No. 08-559

IN THE

Supreme Court of the United States

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

v.

TROY BROWN,
Respondent.

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

BRIEF OF RESPONDENT

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July 17, 2009

QUESTIONS PRESENTED

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

2. Does analysis of a sufficiency of the evidence claim pursuant to *Jackson* v. *Virginia*, 443 U.S. 307, 318-19 (1979), under 28 U.S.C. § 2254(d)(1) permit a federal habeas court to expand the record or consider nonrecord evidence to determine the reliability of testimony and evidence given at trial?

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STATEMENT OF THE CASE

This habeas case arrives at the Court in an odd procedural posture. Although the Ninth Circuit and the District Court purported to apply the remedial analysis set forth in *Jackson* v. *Virginia*, 443 U.S. 307 (1979), in addressing Respondent Troy Brown's due process claim, the reasoning in their opinions and the type of remedy imposed (a new trial) demonstrate that Brown's claim was not actually decided pursuant to *Jackson*.[1] Brown agrees both with the Solicitor General and with the National Association of Criminal Defense Lawyers ("NACDL") that the true remedial standard of *Jackson* is inapplicable to the due process violation that rendered Brown's trial fundamentally unfair. Brief of the Solicitor General as *Amicus* at 16-19 ("*Amicus* U.S. Br."); *Amicus* NACDL Br. That violation occurred when the State presented and relied upon the improper and gravely prejudicial testimony of its DNA expert. The understandable confusion on all fronts in this case stems from the reality that, as the State earlier conceded, the remaining evidence adduced at Brown's trial was wholly insufficient to support a verdict of guilt beyond a reasonable doubt on the charged offenses. In more precise terms, the improper testimony of the State's expert was not harmless error.

Like the District Court, the Ninth Circuit held that the admission of the unreliable DNA testimony "rendered the trial fundamentally unfair" and

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[1] The District Court also granted Brown a conditional writ on two of his ineffective assistance of counsel claims. Pet. App. 54a. Because the Court of Appeals affirmed on the *Jackson* claim, it did not reach the two ineffective assistance claims. *Id*. at 21a.

"violated [Brown's] due process rights." Pet. App. 19a; see also *id.* at 38a ("if the evidence is not reliable, then due process requires it be excluded"). Then, "[a]fter excluding [the expert's] testimony," the District Court and the Ninth Circuit sought to determine the effect of that improper testimony by "weigh[ing] the sufficiency of the remaining evidence in the light most favorable to the prosecution," under the remedial analysis set forth in *Jackson*. *Id.* at 19a. This analysis is not a true *Jackson* analysis because, as the Solicitor General observes, a *Jackson* review is based on the "record evidence adduced at the trial." *Amicus* U.S. Br. 17 (citing 443 U.S. at 324). The purpose of a *Jackson* analysis is to determine whether the jury acted in a rational manner in returning a guilty verdict based on the evidence before it, not whether improper evidence violated due process. See, *e.g.,* 443 U.S. at 317-18; see also *Herrera* v. *Collins*, 506 U.S. 390, 402 (1993).

Instead, the proper remedy analysis for the violation identified in this case (and acknowledged by the State) should have been harmless error review pursuant to *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993). The references to *Jackson* in Brown's case, however, ultimately worked in the State's favor. The courts below asked whether, absent the improperly admitted DNA testimony, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *E.g.*, Pet. App. 13a (citing *Jackson*, 443 U.S. at 319) (emphasis in original). That standard is more deferential to the jury's verdict than harmless error review under *Brecht*, which looks to whether the improperly admitted testimony had a "substantial and injurious effect or influence in determining the jury's verdict." 507 U.S. at 623.

That *Jackson* was not, in fact, the basis of the underlying decisions in this case is further demonstrated by the remedy that was ordered—a retrial. Pet. App. 21a; see also *id.* at 54a. As the Solicitor General correctly observes, the Double Jeopardy Clause precludes retrial after a successful *Jackson* claim. *Amicus* U.S. Br. 17. Thus, had the decisions wholly relied upon *Jackson*, the federal courts could not have subjected Brown to a retrial.

Because Brown agrees with the Solicitor General that this case should not be decided under *Jackson*, see *Amicus* U.S. Br. 15-16, the two questions presented are properly viewed as moot. A proper disposition of this case would be a remand to the Ninth Circuit for a proper analysis of Brown's claim under *Brecht*. See*, e.g., Roberts* v. *Galen of Va., Inc.*, 525 U.S. 249, 253-54 (1999) (per curiam). The Court could also properly affirm the judgment of the Ninth Circuit on the grounds, discussed below, see*, e.g.*, *infra* pp. 20-35, that it reached the correct result (although relying on the wrong standard) by finding a violation of due process resulting from the use of impermissible, unreliable testimony about the DNA evidence which was not harmless and which justified habeas relief.[2] See *Thigpen* v. *Roberts*, 468 U.S. 27, 32-33 (1984) (affirming on grounds other than those on which certiorari was granted); see also *Bunting* v. *Mellen*, 541 U.S. 1019, 1023 (2004) (Scalia, J., dissenting) ("This Court reviews judgments, not statements in opinions.") (quoting *California* v.

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[2] As explained below, the *Jackson* analysis referenced by the District Court and the Ninth Circuit imposes a standard that is more deferential to the jury's verdict than that under *Brecht*. For this reason, and others explained in the NACDL brief, a dismissal of the case as improvidently granted could also be an appropriate disposition. *See Amicus* NACDL Br.

Rooney, 483 U.S. 307, 311 (1987)); *K Mart Corp.* v. *Cartier, Inc.*, 485 U.S. 176, 185 (1988) ("Although we reject the Court of Appeals' analysis, we nevertheless agree with its conclusion . . . ."). In any event, in light of the plain constitutional error which infected Brown's trial, it is clear that reversal of the grant of habeas relief, as the State requests, is not warranted.

BACKGROUND

A. The DNA Evidence

During Troy Brown's trial for sexual assault, the State made two errors in describing the statistical meaning of the deoxyribonucleic acid ("DNA") evidence to the jury that rendered his trial fundamentally unfair.

First, the State relied on the "prosecutor's fallacy" in its presentation to Brown's jury. See Pet. Br. 54 ("[The expert] committed this fallacy in her testimony."); *id.* at 55 ("When the prosecutor confused the concepts of comparison and identification in that question, he committed the 'prosecutor's fallacy.'"). The "prosecutor's fallacy" is a highly prejudicial scientific error whereby the prosecution represents the probability that a person picked at random would match the crime scene DNA sample ("random match probability") as if it were the likelihood that the person on trial is the source of the DNA ("source probability"). See *id.* at 54-55. In essence, the prosecutor's fallacy improperly converts the statistical probability of a random match into an "identification" of the perpetrator of a crime. The State's DNA expert testified—incorrectly—that there was a .000033 percent chance that Brown was not the source of the crime scene DNA sample. J.A. 460-62. In his final argument to the jury, the prosecutor compounded this error by arguing that the DNA

proved that the jury could be "99.999967 percent sure" that Brown was guilty. *Id.* at 730.

Like other identification procedures that are unnecessarily suggestive and unreliable, the prosecutor's procedure of introducing the DNA evidence as a means of "identifying" the assailant violated the Due Process Clause of the Fourteenth Amendment. The admission of expert testimony about source probability is improperly suggestive because it incorrectly implies that the DNA evidence has proven the source of the crime scene DNA. Here, such testimony was not only unreliable, it was demonstrably wrong.

Second, the State's expert testified that the probability that two brothers would share a DNA pattern at five loci was one in 6,500 or .02 percent. *Id.* at 468-69. This figure is mathematically incorrect. Moreover, the testimony fails to take into account that Brown has four brothers, two of whom were in the immediate area during the night of the assault. *Id.* at 427, 1582-83, 1586. When asked of whom the assailant reminded her, the victim repeatedly named Trent Brown, one of these brothers, see *id.* at 177, 521-22, 526-29, although she ultimately never made any positive identification of her assailant at trial.

These errors rendered Brown's trial fundamentally unfair and denied him due process of law. The errors were not harmless; even the State has conceded that, absent the faulty DNA evidence, there was not sufficient evidence to establish Brown's guilt. See *id.* at 1173, 1176, 1483.

