No. 08-559

In The
Supreme Court of the United States

E. K. MCDANIEL, WARDEN and THE ATTORNEY GENERAL OF THE STATE OF NEVADA,
Petitioners,

v.

TROY BROWN,
Respondent.

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

BRIEF FOR 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 Anti-Terrorism 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, 318-19 (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 given at trial?

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The opinion of the Court of Appeals for the Ninth Circuit is reported at 525 F.3d 787 (9th Cir. 2008), and is reproduced in the petition for writ of certiorari. Pet. App. 1a. The decision of the United States District Court is reproduced in that appendix as well. Pet. App. 29a. The opinion of the Nevada Supreme Court is reported at 934 P.2d 235 (Nev. 1997), and is reproduced in the appendix to the petition. Pet. App. 68a.

JURISDICTION

The Court of Appeals issued its decision on May 5, 2008. Pet. App. 1a. It denied the Warden's timely petition for rehearing and rehearing en banc on July 30, 2008. This Court granted the Warden's petition for writ of certiorari. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 13.3.

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED

Fifth Amendment

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or

> property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, Section 1.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(b)(1) is reproduced at Pet.App. 99a-100a.

28 U.S.C. § 2254(d) is reproduced at Pet.App. 100a-01a.

28 U.S.C. § 2254(e) is reproduced at Pet.App. 101a-02a.

Rule 7 of the Rules Governing Section 2254 Cases in the United States District Courts.

> **(a) In General.** If the petition is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to the petition. The judge may require that these materials be authenticated.

> **(b) Types of Materials.** The materials that may be required included letters predating the filing of the petition, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits may also be submitted and considered as part of the record.
>
> **(c) Review by the Opposing Party.** The judge must give the party against whom the additional materials are offered an opportunity to admit or deny their correctness.

Nev. Rev. Stat. 200.366 is reproduced at Pet.App. 103a-05a.

STATEMENT OF THE CASE

1. On the night of January 28, 1994, nine-year-old Jane Doe[1] was savagely raped in her own bedroom in Carlin, Nevada. In addition to physical injuries that required surgical repair, Jane Doe was mentally injured, suffering from post-traumatic stress disorder as the result of her attack. Joint Appendix (JA) 67- 71, 88-90. Because of the mental injury she suffered during the attack, Jane Doe could not positively identify her attacker. JA 74-75, 160.

Troy Brown (Troy) was charged with sexual assault on a child under the age of 14 years, sexual assault on a child under the age of 14 years causing substantial

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[1] All reviewing courts have referred to the victim as "Jane Doe" to protect her identity. To avoid confusion, the victim will be referred to as "Jane Doe" throughout this brief.

bodily harm, child abuse causing substantial bodily harm and attempted murder. JA 28-33.

At trial, evidence showed that Troy's sister-in-law, Raquel Brown, called Jane Doe's mother, Pamela Doe, and asked if Jane Doe could babysit Raquel's children while Pamela and Raquel went to a local bar, C.G.'s, to celebrate Raquel's birthday with Raquel's husband (and Troy's brother), Trent. JA 102. Pamela agreed. JA 102.

After Pamela took Jane Doe and her sister to Raquel's, she and Raquel met Troy and Trent at the bar. JA 103, 113. Troy left C.G.'s first, followed by Trent and Raquel who returned home at around 8:00 p.m. JA 103-04, 117. Trent then took a shower and went to bed. JA 104. At 9:30 p.m., after letting the children finish watching a movie, Raquel took Jane Doe and her sister home. JA 105. No one else was at the residence, but Raquel was unconcerned because Pamela was supposed to be home within a half hour. JA 105-06. A short time later, Jane Doe called C.G.'s to let her mother know she arrived home safely, but the line was busy. Jane Doe then called the Peacock Bar, where Troy answered the phone and said he would go to C.G.'s to tell Pamela. When Troy arrived at C.G.'s, between 10:00 and 10:30 p.m., Pamela was speaking with Jane Doe on the phone. JA 119, 123. Troy told Pamela that Jane Doe was looking for her and she was at home. JA 119.

Shortly thereafter, Pamela Doe and Troy went to the Peacock Bar where they played a game of pool together. JA 121. Troy had been drinking so heavily that he vomited on his clothing while walking home. JA 613. A bartender at the Peacock testified that Troy

left no later than 12:15 to 12:20 a.m. JA 187-88. At around 1:00 a.m., Jane Doe called the bar and told Pamela that a man had hurt her and was looking for Pamela. Pamela hurried home to discover that her daughter had been savagely raped. JA 124-26.

At 1:05 a.m., a passing motorist and her husband spotted a person staggering in the middle of the street, in the vicinity of Jane Doe's home, wearing a cowboy hat, dark jeans, and black satin jacket with a bright green emblem on the back. JA 202-03, 206-07, 215-16, 220, 364, 603. That night, Troy wore a cowboy hat, dark jeans, and black satin jacket with an orange and yellow C.G.'s logo on the back.

When Jane Doe spoke to police later that night, she described her attacker as wearing a cowboy hat and a black jacket, and as having an "awful smell" like "beer or puke or something." JA 171, 173, 516, 518. She also stated she thought her attacker had a moustache, as Troy did at that time. JA 521, 648.

Further evidence presented at trial showed that Jane Doe's house was less than a 15 minute walk from the Peacock Bar, JA 220, 364, 603; that Troy knew the location of Jane Doe's bedroom, JA 605; and that Troy washed his pants and shirt immediately upon arriving home at around 1:30 a.m. JA 280, 286.

In addition to circumstantial evidence showing that Troy was the perpetrator, the prosecution presented DNA evidence which used the Restrictive Fragment Length Polymorphism (RFLP) method of analysis. DNA in semen recovered from Jane Doe's clothing was compared with a known sample of Troy's DNA. The State's expert, Renee Romero, testified the frequency

of such a match would be 1 in 3,000,000, and described this statistic as "very conservative." JA 437-38. In other words, only one person in 3,000,000 would share the same genetic code. JA 438. Romero further testified that there was only a 1 in 6,500 chance that one of Troy's brothers would match that DNA. JA 468-69.

Troy testified in his defense and denied committing the crimes. JA 602. He asserted that the reason he washed his clothes was because he was going to Loa, Utah, the next day and all his clothes were already packed. JA 602-03. He testified his route home from the bar differed from that where the passing motorists saw a man fitting his description shortly after the rape occurred. JA 610-11. Troy testified he called the police from Utah to see if he was wanted for arrest and went to a nurse for an examination to record his condition. JA 616-19, 640. Troy's counsel argued that Jane Doe was unable to identify her attacker, that there were conflicts in Jane Doe's description of her attacker, and that Troy's fingerprints were not found in the victim's home, JA 714, 720. Troy's brother, Travis, testified that when Troy arrived at his home later that night, Troy's demeanor seemed normal. JA 282. Finally, there was no evidence of blood or bite marks on Troy. JA 240, 400-07.

The jury found Troy guilty of two counts of sexual assault of a child under 14 years of age, and one count of child abuse by sexual assault. The jury acquitted Troy of attempted murder. JA 783-786.

Prior to sentencing, at the behest of the defense, an independent laboratory, Forensic Science Associates, did DNA testing using the PCR method which is not as

discriminating as the RFLP method. JA 909-21. This testing found a reciprocal frequency of its sample of 1 in 10,000. JA 916, 918. In other words, 1 in 10,000 people chosen at random would have the same DNA characteristics as the evidence it tested. Troy has these same DNA characteristics. JA 918. While it was not made part of the record at that time, Troy subsequently attached it to his Reply Brief on direct appeal. JA 909-21, and the trial judge made reference to the PCR test at sentencing. JA 799.

2. On direct appeal, Troy claimed, *inter alia*, the trial court should have conducted a hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), before admitting the DNA evidence. The court held that Troy forfeited that argument by failing to object at trial either to the lack of a pretrial evidentiary hearing or to qualifying Romero as an expert witness on DNA evidence. Pet. App. 82a.

The Nevada Supreme Court then rejected Troy's sufficiency-of-the-evidence claim on its merits. The court stated that the "standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. *Kazalyn v. State*, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992)." The court concluded that a jury, acting reasonably, could have been convinced of Troy's guilt beyond a reasonable doubt. The court pointed to testimony showing that Troy left the bar with ample time "to get from the bar to Jane Doe's house and to assault Jane Doe before she made the telephone call to her mother at approximately 1:00 a.m.;" a witness "saw someone resembling Troy in a black jacket and black hat stumbling in the road near Jane Doe's house

at 1:05 a.m.;" and Troy arrived home at 1:30 a.m. and proceeded immediately to wash his pants and shirt. The court noted that Troy wore clothing similar to Jane Doe's description; and he smelled like beer and vomit, as Jane Doe described. Lastly, the court pointed to the DNA evidence, which "indicated that semen collected from Jane Doe's underwear matched Troy's and that only 1 in 3,000,000 other people had matching DNA (the second DNA test indicated that 1 in 10,000 people had matching DNA)." Pet. App. 82a-83a.[2]

Troy pursued a state post-conviction action in which he claimed, among other things, that his counsel was ineffective for failing to object to the admission of the DNA evidence, and for failing to explore the possibility that Jane Doe's stepfather was the true perpetrator. JA 1036, 1043. The state courts found that counsel was not ineffective. JA 1489-99, 1500-06.

3. Troy filed a federal habeas petition and, later, an amended petition. JA 2; Pet. App. 130a. In his amended petition, Troy claimed there was insufficient evidence to convict him of the charges, and his counsel was ineffective for various reasons, including his failure to enforce the stipulated RFLP protocol and his failure to object to the DNA evidence admitted at trial. Pet. App. 147a-73a. The Warden moved to dismiss Troy's amended petition, arguing that Troy's sufficiency-of-the-evidence claim was unexhausted because Troy attacked the reliability of the DNA

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[2] The Nevada Supreme Court also vacated the conviction for child abuse because it violated double jeopardy and held that the judge abused his discretion at sentencing. Pet. App. 94a-96a.

testing, which he had not done in state court, and because Troy did not rely on any federal constitutional provision when he presented the claim in state court. Pet. App. 175a-85a.

