

IN THE NEVADA SUPREME COURT

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Elizabeth A. Brown
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Tyrone David James Sr.,

Petitioner-Appellant,

v.

State of Nevada/Brian Williams et. al.,

Respondents-Appellees.

On Appeal from the Order Denying Post-Conviction Petition
Requesting Genetic Marker Analysis (10C265506) &
Post-Conviction Petition for Writ of Habeas Corpus (A-19-797521-W)
Eighth Judicial District, Clark County
Honorable Ronald J. Israel, District Court Judge

Petitioner-Appellant's Opening Brief

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NEV. RULE. APP. P. 26.1(a), and must be disclosed. These representations are made so the judges of this court may evaluate possible disqualification or recusal.

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JURISDICTIONAL STATEMENT

These are consolidated appeals from the final order denying Tyrone James's petition for writ of habeas corpus filed June 27, 2019 (case no. A-19-797521-W), and post-conviction petition requesting a genetic marker analysis of evidence within the possession or custody of the State of Nevada filed July 16, 2019 (case no. 10C265506).¹ The district court filed both of the Notices of Entry of Findings of Fact, Conclusions of Law and Order on February 26, 2020.² Tyrone James timely filed the notices of appeal on March 24, 2020.³

This Court has jurisdiction under NEV. REV. STAT. § 34.575.

ROUTING STATEMENT

Under NEV. R. APP. P. 17(b)(1), this case is not presumptively assigned to the Court of Appeals because it involves the conviction of a Category A felony – sexual assault of a minor under the age of 16.

¹ App.778.

² App.797, 817.

³ App.837, 839.

STATEMENT OF THE ISSUES

1. Whether the district court erred by denying James' request for genetic marker testing when there was a presumptive positive DNA test matching sperm on the sexual assault victim to another man?

2. Whether the district court erred by dismissing James' petition for writ of habeas corpus where new evidence of actual innocence serves to overcome the procedural bars?

STATEMENT OF THE CASE

I. Facts

On May 14, 2010, 15-year-old TH reported that she had been sexually assaulted. She identified her assailant as her mother's boyfriend, Tyrone James.⁴ TH went to Sunrise Hospital where a sexual assault exam was conducted.⁵ TH reported to the nurse that she had not had consensual sex in the past seven days and that her last sexual encounter was one year ago.⁶ TH reported she had been vaginally penetrated by the assailant's finger and penis,⁷ and a doctor observed swelling during the pelvic exam.⁸ Evidence was collected from TH including oral swabs, vaginal and cervical swabs, and rectal swabs.⁹

No evidence regarding the rape kit, swabs, or DNA was presented during James' trial.¹⁰ No analysis of the rape kit, swabs, or DNA was

⁴ App.849, 850.

⁵ App.847-861.

⁶ App.850, 858.

⁷ App.857.

⁸ App.854.

⁹ App.858.

¹⁰ App.005-597 (trial transcripts).

included in pre-trial discovery. At the time of trial, defense counsel, Bryan Cox, was unaware that any DNA was contained on the swabs.¹¹ James was convicted almost entirely on the testimony of TH, as well as the introduction of prior bad act evidence. A doctor from Sunrise Hospital also testified on behalf of the State. She had conducted the gynecological exam on TH and observed swelling to her vaginal area that could have been caused by trauma such as penetration.¹² She testified her findings were “consistent with probable abuse.”¹³ James was convicted of and sentenced to 25 years to life.¹⁴

After an unsuccessful direct appeal and post-conviction proceedings in state court, James filed a pro se federal habeas petition on May 17, 2018. He was not immediately appointed counsel. On February 21, 2019, the Federal Public Defender’s Office (“FPD”) was contacted by Senior Deputy Attorney General Amanda Sage.¹⁵ Sage

¹¹ App.621.

¹² App.443-444.

¹³ App.458.

¹⁴ App.599-601.

¹⁵ App.603.

said that she was contacted by the Clark County District Attorney's Office about new DNA evidence having been discovered in James' case that was potentially exculpatory.¹⁶ The FPD immediately sought to be appointed as counsel for James.¹⁷ Based on this turn of events, the federal court granted the motion and appointed the FPD to represent James.¹⁸ On March 18, 2019, Sage emailed the FPD the relevant DNA report and medical records.

