No. 08-559

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2008

E.K. McDANIEL, Warden, Petitioners,

v.

TROY DON BROWN, Respondent.

On Petition For A Writ of Certiorari
To the United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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E.K. McDANIEL, Warden, Petitioners,

v.

TROY DON BROWN, Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondent, Troy Don Brown, asks for leave to file the attached Petition for Writ of Certiorari, without prepayment of costs and to proceed in forma pauperis. Respondent has been granted leave to so proceed in the District Court and in the United States Court of Appeals. No affidavit is attached, inasmuch as the District Court appointed counsel for Respondent under the Criminal Justice Act of 1964.

Respectfully submitted,

Paul G. Turner

PAUL G. TURNER
Assistant Federal Public Defender
Counsel for Respondent

QUESTIONS PRESENTED

1. Whether The District Court And Court Of Appeals Reweighed The Conflicting Evidence In A Manner Inconsistent With *Jackson v. Virginia* In Light Of The Prosecutor's Concession That Such Evidence Was Insufficient To Convict The Defendant And Raised A Reasonable Doubt As To Brown's Guilt.

2. Whether The District Court and Court Of Appeals Improperly Considered Any Non-record Evidence Inconsistent With *Jackson v. Virginia* And *Vasquez v. Hillery* In Light Of Brown's Submission Of A DNA Expert Report Which Merely Supplemented And Clarified The Challenge To DNA Evidence Submitted At Trial Set Forth In His Opening And Reply Briefs On Direct Appeal.

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STATEMENT OF THE CASE[1]

By Order On Merits Clerk's Record (CR) 66, P.App. 31a) and Judgment In A Civil Case (CR 67, P.App. 29a), the United States District Court for the District of Nevada, granted a writ of habeas corpus as to Grounds One through Three of Brown's First Amended Petition. On May 5, 2008, the United States Court of Appeals for the Ninth Circuit issued an opinion, reported at 525 F.3d 787, affirming the district court's grant of Troy Don Brown's ("Brown's") writ of habeas corpus and reversing his conviction. As found by the district court and affirmed by the court of appeals, Brown has been in custody for almost 14 years because of an indictment and conviction based upon (i) false deoxyribonucleic acid ("DNA") information and (ii) additional evidence conceded by the state to be insufficient without the DNA evidence to establish guilt.

> At Petitioner Troy Brown's trial for sexual assault, the Warden and State's ("Respondents") deoxyribonucleic acid ("DNA") expert provided critical testimony that was later proved to be inaccurate and misleading.[2] Respondents have conceded at least twice that, absent this faulty DNA testimony,* there was not sufficient evidence to sustain Troy's conviction. In light of these extraordinary circumstances, we agree with District Judge Philip Pro's conclusions that Troy was denied due process, and we affirm the district court's grant of Troy's petition for writ of habeas corpus.

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[1] Citations to the record will be referenced as they were in the court of appeals except for references to the record that have been included in the Petitioner's Appendix (P.App.) Or Respondent's Appendix (R.App.).

[2] The court of appeals also found that Brown "was most probably convicted based on the jury's consideration of false, but highly persuasive, evidence." 525 F.3d at 796. Not withstanding its duty to do, the state has never admitted its Napue v. Illinois, 360 U.S. 264 (1958), error and never taken affirmative action to correct it.

*Respondents conceded this point at least twice in the state post-conviction proceedings, both in their written papers and during oral argument.

See Brown v. Farwell, 525 F.3d 787, 789-90, 798 (9th Cir. 2008)("The conflicts in the evidence are simply too stark for any rational trier of fact to believe that Troy was the assailant beyond a reasonable doubt, an essential element of any sexual assault charge. This conclusion is confirmed by Respondents' own concessions."). On July 30, 2008, the court of appeals denied petitions for rehearing and rehearing en banc, respectively. See General Docket entries 32 & 38, Untied Sates Court of Appeals for the Ninth Circuit, Appeal # 07-15592. Petitioner's Petition For Writ of Certiorari (hereinafter the "Petition") was docketed October 28, 2008. Respondent now files his Brief In Opposition To Petition For Writ Of Certiorari.

