

No. 08-559

IN THE
Supreme Court of the United States

E. K. MCDANIEL, Warden, *et al.*,
Petitioners,

vs.

TROY BROWN,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**BRIEF AMICUS CURIAE OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF PETITIONERS**

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QUESTIONS PRESENTED

1. What is the standard of review for a federal habeas court for analyzing a sufficiency-of-the-evidence claim under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)?

2. Does analysis of a sufficiency-of-the-evidence claim pursuant to *Jackson v. Virginia*, 443 U. S. 307, 318-319 (1979), under 28 U. S. C. § 2254(d)(1), permit a federal habeas court to expand the record or consider nonrecord evidence to determine the reliability of testimony and evidence given at trial?

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**BRIEF *AMICUS CURIAE* OF THE
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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)¹ is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, the District Court and Court of Appeals overturned a state conviction for insufficiency of the

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

evidence even though the sum of the evidence presented at trial and in a full evidentiary hearing on state habeas was not only sufficient but overwhelming. They did this through the unusual, possibly unprecedented, step of allowing the habeas petitioner to introduce new evidence never presented to the state courts despite ample opportunity, striking the trial testimony contrary to the new evidence, and then declaring the remainder insufficient. This is precisely the kind of misuse of federal habeas to relitigate state trials that this Court denounced in *Barefoot v. Estelle*, 463 U. S. 880, 887 (1983). It is contrary to the controlling Act of Congress, contrary to this Court's precedents, and contrary to the rights of victims that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

A. The Crime and Trial.

On January 29, 1994, in Carlin, Nevada, an adult man committed an unspeakable atrocity against a nine-year-old girl, called "Jane Doe" in the published opinions in this case. J. A. 1049. He raped her so brutally that she "lost fifteen percent of her blood and required vaginal reconstruction." J. A. 1052. The primary question at trial was whether Troy Brown was that man.

In an interview at the hospital, the traumatized girl said that the attacker reminded her of Troy Brown, then said his brother Trent. She later picked Troy's picture out of a photo line-up although this identification was less than certain. J. A. 521-530.

Renee Romero testified for the State regarding DNA testing. A sample from the victim's underwear was tested using Restriction Fragment Length Polymorphism (RFLP) analysis with five probes. See J. A. 423,

426-427. Using the “ceiling principle” created by the National Research Council, Romero testified to a conservative estimate that the chance that a person chosen at random would match the profile was one in three million. J. A. 437.

On recross-examination, defense counsel raised the question of a DNA match between brothers. J. A. 468. Romero testified that a brother who was not an identical twin had a 1 in 6,500 chance of matching on all five probes. The defense had no objection to this testimony and elicited much of it. J. A. 468-472. The defendant had two brothers who were adults at the time of the crime. All three lived in Carlin. J. A. 1277, 1586. They bear a resemblance to each other and are close in age. See J. A. 275, 1538. Two other brothers were teenagers at the time of the crime and were living with their mother in Loa, Utah, J. A. 1586, which is a six-hour drive from Carlin. J. A. 1245. Brown was convicted of two counts of sexual assault on a child, including substantial bodily harm on one of the counts, and one count of child abuse. J. A. 783-786.

After the trial, the defense requested and received an additional DNA test on a different sample, a vaginal swab. The test was performed by an independent lab chosen by the defense and paid for by the State. J. A. 798-799. The report by Forensic Science Associates is signed by Edward T. Blake, a well-known authority on forensic DNA,² and Jennifer Mihalovich. Using a different technique than the State used, PCR, Blake and Mihalovich found the sperm in the vaginal swab to

2. Dr. Blake has testified in many high profile DNA cases over the years. See, *e.g.*, *Coleman v. Thompson*, 789 F. Supp. 1209, 1213 (1992), *aff'd* 966 F. 2d 1441, *stay den.* 504 U. S. 188; *Cooper v. Brown*, 510 F. 3d 870, 879-881 (CA9 2007), *pet. for reh'g.* pending.

be a match to Brown and that only 1 person in 10,000 would match. J. A. 910-918.

B. State Court Review.

On direct appeal, the Nevada Supreme Court held in a published opinion that admission of the DNA evidence without objection was not “plain error,” and the evidence was sufficient for conviction, but it reversed the child abuse count as duplicative and remanded for resentencing. App. to Pet. for Cert 69a, 82a; *Brown v. State*, 113 Nev. 275, 277, 284, 934 P. 2d 235, 236-237, 241 (1997) (*per curiam*).

In Brown’s appeal brief, his attack on the admission of the DNA evidence was based on state law. See J. A. 842-850. His attack on the sufficiency of the evidence was a single paragraph making no mention of *Jackson v. Virginia*, due process, the United States Constitution, or any federal law whatever. J. A. 850. The Nevada Supreme Court rejected the sufficiency argument using a Nevada standard which predates *Jackson*, “whether the jury, acting reasonably, could have been convinced of the defendant’s guilt beyond a reasonable doubt.” App. to Pet. for Cert. 82a; see *infra*, at 21.

Following resentencing, see J. A. 1031, defendant appealed again. The Nevada Supreme Court dismissed the appeal. This appeal involved no issues relevant to the present habeas petition. See J. A. 1077-1080. Brown then filed a state habeas petition. His points and authorities made nine specific claims of ineffective assistance. See J. A. 1093-1110. Brown did not allege his attorney had been insufficiently vigorous in suggesting his brother Trent might have been the perpetrator, but just the opposite. He claimed trial counsel was ineffective for raising the possibility at all. See J. A. 1105.

The state trial court held an evidentiary hearing. J. A. 1023-1487. The trial court made findings of fact. J. A. 1489-1495. Among other findings, the court rejected attacks on the qualifications of both the state's and the defense's experts and rejected the claim that the DNA samples might have been contaminated. J. A. 1492-1493. After rejecting the various ineffective assistance claims, the court denied the petition. J. A. 1499. The Nevada Supreme Court affirmed. J. A. 1500-1506.

