Nos. 80902 & 80907

IN THE NEVADA SUPREME COURT

Electronically Filed
Sep 28 2020 08:22 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Tyrone David James Sr.,

Petitioner-Appellant,

v.

State of Nevada/Brian Williams et. al.,

Respondents-Appellees.

On Appeal from the Order Denying Post-Conviction Petition
Requesting Genetic Marker Analysis (10C265506) &
Post-Conviction Petition for Writ of Habeas Corpus (A-19-797521-W)
Eighth Judicial District, Clark County
Honorable Ronald J. Israel, District Court Judge

Petitioner-Appellant's Appendix to the Opening Brief Volume III of V

Rene Valladares
Federal Public Defender,
District of Nevada
*C.B. Kirschner
Assistant Federal Public Defender
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
CB_Kirschner@fd.org

*Counsel for Tyrone David James Sr.

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Respectfully submitted,

/s/ CB Kirschner
C.B. Kirschner
Assistant Federal Public Defender

CERTIFICATE OF SERVICE AND MAILING

I hereby certify that this document was filed electronically with the Nevada Supreme Court on September 28, 2020. Electronic Service of the foregoing **Petitioner-Appellant's Appendix to the Opening Brief** shall be made in accordance with the Master Service List as follows:

James Sweetin, District Attorney

/s/ Adam Dunn
An Employee of the
Federal Public Defender, District of Nevada

THE COURT: Sustained.

MR. PAGE: No further questions, Your Honor.

THE COURT: Okay.

MR. PANDELIS: Just a few brief follow-up.

REDIRECT EXAMINATION

BY MR. PANDELIS:

Q [redacted], you're seventeen years old now?

A Yes.

Q It's 2010, so back in 2005 you were twelve years old?

A Yes.

Q And you said your brother T[redacted] J[redacted] is eleven years old now, right?

A Yes.

Q So five years ago he was six years old, right?

A Yes.

Q And your sister T[redacted] J[redacted] she's nine years old now?

A Yes.

Q So five years ago she was four years old?

A Yes.

Q And you were worried about your brother and sister, Tyrone James' son and daughter, back when these things were happening to you, right?

A Yes.

MR. PANDELIS: Nothing further.

THE COURT: Mr. Page, anything else?

RECROSS EXAMINATION

BY MR. PAGE:

Q You testified that the one incident that you reported to the police officers --

MR. PANDELIS: Objection. This is beyond the scope of my redirect.

THE COURT: Sustained.

MR. PAGE: No further questions, Judge.

THE COURT: All right. Anything from the jury? No. Okay.

You're free to go, N[redacted]. Thank you.

(Bench conference begins)

MR. PANDELIS: Chris Pandelis for the State. That was our final witness for today. We have one more tomorrow morning.

THE COURT: Okay.

MR. PANDELIS: I'm sorry about the fifteen minutes.

THE COURT: Well, we only have fifteen minutes more. Then we'll start at 9:30 tomorrow. What do we have tomorrow and how long are they going to take?

MR. PANDELIS: We have Pamela Douglass and that's it. She's the nurse from Sunrise.

THE COURT: So thirty minutes?

MS. KOLLINS: Yeah, probably.

THE COURT: We'll let them go. We'll go through the instructions now. And then that way tomorrow we can take care of her and just basically go straight on through. Are you anticipating your openings going -- well, you know what, I'm going to excuse everybody and then we can talk about this.

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MR. COX: Okay.

(Bench conference concluded)

THE COURT: Ladies and gentlemen, we're going to go ahead and break for the day.

During this recess you are admonished not to talk or converse among yourselves or with anyone else on any subject connected with this trial, or read, watch or listen to any report of or commentary on the trial or any person connected with this trial by any medium of information, including without limitation newspapers, television, the Internet and radio, or form or express any opinion on any subject connected with the trial until the case is finally submitted to you.

We'll see you folks back here at 9:30 tomorrow morning.

(The jury exits the courtroom)

THE COURT: Okay. First of all, I would like to make a record. When N[redacted]a C[redacted]s was testifying, she became very emotional at one point and Ms. Kollins approached her simply to ask her -- and I could hear everything that Ms. Kollins was saying -- simply to ask her if she was all right, if she was able to continue and if she needed to take a break, and to just suggest that she try to get -- keep going.

MS. KOLLINS: The only other thing I said to her, to my recollection, is she had her shirt up over her face and she was starting to --

THE COURT: And you told her to take her shirt away from her face.

MS. KOLLINS: -- breathe kind of, you know, in a gasping manner, so I asked her to take her shirt down and we'd get her a Kleenex.

MR. COX: And Judge, you know --

THE COURT: So there was no conversation, and obviously I would have stopped any conversation relative to, you know, anything with respect to testimony.

MR. COX: In fairness, Judge, I didn't realize that you could hear, and I didn't -- you know, on one hand I know they're trying to console and she's breaking down in front of the jury, on the other hand as a defense attorney --

THE COURT: I understand.

MR. COX: -- I wanted to at least hear, even though it was just --

THE COURT: I understand, Mr. Cox.

MR. COX: Okay. That's all.

THE COURT: I understand. You just lodged an objection. I just wanted to make sure the record was clear about what was going on, so there wasn't any question that there was anything inappropriate going on. I figured it would actually probably draw more attention to it if we hauled the whole jury out, and she seemed like she wanted to pull herself back together.

MS. KOLLINS: And that's part of the reason I went up there was to preserve the defense position in that if that -- her emotional upset became protracted, we could get them out and let her have her breakdown without everyone sitting here watching her cry with the defendant sitting in here, so.

THE COURT: Okay. I want to go through the waiver with Mr. James, and then we'll talk about jury instructions.

Sir, I need to just go through some information with you about your right to testify. So, under the Constitution of the United States and under the Constitution of the State of Nevada you cannot be compelled --

You know what, sir, you can sit if you'd like. However you like.

MR. PAGE: Oh, he can? I apologize, Judge.

THE COURT: Let me start again. Under the Constitution of the United States and under the Constitution of the State of Nevada, you cannot be compelled to testify in this case. Do you understand that?

THE DEFENDANT: You say I cannot?

THE COURT: You can't -- Nobody can force you to get up here and testify. Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: Okay. You may at your own request give up this right and take the witness stand and testify. If you do, you will be subject to cross-examination by the deputy district attorney, and everything that you say, either on direct examination from your own attorneys or on cross-examination from the district attorneys would be the subject of fair comment when the deputy district attorney speaks to the jury in his or her closing. So when they get up and talk to the jury at the end, they would be able to talk about anything that you said or did while you were up on the stand. Do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: If you choose not to testify, I will not permit the deputy district attorneys to make any comments to the jury because you did not testify. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And if you elect not to testify, I will instruct the jury, but only if your attorney specifically requests, as follows: The law does not compel a defendant in a criminal case to take the stand and testify, and no presumption may

be raised and no inference of any kind may be drawn from the failure of a defendant to testify. So you can have that instruction, but only if your lawyers ask for it.

Do you have any questions about these rights?

THE DEFENDANT: No, I don't.

THE COURT: You are also further advised if you have a felony conviction and more than ten years has not elapsed from the date you have been convicted or discharged from prison, parole or probation, whichever is later, and the defense has not sought to preclude that from coming before the jury and you elect to take the stand and testify -- Let me break that down a little bit because that's kind of a lot.

If you decide that you're going to testify and you have had a felony conviction in the past, they count ten years and it's ten years from when you're completely done with the case, whether it's getting off of parole, whether you were on probation, or whether you expired and were released from prison, but that's the date that the ten years goes from is the very end of it.

If it's not been ten years since that date, then the deputy district attorney would be able to ask you in front of the jury, have you been convicted of a felony, what was the felony, and when did it happen. However, they would not be able to go into any details with regard to any conviction.

Okay. Do you have any questions at all about that, sir?

THE DEFENDANT: No.

THE COURT: Okay. With respect to the jury instructions, I have only received one proposed instruction from the defense, which was the limiting instruction. Were there any additional defense instructions?

MR. COX: Judge, that's the one instruction I had objection with. I believe it

was the second to the last one the State submitted.

THE COURT: Okay.

MR. COX: I submitted you mine. It just didn't have -- My secretary was out that day, so it's not in the same format. But my instruction does not have that last line.

THE COURT: This instruction. Right.

MR. COX: Yes.

THE COURT: Okay. There wasn't any other instructions, though; I'm not missing anything?

MR. COX: That's the one, Judge.

THE COURT: Okay. So there was no -- And you have no objections to any of the State's --

MR. COX: No, Judge.

THE COURT: You looked through their proposed instructions. Okay.

MR. COX: I have looked through them.

THE COURT: Let's --

MS. KOLLINS: Either -- There was an additional instruction that Mr. Pandelis and I talked about today, and because of the length of the day we did not get it to the Court. It's an instruction that talks about being unanimous as to your verdict but not to your theory. And I think we'll submit that to the Court in the morning. If Mr. Cox has an objection to it, that's fine. But it goes to the sexual assault on Count 3, I believe it is.

And the proposed defense instruction today is the limiting instruction that was actually read before witness N[redacted]a C[redacted]s testified, correct?

THE COURT: And the question was just -- Right. And the question was just whether the last sentence would be included or no.

MS. KOLLINS: My belief is that comes out of a case. I do not have the case law with me this afternoon. I would be happy to give it to the Court tomorrow if that sheds any --

THE COURT: Let's just --

MS. KOLLINS: It's really not that big of a difference.

THE COURT: Okay. Let's just take a minute and go through what we do have, and then with the couple exceptions; that way we can have everything together.

We have instructions to the jury. Instruction No. 1 is: It is now my duty as judge to instruct. Instruction No. 2 would be: If in these instructions any rule, direction or idea is repeated. Instruction No. 3 is: An Information is but a formal method of accusing. Instruction No. 4 is: To constitute the crime charged. Instruction No. 5 is: The defendant is presumed innocent. Instruction No. 6 is: You are here to determine the guilt or innocence.

MR. COX: That's No. 6?

THE COURT: Yes.

MR. COX: Thank you.

THE COURT: Instruction No. 7 is: The evidence which you are to consider. Instruction No. 8 is the credibility instruction. The instruction submitted by the State is a not gender neutral instruction, so I have one that just simply replaces "his" with "the witness," so I will substitute that instruction for this one. It's otherwise identical. That just makes it gender neutral. And the same thing for instruction No. 9.

MS. KOLLINS: I don't know why in 2010 those are not all changed in the bank, but they're not.

THE COURT: We're working on it.

Instruction No. 10 is: Although you are to consider only the evidence in this case. Then the State submitted instruction is minor under fourteen. I think that should properly read -- This would be Instruction No. 11, but I think it should properly read minor under sixteen, both in line 2 and in line 5, because that reflects the accurate state of the law at this time.

MR. COX: Okay. Hold on one second. I'm out of order somehow.

MS. KOLLINS: Where is --

MR. PANDELIS: Yeah, it's after the verdict form.

MS. KOLLINS: I don't have that instruction.

THE COURT: It's: A person who subjects a minor under --

MR. COX: Is that after the verdict form, Judge?

THE COURT: What?

MR. COX: Yeah, okay. That's the one after the verdict form.

THE COURT: It's after "Although you are to consider."

MR. PANDELIS: Would you like us to get that prepared?

THE COURT: No, it's just two changes.

MS. KOLLINS: Well, for whatever reason, there's not a copy of that in my stack.

MR. COX: No, there is. It's after the verdict forms.

THE COURT: It's after --

MS. KOLLINS: I realize that.

MR. COX: Oh, you did? Oh, okay.

MS. KOLLINS: There's not a copy of it in my stack.

THE COURT: "Although you are to consider only the evidence," and then the next instruction is: A person who subjects a minor. And it just says under fourteen. I think that should read sixteen.

MR. COX: Agreed, Judge.

THE COURT: Both in line 2 and in line 5. I don't think there's anything else that needs to be changed in that one.

And then Instruction No. 12 is: Where multiple sexual acts occur. This instruction No. 12 is a little bit of a mess. It says: "Where multiple sexual acts occur as part of a single criminal encounter, a defendant may be found guilty for each separate or different act of sexual assault and/or open or gross lewdness." That part is fine. Then: "Where a defendant commits a specific type of act constituting sexual assault and/or" -- and it just says lewdness. I think it should be open or gross, and then there should be a comma, "he may be found guilty of more" -- and it says "that"; it should say "than" -- "one count of that specific type of act of sexual assault." And it should say and/or --

MS. KOLLINS: One count of a specific type of sexual assault?

THE COURT: -- open or -- That specific type --

MS. KOLLINS: How about just get rid of -- more than one count of sexual assault or open and gross lewdness.

THE COURT: Yeah, that's better. Okay. One count of -- I'm not sure if we can fit more prepositions in a sentence. Okay. Open or gross lewdness.

So that sentence would read: "Where a defendant commits a specific

type of act constituting sexual assault and/or open or gross lewdness (comma), he may be found guilty of more than one count of sexual assault and/or open or gross lewdness if. And then there's some punctuation missing here. "There is an interruption between the acts which are of the same specific type." That should be a semi-colon. I think that should be a semi-colon, or. And then two, I think we'll just start that with: "Acts of the same specific type are interrupted by a different specific" -- I didn't meant to say specific -- "a different type" --

MS. KOLLINS: Yeah, a different type of sexual assault.

THE COURT: -- "of sexual assault" and then a semi-colon, or. And then three --

MS. KOLLINS: Or a separate object.

THE COURT: Does this --

MS. KOLLINS: What do you think about this, Judge? Semi-colon, or -- strike for each, and then put a separate object is manipulated or inserted, blah, blah, blah.

THE COURT: Okay. "A separate object is manipulated or inserted into the genital or anal opening of another." Can we just strike the "or anal" part, because there's no allegation of that in this, right?

MS. KOLLINS: Yes.

THE COURT: It's kind of complicated enough without. "Only one sexual assault occurs where a defendant's actions were of one specific type of sexual assault and those acts were continuous and did not stop between the acts of that specific type."

Do we need to add the open or gross lewdness there, too, as well? How about if we do this: Only one sexual assault or open or -- and/or open or gross

lewdness occurs when a defendant's actions were of one specific type and those acts were continuous and did not stop between the acts of that specific type.

MS. KOLLINS: Perfect.

THE COURT: Okay. Mr. Cox, any objection to that?

MR. COX: No, Judge.

THE COURT: Instruction No. 13 is: Physical force is not necessary. Instruction No. 14 is: A person is not required. Instruction No. 15 is: There is no requirement that the testimony. Instruction No. 16 is: Open and gross lewdness. Instruction No. 17 is: Any person who willfully and unlawfully uses force or violence. Instruction No. 18 is: Any person who commits battery upon another.

MR. COX: Okay, I've got those reversed then. So 17 is any person who willfully and unlawfully.

THE COURT: Uh-huh.

MR. COX: Okay. And 18 is any person who commits a battery.

THE COURT: Right.

MR. COX: Okay, I'm sorry.

THE COURT: And then -- Okay, then at this point we would have as 19 a limiting instruction.

Mr. Cox, could you just for the record, I know you have an objection to line 7 and 8 of the limiting instruction.

MR. COX: Your Honor, I think that last line effectively nullifies the intent of giving the instruction. On the one hand they're only to consider that evidence for limited purposes, but then the very last line says you weigh it the same as anything else. But that's not actually true because it's limited to very specific -- for very

specific purposes.

MS. KOLLINS: And I think the intent of the line is really such that they receive it as any other testimony they would. They look at somebody's manner, their motivations to lie or tell the truth. You know, they're to assess it for credibility like any other evidence. So I don't know, without putting the whole --

THE COURT: How about if instead of the word "weigh" we use the word --

MS. KOLLINS: Evaluate?

THE COURT: -- "assess." Does that --

MS. KOLLINS: That's fine.

THE COURT: -- address your concern, Mr. Cox? Because then we're not asking them --

MR. COX: That's fine.

THE COURT: Okay. Or do you like "evaluate" better? I mean, I understand what you're saying, Mr. Cox, but I think that would probably address that.

MS. KOLLINS: Either one is fine with the State, Judge. The less words the better.

THE COURT: So that would be Instruction No. 19. And then the State is proposing -- You know what instruction they're talking about, right, Mr. Cox?

MR. COX: Uh, I haven't seen it yet.

THE COURT: Do you have a general idea what they're talking about?

MR. COX: Yes, I do.

THE COURT: Okay. And do you have a general objection to the general idea of their instruction?

MR. COX: I think their instructions are pretty specific that you don't have to --

you know, motive is not an element.

THE COURT: No. The instruction that they're talking about is saying that it doesn't have to be unanimous as to theory, so -- and I can't remember now the particulars, but there's one count that's charged like finger or penis or something.

MS. KOLLINS: Charged penis and/or finger and/or unknown object.

THE COURT: Right. So they're saying you don't have to agree as to the specific mechanism.

MR. COX: I would argue it would have to be unanimous.

MS. KOLLINS: Then what would be the point of the and/or in the pleadings? I mean, you've been on notice since the beginning that we've -- you know, the allegation is she couldn't see his penis, she could feel the head of it, but there was some suggestion on cross-examination at the Prelim that she didn't know what it was. So in an abundance of caution it was pled in the alternative. I don't know. We'll come with the full instruction tomorrow and --

THE COURT: Okay. Well, we'll deal with that tomorrow. I'm going to leave a --

MR. COX: Leave the remaining blank?

MS. KOLLINS: Do you want to leave a space for that?

THE COURT: I will leave a space for that, because I think it looks less weird to have a skip in numbers than it does to have an "A." So we'll leave a space for 20.

Did that make sense? Mr. Pandelis, did that make sense? You were giving me --

MR. PANDELIS: That does.

THE COURT: You were giving me a look.

MR. PANDELIS: No.

THE COURT: Okay. And then 21 would be: In your deliberations you may not discuss or consider.

Oh, you know what, are we giving a testifying instruction, Mr. Cox, because I don't have that either.

MR. COX: A testifying instruction. You mean, that he's not testifying?

THE COURT: That if your client chooses not to testify, that the jury is not to consider that.

MR. COX: I believe he is testifying, Judge, so.

THE COURT: Okay. So we won't need to do that. If for some reason he were to change his mind overnight, would you anticipate giving that instruction regardless?

MR. COX: Yes, I would.

THE COURT: Okay.

MR. COX: In fact, we could make that -- well --

MS. KOLLINS: Will you come with a copy of that then?

MR. COX: I will.

THE COURT: Since you're anticipating him testifying, I'm not -- I won't leave a space here, but we'll find a place for it if we need to.

Okay. Then 21 is: You may not discuss or consider the subject of punishment.

MR. COX: Okay. I've got 21 as: In your deliberation.

THE COURT: Oh, right. In your deliberation. I just started in the middle there.

MR. COX: Okay.

THE COURT: Twenty-two is: When you retire to consider your verdict. Twenty-three is: If during your deliberation. And I am going to modify this instruction just to make it: The defendant and his counsel. And the court recorder can arrange her notes.

And then Instruction No. 24 will be the final instruction.

MR. COX: Twenty-four is "If in your deliberation"?

THE COURT: No, that's 23.

MR. COX: Okay, I've got a duplicate. I'm sorry.

MR. PANDELIS: Well, one is read-back, one is play-backs.

THE COURT: Oh, right.

MR. COX: Oh.

THE COURT: I don't have that in my set.

MR. COX: I've got read-back and play-backs.

THE COURT: Right. Take out the read-back.

MR. PANDELIS: Okay. So this is 23.

THE COURT: And then I'm going to fix the play-back instruction so it says "his" in line 6 and "her" in line 9. And the last one is 24.

So I think that's it until tomorrow. Anything else?

MR. COX: We left off with 23, and we have "Now you will listen." Okay.

THE COURT: Twenty-four is: "Now you will listen."

MR. COX: Oh, 24. Okay, got it. Okay, thank you.

THE COURT: Okay? And has everybody had a chance to look at the verdict form? It's here if you don't have one.

MS. KOLLINS: I'm sorry, I did something wrong. Can somebody tell me where the common sense instruction goes?

THE COURT: I'm not sure I have that.

MR. PANDELIS: Oh, 10. It's in-between the expert witness and --

THE COURT: Ten.

MR. PANDELIS: Yeah.

MS. KOLLINS: Okay, so it is in there. Thank you. Sorry. Sorry about that.

THE COURT: Okay. Verdict form. Everybody look at it?

MR. PANDELIS: No problems.

MR. COX: No, Judge.

THE COURT: Okay. You didn't look at it, or you're fine with it?

MR. COX: No, I've looked at it. If I have objection, I'll -- I don't anticipate one now, but I'll review it some more.

THE COURT: Okay, great. If there's nothing else, everyone have a good evening.

(Court recessed at 5:05:45 p.m. until the following day,

Thursday, September 23, 2010 at 9:30 a.m.)

* * * * *

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

Liz Garcia

Liz Garcia, Transcriber
LGM Transcription Service

4/28/11

Date

FILED
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CLERK OF THE COURT

TRAN

ORIGINAL

EIGHTH JUDICIAL DISTRICT COURT
CIVIL/CRIMINAL DIVISION
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

TYRONE D. JAMES,

Defendant.

CASE NO. C265506

DEPT. NO. VII

BEFORE THE HONORABLE LINDA M. BELL, DISTRICT COURT JUDGE

THURSDAY, SEPTEMBER 23, 2010

TRANSCRIPT RE:
TRIAL BY JURY
DAY 3 - VOLUME III

10C265506
TRAN
Reporters Transcript
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APPEARANCES:

For the State: STACY L. KOLLINS, ESQ.
CHRISTOPHER P. PANDELIS, ESQ.
Deputy District Attorneys

For the Defendant: BRYAN A. COX, ESQ.
DANIEL R. PAGE, ESQ.
Deputy Public Defenders

RECORDED BY: Renee Vincent, Court Recorder

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APR 29 2011
CLERK OF THE COURT

INDEX OF WITNESSES

	Direct	Cross	Redirect	Recross
STATE'S WITNESSES:				
Pamela Douglass	7	12	13	--
		* * * * *		
DEFENDANT'S WITNESSES:				
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		* * * * *		

CLARK COUNTY, NEVADA THURSDAY, SEPTEMBER 23, 2010

PROCEEDINGS

(PROCEEDINGS BEGAN AT 9:35:50 A.M.)

(Whereupon the following proceedings were held outside the presence of the jury)

THE COURT: Rick, could you please get Mr. Griffin.

THE MARSHAL: Mr. Griffin?

THE COURT: Yeah.

(Juror Cedric Griffin enters the courtroom)

THE MARSHAL: Here you go, Judge.

THE COURT: Good morning, sir. Have a seat.

Good morning. Mr. Griffin, there was just some concern that Mr. Cox had that perhaps you overheard a conversation he had with another lawyer this morning, and so we just wanted to bring you in and see if you overheard anything this morning when you were on your way to court.

JUROR GRIFFIN: No.

THE COURT: Okay. Any --

MS. KOLLINS: Nothing from the State, Judge. Thank you.

THE COURT: Okay. Thank you.

JUROR GRIFFIN: Okay, thank you.

(Juror Griffin exits the courtroom)

THE COURT: And let me just make a real quick record about that. It's just that Mr. Cox and Ms. Coffee came in this morning. Ms. Coffee had to be somewhere else and she just wanted to let me know that she had asked Mr. Cox --

something to the effect of, hey, did your case settle? And then they realized that the juror was nearby. She was extremely apologetic about it and, you know, obviously just was not thinking that a juror would be out and about that early in the morning.

MS. KOLLINS: Well, and I understand the conversation took place outside the courthouse across the street --

THE COURT: Right.

MS. KOLLINS: -- in front of the Courthouse Grill, so it wasn't like it was in the courthouse, in the elevator, so --

THE COURT: Right. So there was certainly no intent to do anything. But that's why we thought out of an abundance of caution we should just ask Mr. Griffin, and apparently he was not close enough or wasn't paying enough attention to ever hear what happened. Okay.

THE CLERK: Are we going to do that -- Let's do that instruction real quick.

THE COURT: Okay. Instruction. Mr. Cox, did you copy the instruction?

MR. COX: I did, Judge.

THE COURT: And do you have any objection to the instruction?

MR. COX: Judge, I do -- I do lodge objection. It's my position that the facts do need be unanimous to reach a verdict.

MS. KOLLINS: I'm sorry, I couldn't hear you, Mr. Cox.

THE COURT: He said that his position is that the facts need to be -- they do need to be unanimous.

MS. KOLLINS: Well, actually that's out of a -- that's similar to an instruction that's given in murder cases where you don't have to be unanimous as to your theory of guilt, just unanimous as to your verdict. It comes out of *Byford*. And I think

when we plead -- I mean, we have three theories of penetration in Count 3, so I think it's accurate on the law in that if they believe -- if one person thinks it was a penis and another person thinks, well, she did say, you know, she felt the head of his penis, but they did impeach her on the fact that she never saw his penis going in her. So it was pled in the alternative that way from Prelim. They did impeach her in that regard here.

So in an abundance of caution, the State believes we should instruct them that if one person thinks that that was a finger and not his penis, for whatever reason, based on their impeachment or just their reception of the evidence, that that's an accurate statement of the law. They don't all have to agree it was a penis, all have to agree it was a finger, all have to agree it was an unknown object for them to return a verdict on that count.

THE COURT: Okay. The defense objection will be noted. This is an objection to Instruction No. 20.

(Colloquy regarding copies of jury instruction packet)

THE COURT: Oh, are we doing a testifying instruction? No?

MR. COX: Judge, he's testifying today.

THE COURT: Okay.

(Speaking to the marshal) Just waiting on you out there now. Do you have everybody?

THE MARSHAL: Yes, ma'am. Ready?

THE COURT: Okay. Yeah, we're ready.

THE MARSHAL: The jury is in the courtroom.

(The jury panel enters the courtroom)

THE MARSHAL: All present and accounted for, Judge.

(Whereupon the following proceedings were held in the presence of the jury)

THE COURT: Good morning, everyone.

JUROR IN UNISON: Good morning.

THE COURT: We are back on the record in Case Number C265506, State of Nevada versus Tyrone James. Let the record reflect the presence of all of our jurors, Mr. James with his counsel, the representatives of the District Attorney's Office, and all of the court staff.

Ms. Kollins, your next witness.

MS. KOLLINS: Pamela Douglass, please, Your Honor.

THE COURT: And Officer Moon stepped out, so you may need to --

MS. KOLLINS: I can get her.

THE COURT: Thanks.

PAMELA DOUGLASS

Having been called as a witness and being first duly sworn, testified as follows:

THE COURT: Good morning, ma'am. Could you please state your name and then spell it first and last for the record.

THE WITNESS: Yes. It's Pamela Douglass. P-a-m-e-l-a D-o-u-g-l-a-s-s.

THE COURT: Okay. And ma'am, could you do me a favor.

THE WITNESS: Absolutely.

THE COURT: You have a slot for those -- Oh, it's already on there. Never mind. I might have to do two boxes of Kleenex, but we'll see how it goes.

/ / / / /

DIRECT EXAMINATION

BY MS. KOLLINS:

Q Good morning, Ms. Douglass. How are you employed?

A I am employed by Sunrise Hospital Pediatric Emergency Department.

Q And what do you do at Sunrise Hospital Pediatric Unit?

A I'm a pediatric emergency nurse and I also work on the sexual assault nurse examiner team.

Q How long have you been doing that?

A I've been working at Sunrise doing that for over two years.

Q Any special training that qualifies you to perform that function?

A I -- Prior to moving to Las Vegas I had forty hours of continuing education getting certified, certification as an adult and adolescent sexual assault nurse examiner, and then I also have fifty-one hours of continuing education for pediatric nurse examinations.

Q What do you do in your job regarding sexual assault examinations? What's your job?

A My job is to collect a thorough medical history, as well as the events of the sexual assault and a sexual assault history, and a complete head to toe physical exam, and also to obtain the evidence for the sexual assault kit.

Q So there's kind of three parts to it, right?

A Um-hm.

Q Is that a yes?

A Yes.

Q So there's a history portion where you gain the information of why the

person is presenting at the Peds E.R., right?

A Yes.

Q And then there's the wellness portion that you talked about, the head to toe portion?

A Yes.

Q And then finally the sexual assault examination itself?

A Yes.

Q And there's a protocol for performing that whole series of events?

A Yes, there is.

Q And you guys follow that protocol?

A Yes.

Q How many examinations have you participated in?

A Approximately fifty.

Q Calling your attention to May 14th of 2010, were you on duty in that capacity at Sunrise Hospital Peds E.R.?

A I was on duty as a nurse there, and I was the sexual assault nurse for the patient.

Q Did you have occasion to meet with a young lady by the name of T[redacted]a H[redacted]s on that date?

A Yes, I did.

Q The protocol that we talked about, the history, the wellness portion and the sexual assault exam, did T[redacted]a go through all those stages of evaluation?

A Yes, she did.

Q Can you tell me about taking a history from T[redacted]?

A The first thing I did after the forensic interview was I took a thorough medical history from T[redacted], including any medical problems that she had. The only thing she had was borderline Diabetes. And then I proceeded to ask if she had taken any medications recently, including anything that could cause bruising or bleeding that would cause -- something that would look like an injury that could be caused from medications or a medical disorder. And then I also asked her if she had ever had any genital injuries, such as a bike accident, a straddle injury, or a previous sexual assault that would cause us to find anything abnormal. And then I also asked her if she was having any pain to any part of her body from earlier that day or also any genital pain or discharge at that time.

Q Did she report any physical pain to you?

A She did not.

Q Did you take a history of the sexual assault itself?

A Yes. After I collected my medical history, I then asked T[redacted]a -- I told her that I needed to collect a sexual assault history in order to know what evidence to collect and also to know what injuries to assess for when I was doing her physical assessment. And I asked T[redacted]a to please explain to me what had occurred earlier that morning.

Q And do you have a form at Sunrise, it's called a SCAN form, that you document that history?

A Yes, I do.

Q It's kind of a check sheet, right?

A Yes.

Q Did you fill out that check sheet regarding T[redacted]?

A Yes, I did.

Q And what was the history you obtained, as reflected in your documentation that you got from T[redacted]?

A The first history I got was T[redacted]a's narrative of what had happened that morning. And T[redacted]a told me that Tyrone had came into her room, pulled her chest out of her shirt and bra, and then she began to fight back, so he put his hands around her neck and then grabbed her by her wrist and drug her into the living room. After that he then proceeded to put a gloved finger inside of her. I asked her what did she mean by inside of her, and she said inside of my vagina. And then she stated that after that he placed his penis inside of lips. And I asked her which lips did she mean, and she said inside the lips of her vagina. She stated that during all this she was hitting, screaming, fighting back.

And after that she said that she was fighting so much he finally decided to stop, and then he told her to get ready for school. He drove her to school. And as he was driving her to school, he asked her if she was going to tell anybody what happened. During this part of the exam she then became tearful, very upset, and stated, no, because I was afraid he might hurt or kill me.

Q And from the narrative, do you then -- that she gave you, do you then fill out the check sheet?

A Yes, I do.

Q And in this case what was the nature of the assault that you just put in that portion of the check sheet?

A So, we also fill out a sexual assault kit check sheet as well. On that sheet basically we write, was the patient licked, were they bitten, were they

penetrated orally, vaginally, digitally. If so, by what. Was there a condom, lubricant, anything else used during the assault. So on that portion of the checklist I checked that she was penetrated with a finger, penis, both vaginally, and then there was no oral penetration or no rectal penetration.

And also on this portion I asked her if there was -- Prior to that during my medical history I asked her what she had done after the assault had occurred, such as eating, urinating, having a bowel movement, brushing your teeth. And the only thing she answered yes to was having eaten, drank, and brushing her teeth. And she had not changed her clothes.

Q And she also urinated prior to that?

A Yes, she had.

Q And did you also indicate that that was all done -- that the digital penetration was done with a gloved hand?

A Yes, I did.

Q And did you have any report of any lubricants at that time?

A There was no lubrication that she reported to me.

Q And then subsequent to that you participated in the collection of the sexual assault kit, correct?

A Yes, I did.

MS. KOLLINS: And I'm not going to make you go through that because we heard that from the doctor yesterday. I thank you, Ms. Douglass.

I'll pass the witness.

THE COURT: Thank you. Mr. Cox?

MR. COX: Thank you, Judge.

CROSS-EXAMINATION

BY MR. COX:

Q Good morning, Ms. Douglass.

A Good morning.

Q You took a fair amount of reports regarding what Ms. H[redacted]s told you?

A Yes.

Q Now, is it fair to say that the accuracy of the report is dependent on whether or not the person providing the information is truthful?

A Yes, it is.

Q Okay. You have no way of verifying that?

A No, I do not.

Q Okay. Now, she described the incident and when she did that she claimed that she slapped and hit Mr. James?

A Yes.

Q And fought so much that that's what caused the incident to cease?

A Yes.

Q Okay. So she described a violent episode of fighting?

A Yes.

Q Okay. Did she say how many times she hit Mr. James?

A I did not ask her that question.

Q Was it your impression it was repeated?

A Yes.

MR. COX: Okay. I have no further questions, Judge.

THE COURT: Okay.

MS. KOLLINS: No redirect, Your Honor.

THE COURT: Anything from the jury? Okay.

(Bench conference begins)

MS. KOLLINS: That's fine.

MR. COX: I don't have any reason to oppose either question.

MS. KOLLINS: Neither does the State.

THE COURT: Okay.

(Bench conference concluded)

THE COURT: Okay, ma'am. Did you notice any bruising or redness around Ms. H[redacted] neck?

THE WITNESS: I did not.

THE COURT: And did Ms. H[redacted]s indicate to you that she ate breakfast after the assault she reported?

THE WITNESS: She had eaten lunch afterwards, because it had happened at nine o'clock in the morning.

THE COURT: Okay. Any follow-up from the State?

MS. KOLLINS: Very briefly.

REDIRECT EXAMINATION

BY MS. KOLLINS:

Q Do you recall what time your examination started or your history taking started?

A She arrived at the E.R. at 1426, I believe. Detective Tomaino and the CPS worker, Lizette Woods, did a forensic interview around 1435. They were done approximately around three o'clock in the afternoon. So I began my exam

between 3:00, 3:30, and then she left the E.R. around six o'clock that afternoon.

Q So 1426 is 2:26 in the afternoon?

A Yes.

Q And the first thing she did was be interviewed by the detective and the -- I'm sorry -- Child Protective Service worker, Lizette Woods, correct?

A Yes.