Because the inaccurate DNA testimony was unnecessarily suggestive and unreliable, but was presented to the jury as irrefutable scientific evidence

establishing Brown's guilt, the District Court and Ninth Circuit correctly held that Brown's due process rights were violated and granted his petition for writ of habeas corpus. Pet. App. 31a-54a; see also *id.* at 1a-28a.

B. The Non-DNA Evidence

The State has conceded that the non-DNA evidence is insufficient to convict Brown. J.A. 1173, 1176, 1483. Brown agrees.[3]

In the early morning hours of January 29, 1994, 9-year-old Jane Doe (a pseudonym) was sexually assaulted in her home in Carlin, Nevada. *Id.* at 160. According to Jane, a man entered her bedroom and raped her. *Id.* She "played dead," and he left. *Id.* at 162. Jane has never identified her assailant. When police showed Jane a photo line-up containing Brown's picture, she identified him as someone she knew, but not as her assailant. *Id.* at 528-30, 533-34.

Jane described her assailant as a man with blond hair. *Id.* at 503, 515, 520. Brown has brown hair. *Id.* at 106. Jane said she thought the man had a moustache. *Id.* at 521. That night, Brown was clean shaven. *Id.* at 135; see also *id.* at 606. Jane said her assailant wore a black coat that had "a zipper, for sure," and a watch that scratched her face. *Id.* at 516-18. That night, Brown was wearing dark jeans and a black satin coat with no zipper. *Id.* at 291, 646. Brown not only did not wear a watch; he does not own one. *Id.* at 610, 630. The trial evidence

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[3] The State's attempt to withdraw this concession in its brief, *see* Pet. Br. 35, is foreclosed. *See, e.g.*, *Russell* v. *Rolfs*, 893 F.2d 1033, 1038 (9th Cir. 1990) ("[T]he federal courts can protect the integrity of the federal system by preventing the state from taking advantage of a state decision it secured by telling the state court the opposite of what it told the federal court.").

established that Jane said her assailant wore no hat or cap. *Id.* at 519.[4] That night, Brown was wearing a black cowboy hat with a silver rim. *Id.* at 192, 595. Jane said her assailant smelled of cologne. *Id.* at 524. Jane's mother Pam Henle testified that she had danced with Brown that night and he did not smell of cologne. *Id.* at 134-35.

Jane said she bit her assailant on the hand. *Id.* at 176. About four hours after the assault, a police officer found no evidence of any bites on Brown's hands. *Id.* at 240. As a result of the assault, Jane was covered in blood. *Id.* at 124, 251. Hours later, that same police officer found no evidence of blood on Brown or the boots he wore that night. *Id.* at 254, 261-62.

Jane believed that her assailant turned off the lighted make-up mirror that she used as a night light; after the assault, the light was off and turned from its normal position. *Id.* at 139, 514. Police lifted one fingerprint from the mirror and determined it did not match Brown. *Id.* at 495-98.

At trial, Jay and Leah Doke testified that they saw a man on Jane Doe's street at 1:05 a.m. wearing a black jacket with a bright green emblem on the back. *Id.* at 202, 207, 543, 547. Leah Doke said the emblem on the back of the jacket was "fluorescent green" and reminded her of "a skull, bandit emblem." *Id.* at 543. Brown's brother Travis owns a black satin jacket with a zipper that has a bright blue-green SKOAL emblem

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[4] The State asserts that Connie Walker, an Elko police detective, "testified that Jane Doe stated that her attacker wore a cowboy hat." Pet. Br. 26. The record directly contradicts this. Connie Walker initially stated this fact, but upon further examination she admitted that Jane Doe in fact said her attacker did *not* wear a hat. J.A. 518-19.

on the back. See *id.* at 291-93. The jacket was entered into evidence as trial exhibit M. *Id.* at 292-95. The black jacket that Brown was wearing on the night of the assault has snaps instead of a zipper and a very colorful orange and yellow depiction of a woman on the back. *Id.* at 291. Brown's jacket was admitted as trial exhibit L. *Id.* at 294.

On the night before the assault, Jane and her sister were at Brown's brother Trent's trailer, babysitting for Trent and his wife Raquel's two younger children. *Id.* at 102-04. Trent and his wife had been out at a bar with Jane's mother Pam. *Id.* Trent and his wife returned home at 7:30 or 8:00 p.m.; around 9:30 p.m., Jane and her sister went back to their own home. *Id.* at 103-05. Around 10:00 or 10:30 p.m., Jane called the Peacock Bar to find her mother and let her know that they had returned home. *Id.* at 119, 123. Brown answered the telephone when Jane called the bar. *Id.* at 119-23, 608. He told Jane that her mother was at CG's Bar and that he would deliver the message that she had called. *Id.* at 608-09. Brown went across the street to CG's Bar, but by the time he arrived, Pam was already on the phone with Jane, and so Brown returned to the Peacock Bar and kept drinking. *Id.* At trial, Jane testified that she went to sleep around 11:00 p.m. and that the attack lasted about two hours. *Id.* at 159-60.

After the assault, Jane telephoned her mother (Pam) at the bar where she was drinking. *Id.* at 123, 129-30, 189. Jane stated that a man who had been looking for her mother had hurt her. *Id.* at 123. Pam went home and called 911. Carlin Police Officer Michael Terry arrived at approximately 1:15 a.m. *Id.* at 219-20. Jane was covered in blood. *Id.* at 124, 251. Pam blurted out that she was feuding with her ex-husband and that he had threatened to "f*** her

daughter in order to get back at her." *Id.* at 253, 553, 599.

At the hospital, examination confirmed that Jane had been penetrated both vaginally and anally. *Id.* at 91-92, 480-82. A "sexual assault kit" was taken, including a vaginal smear, to test for the presence of sperm. *Id.* at 481-82. Debris was collected off Jane's teeth by the emergency room doctor because Jane said she had bit her assailant. *Id.* at 176, 346, 504-05. All physical and medical evidence was kept by Carlin Police and later taken to Washoe County's Crime Lab. *Id.* at 339-40, 347. At trial, it was revealed that, although a policeman testified he saw it, the emergency room doctor had no recollection of taking teeth debris scrapings, nor was any ever located or tested by the lab. *Id.* at 483, 486-87. In addition, although Brown's bedding was collected by police, see *id.* at 347, it was never examined or tested. See *id.* at 398-99, 402-03.

A few days after the attack, when Jane was pressed by police to say who the man reminded her of, she said "Troy." *Id.* at 521-22. The police asked "who?" and Jane replied "Trent. Yes, Trent," referring initially to Troy Brown and then correcting herself and indicating his brother Trent Brown. *Id.* at 522. Both Troy and Trent Brown were friends with Jane's step-father Wayne, and both had previously been to Jane's home to visit Wayne. *Id.* at 143, 289, 522, 604.

When Jane saw a television report that there was a warrant for Troy Brown's arrest she became upset. *Id.* at 526. The police were called, and Jane told them she "knew it was him" and that the man that attacked her "sent [her] flowers." *Id.* at 526-29. Jane retrieved the card from the flowers and showed it to police. It was signed by "Trent and Raquel," who are Brown's brother Trent and Trent's wife. *Id.* at 527.

Police showed Jane a photo line-up containing Brown's photo but no one else Jane knew. *Id.* at 526-28, 538. Photos of Brown's brothers Trent and Travis were not included in the line-up. *Id.* at 369, 527-28. Jane identified Brown as someone she knew, but not as her assailant. *Id.* at 528-30, 533-34.

At trial, Jane said she did not know who had assaulted her. *Id.* at 160. She said the man reminded her of Brown's brother Trent "[a] little" and that he smelled "kind of the same," like the same type of cologne. *Id.* at 177. Jane testified that she did not know Brown's other brother Travis Brown. *Id.* at 180. Trent, Troy, Travis, and the two youngest Brown brothers all resemble each other. *Id.* at 275.

Jane's neighbor Ellen Johnson testified that two or three days after the crime a young man with longer dirty blond hair who had lived in the same trailer park suddenly appeared clean shaven and with real short hair. *Id.* at 589-91.

On January 28, 1994, Brown spent the night drinking at two bars in Carlin, Nevada—CG's Bar and the Peacock Bar. *Id.* at 606-08. Brown's brothers Trent and Travis were also at CG's Bar during parts of the evening. *Id.* Brown, who was not wearing a watch, could not say what time he left the Peacock Bar. *Id.* at 610. One bartender said about 12:15 am or 12:20 a.m., *id.* at 187-89; another bartender said Brown left closer to 1:30 a.m. *Id.* at 596.