C. Federal Habeas Review.

On federal habeas corpus, petitioner Brown claimed five grounds of relief. Ground One was insufficiency of the evidence in violation of the Due Process Clause. J. A. 147a. Ground Two was ineffective assistance of counsel related to the DNA evidence. J. A. 164a. The District Court denied the State's motion to dismiss. It found Ground One had been fairly presented to the state court, despite the lack of a federal citation in the appeal brief, on an identical-standards theory. App. to Pet. for Cert. 60a-62a.

Over the State's objection, the District Court permitted petitioner Brown to expand the record with an affidavit from another DNA expert, Laurence Mueller. J. A. 1595-1598. Mueller criticized the way Renee Romero reluctantly agreed with the prosecutor's restatement of her calculation on the probability of a random match, J. A. 1583; cf. J. A. 458-462, but he did not question her original testimony that the chance of an unrelated person matching at random was one in three million. Mueller also disagreed with Romero's testimony regarding sibling matches. He said the chance that one brother would match is "1 in 263. The chance that among two brothers one or more would match is 1 in 132" J. A. 1583.

The District Court granted relief on the insufficiency of evidence ground and two ineffective assistance grounds. App. to Pet. for Cert. 54a. The court ordered, “Respondents shall retry Brown within 180 days or shall release him from custody,” *ibid.*, apparently unaware that relief under *Jackson* precludes retrial. See *infra*, at 29-30. On appeal, a divided panel affirmed the expansion, exhaustion, and insufficiency holdings and did not reach the ineffective assistance claims. *Brown v. Farwell*, 525 F. 3d 787 (CA9 2008), App. to Pet. for Cert. 11a, 21a. The Court of Appeals was also apparently unaware that its holding precluded retrial. See App. to Pet. for Cert. 21a. Judge O’Scannlain dissented.

SUMMARY OF ARGUMENT

When a state court decision on the merits is challenged in a petition under 28 U. S. C. § 2254, the question of whether relief is precluded by § 2254(d) should be decided on the state court record, before taking any additional evidence. Proceeding in this manner will advance the primary objective of the habeas reforms of AEDPA, to reduce delay.

The § 2254(e)(2) bar on evidentiary hearings when the petitioner has defaulted the factual basis of his claim is independent of § 2254(d). The fact that § 2254(e)(2) does not bar a hearing in a particular case does not necessarily entitle the petitioner to one, particularly when no facts he could prove would lift the bar of § 2254(d) and entitle him to relief.

When the state court decision judged on the state court record precludes relief under § 2254(d), it is an abuse of discretion to take additional evidence, whether by expansion of the record or an evidentiary hearing.

The state court decision in this case was not contrary to *Jackson v. Virginia*. *Jackson* itself uses the terms “rational” and “reasonable” interchangeably.

Jackson v. Virginia is not a proper vehicle for adjudicating claims that trial evidence was unreliable. The right to an effective attorney who properly challenges that evidence at trial is the vehicle consistent with the text of the Constitution and this Court’s precedents. That approach also offers important practical advantages.

ARGUMENT

In the present case, the Court of Appeals held “that the Nevada Supreme Court’s decision was ‘an unreasonable application’ of *Jackson*³ because, *in light of the Mueller Report*, no rational trier of fact could have found [petitioner] Troy [Brown] guilty beyond a reasonable doubt *on the evidence presented at trial*.” App. to Pet. for Cert. 14a-15a (emphasis added). Petitioner never presented the Mueller Report to the state courts but instead presented it for the first time in federal habeas corpus. It was brought in through a motion to expand the record under Rule 7 of the Rules Governing Section 2254 Cases in the United States District Courts (“Habeas Rules”), over the State’s objection. See App. to Pet. for Cert. 219a-239a.

As the quoted passage above indicates, this new evidence, never presented to the state courts, was essential to the holdings of both the District Court and the Court of Appeals. The threshold questions are whether such evidence can be considered under

3. *Jackson v. Virginia*, 443 U. S. 307 (1979). The inner quote is from 28 U. S. C. § 2254(d)(1).

§ 2254(d)(1) and whether it should have been received at all before ruling on the point. The answer to both questions, *amicus* submits, is no.⁴

I. The § 2254(d)(1) question should be decided on the state court record, before taking any additional evidence.

A. The Purpose of § 2254(d).

In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress added subdivision (d) to 28 U. S. C. § 2254 as a new limitation on the power of federal courts to overturn state criminal judgments via the writ of habeas corpus. This new limitation was not, as some contended, a mere codification or even expansion of the preexisting retroactivity rule of *Teague v. Lane*, 489 U. S. 288 (1989). *Teague* and § 2254(d) are distinct inquiries. *Horn v. Banks*, 536 U. S. 266, 272 (2002) (*per curiam*).

The new limitation abrogated the pre-AEDPA, post-1953 rule of independent review, taking the step the Court considered but did not take in *Wright v. West*, 505 U. S. 277 (1992). See *Terry Williams v. Taylor*, 529 U. S. 362, 400-402 (2000) (O'Connor, J., concurring in part); *id.*, at 410-412 (opinion of the Court). Before *Brown v. Allen*, 344 U. S. 443 (1953), a federal petition by a state prisoner who had exhausted state remedies was considered to be analogous to a successive federal petition by a federal prisoner. Three years earlier, the

4. The State is certainly correct that *Jackson* on its face calls for decision on the state trial court record, and reversal would be required, AEDPA or no AEDPA. See Brief for Petitioners 40-43. However, decision on that basis would leave the important issue described above undecided until another case brings it to this Court.

