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

REPLY BRIEF FOR PETITIONERS

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A. Troy Has Not Responded To The Questions Before This Court.

This Court granted certiorari on two issues:

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?

Because Troy does not address the issues in his brief, he apparently concedes that when a defendant challenges the sufficiency of the evidence presented at trial, "[T]he relevant question is 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 v. Virginia*, 443 U.S. 307, 319 (1979). Likewise, Troy apparently concedes that when a federal court reviews a state *Jackson* claim, the federal court must review the state court decision under the deferential prism 28 U.S.C. § 2254(d) mandates. Troy also apparently concedes that review of a *Jackson* claim is limited to the evidence presented at trial.

Troy makes these apparent concessions because, we are told, *his* claim is not based on *Jackson* at all,

despite his repeated reassurances to the courts below, and indeed this Court, that he was presenting a *Jackson* claim. This Court should not countenance such gamesmanship.

Instead of addressing the issues upon which this Court granted *certiorari*, Troy attempts to transmogrify the issues, asserting that his claim has been misconstrued. He now claims that the DNA evidence was improperly admitted during the state trial, apparently in violation of the Due Process Clause, and his claim is governed by *Manson v. Brathwaite*, 432 U.S. 98 (1977). Further, he claims that this Court should apply the harmless-error analysis to his claim, citing *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Respondent's Answering Brief at 1-4, 18-20. Troy's claim is not a subsidiary question fairly included within the purview of the questions upon which this Court granted *certiorari*. This Court should not consider Troy's claim. Sup. Ct. R. 14(1). Rather, this Court should grant Petitioner's relief and reverse the decision of the Court of Appeals.

Troy further argues that the District Court properly expanded the record and considered the Mueller letter. However, Troy makes that argument in a context completely different from that presented in the issues upon which this Court granted *certiorari*. Respondent's Answering Brief at 1-4, 18-20, 35-40. Troy wrote, "Therefore, even if the report would not be properly considered in evaluating a *Jackson* claim (which Brown does not assert here), it was nonetheless properly admitted to inform Brown's DNA due process and ineffective assistance of counsel claims." Respondent's Answering Brief at 35. Consequently, Troy has not responded to the second question upon

which this Court granted *certiorari*.[1] Troy does not dispute that the Mueller letter was not properly before either the District Court or the Court of Appeals in the resolution of Troy's sufficiency-of-the-evidence claim. Therefore, those courts erred in considering the letter in the context that is presently before this Court.

The District Court and the Court of Appeals erred in excluding the DNA evidence from consideration in analyzing the *Jackson* claim, improperly considered the Mueller letter in analyzing the *Jackson* claim, did not apply the deferential *Jackson* standard in assessing the evidence, and failed to apply the additional deference required by 28 U.S.C. § 2254(d)(1). This Court should reverse the decision of the Court of Appeals.

Troy now argues that his sufficiency-of-the-evidence claim is not governed by *Jackson*, but rather, by *Manson v. Brathwaite*, 432 U.S. 98 (1977). Troy argues that he did not actually present a sufficiency-of-the-evidence claim at all. There are several problems with Troy's argument, both procedural and substantive. The Warden will address the procedural problems first.[2]

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[1] The Warden does not concede that the Mueller letter was properly before the District Court or the Court of Appeals in any context.

[2] Troy argues that the petition is now moot. Respondent's Answering Brief at 19-20. In a footnote, Troy states he also agrees with Amicus NACDL that certiorari should be dismissed as improvidently granted. Respondent's Answering Brief at 3 n.2. Troy is mistaken on both counts. First, the case is not moot. *Pacific Bell Tel. Co. v. Linkline Communications, Inc*., 129 S.Ct.

B. Procedural Deficiencies.

First, Troy has consistently argued in federal court that his sufficiency-of-the-evidence claim is governed by *Jackson v. Virginia*, 443 U.S. 307 (1979). On direct appeal, Troy argued that DNA evidence was not scientifically accepted under Nevada evidentiary law. Pet. App. 112a-20a. In doing so, Troy relied on Nev. Rev. Stat. § 56.020 and the interplay between *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1932) (the Nevada evidentiary test), and *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993) (the federal evidentiary test). Troy did not make a due process argument anywhere in that claim. In the same brief, identified as a wholly separate claim, Troy also argued, after noting evidentiary inconsistencies, "Appellant submits that there was insufficient evidence to convict Troy Brown of these crimes." Pet. App. 120a.

In his state post-conviction petition, Troy claimed that he received ineffective assistance of counsel for a variety of reasons and that there was a due process violation based on the police investigation. JA 1043-46. However, his state petition contained no argument

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1109, 1117 (2009). The Warden believes that *Jackson* governs; that there was sufficient record evidence to sustain Troy's conviction; that the Court of Appeals failed to apply the deferential standard required by the AEDPA; and that the decision of the Court of Appeals should be reversed. Thus, each party continues to seek different relief despite Troy's putative confession of error. *Id*. Instead, as in *Pacific Bell*, Troy seeks a "mulligan" so that he can posture the case in a manner more to his current pleasing. Second, *certiorari* was not improvidently granted. If *certiorari* was dismissed, a legal analysis and conclusion that *Troy* now acknowledges to be unsound would survive as the controlling authority within the Ninth Circuit.

regarding a due process violation of any kind due to the admission at trial of the DNA evidence.

When Troy turned to the federal courts, he argued that he "was denied his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution because there was insufficient evidence presented at trial to support a finding of guilty of the sexual assault crimes beyond a reasonable doubt." Pet. App. 147a. Troy further argued that if the DNA evidence was set aside, then, once the evidence was reweighed, there was insufficient evidence. Pet. App. 157a-63a.

The Warden filed a Motion to Dismiss, arguing the claim was unexhausted, presciently anticipating the very argument Troy makes now:

> In this case, Ground 1 of Brown's petition is unexhausted. While Ground 1 is similar to the issue Brown raised on direct appeal, the claim is assuredly unexhausted. On direct appeal, Brown did argue sufficiency of the evidence. If that was the sole basis for Ground 1, Respondents would agree exhaustion has occurred. However, that is not what happened.
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> After reciting part of the Nevada Supreme Court's decision, Brown then attacks the reliability of the DNA evidence used to convict him. The reliability of this evidence *was not* challenged on direct appeal in the same way Brown challenges it now. Respondents note that Brown did argue on direct appeal in part, that "the total failure [of evidence] as trustworthy in this particular case," this

> argument is not the same as the one he raised in the habeas corpus context.

Pet. App. 182a-83a. Troy responded by arguing that *Jackson* governed.[3] JA 1521, 1522, 1524. The District Court subsequently denied the Warden's Motion and ordered the Warden to file an Answer, which he did. Troy filed a Reply, again citing *Jackson*. JA 1546.

The District Court subsequently granted the Writ of Habeas Corpus and the Warden appealed. In his brief to the Court of Appeals, Troy argued that *Jackson* was "the controlling Supreme Court precedent." Supplemental Appendix 51b.

After the Court of Appeals ruled in Troy's favor, the Warden sought rehearing and suggested rehearing *en banc*. Troy again cited *Jackson* as the controlling authority. Supplemental Appendix 69b.[4]

The Warden then sought *certiorari* in this Court. In his opposition to the *Petition for Writ of Certiorari*,

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[3] While various counsel have represented both Troy and the State of Nevada's interests in various proceedings, the same attorney has represented Troy at all times in the federal courts, and is *counsel of record* in this Court.

[4] This Court should note that Troy's counsel took different positions in the District Court and the Court of Appeals, when he argued in response to the Warden's Motion to Dismiss that the Nevada Supreme Court equated its test with *Jackson*, and shared his agreement with the Court of Appeals that the standards are different. *Compare* JA 1524 (argument regarding exhaustion) *with* Supplemental Appendix 71b (quoting Court of Appeals' opinion and opposing rehearing).

Troy again argued *Jackson* was the controlling authority. Opp. to Pet. for Cert. 2.

Only *now*, after *certiorari* has been granted by this Court, and after the Warden has filed his brief arguing *Jackson*'s applicability, does Troy argue that *Manson* applies instead of *Jackson*. However, this Court has consistently held, "In the ordinary course, we do not decide questions neither raised nor resolved below. As a general rule furthermore, we do not decide issues presented outside the questions presented by the petition for certiorari." *Glover v. United States*, 531 U.S. 198, 205 (2001) (citation omitted). *Accord National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999) ("[W]e do not decide in the first instance issues not decided below"); *Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 253 (1999) (*per curiam*) ("Although respondent presented two alternative grounds for the affirmance of the decision below, we decline to address these claims at this stage in the litigation").

While Troy may argue he addressed the issue presented in Question 1, the *Manson* argument was neither raised in, nor resolved by, any other court, state or federal. Indeed, Troy did not cite *Manson* in any of his prior pleadings. As a result, Troy's argument should not be considered for the first time in this Court.[5]

Additionally, Troy is judicially estopped from making his *Manson* argument.

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[5] Likewise, Troy's argument regarding the "prosecutor's fallacy" should not be considered for the same reason.

"Judicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000). *See* 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4477, p. 782 (1981) ("absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory").

A year after *Pegram*, this Court recognized that the doctrine of judicial estoppel serves "to protect the integrity of the judicial process . . . by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (internal punctuation omitted) (*quoting Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982), and *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993)).

New Hampshire also set forth a number of factors to determine whether judicial estoppel should be imposed as an equitable remedy:

> First, a party's later position must be "clearly inconsistent" with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, and thus

> poses little threat to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

532 U.S. at 750-51 (citations and internal punctuation omitted). In this case, all three *New Hampshire* factors are present. With respect to the first factor, Troy clearly cited *Jackson* as the controlling authority at all stages and at all levels of federal review until now. In this Court, Troy states he "agrees with the Solicitor General that this case should not be decided under *Jackson*." Respondent's Answering Brief at 3.[6]

Under the second factor, Troy has clearly prevailed, both at the District Court and Court of Appeals level, by arguing that *Jackson* provides the correct test. Finally, the third factor is present as well.

Furthermore, as Troy acknowledges in his own brief, a successful *Jackson* claim prohibits retrial under the Double Jeopardy Clause. *Tibbs v. Florida*, 457 U.S. 31, 41, 45 (1982). Respondent's Answering Brief at 3. Troy *never*, in any proceeding before now, acknowledged *Tibbs* or that the remedy the District Court ordered, and the Court of Appeals endorsed, was contrary to this Court's and the Court of Appeals' precedent.[7] Instead, he waited until the Solicitor

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[6] This is a baffling assertion, since the Solicitor General argued that the Court of Appeals misapplied *Jackson* and erred in the process. Brief of United States at 19-21, 27.

[7] The Court of Appeals held in 1985 that a successful *Jackson* claim bars re-trial. *United States v. Bibbero*, 749 F.2d 581, 586

General pointed to this Court's governing precedent and conceded what is now obvious.

It seems highly probable that Troy was preparing to argue to the Nevada state courts, once the mandate issued from the Court of Appeals, that *Tibbs* prohibited his re-trial, despite the federal courts' insistence that he could be re-tried. Now, Troy seeks a remedy from this court that allows re-trial. Troy's conduct—knowing that the District Court had fashioned an unconstitutional remedy but saying nothing so that he could seek unconditional release—should not be rewarded. The Warden must assume that Troy did this based on his ready acknowledgement that the federal courts ordered an invalid remedy and suggestion that this Court craft a valid one.[8]

Even if Troy was not judicially estopped from raising his *Manson* argument, he is most assuredly proposing that this Court craft a new rule—one that essentially would hold that it is constitutional error if the prosecutor makes a misstep in presenting DNA evidence, even if there was not a contemporaneous

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(9th Cir. 1985). The Court of Appeals extended this rule to habeas cases in 1998. *Bean v. Calderon*, 163 F.3d 1073, 1086 (9th Cir. 1998).

[8] The District Court and the Court of Appeals *may* have thought that a re-trial was possible pursuant to *Lockhart v. Nelson*, 488 U.S. 33 (1988). However, *Lockhart* is most assuredly *not* mentioned by either court in their decisions while *Jackson* assuredly is—which would allow Troy to argue that *Tibbs* and *Bean* govern rather than *Lockhart*.

objection. To this end, Troy argues that *Manson* controls the discussion.

As will be discussed *infra,* however, *Manson* involves suggestive pre-trial photographic identification, a very different issue than the one before this Court. *Manson*, 432 U.S. at 114-15. It has nothing to do with DNA and its admissibility in the courtroom. Indeed, Troy does not cite a single case where a court has undertaken the kind of due process analysis regarding DNA evidence that he claims the Nevada Supreme Court was required to take. Not one. A Westlaw database search finds none, either.

In fact, in the only federal case the Warden has discovered where a petitioner argued that *Manson*, as opposed to *Jackson*, applied for certain sufficiency-of-the-evidence claims (in that case the petitioner objected to an actual photographic lineup and not DNA evidence), the Court of Appeals held that *Jackson* applied. *Frazier v. New York*, 156 Fed. Appx. 423, 425 (2nd Cir. 2005) (*per curiam*).

The Kentucky Supreme Court expressly disagreed with the gravamen of Troy's contention in this Court. "Neither opinion contains language suggesting that the Due Process Clause's standards for admissibility of identification testimony should be extended to govern appellate review of claims of insufficiency of evidence." *Potts v. Commonwealth*, 172 S.W.3d 345, 349 (Ky. 2005) (*citing Manson* and *Neil v. Biggers*, 409 U.S. 188 (1972)). *But see State v. Mathieu*, 980 So.2d 716, 725 (La. Ct. App. 2008) (analyzing sufficiency-of-the-evidence under *Jackson* but applying *Manson* standards for reliability of photographic identification in making analysis); *State v. Stewart*, 909 So.2d 636,

639 (La. Ct. App. 2005) (same); *State v. McNeal*, 765 So.2d 1113, 1116-17 (La. Ct. App. 2000) (same).[9]

Since no court (other than those in this case) has applied a rule even resembling the one Troy proposes, Troy's argument that *Manson* must apply to DNA cases would constitute a new rule under this Court's precedent. "[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague v. Lane*, 489 U.S. 288, 301 (1989). Additionally, this Court has clearly stated, "Under the *Teague* framework, an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review." *Whorton v. Bockting*, 549 U.S. 406, 416 (2007).

