

08-559 OCT 24 2008

No. _____ OFFICE OF THE CLERK

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

PETITION FOR WRIT OF CERTIORARI

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October 24, 2008

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 non-record evidence to determine the reliability of testimony and evidence given at trial?

PARTIES TO THE PROCEEDINGS

There are no parties to the proceedings other than those listed in the caption.

The Petitioners are E.K. McDaniel, Warden and the Attorney General of the State of Nevada. Craig Farwell was the previous Warden listed as the Appellant in the Ninth Circuit. Fed. R. App. P. 43(c); Sup. Ct. R. 35(3).

The Respondent is Troy Brown.

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PETITION FOR A WRIT OF CERTIORARI

The Warden files this petition for writ of certiorari seeking an order vacating the June 3, 2008 Opinion and Order of the United States Ninth Circuit Court of Appeals in *Brown v. Farwell*, 525 F.3d 787 (9th Cir. 2008). The Court of Appeals determined that there was insufficient evidence presented during a jury trial to support the defendant's convictions for sexual assault. Contrary to the requirements of *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Herrera v. Collins*, 506 U.S. 390, 402 (1993); *Marshall v. Lonberger*, 459 U.S. 422, 434-35 (1983); and 28 U.S.C. § 2254(d)(1), which limit the analysis to record evidence and require the court to consider the record evidence in the light most favorable to the prosecution, the Court of Appeals considered non-record evidence and newly discovered evidence, excluded record evidence, discounted record evidence, analyzed only part of the trial record evidence and resolved conflicting testimony and credibility questions in the light most favorable to the federal habeas petitioner.

OPINIONS BELOW

The opinion of the Court of Appeals is published at 525 F.3d 787 (9th Cir. 2008). Appendix A. The Order of the United States District Court granting the petition is unpublished. The Nevada Supreme Court's opinion is published at 934 P.2d 235 (Nev. 1997). Appendix F.

JURISDICTION

The federal district court reviewed the Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254. Appendix C. Following the grant of the petition, the Warden appealed to the United States Court of Appeals for the Ninth Circuit. Appendix A. The Ninth Circuit, in an opinion filed May 5, 2008, and amended on July 21, 2008, affirmed the grant of the petition. However, because it affirmed the grant of habeas relief with respect to a claim of insufficient evidence, it did not reach claims of ineffective assistance of counsel, *Id.* The Warden filed a petition for rehearing and suggestion for rehearing en banc which was denied on July 30, 2008. Appendix G. This petition for writ of certiorari is filed within ninety (90) days of the judgment of the circuit court. 28 U.S.C. § 2101(c). See also Sup. Ct. R. 13(1), (3) and 20. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The statutes involved are 28 U.S.C. § 1254(1); 28 U.S.C. § 2254; 28 U.S.C. § 2254(d)(1); 28 U.S.C. § 2254(e)(2) and NRS 200.366.

STATEMENT OF THE CASE

A jury convicted Troy Don Brown (Brown) of two counts of sexual assault on a child under the age of 14, violations of NRS 200.366, and one count of abuse or neglect of a child resulting in substantial bodily harm. Appendix F at 69a.

In his direct appeal, the Nevada Supreme Court rejected Brown's contention that there was insufficient evidence to convict. *Brown v. State*, 934 P.2d 235, 277-285 (Nev. 1997). Appendix F at 82a-83a. The Nevada Supreme Court vacated the third conviction and remanded for resentencing on the second sexual assault charge. Appendix F at 96a. Brown was resentenced to life with the possibility of parole after ten years on both sexual assault counts, to run consecutively. Appendix E.

Subsequently, Brown filed an amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in which he claimed that there was insufficient evidence to convict him. Appendix K at 147a-163a.

The Warden moved to dismiss ground one of the amended petition which alleged insufficiency of the evidence as unexhausted because Brown attacked the reliability of the DNA evidence used to convict him. Appendix L at 176a-184a. Brown opposed the motion and the federal district court denied the motion. Appendix D.

The Warden answered the petition. Appendix M. Brown filed a motion to expand the record pursuant to Rule 7 of the Rules Governing Section 2254 Cases to include non-record evidence. Appendix N. The Warden opposed the motion arguing that expansion was not permissible under either Rule 7 or 28 U.S.C. § 2254(e)(2). Appendix O.

