APPENDIX

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2024 WL 1576814
Only the Westlaw citation is currently available.
United States Court of Appeals, Fourth Circuit.

Sherman BROWN, Petitioner - Appellant,
v.
Bernard W. BOOKER, Respondent - Appellee.

No. 22-6522
|
Submitted: January 29, 2024
|
Decided: April 11, 2024

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Elizabeth Kay Dillon, District Judge. (7:16-cv-00576-EKD-JCH)

Attorneys and Law Firms

Donald P. Salzman, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, Washington, D.C., for Appellant.

Before WILKINSON, QUATTLEBAUM, and RUSHING, Circuit Judges.

Opinion

Dismissed by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

***1** Sherman Brown seeks to appeal the district court's orders denying relief on his 28 U.S.C. § 2254 petition and denying reconsideration. The orders are not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 580 U.S. 100, 115-17 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012).

We have independently reviewed the record and conclude that Brown has not made the requisite showing. * Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

* Brown failed to challenge on appeal the district court's independent determination that his fiber analysis due process claim was barred by the one-year limitations period in 28 U.S.C. § 2254(d). Thus, he forfeited appellate review of that portion of the district court's order. *See Jackson v. Lightsey*, 775 F.3d 170, 177 (4th Cir. 2014).

DISMISSED

All Citations

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2022 WL 989243
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United States District Court, W.D. Virginia,
Roanoke Division.

Sherman BROWN, Petitioner,
v.
Bernard W. BOOKER, Warden, Respondent.

Civil Action No. 7:16-cv-00576
|
Signed 03/31/2022

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Matthew P. Dullaghan, Office of the Attorney General, Richmond, VA, for Respondent.

MEMORANDUM OPINION AND ORDER

Elizabeth K. Dillon, United States District Judge

***1** In 1970, Sherman Brown was convicted of murdering the four-year-old son of a woman the court has referred to as Mrs. B, who herself was stabbed several times, but survived. On March 31, 2021, the court issued an opinion and order granting the respondent's motion to dismiss and denying Brown's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. *See Brown v. Booker*, 2021 WL 1207751 (W.D. Va. Mar. 31, 2021). (Dkt. Nos. 50, 51.) Brown now moves to alter or amend the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. (Dkt. No. 52.) Brown's primary argument is that the court erred in not holding an evidentiary hearing before resolving the petition on the merits.

For the reasons stated below, an evidentiary hearing is not necessary or required to resolve Brown's petition. The court will therefore deny Brown's Rule 59(e) motion.

I. BACKGROUND

The court adopts by reference the extensive factual and procedural background set forth in its March 31 opinion. 2021 WL 1207751, at *1–12. Brown is challenging his 1970 first-degree murder conviction and life prison sentence. Brown's petition contends that (1) new evidence establishes his actual innocence and (2) introduction of invalid scientific testimony violated his right to due process and undermined the fundamental fairness of his trial. Respondent moved to dismiss.

The court dismissed the first claim because the state court's determination that Brown failed to meet the required burden of proof on his "freestanding" actual innocence claim was not contrary to, or an unreasonable application of, clearly established federal law, or based on an unreasonable determination of facts. 2021 WL 1207751, at *16–17.

Regarding the second claim, the court explained that for it to be addressed on its merits, Brown needed to pass through the gateway established by *Schlup v. Delo*, 513 U.S. 298 (1995). "In *Schlup*, the court established a standard for an actual innocence claim to be a gateway to allow the court to consider otherwise untimely and defaulted claims." 2021 WL 1207751, at *17 (citing *Schlup*, 513 U.S. at 329). When a petitioner raises such a claim, supported by new reliable evidence, the court must consider all evidence, old and new, inculpatory and exculpatory, admissible and even inadmissible, to determine whether it is more likely than not that a reasonable juror would not find the petitioner guilty beyond a reasonable doubt if all the evidence were presented. *Id.* (citing *Schlup*, 513 U.S. at 327–28). "Stated another way, the court must determine whether it is more likely than not that any reasonable juror would have a reasonable doubt." *Id.* (citing *Teleguz v. Pearson*, 689 F.3d 322, 328 (4th Cir. 2012)). "[T]enable actual-innocence gateway claims are rare: 'A petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror acting reasonably would have voted to find him guilty

beyond a reasonable doubt.' " *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013) (quoting *Schlup*, 513 U.S. at 329).

***2** In a footnote, the court stated that "[n]either party requested a hearing, and the relevant facts pertaining to DNA evidence, hair, and fiber are not disputed. The parties dispute only the significance of those facts." 2021 WL 1207751, at *17 n.6. The court acknowledges its oversight because Brown did, in fact, request an evidentiary hearing. *See, e.g.*, Dkt. No. 49 at 1 ("Respondent's Motion to Dismiss should be denied and Mr. Brown should be afforded an evidentiary hearing."); Dkt. No. 19-1 at 55 ("If the Court determines that relief may not be granted in the absence of an evidentiary hearing, order an evidentiary hearing to resolve all factual issues.").

The court then analyzed the merits of Brown's *Schlup* gateway claim:

> The court begins by noting that fifty years ago, the Supreme Court of Virginia affirmed the sufficiency of the evidence against Brown, stating that a "detailed review of the evidence of the circumstances surrounding this murder and the evidence pointing to the defendant's guilt as the murderer leaves no doubt in our mind that this evidence, viewed in the light most favorable to the Commonwealth, amply supports the jury's verdict." *Brown*, 184 S.E.2d at 787. Such evidence included Mrs. B's identification of Brown. Two witnesses established that Brown was on Mrs. B's property after 3:00 p.m. on October 1, 1969, and Brown conceded his presence there to the resentencing jury. Larry testified that Brown frequently jogged in Mrs. B's field, corroborating her account of her prior acquaintance with Brown. Larry also corroborated Mrs. B's report that Brown telephoned her before he arrived at her house, a call that Brown admitted – in later parole proceedings – he had made.
>
> Further, Brown made post-sentencing admissions during his parole proceedings, including that he went to Mrs. B's house after being told that she did not wish to see him. Brown reported that Mrs. B gave him a drink of water. The paper cup that Mrs. B gave to Brown was in Mrs. B's living room when Deputy Guthrie arrived. Finally, Deputy Bailey testified that when asked if he had been on Mrs. B's property that day, Brown replied that he had not. A jury could reasonably conclude that this false statement to the investigating officer was made to conceal Brown's guilt.
>
> Brown also made additional inculpatory statements to the parole board. During a parole interview in 1991, Brown stated, "I accept full responsibility for my crime and I feel sorry for the victim, but I can't undo what's been done." *In re Brown*, 810 S.E.2d at 451. In a 1985 parole interview, Brown expressed "fervent regret and remorse." *Id.* In a 1984 interview, Brown offered a detailed statement to the parole board explaining how the crimes occurred. After a bout of "drinking alcohol" and "taking some LSD," he approached Mrs. B at her home knowing that she did not want to see him. After Mrs. B gave water to Brown, she "turned into a snake." In a later parole interview, he recalled standing over Mrs. B with the "knife handle in his hand." *Id.*
>
> Brown recalled feeling like he was "tripping" at the time of the offense. He could not specifically remember stabbing Mrs. B and murdering her son, but he remembered that he had blood all over him and he knew something was wrong. *Id.* Brown told the parole board in 1991 that he thought he "committed the crimes, stabbed Mrs. B and killed her 5 y/o son." *Id.* Brown discussed the circumstances of the crimes because he knew what drugs and alcohol can do to a person and did not want another young child's life taken in vain. *Id.*

Finally, the court addressed the scientific evidence advanced by Brown. This included DNA evidence that excludes Brown and Mrs. B's husband as contributors of genetic material; a 2015 report that hair comparison analysis "exceeds the limits of science"; evidence concerning severe deficiencies in fiber examination; and blood analysis evidence. The court found that none of this evidence makes it "more likely than not that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt." 2021 WL 1207751, at *18. The DNA evidence, for example, "does not demonstrate that another person attacked Mrs. B. At best, it invites speculation about Mrs. B's sexual activities outside of her marriage." *Id.*

***3** Thus, the court granted the motion to dismiss, dismissed the petition, and declined to issue a certificate of appealability.

II. ANALYSIS

Brown timely filed a motion to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e), which provides that a "motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." Rule 59(e) motions can be granted for three reasons: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at the time of

judgment; or (3) to correct a clear error of law or prevent manifest injustice. *Arvon v. Liberty Mut. Fire Ins. Co.*, —— F. App'x ——, 2021 WL 3401258, at *3 (4th Cir. Aug. 4, 2021) (citing *Zinkand v. Brown*, 478 F.3d 634, 637 (4th Cir. 2007)). A district court may amend a judgment under Rule 59(e) to "prevent manifest injustice." *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993). Another purpose is to "permit a district court to correct its own errors, 'sparing the parties and the appellate courts the burden of unnecessary appellate proceedings.' " *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998) (quoting *Russell v. Delco Remy Div. of Gen. Motors Corp.*, 51 F.3d 746, 749 (7th Cir. 1995)). "Mere disagreement with a court's ruling does not support a Rule 59(e) motion." *Hutchinson*, 994 F.2d at 1082. Indeed, "reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." *Pac. Ins. Co.*, 148 F.3d at 403.

As noted, the court erred when it stated that Brown did not request a hearing. That misstatement was harmless, however, because Brown is not entitled to an evidentiary hearing on his § 2254 petition.

Initially, § 2254(e)(2) precludes a district court from conducting an evidentiary hearing on a federal habeas claim if the petitioner "failed to develop the factual basis of a claim in State court proceedings," unless the petitioner can meet one of two exceptions. [1] Assuming, without deciding, that § 2254(e)(2) does not proscribe an evidentiary hearing, [2] the court must assess whether Brown is entitled to one. *See Wolfe*, 565 F.3d at 169. A § 2254 petitioner who has "diligently pursued his habeas corpus claim in state court is entitled to an evidentiary hearing in federal court, on facts not previously developed in the state court proceedings, if the facts alleged would entitle him to relief." *Conaway v. Polk*, 453 F.3d 567, 582 (4th Cir. 2006). Also, a petitioner must satisfy one of six factors enumerated by the Supreme Court in *Townsend v. Sain*, 373 U.S. 293, 313 (1963). [3]

1 (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
(A) the new claim relies on—
(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
§ 2254(e)(2).

2 The Fourth Circuit has recognized that an actual innocence contention under *Schlup* is procedural in nature and could be construed as not constituting a "claim" under § 2254(e)(2). *See Wolfe v. Johnson*, 565 F.3d 140, 167 n.40 (4th Cir. 2009). The Fourth Circuit has reserved ruling on this issue. *See id.* The Fourth Circuit has also recognized that the weight of authority finds that § 2254(e)(2) does not apply to *Schlup* claims. *See Teleguz*, 689 F.3d at 331 n.6 ("Our sister circuits considering whether the limitation on evidentiary hearings in § 2254(e)(2) applies to *Schlup* claims have overwhelmingly found that it does not.") (collecting cases).

3 The six *Townsend* factors, one of which must be satisfied in order to obtain an evidentiary hearing in a federal habeas corpus proceeding, are:
(1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.
Townsend, 372 U.S. at 313.

***4** In assessing whether a federal habeas corpus petition can be properly dismissed without an evidentiary hearing or discovery, the court must evaluate the petition under the standards governing motions to dismiss made pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Conaway*, 453 F.3d at 582 (citing *Walker v. True*, 399 F.3d 315, 319 n.1 (4th Cir. 2005)). Accordingly, the court is "obliged to accept a petitioner's well-pleaded allegations as

true," and the court must "draw all reasonable inferences therefrom in the petitioner's favor." *Id.*

Brown argues that the court misapprehended the DNA evidence pertaining to Mrs. B's sexual activities outside of her marriage. Brown takes particular umbrage with the court's statement that the DNA evidence "does not demonstrate that another person attacked Mrs. B. At best, it invites speculation about Mrs. B's sexual activities outside of her marriage." 2021 WL 1207751, at *18. According to Brown, the DNA evidence excluding Brown and Mrs. B's husband as the source of male DNA on the vaginal smear slide, combined with Brown's allegation in his petition that Mrs. B was in a monogamous relationship with her husband, definitively excludes Brown as the person who sexually assaulted and attacked Mrs. B. *See* Am. Pet. 3, Dkt. No. 19-1 ("In 2016, M.B. informed an Agent for the Commonwealth that, at the time of the attack, she had not had consensual sex with anyone other than her husband."). [4]

4 *See also* Am. Pet. at 27–30:

> M.B. was married, and she had a monogamous sexual relationship with her husband, and she told the Commonwealth's Attorney in 2016 that her husband was her only consensual sexual partner at the time of this incident Bode's analysis proves, in a number of different respects, that M.B.'s husband was not the source of the male DNA found on the slide.... M.B. has stated that she had a monogamous relationship with her husband, and did not have consensual sex with any other person. Because the supplemental DNA testing excludes her husband as the source of the male DNA on the vaginal smear slide, the DNA found on that slide must have come from the perpetrator. But the previous DNA testing also excludes Mr. Brown as the contributor to the male DNA found on the slide and, thus, combined, these results are highly exculpatory.

At this stage, the court is obliged to accept the allegations in the petition as true. Thus, the court assumes as true Mrs. B's statement that she was in a monogamous relationship. Further, the court assumes that she would come across as a truthful and reliable witness in making this statement. Even so, Brown could never prove Mrs. B's professed monogamy to be true as an unassailable fact, which is how Brown is representing it to be. For purposes of the court's *Schlup* analysis, the court must consider whether " 'no juror acting reasonably would have voted to find him guilty beyond a reasonable doubt.' " *McQuiggin*, 569 U.S. at 386 (quoting *Schlup*, 513 U.S. at 329). It would not be unreasonable for a juror to disbelieve Mrs. B, for example, on the theory that many or most people would deny being an adulterer. Therefore, the court stands by its analysis that the DNA evidence does no more than invite speculation about Mrs. B's sexual activities outside of her marriage, and Brown is not entitled to discovery or an evidentiary hearing in light of this evidence.

Brown also argues that the court erred in crediting inculpatory statements made by Brown during his parole hearings. Brown asserts that such admissions have little relevance because innocent inmates who fail to admit culpability suffer severe consequences long after they are sentenced. Brown maintains that the court should have held an evidentiary hearing to consider testimony from false confession experts to explain the incentives that lead innocent inmates to admit to crimes they did not commit. The court understands the incentive to profess innocence in parole hearings, but this dynamic does not undermine the court's conclusion that a reasonable juror could find Brown guilty beyond a reasonable doubt. The fact that some inmates lie about culpability during parole hearings does not imply that this is always the case. Moreover, Brown's parole statements were just one aspect of the evidence pointing towards Brown's guilt. *See, e.g.*, 2021 WL 1207751, at *18 ("Such evidence included Mrs. B's identification of Brown. Two witnesses established that Brown was on Mrs. B's property after 3:00 p.m. on October 1, 1969, and Brown conceded his presence there to the resentencing jury.").

***5** Finally, Brown maintains that the court erred in stating that "the relevant facts pertaining to DNA evidence, hair, and fiber are not disputed. The parties dispute only the significance of those facts." 2021 WL 1207751, at *17 n.6. Brown points out that the parties dispute whether the DNA evidence may be contaminated. The court's misstatement, if it was a misstatement, was harmless because the court accepted as true the admissibility and validity of the DNA evidence when it analyzed the *Schlup* issue. [5]

5 Brown asks the court to reconsider its denial of a certificate of appealability. The court does not do so because the court believes that Brown failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

III. CONCLUSION

For the foregoing reasons, Brown's motion to alter or amend the judgment (Dkt. No. 52) is DENIED.

All Citations

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United States District Court, W.D. Virginia.

