IN THE SUPREME COURT OF THE UNITED STATES

Kevin Skaggs,

Petitioner,

19-6069

v.

State of Kansas,

Respondent.

PETITION FOR WRIT OF CERTIORARI

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTION, STATUTES, REGULATIONS, AND RULES

QUESTIONS PRESENTED FOR REVIEW

Whether defense counsel performs unreasonably under the Sixth Amendment if their pre-trial and trial investigations and strategies are based on their belief in the impossible, a belief that leads counsel to not even consider consulting with an expert, and not investigating if certain evidence could be challenged.

Whether a court's decision to grant a Certificate of Appealability on only some parts of an ineffective assistance of counsel claim conflicts with cumulative analysis required by both the deficient performance and prejudice prongs of Strickland v. Washington.

It is long overdue that this Court defines exactly what "overwhelming evidence" is and what test or standard must be applied before a court can determine there is overwhelming evidence against a defendant.

OPINIONS AND ORDERS BELOW

The unpublished opinions of the Kansas Court of Appeals are attached hereto as Appendix A and C. The written ruling of the state post-conviction court denying Mr. Skaggs' ineffective assistance of counsel claim after a full evidentiary hearing is attached at hereto Appendix B. The Kansas Federal District Court's decision is attached hereto at Appendix D. The Tenth Circuit Court of Appeals' decision is attached hereto at Appendix E.

JURISDICTION

Because the Tenth Circuit Court of Appeals' judgment and decree denying Mr. Skaggs' petition for Repanel Hearing and hearing En banc was final on June 17, 2019, this Court has jurisdiction to review under 28 U.S.C. § 1257(a).

RELEVENT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his

defense." U.S. Const., amend. VI.

The Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1.

STATEMENT OF THE CASE

A. INTRODUCTION

In June of 2007, Mr. Skaggs was tried on multiple counts of rape, aggravated criminal sodomy, exploitation of a child, and promoting obscenity involving a young girl, B.S. (Vol. III at 72-90). The State repeatedly asserted two critical arguments to the jury; 1) that a stain left on the alleged victim's underwear was Mr. Skaggs' saliva from a purported cunnilingus by him B.S., and 2) the initial SAFE examination of the alleged victim that was done without the aid of any magnification instrument, nor camera for documentation, was consistent with sexual abuse because the alleged victim's hymen was purportedly gone.

Following a jury trial, Mr. Skaggs was convicted on all but one count, and sentenced to a total of 310 months imprisonment (Vol. III at 72-90). The convictions were affirmed on appeal. State v. Skaggs, 212 P.3d 1039 (2009) (Appx. at A1-12). Mr. Skaggs' post-conviction relief was denied. Skaggs v. State, 321 P.3d 36 (2014) (Appx. at C1-9). The Kansas District Court denied federal habeas relief and denied a Certificate of Appealability. Skaggs v. Cline, 2018 U.S. Dist LEXIS 147683 (2018) (Appx. at D1-22). The Tenth Circuit granted Mr. Skaggs a Certificate of Appealability on three of his ten grounds raised in the Kansas District Court. The Tenth Circuit determined that all three grounds they reviewed were decided in error, but the evidence against Mr. Skaggs was overwhelming, and so denied relief. Skaggs v. Baker, 2019 U.S. App. LEXIS 14358 (2019) (Appx. at E1-9).

B. STATEMENT OF FACTS

(1) Defense Counsel's Disciplinary History

Mr. Skaggs retained Gary Fuller in February of 2005 to represent him for his defense of these charges, but Fuller withdrew due to health problems (Vol. XVIII at 41). Terrence Lober took over, entering his appearance on October 11, 2006 (Vol. XVIII at 14). Mr. Skaggs went to trial June 18-26, 2007. Lober has a lengthy history of disciplinary actions in Kansas. He was informally admonished in 1994 and 1996 for violations of Kansas Rules of Professional Conduct 1.3 (diligence) and 1.4 (communication). In the Matter of Terrence A. Lober, 291 Kan. 394, 400, (2010). In December of 1998, the Kansas Supreme Court put Mr. Lober on probation for two years for multiple violations of professional conduct. Id. In the disciplinary hearing in 1998, Lober admitted to alcohol abuse, including drinking in the evenings and afternoons to the point that he could not function (Vol. XXI, Movant's Ex. GG at 42). A phychological evaluation found that he minimized the impact of alcohol on his behavior, but he admitted to regular and compulsive usage, poor judgments, and blackouts (Vol. XXI, Movant's Ex. HH at 3).

On two occasions in 2000, Mr. Lober was informally admonished. Lober, 291 Kan. at 400. In 2003, Mr. Lober was suspended from the practice of law for one year. Id. His license was reinstated in 2005, but in 2009, he was suspended indefinitely. Id. at 400-01. The 2009 suspension stemmed from conduct occurring in 2006 and 2007, the exact same time period in which Lober was preparing for and trying Mr. Skaggs' case. In the Matter of Terrence A. Lober, 288 Kan. 498, 500-01, 204 P.3d 610, 611-12 (2009). At the administrative hearing on these actions, a witness complained of meeting with Lober and another attorney in a smoke-filled office containing empty alcohol bottles (Vol. XXI, Movant's Ex. LL at 16). Another witness testified that she had paid Lober $10,000, in October of 2007, to file a motion to withdraw a guilty plea which was never filed, and Lober did not return the money (Vol. XXI, Movant's Ex. LL at 24). One of the hearing officers commented that Lober's conduct could only be

catagorized as fraud or theft (Vol. XXI, Movant's Ex. LL at 46).

On October 15, 2010, the Kansas Supreme Court found that Mr. Lober violated American Bar Association standards by knowingly failing to perform services for clients, engaging in a pattern of neglect with respect to client matters, and failing to understand the most fundamental legal doctrines and procedures, which caused serious or potentially serious injury to his clients. Lober, 291 Kan. at 403. Mr. Lober was finally disbarred. Id.

Mr. Lober's disciplinary history was not disclosed to Mr. Skaggs (Vol. XVIII at 210). Lober sometimes drank alcohol in the months leading up to Mr. Skaggs' trial, but denied drinking during evening recesses at trial (Vol. XVIII at 204-05). Lober was "disillusioned with the law" and "found it difficult to go to the office" (Vol. XVIII at 204). Lober coped with the disillusionment and the difficulty of Mr. Skaggs' case by drinking (Vol. XVIII at 205). Lober also suffered from shingles and pneumonia before, but not during, trial (Vol. XVIII at 203).

(2) The State's Evidence at Trial.

The investigation and prosecution of Mr. Skaggs began with a dream (Tr. at 200-02). Mr. Skaggs and Faynett Anderson, the mother of the alleged victim B.S., were friends who briefly dated and had a sexual relationship (Tr. at 177). The friendship continued after the sexual relationship ended, and at Ms. Anderson's request, Mr. Skaggs would occasionally babysit Ms. Anderson's two daughters, B.S. and K.A. (Tr. at 177-78, 232-33). The girls would sometimes sleep over at his house on nights Ms. Anderson went out, when she worked the next morning, or when the children asked to spend the night at Mr. Skaggs' house (Tr. at 188, 192-94, 383).

Although both children enjoyed spending time with Mr. Skaggs, and neither B.S.'s conduct nor her statements revealed any indication of abuse, Ms. Anderson testified that her intuition made her suspicious (Tr. at 251). She told police that she came to discover the alleged abuse on January 22, 2005, after a) watching "too much CSI" about child molestation the night

before, then b) dreaming that B.S. was being sexually molested just like the girl in the CSI show, and then c) receiving her daily horoscope from her cell phone the next morning that told her to "go with your gut," prompting Ms. Anderson to pick up B.S. from Mr. Skaggs' house one hour early at around 11:00 a.m., go out all day and play poker with her boyfriend until around 7:00 p.m., and then come home and finally question B.S. about her suspicions (Tr. at 200-02, 680).

Ms. Anderson testified that B.S. initially denied several times that she had endured any abuse, and that B.S.'s demeanor did not change at all when she was first asked these questions (Tr. at 202, 251-52). Unsatisfied with this answer, Ms. Anderson continued to press the issue, until finally after some prompting, B.S. agreed that someone had touched her in a bad way (Tr. at 202-03). Ms. Anderson eventually asked B.S. "Is it Kevin?" and B.S. nodded (Tr. at 204).

On January 22, 2005, Ms. Anderson took B.S. to Children's Mercy Hospital where B.S. was interviewed by a social worker, Penny Clodfelter, and examined by a resident doctor, Kelly Sinclair (Tr. at 32-37). There B.S. alleged purported penile and digital penetration of her vagina and mutual oral sex, including oral sex and digital penetration of her vagina the night before when she spent the night at Mr. Skaggs' house (Tr. at 32-37). B.S. alleged condoms were used when Mr. Skaggs purportedly tried to have intercourse with her (Tr. at 391-92). She also alleged that Mr. Skaggs had shown her pornography on her mother's computer (Tr. at 36).

The physical examination of B.S. done by resident Sinclair purportedly revealed the complete absence of her posterior hymen, only a fleshy remnant of her anterior hymen, and "notching" of her hymen, which Sinclair said indicated repeated, old trauma to the area (Tr. at 67, 85, State's Ex. 2). This examination was conducted without the aid of any instrumentation, such as a colposcope used for magnification of the genital area, nor documented with photographs (Tr. at 65, 69, 72). Sinclair concluded that these injuries were consistent with sexual abuse (Tr. at 73, 81, State's Ex. 2). A rape kit, including oral, vaginal, and rectal swabs, was taken (Tr. at 70-71).