Troy opposed the motion arguing, *inter alia*, that he had presented the substance of his sufficiency-of-the-evidence claim to the state courts, the standard applied by the Nevada Supreme Court was, in fact, the *Jackson* standard, and his new factual allegations did not fundamentally change the claim. JA 1512-26. The District Court denied the Warden's motion. JA 6.

The Warden then answered the amended habeas petition. Pet App. 186a. Troy replied and contemporaneously moved, pursuant to Rule 7 of the Rules Governing Section 2254 Cases in the United States District Courts, to expand the record to include three documents – the curriculum vitae of Dr. Laurence Mueller, a letter by Dr. Mueller, and an affidavit of the federal public defender's investigator – because they were "pertinent to the issues raised" by Troy in his amended petition and reply. JA 1552, Pet.App. 219a-21a. In his letter, Mueller challenged aspects of Romero's testimony, but did not contest the RFLP test showing that only 1 in 3,000,000 people would, like Troy, match the DNA found in Jane Doe's underwear. JA 1581-84. Rather, Mueller alleged that Romero erred in finding the chances of a sibling match at 1 in 6500 when, in Mueller's opinion, it was 1 in 1024. He concluded that "the chance that among four brothers one or more would match is 1 in 66." JA 1583. Mueller also asserted that Romero committed the "prosecutor's fallacy," when, in response to a question, she agreed with the prosecutor's statement, that given the 1 in 3,000,000 figure, "the likelihood

that it is not Troy Brown would be 0.000033%."[3] JA 1583.

Over the Warden's objection, the District Court granted Troy's motion to expand the record, holding that the limits on evidentiary hearings imposed by AEDPA, 28 U.S.C. § 2254(e), did not apply because Troy exercised due diligence in pursuing his challenge to the DNA evidence in state court, and that the new evidence did not render the claim unexhausted because Troy sought merely to supplement the information previously developed. Pet.App. 222a-39a, JA 1595-98.

Relying on Dr. Mueller's letter, the District Court determined the state's expert had committed the "prosecutor's fallacy." Accordingly, the District Court held that the DNA evidence presented at trial was unreliable and excluded it from consideration for purposes of assessing Troy's *Jackson* claim. The District Court then concluded there was insufficient remaining evidence to convict Troy because, "even after weighing the evidence in favor of the prosecution, there [is] sufficient conflicting testimony to raise a reasonable doubt in the mind of any rational trier of fact." Pet. App. 42a. In particular, the District Court found that there were conflicts in Jane Doe's description of her assailant; there was no evidence of blood or bite marks on Troy; Troy testified that he washed the clothes he was wearing the night of the

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[3] The "prosecutor's fallacy" occurs when the jury is asked to use the DNA evidence as source probability for the DNA sample instead of random source probability. *See United States v. Chischilly*, 30 F.3d 1144, 1157 (9th Cir. 1994) (explaining "prosecutor's fallacy").

attack because he was leaving for a week in Utah; Troy testified he called Carlin to see if he was wanted for arrest; Troy testified he went to a nurse for a full body examination and wanted to record his condition; none of Troy's fingerprints were found in the victim's home; Troy surrendered his hat and jacket for examination; and because Troy denied involvement in the crime, including when being sentenced. The District Court further ruled that the Nevada Supreme Court applied the wrong standard in analyzing Troy's *Jackson* claim. The District Court also found merit in Grounds 2 and 3 of Troy's amended petition (raising ineffective assistance of counsel claims). Pet. App. 31a.

4. The Court of Appeals affirmed the District Court's order granting habeas relief on Troy's *Jackson* claim. Pet. App. 13a. The Court of Appeals first determined that the *Jackson* claim was exhausted and the District Court had properly expanded the record. Pet. App. 11a-13a. Turning to the merits, the Court of Appeals found the Nevada Supreme Court's decision was "contrary to" *Jackson* within the meaning of 28 U.S.C. § 2254(d)(1) because the Nevada Supreme Court applied a different standard, which asked what a "reasonable" jury – not a "rational" jury – would hold. Pet. App. 13a-14a. The Court of Appeals also criticized the Nevada Supreme Court for "recit[ing] all of the facts cumulatively without analyzing whether each or any of those facts established an essential element of the counts of conviction beyond a reasonable doubt, and that a rational juror could have so found." Pet. App. 14a.

The Court of Appeals next found that the Nevada Supreme Court's resolution of the *Jackson* claim was

an "unreasonable application of" *Jackson* within the meaning of 28 U.S.C. § 2254(d)(1) because, in light of the Mueller report, and its exclusion of the DNA evidence, no rational trier of fact could have found Troy guilty beyond a reasonable doubt. The Court of Appeals found that the DNA evidence was unreliable because Romero had committed the "prosecutor's fallacy" and had wrongly minimized the likelihood that Troy's DNA would match one of his four brothers. Ignoring the DNA evidence that only 1 in 3,000,000 persons would (like Troy) match the DNA found in Jane Doe's underwear, and ignoring even Mueller's assertion that the odds are only 1 in 66 that one of Troy's brothers would also match that DNA, the Court of Appeals held that it would violate due process to consider *any* DNA evidence for purposes of the *Jackson* inquiry. Pet. App. 14a-19a. The Court of Appeals then assessed the evidence against Troy, after stating that "it is [the Warden's] burden to establish guilt beyond a reasonable doubt for each and every element of the offense, a burden that [he has] not carried here." Pet. App. 19a. Tracking the District Court's reasoning, the Court of Appeals concluded that conflicts, inconsistencies and faults with respect to some of the testimony, were such that no rational juror could have found Troy was the assailant beyond a reasonable doubt. Pet. App. 19a-21a. Because the panel found relief appropriate under the *Jackson* claim, it did not address the other claims. Pet. App. 21a.

Judge O'Scannlain dissented. He found that the standard applied by the Nevada Supreme Court "mirrors the *Jackson* approach, and that AEDPA "does not require express citation to federal law." Pet.App. 23a. (*citing Early v. Packer*, 537 U.S. 3, 8 (2002)).

Judge O'Scannlain faulted the District Court for "fail[ing] to view the evidence in the light most favorable to the prosecution," and instead granting relief on the existence of disputed facts. "[U]nder *Jackson*, these disputed facts should have been viewed in the light most favorable to the government." Pet. App. 25a. Judge O'Scannlain also criticized the panel majority's failure to give any weight to the DNA evidence and pointed out that even if one were to accept Dr. Mueller's estimate, the probabilities still constituted overwhelming DNA evidence against Troy which the jury was entitled to consider. Pet. App. 26a-27a. Judge O'Scannlain noted there was considerable circumstantial evidence linking Troy to the crime, and concluded that "[t]he compelling force of the DNA evidence, coupled with the strong circumstantial evidence and inferences supported by the totality of the evidence, firmly grounded the Nevada Supreme Court's decision." Pet. App. 28a. (O'Scannlain, J., dissenting).

The Court of Appeals denied the Warden's petition for rehearing and suggestion for rehearing en banc. JA 24-25.

SUMMARY OF THE ARGUMENT

The test for a state court reviewing a sufficiency-of-the-evidence claim is whether after reviewing the trial record evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The examination required by that test is limited to record evidence adduced at trial. *Id*. at 324.

That is the clearly established federal law as determined by this Court.

Federal habeas courts are required to analyze sufficiency-of-the-evidence claims by applying "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Moreover, federal habeas relief cannot be granted unless the state court's adjudication of the claim resulted in a decision that was contrary to or an objectively unreasonable application of, clearly established federal law, as determined by this Court. *Id*.

The Nevada Supreme Court examined Troy's sufficiency-of-the-evidence claim under the *Jackson* standard. The Nevada Supreme Court's adjudication of the sufficiency-of-the-evidence claim was neither contrary to nor an objectively unreasonable application of *Jackson*.

After the federal district court granted habeas relief on Troy's *Jackson* claim, the Court of Appeals erred in affirming the grant of federal habeas relief for several reasons. First, the Court of Appeals erroneously determined that the Nevada Supreme Court did not apply the *Jackson* standard and, therefore, its adjudication of Troy's claim was "contrary to" clearly established federal law. Second, the Court of Appeals erroneously determined that the Nevada Supreme Court's adjudication of the claim was an "unreasonable application" of the *Jackson* standard because evidence not presented to the jury purportedly made DNA evidence given to the jury unreliable and subject to exclusion. Third, the Court Of Appeals erred in its analysis by failing to properly apply the

clearly established standard and principles of *Jackson* and 28 U.S.C. § 2254(d)(1). Specifically, the Court of Appeals erred by considering evidence that had not been adduced at trial to conclude that evidence given at trial was unreliable and, therefore, subject to exclusion. That holding contravened *Jackson*'s requirement that the court consider *all* evidence given at trial in the light most favorable to the prosecution and *only* the evidence adduced at trial. In affirming the grant of habeas relief, the Court of Appeals erred in several additional significant respects. The court (1) wrongly excluded reliance on the DNA evidence altogether, (2) did not apply the deferential *Jackson* standard in assessing the evidence, and (3) failed to apply the deference required by 2254(d)(1).

The Court of Appeals also erred by affirming the expansion of the record authorized by the District Court. Consideration of a *Jackson* claim is limited to evidence adduced at trial and not other evidence. Expansion of the record which allows a federal habeas court to determine that evidence adduced at trial is not reliable is not permitted. Furthermore, expansion of the record to permit consideration of evidence not adduced at trial when analyzing a *Jackson* claim is not permitted.