Sherman BROWN, Petitioner,

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Bernard W. BOOKER, Warden, Respondent.

Civil Action No. 7:16-cv-00576

Signed 03/31/2021

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Matthew P. Dullaghan, Office of the Attorney General, Richmond, VA, for Respondent.

MEMORANDUM OPINION

Elizabeth K. Dillon, United States District Judge

***1** Petitioner Sherman Brown, a Virginia inmate proceeding by counsel, filed a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, challenging his Albemarle County Circuit Court conviction for first-degree murder on May 25, 1970, when he was 23 years old. (*See* Amended Petition (Am. Pet.), Dkt. No. 19.) Initially sentenced to death, the death penalty was vacated by the United States Supreme Court on June 29, 1972, but the conviction was upheld. *Brown v. Virginia*, 408 U.S. 940 (1972). On remand, Brown was sentenced to life in prison. (Trial Tr. (Tr. #2) 508 (Nov. 7, 1973), Ex. F to Pet., Dkt. No. 1-9.)[1] The Respondent has filed a motion to dismiss the petition, and Brown has filed a response, making this matter ripe for disposition.

[1] Both parties have attached many state court pleadings and other documents as exhibits to their briefs. (*See* Dkt. Nos. 1, 19, 38, & 49.) For convenience the court cites to the briefs' exhibits, where possible, using the ECF-generated page numbers when a page cite is appropriate. "Va. Sup. Ct. R." will refer to citations to the combined Virginia Supreme Court record of Brown's state habeas case (Record No. 161422) and his state petition alleging actual innocence (Record No. 161421) using the page numbers in the lower left corner, "page __ of 803."

Brown's petition raises two claims: (1) new evidence establishes his actual innocence, and (2) introduction of invalid scientific testimony violated his right to due process and undermined the fundamental fairness of his trial. (Am. Pet., Dkt. No. 19.) Upon consideration of the record and arguments of counsel, the court finds that Brown has failed to establish his freestanding claim of actual innocence. With respect to the second claim, the court also finds that Brown has not satisfied the standard for using his actual innocence claim as a gateway to reach otherwise procedurally defaulted constitutional claims. *See Schlup v. Delo*, 513 U.S. 298 (1995). Accordingly, for the reasons stated below, the court will grant respondent's motion to dismiss, deny the petition, and decline to issue a certificate of appealability.

I. BACKGROUND

A. Factual Background

1. The crime and the crime scene

On October 1, 1969, at 4:55 p.m., Mrs. B.'s sister-in-law[2] walked next door to Mrs. B.'s home to see if the phone was off the hook. She walked in to find Mrs. B. lying in a pool of blood in the living room floor, near the kitchen door. The phone was hanging from the wall, with the wires ripped from the wall and the receiver broken into two pieces. Mrs. B. was weak and could not talk very loudly, but she seemed coherent and spoke briefly to her sister-in-law. After getting Mrs. B. a rag, the sister-in-law left to call her husband and the rescue squad from a neighbor's phone. (Trial Tr. (Tr. #1) 95–100, Ex. B to Pet., Dkt. No 1-5.)

[2] The names of Mrs. B., her husband, her father, her brother-in-law (husband's brother), and sister-in-

law were all redacted in the trial transcripts. Her son's name was replaced with the initials "W.B." Presumably, her husband and in-laws had the same last initial, and her father's last initial cannot be determined from the record. For this reason, each of these witnesses will be identified based on their relationship to Mrs. B.

***2** She returned to Mrs. B.'s home to await the rescue squad, and while waiting, asked where the children were. She removed Mrs. B's unharmed 2-year-old son from his crib in the front bedroom and took him outside to be with her own children. She then walked to the back bedroom and saw her 4-year-old nephew lying face down in the bed. She could tell that he was seriously hurt but did not know if he was dead. She did not move the child or disturb the scene and returned to the living room. Her husband and Mrs. B.'s husband then arrived, followed immediately by the rescue squad. (*Id.* at 100–03, 112.)

Maynard Strickler and James Bingler, volunteers with the rescue squad, were dispatched to the B. home at 5:05 p.m., and they arrived on scene between 5:15 and 5:20 p.m. While Bingler started assisting Mrs. B., Strickler went to the back bedroom to check on the child, where he determined that the boy had no signs of life. (*Id.* at 124–25.) Bingler saw no blood on Mrs. B's back, but there was a lot of blood coming from somewhere. Needing help to turn her over, he called for Strickler. As they turned Mrs. B. over, a knife flipped up into Bingler's face, the blade still stuck in Mrs. B's side. Because they are trained not to remove foreign objects, if possible, they unsuccessfully tried to stop the bleeding and bandage the wound without removing the knife, which had no handle. They determined that they had to move the knife in order to put enough pressure on the wound to stop the bleeding. Mrs. B. was weak, mumbling, and possibly bleeding out. She was dressed in a nightgown and robe, with no underwear on. Bingler cut a square out of her nightgown, with the blade through it, and Strickler removed the patch and blade. (*Id.* at 142–46.)

Strickler went to get the stretcher from the ambulance; while outside, he called the Sheriff's office and then notified the hospital that an emergent patient was on the way. In order to make room to place Mrs. B. on the stretcher, he had to move the coffee table and rug; he used his foot to move a pair of panties from under the coffee table, pushing them to the edge of the couch. (*Id.* at 128.) After placing Mrs. B. on the stretcher and into the ambulance, the rescue squad workers dropped her off at University of Virginia Hospital before responding to another call. (*Id.* at 146.)

Dr. Alrich, the surgeon on call when Mrs. B. arrived at University Hospital, examined her and operated on her. He testified that she had stab wounds on her lower back, her chest, and the right side of her upper abdomen. Although her chest and pleural cavity showed no internal wounds, her abdominal cavity was full of blood. She appeared to be bleeding out through a vein from her liver, and he had to stop the bleeding. Once he stopped the bleeding and removed the blood from her abdomen, he determined that a stab wound had sliced all the way across the right lobe of her liver. She was also bleeding from the pedicle of her spleen, where the artery and vein enter, and he removed the spleen. He closed her surgical incisions and stitched up the wound in her back. He noticed two major lacerations on the top of her head, down to her skull, which he also cleaned and closed. These were consistent with a blow to her head. Finally, he called the gynecology department to perform an exam. (*Id.* at 115–21.)

Dr. Wiecking, the medical examiner, testified about his autopsy of W.B., Mrs. B.'s 4-year-old son, who had been declared dead by Dr. Ooghe at 5:30 p.m. on October 1, 1969. Wiecking examined the body in the home at 6:00 p.m. and later at the University Hospital Morgue, where he also performed the autopsy. W.B. had suffered two stab wounds in his chest, just to the left and right of midline, both of which pierced the heart; either wound alone would have been fatal within one to five minutes. W.B. had a stab wound through his left armpit into his left chest and lung and a stab wound through his right wrist. He had blood inside his lung and chest cavity. He also had two lacerations on the back of his head, down to the bone, another laceration above his left ear, and a fourth laceration on his scalp. Finally, W.B. had several bruises that had occurred somewhere between minutes and one day before his death, including two in the middle of his forehead, one above his left eyebrow, behind his left ear, on the back of his right shoulder, and on his arms and legs. He estimated time of death between 30 minutes or an hour before he saw the child and several hours earlier. On cross-examination, he acknowledged that the body cools 1 to 1.5º Celsius per hour after death. Normal is 37º, and W.B.'s temperature at 7:30 p.m. was 33º. He also acknowledged that it would not take a lot of strength to cause the injuries to the child. (*Id.* at 75–92.)

***3** Deputy Guthrie of the Albemarle County Sheriff's Department was the first law enforcement officer on scene,

after receiving a call from the rescue squad. En route to the home, he passed the rescue squad taking Mrs. B. to the hospital. When he entered the home, he saw a lot of blood and furniture in disarray. After speaking with Mrs. B.'s sister-in-law and brother-in-law, Guthrie returned to his cruiser and requested additional officers to assist. He also requested a lookout for Ike Brown,[3] along with a description of Ike Brown's vehicle. Chief Deputy Sheriff George Bailey arrived on the scene, and within five minutes, according to Guthrie, Bailey told him the suspect was Sherman Brown, not Ike Brown, and the lookout notice was corrected. Guthrie was not familiar with either Ike or Sherman. (*Id.* at 366–68.)

[3] Ike Brown was defendant Sherman Brown's father and lived across the street from Mrs. B. (Tr. #1, at 44, 56–57, & 153.)

Chief Deputy Bailey arrived around 5:35 p.m. and began taking notes five minutes after he arrived. According to his notes, at 5:45 p.m., the people present in the house when Bailey arrived were: Mrs. B.'s sister-in-law and her husband (Mrs. B.'s brother-in-law), Dr. Ooghe, Rev. Boogher, Deputy Guthrie, and Deputy Cobbs. W.B.'s body also remained. Mrs. B. had already been taken away by ambulance, her husband riding along with her. Bailey first spoke with Mrs. B.'s sister-in-law, and after speaking with her, he notified dispatch that the suspect to look for was Sherman Brown, not Ike Brown; he provided a description of Sherman and Sherman's car. Bailey stated that he knew both Ike and Sherman before that day. He had two officers on scene, Deputy Cobbs and Deputy Bunch, go over to Dry Bridge Rd., where Sherman lived with his wife, mother-in-law, and her family. He sent Deputy Marshall and Deputy Davis to look for Sherman. Mrs. B.'s sister-in-law was not feeling well, and she and her husband left after Bailey finished speaking with her. (*Id.* at 55, 59–63.)

Bailey walked through the home on his own to observe the scene, and then he called for a photographer, Rip Payne, and the medical examiner. Between 6:30 and 6:45, the photographer took pictures of the deceased child and the wounds, as well as pictures of the boy's bed, the hallway, and the washer and dryer, showing blood in each location. In the living room, he took pictures of blood on the end of the sofa, on the carpet, and in splotches dripping down the wall behind the sofa. Other pictures were taken of pieces of a knife blade, the knife removed from Mrs. B. and the piece of cloth cut from her gown, a busted telephone sitting on the end table, an overturned lamp on the floor, a crushed paper cup and broken ashtray from under the sofa, ladies' panties, a pipe, and a child's scarf, all on the floor. In the kitchen, he photographed a partially open silverware drawer, the kitchen cabinets, and the sink. After the photographs were taken, Bailey collected, bagged, and marked the evidence. (*Id.* at 49–54.)

At trial, other witnesses who were asked did not remember seeing several of the items on the living room floor that evening. Mrs. B.'s sister-in-law did not see the lamp, scarf, panties, pipe, or paper cup, though she remembered seeing some water spilled on the coffee table. She recognized the picture of the broken phone, but said it was not on the end table when she saw it, but it was hanging from the wall by the kitchen. (*Id.* at 108–10.) The paramedic who moved the panties off the rug when he moved the rug and coffee table did not see a paper cup. (*Id.* at 130.) Everyone, of course, remembered seeing the blood.

2. The investigation

At the Chief Deputy's direction, Deputies Marshall and Davis went to the Boar's Head Inn, where Brown worked, to look for Brown. They arrived at 6:15 p.m. and asked a man in the hallway if Brown was there. Upon being directed to the kitchen, they saw someone wearing a white shirt and dark trousers and asked if he was Brown. Brown confirmed his identity and was cooperative. They told him he was wanted for questioning and gave him his *Miranda* warnings, and Brown walked with them voluntarily to the police car. Brown appeared calm, and there was nothing unusual about him—no bruises, scratches, or other injuries. (*Id.* at 207–12.)

***4** Marshall and Davis drove Brown to the driveway of Mrs. B.'s home, and Chief Deputy Bailey got in the front seat and turned around to talk to Brown, who was seated in the backseat. Bailey left the front car door open. He asked Brown if he had been read his rights, and Brown said yes. Nevertheless, Bailey reviewed the warnings again and asked Brown if he understood them. Bailey asked Brown if he had been on Mrs. B.'s property that day, and Brown said that he had not. Bailey asked no other questions, and Brown made no other statements. Bailey did not tell Brown what had happened to Mrs. B. and W.B., nor did he give any information about why he was questioning Brown. After Brown denied being on Mrs. B.'s property, Bailey directed Marshall and Davis to take Brown to the Charlottesville jail. (*Id.* at 213–15.)

Sometime after 6:00 p.m., as it was getting dark, Deputy Bunch went to the Waller home, where Brown was living, and wanted to take Brown's clothes. Mrs. Waller watched Bunch

go through the clothes, pick them up to look at them, and then stuff them in a pillowcase. She said they took clothes from the clothes hamper and from Brown's closet, and they even took a pair of pants belonging to Helen (Mrs. Waller's daughter, defendant Brown's wife). (*Id.* at 270–74.) Bunch testified that he got clothes from Brown's bedroom, from a closet, and a stack from another room, all with Mrs. Waller's permission; Brown's brother, Vernon, identified which clothes were his and which ones were Brown's. Bunch acknowledged that in all locations, the clothes were touching other clothes, and he corroborated putting the clothes in a single pillowcase, except for jackets on coat hangers, which he carried. Bunch then took the items to Bailey at the Sheriff's Office. (*Id.* at 283–84.)

Bailey examined the items of clothing and marked them for identification. He put each item in a plastic bag, sealed the bag, and turned the items of clothing over to the FBI for examination. On October 2, the day after Brown's arrest and Bunch's seizure of clothing from Mrs. Waller's home, Bailey went back to Mrs. Waller's home. While he was there, Mrs. Waller gave him a blue sweatshirt that she found in either her son Larry's room or her daughter Eloise's room. Larry was present when Mrs. Waller gave Bailey the sweatshirt, which Bailey put in a plastic bag with an evidence card and sealed it for delivery to the FBI. (*Id.* at 269–70, 285–86.)

At some point not identified in the transcript, Bailey and other law enforcement personnel questioned Larry Waller about the events of October 1. A school bus driver, Eddie Howard, had seen Larry running from the vicinity of Mrs. B.'s driveway in the afternoon. Deputies told him he was a suspect in the crime and that he would go to the penitentiary if he did not cooperate. They took samples of Larry's hair to send the FBI. Larry told them that Brown had been wearing the blue sweatshirt on October 1, the same sweatshirt his mother gave Bailey on October 2, even though the shirt was Larry's and had Larry's name written inside it. (*Id.* at 251–53.)

Bailey forwarded all evidence collected to the FBI, including the clothing taken from Brown's room and elsewhere in Mrs. Waller's house, the nightclothes worn by Mrs. B. when she was assaulted, the pajamas worn by W.B. at the time of his death, and the miscellaneous items scattered about Mrs. B.'s floor and living room. The items were submitted for blood, fingerprint, hair, and fiber analysis. The FBI returned the clothing to the Sheriff's office, along with scrapings from clothing mounted on sealed glass microslides, on October 21, 1961. In November, the Sheriff's office returned the items to the FBI, along with samples of Brown's hair. Brown's hair was mounted on microslides, and the original microslides were examined and resealed. All items were returned to the Sheriff on November 24, 1969. On January 15, 1970, the items and sealed slides were sent to the FBI again, with a sample of Larry Waller's hair. When the FBI finished examining the slides against new slides with Larry Waller's hair, the resealed microslides were returned to the Sheriff on February 9, 1970.