Whorton also explained, "A new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." 549 U.S. at 416 (internal punctuation omitted) (*quoting Saffle v. Parks*, 494 U.S. 484, 495 (1994)).

In this case, Troy suggests a rule, based on an extension of *Manson*, that certain errors in the

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[9] Louisiana is apparently alone in using *Manson* as part of a *Jackson* analysis. However, Louisiana law also states that "When circumstantial evidence forms the basis for the conviction, such evidence must exclude every reasonable hypothesis of innocence." La. Rev. Stat. § 15:438. *State v. Young*, 839 So.2d 186, 193 n.7 (La. Ct. App. 2003). Consequently, Louisiana provides more protection than the Constitution requires, which might explain why it conducts *Jackson* analyses in the manner it does.

presentation of DNA evidence at trial constitute such a substantial violation of due process that they be considered in a manner separate and distinct from other trial errors since a state defendant would not be required to make a contemporaneous objection to have his claim considered in federal court. *See Puckett v. United States*, 129 S.Ct. 1423, 1428 (2009) (explaining purpose of contemporaneous objection rule); *Wainwright v. Sykes*, 433 U.S. 72, 89-90 (1977) (requiring contemporaneous objection for habeas review). Such a rule is procedural and not substantive. This rule has never before been applied in any decision by any court.

As *Saffle* discussed:

> The 'new rule' principle therefore validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions. Under this functional view of what constitutes a new rule, our task is to determine whether a state court considering Parks' claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule Parks seeks was required by the Constitution.

494 U.S. at 488 (citation and internal punctuation omitted). Since no court has ever followed the rule Troy claims the Nevada Supreme Court should have followed, it clearly constitutes a "new rule."

Whorton also noted that this Court has *never* found that any "new rule" constituted a watershed rule of criminal procedure requiring retroactive application

and has expressed doubt that any such rules lie undiscovered. *Whorton*, 549 U.S. at 417-18. Certainly, the rule that Troy proposes does not qualify—since *Whorton* noted the last such rule to qualify as "watershed" was the rule announced in *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Whorton*, 549 U.S. at 419.

Because Troy's conviction is indisputably final, the rule he proposes is barred from federal court review of habeas corpus cases, including his.

Not surprisingly, Troy misconstrues this Court's precedent in arguing that the rule is not "new" but rather "required." Respondent's Answering Brief at 27-28. To this end, Troy cites this Court's precedent for the proposition that "AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Id*. at 27 (*quoting Panetti v. Quarterman*, 127 S.Ct. 2842, 2858 (2007)) (internal punctuation omitted). Troy is wrong.

In 2007, this Court held that a prisoner's claim that he is incompetent to be executed does not constitute a "second or successive" habeas corpus petition under federal law. *Panetti*, 127 S.Ct. at 2853. *Panetti* further concluded that this Court clearly established the rights afforded a prisoner claiming incompetency to be executed in *Ford v. Wainwright*, 477 U.S. 399 (1986). 127 S.Ct. at 2856.

From *Panetti*, a case dealing with a prisoner's competency to be executed, and its interplay with *Ford*, a case dealing with a prisoner's competency to be executed, Troy argues that it is clearly established that

his case, dealing with the prosecutor's use of DNA evidence, is governed by *Manson*, a case dealing with suggestive pre-trial identification by witnesses. Such an assertion is illogical. Nothing in *Manson* mandated the Nevada Supreme Court to conduct the analysis Troy now demands.

Additionally, from a procedural standpoint, Troy's legal theory is unexhausted. This Court has consistently held that for a federal court to review a claim, it must first be exhausted in state court. *Rose v. Lundy*, 455 U.S. 509, 522 (1982). As *Rose* itself observed, "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." *Id*. at 518. Of course, the exhaustion requirement has been codified at 28 U.S.C. § 2254(b)(1).

Subsequent to *Rose*, this Court held that a petitioner must provide a factual basis and an underlying theory in order to satisfy the exhaustion requirement. *Gray v. Netherland*, 518 U.S. 152, 162 (1996). *Gray* specifically emphasized that "it is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of such a claim to a state court." *Id*. at 163.

As the Warden has consistently argued, Troy did not even do that. On direct appeal, Troy challenged the admission of DNA evidence, but on statutory grounds. Pet. App. 112a-20a. While Troy did cite a case from this Court, *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993), *Daubert* is a case about the Federal Rules of Evidence, not the United States Constitution. *See, e.g., United States v. Scheffer*, 523

U.S. 303, 311 n.7 (1998) (identifying *Daubert* as a case addressing the Federal Rules of Evidence). As a result, the "underlying theory" that Troy presents is unexhausted, even if it was otherwise properly before this Court.

Furthermore, Troy's new claim is procedurally barred. When a federal habeas petitioner failed to meet the exhaustion requirement and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred, in such a case there is a procedural default for purposes of federal habeas regardless of the decision of the last state court to which the petitioner actually presented his claims. A federal court is bound to bar the claim where, as in this case, application of the bar is clear. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991); *Teague v. Lane*, 489 U.S. 288, 297-99 (1989). Under Nevada law, Troy's claim would be untimely, barred by laches, and successive. *See* Nev. Rev. Stat. § 34.726(1) (timeliness); § 34.800 (laches); and § 34.810 (successive state petitions).

C. *Manson* Has No Applicability To The Questions Before This Court.

Recognizing that any argument contrary to those presented in the Warden's opening brief is untenable, Troy has attempted to transmogrify the issue before this Court into a claim that the use of purportedly unreliable DNA evidence violates due process and, therefore, he is entitled to habeas relief. Respondent's Answering Brief at 19, 27 (*citing Manson v. Brathwaite*, 432 U.S. 98 (1977)).

In *Manson*, Nowell Brathwaite was convicted of two counts of possession and sale of heroin. A trained undercover state police officer, Jimmy Glover, purchased heroin from a person later identified as Brathwaite. After hearing Officer Glover's description of the person who had sold him heroin, another officer suspecting that Brathwaite might be the seller, left a photograph of Brathwaite at Officer Glover's office. Two days later, Officer Glover, when alone, viewed the photograph and identified the person as the person from whom he had purchased the narcotics. At trial the photograph was admitted into evidence without objection. Glover testified that there was no doubt in his mind that the person shown in the photograph was the person from whom he had purchased the narcotics. In court, Glover also made a positive identification of Brathwaite without objection. *Manson*, 432 U.S. at 100-104.

Following an unsuccessful state appeal, Brathwaite filed a federal habeas petition alleging that the admission of the identification testimony at his trial deprived him of due process of law under the Fourteenth Amendment. The District Court dismissed the petition. However, the Court of Appeals reversed because it believed that the photographic evidence should have been excluded, regardless of reliability, because the examination of the single photograph was unnecessary and suggestive. Additionally, the Court of Appeals also believed the evidence was unreliable. *Manson*, 432 U.S. at 99-104.

This Court reversed the Court of Appeals, finding that its prior precedent did not establish a strict exclusionary rule or a new standard of due process. *Manson*, 432 U.S. at 104-05, 113 (*citing Stovall v.*

Denno, 388 U.S. 293 (1967), and *Neil v. Biggers*, 409 U.S. 188 (1972)). This Court concluded, "[R]eliability is the linchpin in determining the admissibility of identification testimony for both pre-and post-Stovall confrontations." *Manson*, 432 U.S. at 114.

As Troy acknowledges, *Manson* does not address the issue before this Court: the standard of sufficiency-of-the-evidence under *Jackson* as it relates to the AEDPA. Indeed, it does not. Additionally, *Manson* does not address whether a federal habeas court may expand the record or consider non-record evidence to determine the reliability of testimony and evidence given at trial when analyzing a sufficiency-of-the-evidence claim under *Jackson*.

The most obvious distinction between *Manson* and this case is the fact that this case does not deal with eye-witness identification. Troy errs by equating the circumstances and the analysis in *Manson* with the admissibility of DNA evidence.

Troy, relying on *Manson*, seeks a per se rule that DNA evidence is subject to collateral attack, and that DNA evidence is subject to exclusion from the consideration of the evidence presented at trial, if its accuracy or reliability is belatedly questioned in a federal habeas action, regardless of the lack of a contemporaneous objection. *Manson* rejected a per se rule of inadmissibility. *Manson*, 432 U.S. at 112-13.

Manson recognized that an earlier case protected a limited evidentiary interest in our adversary system. *Manson*, 432 U.S. at 113 n.14 (*citing Stovall*). DNA evidence is still only evidence and is not a factor that goes to the integrity of the adversary process. At trial,

defense counsel can, as Troy's counsel did, cross-examine the witnesses. JA 384-404, 407-409, 440-456, 466-469, 472. Defense counsel also can argue in summation, as Troy's counsel did, the factors causing doubts as to the accuracy of the evidence. JA 702-722. In this case, the fact that Troy chose not to present his own DNA expert or seek to further challenge the DNA evidence at trial beyond what he did does not mean that the DNA evidence was inadmissible or that his trial was unfair.

Finally, even if the question before this court were converted to that which Troy belatedly wants this Court to consider, federal habeas relief is precluded because this Court has not mandated that the state courts examine, using the *Biggers* factors, the reliability of DNA evidence presented at trial and exclude it if it was "unreliable." *Carey v. Musladin*, 549 U.S. 70, 79 (2006). No such rule is clearly established. 28 U.S.C. § 2254(d)(1).

D. Federal Court Decisions On The Admissibility Of DNA Evidence In Federal Criminal Trials Do Not Provide A Basis For Habeas Relief.

Troy attempts to rely on one Court of Appeals decision and two District Court cases to suggest that commission of the "prosecutor's fallacy" is a federal due process violation requiring federal habeas relief. *United States v. Chischilly*, 30 F.3d 1144 (9th Cir. 1994), *United States v. Morrow*, 374 F. Supp. 2d 51 (D.D.C. 2005), and *United States v. Shea*, 957 F. Supp. 331 (D.N.H 1997), *aff'd*, 159 F.3d 37 (1st Cir. 1998). However, as noted in the Warden's opening brief, Troy presented no such claim to the Nevada Supreme Court and any such claim is unexhausted.

All three decisions discuss the "prosecutor's fallacy" only as part of their analysis of whether DNA evidence is admissible at trial. These cases addressed the issue of the admissibility of DNA evidence under the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). *Chischilly*, 30 F.3d at 1152-1158; *Morrow*, 374 F. Supp. 2d at 64; *Shea*, 957 F. Supp. at 337.

Moreover, those three cases are not binding on the state courts because they are cases in which the Court of Appeals was acting in a supervisory capacity and the District Courts were ruling on the admissibility of evidence in a federal criminal trial. *See Holbrook v. Flynn*, 475 U.S. 1340, 1347 (1986) (contrasting what is constitutionally required with what the Court might order in its supervisory capacity). The Federal Rules of Evidence are not constitutionally based and, therefore, cases under the Federal Rules are not constitutionally mandated and cannot dictate a constitutional result. *See Dowling v. United States*, 493 U.S. 342, 352 (1990) (describing the Federal Rules of Evidence as "nonconstitutional"). Additionally, no court, including this one, has held that commission of the "prosecutor's fallacy" constitutes a violation of due process requiring habeas corpus relief. Thus, federal habeas relief is precluded. *Carey v. Musladin*, 549 U.S. 70, 79 (2006).

E. Petitioners Are Not Estopped.

Respondent's attempt to rely on purported concessions by Petitioners that the evidence remaining upon removal of the DNA evidence is insufficient to support the guilty verdicts as judicial estoppel is

misguided. This Court should apply its three-part test for judicial estoppel:

> First, a party's later position must be "clearly inconsistent" with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

New Hampshire v. Maine, 532 U.S. 742, 750-51 (2001) (citations and internal punctuation omitted).

None of the three *New Hampshire* factors apply. First, the Warden has not taken a position clearly inconsistent with their earlier position. On direct appeal, the State argued there was sufficient evidence to convict Troy, describing the evidence as "overwhelming." JA 876-77. Later, in the context of state post-conviction proceedings, when the issue before the court was ineffective assistance of counsel, the Elko County District Attorney made the statements at issue. JA 1173, 1176, 1483. It cannot be said that Petitioners took inconsistent positions before the Nevada Supreme Court when the sufficiency-of-the-evidence issue was being considered. It is also

clear that the Nevada Supreme Court did not rely on the statements made by counsel years later during the state post-conviction litigation. The Warden has never taken an inconsistent position with respect to the DNA or the non-DNA evidence.

The second *New Hampshire* factor is not present either. The Elko County District Attorney's statements were not necessary to persuade the state district court to find that counsel was not ineffective.

Finally, the Warden has gained no unfair advantage nor has Troy suffered any unfair detriment through the position the Warden has taken in this Court.

F. The Mueller Report Was Improperly Admitted And Considered By The Federal Courts.

Troy argues that Dr. Mueller's letter helped "explain the DNA information that was presented to the Nevada Supreme Court and was before the federal District Court." Respondent's Answering Brief at 35. This is a most puzzling statement, since Dr. Mueller's letter does nothing to clarify the evidentiary argument that Troy made on direct appeal. Rather, as the Warden previously noted, the Mueller letter criticizes Rene Romero's testimony, not DNA evidence in general. Petitioners' Opening Brief at 50.

Interestingly, in defense of Rule 7 and expansion of the record, Troy cites *only one case* that postdates the adoption of the Anti-terrorism and Effective Death Penalty Act on April 24, 1996. *Boumediene v. Bush*, 128 S.Ct. 2229 (2008). Of course, as this Court is well aware, *Boumediene* was not a case brought pursuant

to 28 U.S.C. § 2254, but rather, the constitutional right to habeas corpus found in Article I, Section 9 of the Constitution. *Id*. at 2240. As a result, the passing reference to federal habeas petitioners having the "means to supplement the record" found in *Boumediene* is little more than obiter dicta. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66-67 (1996) (contrasting "dicta" with "holdings").

Troy makes no coherent argument as to how *Vasquez v. Hillary*, 474 U.S. 254 (1986), survives the recodification of 28 U.S.C. § 2254(e)(2) under the AEDPA. As a result, this Court should take the opportunity to expressly limit *Vasquez* to federal habeas corpus petitions filed before April 24, 1996.