After Ms. Clodfelter's interview of B.S. at the hospital, Ms. Clodfelter and Ms. Anderson had a conversation (Tr. at 212-13). At trial, Ms. Anderson gave the following testimony regarding their conversation:

> Q: And so you had to wait for the social worker and then she was talking to you and [B.S.] for several, some period of time?
>
> A: Yes.
>
> Q: And then what happened after that?
>
> A: She pulled me back there by myself. She told me that she felt that [B.S.] had been molested and she started questioning me about who Kevin Skaggs was. And explained to her who he was and she was pretty blunt. She even asked me how come I was so stupid, and I didn't know what to say. What are you thinking letting a single guy hang around your young girls? What were you thinking? And said, I don't know, I must have been stupid, what I am.

(Tr. at 212-13).

After leaving the hospital and a brief stop at home, Ms. Anderson and B.S. went to the Leavenworth Police Department, where B.S. was interviewed by Officer Jerry Roach (Tr. at 106-07, 215-16). Ms. Anderson gave the police her computer and B.S.'s unwashed underwear that she wore while at Mr. Skaggs' house during the alleged abuse (Tr. at 96-97, 215-16, 242-43).

The police arrested Mr. Skaggs and, pursuant to a search warrant seized his computer, condoms from the trash, the comforter bed B.S. alleged was laid on during the purported oral sex and digital penetration, and clothing that B.S.'s claimed Mr. Skaggs had worn and purportedly used that night (Tr. at 103-05, 127-30, 146). B.S. also alleged that after ejaculating, Mr. Skaggs wiped his penis off on a dark, long-sleeved shirt (Tr. at 32).

Mr. Skaggs voluntarily spoke with Detective Kevin Crim and denied B.S.'s allegations (Tr. at 135-36, State's Ex. 27; Vol. XXI, Movant's Ex. H). A transcript of Mr. Skaggs' statement to Detective Crim was admitted into evidence and was available to the jury during deliberations (Tr. at 134, 544). During the interview, Detective Crim informed Mr. Skaggs that a rape kit had

been taken and the following exchange occurred:

> Crim: Is there any, are we going to find anything in the rape kit?
>
> Kevin: Shouldn't I haven't done anything.
>
> Crim: Well we wouldn't have arrested you on these charges if we didn't believe her story.

(Tr. at 135-36, State's Ex. 27; Vol. XXI, Movant's Ex. H).

Barbara Crim-Swanson, a forensic biologist for the Kansas Bureau of Investigation, analyzed swabs from the rape kit, the various items of clothing, and the condoms found in Mr. Skaggs' trash (Tr. at 306, 311-12). Swanson detected amylase on B.S.'s underwear, which she deemed significant because amylase is found in high concentrations in saliva (Tr. at 316, 323). Swanson observed that the stain was in the crotch of the underwear, and it did not have the appearance of fecal matter, which would contain pancreatic amylase (Tr. at 317). Testing of the stain yielded a single DNA profile which matched the known profile of B.S. (Tr. at 321-22).

The state then questioned Ms. Swanson whether it was possible that the person who left the amylase stain did not leave enough DNA to be identified through testing:

> Q: And does the fact that you found it indicate that there was sufficient amounts there you would expect to get a positive DNA test?
>
> A: I don't think there is no way to correlate the two. In saliva what we are looking for is skin cells from inside the mouth secreted into saliva. And when we find it, if there is enough cellular material, often times we get DNA profile. And in the abscence of getting the DNA profile, I just didn't pick up enough to be able to make a strong conclusion.
>
> Q: And is it a possibility that the person who contributed the fluids that gave you the poitive amylase test, could come up and not be identified by DNA testing?
>
> A: Rephrase that please.
>
> Q: The person who contributed the biological fluid that resulted in the positive amylase test that you detected -

A: Yes.

Q: And, one, that means that they would have to have left enough material there that you could have collected to get a positive DNA test?

A: There has to be enough there to get a positive DNA test, and we don't have any way to quantitate how much is enough since we cannot confirm saliva.

Q: And so the fact that the amylase was there doesn't mean that the person who contributed it had to leave enough there to be a positive DNA test?

A: The possibility there were not enough skin cell materials there to get DNA results, abscence of getting DNA results, you know. I tried but I didn't get it and kind of where I'm going. The Laboritory, I will try it and see what I can get and see what happens. It's kind of a nebulous area and got a negative result and about all I can tell you about it.

(Tr. at 323-24).

Swanson did not find seminal fluid on any of the clothing tested or vaginal swabs from the rape kit (Tr. at 313). A preliminary test of B.S.'s rectal swab was positive for the presence of acid phosphatase, an enzyme found in other bodily fluids, including semen, but when Swanson performed a more precise test, she could not confirm the presence of semen (Tr. at 313-16).

During closing argument, the prosecutor told the jury that the acid phosphatase on B.S.'s rectal swab came from seminal fluid and the amylase on B.S.'s underwear came from Mr. Skaggs' saliva (Tr. at 1031-32, 1039). He argued that the stain on B.S.'s underwear made perfect sense, because Mr. Skaggs performed oral sex on her (Tr. at 1032).

James Kanatzer, a forensic computer expert, examined Mr. Skaggs' computer and found thirteen images of child pornography on the hard drive (Tr. at 427, 430-32, 443). All of the images had been deleted, or placed in the recycle bin, on January 22, 2005 at 10:45 p.m. (Tr. at 479-81). Mr. Kanatzer found eleven child pornography movies and one image on Ms. Anderson's hard drive (Tr. at 503). He also found an e-mail from Daniel LaFountain, using the

screen name Caitlyn Roberson, in Mr. Skaggs' e-mail account with movie files attached (Tr. at 282-83, 509-10, State's Ex. 31). The attachments were downloaded on November 20, 21, and 24, 2004, and on December 11, 2004 (Tr. at 507, 510, 539). Movie viewing programs were installed on Ms. Anderson's computer on November 24, 2004 (Tr. at 537).

(3) The Defense Evidence at Trial

Joseph Foderaro, an information management specialist for the federal government, testified that Mr. Skaggs' computer contained seven viruses, any one of which could permit unauthorized access to his computer without his knowledge (Tr. at 579, 581-82, 608). Using a "Trojan Horse" virus, a hacker can access a computer and engage in chats and download files without the owner's knowledge (Tr. at 587-88). A hacker can store illegal materials on a compromised computer rather than their own computer (Tr. at 591). A hacker can send e-mail from a compromised computer (Tr. at 588). If a hacker had a person's ID and password, the e-mail would appear to have been sent by the owner of the compromised computer, having originated with the hacker's computer (Tr. at 589-90). When a hacker uses a compromised computer, nothing alerts the owner that a hacker has control of the system (Tr. at 594).

Mr. Skaggs' uncle, William Lough, testified that Mr. Skaggs was working with him installing heating and cooling ductwork in Gardner, Kansas from 7:00 a.m. to 3:30 p.m. on November 24, 2004, the day that pornography was downloaded and movie viewing programs were installed on Ms. Anderson's computer over 50 miles away (Tr. at 621-23). Mr. Skaggs' time record for November 24, 2004 that were kept by his employer, Air Service Company, whose home office is located in Joplin, Missouri that confirmed he was at work that day at that time was admitted into evidence (Tr. at 615, 618-21, Defense Ex. 1).

David Green, Mr. Skaggs' roommate, testified that Mr. Skaggs was at work on November 24, 2004 with Mr. Lough and Mr. Green. He testified that Ms. Anderson would often

call Mr. Skaggs asking him to watch the girls (Tr. at 831-38). Mr. Skaggs never initiated a conversation with Ms. Anderson in which he asked to watch the girls (Tr. at 833). Ms. Anderson once dropped off B.S. at Mr. Skaggs' house while no one was there (Tr. at 831). Mr. Green never witnessed any inappropriate behavior by Mr. Skaggs towards the girls (Tr. at 834). B.S. would often play on Mr. Skaggs' computer alone when she was at his house (Tr. at 827, 830). Many other people used Mr. Skaggs' computer, including when Mr. Skaggs was not home but Mr. Green was (Tr. at 826, 838-39). Mr. Green witnessed Ms. Anderson get angry and get into an argument with Mr. Skaggs because Mr. Skaggs was getting back with his ex-girlfriend (Tr. at 836-38). This occurred a week or two before the allegations against Mr. Skaggs (Tr. at 838).

Michael Lizardi, a friend of Mr. Skaggs and the boyfriend of Ms. Anderson at the time of the allegations, testified that Ms. Anderson disclosed to him her suspicions that B.S. had been molested (Tr. at 678, 683, 728). These suspicions were because she dreamt Mr. Skaggs molested B.S. and her feelings came from watching an episode of CSI about molestation and her horoscope (Tr. at 679-80). Mr. Lizardi recommended to Ms. Anderson that she take B.S. to a hospital for evaluation (Tr. at 686, 729). Although Mr. Lizardi and Mr. Skaggs were friends, and Mr. Lizardi saw Mr. Skaggs shortly after the allegations, Mr. Lizardi did not inform Mr. Skaggs of the allegations (Tr. at 688-89, 691). Although the girls regularly asked Ms. Anderson to spend time with Mr. Skaggs at his house, Mr. Lizardi never saw Mr. Skaggs initiate any requests to watch Ms. Anderson's daughters (Tr. at 704-05). Ms. Anderson did regularly ask Mr. Skaggs to watch the kids (Tr. at 675). Mr. Lizardi and others witnessed B.S. hiding in Ms. Anderson's bedroom closet so she could listen to the adults tell jokes of a sexual nature (Tr. at 707-09). B.S. and her aunt Ana had conversations of a sexual nature, in which Ana described a 14 year-old girl she knew who likes to "give head." (Tr. at 710-11). Ana, a State's witness who claimed to be at Ms. Anderson's house on January 22, 2005, the night of the allegations, was in fact not at Ms.