3. The trial evidence against Sherman Brown

***5** Mrs. B. testified that she had spoken with Sherman Brown on two occasions prior to October 1, 1969. First, a couple of months earlier, she got a call from a person who identified himself as “Sherman” or “Sherman Brown”, who said he lived across the road and was looking for outdoor work; she said she did not need any. Although she had never seen Sherman in the six and a half years she had lived there, she knew that the Brown family lived across the road. (*Id.* at 152–53, 171.) Then, on a Sunday in early September, she was outside watching W.B. play in the yard when she saw a man jogging around the front field; although the field was part of her property, it was customary for kids in the neighborhood to play or run in the field, nothing unusual. He stopped at the fence and asked if they needed anyone to do yardwork. Although she had never seen him before, and he did not identify himself nor refer to the earlier telephone conversation, she thought she recognized the voice. She asked about his sister Rosie, and they talked about the weather, and he asked if he could come inside the fence. She said yes, and he jumped over the fence and sat in a lawn chair. He did not have anything to drink, but he borrowed a cigarette from her. They continued making small talk, and he mentioned that he had been in the service in Viet Nam. She asked if he had been in combat, and he did not answer. He never mentioned having any adjustment issues after returning from Viet Nam. After conversing about 15 minutes, she indicated that she needed to cook dinner, she got up to go inside, and he got up and left. She acknowledged that the encounter had been friendly and polite, nothing improper. (*Id.* at 153–55, 173–76.)

She had no other contact with this person until she received a phone call on October 1, asking if he could come over and talk. At the time she received the call, her father was visiting at her home. She said no and that it was not convenient that day or the next. He was persistent, saying that he was very confused. She remained firm, saying either that her father was there or that she had a visitor. She was “a little shaken” by the call (*id.* at 156), but she returned to the conversation with her father and forgot about it. On cross-examination, she initially denied trying to keep her father from knowing

what the conversation was about, but when pressed about her testimony at the preliminary hearing, she admitted that her dad was furious about the conversation and felt like she was being guarded. She said he asked what the call was about, and she said, "You wouldn't believe it if I told you." (*Id.* at 185.)

Mrs. B. testified that her father left about five minutes after she got off the phone. Prior to her father's arrival, she had put her two-year-old in his crib for a nap. She had put on a gown and robe to lie down (keeping her underpants on) and read to her four-year-old, hoping that he would fall asleep. She had been reading for a while, then turned off the light, when she heard a car coming in the driveway. She looked out and saw that it was her father. She and W.B. went to the front door to greet him, and he asked for a glass of wine, which was unusual. She got him a glass, and they talked for a little while. She does not know what time this was, because she had no reason to look at a clock. After he left, she and W.B. headed back to the bedroom, intending to take their nap. (*Id.* at 150–52, 181–83.)

Her father testified that he arrived at her home between 2:45 and 2:50 p.m. He said that she had not been home long and was getting ready to put W.B. down for a nap. He does not recall what she was wearing. He had been there for five or ten minutes when she got a phone call. He heard her say "No, I can't see you today." (*Id.* at 202.) Otherwise, he really was not listening, because he was playing with W.B. When she got off the phone, he asked, "Someone I know?" and she replied, "No. And you'd be surprised." (*Id.* at 203.) He finished his wine and put the glass on the coffee table, leaving about half an hour after he arrived, because he had to leave for a business trip that evening. (*Id.* at 201–05.)

When Mrs. B. returned to her room to start her nap, she had started to unfasten her robe when she heard the front gate open (closest to the driveway). She looked out the window and could not see anyone, but she did not want someone to knock on the door and wake the baby up (whose bedroom was in the front of the house, right off the living room). There were two knocks on the door before she and W.B. got there. Having no peephole, she opened the wooden door a crack and looked out to see Sherman Brown standing there, holding the screen door slightly open. He wanted to talk and asked to come in. She said no, that she needed to get her child down to nap. Finally, he asked if he could have a drink of water. She went to the kitchen and got him a paper cup of water; when she returned, he had stepped inside the door. He started drinking the water, and she asked him to leave so she could get W.B. to bed. She said it became obvious that he wanted to talk about problems between Blacks and Whites. Then, he admired her living room and asked if he could see the rest of the house. She said no. He said if she ever sold it, he would be interested in buying it. Then, out of the blue, he asked if she would have sex with him. She said, "Of course not." (*Id.* at 162.) When he asked why not, she said something to the effect of she was married, and he was not her husband. She also said that little ears were listening, referring to W.B., who was standing right there the whole time. He said, "I'm so sexed up, I don't know what to do." She responded, "I'm sorry, you'll have to go somewhere else. I'm not available." (*Id.*)

***6** Her next memory is feeling painful blows in her side and feeling like she was pitching forward. Then, she woke up on the floor and tried to move, but she was in too much pain. She remembered her sister-in-law coming in, but she did not know that her sister-in-law left to call for help. She does not remember anyone else being in the house or arriving, but she remembers being in the ambulance and hearing the siren, as well as small bits of being in the emergency room. (*Id.* at 163–67.) On cross-examination, she acknowledged that she had no memory of any hostile action by this man. She never saw him put his hands on her or lunge towards her. In her last memory, he was standing at least six feet away from her, and she does not associate that memory with the blow she felt in her side. In fact, she does not recall seeing anyone when she felt the blow to her side. (*Id.* at 198–200.)

The first time that Mrs. B. saw or identified Sherman Brown after October 1, 1969, was at the preliminary hearing on January 24, 1970, when the defendant was the only Black person in the courtroom. In the words of counsel, objecting to the Commonwealth's failure to hold a lineup during its investigation: "There are no colored people even present in this court room. The assailant was obviously colored, and the defendant is colored." (Prelim. Hr'g Tr. 2, Ex. G to Pet., Dkt. No. 1-10.)

William Thomas Waller, a first cousin of Brown's wife and of Larry Waller, spent the morning with Brown and Larry on October 1, 1969. Just before 2:00 p.m., he dropped Larry and Brown at the home of Brown's father. That was the last time he saw Brown that day. (Tr. #1, at 216–22.) Larry testified that he and Brown played records in the basement, then went outside to lift weights. Larry had no concept of time and could not say when they arrived at Brown's house or how long they played music or lifted weights, but after lifting weights, Larry was listening to records and heard Brown on the phone. (*Id.*

at 224–26.) He does not know who Brown was talking to or who called whom, but he heard Brown say something about "I have talked to you before about a problem." (*Id.* at 226.) A little later, they went across to the field for Brown to run some laps, as part of his training exercise routine. Brown was physically in excellent shape; weightlifting and running were regular parts of his routine. After Brown ran three or four laps, Larry stopped him to say that he was going up to the Murray School. Larry had been planning to do this all day, because he wanted to see a girl named Tina, but he had not mentioned it to Brown. Larry started to walk, but then saw Eddie Howard's school bus coming, so he ran to flag him down and rode the bus to the Murray School. He thought it was 3:15 or 3:30 when he caught Howard's bus. Brown had returned to running around the field, still wearing the blue sweatshirt and green work pants, like Army fatigues. (*Id.* at 226, 228, 233–35, 245, 254.)

Tina's bus usually departed Henley at 3:15 and arrived at the Murray School at 3:40, where she changed buses. To get home, she had to ride the rest of the way on Eddie Howard's bus, which departed Murray School at 3:45. Larry got to speak to Tina for about five minutes before she had to leave on Howard's bus, and then he caught the bus driven by Bruce to get to his home, which was not far from the Murray School. He recalled that Mrs. Bailey, the Murray School principal (and wife of Chief Deputy Bailey) chastised him for riding the school bus since he had dropped out of school and was no longer attending. When he got off the bus, he agreed to carry Thelma Whiting's books for her; she lived three houses down from him. He watched some television at her house for about 20 minutes, shot a couple of baskets outside, then walked home, arriving before 4:30. Brown was already home, washing up [4] and getting ready for work. He had on his dark work trousers but had not yet put on his shirt. Although Larry does not remember what the two talked about, he remembers Brown saying, "I messed up." He did not know what Brown was talking about, and he did not ask. Larry's cousin, Henry, worked at the Boar's Head Inn with Brown, and picked Brown and Larry up. They dropped Larry at University Hospital, where he worked, around 5:15 or 5:20 p.m. (*Id.* at 240–41, 245–52.)

4 The Waller home did not have indoor plumbing, so Brown was bathing from a basin with water drawn outside and then heated up inside. (Tr. #1, at 250–51.)

***7** As he had told the police during the investigation, Larry identified Exhibit 33, a blue sweatshirt with "Larry W." written inside the shirt, and he said that Brown was wearing the sweatshirt on October 1, 1969, including when he was running around the field beside Mrs. B.'s house. (*Id.* at 227–28.) On cross-examination, Larry testified that he did not know when the shirt had last been washed. He also admitted that he suffered from chronic nosebleeds, and he could not say whether he had a nosebleed while wearing the sweatshirt. (*Id.* at 239.)

Eddie Howard, school bus driver, testified that he picked Larry up in front of Mrs. B.'s house, where he saw Larry talking to Brown on the edge of the driveway and roadway. He said that he arrived at the Murray School at 3:15, as always, and waited for the bus from Henley to arrive at 3:30, then departed Murray School at 3:40 after transfer students were on the bus. (*Id.* at 255–58.) Elizabeth Bailey, principal at Murray School and wife of Chief Deputy Sheriff Bailey, testified that Howard's bus arrived at 3:15 on October 1, and students were dismissed from school at 3:30 to begin boarding busses. She remembered seeing Larry around 3:30; he got off Howard's bus and left on Bruce's bus at 3:40 p.m. Mrs. Bailey admitted that she had discussed the case against Brown with her husband. (*Id.* at 263–65.) Finally, Thelma Whiting, a student at Albemarle High School, testified that she lived four houses up from Larry Waller, and on October 1, 1969, she and Larry got off Bruce's school bus at the same stop. Larry carried her books home, stayed and watched television for 25–30 minutes, and then left around 4:15 or 4:20.

The Commonwealth Attorney then put on a trio of FBI expert witnesses, the first of whom was Agent Stombaugh, a hair and fiber examiner and 19-year veteran of the FBI who had testified as an expert in more than 300 trials. He testified that he examined hairs taken from the blue sweatshirt and compared them under a microscope, looking to compare 15–25 different characteristics, with hair samples from Brown and hair samples from Larry Waller. He testified that he found eight hairs from the sweatshirt that matched Larry Waller and two that matched Brown. (*Id.* at 304–07.) While stating that hair analysis was not the same as fingerprint analysis, he said that if all the hair characteristics matched, he could say "the hair originated from either this person by the hair sample or from another individual of the same race whose hairs are *identical*." (*Id.* at 305 (emphasis added).) The government did not leave the opinion there, but asked, "In all of your experience in this field, have you ever found hairs that were

identical except when they came from the same individual?" Stombaugh replied, "No sir, I have not." (*Id.*)

Agent Stombaugh's testimony then turned to fiber analysis. He testified that he used a research microscope to examine fibers on clothing, and that the microscope's magnification and wavelengths of light enabled him to determine both the color and shade of fibers with his naked eye, without any further testing. However, he noted that some synthetic fibers, particularly various acetates and rayons, appear similar, so a microchemical process is necessary to distinguish the fiber type. (*Id.* at 305–06, 325.) Stombaugh found blue delustered triacetate fibers on the sweatshirt that matched the fibers from which Mrs. B's bathrobe was made. He also found many blue cotton fibers on Mrs. B.'s robe, which matched the blue cotton in the sweatshirt. He then testified that he had examined a pair of gold trousers identified as having been found in Brown's clothing. The trousers were made of gold wool fiber and gold delustered dacron fibers. He found both types of those gold fibers on Mrs. B.'s robe, and he found the blue delustered triacetate fibers matching Mrs. B.'s robe on the trousers. Finally, he found gold wool fibers matching the gold trousers on W.B.'s pajama bottoms. He did not find any Caucasian hair on Brown's clothing, nor did he find any Negroid hair on either victim's clothes. (*Id.* at 308–09, 314–15.) Stombaugh was not concerned that Brown's trousers had been in a pillowcase with many other items of Brown's clothing, as long they had not had contact with the victims' clothing between seizure by the Sheriff and arrival at the lab. (*Id.* at 310–12.)

***8** To determine the exact type of synthetic fibers in Mrs. B.'s robe and in the gold trousers, Stombaugh first performed a test in glacial acetic acid to distinguish rayon from acetate. Because a sample of the fibers dissolved in the acetic acid, he knew he was dealing with a type of acetate. He then put a sample of fibers in chloroform, where they also dissolved, indicating that the fiber was triacetate instead of a secondary acetate fiber. To double check, he put another sample of the fibers into a 70% acetate solution; in this, secondary acetates will dissolve completely, but triacetate will not. The 70% acetate solution will cause all the color to bleed from the triacetate, so that the microscope is necessary to see the almost invisibly clear naked fiber. (*Id.* at 321–22.)

The defense aggressively cross-examined Stombaugh on the fiber analysis. Stombaugh maintained that the delustered fibers found on the sweatshirt and trousers were identical to the fibers from which the robe was made, and that the blue cotton fibers and various gold fibers found on Mrs. B's robe and W.B.'s pajamas were identical to the fibers from which Brown's clothes were made, although he admitted that the fibers did not necessarily come from the same clothes. Stombaugh claimed that triacetate is "not too common," but then admitted that over 50 companies make triacetate clothing, and he had no idea how many yards of triacetate material are made each year. Stombaugh did not perform any chemical tests to determine whether the triacetate was dyed during the manufacturing process or whether it was dyed after the fabric had been made; he said he could usually tell from his visual examination, but he did not remember for these fibers. He ran no chemical tests to determine color or dye lot, although such tests are available, claiming that he ran the "industry standard" tests, which was all he needed to do. Finally, Stombaugh admitted that most manufacturers put a tracer in their fabrics, so that with neutron activation, the actual manufacturer of a fiber could be identified, but he did not perform that test, either. (*Id.* at 323–32.) Stombaugh also admitted that two items of clothing did not have to touch each other for fibers to contaminate. (*Id.* at 333.)

Cornelius McWright, a blood and bodily fluids examiner with 15 $^{1}/_{2}$ years working for the FBI, ran tests to analyze anything that looked like blood on the victims' clothing, the sweatshirt and trousers, and items found in Mrs. B.'s home, such as the ashtrays, knife blades, etc. He found human blood, Type A, on the following items: ladies' underpants, scarf, knife blade, square material cut from housecoat, handkerchief (from clothes taken from Mrs. Waller's home), brown ashtray, black ashtray, broken ashtray, pillowcase, nightgown, bathrobe, boy's t-shirt, boy's pajama bottoms, and boy's undershorts. (*Id.* at 336–39.) He found spots of human blood too small to type on a jacket from Brown's closet, five pieces of broken knife blade, undershorts from the hamper in Brown's bedroom, the blue sweatshirt, and the broken telephone. The only blood spot on the sweatshirt was on the right shoulder, and no semen was found on the sweatshirt. On the trousers, small spatters of blood on the bottom of the pant legs were too small to distinguish between animal blood and human blood. (*Id.* at 340–42.) McWright testified that there were not any reliable tests for RH factor in dried blood samples, so he was unable to determine whether any of the blood was A positive or A negative. (*Id.* at 349.) Mrs. B., W.B., and Brown all had Type A blood. (*Id.* at 353.)

The state's final expert was William Carman, an FBI fingerprint examiner for 19 years. Carman examined a wine bottle, wine glass, broken telephone, knife blades, and brown

ashtray from the crime scene. He saw smudged prints, but none sufficiently clear to identify. He indicated that smudges and smears were normal, and that the scene had not been "wiped down" to remove prints. (*Id.* at 356–63.)