Q And then you didn't get her for her exam until three o'clock?

A No. I --

Q Or her -- the history?

A The history part. I quickly explained to her what would be happening in the E.R., that she would be interviewed and then what would be occurring after that interview about -- because the detective arrived five minutes after she arrived from triage to the room.

MS. KOLLINS: Nothing else, Judge.

MR. COX: I don't have any other questions, Judge.

THE COURT: Okay. Any additional questions from the jury? No?

Thank you, ma'am. You're free to go.

THE WITNESS: Thank you.

THE COURT: Ms. Kollins.

MS. KOLLINS: Your Honor, with the testimony of Ms. Douglass, the State is prepared to rest.

THE COURT: Okay. Mr. Cox.

MR. COX: Court's indulgence. Your Honor, the defense calls Tyrone James.

THE COURT: Mr. James.

TYRONE D. JAMES

Having been called as a witness and being first duly sworn, testified as follows:

THE COURT: Good morning, sir. Could you please state your name and then spell it first and last for the record.

THE WITNESS: Yes. Tyrone David James, Sr. T-y-r-o-n-e J-a-m-e-s.

THE COURT: Thank you. Mr. Cox.

MR. COX: Thank you, Judge.

DIRECT EXAMINATION

BY MR. COX:

Q Mr. James, did you touch N[redacted]a C[redacted] inappropriately?

A No.

Q Now, based on the allegations she made, that she's saying happened in 2005, was there a trial?

A No.

Q Did you have an attorney?

A No.

Q Did you cooperate?

A Yes, I did.

Q Why?

A Her mother told me there was an allegation that was -- that N[redacted]a had said something, and that was basically it.

Q Okay. Did you touch T[redacted]a H[redacted]s inappropriately?

A No.

Q Did you cooperate with law enforcement when they contacted you?

A Yes, I did.

Q Why?

A Because I didn't do it.

Q Now, on occasions when you stayed the night with Theresa Allen, did T[redacted]a H[redacted]s treat you with hostility?

A Yes, she did.

MS. KOLLINS: Objection, leading.

MR. COX: I don't --

THE COURT: Sustained.

MR. COX: I don't think I suggested an answer in that question.

THE COURT: It's sustained. If you could rephrase, please.

MR. COX: Okay.

BY MR. COX:

Q There were -- there had been occasions when you stayed the night at Theresa Allen's home?

A Yes.

Q Did you find that -- Well, would T[redacted]a H[redacted]s know that you were there the next morning on occasion?

A Yes.

MS. KOLLINS: Objection, calls for speculation and leading.

BY MR. COX:

Q Okay. Would you see each other the next morning on occasion when you stayed the night?

A Yes.

Q And you'd make eye contact?

A Yes.

Q On those occasions when you saw each other the next morning, was she nice to you?

A No.

Q Now, there's been two different grandmas mentioned, a grandma mentioned that you were going to go fishing with on May 14th, and N[redacted]a had mentioned a grandma that she claimed could verify events -- well, that she mentioned when she mentioned the version of events from 2005. Are those two different people?

A Yes.

Q Who is Tahisha Scott?

A My ex-wife.

Q And who is her daughter?

A N[redacted]a C[redacted].

Q Now, are you divorced from Tahisha Scott?

A Yes.

Q Have you maintained contact with Tahisha Scott?

A Yes, I have.

Q Have you maintained contact with Tahisha Scott's children?

A Yes.

Q And Tahisha Scott allowed you to do that?

A Yes.

Q Was there occasions when you attended events together?

A Yes.

Q What were some of those events?

A My son's basketball games, football games. Outings at parks and stuff like that. Birthday parties.

Q And would N[redacted]a C[redacted]s be in attendance to those events?

A Yes.

Q Did she -- Would she be in close proximity to you at those events?

A Yes.

Q Do you know whether or not Tahisha -- I'm sorry, N[redacted]a C[redacted]and T[redacted]H[redacted]s know of each other?

A Yes, I believe they do.

MS. KOLLINS: Objection. Move to strike as speculative. I believe they do. Either they do or they don't.

THE COURT: Sustained. The jury is to disregard that comment.

Do you want to rephrase the question, Mr. Cox?

MR. COX: Okay.

BY MR. COX:

Q Has D[redacted]e J[redacted]n made comments to you in which she's accusing you --

MS. KOLLINS: Objection. Hearsay; leading.

MR. COX: Judge, I'll move on to a different line of questions.

THE COURT: Okay.

BY MR. COX:

Q On May 14th, you made -- you and Theresa Allen made arrangements

for you to pay a bill?

A Yes.

Q And part of the arrangement to pay the bill was you were to pick up the bill itself?

A Yes.

MS. KOLLINS: Again, objection. Leading.

THE COURT: Sustained.

MR. COX: Okay. I apologize, Judge.

THE COURT: That's okay, Mr. Cox.

BY MR. COX:

Q Okay. As part of that arrangement, did you go to the home?

A Yes.

Q And what did you do?

A I went to the home to drop off my dog, where I was keeping it at her household, and I picked up her power bill.

Q Okay. Now, were you surprised to see somebody at the home at that time?

A Yes, I was.

Q Okay. And who were you surprised to see?

A T[redacted]a H[redacted].

Q And what was she doing?

A She was ironing her clothes.

Q Okay. Did you believe that she was late for school?

A Yes, I did.

MS. KOLLINS: Objection. Leading; relevancy.

THE COURT: Sustained.

BY MR. COX:

Q Okay. As a result of you seeing her, did you offer her a ride to school?

A Yes, I did.

Q Did you in fact give her a ride to school?

A Yes, I did.

Q Now, later on did a Detective Hatchett contact you?

A Um, actually before any officer contacted me, Theresa Allen called me.

Q Okay. She contacted you --

A Yes.

Q -- and you guys talked?

A Yes.

Q But later on did Detective Hatchett call you?

A Yes.

Q Did you cooperate with him?

A Yes, I did.

Q Did he tell you anything about the allegation?

A Yes.

Q Did he tell you that you were being accused?

MS. KOLLINS: Objection. Hearsay.

THE COURT: Would counsel approach for a second.

MR. COX: Sure.

/////

(Bench conference begins)

MR. COX: I have to admit, I'm not really good at -- (indiscernible). I'm not -- I don't do a lot of it.

THE COURT: It's just, I know that most of what you do on that end of things is cross-examination.

MR. COX: I'm trying to change -- (indiscernible).

THE COURT: Just try to, like, who, what, when, where, how, what happened next.

MR. COX: Okay. I'm doing my best.

THE COURT: All right. Okay, thanks.

(Bench conference concluded)

BY MR. COX:

Q Okay. When you were with Detective Hatchett, was the accusation discussed?

A Yes, it was.

Q Okay. Now, on a previous date, not yesterday, were you present when N[redacted] took the stand and testified?

A Yes.

Q That was recently?

A Yes.

Q Okay. Now, the grandma that N[redacted] mentions, is that person present in the courthouse?

A Yes.

MR. COX: Okay. Judge, I don't have any more questions at this time.

THE COURT: Okay.

CROSS-EXAMINATION

BY MS. KOLLINS:

Q Good morning, Mr. James. How are you?

A I'm doing fine.

Q I have a few questions for you. You and I have not spoke before, correct?

A Correct.

Q You arrived at T[redacted]a's home at what time that morning?

A Around 9:40, 9:45.

Q You said you were surprised that she was there. You knew she didn't start school until 10:00, so why were you surprised?

A She doesn't start school at 10:00. She starts school at 9:55.

Q Well, a five minute discrepancy is what we're talking about?

A Well, yes.

Q They lived in an apartment then, correct?

A Yes.

Q And you were going to drop your Pitbull off?

A Yes.

Q And you heard mom say yesterday the Pitbull wasn't welcome there; she didn't know that.

A That's not true.

Q Why would she lie about that?

A I don't know. You would have to ask her that.

MR. COX: Objection. Calls for speculation, Judge.

THE COURT: Overruled.

BY MS. KOLLINS:

Q You heard T[redacted]a say that she liked some things about you yesterday, right?

A Yes, I did.

Q Did she like some things about you?

A I could say some things, yes.

Q You helped her mom out?

A Yes.

Q Paid some bills?

A Yes.

Q Drove mom to the doctor, to the attorney when she was having a bad time?

A Yes.

Q So there was things she liked about you?

A Yes.

Q So she wasn't always hostile to you?

A Uh, it depends on what subject you're trying to say on hostile.

Q Okay. Well, the subject I'm talking about now is about you paying bills and watching out for mom. She wasn't hostile to you about those topics, was she?

A No.

Q So she wasn't always hostile?

A No.

Q When did you marry Tahisha Scott?

A When did I marry Tahisha Scott? I, uh, I've been divorced from her so long, I can't say exactly off the top of my head right now. I'm sorry.

Q But you remember that you got to the house at 9:45 on May 14th, 2010?

A Yes.

Q But you don't remember when you got married?

A Like I said, I've been divorced awhile now and I put that in -- that's part of my past.

Q Okay. When did you get a divorce?

A When did I get a divorce? Me and Tahisha got a divorce in -- I'm trying to say exactly -- It was in '05.

Q Right after N[redacted]a called the police?

A No.

Q Didn't that happen in 2005?

A Yes, it did.

Q And isn't the reason that that case -- that there was no trial is because Tahisha Scott called Metro and told them that her daughter would not cooperate?

MR. COX: Objection. Calls for --

MS. KOLLINS: Effect on the hearer.

MR. COX: Judge, the reality is that he doesn't have a base of knowledge to answer that question.

THE COURT: Overruled.

Sir, if you know, you can answer.

THE WITNESS: I don't -- Could you repeat the question, please?

BY MS. KOLLINS:

Q Isn't it true that the reason there was no trial with the N[redacted]a case is because Ms. Scott called Metro and relayed that her daughter would no longer cooperate?

A I don't know.

Q That was Tahisha Scott's choice, not N[redacted]a's choice?

MR. COX: Judge, asked and answered, and I don't think he has a base of knowledge to answer the question.

THE COURT: Sustained.

BY MS. KOLLINS:

Q You don't know whether or not that was N[redacted]a's choice?

A I don't -- I don't know. I don't recall at all anything to do with that. Could I say something in regards to that?

Q There's no question pending. I'm sorry.

A Okay.

THE COURT: Sir, just go ahead and wait until she asks a question, okay.

BY MS. KOLLINS:

Q You said there had been occasions where you've been in close proximity with N[redacted]?

A Yes.

Q Was that with her little brothers?

A Yes.

Q Little brother, little sister?

A Yes.

Q Those are your biological children?

A Yes.

Q She's still -- N[redacted]a is still a minor?

A Is she still a minor? Yes, she is.

Q Okay. And you still pay support for those two boys, or the boy and the girl?

A Yes, I do.

Q When did you ask T[redacted]a's mom about bringing the dog over?

A I spoke to Theresa that morning. She called me when she -- she told me she was on her way to work. She had just dropped off her daughter and her son at school.

Q Okay. So what did you ask her about the dog?

A I let her know that I was going to drop the Pitbull off at her house and that I was coming by to pick up the bill.

Q Why was it necessary to drop the Pitbull off at her house and not leave him at your house?

A Well, the reason I wasn't taking the Pitbull -- well, actually I was over at -- well, Ms. Verlene's house, she's almost like a grandmother to me. We was at her house. I was staying over there shortly, and my dog, I didn't keep it there. The only reason I took the dog with me that day before was because we went to Sunset Park and went fishing. I wanted to take the dog with me.

Q Well, why didn't you take the dog fishing? Why were you leaving it cooped up in an apartment with another dog?

A It's not cooped up in an apartment. She has an outside patio, it's an open area.

Q Well, again, why weren't you taking the dog fishing?

A That day I wasn't taking the dog fishing because usually I have to walk the dog, let the dog use the bathroom. That day I wanted to concentrate on fishing.

Q You wear size eight and a half men's tennis shoes?

A Yes, I do.

Q And had bought a pair of Air Jordan's at some point?

A Yes.

Q Okay. And that box would have remained at Theresa's apartment?

A I don't know.

Q Did you buy them when you were staying there?

A No.

Q When did you buy them?

A When I was at my grandmother's house.

Q You used gloves in your job at Caesars Palace as a porter?

A Yes. Theresa works there as well.

Q Kind of surgical looking gloves, rubber gloves?

A Um, cleaning gloves.

Q Did you ever use those gloves at home?

A No.

Q Did you offer to get T[redacted]a a new cell phone cover?

A No.

Q What did you talk about on the way to school?

A What did we talk about on the way to school? Nothing. She was sitting there playing and texting on her phone like she always does.

Q Was she hostile that morning?

A Was she hostile that morning? No, 'cause I offered to give her a ride to school.

Q But she was hostile the rest of the time?

A T[redacted]a has a real bad attitude sometimes. One minute you could be -- she'll talk to you just as polite and the next minute she's snapping at you, and that's just the way she is.

Q Did you ever discipline the kids? Did you ever discipline T[redacted]?

A Do I discipline them? No.

Q So you weren't responsible for that in your relationship with Theresa, telling the kids what they could or couldn't do?

A Well, if you want to consider that disciplining, yes. The reason -- The only thing I would do is relay messages that their mother gave me to give to them.

Q What do you consider discipline?

A What do I consider disciplining? Well, what I consider disciplining is if I have to basically tell them what my rules are, what my -- that's what I consider disciplining.

Q Prior to the morning of May 14th, 2005 (sic), when was the last time you spent the night at Theresa Allen's house?

A When was the last time I spent the night at Theresa Allen's house? Approximately three weeks -- three weeks.

Q Three weeks before? So you weren't living there then?

A No.

Q When was the last time you were permanently living with Theresa Allen?

A Three weeks before that.

Q Three weeks before. Was that when you were in and out, or was that when you moved your stuff out?

A I always was in and out, and I always kept stuff at her house.

Q Were you ever together with N[redacted]a and T[redacted]a at the same place at the same time?

A No.

Q When you lived with Theresa Allen, where did N[redacted]a live?

A With her mother.

Q And where was that at?

A I don't know her address, but she lives with her mother.

Q Okay. Well, how far apart were they? What part of town?

A What part of town? East Las Vegas.

Q Both of them?

A Yes.

Q Would N[redacted]a and Tahisha Scott be invited to Theresa Allen's house for any occasions?

A No.

Q So they didn't socialize?

A No. They knew each other through N[redacted]a's cousin. They went to school together.

Q Did you ever seen T[redacted]a get real upset?

A Yes.

Q About what? What kind of stuff did you see her get upset about?

A I guess boys at school, things like that. Or one time she got real mad at me because I came in her room because she had a boy in her room.

Q Did you ever see her cry?

A Have I ever seen her cry? Yes.

Q Did you ever see her sleep with her mom?

A No.

Q Was she a good kid generally or not so much?

A She always gets into fights at school because of -- she has -- like I say, she has a bad attitude, so she always gets into confrontations.

Q How long were you in that child's life?

A Three years.

Q Do you have anything good to say about her?

A Do I have anything good to say about her? The only good thing I can say about T[redacted]a H[redacted]s is that -- as far as -- like I say, her attitude just was real bad. She always kept a real bad attitude towards me, so therefore the only thing I can say good about her was that she loves her mother.

Q So she had such a bad attitude about you, but she couldn't wait to get in the car and get a ride to school from you; right?

MR. COX: Objection, Judge. Argumentative.

THE COURT: Sustained.

/ / / / /

BY MS. KOLLINS:

Q Do you have anything good to say about N[redacted]?

A Yes.

Q What's that?

A N[redacted]a is good in school. She does her homework. She's a good student. And she's a good older sister to my son and my daughter.

Q And who do you think put her up to this?

A I honestly don't know.

Q Who do you think put T[redacted]a up to this?

A I honestly don't know, but I know that she heard rumors from school from her cousin, from N[redacted]a's cousin.

MS. KOLLINS: No more questions, Judge.

THE COURT: Okay. Mr. Cox?

MR. COX: No more questions, Judge.

THE COURT: Anything from the jury? Okay. Counsel approach.

(Bench conference begins)

THE COURT: (Indiscernible).

(Speaking to the marshal) Are we waiting on another question there?

THE MARSHAL: What was that?

THE COURT: Are we waiting on another question?

THE MARSHAL: No.

THE COURT: Oh, okay.

(Bench conference concluded)

THE COURT: Okay. Sir, how did T[redacted]a treat you when you stayed at

her house?

THE WITNESS: Real rudely. She back-talks and she just -- it just was like she didn't want me around.

THE COURT: And what actions did she take that were hostile?

THE WITNESS: What actions did she take that was hostile towards me?

THE COURT: Right.

THE WITNESS: Like I say, the back-talk, smacking her lips, rolling her eyes.

THE COURT: Okay. Any follow-up from the State?

REDIRECT EXAMINATION

BY MS. KOLLINS:

Q How many kids do you have?

A How many kids do I have? I have three.

Q Any other teenagers?

A Yes, I have a teenage daughter.

Q Teenagers roll their eyes and back-talk?

A Yeah. Towards certain people, yes, they do.

Q So it's not unusual for a teenager to roll their eyes, back-talk, talk under their breath, do things like that?

A It depends on how they're doing it and how they're behaving.

Q Well, what do you mean it depends on how they're doing it or how they're behaving?

MR. COX: I think this calls for speculation at this point.

THE COURT: Overruled.

THE WITNESS: You said what do --

BY MS. KOLLINS:

Q I don't understand your answer. I'm sorry.

A It depends on how they carry their self when they're doing it. Yes, teenagers roll their eyes and smack their lips, true. But it's their demeanor, how they present it to a person.

Q I'm not disagreeing it's disrespectful, but it's just kind of teenage angst, isn't it? I mean, don't teenagers just go through that stage where that's how they behave?

A Some of them, yes.

Q Okay. And that's the conduct you defined by this kid as hostile?

A Well, like I said, she – she acted hostile towards me. If it would have been in a polite way, I'd say it was a polite way. If was in a nice way. Her sister didn't act that way towards me.

Q So even when you were paying bills and doing stuff for mom, she was hostile?

A She was always that way towards me. She did not like me at all.

MS. KOLLINS: No more questions, Judge.

THE COURT: Mr. Cox?

MR. COX: No, Judge.

THE MARSHAL: More questions.

(Bench conference begins)

MS. KOLLINS: I think -- (indiscernible) -- because I know -- (indiscernible). So, he opened the door and technically -- (indiscernible).

MR. COX: I agree, Your Honor.

MS. KOLLINS: I don't really want to go there -- (indiscernible).

MR. COX: Yeah -- (inaudible).

MS. KOLLINS: And I don't think he realizes what -- (indiscernible).

THE COURT: Okay. So we're not asking this one.

MS. KOLLINS: This one, I -- (indiscernible).

MR. COX: This -- the problem here is -- (indiscernible).

THE COURT: We're not asking that.

MR. COX: Yeah, I object to that one.

THE COURT: Okay. So we'll ask those. Okay.

MS. KOLLINS: And just for the record, Stacy Kollins, D.A.'s Office. As to the question from Juror No. 8, the defendant opened the door to that information on cross-examination, but I did not follow up on it purposefully.

THE COURT: Okay.

(Bench conference concluded)

THE COURT: Okay. Sir, did you ever ask T[redacted]a why she didn't like you?

THE WITNESS: Have I ever asked T[redacted]a why didn't she like me? I never really tried to talk to T[redacted]a like that, 'cause she was always hostile.

THE COURT: Okay. Any follow-up from the State? Any follow-up from --

MS. KOLLINS: Just a couple questions.

THE COURT: Oh, I'm sorry.

FURTHER REDIRECT EXAMINATION

BY MS. KOLLINS:

Q You had a pretty long-term relationship with Theresa Allen, right?

A Yes.

Q Was it important to you to gain the love and trust of her kids?

A It was important to me, but I just -- when I notice that a child is being that much, um, I try to avoid them because I don't want any conflict.

Q So it was important to you, but it wasn't important enough for you to go to T[redacted]a and try to say, hey, let's work this out?

A I have -- I have said that before, yes. I tried -- I told her, let's try to get along.

Q Okay. So when the judge just asked you the question, did you try to talk to T[redacted]a about why she didn't like you, the real answer was yes, not no?

A Well, she didn't ask me that question in that way.

MS. KOLLINS: I guess we can differ on that. Thank you, no more questions.

THE COURT: Okay. Mr. Cox, anything?

MR. COX: No, Judge.

THE COURT: Anything else from the jury? No? Okay.

Thank you, sir. You can go ahead and step down.

Mr. Cox?

MR. COX: The defense rests, Judge.

THE COURT: Okay.

(The Court confers with the marshal)

THE COURT: Okay. Ladies and gentlemen, we're going to take a break for just about ten minutes. Then when you come back I will -- Oh, you know what, I didn't -- Does the State have any rebuttal?

MS. KOLLINS: No, Your Honor, the State has no rebuttal case. Thank you.

THE COURT: Okay. We're going to let you go for about ten minutes. When we come back we'll read through the jury instructions, have closing arguments, and then the case will be submitted to you.

During this recess you are admonished not to talk or converse among yourselves or with anyone else on any subject connected with this trial, or read, watch or listen to any report of or commentary on the trial or any person connected with this trial by any medium of information, including without limitation newspapers, television, the Internet and radio, or form or express any opinion on any subject connected with the trial until the case is finally submitted to you.

So if you could just be back here at 10:40. Thank you.

(The jury exits the courtroom)

THE COURT: Anything we need to put on the record?

MS. KOLLINS: No. I mean, I think the bench conference on the two questions that weren't asked is already recorded, so other than that I don't think so.

THE COURT: Okay, great.

And Mr. Cox, I know you had looked at the verdict form. I just want to make sure --

MR. COX: I don't object, Judge.

THE COURT: -- you had no objections to the verdict form.

MR. COX: No, I don't have one, no.

THE COURT: And everybody has copies of the instructions.

(The Judicial Executive Assistant gives counsel copies of the Jury Instructions)

(Court recessed from 10:25:30 a.m. until 10:38:30 a.m.)

THE COURT: We're ready.

(The jury enters the courtroom)

THE MARSHAL: All present, Judge.

THE COURT: Back on the record in Case Number C265506, State of Nevada versus Tyrone James. Let the record reflect the presence of all of our jurors, Mr. James with his counsel, the representatives of the District Attorney's Office, and all of the court staff.

Ladies and gentlemen, there should be a set of jury instructions for each of you there. I'm just going to read through them and then we'll have opening -- or closing arguments by counsel.

(The Court reads the Jury Instructions aloud)

THE COURT: Mr. Pandelis.

MR. PANDELIS: Thank you, Your Honor.

CLOSING ARGUMENT

BY MR. PANDELIS:

Counsel, ladies and gentlemen of the jury. First and foremost, on behalf of the Clark County District Attorney's Office and the State of Nevada, we thank you for your service this week and your willingness to serve as jurors and to carefully consider the evidence in this case.

This case against the defendant, Tyrone James, is about one thing. On May 14th of 2010, T[redacted]a H[redacted]s was home alone, or so she thought, at about 9:00 a.m. when the defendant came over to her house, took her out of her bedroom by her neck, put his gloved finger into her vagina, and then put an object that T[redacted]a believed to be his penis and likely was his penis into T[redacted]a's

15-year-old vagina. And due to those actions the State is going to ask that you return a verdict of guilty on all five counts in this case.

Before you do that, you'll need to go back, deliberate, consider the instructions and apply the facts to the law, and you'll need to answer two questions. First, what crimes were committed, and once you determine that all the elements of the crimes are satisfied, you'll need to determine whether or not it was Mr. James that committed these crimes.

Again, there are five counts in the Information that you have before you in your instructions. Counts 1 and 2 relate to the same act, the act of digital penetration against T[redacted]a H[redacted], or the defendant putting his finger into T[redacted]a's vagina. Count 1 is Sexual Assault With a Minor Under the Age of Sixteen, and that again is for the defendant inserting his finger or his fingers into T[redacted]a's vagina. Count 2 is one count of Open or Gross Lewdness, and again, that is for the same act of the defendant touching, rubbing, fondling T[redacted]a's vagina or even inserting his finger into her vagina.

Counts 3 and 4 relate to another separate act. T[redacted]a told you that after he digitally penetrated her with his gloved hand, he got on top of her, opened up her legs, and from what T[redacted]a could tell, the defendant then inserted his penis into her vagina. That's what Counts 3 and 4 relate to. Again, if you read the Information, Count 3 says inserting a penis and/or finger and/or unknown object into the genital opening. Now, based on T[redacted]a's testimony, I think it was pretty clear that it was the defendant's penis being inserted into her vagina. T[redacted]a told you that the defendant was over her and she could feel something that she believed the tip of his penis rubbing in-between the lips of her vagina.

But you also have that unknown object into the genital opening, and within your instructions the judge just read a few minutes ago, there's an instruction that tells you you have to be unanimous -- or that the act was committed, but you do not have to be unanimous on the theory. If some of you believe that it was a penis but others believe that it was some other unknown object or you're not absolutely certain it was a penis but you know something was inserted, as long as you all are unanimous that when Tyrone was over T[redacted]a something was rubbing between the lips of her vagina, as long as you're all unanimous on that, you don't have to agree on what it was that was inserted into her vagina.

And Count 4 is related to the same act; that was the defendant using his penis or finger, hand or unknown object to touch, rub, fondle the genital area. And again, that's for the specific act that occurred after the defendant digitally penetrated her with his gloved hand. After she was on the floor he spread her legs apart and put something that T[redacted]a believed was his penis into her vagina.

And again, Count 5 is Battery With Intent to Commit a Crime; more specifically, battery with intent to commit the crime of sexual assault. And the defendant is charged with that for his use of force or violence against T[redacted]a with the intent to commit sexual assault. And that was his act of grabbing her by the neck when she was in the bedroom, and I believe that he continued to grab her by the neck while she was in the living room. T[redacted]a -- I believe she said he grabbed her by the neck, he choked her, and that's what that count relates to.

Now, you were given some instructions on what a sexual assault is, and I'd like to go through that for you, because I know for a lay person and for attorneys it can certainly be a little intimidating. A sexual assault of a minor is

committed when a person subjects a minor under the age of sixteen to sexual penetration. And you'll notice I have the words sexual penetration highlighted. We spent a lot of time talking about sexual penetration in this case. But it's sexual penetration against the minor's will or under conditions in which the perpetrator knows or should now that the minor is mentally or physically incapable of resisting or understanding the nature of his conduct. That's sexual assault of a minor under the age of sixteen. Again, either against the child's will or under conditions that the perpetrator knows they can't really resist or understand the conduct.

But what is sexual penetration? It's a legal term that, as you can tell, there's a lot of confusion over. You'll recall Theresa Allen's testimony. She got up on the stand and she was talking about T[redacted]a's disclosure to her, and she told her that, yeah, my daughter told me that Tyrone put a finger inside of her vagina. And then the next question to her was: Well, was she sexually penetrated? And T[redacted]a said no. So clearly a lot of us aren't certain what the word sexual penetration means. When we asked Theresa to explain what sexual penetration was, she couldn't really give a good definition.

But the definition in the eyes of the law in the State of Nevada is as follows: Sexual penetration is digital penetration or any intrusion at all, however slight, of the genital opening. And I'd ask you to keep those words "however slight" in mind when looking up this instruction. It doesn't require that an object or a penis, for example, be inserted all the way into a vagina, half-way into a vagina or even an inch into a vagina. All that is required is some penetration into the genital opening, however slight that penetration may be.

Sexual penetration also includes digital penetration. Digital penetration,

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ladies and gentleman, is, for example, putting a gloved finger into a vagina. And again, a tip of a penis, finger or any other object entering the genital opening ever so slightly is sufficient for penetration. Again, there's no requirement that you find it go in all the way. Recall T[redacted]a's testimony. She identified that her vagina has two lips, and she told you that the defendant's penis was rubbing in-between those two lips. And when you're considering her testimony, try to recall when she talked about any type of pressure or rubbing. That, ladies and gentlemen, is sufficient for penetration. That is evidence of intrusion into the genital opening, however slight. When there's rubbing in-between the lips of the vagina, that is penetration in the eyes of the law.

For there to be a sexual assault, a lot of times we think of sexual assault as very violent things. Well, they certainly can be, but physical force is not an element for sexual assault. You have that -- going back to the instruction for sexual assault, it's against the person's will or under conditions in which they really don't understand what's going on. So you don't need to find that there's physical force. There was some discussion during trial whether or not T[redacted]a's legs were forced apart or just opened up. The question is, were her legs opened and did the defendant put his penis inside her, not whether there was physical force used when he was doing it. And again, the question is whether the sexual assault was committed without the victim's consent or under conditions which the defendant knows or should know that the person was incapable of giving consent.

Well, we know this was committed against T[redacted]a's consent. She tells you she was screaming, trying to get away, but the defendant had her by the neck and she couldn't. So this was clearly against T[redacted]a's consent. And even --

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And I'd also ask you to consider whether a 15-year-old who is subjected to this by her mother's boyfriend can really understand what is going on, and hold the victim to a 15-year-old standard. Although you or I may have acted differently, a victim is not required to do more than her age, strength, or surrounding facts and circumstances make it reasonable for her to do to manifest an opposition to the sexual assault. Maybe in a perfect world maybe T[redacted]a would have just ran out of the room when he first got in there, but hold her to a 15-year-old female standard that is in this type of relationship with the defendant. He's in a dating relationship with her mother.

But when you consider all the instructions and the facts, and we'll get to the facts in just a moment, it's clear that the defendant committed two acts of sexual assault here, one by inserting his finger into T[redacted]a's vagina and then inserting an object that T[redacted]a felt with the defendant's penis and rubbing it in-between her lips.

But before we get to the facts, by committing those two acts the defendant also committed two counts of Open and Gross Lewdness. Open and Gross Lewdness is an indecent, obscene or vulgar act of a sexual nature. Putting your gloved finger into a 15-year-old's vagina is certainly an indecent, obscene or vulgar act of a sexual nature, as is rubbing the tip of your penis in-between the genital opening of a 15-year-old.

Now, let's recall T[redacted]a's testimony. And my list of the testimony here, this is just based on my recollection, but it's up to you and your recollection. So if I mis-state anything or anything seems out of order, I have no intent to mislead you. It's just a summary of the facts. T[redacted]a testified that on May 14th of 2010, it's approximately 9:00 a.m., she's home alone, or so she thought. She hears a

noise in her bedroom and then she sees the defendant in her bedroom kind of peeking around the corner. The defendant suddenly jumps on top of her and then he begins to choke her. T[redacted]a starts to say something at that point and the defendant tells her to keep quiet or he would hurt her. And T[redacted]a used some pretty graphic language when describing what the defendant said to her. The defendant then forced T[redacted]a into the living room. Once in the living room, I believe T[redacted]a said that he still had -- the defendant still had his hand on her neck. Again, that's the Count of Battery.

The defendant then removed T[redacted]a's clothing. He got on top of T[redacted], put his gloved finger into her vagina. That's the one count of sexual assault with a minor under sixteen and the one count of open and gross lewdness, Counts 1 and 2. And then T[redacted]a noticed that the defendant was wearing the glove. She described the glove to you and those gloves were admitted into evidence -- or excuse me, gloves that were later found in the house were admitted into evidence.

And then after he was done digitally penetrating T[redacted], a complete separate act, he had removed his hand, he positioned himself in-between T[redacted]a's legs, opened up her legs, and T[redacted]a looked down and by the way the defendant was positioned in relation to her body, she believed it was the defendant's penis, but she felt what she believed to be the tip of his penis rubbing in-between the lips of her vagina. And again, you'll see the specific language in Count 3. It says penis, fingers, and/or unknown -- penis and/or fingers and/or unknown object. So again, you all need to agree that there was something inserted into T[redacted]a's genital opening for Count 3, but you do not have to agree on what it

was. But based on this testimony, something rubbing in-between the lips of her vagina, the defendant committed an additional count of sexual assault of a minor under the age of sixteen because there was sexual penetration of her vagina by an object, and it may have been slight penetration, but again, all that is required is some slight penetration, and she felt rubbing, she felt pressure, and that rubbing is sufficient for penetration. And again, there was another act of open and gross lewdness committed.

Count 5 is Battery With Intent to Commit a Crime. Now, a battery is a willful and unlawful use of force or violence upon another person. If Ms. Kollins came up to me and smacked me across the face, that's a battery. It's a willful act on her part. It's an unlawful use of force. She's hitting me or slapping me. But I'm not -- the State is not asking you to find the defendant guilty of just battery. We're asking you to find the defendant guilty of battery with intent to commit a crime, specifically battery within intent to commit the crime of sexual assault.

So how do we know what the defendant's intent is? We can't read his mind. Well, the instructions answer that question for you. The intent in which a person acts is done -- or the intent with which an act is done is shown by the facts and circumstances surrounding the case. So to get an idea of what the defendant's intent was when he had his hand around T[redacted]a's neck, you look to all the facts and circumstances surrounding this case. He entered his room -- or T[redacted]a's room, he removed her clothing, he took her out to the living room. In the living room I believe T[redacted]a said he still had his hand on her neck. And then the defendant actually did sexually assault her. He put his gloved finger into her vagina and then put his penis and rubbed it in-between the lips of her vagina. So there was actually

a sexual assault in this case.

But you're told that there is no requirement that an actual sexual assault be committed. Suppose you had a case where everything leading up to getting into the living room was done. The defendant came into the room, put his hand around her neck, removed her clothing, laid her down on the floor, spread her legs apart, but then for whatever reason stopped. You still have facts and circumstances suggesting that an act -- the defendant had the requisite intent to commit a sexual assault when he was committing that battery. Accordingly, the State is going to ask that you find the defendant guilty of battery with the intent to commit a sexual assault, because the defendant had his hand around T[redacted]a's neck, and in doing so he had the intent to commit a sexual assault and he did in fact commit two acts or two counts of sexual assault against T[redacted]. And again, I've just gone over this. A battery was committed. He grabbed T[redacted]a by the neck and he had the intent to commit a sexual assault in doing so.

Now that we've gone over what crimes were committed, I told you earlier that the second question you need to answer is whether or not it was the defendant that committed these crimes. And the State is confident that after you have carefully considered the evidence, there will be no reasonable doubt that the defendant committed these crimes.

First I'd ask you to consider the defendant's access to T[redacted]. It's undisputed here that the defendant was in that house that day. He tells you he was. Although he was dating T[redacted]a's mom for quite some time, although their relationship was still on the -- or kind of on the skids, he was still doing nice things for Theresa. He was paying her bills, helping her out with some things. I believe

he took her to an appointment just a few days before that. But he had access to T[redacted].