Resolution of this case in Troy's favor would have the effect of making a state court trial a mere formality, a warm-up for proceedings in federal court, and would permit federal courts to usurp the province of the jury to resolve conflicts, determine the credibility of the evidence, the reliability of the evidence and the weight to give evidence. Federal habeas corpus actions would no longer be collateral attacks, but, rather, would be "retrials" in the most

literal sense with the federal courts sitting in the stead of the jury.

Resolution of this case in Troy's favor would have the added deleterious effect of permitting federal habeas courts to diverge from the congressionally mandated standard of review, 28 U.S.C. § 2254(d)(1). Federal habeas courts are required to determine whether the State court's adjudication of a sufficiency-of-the-evidence claim was an objectively unreasonable application of clearly established federal law, not merely erroneous.

ARGUMENT

I. The Nevada Supreme Court Decision Rejecting Respondent's Claim Under *Jackson v. Virginia* Was Neither Contrary To Nor An Unreasonable Application Of *Jackson*.

The core issue in this case is whether the Nevada Supreme Court decision rejecting Troy's sufficiency-of-the-evidence claim was "contrary to or … an unreasonable application of clearly established Federal law, as determined by [this] Court." 28 U.S.C. § 2254(d)(1). Resolving that issue requires application of the rule announced in *Jackson v. Virginia*, 443 U.S. 307 (1979), and the limitations on federal habeas corpus review set forth in 28 U.S.C. § 2254(d)(1). As will be seen, both *Jackson* and § 2254(d)(1) require a federal court to review a state conviction with great deference.

The clearly established test for examining sufficiency-of-the-evidence claims is whether, after reviewing the trial record evidence in the light most

favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id*. at 319. Attendant to that test are several principles. The standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law. *Id*. at 324 n.16. The reviewing court is not required to ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt and, indeed, is not permitted to make its own subjective determination of guilt or innocence. *Id*. at 318-19. The trier of fact has the responsibility to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from the basic facts to ultimate facts; the reviewing court must assume that the trier of fact resolved any evidentiary conflicts in favor of the prosecution, even if the determination does not appear on the record, and must defer to that resolution. *Id*. at 318-19, 326. Upon a finding of guilt, upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution. *Id.* at 318-19. The prosecution has no obligation to rule out every hypothesis except guilt. *Id*. at 326.

Additionally, the sufficiency-of-the-evidence review authorized by *Jackson* is limited to "record evidence adduced at trial." *Id*. at 324. *Jackson* does not extend to non-record evidence, including newly discovered evidence. The *Jackson* inquiry does not focus on whether the trier of fact made the *correct* guilt or innocence determination, but whether it made a *rational* decision to convict or acquit. *Herrera v. Collins*, 506 U.S. 390, 401 (1993).

When a state inmate brings a *Jackson* claim in federal habeas, an additional layer of deference is added. A federal court can not grant federal habeas relief with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by this Court. 28 U.S.C. § 2254(d)(1).

A state court decision is "contrary to" this Court's clearly established precedent where "the state court applies a rule that contradicts the governing law set forth in our cases," or "if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *(Terry) Williams v. Taylor*, 529 U.S. 362, 405-06 (2000).

Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Williams*, 529 U.S. at 413. The "unreasonable application" clause requires the state court's application of clearly established law be more than incorrect or erroneous; it must be "objectively unreasonable." *Id*. at 409-10. Two years after *Williams*, this Court recognized that the AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under the law." *Bell v. Cone*, 535 U.S. 685, 693 (2002).

Of course, the threshold matter for a federal habeas court is to decide what constitutes "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Clearly established Federal law under 28 U.S.C. § 2254(d)(1) is the governing legal principle or principles set forth by this Court at the time the state court renders its decision. *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003); *Williams*, 529 U.S. at 405. *Jackson* is the clearly established Federal law with respect to sufficiency-of-the-evidence claims, as determined by this Court at the time the Nevada Supreme Court rendered its decision.

A. The Nevada Supreme Court's decision was not "contrary to" the rule announced in *Jackson*.

Review under *Jackson* asks "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 318. The Nevada Supreme Court stated, "The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt." Pet. App. 82a (*citing Kazalyn v. State*, 825 P.2d 578, 581 (Nev. 1992). The Court of Appeals held that this statement of the legal standard was "contrary to" Jackson because it used the term "reasonable" jury rather than a "rational" juror. Pet. App. 14a. That holding was erroneous.

In *Jackson* itself, this Court recognized that the rule was not novel and referred to earlier circuit cases

which used the word "reasonable" rather than the word "rational." *Jackson*, 443 U.S. at 319 n.12. See *United States v. Amato*, 495 F.2d 545, 549 (5th Cir. 1974) ("whether, taking the view [of the evidence] most favorable to the Government, a *reasonably-minded jury* could accept the relevant evidence as adequate and sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt") (emphasis added); *United States v. Jorgenson*, 451 F.2d 516, 521 (10th Cir. 1971) ("whether, 'considering the evidence in the light most favorable to the government, there is substantial evidence from which a jury might *reasonably find* that an accused is guilty beyond a reasonable doubt'") (emphasis added).

Indeed, the Court of Appeals' insistence on the use of the word "rational" is contrary to usage by the Court of Appeals itself. *See Juan H. v. Allen*, 408 F.3d 1262, 1275 (9th Cir. 2005) ("In our Circuit, we have held that a writ of habeas corpus should have been granted to a petitioner who demonstrated that no *reasonable* jury could have found that false statements given under oath were material to an underlying court case, an element essential to sustaining his conviction for perjury") (emphasis added). The Court of Appeals' distinction is also contrary to usage by at least three other circuits. *See Dupuy v. Cain*, 201 F.3d 582, 589 (5th Cir. 2000) ("Obviously, the evidence is sufficient for a *reasonable* juror to find, beyond a reasonable doubt, that Dupuy intended to kill Normand") (emphasis added); *United States v. Marek*, 238 F.3d 310, 314 (5th Cir. 2001) ("A panel of this Court concluded that a *reasonable* jury could have found that (1) the fortune teller had participated in international telephone calls as Cisneros's agent, and (2) those calls were sufficiently connected to the murder to be 'in

furtherance' of that crime") (emphasis added); *Berryhill v. Calpone*, 168 Fed. Appx. 253, 255 (10th Cir. 2006) (unpublished) ("Based on the record, we agree with the district court and the OCCA that a *reasonable* juror could have found proof beyond a reasonable doubt that Berryhill manufactured methamphetamine") (emphasis added); *Davis v. Kemp*, 829 F.2d 1522, 1532 (11th Cir. 1987) ("Although this may be true, a *reasonable* juror could have found beyond a reasonable doubt that the victim was raped") (emphasis added).

The Court of Appeals' distinction is also contrary to the usage in *Black's Law Dictionary,* Sixth Edition, 1265 ("reasonable"); *The American Heritage Dictionary*, Second College Edition, 1028 ("rational"), 1031 ("reasonable"); and *Webster's Dictionary and Thesaurus*, 2002 Edition, 311 ("rational"), 312 ("reasonable"); all of which use the terms synonymously.

The Court of Appeals also found a distinction between *Jackson*'s "trier of fact could have found the essential elements of the crime beyond a reasonable doubt" requirement and the Nevada Supreme Court's requirement that the jury "could have been convinced of the defendant's guilt" beyond a reasonable doubt. Pet. App. 14a. The Court of Appeals criticized the Nevada Supreme Court for "merely reciting all of the facts cumulatively without analyzing whether each or any of those facts established an essential element of the counts of conviction beyond a reasonable doubt, and that a rational juror could have so found." Pet. App. 14a. That objection is misplaced because the only issue on direct appeal with respect to Troy's *Jackson* claim was whether there was sufficient evidence

presented to establish him as the perpetrator. Pet. App. 120a. The Nevada Supreme Court did not need to engage in a ritualistic discussion of matters not at issue. The state court addressed the issue before it – whether there was sufficient evidence presented at trial to identify Troy as the perpetrator – and set out evidence showing that there was. Pet. App. 82a-83a.

Nevada case law confirms that the Nevada Supreme Court's description of the sufficiency-of-the-evidence standard is not a repudiation of the *Jackson* standard. The Nevada Supreme Court's decisions clearly indicate that the court understands that a finding of guilt beyond a reasonable doubt necessarily requires a finding of each element of the offense beyond a reasonable doubt. *Leonard v. State*, 969 P.2d 288, 297 (1999); *Koza v. State*, 681 P.2d 44, 47 (Nev. 1984); *Wilson v. State*, 664 P.2d 328, 336 (Nev. 1983). Furthermore, Troy himself admitted in the litigation below that the *Kazalyn* standard is the same as the *Jackson* standard. JA 1521.

The Court of Appeals' nitpicking at the Nevada Supreme Court's opinion runs afoul of this Court's repeated admonition that state courts are presumed to know and follow the law and that § 2254's "highly deferential standard for evaluating state-court rulings demands that state court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 23-24 (2002). The Court of Appeals' opinion disregarded 28 U.S.C. § 2254(d)(1), and this Court's opinions, *Early v. Packer*, 537 U.S. 3, 8-11 (2002), and *Woodford*, 537 U.S. at 23-24 (2002). The Court of Appeals erred in finding that the Nevada Supreme Court's decision was "contrary to" *Jackson*.

B. The Nevada Supreme Court's adjudication of Troy's *Jackson* claim was not objectively unreasonable.

1. Ample evidence supported the Nevada Supreme Court's ruling.

Troy was charged by information with two felonies in violation of Nev. Rev. Stat. 200.366: sexual assault on a child under the age of 14 years, and sexual assault on a child under the age of 14 years resulting in substantial bodily harm.[4] JA 28-20.

Under Nevada law, in order to convict Troy of sexual assault on a child under the age of 14 years, the State was required to prove beyond a reasonable doubt that the defendant subjected a child under the age of 14 years to sexual penetration against that person's will or under conditions in which the perpetrator knew or should have known that the child was mentally or physically incapable of resisting or understanding the nature or his conduct. Nev. Rev. Stat. 200.366; JA 29. With respect to the latter charge, the State was additionally required to prove that the act resulted in substantial bodily harm. *Id.* The jury convicted Troy of both charges. JA 30.