B. Procedural Background

1. Initial trial and appeal

***9** Following his arrest on October 1, 1969, and preliminary hearing on January 24, 1970, Brown's three-day jury trial began on May 21, 1970. After hearing the evidence summarized in the previous section, the jury convicted Brown of first-degree murder of W.B., the sole charge against Brown, and sentenced him to death.[5] The court entered judgment on the verdict on May 25, 1970. (Order of Conviction, May 25, 1970, Resp't's Mot. to Dismiss, Ex. 1, Dkt. No. 38-1.) He appealed to the Supreme Court of Virginia, challenging sufficiency of the evidence, admission of medical examiner photographs of W.B., voir dire questions regarding attitudes towards the death penalty, and the government's use of a peremptory strike to remove the only African-American juror on the panel. His appeal was denied on all issues. *Brown v. Commonwealth*, 184 S.E.2d 786 (Va. 1971). He petitioned the United States Supreme Court for certiorari, which was granted; the Court vacated the death sentence but affirmed the conviction. *Brown v. Virginia*, 408 U.S. 940 (1972).

[5] At the time of this trial, the jury heard evidence in a single trial, returning verdict on guilt or innocence and imposing the sentence at the same time. There was no bifurcated trial.

2. Resentencing trial

At the time Brown was charged, first-degree murder carried a penalty range of either 20 years to life or death. Va. Code § 18.1-22 (1950 & Supp. 1960). Therefore, a new jury was impaneled to determine Brown's sentence on remand. On November 7, 1973, the parties read the transcript of the entire May 1970 trial to the jury. (Tr. # 2, at 23, 43–392.) The defense then introduced live testimony from character witnesses to vouch for Brown's reputation for honesty and veracity and his reputation as a law-abiding person in the community. The witnesses who testified were his sister, his father, and Florence Wheat, a lady in the community who had been Rev. Boogher's housekeeper for 40 years. (*Id.* at 410–22.) The defense offered the testimony of Rev. Charles Kramer (President of the Presbyterian School of Christian Education), Floyd Profit (Asst. Supervisor of textiles in the Virginia State Penitentiary [VSP]), Sgt. Ernest Roberts (shift officer at the VSP), Rev. Ottie Brown (minister at Second Baptist Church in Richmond), and Chaplain Walter Thomas (VSP Chaplain), all of whom knew and had worked with Brown during his time in the VSP after the first trial and had very positive opinions about his reputation among inmates and staff. The court did not allow any of this testimony, however, having ruled that "anything relating to the character of [sic] the attitude or the rehabilitation, if any, of the defendant since the imprisonment, the Court will not allow it as proper evidence before the jury." (*Id.* at 394.) While the jury was out, the testimony of these witnesses was taken for the record. (*Id.* at 83–97, 487–507.)

Brown also testified on his own behalf at the re-sentencing trial. Raised in Ivy, Virginia, and Mount Calvary Baptist Church all his life, Brown left school in the 11th grade. He joined the Army for four years, during which he was stationed in South Carolina; Ft. Eustis, Virginia; Viet Nam; and Ft. Knox, Kentucky. He married in 1966 and had one daughter, who was born in Ft. Eustis before he went to Viet Nam. He was in Viet Nam from 1967–68. When he returned from Viet Nam, he was stationed at Ft. Knox. Prior to that time, his record in the Army had been exemplary, with no disciplinary problems. When he returned to the United States, however, he began experiencing readjustment problems. Because of mouthing off threats to a supervisor and later to a non-commissioned officer, he was court-martialed and sentenced to three months in the stockades (each time). During his second incarceration, he and four other inmates tried to steal Darvon (medication) from the pharmacy, but they got caught. He was transferred to a different stockade, where a Lieutenant came to talk with him. Brown was "talking with his hands" while he spoke, and the Lieutenant told him to stand at attention and stop moving his hands, but the longer they talked, the more nervous Brown became. The more nervous he became, the more he talked with his hands, and he told the Lieutenant he could not stop. He was court martialed for disobeying a direct order and received an undesirable discharge from the Army in July 1969. (*Id.* at 428–31, 433–39.)

***10** Brown also acknowledged difficulties in personal relationships when he came home, with his wife, his mother, and his sister. He said he felt that he had changed in Viet Nam, including questioning the faith in which he was raised and reading more about Islam, which grieved his mother a lot. Despite his personal difficulties, Brown secured employment at Acme in Crozet, Virginia, during the day and at Boar's Head

Inn during the evenings. He held both jobs until his arrest on October 1, 1969. (*Id.* at 432, 440–45.)

Brown also testified, over the government's objection, that he did not kill W.B., never assaulted Mrs. B., and never went into her home. He did not speak to her on October 1, did not ask her to have sex, and did not ask for a cup of water. He denied joining her and W.B. in the yard in early September, talking with her, and smoking a cigarette. He said that he would never have considered jumping over the fence and joining her family after running in the field. When asked on cross-examination, he said he could not explain how fibers from his pants got on W.B.'s pajamas, because he never went there. (*Id.* at 445, 448–51.)

The jury sentenced Brown to life in prison. He apparently did not file another appeal. (Resentencing Order, Resp't's Mot. to Dismiss, Ex. 4, Dkt. No. 38-4.)

3. State post-conviction proceedings

On October 7, 2016, Brown filed two post-conviction proceedings in the Supreme Court of Virginia: Petition for Habeas Corpus, Record No. 161421 and Petition for a Writ of Actual Innocence, Record No. 161422. His state habeas petition alleged violation of his due process rights by introduction of false and scientifically flawed testimony about hair comparison and fiber analysis. (Va. Sup. Ct. R. at 40.) The primary basis for his actual innocence petition was the new DNA evidence, obtained from a vaginal smear slide prepared at University of Virginia Hospital on October 2, 1969, following the October 1 gynecological exam of Mrs. B. requested by the Sheriff's Office while Mrs. B. was being treated for the injuries she sustained in the attack. (*Id.* at 241a, p.2). The slide was found in a hospital storage area in 2015, and the Albemarle County Circuit Court entered an order for the Division of Forensic Science (DFS) to examine and test the slide for DNA evidence. (Supp. Disc. Order No. 4, Jan. 14, 2015, Ex. J. to Pet., Dkt. No. 1-13.) The DFS lab used differential extraction on a portion of the slide's material, separating the material into a "sperm fraction" and a "nonsperm fraction" (or epithelial fraction). The lab developed no DNA profile from the sperm fraction of the vaginal slide and developed a profile of no value from the non-sperm fraction. (DFS Lab Rpt., May 19, 2015, Ex. K to Pet., Dkt. No. 1-14.) The court then ordered further analysis at Bode Laboratories. (Supp. Order No. 5, July 17, 2015, Ex. L to Pet., Dkt. No. 1-15.) Drawing another portion of material from the slide and using the same differential extraction technique, Bode was able to obtain a partial Y-STR of male DNA from the epithelial (non-sperm) fraction of the slide. (Bode Lab Rpt., Feb. 19, 2016, Ex. M to Pet., Dkt. No. 1-16.) Subsequently, Bode received a sample from Brown's buccal swabs in March 2016 and from W.B.'s shirt on June 9, 2016. In a report dated August 25, 2016, Bode reported that Brown could be excluded as a contributor to the male genetic material on the vaginal smear slide, and based on W.B.'s profile, Mrs. B.'s husband could be excluded with greater than 98% certainty. (Bode Supp. Lab Rpt., Aug. 25, 2016, Ex. O to Pet., Dkt. No. 1-18; Jennifer Fienup Aff., Ex. P to Pet., Dkt. No. 1-19.) A supplemental report, correcting mis-transcription of the name on the DNA profile for W.B., reported that W.B. and Brown were both excluded as contributors to the male genetic material on Mrs. B's slide. (Bode Supp. Lab Rpt., Sept. 6, 2016, Ex. N to Pet., Dkt. No. 1-17.)

***11** Brown's actual innocence petition also proffered new evidence challenging all forensic evidence used against him at his trial. First, Brown's attorney received a letter dated October 9, 2015, from Norman Wong, Special Counsel, U.S. Department of Justice, regarding the joint DOJ/FBI Microscopic Hair Comparison Analysis Review. The letter included a form captioned "Result of Review" prepared by the FBI Microscopic Hair Comparison Analysis Review Team, indicating that Agent Stombaugh's hair analysis testimony in Brown's case "stated or implied that the evidentiary hair could be associated with a specific individual to the exclusion of all others. This type of testimony exceeds the limits of science." (Letter from Norman Wong to Olga Akselrod, Oct. 9, 2015, Ex. A to Pet., Dkt. No. 1-4.) In September 2015, the Attorney General's Office wrote to Senator Richard Blumenthal to advise on the progress of FBI review of the thousands of cases in which hair comparison analysis testimony had been used; in that letter, Assistant Attorney General Kadzik noted that the United States had no jurisdiction to intervene in state criminal cases, even if erroneous FBI testimony had been used. However, Kadzik stated that in federal cases, "in the interests of justice ..., the government will not dispute that the erroneous statements should be treated as false evidence and that knowledge of the falsity should be imputed to the prosecution." (Letter from Peter J. Kadzik to The Honorable Richard Blumenthal, Sept. 15, 2016, Ex. FF to Am. Pet., Dkt. No. 19-7.) Kadzik indicated that state prosecutors would receive the federal government's position in the letters accompanying the results of file reviews, and Wong's letter to Brown's counsel included a copy of his letter so advising the Albemarle County Commonwealth Attorney.

Brown also included an affidavit from Skip Palenik, an expert on fiber analysis, to state that an instrument known as a microspectrophotometer had been developed after the time of Brown's trial. This instrument revealed severe deficiencies in fiber examination based only on comparison microscopes, leading forensic scientists to conclude that the "use of comparison microscopy alone ... is virtually useless since our results show that approximately one in seven blue, one in three red, and one in four black cottons may be expected to match. Discrimination is so poor that the results are of little value as evidence." M.C. Grieve et al., *An Assessment of the Value of Blue, Red, and Black Cotton Fibers as Target Fibers in Forensic Science Investigations*, 33 J. Forensic Sci. 1332, 1340 (Jan. 1988). Palenik states that the FBI has required the use of microspectrophotometry in fiber comparisons since 2001, and that Agent Stombaugh's methods lacked any scientific basis. He also stated that Stombaugh's testimony was misleading because he did not acknowledge how commonly the fibers were used, nor did he quantify the number of fibers examined. (Skip Palenik Aff., Oct. 4, 2016, Ex. D to Pet., Dkt. No. 1-7.)

Brown also included information in his innocence petition that a 2012 DFS examination of the sweatshirt, pants, and underwear used against him at trial did not identify any blood on either item, contrary to the testimony of Agent McWright that human blood was on the right shoulder of the sweatshirt and small amounts of blood spatter were on the bottom of the trousers, too small to determine if it was human blood or animal blood. (Va. Sup. Ct. R. at 241a, p. 14.)

Finally, Brown argued that several factors undermine the strength of Mrs. B.'s identification of him. First, her first contact with Sherman Brown was by telephone, not in person, and her only other contact with the person she believed to be Sherman Brown occurred a month prior to the assault, for 15 minutes, and the man did not identify himself, but she thought she recognized his voice. Fifteen minutes of observation, a month earlier, is a slim basis for identification, especially cross-racial identification. Next, her in-court identification of Brown as the perpetrator was made under highly suggestive circumstances, since he was the only African-American in the courtroom and was sitting at the defense table. A final factor he raised was that Mrs. B. suffered a head injury in the assault that affected her memory. (*Id.* at 241a, pp. 42–49.)

By order entered April 11, 2019, the Supreme Court of Virginia dismissed Brown's habeas petition as untimely, noting that the habeas statute of limitations in Virginia Code § 8.01-654(A)(2) makes no exception either for claims of actual innocence or for newly discovered evidence. *Brown v. Booker*, 826 S.E.2d 304, 307 (Va. 2019).

The state court denied the actual innocence petition by opinion dated March 22, 2018. *In re Brown*, 810 S.E.2d 444 (Va. 2018). The court based its decision on two alternative grounds. First, the court stated that the statute required the court to consider only lab reports prepared by or certified by the Virginia Department of Forensic Sciences. *Id.* at 456. Second, even if the court considered the DNA evidence, the overall evidence was insufficient to prove by clear and convincing evidence that no rational factfinder would find Brown guilty. *Id.* at 459.

4. Parole proceedings

***12** Brown made various inculpatory statements to the parole board. During a parole interview in 1991, Brown stated, "I accept full responsibility for my crime and I feel sorry for the victim, but I can't undo what's been done." *In re Brown*, 810 S.E.2d at 451. In a 1985 parole interview, Brown expressed "fervent regret and remorse." *Id.* In a 1984 interview, Brown offered a detailed statement to the parole board explaining how the crimes occurred. After a bout of "drinking alcohol" and "taking some LSD," he approached Mrs. B at her home knowing that she did not want to see him. After Mrs. B gave water to Brown, she "turned into a snake." In a later parole interview, he recalled standing over Mrs. B with the "knife handle in his hand." *Id.* Further, in the 1984 interview, Brown admitted telephoning Mrs. B before he arrived at her house. (Ex. HH to Am. Pet., Dkt. No. 19-9.)

Brown recalled feeling like he was "tripping" at the time of the offense. He could not specifically remember stabbing Mrs. B and murdering her son, but he remembered that he had blood all over him and he knew something was wrong. *In re Brown*, 810 S.E.2d at 451. Brown told the parole board in 1991 that he thought he "committed the crimes, stabbed Mrs. B and killed her 5 y/o son." *Id.* Brown discussed the circumstances of the crimes because he knew what drugs and alcohol can do to a person and did not want another young child's life taken in vain. *Id.*

5. Current claims

Brown's petition, filed on December 9, 2016, and amended on June 10, 2019, raises two claims:

(1) New evidence establishes his actual innocence, and

(2) Introduction of invalid scientific testimony violated his right to due process and undermined the fundamental fairness of his trial. (Am. Pet.)

II. DISCUSSION

A. Procedural Requirements

As amended by the Antiterrorism and Effective Death Penalty Act (AEDPA), the federal habeas statute requires state prisoners to meet several procedural hurdles before a federal court may grant relief. First, the petitioner must timely file his claim. 28 U.S.C. § 2244(d). Next, he must exhaust his state court remedies before filing in federal court. 28 U.S.C. § 2254(b)(1)(A).

1. Timeliness

Under 28 U.S.C. § 2244(d), a petitioner has one year in which to file a federal habeas corpus petition. This statute of limitations runs from the latest of:

(1) (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Id. The sentencing order after Brown's resentencing trial, dated November 8, 1973, was not appealed. Therefore, it became final on Monday, December 10, 1973, 30 days after it was entered. Clearly, the date on which his initial § 2254 petition was filed, December 9, 2016, is decades later. Brown has not alleged any new constitutional rights nor that state action prevented him from filing. Rather, he alleges that the one-year statute of limitations should run from the date he received information constituting the factual predicate for his claim, which he could not have discovered earlier in the exercise of due diligence. The FBI's admission that its agent in Brown's case had offered testimony "exceed[ing] the bounds of science" was not and could not have been known to Brown until receipt of Wong's October 9, 2015, letter.

***13** DNA testing was not available for decades after Brown's conviction, and the slide containing the vaginal smear was not found until 2015. Prompt and multiple efforts to have the material evaluated for DNA finally resulted in the exculpatory DNA report he first received on August 25, 2016.

For purposes of the one-year statute of limitations, Brown became aware of the factual basis for the improper hair analysis testimony on receipt of Wong's October 9, 2015, letter. Upon investigating that claim, his attorneys looked further into the fiber evidence claim, since the same expert witness offered both opinions. However, Brown's trial attorney was aware of other tests that could be performed on the fibers in 1970 (Mot. Tr. (April 14–15, 1970), Resp't's Br. in Supp. of Mot. to Dismiss, Ex. 19, Dkt. No. 38-19) and the microspectrophotometer had been standard FBI protocol for fiber examination since 2001. (Skip Palenik Aff., Oct. 4, 2016.) Brown became aware that the vaginal slide provided DNA evidence exculpatory to him on August 25, 2016. His state petitions for actual innocence and habeas corpus relief were filed October 7, 2016, within one year of learning about the false hair evidence and the DNA evidence. However, he or his attorney knew or should have known of the unreliability of the fiber evidence at least 15 years before he filed his state habeas petition, and that claim is time barred under § 2244(d).