Consider T[redacted]a's testimony. T[redacted]a told you what the defendant did to her. And when you're considering T[redacted]a's testimony, consider her motivation. You're instructed that you can do that. The defendant is helping out T[redacted]a's mother by paying bills for the family and things like that. And consider the fact that although T[redacted]a admits she didn't care for the defendant, the defendant was no longer living at the house. In fact, Mr. James told you today that the last time before this particular day he had slept over at the house was three weeks before.

Consider T[redacted]a's -- in addition to her testimony here in court, consider her disclosure. You heard from several people regarding T[redacted]a's disclosure. You heard from the detectives, you heard from medical professionals. But consider her disclosure in this case and the timing of that disclosure. Consider the defendant's own statement, his own statement in his testimony here today. Consider what's motivating him. There's an old saying that you admit what you can't deny and you deny what you can't admit. It's clear the defendant was at the house that day, so he admits to that. But when it comes time to talk about the sexual assault, that never happened in the defendant's mind. But consider his motivations as well as T[redacted]a's motivations when considering what both of them had to tell you. Consider Dr. Vergara's testimony. She told you that when she conducted the exam of T[redacted]a there were findings consistent with her disclosure.

And finally, consider that there were in fact gloves found under Theresa Allen's bed that were similar to the gloves described by T[redacted]. Now,

the defendant made -- or defense counsel made a big deal about these gloves being found several days later, but I'd like you to keep in mind a couple things. Where did the sexual assault happen? Well, it started in T[redacted]a's bedroom and ended up in the living room. It never went into Theresa Allen's bedroom. The gloves were found there. So there was really no reason to look for gloves in that room. Also consider the fact that Theresa Allen told you that after this event happened, they didn't really spend the next few nights at the house, and I believe she said they found the gloves maybe five days -- I can't remember exactly, but about five days later. She told you that the nights following the incident they were spending the night somewhere else. But when did she find the gloves? When she was going back to the house to get some extra clothes and to get some shoes, shoes that she kept under the bed, and that's when she found the gloves.

Although there is corroboration in this case in the form of what I just went over in the last slide, there's no corroboration necessary. And we went over that quite a bit in jury selection. The word of the victim is all you need in this case. If you believe T[redacted], if you believe her testimony, it does not need to be corroborated. That testimony standing alone, if believed by you, is sufficient for you to return a verdict of guilty in this case. But again, I'd ask you to consider all the other things in addition to T[redacted]a's testimony that point to the guilt of Mr. James.

And why do we have an instruction like that? Because as we talked about also in jury selection, sexual assault is a crime that is committed in secret. There are oftentimes no witnesses other than the person doing it and the victim. Sometimes it's just the victim's word against the defendant's word, as in addition to the corroborating evidence in this case, thankfully we have that, but in a lot of cases

there is nothing else other than the word of the victim and the defendant. T[redacted]a's testimony in this case is all you need to find the defendant guilty, but thankfully as I went over in the last slide, there is other evidence that corroborates what T[redacted]a told you.

You also heard from N[redacted] C[redacted]s late yesterday. And again, you are instructed that when you consider N[redacted]a's testimony, you cannot consider it -- you cannot consider it as evidence of the defendant's bad character. You can consider it for the limited purpose of determining whether or not the defendant had the opportunity to commit the crimes in this case, what his motive was in this case, what his intent was when he acted in this case, and whether or not there was some type of mistake or accident in this case. But those are the only reasons you can consider N[redacted] C[redacted]' testimony with regard to this case.

Ladies and gentlemen, after you consider the evidence in this case, the State is confident that you will return a verdict of guilty, again, for the four counts representing the two separate sexual acts of the defendant putting his finger into T[redacted]a's vagina, that's Counts 1 and 2, and then the defendant rubbing his penis in-between T[redacted]a's genital lips. She told you that she felt an object that she believed to be his penis rubbing in-between her lips. That is represented in Counts 3 and 4.

And finally, Count 5 is the Battery With Intent to Commit a Crime, or specifically battery with intent to commit the crime of sexual assault. T[redacted]a told you that when he came into her room he grabbed her by the neck at some point and brought her into the living room. He still had his hand around her neck. That was an unlawful use of force, and while he did that he had the intent to commit a sexual

assault. And when you go back and deliberate, the State respectfully asks that you return a verdict of guilty in this case. Thank you.

THE COURT: Thank you, Mr. Pandelis.

Mr. Cox.

MR. COX: Thank you, Judge.

CLOSING ARGUMENT

BY MR. COX:

Good morning, ladies and gentlemen. Thank you for your patience. Ladies and gentlemen, Mr. Page told you on the first day, zero plus zero equals zero. When we first me you when we were doing jury selection, there was a discussion about whether or not there would be physical evidence in the case and whether or not you would be willing to find a verdict of guilt if there was no physical evidence and all you had was the testimony of the alleged victim.

Well, in fact here we are, and I'll submit to you we have no physical evidence. Do we have scratches and bruises? No, we don't. T[redacted]a H[redacted]s was examined by Officer Tomaino, looked at by -- it was testified that there was a CPS person with him, Lizette Woods. And finally you have Dr. Vergara. Put her in a gown, head to toe inspection at the hospital. Several hours later gives some time for bruises, if they're going to exist they're going to develop, or we can observe scratches. A medical professional, head to toe exam; nothing.

Now, this is after she claims she's been choked several times, at least more than once. She was drug through her house by the wrist. Somebody was laying on top of her, put their body on her. Forces the legs apart and put her on the floor. Now, as we know, floors can leave burns. Not present either. This is an

aspect that if present could verify what she claims, and I'll submit to you its absence puts her testimony in doubt.

She goes to the hospital, talks to Pamela Douglass. And she tells Pamela Douglass that she hit and slapped Mr. James and that there was fighting, violent fighting between us. Now, if there's violent fighting between two people, somebody is going to end up with something on their body; on their hands, on their body. Physical hands has to come in contact with something. As far as T[redacted]a goes, we know there's nothing. Officer Hatchett testified that he arrested Mr. James. We take our common sense into the jury room. He's stripped. Is there any testimony they found anything, any scratches or bruises? Have you heard any testimony that anything like that was detected on Mr. James? Now, I think you could feel quite confident that these prosecutors, if they had that piece of evidence would have let you know, but they did not have that.

They talk about a phone. It could have broken at any time. I'd like to think I take good care of my phone, but I'll submit to you it's got lots of dings on it itself. No idea of knowing. Did we see the phone? Do we see a broken case? We didn't even see that. The reporting of that is based on -- that aspect is based on T[redacted]a H[redacted]' credibility.

Now we get to gloves. This is where the case gets a little bit frightening. We talked to Officer Tomaino, and as you recall I took exception with Officer Tomiano. When he tells somebody a lie during a discussion, it's not a lie, it's a ruse. I would submit if anybody else tells Officer Tomaino a lie, it's a lie, but that's the jargon they use. Officer Tomaino tells you we searched the house for gloves; I directed somebody to search the house for gloves. Was anything located?

No, it wasn't. Officer Meltzer gets on the stand. Hasn't been a police officer very long. Very matter of fact. Did you look around for any gloves? No, I didn't. Officer Hatchett didn't do a whole lot of anything.

Then Theresa Allen gets involved, and this is where her credibility is really demonstrated. She finds the gloves, the box of gloves under her bed where she keeps her shoes. Now, what's she's telling you is that prior to this incident she never got her shoes. Otherwise she would have seen the box. But what she's also telling you is five days after this incident she didn't get any shoes; she was wearing the same pair of shoes.

Now, you take with you -- in fact, I already mentioned it once, Instruction 10. You take your common sense and judgment with you into the jury room. Jury Instruction No. 10. If you're going to go and stay at a friend's house for a number of days, what are you going to get? Now, I'm going to get my underwear and some clothes. Ladies, you might get intimate apparel and a couple changes of clothes. Are you going to get a pair of shoes? Yes, you are. That's when she would have seen the box if it was there. But I'll submit to you it wasn't there because she put it there. She put it there to help corroborate her daughter's story.

We heard about what an introitus is. I didn't know what an introitus is. An introitus is the outside opening of a vagina. Now, Dr. Vergara took the stand and said, yes, there is -- I saw swelling, a redness. I can't remember, I think it was swelling, at the opening of the vagina. She looked at the sheet, she checked the box that said it's consistent but it can be there for other causes. Now, what other causes did we hear? We heard two specific medical findings that she found. One on that day, May 14th; one several days later when the lab results came back.

She found a urinary tract infection. Very common. It causes redness or swelling at the introitus. When the lab results come back, there's Strep Group B, and there's another word there I don't pronounce correctly, but there was a Strep Group B condition that she had. And the results were sent from May 14th, meaning she had both conditions on May 14th. Both conditions, Dr. Vergara testified, leaves redness -- I'm sorry, swelling at the opening of the vagina.

Ladies and gentlemen, this is not a case that has physical evidence. And so we are left with the credibility of T[redacted]a H[redacted]. Ladies and gentlemen, that takes us to Jury Instructions 8 and 15. Jury Instruction 8 talks about the credibility of a witness, motives and fears, and whether or not they've lied about material facts. And if they do -- in the last paragraph: "You may disregard the entire testimony of that witness or any portion of the witness' testimony which is not proved by other evidence." Going to Instruction 15, that's the one that Mr. Pandelis talked about, and what they're asking you to do is to rely completely on T[redacted]a H[redacted]' testimony. Why? Because there's no other evidence.

The State will claim and has claimed that T[redacted]a H[redacted]s has consistently told the same story. I submit to you that she has not. Now, what's one key piece of evidence that we don't have? That's those text messages. I don't know about you, but we've got to use our common sense. I think I've got my text messages from my kid texting me last week in my phone. Something that can easily be brought in, something that can be shown to you. We could have seen what that message was when she contacted her sister or her friend; what was said. We don't have that.

Now, I'll submit to you that she did not allege that she had been

sexually assaulted. And how can I -- how can I boldly stand before you and say that? Look at the behavior of the people that received it. Denise Jordan. Did she call the police? If your sister tells you, I've just been raped, what's your sister going to do? They're going to call the police. She leaves class. She sees a police officer. Now, if I leave class I think I'd be a little scared, and here's the officer here. He didn't have a gun. I remember campus police having guns. I guess that was a long, long time ago. But he had a badge. Opportunity there. Why are you out of class, Denise? I've got an excuse. My sister has been raped. Help me. Does she say that to the officer? No.

Theresa Allen. We already know about the gloves. I submit to you that she does not have credibility. She tells you that she wants -- she completely -- I have to ask you, does what she say is logical and does it make sense? Let's get to brass tacks here. He's going to go pay a bill, and he says I went to go get the bill. I asked her, Do you pay with the bill? Do you send a check with the bill with it? You know, the document from the power company that tells you how much you owe and what your customer number is and what your address is. She said, yes, I do. When you go to pay it in person, is that what you do? Yes, I do. But she expected him to go pay her bill without that information, and even though he had a key she claims he wasn't supposed to be in the house. Lots of discussion brought up about a dog. You know what, ladies and gentlemen, you know, he had a key to the place. There's a place for the dog to be. I'll submit to you this case is not about a dog.

Now, Theresa Allen took the stand and we asked her very specifically, Did you tell the police that he wasn't allowed to be in the house? She said yes, I told the police during the 9-1-1 call. Now, I even played that thing all the way over

again and we all heard the same thing. Not one word mentioned about Tyrone James is not supposed to be in my house. Even after listening to the whole thing all over again, she says, well, I told them. Well, it's there. You're going to take the 9-1-1 call into the jury room with you.

The gloves shows that Theresa Allen lacks any credibility. You just don't not get shoes before something like this happens, and you don't wait five days to get shoes again. I don't think any one of us believe that she went five days without changing her shoes, because that's where she said she kept her shoes.

Let's look at Theresa Allen's behavior after receiving the call. This is evidence that she did not allege sexual assault early on. What was her behavior? She talks to T[redacted]a H[redacted]. What does Theresa Allen do? If your daughter tells you I've been raped, what are you going to do? You're going to call the police. The original message, I'll submit to you her behavior indicates it was another allegation, something that perhaps was not criminal, or she simply did not believe T[redacted]a H[redacted].

We all heard the 9-1-1 call. Theresa Allen testified, I talked to T[redacted]a Holmes about everything she's alleging. Now, we could split hairs about, well, there's a legal definition of penetration; what is penetration is confusing. I asked her, wait a minute, just penetration, what does that mean? Now, she finally got flustered because I guess she didn't want to cooperate or she didn't think she was going to give an answer that would bolster the State's case, and she says, well, I just don't know what penetration is. Well, she was sure the day when she called 9-1-1 that T[redacted]a did not say there was penetration. So I'll submit to you the behavior and that call alone indicate that there was a version that was told and it

did not include penetration.

And when it comes to the text messages, we all played a game when we were kids, I think it was called the telephone game, where if I gave a message to this gentleman and asked him to tell several people next to him the same message, how quickly does it change when it gets to the third or fourth person. It just changes. Things spin out of control. And I'll submit to you that's what happened here.

After the 9-1-1 call and prior to going to the hospital and talking to Officer Tomaino, that's when we get the allegation of penetration. And that's when we get gloves made of lubricant. I don't know if anyone in the courtroom understood what she was talking about. Now, at first when I was talking to Officer Tomaino, I was asking him, did you look for lubricant? The State asked similar questions. Come to find out what T[redacted]a means the gloves are made out of lubricant. Ladies and gentlemen, I don't think any of us understand it. It is what it is.

Then we go to Mr. James. Is his version logical and does it change? We know that he's a hundred percent cooperative. If he has bruises on his body, all he has to do is be hidden for a short amount of time and let himself heal up. What does he do? They call him up; he goes down. He goes down and submits himself for questioning, submits himself for obvious examination if you show up in person. He does both. He's going fishing with grandma. Now, is that something you can make up?

He arranges to pay the bill. He goes down and gets the bill. Now, I don't know about you, but who knows this school starts that late in the day for a high school kid? He -- The evidence indicates he did not have any idea she was going to be home. And I'll submit to you both parties were surprised when they saw

the other person there. Now, she claims she's asleep. If she was really asleep, she wouldn't be making any noise. He would have got the bill. There's no way that he could have known she was even there.

Why does -- What evidence indicates why T[redacted]a H[redacted]s uses the allegation of gloves? Gloves that are found five days later. Because she knew it was an allegation that would not leave evidence. She could make the allegation; she knows that it's not going to leave evidence.

Mr. James gives a logical version of events. He goes over, he arrives to get the bill, she's ironing her clothes. That's logical. She's getting ready for school. No evidence she was late for school. If she was late for school, that's documented. We could have brought in a record saying that the teacher reported her tardy. No evidence that she was late for school. The evidence is -- we don't have contrary evidence that she was late.

He talked to the officer. Notwithstanding Officer Tomaino told him there were marks that weren't actually there, he maintains his innocence.

And ladies and gentlemen, that brings us to N[redacted] C[redacted]. When I think of N[redacted] C[redacted], I think of -- I think of an incident in history going back to Massachusetts, an incident that took place in Massachusetts in which 150 people were arrested and imprisoned. At least five of those people accused died in prison. All twenty-six who were accused, went to trial and were convicted. Two courts convicted twenty-nine people of capital felony witchcraft. Nineteen of the accused, fourteen of them were women, five men were hanged. One man who refused to enter a plea was crushed to death under stones. He was pressed. That was the Salem witch trials that took place in 1692 to 1693. The Salem witch trials began

with the allegation of two girls, Betty Paris and Abigail Williams. They cried, they wailed, they flopped on the ground. They convinced people that things had been done to them. Horrific things. People believed it without any corroboration.

Ladies and gentlemen, we have to look to the credibility of the people making the allegation. N[redacted] C[redacted]' allegation is five years old. The one incident reported had a person that could corroborate what she claims happened. She says grandma came in. Grandma came in and saw him in my room. We also hear that that same grandma was present when N[redacted] C[redacted] testified recently. Did the State call the grandma to take the stand to corroborate her story, to corroborate that one incident, the one incident that can be corroborated? No, they did not. You cannot assume that it could be corroborated.

I don't think there's any doubt that Mr. Pandelis and Ms. Kollins, if they had evidence, would withhold it from you. Here we do not have evidence that can corroborate the version. The one thing, the one person that can corroborate any of that is not called. Five years ago there was no trial, there was no investigation. He did not have an attorney. And I'll submit to you he did not have justice.

Ladies and gentlemen, I like to go hiking and camping. And quite frankly, I'm afraid of bears. Luckily we don't have bears in Nevada, but I kind of avoid places where there are bears. Male bears are large and if they're hungry they can come after you, but I don't fear papa bear as much as I fear mama bear. Mama bear is dangerous. Do you know why mama bear is dangerous? Because she has cubs. And it doesn't matter if mama bear is hungry. All that mama bear cares about is protecting her cubs. And if she senses that you're placing her cubs in danger, then you're in danger, and the only hope you have is outrunning the person next to you.

Tahisha Scott obviously had knowledge, at least some, of what N[redacted]a claims happened. In the last five years, N[redacted]a Ch[redacted], Tahisha Scott and my client have had social interaction. N[redacted]a C[redacted] has been in places with Mr. James. No allegation that she refused or shied away from him. She was in close proximity. If Tahisha Scott, her mom, believed that he had sexually assaulted her daughter, would she ever let him within a mile of N[redacted]a C[redacted]? I'll submit to you, no. And I'll submit to you also there's no indication or we don't have evidence that N[redacted]a C[redacted] ever told her mom, I don't want to go places where Tyrone James is. The behavior is not consistent with something like that happening.

Now, here is the danger of this trial. We have the allegation of T[redacted]a H[redacted]. It lacks any evidence, lacks credibility. We know that there was an original version where there was no penetration. I'll suggest to you based on the conduct, the version may even be claimed a third time. The behavior suggests that. We have gloves that were placed there five days later. With that in mind, ladies and gentlemen, we don't have evidence, we don't have credibility.

Then we have N[redacted]a C[redacted] that comes from five years -- something from five years ago. The danger is you cannot use that case to say I believe he committed this crime, even though there's no evidence, because she says something happened in 2005. You have to look at the limiting instruction given by the judge and mentioned by the district attorney. And you have to -- you have to refrain from using her allegation in that manner.

Now, as I mentioned from the very start, zero plus zero equals zero. The allegation as to T[redacted]a H[redacted]s doesn't have evidence, it doesn't have credibility. This allegation is old, never mentioned again, recanted. Her behavior is

not consistent with it. It is zero as well. You cannot take two stories and say, well, both of them don't lack any credibility, but if you put them together, we may have something out of this. No. You must refrain from that instinct if you have it. You have to look at this case. Did he sexually assault T[redacted]a H[redacted]? Does the evidence show that? Is there credibility in the story? No. That is why, ladies and gentlemen, the only just verdict we can have in this case is a verdict of not guilty on all counts. Thank you.

THE COURT: Thank you, Mr. Cox.

Ms. Kollins.

REBUTTAL CLOSING ARGUMENT

BY MS. KOLLINS:

Good morning again, ladies and gentlemen. I would like to reiterate the gratitude expressed by my co-counsel. Thank you again for your time over the last couple days. I think we met our schedule, so hopefully we can get you on to the rest of your lives after today.

I'm not going to talk to you about Salem witch trials or mama bears, but what I'm going to start with is this, though. At the beginning of this trial you took an oath, and you took an oath to follow the instructions as they were given. And you cannot selectively follow them, you must follow all of them. You can't adopt some of them and disregard others. You were chosen for this panel for a reason, after questioning.

T[redacted]a H[redacted]s does not need your sympathy. All she needs is a little justice this week, and that's why we're here. What she deserves, and what Instruction No. 10 tells you you can use is the unequivocal application of your

common sense in this case. I asked every person or almost every person if you would hold a child or a kid to a kid's standard, and you would take into consideration their ability to communicate, their language skills, their developmental level, their education, their ability to relay events, and yes, their consistency. And I'm going to ask you to hold T[redacted]a to that standard.

But I want you to think about and really think about what this kid went through. A very startling, traumatic event to her. Imagine an adult that gets in a car accident. You leave here today, somebody gets in a car accident. Not one of you, just another individual. They have to tell the police officer how it happened. Well, the light was yellow. Well, maybe it was red. They may have to tell their insurance company. Then they have to tell their spouse. Three days from now they have to tell a friend. Are they going to reiterate, even the most educated perceptive adult -- and that was a startling event, a traumatic event, that car accident -- are they going to relay everything perfectly chronologically in the same language every time to every person? And I submit to you they won't.

And when you take that type of analysis and you review what T[redacted]a has had to say, given her education level, her language skills, her ability to articulate, hold her to a kid's standard. Don't expect her to describe events the way a 30-year-old adult might. She's not. She's a 15-year-old kid, and I submit to you was nervous when she came in here. There are fourteen of you that she's never seen before. There's a judge up here she's never seen before. There are members of this audience that she has never seen before. I submit to you she did the best she could with her language skills to articulate for you what happened.

They made a big deal about -- And I'll give you one example. She

described the gloves as lubricant. I submit to you that kid didn't know what that was. She didn't know what it was. Mr. Cox kept asking her. It had nothing to do with a tube of lubricant, adult sex lubricant. That's what she thought the gloves were called. And he went back and forth with her, back and forth with her. Really pointless, actually. It just really showed you that that is what her communication and knowledge levels are.

Instruction No. 8 talks about credibility, and it gives you a bunch of things that you should measure when you assess credibility. Mr. Cox would have you believe that this child held such disdain for his client that she waited three years and calculated the perfect twenty minute opportunity on a school morning to frame him for sexually assaulting her. She was that calculated, that fore-thinking, that instead of doing it two years ago when she was hostile and she hated him and she was a smart-mouthed teenager, she waited until he was out of the house for three weeks and calculated this one fifteen minute opportunity to ruin his life. That's what Mr. Cox would have you believe.

Is that credible? Is that plausible? Does that -- does the evidence show and her ability to testify show that she has the mental wherewithal to calculate the outcome of this case? Here's how smart she has to be. I am going to make up a sexual assault because I don't like him. I want him out of our life. So how am I going to get the news out? I'm going to get a ride to school from him, and then who am I going to -- what am I going to do? I'm going to text message my 14-year-old little sister because that will make it work. That's the perfect plan. Why not just call mom? When I get on the cell phone, call mom, start crying. No, I'm going to text message my sister and I know this will all come out the way I want it to.

The manner of her disclosure coupled with her demeanor at that disclosure is something that you can all assess when determining what she says happened is credible. In the defense perfect world, this kid had to be able to calculate that a single text message to her sister would result in her ultimate goal, getting rid of the defendant. Why not call mom? Why not just call the police herself? No, she had to calculate that she knew that's what would happen.

He had been -- When you look at the credibility instruction it talks about the relationship of the parties. He had been in and out of mom's life. We know at least out of the house for three weeks. The fact that he was paying a bill on that day, and this is the day she's going to choose to falsely accuse him of touching her.

There was a lot of to-do made about how she disclosed. Well, you know what, she didn't wait until she got to school. Guess what? She was home alone with him. Did you see that girl? Her waist is about eight inches. She's itty-bitty, teeny-tiny. Was she supposed to stay in the residence with the perpetrator and try to make a phone call in front of him where he had physical access to her, where he could continue to overpower her? You can't fault her for getting herself to a place of safety and say that that means she's lying. She got herself to a place where she was safe and she could talk, away from him.

You know, she probably didn't like him. I don't think we can disagree with that. Her father figure was incarcerated and had been, and mom is with somebody else and she doesn't like it. That's not an unusual circumstance. There are numerous blended families where one kid doesn't get along with the new step-parent figure. But when called on the carpet about what her behavior was, it was

nothing more than teenager talk-back. Is that hostile? I submit to you that's nothing beyond teenage angst, and that's not a basis to vitiate her credibility and what she says happened in this case.

I submit to you that her conduct subsequent to this disclosure is something that you can look at to assess her credibility. Her mom was on the phone with her and said she was crying in a manner that she did not routinely hear from her child. I submit to you a mother can recognize pain or injury in their own child by the tone of their voice, by their actions, by their demeanor, and her mom recognized that something was seriously enough wrong with her that she said go to the office and I'll be there. The other conduct subsequent to this disclosure that you can use to assess her credibility is her mom said she slept in the bed with me. My 15-year-old daughter did not want to be home, and she slept in bed with me. Something frightened her to the point that she slept in bed with me. It's a behavior that I have not seen in my daughter. That's what the evidence shows. It's what mom said, that's a behavior I have not seen. A very visceral reaction to a startling event.

Now, under the defense theory this child was so calculating that this is something she planned, was the crying hysteria at school and the subsequent actions where she slept with mom. And then they stayed gone from the house for a couple weeks, and then they went back and they shared the couches in the living room. She's that -- Is she that smart? Is she that calculating? I submit to you she's not, and those things need to be assessed by you when you think about her credibility in what she had to tell you happened.

Was she fortuitous enough that N[redacted]a would come forward? Was

that just luck on her part? Certainly no evidence in the record that those two girls collaborated to come in here and speak about what this man did to them. There's no evidence of that in the record. Because they knew of each other does not show that there was any communication such that there was some kind of conspiracy between these two kids to come in here and talk about what this man did.

The physical symptomology, was she just fortu-- She didn't know she had a urinary tract infection and she certainly didn't know she had Strep B. She made this up just at a time where she knew she would have physical symptomology? She was just fortuitous enough to have some medical corroboration? The swelling is consistent with penetration, abrasion, blunt force trauma. It's also consistent with her medical condition. But it is not inconsistent with what she had to tell you happened, that he put a gloved finger with latex, which many people are reactive to, in her vagina, and that he put his penis and rubbed it between the lips of her vagina.

You saw the legal definition of penetration. It is breaking the plane of the lips of the vagina. It is not in the introitus. It is breaking the plane of the outer lips of the vagina. That is sufficient under the law to find evidence beyond a reasonable doubt of penetration. Whether you like it or not, whether you think that's what penetration should be or not, that's what the law says. And you all made a promise to follow that law.

There's been a lot of talk about we should have seen bruises, we should have seen this, we should have seen that. How much strength do you think it takes that man to overpower that itty-bitty little girl? I submit to you not a lot. I submit to you not a lot at all. And he's pretty smart. You heard him talk today. He's pretty smart, he's a smart guy. Not going to let anybody trip him up. Not going

to let me make him answer backwards, get himself in trouble. You think he's going to injure that child to the point where people can see that something's been done to her? You think he's going to really knock her around? No, because then they're going to know and everyone is going to know. It doesn't take him much. He's a stocky guy. Put a hand on that kid and control her. She's what, five foot two, maybe ninety pounds on a good day. It doesn't take him much to overpower her and it doesn't take him enough force to overpower her to leave a bruise, and I submit that's what the evidence shows.

Mr. Cox talked about that there was this violent fight. What I say is not evidence, what Mr. Pandelis says isn't evidence, what Mr. Cox, Mr. Page say, not evidence. Violent, I submit to you, was Mr. Cox's word on cross-examination, not the nurse's word. He said, was there a violent struggle. She said yes. It's an adjective. I can be violent throwing a pen down, I can be violent punching somebody in the face. There are degrees of violence. I would submit to you that was his word, not hers. So the fact that there aren't bruises and cuts on that child does not mean what she says happened to her did not happen. And I'll point you back to the instruction that says physical corroboration is not required. And T[redacted]a's voice, if believed by you beyond a reasonable doubt is sufficient. T[redacted]a's voice.

He talked about, well, there should have been some things -- my client was strip-searched and there was no scratches. There is no evidence in this record anywhere that his client was strip-searched, photographed, or anything of the sort, nor is there any evidence in this record that he consented to that. So to say that his client was strip-searched and he had no marks, look at your notes. That's my

recollection. I didn't elicit any of that information from either of the police officers that I had testify.

Where's the broken cell phone case? Oh, well, there is the absolute linchpin to the case, when a broken cell phone case produced in this courtroom makes you believe that child more than you do right now. A broken cell phone case.

There was a lot of discussion about Theresa Allen and the actions that she took. (And I'm sorry, I have a cold, I have to have a drink. Excuse me. And I'm certain you've all heard me hacking all week and it's been very pleasant for you). Why did Theresa Allen call the defendant first? Maybe she called him first because maybe she wanted to salvage the relationship. He was paying a bill for her. Maybe she didn't want this to be true. Maybe the fact that the man that you've had in your life for three years around your kids, maybe you don't want that relationship to go away. Maybe this is shocking to you. I submit it was shocking to her. I think the evidence shows that. I was surprised, I was hurt. You don't want it to be true for your relationship, but you also don't want it to be true for your child. So if you think that was a bad decision on her part to call the defendant first, I submit to you T[redacted]a is not responsible for the bad decisions any of the adults in this case made.

The whole shoes under the bed thing that he was talking about. She left the house for four days, she went back to get some more clothes. By her testimony, she needed more shoes. I mean, if she took two -- you know, some of us can take ten pairs of shoes for two days and it wouldn't be enough; you know, some of us could take one. She went back and she looked for shoes. She found the box. At the time Mr. Cox is suggesting that she went back in an effort to frame his client

with these gloves, he was paying her bills. He had just paid a bill. He had just done something nice.

We need the text messages. That's what Mr. Cox said, we need the text messages. You know what, I wish Detective Tomaino would have preserved those in some fashion. At the inception of this case he had been on sexual assault for five months. Should he have? It would have been nice. Would the existence of those text messages make you believe T[redacted]a more? T[redacted]a came in here and told you she texted her sister. Her sister came in here and told you she received a text from T[redacted]; contacted mom.

The whole Nevada Power bill thing, she said that all she needed was the name and the address, that there was no paper bill required; that she had not had any conversation with the defendant that morning; that he was supposed to go to her house. A big deal was made -- and we just kind of respond to these arguments as they're made, so these are just from my notes -- about school starting at ten o'clock. No school starts at ten o'clock. I think that's what Mr. Cox said. Well, his client knew that school started at 9:55. There are staggered school schedules all over this valley. What does that have to do with what happened in that house that morning? Absolutely nothing.

And T[redacted]a was sophisticated enough to know that if she said gloves were used there would be no evidence. T[redacted]a was that sophisticated. And then sophisticated enough to enlist her mom to find gloves consistent with what she had talked about under her bed in a location where none of these things happened, because she knew there would be no evidence left if there were gloves. Is that child that sophisticated? What you saw on the stand from that child, is she

that sophisticated to enlist her mom? I submit to you in these cases when you're assessing credibility of a child, some of the things we've gone through today, the truth is in the details. And I submit to you the glove detail is a detail that you can't make up.

Isn't it equally as plausible that a sexual perpetrator would put a glove on his hand before he touched a child, hoping not to leave anything. But if you buy Mr. Cox's theory, the kid enlisted her mom and they planted the gloves under the bed five days later. She's that sophisticated.

One of the aspects of credibility is someone's demeanor on the stand. And we spent a lot of time talking about that in jury selection and whether or not you believed that every kid or every victim would act the same, and all of you agreed that you did not expect the same reaction from everyone. Some kids like T[redacted]a is very closed, very difficult to get her to respond. She wasn't -- she didn't use a lot of big words, she didn't use a lot of big sentences. She did not become emotional. I submit to you she was nervous. And contrast that with N[redacted], who sobbed and at least had tears streaming for a great portion of her testimony. I submit to you, where do those tears come from, if they didn't come from trauma? What happened in this courtroom that would make her so overcome with that emotion, were she not relaying to you something that she had been through?

That girl, I submit to you at the hands of her mom, Tahisha Scott, has been around this man, who is the biological father of two of Tahisha Scott's kids. I asked him today if he continued to pay child support for those children, and he does. Those are his biological kids. N[redacted]a is not his biological child. And she's still a minor. She has no choice in what access her mother gives her. Her mother.

There was no other case. That investigation was thwarted. I submit to you there are parents that trade their kids for perpetrators and money. It happens.

T[redacted]a sat here and she told you about that man putting his finger in her vagina, taking her out to the living room, his hand around her neck, his penis in her vagina between the lips; penetration, however slight, and she told you that. And she told you that in the best words she could.

N[redacted]a was here for a very limited purpose, and that was for you to use what happened to N[redacted]a in an effort to measure the defendant's motive, intent, opportunity in this case. The absence of mistake or accident that this would happen again. That's why N[redacted]a was here.

MR. COX: Judge, I object to the last characterization of the limiting instruction.

THE COURT: Overruled.

BY MS. KOLLINS:

T[redacted]a told her mom, finger in my vagina, penis in my vagina. Mom gets on the phone. Obviously mom does not have an understanding of what penetration is when she says he put his finger in her, and then when the operator says was there penetration, she says no. Mom's relay is not what we're using to prove this case beyond a reasonable doubt. We're using the consistent relay of the facts of this case by that child. And she has said it repeatedly: Put his fingers in my vagina, put his penis in my vagina. He put his hand around my neck. I submit to you, again, T[redacted]a's voice is enough for you to convict this defendant of each and every count charged in the Information.

The standard in this state is beyond a reasonable doubt. It is the standard used in every criminal case in every criminal courthouse, in every state,

in every jurisdiction to secure a criminal convictions. If you walk through the credibility statute and you look at this child's behavior and you look at her statements, I submit you the State has offered you sufficient evidence to find the defendant guilty beyond a reasonable doubt of all five counts. I thank you again for your time.

THE COURT: Thank you, Ms. Kollins.

Okay. The clerk will now swear the officer to take charge of the jurors and alternate jurors, and then we will select our two alternates.

(The clerk administers the oath to the officer to take charge of the jury deliberations)

THE CLERK: Alternate number one will be Juror Number 5, Alisa Price. Alternate number two will be Juror Number 15, Vernon Zobian, Jr.

THE COURT: Okay. Folks, if you'll just go with Officer Moon.

(The jury exits the courtroom to begin deliberations at the hour of 12:13:30 p.m.)

THE COURT: Okay. Mr. Pandelis, could we get a copy of your PowerPoint, just so we have it for the record.

MR. PANDELIS: Exactly. I think I have one for you.

THE COURT: And is there anything else we need to take care of right now?

MS. KOLLINS: No.

MR. COX: Do you want a photo of my white board presentation?

MS. KOLLINS: I doubt it will be necessary. I'll leave you my number, but after three I'll be gone.

THE COURT: Okay. So Mr. Pandelis will be able to handle it.

MR. PANDELIS: Yeah. I'll leave you my number.