Court explained the status of a prior state decision in *Darr v. Burford*, 339 U. S. 200, 215 (1950) (emphasis added):

“Even after this Court has declined to review a state judgment denying relief, other federal courts have power to act on a new application by the prisoner.⁴⁰ On that application, the court may require a showing of the record and action on prior applications, and may decline to examine further into the merits *because they have already been decided* against the petitioner.⁴¹”

40. *Ex parte Royall*, 117 U. S. 241 [1886].

41. *Salinger v. Loisel*, 265 U. S. 224 [1924].”

The *Salinger* case cited for the last proposition is a federal successive petition case. See 265 U. S., at 226-228. In AEDPA, Congress abrogated the *Brown* “independent judgment” rule and restored the basic concept of pre-*Brown* law as explained in *Darr*. The so-called “deference” rule of § 2254(d) is a rule of the same class as the successive petition rules of §§ 2241(b) and 2255(h)—“a modified res judicata rule.” Cf. *Felker v. Turpin*, 518 U. S. 651, 664 (1996). The new statute does not restore the pre-1953 rule in its original, open-ended form, though. Consistently with other developments in the law of habeas corpus, it replaces the discretionary rule with “more complex procedural principles that regularize and thereby narrow the discretion that individual judges can freely exercise.” *Lonchar v. Thomas*, 517 U. S. 314, 322 (1996). The language at the top of subdivision (d) establishes a general rule forbidding relitigation of issues decided on the merits by the state court, and the two numbered paragraphs make exceptions to that general rule. See Scheidegger, Habeas Corpus Relitigation, and the

Legislative Power, 98 Colum. L. Rev. 888, 946, 957-958 (1998).

The central purpose of the habeas reforms of AEDPA is abundantly clear from the debates. It is to expedite the resolution of habeas corpus petitions, particularly in capital cases. The supporters of reform invariably bolstered their arguments with horror stories of unconscionable delays. See 141 Cong. Rec. 14,734, col. 1 (1995) (statement of Sen. Feinstein); *id.*, at 15,062, cols. 1-2 (statement of Sen. Hatch); *id.*, at 15,019 (statement of Sen. Specter); *id.*, at 15,036-15,037 (statement of Sen. Nickles).

“After all, State courts are constrained to uphold the Constitution and faithfully apply Federal law as well. There is simply no reason that Federal courts should have the ability to virtually retry cases that have been properly adjudicated by our State courts. There is no reason to allow Federal courts to do that.” *Id.*, at 15,062, col. 3 (statement of Sen. Hatch) (emphasis added).

The primary sponsor of § 2254(d) saw it as not only a limitation on relief but also as a limitation on relitigation. This is a rule about respecting the outcome of a previous adjudication, in the same category as *res judicata* and law of the case. See Scheidegger, *supra*, 98 Colum. L. Rev., at 946; see also *id.*, at 911-917. A substantial part of its value lies in protecting the party who has already prevailed on the merits from the burden and delay of having to litigate those merits over again. It is not enough for that party to win the second battle over the same turf; in most cases he should not have to fight the second battle at all. See *Allen v. McCurry*, 449 U. S. 90, 94 (1980) (“relieve parties of the cost and vexation of multiple lawsuits”).

Respect for the intent of Congress and the purpose of the AEDPA therefore favors addressing the § 2254(d) question at the threshold. Specifically addressing § 2254(d), Senator Hatch noted, “Now, Federal habeas corpus proceedings have become, in effect, a second round of appeals in which convicted criminals are afforded the opportunity to relitigate claims already considered and rejected by the state courts.” 141 Cong. Rec. 15,062, col. 2 (1995) (emphasis added); see also K. Scheidegger, *Overdue Process: A Study of Federal Habeas Corpus in Capital Cases and a Proposal for Reform 27-28* (1995), available at <http://www.cjlf.org/publctns/OverdueProcess.pdf>.

In *Terry Williams*, 529 U. S., at 386, Justice Stevens acknowledged that, “Congress wished to curb delays, to prevent ‘retrials’ on federal habeas, and to give effect to state convictions to the extent possible under law.” (Opinion concurring in the judgment). The opinion of the Court noted, “That acknowledgment is correct and significant to this case. It cannot be disputed that Congress viewed § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved.” *Id.*, at 404.

For § 2254(d)(1) to achieve its purpose, it is not enough to preclude relief; it must preclude relitigation. The state’s primary interest in habeas reform was not to block relief in cases where it is warranted. Rather, it was to reduce the “burden of federal relitigation of state decisions” S. O’Connor, *Local Control of Crime, Address to the Attorney General’s Crime Summit 5* (Mar. 4, 1991), reprinted in *Habeas Corpus Issues: Hearings before the House Subcommittee on Civil and Constitutional Rights, Serial No. 39, 102d Cong., 1st Sess., 192, 197* (1991). In habeas, as in immunity, once the respondent is forced to litigate the question, much

of the value of the protection is lost. Cf. *Mitchell v. Forsyth*, 472 U. S. 511, 526 (1985).

B. Decision on the State Court Record.

As noted in *Darr, supra*, 339 U. S., at 215, a decision to “decline to inquire further into the merits because they have already been decided against the petitioner” normally requires examination of the “record and action” in the prior proceeding and nothing more. This is true as well under AEDPA.

The threshold requirement for § 2254(d) to apply is that the state court decision must be on the merits. That determination obviously must be made from the state court decision itself, and when there is a written opinion, as in the present case, it generally presents little difficulty. Summary dispositions may require reference to lower court decisions, see *Ylst v. Nunnemaker*, 501 U. S. 797, 803 (1991), or to the briefs. See *Coleman v. Thompson*, 501 U. S. 722, 740 (1991) (state court granted motion to dismiss, motion based solely on state procedure).

