically expects the members to hear in order to properly frame the opening statement.

I. Cross-Examination of the Victim

As with all cross-examinations, the only way to do a truly effective job is to prepare, prepare, prepare. Child witnesses present unique issues to the defense counsel, both during the interview process and in cross-examination.[150] To prepare the cross-examination, the defense counsel should know each and every statement that the child has made, to whom and when, so that he can take full advantage of prior inconsistent statements.[151] Constructing a timeline may also be an effective organizational tool when preparing cross-examination.[152] Another useful approach is to do a small chart containing all of the previous statements made by child that the defense counsel can keep at the desk. [153] The defense counsel could break the statements into the different allegations. As the child testifies on direct, he should then write down the statements that are inconsistent with earlier statements. Pointing out the inconsistencies may be more difficult with the child because they can easily become confused and simply may not remember making previous statements. The defense counsel should work with the military judge and trial counsel to determine the best way to present inconsistent statements to the members. If the inconsistent statements are contained in a videotaped interview, this may be easier to do as the statements

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[150] *See generally* John B. Meyers, et al., *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 27 PACIFIC L.J. 1, 12, 25 (1996).

[151] For a discussion on the use of prior inconsistent statements *see generally* Earl F. Martin, III, *Prior Inconsistent Statements and the Military Rules of Evidence*, 39 A.F. LAW REV. 207 (1996).

[152] *See* LARRY S. POZNER & ROGER J. DODD, CROSS-EXAMINATION: SCIENCE AND TECHNIQUES, 137 (1993). Pozner explains cross-examination preparation by using sequence of events charts.

[153] *Id.* at 155. Pozner discusses cross-examination preparation by using witness statement charts.

can be played for the child in court.[154] The important thing is that the defense counsel shows the members the relevant inconsistencies.

The defense counsel should determine the approach he intends to take in cross-examination. For older children, such as teenagers, he may be able to treat them as he would an adult witness. To the extent that he can, the defense counsel should examine a preteen child as he would an adult except that he simplifies his vocabulary. Trial counsel will most likely present the child in a manner that emphasizes the youth and innocence of the child.[155] The defense counsel should therefore talk to the child like an adult to the extent possible while keeping the examination as emotionless as possible. If the defense counsel becomes visibly agitated or angry, the child may feel threatened and shut down. Or the defense counsel may upset the members and they may shut down. Either way, the defense counsel loses. The defense counsel should be firm in the questioning but not argumentative. The defense counsel will have hard questions to ask but should do it in a manner that does not antagonize the child, members or military judge.

Cross-examination of a child can be both challenging and intimidating to the defense counsel. Children are unpredictable witnesses and there is a danger that the defense counsel may actually bolster the child's credibility during cross-examination. The defense counsel must be disciplined and prepared. It does not have to be a long examination, nor does it have to be an aggressive one. Like air power, the key to a good cross-examination of a child is flexibility. The defense counsel should remember to ask only the questions that he needs for the closing argument. Once defense counsel obtains the information he needs, end the examination. It is rare that the defense counsel will destroy the credibility of a child through cross-examination. That will come from the other evidence the defense counsel has that supports why the allegations are unreliable.

J. Confrontation Issues

In child abuse cases, the defense counsel may be presented with situations where the government seeks to have the child testify behind a barrier, by closed circuit television, or in some other manner that prevents the child from actually "facing" the accused. The starting point for the defense counsel is whether the government can establish the necessary prerequisites.

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[154] Introduction of a videotape may also be beneficial to the defense if there is a question of suggestion. *See* United States v. Casteel, 45 M.J. 379 (1996) (allowing defense counsel to play videotape and cross-examined investigator about leading questions used in the interview).

[155] Recent studies have shown a child's age has the greatest impact on both credibility and conviction. Younger children, especially those around nine years old, are viewed by jurors as being more credible than older children, teenagers and adults. *See* Jessica Libergott Hamblen & Murray Levine, *The Legal Implications and Emotional Consequences of Sexually Abuse Children Testifying as Victim-Witnesses*, 21 LAW & PSYCHOL. REV. 139, 145-154 (1997).

> [T]he confrontation Clause [is] satisfied in cases involving child victims where: (1) there [is] a case-specific finding that testimony by the child in the presence of the defendant would cause the child to suffer serious emotional distress such that the child could not reasonably communicate; (2) the impact on the child [is] more than *de minimis*; (3) the child testifie[s] via one-way closed-circuit television, enabling the judge, jury, and the defendant to observe the child's demeanor during testimony; and (4) the child [is] subject to full cross-examination.[156]

In the two recent cases of *United States v. Longstreath*[157] and *United States v. Daulton,*[158] the Court of Appeals for the Armed Forces declined to find that the Comprehensive Crime Control Act of 1990[159] applied to trials by courts-martial. The Act authorizes federal courts to order two-way closed-circuit television in cases involving child-abuse. This suggests that the Court is unwilling to establish a "bright line" rule regarding how this situation can be handled during a court-martial. When this issue arises at trial, the defense counsel should familiarize himself with the current state of the law in order to handle the situation appropriately at trial, as well as create a record for appeal.[160]

K. Expert Witness Testimony

Equally challenging to the defense counsel in these kinds of cases is handling cross-examination of the government expert witnesses, as well as the decision regarding whether he will put on expert testimony. "Use of expert testimony in these child sexual abuse cases is another 'legal thicket' for the expert testimony is extremely complex and often novel."[161] The permissible scope of expert testimony in child sexual abuse cases was defined in *United States v. Birdsall.*[162] Citing a case from the Eighth Circuit,[163] the Court of Appeals for the Armed Forces had this to say regarding the parameters of expert testimony.

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[156] United States v. Longstreath, 45 M.J. 366, 372 (1996) citing Maryland v. Craig, 497 U.S. 836, 856-57, 110 S. Ct. 3157, 3169-70, 111 L. Ed. 2d. 666 (1990).
[157] *Id.*at 366.
[158] United States v. Daulton, 45 M.J. 212 (1996).
[159] Comprehensive Crime Control Act of 1990 § 225, 18 U.S.C. § 3509 (1990).
[160] *See* U.S. v. Daulton, 45 M.J. 212, 219 (1996) (holding Confrontation Clause was violated by requiring accused to leave the courtroom during the testimony and watch on closed-circuit television); United States v. Williams, 37 M.J. 289 (C.M.A. 1993) (allowing child to testify from a chair in the center of the courtroom where accused could see her profile); United States v. Thompson, 31 M.J. 168 (C.M.A. 1990) (stating Confrontation Clause not violated by allowing boys to testify with their backs to accused, facing military judge and counsel).
[161] United States v. Banks, 36 M.J. 150, 160 (C.M.A. 1992).
[162] United States v. Birdsall, 47 M.J. 404 (1998).
[163] United States v. Whitted, 11 F.3d 782, 785 (8th Cir. 1993).