The new evidence includes the following. A forensic case report from April 30, 2018, which states that physical evidence from this case was "Received on **December 6, 2017** for possible DNA analysis."¹⁹ The report reflects that only 1 of the 3 swabs, the perineum swab, was processed and a **sperm fraction consistent with a male contributor** was detected.²⁰ On June 28, 2018, there was a

¹⁶ App.603.

¹⁷ App.602-605.

¹⁸ App.606-609.

¹⁹ App.843 (emphasis added).

²⁰ App.843.

presumptive “CODIS” match to a **Ramon Wilson**.²¹ The CODIS Hit Notification Report provides the following information:²²

This hit constitutes an investigative lead in your case(s). A new reference buccal swab must now be obtained from this individual in order to confirm this hit and complete the case(s). The DNA sample currently on file, which was collected in accordance with Nevada Law (NRS 176.0913), will not suffice for the confirmation process.

The information provided in this report can be used to obtain a Search Warrant for a reference buccal swab from the above person.

The CODIS Hit Disposition Form, dated July 31, 2018, similarly notes: “This is a viable lead requiring further action.”²³

Despite the directives in the CODIS hit notification report and disposition form, no further investigation was conducted and no reference buccal swab was obtained from Ramon Wilson.²⁴ The other 2 swabs from the rape kit were never analyzed. And no buccal swab was ever obtained from James and tested against the swabs from the rape kit, in order to rule him out as a contributor. Consequently, James petitioned the district court for a genetic marker analysis²⁵ and filed a

²¹ App.842.

²² App.842.

²³ App.845.

²⁴ Wilson’s name does not appear in pre-trial discovery. Petitioner has no further information about him, aside from the CODIS report.

²⁵ App.642-650.

new post-conviction petition for writ of habeas corpus raising errors related to this new evidence.²⁶

II. Procedural history

Following the jury trial, the judgment of conviction was filed on February 9, 2011.²⁷ On February 21, 2019, the FPD, who was not yet counsel for James, was contacted by the Attorney General's Office about the new DNA evidence.²⁸ Based on this new information, the FPD requested appointment.²⁹ The federal court agreed.³⁰

Approximately four months later, counsel for James filed a new petition for writ of habeas corpus (post-conviction) raising these claims for relief:³¹

1. Trial counsel was ineffective for not having James' DNA tested and compared to the DNA from the rape kit.

2. James' right to due process of law under the Fifth, Sixth, and Fourteenth Amendments of the

²⁶ App.610-630.

²⁷ App.599.

²⁸ App.603.

²⁹ App.602-605.

³⁰ App.606-609.

³¹ App.610-630.

United States Constitution and Article Once, Section Eight of the Nevada Constitution was violated because new evidence demonstrates he is actually innocent of the crimes for which he was convicted.

3. James was denied due process and a fair trial under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article One, Section Eight of the Nevada Constitution where the State failed to disclose exculpatory and material evidence that another man's DNA was found on the victim.

4. Ongoing prosecutorial misconduct has violated James' right to due process and a fair trial under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article Once, Section Eight of the Nevada Constitution where the State failed to have the DNA timely tested and has failed to follow-up on the presumptive DNA match to another man.

5. James was denied an adequate opportunity to confront TH in violation of the Sixth Amendment of the United States Constitution because of the State's suppression of exculpatory evidence.

That petition was assigned a new civil case number of A-19-797521-W.

Shortly thereafter, counsel for James also filed a post-conviction petition requesting a genetic marker analysis of evidence within the possession or custody of the state of Nevada, pursuant to NRS

176.0918.³² That petition, which was filed under the original criminal case number of 10C265506, requested confirmation DNA testing to prove James' innocence.

Under NRS 176.0918(4)(c), the district court ordered the evidence from the sexual assault exam preserved and inventoried.³³ James requested the proceedings on the habeas petition be stayed until the genetic marker petition had been resolved, because the results of any DNA testing would necessarily effect the claims in the habeas petition.³⁴ The district court granted the stay.³⁵

Following briefing³⁶ and argument, on January 13, 2020, the court denied the petition for genetic marker testing.³⁷ Then, with no further

³² App.642-650.

³³ App.697-698.

³⁴ App.692-695.

³⁵ App.712.

³⁶ App.714-743 (State's response and James' reply).