The federal district court permitted expansion of the record and considered the non-record evidence presented to determine that the testimony of a witness

and evidence during the trial was unreliable and thereafter determined that there was insufficient evidence to convict Brown. Appendix C at 37a-46a. As a result, the federal district court failed to review the evidence in the light most favorable to the prosecution, excluded from its analysis record evidence it found unreliable, reassessed the credibility of witnesses and reweighed the evidence contrary to *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979), and *Herrera v. Collins*, 506 U.S. 390, 402 (1993).

The Warden appealed to the Ninth Circuit Court of Appeals. Appendix A. The Court of Appeals, conducting its analysis pursuant to 28 U.S.C. § 2254(d)(1), affirmed the district court's decision to supplement the record with non-record evidence. Appendix A at 9a-21a. The Court of Appeals also considered the non-record evidence and, like the district court, failed to review the record evidence in the light most favorable to the prosecution, excluded from its analysis record evidence it found unreliable, reassessed the credibility of witnesses and reweighed the evidence, contrary to *Jackson v. Virginia*, 443 U.S. 307, 318-319 (1979), and *Herrera v. Collins*, 506 U.S. 390, 402 (1993).

The Warden filed a petition for rehearing and a suggestion for rehearing en banc. Appendix G. The Court of Appeals denied the petition. Appendix G.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' opinion conflicts with this Court's precedent, in particular, *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979), and *Herrera v. Collins*,

506 U.S. 390, 402 (1993). Consideration by the Court is necessary to secure and maintain uniformity of the Court's decisions. The Court of Appeals' opinion conflicts with United States Supreme Court precedent as stated below:

1. The Court of Appeals' decision conflicts with controlling United States Supreme Court precedent when it performed a sufficiency-of-the-evidence analysis by expanding the record, excluding some evidence, and rather than reviewing all of the evidence in the light most favorable to the prosecution, analyzed only part of the evidence and resolved conflicting testimony and credibility questions in the light most favorable to the Brown, contrary to *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Herrera v. Collins*, 506 U.S. 390, 402 (1993); and *Marshall v. Lonberger*, 459 U.S. 422, 434-35 (1983).

2. The Court of Appeals' decision conflicts with United States Supreme Court precedent because it expanded the record with newly discovered/developed evidence and considered the evidence in its resolution of the *Jackson v. Virginia* claim contrary to *Herrera v. Collins*, 506 U.S. 390, 402 (1993). See also *Holland v. Jackson*, 542 U.S. 649, 652-54 (2004); *Williams v. Taylor*, 529 U.S. 420 (2000); and *Williams v. Taylor*, 529 U.S. 362, 375-90 (2000).

3. The Court of Appeals' decision conflicts with United States Supreme Court precedent when it found that on appeal of the District Court's grant of habeas relief, "However, it is Respondents' burden to establish guilt beyond a reasonable doubt for each and every element of the offense." Federal habeas actions are not

retrials and do not impose that burden on the state. *Williams v. Taylor*, 529 U.S. 362, 375-90 (2000); *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979).

4. The Court of Appeals' decision conflicts with controlling United States Supreme Court precedent when it found, without any citation or distinction, that the state court erroneously applied the "reasonable" juror standard of *Kazalyn v. State*, 825 P.2d 578, 581 (Nev. 1992), rather than the "rational" juror standard of *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979), to its sufficiency of the evidence analysis. *Early v. Packer*, 537 U.S. 3, 8-11 (2002).

5. The Court of Appeals' decision conflicts with United States Supreme Court precedent because it mixed and matched legal theories and factual allegations presented in the state courts to find exhausted a claim and factual basis that was never presented to the state courts. *Picard v. Connor*, 404 U.S. 270, 275-78 (1971); *Duncan v. Henry*, 513 U.S. 364, 366 (1995) (per curiam); and *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996).

ARGUMENT

Over a well-reasoned dissent, the Court of Appeals affirmed the District Court's judgment granting the petition for writ of habeas corpus on the grounds that there was insufficient evidence to sustain Brown's convictions, in violation of due process. Appendix A at 9a-21a. This petition for writ of certiorari should be granted because the state court record provided ample support to find that the Nevada Supreme Court's decision was in accordance with Federal law as

determined by the United States Supreme Court and that, in light of the evidence presented in the State court proceedings, the Nevada Supreme Court reasonably determined that the evidence was sufficient to sustain Brown's conviction.