Brown filed his § 2254 petition in this court on December 9, 2016, and moved to stay the petition while he finished exhausting his remedies in state court. The DNA claim was thus filed within less than four months after Brown learned the factual basis for the claim, and thus, the DNA claim is timely. The question is whether the filing of the state petitions tolls the statute of limitations on the false hair evidence.

The statute provides for tolling of the limitation period while a properly filed application for State post-conviction relief is pending. Specifically, "[t]he time during which" the application is pending "shall not be counted toward" the limitation period. 28 U.S.C. § 2244(d)(2). Unlike § 2244(d)(1), § 2244(d)(2) does not delay when the statute starts running. Rather, the statute started running when the defendant knew or should have known of the new evidence, but the clock is stopped when a *properly filed* state post-conviction application is pending. When the state action is no longer pending, the clock resumes at the point where it was when it stopped; the statute does not begin anew. *Harris v. Hutchinson*, 209 F.3d 325, 327 (4th Cir. 2000). If the statute has already fully run before the state action is filed, the state collateral proceeding can no longer toll the federal filing period, as there is nothing left to toll; the state action does not "revive" the one-year limitation period. *Wahl v. Kholi*, 562 U.S. 545, 547 (2011).

The Supreme Court has long recognized that a petition untimely filed in state court is not "properly filed." *Artuz v. Bennett*, 531 U.S. 4, 11 (2000). If the state petition is untimely under state law, " 'that is the end of the matter' for purposes of § 2244(d)(2)." *Pace v. DiGuglielmo*, 544 U.S. 408, 414 (2005) (internal citation omitted). The state court specifically held that Brown's state habeas petition was untimely. *Brown*, 826 S.E.2d at 305. That does not end the inquiry, however, because Brown had filed a state Petition for Writ of Actual Innocence simultaneously with filing his state habeas petition, and that petition was properly filed and decided on its merits by the state court.

***14** The question becomes whether the Petition for Writ of Actual Innocence qualifies as a state "post-conviction or other collateral proceeding." The Supreme Court has noted that habeas petitions are not the only post-conviction collateral pleadings that toll the federal habeas statute of limitation. *Wall v. Kholi*, 562 U.S. 545, 551 (2011). In *Wall*, the Court specifically recognized that motions to reduce a sentence and coram nobis petitions are also collateral proceedings that will toll the statute. *Id.* at 552–53. Likewise, the Fourth Circuit Court of Appeals has recognized a state mandamus as a collateral proceeding that can toll the statute. *Harris v. Director*, 282 F. App'x 239 (4th Cir. 2008) (unpublished). The *Wall* Court explained that a collateral proceeding is any request for judicial review of a case that is not part of the direct review process. Although the collateral proceeding may challenge the validity of a judgment, it need not do so. 562 U.S. at 551. Brown's state petition alleging actual innocence seems to fall squarely within that definition of collateral proceeding; the petition is certainly not an appeal or part of the direct review of his original case, and the petition requires judicial review of the proceedings. Therefore, the petition is a collateral proceeding that tolls the statute of limitations.

The next issue is whether the statute is tolled only for that portion of Brown's claim alleging actual innocence, as argued by the respondent. (Resp't's Br. in Supp. of Mot. to Dismiss, 42–44, Dkt. No. 38.) That issue has not been decided by the Supreme Court or the Fourth Circuit Court of Appeals, but the other circuits considering this issue have now unanimously concluded that a collateral proceeding tolls the statute of limitations for the entire habeas petition, not just for parts of it. A federal habeas petition may not even raise the same issues raised in the state collateral proceedings, but the properly filed state collateral proceeding still tolls the statute. As stated by the Court of Appeals for the Third Circuit:

> We hold that under § 2244(d)(2), a properly filed state post-conviction proceeding challenging the judgment tolls the AEDPA statute of limitations during the pendency of the state proceeding. Whether the federal habeas petition contains one or more of the claims raised in the state proceeding does not matter as long as the state proceeding and the federal petition attack the same judgment.

Sweger v. Chesney, 294 F.3d 506, 520 (3d Cir. 2002). *See also Cowherd v. Million*, 380 F.3d 909, 913–14 (6th Cir. 2004) (overruling *Austin v. Mitchell*, 200 F.3d 391 (6th Cir. 1999)); *Ford v. Moore*, 296 F.3d 1035, 1040 (11th Cir. 2002); *Carter v. Litscher*, 275 F.3d 663, 665 (7th Cir. 2001); *Tillema v. Long*, 253 F.3d 494, 503 (9th Cir. 2001), *overruled on other grounds by Pliler v. Ford*, 542 U.S. 225 (2004).

Because the state petition seeking a writ of actual innocence qualifies as a collateral proceeding, the statute of limitations on Brown's federal habeas was tolled when the state petition was filed on October 7, 2016. At that time, the statute of limitations had not expired on either the DNA claim or the erroneous hair comparison testimony raised in Brown's § 2254 petition. The state petition was still pending when the federal petition was filed on December 9, 2016, and

then stayed pending the outcome of the state proceedings. Because the state proceedings were still pending, the statute of limitations was still tolled, and the federal habeas was timely filed for the DNA claim and hair comparison testimony. The matter of exhaustion, however, remains.

2. Exhaustion

To exhaust his claims, a petitioner must present his federal constitutional claims to the highest state court before he is entitled to seek federal habeas relief. *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). Failure to do so "deprive[s] the state courts of an opportunity to address those claims in the first instance." *Coleman v. Thompson*, 501 U.S. 722, 732 (1991). When a petitioner has no more state remedies available, his claim has been exhausted. When the state court rules that petitioner has procedurally defaulted his claims, those claims are simultaneously exhausted and defaulted. *Id.*

***15** Clearly, Brown's claim of actual innocence was presented to and decided by the Supreme Court of Virginia on the merits, and thus, has been exhausted. His remaining claims, however, are procedurally defaulted, based on the state court's determination that his state habeas petition was untimely. These claims are simultaneously exhausted and defaulted, as they cannot be presented to any state court for further consideration. When the state court "clearly and expressly bases its dismissal" of state habeas claims on procedural default under state rules, those procedural rules provide "an independent and adequate ground" for the federal court to dismiss them as well. *Breard v. Pruett*, 134 F.3d 615, 619 (4th Cir. 1998).

A petitioner may overcome default, however, if he can show both cause for the default and actual prejudice as a result of the claimed federal violation. *Coleman*, 501 U.S. at 750. Cause for procedural default requires the existence of some objective factor, external to the defense and not fairly attributable to the prisoner. *Coleman*, 501 U.S. at 756–57. If the factual basis for the claim was not reasonably available to the prisoner at the time of his default, that may constitute good cause. *Reed v. Ross*, 468 U.S. 1, 15 (1984). The DOJ's letter of October 9, 2015, to Brown's attorney, acknowledging for the first time that FBI agent Stambaugh's testimony exceeded the bounds of science in Brown's trial, was Brown's first knowledge of the facts underlying his due process claim for presentation of unreliable scientific evidence. Because the state's habeas statute of limitations makes no exceptions for newly discovered evidence, Brown had no opportunity to present this claim to the state's high court, although he tried to do so. The court finds cause for his procedural default.

To show prejudice necessary to overcome procedural default, the petitioner must show that the error worked to his "actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982). Scientific expert testimony is often viewed by jurors as more credible, reliable, and impartial than other forms of evidence and therefore can be "both powerful and quite misleading." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993). Nonetheless, the hair analysis testimony, by itself, did not connect Brown directly to the crime scene. No hair alleged to be Brown's was at the crime scene, and no hair from either victim was alleged to be on Brown's clothing. The sweatshirt's owner, Larry Waller, was identified as having most of the hair on the sweatshirt, not Brown. Because Waller and Brown lived in the same household and any number of conclusions can be drawn about how Brown's hair got on the sweatshirt, the court cannot say that the testimony, even though completely unreliable, had any significant effect, by itself, on the overall trial.

Although Brown has failed to establish the prejudice necessary to overcome this procedural bar, Brown can overcome his procedural default by establishing an actual innocence claim as a gateway to considering otherwise defaulted claims.

B. Actual Innocence Claims

Brown has raised two types of actual innocence claims, one referred to as a "freestanding claim of actual innocence" and the other known as a "gateway claim." For the reasons set forth below, the court finds that the state court reasonably determined that Brown failed to establish a freestanding claim of actual innocence. The court also finds that Brown has not satisfied the standard for using his actual innocence claim as a gateway to reach otherwise procedurally defaulted constitutional claims

1. Freestanding actual innocence claim

***16** In *Herrera v. Collins*, the Supreme Court recognized the possibility of a theoretical claim of actual innocence so compelling that even if his trial, conviction, and sentence were entirely fair and error free, his innocence would render his execution a "constitutionally intolerable event." 506 U.S. 390, 419 (1993) (O'Connor, J., concurring). The Court's plurality opinion assumed that such right exists, for the sake

of argument, but noted that the threshold showing for such a claim would be "extraordinarily high." *Id.* at 417 (Rehnquist, J., plurality). As a practical matter, no petitioner has ever made such a showing.

Brown's freestanding actual innocence claim was raised in his state petition seeking a writ of actual innocence and was decided on the merits by the Supreme Court of Virginia. A federal habeas court may grant relief on a state claim adjudicated on the merits in state court only if the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). A decision is contrary to federal law only if it reaches a legal conclusion that is directly opposite to a Supreme Court decision or if it reaches the opposite result from the Supreme Court on facts that are materially indistinguishable from the Supreme Court case's facts. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). A state's decision is an "unreasonable application" of federal law only if the state court's ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). The question is not whether a federal court believes the state court's decision is incorrect, but whether the decision was unreasonable, which is "a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). Likewise, the federal court must presume that the state court's factual findings are correct, and this presumption can be overcome only "by clear and convincing evidence." 28 U.S.C. § 2254(d). Again, the federal court must find more than just an incorrect determination of facts, as "unreasonable determination of the facts" is "a substantially higher threshold." *Schriro*, 550 U.S. at 473.

The first basis for the state court's decision was that Virginia Code § 19.2-327.1 requires evidence to come from the Department of Forensic Science, not from a private lab. This is obviously a state statute and a state ground for the Virginia court's decision. As such, that decision is not subject to federal habeas review. *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991). Neither is the federal court limited by that state evidentiary rule, however.

The Supreme Court of Virginia did not rely solely on the state procedural ground, however. The court applied a "clear and convincing evidence" standard for determination of actual innocence on the merits, under which Brown must prove that "no rational trier of fact would have found proof of guilt ... beyond a reasonable doubt." *In re Brown*, 810 S.E.2d at 458. The United States Supreme Court used the same standard in *Sawyer v. Whitley* to consider whether that petitioner, who had filed multiple successive and abusive petitions, was actually innocent of the criteria that made him eligible for the death penalty. 505 U.S. 333, 336 (1992). The state court's use of this standard is reasonable, and as the respondent argued, if the Supreme Court ever considers a case to satisfy a freestanding innocence claim, the standard is likely to be at least as stringent as the clear and convincing standard. The state court purported to use a prospective approach, predicting what a rational factfinder would do at a new trial with all the evidence, old and new, whether admissible or not. *In re Brown*, 810 S.E. 2d at 459.

***17** In order to evaluate the reasonableness of the state court's determination that Brown failed to meet the burden of proof on his freestanding innocence claim, it is necessary to know the facts determined by the court. The court started with the evidence from the original trial, which the court noted was a homicide case, not a rape case. Therefore, the court reasoned, proof that Brown did not rape Mrs. B. does not prove that he did not assault her and kill her son. The court noted that Mrs. B.'s testimony had been held reliable on direct appeal, including her identification of Brown, and that the evidence had been sufficient to support the verdict. Second, the court found the DNA evidence would probably be admitted, but the weight it would be accorded would be low because of the extremely small quantity available to measure, resulting in only a partial Y-STR strand, possible deterioration and degradation of the sample due to age, the inability to verify that the DNA came from sperm, irregularities in the chain of custody, and possible contamination of the sample. *Id.* at 453–55, 460–62, & nn. 16–22. Finally, the court considered the evidence of Brown's statements at his parole hearings in 1984, 1985, and 1991, in which he "accepted responsibility" and expressed remorse for his actions. *Id.* at 451–52, 460. Notably, the state court did not discuss the false hair analysis testimony, the newer scientific developments demonstrating the unreliability of the fiber analysis testimony, or the recent analyses finding no blood on the blue sweatshirt or on the bottom of Brown's trousers, even though all this information was included in the state Petition for Actual Innocence. (Va. Sup. Ct. R. at 241a, pp. 1–52.)

This court need not agree with the state court's factual findings or its conclusions of law. The court must only consider whether its findings of fact and conclusions of law are reasonable. This court cannot say that the state court unreasonably found that Mrs. B.'s testimony was sufficient to support the original verdict and that Brown's parole hearing statements contradicted his current claims of innocence, nor can one say that the court unreasonably found the probative value of the DNA evidence to be limited in weight, under the circumstances described by the court. If the facts found by the state court are not unreasonable, then neither is the legal conclusion that the DNA evidence was insufficient to overcome the evidence against Brown by clear and convincing evidence.

Because the state court's decision is not unreasonable, this court must defer to the state court and cannot grant relief on the freestanding claim of actual innocence. The court will dismiss this claim.

2. Gateway claim

In *Schlup*, the court established a standard for an actual innocence claim to be a gateway to allow the court to consider otherwise untimely and defaulted claims. 513 U.S. at 329. When a petitioner raises such a claim, supported by new reliable evidence, the court must consider all evidence, old and new, inculpatory and exculpatory, admissible and even inadmissible, to determine whether it is more likely than not that a reasonable juror would not find the petitioner guilty beyond a reasonable doubt if all the evidence were presented. *Id.* at 327–28. Stated another way, the court must determine whether it is more likely than not that any reasonable juror would have a reasonable doubt. *Teleguz v. Pearson*, 689 F.3d 322, 328 (4th Cir. 2012). Meeting this standard is exceedingly difficult. "[T]he *Schlup* standard is demanding and permits review only in the extraordinary case." *House v. Bell*, 547 U.S. 518, 538 (2006).

A petitioner seeking entry through *Schlup*'s gateway must "make a stronger showing than that needed to establish prejudice" because he does not come to the habeas court cloaked in the presumption of innocence. *Schlup*, 513 U.S. at 326 n.42. Rather, he comes "with a strong—and in the vast majority of cases conclusive—presumption of guilt." *Id.* Petitioner must present "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." *McQuiggin v. Perkins*, 569 U.S. 383, 401 (2013). Given the rarity of such evidence, "in virtually every case, the allegation of actual innocence has been summarily rejected." *Teleguz*, 689 F.3d at 330.

A district court assessing a *Schlup* claim must examine all the evidence and make a threshold determination about the petitioner's claim of innocence that is separate from its inquiry into the fairness of his trial. *Teleguz*, 689 F.3d at 330. Relevant state court findings are "taken into account in the district court's analysis of the requirements set out in *Schlup*." *Sharpe v. Bell*, 593 F.3d 372, 381 (4th Cir. 2010). The district court "may make determinations about the probative force of relevant evidence that was either excluded or unavailable at trial, and assess how reasonable jurors would react to the overall, newly supplemented record, but the district court may not reject the factual findings of a state court absent clear error." *Teleguz*, 689 F.3d at 332. [6]

6 Neither party requested a hearing, and the relevant facts pertaining to DNA evidence, hair, and fiber are not disputed. The parties dispute only the significance of those facts.