Anderson's house at any point Mr. Lizardi was that night (Tr. at 687, 744). Ms. Anderson disclosed to Mr. Lizardi that B.S. recently got curious about and engaged in masturbation during the summer of 2004 while B.S. was in Pennsylvania, before Mr. Skaggs ever met the children (Tr. at 712-13). Mr. Lizardi disclosed numerous people used Mr. Skaggs' computer (Tr. at 700).

Curtis Matousek, a friend of Mr. Skaggs and Ms. Anderson, testified that he never saw Mr. Skaggs ask to watch the two children (Tr. at 780). Mr. Matousek nor Mr. Skaggs were privy to the allegations at any time during the night the allegations first came to be (Tr. at 793). Ana, a State's witness who claimed to be at Ms. Anderson's house on January 22, 2005, the night of the allegations, was in fact not at Ms. Anderson's house when Mr. Matousek and Mr. Skaggs stopped by on January 22, 2005 (Tr. at 793). Mr. Matousek witnessed B.S. try several times to sit on Mr. Skaggs' lap while the girls were around Mr. Skaggs, with Mr. Skaggs actively pushing her away and telling her to stop (Tr. at 786). Mr. Matousek testified that Mr. Skaggs expressed concerns to Ms. Anderson about some of B.S.'s behavior and conduct towards him, but Ms. Anderson just blew it off (Tr. at 812). Mr. Matousek would have seen if Mr. Skaggs was having any chat conversations with anyone other than his girlfriend, Ms. Coblentz, during the time the other chat discussion about child pornography allegedly took place (Tr. at 789-90). Mr. Skaggs was not very computer savvy (Tr. at 808). Many people had access to and used Mr. Skaggs' computer (Tr. at 794-95).

Tim Supplee testified that on January 22, 2005 - the date that pornographic images were deleted from Mr. Skaggs' computer at 10:45 p.m. - he played in a championship basketball game for his high school (Tr. at 1011). Mr. Skaggs attended the game (Tr. at 1012). After the game, Mr. Skaggs, Mr. Supplee, and several others watched a tape of the game at their parents' home, a ritual they did almost every game night (Tr. at 1013). Mr. Skaggs arrived shortly after 10:00 p.m. and he did not leave until after 11:45 p.m. (Tr. at 1013-14).

Mr. Skaggs testified and denied downloading child pornography to any computer (Tr.

at 868, 876). He never showed B.S. any sexually suggestive material (Tr. at 869). He never met or exchanged e-mails with Daniel LaFountain (Tr. at 876). Mr. Skaggs denied having sexual contact with B.S. (Tr. at 880, 885-86).

The jury returned guilty verdicts on all but one count (Tr. at 1070-72). Mr. Skaggs was sentenced on February 22, 2008. At the sentencing hearing, Dr. Dean Stetler, a professor at the University of Kansas with a Ph.D. in microbiology and an expert on DNA analysis, testified about the forensic testing done on B.S.'s underwear (Vol. XIII at 8-11, 28, 30-34). Dr. Stetler explained that amylase is found in saliva, but the presence of amylase on B.S.'s underwear could be from urine, vaginal secretions, or feces as well (Vol. XIII at 25, 30). There is no way to determine which bodily fluid accounted for the stain (Vol. XIII at 31). It would be pure speculation to suggest that the amylase came from saliva (Vol. XIII at 32). DNA testing of the underwear yielded the genetic profile of only B.S. and no other person (Vol. XIII at 28-30). Not only did the DNA testing not connect the underwear stain to Mr. Skaggs, there was no male DNA in the underwear stains or in any items associated with B.S. (Vol. XIII at 30).

(4) Trial Errors Raised

Mr. Skaggs raised several issues in his direct appeal in the Kansas Appellate Courts. These issues were: 1) The prosecutor misled the jury by presenting evidence and argument that forensic test results supported B.S.'s testimony and were evidence of Mr. Skaggs' guilt, when the result did not link Mr. Skaggs to the purported offenses, 2) the court abused its discretion in admitting social worker Penny Clodfelter's detailed, lengthy, and cumulative report regarding her interview with B.S., and Mr. Skaggs' fundamental rights were violated by the admission of B.S.'s statements to police officers Roach and Crim, and Ms. Anderson's statement to Crim, 3) the court abused its discretion in permitting social worker Penny Clodfelter to comment on B.S.'s credibility by testifying that she questioned B.S. in such a way as to ensure accuracy and that B.S.

always gave her the same answer, 4) the court erroneously admitted evidence of other untrue, supposed crimes and prior civil wrongs under K.S.A. § 60-455 and committed clear error by not instructing the jury as to how the evidence could be considered, 5) the prosecutor engaged in misconduct when he argued that Mr. Skaggs destroyed evidence, and 6) the numerous errors in this case cumulatively denied Mr. Skaggs a fair trial. The conviction was affirmed on appeal. State v. Skaggs, 212 P.3d 1039 (2009) (Appx. at A12).

(5) Post-conviction Claims of Ineffective Assistance of Counsel

Mr. Skaggs raised post-conviction claims that his trial counsel was ineffective for failing to object to numerous instances in which the State's witnesses indicated that they believed B.S.'s accusations and improperly commented on her credibility, including police officers (Vol. I at 11-12, 59). Mr. Skaggs alleged that the improper comments on her credibility occurred during: Ms. Anderson's testimony; the playing of State's Ex. 15 (B.S.'s recorded statement to Officer Roach); State's Ex. 26 (B.S.'s recorded statement to Detective Crim); State's Ex. 25 (Ms. Anderson's statement to Detective Crim); and the admission of State's Ex. 27 (Mr. Skaggs' transcribed statement to Detective Crim) which the jury had for deliberations (Vol. I at 59-60).

Mr. Skaggs also alleged that counsel was ineffective for failing to present evidence — either through cross-examination of the State's expert, Barbara Crim-Swanson, or through a defense expert, Dr. Dean Stetler — demostrating that Mr. Skaggs was excluded as a possible contributor of the amylase stains found on B.S.'s underwear and that there was no physical evidence connecting Mr. Skaggs to the rape and sodomy charges (Vol. I at 9-11, 51-58).

Mr. Skaggs also alleged that counsel was ineffective for failing to cross-examine Dr. Kelly Sinclair regarding a follow-up physical examination of B.S. that showed a normal genital examination only ten days after Sinclair's initial examination in which she reported B.S. having no hymen at all (Vol. I at 13-14, 79-80). Mr. Skaggs alleged that counsel was ineffective for failing

to object to move to redact portions of Ms. Anderson's statement to Detective Crim in which she referred to non-existent restraining orders against Mr. Skaggs (Vol. I at 14-15, 81-93). Mr. Skaggs alleged these errors by counsel acted cumulatively to deny him a fair trial (Vol. I at 20, 96).

An evidentiary hearing was held on the post-conviction motion (Vol. XVIII and XIX). Mr. Skaggs called Mr. Lober as a witness and questioned him regarding his purported trial strategies regarding the above claims of ineffective assistance of counsel. On August 29, 2012, the district court denied relief on all claims (Vol. I at 324) (Appx. at B1-11). The Kansas Appellate Court affirmed the decision, Skaggs v. State, 321 P.3d 36 (2014) (Appx. at C9).

(6) Federal Habeas Corpus Claims

Mr. Skaggs filed his federal habeas in April, 2016, raising each of his State claims with the Kansas District Court. On August 30, 2018 the Kansas Federal District Court denied Mr. Skaggs federal habeas relief and denied him a Certificate of Appealability, Skaggs v. Cline, 2018 U.S. Dist. LEXIS 147683 (2018) (Appx. at D14). The Tenth Circuit Court of Appeals granted Mr. Skaggs a Certificate of Appealability on only three of his ten grounds raised in the Kansas Federal District Court. These grounds were 1) whether his attorney provided ineffective assistance of counsel when he failed to cross-examine the State's forensic expert using the finding from her own report excluding Mr. Skaggs as a possible match to DNA evidence, 2) whether a statement made by the prosecution to the jury amounted to misconduct, and 3) whether the cumulative effect of otherwise harmless or nonprejudicial federal constitutional errors deprived Mr. Skaggs of due process or a fair trial. The Tenth Circuit Court of Appeals determined that the three grounds they reviewed were decided in error, but that the evidence against Mr. Skaggs was overwhelming, and so denied relief, Skaggs v. Baker, 2019 U.S. App. LEXIS 14358 (2019) (Appx. at E8).

C: COUNSEL'S FAILURE TO INVESTIGATE FORENSIC DNA EVIDENCE

Mr. Lober testified that when he took over Mr. Skaggs' case, he was aware that an

expert on DNA analysis, Dr. Dean Stetler, had been retained and he knew how to contact him (Vol. XVIII at 97-98). Lober never contacted Dr. Stetler about the DNA forensic evidence (Vol. XIII at 16; Vol. XVIII at 99-101). Lober did not consider questioning his own expert as effective as cross-examining the State's expert (Vol. XVIII at 112). Lober thought he could get all the information he wanted out of the State's expert, Ms. Crim-Swanson on cross-examination (Vol. XVIII at 112-13).