After Brown left the Peacock Bar he walked to CG's, ordered a beer, took a few sips, and walked home. *Id.* at 610-11. He was highly intoxicated and vomited on his walk home. *Id.* at 608, 613. According to his roommate and younger brother Travis, Brown got home at 1:32 a.m. *Id.* at 280. (A

policeman later determined Travis's digital clock was about 6 minutes fast. *Id.* at 280-81.) Brown took off his hat, put his pants and shirt into the washer to get rid of the vomit, and went to bed in his underwear. *Id.* at 279-80, 612-13. Travis did not see any traces of blood anywhere. *Id.* at 287.

At about 5:00 a.m. on the morning of the assault, Carlin Police Officer Michael Terry went to Brown's home. *Id.* at 282. Brown, who had been sleeping, spoke with Officer Terry while wearing nothing but his underwear. *Id.* at 238. Officer Terry questioned Brown for about 30 minutes and looked for evidence pertaining to the case. *Id.* at 239-40, 261-62. Officer Terry looked at Brown's hands and found no evidence of any bites. *Id.* at 240. Officer Terry also did not see any blood on Brown. *Id.* at 254. He looked at Brown's boots and saw no evidence of blood spatter. *Id.* at 261-62.

Later that day, after Brown left for a previously planned trip to his parent's house in Loa, Utah, police came back with a search warrant and took Brown's bedding. *Id.* at 616. Brown's father suggested he go to a medical clinic to confirm he had no bites or scratches on his body. *Id.* at 617-18. He did so on Wednesday, February 2, 1994, and a nurse confirmed he was free of any and all abrasions, scratches, bruises, and lacerations. *Id.* at 617-18, 761. On February 3, 1994, Brown voluntarily went in for questioning by Carlin police. *Id.* at 620-21.

Brown has consistently denied any involvement in the crime. See, *e.g.*, *id.* at 602. When a police officer lied to him, saying they found his fingerprints in Jane's bedroom and that a car light had shone upon his face in front of her trailer, Brown still denied involvement. *Id.* at 651-53, 672-74. Even at his sentencing hearing, when offered leniency if he would

confess, Brown maintained his innocence. See, *e.g.*, *id.* at 809 ("I know that I'm not guilty . . . all I'd like to say is I—I'm not guilty."). The duress Brown faced at his sentencing hearing was so strong that the Nevada Supreme Court ordered a resentencing. Pet. App. 92a-94a. At trial, Jane did not identify Brown as her assailant. See J.A. 160.

C. The DNA Expert Testimony

Renee Romero of the Washoe County Sheriff's Office Crime Lab conducted Restriction Fragment Length Polymorphism ("RFLP") testing on the semen found in the victim's panties and compared it to samples of blood from the victim and from Brown. *Id.* at 427, 434-37.

Only a few months before Brown's trial, the Ninth Circuit approved the admission of RFLP evidence in that circuit. *United States* v. *Chischilly*, 30 F.3d 1144, 1153, 1156 (9th Cir. 1994); see *United States* v. *Hicks*, 103 F.3d 837, 844 n.7 (9th Cir. 1996), *overruled on other grounds by United States* v. *W.R. Grace*, 526 F.3d 499 (9th Cir. 2008). 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)." *Chischilly*, 30 F.3d at 1156.

At the preliminary hearing, Romero testified that she did not think she could conduct the RFLP test because she believed there was insufficient semen to test. J.A. 432. However, after the preliminary hearing, and five months after collecting the samples, Romero said she looked at another section of the panties and "there was more than enough semen." *Id.* Romero claimed she "just didn't catch it the first time." *Id.*

At trial, in his opening statement, the prosecutor equated the DNA evidence to a "fingerprint" and promised the jury that it would identify Brown as the perpetrator of the crime: "We have another type of fingerprint that the State has to show that the defendant committed this crime. And that is called DNA." *Id.* at 37-38.

Romero was qualified as the State's expert and testified that Brown's DNA profile matched the DNA profile presented in the semen sample found in the victim's panties. *Id.* at 436-40. Applying the "ceiling principle" from the National Research Council, Romero testified that "one in 3 million" people would be expected to share the same specific genetic code. *Id.* at 437-38.

The prosecutor asked Romero for "another way to show that statistic," asking "what is the likelihood that the DNA found in the panties is the same as the DNA found in the defendant's blood?" *Id.* at 458. At first, Romero resisted, stating that percentages are "[n]ot the way forensics likes to look at it. We prefer the one in 3 million." *Id.* The prosecutor pressed Romero, again requesting she provide "another way to look at it, what would that percentage be?" *Id.* "It would be 99.99967 percent," Romero stated. *Id.*

The prosecutor pressed Romero further. He had Romero write the percentage on a blackboard and then subtract the figure from one hundred percent. *Id.* at 458-60. The mathematical calculation was introduced into evidence as exhibit 31:

100.000000

- 99.999967%

.000033

Id. at 460, 754.

The prosecutor asked "would it be fair to say, based on that that the chances that the DNA found in the panties—the semen in the panties—and the blood sample, the likelihood that it is not Troy Brown would be .000033?" *Id.* at 460. Romero agreed that it was "not inaccurate" to state it that way.[5] *Id.* at 462.

In his final argument to the jury, the prosecutor commented on the likelihood that Brown committed the crime:

> Are you 75 percent sure? Based on the DNA? 90 percent, 99, sometimes people use the phrase, I'm 99 percent sure about that. Well, in this case the evidence shows—how sure can you be? 99.999967 percent sure.

Id. at 730. The prosecutor emphasized that, based on the DNA testing on the semen, the jury would be "able to determine beyond a reasonable doubt, based on reliable scientific evidence that you heard that he committed this crime." *Id.* at 731.

Romero was also asked about the probability that brothers would share a DNA pattern. *Id.* at 468. She testified that there is a 25% chance of two brothers' DNA matching at a single locus. *Id.* Based on her understanding of a National Research Council report, she said that "in this case [where five loci were tested] that turns out to be one in 6,500. Meaning those two adults would have to mate and produce offspring 6,500 times to come up with that pattern again." *Id.* at 469. The prosecutor again had Romero use the blackboard to "convert" the probability into a

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[5] Romero testified in such a manner even though, in earlier testimony, she had recognized that a DNA comparison, unlike a fingerprint, is *not* an identification. J.A. 438-39.

percentage. *Id.* at 471-72. She provided the following calculation:

$$\begin{array}{r} 10000 \\ \underline{\quad 99.982} \\ .02 \end{array}$$

Id. at 754.

Romero then agreed with the prosecutor's statement "that the likelihood of the parents having one child, and then the very next child having the same genetic code would be .02 percent." *Id.* at 472. Asked on cross-examination, "[d]oes that change at all with two brothers?," Romero replied "No." *Id.*

On September 30, 1994, the jury found Brown guilty of sexual assault on a child under the age of 14 years, resulting in substantial bodily harm (count I), and sexual assault on a child under the age of 14 years (count II) in violation of Nev. Rev. Stat. § 200.366.[6] J.A. 783-84. The jury found Brown not guilty of attempted murder. *Id.* at 785.

On count I, the court sentenced Brown to life with the possibility of parole after ten years has been served. *Id.* at 787. On count II, the court sentenced Brown to life with the possibility of parole after ten years, to run consecutive to the other sentence. *Id.* at 810.

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[6] Brown was also found guilty of abuse or neglect of a child less than 18 years of age, resulting in substantial mental harm, J.A. 786, but the Nevada Supreme Court subsequently reversed this conviction on double-jeopardy grounds. Pet. App. 68a-96a.

D. State Court Appellate And Post-Conviction Proceedings

Brown appealed, challenging *inter alia* the introduction of the DNA evidence discussed above. *Id.* at 812-51, 878-922. The Nevada Supreme Court affirmed in part, and remanded for resentencing because the trial court had abused its discretion at the first sentencing hearing. Pet. App. 68a-96a. On March 18, 1998, Brown was again sentenced to life in prison with the possibility of parole after 10 years on count II, consecutive to the sentence in count I. Pet. App. 63a-67a. Brown appealed, and the Nevada Supreme Court affirmed on September 8, 2000. J.A. 1083.

On August 30, 2001, Brown filed a timely petition for writ of habeas corpus in state court. *Id.* at 1036-47. The prosecutor conceded in the State's answer to Brown's habeas petition that "there is essentially no argument that, *but for the DNA evidence, there was insufficient evidence to convict Brown*." *Id.* at 1173 (emphasis added). Later in the same pleading, the prosecutor stated:

> 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.