Nor does Troy provide a satisfactory explanation for his lack of diligence. Troy claims that he *was* diligent in bringing forth Dr. Mueller's opinions. Troy also claims that he did object to the DNA evidence in his trial, but provides no record citation to this claim. Rather, he provides a record citation going *only* to his opening brief before the Nevada Supreme Court. Respondent's Answering Brief at 38.

Troy does not explain how, if he "objected to the DNA evidence during the state court proceedings," the Nevada Supreme Court could have possibly stated as a factual matter, "Troy made no objection to either the lack of a pretrial evidentiary hearing or to qualifying Romero as an expert witness on DNA evidence." Pet. App. 82a. This statement about the failure to object is entitled to a presumption of correctness. 28 U.S.C. § 2254(e)(1).

Additionally, Troy claims he could not bring forth evidence criticizing Romero's testimony at the state post-conviction evidentiary hearing, since the issue had already been decided on direct appeal. As previously discussed, the issue was not decided on direct appeal. But again, that is something of a red herring. In his state post-conviction petition Troy raised the following claims regarding the purported ineffectiveness of trial counsel, all DNA related:

> 1. Trial counsel failed to file a Motion or otherwise object to exclude all DNA evidence.
>
> 2. Trial counsel failed to obtain testing by an independent DNA expert, instead utilizing an expert who had a conflict of interest and failed to be present during the testing.
>
> 3. Trial counsel failed to prevent testing of DNA by the State in the absence of a defense expert in violation of a stipulation and order resulting in test results that were not reliable.
>
> * * *
>
> 10. Trial counsel failed to object to the lack of pre-trial evidentiary hearing or to qualifying Rene Romero as an expert witness thereby precluding appellate review of the DNA evidence.

JA 1043-45.[10] Thus, Dr. Mueller's letter, or something similar, could have been presented, as relevant evidence, in the state evidentiary hearing. It was not. Rather, the focus at the evidentiary hearing was Troy's theory that Jane Doe's attacker was her stepfather. Because Troy was not diligent, the District Court should not have allowed expansion of the record with Dr. Mueller's letter.

CONCLUSION

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

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[10] The Warden notes that the District Court granted habeas relief on two claims of ineffective assistance of trial counsel, one of which was based on the DNA evidence. Pet. App. 46a. The Court of Appeals did not address the ineffective assistance of counsel issues. Pet. App. 21a.

Respectfully Submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CA NO. 07-15592
D.C. NO. 3:03-cv-0712-PMP-VPC
(Nevada, Reno)

[Filed June 18, 2007]

TROY DON BROWN,	)
	)
Plaintiff-Appellee,	)
	)
vs.	)
	)
CRAIG FARWELL, *et. al.*,	)
	)
Defendant-Appellant.	)
	)

Appeal from the United States District Court
for the District of Nevada

APPELLEE'S ANSWERING BRIEF

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II.

BAIL STATUS OF APPELLANT

Appellee Troy Don Brown [hereinafter "Brown"] is in the custody of the State of Nevada at Lovelock Correctional Center, Lovelock, Nevada, serving consecutive life sentence imposed in this case. Excerpts of Record (EOR) 699 (Amended Judgment of Conviction).[1] Brown has no projected release date.

III.

STATEMENT OF JURISDICTION

This is an appeal filed by State of Nevada officials following an Order On Merits (Clerk's Record (CR) 66, EOR 996) and Judgment In A Civil Case (CR 67, EOR 1014), granting the writ as to Grounds One through Three of the First Amended Petition (EOR 34) and denying as to Grounds Four and Five. Respondents' Notice Of Appeal (CR 68) and Motion For Stay (CR 69) were filed January 3, 2007. Brown responded to the motion and moved for his release pending final resolution of the case on January 22, 2007 (CR 70). Respondents filed a reply (CR 73) to Brown's response to the motion for stay and their response (CR 74) to Brown's motion for release on February 23, 2007, to which Brown replied. CR 76. During a telephonic motion hearing on March 22, 2007[2], the district court

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[1] Excerpts Of Record (EOR) citations refer to the Excerpts filed by appellants concomitantly with their Opening Brief.

[2] The transcript of the March 22 hearing is attached as Exhibit G to the motion for release filed with this Court April 23, 2007.

granted the motion to stay (CR 77). This Court has jurisdiction pursuant to 28 U.S.C. § 1291 and 28 U.S.C. §2253.

IV.

STATEMENT OF THE CASE

A. Procedural History

On July 20, 1994, the state filed an Information in the Fourth Judicial District Court, Elko County, Nevada, charging Brown with the following crimes: Sexual Assault on a Child Under the Age of 14 Years, Resulting in Substantial Bodily Harm, a felony as defined by NRS 200.366 (Count I), Sexual Assault on a Child Under the Age of 14 Years, a felony as defined by NRS 200.366 (Count II), Attempted Murder, a felony as defined by NRS 193.330, 200.010 and 200.020 (Count III), and Abuse of Neglect of a Child Less Than Eighteen (18) Years of Age, Resulting in Substantial Mental Harm, a felony as defined by NRS 200.508, 432B.020 and 432B.070 (Count IV). (EOR 76-791.)

The case proceeded to trial on September 27-30, 1994 (EOR 80-514.) On September 30, 1994, the jury found Brown guilty of Counts I, II and IV and not guilty of Count III as listed in the Information. (EOR 515-16, 518.) The jury imposed a sentence of life with the possibility of parole after ten years has been served as to Count I, Sexual Assault on a Child Under the Age of 14 Years, Causing Substantial Bodily Harm. Sentencing by the court on Counts II and IV was to be held later. The jury acquitted Brown of the attempted murder charge (EOR 517). The sentencing hearing on

Counts II and IV ultimately took place on June 23, 1995. The court sentenced Brown to life with the possibility of parole after ten years on Counts I and Count II and twenty years on Count IV, all three sentences to run consecutive to the other. The Judgment of Conviction was filed on June 28, 1995. (EOR 544-49.)

Following a timely notice of Appeal (EOR 550), Brown filed his Opening Brief (Case No. 27426) on November 20, 1995. (EOR 552) The Nevada Supreme Court filed its Opinion on February 26, 1997 (EOR 674)[3], finding in part "that the district judge abused his discretion during the sentencing phase of the trial and the case must be remanded to the district court for a new sentencing hearing on the remaining sexual assault conviction (Count II)." In addition, it vacated the child abuse/ sexual assault conviction (Count IV) as barred by the Double Jeopardy Clause.

On March 6, 1998, "Defendant's Motion For A New Trial; And, Motion To Vacate And Continue Sentencing" was filed in the state district court It was denied on March 9, 1998. The resentencing hearing ordered by the Nevada Supreme Court was held on March 13, 1998. The district court sentenced Brown to a term of life in prison with the possibility of parole after 10 years on Count II consecutive to the sentence in Count I. The Amended Judgment of Conviction was filed on March 18, 1998. (EOR 699.)

On March 20, 1998, Brown filed a timely Notice of Appeal (EOR 703) with respect to the March 9, 1998,

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[3] The opinion is reported at 934 P.2d 235 (Nev. 1997).

order and his amended judgment. A Docketing Statement was duly filed in appeal Case No. 32025.

On October 19, 1998, the district court entered an "Order Denying Motion for New Trial" respecting his "Pre-Sentencing Motion For a New Trial" (SEOR 28, 33[4].) On November 9, 1998, Brown filed a timely Notice of Appeal of that denial which was docketed as appeal Case No. 33325. (SEOR 36.)

On January 29, 1999, Brown filed a "Motion to Consolidate Appeals No's. 32035 and 33325", which was granted. (SEOR 48.) Following briefing by the parties the Nevada Supreme Court filed its Order Dismissing Appeal in appeal No's. 32025 and 33325 on September 8, 2000. (EOR 706.)

On August 30, 2001, Brown filed a Petition for Writ of Habeas Corpus (EOR 710) and Points and Authorities in Support of Petition for Writ of Habeas Corpus (Ex. 159) in the Fourth Judicial District Court. Following an evidentiary hearing held February 21, 2002 (EOR 791-813) the district court denied Brown's petition. See Findings of Fact, Conclusions of Law, and Order Denying Writ of Habeas Corpus filed on March 7, 2002. (EOR 787.) Brown filed a timely Notice of Appeal on April 8, 2002 (EOR 788), which was docketed as appeal No. 39475. On October 10, 2002, Appellant's Opening Brief was filed (SEOR 112) asserting the following assignment of error:

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[4] Appellee's Supplemental Excerpts Of Record (SEOR) are being filed concomitantly with this Answering Brief.

I. THE DISTRICT COURT ERRED IN DENYING BROWN'S WRIT OF HABEAS CORPUS.

The Nevada Supreme Court filed its Order of Affirmance on November 21, 2003. (EOR 861.)

Following appointment of the Office of the Federal Public Defender to represent petitioner, Clerk's Record (CR) 10, the First Amended Petition was filed (CR 19, EOR 34) wherein Brown asserted five grounds for relief. On October 19, 2005, respondents filed their Answer (EOR 900). Brown thereafter filed a Reply (EOR 919) and a Motion to Expand the Record (EOR 933), which was granted. EOR 979. Respondents thereafter filed a supplemental answer. See CR 61 & 65.

By Order On Merits (CR 66, EOR 996) and Judgment In A Civil Case (CR 67, 1014), the writ was granted as to Grounds One through Three of the First Amended Petition and denied as to Grounds Four and Five. Respondents' Notice Of Appeal (CR 68, EOR 1015) and Motion For Stay (CR 69) were filed January 3, 2007. Brown responded to the motion and moved for his release pending final resolution of the case on January 22, 2007 (CR 70, EOR 1017). Respondents filed a reply (CR 73) to Brown's response to the motion for stay and their response (CR 74) to Brown's motion for release on February 23, 2007, to which Brown replied. CR 76. During a telephonic motion hearing on March 22, 2007[5], the district court granted the motion

[5] The transcript of the March 22 hearing is attached hereto as Exhibit __ to Brown's motion for release filed with this Court on April 23, 2007. See Case Summary, 4/23/2007.

to stay (CR 77) and thereafter on March 30, 2007, denied Brown's release pending appeal. CR 78. The notice of appeal, docket sheet and certificate of record were transmitted to this Court on April 4, 2007. CR 80. On April 11, 2007, Brown transmitted by overnight mail (Federal Express) his Motion To Expedite Briefing and Hearing. That same day this Court set a briefing schedule and filed the certificate of record on appeal. See General Docket, 4/11/07 entries.

Brown then renewed his request for release pending completion of respondents' appeal as previously presented to the district court. General Docket, 4/23/07 entry. After further briefing by the parties, see General Docket, 4/23 and 4/24 entries, the Court denied the motion for release setting and expedited schedule. See General Docket entries 4/26/07 and 4/30/07. On June 6, 2007, respondents' Opening Brief was filed. Brown now files his Answering Brief.

B. <u>Statement of Facts</u>

In this federal post conviction proceeding the district court made the following factual findings:

> The science of human DNA is highly complex and difficult to understand, even for the well educated and patient student. It involves the matching of human genome materials or alleles and a statistical calculation of how often that match might occur in a chosen population. An allele is "an alternative form of a gene that can occupy a particular chromosomal locus. In humans and other diploid organisms there are two alleles, one on each chromosome of homologous pair." Dorland's *Illustrated Medical*

Dictionary 48 (27th ed. 1988). Forensic DNA tests compare allele combinations at loci where the alleles tend to be highly variable across individuals and ethnic groups. If there is no match between the alleles from the evidence DNA and the potential suspect's DNA, the suspect is generally ruled out as the source of the evidence, unless the failure is attributed to in adequate test conditions or contaminated samples. If there is a match, analysts use the frequency of the alleles' appearance in the relevant population to calculate the probability that another person could have the same pattern of allele pairs. *See* Georgia Sargeant, *DNA Evidence Finding Stricter Scrutiny, New Uses, Trial,* Apr. 1993, at 15. Under the product rule the probabilities of find a match at each given locus on te samples satisfying statistical criteria for a match are multiplied together to calculate the random probability that the trace DNA found at the crime scene could have come from another member of the population represented by the defendant." *U.S. Chischilly* 30 F.3d 1144, 1155 n.14 (9th Cir. 1994)

"The prosecutor's fallacy' occurs when a prosecutor presents statistical evidence tot suggest that the [DNA] evidence indicates the indicates that likelihood of the defendant's guilt rather than the odds of the evidence having been found in a randomly selected samples." United *States v. Shonubi,* 895 F.Supp. 460, 516 (E.D.N.Y. 1995). The prosecutor's fallacy is present when the jury accepts the DNA evidence as a statement of the source probability (i.e. the likelihood that hte

defendant is the source of the evidentiary sample). *See Chischilly* 30 F.3d at 1155-1157 (9th Cir. 1994), *citing* Lempert, *Caveats Concerning* DNA, 13 Cardozo L.Rev. 303, 306 (1991)(posting that "[u]nfortunately, the careless presentation of evidence. . . may make it look as if the question of the rareness of the evidence DNA profile and the probability that the defendant's matching DNA is the source of the evidence profile are identical"), and Koehler, *Error and Exaggeration in the Presentation of DNA Evidence at Trial,* 34 Jurimetrics 21, 27 n.24 (documenting instances where courts, commentators and expert witnesses have committed such source probability errors).

In this instance, according to the report prepared by Laurence Dochez Mueller, a professor in Ecology and Evolutionary Biology at the University of California, Irvine, the .000033 percent likelihood that the perpetrator was not Troy Brown, as testified to by Ms. Romero, falls directly into the prosecutor's fallacy. *See* Exhibit 197.[2] However, this misstatement is not the only one made by Romero, according to Petitioner.[3] The most egregious misstatement relates to the probability of the DAN evidence coming from one of Petitioner's four brothers, two of which were in Carlin, Nevada at te time of the assault and two of which were within the region, residing in Loa, Utah. *See* Exhibit 198, Affidavit of Ed Heddy.