When the petitioner claims the “unreasonable determination of the facts” exception of § 2254(d)(2), the statute is explicit that this determination is based on “the evidence presented in the State court proceeding.” *Miller-El v. Dretke*, 545 U. S. 231, 241-242, n. 2 (2005), confirmed that the evidence to be considered is limited in this way, while distinguishing “theories about that evidence.” Expansion of the record might be required in the unusual circumstance where the petitioner proffered evidence and the state court unreasonably rejected it and kept it out of the record, but in the typical case the state court record contains everything relevant. The “contrary to” portion of paragraph (1) refers to the state court’s selection of the governing rule, see *Terry Williams*, 529 U. S., at 405-406, or “if

the state court confronts a set of facts that are materially indistinguishable from a decision of this Court.” See *id.*, at 406. Both of those inquiries necessarily depend on the facts before the state court, and only those facts.

That leaves the “unreasonable application” clause. This clause only comes into operation when the state court has decided the claim on the merits, has selected the correct rule to apply, and has reasonably determined the facts. Otherwise, either § 2254(d) does not apply at all or one of the other exceptions removes its barrier. “[W]hen a state-court decision unreasonably applies the law of this Court *to the facts* of a prisoner’s case, a federal court applying § 2254(d)(1) may conclude that the state-court decision falls within that provision’s ‘unreasonable application’ clause.” *Terry Williams*, 529 U. S., at 409. What facts? It would make no sense to speak of “unreasonable application” to facts never presented to the court. This must refer to facts that have been reasonably found under § 2254(d)(2), are undisputed, or have been alleged by the petitioner and assumed to be true for the purpose of disposition without factfinding. It cannot refer to evidence never presented in any form to the state court.

We can put to one side, for now, the scenario where a state court decides a claim on the merits but refuses to consider the petitioner’s evidence. A claim along those lines was alleged in a case recently before this Court, but the allegation was false. See Tr. of Oral Arg. in *Bell v. Kelly*, No. 07-1223, pp. 4-5. A procedurally unreasonable determination of facts might fit within § 2254(d)(2). The Court can decide that issue when and if a case actually presents it. The record is clear in the present case that the petitioner had a full and fair opportunity to present his evidence in the state postconviction proceeding.

When the state court record shows a decision on the merits after either a reasonable fact-finding process or an assumption of genuinely disputed material facts in the petitioner's favor, the § 2254(d)(1) question should be decided solely on the state court record. New evidence is not relevant to the decision, and the delay caused by hearing it is contrary to the core purpose of AEDPA.

C. Relation to § 2254(e)(2).

Holland v. Jackson, 542 U. S. 649, 652 (2004) (*per curiam*), recognized that “whether a state court’s decision was unreasonable must be assessed in light of the record the court had before it.” However, in the next paragraph the *Holland* opinion muddies this clear language with a reference to § 2254(e)(2). *Bradshaw v. Richey*, 546 U. S. 74, 79 (2005), is similar. The confusion arises from a failure to recognize that subdivisions (d) and (e) are distinct rules.

As discussed *supra*, at 9, § 2254(d) is a “modified *res judicata* rule.” By its terms, it applies only to claims “adjudicated on the merits in State court proceedings” Paragraph (e)(2), in contrast, is a procedural default rule. In *Keeney v. Tamayo-Reyes*, 504 U. S. 1, 4-5 (1992), the Court overruled *Townsend v. Sain*, 372 U. S. 293 (1963), on the question of when a federal court must hold an evidentiary hearing for evidence not presented to the state court. The *Keeney* dissent maintained that the decision was inconsistent with the pre-AEDPA subdivision (d) of section 2254, regarding the presumption of correctness of state findings of facts. See 504 U. S., at 12, 20-23 (opinion of O’Connor, J.).

In AEDPA, Congress resolved the tension in favor of the *Keeney* majority opinion by repealing the former subdivision (d) and enacting the new subdivision (e). Paragraph (e)(1), like former subdivision (d), addresses

the presumption of correctness when the state court has found the facts. Paragraph (e)(2), like *Townsend* and *Keeney*, addresses the default situation where the defendant fails to present the facts to the state court. See *Michael Williams v. Taylor*, 529 U. S. 420, 433-435 (2000) (discussing § 2254(e)(2) as a partial codification of *Keeney*).

Paragraph (e)(2) can come into play in two different scenarios, as illustrated by *Keeney* and *Michael Williams*. In *Keeney*, the petitioner made his claim in state court but made an inadequate factual showing, and the state court denied his claim on the merits. See 504 U. S., at 3-4. In *Michael Williams*, the petitioner raised three new claims on federal habeas based on facts not known to him at the time of his state habeas proceeding. See 529 U. S., at 427.

In the *Keeney* situation, an evidentiary hearing would usually be barred both by § 2254(e)(2) and by a denial of relief under § 2254(d) based on the state court record alone,⁵ but not always. If the state court found the facts reasonably based on the evidence the petitioner presented, but then chose the wrong standard of law to apply, § 2254(d) would not bar relief. See *Terry Williams*, 529 U. S., at 405-406. However, if the petitioner left out evidence through a lack of diligence and did not qualify for one of § 2254(e)(2)'s exceptions, an evidentiary hearing would be barred, and the federal court's decision would be limited to *de novo* application

5. The present case would fit the *Keeney* pattern *if* it is assumed that (1) the federal question was fairly presented to the state court and decided on the merits, and (2) evidence outside the record is relevant to a *Jackson* claim. See Brief for Petitioner 45 (arguing both §§ 2254(d) and 2254(e)(2)); but see *id.*, at 47-52 (exhaustion); *id.*, at 40-43 (extra-record evidence and *Jackson*).

of the correct standard to the facts proved in state court.

The *Williams* scenario is different. Michael Williams never presented his *Brady* claim to the state court. See 529 U. S., at 427. Hence, there was no state court decision on the merits, and § 2254(d) did not apply. However, because the facts were readily available to petitioner at the time of the state habeas proceeding and neither of § 2254(e)(2)'s exceptions applied, no evidentiary hearing on this claim was permitted in federal habeas. See *id.*, at 437-440.