Id. at 1176. In his closing argument at the state post-conviction evidentiary hearing, the prosecutor again conceded:

> [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 [defense counsel] have to keep piling up when the problem is the DNA?

Id. at 1483. On February 21, 2002, the court denied Brown's petition. *Id.* at 1489-99.

Brown appealed. On November 21, 2003, the Nevada Supreme Court filed its order of affirmance. *Id.* at 1500-06.

E. Federal Court Proceedings

Brown's first federal amended petition for writ of habeas corpus asserted five grounds for relief. Pet. App. 130a-74a. The District Court granted Brown's motion to expand the record with a report of Dr. Lawrence Mueller. J.A. 1595-98; see also *id.* at 1581-84.

The District Court granted Brown's habeas petition on three grounds. Pet. App. 31a-54a. Applying the Antiterrorism and Effective Death Penalty Act's ("AEDPA's") standard of review under 28 U.S.C. § 2254(d)(1) and the analytical framework set forth in *Jackson* v. *Virginia*, 443 U.S. 307 (1979), the District Court held that there was insufficient evidence to convict Brown, granting relief on ground one of the petition but allowing the State to retry him. Pet. App. 31a-54a. In addition, the District Court granted relief on Brown's ineffective assistance claims set forth in grounds two and three of the first amended petition. *Id.* The court determined that trial counsel, while having expert resources, did not effectively challenge the DNA evidence and, notwithstanding the primarily exculpatory lay testimony, inexplicably

failed to apprise the jury of another suspect, the victim's stepfather. *Id.*[7]

The Ninth Circuit affirmed the District Court's grant of Brown's habeas petition. Pet. App. 1a-28a. Although the parties briefed all three grounds on which the writ was granted, the court decided the case solely on Brown's sufficiency of the evidence DNA claim. *Id.* The Ninth Circuit affirmed the District Court's remedy as to the DNA claim—a conditional writ directing the State to retry or release Brown. *Id.* at 21a. It then denied the State's petition for rehearing and petition for rehearing en banc. *Id.* at 97a-98a.

SUMMARY OF ARGUMENT

The constitutional error in this case is clear and fundamental. The prosecutor told the jury in Brown's rape trial that DNA evidence proved Brown's guilt with a 99.999967% degree of certainty. In fact, the DNA evidence did not prove Brown's guilt at all, and could not be relied upon as proof of identity. Rather, the point of the DNA evidence, and its sole reasonable interpretation, was as proof that in a random population sampling only a small percentage of individuals will share the same genetic code, which should be considered in the context of Brown having four brothers. By mischaracterizing this evidence to show something it could not—that Brown must have committed the crime—the prosecutor obtained a guilty verdict despite demonstrable evidentiary shortcomings in the case against Brown.

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[7] The District Court provided the same remedy for Brown's two successful ineffective assistance of counsel claims. Pet. App. 54a.

These errors rendered the trial fundamentally unfair and violated Brown's right to due process under the Constitution. This Court held in *Manson* v. *Brathwaite*, 432 U.S. 98 (1977), that identification testimony which is "unnecessarily suggestive" of the defendant's guilt, if based upon state practices that lack reliability, represents a violation of due process. *Id.* at 110, 114. The expert testimony and argument of the prosecutor in this case, suggesting that the DNA evidence identified Brown as the assailant when the evidence in fact did not and could not establish that fact, constitutes precisely the type of "unnecessarily suggestive" testimony rejected in *Brathwaite*. That opinion clearly applied and clearly established the constitutional violation in this case.

The prosecutor's error in presenting the DNA evidence was not harmless, especially because (as the State has conceded) the non-DNA evidence was entirely insufficient to establish Brown's guilt. Had the State accurately presented the statistical meaning of the DNA evidence, instead of suggesting that it had identified Brown as the assailant, there clearly would have been reasonable doubt concerning Brown's guilt. Other evidence suggested that the assailant was not Brown, but one of his brothers. Only through a mistaken interpretation of the DNA evidence did the prosecutor link Brown to the crime and secure conviction.

Habeas relief was plainly justified in light of this error and the resulting due process violation. The Ninth Circuit, however, incorrectly addressed this issue under the *Jackson* sufficiency of the evidence standard, rather than the *Brecht* harmless error analysis. Brown agrees with the Solicitor General's contention that this case cannot be decided pursuant to *Jackson*. For that reason, the two questions

presented are moot. Nevertheless, under either the standard applied by the Ninth Circuit or under *Brecht*, Brown's petition for a writ of habeas corpus was properly granted. The judgment below should therefore be affirmed. In the alternative, the case should be remanded to the Ninth Circuit for analysis under *Brecht*.

ARGUMENT

THE NEVADA SUPREME COURT'S DECISION IS CONTRARY TO CLEARLY ESTABLISHED FEDERAL DUE PROCESS LAW.

A. The DNA Testimony Was Impermissibly Suggestive And Unreliable.

The most egregious due process errors with respect to the DNA evidence presented in Brown's trial were the State expert's commission of the "prosecutor's fallacy" and her inaccurate testimony about the probability that one of Brown's brothers would share the same DNA profile as Brown. J.A. 436-72. The prosecutor compounded these errors by emphasizing the expert's inaccurate and misleading statements as irrefutable scientific proof of Brown's guilt during his final argument to the jury. *Id.* at 730-31.

1. The State concedes that, in describing the statistical meaning of the DNA evidence, Romero and the prosecutor committed the "prosecutor's fallacy." See Pet. Br. 54 ("Romero committed this fallacy in her testimony."); *id.* at 55 ("When the prosecutor confused the concepts of comparison and identification in that question, he committed the 'prosecutor's fallacy.'"). Specifically, Romero committed the prosecutor's fallacy when she testified that there was a 99.999967% chance that Brown was the assailant and, conversely, that there was a

.000033 percent likelihood that the perpetrator was not Brown. The statistics from which Romero derived this testimony can show the chance that a person chosen at random would match the evidence DNA profile, but they undisputedly do not show—as Romero's testimony suggests—the likelihood that a particular person committed the crime. J.A. 1583.

The prosecutor's fallacy is a serious error because it suggests the DNA evidence has "identified" the person who committed the crime with a high degree of certainty. "Forensic evidence is not uniquely immune from the risk of manipulation." *Melendez-Diaz* v. *Massachusetts*, 129 S. Ct. 2527, 2536 (2009). Indeed, "[s]erious deficiencies have been found in the forensic evidence used in criminal trials." *Id.* at 2537. It is therefore critical to ensuring a fair trial that the prosecution not be permitted to claim that random match statistics "identify" the source of the crime scene DNA sample. Numerous courts have warned against such incorrect mathematical calculations.[8]

The State suggests that, at most, the "prosecutor's fallacy" justifies "exclusion of Romero's statement

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[8] *See, e.g., Chischilly*, 30 F.3d at 1157 ("The . . . matching statistic does not represent *source probability*. . . . To illustrate, suppose the . . . evidence establishes that there is a one in 10,000 chance of a random match. The jury might equate this 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*.") (emphases added); *accord United States* v. *Morrow*, 374 F. Supp. 2d 51, 66 (D.D.C. 2005) (prosecutor's fallacy is 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"), *aff'd*, 159 F.3d 37 (1st Cir. 1998); *see also Amicus* Scholars of Forensic Evidence Br.

that there is a 99.99967% chance that [Brown] committed the crime." Pet. Br. 32. But the federal courts should not attempt to imagine a situation where Romero testified differently and then decide whether a trier of fact would have developed a reasonable doubt of Brown's guilt based on that revised testimony. Cf. *id.* at 33 (arguing that, "even if one accepted Mueller's estimate, no rational trier of fact would have changed his mind"). Such an approach would improperly usurp the role of the jury and should be rejected by this Court.

Ironically, while the State argues that the Ninth Circuit "arrogated to itself the ability to determine the truth or falsity of evidence and substituted its own judgment for that of the jurors," *id.* at 35, it is the approach recommended by the State that would result in such an improper situation. By ordering a retrial, the Ninth Circuit determined that the proper body to weigh the DNA evidence should be a jury, not the court.