At trial, Romero testified that there is a 25 percent chance that tow bothers, "shar[e] both

alleles at a single locus in common," which she calculated as a 1 in 6500 chance that these two brothers' DNA would match at five loci. Exhibits 31, p. 343. According to the report prepared by Mueller, this statistical probability represented the lowest probability possible among siblings, assumes that the parents are heterozygotes, sharing only one allele in common and is incorrectly calculated. See exhibit 197, p. 1. Furthermore, if the parents are not heterozygotes, and no evidence was presented at trial as to Petitioner's parents' DNA, the probability of two siblings matching could be 50% or 100%. *Id.* Significantly, Romero's calculations did not take into account that Petitioner had four brothers living in the general vicinity at the time of the attack. Given this fact, Mueller opines that even taking the least likely chance for a match, 25%, the chance that one or more brothers would match at a single loci on the DNA chain is 1 in 256, not 1 in 6500. *Id.*

Applying a formula provided by the second National Research Council report on DNA typing, and using the FBI Caucasian database, Mueller calculates that the chance of a single sibling matching Troy Brown's DNA profile is 1 in 263 and the chance that among two brothers, one or more would match is 1 in 132. Applying the formula to four brothers, the chance increases to 1 in 66. *Id.,* p. 2. A 1 in 66 probability is significantly different than a 1 in 6500 probability.

Romero's testimony was inaccurate and, therefore, unreliable. Taking into account the State's own admission that absent the DNA evidence, there with insufficient evidence to convict Petitioner, the state court's factual determinations are called into question.[4] Moreover, the state court's application of law to the facts also presents grave concern.

In considering Petitioner's claims on direct appeal, the Nevada Supreme Court set out a lengthy and detailed finding and facts. *See* Opinion and Order, Exhibit 70, pp. 2-11. Because of their detail, the facts will not be repeated in their entirety here. However, absent the DNA testimony and even after weighing the evidence in favor of the prosecution, there are sufficient conflicting testimony to raise a reasonable doubt in the mind of any rational trier of fact. For example, there was conflicting testimony about the time the Petitioner actually left he bar and headed home. *See e.g.* Exhibit 70, testimony of the victim's mother, and compare the testimony of the two bartenders at CG;s Bar, pp. 3, 5 and 6.

There is also conflict between the victim's description of her assailant and Petitioner's apparel and appearance. The victim testified that her assailant wore a watch that scratched her face and that his jacket definitely had a zipper. *Id.* p. 5. She testified her attacker did not wear a hat, might have had a small moustache, and had a longish sandy blond hair that twas curly at the ends and thinning on top. *Id.* When asked, the victim told police that the

attacker reminder her of Petitioner, but then said it was Trent Brown, who is Petitioner's brother. She told police at least two times that her attacker was Trent Brown and she could not identify Petitioner Tony Brown as her attacker in a photo lineup. *See id.*, pp. 5, 7. Other evidence showed that Petitioner did not own a watch and his jacket, although similar in some respects to victim's description, did not have a zipper.

Petitioner's other brother and roommate Travis, testified that he was awakened by Petitioner's return home at 1:32 a.m. on the night of the attack. He testified that he did not see anything unusual about Petitioner and that he did not see any blood on Petitioner or anywhere in the house. *Id.*, p. 6. Officer Terry testified that at five a.m. the morning of the attack, when he awakened Petitioner to question him, he did not observe any evidence of bite marks on Petitioner's hands and observed no blood on his body or on his boots. *Id.* The officer had an opportunity to view much of Petitioner's body, as he was sleeping in only a pair of boxer shorts. *Id.*

According to his own, Petitioner had laundered the shirt and jeans he was wearing the night of the attack because he was leaving for a week in Utah early the next morning and needed all of his clothes for the trip. *Id.* He testified the shirt and jeans were soiled because he was so drunk that night that he had vomited several times during his walk from the bar to his house.[5] *Id.*

While in Utah, Petitioner call the Carlin police to see if he was wanted for arrest, being told no. Id. While in Utah, Petitioner also went to a nurse for a full body examination because the victim reported that she had bitten and scratched her attacker and Petitioner wanted a record of his condition. *Id*.

None of Petitioner's fingerprints were found in the victim's home and he surrendered his jacket and cowboy hat to the police for their examination. He repeatedly denied any involvement in the crime, including at the time of sentencing even though the judge made it very clear that, unless Petitioner accepting responsibility for the attack, the sentence would be very severe. *Id.*, pp. 7, 10-11.

The police took Petitioner's bedding when they executed a search warrant for his residence. However, the bedding was never tested for DNA evidence. Police found no evidence of blood on Petitioner's boots and did not process pubic hairs found in a fleece jacket recovered form the victim's bedroom. A single fingerprint found on the nightlight in the victim's bedroom was not Petitioner's. *Id.*, pp. 8-9. At trial, Rene Romero of the Washoe Crime Lab testified that she identified Petitioner's DNA in the victim's underwear. *Id.* However, there was no inquiry about how the DNA might have gotten into the underwear, considering that the victim testified that the attacker had removed her underwear prior to the sexual assault. Moreover, at the preliminary hearing, Romero had testified that there was insufficient

> stain sample in the panties to the RFLP type testing. *See* Exhibit 19, pp. 172-176. Then, shortly before trial, the RFLP testing was done. At trial, Romero testified that she had found sufficient sample in the panties to conduct the testing. The defense did not call it's own expert to testify about the DNA evidence.

[2] Mueller's report admitted to supplement the record in these proceedings, was not presented to the Nevada Supreme Court during Petitioner's post-conviction proceedings. However, the thesis of the report was argued during post-conviction and the report was accepted on the basis.

[3] Respondents present no scientific evidence or information to counter Mueller's conclusions.

[4] See Exhibit 161, p. 13.

[5] Testimony indicated that Petitioner had consumed at least twenty alcoholic beverages at the various bars he visited that night.

EOR 1001, l. 17 - EOR 1006, l. 14.

V.

LEGAL ARGUMENT

A. THE DISTRICT COURT CORRECTLY FOUND THE CLAIM ASSERTED IN GROUND ONE TO BE EXHAUSTED.

Brown responds as follows to the state's argument that he never presented his challenge to the sufficiency of the DNA evidence asserted in Ground One of the First Amended Petition to the Nevada courts. Opening Brief (OB) 17-19.

A petitioner must "present the substance of his claim to the state courts." Vasquez v. Hillery, 474 U.S. 254, 258 (1986). See also Anderson v. Harless, 459 U.S. 4, 6 (1982) (petitioner must "'fairly present [ ]' to the state court the 'substance' of his federal habeas corpus claim."); Humphrey v. Cady, 405 U.S. 504, 516 n. 18 (1972) ("question. . . is whether any of petitioner's claims is so clearly distinct from the claims he has already presented to the state courts that it may fairly be said that the state courts have had no opportunity to pass on the claims"). Although a state prisoner seeking federal habeas relief must first exhaust the remedies available in the courts of the state, "[i]t is the legal issues that are to be exhausted, not the petitioner." Burkett v. Cunningham, 826 F.2d 1208, 1218 (3d Cir. 1987) (emphasis added) (quoting U.S. ex rel. Geisler v. Walters, 510 F.2d 887, 893 (3d Cir. 1975)); see Watson v. Dugger, 945 F.2d 367, 372 (11th Cir. 1991) ("When a federal habeas petitioner presents what amounts to 'a mere variation in the same claim rather than a different legal theory,' . . . he has presented the state courts with the substance of his claims and thus has properly exhausted them.").

In Ground One of the First Amended Petition Brown challenges the sufficiency of the evidence admitted at trial to convict him of the sexual assault, focusing primarily on the deoxyribonucleic acid ("DNA") evidence admitted against him. In doing so Brown addresses (a) the treatment of pertinent crime scene evidence, (b) presentation of the DNA evidence at trial, (c) violation of the court ordered DNA testing protocol and (d) expertise of the Washoe County Crime Lab. EOR 48-52. These same subjects are addressed in Brown's Opening and Reply Briefs on direct appeal to the Nevada Supreme Court. See, e.g.:

(a) Sufficiency of the evidence.

"Given the plethora of evidence that the assailant was not Troy Brown, include the hair which did not match, the coat which was different, the lack of watch and zipper, the fact that Megan repeatedly named Trent every time the police brought up Troy to her, the lack of blood on Troy when he first came back home at 1:32 a.m., the absence of scratches or bites from Megan on Troy's body and the total failure of the DNA evidence to be established as trustworthy and reliable in this particular case, Appellant submits that there was insufficient evidence to convict Troy Brown of these crimes. Opening Brief, EOR 590, ll. 11-20 (emphasis added).

(b) Treatment of pertinent crime scene evidence.

". . . Romero testified that she did not think she had enough vaginal stain sample in the panties to do an RFLP type DNA test [citation omitted], although, by the time of trial, sufficient stain sample had materialized casting suspicion on the entire process [citation omitted]." Opening Brief, EOR 585, ll. 16-20.

. . . . .

"[Washoe Lab serologist Maria] Fassett also testified that in this case, the Carlin police appeared to lack knowledge on evidence labeling for lab work. She said she was told that the suspect never went back to his own bed

after the attack, thus there was no point in examining the bedding taken from Troy's bedroom. Of course, the evidence from Troy, Travis, Dave Prescott and Officer Terry all disproved that statement. There was also testimony about the 'lost' teeth scrapings from Megan, who claimed to have bitten her assailant. Given these kinds of evidentiary problems with this particular case, it is incomprehensible that no pre-trial evidentiary hearings were held to establish the integrity of the evidence gathering, the lab techniques, and the overall scientific process, before the court would allow the jury to hear expert testimony. There was a poor showing of expertise, a total lack of appropriate foundation and virtually a non-existent cross-examination of the experts and evidence custodians in this case. That was prejudicial to Troy Brown, and in the face of the other evidence which strongly indicated Troy was not the assailant and that there were other likely suspects, the effect of these evidentiary failing [sic] was fatal to Troy." Opening Brief, EOR 588, l. 24 - EOR 589, l. 17.

. . . . .

"When one criminalist Maria Fassett, expressed concern over the inexperience in evidence collection methods of the Carlin police, Defense counsel failed to delve into that, and its potential effect on the ultimate lab results. Even when Ms. Fassett testified she was mislead about bedding and other evidence and would have investigated and examined it further had she not been, Defense Counsel

failed to stress that or capitilize on it in argument or cross-examination of others." Reply Brief, EOR 650, l. 26 - EOR 651, l. 7.

(c) Presentation of the DNA evidence at trial.

"She [Renee Romero] further testified that the national technical working group (TWG-DAM) which is working on DNA analysis methods, is trying to set standards for quality control or quality assurance in the area of DNA testing and reporting, but that so far, they've only issued non-mandatory guidelines. [citation omitted]. She further testified that the population database used by her lab was the FBI's Roche Molecular Systems database, which was not yet even published as of that date. ('I have a pre-publication and it will be published in the Journal of Forensic Science in July.') [citation omitted]).

Romero acknowledged that there are several different population databases in the field and that she was using the FBI's and would be looking at additional information at the end of the month. . . . While some databases have gained acceptance in DNA work, the FBI database has been criticized compared to that of other specialized agencies like Cellmark and Lifecodes, and their DNA results have even been declared inadmissible [citations omitted}. Opening Brief, EOR 584, l. 20 - EOR 585, l. 26.

. . . . .

"Even with the myriad scientific and technical errors that occur in DNA analysis, the one thing about which most scientific and legal commentators agree is that experts disagree on the accuracy of the various methods used to determine the reference population databases used to compute the random match probabilities (RMP) once DNA evidence is found and analyzed.

The RMP is the figure which is usually quoted to the jury, by the DNA expert, the prosecutor, and often the judge, in an attempt to give some significance to the DNA findings. The findings are often couched in terms of the 'frequency of the defendant's genetic traits in the reference population' and the 'likelihood or probability that someone other than the defendant has these genetic traits'.For example, in the present case, Renee Romero variously told the Court at Preliminary Hearing that the frequency of Troy Brown's PCR polymarkers was 1 in 22 in the Caucasian race; his DQ Alpha traits was 1 in 18,900 in the Caucasian population; and using the 'interim ceiling method' devised by the NCR,she could place the RMP that it was someone other than Troy at 1 in 3 million. Reply Brief, EOR 642, p. 17, l. 8 – EOR 643, l. 3.

. . . . .

"When a jury is told that the 'chances that the DNA in the panties and blood is not Troy's is 1 in 3 million' [citation omitted] and that is 3 times the entire population of Nevada, this

effectively relieves the jury of its decision-making task by replacing the jury's function of weighing all the evidence with considering instead the probability of guilt." Reply Brief, EOR 647, p. 22, l. 21 – EOR 648, l. 3 (emphasis in original).

. . . . .

"In our case, Romero told the jury that the percent of likelihood that the DNA in the panties is the same as the defendant's DNA is 99.99967% [citation omitted]. That is improper exaggeration and source error, according to the experts. It is also extremely prejudicial to the accused." Reply Brief, EOR 650, p. 25, ll. 10-15.

(d) Violation of court ordered DNA protocol mandating coordination with outside laboratory.

"Some courts have found that the testimony of a single expert on DNA and population [sic] genetics is insufficient to pass muster for scientific acceptance. [citation omitted]. Romero was the only witness to testify on DNA methods or statistics, and the defense, even though it had been provided with funds for a DNA expert at trial (ROAD 2, 285-295), produced no expert to challenge anything at trial and virtually no cross-examination about population genetics or statistics took place, even though this is the single biggest area of substantial controversy in this field." Opening Brief, EOR 586, l. 20 – EOR 587, l. 3.

. . . . .

"The prejudice to Troy from the lack of challenge to the DNA evidence is evident in comparing the earliest DNA testimony at Preliminary Hearing, and the later, more developed theories and results and methods used by the time of trial. Either the lab was incredibly inexpert and deficient in July, 1994, or it drastically changed its methods and databases, and perhaps techniques, by the time of trial. That change alone should have been thoroughly explored but instead was virtually ignored." Opening Brief, EOR 589, p. 32, ll. 18-25.

(e) Expertise of the Washoe County Crime Lab.