> In the context of a child sexual abuse case, a qualified expert can inform the jury of characteristics in sexually abused children and describe the characteristics the alleged victim exhibits. A doctor who examines the victim may repeat the victim's statements identifying the abuser as a family member if the victim was properly motivated to ensure the statements' trustworthiness. A doctor can also summarize the medical evidence and express an opinion that the evidence is consistent or inconsistent with the victim's allegations of sexual abuse. Because jurors are equally capable of considering the evidence and passing on the ultimate issue of sexual abuse, however, a doctor's opinion that sexual abuse has in fact occurred is ordinarily neither useful to the jury or admissible.[164]

The Court reversed Birdsall's conviction because a doctor and a psychologist testified for the government that in their opinion the children had been sexually abused.

> Normally expert testimony that a victim's conduct or statements are consistent with sexual abuse or consistent with the complaints of sexually abused children is admissible and can corroborate an alleged victim in a significant way. Nevertheless, to say as a matter of expert opinion that sexual abuse occurred and a particular person did it crosses the line of proper medical testimony and imparts an undeserved scientific stamp of approval on the credibility of the victims in this case. Here the inadmissible testimony came from two doctors, magnifying its impact on the members in an extremely close case.[165]

Additionally, profile evidence is inadmissible. The leading case in this area is *United States v. Banks.*[166] The Court of Military Appeals held that it was reversible error to allow expert testimony that the accused's family fit the profile of a family experiencing the dynamics of sexual abuse within the family.[167] As these cases illustrate, the defense counsel must be well aware of the parameters of expert testimony in order to prevent experts from providing impermissible evidence.[168]

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[164] *See* 47 M.J. at 409 (citations omitted).
[165] *Id.* at 410 (citations omitted).
[166] United States v. Banks, 36 M.J. 150 (C.M.A. 1992).
[167] *Id.* at 163.
[168] *See also* United States v. Dollente, 45 M.J. 234 (1996) (reversing for allowing expert to testify as a human lie detector); United States v. Cacy, 43 M.J. 214 (1995) (stating expert went too far when testified that she explained necessity of telling truth to child in order to determine if further treatment was necessary, then recommended further treatment, which were really euphemism for truthfulness of child); and United States v. King, 35 M.J. 337, 342 (C.M.A. 1992) (finding it error to permit expert to testify that 5 year old children lack the ability to fabricate allegations because of lack of sophistication) ("This type of testimony illustrates how dangerous it is for judges to receive uncritically just anything an expert wants to say. The evaluation of expert testimony does not end with a recitation of academic degrees. Everything the expert says has to be relevant, reliable, and helpful to the factfinder.").

Cross-examination of an expert witness can be daunting, but with some background work and assistance of the consultant, it can be extremely productive to a defense counsel. One source of information the defense counsel should attempt to obtain is copies of previous testimony by the government expert. This information previews the expert's testimony and helps the defense counsel to prepare a solid cross-examination. Additionally, it may assist the defense counsel to find areas the expert can testify about that are helpful to the defense. The defense counsel then can minimize anything damaging said by the expert on direct, while obtaining information helpful to the defense (without having to call his own expert).

The decision whether the defense expert will testify may depend in large part on the strength of the government's case. The decision should be based on discussions with the expert regarding what the expert can testify about that is helpful to the defense case. Such discussions should include the issues the expert will have to concede that could harm the defense. Defense counsel should also be sensitive to the limits of the expert testimony it seeks to introduce. However, the appellate courts have noted that "[J]udges should 'view liberally the question of whether the expert's testimony may assist the trier of fact.' And, 'if anything, in marginal cases, due process might make the road a tad wider on the defense's side than on the Government's.'"[169] In *United States v. Dollente*,[170] the Court of Appeals for the Armed Forces held the military judge erred when he refused to allow the defense to present expert testimony that the alleged victim suffered from Post Traumatic Stress Disorder that could have been caused by other things present in the victim's life other than a sexual assault. This evidence directly contradicted the government's expert opinion that there was no other explanation for the victim's mental state but the trauma of a sexual assault. [171]

L. Closing Argument

Closing argument is an opportunity for the defense counsel to weave together all the evidence in the case that supports the defense theory of why his client is not guilty of the offense. While heaven may belong to the meek, courtrooms belong to the bold. The defense counsel should make no apologies for defending his client zealously. Nor should he be afraid to make the hard call, i.e., arguing the child is lying or is unable to accurately perceive and recall. The defense counsel cannot overemphasize the government's burden of proof despite the evidence that cuts against the reliability of the allegations. These may include evidence of motivation of the child or spouse to fabricate,

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[169] United States v. Garcia, 40 M.J. 533, 536 (A.F.C.M.R. 1994) (citations omitted), *aff'd*, 44 M.J. 27 (1996).
[170] United States v. Dollente, 45 M.J. 234 (1996).
[171] *Id.* at 238.

external influences which may have affected the child's memory, prior inconsistent statements, basic improbabilities of the story, and the client's good record.

The defense counsel may want to consider consulting the expert concerning the content of the closing argument. The expert may have more objectivity with regard to the strengths and weaknesses of the defense theory. The expert may be able to find any faults in the logic or presentation. The expert may also be helpful in assisting the defense counsel in framing his argument relating to the expert testimony.

M. Guilty Pleas

Getting the client through a *Care*[172] inquiry in cases involving child abuse can be difficult. It requires a great deal of preparation and practice with the client.[173] In cases involving child sexual abuse, the most difficult part of the inquiry may be convincing the client to admit that his conduct was "with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both."[174] Obviously, the defense counsel cannot advise the client to plead guilty if he is in fact not guilty. And if the client cannot bring himself to admit this particular element, then he still cannot plead guilty. However, once the defense counsel explains the elements to the client, the defense counsel can help the client provide the relevant information that satisfies the requirements of a guilty plea inquiry.

N. Sentencing

Sentencing is one of the most important, and difficult, portions of any defense case. In a litigated case, sentencing is even more difficult because the defense counsel does not have the arguments he would have had in a guilty plea. However, it is important even in litigated cases to provide perspective to the members. The defense counsel can potentially argue the good military record of the client, the impact of a severe sentence on the family and the member's ability to support them, the devastating effect of a punitive discharge, or the need to help the family recover from the accused's misconduct.

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[172] United States v. Care, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969).

[173] The defense counsel should consider such things as giving the accused a copy of the proof analysis to familiarize the client with the elements the military judge will talk with him about. The defense counsel may also ask the client to write out a statement explaining the offense. The client could use this as a basis for telling the judge in his own words why he is guilty of the charged offense.