2. The random match probability between siblings is higher than the general population. Romero testified that there is a 25% chance of two brothers' DNA matching at a single locus and that the chance of two siblings matching at five loci would be 1 in 6,500. J.A. 468-69. Romero's 25% figure is unfounded and, in fact, could be 50% or even 100%, depending on the DNA makeup of Brown's parents. *Id.* at 1582. Specifically, the 25% probability is accurate only if Brown's parents are heterozygotes, sharing only one allele in common. *Id.* Yet no evidence regarding Brown's parents' DNA was presented during trial. In addition, even if the 25% figure were accurate, Romero's probability of 1 in 6,500 is mathematically incorrect—the correct figure

is much lower. See *id.*; see also *Amicus* Scholars of Forensic Evidence Br.

More importantly, Romero improperly indicated that her testimony regarding the probability of a DNA match between brothers would not change if there were more brothers. J.A. 472. In fact, the probability of a match is impacted by the number of brothers. *Id.* at 1582-83. Specifically, the "chance that among two brothers one or more would match is 1 in 132 and the chance that among four brothers one or more would match is 1 in 66." *Id.* at 1583. Brown has four brothers. *Id.* at 1586. At the time of the crime, two brothers were living in Carlin, Nevada, where the crime occurred, and two brothers were living nearby, in Loa, Utah. *Id.*

As the District Court found, a "1 in 66 probability is significantly different than a 1 in 6500 probability." Pet. App. 42a. The jury should be permitted to assess Brown's guilt based on a statistically accurate presentation of the evidence and decide whether a 1 in 66 probability that one of Brown's four brothers also matches the evidence DNA profile, when considered with all the other primarily exculpatory non-DNA evidence, raises reasonable doubt of Brown's guilt. At Brown's trial, the jury's ability to fairly consider the testimony about the sibling match probability was also likely affected by the State's commission of the prosecutor's fallacy. Because the State's expert told the jury, incorrectly, that the DNA evidence identified Brown as the perpetrator of the crime with a 99.999967% level of certainty, the jury was certainly less likely to appreciate the statistical relevance of the expert's subsequent testimony about siblings' DNA (even if it had been statistically accurate). As the Solicitor General points out, "without specialized knowledge of genetics, DNA, and

probability theory, a typical juror would not have a sound reason to reject the accuracy" of Romero's testimony. *Amicus* U.S. Br. 26.

As demonstrated below, the presentation of the DNA evidence violated Brown's due process rights and was not a harmless error.

B. The Admission Of Inaccurate And Misleading DNA Testimony Violated Brown's Due Process Rights.

1. The Ninth Circuit granted habeas relief on due process grounds and ordered a new trial.

Romero's inaccurate and misleading testimony about the DNA evidence and related statements by the prosecutor rendered Brown's trial so fundamentally unfair that it violated his due process rights.[9] The Ninth Circuit correctly held that the admission of the inaccurate DNA testimony resulted in a violation of the Due Process Clause. Pet. App. 19a ("admission of Romero's unreliable and misleading testimony violated [Brown's] due process rights"). The court characterized the testimony "that [Brown] was 99.99967 percent likely to be guilty" as "misleading, as it improperly conflated random match probability with source probability," and as "scientifically flawed" and "false, but highly persuasive, evidence." *Id.* at 16a-17a. Likewise, it found that such testimony "inaccurately minimized the likelihood that [Brown's] DNA would match one of his four brothers' DNA, thus underestimating the

[9] The failure of Brown's counsel to investigate and marshal competing expert evidence with respect to the DNA evidence also violated Brown's Sixth Amendment rights and is the basis for one of his two successful ineffective assistance claims. *See* Pet. App. 46a-50a.

likelihood that one of [Brown's] brothers could have been the perpetrator" and was "misleading because it presented the narrowest interpretation of the DNA evidence." *Id.* at 17a-18a. The court determined that Romero's testimony was inaccurate and ignored logical implications, and that "[a]dmission of this unreliable testimony most certainly rendered the trial fundamentally unfair." *Id.* at 19a.

The Ninth Circuit determined that, without the DNA testimony, the remaining evidence was insufficient to convict Brown, and it remanded the case for a retrial. As noted above, while the Double Jeopardy Clause precludes retrial after a finding of evidentiary insufficiency under *Jackson*, the Ninth Circuit ordered a retrial, which was consistent with the court's view of Brown's claim as a standard due process claim. This remedy is also appropriate under *Lockhart* v. *Nelson*, 488 U.S. 33 (1988): "[W]here the evidence offered by the State and admitted by the trial court—whether erroneously or not—would have been sufficient to sustain a guilty verdict, the Double Jeopardy Clause does not preclude retrial." *Id.* at 34. Here, the inaccurate and misleading testimony regarding the DNA evidence violated Brown's due process rights and should never have been presented to the jury.

2. Because the Nevada Supreme Court failed to provide the fundamentally fair procedures to which Brown was entitled under the Due Process Clause, that court's decision was "contrary to, or . . . an unreasonable application of, clearly established Federal law."

By rejecting Brown's due process argument that the State's presentation of the DNA evidence was

unreliable and rendered his trial unfair, the Nevada Supreme Court's decision was contrary to *Brathwaite*, warranting relief under AEDPA. See 28 U.S.C. § 2254(d)(1).

"The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment." *Estelle* v. *Williams*, 425 U.S. 501, 503 (1976) (citing *Drope* v. *Missouri*, 420 U.S. 162, 172 (1975)); see *Spencer* v. *Texas*, 385 U.S. 554, 563-64 ("Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial."). Certain courtroom practices "are so inherently prejudicial that they deprive the defendant of a fair trial." *Carey* v. *Musladin*, 549 U.S. 70, 72 (2006). To determine whether a particular practice rises to the level of a due process violation, the question is whether the practice presents "an unacceptable risk . . . of impermissible factors coming into play." *Id.* at 75 (internal quotation marks omitted); see also *Lisenba* v. *California*, 314 U.S. 219, 236 (1941) (the "denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice").

The requirement of due process aims to prevent fundamental unfairness in the use of evidence. *Colorado* v. *Connelly*, 479 U.S. 157, 167 (1986) (citing *Lisenba*, 314 U.S. at 236); see *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977) (the court's task is to determine if action complained of violates "conceptions of justice which lie at the base of our civil and political institutions" and "which define 'the community's sense of fair play and decency'") (citations omitted). In some certain circumstances, "exclusion of evidence may be necessary to protect constitutional guarantees." *Connelly*, 479 U.S. at 167.

Under AEDPA, 28 U.S.C. § 2254(d)(1), the Nevada Supreme Court's decision was contrary to the clearly established law set forth in *Brathwaite*. See 432 U.S. at 114. The State presented "identification testimony" that lacked reliability and deprived Brown of due process of law when it argued to the jury that the DNA evidence could identify the source of the crime scene sample. This practice is contrary to the holding of *Brathwaite*, which is clearly established law on the due process requirements associated with testimony that purports to identify the perpetrator of an alleged crime. Under *Brathwaite*, the admission of identification testimony may deprive a defendant of due process of law if it is unnecessarily suggestive and the identification procedure lacks reliability. 432 U.S. at 114; see also *Neil* v. *Biggers*, 409 U.S. 188, 198 (1972) ("It is the likelihood of misidentification which violates a defendant's right to due process . . . ."). Reliability is "the linchpin" in determining the admissibility of such "identification testimony." *Brathwaite*, 432 U.S. at 114.

While the State emphasizes that this Court has not specifically held that the prosecutor's fallacy violates due process, see Pet. Br. 55, "AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'" *Panetti* v. *Quarterman*, 127 S. Ct. 2842, 2858 (2007) (citing *Musladin*, 549 U.S. at 81 (Kennedy, J., concurring)); *Wright* v. *West*, 505 U.S. 277, 309 (1992) (plurality opinion) (Kennedy, J., concurring) ("Where the beginning point is a rule [like *Jackson*] of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent."); see also *United*

States v. *Lanier*, 520 U.S. 259, 271 (1997) (in considering adequacy of notice under due process clause, "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful'") (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987)) (alteration in original). AEDPA does not prohibit "a federal court from finding an application of a principle unreasonable when it involves a set of facts 'different from those of the case in which the principle was announced.'" *Panetti*, 127 S. Ct. at 2858. Therefore, even a general standard like due process can be applied in an unreasonable manner. Cf. *id.*

Here, application of the Court's well-established holding in *Brathwaite*, that admission of unreliable "identification testimony" stemming from an unnecessarily suggestive process violates due process, shows that commission of the prosecutor's fallacy—the particular factual context of this case—is a violation of the Due Process Clause. As such, the Nevada Supreme Court's decision rejecting Brown's due process claim was contrary to clearly established federal law, as determined by this Court. 28 U.S.C. § 2254(d)(1).