"At the Preliminary Hearing held July 6, 1994, Washoe County Crime Lab DNA specialist Renee Romero testified that her lab had just begun doing DQ Alpha testing in October, 1993, [citation omitted] and had only started reporting PCR DNA test results two months earlier and they were still evaluating the system and completing proficiency tests [citation omitted]." Opening Brief, EOR 584, ll. 15-20.

. . . . .

"Clearly Romero's Preliminary Hearing testimony alone established the infancy of the Washoe County Crime Lab in conducting DNA work and that, alone, should have prompted the defense counsel to seek, and the trial court to

> require, a pretrial hearing on DNA before admitting the evidence at trial in this case. But not only was that not done, Romero's own credentials were barely discussed and instead, her curriculum vitae was simply introduced into evidence with little or no discussion." Opening Brief, EOR 586, ll. 12-19.
>
> . . . . .
>
> "In the present case, Renee Romero testified that exclusions occur in about 30% of DNA analysis cases, [citation omitted] but she did not testify to the lab error rate in Washoe County, nor could she have, as they had not completed any proficiency testing yet. [citation omitted] In fact, they had only been doing DQ Alpha testing for less than 9 months [citation omitted] and only started PCR analysis two months earlier [citation omitted]. She had only testified twice, in Elko and Washoe Counties, on DNA before [citation omitted]. Reply Brief, EOR 649, ll. 14-22.

Brown's First Amended Petition was filed in November, 2004. EOR 34. His direct appeal briefs were filed in late 1995 and early 1996 with the Nevada Supreme Court. Admittedly, there are some additional facts in the present claim, which is hardly surprising in light of advancements in understanding DNA over the last decade. However, since the substance of the current Ground One federal claim is the same as that of the prior state court claim, as found by the district court, the Ground One claim has been exhausted.

> New factual allegations do not render a claim unexhausted unless they 'fundamentally alter the legal claim already considered by the state courts.' Vasquez v. Hillery, 474 U.S. 254, 260, 160 S.Ct. 617, 622, 88 L.Ed. 2d 598 (1986). In this instance, the discussion of the DNA evidence was so in-depth and expansive that it cannot be said that the Nevada Supreme Court did not have an opportunity to address the claim. Any new facts or arguments presented here merely enhance the presentation, clarifying, rather than changing the nature of the legal claim.
>
> Ground One of the petition has been fairly presented to the Nevada Supreme Court and is exhausted. The motion to dismiss shall be denied.

EOR 898-99; See also Picard v. Connor, 404 U.S. 270, 278 (1971)(fair presentation requires "that the substance of a federal habeas corpus claim must first be presented to the state courts")(emphasis added). None of the above presentations of DNA claims by Brown to the Nevada courts considered by the district court in finding exhaustion, including the references to various random match probability (RMP) statistics such as the 99.99967% chance it was Brown's DNA (0.000033% chance it was not), are mentioned in the Opening Brief. Instead, respondents simply acknowledge that Brown argued in a footnote in a state court reply brief, as he does now, that

> [t]he 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 State's DNA 'expert' quoted the odds of two brothers sharing the same alleles as **1 in 6500!**

EOR 636-37 and n. 1 (emphasis in original); see OB 18. Brown had a right to reply to address DNA evidence in his respondents' defense of the DNA evidence. Although respondents correctly note that the footnote is in a section of a reply brief addressing sentencing issues, its application to the DNA evidence submitted at trial is obvious to the reader in light of the "in depth and expansive" DNA argument otherwise presented to the Nevada Supreme Court (see EOR 898, l. 17) as set forth above and the reference in the footnote to the trial transcript, i.e. "TR 344."

Also, after his case was remanded to the state district court for resentencing, Brown renewed his insufficiency of the evidence claim by way of a Motion For New Trial filed March 6, 1998 (EOR 14), citing Jackson v. Virginia, supra, for the proposition that the "Due Process Clause prohibits conviction upon evidence insufficient to establish every element of the charged crime[.]" See EOR 14, ll.14-18. The Motion To Dismiss was denied by order of March 9, 1998 (EOR 25), which ruling was appealed. See Ex. 93, p. 1, ll. 13-18. In its Order Dismissing Appeal (ODA) in

consolidated Cases No. 32025 and 33325 the Nevada Supreme Court initially notes that "[t]his is an appeal from an amended judgment of conviction entered after resentencing and from a denial of a motion for a new trial." Ex. 153, p. 1 (emphasis added). Therefore, in addition to Brown's exhaustion of his Ground One claim on direct appeal, he exhausted the claim by his appeal of the denial of the Motion For New Trial (Ex. 86) to the Nevada Supreme Court. The district court's finding that Ground One is exhausted should be affirmed.

B. THE DISTRICT COURT'S ORDER ALLOWING EXPANSION OF THE RECORD TO INCLUDE EXHIBITS 196-96 (EOR 936-960) WAS CORRECT

1. 28 U.S.C. §2254(e)(2)

In Cooper-Smith v. Palmateer, 397 F.3d 1236, 1241 (9th Cir. 2005), this Court held that to expand the record under Rule 7 of the "Rules Governing Section 2254 Cases In The United States District Court" (hereinafter the "Habeas Rules") a petitioner must satisfy 28 U.S.C. § 2254(e)(2). In Williams v. Taylor, 529 US. 420 (2000), the Supreme Court identified two tests under 28 U.S.C. § 2254(e)(2).[6] Under the first

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[6] If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that-

(A) the claim relies on-

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

test, as set forth in the opening clause, the statute applies only "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings . . . ." The second § 2254(e)(2) test precludes expanding the record unless (1) "the claim relies on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court that was previously unavailable" or (2) the petitioner is pursuing "a factual predicate that could not have been previously discovered through the exercise of due diligence . . . ." See § 2254(e)(2)(A)(i) and (ii). The district court correctly found that,

> [i]n state court, petitioner presented a comprehensive discussion of DNA evidence's deficiencies, particularly related to probability testimony and how the presence of Brown's two brothers in the area impacted the erroneous DNA probability analysis given at trial. The proposed supplemental exhibits shall be admitted into the record. The matter shall be submitted to the court for consideration of the merits of the petition.

EOR 981, ll. 3-7. The district court's ruling should be affirmed. Since Brown did not fail to develop the facts under section 2254(e)(2)'s opening clause, he was

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> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

Section 2254(e)(2)(emphasis added)

properly excused from showing compliance with the remainder of the subsection's requirements. See Williams, supra, at 437.

As set forth in Argument A supra, Brown presented in detail his DNA claims to the Nevada courts, including references to various random match probability (RMP) statistics such as the 99.99967 % chance it was Brown's DNA (0.000033% chance it was not) addressed in the motion to expand the record. Compare EOR 880-81, with Exhibit 197, p. 2, EOR 956. In asserting that the district court wrongly expanded the record respondents do not mention such arguments. See OB 32-34. Instead they point solely to Brown's additional argument that

> [t]he 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 State's DNA 'expert' quoted the odds of two brothers sharing the same alleles as **1 in 6500!**

EOR 636-37 and n.1 (emphasis in original); OB 34. The district court previously found that Brown's state court "discussion of the DNA evidence was so in-depth and expansive that it cannot be said that the Nevada

Supreme Court did not have an opportunity to address the claim." EOR 898, ll. 16- 19. Therefore, since Brown did not failed to develop the factual basis of his DNA claims, Grounds One and Two of the First Amended Petition, in state court, the second § 2254(e)(2) test is inapplicable and the statute is no bar to expanding the record with Exhibits 196-98 (EOR 936-960). See Morris v. Dretke, 413 F.3d 484, 498 (5th cir. 2005)(petitioner "having met the § 2254(b)(1)(A) exhaustion requirement on the IQ evidence presented for the first time on federal habeas, need not additionally overcome the obstacles of § 2254(e)(2)"). The district court correctly found that

> [i]n state court, petitioner presented a comprehensive discussion of DNA evidence's deficiencies, particularly related to probability testimony and how the presence of Brown's two brothers in the area impacted the erroneous DNA probability analysis given at trial. The proposed supplemental exhibits shall be admitted into the record. The matter shall be submitted to the court for consideration of the merits of the petition.

The district court's ruling should be affirmed.

b. The Facts Set Forth In Exhibits 196-98 (EOR 936-960) Have Been Exhausted.

The statistical analysis set forth in Exhibits 196-98 (EOR 936-960) merely supplement and clarify the DNA claims previously raised in the state-court proceedings. In Vasquez v. Hillary, 474 U.S. 254 (1986), the Supreme Court analyzed the issue of whether expansion of the state court record to include

statistical figures related to an equal protection claim altered the petitioner's claim. In his state court proceedings Vasquez had raised an equal protection challenge to the discriminatory selection of the grand jury. Seeing a need to "supplement and clarify" the state court record, the district court ordered the state to provide statistical figures regarding juror eligibility at the time of Vasquez' trial and directed the parties to present their views regarding the application of statistical probability analysis to the facts of the case. The Supreme Court rejected the argument that the district court's order had drastically altered Vasquez' claim, thereby rendering it unsuitable for review without prior consideration before the state courts, explaining that the statistical estimates added "nothing new to the case" that was not already intrinsic to the consideration of the grand jury discrimination claim. Id. at 259. The Court further noted that the district court's request for further information was "evidently motivated by a responsible concern that [the court] provide the meaningful federal review of constitutional claims that the writ of habeas corpus has contemplated throughout its history." Id. at 259-60; accord, Landrigan v. Schriro, 441 F.3d 638, 648 (9th Cir. 2006) ("additional information offered by Landrigan in support of the federal habeas claim does not 'fundamentally alter' the ineffective assistance claim presented to the state court [but] simply provides additional evidentiary support for the claim . . .").

Exhibits 196-98 (EOR 936-960) likewise merely supplement Brown's claims that he was convicted by the state's presentation of unreliable, untrustworthy and uncomplete DNA evidence to the jury. As set forth in Dr. Mueller's report, Renee Romero's 1/6500 ratio

was incorrect and grossly understated the probability of a random match of two siblings at five loci. The correct figure is 1/1024 (EOR 955, Ex. 197, p. 1), more than six times the likelihood of a random match than the 1/6500 figure provided to the jury by Romero. Furthermore, Romero's calculation for two brothers was inaccurate and incomplete because she never considered the fact that a third brother was in Carlin, Nevada, the night in question and that Brown had two other brothers in Utah. Since it was at least 6 to 12 times more likely that the DNA matched one of the two brothers living in Carlin the evening in question than the 1/6500 probability opined by Ms. Romero, materially inaccurate and incomplete evidence was provided to the jury. Dr. Mueller's report merely supports and clarifies Brown's claim that the DNA evidence, which included the mathematical calculations and testimony presented at trial through Romero, was unreliable and incomplete.[7]

Exhibits 196-98 (EOR 936-960) satisfy Habeas Rule 7 since "relat[ed] to" Grounds One and Two of Brown's petition and are not barred by 28 U.S.C. 2254(e)(2). The district court's rejection of respondents' argument that such expansion of the record renders Ground One unexhausted should be affirmed since the proposed exhibits do not fundamentally alter the legal claim already considered by the state courts in this case. See also the exhaustion discussion in Argument A supra.

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[7] The same is true for the scientific commentary cited in the district court opinion (see EOR 1002).

C. The District Court's Determination As To Ground One "That The Nevada Supreme Court's Determination Of The Sufficiency Of The Evidence Claim Involved An Objectively Unreasonable Factual Finding As Well As A Legal Determination That Was Contrary To Clearly Established Federal Law." Factually Clearly Erroneous nor Legally Incorrect

1) Summary of Argument

Troy Don Brown ("Brown") was convicted of sexual assault and sentenced to life in prison on the basis of an expert witness's mathematically incorrect, incomplete and unreliable DNA testimony and conflicting lay evidence acknowledged by the prosecutor in a state post-conviction pleading as insufficient to convict Brown apart from the DNA evidence. Applying the Antiterrorism and Effective Death Penalty Act's ("AEDPA's") standard of review under 28 U.S.C. § 2254 (d)(1) and "clearly established Federal law" as set forth in Jackson v. Virginia, 443 U.S. 307 (1979), and related cases, the district court correctly held that there was insufficient evidence to convict Brown, granting the writ of habeas corpus as to Ground One of Brown's First Amended Petition. In addition, the district court correctly granted the writ as to Brown's ineffective assistance of counsel ("IAC") claims set forth in Grounds Two and Three of the First Amended Petition, finding that counsel, while having expert resources, did not effectively challenge the DNA evidence and, notwithstanding the conflicting lay testimony, wrongly elected not to apprise the jury of another suspect, the victim's stepfather.

2) Standard of Review

A district court's decision to grant a 28 U.S.C. § 2254 habeas petition is reviewed de novo. See Leavitt v. Arave, 371, F.3d 663, 668 (9th Cir. 2004); Ramirez v. Castro, 365 F.3d 755, 762 (9th Cir. 2004). Findings of fact "made by the district court are reviewed for dear error." Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir, 2004). McClure v. Thompson, 323 F.3d 1233, 1240 (9th Cir. 2003).

3) Facially Inaccurate General Population DNA Random Match Probability Evidence: Prosecutor's Fallacy.

This is a Restriction Fragment Length Polymorphism (RFLP) case with results reported from five loci. A few months before Brown's trial this Court approved the admission of RFLP evidence in federal trials. See United States v. Hicks 103 F.3d 837, 844 n.7 (9th Cir. 1996); United States v. Chischilly, 30 F.3d 1144 (9th Cir. 1994). In doing so it warned against using RFLP DNA evidence for "source probability (i.e., the likelihood that the defendant is the source of the evidentiary sample . . . [,]" 30 F.3d at 1156, which was precisely what the state did in this case.

Based on the chosen genetic population database, Rene Romero of the Washoe County Forensic Science Division opined that there was a 1 in 3,000,000 ratio for finding a random match between the perpetrator's DNA and Brown's. EOR 404. Not satisfied with that calculation, the prosecutor pressed Ms. Romero to convert those figures to mathematical percentages as to whether Brown was the source of the semen found on the victim's panties, a calculation with which Ms.

Romero was not comfortable. EOR 419-22. Nevertheless, she grudgingly did so, ultimately accepting a 99.99967 percent "likelihood" that the perpetrator was Brown (or .000033 percent that he was not the source). EOR 420-430; SEOR ___. As this Court found in Chischilly supra, such mathematical calculations are wrong.