³⁷ App.745-752. The transcript from the hearing on January 13, 2020 was reproduced twice, once with the civil case number and once with the criminal case number. Otherwise the transcripts are identical. In the interest of completeness, both copies are contained in the appendix. In the interest of clarity, only one copy is cited here.

briefing and without actually lifting the stay, the court also asked for argument on whether the habeas petition was moot.³⁸ Shortly thereafter, the court issued a minute order denying the habeas petition.³⁹ On February 25, 2020, the court filed one Findings of Facts, Conclusions of Law and Order in both cases, although it actually only addressed the habeas petition.⁴⁰ Two notices of entry were filed, one in each case number.⁴¹

On March 24, 2020, James filed notices of appeal in both cases.⁴² On August 5, 2020, this Court sua sponte consolidated the appeals. This consolidated opening brief follows.

SUMMARY OF THE ARGUMENT

To obtain genetic marker testing, a petitioner need only show a reasonable possibility that he would not have been convicted, given the exculpatory DNA results. Here, the only evidence linking James to the

³⁸ App.753-759.

³⁹ App.776-777.

⁴⁰ App.778-796.

⁴¹ App.797, 817.

⁴² App.837, 839.

sexual assault was the testimony of the victim. There was no physical evidence connecting him to the crime. If the jury had heard that sperm from another man was found on the victim's body during the sexual assault exam, there is a reasonable possibility James would not have been convicted. Therefore, the district court erred by denying his request for genetic marker analysis.

Even absent confirmation DNA testing, the presumptive CODIS match is still new evidence of James' innocence. New evidence of actual innocence is cause to overcome the procedural bars to a post-conviction habeas petition. The presumptive CODIS hit, matching DNA found on the victim during the sexual assault exam to another man, is new evidence of James's actual innocence. Consequently, the district court erred by dismissing the habeas petition on procedural grounds, given this new evidence.

ARGUMENT

I. The district court erred by denying James' request for genetic marker testing when there was a presumptive positive DNA test matching sperm on the sexual assault victim to another man.

The only evidence connecting James to the assault of TH was her testimony. Whether her identification of James was mistaken, or false,

there is a reasonable possibility⁴³ the jury would not have convicted James if they knew that DNA, specifically a sperm fraction, was found on the victim and it did not match James, but in fact matched another man. As TH told medical authorities she did not have consensual sex with anyone in at least seven days before the assault,⁴⁴ there is no other explanation for the DNA matching Ramon Wilson aside from him being the true assailant. There was no physical evidence connecting James to the crime and therefore the DNA evidence is highly exculpatory. The district court erred by failing to order confirmation DNA testing to definitively prove James' innocence.

A. The legal standard governing the genetic marker petition is separate and distinct from the legal standard governing the habeas petition, and the later has no bearing on the former.

The standard for granting a petition for genetic marker testing is set forth in NRS 176.09183, which provides:

⁴³ The “reasonable possibility” standard is less demanding than the more stringent “reasonable probability” standard. *See Lord v. State*, 107 Nev. 28, 44 (1991) (citing *People v. Brown*, 758 P.2d 1135, 1144-45 (Cal. 1988) (distinguishing reasonable possibility from reasonable probability)).

⁴⁴ App.850, 858.

The court **shall order** a genetic marker analysis...if the court finds that:

- (a) The evidence to be analyzed exists;
- (b) Except as otherwise provided in subsection 2, the evidence was not previously subjected to a genetic marker analysis...and
- (c) One or more of the following situations applies:
 - (1) A reasonable possibility exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through a genetic marker analysis of the evidence identified in the petition;
 - ...

NRS 176.09183(1) (emphasis added).

On the other hand, the standard for granting a post-conviction writ of habeas corpus requires a petitioner to show his conviction was obtained in violation of the Constitution of the United States or Constitution of the State of Nevada. *See* NRS 24.724(1). For example, a writ may be granted upon a finding of ineffective assistance of counsel in violation of the Sixth Amendment of the United States Constitution and Article I, Section 8 of the Nevada Constitution. *See Means v. State*, 120 Nev. 1001, 1011 (2004). However, the likelihood of success on the

merits of the claims raised in James' habeas petition does not affect whether he should have been granted genetic marker analysis. The only question is whether James met the requirements for genetic marker testing under NRS 176.09183.