[174] MCM, *supra* note 10, Uniform Code of Military Justice, Part IV paragraph 87, Article 134, Indecent Acts or Liberties With a Child.

Evidence presented in sentencing by the prosecutor may include victim impact testimony or expert testimony. The defense counsel must be alert to any overreaching by the witnesses in these areas because failure to object waives the issue (absent plain error).[175] He must also be alert to improper argument by the government. For instance, he should object to any inappropriate government argument regarding the accused's lack of remorse, especially if the case is litigated. The basis for the objection is that the accused may chose to assert his rights and not testify.[176]

Even in the most egregious cases of long-term abuse or multiple victims, there are points for the defense counsel to argue in sentencing. If supported by the facts, the defense counsel can argue the value of the guilty plea, the therapeutic needs of the client, any efforts the client has undertaken before trial to deal with the problem, the client's background, the need to provide the client with a motive to get better, the impact on the family if the sentence is unduly severe, or the family's desire to reunite. While all may seem lost at this point in the trial, the defense counsel must redouble his efforts to obtain the best possible punishment outcome for his client.

IV. CONCLUSION

"In many respects, child abuse litigation is a new frontier with a plethora of cases in all jurisdictions addressing provocative issues."[177] Defending a case involving any kind of child abuse, may be personally and professionally one of the most challenging that the defense counsel will face. The defense counsel must remain detached from his own feelings about the case. It is important for him to remember that he is often the only person in the client's world who is offering any kind of support or encouragement for the future. Regardless of the defense counsel's personal views, the client should never feel that the defense counsel also considers him unworthy of human existence because of the allegations, or his confession to such allegations. An accused has every right to expect and demand that his defense counsel will provide the same kind of zealous representation for his case he would provide in any other case. Harper Lee, in her novel, *To Kill A Mockingbird,*[178] touched

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[175] *See generally* United States v. Williams, 41 M.J. 134 (C.M.A.) (holding expert can testify as to future dangerousness as it relates to relevant rehabilitative potential); United States v. Prevatte, 40 M.J. 396 (C.M.A. 1994) (explaining it is not plain error for government experts to recommend confinement as part of sentence).

[176] *But see* United States v. Toro, 37 M.J. 313, 318 (C.M.A. 1993) ("It is proper for the prosecutor to comment on appellant's refusal to admit guilt after the accused has either testified or has made an unsworn statement and had either expressed no remorse or his expressions of remorse can be arguably construed as shallow, artificial, or contrived." (citations omitted)).

[177] *See* United States v. Banks, 36 M.J. 150, 160 (C.M.A. 1992).

[178] HARPER LEE, TO KILL A MOCKINGBIRD (1960).

on the need for meaningful representation even in controversial cases. Although Ms. Lee was talking about racism, her thoughts about defending an unpopular client in an unpopular case are equally applicable to the issues the defense counsel will face in cases involving child abuse.

> "Do all lawyers defend n-Negroes, Atticus?"
>
> "Of course they do, Scout."
>
> "Then why did Cecil say you defend niggers? He made it sound like you were runnin' a still."
>
> Atticus sighed. "I'm simply defending a Negro – his name's Tom Robinson. He lives in that settlement beyond the town dump. He's a member of Calpurnia's church, and Cal knows his family well. She says they're clean living folks. Scout, you aren't old enough to understand some things yet, but there's been some high talk around town to the effect that I shouldn't do much about defending this man." . . .
>
> "If you shouldn't be defendin' him, then why are you doin' it?"
>
> "For a number of reasons," said Atticus. "The main one is, if I didn't I couldn't hold up my head in town, I couldn't represent this county in the legislature, I couldn't even tell you or Jem not to do something again."
>
> "You mean if you didn't defend that man, Jem and me wouldn't have to mind you any more?"
>
> "That's about right."
>
> "Why?"
>
> "Because I could never ask you to mind me again. Scout, simply by the nature of the work, every lawyer gets at least one case in his lifetime that affects him personally. This one's mine, I guess."[179]

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[179] *Id.* at 83-84.

EXHIBIT 28

Approach to the Interpretation of Medical and Laboratory Findings in Suspected Child Sexual Abuse: A 2005 Revision

Joyce A. Adams, MD

When child sexual abuse is suspected, a medical examination is often one part of the overall evaluation. A suspicion of sexual abuse may result when a child has disclosed such abuse, has developed behaviors suggestive of sexual abuse, is diagnosed with a sexually transmissible infection, when there are suggestive medical or laboratory findings, or because the abuse has been witnessed by others or documented by photographs or videotapes. Health care providers responsible for performing medical examinations in these situations are often asked by parents, care givers, social service workers, or law enforcement officers whether or not any "evidence" of sexual abuse was found.

During the past 15 years, many changes have occurred in the way medical professionals perform evaluations of children suspected of having been sexually abused, and in how physical and laboratory findings are interpreted (Heger, Ticson, Velasquez, & Bernier, 2002). During the early 1990s, research studies documented genital and anal findings in children who were not suspected of having been sexually abused, which provided medical practitioners with a better understanding of the range of normal variations in the appearance of these tissues (McCann, Voris, Simon, & Wells, 1989; McCann, Wells, Simon, & Voris, 1990; Berenson, Heger, & Andrews, 1991; Berenson, Heger, Hayes, Bailey, & Emans, 1992).

A comprehensive listing of findings in nonabused children and medical and laboratory findings associated with suspected child sexual abuse was first published as a table in an article by Adams, Harper, and Knudson (1992). This classification system, sometimes referred to as the Adams Classification System, had been developed using published data on both abused and nonabused children. It 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.

The table, listing physical and laboratory findings, has been modified multiple times since 1992 in response to newly published research findings in order to refine the characterization of listed medical findings not supported by research data. The most recent set of revisions was begun in January, 2003, when groups of interested physicians were convened at the San Diego Child Maltreatment Conference and at annual meetings of the Ray Helfer Society. Participating physicians were asked to review the most recently published version of the document, to reassess the listings of medical and laboratory findings, and to attempt to reach consensus on how to define and interpret those medical findings. In January, 2004, under the sponsorship of the American Professional Society on the Abuse of Children, a group of 18 physicians met to further discuss proposed changes. These physicians achieved consensus on most of the criteria to be included in the document, including those criteria that should be listed for newborns and nonabused children as well as criteria thought to be diagnostic of trauma or sexual contact. The document was then circulated via e-mail to 46 physicians in the United States and Canada who had expressed interest in being involved in the revision process.

The document produced as a result of these reviews is included in Table 1. It has received support from the majority of physicians who participated in the review process. This version does not differ significantly from the 2004 version of the proposed classification system, which was published in the *Journal of Pediatric and Adolescent Gynecology* (Adams, 2004), but it has been renamed to remove the word *classification* from the title. The research studies that support inclusion of specific findings under each heading are referenced in the body of the instrument for each listed finding. Many of these studies are cross-sectional and retrospective in nature; only a few are prospective, longitudinal, or case control studies. The recommendations for interpreting the significance of sexually transmissible infections or lesions differ slightly from the guidelines published by the American Academy of Pediatrics (AAP) Committee on Child Abuse and Neglect (2005), and those differences are noted in the table.

