Nos. 80902 & 80907

IN THE NEVADA SUPREME COURT

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 Reply 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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ARGUMENT

I. Genetic marker testing should have granted because there is a reasonable probability that Mr. James would not have been convicted if exculpatory results had been obtained.

At this time, James is only seeking access to genetic marker testing. Depending on the results, the next step would be a motion for a new trial. *See* NRS 176.09187 ("Genetic marker analysis: Motion for new trial authorized when results favorable to petitioner"). Because James is only seeking to have the DNA evidence tested, the standard he has to meet is very low—a reasonable possibility that he would not have been prosecuted or convicted in light of exculpatory results. *See* NRS 176.09183(1)(c)(1). 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 both 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). That standard is clearly met in James' case.

A. Rape shield laws are irrelevant to the current analysis because the victim had no prior, consensual sexual encounter.

The State argues that exculpatory DNA results, connecting another man to the sexual assault, would not have been admissible in James' trial under the rape shield laws.[1] This argument is based on a speculative theory—unsupported by actual evidence—that the newly discovered DNA was from a prior consensual sexual partner of the victim, and not the sexual assault. The State's theory, however, is contradicted by the evidence. The victim told the nurse from Sunrise Hospital during her sexual assault exam that she had not had consensual sex within the past seven days and that the last time she had consensual intercourse was one year prior.[2] Her only sexual encounter around the time in question was the sexual assault.

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[1] *See* Answering Brief at 17-19.

[2] App.850, 858.

Indeed, the State is now contradicting itself. During the trial, the defense sought to introduce evidence of the victim's sexual history. Specifically, the defense wanted to argue that the swelling found on the victim's vagina was not the result of a penetrating injury, but the result of a prior consensual sexual act.[3] The State responded by arguing the victim had "not been sexually active within the 72 hour period" leading up to the assault.[4] The State continued, "And there's certainly nothing in that report that indicates that she was sexually active within an acute period wherein the redness is attributable to other sexual contact or conduct."[5]

Wherein previously the State agreed there was no evidence of prior sexual conduct by the victim in the time leading up to the assault, now the State has changed its tune and is arguing a phantom sexual encounter must have occurred to explain the presence of another man's sperm on the victim's body. However, as the State previously recognized, such a theory is devoid of evidence. Rather, the simplest

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[3] App.318.

[4] App.318.

[5] App.321.

explanation is usually the right one. The victim had no other sexual encounters around the time of the assault. And the sperm found during the sexual assault exam can only be attributed to the real assailant. That man is not Tyrone James.

B. The CODIS hit demonstrates that this was an identity case.

Next, the State repeatedly argues, "This was not an identity case" (because the victim knew James when she identified him as her assailant).[6] A more accurate statement would be—no one realized this was identity case. The CODIS hit, matching sperm from the sexual assault exam to a man other than James, reveals that this was, in fact, an identity case.

The victim's testimony notwithstanding, exculpatory DNA evidence would create a reasonable possibility that the jury would not have convicted James. This Court, among others, has previously recognized the weight DNA evidence carries, recognizing that DNA evidence linking one man to a crime would likely outweigh another man's confession to the same crime. *See Berry v. State*, 131 Nev. 957,

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[6] Answering Brief at 19, 31.

969 (2015). This Court further recognized that eyewitness accounts are not as strong as physical evidence, such as DNA evidence. *Id*. at 973. Indeed, the United States Supreme Court has described the value of DNA testing as "unparalleled." *District Attorney's Office v. Osborne*, 557 U.S. 52, 55 (2009). "Modern DNA testing can provide powerful new evidence unlike anything known before." *Id*. at 62.

A law review article conducted an empirical study of 200 "exonerees"—people whose convictions were overturned based on DNA evidence. Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55 (2008). The study showed that "the vast majority of the exonerees (79%) were convicted based on eyewitness testimony" (*Id*. at 60, 76), and in 10% of the cases, the evidence had previously been described as "overwhelming (*Id*. at 107, table 8). Eight of the studied exoneree cases were rape cases involving "incorrect acquaintance identifications." *Id*. at 78-79. That is an accurate description of James' case—an incorrect acquaintance identification. That is what the new DNA evidence proves.

The State also argues the prior bad act evidence introduced against James somehow makes the exculpatory DNA evidence

irrelevant.[7] If anything, this merely demonstrates the highly prejudicial nature of such evidence, and the dangers of admitting it.

Finally, the State appears to argue the lack of physical evidence during the trial somehow makes it more likely that the jury would have convicted James, even in light of exculpatory DNA evidence.[8] This argument is nonsensical. The lack of inculpatory physical evidence makes it more likely that the jury would **not** have convicted James when presented with DNA evidence linking the sexual assault to another man.

Trial counsel's testimony at the 2016 evidentiary hearing, cited by the State, is irrelevant because it was given several years before the exculpatory CODIS hit.[9] Had trial counsel known that sperm from another man was found on the victim during the sexual assault exam, he undoubtedly would have agreed this case was very much about the physical evidence. There is a reasonable possibility the jury would not have convicted James if exculpatory DNA testing was obtained because

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[7] Answering Brief at 20-21.