The State opted not to address the requirements of NRS 176.09183 in its supplemental response. Rather, the State spent considerable time discussing the merits of the substantive claims raised in James' habeas petition.⁴⁵ As explained above, the merits of those claims do not affect the DNA petition. They are separate entities. The habeas petition was filed before the DNA petition being resolved in order to preempt any future untimeliness arguments. In all other respects, the habeas petition was premature. Had James gambled by not filing the habeas petition when he did, the DNA petition would still be viable. In essence, the habeas petition was irrelevant to the DNA petition.

A look at each of the requirements for DNA testing reveals that genetic marker analysis should have been ordered in this case because:

⁴⁵ See App.724-729.

1) The evidence to be analyzed exists and is in the possession of Metro;
2) The evidence was not previously subjected to a genetic marker analysis; and 3) There is a reasonable possibility that James would not have been convicted if exculpatory results had been obtained of the DNA evidence identified in the petition.

The district court's written Findings of Facts, Conclusions of Law and Order does not address the denial of the genetic marker petition at all.⁴⁶ However, at the hearing on the petition, the court ruled:

I read this stuff thoroughly and although I don't write it out, which maybe I should, so then when you try, you know, now I—all right, in any event, this wasn't, there is no indication that this was anything other than an individual known to the victim. This was no the type of case where the allegations may prove that it was some—some unknown individual. And from everything I have read on the rape shield, et cetera, provided to me, and from the Supreme Court on this case, that the fact that the victim may have had other sexual conduct would not be admissible.

And, therefore, although I realize that the standard is very slight, it's the possibility, if there is no new evidence, meaning that this can't come in to show someone else, the—well, the statute, along with what I just quoted, preclude the

⁴⁶ App.778-796.

testing. And therefore I'm denying the petition on that basis.⁴⁷

The court appeared to adopt the State's argument⁴⁸ that the new DNA evidence would not have been exculpatory because it only showed the victim **may** have had other sexual partners, and such evidence would not have been admissible. The problem with this speculative argument is that it is not based in fact. There were no other sexual partners. The victim told the nurse from Sunrise Hospital during her exam that she had not had consensual sex within the past seven days and that her last consensual intercourse was one year ago.⁴⁹ Her only sexual encounter was the sexual assault. Sperm from the perineum swab taken during the sexual assault examination matched a man other than James.⁵⁰ DNA evidence that another man committed the sexual assault would not be barred by rape shield laws. Rape shield laws do not shield the real rapist. The new evidence has nothing to do

⁴⁷ App.768.

⁴⁸ See App.722-724.

⁴⁹ App.850, 858.

⁵⁰ App.842-843.

with the victim's sexual history. It has to do with who really sexually assaulted her on the day in question. The district court erred by denying the petition on those grounds.

B. There is a reasonable possibility James would not have been convicted if exculpatory results had been obtained of the DNA evidence identified in the petition.

The “reasonable **possibility**” standard is less demanding than the more stringent “reasonable **probability**” standard. *See Lord v. State*, 107 Nev. 28, 44 (1991) (citing *People v. Brown*, 758 P.2d 1135, 1144-45 (Cal. 1988) (distinguishing reasonable possibility from reasonable probability)). The reasonable possibility standard is less demanding and more favorable to the petitioner. *See Wade v. State*, 115 Nev. 290, 296 n.4 (1999) (recognizing the reasonable possibility standard is more favorable to the accused than the reasonable probability standard); *State v. Bennett*, 119 Nev. 589, 600 (2003) (finding the reasonable possibility standard requires a lesser showing than the reasonable probability standard).

James would not have been convicted, given the exculpatory DNA evidence because there was no physical evidence connecting him to the crime. The only evidence linking James to the sexual assault was the

mistaken, or false, testimony of the victim. Had the jury known there was DNA evidence linking another man to the sexual assault, they would not have convicted James, even in light of the victim's identification. This Court has recognized the strength of DNA evidence even when it is contrary to testimonial evidence. *See Berry v. State*, 131 Nev. 957, 969 (2015). Similarly, the United States Supreme Court has repeatedly recognized that "DNA testing can provide powerful new evidence unlike anything known before." *McDaniel v. Brown*, 558 U.S. 120, 136 (2010); *District Attorney's Office v. Osborne*, 557 U.S. 52, 62 (2009). The "persuasiveness of such evidence in the eyes of the jury" cannot be understated. *McDaniel*, 558 U.S. at 136. *See also House v. Bell*, 547 U.S. 518, 540-41 (2006) (recognizing a jury would have given great weight to DNA evidence linking someone else to the crime).