II.

REASON FOR DENYING THE WRIT

A. The District Court And Court Of Appeals Correctly Applied The Clearly Established Federal Law Set Forth In *Jackson v. Virginia*, 443 U.S. 307 (1979), And *Vasquez v. Hillery*, 474 U.S. 254 (1986).

1. The Prosecutor Has Conceded The Insufficiency Of The Non-DNA Evidence.

In their petition for writ of certiorari petitioners assert that the district court and court of appeals misapplied the standard set forth in Jackson v. Virginia, 443 U.S. 307 (1979), for measuring the sufficiency of evidence to sustain a criminal conviction under the Due Process Clause by reweighing the evidence, saying that "rather than consider the evidence in the light most favorable to the prosecution, the panel reweighed the evidence and considered it in a light most favorable to the defense" and that "the District Court and the Court of Appeals resolved the inconsistencies and contrary testimony in favor of Brown." See Petition at pp. 8-9. Actually, rather than reweigh the

evidence, the district court and court of appeals acknowledged the prosecutor's own confirmation on the record in state post-conviction proceedings not mentioned by petitioners in the Petition of the reasonable doubt resulting from the evidentiary inconsistencies. During state post-conviction proceedings the prosecutor conceded in a written pleading that

> 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.

R.App. 8, ll. 22-25. The prosecutor reaffirmed such evidentiary analysis in closing argument at the state post-conviction evidentiary hearing, conceding that the defense counsel

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

R.App. 6, p. 256, ll. 5-9. The court of appeals accepted the prosecutor's concessions.

> The conflict in the evidence are simply too stark for any rational trier of fact to believe that Troy was the assailant beyond a reasonable doubt, an essential element of any sexual assault charge. This concession is confirmed by Respondents' own concessions . . . .

525 F.3d 798. A prosecutor is uniquely qualified to appraise the strengths and weaknesses of a case.

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

Singh v. Prunty, 142 F.3d 1157, 1163 (9th Cir. 1998)(emphasis added); cf. Kyles v. Whitley, 514 U.S.

419, 437 (1995)("prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net affect of all such evidence and make disclosure when the point of 'reasonable probability' is reached"). The district court and court of appeals did not misapply Jackson v. Virginia by reweighing the evidence.

2. The District Court And Court Of Appeals Correctly Applied The Clearly Established Federal Law Set Forth In *Vasquez v. Hilliary*, 474 U.S. 254 (1986), To The DNA Evidence.

With respect to the DNA, petitioners assert that the district court and court of appeals relied on non-record evidence to grant the writ. To the contrary, as set forth below, Brown addressed the presentation of DNA evidence at trial, including the DNA evidence's lack of reliability, in his Opening and Reply Briefs on direct appeal to the Nevada Supreme Court. See, e.g.:

(a) Sufficiency of the evidence.

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

(b) Presentation of the DNA evidence at trial.

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

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

. . . . .

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

. . . . .

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

[T]he impact of brothers in the suspect population is an important consideration that bears on the Random Match Probabilities (RMP). 'But the probability that the suspect and his biological brother will share a set of alleles on each of the three probe sites is approximately (1/4)3 = 1/64.' See - Jonathan J. Koehler, DNA Matches and Statistics: Important Questions, Surprising Answers. 76 Judicature 222 (1993). In the present case, that factor is critically important, not only because the victim constantly referred to Trent' instead of 'Troy', but also because Renee Romero, the State's DNA 'expert' quoted the odds of two brothers sharing the same alleles as **1 in 6500!** Reply Brief EOR 636-37 and n.1 (emphasis in original).