> . . . The [Washoe County Forensic Science Division] matching statistic does not represent source probability. Rather, the test results reflect the statistical probability that a match would occur between a randomly selected member of the database group and either the evidentiary sample or the defendant. To illustrate, suppose the . . . evidence establishes that there is a one in 10,000 chance of a random match. The jury might equate the likelihood with source probability by believing that there is a one in 10,000 chance that the evidentiary sample did not come from the defendant. This equation of random match probability with source probability is known as the prosecutor's fallacy.

30 F.3d at 1157 (emphasis added); accord, United States v. Morrow, 374 F.Supp.2d 51, 66 (D.D.C. 2005)(prosecutor's fallacy characterized as a "very real danger"); United States v. Shea, 957 F. Supp. 331, 345 & n.44 (D.N.H. 1997)("[t]his type of incorrect reasoning is often referred to as the fallacy of the transposed conditional, or the prosecutor's fallacy"); see R. Lempert, "Some Caveats Concerning DNA As Criminal Identification Evidence : With Thanks To The Reverend Bayes," 13 Cardoza L. Rev. 303, 305-06

(1991). See also letter report of Laurence D. Mueller, Ph.D. (Ex. 197, p. 2).[8]

> The 'prosecutor's fallacy' occurs when a prosecutor presents statistical evidence to suggest that the evidence indicates the likelihood of the defendant's guilt rather than the odds of the evidence having been found in a randomly selected sample.

United States v. Shonubi, 895 F. Supp. 460, 516 (E.D.N.Y. 1995), quoting from M. Berger, "Evidentiary Framework," Federal Judicial Center, Reference Manual On Scientific Evidence, pp. 95, 97 (1994), rev'd on other grounds, 103 F.3d 1085 (2d Cir. 1997).

Relying on this mathematically incorrect evidence, at closing the prosecutor told the jury that such calculations meant that they could be "99.999967 percent sure" that Brown committed the crime. Ex. 34, p. 546, l. 18. Such grossly unreliable evidence was insufficient to support the jury's guilty verdict against Brown.

4) Absence Of Relevant Sibling DNA Random Match Probability Evidence.

At the time of the incident in question Troy Brown had four brothers, Trent, Travis, Trace and Lance, ages 23, 21, 16 and 13, respectively. Two of them, Trent and Travis, were known to be in Carlin, Nevada, the evening in question in close proximity to the crime

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[8] Petitioner submitted Exhibits 196-98 (EOR 936-960)with his Motion To Expand The Record as discussed in Argument B, supra.

scene. See SEOR 959-60. Only Troy Brown's DNA was analyzed, and the state provided the following inaccurate mathematical calculations at trial to distinguish Troy Brown from his brothers.

a. Use Of Incomplete Assumption Offering Evidence Most Disfavorable To Defendant.

In computing the random match probability of brothers at five loci as "1/6500" Ms. Romero relied solely on the following formula set forth in the National Research Council, DNA Technology in Foresnsic Science (1992)(hereinafter "NRC I"), publication:

> Indeed, two sibs will often have matching genotypes at a locus – they have a 25% chance of inheriting the same pair of alleles from their parents and a 50% chance of inheriting one allele in common (which will result in identical genotypes if their other alleles happen to match by chance).

EOR 427, l. 19 – EOR 428, l. 12. As summarized by Ms. Romero at trial,

> [w]ith a brother, there would be some genetic relationship. They have a 25 percent chance of sharing both alleles - - both bands, and 50 percent chance of sharing one band.

EOR 427, ll. 22-24. Such evidence is unreliable since (1) it presents an incomplete picture of DNA among siblings and (2) the 1/6500 random match probability figure grossly understates the probabilities of matches

among siblings. Cf. 3 Mod. Sci. Evidence § 25-2.6.2[2] n. 153 (2d ed.)(NRC I formula used by Ms. Romero is "an incorrect formula for siblings").

Since siblings inherit DNA from their parents, their random match probability is extremely high compared to the general population.

> It is well established that relatives, especially siblings, have very similar DNA patterns and can have identical patterns at various sites. Thus, if a defendant has 10 brothers, there is an increased likelihood that more than one brother would match the DNA evidence sample exactly.
>
> D. Filocomo, "Unraveling The DNA Controversy: People v. Wesley, A Step In The Right Direction," 3 J.L. & Pol'y 537, 564 & n.151 (1995).
>
> . . . . .
>
> The jury must be informed about the fact that the probability of two relatives having the same DNA profile for a number of loci is much greater than two randomly chosen people.
>
> Plainly, the best solution is to obtain DNA from the relatives who are plausible suspects and either include or exclude them. If prosecutors do not make adequate efforts to conduct DNA tests on relatives who are plausible suspects, but offer DNA evidence against a defendant, courts should seriously consider instructing the jury, in a fashion similar to a missing witness charge, that it may

> draw a negative inference that the result would not have been favorable to the prosecution.
>
> B. Scheck, "DNA And Daubert," 15 Cardoza L. Rev. 1959, 1974-75 (1 994); accord, S. Rosenthal, "My Brother's Keeper: A Challenge To The Probative Value Of DNA Fingerprinting," 23 Am. J. Crim. L. 195, 212-13 (1995).

With respect to the incompleteness of Ms. Romero's sibling calculations, siblings' parents may be homozygotes, i.e. have matching alleles at various loci, or heterozygous, i.e. have different alleles at various loci.

> "The genetics of a human cell . . . is compiled by the owner's parents, each of whom contributes . . . 23 paired sets inside the sacrosanct edifice of the *nucleus* . . . . [Genetic information within the paired sets] are called *alleles.* If. . .at a particular region or locus on the DNA . . . the allele from the mother is A and the corresponding allele from the father is B, the *genotype* at that locus is designated AB. The text of two corresponding alleles at any locus may be identical (a *homozygous* genotype, e.g., AA) or different (a *heterozygous* genotype, e.g., AB)."

People v. Pizarro, 3 Cal.Rptr.3d 21, 49-50 (Cal. App. 2003), quoting from People v. Brown, 110 Cal.Rptr.2d 750 (2001). The 25% figure utilized in this case for sibling random match probability at one loci, and which mistakenly (see discussion below) was used as the foundation for the state's 1/6500 figure, lies at one extreme where "both parents are heterozygotes and

share at most one allele in common[,]" the most unfavorable possible alternative for a criminal defendant sibling. "For other possible parental pairs the probability of two sibs matching could be 50% or 100%." Ex. 197, 1, second ¶. The jurors never knew this.

As summarized by Dr. Mueller, "in this portion of Ms. Romero's testimony she has chosen a special case which suggests that sibs have the lowest chance of matching that is biologically possible." EOR 955, Ex. 197, p. 1. Such presentation of scientific evidence based on the most negative assumption possible as to the defendant has been soundly condemned. Cf. People v. Pizarro, Cal.Rptr.3d 21 (Cal. App. 2003), a DNA case where, as here, there was "insufficient evidentiary foundation" for the conviction. Id. at 540.

> If the description of the perpetrator is instead based on evidence of the *defendant's* traits - - which are simply assumed to be the same as the perpetrator's - - the defendant no longer enjoys the presumption of innocence. It is as though the sketch artist sits with the defendant, sketches him as the perpetrator, and the prosecution introduces the sketch at trial as evidence that the defendant looks exactly like the perpetrator. The defendant's traits fill out the perpetrator's description with *facts that are not in evidence*, and the perpetrator's traits are 'proved' by what is in effect a *presumption* that because the defendant possesses certain traits, the perpetrator also possesses those traits. Such a presumption operates as a substitute for proper evidence of the perpetrator's traits, thereby lightening the prosecution's burden of

affirmatively proving the defendant's identity as the perpetrator and undermining the defendant's presumption of innocence.

b. <u>Incorrect Probability Figures</u>.

As set forth in Dr. Mueller's report (EOR 955), even accepting the 25% figure as proper to calculate the chance of a random match of two brothers at a single loci, Ms. Romero's 1/6500 ratio is incorrect and grossly understates the probability of a random match of two siblings at five loci. The correct figure is 1/1024 (Ex. 197, p. 1), which is more than six times the likelihood of a random match than the 1/6500 figure provided the jury by Ms. Romero. As noted previously Brown had four brothers, Trent (23), Travis (21), Trace (16) and Lance (13), at the time of the incident, two of whom (Trent and Travis) were known to be in Carlin, Nevada, the evening of the crime and two of whom resided in the adjacent state of Utah. Dr. Mueller calculates the probability of any one of the brothers matching the DNA profile:

(1)One or more brothers (three were known to be in Carlin the evening in question): 1/512, more than 12 times the likelihood of a random match than the 1/6500 figure provided the jury by Ms. Romero;

(2)Total of five brothers (including the two brothers residing in Utah at the time of the incident): 1/256, more than 25 times the likelihood of a random

match of one of the five brothers than the 1/6500 figure provided by Ms. Romero.[9]

Ms Romero's figure for two brothers was inaccurate; she never considered the fact that a third brother was in Carlin the night in question and that Brown had two other brothers in Utah. Since it was at least six to 12 times more likely that the DNA matched one of Brown's two brothers in Carlin the evening in question than the 1/6500 probability opined by Ms. Romero, materially inaccurate evidence was provided to the jury.

4. Use Of The Unreliable And Incomplete DNA Evidence Rendered The Evidence Insufficient To Prove Brown's Guilt.

In summary, the state's DNA random match probability evidence was facially inaccurate. The so-called "prosecutor's fallacy" was used to wrongly convert the chance of a random match of DNA from the general population to the chance of Troy Brown being the perpetrator of the crime. Such classic fallacy, recognized by this Court and by numerous other courts and legal authorities, rendered the DNA evidence as presented to the jury unreliable. Moreover, the sibling

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[9] Applying a formula found in National Research Council, "The Evaluation of Forensic DNA Evidence" (1996)("NRC II"), page 113 (4.9a & 4.9b), he finds that the "chance of a single sib matching Brown's profile is 1 and 263. The chance that among two brothers one or more would match is 1 and 132 and the chance that among four brothers one or more would match is 1 and 66." EOR 955-56, Ex. 197, pp. 1-2. These probabilities of sibling matches are dramatically greater than Ms. Romero's 1/6500 figure presented to the Brown jury.

issue central to this case was mishandled in several particulars:

> (1) The incomplete mathematical calculations were based on two brothers, not the three known to be in Carlin that night or the additional two residing in Utah;
>
> (2) The record contained only a partial picture of sibling DNA science, i.e. 25% figure for sibling's DNA matching at one loci, based on the most extreme case of heterozygous parents, was used exclusive of other mathematically correct possibilities, i.e. 50% or even 100% for parents' DNA ranging from heterozygous to homozygous. The state unfairly placed its sole reliance on the alternative possibility most disfavorable to the defendant.
>
> (3) Accepting the 25% figure for sibling random match probability at one loci, the state erred by a factor of six in miscalculating the probability at five loci as 1/6500 instead of the 1/1024 figure. This error was compounded by the failure to consider at least the third brother in Carlin the evening in question, which increases the probability to 1/512 from the state's 1/6500, an error by a factor of 12.

Finally, in its Answer In Opposition to Brown's state post-conviction petition, the state conceded that, exclusive of the DNA, the evidence presented to the jury was insufficient to convict Brown.

> There was insufficient evidence to convict the Defendant unless the DNA evidence established guilt . . . .

This statement was made by the prosecutor who prepared and tried the case in a state post-conviction pleading. As such, it is a highly reliable assessment of the no-DNA evidence. EOR 759, ll. 22-23.

Since the DNA evidence was incomplete and mathematically incorrect and was, therefore, highly unreliable, it was insufficient to establish Brown's guilt. The DNA evidence provided no support for distinguishing Brown from his brothers. Affirming guilt on such evidence constitutes an unreasonable application of the controlling Supreme Court precedent, i.e. Jackson v. Virginia, 443 U.S. 307 (1979).

5. The Jackson v. Virginia test.

To meet the fourteenth amendment's due process test for sustaining a guilt finding the evidence must be of sufficient quality to be reliable.

> When considering a due process challenge to the sufficiency of the evidence to support a conviction, we determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307. . . (1979). This inquiry focuses on the quantity and quality of the evidence [citation omitted].

Ticey v. Peters, 8 F.3d 498, 500 (7th Cir. 1993)(emphasis added). In other words, as found by the district court, "if the evidence is not reliable, then due process requires it be excluded." See EOR 1000, l. 25 - EOR 1001, l. 8, and cases cited therein; cf. State v. Jones, 610 So.2d 782, 784-85 (La. 1992)(emphasis

added)(court "not precluded from inquiring into the reliability of the result for due process purposes under Jackson v. Virginia" and Jackson "does not permit jurors to speculate when the evidence at trial would leave any rational factfinder with a reasonable doubt of guilt"); United States v. Moree, 897 F.2d 1329, 1332 (5th Cir. 1990)(emphasis added)(under Jackson v. Virginia prosecution must "produce[d] sufficient evidence to form a rational basis for the jury's adjudication of [the defendant's] guilt").

In summary, underlying the Thompson v. Louisville, 362 U.S. 199 (1960), "no evidence" rule and the Jackson v. Virginia "sufficiency" of the evidence jurisprudence is the due process right of "freedom from a wholly arbitrary deprivation of liberty." See 443 U.S. at 314. As this Court has held, if a petitioner can show that

> there is no factual basis for [his] conviction . . . it follows inexorably that [he] has been denied due process of law. Thompson v. Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960); Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Golden v. Hayes, 444 F.3d 1062, 1071 (9th Cir. 2006), quoting from Dretke v. Haley, 541 U.S. 86, 397 (2004). See also Garcia v. Carey, 395 F.3d 1099 (9th Cir. 2005).

> Because there was *no* testimony or other evidence to support a rational inference that the robbery of Bojorquez was committed with the intent to further other criminal activity of E.M.F., the ruling of the California Court of Appeal meets the deferential AEDPA standard

> for federal habeas corpus relief: the ruling is '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). The clearly established law, as we have already stated, is Jackson v. Virginia, 443 U.S. at 324, 99 S.Ct. 2781. To uphold the jury's finding in the circumstances of this case and in the absence of any evidence at all of specific intent is not only an inaccurate, but an unreasonable, application of Jackson.