***18** The court begins by noting that fifty years ago, the Supreme Court of Virginia affirmed the sufficiency of the evidence against Brown, stating that a "detailed review of the evidence of the circumstances surrounding this murder and the evidence pointing to the defendant's guilt as the murderer leaves no doubt in our mind that this evidence, viewed in the light most favorable to the Commonwealth, amply supports the jury's verdict." *Brown*, 184 S.E.2d at 787. Such evidence included Mrs. B's identification of Brown. Two witnesses established that Brown was on Mrs. B's property after 3:00 p.m. on October 1, 1969, and Brown conceded his presence there to the resentencing jury. Larry testified that Brown frequently jogged in Mrs. B's field, corroborating her account of her prior acquaintance with Brown. Larry also corroborated Mrs. B's report that Brown telephoned her before he arrived at her house, a call that Brown admitted – in later parole proceedings – he had made.

Further, Brown made post-sentencing admissions during his parole proceedings, including that he went to Mrs. B's house after being told that she did not wish to see him. Brown reported that Mrs. B gave him a drink of water. The paper cup that Mrs. B gave to Brown was in Mrs. B's living room when Deputy Guthrie arrived. Finally, Deputy Bailey testified that when asked if he had been on Mrs. B's property that day, Brown replied that he had not. A jury could reasonably

conclude that this false statement to the investigating officer was made to conceal Brown's guilt.

Brown also made additional inculpatory statements to the parole board. During a parole interview in 1991, Brown stated, "I accept full responsibility for my crime and I feel sorry for the victim, but I can't undo what's been done." *In re Brown*, 810 S.E.2d at 451. In a 1985 parole interview, Brown expressed "fervent regret and remorse." *Id.* In a 1984 interview, Brown offered a detailed statement to the parole board explaining how the crimes occurred. After a bout of "drinking alcohol" and "taking some LSD," he approached Mrs. B at her home knowing that she did not want to see him. After Mrs. B gave water to Brown, she "turned into a snake." In a later parole interview, he recalled standing over Mrs. B with the "knife handle in his hand." *Id.*

Brown recalled feeling like he was "tripping" at the time of the offense. He could not specifically remember stabbing Mrs. B and murdering her son, but he remembered that he had blood all over him and he knew something was wrong. *Id.* Brown told the parole board in 1991 that he thought he "committed the crimes, stabbed Mrs. B and killed her 5 y/o son." *Id.* Brown discussed the circumstances of the crimes because he knew what drugs and alcohol can do to a person and did not want another young child's life taken in vain. *Id.*

The court takes note of the scientific evidence advanced by Brown: the DNA evidence that excludes Brown and Mrs. B's husband as contributors of male genetic material; the 2015 report that hair comparison analysis "exceeds the limits of science"; evidence concerning the severe deficiencies in fiber examination; and blood analysis evidence. This evidence does not contradict the trial evidence or post-trial admissions pointing towards Brown's guilt. For example, the DNA evidence does not demonstrate that another person attacked Mrs. B. At best, it invites speculation about Mrs. B's sexual activities outside of her marriage. Regarding the hair comparison, the testimony would be limited to the expert's statement that two hairs on the sweatshirt had the same characteristics as Brown's hair, but would have to include that the expert could not definitively identify Brown as the source of the hair. The fiber analysis testimony would have to be more limited than before, because the agent's testimony that color and shade could be identified just with a microscope is scientifically unsupportable; research has shown that seven different shades of blue cannot be visually distinguished by microscopy. The admissible evidence would be that the fibers were made of the same type of material and that such materials were then used by 50 different manufacturers. Finally, the blood analysis evidence at trial, to begin with, was limited because Brown and the victims all had Type A blood. Brown also cites a 2012 study that contradicts the testimony at trial that there was blood spattered on the sweatshirt Brown was alleged to be wearing. At best, this evidence is equivocal as to guilt, and it does not undermine the strong evidence of guilt set forth above. In sum, none of this evidence makes it "more likely than not that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt." *Teleguz*, 689 F.3d at 328 (quoting *Schlup*, 513 U.S. at 327).

III. CONCLUSION

***19** For the above reasons, the court will grant respondent's motion to dismiss and deny the petition for a writ of habeas corpus. Further, concluding that Brown has failed to make a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c)(1), a certificate of appealability will be denied. An appropriate order will be entered.

All Citations

Slip Copy, 2021 WL 1207751

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297 Va. 245
Supreme Court of Virginia.

Sherman BROWN, Petitioner,
v.
Bernard W. BOOKER, Warden, Green Rock Correctional Center, Respondent.

Record No. 161421
|
April 11, 2019

Synopsis
Background: Following affirmance on direct appeal of petitioner's conviction and death sentence for first-degree murder of a child, 212 Va. 515, 184 S.E.2d 78, vacatur of death sentence and imposition of life imprisonment sentence, 408 U.S. 940, 92 S.Ct. 2877, 33 L.Ed.2d 763, and denial of petition for writ of actual innocence, 295 Va. 202, 810 S.E.2d 444, he filed petition for writ of habeas corpus.

[Holding:] The Supreme Court of Virginia held that limitations period for filing habeas petition did not operate as a suspension of the writ in contravention the Suspension Clause of the Virginia Constitution.

Petition dismissed.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Headnotes (3)

[1] **Habeas Corpus** Limitations, Laches or Delay
Habeas Corpus Suspension of Writ
Statutory limitations period for filing petition for writ of habeas corpus did not operate as a suspension of the writ in contravention of the Suspension Clause of the Virginia Constitution as applied to claim asserted by petitioner convicted of first-degree murder and sentenced to life imprisonment that new evidence in form of allegedly exculpatory biological evidence demonstrated he was not guilty; claim was not within scope of common law writ at time of adoption of Suspension Clause, as it did not challenge subject matter jurisdiction of trial court to convict and sentence him. Va. Const. art. 1, § 9; Va. Code Ann. § 8.01-654(A)(2).

[2] **Habeas Corpus** Suspension of Writ
In determining whether a statute violates the Suspension Clause of the Virginia Constitution, a court looks to the subject matter to which habeas corpus review extended when the Suspension Clause was first adopted. Va. Const. art. 1, § 9.

[3] **Habeas Corpus** Criminal liability; innocence
Habeas Corpus Miscarriage of justice; actual innocence
Habeas corpus is not a vehicle for raising claims of actual innocence, nor does the statute of limitations for habeas petitions include any exception for claims of innocence. Va. Code Ann. § 8.01-654(A)(2).

1 Cases that cite this headnote

PRESENT: All the Justices

***245** Upon a Petition for a Writ of Habeas Corpus

Upon consideration of the petition for a writ of habeas corpus, the respondent's motion to dismiss, and the record, the Court is of the opinion that the motion should be granted and the petition should be dismissed.

I. BACKGROUND AND MATERIAL PROCEEDINGS

On May 25, 1970, Sherman Brown was convicted by a jury of the murder of a four-year-old child and was sentenced to death. This Court affirmed Brown's conviction, holding it was amply supported by the evidence, and affirmed his sentence. *Brown v. Commonwealth*, 212 Va. 515, 184 S.E.2d 786 (1971). In 1973, after his death sentence was vacated as

a result of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), Brown was resentenced by a jury to life imprisonment.

In 2016, Brown filed a petition for a writ of actual innocence pursuant to Code §§ 19.2-327.1 to -327.6, which govern writs of actual innocence based on biological evidence. We dismissed Brown's petition, holding the Court had no authority to issue a writ of actual innocence based on the DNA test results proffered by Brown, because the tests were conducted by a private laboratory and were not certified by the Commonwealth's Department of Forensic Science. *In re: Brown*, 295 Va. 202, 226, 810 S.E.2d 444 (2018). Further, even if the Court were authorized to consider the private laboratory's results, Brown failed to prove by clear-and-convincing evidence that no rational factfinder would find him guilty of murder in light ****305** of the totality of the evidence before the Court. *Id.* at 229, 810 S.E.2d 444.

Simultaneous with the filing of his petition for a writ of actual innocence, Brown submitted the present petition for a writ of ***246** habeas corpus. Brown asserts that new evidence, based on advances in forensic science, reveals flaws in hair and fiber evidence admitted at his trial and that new DNA evidence, the same evidence relied upon in his petition for a writ of actual innocence, exculpates him. Brown contends the admission of flawed hair and fiber evidence violated his right to a fair trial. Brown acknowledges his petition is untimely under Code § 8.01-654(A)(2) (governing time for filing habeas corpus petitions attacking a criminal conviction or sentence). However, Brown asserts that, if applied to him, this statutory limitation period would violate the bar against suspension of the writ of habeas corpus as set forth in the Suspension Clause of Article I, Section 9 of the Constitution of Virginia, because his claims are based on newly-discovered evidence and could not have been brought within the time permitted under the statute. We agree with Brown's concession that his petition is untimely under Code § 8.01-654(A)(2), but reject his argument that the limitation period violates the Suspension Clause and dismiss the petition.

II. ANALYSIS

Since 1998 Code § 8.01-654(A)(2) has provided that a habeas corpus petition attacking a criminal conviction or sentence, as here, must "be filed within two years from the date of final judgment in the trial court or within one year from either final disposition of the direct appeal in state court or the time for filing such appeal has expired, whichever is later." [1] However, because Brown was convicted before July 1, 1998, when the statute became effective, he had until July 1, 1999, to file a timely petition for a writ of habeas corpus. *See Haas v. Lee*, 263 Va. 273, 277, 560 S.E.2d 256 (2002) (petitioners convicted prior to the effective date of Code § 8.01-654(A)(2) afforded one year from effective date to file petition for writ of habeas corpus). Brown did not file his habeas petition until October 7, 2016, long after the limitation period expired.

1 Code § 8.01-229 provides for tolling of the limitation period for reasons not applicable here. *See Hicks v. Dir., Dep't of Corr.*, 289 Va. 288, 298, 768 S.E.2d 415 (2015) (failure to disclose exculpatory evidence may toll limitation period pursuant to Code § 8.01-229(D)).

[1] Brown argues that the Suspension Clause bars application of the statute of limitations to his petition because his claims, based on allegedly newly discovered evidence, could not have been brought within the limitation period. Assuming without deciding that ***247** Brown's claims could not have been brought before the limitation period expired, we reject his argument that the statutory limitation period operates as a suspension of the writ of habeas corpus in contravention of Article I, Section 9 of the Constitution of Virginia. [2]

2 Although Brown asserts he could not have discovered his claim before 2015, we note that many of the advances in forensic science upon which Brown relies were available prior to 1999. Indeed, Brown cites to studies from 1988 and 1997 in support of his argument that the fiber evidence at his trial was flawed.

[2] The Suspension Clause states that "the privilege of the writ of habeas corpus shall not be suspended unless when, in cases of invasion or rebellion, the public safety may require." Va. Const. art. I, § 9. The Court has not previously addressed whether a particular statutory provision constitutes suspension of the writ. In addressing the issue now, we look to the limited subject matter to which habeas corpus review extended when our Suspension Clause was first adopted and conclude statutory limits on Brown's ability to raise his present claims are constitutional. *See Edwards v. Vesilind*, 292 Va. 510, 524, 790 S.E.2d 469 (2016) (Interpreting the Speech and Debate Clause and stating that "[t]he Clause was not

introduced into the Constitution of Virginia devoid of history or context, nor should it be interpreted as if it had.").

At common law, a "habeas court's role was most extensive in cases of pretrial and noncriminal detention, where there had been little or no previous judicial review of the ****306** cause for detention." *Boumediene v. Bush,* 553 U.S. 723, 780, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008). As particularly relevant here, its use as a post-conviction remedy was limited to challenging the jurisdiction of the sentencing court. *Felker v. Turpin*, 518 U.S. 651, 663-64, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996). In England, the use of the writ for those "detained for criminal or supposed criminal matters was defined and regulated by the Habeas Corpus Act of 1679." *See* 1 A.E. Dick Howard, Commentaries on the Constitution of Virginia 160 (1974).

The writ was available in Virginia prior to 1830 but did not gain constitutional protection in Virginia until the Suspension Clause appeared as Article III, Section 11 of the Constitution of 1830. [3] Although there "is little available evidence to cast light on the ***248** meaning of" the Clause, *id.* at 165, by the time it was adopted, the scope of the writ, insofar as it lay to challenge the validity of a criminal conviction, remained as it did at common law, limited to challenging the jurisdiction of the sentencing court. As this Court explained:

> The writ of habeas corpus is not a writ of error. It deals, not with mere errors or irregularities, but only with such radical defects as render a proceeding absolutely void. It brings up the body of the prisoner with the cause of his commitment, and the court can inquire into the sufficien[cy] of that cause; but, if he be detained in prison by virtue of a judgment of a court of competent jurisdiction, that judgment is in itself sufficient cause. An imprisonment under a judgment cannot be unlawful unless that judgment be an absolute nullity, and it is not a nullity if the court or magistrate rendering it had jurisdiction to render it.

Ex Parte Marx, 86 Va. 40, 43-44, 9 S.E. 617 (1889); *see also Swain v. Pressley*, 430 U.S. 372, 384–85, 97 S.Ct. 1224, 51 L.Ed.2d 411 (1977) (Burger, C. J., concurring) ("The scope of the writ during the 17th and 18th centuries has been described as follows: [O]nce a person had been convicted by a superior court of general jurisdiction, a court disposing of a habeas corpus petition could not go behind the conviction for any purpose other than to verify the formal jurisdiction of the committing court.") (quoting Oaks, Legal History in the High Court - Habeas Corpus, 64 Mich. L. Rev. 451, 468 (1966)); *State ex rel. Glover v. State*, 660 So.2d 1189, 1196 (La. 1995) ("Traditionally, the writ of habeas corpus was used to: (1) insure that necessary pre-trial procedures were followed; (2) examine whether the person had been committed pursuant to judicial process; and (3) ascertain whether the committing court had jurisdiction.") (citations omitted) abrogated on other grounds by *State ex rel. Olivieri v. State*, 779 So.2d 735, 741-42 (La. 2001). Of course, were Brown challenging the jurisdiction of the circuit court to convict or sentence him that claim remains cognizable in a petition for a writ of habeas corpus without regard to the limitation period. *See Singh v. Mooney*, 261 Va. 48, 52, 541 S.E.2d 549 (2001) (an order that is void ab initio for lack of jurisdiction may be challenged "anywhere, at any time, or in any manner.").

[3] In the initial iteration, the Clause did not include an "unless" clause. That was adopted in the Reconstruction revision of 1867-68, and the Clause was moved to its current location in Article I in 1969. *Id.* at 164-65.

***249** Here, however, Brown challenges only the reliability of the evidence adduced at his trial – not the subject matter jurisdiction of the sentencing court to address his case – and he attempts to present new evidence which, he contends, shows he is actually innocent. The use of the writ to challenge non-jurisdictional claims of the sort alleged by Brown was unknown to the drafters of our Suspension Clause, and they could not have intended to protect a convicted prisoner's ability to raise them. *See Felker*, 518 U.S. at 663, 116 S.Ct. 2333 (noting "[t]he writ of habeas corpus known to the Framers was quite different from that which exists today"). Accordingly, Brown's inability to now question and present new evidence bearing on his factual guilt or innocence does not violate the Suspension Clause.