To obtain confirmation DNA testing, James need only meet the low threshold of showing a reasonable possibility he would not have been convicted in light of exculpatory results. Absent any physical evidence to the contrary, there is a reasonable possibility James would not have been convicted if the jury knew the sexual assault exam recovered sperm on the victim matching another man. Genetic marker

analysis was thus warranted.

C. The State conceded the need for confirmation testing.

In the district court, the State argued James could not meet the legal standard for relief on his habeas petition because the current, preliminary DNA report “is not reliable, ‘exculpatory scientific evidence.’”⁵¹ The State wrote:⁵²

The “CODIS Hit Notification Report” specifically notes that a buccal swab from the individual potentially identified as a match must be obtained “in order to *confirm* this hit.” Defendant’s Exhibit 3 at 2 (emphasis added). That is, this is not a conclusive match: “further action” is required. *Id.* at 5. Defendant has not argued that he has obtained this further testing. Accordingly, the CODIS hit itself is not reliable exculpatory evidence.

James hasn’t obtained further testing because the State, which recognizing the need for it, nevertheless opposed it. The purpose of the genetic marker petition is to obtain confirmation testing of this exculpatory evidence.

After testing confirms the presumptive results, James will have

⁵¹ App.726 (citing *Schlup v. Delo*, 513 U.S. 298, 324 (1995)).

⁵² App.726.

two options. One, he can continue to pursue habeas relief. Or two, he can seek a new trial under NRS 176.09187, which contemplates a motion for a new trial based on newly discovered evidence after obtaining favorable results from genetic marker analysis.⁵³ That is why James sought genetic marker analysis first. Confirmation testing must be conducted and the district court erred by failing to order it.

II. The district court erred by dismissing James' petition for writ of habeas corpus where new evidence of actual innocence, and a *Brady* violation, serve to overcome the procedural bars.

Contemporaneously with the filing of the genetic marker petition, James filed a new petition for writ of habeas corpus (post-conviction).

He raised these substantive claims for relief:

1. Trial counsel was ineffective for not having James' DNA tested and compared to the DNA recovered from the rape kit.
2. James' right to due process of law under the Fifth, Sixth, and Fourteenth Amendments of United States Constitution and Article One, Section Eight of the Nevada Constitution was

⁵³ "If the results of a genetic marker analysis performed pursuant to this section and NRS 176.0918 and 176.09183 are favorable to the petitioner... the petitioner may bring a motion for a new trial based on the ground of newly discovered evidence pursuant to NRS 176.515." NRS 176.09187(1)(a).

violated because new evidence demonstrates he is actually innocent of the crimes for which he was convicted.

3. James was denied due process and a fair trial under the Fifth, Sixth, and Fourteenth Amendments of United States Constitution and Article One, Section Eight of the Nevada Constitution where the State failed to disclose exculpatory and material evidence that another man's DNA was found on the victim.

4. Ongoing prosecutorial misconduct has violated James' right to due process and a fair trial under the Fifth, Sixth, and Fourteenth Amendments of United States Constitution and Article One, Section Eight of the Nevada Constitution where the State failed to have the DNA timely tested and has failed to follow-up on the presumptive DNA match to another man.

5. James was denied an adequate opportunity to confront TH in violation of the Sixth Amendment of the United States Constitution because of the State's suppression of exculpatory evidence.

These grounds were not previously raised in the state courts.

Counsel was appointed for James' federal habeas case after being notified about the new, exculpatory DNA evidence. James had good cause for raising these claims in a successive petition due to new evidence demonstrating his actual innocence.

A. New evidence of actual innocence overcomes the procedural bars.

The new DNA evidence was discovered within one year of filing the petition and could not have been discovered by James any earlier. A petitioner may overcome procedural bars by establishing cause and prejudice. *See Hathaway v. State*, 119 Nev. 248, 252 (2003) (citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). Actual innocence is good cause and prejudice to overcome the procedural bars in Chapter 34.