All participants agreed that the revised document should be used solely as a tool to assist medical providers in making clinical determinations of the possible significance of medical findings in children they evaluated for suspected sexual abuse.

The tables in the article published by the author in 2001 continued to incorporate a section, titled "Overall Assessment of the Likelihood of Sexual Abuse." 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.

In response, the author solicited input from medical colleagues to refine and clarify the instrument's purpose and content and to redesign it accordingly. All participants agreed that the revised document should be used solely as a tool to assist medical providers in making clinical determinations of the possible significance of medical findings in children they evaluated for suspected sexual abuse. The tool was also intended to provide guidelines for teaching physicians and nurses to demonstrate what is known, and what is not known, about physical findings in abused and nonabused children. Subsequent to these decisions, the Overall Assessment table, which was present in previous versions, was removed.

cont'd on page 8

MEDICAL AND LABORATORY FINDINGS: A 2005 REVISION

There is not complete agreement regarding this listing of findings and its guidelines for interpretation among physicians with expertise in the medical evaluation of suspected child sexual abuse. Several contributors still believe strongly that findings such as deep notches in the hymen and a marked narrowing of the rim of the hymen should be listed as more significant than "indeterminate." The majority of participants, however, do agree that these findings should not be considered diagnostic of trauma, because at present, data from published research are insufficient to justify that conclusion. Pragmatically, it is also problematic to rely on measurements as small as one millimeter, or to determine whether a notch is through 50% or more than 50% of the width of the hymen. Medical or laboratory findings of indeterminate significance could raise the suspicion of sexual abuse, even in the absence of a history from the child. In those cases, a report to child protective services, for further investigation, is appropriate.

Other participants are skeptical of an approach that does not emphasize the importance of the child's statement in the overall medical evaluation, which of necessity must include more than just a physical examination. It is clear that the history from the child is the most important part of any evaluation for suspected child sexual abuse. Further, unless the physical examination is performed within a very short time after an assault that causes injury, the physical exam will likely show no signs of either acute or healed trauma. We also know that injuries to the genital and anal tissues heal rapidly and often completely, and that many types of sexual contact do not cause apparent physical injury. As reported in studies since 2000, the percentage of children giving a history of abuse who have abnormal physical examination findings is about 4% to 5% (Heger et al., 2002; Berenson, Chacko, Wiemann, Mishaw, Friedrich, & Grady, 2000) in most clinical settings.

Medical professionals must take great care to interpret physical findings using research-derived knowledge concerning the variations of normal and the particular conditions that may be mistaken as abuse.

Certainly, children suspected of having been sexually abused deserve to be heard and believed in addition to receiving careful medical evaluations. Further, children deserve to have as much attention directed to what they disclose about their abuse experiences as to the microscopic appearance of their genital or anal tissues. However, sexually abused children are often too young to provide a coherent history, and some may deny having experienced any acts that may have caused injury. In these circumstances, physical examination findings may take on greater importance in the overall evaluation. Medical professionals must take great care to interpret physical findings using research-derived knowledge concerning the variations of normal and the particular conditions that may be mistaken as abuse. That said, the history provided by the child, the child's medical history, the history as reported by parents or other care givers 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.

Accurate documentation, using diagnostic-quality photographs or videotapes of the examination, is essential for health care providers conducting medical evaluations of children and youth who may have been sexually abused. It is also helpful for physicians, nurse practitioners, physician assistants, and nurses to have access to experts who can review records, photographs, and/or videotapes of examination findings in difficult cases, especially when a child is too young to provide a history, or the history is insufficient to explain the injuries. High-quality still photographs or videotapes that provide sufficient magnification to clearly show all the genital and anal tissues are necessary for meaningful peer review and to obtain second opinions.

For newly trained providers, or for those practicing in relative isolation, consultation can be obtained from experts in children's hospitals, medical schools, or regional referral centers located throughout the United States and Canada. Medical providers who perform these evaluations should establish formal networks for ongoing peer review of cases and continuing medical education. The Ray E. Helfer Society is an honorary association of physicians who are recognized as leaders in the field of child abuse evaluation, treatment, or prevention. A listing of current members and their academic affiliations is available at www.helfersociety.org. However, not all members are active in the medical evaluation of suspected sexual abuse.

In this rapidly evolving field, health care providers with responsibility to examine children for suspected child sexual abuse also need opportunities to participate in comprehensive and ongoing educational programs and peer review. They should have access to expert consultation as needed. Continual review of the literature is also essential for health care providers to attain and maintain competence in a field as dynamic and critically important as this.

The document presented in Table 1, Approach to Interpreting Physical and Laboratory Findings in Children With Suspected Sexual Abuse: 2005 Revision, reflects the latest thinking on how findings should be considered and interpreted when evaluating children who may have been sexually abused. This document replaces all prior tables in publications referred to as the Adams Classification or Research-Based Classification.

The individuals who actively participated in the revision process, either in person or via e-mail, are listed in Table 2. The listing of individual names here does not necessarily imply complete agreement with every detail of the document, but rather is an acknowledgment of one's participation in the process over the last several years and general acceptance of the final product.

Finally, participants in the review process have acknowledged that these guidelines may continue to undergo revisions as additional research studies are completed that clarify the significance and appropriate interpretation of clinical findings.

TABLE 1. APPROACH TO INTERPRETING PHYSICAL AND LABORATORY FINDINGS IN SUSPECTED CHILD SEXUAL ABUSE: 2005 REVISION

This product is the result of an ongoing collaborative process by child maltreatment physician specialists, under the leadership of Joyce A. Adams, MD.

This document was developed to provide a useful tool to assist health care providers in interpreting physical examination findings and laboratory results, based on information currently available in the medical literature.[1-34] It may also be useful in training health care providers who are learning how to conduct examinations of children. Because updated research studies continue to appear in the medical literature, this document will likely undergo further revisions.

A medical evaluation of suspected child sexual abuse involves much more than a physical examination. Any medical professional who provides these examinations should be able to obtain a medical history from the parent/caretaker and also from the child, if developmentally appropriate. Details of the alleged events leading to the request for an examination should be obtained by the individual(s) designated by local protocols. The health care professional who examines the child needs to understand and utilize the process of differential diagnosis, since many physical signs and symptoms may be caused by conditions other than abuse.