In so holding, we join numerous other states which have rejected similar challenges to their own limitation periods. *See* ****307** *Flanigan v. State*, 3 P.3d 372, 374-76 (Alaska Ct. App. 2000) (rejecting petitioner's argument that habeas time bar violated Alaska Constitution because petitioner did not plead a claim within scope of common law writ,

which permitted challenges to convictions only on grounds of lack of jurisdiction); *Glover*, 660 So.2d at 1196 (holding limitation period on application for post-conviction relief did not "suspend the writ of habeas corpus because 'suspension,' insofar as ... this state's constitution is concerned, refers to suspension of the traditional common law writ of habeas corpus"); *In re Pers. Restraint of Runyan*, 121 Wash.2d 432, 853 P.2d 424, 429-32 (1993) (limitation period not unconstitutional suspension of writ where exception existed for void convictions, which was sufficient to preserve narrow constitutional scope of habeas relief, which was limited to scope of writ as it existed at common law); *cf. Potts v. State*, 833 S.W.2d 60, 61-62 (Tenn. 1992) (stating purpose of writ is to challenge void judgments and habeas corpus cannot be used to collaterally attack a facially valid conviction; thus, limitation period for filing a petition for post-conviction relief pursuant to state statute, which permitted petitioners to challenge convictions as void or voidable due to a constitutional violation, could not violate suspension clause); *Passanisi v. Director, Nev. Dep't of Prisons*, 105 Nev. 63, 769 P.2d 72, 74 (1989) (rejecting suspension clause challenge to prerequisite for filing habeas corpus petition because ***250** "[t]he legislature may ... impose a reasonable regulation on the writ of habeas corpus, so long as the traditional efficacy of the writ is not impaired").

[3] Finally, to the extent Brown attempts to raise a freestanding claim of actual innocence or argue his innocence should exempt him from the limitation period, we reject both contentions. Habeas corpus is not a vehicle for raising claims of actual innocence, nor does the statute of limitations include any exception for claims of innocence. Even if such an exception existed, we previously rejected Brown's actual innocence claim. *See Brown*, 295 Va. at 234, 810 S.E.2d 444. Nothing in Brown's present petition persuades us that we should revisit that decision.

Accordingly, the petition is dismissed.

Dismissed.

This order shall be published in the Virginia Reports.

All Citations

297 Va. 245, 826 S.E.2d 304

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295 Va. 202
Supreme Court of Virginia.

IN RE: Sherman BROWN

Record No. 161422
|
MARCH 22, 2018

Synopsis

Background: Following affirmance of conviction and death sentence for first-degree murder of four-year-old child, 212 Va. 515, 184 S.E.2d 78, and vacation of death sentence, 408 U.S. 940, 92 S.Ct. 2877, 33 L.Ed.2d 763, petitioner filed petition seeking writ of actual innocence based on biological evidence tested by private laboratory more than 45 years after crime.

Holdings: The Supreme Court, D. Arthur Kelsey, J., held that:

[1] actual-innocence statutes limited Supreme Court's review of allegedly exculpatory biological evidence to test results certified by Commonwealth's Department of Forensic Science (DFS), and not private laboratories;

[2] law of the case doctrine did not preclude Commonwealth from arguing that Supreme Court lacked authority to grant writ of actual innocence based on test results not certified by DFS;

[3] Attorney General was not estopped from arguing that Supreme Court lacked authority to grant writ of actual innocence based on test results not certified by DFS; and

[4] petitioner failed to prove by clear and convincing evidence that no rational factfinder would find him guilty of child's murder, and thus he was not entitled to writ of actual innocence.

Petition dismissed.

West Headnotes (26)

[1] **Pardon and Parole** Pardon

Supreme Court has no common-law authority to grant what amounts to a judicial pardon—that is, to set free a convict lawfully found guilty by a jury—based upon his later protestation that he was in fact innocent.

[2] **Courts** Virginia

Judicial power under state constitutional provision vesting the Supreme Court with original jurisdiction to consider convicted felons' claims of actual innocence is limited. Va. Const. art. 6, § 1; Va. Code Ann. § 19.2-327.1 et seq.

[3] **Constitutional Law** Nature and scope in general

If a convict seeks exoneration outside of the statutory boundaries of the Supreme Court's original jurisdiction to consider claims of actual innocence, he may obtain it only from the Governor of Virginia, who is vested with the power of executive clemency. Va. Const. art. 6, § 1; Va. Code Ann. § 19.2-327.1 et seq.

1 Cases that cite this headnote

[4] **Sentencing and Punishment** Effect of recommendation

Sentencing and Punishment Overriding jury recommendation

Punishment as fixed by the jury is not final or absolute in capital case, since its finding on the proper punishment is subject to suspension by the trial judge, in whole or in part, on the basis of any mitigating facts that the convicted defendant can marshal; under such practice, the convicted criminal defendant is entitled to two decisions on the sentence, one by the jury and the other by the trial judge in the exercise of his statutory right to suspend, and the ultimate sentence does not,

therefore, rest with the jury alone but is always subject to the control of the trial judge.

[5] **Habeas Corpus** Newly discovered evidence

Statutes governing writs of actual innocence based on biological evidence required the Supreme Court to limit its review of allegedly exculpatory biological evidence to test results certified by Commonwealth's Department of Forensic Science (DFS), and the Supreme Court had no authority to issue a writ of actual innocence based upon the test results obtained by a petitioner from a private laboratory. Va. Const. art. 6, § 1; Va. Code Ann. §§ 19.2-327.1(A), (D)-(E), 19.2-327.3(A)(v)-(vi), 19.2-327.5.

4 Cases that cite this headnote

[6] **Statutes** Language

Supreme Court presumes that the legislature chose, with care, the words it used when it enacted a statute.

1 Cases that cite this headnote

[7] **Statutes** Express mention and implied exclusion; expressio unius est exclusio alterius

Legislature's act of choosing carefully some words in a statute necessarily implies others are omitted with equal care.

1 Cases that cite this headnote

[8] **Habeas Corpus** Res judicata or collateral estoppel effect

Law of the case doctrine did not preclude Commonwealth from arguing that Supreme Court lacked authority to grant writ of actual innocence based on test results not certified by Commonwealth's Department of Forensic Science (DFS), though trial court had authorized private laboratory to test biological evidence on actual innocence claim by petitioner, who had been convicted of first-degree murder; law-of-the-case had no binding effect prior to an appeal, Supreme Court did not sit as appellate court reviewing trial court's testing orders, and question was not whether trial court should have authorized testing, but was whether Supreme Court, exercising its original jurisdiction, had statutory authority to consider those test results. Va. Const. art. 6, § 1; Va. Code Ann. §§ 19.2-327.1, 19.2-327.5.

2 Cases that cite this headnote

[9] **Courts** Previous Decisions in Same Case as Law of the Case

Law-of-the-case doctrine has no binding effect on a trial court prior to an appeal.

1 Cases that cite this headnote

[10] **Habeas Corpus** Res judicata or collateral estoppel effect

Attorney General was not estopped from arguing that Supreme Court lacked authority to grant petitioner, who had been convicted of first-degree murder, writ of actual innocence based on test results for biological evidence not certified by Commonwealth's Department of Forensic Science (DFS), though Commonwealth's Attorney apparently disagreed on the issue; Attorney General and Commonwealth's Attorney are separate constitutional officers and are entitled to their separate opinions, Attorney General and Commonwealth's Attorney each have distinct, though at times complementary, responsibilities, and the duty to represent Commonwealth in petitions for writs of actual innocence rests exclusively with Attorney General. Va. Code Ann. §§ 2.2-511, 15.2-1627(B), 19.2-327.3(C), 19.2-327.10(C).

[11] **Habeas Corpus** Particular issues and problems

Burden of proof at all times remains with the petitioner on a petition seeking writ of actual innocence based on biological evidence, because once a defendant has been afforded a fair trial and convicted of the offense for which

he was charged, the presumption of innocence disappears. Va. Code Ann. § 19.2-327.5.

[12] **Criminal Law** Degree of proof

"Clear and convincing evidence" standard is considerably higher than a mere preponderance.

3 Cases that cite this headnote

[13] **Criminal Law** Degree of proof

Clear and convincing evidence standard cannot be met with evidence that leaves competing inferences equally probable.

3 Cases that cite this headnote

[14] **Habeas Corpus** Criminal Proceedings, Weight and Sufficiency

Actual-innocence statutes require petitioners seeking writs of actual innocence to prove by clear and convincing evidence that no rational trier of fact would have found proof of guilt beyond a reasonable doubt, instead of requiring them to prove that no rational trier of fact "could" have done so; in this context, the substitution of "would" for "could" changes the decision-making paradigm from a threshold sufficiency analysis to a more predictive analysis. Va. Code Ann. §§ 19.2-327.3(A)(vii), 19.2-327.5, 19.2-327.11(A)(vii), 19.2-327.13.

1 Cases that cite this headnote

[15] **Criminal Law** Degree of proof

"More likely than not" proof falls short of the clear and convincing evidence standard, as does, all the more, a mere evidentiary equipoise.

2 Cases that cite this headnote

[16] **Habeas Corpus** Criminal Proceedings, Weight and Sufficiency

In examining a petition for writ of actual innocence based on biological evidence, the Supreme Court must apply the statutory standard that the petitioner must prove by clear and convincing evidence that no rational factfinder would have found him guilty not simply to fragments of the evidence but to all of the evidence in the aggregate—including the testimony and exhibits at the original trial, any previous records from the original case, the facts proffered by the petitioner, the factual proffers in the Commonwealth's response, any records of pertinent evidentiary hearings, and any findings certified to the Supreme Court by a circuit court pursuant to a remand order. Va. Code Ann. § 19.2-327.5.

2 Cases that cite this headnote

[17] **Habeas Corpus** Criminal Proceedings, Weight and Sufficiency

Statutes governing petitions for writs of actual innocence based on biological evidence require the Supreme Court to take all of the factual information, which is reviewed in its totality, and to test it under the clear-and-convincing standard. Va. Code Ann. § 19.2-327.5.

1 Cases that cite this headnote

[18] **Habeas Corpus** Newly discovered evidence

Supreme Court does not limit its analysis to the arguments raised by the parties in the original trial, in determining whether a petitioner seeking a writ of actual innocence based on biological evidence has met the statutory standard of proving that no rational factfinder would have found him guilty. Va. Code Ann. § 19.2-327.5.

2 Cases that cite this headnote

[19] **Habeas Corpus** Newly discovered evidence

Statute governing petitions for writ of actual innocence based on biological evidence effectively requires the Supreme Court to draw its conclusion as to whether the petitioner has met the statutory standard of proving that no rational factfinder would have found him guilty from a hypothetical new trial in which a rational

factfinder hears all of the evidence in the aggregate. Va. Code Ann. § 19.2-327.5.

4 Cases that cite this headnote

[20] **Habeas Corpus** Newly discovered evidence

On a petition for writ of actual innocence based on biological evidence, the admixture of old and new evidence necessarily means that the petitioner and the Commonwealth are free to assert their respective theories of innocence or guilt that correspond to their competing versions of the aggregate fact pattern. Va. Code Ann. § 19.2-327.5.

3 Cases that cite this headnote

[21] **Habeas Corpus** Newly discovered evidence

Petitioner failed to prove by clear and convincing evidence that no rational factfinder would find him guilty of murder of victim's four-year-old son in light of totality of evidence, and thus petitioner was not entitled to writ of actual innocence based on biological evidence, including new DNA test results demonstrating petitioner's DNA was not found on victim's vaginal sample; DNA test results proved at best that petitioner did not vaginally rape victim, and not that he did not bludgeon and stab victim almost to death and murder her son, petitioner confessed "full responsibility" for crimes and provided detailed account to parole board, and probative value of DNA results was questionable, given small sample size, risk of contamination, and weak chain of custody. Va. Code Ann. § 19.2-327.5.

3 Cases that cite this headnote

[22] **Habeas Corpus** Newly discovered evidence

Risks of contamination and potential secondary or tertiary transfer should be factored into any court's consideration of test results obtained from low amounts of DNA on a petition for writ of actual innocence based on biological evidence. Va. Code Ann. § 19.2-327.5.

3 Cases that cite this headnote

[23] **Criminal Law** Condition; change; tampering

Basic rule for admitting real evidence is that the burden is upon the party offering the evidence to show with reasonable certainty that there has been no alteration or substitution of it, and reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received.

[24] **Criminal Law** Chain of custody

Establishing a chain of possession, as required for admission of real evidence, demonstrates that the evidence presented is in the same condition when analyzed as it was when taken from the victim.

[25] **Criminal Law** Chain of custody

Burden is on the proponent of the evidence, when scientific analysis of a sample is offered, to establish each vital link in the chain of custody by showing the possession and handling of the evidence from when it is obtained to its presentation.

1 Cases that cite this headnote

[26] **Criminal Law** Chain of custody

Determination of whether a proponent has established a proper chain of custody for real evidence, as required for its admission, is in the sound discretion of the court determining the admissibility of the evidence.

1 Cases that cite this headnote

Attorneys and Law Firms

****447** Susan Friedman (Peter Neufeld; Matthew W. S. Estes; Parisa Dehghani-Tafti; Steven D. Rosenfield), for petitioner.

Alice T. Armstrong, Senior Assistant Attorney General (Mark R. Herring, Attorney General), for respondent.

PRESENT: All the Justices

UPON A PETITION FOR A
WRIT OF ACTUAL INNOCENCE

OPINION BY JUSTICE D. ARTHUR KELSEY

***207** In 1970, a jury found Sherman Brown guilty of first-degree murder of a four-year-old child. The child's mother ("M.B.") testified that, after she rejected Brown's demand for sex, he knocked her unconscious, and upon awaking, she discovered that she had been repeatedly stabbed. While she was unconscious, her four-year-old son had been stabbed to death. Brown did not testify at his trial or proffer any evidence suggesting that someone else committed the attack.

In 2016, Brown filed a petition seeking a writ of actual innocence pursuant to Code §§ 19.2-327.1 to -327.6, which govern writs of actual innocence based on biological evidence. Brown asserts under oath that he is "actually innocent" of the crime, Code § 19.2-327.3(A)(ii), and that recent DNA testing by a private laboratory, Bode Cellmark Forensics ("Bode"), conclusively exonerates him with "clear and convincing evidence" such that "no rational trier of fact would have found proof of guilt ... beyond a reasonable doubt," Code § 19.2-327.5. Reviewing this case under our original jurisdiction, we dismiss Brown's petition for two reasons.

First, the governing statutes limit our review of allegedly exculpatory biological evidence to the findings of the Commonwealth's Department of Forensic Science ("DFS"). DFS analyzed a vaginal smear slide presented by Brown and was unable to identify sufficient amounts of DNA in order to render any conclusion ***208** as to whether Brown could be included or excluded as a contributor to the DNA on the slide. The findings of DFS, therefore, do not support Brown's claim of actual innocence.

Second, even if we were authorized to consider the private laboratory's results obtained by Brown, he would still have the burden of proving that the evidence submitted to us in this writ proceeding—DNA test results from the Bode laboratory, the factual proffers in Brown's petition, the post-trial evidence presented in the Commonwealth's response, and the evidence presented at the original trial—provide, in the aggregate, clear-and-convincing proof that "no rational trier of fact would have found proof of guilt ... beyond a reasonable doubt." *Id.* We find this evidence falls far short of satisfying this clear-and-convincing statutory standard of proof.

I.

[1] Our analysis begins with a restatement of first principles. We have no common-law authority to grant what amounts to a judicial pardon—that is, to set free a convict lawfully found guilty by a jury—based upon his later protestation that he was in fact innocent. Under English common law, as relevant today as it was at the Founding,[1] "the power to exercise executive clemency lay within the prerogative of the crown," *Gallagher* v. *Commonwealth,* 284 Va. 444, 450, 732 S.E.2d 22, 25 (2012), and "[t]here simply was no such thing as a judicial pardon," *Taylor* v. *Commonwealth,* 58 Va. App. 435, 445, 710 S.E.2d 518, 523 (2011). The "traditional remedy ****448** for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency." *Herrera v. Collins*, 506 U.S. 390, 417, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993).

