

IN THE SUPREME COURT OF THE STATE OF NEVADA

TYRONE JAMES, SR.,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Electronically Filed
Jul 27 2017 04:05 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No. 71935

APPELLANT'S REPLY BRIEF

Appeal from Eighth Judicial District Court, Clark County

The Honorable Elizabeth Gonzalez, District Judge

District Court Case No. 10-C-265506

Margaret A. McLetchie, Nevada Bar No. 10931

MCLETCHIE SHELL LLC

701 East Bridger Ave., Suite 520

Las Vegas, Nevada 89101

Telephone: (702) 728-5300

Fax: (702) 425-8220

Email: maggie@nvlitigation.com

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
I. INTRODUCTION	1
II. ARGUMENT.....	2
A. Trial Counsel’s Failure to Retain an Expert Witness Deprived Mr. James of the Ability to Effectively Cross-Examine Dr. Vergara.....	2
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.	3
2. The Failure to Retain an Expert in a Case Built Upon Circumstantial Evidence Rendered Trial’s Counsel Representation of Mr. James Ineffective.	7
B. Trial Counsel Was Ineffective for Failing to Challenge the Admission of the Latex Gloves Police Recovered from T.H.’s Residence.	13
C. Trial Counsel’s Failure to Conduct Adequate Investigation in This Case Deprived Mr. James of Effective Assistance of Counsel.....	15
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.	17
E. The Cumulative Errors in This Case Warrant Relief.....	19
F. The District Court Erred in Limiting the Scope of Mr. James’ Post-Conviction Evidentiary Hearing.....	21
III. CONCLUSION.....	22
CERTIFICATE OF COMPLIANCE.....	23
CERTIFICATE OF SERVICE	25

TABLE OF AUTHORITIES

Cases

<i>Byford v. State</i> , 123 Nev. 67, 156 P.3d 691 (2007)	21
<i>Byrd v. Trombley</i> , 580 F.Supp.2d 542 (E.D. Mich. 2008).....	7
<i>Cooper v. Fitzharris</i> , 586 F.2d 1325 (9th Cir.1978)	20
<i>Donnelly v. DeChristoforo</i> , 416 U.S. 637 (1974).....	21
<i>Ewing v. Williams</i> , 596 F.2d 391 (9th Cir.1979)	20
<i>Eze v. Senkowski</i> , 321 F.3d 110 (2nd Cir. 2003)	8
<i>Gersten v. Senkowski</i> , 426 F.3d 588 (2nd Cir. 2005)	8, 11
<i>Hays v. Farwell</i> , 482 F. Supp. 2d 1180 (D. Nev. 2007)	3
<i>In re Glasmann</i> , 286 P.3d 673 (Wash. 2012)	18
<i>Mak v. Blodgett</i> , 970 F.2d 614 (9th Cir.1992).....	20
<i>Mancuso v. Olivarez</i> , 292 F.3d 939 (9th Cir. 2002)	19
<i>McConnell v. State</i> , 125 Nev. 243, 212 P.3d 307 (2009)	20, 21
<i>McMann v. Richardson</i> , 397 U.S. 759 (1970).....	1
<i>Middleton v. Ruper</i> , 455 F.3d 838 (8th Cir. 2006)	20
<i>Nika v. State</i> , 124 Nev. Adv. Rep. 103, 198 P.3d 839 (2008)	21
<i>Parle v. Runnels</i> , 505 F.3d 922 (9th Cir. 2007).....	19, 21
<i>Phillips v. Woodford</i> , 267 F.3d 966 (9th Cir. 2001)	20
<i>Sanders v. Ratelle</i> , 21 F.3d 1446 (9th Cir. 1994)	3

<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	1, 7
<i>United States v. Frederick</i> , 78 F.3d 1370 (9th Cir.1996)	19
<i>United States v. Kimsey</i> , 668 F.3d 691 (9th Cir. 2012)	9
<i>United States v. Martinez</i> , 182 F.3d 1107 (9th Cir. 1999).....	9
<i>United States v. Tucker</i> , 716 F.2d 576 (9th Cir.1983)	20
<i>Watters v. State</i> , 129 Nev. Adv. Op. 94, 313 P.3d 243 (2013).....	17, 18
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003).....	8

Other Authorities

Nev. Rev. Stat. Ann. § 34.770	21
-------------------------------------	----

I. INTRODUCTION

As the United States Supreme Court has observed, criminal defendants have not just the right to assistance of counsel, but the “right to the effective assistance of counsel.” *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970); *accord Strickland v. Washington*, 466 U.S. 668, 686 (1984). In this case, Appellant Tyrone James was deprived of that right to effective assistance of counsel. Trial counsel’s representation of Mr. James during his trial for multiple charges related to the alleged sexual assault of his ex-girlfriend’s teenage daughter 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 provided 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 a reasonable investigation prior to trial. Specifically, trial counsel failed to investigate the circumstances surrounding the “discovery” of the

latex gloves. Third, trial counsel failed to investigate what happened to photographs Dr. Vergara took during her examination of the victim—a failing which has even affected post-conviction proceedings in this case. 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 fundamental right to effective 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.