Mr. Lober wanted to emphasize to the jury the fact that Mr. Skaggs was excluded as a possible contributor to the amylase stain on B.S.'s underwear (Vol. XVIII at 107). Lober also wanted to emphasize that the amylase stain could have come from a bodily fluid other that saliva (Vol. XVIII at 113-14). Lober "wanted both facts in evidence so that [he] could argue to the jury that there was a significant material lack of DNA evidence, which is very persuasive to juries, and if it's not there then they shouldn't be so easily persuaded of guilt" (Vol. XVIII at 114).

Mr. Lober didn't understand the DNA forensic evidence (Vol. XVIII at 118). Lober kept mixing up the sources of acid phosphatase and amylase, and was confused about why the prosecution used them as evidence of Mr. Skaggs' guilt (Vol. XVIII at 117-18, 122). Lober testified he still didn't see the argument or inferences of guilt (Vol. XVIII at 122). Lober testified that Ms. Crim-Swanson's DNA report that excluded Mr. Skaggs as a contributor to the amylase on the underwear was a "complicated piece of work" (Vol. XVIII at 105). Lober believed that the DNA evidence was suspicious of Petitioner's guilt, but not conclusive (Vol. XVIII at 125).

The Tenth Circuit Court of Appeals granted Mr. Skaggs a Certificate of Appealability on this issue, and ultimately determined that Lober was ineffective for failing to challenge Crim-Swanson, determining:

> Mr. Skaggs claims his counsel performed deficiently when he failed to adequately cross-examine Dr. Swanson to "challenge [her] testimony . . . with her previous testimony that she did in fact get a single source profile" or with her report that excluded Mr. Skaggs as

a "possible contributor" of the amylase. The state court rejected this claim. It determined that Mr. Skaggs' attorney adequately cross-examined Dr. Swanson because the cross-examination "established that amylase can be attributed to a number of nonsexual bodily fluids other than saliva."

Because Dr. Swanson's "report conclusively eliminated Skaggs as a contributor to the amylase," the state court explained, any additional testimony by a defense expert "would have been cumulative." Mr. Skaggs rejects that explanation, arguing that "there is no way to know if the jury actually read or understood the results quoted in the four-page report." But the state court determined that Dr. Swanson's testimony implied the report's conclusion: the amylase featured only one source profile, the source profile was consistent with B.S., and B.S.'s DNA "would naturally be in her own panties in the form of vaginal secretions and skin cells," implying that the single source of the amylase was B.S. The district court found "the [state court's] analysis consistent with the Strickland standard." But even given the "doubly deferential" standard applicable here, we cannot agree. We see neither a strategic advantage nor an objectively reasonable rationale for failing to challenge Dr. Swanson on cross-examination with her report excluding Mr. Skaggs "as a possible contributor of the [amylase]." But that does not mean Mr. Skaggs is entitles to habeas relief.

Mr. Skaggs cannot show that his attorney's deficient performance prejudiced him. Although neither the state court nor the district court addressed prejudice (and even though the government did not argue it), we are free to affirm the district court "on any basis supported by the record."

First, the fact that Dr. Swanson could identify only B.S. as a source of the amylase does not disprove the allegations of abuse. Second, we conclude, as the state court did elsewhere, that "the evidence at trial against Mr. Skaggs was overwhelming." The jury was presented not only with B.S.'s testimony of abuse, but with chat logs, shown to have been written by Mr. Skaggs, that corroborated her testimony. Further, B.S.'s testimony about the videos Mr. Skaggs showed her was corroborated by the discovery of such videos. Thus, even if Mr. Skaggs' attorney had not performed deficiently, there is no "reasonable probability that . . . the result of the proceeding would have been different." We therefore deny Mr. Skaggs' ineffective assistance of counsel claim.

Skaggs v. Baker, 2019 U.S. App. LEXIS 14358 (2019) (Appx. at E6-7).

The Tenth Circuit Court of Appeals could see "neither a strategic advantage nor an objectively reasonable rationale for failing to challenge Dr. Swanson on cross-examination with her

report excluding Mr. Skaggs 'as a possible contributor of the [amylase]'" (Appx. at E6). They ultimately denied relief, determining 1) the fact that Dr. Swanson could identify only B.S. as a source of the amylase does not disprove the allegations of abuse, and 2) "the evidence at trial against Mr. Skaggs was overwhelming" (2019) (Appx. at E6-7).

D: COUNSEL'S FAILURE TO INVESTIGATE MEDICAL EVIDENCE

The state's medical expert, resident doctor Kelly Sinclair, provided the following testimony at trial. On January 22, 2005, Sinclair examined the alleged victim, B.S. by visualizing her genital area without the aid of instruments (Tr. at 65). A colposcope, the proper instrument that is used to magnify the area, was not used (Tr. at 69, 72). Sinclair testified that B.S. had no posterior hymen and only a fleshy remnant of her anterior hymen, which Sinclair said indicated repeated, old trauma to the area (Tr. at 67, 85). Sinclair also reported "notching," or a tear, which she said indicated a history of trauma to the area (Tr. at 67-67, 76). In prepubertal girls, the hymen usually heals in one to two weeks and the notching will go away leaving a small skin tag (Tr. at 68). Sinclair concluded that the notching she observed was a recent injury and probably occurred within five days of the examination (Tr. at 68, 75-76). A small tear of the hymen can take 24 to 48 hours to start to heal into a notch (Tr. at 76). Notching is a distinct injury that is "pretty consistent" with sexual abuse and is more consistent with penetration (Tr. at 85-86).

Sinclair concluded that the physical findings were consistent with sexual assault (Tr. at 73, 81). The injuries purportedly seen by Sinclair were not documented with photographs, because the hospital's camera was not working (Tr. at 71). Sinclair said that the camera malfunction was why B.S. went to the CARE Clinic a few days later (Tr. at 72).

Evidence regarding B.S.'s normal follow-up examination was not presented at trial. Sinclair was not asked any questions on direct or cross-examination about the follow-up exam of B.S. that took place on February 2, 2005, just 10 days after the initial examination (Tr. at 57-

86). This follow-up exam was conducted by a different doctor, who did use a colposcope and who did document the examination with photographs. Although Sinclair did not conduct the follow-up exam, nor was she even present while it was being done, Sinclair issued a follow-up report after reviewing the photographs from the follow-up exam. This report states:

> [B.S.] was seen in our CARE Clinic on February 2, 2005 for a follow-up of her evaluation for possible sexual abuse in the ER. I have reviewed the photographs taken in Care Clinic which show a normal female genitalia with intact hymen. These photographs show a different exam finding than noted in our ER evaluation on January 22. Her ER examination showed her genital area to be more red and her vaginal opening more widely open. Review of the photographs taken with the aid of colposcopy show the evolution of her examination. My overall impression does not change given the child's history in addition to her physical examination. She gave detailed disclosure of ongoing sexual contact with an adult male (See Jan. 23, 2005 social worker note). Her anogenital exam in CARE Clinic had normalized. A normal exam does not conflict with the history given.

(Vol. XXI, Movant's Ex. I).

Mr. Lober did not investigate the discrepancies in the two conflicting medical examination results. Lober testified that he did not believe that he could find another doctor to challenge Sinclair's findings (Vol. XVIII at 180). Lober based his decision not to investigate the medical evidence by looking for an expert to consult with because he believed that Sinclair was correct in her assessment that a hymen that was nearly completely gone could somehow regrow and be normal and intact ten days later (Vol. XVIII 180). Lober believed that a hymen could regrow and regenerate to a normal state (Vol. XVIII 178-180). Lober testified that he believed it was possible for a "female to be a virgin twice" (Vol. XVIII 179).

Lober testified he believed "When a lawyer examines an expert witness, the lawyer should know as much as the expert, because you can't examine them competently if you don't know what they are talking about, or they will make you look stupid and ruin your case" (Vol. XVIII 215). Lober admitted that he believed a lawyer should know as much as the expert he is

examining, or he can't examine them competently (Vol. XVIII 215). Yet Lober also testified that he did not have the medical credentials to take on a doctor (Vol. XVIII 179). Lober testified that the medical evidence was the defense's only credibility (Vol. XVIII 181). Lober did not believe that a jury could have been persuaded that Sinclair's finding could not be accurate (Vol. XVIII 181-82). Yet Lober admitted that it would have been a difficult argument for the prosecution to make to a jury, that a hymen could regrow (Vol. XVIII 179).

E: REASONS FOR GRANTING THE PETITION

1. This Court should address the important federal question of whether defense counsel performs unreasonably under the Sixth Amendment if their pre-trial and trial investigations and strategies are based on their belief in the impossible, a belief that leads counsel to not even consider consulting with an expert, and not investigating if certain evidence could be challenged.

A) Ineffectiveness

Under Strickland, strategic choices made after "less than complete investigation" are reasonable only "to the extent that reasonable professional judgments support the limitations on investigation" (466 U.S. at 690-91). In denying post-conviction relief, the Kansas courts and the Tenth Circuit Court of Appeals ignored this Court's clear precedents that effective assistance of counsel includes the duty to make reasonable pre-trial investigation of challenges to the prosecution's evidence or make a reasonable (and informed) decision that such investigation would be fruitless. This Court has repeatedly held counsel ineffective due to unreasonable, inadequate investigation. See Porter v. McCollum, 588 U.S. 30, 40 (2009); Rompilla v. Beard, 545 U.S. 374 (2005); Wiggins v. Smith, 539 U.S. 510 (2003); Williams v. Taylor, 529 U.S. 362, 390-99 (2000). And the Court has recognized that in certain criminal cases, "the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both," Harrington v. Richter, 562 U.S. 86, 106 (2011).