THE COURT: Okay.

(Court recessed from 12:14:35 p.m. until 2:13:15 p.m.)

(Whereupon the following proceedings were held outside the presence of the jury)

MR. COX: What's the request that they have?

THE COURT: Yeah, here's the question.

MR. COX: Okay.

THE COURT: Which I think we'll be able to resolve fairly easily.

MS. KOLLINS: Are we going on the record?

THE COURT: Are we on, Renee?

COURT RECORDER: Yeah.

THE COURT: It's: Why would Tahisha Scott sign the consent to search form for the apartment at 207 Lamb?

MS. KOLLINS: Tahisha Scott did not sign the consent form, Theresa Allen did. Tahisha Scott is the wrong mom.

MR. COX: There's -- You've got Tahisha, Theresa, N[redacted] --

MS. KOLLINS: Tahisha is N[redacted]'s mom.

THE COURT: Right.

MR. COX: We've got a lot of "tias" in this case.

MS. KOLLINS: So she had nothing to do with the consent to search there.

MR. COX: Tyrone, T[redacted].

MS. KOLLINS: I don't know how you'd fix that because -- I mean, I guess that means a read-back, unless somebody mis-spoke, and I don't recall that.

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MR. COX: I think she's talking about the van.

THE COURT: She signed -- Right.

MR. COX: Tahisha Scott signed for the van.

THE COURT: She signed --

MR. PANDELIS: She signed for the van.

MS. KOLLINS: She's not at the 207.

MR. COX: But not for the apartment. There was -- Was there even a consent to search signed for that?

MR. PANDELIS: No. But mom gave -- I mean, mom came in here and told you that she had a consent to search --

MS. KOLLINS: So they're looking at -- they're looking at the consent form that was in that evidence bag, I assume.

THE CLERK: I hope not. We did not open those.

THE MARSHAL: It was on the -- it was on the outside.

MR. COX: Well, okay. Obviously they're just confused. So I don't know if the best thing to do --

THE COURT: Could you bring --

MS. KOLLINS: Could we resolve it by opening the bag?

THE COURT: Could you bring the bag?

THE MARSHAL: That bag they were looking at? Okay.

MS. KOLLINS: Because she may have been the owner of the van. And she could have signed the van, and maybe he filled out the front of the evidence bag incorrectly. But that was not from testimony.

THE COURT: I think the -- There was an odd assortment of things in that

bag, wasn't there? I mean, there was the consent form, but then there was --

THE CLERK: And the shirt.

MR. PANDELIS: I think the shirt.

MS. KOLLINS: And the clothing.

THE CLERK: A girl's night shirt.

THE COURT: Oh. So that was --

MS. KOLLINS: I can't tell you why they were contained within the same envelope.

THE COURT: That's -- I just --

MS. KOLLINS: That is unusual.

THE COURT: -- recall thinking that that was sort of an odd assortment of things in the bag.

MS. KOLLINS: The only thing I can attribute it to is that those were the things that Tomaino collected. I mean, he collected the clothes from Sunrise and then he -- there was a written consent to search on the van. It was verbal as to the house, is my understanding.

MR. COX: That's the way I remember it, too.

(The marshal hands evidence bag to the Court)

THE COURT: Thank you.

MR. COX: I don't remember there being something signed on the house. That was Theresa's house.

MR. PANDELIS: Yeah. Theresa Allen gave verbal consent to search the house.

MS. KOLLINS: Right. Is it filled out incorrectly?

THE COURT: Yeah, I see why there's -- honestly, I see why there's confusion. I think --

MS. KOLLINS: May I approach and look at the bag?

THE COURT: You may.

(Counsel approach the bench)

THE COURT: Maybe if we mark the contents --

MR. PANDELIS: Consent to search card signed by Tahisha Scott.

MS. KOLLINS: That's a consent to search card --

MR. COX: For the van.

MS. KOLLINS: -- from the van.

THE COURT: I understand that, but if you look at the front of that envelope, you can't tell that from that.

MS. KOLLINS: No.

THE COURT: Because it has the address.

MS. KOLLINS: Because it has 207 Lamb.

THE COURT: Right. And it just says Consent to Search. So I think that that's the confusion.

MS. KOLLINS: Do you have a problem supplementing that fact or opening that bag?

MR. COX: I don't want to open it.

MR. PANDELIS: Well, would you have a problem supplementing by saying the consent to search was for the van?

MR. COX: Yeah, that's fine. Yeah. I think that's correct -- to me, that corrects their misconception.

MS. KOLLINS: That's accurate.

MR. COX: I don't want to start opening things. I would rather just clear it up by saying the consent to search signed by Tahisha was for the van.

THE COURT: Okay. Okay.

MR. COX: And do you want to take it a step further and say the consent to search on the apartment was given by Theresa orally?

MS. KOLLINS: Certainly.

MR. COX: I mean, that clears it up.

MR. PANDELIS: Yeah. I'm fine with both of those.

THE COURT: Do we need to --

MS. KOLLINS: That was -- that was in the testimony.

THE COURT: I would prefer to limit this to the question that they've asked, which is just that the consent to search form --

MS. KOLLINS: Okay, that's fine.

THE COURT: Okay. So how are we going to word this?

MR. COX: So, Tahisha Scott gave consent to search Tyrone James' van.

MS. KOLLINS: It wasn't his van, though, it was Tahisha Scott's van.

MR. PANDELIS: Yeah.

MS. KOLLINS: She wasn't the owner -- He wasn't the owner.

MR. COX: Oh. Okay. That's why I kept mentioning van, and it wasn't his van. Okay.

MR. PANDELIS: Should we -- If weren't not including --

MS. KOLLINS: Well, that's fine. Because otherwise we're going to have to do a playback.

MR. PANDELIS: But should we put something in there that -- you know, not necessarily saying that Theresa Allen gave verbal consent to search the house, but just saying the consent to search -- Scott's consent had nothing to do with the search of the house?

THE COURT: How's this? (Holds up note for counsel to read)

MR. PANDELIS: Perfect.

MR. COX: Yeah.

MS. KOLLINS: Yes.

THE COURT: Okay. Okay, so it will read: Tahisha Scott signed the consent to search form for the van, not 207 Lamb.

MR. COX: Yes.

MR. PANDELIS: Perfect.

THE COURT: Okay. And everybody is in agreement with that?

MR. COX: Yeah. It answers the question and clears up a factual misconception.

THE COURT: Okay. And that's not supplementing the evidence, it's just making --

MS. KOLLINS: It's clarifying the tag that's contained on the outside of the evidence bag --

THE COURT: Right.

MS. KOLLINS: -- because the evidence bag attributes the 207 Lamb address to Tyrone James, and then underneath there it just says: Number 1, blue night shirt. Number 2, consent to search card by Tahisha Scott. And I think there's been an inappropriate inference drawn that that consent to search card --

THE COURT: And I'm actually --

MS. KOLLINS: -- refers to the above address.

THE COURT: -- going to say for the apartment at 207 Lamb.

MS. KOLLINS: Okay.

THE COURT: Okay. (Holds up note for counsel to read)

MS. KOLLINS: (Reading) Tahisha Scott signed the consent to search form for the van, not for the apartment at 207 Lamb. Perfect.

MR. COX: Yeah, that's fine.

THE COURT: Okay. Here.

(The Court hands the note and the evidence bag to the marshal)

MR. COX: Is this for me right here?

THE CLERK: Yeah, that's the amended jury list that shows the alternates.

MR. COX: Okay, thanks.

THE MARSHAL: Now, do I bring this back after they read it?

THE COURT: Oh, you know what --

THE CLERK: Just bring it back after.

THE MARSHAL: You've got to put this in the record.

THE CLERK: You can leave it in there. Tell them leave it with the evidence.

THE COURT: Or we can make a photocopy and keep the original.

THE CLERK: Yeah, because I have to mark that question as a Court's exhibit.

THE MARSHAL: Right. All right.

THE CLERK: I just want to leave it in there with them.

THE COURT: Okay.

(Court recessed from 2:20:20 p.m. until 3:06 p.m.)

THE MARSHAL: The jury is in the courtroom.

(Whereupon the following proceedings were held in the presence of the jury)

THE COURT: Okay. Back on the record in Case Number C265506, State of Nevada versus Tyrone James. Let the record reflect the presence of our twelve jurors and two alternate jurors; Mr. James with his counsel, Mr. Cox, and the representative of the District Attorney's Office.

Okay. Ladies and gentlemen, has the jury selected a foreperson?

FOREPERSON BARR: Yes, Your Honor.

THE COURT: And ma'am, has the jury reached a verdict?

FOREPERSON BARR: Yes, Your Honor.

THE COURT: Could you please hand the verdict form to the marshal? Thank you. The clerk will now read the verdict out loud.

THE CLERK: District Court, Clark County, Nevada. The State of Nevada, Plaintiff, versus Tyrone D. James, Defendant. Case Number C265506, Department Number VII.

VERDICT

We, the jury in the above-entitled case, find the defendant, Tyrone D. James, as follows:

Count 1 -- Guilty of Sexual Assault With a Minor Under the Age of Sixteen.

Count 2 -- Guilty of Open or Gross Lewdness.

Count 3 -- Guilty of Sexual Assault with a Minor Under the Age of Sixteen.

Count 4 -- Guilty of Open or Gross Lewdness.

Count 5 -- Guilty of Battery With Intent to Commit a Crime.

Dated this 23rd day of September, 2010, April Barr, foreperson.

Ladies and gentlemen of the jury, are those your verdicts as read, so say you one, so say you all?

JURORS IN UNISON: Yes.

THE COURT: Does either side wish to have the jury polled?

MR. COX: I would, Judge.

MR. PANDELIS: No, Your Honor.

THE CLERK: Cedric Griffin, are those your verdicts as read?

JUROR GRIFFIN: Yes.

THE CLERK: Natalie Duggan, are those your verdicts as read?

JUROR DUGGAN: Yes.

THE CLERK: Jessica Higgs, are those your verdicts as read?

JUROR HIGGS: Yes.

THE CLERK: Sean Grupe, are those your verdicts as read?

JUROR GRUPE: Yes.

THE CLERK: Jennifer Mills, are those your verdicts as read?

JUROR MILLS: Yes.

THE CLERK: Susan Winters, are those your verdicts as read?

JUROR WINTERS: Yes.

THE COURT: April Barr, are those your verdicts as read?

JUROR BARR: Yes.

THE CLERK: Heather Lynn Egan, are those your verdicts as read?

JUROR EGAN: Yes.

THE CLERK: Lindsey Johnston, are those your verdicts as read?

JUROR JOHNSTON: Yes.

THE CLERK: Kimberley Johnston, are those your verdicts as read?

JUROR JOHNSTON: Yes.

THE CLERK: Elizabeth Mitchell, are those your verdicts as read?

JUROR MITCHELL: Yes.

THE CLERK: Rudy Araujo, are those your verdicts as read?

JUROR ARAUJO: Yes.

THE COURT: Okay. The clerk will now record the verdict into the minutes of the court.

Ladies and gentlemen, I want to thank you for your time and your attention for the past three days. We've all said this, we know that everybody is very busy and that it's difficult to take time out of your lives, and we really do appreciate that. We appreciate your attention to this case.

I'm going to ask for just a couple more minutes of your time to see -- not to talk about the case, but just to see what we can do to improve what we do for jurors in the future. So if you could just all go with Officer Moon and I'll be there in a moment.

(The jury exits the courtroom)

THE COURT: We need to set a sentencing date.

THE CLERK: December 1; 8:45.

(The Court confers with the clerk)

THE COURT: Okay. Mr. James will remain in custody until the time of sentencing. The case is referred to Parole & Probation for a Pre-Sentence Report.

MR. PANDELIS: Your Honor, the State will be dismissing Counts 2 and 4.

They're the lesser-included Open or Gross counts. We'll just do that at sentencing, I guess.

THE COURT: We can just take care of that at sentencing.

MR. PANDELIS: Okay, thank you.

THE COURT: Obviously he can't be sentenced on both anyhow, so.

Okay, thank you.

MR. PANDELIS: Thank you.

MR. COX: Judge, will we be able to go back as well to see the jury, or should we just wait downstairs?

THE COURT: You know what, if you go down to the third floor --

MR. COX: Okay. All right.

THE COURT: -- they'll come down and I'm sure they'll be happy to talk to you.

MR. COX: Okay.

THE COURT: I always encourage them to give any feedback that they have.

MR. COX: Okay. I'll go downstairs.

(PROCEEDINGS CONCLUDED AT 3:11:20 P.M.)

* * * * *

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

Liz Garcia

Liz Garcia, Transcriber
LGM Transcription Service

4/28/11
Date

VER

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
SEP 23 2010 3:09 pm
BY, TINA HURD, DEPUTY

ORIGINAL

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

TYRONE D. JAMES,

Defendant.

CASE NO: C265506

DEPT NO: VII

10C265506
VER
Verdict
946399

VERDICT

We, the jury in the above entitled case, find the Defendant TYRONE D. JAMES, as follows:

COUNT 1 – SEXUAL ASSAULT WITH A MINOR UNDER THE AGE OF 16

(please check the appropriate box, select only one)

☒ Guilty of Sexual Assault with a Minor Under the Age of 16

☐ Not Guilty

COUNT 2 – OPEN OR GROSS LEWDNESS

(please check the appropriate box, select only one)

☒ Guilty of Open or Gross Lewdness

☐ Not Guilty

COUNT 3 – SEXUAL ASSAULT WITH A MINOR UNDER THE AGE OF 16

(please check the appropriate box, select only one)

☒ Guilty of Sexual Assault with a Minor Under the Age of 16

☐ Not Guilty

//

COUNT 4 – OPEN OR GROSS LEWDNESS

(please check the appropriate box, select only one)

☒ Guilty of Open or Gross Lewdness

☐ Not Guilty

COUNT 5 – BATTERY WITH INTENT TO COMMIT A CRIME

(please check the appropriate box, select only one)

☒ Guilty of Battery With Intent to Commit a Crime

☐ Guilty of Battery

☐ Not Guilty

DATED this 23 day of September, 2010

April Barr
FOREPERSON

ORIGINAL FILED

JOC

2011 FEB -9 A 11:14

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

TYRONE D. JAMES
#1303556

Defendant.

CASE NO. C265506

DEPT. NO. VII

10C265506
JOC
Judgment of Conviction
1232103

JUDGMENT OF CONVICTION

(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crimes of COUNT 1 – SEXUAL ASSAULT WITH A MINOR UNDER SIXTEEN YEARS OF AGE (Category A Felony) in violation of NRS 200.364, 200.366, COUNT 2 – OPEN OR GROSS LEWDNESS (Gross Misdemeanor) in violation of NRS 201.210, COUNT 3 - SEXUAL ASSAULT WITH A MINOR UNDER SIXTEEN YEARS OF AGE (Category A Felony) in violation of NRS 200.364, 200.366, COUNT 4 - OPEN OR GROSS LEWDNESS (Gross Misdemeanor) in violation of NRS 201.210, COUNT 5 - BATTERY WITH INTENT TO

//

//

COMMIT A CRIME (Category A Felony) in violation of NRS 200.400; and the matter having been tried before a jury and the Defendant having been found guilty of the crimes of COUNT 1 – SEXUAL ASSAULT WITH A MINOR UNDER THE AGE OF 16 (Category A Felony) in violation of NRS 200.364, 200.366; COUNT 2 – OPEN OR GROSS LEWDNESS (Gross Misdemeanor) in violation of NRS 201.210; COUNT 3 - SEXUAL ASSAULT WITH A MINOR UNDER THE AGE OF 16 (Category A Felony) in violation of NRS 200.364, 200.366; COUNT 4 - OPEN OR GROSS LEWDNESS (Gross Misdemeanor) in violation of NRS 201.210; COUNT 5 - BATTERY WITH INTENT TO COMMIT A CRIME (Category A Felony) in violation of NRS 200.400; thereafter, on the 19TH day of January, 2011, the Defendant was present in court for sentencing with his counsel BRYAN COX, Deputy Public Defender, and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offenses and, in addition to the $25.00 Administrative Assessment Fee and a $150.00 DNA Analysis Fee including testing to determine genetic markers, the Defendant is SENTENCED to the Nevada Department of Corrections (NDC) as follows: AS TO COUNT 1 - TO LIFE with a MINIMUM parole eligibility of TWENTY-FIVE (25) YEARS; AS TO COUNT 3 - TO LIFE with a MINIMUM parole eligibility of TWENTY-FIVE (25) YEARS, COUNT 3 to run CONCURRENT with COUNT 1; AS TO COUNT 5 – TO LIFE with a MINIMUM parole eligibility of TWO (2) YEARS, COUNT 5 to run CONCURRENT with COUNTS 1 & 3, with TWO HUNDRED FIFTY (250) DAYS credit for time served. COUNTS 2 & 4 – DISMISSED.

FURTHER ORDERED, a SPECIAL SENTENCE of LIFETIME SUPERVISION is imposed to commence upon release from any term of imprisonment, probation or parole.

ADDITIONALLY, the Defendant is ORDERED to REGISTER as a sex offender in accordance with NRS 179D.460 within FORTY-EIGHT (48) HOURS after sentencing or prior to release from custody.

DATED this 2 day of ~~January~~ Feb, 2011.

LINDA BELL
DISTRICT JUDGE

S:\Forms\JOC-Jury 1 Ct/1/28/2011

RENE L. VALLADARES
Federal Public Defender
Nevada State Bar No. 11479
MEGAN C. HOFFMAN
Assistant Federal Public Defender
Nevada State Bar No. 9835
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-5819 (fax)
Megan_Hoffman@fd.org

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Tyrone David James, Sr.,

Petitioner,

v.

Williams, et al.,

Respondents.

Case No. 2:18-cv-00900-KJD-GWF

UNOPPOSED MOTION FOR APPOINTMENT OF COUNSEL TO REPRESENT PETITIONER[1]

The Federal Public Defender hereby moves this Court to be appointed as counsel to represent Petitioner Tyrone James, Sr. in this matter. 18 U.S.C. § 3006A(a)(2)(B). This motion is based upon the attached Memorandum of Points and Authorities.

[1] The FPD generally takes the position that counsel for the Respondents have no standing with regard to the determination of the appointment of counsel. (*See generally See, e.g,. Knapp v. Hardy*, 523 P.2d 1308, 1313 (Ariz. 1974)*; Death Row Prisoners of Pennsylvania v. Ridge*, 948 F.Supp. 1278, 1279 n.2 (E.D.Pa. 1996); *Griffin v. Illinois*, 351 U.S. 12, 17 (1956); *Douglas v. California*, 372 U.S. 353 (1963)). However, in this instance counsel for Respondents have information that is relevant to this particular motion. For this reason, James does not file this motion *ex parte*.

MEMORANDUM OF POINTS AND AUTHORITIES

Before this Court is Tyrone James's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, mailed on or about April 23, 2018. ECF No. 1-1. James moved this Court for the appointment of counsel. ECF No. 2. That motion remains pending before this Court. On July 3, 2018, James's application to proceed *in forma pauperis* was denied and this Court ordered him to pay the $5 filing fee within thirty days. ECF No. 4. He complied on July 10, 2018. ECF No. 5.

The Federal Public Defender (FPD) asks for appointment to represent James in these proceedings for the reasons set forth below.

On February 21, 2019, counsel for Respondents, Amanda Sage, contacted undersigned counsel, Megan Hoffman. Ms. Sage advised she had received information from the Clark County District Attorney regarding possibly relevant, new DNA information in James's case. Ms. Sage advised she did not object to the appointment of counsel in these circumstances. Both the FPD and counsel for Respondents believe the appointment of counsel would be beneficial in this matter.

18 U.S.C. § 3006A(a)(2)(B) provides for appointment of counsel for financially eligible, non-capital habeas corpus petitioners when "the interests of justice so require." In determining whether the interests of justice require appointment of counsel in order to prevent a due process violation, see *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986), the court considers whether the issues are complex, or if counsel is necessary to employ discovery proceedings adequately or if an evidentiary hearing is required. *See Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983). The appointment of counsel where a defendant has "established mental health issues" may also serve the "interests of justice." *U.S. v. Dillard*, 2005 WL 2847411, *2 (D. Idaho 2005); *see also Hall v. Director*, 2:08-cv-01825-RCJ, ECF No. 7 (finding the interest of justice warranted appointing counsel in part because of the inmate's

"allegations of lack of competency, mental health problems, and intake of psychotropic medications...")

A jury sentenced James to 25 years to life in prison. The issues in his case appear complex, particularly in light of the new evidence that may prove to be relevant. Based upon information and belief, it is likely investigation and/or expert assistance will be necessary in this matter.

The undersigned submits that appointment of counsel in this matter would serve the interests of justice. Based upon the factors listed above, counsel therefore requests that this Court appoint the Federal Public Defender, District of Nevada to represent James.[2]

IT IS SO ORDERED:

_____
Judge Kent Dawson

DATED: _____

Respectfully submitted by,
DATED this 27th day of February, 2019.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ Megan C. Hoffman
MEGAN C. HOFFMAN
Assistant Federal Public Defender

[2] The FPD has completed and cleared a conflict check on the parties appearing in James's state court litigation. Counsel for Respondents have requested but not yet received additional information with regard to the new evidence from the Clark County District Attorney. The FPD will need to conduct additional conflict checks once the new information is provided. Should the FPD discover a conflict at some future point in time, it will return to this Court to request the appointment of counsel for James from the CJA Panel.

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States District Court, District of Nevada by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system and include: Amanda Sage

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing by First-Class Mail, postage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three calendar days, to the following non-CM/ECF participants:

Tyrone David James Sr.
No. 1063523
High Desert State Prison
PO Box 650
Indian Springs, NV 89018

/s/ Jessica Pillsbury
An Employee of the
Federal Public Defender,
District of Nevada

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

TYRONE DAVID JAMES, SR.,

Petitioner

v.

WILLIAMS, et al.,

Respondents

Case No.: 2:18-cv-00900-KJD-GWF

ORDER

This court previously denied a motion for appointment of counsel by 28 U.S.C. § 2254 habeas corpus petitioner Tyrone David James, Sr. (*see* ECF No. 6). The Federal Public Defender (FPD) has now filed an unopposed motion for appointment of counsel on behalf of James (ECF No. 16). The FPD explains that counsel for respondents informed her that the Clark County District Attorney's office has indicated that there may be new, relevant DNA information in James' case. The FPD states that respondents also believe appointment of counsel would be beneficial. *See Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir.1986). Good cause appearing, the motion for counsel is granted.

In light of the appointment of counsel, respondents' motion to dismiss is denied without prejudice.

IT IS THEREFORE ORDERED that petitioner's unopposed motion for appointment of counsel (ECF No. 16) is **GRANTED**.

IT IS FURTHER ORDERED that the Federal Public Defender for the District of Nevada (FPD) is appointed to represent petitioner.

IT IS FURTHER ORDERED that the Clerk shall **ELECTRONICALLY SERVE** the FPD a copy of this order, together with a copy of the petition for writ of habeas corpus (ECF No. 7). The FPD shall have 30 days from the date of entry of this order to file a notice of appearance.

IT IS THEREFORE ORDERED that counsel for petitioner shall meet with petitioner as soon as reasonably possible, if counsel has not already done so, to: (a) review the procedures applicable in cases under 28 U.S.C. § 2254; (b) discuss and explore with petitioner, as fully as possible, the potential grounds for habeas corpus relief in petitioner's case; and (c) advise petitioner that all possible grounds for habeas corpus relief must be raised at this time in this action and that the failure to do so will likely result in any omitted grounds being barred from future review.

IT IS FURTHER ORDERED that petitioner shall have 90 days from the date of this order to FILE AND SERVE on respondents an amended petition for writ of habeas corpus, which shall include all known grounds for relief (both exhausted and unexhausted).

IT IS FURTHER ORDERED that respondents shall have 45 days after service of an amended petition within which to answer, or otherwise respond to, the amended petition. Any response filed shall comply with the remaining provisions below, which are entered pursuant to Habeas Rule 5.

IT IS FURTHER ORDERED that any procedural defenses raised by respondents in this case shall be raised together in a single consolidated motion to dismiss. In other words, the court does not wish to address any procedural defenses raised herein either in seriatum fashion in multiple successive motions to dismiss or embedded in the answer. Procedural defenses omitted from such motion to dismiss will be subject to potential waiver. Respondents shall not file a response in this case that consolidates their procedural defenses, if any, with their response on the merits, except pursuant to 28 U.S.C. § 2254(b)(2) as to any unexhausted claims clearly lacking merit. If respondents do seek dismissal of unexhausted claims under § 2254(b)(2): (a) they shall do so within the single motion to dismiss not in the answer; and (b) they shall specifically direct their argument to the standard for dismissal under § 2254(b)(2) set forth in *Cassett v. Stewart*, 406 F.3d 614, 623-24 (9th Cir. 2005). In short, no procedural defenses, including exhaustion, shall be included with the merits in an answer. All procedural defenses, including exhaustion, instead must be raised by motion to dismiss.

IT IS FURTHER ORDERED that, in any answer filed on the merits, respondents shall specifically cite to and address the applicable state court written decision and state court record materials, if any, regarding each claim within the response as to that claim.

IT IS FURTHER ORDERED that petitioner shall have 45 days from service of the answer, motion to dismiss, or other response to file a reply or opposition, with any other requests for relief by respondents by motion otherwise being subject to the normal briefing schedule under the local rules.

IT IS FURTHER ORDERED that any state court record exhibits filed by the parties herein shall be filed with an index of exhibits identifying the exhibits by number or letter. The

CM/ECF attachments that are filed shall further be identified by the number or letter of the exhibit in the attachment.

IT IS FURTHER ORDERED that the parties SHALL SEND courtesy copies of all exhibits to the Reno Division of this court. Courtesy copies shall be mailed to the Clerk of Court, 400 S. Virginia St., Reno, NV, 89501, and directed to the attention of "Staff Attorney" on the outside of the mailing address label. Additionally, in the future, all parties shall provide courtesy copies of any additional exhibits submitted to the court in this case—numbered sequentially to follow earlier-filed exhibits—in the manner described above.

IT IS FURTHER ORDERED that petitioner's ex parte motion to dismiss (ECF No. 9) is **DENIED** as moot.

IT IS FURTHER ORDERED that respondent's motion to dismiss (ECF No. 10) is **DENIED** without prejudice.

Dated: February 28, 2019

KENT J. DAWSON
U.S. DISTRICT JUDGE

Electronically Filed
6/27/2019 10:32 AM
Steven D. Grierson
CLERK OF THE COURT

PWHC
Rene L. Valladares
Federal Public Defender
Nevada State Bar No. 11479
*C.B. Kirschner
Assistant Federal Public Defender
Nevada State Bar No. 14023C
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
CB_Kirschner@fd.org

*Attorney for Petitioner Tyrone David James, Sr.

CASE NO: A-19-797521-W
Department 24

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

Tyrone David James, Sr., Petitioner, v. Brian Williams, Warden, and the Attorney General for the State of Nevada, et al., Respondents.	Case No. _____ (10C265506) Dept. No. __ Date of Hearing: Time of Hearing: (Not a Death Penalty Case)

PETITION FOR WRIT OF HABEAS CORPUS

(POST-CONVICTION)

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: High Desert State Prison, Indian Springs, Nevada.

2. Name and location of court which entered the judgment of conviction under attack: Eighth Judicial District Court, Clark County, Las Vegas, Nevada.

Case Number: A-19-797521-W

3. Date of judgment of conviction: February 9, 2011

4. Case Number: 10C265506

5. (a) Length of Sentence: Count 1 - a maximum term of life with a minimum parole eligibility after 25 years; Count 3 - a maximum term of life with a minimum parole eligibility after 25 years, concurrent with Count 1; and Count 5 - a maximum term of Life with a minimum parole eligibility after 2 years, concurrent with Counts 1 and 3.

(b) If sentence is death, state any date upon which execution is scheduled: N/A

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes [ ] No [X]

If "yes", list crime, case number and sentence being served at this time: Nature of offense involved in conviction being challenged:

7. Nature of offense involved in conviction being challenged: Count 1: Sexual Assault with a Minor Under Sixteen Years of Age; Count 2: Open or Gross Lewdness; Count 3: Sexual Assault with a Minor Under Sixteen Years of Age; Count 4: Open or Gross Lewdness; Count 5: Battery with Intent to Commit a Crime.

8. What was your plea?

(a) Not guilty __X__ (c) Guilty but mentally ill _____

(b) Guilty _____ (d) Nolo contendere _____

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: N/A

10. If you were found guilty after a plea of not guilty, was the finding made by: (a) Jury __X__ (b) Judge without a jury _____

11. Did you testify at the trial? Yes __X__ No _____

12. Did you appeal from the judgment of conviction? Yes __X__ No __

13. If you did appeal, answer the following:

(a) Name of Court: Nevada Supreme Court

(b) Case number or citation: Case No. 57178

(c) Result: Order of Affirmance filed October 31, 2012.

14. If you did not appeal, explain briefly why you did not: N/A

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes __X__ No _____

16. If your answer to No. 15 was "yes," give the following information:

(a) (1) Name of Court: Eighth Judicial District Court, Clark County

(2) Nature of proceeding: Petition for Writ of Habeas Corpus (Post-Conviction) filed on March 14, 2013.

(3) Grounds raised:

1. The court violated Mr. James due process right by going over the 60 days of his speedy trial and waving his rights for him. Sixth Amendment.
2. Ineffective Assistance of Counsel. I allege that my state court conviction and or sentence are unconstitutional in violation of my Sixth and Fourteenth Amendment right to effective assistance of counsel.
3. The trial court's admission of NC's allegations of uncharged, prior sexual misconduct violated Mr. James' constitutional and statutory rights.
4. The trial court violated Mr. James' constitutional and statutory rights by refusing to allow defense counsel to cross-examine TH on the fact that at some point prior to the alleged offense, had sexual intercourse with another individual.
5. The trial court erred by refusing to grant a mistrial following the admission of testimony that Mr. James had a felony arrest record as well as an active arrest warrant.

6. The trial court erred by admitting testimony that amounted to improper vouching.

7. The trial court's admission of TH's hearsay statements to numerous witnesses violated Mr. James' constitutional and statutory rights.

8. The prosecutor committed misconduct in her cross-examination of Mr. James thereby violating his federal and state constitutional rights.

9. The repeated use of the word "victim" by prosecutors and government witnesses, as well as the court in a jury instructions, deprived Mr. James of his fair trial and due process rights.

10. Double jeopardy and redundancy principles prohibit Mr. James multiple convictions arising from a single encounter.

11. The trial court erred by proffering jury instructions that were inaccurate misleading, and/or misstated the law.

12. The prosecution failed to present sufficient evidence to sustain Mr. James' convictions.

13. Cumulative error warrants reversal of Mr. James' convictions under the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution.

On September 4, 2015, a Supplemental Petition for Post-Conviction Writ of Habeas Corpus raised the following grounds:

A. Trial Counsel Provided Ineffective Assistance of Counsel by Failing to Retain an Expert Witness to Review Dr. Vergara's Examination of TH and Rebut Her Testimony that Her Examination Indicated TH Was Sexually Assaulted.

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

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

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

E. Cumulative Error.

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes __X__ No _____

(5) Result: Petition denied.

(6) Date of Result: October 3, 2016.

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: Findings of Fact, Conclusions of Law and Order filed November 8, 2016; Notice of Entry of Decision and Order filed November 9, 2016.

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: Nevada Supreme Court, Case No. 71935.

(2) Nature of proceeding: Appeal from November 8, 2016 findings of fact denying post-conviction relief.

(3) Grounds raised:

A. Trial Counsel Provided Ineffective Assistance of Counsel.

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

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

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

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

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

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

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes _____ No __X____

(5) Result: Affirmed.

(6) Date of result: Order of Affirmance filed November 14, 2017.

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: *James v. State*, Nevada Supreme Court Case No. 71935, Order of Affirmance filed November 14, 2017.

(c) As to any third petition, application or motion, give the same information:

(1) Name of court: United States District Court, District of Nevada, Case No. 2:18-cv-00900-KJD-GWF.

(2) Nature of proceeding: Petition for Writ of Habeas Corpus by a Person in State Custody Pursuant to 28 U.S.C. § 2254 filed May 17, 2018.

(3) Grounds raised:

Ground One: I allege that my state court conviction and/or sentence are unconstitutional, in violation of my Sixth and Fourteenth Amendment right to the U.S. Constitution.

1. The trial court's admission of NC's allegations of uncharged, prior sexual misconduct violated Mr. James' constitutional and statutory rights.

2. The trial court violated Mr. James' constitutional and statutory right by refusing to allow defense counsel to cross-examine TH on the fact that at some point prior to the alleged offense, had sexual intercourse with another individual.

3. The trial court erred by refusing to grant a mistrial following the admission of testimony that Mr. James had a felony arrest record as well as an active arrest warrant.

4. The trial court's erred by admitting testimony that amounted to improper vouching.

5. The trial court's admission of TH's hearsay statements to numerous witnesses violated Mr. James' constitutional and statutory rights.

6. The prosecutor committed misconduct in her cross-examination of Mr. James thereby violating his federal and state constitutional rights.

Ground Two: I allege that my state court conviction and/or sentence are unconstitutional, in violation of my Fifth, Sixth and Fourteenth Amendment right to the U.S. Constitution as well as Art. 1.

1. The repeated use of the word victim by prosecutors and government witnesses, as well as the court in a jury instruction, deprived Mr. James of his fair trial and due process rights.

2. Double jeopardy and redundancy principles prohibit Mr. James multiple convictions arising from a single encounter.

3. The trial court erred by proffering jury instruction that were inaccurate, misleading, and/or misstated the law.

4. The prosecution failed to present sufficient evidence to sustain Mr. James convictions.

5. Cumulative error warrants reversal of Mr. James convictions under the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution as well as Art. 1, Sect. 8 of the Nevada Constitution.

Ground Three: I allege that my state court conviction and/or sentence are unconstitutional, in violation of my Fifth, Sixth and Fourteenth Amendment right to the U.S. Constitution.

1. Trial counsel provided ineffective assistance of counsel by failing to retain an expert witness to review Dr. Vergara's examination of TH and rebut her testimony that her examination indicated TH was sexually assaulted.

2. Trial counsel's failure to challenge the State's admission of the latex gloves renders his performance deficient.

3. Trial counsel provided ineffective assistance by failing to conduct adequate investigation.

4. Trial counsel provided ineffective assistance by failing to object to the State's use of a highly prejudicial PowerPoint during closing argument.