IMPORTANT NOTE: Recent studies have shown that 85% to 95% of children who have given clear histories of being sexually abused will have no findings of acute or healed trauma on examination, either because the injuries they sustained have healed completely by the time they are examined, or because the acts of abuse did not cause any physical injury to the child.[8, 21, 22] Many children do not have a clear concept of what "penetration" means, and they may be describing rubbing or pushing against their external genitalia or between the buttocks or, for prepubertal girls, penetration beyond the labia majora but not the hymen. Even penile penetration of the anus or the hymen may not cause any injury, because of partial penetration or because of the ability of the tissues to stretch[25] or it may cause minor injuries that heal completely.[22]

The numbering of the findings below is for ease of reference only and does not imply increasing significance.

Findings Documented in Newborns, or Commonly Seen in Nonabused Children

(the presence of these findings generally neither confirms nor discounts a child's clear disclosure of sexual abuse)

Normal Variants

1. Periurethral or vestibular bands[9, 17, 30, 10, 8, 6]
2. Intravaginal ridges or columns[9, 30, 10, 8, 6, 32]
3. Hymenal bumps or mounds[9, 17, 30, 10, 86, 32]
4. Hymenal tags or septal remnants[9, 17, 30, 10, 8, 6]
5. Linea vestibularis (midline avascular area)[17, 30, 6, 26, 32]
6. Hymenal notch/cleft in the anterior (superior) half of the hymenal rim (prepubertal girls) on or above the 3 o'clock–9 o'clock line, patient supine[9, 10, 8, 6]
7. Shallow/superficial notch or cleft in inferior rim of hymen (below 3 o'cloc–9 o'clock line)[9, 17, 10, 8, 6, 20, 4, 28, 22, 19]
8. External hymenal ridge[9, 10, 8, 6, 32]
9. Congenital variants in appearance of hymen, including crescentic, annular, redundant, septate,[30, 10] cribiform, microperforate, imperforate[19, 32]
10. Diastasis ani (smooth area)[29, 11, 31]
11. Perianal skin tag[29, 11, 31]
12. Hyperpigmentation of the skin of labia minora or perianal tissues in children of color, such as Mexican-American and African-American children[29, 11]
13. Dilation of the urethral opening with application of labial traction[17, 30]
14. "Thickened hymen" (may be due to estrogen effect, folded edge of hymen, swelling from infection, or swelling from trauma; the latter is difficult to assess unless follow-up examination is done)[17, 30, 4, 28]

Findings Commonly Caused by Other Medical Conditions

15. Erythema (redness) of the vestibule, penis, scrotum or perianal tissues (may be due to irritants, infection, or trauma*)[17, 30, 10, 6, 20, 4, 28, 27, 31, 32]
16. Increased vascularity ("dilatation of existing blood vessels") of vestibule and hymen (may be due to local irritants, or normal pattern in the nonestrogenized state)[17, 30, 10, 6, 20, 4]
17. Labial adhesion (may be due to irritation or rubbing)[17, 30, 10, 6, 20, 4, 32]
18. Vaginal discharge (many infectious and noninfectious causes; cultures must be taken to confirm if it is caused by sexually transmitted organisms or other infections)[17, 6, 4]

Table 1 continued on page 12

19. Friability of the posterior fourchette or commisure (may be due to irritation, infection, or may be caused by examiner's traction on the labia majora)[17, 6, 28, 32]
20. Excoriations/bleeding/vascular lesions. These findings can be due to conditions such as lichen sclerosus, eczema or seborrhea, vaginal/perianal Group A streptococcus, urethral prolapse, hemangiomas)[22, 34, 19, 14, 16, 12, 23, 13.]
21. Perineal groove (failure of midline fusion)[19]
22. Anal fissures (usually due to constipation, perianal irritation)[19, 16, 31]
23. Venous congestion, or venous pooling in the peranal area (usually due to positioning of child; also seen with constipation)[29, 11, 31, 4, 27]
24. Flattened anal folds (may be due to relaxation of the external sphincter or to swelling of the perianal tissues due to infection or trauma*)[29, 4, 27, 31]
25. Partial or complete anal dilatation to less than 2 cm, with or without stool visible (may be a normal reflex, or may have other causes, such as severe constipation or encopresis, sedation, anesthesia, neuromuscular conditions)[29, 4, 27, 31]

* Follow-up examination is necessary before attributing these findings to trauma

INDETERMINATE Findings: Insufficient or Conflicting Data From Research Studies

(may require additional studies/evaluation to determine significance; these physical/laboratory findings may support a child's clear disclosure of sexual abuse, if one is given, but should be interpreted with caution if the child gives no disclosure)

Physical Examination Findings

26. Deep notches or clefts in the posterior/inferior rim of hymen, in contrast to transections (see 41). One case-control study[6] found notches through more than 50% of the width of the posterior hymen only in girls who described digital or penile-vaginal penetration; however, this was seen in only 2/192 girls between the ages of 3 and 8 years alleging penetration. In a study of the appearance of the hymen in adolescent girls admitting consensual intercourse compared with girls who denied such contact, there was not a statistically significant difference in the frequency of deep notches in the posterior rim of hymen, but more girls describing intercourse had deep notches at 3 or 9 o'clock.[2] Distinguishing between superficial notches (through 50% or less of the width of the hymen) and deep notches (through more than 50% of the width of the hymen) can be extremely difficult
27. Deep notches or complete clefts in the hymen at 3 or 9 o'clock in adolescent girls. In the adolescent study referenced above, the finding of deep notches or complete clefts in the hymen at 3 and 9 o'clock was significantly higher in girls admitting vaginal intercourse than in girls who denied intercourse (26% v. 5%, $p<.01$), but each type of finding was seen in 5 of 58 subjects denying intercourse[2]
28. Smooth, noninterrupted rim of hymen between 4 and 8 o'clock, which appears to be less than 1 millimeter wide, when examined in the prone knee-chest position, or using water to "float" the edge of the hymen when the child is in the supine position. This finding was not seen in girls selected for nonabuse in four separate studies.[30, 10, 6, 32] However, a rim estimated to be less than 1 to 2 millimeters was found in 22% of girls selected for nonabuse in another study.[20] In addition, most experts acknowledge that it is very difficult to accurately measure the posterior rim of hymen in many cases
29. Wart-like lesions in the genital or anal area (may be skin tags or warts not of the genital type; may be condyloma accuminata that was acquired from perinatal transmission or other nonsexual transmission)[34, 18, 5, 19] (biopsy and viral typing may be indicated in some cases)
30. Vesicular lesions or ulcers in the genital or anal area (Iinfectious and noninfectious causes, including herpes, syphilis, varicella or other viruses, Behcet's disease, Crohn's disease, idiopathic causes)[34, 18, 5, 19] (need to obtain viral cultures or PCR[33] to diagnose herpes or serology to diagnose syphilis)
31. Marked, immediate anal dilation to a diameter of 2 cm or more, in the absence of other predisposing factors such as chronic constipation, sedation, anesthesia, neuromuscular conditions (a rare finding in both abused[4] and nonabused [29, 31] children; no consensus exists currently among experts as to how this finding should be interpreted)

Lesions With Etiology Confirmed: Indeterminate Specificity for Sexual Transmission

32*. Genital or anal condyloma accuminata in child, in the absence of other indicators of abuse[18, 5]
33*. Herpes Type 1 or 2 in the genital or anal area in a child with no other indicators of sexual abuse[18, 5]

* Report to child protective services is recommended by AAP Guidelines[5]

Findings Diagnostic of Trauma and/or Sexual Contact

The following findings support a disclosure of sexual abuse, if one is given, and are highly suggestive of abuse even in the absence of a disclosure, unless a clear, timely, plausible description of accidental injury is provided by the child and/or caretaker.