It was patently unreasonable for trial counsel to fail to even consult with a medical expert to become knowledgable and informed for assisting in preparing cross-examination of Sinclair or for possible rebuttal testimony, because such decisions were not supported by thorough investigation. See, e.g., Hooper v. Mullin, 314 F.3d 1162, 1170-71 (10th Cir. 2002) ("A decision not to investigate cannot be deemed reasonable if it is uninformed."); Fisher v. Gibson, 282 F.3d 1283, 1296 (10th Cir. 2002) (same) (granting federal habeas relief); Battenfield v. Gibson, 236 F.3d 1215, 1229 (10th Cir. 2001) (failure to investigate rendered any resulting strategy unreasonable) (granting federal habeas relief).

In a case such as Petitioner's involving technical or scientific evidence over which the attorney has no independent expertise, counsel is ineffective for failing to consult with all necessary expert witnesses. See Pavel v. Hollins, 261 F.3d 210, 224-25 (2nd Cir. 2001), and cases cited therein. Lober admitted he did not look for a medical expert because he believed he could not find another doctor to challenge Sinclair's findings (Vol. XVIII at 179). Petitioner's trial counsel admitted that he believed a lawyer should know as much as the expert he is examining, or he can't examine them competently (Vol. XVIII 215).

Lober testified that he believed the question was not whether B.S. was abused, but rather who did it (Vol. XVIII 161). Lober also admitted he conceded the medical evidence without investigating whether or not it could be challenged (Vol. XVIII 180). Similarly, in Gersten v. Senkowski, 426 F.3d 588 (2005), the court affirmed the district court's finding of ineffective assistance where defense counsel conducted only a limited investigation concerning the prosecution's expert testimony on sexual assault, which hampered his cross-examination, and did not consult with an independent medical expert. Id. at 605. After noting that "the failure to consult with or call a medical expert is often indicative of ineffective assistance of counsel" in sexual abuse cases, the Second Circuit found that the decision not to investigate was not objectively reasonable,

because "no facts known to defense counsel at the time that he adopted a trial strategy that involved conceding the medical evidence [of sexual abuse] could justify that concession." Id. at 607, 609. The court remarked that "Defense counsel may not fail to conduct an investigation and then rely on the resulting ignorance to excuse his failure to explore a strategy that would likely have yielded exculpatory evidence." Id. at 610.

Although this Court has recently decided some cases that involve expert-witness issues in the context of a claim of ineffective assistance of counsel, none have adresses counsel's failure to investigate and prepare for trial based on counsel's belief in the impossible. See, e.g., Hinton v. Alabama, 134 S. Ct. 1081 (2014) (counsel ineffective for failing to request funds to replace an inadequate defense expert); Harrington v. Richter, 562 U.S. 86, 106 (2011) (counsel not ineffective for failing to consult blood-pattern experts where results may have shown that the defendant's version of events was fabricated). Mr. Skaggs' appeal presents such an opportunity.

Mr. Skaggs argues and the record does not contradict his claim that his trial counsel failed to engage any medical expert whatsoever and conducted no investigation whatsoever into whether the medical evidence from the initial examination could be challenged by the findings in the follow-up exam, and did not challenge Sinclair with the follow-up exam. This was deficient performance because Lober believed a hymen could regrow (Vol. XVIII at 178-180). Counsel testified that he did not possess the necessary expertise in the medical field, such as would have allowed him to accurately assess the efficacy of proceeding without consulting appropriate experts (Vol. XVIII at 179). Strickland established that counsel has the duty to either conduct a reasonable investigation or to make decisions which make such investigation unnecessary. Strickland v. Washington, 466 U.S. 668, 691 (1984). Here, counsel did neither.

Similarly, in Pavel v. Hollins, 261 F.3d 210, 218 (2nd Cir. 2001), the Pavel Court observed even if counsel's decision "was 'strategic' in some sense of the word, it was not the sort

of conscious, reasonably informed decision made by an attorney with an eye to benefitting his client that the federal courts have denominated 'strategic' and been especially reluctant to disturb." See Strickland, 466 U.S. at 690-91 (strategy must be based on a reasonable decision). In that child abuse case, the Second Circuit granted habeas relief due in part to counsel's failure to "contact an expert, either to testify or (at least) to educate counsel on the vagaries of abuse indicia." Pavel at 201. "Such pre-trial investigation and analysis [related to child sexual abuse] will generally require some consultation with an expert." Id. (citing Beth A. Townsend, Defending the "Indefensible": A Primer to Defending Allegations of Child Abuse, 45 A.F.L. Rev. 261, 270 (1998) (It is difficult to imagine a child abuse case. . . where the defense would not be aided by the assistance of an expert.").

The Pavel Court counseled that because of the particular importance of physical evidence in child sexual abuse cases that turn into credibility contests, "physical evidence should be a focal point of defense counsel's pre-trial investigation and analysis." Pavel at 224. Moreover, "because of the 'vagaries of abuse indicia,' such pre-trial investigation and analysis will generally require some sort of consultation with an expert." Id. Consultation with an expert was crucial in Pavel for two reasons: 1) counsel had neither the education nor the experience necessary to evaluate the evidence and "make for himself a reasonable, informed determination as to whether an expert should be consulted or called to the stand," and 2) there was an "obvious, commonsense mismatch" between the physical evidence and the allegations such that a "reasonably professional attorney" would have consulted and been ready to call an expert to address the inconsistencies.

A lesson to be learned from Pavel is that when a defendant is accused of sexually abusing a child and the evidence is such that the case will turn on accepting one party's word over the other's, the need for defense counsel to, at a minimum, consult with an expert to become

educated about the "vagaries of abuse indicia" is critical. Pavel at 224. The importance of consultation and pre-trial investigation is heightened where, as Petitioner's case, the physical evidence is less than conclusive and open to interpretation.

Here, there could be no reasonable - or even conceivable - basis for deciding not to consult with a medical expert to become educated on whether the medical evidence could be challenged, nor challenging Sinclair's original findings that B.S. had no hymen with her own report that stated B.S. had a "normal female genitalia with intact hymen" ten days after Sinclair reported it was completely gone, especially since it is medically impossible for a hymen to regrow [see People v. Lopez, 207 Ill. 2d 449 (2003); see Gersten v. Senkowski, 426 F.3d 588 (2005); see In re Hill, 198 Cal. App. 4th 1008 (2011); see Baba-Ali v. State of New York, 19 N.Y. 3d 627 (2012); see United States v. Matthew Lane Durham, 2016 U.S. Dist LEXIS 9000 (10th Cir.); see U.S. v. Durham, 2018 U.S. App. LEXIS 24546 (10th Cir)]. Because Mr. Lober believed that a hymen could regrow, he based his decision not to investigate the medical evidence and whether Sinclair's findings could be challenged on his own personal belief on something he falsely believed to be possible but was in fact impossible (Vol. XVIII at 177-82; 215). Lober testified that there was no information contained in the follow-up report that he wanted to present to the jury (Vol. XVIII at 177). As a result, the only medical testimony and results the jury heard was that Sinclair found that B.S. had no hymen left at the time of the initial examination, which was "more consistent" with penetration (Tr. at 67-68, 73, 75-76, 81, 85-86; State's Ex. 2).

B) Prejudice

"An attorney's failure to present available excuplatory evidence is ordinarily deficient, unless some cogent tactical or other consideration justified it." Pavel v. Hollins, 261 F.3d 210, 220 (2nd Cir. 2001). The failure of an attorney to counter expert witnesses and prosecution theory with available facts qualifies as ineffective assistance of counsel, if prejudicial. Holsomback v.

White, 133 F.3d 1382 (11th Cir. 1998); Pavel v. Hollins, 261 F.3d 210 (2nd Cir. 2001).

In Petitioner's case the jury was told by a medical expert that B.S. had no hymen, which was "more consistent" with penetration (Tr. at 67-68, 73, 75-76, 81, 85-86; State's Ex. 2). The key element to rape is penetration of the vagina. B.S. having no hymen would be the single most extensive corroboration that there was indeed repeated penetration. But the fact that B.S. had a "normal female genitalia with intact hymen" ten days after Sinclair claimed it was missing completely disproved Sinclair's original findings, since a hymen cannot regrow. In order for Sinclair's testimony and findings that B.S. had no hymen in the initial exam and the description in the follow-up report to be accurate, that would mean that B.S.'s hymen did the impossible, it regrew. This was an "obvious, commonsense mismatch" between the two examinations, as well as the physical evidence and the allegations such that a "reasonably professional attorney" would have consulted with and been ready to call an expert to address the inconsistencies and would have challenged Sinclair with her own follow-up report.

In Petitioner's case, Mr. Lober was ineffective for failing to learn this commonly-known fact. The prejudice in Petitioner's case is glaring and obvious. Petitioner was not convicted on the basis of an eyewitness. He was not convicted on the basis of a confession. He was convicted on the basis of Swanson's and Sinclair's testimonies that amylase could have come from Mr. Skaggs and B.S. had no hymen, which was indicative of sexual contact and penetration, simply because of Mr. Lober's handling of exculpatory DNA and medical evidence that he failed to utilize which disproved the testimonies of both state's experts. To counter those opinions with scientific facts, especially the fact that a hymen cannot regrow and that when B.S. came back for the follow-up examination, that doctor used the proper instrumentation, and it showed B.S. had a "normal female genitalia with intact hymen" ten days after Sinclair's exam was the obligation of Mr. Lober, and his efforts in that area were grossly inadequate and below prevailing norms.