The statistical analysis set forth in Dr. Laurence Mueller's report (R.App. 001) submitted to the district court (see CR 48) merely supplemented and clarified the DNA claims previously raised in the state-court proceedings. In Vasquez v. Hillery, 474 U.S. 254 (1986), this Court analyzed the issue of whether expansion of the state court record to include statistical figures related to an equal

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[3] Brown had a right to address DNA evidence further in his Reply Brief in response to the state's defense of the DNA evidence in its answering brief.

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

Dr. Mueller's report (R.App. 1) likewise merely supplements Brown's claims that he was convicted by the state's presentation of unreliable and untrustworthy DNA evidence to the jury. As set forth in Dr. Mueller's report, Renee Romero's 1/6500 ratio was incorrect and grossly understated the probability of a random match of two siblings at five loci. The correct figure is 1/1024, more than six times the likelihood of a random match than the 1/6500 figure provided to the jury by Romero. Furthermore, Romero's calculation for two brothers was inaccurate because she never considered the fact that a third brother was in Carlin, Nevada, the night in question and that Brown

had two other brothers in Utah. Since it was at least 6 to 12 times more likely that the DNA matched one of the two brothers living in Carlin the evening in question than the 1/6500 probability opined by Ms. Romero, materially inaccurate evidence was provided to the jury. Dr. Mueller's report merely supports and clarifies Brown's claim that the DNA evidence, which included the mathematical calculations and testimony presented at trial through Romero, was unreliable. Indeed, the 1 in 66 figure for a sibling match presented in Dr Mueller's report is comparable to the figure1 in 64 presented by Brown to the Nevada Supreme Court.

Accordingly, as set forth below, the court of appeals correctly applied this Court's Vasquez holding:

> [A]s the district court found, the Mueller Report merely clarifies, rather than fundamentally alters, the DNA evidence and expert testimony that was already before the Nevada courts. *See Vasquez v. Hillery*, 474 U.S. 254, 260, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) ("We hold merely that the supplemental evidence presented by respondent did not fundamentally alter the legal claim already considered by the state courts, and, therefore, did not require that respondent be remitted to state court for consideration of that evidence."). Therefore, the district court did not err by admitting the Mueller report.

525 F.3d at 794.

Since the district court and court of appeals correctly applied the clearly established federal law set forth in Jackson v. Virginia and Vasquez v. Hillary, supra, there is no reason to grant certiorari on the questions presented. Since none of the considerations set forth in this Court's Rule 10 are present in this case, review is not warranted.

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III.

CONCLUSION

Brown respectfully asks that this Court deny the Petition For Writ of Certiorari.

Dated this 28th day of November, 2008.

Respectfully submitted,

Paul G. Turner

PAUL G. TURNER
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

E.K. McDANIEL, Warden, ET AL., Petitioners	USDC Case No. 3:03-cv-0712-PMP(VPC)
v.	CA No. 07-15592
TROY DON BROWN, Respondent.	

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on November 28, 2008, she served a copy of the attached Opposition to Petition for Writ of Certiorari and Motion to Proceed in Forma Pauperis by personally placing a copy in the United States mail, postage paid to the addresses named below:

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Troy Brown
NDOC No. 44132
Ely State Prison
P.O. Box 1989
Ely, NV 89301

Robert E. Wieland
Senior Deputy Attorney General
Office of the Attorney General
5420 Kietzke Lane, Suite 202
Reno, NV 89511

Leianna Montoya, Secretary

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28 February 2006

Mr. Paul Turner
Law Offices of the Federal Public Defender
411 E. Bonneville Ave., Suite 250
Las Vegas, Nevada 89101

RE: Brown v. Farwell

Dear Mr. Turner:
Below I have summarized my opinions about the case material you sent me for review. I have reviewed the preliminary hearing and trial transcripts of Renee Romero, the Washoe County Sheriff's reports of 11 and 14 February, 6 June, and 15 September 1994 as well as their lab notes, the FSA FAX sheet dated 26 September 1994, the FSA report of 31 May 1995 and the curriculum vitae of Renee Romero.