It is recommended that diagnostic quality photodocumentation of the examination findings be obtained and reviewed by an experienced medical provider before concluding that they represent acute or healed trauma. Follow-up examinations are also recommended.

Acute Trauma to External Genital/Anal Tissues

34. Acute lacerations or extensive bruising of labia, penis, scrotum, perianal tissues, or perineum (may be from unwitnessed accidental trauma or from physical or sexual abuse)[28, 22, 14, 23]
35. Fresh laceration of the posterior fourchette, not involving the hymen (must be differentiated from dehisced labial adhesion or failure of midline fusion; may also be caused by accidental injury[28, 22, 19, 14, 16, 12, 23, 13] or consensual sexual intercourse in adolescents[24])

Residual (Healing) Injuries

These findings are difficult to assess unless an acute injury was previously documented at the same location.

36. Perianal scar (rare; may be due to other medical conditions, such as Crohn's disease, accidental injuries, or previous medical procedures)[27, 22, 19, 14, 13]
37. Scar of posterior fourchette or fossa (pale areas in the midline may also be due to linea vestibularis or labial adhesions)[28, 22]

Injuries Indicative of Blunt Force Penetrating Trauma, or From Abdominal/Pelvic Compression Injury, If Such History Is Given

38. Laceration (tear, partial or complete) of the hymen, acute[28, 22, 19, 14, 16, 12, 13]
39. Ecchymosis (bruising) on the hymen (in the absence of a known infectious process or coagulopathy)[28, 22, 19, 14, 16, 12, 13]
40. Perianal lacerations extending deep to the external anal sphincter (not to be confused with partial failure of midline fusion)[27, 22, 19, 16, 13]
41. Hymenal transection (healed). An area between 3 and 9 o'clock on the rim of the hymen where it appears to have been torn through, to or nearly to the base, so there appears to be virtually no hymenal tissue remaining at that location. This must be confirmed using additional examination techniques, such as a swab, prone knee-chest position, Foley catheter balloon (adolescents only), or water to float the edge of the hymen. This finding has also been referred to as a "complete cleft" in sexually active adolescents and young adult women [4, 27, 22, 19, 14, 16, 12, 13, 15, 2]
42. Missing segment of hymenal tissue. Area in the posterior (inferior) half of the hymen, wider than a transection, with an absence of hymenal tissue extending to the base of the hymen, which is confirmed using additional positions/methods [4, 19, 14]

Presence of Infection Confirms Mucosal Contact With Infected and Infective Bodily Secretions, Contact Most Likely to Have Been Sexual in Nature

43*. Positive confirmed culture for gonorrhea (from genital area, anus, throat) in a child outside the neonatal period[18]
44*. Confirmed diagnosis of syphilis, if perinatal transmission is ruled out[18]
45. Trichomonas vaginalis infection in a child older than 1 year of age, with organisms identified by culture or in vaginal secretions by wet mount examination[18, 5] (by an experienced technician or clinician)
46*. Positive culture from genital or anal tissues for chlamydia, if child is older than 3 years at time of diagnosis and specimen was tested using cell culture or comparable method approved by the Centers for Disease Control[18]
47*. Positive serology for HIV, if perinatal transmission, transmission from blood products and needle contamination have been ruled out[18]

* Considered diagnostic of sexual transmission by AAP Committee guidelines[5]

Diagnostic of Sexual Contact

48. Pregnancy[5]
49. Sperm identified in specimens taken directly from a child's body[5]

Table 1 continued on page 12

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Jack Coyne, MD	Child Advocacy Center	Buffalo, NY
James Crawford, MD	Children's Hospital Oakland	Oakland, CA
Allan DeJong, MD	Alfred L. DuPont Hospital for Children	Willmington, DE
Martin Finkel, MD	University of Medicine & Dentistry, New Jersey, School of Osteopathic Medicine	Stratford, NJ
Lori D. Frasier, MD	Primary Children's Medical Center	Salt Lake City, UT
Astrid Heppenstall-Heger, MD	University of Southern California L.A. County-USC Medical Center	Los Angeles, CA
Dirk Huyer, MD	Private Practice	Toronto, Canada
Jerry G. Jones, MD	Arkansas Children's Hospital, University of Arkansas	Little Rock, AR
Rich Kaplan, MD	Midwest Children's Resource Center	St. Paul, MN
Marilyn Kaufhold, MD	Children's Hospital of San Diego, Chadwick Center	San Diego, CA
Nancy D. Kellogg, MD	University of Texas Health Science Center, San Antonio	San Antonio, TX
Walter Lambert, MD	University of Miami Child Advocacy Center	Miami, FL
Carolyn Levitt, MD	Midwest Children's Resource Center	St. Paul, MN
Neha Mehta, MD	Sunrise Children's Hospital	Las Vegas, NV
Marcellina Mian, MD	Hospital for Sick Children, University of Toronto	Toronto, Canada
Vincent J. Palusci, MD	DeVos Children's Hospital	Grand Rapids, MI
Robert T. Paschall, MD	St. Louis Children's Hospital Washington University Medical School	St. Louis, MO
Kay Rauth-Farley, MD	Sunflower House	Kansas City, KS
Larry Ricci, MD	Spurwink Clinic	Portland, ME
Elliott Schulman, MD	Department of Health	Santa Barbara, CA
Robert Shapiro, MD	Children's Hospital Medical Center	Cincinnati, OH
Lynn Sheets, MD	University of Kansas Medical Center	Kansas City, KS
Andrew Sirotnak, MD	Children's Hospital of Denver	Denver, CO
Betty Spivack, MD	University of Louisville	Louisville, KY
Suzanne Starling, MD	Children's Hospital of the King's Daughters	Norfolk, VA
Karen St. Claire, MD	Center for Child and Family Health	Durham, NC
R. Daryl Steiner, MD	Children's Hospital Medical Center of Akron	Akron, OH
Naomi Sugar, MD	Harborview Medical Center University of Washington	Seattle, WA
Jay M. Whitworth, MD	University of Florida	Jacksonville, FL

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **March 29, 2016**

10C265506 State of Nevada
vs
Tyrone James

March 29, 2016 **10:15 AM** **Minute Order: In Camera Review**

HEARD BY: Gonzalez, Elizabeth **COURTROOM:** RJC Courtroom 14C

COURT CLERK: Dulce Romea

PARTIES PRESENT: None. Minute order only – no hearing held.