[8] *See* Answering Brief at 21-22.

[9] *See* App.841-845 (sealed DNA reports).

there was no other physical evidence connecting James to the crime. As the State argued during the trial, there was no evidence of any other sexual conduct by the victim around the time of the assault. Thus, the sperm found on the victim during the sexual assault exam must have come from the man who assaulted her. The presumptive CODIS hit says that man was someone other than Tyrone James. Pursuant to NRS 176.09183(1)(c)(1), the district court should have granted James access to genetic marker testing.

II. Mr. James can overcome the procedural bars to his Petition for Writ of Habeas Corpus.

All the claims in James' Petition for Writ of Habeas Corpus (Post-Conviction) relate to the new DNA evidence. If this Court agrees that the lower court erred by denying James genetic marker testing, then a ruling on the habeas petition would be premature. Rather, the habeas petition should be remanded for consideration in light of the results of the genetic marker testing.

In the absence of genetic marker testing, however, James can still overcome the procedural bars and is entitled to have his habeas petition decided on the merits.

A. James has met the threshold for actual innocence.

After spending the first half of its brief arguing to preclude James confirmation DNA testing, the State has the audacity to fault James for not presenting more reliable DNA evidence in support of his habeas petition.[10] This is the very definition of chutzpah. As the State pointed out, the preliminary DNA reports indicates that "further action" is needed.[11] Nevertheless, it is the State that had a duty, and failed, to take further action.[12]

Next, the State again argues that even a confirmed DNA match, matching sperm on the victim to another man, would not support a finding of actual innocence due to the rape shield laws and identification by the victim.[13] James hereby incorporates the response he made to these same arguments in Section I (A & B), supra.

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[10] *See* Answering Brief 30.

[11] Answering Brief at 30.

[12] *See* App.842 (sealed) (providing that the preliminary CODIS hit "can be used to obtain a Search Warrant for a reference buccal swab from the above person."). *See also* App.845 (sealed) (police lab report listing a variety of investigative actions that could have been taken to follow up on the "viable lead"). The State never obtained a search warrant or took any other steps to follow up on the CODIS hit.

[13] Answering Brief at 31-32.

Moreover, regardless of the rape shield laws, a determination of actual innocence is made "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). *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 review incorporates "all evidence," including evidence "not presented at trial," evidence "alleged to have been admitted illegally (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongfully excluded or to have become available only after the trial." *Griffin v. Johnson*, 350 F.3d 956, 961 (9th Cir. 2003) (citing *Schlup*, 513 U.S. at 324, 330, 332). Thus, the weight of the DNA evidence must be considered without regard to its admissibility.

As previously argued, sperm from another man was found on the victim, who had not had consensual sexual contact with anyone else during the time of the sexual assault. The victim's incorrect identification notwithstanding, the new DNA evidence linking another

man with the sexual assault is such that this Court "cannot have confidence in the outcome of the trial." *Johnson*, 541 F.3d at 937. James has, therefore, satisfied the standard for actual innocence to overcome any procedural bars to his habeas petition.

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

The State argues there was no *Brady* violation because the existence of the sexual assault exam was disclosed prior to trial.[14] The State confuses the existence of the exam, with the finding of DNA. The exam itself includes swabs being taken from the victim's body.[15] Whether or not any male DNA was present on the swabs is a separate question not addressed by the existence of the exam itself. Moreover, evidence of the absence of James' DNA on the victim is not the equivalent of evidence of another man's DNA on the victim. The former might merely suggest that James didn't leave his DNA behind; whereas the later suggests that another man committed the sexual assault.

The State also argues that the victim testified the perpetrator

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[14] Answering Brief at 35.

[15] *See* App.858 (sealed).

rubbed his penis on her, but did not ejaculate; thereby suggesting the sperm found on the victim was not related to the sexual assault.[16] First, as previously argued, the evidence presented thus far, and relied upon by the State during James' trial, is that the victim had no consensual sexual contact in the days leading up to her assault.[17] Second, human biology proves the fallacy of the State's argument. Ejaculation is **not** required for the presence of sperm because pre-ejaculate fluid contains sperm.[18] According studies from the National Center for Biotechnology Information website (a division of the National Institutes of Health), pre-ejaculatory fluid contains sperm anywhere from 16.7% to 41% of the time.[19] Thus, the sperm recovered from the victim came from the man who actually sexually assaulted her. And that man was not Tyrone James.

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[16] Answering Brief at 36-37.

[17] App.318, 321.

[18] *See* https://www.mayoclinic.org/healthy-lifestyle/birth-control/expert-answers/birth-control/faq-20058518.

[19] *See* https://www.ncbi.nlm.nih.gov/pubmed/27266214 and https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3564677/.

C. Merits

The merits of the claims raised in James' habeas petition were never fully argued before the district court because the petition was dismissed on procedural grounds. If this Court finds James can overcome the procedural bars, then the case should be remanded for briefing and a hearing on the substantive claims.