In his direct appeal to the Nevada Supreme Court, Troy claimed there was insufficient evidence to convict him. Pet. App. 120a.

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[4] Brown was also charged with attempted murder and child abuse resulting in substantial mental harm as a result of sexual assault. However, Brown was found not guilty of attempted murder and the Nevada Supreme Court found that the child abuse charge merged with the sexual assault conviction.

In rejecting that claim, the Nevada Supreme Court held:

> We conclude that a jury, acting reasonably, could have been convinced of Troy's guilt beyond a reasonable doubt.
>
> Testimony indicated that Troy left the bar around 12:15 a.m., that Troy lived very close to the bar, and that Troy lived very close to Jane Doe. Troy had enough time to get from the bar to Jane Doe's house and to assault Jane Doe before she made the telephone call to her mother at approximately 1:00 a.m. While Jane Doe could not identify her assailant, her description of his clothing was similar to what Troy was wearing; she also said that her assailant smelled like beer or vomit and testimony indicated that Troy had been drinking beer and had vomited several times that night. Furthermore, testimony indicated that Troy got home at approximately 1:30 a.m., which gave him enough time to assault Jane Doe. Additionally, the Dokes testified that they saw someone resembling Troy in a black jacket and black hat stumbling in the road near Jane Doe's house at 1:05 a.m. Troy also washed his pants and shirt when he got home, arguably to remove the blood evidence from his clothes. Finally, the DNA evidence indicated that semen collected from Jane Doe's underwear matched Troy's and that only 1 in 3,000,000 other people had matching DNA (the second DNA test

> indicated that 1 in 10,000 people had matching DNA).

Pet. App. 82a-83a.

There is no dispute that Jane Doe was sexually assaulted or that Jane Doe suffered substantial bodily harm as a result. There is no dispute that Jane Doe was under the age of 14 when she was assaulted. The only dispute on direct appeal was whether a rational juror could have concluded from the evidence presented at trial that the perpetrator was Troy. As quoted above, the Nevada Supreme Court referred to evidence from which a rational juror could have concluded that the perpetrator was Troy. Pet. App 82a-83a.

The trial evidence from which a rational juror could have concluded that Troy was the perpetrator includes:

The surgeon who performed surgery on Jane Doe following the sexual assault described traumatic injuries to Jane Doe's vagina and rectum. JA 79, 83-84, 87-89. The surgeon described Jane Doe's injuries to both her vagina and anus as "trauma secondary to insertion of a blunt object" consistent with an adult erect penis. JA 91-92. Additionally, semen was found on Jane Doe's panties and pajama bottoms. JA 230-32; 377-80. From this testimony, the jury could rationally have concluded that the attacker was an adult male.

Pamela Doe, Jane Doe's mother, testified that Troy had been to her home 10-12 times. JA 115. Troy admitted to having been in the Doe's home on previous occasions. JA 605. Pamela Doe owned a dog, which would bark at strangers but not at people with whom

it was familiar. JA 125, 164. The dog would not bark at Troy. JA 125. Jane Doe remembered that the dog was inside with her on the night of the attack. JA 158-59. The jurors could rationally conclude that the perpetrator was not someone at whom the dog would bark and that Troy is among that class of persons.

Jane Doe was unable to identify her attacker. JA 160. However, the jury could have rationally concluded that inconsistencies in Jane Doe's testimony and her description of her attacker and her inability to identify her attacker were the result of her suffering from Post Traumatic Stress Disorder (PTSD) as a result of her attack. JA 65, 67, 69-71, 74. A person suffering from PTSD might not remember specific information, such as the identity of an attacker. JA 76.

Connie Walker, an Elko police detective, testified that Jane Doe stated that her attacker wore a cowboy hat and thought he wore a black jacket. JA 518, 516. Pamela Doe described Troy as wearing a western shirt, jeans, boots, a black satin jacket, and a black cowboy hat the night of the attack. JA 119, 147. Travis, Troy's brother, testified that the night of the sexual assault, Troy was wearing a black hat and jacket. JA 280. Moreover, according to Travis, when Troy walked into their house at 1:32 a.m., Troy removed his hat and jacket. JA 275-80. From this testimony, the jury could reasonably have concluded that the attacker wore a cowboy hat and a black jacket and that Troy wore a cowboy hat and a black jacket the night of the attack.

Jane Doe testified that the person who attacked her smelled of alcohol and vomit. JA 172-73. Several

witnesses, including Troy himself, testified that Troy had been drinking the night of the attack. JA 121, 187, 303, 608, 627. Troy admitted in his trial testimony that he vomited on his clothes while walking home. JA 613. From this testimony, the jury could reasonably have concluded that the attacker smelled of alcohol and had vomited. The jury also could reasonably have concluded that Troy smelled of alcohol and had vomited and, therefore, that Troy was among the class of people who could have been the attacker.

At around 11:40 p.m. on January 28, 1994, bartender Steven Pennino observed Troy at the Peacock Bar. JA 186-87. Troy seemed "very intoxicated" that night. JA 187. Troy left the bar no later than 12:15 to 12:20 a.m. on January 29. JA 187-88. Pennino remembered Pamela Doe receiving a phone call at around 1:00 a.m. JA 189. Pamela Doe abruptly left the bar after the telephone call. JA 190. Pamela Doe testified that she left the bar after receiving a phone call from Jane Doe in which Jane Doe told her that she had been hurt. JA 123-24.

Pamela Doe also testified that Troy lived about 10 houses down in the same trailer park. JA 115. Troy admitted knowing the location of Jane Doe's bedroom. JA 605. A police officer testified that at his own normal pace, it was a 12 ½ minute walk from the bar to Jane Doe's house, and four minutes from Jane Doe's house to Travis's home, where Troy also resided. JA 364, 220, 603.

From this testimony, the jury could reasonably have concluded that Troy left the bar around 12:15 a.m., that Troy lived very close to the bar, and that Troy lived very close to Jane Doe. The jury could

reasonably conclude that Troy had enough time to get from the bar to Jane Doe's house and to assault Jane Doe before she made the telephone call to her mother at approximately 1:00 a.m.

At 1:05 a.m., a passing motorist and her husband spotted a person wearing a black cowboy hat, a black satin jacket, and dark jeans staggering in the middle of the street, in the general vicinity of Jane Doe's home. JA 202, 207, 216. From this testimony and the other testimony regarding what Troy was wearing the night of the attack, the testimony that Troy had been drinking heavily, the testimony where Jane Doe and Troy lived relative to each other, and the testimony when Troy left the bar, the jury could reasonably have concluded that it was Troy whom the passing motorist and her husband had seen.

David Prescott, Troy's roommate, testified that Troy told him that he could not remember what had happened the night of the sexual assault. JA 298, 306-07, 309. However, when he testified on his own behalf, Troy was able to account for his whereabouts that night and recalled the route he had taken home as being different from that where the passing motorists saw a man walking. JA 612-13. The jury could reasonably have concluded that Prescott was truthful and that Troy was lying. Furthermore, the jury could have considered Troy's lying as his consciousness of his guilt.

Travis testified that Troy woke him at 1:32 a.m. as Troy entered the trailer wearing a hat and jacket. JA 280. In his trial testimony, Troy admitted that when he got home, he put his clothes in the washing machine and started it. JA 613. Travis testified that

Troy asked him to remove his clothes from the washer and put them in the dryer. JA 284. Travis described the clothes he removed from the washer and put in the dryer as a black pullover shirt and a pair of black jeans. JA 286. The jury reasonably could have concluded that Troy washed his clothes to remove blood or other evidence.

In his trial testimony, Troy claimed that his route home was different from where the passing motorists saw a man walking. JA 619. Other testimony indicated that Troy claimed he did not remember what had happened the night of the sexual assault. JA 306-07. From this testimony, the jury could reasonably have concluded that Troy was lying and that he was conscious of his guilt.

Raquel testified that at approximately 9:30 p.m., she took Jane Doe and Jane Doe's sister home from babysitting at Raquel's residence. JA 105. Raquel denied that either she or her husband, Trent, left that evening after she took Jane Doe home. JA 105. This testimony provided Trent with an alibi that the jury was entitled to accept and exclude Trent as a suspect.

Travis testified that he gave his brother Troy a ride to a Carlin bar so that he could get his paycheck from Trent. JA 278. Travis testified that he left Troy at the bar and returned home. JA 278. Travis testified that he subsequently fell asleep watching television. JA 279. Travis testified that at 1:32 a.m., Troy woke him when he entered the trailer. JA 280. Notably, Troy did not contradict this testimony when he testified. JA 614. Troy's own testimony provided Travis with an alibi that the jury was entitled to accept and exclude Travis as a suspect.

There is evidence from which the jury could have inferred that Troy knew that Jane Doe was home unsupervised. Jane Doe called the Peacock Bar to see if Pamela Doe was there; Troy answered the phone and Jane Doe asked him if Pamela was there. Troy stated he thought she was at C.G.'s. Jane Doe said that she was trying to find Pamela in order to tell her that she and her sister were home safely. Troy said he would go to C.G.'s to deliver the message. Troy went to C.G.'s, but when he arrived, Pamela was already talking to Jane Doe on the phone. JA 119, 159, 165. Between 10:00 and 10:30 p.m., Pamela spoke with Jane Doe on the telephone. JA 119, 123. While Pamela and Jane Doe were talking, Troy came into C.G.'s Bar and told Pamela that Jane Doe was looking for her and that she was at home. JA 119, 123. Subsequently, both Pamela and Troy went to the Peacock Bar, where the two of them played a game of pool. JA 121. Troy left approximately "an hour to an hour and a half" after Pamela spoke with Jane Doe, but before Pamela left. JA 122-23.