James can demonstrate good cause and prejudice as to Grounds One through Five of the habeas petition based on newly presented evidence of his actual innocence. Additionally, James can overcome any procedural bars as to Grounds One through Five because he maintains that he is actually innocent of the crimes for which he was convicted. *Mitchell v. State*, 122 Nev. 1269, 1273-74 (2006) (“Even when a petitioner cannot show good cause sufficient to overcome the bars to a successive petition, habeas relief may still be granted if the petitioner can demonstrate that a constitutional violation has probably resulted in the conviction of one who is actually innocent.”). Nevada has adopted the federal standard for determination of whether the petitioner has

made a sufficient showing of actual innocence. *See Mitchell*, 122 Nev. at 1273-74 (citing *Murray v. Carrier*, 477 U.S. 478 (1996), *Bousley v. United States*, 523 U.S. 614, 623 (1998)); *see also Mazzan v. Whitley*, 112 Nev. 838, 842 (1996) (citing *Engle v. Isaac*, 456 U.S. 107 (1982), and *Harris v. Reed*, 489 U.S. 255 (1989)). Under this standard, a petitioner must show that “a constitutional violation has probably resulted in the conviction of one who is actually innocent.” *Carrier*, 477 U.S. at 496; *Mitchell*, 122 Nev. at 1273.

The court makes an actual innocence determination “in light of all of the evidence,” including evidence that was “either excluded or unavailable at trial.” *Schlup v. Delo*, 513 U.S. 298, 327-328 (1995). The petitioner must show that “it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.” *Id.* at 327. *See also Johnson v. Knowles*, 541 F.3d 933, 937 (9th Cir. 2008) (standard for actual innocence is whether “in light of all the evidence, including evidence not introduced at trial, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt”). “Actual innocence,” thus, is something of a misnomer, as a petitioner “need not show that he is actually innocent of

the crime he was convicted of committing; instead, he must show that a court cannot have confidence in the outcome of the trial.” *Johnson*, 541 F.3d at 937; *see also House v. Bell*, 547 U.S. 518, 538 (2006) (“the *Schlup* standard does not require absolute certainty about the petitioner’s guilt or innocence”). The actual innocence inquiry, moreover, does not require a court to assume that the prosecution’s evidence at trial was credible. *Schlup*, 513 U.S. at 330. To the contrary, “the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial,” requiring the court to make a credibility determination based on all the available evidence. *Id.*; *see also House v. Bell*, 547 at 538 (actual innocence determination requires court “to assess how reasonable jurors would react to the overall, newly supplemented record”).

James was convicted of multiples counts of sexual assault and related offenses, for which he is serving multiple sentences of life with the possibility of parole after 25 years. No DNA evidence was presented at James’ trial and, indeed, the defense did not know there was any DNA recovered from the victim’s rape kit. New evidence shows that DNA was not only recovered from the victim, but it matches a man who

is not James. There is a high likelihood that the jury would not have convicted James if this evidence had been presented at trial. This Court cannot have confidence in the outcome of James' trial in light of the new DNA evidence.⁵⁴

Additionally, the current habeas petition is timely because it was filed within one year of discovering the new evidence of actual innocence. The preliminary, exculpatory DNA test results were turned over to (now) counsel for James on February 21, 2019.⁵⁵ The petition was filed just five months later on June 27, 2019.⁵⁶ *See Rippo v. State*, 134 Nev. 411, 422 (2018) (recognizing a one-year deadline to file a new petition based on claims not previously available due to discovery of new facts). Thus, failure to review the substantive claims on their merits would result in a fundamental miscarriage of justice. *Pellegrini v. State*, 117 Nev. 860 (2001).

⁵⁴ Petitioner hereby incorporates the arguments set forth in section I (B), *supra*.

⁵⁵ App.622.

⁵⁶ App.610.

B. The *Brady* violation also overcomes the procedural bars.

Additionally, James alleged a *Brady* violation⁵⁷ concerning the rape kit and DNA evidence. Nevada law also recognizes a newly discovered *Brady* violation as good cause to overcome a procedural default. *See State v. Bennett*, 119 Nev. 589 (2003).

The State has a continuing duty to disclose evidence favorable to the defense and, where the evidence is material, failure to do so constitutes a due process violation. *Brady*, 373 U.S. at 87. Here, the State was in sole possession of the rape kit, which contained exculpatory evidence—the presence of another man’s sperm on the victim’s genitalia. The State held onto the rape kit and did nothing with it for seven years. At the time of trial, defense counsel did not know there was any DNA recovered from the victim and therefore didn’t know there was anything to test against James. Even if Ramon Wilson could not have been identified as the contributor in 2010, the presence of male DNA that did not match James was highly exculpatory. The outcome of the trial would have been different if the jury had known that male

⁵⁷ *Brady v. Maryland*, 373 U.S. 83 (1963).