Proving B.S.'s hymen was normal and intact was the most extensive corroboration possible that B.S.'s vagina was NOT penetrated, much less numerous times as she claimed, and does corroborate Petitioner's denial of the allegations, disproving all physical evidence associated with rape. Had Lober consulted with a medical expert, he would have learned it is against the laws of nature for a hymen to regrow [see People v. Lopez, 207 Ill. 2d 449 (2003); see Gersten v. Senkowski, 426 F.3d 588 (2005); see In re Hill, 198 Cal. App. 4th 1008 (2011); see Baba-Ali v. State of New York, 19 N.Y. 3d 627 (2012); see United States v. Matthew Lane Durham, 2016 U.S. Dist LEXIS 9000 (10th Cir.); see U.S. v. Durham, 2018 U.S. App. LEXIS 24546 (10th Cir)]. He could have challenged Sinclair's finding as not credible.

Mr. Skaggs' trial presents a case where there is a reasonable probability Lober's errors altered the evidentiary landscape. Lober's deficiencies were pervasive, affecting everything from opening and closing statements to cross-examination to the presentation of the defense's case-in-chief. The absence of a real investigation caused a failure to introduce any corroboration at all for Mr. Skaggs' defense despite a showing that such evidence did exist. Lober conceded the medical evidence without any investigation into whether it could be challenged, and conceded that the abuse occurred when the nature and extent of the type of abuse described by B.S. would have left some lasting kind of physical injury (Appx. at G3).

This Court must not allow an attorney to be deemed effective when their pre-trial and trial investigations and strategies are based on the impossible. For example, it cannot be deemed effective trial strategy if in a paternity case an attorney chooses to forego paternity DNA testing for a male client because the attorney believes the only way a man can father a child is if the man himself gives birth to the child. Any strategy derived from the belief that a man can give birth would be worthless and ineffective. Same for Mr. Lober, whose strategies derive from his belief that a hymen can regrow leading him not to challenge contradicting medical results that show B.S.

to have a normal, intact hymen ten days after it was supposedly missing. There is no evidence offered by the prosecutor or Kansas Attorney General showing a hymen can regrow. Notably, even the State prosecutor in a later hearing admitted to the court that they know a hymen cannot regrow (Appx. at F22, 24-25). This admittence is contrary to the prosecutor's previous arguments to the Kansas courts that Lober was effective for not challenging Sinclair based on Lober's belief that a hymen could regrow. If the prosecutor knows a hymen cannot regrow, then they would have had no way to rebut the fact that Sinclair's testimony was not credible, proving that Lober's deficiencies caused extreme prejudice to Mr. Skaggs.

2. The conduct of trial counsel that the Tenth Circuit Court of Appeals deemed ineffective with regards to Swanson and the DNA and amylase was the same conduct exhibited by trial counsel with regards to Sinclair and the medical evidence and testimony that the Tenth Circuit Court of Appeals did not review.

After Petitioner exhausted all of his claims with the state and federal courts of Kansas, the Tenth Circuit Court of Appeals did not grant a Certificate of Appealability on Petitioner's claim that his attorney provided ineffective assistance when he failed to challenge or cross-examine Sinclair, the state's medical expert, using the finding from her own report that B.S.'s hymen was normal and intact just ten days after Sinclair reported the hymen missing.

This ungranted claim had nearly identical factual circumstances of deficiencies as the claim that was granted and decided by the Tenth Circuit Court of Appeals, only the deficiencies in this ungranted claim were much more prejudicial to Mr. Skaggs. In the claim the Tenth Circuit granted, the Court determined that it could see "neither a strategic nor an objective reasonable rational for failing to challenge Swanson on cross-examination with her report excluding Mr. Skaggs as a possible contributor of the [amylase]" (Appx. at E6). This was because at Mr. Skaggs' trial Swanson's testimony left open the possibility Mr. Skaggs was a contributor of that

amylase, which trial counsel left unchallenged despite the fact that counsel had a report from Swanson that stated Mr. Skaggs was in fact excluded as a contributor of that amylase. It was the conduct of trial counsel regarding his failure to utilize and elicit this exculpatory information that was readily available at trial that was the ultimate issue decided in that ground.

It is this same conduct regarding trial counsel's failure to utilize and elicit exculpatory information that counsel could have made available to himself at trial that is at issue regarding the follow-up report by Sinclair. Sinclair testified at Mr. Skaggs' trial that when she examined B.S., she did so without using the proper magnification tool for this type of medical exam, merely visualizing the area with her naked eye (Tr. at 65, 69, 72). Sinclair testified that she observed that B.S. had "no posterior hymen and only a fleshy remnant of her anterior hymen" (Tr. at 67, 85, State's Ex. 2). Ten days later B.S. had a follow-up exam, not done by Sinclair (Tr. at 72). The doctor conducting the follow-up exam used the proper magnification tool and took photos. After merely reviewing the photos taken by the other doctor, Sinclair wrote a follow-up report in which she stated B.S. "had a normal female genitalia with intact hymen. These photos show a different exam finding than noted in our ER evaluation on Jan. 22." (Vol. XXI, Movant's Ex. I).

It is undisputed that trial counsel did not challenge or cross-examine Sinclair about the fact that, in Sinclair's own words, the photos from the doctor who conducted the follow-up exam showed B.S. had a normal, intact hymen with no abnormalities at all just ten days after Sinclair declared it was completely destroyed (Tr. at 57-86), just as trial counsel failed to do with Swanson and her report that excluded Mr. Skaggs as a contributor of amylase on B.S.'s underwear. It is also undisputed that trial counsel did not consult with any medical expert prior to trial nor call a medical expert to testify (Vol. XVIII at 180). The only substancial difference between the two claims was that at least Swanson's report was presented to the jury. Sinclair's report was not. Sinclair's testimony that B.S. had no hymen went completely unchallenged.

In child sexual abuse cases, "physical evidence should be a focal point of defense counsel's pre-trial investigation and analysis" Pavel v. Hollins, 261 F.3d 210, 223 (2nd Cir. 2001). "Because of the 'vagaries of abuse indicia,' such pre-trial investigation and analysis will generally require some sort of consultation with an expert." Id. The Pavel Court determined consultation with an expert was crucial for Pavel for two reasons: 1) counsel had neither the education nor the experience necessary to evaluate the evidence and "make for himself a reasonable, informed determination as to whether an expert should be consulted or called to the stand," and 2) there was an "obvious, commonsense mismatch" between the physical evidence and the allegations such that a "reasonably professional attorney" would have consulted and been ready to call an expert to address the inconsistencies. Id. Pavel found counsel's performance to be deficient. Id. at 225-26.

Mr. Lober failed to challenge Sinclair with her own report. Nor did Lober question the lack of instrumentation used in Sinclair's examination. Lober's failures in these regards calls into question the thoroughness of his pre-trial investigation and preparation. Since Lober failed to investigate and consult with a medical expert to learn that a hymen cannot regrow, he missed out on the chance to impeach Sinclair. Counsel could have called his own expert to undermine Sinclair. Lober admitted he had neither the education nor the experience necessary to evaluate the evidence and make for himself a reasonable, informed determination as to whether an expert should be consulted or called to the stand (Vol. XVIII at 179-80).

Lober was ineffective for failing to consult with a medical expert and learn that it is common knowledge among the medical community that a hymen cannot regrow. Had the Tenth Circuit Court of Appeals granted review of this ineffective assistance claim based on counsel's failure to challenge Sinclair with her own report underlying the exact same conduct as failing to challenge Swanson with her own report, they would likely have reached the same conclusion of ineffectiveness. There could be no strategic advantage nor objectively reasonable rational for the

exact same conduct with Sinclair and her report as with Swanson and her report.

It is time for the Tenth Circuit to fall in line with the rest of the Nation. The First, Second, Fourth, Sixth, Seventh, Ninth Circuits, and of course the United States Supreme Court have all held that where the resolution of a critical legal issue in a criminal case is dependent on expert evidence, the failure to consult with a qualified expert constitutes deficient performance, especially where counsel has an inkling that there is reason to question the validity of the state's own evidence on that issue. See, e.g., Dugas v. Coplan, 428 F.3d 317, 329-30 (1st Cir. 2005 (where arson evidence was the "cornerstone" of the State's case and where counsel was aware of "inconsistencies" in the testimony of the State's arson experts, failure to consult with an arson expert constituted deficient performance); Gersten v. Senkowski, 428 F.3d 588, 608-10 (2nd Cir. 2005) (where "medical expert testimony was central," counsel's failure to consult with or present a medical expert on sexual abuse constituted deficient performance); Williams v. Martin, 618 F.2d 1021, 1025 (4th Cir. 1980) ("there can be no doubt that an effective defense sometimes requires the assistance of an expert witness."); Harrington v. Richter, 131 S. Ct. 770, 788 (2011) (criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both); Richey v. Bradshaw, 498 F.3d 344, 362-64 (6th Cir. 2007) (where scientific evidence of arson was "fundamental" to the State's case and counsel knew that there were gaps in the State's proof, counsel's strategy to merely "poke holes" in the State's case without the benefit of an expert was deficient); Miller v. Anderson, 255 F.3d 455, 459 (7th Cir. 2001) (where the defense theory was that defendant was not at the crime scene, failure to hire an expert on hair, DNA, tread marks, and footprints to rebut the State's expert testimony about physical evidence linking the defendant to the crime scene constituted deficient performance), remand order modified by stipulation, 268 F.3d 485 (7th Cir. 2001) (vacated at party's request with settlement); Duncan v. Omoski, 528 F.3d 1222, 1235 (9th

Cir. 2008) (where the defense theory was that defendant did not commit the murder and a police report indicated that there were antigens in the blood sample that were inconsistent with the victim's blood type, failure to consult with a serologist constituted deficient performance).