In most cases where § 2254(e)(2) bars an evidentiary hearing by itself, without overlap with § 2254(d), relief should also be barred by the nonstatutory procedural default rule. That fact does not render § 2254(e)(2) superfluous for several reasons. First, the procedural default rule does not necessarily protect the state from the burden and delay of retrying the facts before the federal court rules on the default question. As discussed *supra*, at 10, protection from this burden is an important aspect of habeas reform, independent of protection from an erroneous ultimate judgment. Second, the default rule has loopholes that allow many defaulted claims in. Section 2254(e)(2) does not depend on the state default rule being “adequate.” Cf. *Lee v. Kemna*, 534 U. S. 362 (2002); see also Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Philip Morris USA v. Williams*, No. 07-1216, pp. 8-13 (“CJLF *Philip Morris* Brief”) (discussing confused state of this area of the law). Indeed, California’s default rules are brushed aside so routinely by the Ninth Circuit, see, e.g., *Townsend v. Knowles* (No. 07-15712, April 21, 2009) (slip op., at 4635-4639); CJLF *Philip Morris* Brief 4-7, that for all practical purposes the state remains under the discredited regime of *Fay v. Noia*, 372 U. S.

391 (1963), overruled in *Coleman v. Thompson*, 501 U. S. 722 (1991).

In addition, the exceptions to § 2254(e)(2) for defaulted facts are more stringent than the caselaw exceptions for defaulted claims. See *Michael Williams*, 529 U. S., at 433-434. A petitioner who is allowed to bring a defaulted claim for any of several reasons may nonetheless have had a fair opportunity to establish the factual basis of the claim in state court. For example, if the trial court admitted an out-of-court statement over a hearsay objection after finding it was a dying declaration, a petitioner who is permitted to raise a Confrontation Clause claim on federal habeas (*e.g.*, because the state default rule is deemed “inadequate”) should not also be excused from a failure to introduce evidence refuting the status of the statement as a dying declaration. See *Giles v. California*, 554 U. S. ___, 128 S. Ct. 2678, 2684-2685, 171 L. Ed. 2d 488, 497-498 (2008) (noting dying declaration as established exception to confrontation right).

In summary, § 2254(e)(2) is an independent bar on evidentiary hearings in certain circumstances of default by the petitioner. It does not, by negative implication, authorize a hearing in those circumstances where it does not bar one. Whether a hearing is required, discretionary, or prohibited in those other circumstances must be determined by reference to other rules of law. One of those other rules, *amicus* submits, is that the State is entitled to a ruling under § 2254(d) on the state court record, *before* being burdened with any fact-finding procedures, for any claim that was decided on the merits by the state court.

D. Discretion and Limits.

Habeas Rule 7 permits the district judge to expand the record, and Habeas Rule 8 directs the judge “to determine whether an evidentiary hearing is warranted.” Neither rule indicates when these steps are warranted.

Schriro v. Landrigan, 550 U.S. 465, 468-469 (2007), was a case where the District Court denied an evidentiary hearing and the Court of Appeals held that a hearing was mandatory. The case therefore directly addresses only the limit on the court’s discretion to deny a hearing, not the limit on the court’s discretion to grant one. *Landrigan* discusses how AEDPA changed the factors to be considered without directly altering the judge’s authority. See *id.*, at 473-474. The Court then continues, “It follows that if the record refutes the applicant’s factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing.” *Id.*, at 474. This holding implements AEDPA’s purpose of reducing delays in execution. See *id.*, at 475.

The passage emphasizes factual findings that dispose of the claim because that was the situation presented by the case history in *Landrigan*. As a matter of historical fact, Landrigan had forbidden all mitigating evidence, and that fact precluded any possibility of establishing prejudice under *Strickland*. See *id.*, at 477. However, the “otherwise precludes” language indicates that the principle is not limited to dispositive facts. A reasonable application of the correct precedent to the facts before the state court “otherwise precludes habeas relief” on that claim. Therefore, the District Court is not *required* to take new evidence on a claim if the state court decided that claim on the merits and neither exception to § 2254(d) applies.

Is a district court *permitted* to hold a hearing on such a claim? There is no reason to hold one. If the claim is precluded by § 2254(d) on the basis of the state record, no facts introduced in federal court can lift that bar. A hearing would be an unnecessary delay and a waste of resources. An unnecessary delay is an unreasonable delay and therefore a violation of the rights of the victims. See 18 U. S. C. §§ 3771(a)(7), (b)(2)(A), (b)(2)(D).

The question *Landrigan* did not reach is presented in the present case. The District Court authorized expansion of the record with an affidavit of an expert who simply contradicted the state's trial expert. That was error and an abuse of discretion. The correct procedure is to decide whether the § 2254(d) exceptions apply or not based solely on the record in state court. That record may be expanded if necessary to add material missing from it but necessary for understanding the state court proceedings, but not with additional evidence on the merits never presented to the state courts. If no § 2254(d) exception applies, the claim should be finally denied at that point. If an exception does apply, petitioner has cleared that hurdle and must now establish his claim on the merits, just as before AEDPA. If a hearing is needed for that purpose and not precluded by § 2254(e)(2), the court should hold one.

Conceivably, there might be a case where a state court acts unreasonably in summarily deciding material factual questions against the petitioner despite a proffer of solid evidence. When and if that case arises, the Court can consider whether § 2254(d)(2) provides relief. This is not that case. The § 2254(d) question should have been decided solely on the record of proceedings in the state court, and receipt of evidence outside that record was an abuse of discretion.