A. The Court of Appeals' decision conflicts with United States Supreme Court precedent because it performed a sufficiency-of-the-evidence analysis by considering non-record evidence, excluding some evidence, and analyzing other evidence in a light most favorable to Brown.

Jackson requires that:

Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence is to be considered in the light most favorable to the prosecution.*

Jackson v. Virginia, 443 U.S. 307, 318 (1979) (emphasis added). The Court of Appeals violated the *Jackson* standard in several respects. First, it expanded the record, considered non-record evidence, and excluded evidence in its analysis that it deemed unreliable.¹

¹The Warden reiterates that Brown never raised a constitutional reliability-of-the-evidence claim in state court.

Second, rather than consider the evidence in the light most favorable to the prosecution, the panel majority reweighed the evidence and considered it in a light most favorable to the defense. *Brown v. Farwell*, 525 F.3d 787, 795-98 (9th Cir. 2008). Appendix A at 9a-21a.

The Ninth Circuit wisely noted in another case:

Jackson cautions reviewing courts to consider the evidence “in the light most favorable to the prosecution.” 443 U.S. at 319, 99 S.Ct. 2781. ***If confronted by a record that supports conflicting inferences, federal habeas courts “must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.”*** Id. at 326, 99 S.Ct. 2781. ***A jury’s credibility determinations are therefore entitled to near-total deference under Jackson.***

Bruce v. Terhune, 376 F.3d 950, 957 (9th Cir. 2004) (*per curiam*) (internal quotations omitted) (emphasis added).

In addition, this Court has held:

The Court of Appeals’ reliance on respondent’s testimony, discussed above, and the fact that “the state produced no contrary evidence,” is quite wide of the mark for purposes of deciding whether factual findings are fairly supported by the record. 28 U.S.C. § 2254(d) gives federal

habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them.

Marshall v. Lonberger, 459 U.S. 422, 434-35 (1983).

Despite the foregoing, the District Court and the Court of Appeals resolved the inconsistencies and contrary testimony in favor of Brown. *Brown*, 525 F.3d at 795-98; Appendix A at 9a-21a.

Further, this Court has made it clear that “the sufficiency of the evidence review authorized by *Jackson* is limited to ‘record evidence.’ *Jackson* does not extend to non-record evidence, including newly discovered evidence.” *Herrera v. Collins*, 506 U.S. 390, 402 (1993) (citation omitted). Both the federal district court and Court of Appeals relied exclusively on non-record evidence to find the DNA evidence presented at trial in this case unreliable.

B. The Court of Appeals’ decision conflicts with United States Supreme Court precedent by expanding the record with newly discovered evidence.

The Court of Appeals found that Brown presented a comprehensive discussion of the DNA evidence before the Nevada Supreme Court. *Brown*, 525 F.3d at 793-94; Appendix A at 12a. This finding was based on the “numerous challenges to the DNA evidence raised in Troy’s state court briefs.” *Id.* Therefore, reasoned the Court of Appeals, Brown’s attempts were reasonable and therefore diligent. In support, the

Court of Appeals cited *Williams v. Taylor*, 529 U.S. 420, 435 (2000). As *Williams* makes clear, however:

Diligence for purposes of the opening clause 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; ...

Id at 435 (emphasis added). However, Brown, who was represented by counsel, never raised a *claim* that the DNA evidence was unreliable. Brown raised a claim that he was entitled to a hearing before such scientific evidence could be admitted. Appendix I at 112a-113a; 116a; 120a; 121a. Further, Brown only argued about the DNA statistical evidence at the time of his sentencing. He argued that evidence made his sentencing improper. Appendix J at 125a-128a. Thus, any claim that Brown exercised due diligence in presenting this evidence in support of a reliability of the evidence claim state court is refuted by the record. As a result, the Court of Appeals' opinion is in conflict with 28 U.S.C. §2254(e)(2), *Holland v. Jackson*, 542 U.S. 649, 652-54 (2004); and *Williams v. Taylor*, 529 U.S. 420 (2000).