Mr. Lober testified that he believed that the medical evidence was the defense's only credibility (Vol. XVIII at 181). Yet Mr. Lober did not challenge Sinclair's medical findings that B.S. had no hymen when Sinclair examined her, yet Sinclair herself declaired it was present, normal, and intact ten days later. Nor did Lober even look for a medical expert to consult with about these discrepancies (Vol. XVIII at 180). Had Lober consulted with a medical expert, he would have learned it is against the laws of nature for a hymen to regrow. Thus, he could have challenged Sinclair's testimony and findings as not credible. If Lober believed the medical evidence was the defense's only credibility, then it was incumbant upon him to actually investigate whether a hymen could regrow to learn if Sinclair's findings were even possible. Had Lober conducted this investigation, he would have learned what the prosecutor in Mr. Skaggs' case has already admitted they knew, a hymen cannot regrow (Appx. at F22, 24-25). Trial counsel's failures caused extreme prejudice to Mr. Skaggs. With the prosecutor's acknowledgment that a hymen cannot regrow, the prosecutor would have had no choice but to admit that Sinclair's original testimony to the jury that B.S. had no hymen, could not have been accurate.

3. The Tenth Circuit Court of Appeals' decision to grant a Certificate of Appealability on only some parts of an ineffective assistance of counsel claim conflicts with cumulative analysis required by both the deficient performance and prejudice prongs of Strickland v. Washington

In his petition for federal habeas relief, Mr. Skaggs presented four claims of ineffective counsel. Mr. Skaggs was granted an evidentiary hearing in his state proceedings on each claim, and the Kansas Federal District Court also ruled on each claim. Rather than review each claim of ineffective assistance raised by Mr. Skaggs, the Tenth Circuit Court of Appeals only reviewed one.

Skaggs v. Baker, 2019 U.S. App. LEXIS 14358 (2019) (Appx. at E5-7). The ineffective assistance of counsel issues the Tenth Circuit Court of Appeals did not grant a Certificate of Appealability on and review were trial counsel was ineffective for failing to: 1) cross-examine resident doctor Kelly Sinclair, challenging her with her own report about the fact that B.S. had a normal female genitalia with intact hymen in a follow-up examination ten days after the exam in which Sinclair purported B.S. had injuries consistent with sexual abuse because her hymen was missing, 2) to object to testimony and move to redact statements that counsel admitted were impermissible comments on B.S.'s credibility and on Mr. Skaggs' guilt, and 3) to move to redact a portion of Ms. Anderson's statement to Detective Crim in which she said that she was afraid of Mr. Skaggs because he had restraining orders against him from past girlfriends.

This Court should grant ceriorari because the Tenth Circuit Court of Appeals' decision not to address the other claims of ineffectiveness of counsel violates the comprehensive analysis required under each prong of the Strickland test. The first prong of Strickland requires courts to comprehensively examine whether counsel's overall performance was reasonable or deficient. Under the deficient performance prong of Strickland, the ultimate inquiry "must be whether counsel's assistance was reasonable considering all the circumstances." 466 U.S. at 688 (emphasis added). Strickland's first prong thus requires courts to examine counsel's overall performance to determine whether "identified acts or omissions," collectively considered, were unreasonable. Id. at 690 (emphasis added); see also John H. Blume & Christopher Seeds, Reliability Matters: Reassociating Bagley Materiality, Strickland Prejudice, and Cumulative Harmless Error, 95 J. Crim. L. & Criminology 1153, 1194 n.58 (2005) (Reliability Matters) (Strickland's language indicates that cumulation begins in the first prong -- that deficient performance is itself an 'overall' error . . . ."). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the

adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

Thus, lower courts have recognized that "[e]ven when individual errors may not be sufficient to cross the threshold [of deficient performance], their cumulative effect may be." Bowers v. State, 578 A.2d 734, 744 (Md. 1990) (counsel's "numerous laspes" when "taken all together" demonstrated deficient performance); accord Lindstadt v. Keane, 239 F.3d 191, 202 (2nd Cir. 2001) (granting federal habeas relief in sexual-assault-on-a-child case based on counsel's aggregate errors); Stouffer v. Reynolds, 168 F.3d 1155, 1163-64 (10th Cir. 1999) ("Taken alone, no one instance establishes deficient representation. However, cumulatively, each failure underscores a fundamental lack of formulation and direction in presenting a coherent defense.").

Of the three claims the Tenth Circuit granted a Certificate of Appealability on, the they found that all three were decided in error. Skaggs v. Baker, 2019 U.S. App. LEXIS 14358 (2019) (Appx. at E8). One cannot help but feel there is a high probability if the Tenth Circuit had reviewed any of the other claims if those other claims would have been found to have been decided in error. As the Tenth Circuit did not review those claims, they could not properly evaluate counsel's performance as a whole in detemining his ineffectiveness. This Court should grant certiorari in Mr. Skaggs' case to make clear that once a higher court decides an ineffective assistance of counsel claim was decided in error, the cumulative effect of an attorneys overall performance cannot be properly evaluated under Strickland if that court does not in fact review in some capacity those claims of ineffectiveness that were not reviewed.

The second prong of Strickland requires courts to assess the cumulative prejudice arising from counsel's deficiencies, which requires "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. "A reasonable probability is a probability

sufficient to undermine confidence in the outcome." Id. "[A] court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." Id. at 696 (Emphasis added).

This Court should grant certiorari in Mr. Skaggs' case to make clear that once a higher court decides an ineffective assistance of counsel claim was decided in error, they cannot properly determine the total amount of prejudice resulting from all of trial counsel's deficiencies alleged if they do not in fact review in some capacity those claims of ineffectiveness that were not reviewed.

The Tenth Circuit denied Petitioner a Certificate of Appealability on the three remaining claims of ineffective assistance of counsel, failing to correctly apply the Strickland standards for deficient performance and prejudice. Mr. Skaggs' case squarely presents for certiorari review the issue of whether a Circuit Court of Appeals violates Strickland by limiting their review of ineffective assistance of counsel claims once the have decided a similar claim of ineffective assistance of counsel was decided in error.

The Tenth Circuit failed to examine all of Mr. Lober's acts and omissions collectively in assessing whether there was deficient performance and failed to examine prejudice cumulatively under the correct Strickland standard. Skaggs v. Baker, 2019 U.S. App. LEXIS 14358 (2019) (Appx. at E5-8). The Tenth Circuit Court of Appeals did not address whether Lober was ineffective for failing to cross-examine resident doctor Kelly Sinclair, challenging her with her own report about the fact that B.S. had a normal female genitalia with intact hymen in a follow-up examination ten days after the examination in which Sinclair purported B.S. had injuries consistent with sexual abuse because her hymen was missing. (Appx. at E1-8). They did not address Lober's belief in the impossible that he falsely believed a hymen could regrow, causing him to completely forego challenging Sinclair or offering exculpatory evidence disproving Sinclair's findings and the overall allegations of sexual assault. (Appx. at E1-8). They did not

address if Lober was ineffective for failing to object to testimony and move to redact statements that Lober admitted were impermissible comments on B.S.'s credibility and on Mr. Skaggs' guilt. (Appx. at E1-8). They did not address if Lober was ineffective for failing to move to redact a portion of Ms. Anderson's statement to Detective Crim in which she said that she was afraid of Mr. Skaggs because he had restraining orders against him from past girlfriends. (Appx. at E1-8). They did not address if there was a reasonable probability of a different outcome if Lober had performed adequately in these other three grounds, especially with his investigation and trial strategies based on his belief in the impossible. (Appx. at E1-8).

Thus, the Tenth Circuit undertook the prejudice analysis without a complete review of counsel's "numerous laspes" when "taken all together." These errors mattered in Petitioner's case. There is a reasonable probabililty of a different outcome if the jury: (i) had known B.S. had a normal, intact hymen ten days after Sinclair claimed it completely destroyed, which, since a hymen cannot regrow, means her testimony was not accurate; (ii) had received rebuttal evidence from a defense medical expert (iii) had known that if B.S. had suffered the type of penetration she claimed she did, there would have been some lasting kind of injury that would have been present in the follow-up examination (Appx. at G3); (iv) had heard that Mr. Skaggs could not have been a contributor to the amylase in B.S.'s underwear as the state's expert and prosecutor implied; (v) had not heard from repeated police officers and an expert in interviewing children, social worker Penny Clodfelter, that they believed B.S. was truthful and that Mr. Skaggs was guilty; (vi) had not heard from Ms. Anderson that she was afraid of Mr. Skaggs because he had restraining orders on him from past girlfriend, which was demonstrably untrue; (vii) had heard that Ms. Anderson's computer showed signs of sexually suggestive web sites being accessed under the kids' screen ID months before Mr. Skaggs ever met the children (Vol. XXI at 75, 86, 88-94, Movant's Ex. W); and (viii) that many other sexually suggestive websites were being accessed on Ms. Anderson's

computer during times Ms. Anderson admits Mr. Skaggs was not there, but her work record show she herself was (Vol. XXI at 75, 86, 88-94, Movant's Ex. W).

Because the Tenth Circuit Court of Appeals' decision conflicts with Strickland, certiorari review is warranted. S. Ct. R. 10(c).

4. It is long overdue that this Court defines exactly what "overwhelming evidence" is and what test or standard must be applied before a court can determine there is overwhelming evidence against a defendant.