There was also physical evidence in this case. Semen was detected in the crotch area of Jane Doe's panties and her pajama bottoms. JA 227, 232, 377-79.

Renee Romero, a criminalist for the Washoe County Crime Lab, was the State's DNA expert at trial. JA 412-14. The court recognized Romero as a DNA expert without objection. JA 414. Romero began her testimony with a brief overview of DNA. JA 415-23. Romero examined known samples of Troy's and Jane Doe's blood, as well as a section of Jane Doe's panties. JA 426. Romero conducted RFLP DNA testing with respect to each of the samples. JA 423, 427, 430-32.

The stain from the sperm fraction visually matched the known sample of Troy's DNA. JA 434-37. The frequency of such a match would be 1 in 3,000,000. JA 437. In other words, only one person in 3,000,000 would share the same genetic code. JA 438. Romero described this statistic as "very conservative." JA 438. Romero testified that another way to look at the percentage would be that 99.99967% of the population would not have this DNA. JA 458.

Romero also testified that for two non-identical twin offspring, the odds are 1 in 6,500 against the brothers having the same DNA profile. JA 468-69. In other words, the probability of two non-identical twin brothers having the same DNA profile would be 0.02%. JA 471-72.

From the evidence recited above, a rational juror could have found, beyond a reasonable doubt, that Troy committed the crimes. Consequently, the Nevada Supreme Court's adjudication of the sufficiency-of-the-evidence claim was not an objectively unreasonable application of *Jackson*.

2. The Court of Appeals erred in its analysis.

In affirming the grant of habeas relief, the Court of Appeals erred in several significant respects. The court (1) wrongly excluded reliance on the DNA evidence altogether, (2) did not apply the deferential *Jackson* standard in assessing the evidence, and (3) failed to apply the deference required by 28 U.S.C. § 2254(d)(1).

a. As shown in Section II, *infra*, the Court of Appeals erred in taking the Mueller letter into account since it was new evidence and not part of the trial record. Because the Mueller letter served as the principal basis for the Court of Appeals' exclusion of the DNA evidence introduced at trial, this alone justifies reversing the Court of Appeals' ruling. But even if the Mueller letter were properly considered, the Court of Appeals' exclusion of the DNA evidence is manifestly wrong. In excluding the DNA evidence in its entirety, the Court of Appeals made four additional fundamental errors.

First, nothing in the Mueller letter challenged the 1 in 3,000,000 figure. The "prosecutor's fallacy," so heavily emphasized by the Court of Appeals, is a red herring that, at most, justifies exclusion of Romero's statement that there is a 99.99967% chance that Troy committed the crime. However, excluding that statement is not the same as excluding any of the rest of Romero's testimony. Troy asserted a *Jackson* claim, not a claim that Romero's fleeting commission of the "prosecutor's fallacy" violated the Due Process Clause. The Court of Appeals' assertion that the admission of unreliable evidence might violate the Due Process Clause is therefore beside the point.

Second, to the extent the Mueller letter challenged the reliability of Romero's testimony, including her testimony that there is only a 1 in 6500 chance that one of Troy's brothers would match the DNA, *Jackson* dictates that reliability issues be resolved in the prosecution's favor. As explained in Section II, *infra*, *Jackson* requires reviewing courts to assess only the evidence adduced at trial and to assume that the jury resolved conflicts within that evidence in favor of the

prosecution. That is why the Mueller letter, which was never put before the jury, may not be taken into account in assessing Troy's *Jackson* claim. The Court of Appeals nonetheless not only accepted the Mueller letter as relevant to the *Jackson* claim, it went on to resolve the conflict between the letter and Romero's testimony in favor of the defense. The court therefore piled error upon error. If a rational juror could have found Romero's 1 in 6500 figure more accurate than Mueller's 1 in 1024 figure, the 1 in 6500 figure must be accepted for purposes of the *Jackson* inquiry. And the Court of Appeals did not even purport to demonstrate that a rational juror could not have found Romero more persuasive on this point. Indeed, as shown in Section II(D), infra, there is ample basis to conclude that Mueller mischaracterized Romero's analysis.

Third, even accepting the Court of Appeals' assertion (based on the Mueller letter) that "the chance that Troy's DNA would match at least one of his four brothers' DNA can increase to 1/66," that still means that there is a 65 in 66 chance that the DNA is still Troy's and not any of the brothers'. As Judge O'Scannlain correctly observed, even if one accepted Mueller's estimate, no rational trier of fact would have changed his mind:

> [T]he DNA still would have suggested that the rape was committed by Brown or one of his brothers. And the likelihood that one of his brothers would have such DNA was very slim: if not 1/6500, then at most 1/132. Thus, it was extremely unlikely that a random person committed the crime, and of the brothers, it was extremely unlikely that the specimen DNA would match not only Troy – as it did – but

> another brother. These probabilities put together still constitute overwhelming DNA evidence against Troy which the jury was entitled to consider.

Pet. App. 26a-27a (O'Scannlain, J., dissenting) (footnote omitted). As noted above, Travis had an uncontested alibi. Trent also had an alibi. There was overwhelming evidence that, as between Trent and Troy, the rapist was Troy.

The Court of Appeals' reasoning appears to be that, because (in its view) Romero's 1 in 6500 testimony was flawed, due process requires that no DNA evidence be considered whatsoever. But even if the 1 in 6500 testimony were so flawed that its introduction violated due process (and it was not), that would not require a reviewing court to ignore altogether the DNA evidence that remains on the record – such as the 1 in 3,000,000 result and Mueller's own 1 in 66 finding (assuming, for the sake of argument, that Mueller's letter were properly admitted and taken into account by the habeas courts).[5]

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[5] The Court of Appeals therefore erred in relying on two cases for the proposition that a federal court on habeas may exclude evidence admitted in the state court if the evidence "rendered [the] trial so fundamentally unfair as to violate due process." Pet. App. 18a, *citing Butcher v. Marquez*, 758 F.2d 373, 378 (9th Cir. 1985), and *United States v. Scheffer*, 523 U.S. 303, 309 (1998). Neither has anything whatsoever to do with a *Jackson* analysis. Neither contains a statement that in a *Jackson* analysis a reviewing court may exclude evidence for any reason. And both dealt with types of claims that are not even cognizable in a federal habeas action.

Fourth, the District Court and the Court of Appeals both mistakenly placed heavy emphasis on the statements by the State in the state post-conviction action that it had no case without the DNA evidence. Pet.App. 3a; 42a.[6] As an initial matter, the Warden's counsel never conceded any such thing in the federal habeas action. Moreover, the Court of Appeals did not find estoppel; and, there *is* DNA to consider even accepting the Mueller letter. This is, therefore, not a case without DNA evidence. Lastly, a concession made in a state post-conviction action does not absolve a federal habeas court from faithfully applying the tenets of *Jackson* and 28 U.S.C. § 2254(d)(1).

b. The Court of Appeals failed to apply the exceedingly deferential standard of review required by *Jackson* for assessing sufficiency-of-the-evidence claims. The "rational juror" standard established by *Jackson* requires courts to resolve all conflicts in testimony, and to draw all reasonable inferences, in favor of the prosecution. *Jackson*, 443 U.S. at 319. The Court of Appeals instead arrogated to itself the ability to determine the truth or falsity of evidence and substituted its own judgment for that of the jurors. This can be seen both in the standard the Court of Appeals set for itself and in the manner in which the court conducted its review.

After excluding the DNA evidence, the Court of Appeals recited what the District Court wrote: "there

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[6] The Court of Appeals appears to have been making reference to the answer in opposition to Troy's state post-conviction petition and statements of counsel during argument made in response to Troy's claim that his counsel was ineffective for failing to investigate witnesses. JA 1176, 1180, 1483.

[is] sufficient conflicting testimony to raise a reasonable doubt in the mind of any rational trier of fact." Pet. App. 19a. That statement shows that neither court applied the correct standard. The trier of fact has the responsibility to resolve conflicts in the testimony, whereas the reviewing court must assume that the trier of fact resolved any evidentiary conflicts in favor of the prosecution, even if the determination does not appear on the record, and must defer to that resolution. *Jackson*, 443 U.S. at 318-19, 326.

The Court of Appeals next wrote, "On appeal, [the Warden] argues that there is much evidence to support the conviction. However, it is [the Warden's] burden to establish guilt beyond a reasonable doubt for each and every element of the offense, a burden that [the Warden has] not carried here." Pet. App. 19a. The Court of Appeals is wrong. *Jackson*, 443 U.S. at 318-19, 326. No known authority supports the Court of Appeals' conclusion that the Warden has the same burden on *Jackson* sufficiency-of-the-evidence review that the State undeniably has at trial. The Court of Appeals applied a standard that was far less deferential than the *Jackson* standard.

This became evident when the Court of Appeals examined the evidence. Instead of resolving all conflicts, and drawing reasonable inferences, in favor of the prosecution, the Court of Appeals found the existence of conflicts to support Troy's *Jackson* claim. The court noted there were "inconsistencies" and "considerable conflict" in certain testimony, and drew inferences inconsistent with the prosecution's theory (e.g. by relying on Travis's claim that he did not see anything unusual about Troy's appearance when he arrived home at 1:32 a.m., and an officer's statement

that he did not see scratch marks on Troy's hands the next morning). The Court of Appeals rejected the logical inference that Troy had laundered his clothes in order to remove evidence and substituted its own inference that was consistent with Troy's explanation for washing them, but inconsistent with the prosecution's theory. The Court of Appeals also found fault with the manner in which the forensic evidence was collected and examined, pointed out that some testing was not done, and observed that a fingerprint found on the night light did not match Troy's. Finally, the court relied on Troy denying he was involved in the crime and taking actions purportedly inconsistent with having something to hide. Pet. App. 21a. The Court of Appeals concluded, "The conflicts in the evidence are simply too stark for any rational trier of fact to believe that Troy was the assailant beyond a reasonable doubt." Pet. App. 21a.