II. The standard used by the state court is not contrary to *Jackson v. Virginia*.

A. Exhaustion, Identity, and Contrariness.

The Nevada Supreme Court evaluated Brown's "sufficiency of the evidence" claim under its standard of *Kazalyn v. State*, 108 Nev. 67, 825 P. 2d 578 (1992). The Court of Appeals held that this "decision was 'contrary to' *Jackson* as the Nevada Supreme Court did not apply the *Jackson* standard." App. to Pet. for Cert. 13a-14a.

There is a very good reason why the Nevada Supreme Court did not cite or quote *Jackson v. Virginia*, 443 U. S. 307 (1979), or apply its standard. Appellant in his brief did not cite *Jackson* or its standard. His one-paragraph argument on sufficiency of the evidence did not cite any federal cases or mention the federal Constitution. See App. to Pet. for Cert. 120a.

The Court of Appeals held, in one paragraph, that Brown had exhausted his federal *Jackson* claim simply by making a generic sufficiency claim. On the face of the opinion, it appears that the Court of Appeals repeated once again the same error for which it has been reversed twice before in *Duncan v. Henry*, 513 U. S. 364 (1995) (*per curiam*), and *Baldwin v. Reese*, 541 U. S. 27 (2004).

The most charitable interpretation that could be given to the Court of Appeals' terse disposition of the exhaustion question is that it implicitly adopted the reasoning of the District Court in its denial of the State's motion to dismiss. The District Court was at least aware of *Baldwin*, see App. to Pet. for Cert. 61a, n. 2, but its reasoning was still flawed, and it contradicted its later decision of the § 2254(d) issue.

The District Court notes, as if it were significant, that petitioner cited *Jackson* in the state trial court.

See *ibid.* The central holding of *Baldwin* is that a citation to federal authority in the lower court is insufficient to fairly present a federal claim to the higher court. See 541 U. S., at 31-32. The primary basis of the District Court's exhaustion holding appears to be a theory that an appellant need not expressly assert a federal claim or cite federal authority to the state court if the state and federal standards are the same. That theory was advanced in Justice Stevens' dissents in *Duncan*, 513 U. S., at 369-370, and *Baldwin*, 541 U. S., at 34, but this Court has never endorsed it. In *Duncan*, *supra*, at 366, the Court passed on the issue because the standards were not the same. In *Baldwin*, *supra*, at 34, the Court passed again because the habeas petitioner had not preserved the argument.

In its exhaustion analysis, the District Court accepted petitioner's argument that the state and federal standards are identical because "the Nevada Supreme Court has consistently applied the *Jackson v. Virginia* test," citing three Nevada cases from the early 1980s. App. to Pet. for Cert. 60a. However, when the District Court reached the § 2254(d) analysis 17 months later, this consistency mysteriously vanished. Now the standard applied by the Nevada Supreme Court in the present case, quoting its 1992 *Kazalyn* precedent, is "contrary to clearly established federal law," *i.e.*, *Jackson*.

One of the District Court's two holdings must be wrong. The Nevada Supreme Court has applied the standard articulated in *Kazalyn* to sufficiency claims many times, before and after *Jackson* and before and after the present case. See, *e.g.*, *Edwards v. State*, 90 Nev. 255, 258-259, 524 P. 2d 328, 331 (1974) (pre-*Jackson*, cited by *Kazalyn*); *Chappell v. State*, 114 Nev. 1403, 1407, 972 P. 2d 838, 840 (1998) (after *Jackson* and *Brown*). If *Kazalyn* really is substantially different

from *Jackson*, then the identical-standards premise for the exhaustion holding is false, even assuming that there really is an identical-standards exception to *Duncan* at all. On the other hand, if the *Kazalyn* and *Jackson* statements of the test are substantially the same, then the Nevada Supreme Court's decision is not contrary to *Jackson*.

The State did not include the exhaustion question in the Questions Presented, although it is mentioned in the body of the certiorari petition, see Pet. for Cert. i, 15-17. The State makes a somewhat different exhaustion argument in its brief on the merits. See Brief for Petitioners 47-52. The exhaustion point has not been expressly waived and cannot be defaulted. See 28 U. S. C. § 2254(b)(3). If the Court should find it necessary to decide the identical-standards question left hanging in *Duncan* and *Baldwin*, *amicus* CJLF suggests that the Court call for supplemental briefing on the point. We do not believe that it will be necessary, though, because while an unexhausted claim cannot be granted on the merits, *ibid.*, it can be denied on the merits, see § 2254(b)(2), and this one should be.

B. Reasonableness and Rationality.

There is no doubt that the Nevada Supreme Court considers the *Kazalyn* and *Jackson* standards to be equivalent. For example, in *Lay v. State*, 110 Nev. 1189, 1192, 886 P. 2d 448, 450 (1994), the court stated:

“The standard of review on appeal in a criminal case for sufficiency of evidence is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt by the evidence that was properly before it. *Kazalyn v. State*, 108 Nev. 67, 71, 825 P. 2d 578, 581 (1992). This standard has also been articulated as ‘whether, after viewing the evidence in the light most favor-

able to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ *Guy v. State*, 108 Nev. 770, 776, 839 P. 2d 578, 582 (1992).”

On federal habeas in the present case, the Court of Appeals held that the *Kazalyn* standard is contrary to *Jackson* because it “ ‘only requires a reasonable jury, not a rational one.’ ” J. A. 14a (emphasis added) (quoting District Court). This statement is unreasonable on its face, and it becomes irrational in light of the *Jackson* opinion.

In common usage, the term “irrational” connotes a *greater* departure from the norm than “unreasonable,” not a lesser one. If one says to a friend, “My neighbor is unreasonable,” the friend may well reply, “Yeah, so is mine.” On the other hand, if one says, “My neighbor is irrational,” the response is more likely to be an expression of concern, such as, “Should we call the mental health department?” To the extent there is any difference in the terms, the federal courts in this case got it backwards.