Currently there is no measure, guidence, or test for a court to follow to determine how much evidence constitutes overwhelming, or what is necessary for evidence to be considered overwhelming, or what the definition of overwhelming evidence even is. Any court can readily say any type of evidence is overwhelming, and there is no standards to challenge when a court finds that evidence is overwhelming. This Court has decided that there are standards and tests to determine harmless error versus clear error, ineffective assistance of counsel, prosecutorial misconduct, juror misconduct, and many other due process issues. This Court should grant certiorari in Petitioner's case so that this Court may set standards for "overwhelming evidence" as they have for other constitutional claims and due process violations.

Several lower courts have made this observation, and have explained the difficulty in articulating what constitutes "overwhelming evidence." The Missouri Supreme Court described "overwhelming evidence of guilt" as follows:

> "Although 'overwhelming evidence' is difficult to define, there must be no reasonable doubt that the defendant committed the crime, and the degree of prejudice from the inadmissible evidence must be insubstancial... [A] test to determine whether there is overwhelming evidence of guilt in a particular case is not easily articulated. Perhaps the most vivid articulation in Missouri's jurisprudence is that experessed in State v. Martin, 797 S.W.2d 765 at 765 (Mo. App. E.D. 1990), 'if [defendant] were tried one hundred times on this evidence, with or without [the detective's] testimony, she would be convicted one hundred times.' (quoting State v. Smart, 756 S.W.2d

578, 582 (Mo. App. 1988) (Nugent, J concurring).

State. v. Dexter, 954 S.W.2d 332, 342, (Mo. banc 1997)

Missouri's appellate court also seemed to follow this guidence, stating "It seems obvious to us that the phrase 'overwhelming weight of evidence' connotes evidence that is more persuasive than that which is merely 'of greater weight or more convincing than the evidence which is offered in opposition to it.'" Vaught v. Vaughts, Inc./Southern Mo. Constr., 938 S.W.2d 931 (Court of Appeals of Missouri, 1997)

In Washington, that state's court of appeals recognized that "Overwhelming evidence" is akin to the definition of "beauty": it depends on the eye of the beholder. State v. Reid, 38 Wn. App. 203 (Court of Appeals of Washington, 1984). No other constitutional challenges, claims, or due process violations are decided based on the "eye of the beholder;" there are clear standards that this Court decreed must be followed.

In Petitioner's case, it cannot be said that the evidence against him was overwhelming. There were no eyewitnesses. There was no confession. In the Plaintiff's Response to Defendant's Post Trial Motions filed August 22, 2007, the prosecutor pointed to the amylase as indicating that the evidence weighed strongly in favor of Mr. Skaggs' guilt, asserting "the presence of amylase in the victim's underwear is certainly consistent with the victim's testimony and highly probative of the defendant's guilt." In regards to physical evidence the State used with the DNA, the Tenth Circuit admitted that the DNA testimony used against Mr. Skaggs was factually inaccurate, and Lober was ineffective for failing to show that fact to the jury (Appx. at E5-6).

Regarding the initial physical examination of B.S. where Sinclair claimed B.S. had no hymen, no court that has reviewed Mr. Skaggs' case has in their rulings acknowledged the fact that it is impossible for a hymen to regrow, which even the prosecutor of Mr. Skaggs' case admits (Appx. at F22, 24-25), proving the testimony from Sinclair to the jury was not possible. This

physical evidence was very damning to Mr. Skaggs' case. Without showing the jury that a hymen cannot regrow, Lober's failure to investigate the medical evidence and consult with a medical expert to challenge Sinclair with her own report gave the jury the impression that B.S. had no hymen, which corroborated penetration, and led the courts to conclude that there was "overwhelming evidence" against Mr. Skaggs, shown by the Tenth Circuit (Appx. at E8) and the Kansas District Court (Appx. at D12) parroting what the Kansas Court of Appeals declared in State v. Skaggs, 212 P.3d 1039 (2009): "Finally, the nonchallenged evidence supporting the rape and aggravated criminal sodomy convictions was overwhelming...A medical examination confirmed sexual abuse (emphasis added) (Appx. at A12).

Mr. Skaggs' trial presents a case where there is a reasonable probability that Lober's errors altered the evidentiary landscape, making evidence that would have otherwise been circumstancial appear overwhelming. B.S. alleged vaginal penetration, cunnilingus, anal penetration, and child pornography downloads by Mr. Skaggs. Mr. Skaggs denied all allegations. At trial the state had no medical or forensic evidence of anal sodomy. In fact, Sinclair testified B.S. had a normal anal exam (Tr. at 69-70). As a result, the jury acquitted Mr. Skaggs of that specific charge of anal sodomy.

The state presented unchallenged forensic testimony by Swanson that the amylase found in B.S.'s underwear was likely there because B.S. testified that Mr. Skaggs penetrated her vagina with his thumb while performing cunnilingus on her, and so the amylase probably came from the saliva of Mr. Skaggs. This unchallenged evidence tended to corroborate B.S.'s allegations of digital penetration and cunnilingus the night before the exam. The jury found Mr. Skaggs guilty of the rape charge and sodomy charge associated with that specific amylase incident that was alleged. The Tenth Circuit determined that Mr. Lober was ineffective for failing to challenge Swanson with her own report that proved Mr. Skaggs was not responsible

for that amylase (Appx. at E5-6). Yet, despite admitting there was not medical or forensic evidence of that count of rape and criminal sodomy associated with the amylase, the Tenth Circuit felt this lack evidence would not have mattered to the jury (Appx. at E5-8).

The state also presented unchallenged medical testimony from Sinclair that when she examined B.S., B.S. had no hymen. This unchallenged medical testimony tended to offer the strongest corroboration possible of all counts of rape. The jury found Mr. Skaggs guilty of all counts of rape. The Tenth Circuit did not address Lober's conduct with Sinclair and her follow-up report, which was identical to his conduct with Swanson and her amylase report, and whether that same conduct warranted consideration and review to determine if counsel was ineffective for not proving B.S. had a normal, intact hymen in the subsequent exam (Appx. at E). The Tenth Circuit, nor any other court, has addressed how proving this medical impossibility would have impacted the jury as well as the rest of the trial.

Finally, the state attempted to show Mr. Skaggs was the individual responsible for downloading videos of child pornography onto the two computers. While that might be considered considerable circumstancial evidence that Petitioner committed those crimes and the others, there were other evidentiary considerations that raised doubts about his guilt. For example, there were no eyewitnesses, nor any confession by Petitioner. The only DNA evidence that would corroborate sexual contact was proven not to be from Mr. Skaggs. B.S. had a normal genitalia with intact hymen ten days after Sinclair claimed the hymen was destroyed, and it is impossible for a hymen to regrow, which is the strongest cooroboration possible to disprove repeated penetration. Ms. Anderson testified that B.S. and Mr. Skaggs never gave her any reason or suspicions to believe there was any inappropriate behavior from Mr. Skaggs. Mr. Skaggs provided eyewitness testimony from Mr. Lough and Mr. Green, as well as records indicating he was at work, not at Ms. Anderson's house, when many of the videos were downloaded to Ms.

Anderson's computer. The state's own witness, Ms. Coblentz, testified that she verified several occasions when Mr. Skaggs' computer and screen name were in use when Mr. Skaggs was not near a computer (Tr. at 358-59). And to try to prove their case, the prosecutor accused Mr. Skaggs of travelling back through time to download pornographic images (Tr. at 951-52, 1068). These facts are not consistent with a case of overwhelming evidence of guilt.

It simply cannot be said that if Mr. Skaggs were tried one hundred times with and without the medical evidence, he would be convicted one hundred times. Indeed, he was aquitted of the one charge that the state could offer no made-up forensic or physical evidence for. Had the jury known that there was in fact no forensic or physical evidence to support the rest of B.S.'s rape allegations, and that with these types of allegations B.S. would likely have had some lasting types of injuries that would have still been present in the follow-up exam, the jury likely would have also acquitted Petitioner on the remaining counts of rape and aggravated criminal sodomy. Certiari review is warranted in this case

F. CONCLUSION

The influence of Lober's deficient performance and investigation was pervasive, potentially affecting everything from opening and closing statements to cross-examination to the presentation of the defense's case-in-chief. The absence of a real investigation caused a failure to introduce any corroboration at all for Mr. Skaggs' defense despite a strong showing that such evidence existed. It made it especially difficult to effectively cross-examine Swanson and Sinclair. Without offering a viable defense to the three counts of rape and the two counts of aggravated criminal sodomy, Lober could not effectively defend the remaining two counts of sexual exploitation of a child. Lober's errors tainted the fairness of the entire proceeding, particularly because of the nature of the errors and the underlying allegation of a unitary exploit of abuse.

Mr. Loberl's conduct and deficiencies made certain evidence appear overwhelming

because it was unchallenged. Yet, despite this conduct, the fact that Mr. Skaggs was acquitted of the charge of anal sodomy shows that the state's case was, in part, still rejected by the jury, and that the jury relied heavily on the physical evidence presented. The jury was willing to consider Mr. Skaggs' uncorroborated and undeveloped defense. One cannot say with confidence that the jury would not have rejected more, or perhaps all, of the charges had his counsel performed competently. One could certainly not say that if Mr. Skaggs were tried one hundred times with and without the medical evidence, he would be convicted one hundred times.

Lastly, this Court cannot permit pretrial and trial strategy and investigation conducted by an attorney to be considered reasonable if the strategies and investigations are based on something that is impossibe. This would be completely at odds with Strickland. Allowing this would mean any attorney could claim they did or did not do something based on the most absurd of beliefs and still be deemed reasonable.

For all of the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

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