JOURNAL ENTRIES

- Court reviewed records submitted for in camera review on 09/16/15. Pages numbered 1-22 are relevant to Defense's investigation. Therefore, 1-7 ORDERED RELEASED and 8-22 RELEASED with an Acknowledgment that these records include information protected by HIPPA and counsel acknowledges any disclosure must be limited to expert who will keep records confidential and any filings to be submitted with an appropriate motion to seal those records. Court retains original of submission as sealed Court's Exhibit 1. (See worksheet.) Documents numbered as 1-7 are marked as Court's Exhibit 2. Documents numbered as 8-22 are marked as Court's Exhibit 3 and SEALED.

CLERK'S NOTE: A copy of this minute order was distributed via electronic mail to Deputy District Attorney Ryan MacDonald and to Attorney Alina Shell and Attorney Margaret McLetchie for the Petitioner. / dr 3-29-16

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CLERK OF THE COURT

RSPN
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Clark County District Attorney
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200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

TYRONE D. JAMES,
#1303556

Defendant.

CASE NO: **10C265506**

DEPT NO: **XI**

STATE'S RESPONSE TO DEFENDANT'S SUPPLEMENTAL PETITION FOR POST-CONVICTION WRIT OF HABEAS CORPUS AND SUPPLEMENT TO SUPPLEMENTAL PETITION FOR POST-CONVICTION WRIT OF HABEAS CORPUS

DATE OF HEARING: JUNE 8, 2016
TIME OF HEARING: 9:00 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JAMES R. SWEETIN, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's Supplemental Petition for Post-Conviction Writ of Habeas Corpus and Supplement to Supplemental Petition for Post-Conviction Writ of Habeas Corpus.

This response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On June 23, 2010, Tyrone D. James ("Defendant") was charged by way of Criminal Information with two counts of Sexual Assault With a Minor Under Sixteen Years of Age (Category A Felony - NRS 200.364, 200.366); two counts of Open or Gross Lewdness (Gross Misdemeanor – NRS 201.210); and one count of Battery with Intent to Commit a Crime (Category A Felony – NRS 200.400).

On August 16, 2010, the State filed a Motion to Admit Evidence of Other Crimes, Wrongs or Acts. On August 25, 2010, Defendant filed his Opposition. On September 8, 2010, Defendant filed a Motion in Limine to Preclude Lay Opinion Testimony that the Complaining Witness' Behavior is Consistent with that of a Victim of Sexual Abuse. On September 10, 2010, the State filed its Opposition to Defendant's Motion in open court and the District Court conducted a Petrocelli hearing regarding the bad acts motion. The District Court granted both motions.

On September 8, 2010, Defendant filed a Motion In Limine To Preclude Lay Opinion Testimony That The Complaining Witness' Behavior Is Consistent With That Of A Victim Of Sexual Abuse. On September 10, 2010, in open court, the State filed its Opposition. The same day, the District Court granted Defendant's Motion in Limine.

On September 17, 2010, Defendant filed a Motion to Reconsider Motion to Admit Evidence of Other Crimes, Wrongs or Acts. The District Court denied Defendant's motion on September 21, 2010.

Defendant's jury trial commenced on September 21, 2010. On September 23, 2010, the jury found Defendant guilty on all counts.

On January 19, 2011, Defendant was sentenced to the Nevada Department of Corrections as follows: as to Count 1 - to a maximum term of life with a minimum parole eligibility after 25 years; as to Count 3 - to a maximum term of life with a minimum parole eligibility after 25 years, concurrent with Count 1; as to Count 5 - to a maximum term of Life with a Minimum parole eligibility after 2 years, concurrent with Counts 1 and 3. The Court

further ordered a sentence of lifetime supervision to be imposed upon Defendant's release from any term of probation, parole, or imprisonment. Defendant received 250 days' credit for time served. The Court dismissed Counts 2 and 4, as they were lesser-included offenses of Counts 1 and 3. Judgment of Conviction was filed February 9, 2011.

On March 7, 2011, Defendant filed a Notice of Appeal. On October 31, 2012, the Nevada Supreme Court issued an Order of Affirmance. Remittitur was issued November 26, 2012.

On March 14, 2013, Defendant filed a post-conviction Petition for Writ of Habeas Corpus and Motion to Appoint Counsel. The State filed its Response to Defendant's Petition on May 7, 2013. On May 20, 2013, Robert Langford Esq., was appointed as counsel. On September 04, 2015, Defendant filed a Supplemental Petition for Post-Conviction Writ of Habeas Corpus ("Supplement"). On January 15, 2016, Defendant filed a Supplement to Supplemental Petition for Writ of Habeas Corpus ("Second Supplement"). The State responds as follows.

STATEMENT OF THE FACTS

On May 14, 2010, 15 – year- old T.H. was home alone sleeping when she awoke to find Defendant 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 Defendant because he was involved in a dating relationship with T.H.'s mother, Theresa Allen ("Theresa"). Id. at 8.

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

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After Defendant 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 Defendant made T.H. lay on the floor and he sat on top of her. Id. at 21-22. While Defendant was on top of T.H., he continued choking her. Id.

While Defendant 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 Defendant had a glove on the hand he used to digitally penetrate her vagina. Id. 22-23. Defendant 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 Defendant's penis but she felt something rubbing the inside of her vagina. Id. at 25.

T.H. testified that once Defendant stopped rubbing his penis in her vagina, he told her to get up and sit on the couch. Id. at 26. Then, Defendant asked her why she did not like him. Id. at 26-27. Afterwards, T.H. got dressed for school and Defendant drove her to school. Id. at 27. During the ride, Defendant 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 Defendant and told him what T.H. had said. Id. at 99-100. Defendant accused T.H. of lying and asked Theresa where he could meet her. Id. at 100. She told Defendant to meet her at the house. Id. When Defendant came to the house, Theresa met him outside. Id. at 101. Defendant continued accusing T.H. of lying. Id. T.H. looked Defendant in the face and told him exactly what she told Theresa he had done to her. Id. at 100. After her conversation with

Defendant, Theresa called the police. Id. at 102.