In an abundance of caution, James briefly responds to several points made by the State in its Answering Brief.

1. A hearing is needed to determine if trial counsel was ineffective.

The State argues that trial counsel made a strategic decision not to get the DNA from the sexual assault exam tested.[20] There is no evidence of a strategic decision being made by counsel at all. An evidentiary hearing is necessary so that counsel can be questioned about his performance regarding this claim. At this time, any argument that counsel made a deliberate decision to forgo testing is based on speculation rather than evidence.

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[20] Answering Brief at 42.

2. Whether a free-standing actual innocence claim exists is an open question.

The State argues that "Nevada state law does not recognize freestanding claims of actual innocence…"[21] Nevada state law also doesn't preclude freestanding claims of actual innocence. In 2015, this Court wrote, "This court has yet to address whether and, if so, when a free-standing actual innocence claim exists." *Berry v. State*, 131 Nev. 957, 967 n.3 (2015) (citing *McQuiggin v. Perkins* 569 U.S. 383 (2013)).

While the United States Supreme Court has also not definitely answered this question yet, evidence suggests the claim does exist. In the oft-cited United States Supreme Court case addressing this topic, a majority of justices on the court agreed. *See Herrera v. Collins*, 506 U.S. 390, 419 (1993) (O'Connor, J., concurring, joined by Justice Kennedy) ("Regardless of the verbal formula employed… the execution of a legally and factually innocent person would be a constitutionally intolerable event."); *id.* at 429 (White, J., concurring) ("In voting to affirm, I assume that a persuasive showing of 'actual innocence' made after trial, even though made after the expiration of the time provided by law for the

[21] Answering Brief at 43.

presentation of newly discovered evidence, would render unconstitutional the execution of petitioner in this case."); *id.* at 430 (Blackmun, J., dissenting, joined by Justices Stevens and Souter) ("Nothing could be more contrary to contemporary standards of decency… or more shocking to the conscience… than to execute a person who is actually innocent."). Thus, a six-justice majority in *Herrera,* Justices O'Connor, Kennedy, White, Blackmun, Stevens, and Souter, agreed that the federal constitution provides a claim for relief from punishment to those who can now prove they are actually innocent with newly discovered evidence.

The strongest evidence showing that the Supreme Court will acknowledge such a claim can be found in the decision of *In re Davis*, 557 U.S. 952 (2009). In that case, the Court considered the original writ of habeas corpus of Troy Davis. In the brief memorandum opinion, the Court ordered that "[t]he [d]istrict [c]ourt should receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence." *Id.* at 1. Clearly, the Court would not have granted the relief that it did if it believed that a free-standing innocence claim was not cognizable.

And that is precisely what Justice Stevens' reasoned in his concurring opinion:

> The court may also find it relevant to the AEDPA analysis that Davis is bringing an "actual innocence" claim. Even if the court finds that §2254(d)(1) applies in full, it is arguably unconstitutional to the extent it bars relief for a death row inmate who has established his innocence. Alternatively, the court may find in such a case that the statute's text is satisfied, because decisions of this Court clearly support the proposition that it "would be an atrocious violation of our Constitution and the principles upon which it is based" to execute an innocent person.

Id. at 2 (internal citations omitted).

Assuming the fundamental right against wrongful imprisonment exists, the Ninth Circuit has elaborated on what constitutes a "truly persuasive" claim of actual innocence. *See Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997). In *Carriger*, the Ninth Circuit explained that, under *Herrera*, "to be entitled to relief, a habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent." *Id.* at 477-78 (citing *Herrera*, 506 U.S. at 442-44 (Blackmun, J., dissenting); *accord Herrera*, 506 U.S. at 399-400 & 407 n.6 (majority

opinion)). In James' case, there can be no greater affirmative proof of his innocence than DNA evidence identifying another man as having committed the sexual assault.

3. The confrontation claim could not have been raised on direct appeal.

The State argues this claim should have been pursued on direct appeal.[22] This claim is based on the newly discovered DNA evidence, linking another man to the sexual assault—evidence that James never had the opportunity to confront the victim with. However, as the DNA evidence was not brought to light until 7 years after James' conviction, pursuing this claim on direct appeal would have been impossible. While new evidence of actual innocence overcomes a timeliness bar to a habeas petition, *see Mitchell v. State*, 122 Nev. 1269, 1273-74 (2006), it is not grounds for filing a new and untimely direct appeal. Additionally, direct appeals are limited to the trial record, which did not include the new DNA evidence. *See Rippo v. State*, 134 Nev. 411, 429 (2018) (record on direct appeal cannot be expanded "to include evidence that was not part of the trial record").

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[22] Answering Brief at 49.

CONCLUSION

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 January 27, 2021.

Respectfully submitted,

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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:

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Dated January 27, 2021.

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 January 27, 2021. Electronic Service of the foregoing **Petitioner-Appellant's Reply Brief** shall be made in accordance with the Master Service List as follows:

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