On page 343 of the trial transcript Ms. Romero states that there is a 25% chance of two brothers sharing both alleles at a single locus in common. This conclusion is only correct if both parents are heterozygotes and share at most one allele in common. For other possible parental pairs the probability of two sibs matching could be 50% or 100%. Thus, in this portion of Ms. Romero's testimony she has chosen a special case which suggests that sibs have the lowest chance of matching that is biologically possible.

On page 344 Ms. Romero utilizes the assumption that two siblings have a 25% chance of matching at a single locus to estimate that the chances of two siblings matching at five of the loci used in this case would be 1 in 6500. Even if we assume that 25% is the proper number to use in this calculation the chance of two brothers matching is $(0.25)^5$ = 1 in 1024 not 1 in 6500. As before the error made here by Ms. Romero tends to suggest that the chance of two brothers matching is actually much less than it really is.

I have been told that defendant Brown may in fact have 2 brothers that were living in the near vicinity of the crime and two additional brothers that lived a greater distance away. With these additional facts we can address the more relevant question about siblings which is: what is the chance that any one of the two (four) brothers would match the evidence profile? Even if we use the least likely chance of two brothers matching at one locus, 25%, the chance that one or more brothers would match the evidence is 1 in 512. With four brothers this total goes up to 1 in 256.

The calculations in the preceding two paragraphs used the smallest probability that two sibs will have matching profiles. As mentioned before this probability could be as high as 100%. The second National

Research council report on DNA typing gave a formula for computing the chance of matching profiles when the profiles of the parents are unknown. Using this formula and the FBI Caucasian database the chance of a single sib matching defendant Brown's profile is 1 in 263. 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.

In the course of questioning Ms. Romero about the statistical meaning of the DNA match Prosecutor Smith says (pg. 338) "..the likelihood that it is not Troy Brown would be 0.000033?" The accepted meaning of these statistics is that they represent the chance that a single person chosen at random from the suspect population would match the evidence. The phrase above suggests that the probability is that chance of anyone other than the defendant matching the evidence sample. This is not correct since in the population at large there are very many people not just one and the chance of finding a match to any one of these people is much greater (more likely) than the chance of finding a match to just a single person. This erroneous phraseology is in fact so common it has been given a special name, the prosecutor's fallacy.

The report of FSA has a profile for the vaginal swab, sperm fraction that clearly has DNA from more than one person. Since one of the contributors to this mixture is likely to be the victim, FSA has used information about the victims profile and the intensity of the color dots on the test kits to infer the profile or genotype of the second contributor. The ability of analysts to accurately decompose mixtures like this is uncertain. At the very least there is no estimate of how likely it is that this inferred profile is wrong.

Sincerely,

Laurence D. Mueller

Laurence D. Mueller

FILED

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ELKO CO DISTRICT COURT

BY [illegible] DEPUT

CASE NO. CV-HC-01-607

DEPT. NO. I

IN THE FOURTH JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

TROY DON BROWN,

APPELLANT,

V.

WARDEN OF LOVELOCK CORRECTIONAL CENTER, and the STATE OF NEVADA,

RESPONDENT.

_____/

MOTION TO DISMISS AND WRIT OF HABEAS CORPUS HEARING

ROUGH DRAFT TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that the above-entitled matter came on for hearing on February 21, 2002, at the hour of 9:30 a.m. of said day, before the HONORABLE J. MICHAEL MEMEO, District Judge.

The Petitioner, was present in court and represented by David M. Schieck.

The Respondent, was represented in court by Gary D. Woodbury, Elko County District Attorney.

EXHIBIT 25

That report from Jennifer Mihalovich shows that all she did was extract from the web. And then based on the work already done by Sonia Romero; in the absence of her being there to see how it's being done, taking her results and just plugging it in. And coming up with well, it's a match because Sonia's work matches what I'm finding. Without any verification that in fact the work was properly done.

Quite candidly to the Court, one of the allegations that we put forward had to do with the relationship between Mihalovich and Romero. There was no evidence presented to show they were college roommates. In fact, the college roommate angle was not accurate information that was obtained and so we are not proceeding with the college roommate part of it. But we do have -- you know, sort of a handholding here of between Mihalovich and Romero.