DNA, specifically sperm, was recovered from TH and did not match James. This evidence points to someone other than James as the perpetrator.

The State had exclusive possession of this exculpatory evidence and suppressed it for seven years. This was a *Brady* violation resulting in a denial of due process and a fair trial. It also good cause and prejudice to overcome the procedural bars to James' habeas petition. "[P]roving that the State withheld the evidence generally establishes cause, and proving that the withheld evidence was material establishes prejudice." *Bennett*, 119 Nev. at 599.

C. The district court incorrectly analyzed the underlying substantive claims as potential cause to overcome the procedural bars.

The district court, in its opinion, addressed each of the underlying substantive claims as if they were offered in support of overcoming the procedural bars.⁵⁸ They weren't. In the petition itself, James argued newly presented evidence of his actual innocence, and the *Brady*

⁵⁸ App.784-795.

violation, as cause to overcome the procedural bars.⁵⁹ James never argued that ineffective assistance of counsel or the confrontation clause violation were grounds to overcome the procedural default. It is unclear why the district court addressed the merits of the substantive claims when ruling the petition was procedurally barred. But, in an abundance of caution, Petitioner offers the following brief argument on the merits of his claims.

1. Trial counsel was ineffective for not having James' DNA tested and compared to the DNA recovered from the rape kit.

The Sixth Amendment to the United States Constitution and Article One, Section Eight of the Nevada Constitution guarantee criminal defendants the effective assistance of counsel at trial. The standard for evaluating an ineffectiveness claim for trial counsel is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires a showing that counsel's performance fell below an objective standard of professional care and there was a reasonable probability the outcome would have been different absent the deficient performance.

⁵⁹ App.618-620.

James has consistently maintained his innocence. When first interviewed by the police, he offered to take a lie-detector test and a give a DNA sample. Neither was done. Trial counsel should have known via the discovery received from the State that swabs taken from the victim as part of the “rape kit” had not been analyzed. Trial counsel should have known that the presence of another man’s DNA would be exculpatory. Nevertheless, counsel never requested the swabs be tested for DNA, never hired a DNA expert, and never had James’ DNA compared to the DNA found on TH.

A defense attorney must conduct a reasonable investigation into the case in order to find evidence favorable to the defense. This includes retaining experts to analyze the evidence. Counsel was deficient for not investigating the DNA evidence and James was clearly prejudiced, as he has languished in prison for nearly 10 years without this evidence being discovered. James received ineffective assistance of counsel and his continued incarceration violates the United States Constitution.

2. James' right to due process of law under the Fifth, Sixth, and Fourteenth Amendments of United States Constitution and Article One, Section Eight of the Nevada Constitution was violated because new evidence demonstrates he is actually innocent of the crimes for which he was convicted.

The threshold for a freestanding actual innocence claim is “extraordinarily high.” *Herrera v. Collins*, 506 U.S. 390, 417 (1993). Prior cases suggest habeas relief is available in cases of actual innocence where a petitioner goes “beyond demonstrating doubt about his guilt” and affirmatively proves “he is probably innocent.” *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997). The new DNA evidence in this case does exactly that.

TH stated she was sexually assaulted and penetrated by the assailant's finger and penis. A sperm fraction with DNA matching a different man was found on the perineum swab from the victim's rape kit. This evidence proves it was that man, Ramon Wilson, and not Tyrone James that sexually assaulted TH. The remaining evidence against James was circumstantial and pales in comparison to the strength of conclusive DNA evidence. James' continued incarceration violates the United States Constitution.

3. James was denied due process and a fair trial under the Fifth, Sixth, and Fourteenth Amendments of United States Constitution and Article One, Section Eight of the Nevada Constitution where the State failed to disclose exculpatory and material evidence that another man's DNA was found on the victim.

The State has a continuing duty to disclose evidence favorable to the defense and, where the evidence is material, failure to do so constitutes a due process violation. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Here, the State was in sole possession of the rape kit, which contained exculpatory evidence—the presence of another man's sperm on the victim's genitalia. The State held onto the rape kit and did nothing with it for 7 years. At the time of trial, the defense did not know there was any DNA recovered from the victim and therefore didn't know there was anything to test against James. Even if Ramon Wilson could not have been identified as the contributor in 2010, the presence of male DNA that did not match James was highly exculpatory. The outcome of the trial would have been different if the jury had known that male DNA, specifically sperm, was recovered from TH and did not match James. This evidence points to someone other than James as the perpetrator. The State had exclusive possession of this exculpatory

evidence and suppressed it for 7 years. This was a *Brady* violation resulting in a denial of due process and a fair trial. James' continued incarceration violates the United States Constitution.