C. The Court of Appeals' decision conflicts with United States Supreme Court precedent because it found the Nevada Supreme Court applied an incorrect standard for determining sufficiency of the evidence.

Review under *Jackson* asks "whether, after viewing the evidence in the light most favorable to the

prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson*, 443 U.S. at 318.

The Nevada Supreme Court reviewed the claim citing to *Kazalyn v. State*, 825 P.2d 578, 581 (Nev. 1992), *Kazalyn* asks “whether the jury, acting reasonably, could have been convinced of the defendant’s guilt beyond a reasonable doubt. *Id.* at 581 (citations omitted). Without citation or explanation, the Court of Appeals found a distinction between a “reasonable” juror and a “rational” juror. *Brown*, 525 F.3d at 794-95. Appendix A at 13a-14a. The two terms are synonymous and any such distinction is contrary to usage by the United States Supreme Court, *Schlup v. Delo*, 513 U.S. 298, 327 (1995), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); contrary to usage by the Ninth Circuit *Juan H. v. Allen*, 408 F.3d 1262, 1275 (9th Cir. 2005) (“In our Circuit, we have held that a writ of habeas corpus should have been granted to a petitioner who demonstrated that no *reasonable* jury could have found that false statements given under oath were material to an underlying court case, an element essential to sustaining his conviction for perjury.”) (emphasis added); contrary to usage by the Fifth Circuit in *Dupuy v. Cain*, 201 F.3d 582, 589 (5th Cir. 2000) (“Obviously, the evidence is sufficient for a *reasonable* juror to find, beyond a reasonable doubt, that Dupuy intended to kill Normand.”) (emphasis added), and *U.S. v. Marek*, 238 F.3d 310, 314 (5th Cir. 2001) (“A panel of this Court concluded that a *reasonable* jury could have found that (1) the fortune teller had participated in international telephone calls as Cisneros’s agent, and (2) those calls were sufficiently connected to be ‘in furtherance’ of

that crime.”) (emphasis added); the Tenth Circuit in *Berryhill v. Calpone*, 168 Fed.Appx. 253, 255 (10th Cir. 2006) (“Based on the record, we agree with the District Court and the OCCA that a *reasonable* juror could have found proof beyond a reasonable doubt that Berryhill manufactured methamphetamine.”) (emphasis added); and the Eleventh Circuit in *Davis v. Kemp*, 829 F.2d 1522, 1532 (11th Cir. 1987) (“Although this may be true, a *reasonable* juror could have found beyond a reasonable doubt that the victim was raped.”) (emphasis added); and contrary to the usage in Black’s Law Dictionary, Sixth Edition, The American Heritage Dictionary, Second College Edition, and Webster’s Dictionary and Thesaurus, 2002 Edition, all of which use the terms synonymously.

Similarly, the Court of Appeals found a distinction between *Jackson’s* “trier of fact could have found the essential elements of the crime beyond a reasonable doubt” requirement and the Nevada Supreme Court’s “could have been convinced of the defendant’s guilt beyond a reasonable doubt.” State court judges are presumed to know and follow the law. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). Federal judges must presume that a state judge applied the appropriate legal standards. *Townsend v. Sain*, 372 U.S. 293, 314-15 (1963), overruled on other grounds by *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).

Brown cannot reasonably argue that the Nevada Supreme Court did not realize that a finding of guilt beyond a reasonable doubt necessarily requires a finding of each element of the offense beyond a reasonable doubt.

AEDPA does not require express citation to federal law and the Nevada Supreme Court complied with the standard as set forth in *Jackson*. Because the standard employed by the Nevada Supreme Court was identical to that employed in *Jackson*, except as to exact verbiage, the Court of Appeals' opinion is contrary to *Early v. Packer*, 537 U.S. 3, 8-11 (2002), and 28 U.S.C. § 2254(d).

D. The Court of Appeals' decision conflicts with United States Supreme Court precedent when it found that on appeal of the District Court's grant of habeas relief, "However, it is Respondents' burden to establish guilt beyond a reasonable doubt for each and every element of the offense, a burden that Respondents not carried here." *Brown v. Farwell*, 525 F.3d 787, 797 (9th Cir. 2008)

Federal habeas actions are not retrials and do not impose the same burden on the state. *Williams v. Taylor*, 529 U.S. 362, 375-90 (2000). In its opinion, the Court of Appeals stated:

On appeal, Respondents argue that there is much evidence to support the conviction. However, it is Respondents' burden to establish guilt beyond a reasonable doubt for each and every element of the offense, a burden that Respondents have not carried here.