Contrary to the State’s arguments (*see generally* Answering Brief (“AB”), 15-21), trial counsel’s failure to hire an expert to review and rebut Dr. Vergara’s finding that T.H. was sexually assaulted rendered his representation of Mr. James ineffective. 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 prepared by Mr. James’ expert Dr. Joyce Adams evidences this, as it identified several other potential causes of the vaginal swelling Dr. Vergara allegedly observed. Dr. Adams’ report also raises questions about Dr. Vergara’s diagnosis and methodology. Thus, 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. (4 PA187 (trial counsel acknowledges he did not attempt to obtain colposcope photographs).) 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. (4 PA717, 718 (Dr. Adams notes the difficulties presented by the failure to obtain the colposcope photos).) Thus, 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 that trial counsel’s failure to retain an expert was not ineffective because Mr. James has failed to demonstrate that “but for counsel’s decision not to retain an expert, the result of the trial would have been different.” (AB 20.) However, because the State’s expert conclusively established that a sexual assault had occurred, and that conclusion was essentially left unchallenged, the result of the trial would likely have been different because Mr. James would have had an effective defense.

The State ignores that courts have held that 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)). This case

illustrates the need for independent investigation by the defense. Following her alleged sexual assault, T.H. was examined by Dr. Theresa Vergara, an attending physician at Sunrise Children's Hospital. (2 PA327.) Dr. Vergara conducted a Suspected Child Abuse and Neglect (SCAN) examination on T.H. to determine whether she had been sexually assaulted. (2 PA0328, 329-31.) Dr. Vergara testified that during her SCAN examination, she examined T.H.'s genital area. (2 PA333.) As part of that examination, Dr. Vergara used a colposcope¹ to examine T.H. for signs of sexual assault and collect photographic evidence. (2 PA334.)

Dr. Vergara testified she found no bruising, tearing, or bleeding in T.H.'s vaginal area during the examination, but did allegedly observe generalized swelling to the introitus of T.H.'s vagina. (2 PA335, 337.) Based on her observations, Dr. Vergara concluded that the generalized swelling she observed indicated "Probable Abuse." (1 PA064.) Dr. Vergara testified this swelling was possibly caused by penetration. (2 PA335-36.) Dr. Vergara admitted it could be caused by other things. (2 PA336, 342.) Dr. Vergara testified that she discovered T.H. had a urinary tract infection, as well as a vaginal bacterial infection called strep agalactiae, as well as another strep infection. (2 PA341-344.) However, defense counsel, without an expert, did not link up the urinary tract infection as a likely explanation for the

¹ As noted in Mr. James' Opening Brief, a colposcope is a lighted magnifying instrument used to examine and photograph the tissue of the vagina and cervix. (Opening Brief (OB) 8.)

swelling and, while he did elicit testimony that swelling could be caused by other things, failed to effectively explain this point.

In her expert report (4 PA716-19), Dr. Adams demonstrates several ways in which Dr. Vergara's report and testimony could have been questioned at trial so that the jury did not conclude that an assault occurred. First, as noted in Dr. Adams' report, T.H. had borderline diabetes. (4 PA718.) 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.*) 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. later 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 these findings by Dr. Adams. Regarding 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 urinary tract infection 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. (AB 17.) Trial counsel's choice to focus on these two potential causes for the generalized swelling, the State asserts, was a "reasonable strategic decision that is virtually unchallengeable." (*Id.*)

This argument 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. Trial counsel had no medical training (4 PA820), and there is nothing 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. 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. (4 PA817.)

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

Other courts have held that trial counsel’s failure to consult with an expert is not a “reasonable strategic decision” when the prosecution’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 regarding 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”).

Here, trial counsel—who at the time of Mr. James’ trial was part of a team at the Clark County Public Defender’s Office that “specialized in only sex assault cases”²—acknowledged that he had retained experts in other sex assault cases, but did not do so in Mr. James’ case simply because he believed the case “did not turn on physical evidence.” (4 PA813.) While, as the State notes (AB 15), the *Gersten* court acknowledged that there is no “per se rule that requires trial attorneys to seek out an expert,” 426 F.3d at 609, it is ineffective assistance of counsel to fail to retain an expert where, as trial counsel noted, the case against Mr. James was “thin.”³ *See also Eze*, 321 F.3d at 128.

² (4 PA813.)

³ (4 PA814.)