Mihalovich renders no reports. Mr. Locke doesn't even know what she got to review and when she got to review it. Did she review the S.Y.L.P. prior to going to trial? Did she even know what tests were done? They say they learned about it about three days before trial. Mr. Locke is not sure but certainly it was in close proximity to trial at his recollection. No effort was made to be sure that in fact the independent defense expert had the opportunity to review those results and consult with Mr. Locke about how to best argue it. Instead he basis his entire argue on the DNA saying, she

changed her mind between the preliminary hearing and the trial on what was present on the panties.

We didn't have the evidence concerning Mr. Wanis. The State acknowledged that we had filed certified court records showing he was charged with burglary and a force able sexual assault in Utah and ultimately was convicted of that. That information was present in those reports as was Pam Wanis reporting that he had done this before in Carlin. That the victim in that incident was Debbie Deen. No testimony that Mr. Locke did anything to look at Mr. Wanis as an alternative suspect.

He says, I looked at the time cards but I don't recognize these as the time cards. We've had -- you know, Mr. Sasser and Trent Brown come in here and verify these are the time records that are kept. And there are inconsistencies in here that show that Mr. Wanis was not at work when he says he was at work, or claims he was at work. That he drove his own truck. There was ample opportunity for him to be absent from work during the relevant period of time when the sexual assault occurred.

You don't have to be able to prove someone else did it in order to get your client acquitted. When you are arguing the presumption of innocence for your client you're creating a doubt in that jury's mind. And what Mr. Locke did is rejected the evidence that could have been used to create

that reasonable doubt and obtain a different result from this jury.

There was an investigator but there's no evidence that he talked to anybody other than Troy and Travis for about 10 minutes, and did absolutely nothing to verify anything in the case. So, we have no absence of investigation on numerous fronts in this case. On evidence that people are calling and saying, you've got to talk to these people. We've got these records. We've gone and done an investigation at the Courthouse. We've gone and done the investigation of Leadcor. We've talked to the people. We know what's going on. None of it is checked out. None of it is presented at trial.

And although Mr. Locke says he thought the trial went good or smoothly. There was really no evidence presented to create the presumption of innocence. And so, the smoothness of the trial was the smoothness of the State's march to conviction based on the failures of defense counsel to present theories, and issues for the jury to find reasonable doubt.

The same thing with the loss of the teeth scrapings. The record would reflect that one witness, Mary Lou Tagliarelli was present and observed the teeth scrapings being collected and stored in the sexual assault kit. And then when they got around to checking it they are not to be found. Nobody knows where they are at. The doctor is not sure whether it was

collected or not collected. He says there are no notes that say that we collected it, but you don't just reject that as a possibility. An issue to preserve not only for these proceedings but for appellate proceedings, for arguments to be made to an appellate court or to a jury so accumulation of things that went wrong on this case.

So it's just not this little thing here, this little thing there but a culmination of issues of things that were not done. Things that were wrong with the investigation. That were wrong with the collection of evidence. That were wrong with looking at alternative suspects. All geared to preserving issues for appellate review and creating in the jury the minds -- in their minds the presence of reasonable doubt.

Your Honor, based on the testimony that the Court has heard we would respectfully request that the Court grant Mr. Brown's Petition.

THE COURT: Mr. Woodbury.

MR. WOODBURY: Thank you, Your Honor. The evidence code talks about recent fabrications and the fact is the jail garb argument is made now, seven years after trial. David Locke, the Counsel, said I did not -- I was not informed that there was any possibility that he was in jail clothes and that the jury was seeing him or in a position to see him. That means that either Locke forgot it or he is misleading the

Court. He said, had I known that -- I was aware of the rules, had I known that I would have done something about it. He didn't do anything about it. The record is clear. That substantiates with what Mr. Lockie says. Mr. Lockie has no axe to grind here, only that if he had been told he would have done something about it.