All told, the Court of Appeals took great pains to focus on evidence helpful to Troy, "inconsistencies," and inferences that pointed to innocence rather than guilt. The Court of Appeals failed to respect the jurors' role to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from the basic facts to the ultimate facts. The Court of Appeals failed to honor the tenet that the prosecution has no obligation to rule out every hypothesis except guilt. And the Court of Appeals failed to honor the *Jackson* rule that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution. *Jackson*, 443 U.S. at 318-19, 326. Instead, the Court of Appeals substituted its own judgment for that of the jurors.

c. The Court of Appeals compounded its failure to apply *Jackson* properly by failing to apply § 2254(d)(1) at all. Even before Congress enacted AEDPA, this Court established that federal habeas courts have no license to re-determine the credibility of witnesses whose demeanor has been observed by the state trial court, but not by them. *Jackson*, 443 U.S. at 319, 324, 326; *Herrera*, 506 U.S. at 400-01; *Marshall v. Lonberger*, 459 U.S. 422, 434-35 (1983). Federal habeas actions are not "retrials" of state criminal convictions. *Bell*, 535 U.S. at 693; *Herrera*, 506 U.S. at 400-02; *Williams*, 529 U.S. at 375-90; *Jackson*, 443 U.S. at 318-19. Habeas corpus is "a collateral remedy, providing an avenue for upsetting judgments that have become otherwise final. It is not designed as a substitute for direct review." *Teague v. Lane*, 489 U.S. 288, 306 (1989).

Section 2254(d)(1) adds teeth to these principles by requiring federal courts to give an added level of deference on top of the "rational juror" standard of *Jackson*. "The question under AEDPA is not whether the state court's determination was incorrect but whether that determination was unreasonable – *a substantially higher threshold*." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) (emphasis added). The Court of Appeals failed to review the Nevada Supreme Court's adjudication of the *Jackson* claim with the added level of deference required by AEDPA. The Court of Appeals did not even ask whether, having found that the Nevada Supreme Court erred (in its view), was that decision objectively unreasonable. The Court of Appeals wrongly equated error with unreasonable application, in fundamental conflict with the limits on habeas review imposed by § 2254(d)(1).

The Nevada Supreme Court applied the clearly established Federal law, as determined by this Court, when it adjudicated Troy's *Jackson* claim in his federal habeas action. Its adjudication of that claim was not objectively unreasonable. Therefore, the Court of Appeals erred in affirming the grant of habeas relief.

II. In This Case, The District Court Impermissibly Permitted Expansion Of The Record.

In order to find that there was insufficient evidence to convict Troy, the Court of Appeals had to exclude DNA evidence presented through Renee Romero's testimony. The Court of Appeals has never suggested that *with* consideration of the DNA evidence, there would be insufficient evidence to find Troy guilty. In order to exclude Romero's testimony, the District Court and the Court of Appeals accepted without question a letter written by Dr. Laurence Mueller. The Mueller letter was first introduced in the federal habeas corpus proceedings over the Warden's strenuous objections. The expansion of the record to include the Mueller letter was error for multiple reasons.

First, the District Court and Court of Appeals allowed expansion of the record for a *Jackson* claim. *Jackson* specifically held that the review is based on the trial record. *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). Second, even if a *Jackson* claim allowed the expansion of the record, the District Court and the Court of Appeals failed to recognize the lack of diligence on Troy's part. Third, the District Court and Court of Appeals expanded the record in a manner that would render the *Jackson* claim unexhausted.

Finally, there are multiple reasons to discount the Mueller letter.

In the end, the Court of Appeals had no proper basis on which to discard Romero's testimony. That testimony powerfully confirms the strong case the State had against Troy, and would readily allow a rational juror to convict him.

A. The *Jackson* rule, by its terms and nature, looks only to the evidence before the jury.

The standard of review for sufficiency of the evidence claims involves a highly deferential evaluation of the state trial. The reviewing court does not "ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt." *Jackson*, 443 U.S. 307 at 318. Instead, the reviewing court must determine, "after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id*. (emphasis in original). In a footnote, *Jackson* also noted, "The standard announced . . . does not permit a court to make its own subjective determination of guilt or innocence." *Id*. at 319 n.13. Instead, the reviewing court must consider only the trial record. *Id*. at 324.

Fourteen years later, this Court felt *Jackson*'s footnote 13 was important enough to be given its own paragraph in the text of another opinion. *Herrera v. Collins*, 506 U.S. 390, 402 (1993). *Herrera* also noted three important things that differentiated a *Jackson* sufficiency-of-the-evidence claim from one that a habeas corpus petitioner was "factually innocent." (1) A *Jackson* inquiry looks at whether there was a

constitutional violation because the State is required to prove each element of an offense beyond a reasonable doubt; (2) only "record evidence" may be used in a making a *Jackson* analysis and "new evidence" may not be considered; and (3) a *Jackson* analysis does not focus on whether the jury made a correct determination of guilt, but rather whether it made a rational determination of guilt. *Id*.

Not surprisingly, given the specific language of *Jackson* and *Herrera*, the Warden has discovered no other case in which a court has considered new evidence while deciding a *Jackson* claim.

As Judge O'Scannlain wrote in his able Court of Appeals dissent, "*Jackson* does not permit a federal court to resolve a sufficiency-of-the-evidence claim by imagining a different state trial in which evidence actually presented would have been excluded – especially not on the basis of reports added to the record during federal habeas review." Pet. App. 26a (O'Scannlain, J., dissenting).

It appears likely that both the District Court and the Court of Appeals confused sufficiency of the evidence claims, governed by *Jackson*¸ with assertions of "actual innocence" so as to overcome a procedural bar, governed by *Schlup v. Delo*, 513 U.S. 298, 314-15 (1995). *Jackson* claims and *Schlup* claims are, of course, separate and distinct. Like the type of claim foreclosed by this Court in *Herrera*, a *Jackson* claim is substantive – that is, the claim of insufficient evidence itself provides a basis for relief. By contrast, a *Schlup* claim is procedural – that it, its resolution merely allows the consideration of other claims. *See Schlup*,

513 U.S. at 314 (discussing difference between substantive and procedural claims of innocence).

Indeed, *Schlup* claims require a petitioner "to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful." 513 U.S. at 324.

In 2007, this Court discussed the difference between *Jackson* and *Schlup*. *House v. Bell*, 547 U.S. 518, 538-39 (2006). *House* explained that a *Jackson* analysis presumes that the jury reasonably resolved evidentiary disputes so long as sufficient evidence supports the verdict. On the other hand, because a claim of "actual innocence" includes evidence the jury did not have before it, a *Schlup* analysis requires a reviewing court to determine how a jury would weigh all of the evidence, both old and new – and that might include considering whether witnesses were credible. *Id*.

The distinction is best illustrated and understood in the following scenario: A hypothetical prisoner could challenge his conviction based on the sufficiency of the evidence, only to procedurally default this claim in the state courts. In federal habeas corpus litigation, this prisoner could use newly discovered evidence to show, procedurally, that he is "actually innocent" under a *Schlup* analysis so that his otherwise defaulted claim could then be heard. However, the reviewing court could then examine only the trial record and make a substantive determination under a *Jackson* analysis

whether there was sufficient evidence presented at trial to sustain the conviction. If the reviewing court determined that sufficient evidence was presented at trial, it would be required to deny the petition on the grounds of sufficiency of the evidence, even though it was convinced of the prisoner's "actual innocence."

Simply put, a federal court can not consider evidence not adduced at trial in deciding whether or not there was sufficient evidence to sustain a conviction under *Jackson*. As a result, expansion of the record pursuant to Rule 7 is not allowed. To do otherwise would permit a prisoner to present in a federal habeas action a free-standing claim of actual innocence which is not permitted. *Herrera*, 506 U.S. at 416-17. Because both the District Court and the Court of Appeals committed this error, their judgments cannot stand.

B. Because Troy was not diligent in bringing new evidence to the state courts, Section 2254(e) barred Troy from introducing the new DNA evidence in his federal habeas petition.

In the courts below, Troy argued, and the Court of Appeals agreed, that he was entitled to expand the record, pursuant to Rule 7 of the Rules Governing Section 2254 Cases, with the Mueller letter because it "merely clarifies, rather than fundamentally alters, the DNA evidence and expert testimony that was already before the Nevada courts." Pet. App. 12a, *citing Vasquez v. Hillery*, 474 U.S. 254, 260 (1986).

Read in isolation, Rule 7 is one of extraordinary breadth, seeming to allow consideration of just about

any kind of material in deciding federal writs of habeas corpus. In actuality, Rule 7 is not as broad as it seems – particularly given the restraints on granting habeas corpus relief found in federal law. Most significantly in that regard, federal habeas corpus law requires petitioners to develop the factual basis for their claims in state court. 28 U.S.C. § 2254(e)(2).

In 2000, this Court examined the current codification of 28 U.S.C. § 2254(e)(2), and determined when an evidentiary hearing is allowed. *(Michael) Williams v. Taylor*, 529 U.S. 420, 429-34 (2000). *Williams* explained that unless state prisoners are diligent in seeking to develop the factual basis of their claims in state court, an evidentiary hearing may not be held. *Id*. at 432. *Williams* also held, "The question is not whether the facts could have been discovered but instead whether the prisoner was diligent in his efforts." *Id*. at 435.

Williams then interpreted "lack of diligence" to give the term the same definition it had been given in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1991). *Williams*, 529 U.S. at 432-34. However, *Williams* also acknowledged that Congress, in enacting § 2254(e)(2), had not created a freestanding claim of "actual innocence" within the statute. *Id*. at 433.

In 2004, this Court summarily reversed the Sixth Circuit, holding that "we have made clear that whether a state court's decision was unreasonable must be assessed in light of the record the [state] court had before it." *Holland v. Jackson*, 542 U.S. 649, 652 (2004) (*per curiam*). *Holland* explained that the requirements of 28 U.S.C. 2254(e)(2) must be met even, as in this case, when a prisoner seeks relief

based on new evidence and an evidentiary hearing is not held. *Id*. at 652-53.