The Solicitor General argues that the Due Process Clause does not generally impose thresholds of evidentiary reliability.[10] *Amicus* U.S. Br. 27-28. The question is not, however, whether the admission of

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[10] The State made this same argument in the answer to Brown's amended petition in the District Court. Pet. App. 197a-202a. The District Court rejected this argument and specifically found that the introduction of the tainted DNA evidence violated Brown's right to due process. *Id.* at 37a-39a.

the DNA testimony violated Nevada's evidentiary rules. "It is axiomatic that federal courts may intervene in the state judicial process only to correct wrongs of a constitutional dimension." *Wainwright* v. *Goode*, 464 U.S. 78, 83-84 (1983) (per curiam). Although the admissibility of evidence is ordinarily a matter of state law, it is a legitimate basis for habeas relief "when a state court's evidentiary ruling infringes upon a specific constitutional protection or is so prejudicial that it amounts to a denial of due process." *Turner* v. *Armontrout*, 845 F.2d 165, 169 (8th Cir. 1988). Here, the State's presentation of the DNA evidence does not merely raise "questions concerning the reliability of evidence," as the Solicitor General contends. *Amicus* U.S. Br. 28. The State expert's mischaracterization of the DNA evidence, and the prosecutor's insistence that the testimony demonstrated a 99.999967 percent chance of Brown's guilt, rendered Brown's trial fundamentally unfair, in violation of the Due Process Clause.

The United States argues that this case does not require the Court to resolve "whether the introduction of an expert opinion with no basis could *ever* be so lacking in reliability, and so prejudicial, as to deny a defendant a fair trial." *Amicus* U.S. Br. 31 n.14 (emphasis added) (quoting *Delaware* v. *Fensterer*, 474 U.S. 15, 22-23 (1985)). Brown agrees that the Court need not reach the question reserved in *Fensterer* because the existing, clearly established law in *Brathwaite* shows that Brown was denied a fair trial. As explained above, in *Brathwaite* the Court held that admission of unreliable identification testimony will deny a defendant a fair trial if it stems from an unnecessary and unreliable state practice. Because the State's conduct in pressing the expert to commit the prosecutor's fallacy and introducing

inaccurate DNA testimony is such a practice, the court need not establish any new legal principle in this case. Moreover, the facts in *Fensterer* demonstrate that the issue the Court reserved is not squarely presented by Brown's case. In *Fensterer*, the question presented was whether the state's introduction of expert testimony where the prosecution knew "that its expert would be unable to give the precise basis for his opinion" denied the defendant a fair trial. 474 U.S. at 23. In contrast, Romero never testified that she could not recall the basis of her opinion. Therefore, the reserved issue—whether such expert testimony could ever violate due process—need not be decided by this Court at this time.

The State has never shown, nor could it, that there is any legitimate state purpose behind the admission of expert testimony that is inaccurate because of the "prosecutor's fallacy." The testimony about the DNA evidence, and the prosecution's commentary related to that evidence, was inaccurate, misleading, and inflammatory.[11]

3. The constitutional error of allowing the faulty DNA testimony was not harmless.

By the prosecutor's own admission, in the motion to dismiss Brown's post-conviction petition to the state court, see J.A. 1160-81, Romero's testimony had

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[11] The Solicitor General's brief suggests that source probability evidence can, in some instances, properly serve a role in identifying an individual as perpetrator of a crime. *Amicus* U.S. Br. 4 n.2. However, it does not assert that the evidence *in this case* could properly serve that role. *See id.* And, again, the State concedes in its brief that the prosecutor's fallacy occurred in this case. Pet. Br. 54-55.

a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623.

Expert scientific testimony can be very persuasive to a jury. See *Ake* v. *Oklahoma*, 470 U.S. 68, 81 n.7 (1985) ("[T]estimony emanating from the depth and scope of specialized knowledge is very impressive to a jury."). In particular, testimony about DNA evidence can be extremely powerful and, when it is inaccurately presented, presents a great risk that it will mislead a jury. See *Amicus* NACDL Br. Here the expert's commission of the prosecutor's fallacy and the prosecutor's exploitation of that testimony in arguing to the jury that the DNA evidence proved they could be "99.999967 percent sure" that Brown was guilty, J.A. 730, prevented Brown from receiving a fair trial by effectively directing a guilty verdict. See *In re Winship*, 397 U.S. 358, 364 (1970) ("[T]he Due Process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

The statistics presented to the jury about the probability that Brown's DNA would match one of his brothers was also highly prejudicial as it was inaccurate by nearly a hundred-fold. Romero testified that the probability that Brown and one of his brothers would share a DNA profile at five loci is one in 6,500; the actual sibling match probability is one in 66. Given that the entire case rested upon the power of the DNA evidence, such an error is certainly not harmless.

The harm of the constitutional error is in direct proportion to the weakness of the State's evidence outside of the unconstitutionally admitted evidence. *Brecht*, 507 U.S. at 629. Here, the non-DNA evidence

generally pointed away from Brown as the perpetrator of the crime. Indeed, the prosecution has repeatedly conceded that, without the flawed DNA evidence, there was insufficient evidence to convict Brown. See J.A. 1173 ("there is essentially no argument that, but for the DNA evidence, there was insufficient evidence to convict Brown"); *id.* at 1176 (there "was insufficient evidence to convict the Defendant unless the DNA evidence established his guilt"); *id.* at 1483 ("everybody—I think, concedes that but for the DNA there was reasonable doubt").

The prosecutor's concession is not surprising: Jane never positively identified Brown as the assailant, and the fingerprint discovered at the scene of the crime did not match Brown. *Id.* at 495-98. Brown also did not match Jane's description of her assailant.[12]

Certain non-DNA evidence is particularly relevant to analyzing whether the State expert's inaccurate sibling match probability testimony was harmless. First, Jane repeatedly stated that her assailant reminded her of Brown's brother Trent. *Id.* at 177,

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[12] While the assailant had blond hair and a moustache, Brown had brown hair and no moustache. *Compare* J.A. 503, 515, 520-21 *with id.* at 106, 135, 606. While the assailant was wearing a jacket with a zipper and a watch, Brown was wearing a jacket with no zipper, and was not wearing a watch. *Compare id.* at 516-18 *with id.* at 291, 610, 630. While the assailant was wearing no hat, Brown was wearing a hat. *Compare id.* at 519 *with id.* at 192, 595. While the assailant smelled of cologne, Brown did not. *Compare id.* at 524 *with id.* at 134-35. While Jane said she bit her assailant on the hand, *id.* at 176, 240, Brown showed no evidence of any bite marks only hours after the crime, *id.* at 240. In addition, although Jane was covered in blood after the assault, *id.* at 124, 251, the police found no evidence of blood on Brown or the boots he wore that night. *Id.* at 254, 261-62.

521-22, 526-29. Second, Leah Doke testified that she saw a man on Jane's street on the morning of the crime, wearing a jacket similar to a jacket owned by Brown's brother Travis. *Id.* at 291, 543. In light of this non-DNA evidence, the jurors could have very well determined that a one in 66 chance that one of Brown's brothers also matched the DNA evidence from the crime scene raised reasonable doubt in their minds that Brown committed the crime.

4. Although Brown's sufficiency of the evidence claim was analyzed under the *Jackson* framework in the District Court and Ninth Circuit, it is more properly viewed as presenting a Due Process Clause violation.

The State asserts that the Ninth Circuit's conclusion that "the admission of unreliable evidence might violate the Due Process Clause is . . . beside the point" because Brown presented "a *Jackson* claim." Pet. Br. 32; see also *id.* at 50 n.7 (arguing that "[Brown] raised no constitutional claim with respect to the admissibility of DNA evidence on direct appeal"). The State is wrong. Brown has consistently argued that the DNA evidence was improperly admitted against him, in violation of his due process rights. At the time of Brown's petition for writ of habeas corpus, the practice in the Ninth Circuit was to apply a *Jackson*-style standard to determine the appropriate remedy when the court determined that the admission of evidence was a due process violation. See *Wigglesworth* v. *Oregon*, 49 F.3d 578, 581-82 (9th Cir. 1995) (after concluding that admission of lab technician's report violated petitioner's due process rights, court reviewed the sufficiency of the remaining evidence under *Jackson*, without considering the report).