According to the New Oxford American Dictionary 1413 (2001), the word “rational,” when used to refer to a person, means either “able to think clearly, sensibly, and logically” or “endowed with the capacity to reason.” When used in the same way, “reasonable” means “having sound judgment; fair and sensible.” *Id.*, at 1419. To the extent they differ, assessing reasonableness may include an assessment of a person’s fairness, while assuring rationality may require only that the person has the capacity to reason in accordance with basic logic.

As applied to the *Jackson* rule, though, we need not speculate. *Jackson* itself uses the terms interchangeably, indicating it uses them in the sense in which they

are synonymous. “After *Winship*, the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . to determine whether the record evidence could *reasonably* support a finding of guilt beyond a reasonable doubt.” 443 U. S., at 318 (emphasis added). To assert that a decision is contrary to *Jackson* because it uses the word “reasonably” is to assert that *Jackson* is contrary to itself. That is irrational.

The Court of Appeals also held that the *Kazalyn* standard is contrary to *Jackson* because it involves an assessment of “whether the jury could have been ‘convinced of the defendant’s guilt,’ ” while *Jackson* supposedly requires the court to “analyze each of the essential elements of the substantive state crime.” App. to Pet. for Cert. 14a. This is wrong both on its face and as applied. On its face, the same passage of *Jackson* quoted above refers to assessment of support for a finding of guilt, which under the basic constitutional requirement is equivalent to finding each element to have been proved. See 443 U. S., at 318-319 (stating standard as “support a finding of guilt” and “could have found the essential elements” in the same paragraph).

As applied to this particular case, there is no need to go through each element when the crime is undisputed and the only genuine question is who committed it. The Ninth Circuit’s conclusion that the state court decision is contrary to clearly established federal law simply because it did not tick off a list of undisputed elements is the same kind of error this Court found summarily reversible in *Woodford v. Visciotti*, 537 U. S. 19, 23-24 (2002) (*per curiam*), *Middleton v. McNeil*, 541 U. S. 433, 437-438 (2004) (*per curiam*), *Holland v. Jackson*, 542 U. S. 649, 654-655 (2004) (*per curiam*), and *Bell v. Cone*, 543 U. S. 447, 455 (2005) (*per curiam*). Over and over, this Court has admonished the

federal courts of appeals not to read state court opinions with such hostility, eager to find error in every nuance. Yet the practice continues.

The state high court applied a standard consistent with this Court's precedents, even though none were cited to it. Cf. *Early v. Packer*, 537 U. S. 3, 8 (2002) (*per curiam*). The state court applied that standard reasonably to the facts presented to it, as the State has described. See Brief for Petitioners 23-31. Nothing further is required to decide this case. Congress has forbidden the overturning of final state judgments via federal habeas corpus under these circumstances.

III. *Strickland*, not *Jackson*, is the proper vehicle for dealing with insufficiently challenged expert testimony.

The Court of Appeals in this case rested its decision on the sole ground of insufficiency of the evidence under *Jackson v. Virginia*, 443 U. S. 307 (1979). Although in this case the defendant was properly convicted on DNA evidence that holds up upon reexamination, see Brief for Petitioners 31-35, that will not be true in every case. For the benefit of reviewing courts that may be confronted with a case where there actually *has* been “junk science” introduced at trial and not refuted there, it may be helpful to clarify the proper approach. Such claims should not be analyzed under *Jackson*. They should be considered under the right to effective assistance of counsel, under the standard of *Strickland v. Washington*, 466 U. S. 668 (1984).

A. Due Process and Reliable Evidence.

The District Court in the present case recognized, correctly, that “the evidence actually presented at trial, not evidence that should have or might have been

presented . . . is reviewed by the court” under *Jackson*. App. to Pet. for Cert. 38a. *Jackson* further requires that the evidence *at trial* be viewed through the eyes of factfinders who are “rational,” 443 U. S., at 319, or “reasonabl[e],” *id.*, at 325, not factfinders who are experts. If a layman hearing the uncontradicted testimony of an expert witness could have found that testimony persuasive by the requisite standard, there is no *Jackson* claim, even if another expert would have considered the witness to be a crackpot. This makes *Jackson* an inappropriate vehicle for this purpose.

The District Court cited four cases for the proposition that it could go outside the trial record, in clear contradiction of *Jackson*, and exclude trial evidence from its weighing because it is supposedly shown to be unreliable by evidence never presented to the state courts. See App. to Pet. for Cert. 38a. These cases do not bear the weight placed on them, either individually or collectively.

United States v. Scheffer, 523 U. S. 303, 309 (1998), simply states a general government interest in reliable evidence. It does not remotely support a federal constitutional veto over the admission of evidence in state trials on generalized grounds of reliability. *Scheffer* was about the defendant’s right to admit reliable evidence, not exclude unreliable evidence. See *id.*, at 308. Exclusion of evidence on general grounds of unreliability is normally the province of evidence codes and rules, and the authorities promulgating those rules have broad latitude. See *ibid.* Federal habeas does not lie to second-guess determinations under rules of evidence, see *Estelle v. McGuire*, 502 U. S. 62, 67-68 (1991), and to date this Court has not held that the Due Process Clauses of the Constitution include an overarching protection against all unreliable evidence. See *Kansas*

v. *Ventris*, 556 U. S. ___, n. * (No. 07-1356, April 29, 2009) (slip op., at 7).

The District Court also cited three other cases for federal constitutional exclusion of unreliable evidence, but each one relates to the implementation of a specific constitutional guarantee, not a general prohibition of unreliable evidence. The District Court cited *Idaho v. Wright*, 497 U. S. 805 (1990), a Confrontation Clause case, for the proposition that unreliable hearsay is constitutionally excludable. The District Court was apparently unaware that *Wright's* reliability discussion, see *id.*, at 816-817, was based on *Ohio v. Roberts*, 448 U. S. 56 (1980), which had been overruled two years before the District Court's decision. See *Crawford v. Washington*, 541 U. S. 36, 68 (2004). The same is true of *Lee v. Illinois*, 476 U. S. 530, 543 (1986), also cited by the District Court. Whatever precedential value these two cases retain, they are implementations of the Confrontation Clause, not examples of a generalized protection against unreliable evidence.