Mr. Conner testified. I was around, he was not upstairs in jail clothing. Mr. Brown testified that he was upstairs in the foyer, outside she said in jail clothing. That means that Jim Conner is wrong. Neither was he on the second floor in jail clothing according to Jim Conner. That means, Mr. Brown is wrong. Nobody ever brings prisoners who are at trial to the side of the Courthouse. Everybody, according to the policy as explained by John Crockett comes to the back. So, all of a sudden in order to accommodate him now, the Court has to find that the policies and procedures that are in effect and have been since Gromes v. State in Ecko County; are all of a sudden avoided to get Troy Don Brown in a pickle. So, that the jury can see him. So, now against that you have the mother and the father of Troy Don Brown and Troy Don Brown himself. The Court can weigh that evidence.

We did not think, and I apologize because it's my mistake. I should have moved based on the last allegation Theory. We did mention in our responses that we didn't think it was anything more than a last Allegation and Adopt that not be

heard as a part of this. But I did not bring that to the Courts attention because they truly had no justification based on what they gave us before hand to sustain that.

There is conflicting evidence but there is not conflicting evidence that Mr. Brown said she told Dorothy Nash-Holmes that. That matter goes to his right to be presumed innocent. It goes to the protection of his Counsel. It's a constitutional issue and should of been and should of been. If he had it brought before the State Supreme Court on appeal. On the direct appeal, the first direct appeal. And that under the statue is one of the reasons why you can take that issue and say, that's wrong. You had your opportunity to present that and you didn't.

The DNA evidence, first time ever we hear that Michael Terry and he have animosity between them. It's not written any place, no place else, another recent recitation. Is it in his affidavit in support of the Petition, no. First time. First time we've ever heard it is today. You see search this record, it isn't there. It isn't anywhere. It's a recent fabrication. It's brand new. Because they need in order to sustain their theory they need to have Michael Terry as a potential person who wants to do him harm. And if you look at the record in this case, Michael Terry had an opportunity to say -- if he had wanted to really subvert the guy, he had the opportunity to say, yep I assumed his at a

o'clock in the morning and he had a bite mark on him. And you can look at the record and see that Michael Terry did not testify to that effect. Even though if had really wanted to do him some harm he could have done that and then just taken the claim that it went away before anybody else saw it.

The Romero challenge, I mean, if you look at Lockie's strategy it makes sense. There is no surprises about the DNA evidence. Granted the R.F.L.P. testing comes a little bit before hand but what he is faced with is the proposition that his own expert -- and we are entitled to rely on experts on DNA, trial lawyers are at the mercy of them. If they make a mistake then we make a mistake. But in this case there is no evidence that Mihalovich made a mistake. She said, there is enough semen on those panties to test them, R.F.L.P. for -- do the DNA test for R.F.L.P. There is enough.

At the time, Romero is saying there isn't enough but Lockie knew that. That isn't a mistake on Lockie's part. He used that as a part of his trial strategy. That was how he was avoiding -- essentially how he intended to avoid the devastating effect of that DNA evidence. I mean, you can't hold that against him. That Romero made a mistake. Mihalovich knew that she made a mistake, knew there was enough for DNA for an R.F.L.P. test. So, how is he incompetent there?

Why didn't he move for a continuance when the R.F.L.P. test then came in three or four or five days before

trial or whatever it was. Did you feel like you needed more time Mr. Lockie, no. He was satisfied that his theory was going to hold together regardless of which way it went. Why didn't you put Mr. Mihalovich on the stand, why didn't he? Because she was telling us the more testing that was done the more Troy Don Brown was getting convicted. That was all that DNA testing was doing was putting a noose around Troy Don Brown's neck. And he made a reasonable, rational, decision not to put Jennifer Mihalovich on there.

So what they are left with is what they said they didn't prove and that is that Jennifer Mihalovich had some reason to not -- to sustain Romero's finding. Talking about a certification of a Court to do DNA testing. There is no requirement in Nevada for DNA -- or Washoe County Crime Lab be certified to that. You bring your expert up and she tells you what she's done, and what procedure she went through, and what the scientific theory is, and if it's proper the Court admits her as an expert.