The case against Mr. James was largely circumstantial. Undeterred, 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.⁴, who testified at Mr. James' trial. (AB 19-20.) 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). This is because "the legal system punishes people for *proven violations of specific laws*." *United States v. Kimsey*, 668 F.3d 691, 692 (9th Cir. 2012) (emphasis added). And here, the evidence that Mr. James assaulted T.H. was 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. (1 PA156.) 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, 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. (4 PA718.) That report included a section which required an examiner to make a subjective, non-

⁴ Erroneously identified at "N.F." in the State's Answering Brief. (AB 20.)

medical assessment of whether the physical symptoms the examiner observed were consistent with sexual abuse. (*Id.*; see also 4 PA762.) 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.

Finally, it is worth noting that trial counsel's failure to retain an expert has also 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. (1 PA011 at n.4 (describing the undersigned's efforts to obtain colposcope photographs).) During post-conviction proceedings, Mr. James made multiple efforts to obtain those photographs, all of which were 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. (4 PA718.)

The State points to this as evidence that Mr. James' claim must fail. (AB 17-18.) However, the absence of the photographs underscores how trial counsel failed to provide adequate representation, and that those failings redound to Mr. James' detriment even 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 failures to retain an expert and obtain the colposcope photographs have 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.

The Second Circuit Court of Appeals in *Gersten* was faced with a similar situation. In that case, the defendant was charged with several counts related to the alleged sexual abuse of his daughter. *Gersten*, 426 F.3d at 591. As here, the physician who examined the victim used a colposcope during a physical examination of the victim and concluded that the victim had likely been subjected to sexual abuse. *Id.* at 594-95. And also as here, trial counsel "did not even ask to be allowed to examine" the colposcope photographs the examining physician took. *Id.* at 596. Later, during habeas proceedings, the defendant presented evidence from an expert witness who reviewed the colposcope photographs (something Mr. James' expert was unable to do because of the disappearance of this critical evidence) and concluded that the physical evidence was not indicative of sexual abuse. *Id.* at 599-600.

The Second Circuit found trial counsel's failure to examine the colposcope photographs prior to trial was "[p]articularly troubling." *Id.* at 609. The court explained that:

[a]s a direct photographic record of the trauma, or lack thereof, to the alleged victim, it would be difficult to exaggerate the significance of these slides to petitioner's case. Defense counsel's apparent failure even to request to examine them was a serious dereliction of his duty to investigate the facts and circumstances of petitioner's case.

Id. (other citations omitted). Moreover, the court rejected any argument that the failure to retain an expert and to review the evidence being used against his client was a "reasonable strategic decision." *Id.* at 610 (finding that counsel did not make a reasonable strategic decision because "counsel settled on a defense theory and cut off further investigation of other theories without having first conducted any investigation whatsoever into the possibility of challenging the prosecution's medical . . . evidence).

So too here, trial counsel's failure to consult with an expert or request the colposcope photographs taken by Dr. Vergara cannot be excused as a "reasonable strategic decision." Trial counsel testified that he previously requested colposcope images in other cases and had them reviewed by experts (4 PA 817, 819), but did not do so in the instant case based on his feeling that this "case didn't turn on . . . physical evidence" (4 PA817), and his confidence in his ability to cross-examine the State's witness. (4 PA 818; 820 ("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").) An attorney's confidence in his experience at witness examination, however, is not a sufficient reason to fail to even request the physical

evidence being used to prosecute his client. Moreover, failing to request physical evidence can impact a client well after trial, as it did in this case. Thus, contrary to the State's assertions, trial counsel was ineffective.

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

At trial, T.H. testified Mr. James was wearing gloves on the morning of the assault. (2 PA201-02.) 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. (1 PA151.) The detective did not find any gloves during his search. (1 PA158.) 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 [sic] that were sitting under her bed that had some rubber gloves inside." (1 PA156.) The gloves did not appear to be in their original packaging; rather, they were just "loose gloves" in a shoebox. (1 PA158.) 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. (1 PA125 (investigative memorandum regarding the gloves).) 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. (AB 21 (asserting “it would have been futile for counsel to object to the admission of the gloves”); AB 23 (same).) 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. Finally, there is no evidence police attempted to test the gloves (or evidence the box they were in when Detective Tomaino 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. (AB 23-24.) 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. Trial counsel knew that Dr. Vergara had taken photographs of the alleged swelling in T.H.'s vaginal area, but failed to request copies, believing that his experience as an attorney would be sufficient to rebut Dr. Vergara's findings. The failure to adequate investigation to obtain those photographs—which have subsequently disappeared—rendered trial counsel ineffective.