5. The cumulative failings by trial counsel deprived Mr. James of effective assistance of counsel.

6. The district court erred in limiting the scope of evidentiary hearing on Mr. James' post-conviction petition.

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes _____ No ___X___

(5) Result: Petition currently pending.

(6) Date of result: N/A.

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: N/A.

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? __Yes__ If so, identify:

a. Which of the grounds is the same: Grounds 1 – 5.

b. The proceedings in which these grounds were raised: First Amended Petition for Writ of Habeas Corpus filed with the U.S. District Court of Nevada on June 26, 2019 in case no. 2:18-cv-00900-KJD-GWF.

c. Briefly explain why you are again raising these grounds.

These grounds were not previously raised in the Nevada state courts and are, therefore, unexhausted for federal habeas purposes. Counsel was appointed for James' federal case after being notified about new, exculpatory DNA evidence. James has good cause for raising these claims in a successive petition due to new

evidence demonstrating his actual innocence. This new evidence was discovered within the past year and could not have been discovered by James any earlier. Actual innocence is sufficient to establish good cause and prejudice to overcome the procedural bars in Chapter 34. A petitioner may overcome procedural bars by establishing cause and prejudice. *See Hathaway v. State*, 119 Nev. 248, 252 (2003) (citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986)).

James can demonstrate good cause and prejudice as to Grounds One through Five on the basis of newly presented evidence of his actual innocence. Additionally, James can overcome any procedural bars as to Grounds One through Five because he maintains that he is actually innocent of the crimes for which he was convicted. *Mitchell v. State*, 122 Nev. 1269, 1273-74 (2006) ("Even when a petitioner cannot show good cause sufficient to overcome the bars to a successive petition, habeas relief may still be granted if the petitioner can demonstrate that a constitutional violation has probably resulted in the conviction of one who is actually innocent."). Nevada has adopted the federal standard for determination of whether the petitioner has made a sufficient showing of actual innocence. *See Mitchell,* 122 Nev. at 1273-74, citing *Murray v. Carrier*, 477 U.S. 478 (1996), *Bousley v. United States*, 523 U.S. 614, 623 (1998); *see also Mazzan v. Whitley*, 112 Nev. 838, 842 (1996) (citing *Carrier Engle v. Isaac*, 456 U.S. 107 (1982), and *Harris v. Reed*, 489 U.S. 255 (1989)). Under this standard, a petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Carrier,* 477 U.S. at 496; *Mitchell,* 122 Nev. at 1273.

The court makes an actual innocence determination "in light of all of the evidence," including evidence that was "either excluded or unavailable at trial." *Schlup v. Delo*, 513 U.S. 298, 327-328 (1995). The petitioner must show that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* at 327. *See also Johnson v. Knowles*, 541 F.3d 933, 937 (9th

APP. 618

Cir. 2008) (standard for actual innocence is whether "in light of all the evidence, including evidence not introduced at trial, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt"). "Actual innocence," thus, is something of a misnomer, as a petitioner "need not show that he is actually innocent of the crime he was convicted of committing; instead, he must show that a court cannot have confidence in the outcome of the trial." *Johnson*, 541 F.3d at 937; *see also House v. Bell*, 547 U.S. 518, 538 (2006) ("the *Schlup* standard does not require absolute certainty about the petitioner's guilt or innocence"). The actual innocence inquiry, moreover, does not require a court to assume that the prosecution's evidence at trial was credible. *Schlup,* 513 U.S. at 330. To the contrary, "the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial," requiring the court to make a credibility determination based on all the available evidence. *Id.*; *see also House v. Bell*, 547 at 538 (actual innocence determination requires court "to assess how reasonable jurors would react to the overall, newly supplemented record").

James was convicted of multiples counts of sexual assault and related offenses, for which he is serving multiple sentences of life with the possibility of parole after 25 years. No DNA evidence was presented at James' trial and, indeed, the defense did not know there was any DNA recovered from the victim's rape kit. New evidence shows that not only was DNA recovered from the victim, but it matches a man who is not James. There is a highly likelihood that the jury would not have convicted James if this evidence had been presented at trial. Failure to review these claims on their merits would result in a fundamental miscarriage of justice. *Pellegrini v. State*, 117 Nev. 860 (2001).

Additionally, among the claims being raised herein is a *Brady* violation concerning the rape kit and DNA evidence. Nevada does recognize the newly

discovered *Brady* violation to constitute good cause to overcome a procedural default. *See State v. Bennett*, 119 Nev. 589 (2003).

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.). N/A.

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? Yes If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

James has good cause for raising these grounds outside the one-year statute of limitations because he discovered new evidence in support of the claims within the past year. *See* exhibit 3. This petition is being filed within one year of the date of the exculpatory DNA report, even though it was not disclosed until February of this year. James can also overcome the statute of limitations procedural bar due to newly presented evidence of actual innocence and a newly discovered *Brady* violation.

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes X No _____

If yes, state what court and the case number: United States District Court, District of Nevada, case no. 2:18-cv-00900-KJD-GWF.

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Trial: Brian Cox, CCPD; Direct Appeal: Nancy Lemcke; Post-Conviction: Margaret McLetchie and Alina Shell.

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack: Yes ____ No __X____

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

ARGUMENT

Facts

On May 14, 2010, 15-year-old TH reported that she had been sexually assaulted by her mother's boyfriend, Tyrone James. TH went to Sunrise Hospital where a sexual assault exam was conducted. TH reported to the nurse that she had not had consensual sex in the past seven days and that her last sexual encounter was one year ago.[1] TH reported she had been vaginally penetrated by the assailant's finger and penis, and a doctor observed swelling during the pelvic exam.[2] Evidence was collected from TH including oral swabs, vaginal and cervical swabs, and rectal swabs.[3]

No evidence regarding the rape kits or swabs was presented during James' trial. Defense counsel, Bryan Cox, was unaware that any DNA was recovered from the swabs. James was convicted almost entirely on the testimony of TH, as well as the introduction of prior bad act evidence. A doctor from Sunrise Hospital also

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[1] *See* Ex. 3 at 10, 18.

[2] *Id.* at 14, 17.

[3] *Id.* at 18.

testified on behalf of the State. She had conducted the gynecological exam on TH and observed swelling to her vaginal area that could have been caused by trauma such as penetration.[4] She testified her findings were "consistent with probable abuse."[5] The jury found James guilty and the court sentenced him to life imprisonment with parole eligibility after serving 25 years.[6]

James' federal habeas petition was filed on May 17, 2018. He was not immediately appointed counsel. On February 21, 2019, the Federal Public Defender's Office was contacted by Senior Deputy Attorney General Amanda Sage.[7] Sage said that she was contacted by the Clark County District Attorney's Office about new DNA evidence having been discovered in James' case that was potentially exculpatory.[8] The FPD immediately sought to be appointed as counsel for James. Based on this turn of events, the federal court granted the motion and appointed the FPD to represent James.[9] On March 18, 2019, Sage emailed the FPD the DNA report and medical records that are reproduced in Exhibit 1.

The new evidence includes the following. A forensic case report from April 30, 2018, states that physical evidence from this case was "Received on **December 6, 2017** for possible DNA analysis."[10] The report reflects that only 1 of the 3 swabs, the perineum swab, was processed and a sperm fraction consistent with a male contributor was detected. On June 28, 2018, there was a presumptive "CODIS"

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[4] Transcript ("Tr") 9/22/10 at 159-60.

[5] *Id.* at 174.

[6] See Judgment of Conviction, 2/9/11.

[7] *See* Ex. 1 at 2.

[8] *Id.*

[9] *See* Ex. 2.

[10] *See* Ex. 3 at 3 (emphasis added).

match to a **Ramon Wilson**.[11] The CODIS Hit Notification Report provides the following information:[12]

> This hit constitutes an investigative lead in your case(s). A new reference buccal swab must now be obtained from this individual in order to confirm this hit and complete the case(s). The DNA sample currently on file, which was collected in accordance with Nevada Law (NRS 176.0913), will not suffice for the confirmation process.
>
> The information provided in this report can be used to obtain a Search Warrant for a reference buccal swab from the above person.

The CODIS Hit Disposition Form, dated July 31, 2018, similarly notes: "This is a viable lead requiring further action."[13]

Neither trial counsel Bryan Cox, nor post-conviction counsel Margaret McLetchie, have been provided with this new information. Additionally, despite the directives in the CODIS hit notification report and disposition form, there is no indication that any further investigation has been conducted or that a reference buccal swab has been obtained from Ramon Wilson. Nor is there any indication that the other 2 swabs were analyzed. No information was provided to the FPD as to why the evidence was not submitted to the lab until 2017, why it wasn't tested until 2018, why the remaining swabs were not analyzed, why no further investigation has been conducted, or why the District Attorney's Office did not notify James' prior counsel about this exculpatory evidence but rather waited another 8 months before passing it on to the Attorney General's Office. James has been incarcerated on this case since 2010.

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[11] *Id.* at 2.

[12] *Id.*

[13] *Id.* at 5.

Claims

1. Trial counsel was ineffective for not having James' DNA tested and compared to the DNA recovered from the rape kit.

The Sixth Amendment to the United States Constitution and Article One, Section Eight of the Nevada Constitution guarantee criminal defendants the effective assistance of counsel at trial. The standard for evaluating an ineffectiveness claim for trial counsel is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires a showing that counsel's performance fell below an objective standard of professional care and there was a reasonable probability the outcome would have been different absent the deficient performance.

James has consistently maintained his innocence. When first interviewed by the police, he offered to take a lie-detector test and a give a DNA sample. Neither was done. Trial counsel should have known via the discovery received from the State that swabs taken from the victim as part of the "rape kit" had not been analyzed. Trial counsel should have known that the presence of another man's DNA would be exculpatory. Nevertheless, counsel never requested the swabs be tested for DNA, never hired a DNA expert, and never had James' DNA compared to the DNA found on TH.

A defense attorney has a duty to conduct a reasonable investigation into the case in order to find evidence favorable to the defense. This includes retaining experts to analyze the evidence. Counsel was deficient for not investigating the DNA evidence and James was clearly prejudiced, as he has languished in prison for nearly 10 years without this evidence being discovered. James received ineffective assistance of counsel and his continued incarceration is in violation of the United States Constitution.

2. James' right to due process of law under the Fifth, Sixth, and Fourteenth Amendments of United States Constitution and Article One, Section Eight of the Nevada Constitution was violated because new evidence demonstrates he is actually innocent of the crimes for which he was convicted.

The threshold for a freestanding actual innocence claim is "extraordinarily high." *Herrera v. Collins*, 506 U.S. 390, 417 (1993). Prior cases suggest habeas relief is available in cases of actual innocence where a petitioner goes "beyond demonstrating doubt about his guilt" and affirmatively proves "he is probably innocent." *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997). The new DNA evidence in this case does exactly that.

TH stated she was sexually assaulted and penetrated by the assailant's finger and penis. A sperm fraction with DNA matching a different man was found on the perineum swab from the victim's rape kit. This evidence proves it was that man, Ramon Wilson, and not Tyrone James that sexually assaulted TH. The remaining evidence against James was circumstantial and pales in comparison to the strength of conclusive DNA evidence. James' continued incarceration is in violation of the United States Constitution.

3. James was denied due process and a fair trial under the Fifth, Sixth, and Fourteenth Amendments of United States Constitution and Article One, Section Eight of the Nevada Constitution where the State failed to disclose exculpatory and material evidence that another man's DNA was found on the victim.

The State has a continuing duty to disclose evidence favorable to the defense and, where the evidence is material, failure to do so constitutes a due process violation. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). In this case, the State was in sole possession of the rape kit, which contained exculpatory evidence—the presence of another man's sperm on the victim's genitalia. The State held onto the rape kit and did nothing with it for 7 years. At the time of trial, the defense did not know

there was any DNA recovered from the victim and therefore didn't know there was anything to test against James. Even if Ramon Wilson could not have been identified as the contributor in 2010, the presence of male DNA that did not match James was highly exculpatory. The outcome of the trial would have been different if the jury had known that male DNA, specifically sperm, was recovered from TH and did not match James. This evidence points to someone other than James as the perpetrator. The State had exclusive possession of this exculpatory evidence and suppressed it for 7 years. This was a *Brady* violation resulting in a denial of due process and a fair trial. James' continued incarceration is in violation of the United States Constitution.

4. Ongoing prosecutorial misconduct has violated James' right to due process and a fair trial under the Fifth, Sixth, and Fourteenth Amendments of United States Constitution and Article One, Section Eight of the Nevada Constitution where the State failed to have the DNA timely tested and has failed to follow-up on the presumptive DNA match to another man.

For unknown reasons, the State did not send TH's rape kit to the lab for analysis for 7 years, long after James was convicted and sentenced to spend his life in prison. It took another year until there was a presumptive match to Ramon Wilson. The Las Vegas Metropolitan Police Department Forensic Laboratory's own forms provide that the presumptive CODIS match to Wilson was a viable lead requiring further action and that the report was sufficient to obtain a search warrant in order to obtain a confirmation buccal swab from Wilson. There is no indication this was ever done. And there is no indication that the other 2 swabs from the rape kit have ever been analyzed. Moreover, after the presumptive match to Wilson, it took another 8 months before the State provided anyone with this information. Then it was provided to the Attorney General's Office which, to their credit, dutifully contact the Federal Public Defender's Office. The State never

notified any of the prior attorneys who represented James about this game-changing evidence.

James remains in prison while the State continues to drag its feet. The State's failure to have the rape kit promptly analyzed resulted in James going to prison for a crime he did not commit. The State's failure to promptly notify counsel for James of the CODIS hit identifying another man has cost James another year in prison. And the State's neglect in pursuing what they identified as a "viable lead requiring further action" continues to keep James in prison. The State has failed in its mission to seek justice. The sum of this misconduct is a violation of James' right to due process and his continued incarceration is in violation of the United States Constitution.

5. James was denied an adequate opportunity to confront TH in violation of the Sixth Amendment of the United States Constitution because of the State's suppression of exculpatory evidence.

The Sixth Amendment affords criminal defendants the right to confront the witnesses against them. The Confrontation Clause ensures the reliability of evidence by subjecting it to adversarial testing. *See Maryland v. Craig*, 497 U.S. 836, 845 (1990). The right to confront includes the right to cross-examine a witness as to her credibility and possible bias. *See Delaware v. Arsdall*, 475 U.S. 673, 678-79 (1986).

James was denied the opportunity to confront TH about the presence of male sperm on her body, matching a man other than James. The State's failure to disclose this evidence, or have the rape kit timely tested, prevented James from cross-examining TH about it. This evidence is in direct conflict with TH's identification of James as the assailant and calls her credibility into doubt. James had a right to confront TH with the DNA evidence and his continued incarceration is in violation of the United States Constitution.

PRAYER FOR RELIEF

Accordingly, Tyrone James respectfully requests that this Court:

1. Issue a writ of habeas corpus to have Mr. James brought before the Court so that he may be discharged from his unconstitutional confinement;

2. Conduct an evidentiary hearing at which proof may be offered concerning the allegations in this Petition and any defenses that may be raised by Respondents; and

3. Grant him a new trial or any such further relief as, in the interests of justice, the Court deems just and proper.

WHEREFORE, Petitioner prays that the Court grant him relief to which he may be entitled in this proceeding.

Dated this 27th day of June, 2019.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/ CB Kirschner
C.B. Kirschner
Assistant Federal Public Defender

VERIFICATION

Under penalty of perjury, the undersigned declares that she is counsel for the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of her own knowledge except as to those matters stated on information and belief and as to such matters she believes them to be true. Petitioner personally authorized undersigned counsel to commence this action.

Dated this 27th day of June, 2019.

/s/ CB Kirschner
C.B. Kirschner
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on June 27th, 2019, I electronically filed the foregoing with the Clerk of the Eighth Judicial District Court by using the Court's electronic filing system.

Participants in the case who are registered users in the electronic filing system will be served by the system and include: Steven Wolfson, Steven.Wolfson@clarkcountyda.com, Motions@clarkcountyda.com.

I further certify that some of the participants in the case are not registered electronic filing system users. I have mailed the foregoing document by First-Class Mail, potage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three calendars days, to the following person:

Tyrone David James Sr.
No. 1063523
High Desert State Prison
PO Box 650
Indian Springs, NV 89018

Geordan Goebel
Deputy Attorney General
100 North Carson Street
Carson City, NV 89701

/s/ Jessica Pillsbury
An Employee of the Federal Public Defender, District of Nevada

Electronically Filed
6/27/2019 10:32 AM
Steven D. Grierson
CLERK OF THE COURT

EXHS
Rene L. Valladares
Federal Public Defender
Nevada State Bar No. 11479
*C.B. Kirschner
Assistant Federal Public Defender
Nevada State Bar No. 14023C
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
CB_Kirschner@fd.org

*Attorney for Petitioner Tyrone David James, Sr.

CASE NO: A-19-797521-W
Department 24

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

Tyrone David James, Sr.,

Petitioner,

v.

Brian Williams, Warden, and the Attorney General for the State of Nevada, et al.,

Respondents.

Case No. _____
Dept. No. __

Date of Hearing:
Time of Hearing:

(Not a Death Penalty Case)

INDEX OF EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

(PART 1)

Case Number: A-19-797521-W

Petitioner, Tyrone James, by and through counsel submits the following Index of Exhibits in Support of Petition for Writ of Habeas Corpus (Post-Conviction):

No.	Date	Document	Court	Case no.
1.	2/27/2019	Unopposed Motion for Appointment of Counsel	US District Court	2:18-cv-0900-KJD-GWF
2.	3/4/2019	Order Appointing Counsel	US District Court	2:18-cv-0900-KJD-GWF

Dated this 27th day of June, 2019.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/ CB Kirschner
C.B. Kirschner
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

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Carson City, NV 89701

/s/ Jessica Pillsbury
An Employee of the Federal Public Defender, District of Nevada

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Steven D. Grierson
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MSRC
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Federal Public Defender
Nevada State Bar No. 11479
*C.B. Kirschner
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*Attorney for Petitioner Tyrone David James, Sr.

CASE NO: A-19-797521-W
Department 24

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

Tyrone David James, Sr., Petitioner, v. Brian Williams, Warden, and the Attorney General for the State of Nevada, et al., Respondents.	Case No. _____ Dept. No. __ Date of Hearing: Time of Hearing: (Not a Death Penalty Case)

MOTION TO FILE EXHIBIT UNDER SEAL

Case Number: A-19-797521-W

Mr. James respectfully requests permission to file the following exhibit under seal:

No.	Date	Document	Court	Case no.
3.		DNA report and medical records **(FILED UNDER SEAL)**		100514-2100

This exhibit was received by counsel as a single document as is being filed as a single document to preserve its integrity. The DNA report contains the name of a minor sexual assault victim and the medical records are for the same. While there is a "presumption favoring public access to judicial records and documents," Nevada law recognizes the courts' "inherent authority to seal those materials . . . where the public's right to access is outweighed by competing interests." *Howard v. State*, 128 Nev. 736, 742, 291 P.3d 137, 141 (2012). Here, Mr. James seeks to seal the joint DNA report and medical records. The protection of medical information is the sort of "competing interest" that often justifies sealing records. *See Kamakana v. City and Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (affirming decision to unseal all records except medical records). Thus, Mr. James has compelling reasons to request these records be filed under seal.

The need to file medical information under seal is all the more acute given the statutory and regulatory regimes governing medical information. Nevada and federal law and regulations set forth complicated frameworks that require individuals to keep medical information confidential. *See, e.g.*, NRS 49.055, 178.425, 179A.165, 449.720; Health Insurance Portability and Accountability Act of 1996 (commonly known as "HIPAA"), Pub. L. 104-191, 110 Stat. 1936 (1996). For that reason, documents that "include[] medical [or] mental health" information are often redacted or kept under seal. *See* Nevada Rules Governing Sealing and Redacting Court Records, Rule 3(4)(f); *see also id.* Rule 3(4)(a) (requiring sealing or redaction

when "permitted or required by federal or state law"); *Howard*, 128 Nev. at 746, 291 P.3d at 143 (same). Thus, it is appropriate for the Court to file the relevant document under seal.

For these reasons, Mr. James respectfully requests the Court grant permission to file Exhibit 3 under seal.

Dated this 27th day of June, 2019.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/ CB Kirschner
C.B. Kirschner
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

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/s/ Jessica Pillsbury
An Employee of the Federal Public Defender, District of Nevada

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Nevada State Bar No. 11479
*C.B. Kirschner
Assistant Federal Public Defender
Nevada State Bar No. 14023C
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
CB_Kirschner@fd.org

*Attorney for Petitioner Tyrone David James, Sr.

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

Tyrone David James, Sr., Petitioner, v. Brian Williams, Warden, and the Attorney General for the State of Nevada, et al., Respondents.	FUS Case No. A-19-797521-W Dept. No. 24 Date of Hearing: Time of Hearing: (Not a Death Penalty Case)

INDEX OF EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) (PART 2 – FILED UNDER SEAL)

RECEIVED
JUN 27 2019
CLERK OF THE COURT

Petitioner, Tyrone James, by and through counsel submits the following Index of Exhibits in Support of Petition for Writ of Habeas Corpus (Post-Conviction):

No.	Date	Document	Court	Case no.
3.		DNA report and medical records **(FILED UNDER SEAL)**		100514-2100

Dated this 27th day of June, 2019.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

C.B. Kirschner
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

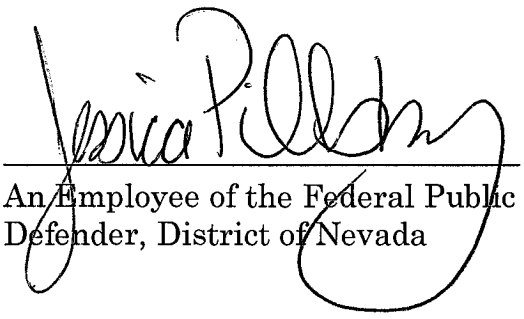
I hereby certify that on June 27th, 2019, I electronically filed the foregoing with the Clerk of the Eighth Judicial District Court by using the Court's electronic filing system.

Participants in the case who are registered users in the electronic filing system will be served by the system and include: Steven Wolfson, Steven.Wolfson@clarkcountyda.com, Motions@clarkcountyda.com.

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PO Box 650
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Geordan Goebel
Deputy Attorney General
100 North Carson Street
Carson City, NV 89701



An Employee of the Federal Public Defender, District of Nevada

A-19-797521-W

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**June 28, 2019**

A-19-797521-W Tyrone James, Sr., Plaintiff(s) vs. Brian Williams, Defendant(s)

June 28, 2019	**3:00 AM**	**Minute Order**	**Minute Order - Assignment to Department 28**

HEARD BY: Crockett, Jim **COURTROOM:** Phoenix Building 11th Floor 116
Chambers

COURT CLERK: Alan Castle

PARTIES PRESENT: None.

JOURNAL ENTRIES

- IT HAS COME to the attention of the Court that a Petition for Writ of Habeas Corpus was assigned a civil case number and assigned to Department 24 under Case number A-19-797521-W, TYRONE DAVID JAMES Sr. v. BRIAN WILLIAMS, et. al.

Petitioner has filed a new action and entitles the pleading a Petition for Writ of Habeas Corpus (Post-Conviction). It appears the Petition is challenging the constitutionality of the Nevada revised Statutes under which he was prosecuted, which this Court interprets as a challenge to his Judgment of Conviction pursuant to NRS 34.720 to NRS 34.830.

As NRS 34.730(b) requires that challenges to the Judgment of Conviction be assigned whenever possible to the original Judge or Court, it appears this matter has been incorrectly assigned to Department 24, rather than assigned to the Department assigned to Petitioner's underlying criminal matter: 10C265506, which was resolved by Department 28.

COURT ORDERED, District Court Clerk's office to file all documents erroneously filed in A-19-797521-W in the correct case 10C265506, pursuant to NRS 34.730(3)(b), COURT FURTHER ORDERS, CASE No. A-19-797521-W CLOSED.

CLERK'S NOTE: The above minute order has been distributed to: Rene L. Valladares, Federal Public Defender (C.B. Kirschner, Assistant Federal Public Defender).

Electronically Filed
7/16/2019 11:34 AM
Steven D. Grierson
CLERK OF THE COURT

PET
Rene L. Valladares
Federal Public Defender
Nevada State Bar No. 11479
*C.B. Kirschner
Assistant Federal Public Defender
Nevada State Bar No. 14023C
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
CB_Kirschner@fd.org

*Attorney for Petitioner Tyrone David James, Sr.

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

Tyrone David James, Sr., Petitioner, v. State of Nevada, Respondent.	Case No. 10C265506 Dept. No. 28 Date of Hearing: Time of Hearing:

POST-CONVICTION PETITION REQUESTING A GENETIC MARKER ANALYSIS OF EVIDENCE WITHIN THE POSSESSION OR CUSTODY OF THE STATE OF NEVADA (NRS 176.0918)[1]

[1] Pursuant to NRS 176.0918(2), this Petition substantially follows the form prescribed by the Department of Corrections, located at Administrative Regulation 571.

Case Number: 10C265506

1. Tyrone David James, Sr. is the Petitioner in this matter. This Petition requests this Court to issue an Order for a Genetic Marker Analysis of evidence pursuant to NRS 176.0918.

2. Petitioner is informed and believes, and on the basis of such belief, alleges in good faith that the State of Nevada, or a political subdivision on the State of Nevada, has possession and control of evidence in the form of Genetic Marker Information relating to the investigation or prosecution that resulted in Petitioner's Judgment of Conviction.

3. The Petitioner was convicted of committing all of the following Category A or Category B felony/felonies:

Crime's NRS	Title of Crime	Category A/B	Date of Conviction	Sentence
200.364, 200.366	Sexual assault with minor under 16	A	2/9/11	25 years to life
200.364, 200.366	Sexual assault with minor under 16	A	2/9/11	25 years to life
200.400	Battery with Intent	A	2/9/11	2 years to life

4. The Petitioner was not sentenced to death and the date set for execution is: Not Applicable.

5. Pursuant to NRS 176.0918(3)(a), the following information identifies the specific evidence either known or believed by the Petitioner to be in the possession or custody of the State of Nevada that can be subject to Genetic Marker Analysis: Sexual assault kit containing –

Bode Cellmark Sample No.	**Description**
NVK-1717-2761-E01	Cervical Swabs
NVK-1717-2761-E02	Vaginal Swabs
NVK-1717-2761-E03	Perineum Swabs
NVK-1717-2761-R04	Buccal Swab Standard (victim)

6. Pursuant to NRS 176.0918(3)(b), the following is the Petitioner's rationale as to why a reasonable possibility exists that the Petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through Genetic Marker Analysis of the evidence identified in paragraph 5:

On May 14, 2010, 15-year-old TH reported that she had been sexually assaulted by her mother's boyfriend, Tyrone James.[2] TH went to Sunrise Hospital where a sexual assault exam was conducted. TH reported to the nurse that she had not had consensual sex in the past seven days and that her last sexual encounter was one year ago. TH reported she had been vaginally penetrated by the assailant's finger and penis, and a doctor observed swelling during the pelvic exam. Evidence was collected from TH including oral swabs, vaginal and cervical swabs, and rectal swabs.

No evidence regarding the rape kit, swabs, or DNA was presented during James' trial. No analysis of the rape kit, swabs, or DNA was included in pre-trial discovery. At the time of trial, defense counsel, Bryan Cox, was unaware that any DNA was contained on the swabs. James was convicted almost entirely on the testimony of TH, as well as the introduction of prior bad act evidence. A doctor from Sunrise Hospital also testified on behalf of the State. She had conducted the gynecological exam on TH and observed swelling to her vaginal area that could have been caused by trauma such as penetration.[3] She testified her findings were "consistent with probable abuse."[4]

After an unsuccessful direct appeal and post-conviction proceedings in state court, James filed a pro se federal habeas petition on May 17, 2018. He was not

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[2] This information is taken from the Petition for Writ of Habeas Corpus (Post-Conviction), filed on June 27, 2019. That petition is still pending.

[3] *See* transcript ("Tr") 9/22/10 at 159-60.

[4] *Id.* at 174.

immediately appointed counsel. On February 21, 2019, the Federal Public Defender's Office ("FPD") was contacted by Senior Deputy Attorney General Amanda Sage. Sage said that she was contacted by the Clark County District Attorney's Office about new DNA evidence having been discovered in James' case that was potentially exculpatory. The FPD immediately sought to be appointed as counsel for James. Based on this turn of events, the federal court granted the motion and appointed the FPD to represent James. On March 18, 2019, Sage emailed the FPD the relevant DNA report and medical records. The redacted DNA report is attached as Exhibit 1. The medical records concerning the rape kit were previously filed under seal contemporaneously with the filing of the post-conviction petition on June 27, 2019.

The new evidence includes the following. A forensic case report from April 30, 2018, states that physical evidence from this case was "Received on **December 6, 2017** for possible DNA analysis."[5] The report reflects that only 1 of the 3 swabs, the perineum swab, was processed and a **sperm fraction consistent with a male contributor** was detected.[6] On June 28, 2018, there was a presumptive "CODIS" match to a **Ramon Wilson**.[7] The CODIS Hit Notification Report provides the following information:[8]

> This hit constitutes an investigative lead in your case(s). A new reference buccal swab must now be obtained from this individual in order to confirm this hit and complete the case(s). The DNA sample currently on file, which was collected in accordance with Nevada Law (NRS 176.0913), will not suffice for the confirmation process.
>
> The information provided in this report can be used to obtain a Search Warrant for a reference buccal swab from the above person.

---

[5] *See* Exhibit 1 at 3 (emphasis added).

[6] *Id.*

[7] *Id.* at 2.

[8] *Id.*

The CODIS Hit Disposition Form, dated July 31, 2018, similarly notes: "This is a viable lead requiring further action."[9]

Despite the directives in the CODIS hit notification report and disposition form, there is no indication that any further investigation has been conducted or that a reference buccal swab has been obtained from Ramon Wilson.[10] Nor is there any indication that the other 2 swabs from the rape kit were ever analyzed. No information was provided to the FPD as to why the evidence was not submitted to the lab until 2017, why it wasn't tested until 2018, and why the remaining swabs were not analyzed. It also appears that a buccal swab was never obtained from Mr. James and tested against the swabs from the rape kit, in order to rule him out as a contributor.

The only evidence connecting Mr. James to the assault of TH was her testimony. Whether her identification of Mr. James was mistaken, or false, there is a reasonable possibility[11] the jury would not have convicted Mr. James if they knew that DNA, specifically a sperm fraction, was found on the victim and it did not match Mr. James, but in fact matched another man. As TH told medical authorities that she did not have consensual sex with anyone in at least 7 days prior to the assault, there is no other explanation for the DNA matching Ramon Wilson aside from him being the true assailant. There is no physical evidence connecting Mr. James to the crime. Confirmation DNA testing would definitively prove his innocence.

---

[9] *Id.* at 5.

[10] Wilson's name does not appear in pre-trial discovery. Petitioner has no further information about him, aside from the CODIS report.

[11] The "reasonable possibility" standard is less demanding than the more stringent "reasonable probability" standard. *See Lord v. State*, 107 Nev. 28, 44 (1991) (citing *People v. Brown*, 758 P.2d 1135, 1144-45 (Cal. 1988) (distinguishing reasonable possibility from reasonable probability)).

7. Pursuant to NRS 176.0918(3)(c), the type of Genetic Marker Analysis the Petitioner is requesting to be conducted on the evidence identified in paragraph 5 is:

Petitioner is requesting that a confirmation buccal swab be obtained from the suspect Ramon Wilson, and a buccal swab be obtained from Petitioner, Mr. James. These swabs should be tested against the evidence identified in paragraph 5, specifically the cervical, vaginal, and perineum swabs obtained from the victim's rape kit. Genetic profiles should be generated as to each of the swabs in the rape kit and compared to the genetic profiles generated from the buccal swabs of Mr. James and Ramon Wilson in order to include or exclude them as contributors.

8. Pursuant to NRS 176.0918(3)(d), the following are the results of all prior Genetic Marker Analysis performed on the evidence in the trial which resulted in the Petitioner's conviction: Not Applicable. No genetic marker analysis was performed on the evidence at the time of Petitioner's trial.

9. Pursuant to NRS 176.0918(3)(e), the following is a statement of the Petitioner that the type of Genetic Marker Analysis the Petitioner is requesting was not available at the time of trial or, if it was available, that the failure to request Genetic Marker Analysis before the Petitioner was convicted was not a result of a strategic or tactical decision as part of the representation of the Petitioner at the trial:

Mr. James has consistently maintained his innocence. When first interviewed by the police, he offered to take a lie-detector test and give a DNA sample. Neither was done. Mr. James similarly asked his trial attorney, Bryan Cox, to have his DNA tested. This was also never done, probably because Mr. Cox did not know that DNA was recovered from the victim. For unknown reasons, the State did not send TH's rape kit to the lab for analysis for 7 years. Thus, the failure to request genetic marker analysis at trial was not a result of a strategic or tactical decision.

PRAYER FOR RELIEF

For these reasons, Petitioner Tyrone James respectfully requests this Court, pursuant to NRS 176.0918, grant the Post-Conviction Petition Requesting a Genetic Marker Analysis of Evidence within the Possession or Custody of the State of Nevada, and requests this Court issue an Order for a Genetic Marker Analysis of evidence pursuant to NRS 176.0918(9). Specifically, Mr. James asks this Court to:

(1) Schedule a hearing on the petition pursuant to NRS 176.0918(4)(c);

(2) Determine which person or agency has possession of the evidence in question, and immediately issue an order requiring, during the pendency of this proceeding, each person of agency in possession or custody of the evidence to:

(a) Preserve all evidence within the possession or custody of the person or agency that may be subjected to genetic marker analysis;

(b) Within 90 days, prepare an inventory of all evidence relevant to the claims in the petition within the possession of custody of the person or agency that may be subjected to genetic marker analysis; and

(c) Within 90 days, submit a copy of the inventory to the Petitioner, the prosecuting attorney, and the Court.

(3) Order a DNA genetic marker analysis to be performed pursuant to the requirements of Nevada Revised Statute 176.0918.

(4) Mr. James further requests that this Court permit an expert retained on his behalf to conduct, supervise, or assist in the requested analysis, if necessary.