On the other hand, since its adoption in 1976, this Court and its members have mentioned Rule 7 on only four occasions. *McCleskey v. Zant*, 499 U.S. 467, 498 (1991); *Vasquez v. Hillery*, 474 U.S. 254, 256 (1986); *Vincent v. Louisiana*, 469 U.S. 1166, 1169 (1985) (Brennan, J., dissenting from denial of *certiorari*); *Rose v. Lundy*, 455 U.S. 509, 526 n.3 (1982) (Blackmun, J., concurring). Only *Vasquez* contains any significant analysis of the rule and its interplay with other habeas corpus concepts.

The *Vasquez* Court allowed expansion of the record with information that "did not fundamentally alter the legal claim already considered by the state courts, and, therefore, did not require that respondent be remitted to state court for consideration of that evidence." 474 U.S. at 260. *Vasquez*, of course, is a pre-AEDPA case, and its continuing viability to justify expansion of the record is doubtful given the requirements of 28 U.S.C. § 2254(e)(2).

Reliance on *Vasquez* and Rule 7 as justification to expand the record suffers from a fundamental problem, particularly with respect to *Jackson* claims, which are limited to record evidence: A federal court's consideration of evidence beyond the trial record does violence to its statutory duty found in 28 U.S.C. § 2254(d)(1).

The Circuit Courts of Appeal have attempted to harmonize 28 U.S.C. § 2254(e)(2) and Rule 7 while following this Court's decisions. The Ninth Circuit, for example, has held that "under *Holland*, [a petitioner]

must comply with § 2254(e)(2) in order to expand the record under Rule 7." *Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1241 (9th Cir. 2004) (footnote omitted). Prior to *Holland*, the Seventh Circuit adopted a rule very similar to the *Holland* rule. *Boyko v. Parke*, 259 F.3d 781, 790 (7th Cir. 2001). The Eighth Circuit expressly endorsed *Cooper-Smith*. *Mark v. Ault*, 498 F.3d 775, 788 (8th Cir. 2007).

Troy did not challenge the DNA evidence at trial. Because he failed to object, the Nevada Supreme Court declined to consider the issue on appeal. Pet. App. 82a. Additionally, although Troy raised his *Jackson* claim on direct appeal, he still had an opportunity, during his post-conviction hearing, to again challenge the DNA evidence. In this case, Troy filed a petition for post-conviction relief, raising various challenges to DNA testimony, including a claim that trial counsel was ineffective for failing "to object to the lack of pre-trial evidentiary hearing or to qualifying Renee Romero as an expert witness thereby precluding appellate review of the DNA evidence." JA 1099.

The state district court conducted an evidentiary hearing on Troy's post-conviction petition. JA 1202. At that evidentiary hearing, Troy presented *no evidence*, from Dr. Mueller or anyone else, challenging the adequacy of Romero's testimony, her qualifications or the reliability of the DNA evidence she presented. Instead, Troy criticized the collection of evidence but provided no actual evidence that the DNA evidence was mishandled. Troy, if he was being diligent, could have used *that* state hearing to buttress his claim that the DNA evidence was somehow unreliable. This he did not do.

Instead, at Troy's state post-conviction hearing, the thrust of the testimony was that trial counsel should have explored the possibility that Jane Doe's stepfather was the true perpetrator. JA 1217-18, 1224-32, 1265-69, 1223-29. Troy argued that Jane Doe's stepfather, who was at work on the night of her attack, should have been investigated as a suspect, particularly since he had been convicted of sexual assault in Utah subsequent to Troy's trial and had a period during his work schedule that might cast doubt on his whereabouts. JA 1475.

Since Jane Doe's stepfather is not one of Troy's numerous brothers, the Mueller letter is inconsistent with Troy's theory presented at the state post-conviction hearing. Indeed, Troy's alternative theory that his brother Trent might have been the perpetrator received scant attention in that proceeding, even though Trent testified as a witness. JA 1278 (Troy's mother testifying about location of Trent's residence); JA 1316-42 (Trent's testimony).

Because he did not present the Mueller letter or something similar at the state evidentiary hearing, Troy was not diligent. Consequently, the District Court erred in admitting and then considering the Mueller letter in the first instance.

C. Consideration of the Mueller letter renders the *Jackson* claim unexhausted.

If the record can be expanded in deciding *Jackson* claims and if the District Court properly allowed expansion of the record despite Troy's lack of diligence, the District Court and Court of Appeals still erred. As already noted, *Vasquez* interpreted Rule 7 to allow

expansion of the record when such expansion does "not fundamentally alter the legal claim already considered by the state courts." *Vasquez*, 474 U.S. at 260.

However, at least three circuits have held that evidence offered pursuant to Rule 7 after a state court's review of a claim impermissibly undermines the exhaustion requirement of § 2254(c) when it transforms the claim "into a significantly different and more substantial claim, placing the claim in a significantly different and stronger posture than it was when the state courts considered it." *Demarest v. Price*, 130 F.3d 922, 935 (10th Cir. 1997) (citation and internal quotation omitted). *Accord Aiken v. Spaulding*, 841 F.2d 881, 884 n.3 (9th Cir. 1988); *Wise v. Warden*, 839 F.2d 1030, 1034 (4th Cir. 1988).

Demarest took the position that unless the factual basis for the new evidence was contained within the claim, the new evidence would render a claim unexhausted. 130 F.3d at 936-37. Significantly, in *Demarest* there was a general attack on the admissibility of blood splatter evidence in the state court. *Id*. at 937. However, in federal court, the petitioner presented an expert who criticized the state trial expert. *See id*. ("Essentially, Dr. Kennedy's testimony regarding the state's blood-spatter evidence was that the 'physics are wrong, so the science is wrong, so the conclusions are wrong'"). This type of evidence rendered the claim unexhausted. *Id*.

Aiken took a similar position, finding that the new evidence – a sound expert critiquing a tape recording in *Aiken* – rendered the claims unexhausted. *Aiken*, 841 F.2d at 883.

This case mirrors *Demarest* and *Aiken*. At trial, Troy's attorney *did not object* to the DNA evidence. On appeal, Troy raised as an issue that DNA evidence in general was unreliable and should not have been admitted without a hearing. JA 841-49. Troy only mentioned the DNA evidence in a passing reference to his sufficiency-of-the-evidence claim with the conclusory assertion "that there was a total failure of the DNA evidence to be established as trustworthy and reliable in this particular case." JA 849.

In his reply brief on direct appeal, Troy attempted to attack the admissibility of the DNA evidence, and included as an appendix the results of DNA testing done by Forensic Science Associates (FSA). JA 909-21. The FSA report did not criticize the State's DNA expert or how the evidence was handled in any fashion. Rather, FSA concluded that using PCR-based DNA testing, it had identified a genotype found in 1 in 10,000 persons in the Caucasian population and that Troy has this genotype. JA 916, 918. This number is not at all inconsistent with Romero's trial testimony of a 1 in 3,000,000 match using RLFP testing.

The Nevada Supreme Court declined to consider the DNA argument, instead holding:

> Troy argues that the district judge erred in not conducting a pretrial hearing to determine whether the DNA results were trustworthy and reliable. However, Troy made no objection to either the lack of a pretrial evidentiary hearing or to qualifying Romero as an expert witness on DNA evidence. Failure to object in the district court precludes consideration of the issues on appeal; however, this court may address plain

> error *sua sponte*. Because we conclude that the failure to conduct an evidentiary hearing was not plain error, we will not consider this issue.

Pet. App. 82a.[7]

On the other hand, the Mueller letter, taken at face value, is a broad-based critique of Renee Romero's trial testimony. JA 1581-84. This critique has no evidentiary link to anything presented to the state courts.[8] Instead, the argument Troy raised on direct appeal, and which Troy defaulted, had to do with DNA testing in general.

In finding the trial DNA evidence unreliable in its order granting habeas corpus relief, the District Court gave great weight to the claimed lack of reliability of the State's statistical figures. Pet. App. 38a-42a. In doing so, the District Court and the Court of Appeals relied upon evidence that was never presented to any Nevada court respecting alleged errors in the statistical probabilities of Troy's brothers in the

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[7] Of course, the admissibility of evidence at trial is generally an issue outside the scope of habeas corpus review. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Significantly, Troy raised no constitutional claim with respect to the admissibility of DNA evidence on direct appeal. Pet. App. 111a.

[8] Independent of Dr. Mueller's actual testimony, the letter has no evidentiary value at all, since it is indisputably hearsay and there is nothing in the Federal Rules of Evidence that would make it self-authenticating and thus admissible. The District Court and the Court of Appeals chose to consider this letter for the truth of the matter asserted even though Dr. Mueller's conclusions have not been subject to the crucible of cross-examination – and did so in order to discount completely Romero's testimony.

vicinity of the crime. The only similar argument presented to the Nevada Supreme Court was in footnote 1 of Troy's reply brief on direct appeal, which read:

> The impact of brothers in the suspect population is an important consideration that bears on the Random Match Probabilities (RMP). "But the probability that the suspect and his biological brother will share a set of alleles on each of the three probe sites is approximately (1/4)3 = 1/64." See Jonathan J. Koehler, DNA Matches and Statistics: Important Questions, Surprising Answers, 76 Judicature 222 (1993). In the present case, that factor is critically important, not only because the victim constantly referred to "Trent" instead of "Troy", but also because Renee Romero, the States's DNA "expert" quoted the odds of two brothers sharing the same alleles as **1 in 6,500!** (TR 344).

JA 893-94 (emphasis in original).