Following *Wigglesworth*, the district courts within the Ninth Circuit have applied the *Jackson* analytical framework when evaluating other similar constitutional violations. For example, in *Cooper* v. *McGrath*, 314 F. Supp. 2d 967 (N.D. Cal. 2004), the court excluded from its consideration a witness' statement to police that violated the Confrontation Clause in order to determine whether there was sufficient evidence to support a murder conviction. *Id.* at 988-89. The *Cooper* court explained that its reason for conducting the *Jackson* analysis in this context was to determine the appropriate remedy; because "the evidence is determined to be insufficient when the improperly admitted evidence is excluded from the equation but sufficient when the improperly admitted evidence is included in the equation," the court held that "retrial rather than acquittal is the remedy." *Id.* (citing *Lockhart*).

The applicability of *Brecht* and nature of the due process error were not explicitly addressed in the petition for writ of certiorari or brief in opposition, but are arguably encompassed within the scope of the questions presented. Cf. *Caspari* v. *Bohlen*, 510 U.S. 383, 388-90 (1994). In any event, this Court undoubtedly has the discretion to address these issues, particularly when they have been raised and briefed by the Solicitor General and the parties. See *Thigpen*, 468 U.S. 27, 32-33 (1984) (affirming in habeas case on grounds other than those on which certiorari was granted); *Teague* v. *Lane*, 489 U.S. 288, 300 (1989) ("The question of retroactivity with regard to [the] fair cross section claim has been raised only in an amicus brief."); see also *Ohio* v. *Robinette*, 519 U.S. 33, 38 (1996) (permitting respondents to defend a judgment on grounds not raised in the brief in

opposition); *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61, 75 n.13 (1996) (same).

Brown agrees with the Solicitor General that *Jackson* does not provide the appropriate framework for analyzing Brown's due process claim, but the Court may and should affirm the holding that the presentation of the DNA evidence at trial violated Brown's due process rights and was not harmless error, warranting habeas relief. See *Thigpen*, 468 U.S. at 32-33. As described above, applying *Jackson* only served to set a higher standard of proof for Brown. Brown's claim should have been resolved by asking "whether the . . . error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht*, 507 U.S. at 623 (citing *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946)). As explained above, this standard is easily satisfied.

C. The Mueller Report Was Properly Admitted By The District Court.

The Mueller report is not "new evidence," as it has been characterized by the State. Rather, the report helped explain the DNA information that was presented to the Nevada Supreme Court and was before the federal District Court. The report was appropriately admitted to inform Brown's entire habeas petition, which raised multiple grounds for relief. J.A. 1595-98; see also *id.* at 1615 (finding exhibits relevant to both the sufficiency of the evidence claim *and* an ineffective assistance claim). 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.

District courts may, and commonly do, expand the record in habeas cases "to clarify the relevant facts." *Vasquez* v. *Hillery*, 474 U.S. 254, 258 (1986); see 28 U.S.C. foll. § 2254, Rules Governing Section 2254 Cases in the United States District Courts, R. 7(a) ("[T]he judge may direct the parties to expand the record by submitting additional materials relating to the petition."); see also *Boumediene* v. *Bush*, 128 S. Ct. 2229, 2270 (2008) ("Federal habeas petitioners long have had the means to supplement the record on review, even in the postconviction habeas setting."); *Lonchar* v. *Thomas,* 517 U.S. 314, 327 (1996) ("The [Habeas Corpus] Rules . . . afford the district court substantial discretion . . . to order expansion of the record to facilitate a disposition on the merits . . . ."); *Schlup* v. *Delo*, 513 U.S. 298, 308-10 & n.18 (1995) (approvingly discussing petitioner's request to supplement the record); *Herrera*, 506 U.S. at 445 (Blackmun, J., dissenting on other grounds) ("It is common to rely on affidavits at the preliminary-consideration stage of a habeas proceeding."); *Keeney* v. *Tamayo-Reyes*, 504 U.S. 1, 14 (1992) (O'Connor, J., dissenting) (noting that the characteristic functions of habeas include introduction of documentary evidence). In *Vasquez*, this Court made clear that "[w]e have never held that presentation of additional facts to the district court, pursuant to that court's directions, evades the exhaustion requirement when the prisoner has presented the substance of his claim to the state courts." 474 U.S. at 257-58.

In *Vasquez*, this Court considered whether the federal district court's expansion of the state court record to include additional statistics altered Vasquez's claim. *Id.* at 257-60. In his state court proceedings, Vasquez had raised an equal protection challenge to the discriminatory selection of the grand

jury. *Id.* 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's trial and directed the parties to present their views regarding the application of statistical probability analysis to the facts of the case. *Id.* This Court rejected the argument that the district court's order had drastically altered Vasquez's claim, thereby rendering it unsuitable for review without prior consideration before the state courts, explaining that the statistical estimates added "nothing 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 260.

The Mueller report similarly supplements and clarifies Brown's DNA claims by further explaining why the statistics presented by Romero were inaccurate, incomplete, and misleading. Like in *Vasquez*, where the Court determined the "supplemental evidence presented by respondent did not fundamentally alter the legal claim already considered by the state court[]," *id.*, the Mueller report merely clarifies the complicated DNA issues that Brown raised before the state court.

The State emphasizes that *Vasquez* is a pre-AEDPA case and doubts its continuing viability "given the requirements of 28 U.S.C. § 2254(e)(2)."[13]

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[13] The State also argues that expanding the record was improper for a *Jackson* claim because *Jackson* limits review to

Pet. Br. 45. However, the requirements of AEDPA are consistent with the *Vasquez* holding and, regardless, are satisfied here.

Under 28 U.S.C. § 2254(e)(2), as amended by AEDPA, if a habeas petitioner shows that he exercised diligence in developing the factual basis for his claims in state court, he need not make any additional showing to expand the record. *Williams* v. *Taylor*, 529 U.S. 420, 431-37 (2000). Here, Brown objected to the DNA evidence during the state court proceedings and raised the issue on direct appeal, including statistical errors in the prosecution expert's testimony. Pet. App. 111a-21a; see *id.* at 122a-29a. The Nevada Supreme Court rejected the argument on the merits, thus leaving no avenue for the claim to be relitigated. See, *e.g.*, *Hall* v. *State*, 435 P.2d 797, 799 (Nev. 1975) ("the doctrine of law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made"); see also *Hogan* v. *Warden*, 860 P.2d 710, 715 (Nev. 1993) (rejecting argument in habeas proceedings that had been raised on direct appeal). Brown thus was diligent in developing the facts related to his due process claim.

Though the State faults Brown for not introducing evidence from Mueller at the evidentiary hearing in state court on Brown's post-conviction petition, see Pet. Br. 46, Brown was not required to do so because he had already presented the factual basis for his due

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the trial record. Pet. Br. 39. However, as explained above, Brown is not asserting a *Jackson* claim, but rather a due process claim based on the State's presentation of highly suggestive and unreliable DNA testimony that purported to "identify" the source probability of the crime scene DNA sample.

process claim in state court.[14] The Mueller report merely clarified and explained those same facts.

Brown provided the factual basis for his due process claim in his opening and reply briefs on direct appeal to the Nevada Supreme Court.[15] Brown devoted an entire section of his opening brief to discuss: "Was the DNA Evidence Improperly Admitted Into Evidence?" J.A. 842-50. Brown noted the challenges with properly presenting statistics about DNA evidence, especially faulty comparisons to the general population, and pointed to the danger of putative experts equating statistical probabilities with guilt. See, *e.g.*, *id.* at 848 ("[T]he expert cannot talk about 'matching' DNA . . . or give his or her opinion about the strength of the DNA evidence."). In the reply brief, Brown further detailed why the DNA evidence was improperly admitted.[16] *Id.* at 893-94 n.1, 897-909.

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[14] The State made this very point during Brown's post-conviction litigation. J.A. 1167-68 (contending that the Nevada Supreme Court had reviewed the admission of the DNA testimony for plain error and rejected it on the merits and that decision precluded review under Nevada's law of the case doctrine). The state trial court refused to hear any objection to or conduct an evidentiary hearing on the DNA claim on law of the case grounds. *Id.* at 1497-98.

[15] Brown first raised objections to the presentation of the DNA evidence during trial. *See*, *e.g.*, *id.* at 461.

[16] Brown highlighted the prejudicial testimony by Romero:

> 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%. That is improper exaggeration and source error, according to the experts. It is also extremely prejudicial to the accused.