Dated this 16th day of July, 2019.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/ CB Kirschner
C.B. Kirschner
Assistant Federal Public Defender

DECLARATION

Under penalty of perjury, the undersigned declares she is counsel for the Petitioner named in the foregoing petition and knows the contents thereof; the pleading does not contain any material misrepresentation of fact; and undersigned has a good faith basis for relying on particular facts for the request.

Dated this 16th day of July, 2019.

/s/ CB Kirschner
C.B. Kirschner
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on July 16th, 2019, I electronically filed the foregoing with the Clerk of the Eighth Judicial District Court by using the Court's electronic filing system.

Participants in the case who are registered users in the electronic filing system will be served by the system and include: Steven Wolfson, Steven.Wolfson@clarkcountyda.com, Motions@clarkcountyda.com.

I further certify that some of the participants in the case are not registered electronic filing system users. I have mailed the foregoing document by First-Class Mail, potage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three calendars days, to the following person:

Tyrone David James Sr.
No. 1063523
High Desert State Prison
PO Box 650
Indian Springs, NV 89018

Geordan Goebel
Deputy Attorney General
100 North Carson Street
Carson City, NV 89701

/s/ Adam Dunn
An Employee of the Federal Public Defender, District of Nevada

Electronically Filed
7/23/2019 7:52 AM
Steven D. Grierson
CLERK OF THE COURT

RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JAMES R. SWEETIN
Chief Deputy District Attorney
Nevada Bar #005144
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: **XXVIII**

STATE'S RESPONSE TO DEFENDANT'S PETITION REQUESTING A GENETIC MARKER ANALYSIS OF EVIDENCE WITHIN THE POSSESSION OR CUSTODY OF THE STATE OF NEVADA (NRS 176.0918)

DATE OF HEARING: **JULY 29, 2019**
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 this State's Response to Defendant's Post-Conviction Petition Requesting A Genetic Marker Analysis Of Evidence Within The Possession Or Custody Of The State Of Nevada (NRS 176.0918).

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.

//

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On June 23, 2010, Defendant Tyrone D. 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, 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. This Court granted both Motions.

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 issued on 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 4, 2015, Defendant filed a Supplemental Petition for Post-Conviction Writ of Habeas Corpus ("Supplement"). On January 15, 2016, Defendant filed another Supplement to Supplemental Petition for Writ of Habeas Corpus ("Second Supplement"). On April 21, 2016, the State filed its Response to Defendant's Second Supplement. On October 3, 2016, this Court held an evidentiary hearing and heard sworn testimony from Bryan Cox, Esq., and Dr. Joyce Adams. On November 8, 2016, this Court entered its Findings of Fact, Conclusions of Law, and Order denying the Petition. On December 8, 2016, James filed a Notice of Appeal from the denial. The Nevada Court of Appeals affirmed the denial on November 14, 2017. Remittitur issued December 29, 2017.

Defendant filed the instant Post-Conviction Petition Requesting A Genetic Marker Analysis Of Evidence Within The Possession Or Custody Of The State Of Nevada (NRS 176.0918) on July 16, 2019. The State responds as follows.

ARGUMENT

Pursuant to Nevada statute, this Court must take certain steps in handling Defendant's Petition.

NRS 176.0918 states, in relevant part:

> 4. If a petition is filed pursuant to this section, the court may:
>
> (a) Enter an order dismissing the petition without a hearing if the court determines, based on the information contained in the petition, that the petitioner does not meet the requirements set forth in this section;
>
> (b) After determining whether the petitioner is indigent pursuant to NRS 171.188 and whether counsel was appointed in the case which resulted in the conviction, appoint counsel for the limited purpose of reviewing, supplementing and presenting the petition to the court; or

> (c) Schedule a hearing on the petition. If the court schedules a hearing on the petition, the court shall determine which person or agency has possession or custody of the evidence and shall immediately issue an order requiring, during the pendency of the proceeding, each person or agency in possession or custody of the evidence to:
>
> (1) Preserve all evidence within the possession or custody of the person or agency that may be subjected to genetic marker analysis pursuant to this section;
>
> (2) Within 90 days, prepare an inventory of all evidence relevant to the claims in the petition within the possession or custody of the person or agency that may be subjected to genetic marker analysis pursuant to this section; and
>
> (3) Within 90 days, submit a copy of the inventory to the petitioner, the prosecuting attorney and the court.
>
> 5. Within 90 days after the inventory of all evidence is prepared pursuant to subsection 4, the prosecuting attorney may file a written response to the petition with the court.

Accordingly, so long as this Court does not dismiss this Petition for not meeting the requirements, this Court should take certain actions at the July 29, 2019 hearing on this Petition. NRS 176.0918(4)(a), (c). First, this Court should make a finding as to who has possession of the evidence in question—that is, the Las Vegas Metropolitan Police Department. NRS 176.0918(4)(c). Next, this Court should issue an order, requiring LVMPD to 1) preserve all evidence; 2) prepare an inventory of said evidence within 90 days; and 3) submit a copy of the inventory to all parties within 90 days. NRS 176.0918(4)(c)(1)–(3).

Only then should this Court set a briefing schedule allowing the State to file a Response to this Petition, such Response to be filed within 90 days of the preparation of the inventory. NRS 176.0918(5).

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CONCLUSION

Based on the aforementioned argument, the State respectfully requests that this Court hold the hearing on Defendant's Petition and make the necessary findings for the matter to continue.

DATED this 23rd day of July, 2019.

Respectfully submitted,

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

BY /s/ JAMES R. SWEETIN
JAMES R. SWEETIN
Chief Deputy District Attorney
Nevada Bar #005144

CERTIFICATE OF SERVICE

I hereby certify that service of the above and foregoing was made this 23rd day of JULY, 2019, to:

C.B. KIRSCHNER, FPD
CB_Kirschner@fd.org

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

hjc/SVU

10C265506 State of Nevada
vs
Tyrone James

July 29, 2019 09:00 AM Post Conviction Petition Requesting a Genetetic Marker Analysis of Evidence Within the Possession for Custody of the State of Nevada

HEARD BY: Cherry, Michael A. COURTROOM: RJC Courtroom 15C

COURT CLERK: Thomas, Kathy

RECORDER: Chappell, Judy

REPORTER:

PARTIES PRESENT:

Courtney Kirschner	**Attorney for Defendant**
Frank R. LoGrippo	**Attorney for Plaintiff**
State of Nevada	**Plaintiff**

JOURNAL ENTRIES

Deft. JAMES not present, in the Nevada Department of Corrections (NDC). Ms. Kirschner from the Federal Public Defender's Office requested the Deft's presence be waived and the genetic markers analysis of the evidence held by the State of Nevada. Colloquy regarding 3 markers taken and one was tested and the Metropolitan Police Department was to preserve them. Ms. Kirschner noted the post-conviction petition was to be transferred from Department 24. Ms. Kirschner was notified from the Attorney General of another match to this case and was told it would come to this Department. (A797521 case in Dept. 24). Ms. Kirschner requested additional time to research this. COURT ORDERED, Matter CONTINUED. Court noted Counsel may notice a hearing if she would like it heard earlier.

11/25/19 9:00 AM POST CONVICTION PETITION REQUESTING A GENETETIC MARKER ANALYSIS OF EVIDENCE WITHIN THE POSSESSION FOR CUSTODY OF THE STATE OF NEVADA

CLERK'S NOTE: Case A797521 was to be closed. pursuant to 06/28/19 minute order and under NRS 34.730(3)(b).

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8/9/2019 2:34 PM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff, vs. TYRONE D. JAMES, Defendant.	CASE#: 10C265506 DEPT. XXVIII

BEFORE THE HONORABLE MICHAEL A. CHERRY,
DISTRICT COURT SENIOR JUDGE

MONDAY, JULY 29, 2019

RECORDER'S TRANSCRIPT OF HEARING
POST CONVICTION PETITION REQUESTING A GENETIC MARKER ANALYSIS OF EVIDENCE WITHIN THE POSSESSION FOR CUSTODY OF THE STATE OF NEVADA

APPEARANCES:

For the State: FRANK LoGRIPPO, ESQ.
Deputy District Attorney

For the Defendant: CB KIRSCHNER, ESQ.
Assistant Federal Public Defender

RECORDED BY: JUDY CHAPPELL, COURT RECORDER

Las Vegas, Nevada, Monday, July 29, 2019

[Case called at 10:05 a.m.]

THE COURT: This is Case Number 10C265506, State of Nevada versus Tyrone James.

Ms. Shell?

MS. KIRSCHNER: No, Your Honor, CB Kirschner from the Federal Public Defender's Office –

THE COURT: Ms. Kirschner.

MS. KIRSCHNER: -- on behalf of Mr. James. He's in the custody of Nevada Department of Corrections, not present today. I'll waive his presence for today.

THE COURT: Ms. Kirschner, this is the federal PD's requesting an analysis of the swabs from the rape kit.

MS. KIRSCHNER: Correct, Your Honor.

THE COURT: On 9/23/10, a jury found defendant guilty on all counts. Defendant filed a postconviction petition for writ of habeas corpus. After an evidentiary hearing on 10/3/16, the court entered a findings of fact, conclusions of law denying the petition. That order was filed on 11/8/16. The federal public defender asserts that three swabs were taken, only one of the swabs was analyzed and it came back a match for a different individual. The State argues the Court must first make a finding as to who was in possession of the evidence and then issue an order requiring Metro to preserve inventory of the evidence.

After that a briefing schedule should be set.

That's what I've got.

MS. KIRSCHNER: And, Your Honor, just to let the Court know, additionally we had filed a successive postconviction petition essentially raising issues that'll be related to this DNA analysis. That petition is – was originally assigned to Department 24. There was an order that it should be transferred to this department. I don't know that administratively that's happened yet. But I wanted to let the Court know that there is a postconviction petition floating around somewhere in the courthouse.

As to the DNA petition, that's correct, Your Honor. We were notified by way of the Attorney General's office about a DNA match. I think it was just another individual who was arrested, their DNA got put into the system and showed up to be a match to this case. There had been no DNA evidence originally introduced as part of this case when it went to trial.

THE COURT: So there's going to be a petition for writ of habeas corpus for postconviction relief –

MS. KIRSCHNER: There is, Your Honor, and --

THE COURT: -- in another department but it's coming to this department?

MS. KIRSCHNER: That's what I was told and my intention would be to move to stay that until the genetic marker petition has been resolved. I didn't want to file the stay until the petition ended up in whichever department it's supposed to be in.

THE COURT: What are we staying?

MS. KIRSCHNER: I'd be moving to stay the petition for writ of habeas corpus until the genetic marker petition has been resolved.

MR. LoGRIPPO: Seems appropriate. We want –

THE COURT: Yeah, sure, --

MR. LoGRIPPO: -- to get the info.

THE COURT: -- I just --

MR. LoGRIPPO: Cart before the horse kind of thing.

THE COURT: Yeah.

MS. KIRSCHNER: Exactly.

THE COURT: Well, Ms. Clerk, are we able to get that petition –

What department is it in?

MS. KIRSCHNER: It's in Department 24. They issued a minute order closing – because it has to be filed now under a civil case number, Department 24 issued a minute order closing the civil case number and saying that the petition should be transferred back to this department under the criminal case number. It then was given administratively a hearing date in Department 24. When I called to ask them about that, they said administratively it is still in the process of being transferred. I don't know what that means.

THE CLERK: Do you have a --

THE COURT: Must be fun being a federal public defender.

THE CLERK: Do you have a case number on the other –

MS. KIRSCHNER: Certainly.

THE CLERK: -- the criminal one? And the civil. Actually, both of them, and then I can enter the --

MS. KIRSCHNER: So the petition for writ of habeas corpus was assigned a civil case number of A-19-797521-W.

THE CLERK: Okay.

MS. KIRSCHNER: And I believe they – the minute order I have says that essentially it should be reopened just under the criminal case number which is 10C265506 and sent back to Department 28. I don't know what it means that administratively that hasn't happened yet, but they told me it was in the works.

THE CLERK: There – there was a minute order that was in June on the A case. And then they set it for a petition your – that or they should have vacated the petition. But that's set for August 15th.

MS. KIRSCHNER: And they said they don't consider that a real date. That was done –

THE CLERK: Okay.

MS. KIRSCHNER: -- by someone –

THE CLERK: Prior.

MS. KIRSCHNER: -- else.

THE CLERK: And that's in Crockett's court. And then the criminal case is closed and the petition is set for August 29th, no that's our, isn't it? Yeah, that's ours. So you gave us the – it's this case.

MS. KIRSCHNER: They were both filed under the original criminal case number, the petition for writ of habeas corpus.

THE CLERK: What was the other case number, though? You

said there was a case in 24?

MS. KIRSCHNER: That was the civil case number.

THE CLERK: Just the civil? Not –

MS. KIRSCHNER: Yes.

THE CLERK: -- criminal. Okay, so that was August 15th.

MS. KIRSCHNER: It got a little confusing once we were told that the petitions for writ of habeas corpus have to be filed and assigned a new civil case number –

THE CLERK: Uh-huh.

MS. KIRSCHNER: -- instead of being filed under the original criminal case number. From what I can tell that's –

THE COURT: Well, we'll keep --

MS. KIRSCHNER: -- created some problems.

THE COURT: -- the case in this department.

THE CLERK: Yes.

THE COURT: And do you want to give her a date.

THE CLERK: Okay. Let's – do you want a week, three weeks?

MS. KIRSCHNER: For the – for which one?

THE CLERK: For the petition for this case.

MS. KIRSCHNER: So for the genetic marker petition and this, I'll be honest, it's the first one of these that I've handled. My understanding is there needs to be 90 days to get an inventory either from Metro or the lab describing where the evidence is and exactly what it is.

THE CLERK: Okay.

MS. KIRSCHNER: The last information I had was an order from the lab from last year saying the DNA extracts and evidence will be retained temporarily by Bode Cellmark until review of the data is completed by Las – excuse, Las Vegas Metropolitan Police Department at which time the evidence and extracts will be returned to Metro.

I don't know whether that means that the lab is still holding or whether anything has been done since then. We have not been able to get that information.

THE COURT: What if I continue to like four months. Does that give you enough time to do what you need to do?

MS. KIRSCHNER: I guess to figure out what exactly –

THE COURT: Yeah.

MS. KIRSCHNER: -- I need to do.

THE COURT: Yeah. And if you need to, you know what, you can put it on earlier in this department just with the notice of motion or notice of hearing.

THE CLERK: Okay. November 25th, 9 a.m.

THE COURT: I know this is confusing because this is brand new as far as the law's concerned –

MS. KIRSCHNER: Yes.

THE COURT: -- as to how we do this stuff.

MR. LoGRIPPO: And a lot of times these petitions will come and they're somewhat general and then the lab needs to say, well, we actually do have swabs, or, hey, actually, we don't. Or this is specifically

what we have these items and then go from there. So that sounds perfect.

THE CLERK: Okay.

THE COURT: That'll be the order. Thank you for your cooperation, Mr. District Attorney and Ms. Federal Public Defender on this because it is confusing.

THE CLERK: And then you –

THE COURT: Just want to make sure we do the right thing on this.

MS. KIRSCHNER: Thank you.

THE CLERK: The civil case still has that date, August 15. You'll probably need to notify Crockett's department.

MS. KIRSCHNER: I will. Last I spoke to them it was maybe a week or so ago and they just said they just couldn't delete a date until the case had been transferred. So –

THE CLERK: Okay.

MS. KIRSCHNER: -- I'm going to stay in touch with them about that and –

THE CLERK: Thank you.

MS. KIRSCHNER: -- see what goes along with that.

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THE CLERK: Okay. And I'll try to work on our end too.

MS. KIRSCHNER: Thank you very much.

[Hearing concluded at 10:12 a.m.]

* * * * * * *

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

Judy Chappell

Judy Chappell
Court Recorder/Transcriber

Electronically Filed
8/5/2019 9:58 AM
Steven D. Grierson
CLERK OF THE COURT

MODR
Rene L. Valladares
Federal Public Defender
Nevada State Bar No. 11479
*C.B. Kirschner
Assistant Federal Public Defender
Nevada State Bar No. 14023C
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
CB_Kirschner@fd.org

*Attorney for Petitioner Tyrone David James, Sr.

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

Tyrone David James, Sr., Petitioner, v. State of Nevada, Respondent.	Case No. 10C265506 Dept. No. 28 Date of Hearing: 11/25/19 Time of Hearing: 9:00 am

MOTION TO PRESERVE AND INVENTORY EVIDENCE, AND PROPOSED ORDER, REGARDING PETITION FOR GENETIC MARKER ANALYSIS PURSUANT TO NRS 176.0918

POINTS AND AUTHORITIES

Petitioner, Tyrone James Sr., submitted a Petition for Genetic Marker Analysis on July 16, 2019. On July 23, 2019, the State filed a response stating that no further response was necessary at this time, and that this Court should make a finding as to who is in possession of the evidence in question and order said agency to preserve the evidence, prepare an inventory of the evidence, and submit a copy of the inventory to all parties within 90 days. This procedure is also set forth in NRS 176.0918(4)(c).

At a hearing on July 29, 2019 this Court (Justice Cherry sitting) continued this matter for 90 days so that the inventory could be prepared. Undersigned counsel represented at that time it was unclear whether the evidence was in possession of the Las Vegas Metropolitan Police Department or of Bode Cellmark Forensics laboratory. In a report dated April 30, 2018 from Bode Cellmark, there is a notation that reads: "The DNA extracts and submitted evidence will be retained temporarily by Bode Cellmark until review of the data is completed by the Las Vegas Metropolitan Police Department, at which time the evidence and extracts will be returned to the Las Vegas Metropolitan Police Department."[1]

Undersigned counsel called both Bode Cellmark and Metro to try to determine which agency currently has possession of the evidence. Counsel was informed by both agencies that said information would not be disclosed to counsel for the defense. Counsel subsequently called and left voicemails for Chief Deputy District Attorney James Sweetin on July 30th and August 1st, inquiring if he would assist in locating the evidence. To date, those calls have not been returned.

An order from this Court is necessary in order to preserve the evidence and obtain the requisite inventory. In order to avoid further unnecessary delay,

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[1] *See* Genetic Marker Petition, Exhibit 1, page 4, note 3.

undersigned counsel is proposing this Court order both agencies to preserve and inventory the evidence. A proposed order is attached to this pleading.

Dated this 5th day of August, 2019.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/ CB Kirschner
C.B. Kirschner
Assistant Federal Public Defender

ORDR
Rene L. Valladares
Federal Public Defender
Nevada State Bar No. 11479
*C.B. Kirschner
Assistant Federal Public Defender
Nevada State Bar No. 14023C
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
CB_Kirschner@fd.org

*Attorney for Petitioner Tyrone David James, Sr.

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

Tyrone David James, Sr., Petitioner, v. State of Nevada, Respondent.	Case No. 10C265506 Dept. No. 28 Date of Hearing: 11/25/19 Time of Hearing: 9:00 am

ORDER ON PETITION FOR GENETIC MARKER ANALYSIS PURSUANT TO NRS 176.0918

Petitioner, Tyrone James Sr., submitted a Petition for Genetic Marker Analysis on July 16, 2019. It appears that physical evidence, swabs from a sexual assault exam, may be in possession of the Las Vegas Metropolitan Police Department or Bode Cellmark Forensics laboratory under LVMPD Lab #: 15-12146; Case: 100514-2100 (alternatively, incorrectly listed as 100514-2011); and/or Bode Cellmark Case #: NVK1717-2761.

Pursuant to NRS 176.0918(4)(c), this Court hereby orders:

1. The Las Vegas Metropolitan Police Department and Bode Cellmark Forensics laboratory to preserve all evidence relating to Mr. James and the above-referenced identification numbers that is within their possession or custody and may be subject to genetic marker analysis, including but not limited to swabs from the sexual assault examination (aka rape kit).
2. Within 90 days, the Las Vegas Metropolitan Police Department and Bode Cellmark Forensics laboratory must prepare an inventory of all evidence that is relevant to the claims in the petition, that is within the possession or control of said agency, and that may be subject to genetic marker analysis.
3. Within 90 days, the Las Vegas Metropolitan Police Department and Bode Cellmark Forensics laboratory shall submit a copy of the inventory to the Petitioner, Tyrone James, via counsel—C.B. Kirschner of the Federal Public Defender's Office, the prosecuting attorney—James Sweetin of the Clark County District Attorneys' Office, and this Court.

Dated this _____ of _____, 2019.

_____
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on August 5th, 2019, I electronically filed the foregoing with the Clerk of the Eighth Judicial District Court by using the Court's electronic filing system.

Participants in the case who are registered users in the electronic filing system will be served by the system and include: James Sweetin, Motions@clarkcountyda.com.

I further certify that some of the participants in the case are not registered electronic filing system users. I have mailed the foregoing document by First-Class Mail, potage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three calendars days, to the following person:

Tyrone David James Sr.
No. 1063523
High Desert State Prison
PO Box 650
Indian Springs, NV 89018

Geordan Goebel
Deputy Attorney General
100 North Carson Street
Carson City, NV 89701

/s/ Adam Dunn
An Employee of the Federal Public Defender, District of Nevada

Electronically Filed
8/6/2019 8:06 AM
Steven D. Grierson
CLERK OF THE COURT

RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JAMES R. SWEETIN
Chief Deputy District Attorney
Nevada Bar #005144
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: **A-19-797521-W**
10C265506

DEPT NO: **XXVIII**

STATE'S RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) and STATE'S MOTION TO DISMISS

DATE OF HEARING: **AUGUST 15, 2019**
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 this State's Response to Defendant's Post-Conviction Petition for Writ of Habeas Corpus (Post-Conviction) and support of the State's Motion to Dismiss.

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.

//

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On June 23, 2010, Defendant Tyrone D. 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, 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 in open court. This Court conducted a Petrocelli hearing regarding the State's bad acts motion. Ultimately, the Court granted both the State's bad acts motion and 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. This 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 issued on November 26, 2012.

On March 14, 2013, Defendant filed a post-conviction Petition for Writ of Habeas Corpus ("First Petition") and Motion to Appoint Counsel. The State filed its Response on May 7, 2013. On May 20, 2013, Robert Langford Esq., was appointed as post-conviction counsel. On September 4, 2015, Defendant filed a Supplemental Petition for Post-Conviction Writ of Habeas Corpus ("Supplement to First Petition"). On January 15, 2016, Defendant filed another Supplement to Supplemental Petition for Writ of Habeas Corpus ("Second Supplement to First Petition"). On April 21, 2016, the State filed its Response to both Supplements. On October 3, 2016, this Court held an evidentiary hearing and heard sworn testimony from Bryan Cox, Esq., and Dr. Joyce Adams. On November 8, 2016, this Court entered its Findings of Fact, Conclusions of Law, and Order, denying the First Petition. On December 8, 2016, James filed a Notice of Appeal. The Nevada Court of Appeals affirmed the denial on November 14, 2017. Remittitur issued December 29, 2017.

Defendant filed a Post-Conviction Petition Requesting A Genetic Marker Analysis Of Evidence Within The Possession Or Custody Of The State Of Nevada (NRS 176.0918) on July 16, 2019. The State filed its Response on July 23, 2019. This Court heard the matter on July 29, 2019, but continued it to be heard alongside the instant filing.

Defendant submitted the instant Petition For Writ of Habeas Corpus (Post-Conviction) ("Second Petition") on June 27, 2019.

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ARGUMENT

I. DEFENDANT'S SECOND PETITION IS PROCEDURALLY BARRED AND MUST BE DENIED

The mandatory procedural bars apply to all five of Defendant's claims.

A. This Second Petition is time-barred.

Pursuant to NRS 34.726(1):

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year of the entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
>
> (a) That the delay is not the fault of the petitioner; and
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> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

The Supreme Court of Nevada has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873–74, 34 P.3d 519, 528 (2001). The one-year time bar proscribed by NRS 34.726 begins to run from the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133–34 (1998).

The one-year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the Notice within the one-year time limit.

Furthermore, the Nevada Supreme Court has held that the District Court has a duty to consider whether a defendant's post-conviction petition claims are procedurally barred. State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court found that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is *mandatory*," noting:

> Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.

Id. (emphasis added).

Additionally, the Court noted that procedural bars "cannot be ignored [by the District Court] when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court has granted no discretion to the District Courts regarding whether to apply the statutory procedural bars; the rules must be applied.

Here, the Judgment of Conviction ("JOC") was filed August 8, 2007. Remittitur from the direct appeal issued February 9, 2011. Thus, the one-year time bar began to run from the date of Remittitur. The instant Second Petition was not filed until June 27, 2019. This is over eight (8) years after Remittitur issued—far in excess of the one-year time frame. Defendant does not deny that it is untimely. Second Petition at 11. Absent a showing of good cause for this delay and undue prejudice to Defendant, this Second Petition must be denied as untimely.

B. This Second Petition is barred as successive.

NRS 34.810(2) reads:

> A second or successive petition *must be dismissed* if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

(emphasis added).

Second or successive petitions are petitions that either fail to allege new or different grounds for relief and the grounds have already been decided on the merits or that allege new or different grounds but a judge or justice finds that the petitioner's failure to assert those grounds in a prior petition would constitute an abuse of the writ. Second or successive petitions will only be decided on the merits if the petitioner can show good cause and prejudice. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994); see also Hart v. State, 116 Nev. 558, 563–64, 1 P.3d 969, 972 (2000) (holding that "where a defendant previously has sought relief from the judgment, the defendant's failure to identify all grounds

for relief in the first instance should weigh against consideration of the successive motion.")

The Nevada Supreme Court has stated: "Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at 950. The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497–98 (1991). Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

Here, as discussed *supra*, this is Petitioner's Second Petition. Petitioner does not deny that it is successive. Second Petition at 3–6. It raises only new and different grounds that could and should have been raised at an earlier, appropriate time. NRS 34.810(2). Accordingly, this Second Petition is an abuse of the writ, procedurally barred, and must be denied.

C. The state affirmatively pleads laches.

Certain limitations exist on how long a defendant may wait to assert a post-conviction request for relief. Consideration of the equitable doctrine of laches is necessary in determining whether a defendant has shown 'manifest injustice' that would permit a modification of a sentence. Hart, 116 Nev. at 563–64, 1 P.3d at 972. In Hart, the Nevada Supreme Court stated: "Application of the doctrine to an individual case may require consideration of several factors, including: (1) whether there was an inexcusable delay in seeking relief; (2) whether an implied waiver has arisen from the defendant's knowing acquiescence in existing conditions; and (3) whether circumstances exist that prejudice the State. See Buckholt v. District Court, 94 Nev. 631, 633, 584 P.2d 672, 673–74 (1978)." Id.

NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period exceeding five years [elapses] between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of

conviction and the filing of a petition challenging the validity of a judgment of conviction…" The Nevada Supreme Court has observed, "[P]etitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final." Groesbeck v. Warden, 100 Nev. 259, 679 P.2d 1268 (1984). To invoke the presumption, the statute requires the State plead laches. NRS 34.800(2).

Here, the State affirmatively pleads laches. As discussed supra, it has been almost twelve (12) years since the JOC issued and over eight (8) years since Remittitur issued in Petitioner's direct appeal—well past the five-year period for the presumption of prejudice. Thus, laches bars consideration of this Second Petition.

II. DEFENDANT HAS NOT ESTABLISHED GOOD CAUSE OR PREJUDICE TO OVERCOME THE MANDATORY PROCEDURAL BARS

A showing of good cause and prejudice may overcome procedural bars. "To establish good cause, appellants must show that an impediment external to the defense prevented their compliance with the applicable procedural rule. A qualifying impediment might be shown where the factual or legal basis for a claim *was not reasonably available at the time of default*." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The Court continued, "appellants cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526. Rather, to find good cause, there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

A petitioner raising good cause to excuse procedural bars must do so within a reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506-07 (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good

cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446, 453 120 S. Ct. 1587, 1592 (2000).

Further, to establish prejudice, the defendant must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)).

Defendant claims he can show good cause in the form of "new evidence" that he alleges supports his actual innocence and *Brady* claims. Second Petition at 11. However, as discussed *infra*, these claims are meritless. Further, because his substantive claims are meritless, Defendant cannot demonstrate prejudice.

A. There was no ineffective assistance of counsel.

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64. See also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant

makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "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, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). 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).

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). This analysis does not mean that the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784

P.2d 951, 953 (1989). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

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." Id. (citing Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064–65, 2068).

The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore, claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part, "[Petitioner] *must* allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed." (emphasis added).

Here, Defendant alleges his counsel was ineffective for not testing the DNA from the rape kit of the victim, T.H. Second Petition at 15. As an initial matter, any claim that trial counsel should have had the DNA tested has been available for years and so is itself time-barred; accordingly, it cannot provide good cause to overcome the procedural bars. Riker, 121 Nev. at 235, 112 P.3d at 1077. Regardless, the claims of ineffectiveness are without merit.

Defendant argues trial counsel did not know there had been DNA collected from the victim's rape kit. Second Petition at 10. However, this is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. In fact, Detective Daniel Tomaino testified at trial that a rape kit

had been collected. Transcript, Jury Trial ("JTT") Day 1, at 252–53. Defense counsel actually cross-examined Det. Tomaino regarding the rape kit. Id. at 267–68, 276. Dr. Theresa Vergara also testified as to the details of the sexual assault examination, including the swabs of the victim's genitalia collected as part of the rape kit. JTT, Day 2 at 150, 154–58. Indeed, as the First Petition made clear, previous counsel—including trial counsel and post-conviction counsel—actually knew Defendant's DNA was *not* found on the victim. See Supplement to First Petition, September 4, 2015, at 5–6; JTT, Day 1 at 276–77.

It was not an objectively unreasonable strategy to refrain from having the DNA tested. First, given that Defendant consistently maintained his innocence, had a test revealed that Defendant was lying, his defense would have been severely undermined. This strategic call cannot be evaluated through the benefit of hindsight, knowing that there is now a potential CODIS hit regarding T.H.'s rape kit. Counsel could not have known there was no match to Defendant unless and until such a test were completed, and the potential risk of having such a test was high. Moreover, Defendant invoked his right to a speedy trial. Recorder's Transcript of Hearing RE: Arraignment, June 24, 2010, at 2. Several weeks after this invocation, Defendant acknowledged on the record that he knew his counsel had just received new evidence but insisted that he still did not want to waive his right to a speedy trial. Court Minutes, August 12, 2010. Accordingly, the fact that there was likely no time for a DNA test was of his own choosing and cannot be attributed to counsel. Given the factors counsel was working with, this Court should not second-guess counsel's strategy not to pursue further DNA investigations. Donovan, 94 Nev. at 675, 584 P.2d at 711.

B. Defendant cannot establish actual innocence.

As an initial matter, actual innocence is not a freestanding claim. It is a method by which the mandatory time-bars may be excused if the "new evidence" at issue is both material and exculpatory. The United States Supreme Court has held for over a quarter-century that actual innocence is not "itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Herrera v. Collins, 506 U.S. 390, 404, 113 S. Ct. 853, 862 (1993). More recently,

the Court has noted that it has not "resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence." McQuiggin v. Perkins, 569 U.S. 383, 392, 133 S.Ct. 1924, 1931 (2013). The Nevada Supreme Court, too, "has yet to address whether and, if so, when a free-standing actual innocence claim exists." Berry v. State, 131 Nev. Adv. Op. 96, 363 P.3d 1148, 1154 (2015)

Regardless, in order for a defendant to obtain a reversal of his conviction based on a claim of actual innocence, both the United States and Nevada Supreme Courts place the burden on the defendant to show "'it is more likely than not that *no* reasonable juror would have convicted him in light of the new evidence' presented in habeas proceedings." Calderon v. Thompson, 523 U.S. 538, 560, 118 S. Ct. 1489, 1503 (1998) (emphasis added) (quoting Schlup v. Delo, 513 U.S. 298, 315, 115 S. Ct. 851, 861, 130 L. Ed. 2d 808 (1995)); see also Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). It is true that "the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial." Schlup, 513 U.S. at 330, 115 S. Ct. at 868. However, this requires "a stronger showing than that needed to establish prejudice." Id. at 327, 115 S. Ct. at 867.

Newly presented evidence must be "reliable," whether "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." House v. Bell, 547 U.S. 518, 537 (2006) (quoting Schlup, 513 U.S. at 324, 115 S.Ct. at 865.) The U.S. Supreme Court has narrowly interpreted reliability of scientific evidence, specifically noting that "DNA testing alone does not always resolve a case. Where there is enough other incriminating evidence and an explanation for the DNA result, science alone cannot prove a prisoner innocent." Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 62, 129 S. Ct. 2308, 2316 (2009) (citing Bell, 547 U.S. at 540–548, 126 S.Ct. at 2064).

Defendant alleges the CODIS hit suggesting that another man's DNA was found in the victim's rape kit is new evidence of his actual innocence. Second Petition at 16. However, Defendant cannot prove that no reasonable juror would have convicted him in light of this information for two reasons. First, it is not reliable, "exculpatory scientific evidence." Schlup, 513 U.S. at 324, 330, 115 S.Ct. at 865, 868. The "CODIS Hit Notification Report" specifically

notes that a buccal swab from the individual potentially identified as a match must be obtained "in order to *confirm* this hit." Defendant's Exhibit 3 at 2 (emphasis added). That is, this is not a conclusive match: "further action" is required. Id. at 5. Defendant has not argued that he has obtained this further testing. Accordingly, the CODIS hit itself is not reliable exculpatory evidence.

Second, even assuming it is true that another man's sperm was found on the victim, that alone cannot prove Defendant innocent. Osborne, 557 U.S. at 62, 129 S. Ct. at 2316. There was overwhelming incriminating evidence and an explanation for the presence of any other DNA. Id. This was not an identity case. T.H. was sexually assaulted by a person she had known for at least a year, as Defendant was dating the victim's mother. Order of Affirmance, October 31, 2012, at 1.; JTT Day 2, at 4, 8–11. Defendant assaulted T.H. in her own home and drove her to school afterward. Accordingly, identity was not—and would not need to be—established through DNA. As the Nevada Supreme Court found, "T.H.'s testimony was consistent and [] the State presented sufficient evidence from which a rational tier of fact could have found guilt beyond a reasonable doubt." Order of Affirmance, October 31, 2012, at 1. Further, any other sexual activity of the victim that could have explained the presence of another man's sperm would have been barred via rape shield, as was in fact the case; the Nevada Supreme Court found that evidence of T.H.'s sexual history was properly excluded. Order of Affirmance, October 31, 2012, at 7–8. Finally, Defendant was alleged to have sexually assaulted another quasi-step-daughter. That victim actually testified in this case. Her testimony was admissible under NRS 48.045(2) because as the Nevada Supreme Court held, it showed that Defendant had a motive and opportunity, as well as a common plan, to perpetrate sexual crimes against the teenage daughters of women he dated. Order of Affirmance, October 31, 2012, at 3.