Now, I don't know about the fact of it. Maybe they probably have their little group that does little certifications, maybe that's so. But it doesn't make it or prevent it from being admissible in the Court of Law in Nevada because that isn't the test as whether it's certified. In some cases they have to be but not in DNA testing.

And Lockie did examine her. He examined her

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considerably down at the preliminary examination on her qualifications to do DNA testing. And at some point as Lockie says in his affidavit, I made a determination Renee Romero is a pretty good witness. She's a compelling witness. I think is what he called her, and I don't want to put her before a jury so she can explain, hammer and tong about how good she really is at this. Particularly when he's got his own expert in the background saying, she's all right, she knows what she's doing.

The contamination evidence, if you look at the record the vaginal swab was done up at the Elko General Hospital -- over there. Troy Don Brown's semen or blood was extracted, from which the DNA testing was done; was extracted at the Elko General Hospital. How in the world would she ever on that child, that 9-year-old child's vagina ever get his semen on her vagina? His DNA on her vagina based upon pajama bottoms and socks. In a testable amount that's not even realistic. If it were realistic, of course what we would have is we'd have an expert up there saying, oh you know this cross contamination can happen. And if she was around where Troy Don Brown has had -- assuming he had a condom over at Trent's sometime, it could happen. But we don't have that. So, you are asked to assume that somehow off of pajama's or off of socks that may have been in Trent's house she got his DNA on her vagina.

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On top of that, it isn't like Renee Romero or Jennifer Mihalovich said, look there's a couple of different kinds of DNA here on this child's vagina or on her panties. That's not the testimony at all. There is one kind of DNA on her panties. His. And leads us into the test, with respect to Mr. Henle.

I'm not sure -- I wrote down when Mr. Schieck said that reasonable doubt you give them every possibility. That's not a theory that have Lockie theories. That is not a theory I suggest to you, that is shared by everybody because you can get so good at raising every possibility that you loose credibility. That you're picking at little, tiny things the jury finally says, if this guy had anything he wouldn't be going after this little, bitty stuff. There are, I suppose in every jury trial, there are things reasonable doubt arguments that counsel can overlook but that doesn't make him ineffective. He only has to provide reasonable defense he doesn't have to provide perfect defense. And in this case I would suggest to you that he did provide reasonable defense.

First of all, Henle's time card shows he was there for 10 hours. I forget who it was, one of the Brown brothers testified that it doesn't look like his signature or his initial at the end. But I suggest you look at it, at the end of the time card. I suggest that he said it looks like four and five are made by the same guy and I suggest that you just

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look at the M. And I think you will find that the person who drew the M in each of those drew them entirely differently although they have a superficial resemblance because you can see the gap not leaving the paper.

Second of all, even if he's only there for seven hours, he went to work at 7 o'clock as he was supposed to or 8 o'clock as Mr. Baker said -- or I guess Mr. Brown said that he did. It's 1 o'clock in the morning. This thing has taken place. It's well over by 1 o'clock in the morning. 1:15 no later than that because that's when the call to the police is made. So, it's not like Henle -- that somehow this time card magically says that Henle could have done it.

There is an interesting proposition too about just how much you can assassinate Mr. Henle's character. I mean, Lockie says look I don't want to get in the position of proving Mr. Henle guilty. Principally I would assume because as he says in his affidavit, if I get locked in -- first of all, if I do it early enough they are going to do DNA testing on Henle and exclude him as a possible suspect. Second, the child didn't identify him. And third, what happened -- I can't prove it. I've got DNA, not two DNA's. Just one on the vagina and the panties of that child. Not Henle's DNA, his DNA. So, there I come, I come to a stop and there is no way I can prove it.

So, he did precisely the best thing, he insinuated.