Continuing to grasp at straws, the District Court cited *Marshall v. Lonberger*, 459 U. S. 422 (1983). In that case, the Court upheld the admission of the prior conviction in question and admonished the federal habeas court that “the Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules” *Id.*, at 438, and n. 6. The case stands for exactly the opposite of the proposition for which it is cited. The District Court cited page 440 of *Lonberger*, apparently unaware that this is a dissent.

The District Court's attempt to pound the square peg of *Jackson* into the round hole of junk science through a general constitutional shield against unreliable evidence fails at its premise. There is no such shield. The drafters of state evidence codes and rules

have broad latitude with regard to the admission as well as the exclusion of evidence, and the trial judge's rulings under those rules are not subject to scrutiny on federal habeas. See *supra*, at 26.

B. Meaningful Adversarial Testing.

The lack of any general federal constitutional requirement for reliability of evidence does not mean that the defendant lacks constitutional protection.

“The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause:

“ ‘In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.’

“Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” *Strickland*, 466 U. S., at 684-685.

In a case where the prosecutor really *did* present “junk science” as proof of guilt and defense counsel failed to show it was junk, the constitutional violation would lie in defense counsel’s failure, not the prosecutor’s presentation. The right of the defendant to make his own case is expressly protected by the Sixth Amendment in terms of confronting the witness against him, “obtaining witnesses in his favor,” and the assistance of counsel to effectively use both of those rights. Those expressly provided rights are supplemented with rights to disclosure of exculpatory information, see *Brady v. Maryland*, 373 U. S. 83 (1963), and to present vital, reliable evidence despite contrary technicalities in state evidence rules. See *Holmes v. South Carolina*, 547 U. S. 319, 324-325 (2006). The affirmative right of the defendant to counter the prosecution’s evidence, not a negative right to keep it out, is the protection provided in both the text of the Constitution and this Court’s precedents.

Strickland also has important practical advantages over *Jackson* as the vehicle for dealing with claims of unreliable evidence. *Jackson* unambiguously calls for decision on the trial record. See 443 U. S., at 324. It looks at what happened at trial, not what should have happened. To preserve a *Jackson* claim, the defendant would normally have to make it on direct appeal, where additional evidence is typically not allowed. *Strickland* claims generally depend on facts outside the record, and raising them for the first time on collateral review is the norm. See *Massaro v. United States*, 538 U. S. 500, 504-507 (2003).

A grant of relief under *Strickland* typically means the defendant gets a new trial, while a successful *Jackson* claim means the defendant walks free, protected from retrial by the Double Jeopardy Clause. See

Burks v. United States, 437 U. S. 1, 18 (1978).⁶ When a habeas court is convinced the petitioner did not receive a fair trial but is not convinced he is innocent, the drastic consequence of irrevocably freeing a murderer or rapist must surely give the judge pause.

The element of prejudice in the *Strickland* test and the fact that the habeas petitioner has the burden of proof facilitate getting to the real truth rather than speculating about what might be. Although *Strickland*'s "reasonable probability" test, 466 U. S., at 694, is the most cited definition of prejudice, this test is just a crystalization of the underlying principle that we should assure that society is justified in relying on the outcome of the trial. See *id.*, at 691-692.

In the present case, the random match probability, not challenged by Brown's expert, is much more than sufficient to justify reliance on the conclusion that this crime was not committed by anyone other than Troy Brown or a close blood relative. On the "brother did it" hypothesis, discourse on probabilities that a brother *might* match is absurd. Just test the brothers. See J. A. 1540-1541 (petitioner's District Court reply memo, quoting Scheck, DNA and Daubert, 15 Cardozo L. Rev. 1959, 1974 (1994)). If one matches, the probability that Troy Brown is the perpetrator based on the DNA alone drops to 50%, and he *might* have a substantial argu-

6. Both the District Court and the Court of Appeals in the present case appear to have been unaware of this rule. See App. to Pet. for Cert. 21a, 54a.

ment that trial counsel’s failure to have that test done was prejudicial.⁷ If not, as is highly likely, prejudice is conclusively negated. If petitioner wanted to claim that counsel was ineffective for not sufficiently pursuing the brother-perpetrator hypothesis, he should have had this test done during the state habeas proceedings.

The Court of Appeals did not rule on the ineffective assistance claim, see App. to Pet. for Cert. 21a, and it is not in the Questions Presented. See Pet. for Cert. i. This claim would, unfortunately, need to remain open on remand if this Court reverses on the *Jackson* claim. It is worth noting, though, that a habeas petitioner with the burden of proof is fundamentally different from a criminal defendant at trial, and his failure to seek and introduce a test that would end the speculation and establish the facts may properly be considered as evidence that he knows he is guilty. Cf. J. A. 1540-1541.

In summary, then, the problem of reliability of evidence should be viewed through the lens of the multiple rights of defendants related to putting on their own case, of which the right to effective counsel is foremost. Allowing federal habeas courts to strike out all the evidence they consider unreliable and then applying *Jackson v. Virginia* to what is left is the wrong road to travel.

7. A matching brother would not be substantially exonerating, however, if he has a solid alibi. See App. to Pet. for Cert. 27a (O’Scannlain, J., dissenting). It matters not if the then-13-year-old brother who lived a six-hour drive away has a matching profile. We say “might” because there is a substantial amount of other evidence in addition to the DNA, described in the Brief for Petitioners 4-7, 23-31.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

May, 2009

Respectfully submitted,

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