Id. at 1104.

In light of the incomplete and inaccurate mathematical calculations undermining the reliability of the DNA evidence presented to the jury and the admitted absence of sufficient additional evidence to prove guilt, the district court correctly found that "the Nevada Supreme Court's determination of the sufficiency of the evidence claim involved an objectively unreasonable factual finding [check in light of new case] as well as a legal determination that was contrary to clearly established federal law" and that "a reasonable doubt would exist in the mind of any rational trier of fact, preventing them from finding each and every element of the crimes for which Petitioner presently stands convicted" (EOR 1007, ll. 2-7) under the "clearly established Federal law" set forth in Thompson v. Louisville and Jackson v. Virginia and its granting of the writ on Ground One should be affirmed.

Accordingly, the Nevada Supreme Court decision did not preclude the district court from issuing the

writ, as it properly did in this case. See 28 U.S.C. § 2254(d)(1).

6. Application Of The AEDPA To The *Jackson v. Virginia* Test.

As this Court recently reaffirmed in Sarausad v. Porter, 479 F.3d 671, 678-79 (9th Cir. 2007), quoting from Chein v. Shumsky, 373 F.3d 978, 983 (9th Cir. 2004), "[t]he Jackson standard 'must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law.'" In compliance with the Supreme Court's direction that the [Jackson] standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law[,]" Jackson v. Virginia, 443 U.S. 307, 324 n. 16 (1979), the Chein opinion includes extensive analysis of the crime's, i.e. perjury's, key elements under California law, i.e. materiality and falsity, before addressing the jury's specific findings count by count. See 373 F.3d at 983-85. In stark contrast the Nevada Supreme Court addresses whether "[s]ufficient evidence existed to convict Troy" in summary fashion with no reference at all to the elements of sexual assault. The entire sufficiency section of its opinion is set forth below.

> ***285 Sufficient evidence existed to convict Troy.***
>
> [3] 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). We conclude that a jury, acting

> reasonably could have been convinced of Troy's guilty beyond a reasonable doubt. Testimony indicted that Tory left the bar around 12:15 a.m., that Troy lived relatively close to the bar, and that Tory live very close to Jane Doe. Troy had enough time to get from the bar to Jane Doe's house 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 ro 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 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).

Brown v. State, 934 P.2d 235, 241-42 (Nev. 1997) (EOR 687). This is not a Jackson v. Virginia analysis. Indeed, the only reference to the crime of sexual assault's elements under Nevada law is found in the opinion's following section addressing a double jeopardy issue. Id. at 242 (EOR 686-87). Even that

reference is incomplete since the definition of the element of "sexual penetration" found in Nev. Rev. Stat. § 200.364 is not even mentioned.

As found by the district court (EOR 1006), the Nevada Supreme Court does not even purport to apply Jackson v. Virginia's constitutional test for sufficiency of the evidence to Brown's case. Instead it relies solely on Kazalyn v. State, 825 P.2d 578, (Nev. 1992). In Kazalyn the court mentions neither Jackson nor its constitutional underpinnings in the Fourteenth Amendment's Due Process Clause. Instead it relies on two Nevada cases predating Jackson. In finding sufficient evidence to convict for burglary in Edwards v. State, 524 P.2d 328, 331 (Nev. 1974), the court does not even cite Nevada's burglary statute much less mention that crime's elements. Likewise, in Cunningham v. State, 575 P.2d 936, 937 (Nev. 1978)(emphasis added), while summarily finding "substantial evidence to support a verdict[,]" the court mentions neither Nevada's murder statute nor the elements of first degree murder.

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA")

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of State court shall not be granted with respect any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved 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)(emphasis added). As defined by the Supreme Court, this provision has two components.

> A federal habeas court may issue the writ under the 'contrary to' clause if the state court applies a rule different from the governing law set forth in our cases [citation omitted]. The court may grant relief under the 'unreasonable application' clause if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case.

Bell v. Cone, 535 U.S. 685, 694 (2002). The district court correctly applied both components to this case. First, as noted above, the Nevada Supreme Court did not apply the "clearly established Federal law" set forth in Jackson v. Virginia to Brown's sufficiency of the evidence claim. Therefore, the district court correctly held that "the Nevada Supreme Court's determination of the sufficiency of the evidence claim . . . was contrary to clearly established federal law" (EOR 1007, ll. 2-5, emphasis added), and its analysis of Brown's Ground One claim was not restricted in any manner under the AEDPA. Second, even if the Nevada Supreme Court had applied the holding in Jackson v. Virginia to Brown's sufficiency claim, its affirmance on direct appeal would constitute an "unreasonable appli[cation of Jackson] to the facts of [Brown's] case[,]" a conclusion reached by the district court.

> Moreover, the state court's application of law to the facts also presents grave concern.
>
> . . . . .
>
> [T]he Court finds that the Nevada Supreme Court's determination of the sufficiency of the evidence claim involved an objectively unreasonable factual finding[.]

EOR 1004, ll. 7-8; EOR 1007, ll. 2-4. Accordingly, Brown meets the test under both 2254 (d)(1) clause for granting a habeas petition devoid of any AEDPA restriction.[10]

Accordingly, it is clear that the district court correctly granted the writ as to Ground One. The DNA evidence's incompleteness and unreliability has never been challenged. See, e.g., EOR 1003 n.3 ("Respondents present no scientific evidence or information to counter Mueller's conclusions"). As analyzed in detail by the district court, the remaining evidence was conflicting and inconclusive (see EOR 1004, l. 9 – EOR 1006, l. 14), a conclusion consistent with that of the person perhaps most knowledgeable of the evidence's strength, the prosecutor himself. See EOR 759, ll. 22-23.[11]

---

[10] Respondents' emphasis on § 2254(d)(2) does not applying to a Jackson v. Virginia AEDPA analysis, see OB at 41-42, is misplaced since the district court did not apply §2254(d)(2) in its Jackson v. Virginia analysis granting the writ.

[11] Respondents suggest that the state is not bound by such candid comments as to the weakness of the case against Brown. However, the prosecutor is the state's agent for prosecuting criminal cases.

D. THE DISTRICT COURT'S DETERMINATION THAT "PETITIONER'S SECOND CLAIM IS MERITORIOUS AND THE NEVADA SUPREME COURT 'S HANDLING OF IT ON POST-CONVICTION APPEAL RESULTED IN AN OBJECTIVELY UNREASONABLE FACTUAL DETERMINATION" IS NEITHER FACTUALLY CLEARLY ERRONEOUS NOR LEGALLY INCORRECT.

The state has acknowledged that absent the DNA evidence it presented to the jury Brown would not have been convicted. EOR 759, ll. 22-23. On the virtual eve of trial, the state produced new RFLP test results. Despite the last minute production of the new testing results trial counsel made no effort to continue the trial. As set forth in the discussion of Ground One supra, and found by the district court the DNA evidence and expert testimony admitted at trial was "Unreliable," "Petitioner stands convicted on evidence that misrepresented to an untrained and perhaps unsophisticated jury that the likelihood of a random occurrence of matching DNA in a particular population is the same thing as the probability that the DNA at the crime scene was Petitioner's . . . [,] The uncontradicted expert testimony leaving the jury with false information that was highly prejudicial and which could have been and should have been challenged by the defense's own expert." EOR 1008, ll. 10-16. Yet this false and incomplete DNA evidence was never challenged.

Surely, his conclusions in a formal pleading filed in court is binding on the state.

When appellate counsel on direct appeal attempted to challenge the DNA evidence, the Nevada Supreme Court refused to consider appellate review of the DNA evidence, finding that the defendant had waived such claim:

> 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. Sterling v. State, 109 Nev. 391, 394, 834 P2.d 400, 402 (1992). Because we conclude that the failure to conduct an evidentiary hearing was not plain error, we will not consider this issue.

Brown v. State, 11 3 Nev. 275, 284, 934 P.2d 235 (1997).

The evidentiary and foundational problems with the collection, testing and presentation of the DNA evidence should have prevented admission of the DNA evidence and/or, if properly challenged, produced an accurate and fair presentation of the evidence to the jury. Moreover, as found by the district court, "[h]ad an effective defense expert participated in the testing and appeared at trial to counter the unreliable information, it is more likely than not that the outcome of the trial would have been different." EOR 1008, ll. 3-5. Brown was prejudiced by admission of this unreliable and incomplete DNA evidence acknowledged by the state

to be essential to a conviction. In failing to challenge the DNA evidence at trial and preserve valid issues for appeal, trial counsel performed ineffectively The district court's determination that the Nevada Supreme Court (see EOR 863-64) failed to apply the "clearly established Federal law [Strickland v. Washington]" to the facts underlying this claim was "objectively unreasonable" and that "Petitioner's second claim is meritorious" (see EOR 1109, ll. 22-24) should be affirmed.

E. THE DISTRICT COURT'S DETERMINATION THAT "AS WITH GROUND 2, THE NEVADA SUPREME COURT'S HANDLING OF [GROUND THREE] RESULTED FROM AN UNREASONABLE DETERMINATION OF THE FACTS" IS NEITHER FACTUALLY CLEARLY ERRONEOUS NOR LEGALLY INCORRECT.

In Ground Three Brown asserted an ineffective assistance of counsel (IAC) claim with respect to his counsel's failure to investigate the case in general and the victim's stepfather, Wayne Henley, in particular. EOR 54-56. The district court agreed with Brown's assertions and granted the writ on this ground. EOR 1010-1011. Respondents' principal argument on appeal is that the district court did not expressly find prejudice. See OB at 52-53. Prior to addressing Ground Three the district court had already noted in its analysis of Ground One "the State's own admission that absent the DNA evidence, there was insufficient evidence to convict Petitioner" (EOR 1004, ll. 4-6) and had found in addressing Ground Two that "[h]ad an effective defense expert participated in the testing and appeared at trial to counter the unreliable information, it is more likely than not that the outcome of the trial

would have been different." EOR 1008, ll. 3-5. Given the district court's findings of such inherent weakness in the prosecution's case, prejudice from failing to inform the jury of an obvious suspect, i.e. the victim's stepfather, who had been arrested for sexual assault in Utah, was suspected of another incident in Carlin, Nevada, where the crime in question occurred and had been "identified by the victim's mother on the night of the attack as someone who had threatened to rape the victim in order to get back at her mother" (EOR 1010 n.6), is obvious. That such conclusion may be implicit rather than explicit in the court's opinion does not diminish the court's Strickland analysis. The district court's granting of the writ on this ground should be affirmed.

VI.

CONCLUSION

For the reasons set forth above and in the Order On Merits the district court's findings that Grounds One through Three of Brown's petition are meritorious and order granting the writ should be affirmed.

VII.

STATEMENT OF RELATED CASES

Counsel for the Appellant is unaware of any related cases at the trial or appellate level.

VIII.

CERTIFICATE OF COMPLIANCE

The typeface used in this brief is proportionately spaced 14-point. The total number of words is 12,929.

Respectfully submitted,

/s/
PAUL G. TURNER
Assistant Federal Public Defender

* * *

[Certificate of Service omitted in printing of this appendix]

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CA NO. 07-15592

D.C. No. 3:03-cv-0712-PMP(VPC)
(Nevada, Reno)

[Filed June 12, 2008]

TROY DON BROWN,	)
	)
Plaintiff-Appellee,	)
	)
vs.	)
	)
CRAIG FARWELL, et. al.,	)
	)
Defendant-Appellant.	)
	)

Appeal from the United States District Court for the District of Nevada

APPELLANT'S OPPOSITION TO REHEARING BY PANEL OR EN BANC

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I.

INTRODUCTION

On May 5, 2008, this Court issued an opinion, reported at 525 F.3d 787, affirming the district court's grant of Troy Don Brown's ("Brown's") writ of habeas corpus and reversing his conviction. On May 16, 2008, Appellants' "Petition For Rehearing And Suggestion For Rehearing *En Banc"* (the "Petition For Rehearing") was filed. By Order of May 23, 2008, Appellee Brown was directed to file a response not exceeding 15 pages. Brown now responds seriatim to appellants' arguments, opposing panel rehearing or en banc review.

II.

ARGUMENT

A. The Panel Majority Correctly Held That The Nevada Supreme Court Did Not Apply The Jackson v. Virginia Test.

As this Court reaffirmed in Sarausad v. Porter, 479 F.3d 671, 678-79 (9th Cir. 2007), cert. granted on other ground sub. nom. Waddington v. Sarausad, 128 S.Ct. 1650 (2008), quoting from Chein v. Shumsky, 373 F.3d 978, 983 (9th Cir. 2004), "[t]he Jackson standard 'must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law.'" The proper Jackson analysis exemplified by Chein, 373 F.3d at 983-85, stands in stark contrast to the following Nevada Supreme Court summary analysis devoid of references to the elements of sexual assault.

***285** *Sufficient evidence existed to convict Troy.*

[3] 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). We conclude that a jury, acting reasonably could have been convinced of Troy's guilty beyond a reasonable doubt. Testimony indicted that Troy left the bar around 12:15 a.m., that Troy lived relatively 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 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 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).

Brown v. State, 934 P.2d 235, 241-42 (Nev. 1997) (EOR 687). The panel majority correctly found that this analysis, based on Kazlyn v. State, 825 P.2d 578, 581 (1992), which does not cite Jackson and does not address the elements of the crime reviewed, is not a Jackson analysis.

> Moreover, under *Kazalyn*, a reviewing court assesses whether the jury could have been "convinced of the defendant's guilt"; the *Jackson* standard is different, requiring the reviewing court to assess "the essential elements of the crime." The Nevada Supreme Court failed to analyze each of the essential elements of the substantive state crime. Instead, it merely recited 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. . . .

525 F.3d at 794-95. This analysis is consistent with this Court's prior emphasis under Jackson on a crime's elements.

> But a state court is not free to define an element out of existence, or to ignore the element entirely when upholding a criminal conviction. Such a ruling is contrary to clearly established *federal* law, namely *Jackson v. Virginia*. *See* 28 U.S.C. § 2254(d)(1). Indeed, the quintessence of a *Jackson* claim-the very meaning of *In re*

> *Winship*-is that every element of a crime must be proven beyond a reasonable doubt.