Theresa testified that she had spoken to Defendant earlier that day because he was supposed to pay her power bill for her. Id. at 88-89. However, despite Defendant'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 Defendant permission to go into her home that day for either purpose. Id. at 87-89. Theresa testified that there was no reason whatsoever for Defendant 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 Defendant 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 Defendant sexually assaulting her. Id. at 187-207. N.F. met Defendant when she was a little girl because he was married to her mother Tanisha. Id. at 187. Tanisha and Defendant 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, Defendant came into her bedroom around midnight. Id. at 192. Defendant took N.F. to another room and told her that he felt

like "someone was touching her." Id. Defendant instructed N.F. to lay on the bed and removed her pants. Id. at 194. Then, Defendant inserted his finger in her vagina. Id. at 194. N.F. told Defendant to stop, which he did. Id. Once Defendant stopped, he told N.F. to go back to her room. Id. During another incident, Defendant entered N.F.'s room again around midnight, while she was sleeping. Id. at 199-200. Defendant jerked N.F. out of her bed and took her into the same room as the previous time. Id. at 200-01. Defendant put N.F. on the bed and pulled her pants off. Id. at 201. N.F. could feel Defendant's penis on her leg. Id. N.F. kept telling Defendant to stop. Id. When N.F. tried to yell for help, Defendant threatened to kill her family. Id. Defendant tried inserting his penis in N.F.'s vagina but was unsuccessful because it would not fit. Id. at 202. Defendant then inserted his penis in N.F.'s butt. Id. N.F. again asked Defendant to stop, which he did. Id.

During a third incident, N.F. was in the house with only Defendant and her younger sister; her mother had left for work. Id. at 194. Defendant was chasing N.F. around the house and they ended up in the living room. Id. at 195. N.F. and Defendant started to play wrestle but Defendant began to get aggressive. Id. Every time N.F. tried to get up Defendant would pull her back down. Id. N.F. kept telling Defendant to leave her alone. Id. Eventually Defendant 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 Defendant insisted stating that he was not going to do anything to her. Id. N.F. went into the bathroom and Defendant 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 Defendant enter the bathroom. Id. Defendant told her to put her foot on top of the bathtub. Id. N.F. refused and Defendant kept persisting. Id. Scared that Defendant might hurt her, N.F. put her foot on top of the bathtub and Defendant inserted his fingers into her vagina. Id. at 197. When N.F. tried calling for help, Defendant put his hands on her neck to try to shut her up. Id. at 198. Afterwards, Defendant instructed N.F. to get out of the shower. Id. at 197. Defendant picked N.F. up and put her on the floor on her back. Id. Defendant got up 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, Defendant entered N.F.'s room while she was

laying on her bed. Id. at 203. Defendant attempted to pull her pants off. Id. at 203-04. While Defendant was trying to pull her pants off, his mother Carol came into N.F.'s bedroom. Id. at 204. Defendant jumped off the bed and hid in N.F.'s closet. Id. at 205. Carol began screaming to Tanisha that Defendant was touching N.F. Id. Tanisha told Defendant to get out of her house and took N.F. to Southwest Medical, where N.F. eventually talked to the police. Id. at 207.

ARGUMENT

I. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment provides that, "[I]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. It has long been recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 706-707 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). To prove ineffectiveness, a claimant must show that his counsel was deficient and that that deficiency prejudiced the defense. Strickland, 466 U.S. at 687 (1984); Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). Deficient performance is representation that falls below an objective standard of reasonableness. Kirksey, 112 Nev. at 987, 923 P.2d at 1107. To show prejudice, the claimant must show a reasonable probability that but for counsel's errors the result of the proceeding would have been different. Id. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 687-89, 694. This Court may consider either prong of the Strickland test, in any order, and need not consider both when a defendant's showing on either prong is insufficient. Kirksey, 112 Nev. at 987, 923 P.2d at 1107. "Effective 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 (1970).

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Thus, the court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by "strong and convincing proof," that counsel was ineffective. Homick v State, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996). The role of a reviewing court considering allegations of ineffective assistance 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).

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and 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) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." McNelton, 115 Nev. at 403, 990 P.2d at 1268 (citing Strickland, 466 U.S. at 687-89 & 694, 104 S. Ct. at 2064-65 & 2068). "The defendant carries the affirmative burden of establishing prejudice." Riley v. State, 110 Nev. 638, 646, 878 P.2d 272, 278 (1994).

Importantly, when raising a Strickland claim, the defendant bears the burden to demonstrate the underlying facts by a preponderance of the evidence. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). When ineffective assistance of counsel claims are asserted in a petition for post-conviction relief, the claims 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).

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

Defendant claims that counsel was ineffective for failing to retain an expert witness. Second Supplement p. 7-11.[1] However, such a claim is without merit because, contrary to Defendant's claim, Dr. Joyce Adams' ("Dr. Adams") report does not contradict Dr. Vergara's testimony. See, Defense Exhibit 26, JAMES 0650-0653.

Defendant relies on an unbinding case, Gersten v. Senkowski, 426 F.3d 588, 609 (2d Cir. 2005), for the proposition that counsel's failure to consult with a medical expert is indicative of ineffective assistance of counsel. Second Supplement p. 6. However, Defendant'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. 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. Transcript: Day 2, Vol II, 151-82. Therefore, Defendant's reliance on Gersten is unpersuasive.

Defendant claims that if counsel had consulted with an expert such as Dr. Adams, he would have been able to question Dr. Vergara about whether she had eliminated other possible causes of the swelling she observed. Second Supplement p. 10. Defendant's claim is meritless because at trial, counsel did question Dr. Vergara regarding other possible causes of the swelling she observed. Transcript: Day 2, Vol II, 151-82. First, during direct examination Dr. Vergara testified that generalized swelling could be consistent with causes other than sexual penetration or rubbing. Id. at 159. Afterwards, counsel cross-examined Dr. Vergara on

[1] Defendant's Second Supplement includes citation to Dr. Adams report and Defendant's finalized claim that counsel was ineffective for failing to retain an expert witness. For brevity, the State will refer only to Defendant's Second Supplement.

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. Id. at 168. 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. Id. at 165-68. Dr. Vergara further testified that generalized swelling could be from anything, from urinary tract infection, from poor hygiene; it is a non-specific finding. Id. at 320. Therefore, Defendant fails to demonstrate that counsel's representation fell below an objective standard of reasonableness and his claim should be denied.

Additionally, Defendant claims 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. Second Supplement p. 11. 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. See, Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992) (strategic choices made by counsel after investigating the plausible options are almost unchallengeable).

Next, Defendant claims that counsel was ineffective for not consulting an expert because it is unclear whether the generalized swelling Dr. Vergara reported actually existed. Second Supplement p. 9. Defendant cites 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. Defense Exhibit 26, James 0651. Thus, Dr. Adams cannot conclude that Dr. Vergara could not have properly determined the presence of swelling without having T.H. return for a follow up examination. Therefore, Defendant's claim fails and should be denied.