Brown, 525 F.3d at 797; Appendix A at 19a.

This new standard imposed by the Court of Appeals is contrary to the clear language of 28 U.S.C. §2254, *Williams v. Taylor*, 529 U.S. 362, 375-90 (2000); *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); and the very purposes for which AEDPA was enacted.

The purpose of AEDPA's habeas corpus reforms was to place "more, rather than fewer, limits on the power of federal courts to grant writs of habeas corpus to state prisoners." *Miller-el v. Cockrell*, 537 U.S. 322, 337 (2003). See *Woodford v. Garceau*, 538 U.S. 202, 206-07 (2003); *Duncan v. Walker*, 533 U.S. 167, 178 (2001); and 28 U.S.C. §2254(d) provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to 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; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Further, 28 U.S.C. § 2254(e)(1) provides:

In a proceeding instituted by an application for a writ of habeas corpus by a person in custody

pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

The Court of Appeals has shifted the burden to the Warden to establish guilt beyond a reasonable doubt for each and every element of the offense in a federal habeas action. No known authority supports the Court of Appeals' conclusion that the Warden has the same burden on federal habeas review that it undeniably has at trial. Thus the Court of Appeals' opinion is contrary to AEDPA and the numerous Supreme Court opinions interpreting AEDPA.

E. The Court of Appeals' decision conflicts with United States Supreme Court precedent because it mixed and matched legal theories and factual allegations presented in the state courts to find exhausted a claim and factual basis that were never presented to the state courts.

The requirements for exhaustion are clear. A federal court cannot entertain a petition for a writ of habeas corpus unless the petitioner has exhausted available and adequate state court remedies with respect to each of the claims contained in the petition. 28 U.S.C. §§ 2254(b), (c); *Rose v. Lundy*, 455 U.S. 509, 510 (1982). Exhaustion requires a petitioner to present both a factual basis *and* underlying theory in order to satisfy the requirements for exhaustion. *Gray*

v. Netherland, 518 U.S. 152, 162-163 (1996); *Picard v. Connor*, 404 U.S. 270, 275-278 (1971).

On direct appeal, Brown did not present the factual basis and underlying theory for the sufficiency of the evidence claim that he presents in federal court. In his opening brief on direct appeal, the full extent of Brown's sufficiency of the evidence argument was:

Given the plethora of evidence that the assailant was not Troy Brown, including 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.

Appendix I at 120a. The claim clearly possesses no factual support for Brown's reliability claim. Even when examining the other claims, it is clear that Brown did not complain of the reliability of the DNA evidence as he did in federal court. In fact, it was not the nature of the evidence at all that Brown complained about. On direct appeal, Brown made a procedural argument that a hearing should have been conducted before the DNA evidence was admitted. Appendix I at 112a-120a. This is the claim that the Nevada Supreme Court addressed: "Troy claims on appeal that ...(2) the DNA evidence was improperly

admitted because no evidentiary hearing was held.” Appendix F at 82a.

No claim was ever presented, and the Nevada Supreme Court never considered whether the DNA evidence was unreliable.

To the extent Brown argued in the Nevada Supreme Court any statistical error in the presentation of the DNA evidence due to the presence of his brothers, it was in footnote 1 of his reply brief on direct appeal. Appendix J at 127a. However, this failed to exhaust Brown’s claim. First, reply briefs are limited to answering any new matters set forth in the opposing brief. N.R.A.P. 28(c). Reply briefs may not present new issues and such issues are not considered by the Nevada Supreme Court. *State v. Bennett*, 81 P.3d 1, 13 (Nev. 2003). Second, the only issue this evidence was presented to support was Brown’s *claim that the sentencing was improper*. Brown never presented this evidence to the Nevada Supreme Court to support a *claim that the DNA evidence was unreliable*.

Thus, Brown never presented both a factual basis *and* underlying theory in order to satisfy the requirements for exhaustion.

Respectfully Submitted,

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