Goldyn v. Hayes, 444 F.3d 1062, 1070 (9th Cir. 2006). The Petition For Rehearing should be denied.

B. The Panel Majority Properly Excluded Evidence Found To Be False And Unreliable From its *Jackson v. Virginia* Analysis And Analyzed The Remaining Evidence In The Light Most Favorable To The Prosecution.

The panel majority characterized the testimony "that Troy was 99.99967 percent likely to be guilty" as "misleading, as it improperly conflated random match probability with source probability[,]" was "scientifically flawed" and "false, but highly persuasive evidence." 525 F.3d at 796. Likewise, it found that such testimony "inaccurately minimized the likelihood that Troy's DNA would match one of his four brothers, thus underestimating the likelihood that one of Troy's brothers could have been the perpetrator" and was "misleading because it presented the narrowest interpretation of the DNA evidence." Id. The district court's exclusion of such false, unreliable evidence from its Jackson analysis is consistent with this Court's prior holding that a Jackson analysis must be predicated on a "factual basis." See Golden Hayes, supra, at 1071, quoting from Dretke v. Haley, 541 U.S. 86, 97 (2004); Smith v. Mitchell, 437 F.3d 884, 890 (9th Cir. 2006)("expert's testimony as to a theoretical conclusion or inference does not rescue a case that suffers from an underlying insufficiency to convict beyond a reasonable doubt").

False evidence is by definition not "factual," and it cannot be part of the Jackson analysis.

As found by the panel majority, the district court correctly "weighed the sufficiency of the remaining evidence in the light most favorable to the prosecution." See 525 F.3d at 797. Even assuming that Brown left the bar in time to commit the crime, the remaining evidence did not support a guilty verdict. For example, it is undisputed that the victim "could not identify her assailant[,] 525 F.3d at 799 (O'Scannlain, J., dissenting), had twice previously identified Troy's brother Trent, as the assailant and had described the assailant's jacket as having a zipper while Troy's jacket was zipperless. Understandably, the prosecutor twice conceded in state post-conviction proceedings that the remaining, non-DNA evidence was insufficient to prove Brown guilty beyond a reasonable doubt. See Argument F. infra. No one has ever asserted that the prosecutor misunderstood the strengths and weaknesses of his own case. The Petition For Rehearing should be denied.

C. Brown's Sufficiency Of The Evidence Claim (Ground One) Was Presented To The Nevada Courts.

In Ground One of the First Amended Petition, Brown challenged the sufficiency of the evidence admitted at trial to convict him of the sexual assault, focusing primarily on the deoxyribonucleic acid ("DNA") evidence admitted against him. Respondents assert in the Petition For Rehearing, page 13, that "Petitioner did not complain of the reliability of the DNA evidence as he does in this action." To the contrary, Brown addressed the presentation of the

DNA evidence at trial, including the DNA evidence's lack of reliability, in his Opening and Reply Briefs on direct appeal to the Nevada Supreme Court. See, e.g.:

(a) Sufficiency of the evidence.

> "Given the plethora of evidence that the assailant was not Troy Brown, include the hair which did not match, the coat which was different, the lack of watch and zipper, the fact that Megan repeatedly named Trent every time the police brought up Troy to her, the lack of blood on Troy when he first came back home at 1:32 a.m., the absence of scratches or bites from Megan on Troy's body and the total failure of the DNA evidence to be established as trustworthy and reliable in this particular case, Appellant submits that there was insufficient evidence to convict Troy Brown of these crimes. Opening Brief, EOR 590, ll. 11-20 (emphasis added).

(b) Presentation of the DNA evidence at trial.

> "She [Renee Romero] further testified that the national technical working group (TWG-DAM) which is working on DNA analysis methods, is trying to set standards for quality control or quality assurance in the area of DNA testing and reporting, but that so far, they've only issued non-mandatory guidelines. [citation omitted]. She further testified that the population database used by her lab was the FBI's Roche Molecular Systems database, which was not yet even published as of that date. ('I have a pre-publication and it will be published

in the Journal of Forensic Science in July.') [citation omitted]). Opening Brief, EOR 584, l. 20 - EOR 585, l. 3 (emphasis added).

. . . . .

"When a jury is told that the 'chances that the DNA in the panties and blood is not Troy's is 1 in 3 million' [citation omitted] and that is 3 times the entire population of Nevada, this effectively relieves the jury of its decision-making task by replacing the jury's function of weighing all the evidence with considering instead the probability of guilt." Reply Brief, EOR 647, l. 21 - EOR 648, l. 3 (emphasis in original).

. . . . .

"In our case. Romero told the jury that the percent of likelihood that the DNA in the panties is the same as the defendant's DNA is 99.99967% [citation omitted]. That is improper exaggeration and source error, according to the experts. It is also extremely prejudicial to the accused." Reply Brief, EOR 650, ll. 10-15 (emphasis added).

[T]he 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 State's DNA 'expert' quoted the odds of two brothers sharing the same alleles as **1 in 6500!** Reply Brief EOR 636-37 and n. 1 (emphasis in original).

The panel majority correctly affirmed the district court's finding that Ground One was exhausted.

> Respondents erroneously contend that Troy failed to exhaust his insufficiency claim in the Nevada Courts. Troy in fact raised this claim on direct appeal, and the Nevada Supreme Court concluded that the totality of the evidence-considering both the DNA and non-DNA evidence together-was sufficient to uphold the conviction. *Brown v. State,* 113 Nev. 275, 934 P.2d 235, 240-42 (Nev. 1997). . . .

525 F.3d at 793. The Petition For Rehearing should be denied.

D. Appellants Misconstrue The Panel Majority's Burden Of Proof Reference.

Appellants characterize the panel majority's statement that "it is Respondents' burden to establish guilt beyond a reasonable doubt for each and every element of the offense" as a new standard foreign to Jackson. That language, of course, refers to the state's burden of proof under In Re Winship, 397 U.S. 358 (1970), which is the basis of the Jackson analysis. See

443 U.S. at 315-16. In the last paragraph of the legal analysis the panel majority concludes that the evidence is insufficient for "any rational trier of fact to believe that Troy was the assailant beyond reasonable doubt." See 525 F.3d 798 (O' Scannlain, J., dissenting)(citing both Winship and Jackson). This is precisely the Jackson standard. See 443 U.S. at 324. The language of the decision clearly shows that the panel majority is simply referring to the state's burden of proof at trial, which is reviewed in Jackson under the aforementioned standard. This is no new rule. The Petition For Rehearing should be denied.

E. The District Court's Order Allowing Expansion Of The Record To Include Exhibits 196-96 (EOR 936-960) Was Correct

In Cooper-Smith v. Palmateer, 397 F.3d 1236, 1241 (9th Cir. 2005), this Court held that to expand the record under Rule 7 of the "Rules Governing Section 2254 Cases In The United States District Court" (hereinafter the "Habeas Rules") a petitioner must satisfy 28 U.S.C. § 2254(e)(2). In Williams v. Taylor, 529 U.S. 420 (2000), the Supreme Court identified two tests under 28 U.S.C. § 2254(e)(2). Under the first test, as set forth in the opening clause, the statute applies only "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings . . ." The panel majority correctly affirmed on the following basis:

> The district court correctly found that Troy 'presented a comprehensive discussion of the DNA evidence before the Nevada Supreme Court. This finding is supported by numerous challenges to the DNA evidence raised in Troy's

> state court briefs. Troy's attempts were reasonable and therefore diligent. See *Williams v. Taylor*, 529 U.S. 420, 435, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000) ("Diligence for purposes of [§ 2254(e)(2)] depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court."). Moreover, as the district court found, the Mueller Report merely clarifies, rather than fundamentally alters, the DNA evidence and expert testimony that was already before the Nevada courts. See *Vasquez v. Hillery*, 474 U.S. 254, 260, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) ("We hold merely that the supplemental evidence presented by respondent 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."). Therefore, the district court did not err by admitting the Mueller report.

525 F.3d at 794.

Since Brown did not fail to develop the factual basis of his DNA claims (Grounds One and Two of the First Amended Petition) in state court the second § 2254(e)(2) test is inapplicable. The statute is no bar to expanding the record with Exhibits 196-98 (EOR 936-960). See Morris v. Dretke, 413 F.3d 484, 498 (5th cir. 2005)(petitioner "having met the § 2254(b)(1)(A) exhaustion requirement on the 1Q evidence presented for the first time on federal habeas, need not additionally overcome the obstacles of § 2254(e)(2)").

Exhibits 196-98 (EOR 936-960) satisfy Habeas Rule 7 since they are "relat[ed] to" Grounds One and Two of Brown's petition and are not barred by 28 U.S.C. § 2254(e)(2).

F. The Panel's Enforcement Of The Prosecutor's Concessions That "There Was Insufficient Evidence To Convict The Defendant Unless The DNA Evidence Established Guilt" Was Consistent With This Court's And The Supreme Court's Prior Rulings.

In state post-conviction proceedings, Brown asserted that trial counsel was ineffective for failing to properly investigate a possible alibi. See, e.g., EOR 717, ¶5. The State of Nevada, represented by the District Attorney who prosecuted Brown, thereafter filed an answer. Supremely confident in the DNA evidence, the prosecutor found it strategically advantageous to defend the ineffectiveness of counsel (IAC) claim by candidly conceding the remaining evidence's insufficiency and focusing the inquiry on the DNA.

> There was insufficient evidence to convict the Defendant unless the DNA evidence established his guilt, but the insufficiency of the evidence established at trial, combined with the alleged evidence not discovered by trial counsel is simply not enough to make the DNA evidence suspect.

EOR 759, ll. 22-25. Consistent with this approach in closing argument at the state post-conviction

evidentiary hearing the prosecutor conceded that the defense counsel

> created a reasonable doubt. And everybody concedes, everybody - -I think, concedes that but for the DNA there was reasonable doubt. How much reasonable doubt does [the defense counsel] have to keep piling up when the problem is the DNA?

Errata To Excerpt Of Record, filed 7/12/07, at 256, ll. 5-9. The state ultimately obtained the IAC claim's denial by focusing on the DNA and crediting the defense counsel with exposing the insufficiency of the remaining evidence.

> THE COURT: All right, . . . [t]he Court is going to deny the Petition for Writ for Habeas Corpus . . . . The DNA evidence there is no grounds presented to the satisfaction of the Court to overturn the verdict of the jury. And with respect to the rest of the issues the Court agrees with the States analysis. So, the Petition for Writ of Habeas Corpus is denied.

Id. at 260, ll. 4-14.

The state changed course in federal post-conviction proceedings. Rather than rely solely on the DNA, the state asserted that the remaining evidence was sufficient to convict Brown. Answer, EOR 909, ll. 17-19 ("even if the DNA evidence was excluded, the remaining evidence was sufficient by which the jury could find each element of the crime beyond a reasonable doubt"; Respondents-Appellants' Opening Brief, p. 24, last two lines) and "sought to distance

[itself] from this concession at oral argument. . . ." 525 F.3d at 789 n.1. Consistent with the United States Supreme Court's position, see generally Zedner v United States, 547 U.S. 489, 504 (2006)(judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradicting argument to prevail in another phase") and this Court's prior rulings, the panel majority correctly found the appellants judicially estopped from doing so. See 525 F.3d at 789-90 & n. 1, citing Helfand v. Gerson, 105 F.3d 530, 534-36 (9th Cir. 1997); Russell v. Rolfs, 893 F.2d 1033, 1037-39 (9th Cir. 1990).

> Indeed, the Assistant United States Attorney who tried the illegal reentry case and who handled the double jeopardy hearing below, speaking on behalf of the government, conceded in district court that the jury in the illegal reentry case 'absolutely ... made a determination that [the government] did not prove beyond a reasonable doubt that [Castillo-Basa] had gone before an immigration judge. They definitely made that determination that the government's evidence did not meet the burden of beyond a reasonable doubt on that single element.' Regrettably, the AUSA who made this truthful and accurate concession in the district court was replaced with another AUSA for purposes of this appeal. The government, through the new AUSA, completely reversed its position and argued on appeal that 'Castillo-Basa cannot meet his burden to show that the jury's not guilty verdict in his [illegal reentry] trial necessarily decided the question of whether he was present at the ... deportation

> hearing.' Although we do not reach the issue, we note that this troubling reversal of position may violate our established judicial estoppel doctrine. That doctrine precludes a party from taking; a position in a legal proceeding, that directly contradicts an earlier position it took in the same or earlier proceeding.

United States v. Castillo, 483 F.3d 890, 898 & n.5 (9th Cir. 2007)(emphasis added); Helfand v. Gerson, 105 F.3d at 1534 (judicial estoppel involves "gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position").

It was advantageous in the state district court to focus entirely on the DNA evidence and credit the defense attorney with exposing the remaining evidence as insufficient. In federal court appellants found it advantageous to take the opposite position, i.e. to argue that the remaining evidence exclusive of the DNA evidence was sufficient to convict Brown. Under almost identical circumstances, this Court has recognized the prosecutor's unique understanding of the strengths and weaknesses of the state's evidence.

> During the evidentiary hearing on Singh's state habeas petition, [the prosecutor] conceded it might have been 'the kiss of death' to the State's case if the jury heard Copas was in essence being rewarded for his testimony with some kind of benefits. With all due respect to the state court of appeal, which felt otherwise, we deem [the prosecutor's] candid concession to be highly significant. In the adversarial process, the prosecutor, more than neutral jurists, can

> better perceive the weakness of the state's case
> . . . .

Singh v. Prunty, 142 F.3d 1157, 1163 (9th Cir. 1998). The panel majority was correct in applying the rule of judicial estoppel here. The Petition For Rehearing should be denied.

III.

CONCLUSION

For the reasons stated in this Opposition, Brown respectfully asks this Court to decline to rehear this case by panel or en banc.

IV.

CERTIFICATE OF COMPLIANCE

The typeface used in this brief is proportionately spaced 14-point. The total number of words is 3,660.

Respectfully submitted,

/s/
PAUL G. TURNER
Assistant Federal Public Defender

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