Defendant has not shown actual innocence and therefore cannot overcome the threshold of the procedural bars.

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C. There was no Brady violation.

Due process obliges a prosecutor to reveal evidence favorable to the defense before trial when that evidence is material to guilt, punishment, or impeachment. Brady v. Maryland, 373 U.S. 83 (1963); Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000). There are three components to a successful Brady claim: "the evidence at issue is favorable to the accused; the evidence was withheld by the state, either intentionally or inadvertently; and prejudice ensued, *i.e.*, the evidence was material." Mazzan, 116 Nev. at 67, 993 P.2d at 37.

Evidence cannot be regarded as "suppressed" by the government when the defendant has access to the evidence before trial by the exercise of reasonable diligence. United States v. White, 970 F.2d 328, 337 (7th Cir. 1992); see also United States v. Brown, 628 F.2d 471, 473 (5th Cir. 1980). Brady "does not place any burden upon the [g]overnment to conduct a defendant's investigation or assist in the presentation of the defense's case." United States v. Marinero, 904 F.2d 251, 261 (5th Cir. 1990); accord United States v. Pandozzi, 878 F.2d 1526, 1529 (1st Cir. 1989); United States v. Meros, 866 F.2d 1304, 1309 (11th Cir. 1989). Nevada follows the federal line of cases in holding that Brady does not require the State to disclose evidence which was available to the defendant from other sources, including diligent investigation by the defense. Steese v. State, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998).

In the post-conviction context of determining whether a Brady claim can overcome the procedural bars, the Nevada Supreme Court has held that "proving that the State withheld the evidence generally establishes cause, and proving that the withheld evidence was material establishes prejudice." State v. Bennett, 119 Nev. 589, 81 P.3d 1, 8 (2003).

However, the United States Supreme Court has held that a convicted defendant's "right to due process is not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief." Osborne, 557 U.S. at 68–69, 129 S. Ct. at 2320. The Court held that "Brady is the wrong framework" when examining a due process right to evidence post-conviction. Id. In other words, Brady's due process right to material evidence is incident to a defendant's trial. Once the trial is over and a defendant has been fairly convicted, that right expires. Id. Thus,

the Court held that "[i]nstead, the question is whether consideration of [a convicted defendant's] claim within the framework of the State's procedures for postconviction relief offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, or transgresses any recognized principle of fundamental fairness in operation." Id. (internal quotations omitted).

Here, Defendant claims the State violated Brady by "h[olding] onto the rape kit" and "doing nothing with it for [seven] years." Second Petition at 16–17. However, as the United States Supreme Court explained a decade ago, "Brady is the wrong framework" in examining any information generated after a defendant has already been convicted. Osborne, 557 U.S. at 68–69, 129 S. Ct. at 2320. Accordingly, Defendant had no rights under Brady to the "new evidence" at issue here—the DNA report generated years after Defendant's conviction.

Regardless, Defendant has not established a Brady violation. First, as discussed *supra*, the CODIS hit is not favorable to Defendant because there was sufficient independent evidence that Defendant sexually assaulted T.H. Mazzan, 116 Nev. at 67, 993 P.2d at 37. Whether there were other sources of male DNA found on her person is irrelevant, given her firm identification of Defendant and her consistent account of the assault. See Order of Affirmance, October 31, 2012, at 1. Second, the CODIS hit was not withheld. As Defendant admits, when the State received the CODIS hit, it turned this information over to the Attorney General's Office, which then turned it over to Defendant. Second Petition at 17–18. Moreover, the existence of the rape kit itself was disclosed well before trial—and trial counsel even cross-examined witnesses about it. JTT Day 1 at 267–68, 276; JTT Day 2 at 150, 154–57. Had the defense wished to test the swabs collected in the rape kit, it could have done its due diligence and obtained its own testing. See Steese, 114 Nev. at 495, 960 P.2d at 331.

Third and finally, there was no prejudice—that is, the evidence was not "material." Mazzan, 116 Nev. at 67, 993 P.2d at 37. As discussed *supra*, defense counsel elicited testimony at trial that Defendant's DNA had not been found on the victim. JTT Day 2 at 276–77. He would not have been permitted to elicit evidence of the victim's other sexual activity pursuant to Nevada's rape shield statute, as the Nevada Supreme Court noted when it denied

Defendant's direct appeal. See Order of Affirmance at 7–8. The fact that the CODIS hit was from a sperm fragment is also significant in explaining why this evidence would never have been material. T.H. consistently recounted the sexual assaults, stating that Defendant first sexually assaulted her with his fingers, while wearing rubber gloves, and that he then used his penis to rub her vulva; either way, he did not ejaculate. See Declaration of Arrest at 1–2; JTT, Day 2, at 4, 21–26. According to T.H., herself, any sperm found on the victim would not have been Appellant's. That is, had this evidence been presented at trial, it would have supported T.H.'s testimony rather than challenge its credibility.

Defendant had no Brady right to the CODIS hit, given that he was convicted in 2010 and the CODIS hit was generated in 2018. Second Petition at 13. Regardless, Defendant has not established a Brady violation because this "new evidence" was neither favorable to the accused, nor withheld, nor material. This claim is insufficient to overcome the procedural bars.

D. There was no prosecutorial misconduct.

The Nevada Supreme Court employs a two-step analysis when considering claims of prosecutorial misconduct. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). First, the Court determines if the conduct was improper. Id. Second, the Court determines whether misconduct warrants reversal. Id. As to the first factor, argument is not misconduct unless "the remarks … were 'patently prejudicial.'" Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (quoting, Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993)). With respect to the second step, the Nevada Supreme Court will not reverse if the misconduct was harmless error, which depends on whether it was of constitutional dimension. Valdez, 124 Nev. at 1188, 196 P.3d at 476. Error of a constitutional dimension requires impermissible comment on the exercise of a specific constitutional right, or if in light of the proceedings as a whole, the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. at 1189, 196 P.3d at 477. If the error is not of a constitutional dimension, the Court will reverse only if the error substantially affected the jury's verdict. Id. In determining prejudice, a court considers whether a comment had: 1) a prejudicial impact on the verdict when considered in the context of the trial as a whole; or 2)

seriously affects the integrity or public reputation of the judicial proceedings. Rose, 123 Nev. at 208–09, 163 P.3d at 418.

Here, Defendant alleges "ongoing prosecutorial misconduct" in that the State did not test T.H.'s rape kit for seven years, did not receive the CODIS hit for another year, and has not tested two of the swabs from the rape kit. Second Petition at 17–18. However, Defendant has cited absolutely no authority supporting his assertions.

First, the State's actions with regard to the rape kit were not improper. Valdez, 124 Nev. at 1188, 196 P.3d at 476. The State is under no duty to continue to test rape kits after conviction. Even when it did receive the CODIS hit, there was no specific obligation. The duty to provide exculpatory evidence does not extend to information generated after conviction. Osborne, 557 U.S. at 68–69, 129 S. Ct. at 2320. Further, the law "does not require the State to disclose evidence which is available to the defendant from other sources, including diligent investigation by the defense." Steese, 114 Nev. at 495, 960 P.2d at 331 (1998). Indeed, as discussed *supra*, the defense could have had the rape kit independently tested, as it was aware of its existence.

Second, there has been no conduct warranting reversal. Valdez, 124 Nev. at 1188, 196 P.3d at 476. Even assuming there was a duty to turn over a CODIS hit generated years after a sexual assault conviction, Defendant admits that the District Attorney's Office provided the information to the Attorney General's Office, which then passed the information along to Defendant. Second Petition at 17–18. The State in no way concealed this information. And Defendant has failed to establish there was any undue delay in the handling of this information, let alone provided any precedent supporting an argument for undue delay. Moreover, as discussed above, Defendant cannot demonstrate actual innocence necessary to overcome the procedural bars even now that he possesses this information. Accordingly, the length of time it took the information to reach Defendant is irrelevant.

Not only could Defendant have had T.H.'s rape kit tested at any time, the State had no duty to test evidence in a case where there the jury had already found Defendant guilty and where his conviction had already been affirmed by the Nevada Supreme Court. And yet, the

State did in fact reveal the existence of the CODIS hit as soon as it received that information, which was then disclosed to Defendant. Defendant's claim of "prosecutorial misconduct" fails.

E. There was no Confrontation Clause issue.

Defendant claims a Confrontation Clause in that he was not allowed to confront T.H. with the information from the CODIS hit. Second Petition at 18. However, this claim—as well as the Brady and prosecutorial misconduct claims—should be considered waived.

NRS 34.810(1) reads:

> The court shall dismiss a petition if the court determines that:
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> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel.
>
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
>
> . . .
>
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief.
>
> unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner.

The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings.... [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646–47, 29 P.3d 498, 523 (2001).

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Because Defendant's Confrontation Clause claim does not challenge the validity of a guilty plea nor allege ineffective assistance of counsel, the claim should have been pursued on a direct appeal. NRS 34.810(1); Franklin, 110 Nev. at 752, 877 P.2d at 1059. As discussed *supra*, Defendant could have had the victim's rape kit independently tested at an appropriate time. Had he wished to confront the victim with the resulting information, he could have attempted to do so at trial; or, at least, he could have challenged the trial court's suppression of the evidence on direct appeal. Accordingly, Defendant cannot demonstrate good cause or prejudice for not bringing this claim at an appropriate time and raising it for the first time only in these habeas proceedings. It is thus waived and must be summarily dismissed. Id.

Nonetheless, it was in a similar context that the Nevada Supreme Court held that the victim's prior sexual activity was properly excluded at trial. Order of Affirmance, filed October 31, 2012, at 7. Indeed, the Court held that Defendant's rights under the Confrontation Clause were not violated when he was not permitted to examine T.H. about her sexual history. Id. For similar reasons, Defendant would not have been permitted to confront T.H. with evidence from the CODIS hit. Thus, this claim is without merit and does not constitute either good cause or prejudice for overcoming the mandatory procedural bars.

CONCLUSION

Based on the foregoing, the State respectfully requests this Second Petition and any related filings be DENIED in their entirety.

DATED this 5th day of August, 2019.

Respectfully submitted,

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

BY /s/ JAMES R. SWEETIN
JAMES R. SWEETIN
Chief Deputy District Attorney
Nevada Bar #005144

CERTIFICATE OF SERVICE

I hereby certify that service of the above and foregoing was made this 5th day of AUGUST, 2019, to:

C.B. KIRSCHNER, FPD
CB_Kirschner@fd.org

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

hjc/SVU

Electronically Filed
8/8/2019 10:47 AM
Steven D. Grierson
CLERK OF THE COURT

MSTY
Rene L. Valladares
Federal Public Defender
Nevada State Bar No. 11479
*C.B. Kirschner
Assistant Federal Public Defender
Nevada State Bar No. 14023C
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
CB_Kirschner@fd.org

*Attorney for Petitioner Tyrone David James, Sr.

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

Tyrone David James, Sr., Petitioner, v. Brian Williams, Warden, and the Attorney General for the State of Nevada, et al., Respondents.	Case No. A-19-797521-W 10C265506 Dept. No. 28 Date of Hearing: 8/19/19 Time of Hearing: 9:00 am

MOTION FOR STAY OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

Case Number: 10C265506

ARGUMENT

In 2011, Tyrone James was convicted of sexual assault and sentenced to 25 years to life. No DNA evidence was presented during the trial. Indeed, we now know, the swabs from the sexual assault exam were not submitted to a lab for analysis until 2017. In 2019, counsel for James was notified by the Attorney General's Office about a CODIS hit linking another man to the sexual assault. The CODIS report was dated June 28, 2018, although counsel wasn't notified about it until February 21, 2019. Nevertheless, to avoid any possible time-bar, James, through counsel, filed a new Petition for Writ of Habeas Corpus (Post-Conviction) on June 27, 2019, within one-year of the CODIS hit. The Petition alleged a number of errors associated with the new DNA evidence. As per the current rules, that petition was given a new civil case number of A-19-797521-W, and was assigned to Department 24. On June 28, 2019, a hearing notice was automatically generated, setting a hearing in Department 24 for August 15, 2019. However, that same day, Department 24 also issued a Minute Order transferring the Petition to Department 28 under the original criminal case number 10C265506.

Shortly thereafter, James, through counsel, filed a Post-Conviction Petition for Genetic Marker Analysis on July 16, 2019. Because the CODIS hit was only a preliminary match, this Petition seeks definitive testing to both confirm the match and exclude James as a contributor. Again, per the rules, this Petition was filed under the original criminal case number of 10C265506, and was assigned to Department 28. A few days later, the State filed a Response asserting that no further response was necessary until the Court made a finding as to who had possession of the evidence and ordered it preserved and inventoried.[1] A hearing on this Petition was held on July 29, 2019, and undersigned counsel appeared on behalf of James. Frank LoGrippo was present on behalf of the State.

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[1] *See* Response filed 7/23/19 at page 4.

At the hearing on July 29, 2019, undersigned counsel informed the Court (Justice Cherry sitting in Department 28) and the State about the pending Petition for Writ of Habeas Corpus (PWHC), which was still in the process of being transferred from Department 24 to Department 28.[2] Counsel stated she would be moving to stay the PWHC until the present Petition for Genetic Marker Analysis had been resolved. ADA LoGrippo agreed that a stay would be appropriate.

At that hearing, undersigned counsel further requested a 90-day date so that the evidence could be inventoried, pursuant to NRS 176.0918. However, counsel pointed out that it was unclear whether the evidence was currently with the Las Vegas Metropolitan Police Department or Bode Cellmark Forensics laboratory. The Court reset the matter for November 25, 2019 so that an inventory could be obtained. Counsel has since attempted to confirm which agency has possession of the evidence, but without success. Consequently, counsel has submitted an order to the Court requesting both agencies be directed to preserve and inventory the evidence, and provide said inventory to all parties within 90 days (in advance of the November 25, 2019 court date).

The State has recently moved to dismiss the PWHC alleging, among other things, that the CODIS hit has yet to be confirmed.[3] In the Genetic Marker Petition, James seeks to do just that. Undoubtedly, the outcome of the Genetic Marker Analysis will impact the issues raised in the PWHC and continued litigation of the PWHC is premature in light of the Genetic Marker Petition. However, if James waited to file the PWHC until after the Genetic Marker Petition was heard, he risked the PWHC being deemed untimely. Therefore, James is requesting the PWHC and pending Motion to Dismiss be stayed until the Genetic Marker Petition has been resolved. Staying this case would promote judicial economy, conserve the resources of counsel for both parties, and further the public interest in the fair administration of justice.

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[2] The PWHC was finally transferred to Department 28 on August 7, 2019.

[3] *See* Response filed 8/6/19 at 12-13.

CONCLUSION

For these reasons, Mr. James respectfully requests this Court order the Petition for Writ of Habeas Corpus and State's Motion to Dismiss stayed until the Petition for Genetic Marker Analysis has been fully resolved.

Dated this 8th day of August, 2019.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/ CB Kirschner
C.B. Kirschner
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2019, I electronically filed the foregoing with the Clerk of the Eighth Judicial District Court by using the Court's electronic filing system.

Participants in the case who are registered users in the electronic filing system will be served by the system and include: James Sweetin, james.sweetin@clarkcountyda.com , Motions@clarkcountyda.com.

I further certify that some of the participants in the case are not registered electronic filing system users. I have mailed the foregoing document by First-Class Mail, potage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three calendars days, to the following person:

Tyrone David James Sr.
No. 1063523
High Desert State Prison
PO Box 650
Indian Springs, NV 89018

Geordan Goebel
Deputy Attorney General
100 North Carson Street
Carson City, NV 89701

/s/ Adam Dunn
An Employee of the Federal Public Defender, District of Nevada

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8/8/2019 3:34 PM
Steven D. Grierson
CLERK OF THE COURT

ORDR
Rene L. Valladares
Federal Public Defender
Nevada State Bar No. 11479
*C.B. Kirschner
Assistant Federal Public Defender
Nevada State Bar No. 14023C
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
CB_Kirschner@fd.org

*Attorney for Petitioner Tyrone David James, Sr.

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

Tyrone David James, Sr., Petitioner, v. State of Nevada, Respondent.	Case No. 10C265506 Dept. No. 28 Date of Hearing: 11/25/19 (Future) Time of Hearing: 9:00 am

ORDER ON PETITION FOR GENETIC MARKER ANALYSIS PURSUANT TO NRS 176.0918

Petitioner, Tyrone James Sr., submitted a Petition for Genetic Marker Analysis on July 16, 2019. It appears that physical evidence, swabs from a sexual assault exam, may be in possession of the Las Vegas Metropolitan Police Department or Bode Cellmark Forensics laboratory under LVMPD Lab #: 15-12146; Case: 100514-2100 (alternatively, incorrectly listed as 100514-2011); and/or Bode Cellmark Case #: NVK1717-2761.

Pursuant to NRS 176.0918(4)(c), this Court hereby orders:

1. The Las Vegas Metropolitan Police Department and Bode Cellmark Forensics laboratory to preserve all evidence relating to Mr. James and the above-referenced identification numbers that is within their possession or custody and may be subject to genetic marker analysis, including but not limited to swabs from the sexual assault examination (aka rape kit).
2. Within 90 days, the Las Vegas Metropolitan Police Department and Bode Cellmark Forensics laboratory must prepare an inventory of all evidence that is relevant to the claims in the petition, that is within the possession or control of said agency, and that may be subject to genetic marker analysis.
3. Within 90 days, the Las Vegas Metropolitan Police Department and Bode Cellmark Forensics laboratory shall submit a copy of the inventory to the Petitioner, Tyrone James, via counsel—C.B. Kirschner of the Federal Public Defender's Office, the prosecuting attorney—James Sweetin of the Clark County District Attorneys' Office, and this Court.

Dated this 8 of Aug, 2019.

Ronald J. Israel

District Court Judge

RONALD J. ISRAEL

10C265506

CERTIFICATE OF SERVICE

I hereby certify that on August 5th, 2019, I electronically filed the foregoing with the Clerk of the Eighth Judicial District Court by using the Court's electronic filing system.

Participants in the case who are registered users in the electronic filing system will be served by the system and include: James Sweetin, Motions@clarkcountyda.com.

I further certify that some of the participants in the case are not registered electronic filing system users. I have mailed the foregoing document by First-Class Mail, potage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three calendars days, to the following person:

Tyrone David James Sr.
No. 1063523
High Desert State Prison
PO Box 650
Indian Springs, NV 89018

Geordan Goebel
Deputy Attorney General
100 North Carson Street
Carson City, NV 89701

/s/ Adam Dunn
An Employee of the Federal Public Defender, District of Nevada

A-19-797521-W Tyrone James, Sr., Plaintiff(s)
vs.
Brian Williams, Defendant(s)

August 19, 2019 09:00 AM All Pending Motions (08//19/19)

HEARD BY: Israel, Ronald J. COURTROOM: RJC Courtroom 15C

COURT CLERK: Thomas, Kathy

RECORDER: Chappell, Judy

REPORTER:

PARTIES PRESENT:

Courtney Kirschner **Attorney for Plaintiff**

James R Sweetin **Attorney for Defendant**

JOURNAL ENTRIES

PETITION FOR WRIT OF HABEAS CORPUS...STATE'S RESPONSE TO DEFENDANT'S POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AND SUPPORT OF THE STATE'S MOTION TO DISMISS

Petitioner/Deft. TYRONE not present, in the Nevada Department of Correction (NDC). Upon Court's inquiry of Deft's request for a stay, State objected to a stay and did not see the request for a stay. State further noted this was time barred and the evidence they are seeking is not relevant to this case. Ms. Kirschner noted they were asking for different testing and this was previously continued because it was pre-mature. COURT ORDERED, Briefing schedule; State's opposition by 09/11/19, Deft's reply by 09/18/19 and Hearing SET.

NDC- (C265506)

09/25/19 9:00 AM PETITION FOR WRIT OF HABEAS CORPUS...STATE'S RESPONSE TO DEFENDANT'S POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AND SUPPORT OF THE STATE'S MOTION TO DISMISS

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9/4/2019 9:29 AM
Steven D. Grierson
CLERK OF THE COURT

RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JAMES R. SWEETIN
Chief Deputy District Attorney
Nevada Bar #005144
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: **A-19-797521-W**
10C265506

DEPT NO: **XXVIII**

STATE'S RESPONSE TO DEFENDANT'S MOTION FOR STAY OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: **SEPTEMBER 25, 2019**
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 this State's Response to Defendant's Motion for Stay of Post-Conviction Petition for Writ of Habeas Corpus (Post-Conviction).

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, Defendant Tyrone D. 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, 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 in open court. This Court conducted a Petrocelli hearing regarding the State's bad acts motion. Ultimately, the Court granted both the State's bad acts motion and 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. This 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.

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On March 7, 2011, Defendant 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, Defendant filed a post-conviction Petition for Writ of Habeas Corpus ("First Petition") and Motion to Appoint Counsel. The State filed its Response on May 7, 2013. On May 20, 2013, Robert Langford Esq., was appointed as post-conviction counsel. On September 4, 2015, Defendant filed a Supplemental Petition for Post-Conviction Writ of Habeas Corpus ("Supplement to First Petition"). On January 15, 2016, Defendant filed another Supplement to Supplemental Petition for Writ of Habeas Corpus ("Second Supplement to First Petition"). On April 21, 2016, the State filed its Response to both Supplements. On October 3, 2016, this Court held an evidentiary hearing and heard sworn testimony from Bryan Cox, Esq., and Dr. Joyce Adams. On November 8, 2016, this Court entered its Findings of Fact, Conclusions of Law, and Order, denying the First Petition. On December 8, 2016, Defendant filed a Notice of Appeal. The Nevada Court of Appeals affirmed the denial on November 14, 2017. Remittitur issued December 29, 2017.

Defendant filed another Petition For Writ of Habeas Corpus (Post-Conviction) ("Second Petition") on June 27, 2019. Defendant then filed a Post-Conviction Petition Requesting A Genetic Marker Analysis of Evidence Within the Possession or Custody of the State of Nevada (NRS 176.0918) ("Genetic Marker Petition") on July 16, 2019. The State filed its Response to the Genetic Marker Petition on July 23, 2019. This Court heard the Genetic Marker Petition on July 29, 2019, but continued it. The State filed its Response to the Second Petition on August 6, 2019. On August 8, 2019, this Court signed an Order requiring the Las Vegas Metropolitan Police Department and Bode Cellmark Forensics Laboratory to preserve all evidence in this case, and, within ninety (90) days, to prepare an inventory thereof and submit a copy of that inventory to the defense, the State, and this Court.

Defendant submitted the instant Motion for Stay of his Second Petition on August 8, 2019. On August 19, 2019, this Court heard the Second Petition, noting the Motion for Stay and setting a briefing schedule. Accordingly, the State responds to the Motion herein.

ARGUMENT

I. DEFENDANT'S SECOND PETITION CAN AND SHOULD BE DECIDED AS ORIGINALLY SCHEDULED

Defendant claims this Court should stay its decision on his Second Petition until the results of the genetic marker analysis. Motion for Stay at 3. However, these results would not impact the Second Petition.

First, as discussed in the State's Response to the Second Petition, Defendant cannot establish ineffective assistance of counsel regarding DNA testing. Defendant invoked his right to a speedy trial and stayed firm in that invocation even when counsel obtained new evidence, denying counsel the time necessary to obtain DNA testing. Recorder's Transcript of Hearing RE: Arraignment, June 24, 2010, at 2; Court Minutes, August 12, 2010. Regardless, it may have been counsel's strategy to proceed to trial prior to DNA analysis being conducted, such that forensic evidence could not be used in the State's case-in-chief; thus, the case would hinge on the victim's testimony and prior bad act evidence.

Second, there was no evidence nor even an allegation that Defendant ejaculated inside the victim. Again, as discussed in the State's Response to the Second Petition, T.H. testified that Defendant first sexually assaulted her with his fingers, while wearing rubber gloves, and that he then used his penis to rub her vulva; either way, he did not ejaculate. See Declaration of Arrest at 1–2; JTT, Day 2, at 4, 21–26. Therefore, an unknown male's semen inside the victim does not prove Defendant's innocence.

Third and finally, the only value the unknown male's semen would have to the defense would be to impeach the victim, who told the nurse who collected the rape kit that she had not had sex in the past week. However, this type of impeachment would be barred by Nevada's Rape Shield Law. See NRS 50.090. Indeed, the Nevada Supreme Court has already found that evidence of T.H.'s sexual history was properly excluded. Order of Affirmance, October 31, 2012, at 7–8.

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//

CONCLUSION

Based on the foregoing, the State respectfully requests this Motion for Stay be DENIED in its entirety.

DATED this 4th day of September, 2019.

Respectfully submitted,

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

BY /s/ JAMES R. SWEETIN
JAMES R. SWEETIN
Chief Deputy District Attorney
Nevada Bar #005144

CERTIFICATE OF SERVICE

I hereby certify that service of the above and foregoing was made this 4th day of SEPTEMBER, 2019, to:

C.B. KIRSCHNER, FPD
CB_Kirschner@fd.org

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

hjc/SVU

Electronically Filed
9/10/2019 1:13 PM
Steven D. Grierson
CLERK OF THE COURT

RPLY
Rene L. Valladares
Federal Public Defender
Nevada State Bar No. 11479
*C.B. Kirschner
Assistant Federal Public Defender
Nevada State Bar No. 14023C
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
CB_Kirschner@fd.org

*Attorney for Petitioner Tyrone David James, Sr.

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

Tyrone David James, Sr., Petitioner, v. Brian Williams, Warden, and the Attorney General for the State of Nevada, et al., Respondents.	Case No. A-19-797521-W 10C265506 Dept. No. 28 Date of Hearing: 9/25/19 Time of Hearing: 9:00 am

REPLY TO STATE'S RESPONSE TO MOTION FOR STAY OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

Case Number: A-19-797521-W

CASE HISTORY

In 2011, Tyrone James was convicted of sexual assault and sentenced to 25 years to life. No DNA evidence was presented during the trial. Indeed, we now know, the swabs from the sexual assault exam were not submitted to a lab for analysis until 2017. In 2019, counsel for James was notified by the Attorney General's Office about a CODIS hit linking another man to the sexual assault. The CODIS report was dated June 28, 2018, although counsel wasn't notified about it until February 21, 2019. Nevertheless, to avoid any possible time-bar, James, through counsel, filed a new Petition for Writ of Habeas Corpus (Post-Conviction) on June 27, 2019, within one-year of the CODIS hit. The Petition alleged a number of errors associated with the new DNA evidence. As per the current rules, that petition was given a new civil case number of A-19-797521-W, and was assigned to Department 24. On June 28, 2019, Department 24 issued a Minute Order transferring the Petition to Department 28 under the original criminal case number 10C265506.

Shortly thereafter, James, through counsel, filed a Post-Conviction Petition for Genetic Marker Analysis on July 16, 2019. Because the CODIS hit was only a preliminary match, this Petition seeks definitive testing to both confirm the match and exclude James as a contributor. Again, per the rules, this Petition was filed under the original criminal case number of 10C265506, and was assigned to Department 28. A few days later, the State filed a Response asserting that no further response was necessary until the Court made a finding as to who had possession of the evidence and ordered it preserved and inventoried.[1] A hearing on this Petition was held on July 29, 2019, and undersigned counsel appeared on behalf of James. Frank LoGrippo was present on behalf of the State.

At the hearing on July 29, 2019, undersigned counsel informed the Court (Justice Cherry sitting in Department 28) and the State about the pending Petition

---

[1] *See* Response filed 7/23/19 at page 4.

for Writ of Habeas Corpus (PWHC), which was still in the process of being transferred from Department 24 to Department 28.[2] Counsel stated she would be moving to stay the PWHC until the present Petition for Genetic Marker Analysis had been resolved. ADA LoGrippo agreed that a stay would be appropriate.

At that hearing, undersigned counsel further requested a 90-day date on the Genetic Marker Petition so that the evidence could be inventoried, pursuant to NRS 176.0918. The Court reset the matter for November 25, 2019 so that an inventory could be obtained. Pursuant to this Court's order, the Las Vegas Metropolitan Police Department submitted the requested inventory on August 20, 2019.

The State has moved to dismiss the PWHC alleging, among other things, that the CODIS hit has yet to be confirmed.[3] James subsequently moved to stay the PWHC, pending the resolution of the Genetic Marker Petition.[4] The State filed a response opposing the requested stay. This Reply follows.

ARGUMENT

The State argues against the Stay for three reasons: 1) James has not demonstrated trial counsel's ineffectiveness; 2) the DNA results would not exonerate James; and 3) the new evidence would not be admissible. The State's argument fails on all points.

First, ineffective assistance of trial counsel is only one of the five errors alleged in James' PWHC. Moreover, as the State noted, "it may have been counsel's strategy to proceed to trial prior to DNA analysis being conducted."[5] It also may **not** have been a strategic decision. An evidentiary hearing on this point will likely be needed in order to determine if counsel was acting strategically or not. However, a merits determination on this issue is premature at this time because we do not yet

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[2] The PWHC was finally transferred to Department 28 on August 7, 2019.

[3] *See* Response filed 8/6/19 at 12-13.

[4] *See* Motion to Stay filed 8/8/19.

[5] State's Response filed 9/4/10 at 4.

know the results of the genetic marker testing. The merits determination on all the issues raised in the PWHC will hinge largely on the outcome of the Genetic Marker Petition.

Second, the State argues that the sperm recovered from the victim could not have come from the perpetrator because he only rubbed his penis on the victim's vagina but did not ejaculate.[6] Ejaculation is not required for the production of sperm because pre-ejaculate fluid contains sperm.[7] According to a paper from the National Center for Biotechnology Information, a study showed pre-ejaculatory fluid to contain sperm 41% of the time.[8] Thus, the sperm recovered from the victim likely came from the man who sexually assaulted her. This is particularly true since the victim told medical authorities she had not had consensual sex with anyone in the seven days prior to the assault and her last sexual encounter was one year prior.[9]

Third, the State suggests evidence of the sperm matching a man other than James would not be admissible under Nevada's Rape Shield Law.[10] The State is mistaken because rape shield laws do not shield the real rapist. The new evidence has nothing to do with the victim's sexual history. It has to do with who really sexually assaulted her on the day in question. The State seems to imply the victim was lying to medical and law enforcement authorities and she actually had consensual sex the same morning she was assaulted. There is absolutely no evidence of this in the record. The purpose of the Genetic Marker Petition is to ascertain who really assaulted the victim in this case. The PWHC should be stayed until that determination has been made.

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[6] *Id.*

[7] *See* https://www.mayoclinic.org/healthy-lifestyle/birth-control/expert-answers/birth-control/faq-20058518.

[8] *See* Stephen R. Killick et al., "Sperm content of pre-ejaculatory fluid," 12/15/10, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3564677/.

[9] *See* sealed exhibit 3 filed in support of the PWHC at pages 10 and 18.

[10] State's Response filed 9/4/10 at 4.

CONCLUSION

For these reasons, Mr. James respectfully requests this Court order the Petition for Writ of Habeas Corpus and State's Motion to Dismiss stayed until the Petition for Genetic Marker Analysis has been fully resolved.

Dated this 10th day of September, 2019.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/ CB Kirschner
C.B. Kirschner
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2019, I electronically filed the foregoing with the Clerk of the Eighth Judicial District Court by using the Court's electronic filing system.

Participants in the case who are registered users in the electronic filing system will be served by the system and include: James Sweetin, james.sweetin@clarkcountyda.com , Motions@clarkcountyda.com.

I further certify that some of the participants in the case are not registered electronic filing system users. I have mailed the foregoing document by First-Class Mail, potage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three calendars days, to the following person:

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PO Box 650
Indian Springs, NV 89018

Geordan Goebel
Deputy Attorney General
100 North Carson Street
Carson City, NV 89701

/s/ Adam Dunn
An Employee of the Federal Public Defender, District of Nevada

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus | **COURT MINUTES** | **September 25, 2019**

A-19-797521-W Tyrone James, Sr., Plaintiff(s)
vs.
Brian Williams, Defendant(s)

September 25, 2019 09:00 AM All Pending Motions (09/25/19)

HEARD BY: Israel, Ronald J. COURTROOM: RJC Courtroom 15C

COURT CLERK: Thomas, Kathy

RECORDER: Chappell, Judy

REPORTER:

PARTIES PRESENT:

Courtney Kirschner **Attorney for Plaintiff**

James R Sweetin **Attorney for Defendant**

JOURNAL ENTRIES

PETITION FOR WRIT OF HABEAS CORPUS...STATE'S RESPONSE TO DEFENDANT'S POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) ANS SUPPORT OF THE STATE'S MOTION TO DISMISS

Petitioner, JAMES, SR. not present, in the Nevada Department of Corrections (NDC). Ms. Kirschner noted the genetic marker testing has happened the sexual assault kit was preserved. State argued nothing from the testing would change the writ and further noted the Deft. invoked a speedy trial without the test and now wants the kit tested because another individual tested positive to this kit, however the victim knew the Deft. COURT ORDERED, Motion for Stay, GRANTED. FURTHER, Petition and Motion to Dismiss, OFF CALENDAR. COURT ORDERED, Matter SET for a status check regarding the status of the stay and to reset the Petition.

11/25/19 9:00 AM STATUS CHECK RE: STATUS OF STAY & RESET PETITION

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus | **COURT MINUTES** | **November 25, 2019**

A-19-797521-W Tyrone James, Sr., Plaintiff(s)
vs.
Brian Williams, Defendant(s)

November 25, 2019 09:00 AM Status Check: Status of Stay // Reset Petition for Writ

HEARD BY: Israel, Ronald J. COURTROOM: RJC Courtroom 15C

COURT CLERK: Tapia, Michaela

RECORDER: Chappell, Judy

REPORTER:

PARTIES PRESENT:

Courtney Kirschner **Attorney for Plaintiff**

James R Sweetin **Attorney for Defendant**

JOURNAL ENTRIES

Deft. not present.

Colloquy. Upon State's request, briefing schedule SET. State's response due by end of business day 12/9/19; Deft's reply due by end of business day 12/23/19. FURTHER, matter CONTINUED.