However, the Nevada Supreme Court could not consider this argument because reply briefs are limited to answering any new matters set forth in the opposing brief. Nev. R. App. P. 28(c). Reply briefs are not vessels for presenting new issues. Additionally, this argument was presented to support Troy's argument that his sentencing was improper, not to support a claim that the DNA evidence was unreliable. JA 889-94.

Consequently, even if the District Court properly expanded the record with respect to the *Jackson* claim

and then considered the Mueller letter, the consideration rendered the claim unexhausted. The substance of Mueller's letter was not considered by the Nevada state courts in the first instance. Mueller's letter makes Troy's *Jackson* claim both significantly different and more substantial – and as a consequence, unexhausted. 28 U.S.C. § 2254 (b), (c); *Rose v. Lundy*, 455 U.S. 509, 510 (1982).

D. The Mueller letter should have raised concerns in the District Court and the Court of Appeals.

The District Court, without ordering an evidentiary hearing, accepted the Mueller letter as authoritative, and on that basis, discounted Romero's testimony in its entirety in finding insufficient evidence to sustain Troy's conviction. Pet. App. 40a-42a. There are several reasons the District Court should have been more skeptical, particularly given Dr. Mueller's biases and the skepticism other courts have shown toward him.

Perhaps most significantly in this case, Dr. Mueller performed no actual DNA testing. Instead, the Mueller letter critiques Romero's trial testimony and, in its final paragraph, critiques the FSA report. JA 1581-84.

That the Mueller letter should not have been uncritically accepted is almost self-evident in Dr. Mueller's curriculum vitae. JA 1552. While Dr. Mueller asserts he has spoken at a host of conferences on DNA testing, all were for criminal defense organizations. JA 1556-59. This potential bias alone

suggests the district court erred in accepting Dr. Mueller's letter without further analysis.

A simple Westlaw search would have raised even more serious concerns. The Washington Supreme Court made a point of criticizing Dr. Mueller by name on at least three occasions. *See State v. Gregory*, 147 P.3d 1201, 1241 n.38 (Wash. 2007) ("We have also questioned testimony from Dr. Mueller"); *State v. Gore*, 21 P.3d 262, 274 n.9 (Wash. 2001) (noting the amount of money Dr. Mueller made as an expert witness and that his testimony was at odds with the opinion of the National Research Council); *State v. Copeland*, 922 P.2d 1304, 1318 n.5 (Wash. 1996) (noting the amount of money Dr. Mueller made as an expert witness and his lack of expertise in human genetics).

Likewise, in an earlier case, the California Court of Appeal noted that the trial court had "found Dr. Mueller's analysis to be biased and not entirely credible." *People v. Reeves*, 109 Cal.Rptr.2d 728, 745 (Cal. Ct. App. 2001).

The Navy-Marine Court of Military Appeals reached a similar conclusion when it observed, "[I]t was likely that the court members would find that Dr. Mueller and Dr. D'Eustachio were too extreme in their views and discount their testimony." *United States v. Goode*, 54 M.J. 834, 850 (N-M Ct. App. 2001).

Of even more concern, the California Court of Appeal observed in 2005, "On cross-examination, Dr. Mueller acknowledged that he did not have any formal training in interpreting data from forensic DNA testing, that he had never worked for a laboratory accredited in forensic DNA testing, and that he had

never done any DNA testing himself." *People v. Richie*, No. B158254, 2005 Westlaw 1340382, *5 (Cal. Ct. App. June 8, 2005) (unpublished).

Finally, a state court in Pennsylvania may have expressed it best when, after Dr. Mueller was proffered as a defense expert, it stated, "Well, I'm going to permit him to testify, but just barely, so proceed." *Commonwealth v. Blasioli*, 685 A.2d 151, 168 (Pa. Super. Ct. 1996).

In addition to not proceeding with caution before uncritically accepting Dr. Mueller's letter as authoritative, the District Court and the Court of Appeals gave the letter undue weight in determining that Romero's testimony could be disregarded in its entirety.

Most significantly, the Mueller letter challenges neither the RFLP testing nor Romero's conclusion that the tested evidence matched Troy's profile and that the probability of such a match happening at random was 1 in 3,000,000. Instead, the Mueller letter diverts attention by talking about the "prosecutor's fallacy." JA 1583.

The "prosecutor's fallacy" occurs when the jury is asked to use the DNA evidence as source probability for the DNA sample instead of random source probability. *See United States v. Chischilly*, 30 F.3d 1144, 1157 (9th Cir. 1994) (explaining "prosecutor's fallacy").

Romero committed this fallacy in her testimony. When initially asked if DNA testing is like a fingerprint, Romero made a critical distinction

between the two. "A fingerprint is making an identification. It's been accepted in the courts; it's being an identification of the one person who left that fingerprint. In DNA comparison, I'm making a comparison. I'm not making an identification." JA 439.

Shortly thereafter, Romero testified that the frequency she would expect to find the match "in the White, Black, and Hispanic populations, male and female" to be "one in 3 million." JA 440.

However, on re-direct examination, the prosecutor asked if that meant that the likelihood that the semen sample did not come from Troy would be .000033%, Romero responded, "I'd prefer to refer to it as one in 3 million." JA 458. When the prosecutor confused the concepts of comparison and identification in that question, he committed the "prosecutor's fallacy."

The Court of Appeals gave great weight to the "prosecutor's fallacy" in affirming the District Court. Pet. App. 15a-16a. There is a major problem with doing so: this Court has never held that the "prosecutor's fallacy" somehow undermines a DNA expert's proper testimony when doing a *Jackson* analysis or even that the "prosecutor's fallacy" violates due process. Indeed, the case below is the only time a Court of Appeals has ever addressed the "prosecutor's fallacy" in the context of federal habeas corpus litigation. As a result, the Nevada Supreme Court's *Jackson* analysis is neither "contrary to, nor an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Ironically, just five days before this Court granted *certiorari* in this

case, it reiterated § 2254(d)(1)'s principle in a case involving purportedly improper jury instructions. *Waddington v. Sarausad*, 129 S.Ct. 821, 823 (2009).

Further, the Mueller letter criticizes Romero's testimony about the likelihood of two brothers matching at the same loci. The Mueller letter suggests that the arithmetic is straightforward: .25 to the fifth power $(.25)^5$, which equals 0.0009765625 and corresponds to 1 in 1024. JA 1582. However, Romero expressly testified:

> In the National Research Council report, the one I spoke about earlier, the committee wrote the report under the auspices of the National Academy of Sciences, they addressed that problem, in their discussion of useful data-banking DNA, and they have a formula in there, and they state that they could share – 25 percent could share two bands and 50 percent chance to share one band. And they have a formula they use – utilize the frequency of occurrence of the alleles. And in this case that turns out to be one in 6,500. Meaning those two adults would have to mate and produce offspring 6,500 times to come up with that pattern again.

JA 468-69.

It seems logical to assume that if the formula was simple, Romero could have testified that it was a matter of arithmetic: $(.25)^5$. However, Romero's rather longer explanation appears to be based on a scientific study that differentiates between "bands" and "alleles" and included more than arithmetic.

Troy did not challenge these numbers at trial. The Mueller letter does not even opine that the National Research Report is wrong or that the "formula" the National Research Report used was merely one of arithmetic. Rather, the letter simply concludes Romero was wrong because 1 in 6500 does not equal $(.25)^5$.

Additionally, in this case, the defense did not challenge the DNA evidence at trial. However, at the initial sentencing hearing, the trial judge referenced the FSA analysis initially prepared for the defense. JA 799. This report was attached as a supplement to Troy's reply brief on direct appeal. JA 909-21.

FSA did PCR testing. JA 909-10, 912. Renee Romero, the trial expert, referenced a 1 in 3,000,000 probability using RFLP testing. PCR stands for polymerase chain reaction and uses a copying method "to replicate DNA regions in a test tube. By repeating the copying process, a small number of DNA molecules can be reliably increased up to billions within several hours. RFLP analysis requires a biological sample about the size of a quarter, but PCR can be used to reproduce millions of copies of the DNA contained in a few skin cells." *DNA Typing-PCR,* http://dna.gov/basics/analysis/pcr.

RFLP, on the other hand, is a technique for analyzing the variable lengths of DNA fragments. RLFP involves using a special kind of enzyme to digest a DNA sample. This enzyme cuts DNA at a specific sequence pattern. As a result, "The presence or absence of certain recognition sites in a DNA sample generates variable lengths of DNA fragments, which are separated using gel electrophoresis. They are then

hybridized with DNA probes that bind to a complementary DNA sequence in the sample." *DNA Forensic*, http://www.ornl.gov/sci/techresources/Human_Genome/elsi/forensics.shtml.[9]

In Appendix 1 of their report, FSA found a random match probability statistic of 1 in 10,000. JA 916, 918. In other words, 1 in 10,000 people chosen at random would have these DNA characteristics. Troy also has these characteristics.

In this case, the District Court, confronted with a letter that appeared to contradict portions of Romero's testimony, decided – contrary to *Jackson*, contrary to 28 U.S.C. § 2254(d)(1), and without taking any additional evidence, without holding the letter to any kind of scrutiny, without having any expert critique of the letter or *its* conclusions, in short, without holding an evidentiary hearing – that it could discount completely the testimony of a witness who qualified as an expert and whose own testimony was subject to cross-examination.[10] As noted in the preceding section, the District Court's and the Court of Appeals' conduct eviscerated the deference owed the trial jury's findings.

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[9] RLFP testing is considered more discriminating than PCR testing. As a result, the PRC and RLFP results are not at odds with each other.

[10] Given the posture of the case, the only issue before the Court is sufficiency of the evidence. However, the District Court also accepted the Mueller letter as indisputable fact in addressing the ineffective assistance of counsel claim. Pet. App. 47a-50a.

Following this discounting, the District Court then weighed the trial evidence for sufficiency and found it wanting. Pet. App. 46a. The District Court fundamentally erred in doing this – and the Court of Appeals compounded the error by not correcting it on appeal.

CONCLUSION

This Court should reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully Submitted,

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