4. **Ongoing prosecutorial misconduct has violated James' right to due process and a fair trial under the Fifth, Sixth, and Fourteenth Amendments of United States Constitution and Article One, Section Eight of the Nevada Constitution where the State failed to have the DNA timely tested and has failed to follow-up on the presumptive DNA match to another man.**

For unknown reasons, the State did not send TH's rape kit to the lab for analysis for 7 years, long after James was convicted and sentenced to spend his life in prison. It took another year until there was a presumptive match to Ramon Wilson. The Las Vegas Metropolitan Police Department Forensic Laboratory's own forms provide that the presumptive CODIS match to Wilson was a viable lead requiring further action and that the report was sufficient to obtain a search warrant in order to obtain a confirmation buccal swab from Wilson. There is no indication this was ever done. And there is no indication that the other 2 swabs from the rape kit have ever been analyzed. Moreover, after the presumptive match to Wilson, it took

another 8 months before the State provided anyone with this information. Then it was provided to the Attorney General's Office which, to their credit, dutifully contact the Federal Public Defender's Office (which had not yet been appointed as counsel for James). The State notified none of the prior attorneys who represented James about this game-changing evidence.

James remains in prison while the State continues to drag its feet. The State's failure to have the rape kit promptly analyzed resulted in James going to prison for a crime he did not commit. The State's failure to promptly notify counsel for James of the CODIS hit identifying another man has cost James another year in prison. And the State's neglect in pursuing what they identified as a "viable lead requiring further action" continues to keep James in prison. The State has failed in its mission to seek justice. The sum of this misconduct violated James' right to due process and his continued incarceration violates the United States Constitution.

5. James was denied an adequate opportunity to confront TH in violation of the Sixth Amendment of the United States Constitution because of the State's suppression of exculpatory evidence.

The Sixth Amendment affords criminal defendants the right to confront the witnesses against them. The Confrontation Clause ensures the reliability of evidence by subjecting it to adversarial testing. *See Maryland v. Craig*, 497 U.S. 836, 845 (1990). The right to confront includes the right to cross-examine a witness as to her credibility and possible bias. *See Delaware v. Arsdall*, 475 U.S. 673, 678-79 (1986).

James was denied the opportunity to confront TH about the presence of male sperm on her body, matching a man other than James. The State's failure to disclose this evidence, or have the rape kit timely tested, prevented James from cross-examining TH about it. This evidence directly conflicts with TH's identification of James as the assailant and calls her credibility into doubt. James had a right to confront TH with the DNA evidence and his continued incarceration violates the United States Constitution.

CONCLUSION

There is a reasonable possibility James would not have been convicted of sexual assault if the jury knew that sperm belonging to

another man was found on the victim. As the victim repeatedly stated she had had no other sexual encounters for a year before the offense, there is no innocent explanation for the sperm. The victim misidentified James and the real assailant should be prosecuted. For these reasons, Tyrone James respectfully requests this Court reverse the decision of the district court and order DNA testing (genetic marker analysis) to be performed under the requirements of NRS 176.09183(3). Additionally, James requests this Court reverse the district court's dismissal of the habeas petition and remand it for a decision on the merits. In the alternative, since the results of the genetic marker analysis will necessarily have an impact on the strength of these claims, the habeas petition should be stayed until genetic marker analysis has been completed.

Dated September 28, 2020.

Respectfully submitted,

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/s/ CB Kirschner
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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

☒ This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century, 14 point font: or

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2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is either:

☒ Proportionately spaced. Has a typeface of 14 points or more and contains 5,974 words; or

☐ Does not exceed pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion

in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated September 28, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND MAILING

I hereby certify that this document was filed electronically with the Nevada Supreme Court on September 28, 2020. Electronic Service of the foregoing **Petitioner-Appellant's Opening Brief** shall be made in accordance with the Master Service List as follows:

James Sweetin, District Attorney

/s/ Adam Dunn
An Employee of the
Federal Public Defender, District of Nevada