Id. at 907; *see also id.* at 904 ("When a jury is told that the 'chances that the DNA in the panties and the blood is not [Brown's] is 1 in 3 million' and that is 3 times the entire

Although the State attacks Mueller's expertise and "biases" at length, see Pet. Br. 52-54, it does not dispute any of Mueller's conclusions. Nor did it ever present any evidence to contradict Mueller in any of Brown's previous state or federal litigation. In fact, the State admits that the prosecution's expert and the prosecutor committed the "prosecutor's fallacy." See *id.* at 54 ("Romero committed this fallacy in her testimony."); *id.* at 55 ("When the prosecutor confused the concepts of comparison and identification in that question, he committed the 'prosecutor's fallacy.'").

In light of these arguments, the federal District Court correctly found that Brown had "presented a comprehensive discussion of the DNA evidence's deficiencies" in state court and permitted consideration of the Mueller report to clarify Brown's habeas petition. J.A. 1597-98.

D. Brown Exhausted The Remedies Available In The Nevada Courts.

The State argues that the admission of the Mueller report has served to render Brown's due process

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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.") (emphasis omitted).

Brown also pointed out 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.*'" *Id.* at 893-94 n.1 (citation omitted). Brown emphasized that this "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 6,500!" *Id.* (emphasis omitted).

claim unexhausted. Pet. Br. 47. However, "[f]orm would indeed triumph over substance were [the Court] to allow the question of exhaustion to turn on whether a federal judge had relied on educated conjecture or has sought out a more sophisticated interpretative aid to accomplish the same objective." *Vasquez*, 474 U.S. at 260. As explained above, the Mueller report clarified the complicated issues presented by the DNA claims that Brown raised in state court. The Mueller report merely helped the federal District Court interpret Brown's previously exhausted due process claim.

Brown has consistently claimed that, in violation of due process, he was convicted based on inaccurate and misleading DNA testimony, without which there was insufficient evidence to sustain his conviction. As described above, in state court, Brown specifically challenged Romero's statements about the DNA evidence that improperly conflated the likelihood of a random DNA match with source probability, as well as her testimony about the probability that one of Brown's brothers would share the same DNA profile as Brown.

In his opening brief to the Nevada Supreme Court, Brown argued that, during his trial, there was a "total failure of the DNA evidence to be established as trustworthy and reliable." J.A. 850. Brown expanded on this argument in his reply brief, in response to the State's brief.[17] See *id.* at 897-909. Brown argued

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[17] Although the State emphasizes that Brown's reply brief offered a more detailed due process argument than his opening brief, his arguments responded to the State's brief. For example, he was responding to the State's argument that there was "undisputed testimony that the probability that someone other than Brown committing the act in the little town of Carlin was one in three million using the conservative ceiling

that the DNA statistics presented at trial "replac[ed] the jury's function of weighing *all of the evidence* at trial with considering instead the *probability of guilt*." *Id.* at 904 (emphasis in original). Brown argued that Romero's testimony that there was a 99.999967 percent of likelihood Brown was the source of the DNA at the crime scene was "improper exaggeration and source error" and "extremely prejudicial to the accused." *Id.* at 906-07. He specifically explained why this error rendered his trial unfair: "Exaggeration of the odds of a defendant being the source of the evidence, *and thus turning a comparison into an identification*, are all too common and egregious because they lead jurors to conclude that there is no possibility that someone other than the defendant is the source of the DNA evidence." *Id.* (emphasis in original).[18] Brown therefore presented

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principle." J.A. 877. Moreover, the Nevada Supreme Court has repeatedly considered issues first raised in reply briefs. *See, e.g., Thomas* v. *State*, 148 P.3d 727, 735 (Nev. 2006) (noting rule that issue could not be raised for the first time in reply brief but addressing it anyway), *cert. denied*, 128 S. Ct. 1061 (2008); *Weaver* v. *State*, 117 P.3d 193, 198-99 (Nev. 2005) (per curiam) (same); *Ducksworth* v. *State*, 942 P.2d 157, 165 (Nev. 1997) (per curiam) ("[W]e are not required to consider the issue. However, because of the serious nature of the crimes and length of the sentence imposed, we will reach the issue."); *Dieleman* v. *Sendlein*, 670 P.2d 578, 579 (Nev. 1983) (per curiam) (same).

[18] Brown cited two cases that show presenting statistics to the jury that purport to prove a probability of guilt is patently prejudicial. *See* J.A. 905 (citing *People* v. *Collins*, 438 P.2d 33, 38 (Cal. 1968) (finding the use of mathematical probability statistics injected "fundamental prejudicial errors" which distracted the jury from its function), and *United States* v. *Gwaltney*, 790 F.2d 1378, 1382-83 (9th Cir. 1986) (finding that a mathematical probability was okay because it did not predict the "odds" of guilt, thereby implying that any mathematical probability that did predict the odds of guilt would be impermissible)).

this claim to the Nevada courts, exhausting it for purposes of § 2254.

Brown's detailed arguments regarding the DNA evidence in his direct appeal show that, contrary to the State's assertions, the explanations provided in the Mueller report were not a "significantly different and more substantial claim" than what Brown raised before the state court. See Pet. Br. 48. The State cites *Demarest* v. *Price*, 130 F.3d 922 (10th Cir. 1997), and *Aiken* v. *Spalding*, 841 F.2d 881 (9th Cir. 1988) (per curiam), but these cases are not analogous. In *Demarest* and *Aiken*, experts questioned the state's evidence first in federal court, *Demarest*, 130 F.3d at 930; *Aiken*, 941 F.2d at 883; here, Brown questioned the State's evidence first in state court. As demonstrated above, the factual basis for the Mueller report was contained within Brown's state court claims.[19]

The Nevada Supreme Court considered and rejected Brown's argument that the State's presentation of the DNA evidence violated due process, rendering the claim exhausted as required by § 2254(c). See *supra* note 14. Despite Brown's arguments that the DNA testimony was unreliable and prejudicial, the court referenced the DNA evidence and held there was sufficient evidence to convict him. Pet. App. 83a. Notably, even when constitutional issues are raised for the first time on appeal, the Nevada Supreme Court may address

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[19] Brown's attorney also objected to the DNA evidence at trial, although his objection was not effectively stated or argued. J.A. 460-61 (objecting to prosecutor's request that Romero agree that "the likelihood that the DNA extracted from the semen in the panties and the DNA extracted from the blood that the likelihood that it's not Troy Brown, that it's not a match is .000033" as not scientifically valid and thus not relevant).

them;[20] in fact the court has held that when an "appellant's contentions are grounded on constitutional questions this court is *obligated* to consider them on appeal." *Hardison* v. *State*, 437 P.2d 868, 870 (Nev. 1968) (emphasis added). Having had his claim rejected by the state's highest court on direct appeal, Brown was left without a remedy in Nevada, thereby fulfilling AEDPA's requirements for exhaustion.

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[20] *See, e.g., Somee* v. *State*, 187 P.3d 152, 159 (Nev. 2008) ("this court has the discretion to review constitutional or plain error"); *Grey* v. *State*, 178 P.3d 154, 161 (Nev. 2008) ("Failure to object below generally precludes review by this court; however, we may address plain error and constitutional error *sua* sponte."); *Walch* v. *State*, 909 P.2d 1184, 1189 (Nev. 1996) (waiver occurs when "asserted error is neither plain nor constitutional in magnitude"); *Sterling* v. *State*, 834 P.2d 400, 402 (Nev. 1992) (per curiam) ("we may address plain error and constitutional error *sua sponte*"); *Emmons* v. *State*, 807 P.2d 718, 723 (Nev. 1991) (per curiam) ("we may address plain error or issues of constitutional dimension *sua sponte*), *abrogated on other grounds*, *Harte* v. *State*, 13 P.3d 420 (Nev. 2000); *McCullough* v. *State*, 657 P.2d 1157, 1158 (Nev. 1983) (per curiam) ("when constitutional questions are raised on appeal, we have the power to address them"); *Dias* v. *State*, 601 P.2d 706, 708 (Nev. 1979) (per curiam) ("when constitutional questions are raised this court has the power to address them").

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed. Alternatively, the judgment should be vacated and the case remanded to the Ninth Circuit for analysis under *Brecht*, or the writ of certiorari should be dismissed as improvidently granted.

Respectfully submitted,

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July 17, 2009