NDC

CONTINUED TO: 1/3/20 9:00 AM

Electronically Filed
12/9/2019 8:00 AM
Steven D. Grierson
CLERK OF THE COURT

SUPP
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
TALEEN R. PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734
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: **XXVIII**

STATE'S SUPPLEMENTAL RESPONSE TO DEFENDANT'S PETITION REQUESTING A GENETIC MARKER ANALYSIS OF EVIDENCE WITHIN THE POSSESSION OR CUSTODY OF THE STATE OF NEVADA (NRS 176.0918)

DATE OF HEARING: **JANUARY 3, 2020**
TIME OF HEARING: **9:00 AM**

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through TALEEN R. PANDUKHT, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in this State's Supplemental Response to Defendant's Post-Conviction Petition Requesting a Genetic Marker Analysis of Evidence within the Possession or Custody of the State of Nevada (NRS 176.0918).

This Supplemental 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, Defendant Tyrone D. 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, 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. This Court granted both Motions.

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 issued on 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 4, 2015, Defendant filed a Supplemental Petition for Post-Conviction Writ of Habeas Corpus ("Supplement"). On January 15, 2016, Defendant filed another Supplement to Supplemental Petition for Writ of Habeas Corpus ("Second Supplement"). On April 21, 2016, the State filed its Response to Defendant's Second Supplement. On October 3, 2016, this Court held an evidentiary hearing and heard sworn testimony from Bryan Cox, Esq., and Dr. Joyce Adams. On November 8, 2016, this Court entered its Findings of Fact, Conclusions of Law, and Order denying the Petition. On December 8, 2016, James filed a Notice of Appeal from the denial. The Nevada Court of Appeals affirmed the denial on November 14, 2017. Remittitur issued December 29, 2017.

Defendant filed another Petition for Writ of Habeas Corpus (Post-Conviction) ("Second Petition") on June 27, 2019. Defendant then filed a Post-Conviction Petition Requesting A Genetic Marker Analysis of Evidence Within the Possession or Custody of the State of Nevada (NRS 176.0918) ("Genetic Marker Petition") on July 16, 2019. The State filed its Response to the Genetic Marker Petition on July 23, 2019. This Court heard the Genetic Marker Petition on July 29, 2019, continuing the matter. The State filed its Response to the Second Petition on August 6, 2019. On August 8, 2019, this Court signed an Order requiring the Las Vegas Metropolitan Police Department and Bode Cellmark Forensics Laboratory to preserve all evidence in this case, and, within ninety (90) days, to prepare an inventory thereof and submit a copy of that inventory to the defense, the State, and this Court.

Defendant filed a Motion for Stay of his Second Petition on August 8, 2019. On August 19, 2019, this Court heard the Second Petition, noting the Motion for Stay and setting a briefing schedule. The State filed its response on September 4, 2019. Defendant filed a reply

on September 10, 2019. On September 25, 2019, the Court granted the Motion for Stay and continued all pending motions again until November 25, 2019. On that date, the Court set a briefing schedule giving the State two (2) weeks including the Thanksgiving holiday to file its response. While the Chief Deputy District Attorney handling the matter in Court was provided a copy of the Las Vegas Metropolitan Police Department (hereinafter "LVMPD") inventory dated August 20, 2019 in open court on September 25, 2019, the Chief Deputy District Attorney now handling Defendant's post-conviction briefs did not receive the file, petitions or inventory until December 2, 2019. The State's response now follows.

STATEMENT OF 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.

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.

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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.

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ARGUMENT

I. PROCEDURE FOR GENETIC MARKER ANALYSIS OF EVIDENCE

Pursuant to NRS 176.0918, which states in pertinent part:

> 4. If a petition is filed pursuant to this section, the court may:
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> (a) Enter an order dismissing the petition without a hearing if the court determines, based on the information contained in the petition, that the petitioner does not meet the requirements set forth in this section;
>
> (b) After determining whether the petitioner is indigent pursuant to NRS 171.188 and whether counsel was appointed in the case which resulted in the conviction, appoint counsel for the limited purpose of reviewing, supplementing and presenting the petition to the court; or
>
> (c) Schedule a hearing on the petition. If the court schedules a hearing on the petition, the court shall determine which person or agency has possession or custody of the evidence and shall immediately issue an order requiring, during the pendency of the proceeding, each person or agency in possession or custody of the evidence to:
>
> (1) Preserve all evidence within the possession or custody of the person or agency that may be subjected to genetic marker analysis pursuant to this section;
>
> (2) Within 90 days, prepare an inventory of all evidence relevant to the claims in the petition within the possession or custody of the person or agency that may be subjected to genetic marker analysis pursuant to this section; and
>
> (3) Within 90 days, submit a copy of the inventory to the petitioner, the prosecuting attorney and the court.
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> 5. Within 90 days after the inventory of all evidence is prepared pursuant to subsection 4, the prosecuting attorney may file a written response to the petition with the court.

Defendant filed a Post-Conviction Petition Requesting a Genetic Marker Analysis of Evidence Within the Possession or Custody of the State of Nevada (NRS 176.0918) ("Genetic Marker Petition") on July 16, 2019. The State filed its Response to the Genetic Marker Petition on July 23, 2019. On August 8, 2019, this Court signed an Order requiring the LVMPD and Bode Cellmark Forensics Laboratory to preserve all evidence in this case, and, within ninety (90) days, to prepare an inventory thereof and submit a copy of that inventory to the defense, the State, and this Court. The LVMPD inventory provided is dated August 20, 2019. It lists

the evidence still retained in this matter as follows: 1) Item #1 – Blu Night Shirt released to District Court; 2) Item #2 - Multiple Robber Gloves released to District Court; and 3) Item #1 - Sexual Assault Kit T.H. at the LVMPD Evidence Vault.

II. FURTHER DNA TESTING IS IRRELEVANT AND BARRED BY RAPE SHIELD LAWS

Further genetic marker analysis results would not impact Defendant's Second Petition. First, Defendant cannot establish ineffective assistance of counsel regarding DNA testing. Defendant invoked his right to a speedy trial and stayed firm in that invocation even when counsel obtained new evidence, denying counsel the time necessary to obtain DNA testing. Recorder's Transcript of Hearing RE: Arraignment, June 24, 2010, at 2; Court Minutes, August 12, 2010. Regardless, it may have been counsel's strategy to proceed to trial prior to DNA analysis being conducted, such that forensic evidence could not be used in the State's case-in-chief; thus, the case would hinge on the victim's testimony and prior bad act evidence.

Second, there was no evidence nor even an allegation that Defendant ejaculated inside the victim. T.H. testified that Defendant first sexually assaulted her with his fingers, while wearing rubber gloves, and that he then used his penis to rub her vulva; either way, he did not ejaculate. See Declaration of Arrest at 1–2; JTT, Day 2, at 4, 21–26. Therefore, an unknown male's semen inside the victim does not prove Defendant's innocence. There was sufficient independent evidence that Defendant sexually assaulted T.H. Whether there were other sources of male DNA found on her person is irrelevant, given her firm identification of Defendant and her consistent account of the assault. See Order of Affirmance, October 31, 2012, at 1.

Third and finally, the only value the unknown male's semen would have to the defense would be to impeach the victim, who told the nurse who collected the rape kit that she had not had sex in the past week. However, this type of impeachment would be barred by Nevada's Rape Shield Law. The Nevada Rape Shield Law recognizes that there may be no relationship between prior sexual conduct and the victim's ability to relate the truth and that whether a victim has previously consented to sexual activity under different circumstances may have

little or no relevance to the issue of her consent to the activities which resulted in the rape prosecution. Lane v. State, 104 Nev. 427, 720 P.2d 1245 (1988). Evidence of prior sexual conduct is not identified as exculpatory evidence until after the accused submits the issue of consent to the court and the court determines, after a hearing on the matter, that the evidence is more probative than prejudicial. Lane v. State. Id. See NRS 48.069.

The State of Nevada, joining a vast majority of jurisdictions, passed statutes limiting the admissibility at trial of evidence concerning the sexual history of a complaining witness in a rape or sexual assault case. To this end, NRS 50.090 prohibits the accused from impeaching a rape victim's credibility with evidence of her prior sexual conduct, unless the victim has testified regarding her sexual history or the prosecution has presented evidence regarding the victim's prior sexual conduct. NRS 50.090 and NRS 48.069 expressly limit the admission of such evidence to prosecutions. Because prosecution of a case does not exist until charges are filed, see Ryan v. District Court, 88 Nev. 638, 503 P.2d 842 (1972), evidence of prior sexual conduct is not admissible under NRS 48.069 and 50.090 and cannot become legal evidence within the meaning of NRS 172.135(2), until on motion a district court rules it to be such following the return of the indictment. See NRS 172.005. Consequently, this evidence is inadmissible.

Furthermore, the Nevada Supreme Court has consistently held that when a defendant in a sexual assault case desires to cross-examine a victim about prior allegations of sexual assault in an effort to paint those prior allegations as false, he has a requisite burden: a defendant must prove by a preponderance of the evidence in a hearing outside the presence of the jury that: 1) the accusations were made; 2) the accusations were in fact false; and 3) that the evidence is more probative than prejudicial. State v. Miller, 105 Nev 497, 502, 779 P.2d 87, 90 (1989); State v. Brown, 107 Nev. 164, 165, 807 P.2d 1379, 1380 (1991). Upon such a showing, the trial court is to permit cross examination of the victim and upon denial or failure of memory, can permit extrinsic evidence. Miller at 502. The Nevada Supreme Court discussed a defendant's burden in Brown, supra. Proof of falsity must be something more than a bare unsupported opinion that the complaining witness is lying. Brown at 166. Before

a sexual assault defendant can commence cross-examination of a victim as to prior complaints of sexual misconduct, he must provide some independent basis that the accusations are false. Id. Moreover, without a showing that the prior complaints are false, they become irrelevant. Brown at 168-169. As an aside, there is no violation a sexual assault defendant's Sixth Amendment Right to Confrontation by refusing to permit cross examination regarding prior complaints when a defendant has not met the Miller burden at a hearing. Id.

Here, there is no evidence of a prior false allegation and the Nevada Supreme Court has already found that evidence of T.H.'s sexual history was properly excluded. Order of Affirmance, October 31, 2012, at 7–8.

III. FURTHER DNA TESTING IS IRRELEVANT TO THE ISSUES AT THIS STAGE OF THE PROCEEDINGS

A. Trial counsel was not ineffective

In this case, Defendant alleges his counsel was ineffective for not testing the DNA from the rape kit of the victim, T.H. Second Petition at 15. As an initial matter, any claim that trial counsel should have had the DNA tested has been available for years and so is itself time-barred; accordingly, it cannot provide good cause to overcome the procedural bars. Riker, 121 Nev. at 235, 112 P.3d at 1077. Regardless, the claims of ineffectiveness are without merit.

Defendant argues trial counsel did not know there had been DNA collected from the victim's rape kit. Second Petition at 10. However, this is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. In fact, Detective Daniel Tomaino testified at trial that a rape kit had been collected. Transcript, Jury Trial ("JTT") Day 1, at 252–53. Defense counsel actually cross-examined Det. Tomaino regarding the rape kit. Id. at 267–68, 276. Dr. Theresa Vergara also testified as to the details of the sexual assault examination, including the swabs of the victim's genitalia collected as part of the rape kit. JTT, Day 2 at 150, 154–58. Indeed, as the First Petition made clear, previous counsel—including trial counsel and post-conviction counsel—actually knew Defendant's DNA was *not* found on the victim. See Supplement to First Petition, September 4, 2015, at 5–6; JTT, Day 1 at 276–77.

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It was not an objectively unreasonable strategy to refrain from having the DNA tested. First, given that Defendant consistently maintained his innocence, had a test revealed that Defendant was lying, his defense would have been severely undermined. This strategic call cannot be evaluated through the benefit of hindsight, knowing that there is now a potential CODIS hit regarding T.H.'s rape kit. Counsel could not have known there was no match to Defendant unless and until such a test were completed, and the potential risk of having such a test was high. Moreover, Defendant invoked his right to a speedy trial. Recorder's Transcript of Hearing RE: Arraignment, June 24, 2010, at 2. Several weeks after this invocation, Defendant acknowledged on the record that he knew his counsel had just received new evidence but insisted that he still did not want to waive his right to a speedy trial. Court Minutes, August 12, 2010. Accordingly, the fact that there was likely no time for a DNA test was of his own choosing and cannot be attributed to counsel. Given the factors counsel was working with, this Court should not second-guess counsel's strategy not to pursue further DNA investigations. Donovan, 94 Nev. at 675, 584 P.2d at 711.

B. Defendant cannot establish actual innocence

As an initial matter, actual innocence is not a freestanding claim. It is a method by which the mandatory time-bars may be excused if the "new evidence" at issue is both material and exculpatory. The United States Supreme Court has held for over a quarter-century that actual innocence is not "itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Herrera v. Collins, 506 U.S. 390, 404, 113 S. Ct. 853, 862 (1993). More recently, the Court has noted that it has not "resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence." McQuiggin v. Perkins, 569 U.S. 383, 392, 133 S.Ct. 1924, 1931 (2013). The Nevada Supreme Court, too, "has yet to address whether and, if so, when a free-standing actual innocence claim exists." Berry v. State, 131 Nev. Adv. Op. 96, 363 P.3d 1148, 1154 (2015).

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Regardless, in order for a defendant to obtain a reversal of his conviction based on a claim of actual innocence, both the United States and Nevada Supreme Courts place the burden on the defendant to show "'it is more likely than not that *no* reasonable juror would have convicted him in light of the new evidence' presented in habeas proceedings." Calderon v. Thompson, 523 U.S. 538, 560, 118 S. Ct. 1489, 1503 (1998) (emphasis added) (quoting Schlup v. Delo, 513 U.S. 298, 315, 115 S. Ct. 851, 861, 130 L. Ed. 2d 808 (1995)); see also Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). It is true that "the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial." Schlup, 513 U.S. at 330, 115 S. Ct. at 868. However, this requires "a stronger showing than that needed to establish prejudice." Id. at 327, 115 S. Ct. at 867.

Newly presented evidence must be "reliable," whether "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." House v. Bell, 547 U.S. 518, 537 (2006) (quoting Schlup, 513 U.S. at 324, 115 S.Ct. at 865.) The U.S. Supreme Court has narrowly interpreted reliability of scientific evidence, specifically noting that "DNA testing alone does not always resolve a case. Where there is enough other incriminating evidence and an explanation for the DNA result, science alone cannot prove a prisoner innocent." Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 62, 129 S. Ct. 2308, 2316 (2009) (citing Bell, 547 U.S. at 540–548, 126 S.Ct. at 2064).

Defendant alleges the CODIS hit suggesting that another man's DNA was found in the victim's rape kit is new evidence of his actual innocence. Second Petition at 16. However, Defendant cannot prove that no reasonable juror would have convicted him in light of this information for two reasons. First, it is not reliable, "exculpatory scientific evidence." Schlup, 513 U.S. at 324, 330, 115 S.Ct. at 865, 868. The "CODIS Hit Notification Report" specifically notes that a buccal swab from the individual potentially identified as a match must be obtained "in order to *confirm* this hit." Defendant's Exhibit 3 at 2 (emphasis added). That is, this is not a conclusive match: "further action" is required. Id. at 5. Defendant has not argued that he has obtained this further testing. Accordingly, the CODIS hit itself is not reliable exculpatory evidence.

Second, even assuming it is true that another man's sperm was found on the victim, that alone cannot prove Defendant innocent. Osborne, 557 U.S. at 62, 129 S. Ct. at 2316. There was overwhelming incriminating evidence and an explanation for the presence of any other DNA. Id. This was not an identity case. T.H. was sexually assaulted by a person she had known for at least a year, as Defendant was dating the victim's mother. Order of Affirmance, October 31, 2012, at 1.; JTT Day 2, at 4, 8–11. Defendant assaulted T.H. in her own home and drove her to school afterward. Accordingly, identity was not—and would not need to be—established through DNA. As the Nevada Supreme Court found, "T.H.'s testimony was consistent and [] the State presented sufficient evidence from which a rational tier of fact could have found guilt beyond a reasonable doubt." Order of Affirmance, October 31, 2012, at 1. Further, any other sexual activity of the victim that could have explained the presence of another man's sperm would have been barred via rape shield, as was in fact the case; the Nevada Supreme Court found that evidence of T.H.'s sexual history was properly excluded. Order of Affirmance, October 31, 2012, at 7–8.

Finally, Defendant was alleged to have sexually assaulted another quasi-step-daughter. That victim actually testified in this case. Her testimony was admissible under NRS 48.045(2) as the Nevada Supreme Court held, it showed that Defendant had a motive and opportunity, as well as a common plan, to perpetrate sexual crimes against the teenage daughters of women he dated. Order of Affirmance, October 31, 2012, at 3. Therefore, Defendant has not shown actual innocence and thus cannot overcome the threshold of the procedural bars.

C. There was no Confrontation Clause issue

Defendant claims a Confrontation Clause in that he was not allowed to confront T.H. with the information from the CODIS hit. Second Petition at 18. However, this claim—as well as the Brady and prosecutorial misconduct claims—should be considered waived.

NRS 34.810(1) reads:

> The court shall dismiss a petition if the court determines that:
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> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly

> entered or that the plea was entered without effective assistance of counsel.
>
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
>
> . . .
>
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief.
>
> unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner.

The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings…. [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646–47, 29 P.3d 498, 523 (2001).

Because Defendant's Confrontation Clause claim does not challenge the validity of a guilty plea nor allege ineffective assistance of counsel, the claim should have been pursued on a direct appeal. NRS 34.810(1); Franklin, 110 Nev. at 752, 877 P.2d at 1059. As discussed *supra*, Defendant could have had the victim's rape kit independently tested at an appropriate time. Had he wished to confront the victim with the resulting information, he could have attempted to do so at trial; or, at least, he could have challenged the trial court's suppression of the evidence on direct appeal. Accordingly, Defendant cannot demonstrate good cause or prejudice for not bringing this claim at an appropriate time and raising it for the first time only in these habeas proceedings. It is thus waived and must be summarily dismissed. Id.

Nonetheless, it was in a similar context that the Nevada Supreme Court held that the victim's prior sexual activity was properly excluded at trial. Order of Affirmance filed October 31, 2012, at 7. Indeed, the Court held that Defendant's rights under the Confrontation Clause

were not violated when he was not permitted to examine T.H. about her sexual history. Id. For similar reasons, Defendant would not have been permitted to confront T.H. with evidence from the CODIS hit.

Therefore, any further DNA testing is irrelevant under the facts and circumstances of this case and such impeachment of the victim would be barred under our rape shield laws. Defendant could have agreed to continue his trial to have DNA testing done, but he chose to rush forward for strategic reasons. Now that he has been convicted, he is not entitled to the relief he now seeks.

CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court deny Defendant's Post-Conviction Petition Requesting a Genetic Marker Analysis of Evidence within the Possession or Custody of the State of Nevada (NRS 176.0918).

DATED this 9th day of November, 2019.

Respectfully submitted,

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

BY /s/ TALEEN R. PANDUKHT
TALEEN R. PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734

CERTIFICATE OF SERVICE

I hereby certify that service of the above and foregoing was made this 9th day of NOVEMBER, 2019, to:

C.B. KIRSCHNER, FPD
CB_Kirschner@fd.org

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

TRP/hjc/SVU

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Steven D. Grierson
CLERK OF THE COURT

RPLY
Rene L. Valladares
Federal Public Defender
Nevada State Bar No. 11479
*C.B. Kirschner
Assistant Federal Public Defender
Nevada State Bar No. 14023C
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
CB_Kirschner@fd.org

*Attorney for Petitioner Tyrone David James, Sr.

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

Tyrone David James, Sr., Petitioner, v. State of Nevada, Respondent.	Case No. 10C265506 Dept. No. 28 Date of Hearing: 1/13/2020 Time of Hearing: 9:00 am

Reply to State's Supplemental Response to Post-Conviction Petition Requesting A Genetic Marker Analysis of Evidence within the Possession Or Custody of the State of Nevada (NRS 176.0918)

Case Number: 10C265506

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INTRODUCTION

On February 21, 2019, the Federal Public Defender's Office ("FPD") was contacted by Senior Deputy Attorney General Amanda Sage. Sage said she was contacted by the Clark County District Attorney's Office about new DNA evidence having been discovered in Tyrone James' case that was potentially exculpatory. On March 18, 2019, Sage emailed the FPD the relevant DNA report and medical records. The DNA report revealed a preliminary CODIS hit from swabs in the rape kit in this case, which had never previously been tested, to a man other than Tyrone James.

In light of this new, exculpatory evidence, undersigned counsel for Mr. James filed two petitions: 1) the current petition for genetic marker analysis ("DNA petition"); and 2) a post-conviction petition for writ of habeas corpus ("habeas petition"). As explained in the later petition, it was filed before resolution of the DNA petition in order to avoid any allegations of untimeliness. The habeas petition has since been stayed pending the outcome of the current petition. James is respectfully requesting this Court order DNA testing of all the swabs in the rape kit in order to exclude him as a contributor and confirm the DNA matches one Ramon Wilson.

The only evidence connecting James to the assault of TH was her testimony. Whether her identification of James was mistaken, or false, there is a reasonable possibility the jury would not have convicted James if they knew that DNA, specifically a sperm fraction, was found on the victim and it did not match James, but in fact matched another man. As TH told medical authorities that she did not have consensual sex with anyone in at least 7 days prior to the assault, there is no other explanation for the DNA matching Ramon Wilson aside from him being the true assailant. There is no physical evidence connecting James to the crime and confirmation DNA testing would prove his innocence.

FACTS

On May 14, 2010, 15-year-old TH reported that she had been sexually assaulted by her mother's boyfriend, Tyrone James. TH went to Sunrise Hospital where a sexual assault exam was conducted. TH reported to the nurse that she had not had consensual sex in the past seven days and that her last sexual encounter was one year ago.[1] TH reported she had been vaginally penetrated by the assailant's finger and penis, and a doctor observed swelling during the pelvic exam.[2] Evidence was collected from TH including oral swabs, vaginal and cervical swabs, and rectal swabs.[3]

No evidence regarding the rape kit, swabs, or DNA was presented during James' trial. No analysis of the rape kit, swabs, or DNA was included in pre-trial discovery. At the time of trial, defense counsel, Bryan Cox, was unaware that any DNA was contained on the swabs. James was convicted almost entirely on the testimony of TH, as well as the introduction of prior bad act evidence. A doctor from Sunrise Hospital also testified on behalf of the State. She had conducted the gynecological exam on TH and observed swelling to her vaginal area that could have been caused by trauma such as penetration.[4] She testified her findings were "consistent with probable abuse."[5]

After an unsuccessful direct appeal and post-conviction proceedings in state court, James filed a pro se federal habeas petition on May 17, 2018. He was not immediately appointed counsel. On February 21, 2019, the Federal Public

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[1] *See* Habeas Petition, Exhibit 3 (sealed) at pages 10 & 18.

[2] *Id.* at 11, 14, 17.

[3] *Id.* at 12 & 18.

[4] *See* transcript ("Tr") 9/22/10 at 159-60.

[5] *Id.* at 174.

Defender's Office ("FPD") was contacted by Senior Deputy Attorney General Amanda Sage. Sage said that she was contacted by the Clark County District Attorney's Office about new DNA evidence having been discovered in James' case that was potentially exculpatory. The FPD immediately sought to be appointed as counsel for James. Based on this turn of events, the federal court granted the motion and appointed the FPD to represent James. On March 18, 2019, Sage emailed the FPD the relevant DNA report and medical records. The redacted DNA report was filed as Exhibit 1 to the current petition. The medical records concerning the rape kit were filed under seal contemporaneously with the filing of the habeas petition on June 27, 2019.

The new evidence includes the following. A forensic case report from April 30, 2018, states that physical evidence from this case was "Received on **December 6, 2017** for possible DNA analysis."[6] The report reflects that only 1 of the 3 swabs, the perineum swab, was processed and a **sperm fraction consistent with a male contributor** was detected.[7] On June 28, 2018, there was a presumptive "CODIS" match to a **Ramon Wilson**.[8] The CODIS Hit Notification Report provides the following information:[9]

> This hit constitutes an investigative lead in your case(s). A new reference buccal swab must now be obtained from this individual in order to confirm this hit and complete the case(s). The DNA sample currently on file, which was collected in accordance with Nevada Law (NRS 176.0913), will not suffice for the confirmation process.
>
> The information provided in this report can be used to obtain a Search Warrant for a reference buccal swab from the above person.

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[6] *See* DNA Petition, Exhibit 1 at 3 (emphasis added).

[7] *Id.*

[8] *Id.* at 2.

[9] *Id.*

The CODIS Hit Disposition Form, dated July 31, 2018, similarly notes: "This is a viable lead requiring further action."[10]

Despite the directives in the CODIS hit notification report and disposition form, there is no indication that any further investigation has been conducted or that a reference buccal swab has been obtained from Ramon Wilson.[11] Nor is there any indication that the other two swabs from the rape kit were ever analyzed. No information was provided to the FPD as to why the evidence was not submitted to the lab until 2017, why it wasn't tested until 2018, and why the remaining swabs were not analyzed. It also appears that a buccal swab was never obtained from James and tested against the swabs from the rape kit, in order to rule him out as a contributor.

The Las Vegas Metropolitan Police Department has confirmed it has possession of the rape kit. No additional testing has yet been conducted. James is serving 25 years-to-life on this case and has been incarcerated since 2010. It is hard to imagine a case in which there is a stronger need for DNA testing.

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[10] *Id.* at 5.

[11] Wilson's name does not appear in pre-trial discovery. Petitioner has no further information about him, aside from the CODIS report.

ARGUMENT

A. The legal standard governing the current DNA petition is separate and distinct from the legal standard governing the stayed habeas petition, and the later has no bearing on the former.

The standard for granting a petition for genetic marker testing is set forth in NRS 176.09183, which provides:

> The court **shall order** a genetic marker analysis…if the court finds that:
>
> (a) The evidence to be analyzed exists;
>
> (b) Except as otherwise provided in subsection 2, the evidence was not previously subjected to a genetic marker analysis…and
>
> (c) One or more of the following situations applies:
>
> (1) A reasonable possibility exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through a genetic marker analysis of the evidence identified in the petition;
> …

NRS 176.09183(1) (emphasis added).

On the other hand, the standard for granting a post-conviction writ of habeas corpus requires a petitioner to show his conviction was obtained in violation of the Constitution of the United States or Constitution of the State of Nevada. *See* NRS 24.724(1). For example, a writ may be granted upon a finding of ineffective assistance of counsel in violation of the Sixth Amendment of the United States Constitution and Article I, Section 8 of the Nevada Constitution. *See Means v. State*, 120 Nev. 1001, 1011 (2004). However, the likelihood of success on the merits of the claims raised in James' habeas petition has no bearing on the current petition. The only question currently before this Court is whether James meets the requirements for genetic marker testing pursuant to NRS 176.09183.

The State opted not to address the requirements of NRS 176.09183 in its supplemental response. Rather, the State spent considerable time discussing the merits of the substantive claims raised in James' habeas petition.[12] As explained above, the merits of those claims have no bearing on the current DNA petition. They are separate entities. The habeas petition was filed in advance of the DNA petition being resolved in order to preempt any future untimeliness arguments. In all other respects, the habeas petition is premature. Had James gambled by not filing the habeas petition when he did, the DNA petition would still be viable and pending before this Court. In essence, the habeas petition is irrelevant to the DNA petition. As such, Petitioner will defer responding to the merits of the habeas claims until such time as that petition, currently stayed, becomes ripe.

If this Court find the requirements of NRS 176.09183 have been met and orders genetic marker testing—and the results are favorable to James—the remedy is not a writ of habeas corpus, but rather a motion for a new trial. *See* NRS 176.09187(1)(a) ("If the results of a genetic marker analysis performed pursuant to this section and NRS 176.0918 and 176.09183 are favorable to the petitioner: The petitioner may bring a motion for a new trial based on the ground of newly discovered evidence pursuant to NRS 176.515.").

A look at each of the requirements for the current petition reveals that genetic marker analysis should be ordered in this case:

1. The evidence to be analyzed exists and is in the possession of Metro.

2. The evidence was not previously subjected to a genetic marker analysis.

3. There is a reasonable possibility that James would not have been convicted if exculpatory results had been obtained of the DNA evidence identified in the petition.

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[12] *See* State's Supplemental Response, 12/9/19, at pages 11-16.

B. There is a reasonable possibility Mr. James would not have been convicted if exculpatory results had been obtained of the DNA evidence identified in the petition.

The "reasonable **possibility**" standard is less demanding than the more stringent "reasonable **probability**" standard. *See Lord v. State*, 107 Nev. 28, 44 (1991) (citing *People v. Brown*, 758 P.2d 1135, 1144-45 (Cal. 1988) (distinguishing reasonable possibility from reasonable probability)). The reasonable possibility standard is less demanding and more favorable to the petitioner. *See Wade v. State*, 115 Nev. 290, 296 n.4 (1999) (recognizing the reasonable possibility standard is more favorable to the accused than the reasonable probability standard); *State v. Bennett*, 119 Nev. 589, 600 (2003) (finding the reasonable possibility standard requires a lesser showing than the reasonable probability standard).

James would not have been convicted in light of the exculpatory DNA evidence because there was no physical evidence connecting him to the crime. The only evidence linking James to the sexual assault was the mistaken, or false, testimony of the victim. Had the jury known there was DNA evidence linking another man to the sexual assault, they would not have convicted James, even in light of the victim's identification. The Nevada Supreme Court has recognized the strength of DNA evidence even when it is contrary to testimonial evidence. *See Berry v. State*, 131 Nev. 957, 969 (2015). Similarly, The United States Supreme Court has repeatedly recognized that "DNA testing can provide powerful new evidence unlike anything known before." *McDaniel v. Brown*, 558 U.S. 120, 136 (2010); *District Attorney's Office v. Osborne*, 557 U.S. 52, 62 (2009). The "persuasiveness of such evidence in the eyes of the jury" cannot be understated. *McDaniel*, 558 U.S. at 136. *See also House v. Bell*, 547 U.S. 518, 540-41 (2006) (recognizing a jury would have given great weight to DNA evidence linking someone else to the crime).

The State suggests evidence of the sperm matching a man other than James would not be admissible under Nevada's Rape Shield Law.[13] The State is mistaken because rape shield laws do not shield the real rapist. The new evidence has nothing to do with the victim's sexual history. It has to do with who really sexually assaulted her on the day in question. The State seems to imply the victim lied to medical and law enforcement authorities and, despite her statements to the contrary, she actually had consensual sex the same morning she was assaulted. This outlandish theory is pure and unfounded speculation. There is absolutely no evidence the victim had consensual sex on the same day she was sexually assaulted. The facts are unambiguous—the victim stated she had not had consensual sex with anyone in the seven days prior to the assault and had not been sexually active in over one year.[14] The State's new theory is not only speculation, it conflicts with the facts. The purpose of the Genetic Marker Petition is not to delve into the victim's sexual history, it is to ascertain who really assaulted her.

The State also argues the sperm recovered from the victim could not have come from the perpetrator because he only rubbed his penis on the victim's vagina but did not ejaculate.[15] Human biology proves the fallacy of the State's argument. Ejaculation is **not** required for the presence of sperm because pre-ejaculate fluid contains sperm.[16] According studies from the National Center for Biotechnology Information website (a division of the National Institutes of Health), pre-ejaculatory

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[13] State's Supplemental Response, 12/9/19, at pages 9-11.

[14] *See* Habeas Petition, Exhibit 3 (sealed) at pages 10 & 18.

[15] *Id.* at 9.

[16] *See* https://www.mayoclinic.org/healthy-lifestyle/birth-control/expert-answers/birth-control/faq-20058518.

fluid contains sperm anywhere from 16.7% to 41% of the time.[17] Thus, the sperm recovered from the victim came from the man who sexually assaulted her. And preliminary testing reveals that man was not Tyrone James.

C. The State concedes the need for confirmation testing.

The State argues James cannot meet the legal standard for relief because the current, preliminary DNA report "is not reliable, 'exculpatory scientific evidence.'"[18] The State continues:[19]

> The "CODIS Hit Notification Report" specifically notes that a buccal swab from the individual potentially identified as a match must be obtained "in order to *confirm* this hit." Defendant's Exhibit 3 at 2 (emphasis added). That is, this is not a conclusive match: "further action" is required. Id. at 5. Defendant has not argued that he has obtained this further testing. Accordingly, the CODIS hit itself is not reliable exculpatory evidence.

The State is correct that the CODIS hit alone is insufficient and further testing is required. That is the purpose of the current petition—to obtain confirmation testing of this exculpatory evidence. NRS 176.09187 contemplates a motion for a new trial based on newly discovered evidence after obtaining favorable results from genetic marker analysis. That is why James is seeking genetic marker analysis at this time, and not a new trial. Confirmation testing must be conducted first.

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[17] *See* https://www.ncbi.nlm.nih.gov/pubmed/27266214 and https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3564677/.

[18] State's Supplemental Response, 12/9/19, at page 13 (citing *Schlup v. Delo*, 513 U.S. 298, 324 (1995).

[19] *Id.*

PRAYER FOR RELIEF

For these reasons, Petitioner Tyrone James respectfully requests this Court, pursuant to NRS 176.0918 & 176.09183, grant the Post-Conviction Petition Requesting a Genetic Marker Analysis of Evidence within the Possession or Custody of the State of Nevada, and requests this Court issue an Order for genetic marker analysis of the evidence. Specifically, James asks this Court to order DNA testing (genetic marker analysis) to be performed pursuant to the requirements of NRS 176.09183(3). James further requests this Court permit an expert retained on his behalf to conduct, supervise, or assist in the requested analysis, if necessary.

Dated this 12th day of December, 2019.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/ CB Kirschner
C.B. Kirschner
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2019, I electronically filed the foregoing with the Clerk of the Eighth Judicial District Court by using the Court's electronic filing system.

Participants in the case who are registered users in the electronic filing system will be served by the system and include: Taleen Pandukht, taleen.pandukht@clarkcountyda.com, Motions@clarkcountyda.com.

I further certify that some of the participants in the case are not registered electronic filing system users. I have mailed the foregoing document by First-Class Mail, potage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three calendars days, to the following person:

Tyrone David James Sr.
No. 1063523
High Desert State Prison
PO Box 650
Indian Springs, NV 89018

Geordan Goebel
Deputy Attorney General
100 North Carson Street
Carson City, NV 89701

/s/ Adam Dunn
An Employee of the Federal Public Defender, District of Nevada