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He wasn't going to get any DNA testing on Henle to exclude him, he simply insinuated it. If you look in the record, he talked to Pam about the threat that Henle had made about going to do some harm -- I don't know if it was harm to the child or something like that. He 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 he have to keep piling up when the problem is the DNA?

And while I suppose from a defense counsel point of view it's unconscionable that sometimes you get caught in a spot where you can't escape. It's like having a fingerprint, the DNA. Everything else can be going your way but if you still have to overcome the fact that his DNA is on that child's vagina. His DNA is on that child's panties. What is he going to do?

I mean, the evidence is insurmountable. In fact, unless you pick on the procedures that the DNA was tested under. Mihalovich as expert is telling him the procedure appears to be okay. She's telling him, I don't have to be there. I can review the procedures afterward. Unless you can show that Romero is not qualified and Mihalovich is telling him she is qualified. Unless you can see that the testing procedure by itself or the collection procedure, I suppose was contaminated. Which he said, Mihalovich told him was alright

FILED

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ELKO CO. DISTRICT COURT

CLERK DEPUTY

CASE NO. CV-HC-01-0000607

DEPT. NO. I

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF ELKO, STATE OF NEVADA

TROY DON BROWN,

Petitioner,

vs.

WARDEN OF LOVELOCK CORRECTIONAL CENTER, and the STATE OF NEVADA,

Respondent.

ANSWER IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION) AND MOTION TO DISMISS PETITION

COMES NOW, the Respondent, State of Nevada, by and through the Elko County District Attorney, who hereby respectfully submits its Answer in Opposition To Petition For Writ of Habeas Corpus (Post Conviction) and Motion to Dismiss Petition (hereinafter referred to as "Opposition"). This Opposition is made and based upon the following Memorandum of Points and Authorities in support hereof, as well as the documents, pleadings and exhibits already on file with this Honorable Court.

In compliance with NRS 34.760, the State informs the Court that the Defendant filed a direct appeal from his judgement of conviction, a second appeal from the re-sentencing ordered as a result of the first appeal, as well as an appeal from the denial of the court of Petitioner's motion for a new trial.

All transcripts of all proceedings are available in the file of the Elko County Clerk.

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EXHIBIT 22

Sallee's purported testimony, if consistent with her statement of March 3, 1998, attached to the petition, would be that the Defendant came into CeeGee's Bar on the night in question, with two friends. She was told they had just come from the Peacock Lounge. They stayed at CeeGee's for about an hour or until about 12:45 a.m. Then Defendant and his friends left. Such testimony, had it been received by the jury, is inconsistent with the Defendant's own trial testimony, which was that after he left the Peacock Lounge, he went into CeeGee's, "looked around, ordered a beer, took a couple drinks out it, and took it with me and headed home" ,Trial Transcript, Defendant's testimony at page 448, line 3 through line 9. It is also inconsistent with Defendant's statement dated February 3, 1998, and attached to his supplemental Pre-Sentence Report. He also told Detective Ladd that his connection with the Peacock, after he left CeeGee's was to walk in, vomit in the toilet and then leave (D-120). All three versions contradict the proposed testimony of Sallee.

The statement of Rarrick attached to the petition adds nothing. In his statement, he admits having no knowledge regarding the presence or absence of Petitioner at any particular bar at any particular time on the night of the attack.

The testimony of neither of these persons adds any validity to the Petitioner's claim that he could not have committed the offense because he had an alibi.

Trial counsel sought out and found an alibi witness, Beverly Scarlett Patrick (Patrick), who testified that Brown was in the Peacock Lounge until 1:30 to 2:00 a.m. (page 435 commencing at line 15).

As outlined in the argument on issue number 4 and in trial counsel's affidavit, additional alibi evidence would simply have been cumulative. 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.

4. COUNSEL FAILED TO DISCUSS DEFENSE STRATEGIES WITH PETITIONER, AND NEVER INFORMED PETITIONER THAT HE INTENDED TO ARGUE THAT PETITIONER'S BROTHER TRENT COULD HAVE COMMITTED THE CRIME.