Second, 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 them. (1 PA158.) 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." (1 PA125.) At trial, however, she testified that she found some gloves in a shoebox under her bed. (2 PA283.) 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 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 investigations to search for exculpatory evidence, evidence that was 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' Opening Brief, 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. (OB 11-12; *see also* 3 PA499.) While the State minimizes the issue, as explained in the Supplemental Petition, this Court has previously disapproved of the use of such imagery in front of the jury. *See Watters v. State*, 129 Nev. Adv. Op. 94, 313 P.3d 243 (2013).) Although, as the State correctly notes (AB25), the circumstances in *Watters* surrounding the State's use of a PowerPoint image of a criminal defendant was different, here the use of the PowerPoint here was nonetheless prejudicial.

This 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 676. The final slides of the presentation prominently featured the defendant's image with the word "GUILTY" superimposed over it. *Id.* Also, as in the instant case, defense counsel did not object to the slides. *Id.* at 677. The Washington Supreme Court reversed Glasmann's convictions 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 679 (citations omitted).

The State first argues that *Glasmann* is "a non-binding" case. (AB 26.) This argument, of course, ignores that this 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 this 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. (AB 26.) 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 had to rely 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. Trial counsel was therefore ineffective for failing to object, and his failure to object ultimately prejudiced Mr. James.

E. 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).

Ignoring case law on point, the State posits that “[c]umulative error should not be utilized in the post-conviction context.” (AB 29.) However, 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* opinion 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.

And it is beyond dispute that—despite the Court’s apparent reluctance to consider cumulative error claims in the post-conviction context⁵—that courts can and do consider cumulative error in the habeas context. *See United States v. Tucker*, 716 F.2d 576, 595 (9th Cir.1983) (“a court may find unfairness-and thus prejudice-from the totality of counsel's errors and omissions”); *Ewing v. Williams*, 596 F.2d 391, 395 (9th Cir.1979) (“prejudice may result from the cumulative impact of multiple deficiencies”) (quoting *Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir.1978) (en banc)); *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir.1992) (per curiam); *Phillips v. Woodford*, 267 F.3d 966, 985 (9th Cir. 2001) (“We consider the cumulative prejudicial effect of multiple trial errors in determining whether [habeas] relief is warranted.”)

Here, Mr. James has established trial counsel’s errors warrant relief both individually and in the aggregate. Trial counsel failed to retain an expert witness. Trial counsel failed to request critical photographic evidence. Trial counsel also

⁵ *See McConnell v. State*, 125 Nev. 243, 259, 212 P.3d 307, 318 (2009)

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*, 505 F.3d at 927 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). Here, such unfairness is evident.

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

A petitioner is entitled to a post-conviction evidentiary hearing when he asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief. *McConnell v. State*, 125 Nev. 243, 246, 212 P.3d 307, 313 (2009); *see also Byford v. State*, 123 Nev. 67, 68-69, 156 P.3d 691, 692 (2007); *Nika v. State*, 124 Nev. 1272, 198 P.3d 839 (2008); Nev. Rev. Stat. § 34.770. Here, Mr. James presented several interrelated errors by trial counsel that warranted a fuller hearing. Trial counsel failed to retain an expert, failed to request photographs taken during the sexual assault examination of Mr. James' alleged victim, failed to conduct adequate investigation, and failed to challenge the introduction of questionable evidence. In addition, trial counsel failed to object to a prejudicial

PowerPoint the State used during its closing argument. These individual failings were not isolated from each other; they were all pieces which, when added together, demonstrate that trial counsel failed to provide adequate representation at trial. Thus, Mr. James is, at a minimum, entitled to a full hearing on all the claims raised in his post-conviction petition.

III. CONCLUSION

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

RESPECTFULLY SUBMITTED this the 27th day of July, 2017.

/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

Fax: (702) 425-8220

Email: maggie@nvlitigation.com

Counsel for Appellant

CERTIFICATE OF COMPLIANCE

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

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

I further certify that this Reply Brief complies with the type-volume limitation of Nev. R. App. P. 32(a)(7)(A)(ii) because it contains 5,235 words.

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

///

///

///

///

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

DATED this 27th day of July, 2017

/s/ Margaret A. McLetchie

Margaret A. McLetchie, Nevada Bar No. 10931

MCLEATCHIE SHELL LLC

701 East Bridger Ave., Suite 520

Las Vegas, Nevada 89101

Telephone: (702) 728-5300

Fax: (702) 425-8220

Email: maggie@nvlitigation.com

Counsel for Appellant

CERTIFICATE OF SERVICE

I certify that I am an employee of McLetchie Shell LLC and that on this 27th day of July, 2017 the APPELLANT'S REPLY BRIEF was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the Master Service List as follows:

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 REPLY BRIEF was served by first class U.S. mail on July 27, 2017 to the following:

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

/s/ Pharan Burchfield
Employee, McLetchie Shell LLC