1 "First enacted in 1776, Code § 1-200 provides that '[t]he common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly.' " *Tvardek v. Powhatan Vill. Homeowners Ass'n*, 291 Va. 269, 274 n.1, 784 S.E.2d 280, 282 n.1 (2016). "As Justice Spratley explained, Virginia 'expressly provided that [English common law] shall "be the rule of decision, except in those respects wherein it is or shall be altered by the General Assembly." These words are simple and clear. They mean what they say.' " *Id.* (quoting *Brown v. Brown*, 183 Va. 353, 358, 32 S.E.2d 79, 81 (1944)); *see also Robinson v.*

Matt Mary Moran, Inc., 259 Va. 412, 417-18, 525 S.E.2d 559, 562 (2000).

[2] The common law, however, always remains subject to the sovereign power of citizens to amend our Constitution and the ***209** power of their representatives to enact statutes in derogation of the common law. In 2002, Virginians did just that when they amended the Constitution of Virginia to vest this Court with "original jurisdiction ... to consider claims of actual innocence presented by convicted felons." Va. Const. art. VI, § 1. That newly granted judicial power, however, is limited. It can only be exercised "in *such cases* and in *such manner* as may be provided by the General Assembly." *Id.* (emphases added).

[3] If a convict seeks exoneration outside of these statutory boundaries, he may obtain it only from the Governor of Virginia, who is vested with the power of executive clemency. *See generally Blount v. Clarke*, 291 Va. 198, 204-05, 782 S.E.2d 152, 155 (2016). The opportunity to seek executive clemency serves the dual goals of defining the limited scope of the judicial role while providing a fail safe for claims of innocence that fall outside of the statutory writ procedure. *See Herrera*, 506 U.S. at 415, 113 S.Ct. 853 ("Executive clemency has provided the 'fail safe' in our criminal justice system."). *Compare, e.g.*, Governor Timothy M. Kaine, List of Pardons, Commutations, Reprieves and Other Forms of Clemency, S. Doc. No. 2, at 22 (2010) (granting absolute pardon to Arthur Lee Whitfield), *with, e.g.*, *In Re: Whitfield*, Record Nos. 042086 and 042087, slip op. at 4 (Va. Oct. 21, 2005) (unpublished) (dismissing Whitfield's petitions for writs of actual innocence because the Court did "not have the statutory authority to consider petitioner's claims").

For these reasons, we limit our analysis to the actual-innocence statutes applicable to petitions asserting newly discovered or previously untested biological evidence. Implementing the authority established by Article VI, Section 1 of the Constitution of Virginia, Code § 19.2-327.2 vests the Court with "the authority to issue writs of actual innocence" based upon biological evidence. In exercising this authority, we must base our determination upon "the petition, the response by the Commonwealth, previous records of the case, the record of any hearing held under [Chapter 19.2] and the record of hearings held pursuant to [Code] § 19.2-327.1 [the testing statute], and if applicable, any findings certified from the circuit court" pursuant to a remand order from this Court. Code § 19.2-327.5.

***210** Under settled principles, we may also take into account factual matters properly within the scope of judicial notice. *See* Va. R. Evid. 2:201(a). These facts include those "not subject to reasonable dispute in that [they are] either (1) common knowledge or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Id. See generally* Charles E. Friend & Kent Sinclair, The Law of Evidence in Virginia § 3-2 at 174-88 (7th ed. 2012 & Supp. 2017); Kent Sinclair et al., A Guide to the Rules of Evidence in Virginia 13-14 (2017-2018 ed.).

We incorporate all of these sources into our review of the relevant facts and our application of the statutory criteria to this case. [2]

2 Both Brown and the Commonwealth have proffered extensive post-trial evidence in this writ proceeding. Neither party, however, has objected to our consideration of any of these proffers. Because resolution of this case does not require "further development of the facts," we decline to enter a remand order pursuant to Code § 19.2-327.4.

A. THE EVIDENCE AT THE 1970 TRIAL

The record before us begins with the evidence presented by the Commonwealth at Brown's 1970 jury trial. [3] Witnesses established that M.B. was at home on October 1, 1969, with her two young children, a two-year-old and a four-year-old. After lunch, M.B. put the two-year-old in his crib for a nap. M.B. then put on a nightgown, read to her four-year-old in bed, and then turned off the light to join him for an afternoon nap. ****449** Before either of them fell asleep, M.B.'s father arrived for a visit.

3 Brown presented no witnesses or evidence at his trial.

During her father's visit, M.B. received a phone call from Brown. [4] He repeatedly asked her if he could come over to her home to talk. She said no each time and was unnerved by his persistent requests. After her father left, M.B. and the four-year-old returned to the bedroom intending to take the planned nap. Just as M.B. started to untie her robe, she heard the front gate of the fence in front of her residence swing open. She looked out the window, saw no one, and walked to the front door with the four-year-old. When ***211** she

cracked the front door slightly open, she saw Brown through an exterior screen door. He asked to come inside. She said no. He insisted, but she continued to refuse his request.

4 Brown also had contacted M.B. on two other occasions in the previous two months. M.B. testified that she had a recent phone conversation with Brown, in which he had offered to do yard work for her. She also recalled him previously approaching her when she was outside in her yard to again inquire about yard work after he had finished running laps in her front field.

While still standing outside, Brown asked M.B. if she would get him a cup of water. She walked to her kitchen to fetch a paper cup of water, and when she returned, Brown had opened the screen door and stepped into the home. She was upset to see him inside the home, but she handed him the cup of water anyway. Brown continued to insist that he wanted to talk to her and even asked her to give him a tour of her home, but she continued to refuse each of his requests. At one point, she "thought that [she] smelled alcohol on his breath," and she "asked him if he had been drinking," which he denied. Trial Tr. at 167. Eventually, Brown abruptly asked her, "Will you have sex with me?" *Id.* at 162. Now "terrified," M.B. replied, "Of course not." *Id.* After Brown asked her why she would not have sex with him, M.B. answered that she was married, that Brown was not her husband, and that Brown should leave. M.B.'s four-year-old was also in the room with them at the time, and M.B. indicated that "little ears were listening" when she requested that Brown leave. Brown finally declared, "I'm so sexed up I don't know what to do." *Id.* "I'm sorry," M.B. responded, "you will have to go somewhere else. I'm not available." *Id.*

M.B.'s next memory was "pitching forward" after "receiving very painful blows" to her side, which rendered her unconscious. *Id.* at 163. When she awoke, she was unable to move. Her sister-in-law arrived later that afternoon and found M.B. on the floor in a pool of blood. After she discovered that M.B.'s phone was hanging from its wires with its receiver broken in half, the sister-in-law drove to a neighbor's home to ask them to call both the rescue squad and her husband, who could pick up M.B.'s husband from his job. M.B.'s sister-in-law returned to M.B.'s home and found the two-year-old unharmed in his crib, but she discovered the four-year-old lying face down on a bloody bed. When the rescue squad arrived, they discovered that M.B. had been stabbed multiple times and still had a knife blade without its handle lodged in her chest. Her underwear had been taken off and were on the floor nearby. The medical examiner later declared the four-year-old dead from repeated stab wounds.

***212** M.B. was taken to the hospital for emergency surgery. She had suffered knife wounds to her chest, lower back, and abdomen and had open scalp lacerations from what the surgeon assumed were "blow[s]" to her head. *Id.* at 119. One of the stab wounds went 12 to 14 inches through her abdominal wall and into her liver and spleen. The child victim was transported to the morgue. He had suffered two stab wounds piercing his heart, four lacerations to his scalp exposing his skull, stab wounds to his left lung and right wrist, and multiple contusions to his forehead, face, arms, legs, and ears.

The Commonwealth charged Brown with a single crime, the murder of M.B.'s four-year-old son. Witnesses at Brown's trial established that on the day of the murder, Brown spent the morning with his brother-in-law, Larry Waller, and Larry's cousin, William Waller. They drank a fifth of whiskey together while working on Brown's car and then drove to Ivy, a town just outside of Charlottesville, for lunch. At Brown's request, William dropped off Brown and Larry at Brown's father's house, which was directly ****450** across the road from M.B.'s house. At Brown's father's house, Larry overheard Brown make a telephone call. Shortly after that call, Brown and Larry walked across the road so that Brown could jog in the field on M.B.'s property in front of her home. After watching Brown jog a few laps, Larry caught a ride on the school bus after 3:00 p.m. and left to visit a friend, who was about to get out of school for the day.

After spending about twenty minutes at his friend's house, Larry returned to his home, in which Brown also lived, at approximately 4:30 p.m. Larry discovered Brown in his own bedroom washing up. Brown turned to Larry and simply said, "I messed up." *Id.* at 232, 251. Larry did not know what Brown had meant by that statement, and Brown did not provide an explanation. Brown went to work that evening where he was arrested around 6:15 p.m. and then questioned by police about the murder of M.B.'s four-year-old son. After reading Miranda warnings to Brown, *see id.* at 208, 214, officers drove Brown to M.B.'s home where an investigator asked him if he had been on M.B.'s property that day, which Brown denied.

The Commonwealth's opening statement at Brown's trial focused entirely on the only charge against him, the murder of M.B.'s ***213** son. The Commonwealth never once suggested

in its opening statement that Brown raped M.B., and M.B. did not make that accusation during her testimony. Furthermore, none of the evidence offered at trial demonstrated vaginal pain, injury, or trauma, which often accompany rape. Instead, the Commonwealth's theory of the case was that Brown may have "*attempted* to have intercourse with her" before stabbing and beating her. *Id.* at 432 (emphasis added). Given the ambiguous circumstantial evidence, the Commonwealth conceded that whether "he tried to rape [her] or did rape her[,] we will never know." *Id.* at 402. [5]

5 The Commonwealth maintained this position during its closing argument at Brown's 1973 resentencing hearing. *See* Sent'g Tr. at 475 ("[I]t's very probable that Sherman Brown sexually assaulted [M.B.], *we don't know for sure* but I point out the fact that she testified that when he arrived her underpants were on and when the people found her stabbed, her underpants were off." (emphasis added)).

In his closing statement to the jury, Brown's counsel pointed out that the Commonwealth did not introduce any evidence of sperm found on Brown or M.B. "You can be certain if they found [semen]" on the victim, witnesses "would have been here to testify to it." *Id.* at 418. That evidentiary omission, counsel argued to the jury, discounts any "motive" suggesting that Brown murdered M.B.'s four-year-old son and attempted to murder M.B. in order to cover up an actual "rape," *id.* at 417-18, a theory of guilt the Commonwealth never advanced at trial. [6]

6 Brown claims that we should take into account his post-conviction challenge to various items of fiber and hair evidence offered by the Commonwealth at his criminal trial. We need not decide whether it would be appropriate to do so. The Commonwealth's expert witness offered, at best, a weak opinion on the incriminating nature of the hair and fiber evidence, *see* Trial Tr. at 306-15, 327-33, and the Commonwealth significantly discounted the inculpatory weight of the hair evidence, *id.* at 397-99. Neither the hair nor the fiber evidence has more than a marginal effect on our totality-of-the-evidence review.

The jury found Brown guilty of first-degree murder of M.B.'s son and sentenced him to death. On appeal, we affirmed the death sentence and rejected Brown's challenge to the finding of guilt. In response to his sufficiency challenge, we stated that "[a] detailed review of the evidence of the circumstances surrounding this murder and the evidence pointing to the defendant's guilt as the murderer leaves no doubt in our mind that this evidence, viewed in the light most favorable to the Commonwealth, amply supports the ***214** jury's verdict." *Brown v. Commonwealth*, 212 Va. 515, 516, 184 S.E.2d 786, 787 (1971), *vacated in part on other grounds*, 408 U.S. 940, 92 S.Ct. 2877, 33 L.Ed.2d 763 (1972).

[4] In the early 1970s, the United States Supreme Court interpreted the Eighth Amendment to declare capital punishment categorically unconstitutional. The de facto moratorium began with *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), a 5-4 per curiam order accompanied by nine separate opinions from each of the Justices, and ended with ****451** *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), which reinstated, with qualifications, the constitutionality of the death penalty. During the moratorium, Brown appealed to the United States Supreme Court and obtained a summary order reversing our affirmance on direct appeal "insofar as it leaves undisturbed the death penalty imposed." *Brown*, 408 U.S. at 940, 92 S.Ct. 2877. In response, we remanded Brown's case to the trial court for resentencing. After receiving a jury verdict fixing the sentence at life imprisonment, the trial court entered a final order approving the sentence without suspension. [7]

7 In Virginia, "the punishment as fixed by the jury is not final or absolute, since its finding on the proper punishment is subject to suspension by the trial judge, in whole or in part, on the basis of any mitigating facts that the convicted defendant can marshal." *Jones v. Commonwealth*, 293 Va. 29, 43 n.12, 795 S.E.2d 705, 713 n.12 (2017) (quoting *Vines v. Muncy*, 553 F.2d 342, 349 (4th Cir. 1977)). "Under such practice, the convicted criminal defendant is entitled to 'two decisions' on the sentence, one by the jury and the other by the trial judge in the exercise of his statutory right to suspend; his 'ultimate sentence ... does not [therefore] rest with the jury' alone but is always subject to the control of the trial judge." *Vines*, 553 F.2d at 349 (alterations in original) (footnotes and citations omitted).

B. BROWN ACCEPTS "FULL RESPONSIBILITY"

During a parole interview in 1991, Brown stated, "I accept full responsibility for my crime and I feel sorry for the victim, but I can't undo what's been done." Commonwealth's Mot. to Dismiss Ex. 7, at 12 [hereinafter MTD]; *see also id.* Ex. 5, at 1 (expressing "fervent regret and remorse" in a 1985 interview for the Parole Board's consideration). During an earlier parole interview in 1984, Brown offered a detailed statement to the Parole Board explaining how the crimes occurred. After a bout of "drinking" alcohol and "taking some LSD," he approached M.B. at her home knowing that "she did not want to see him." *Id.* Ex. 6, at 1. After M.B. gave water to Brown, "she turned into a snake." *Id.* In a later parole interview, he recalled standing over M.B. with the "knife handle in his hand." *Id.* Ex. 7, at 4 (capitalization omitted).

***215** Brown recalled feeling like "he was 'tripping' at the time of the offense." *Id.* Ex. 6, at 1. Brown could not specifically recall the acts of stabbing M.B. and murdering her four-year-old son, but he remembered "that he had blood all over him and he knew something was wrong." *Id.* Brown told the Parole Board in 1991 that he thought "he committed the crimes, stabbed [M.B.] and killed her 5 y/o son." [8] *Id.* Ex. 7, at 4 (capitalization omitted). Brown discussed the circumstances of the crimes because "he now kn[ew] what drugs and alcohol can do to a person" and because he did not "want another 4 year old's life taken in vain." *Id.* Ex. 6, at 1.

8 The child was actually four years old at the time of his murder. *See supra* at 448–49.

C. BROWN CLAIMS ACTUAL INNOCENCE

In 2016, Brown filed the present petition seeking a writ of actual innocence. Brown asserts that he is "actually innocent" of the crime as opposed to not guilty due to insufficient evidence, [9] Code § 19.2-327.3, and that recent DNA testing by a private laboratory conclusively exonerates him with "clear and convincing evidence" such that "no rational trier of fact would have found proof of guilt ... beyond a reasonable doubt," Code § 19.2-327.5.

9 In the context of federal habeas corpus law, the United States Supreme Court has held:

> The meaning of actual innocence ... does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty. It is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do. Thus, a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.

Schlup v. Delo, 513 U.S. 298, 329, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995), *superseded in part by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 104, 106, 110 Stat. 1214 (codified as amended at 28 U.S.C. §§ 2244(b)(2)(B), 2254(e)(2)).

Pursuant to an order by the trial court for post-conviction DNA testing under Code § 19.2-327.1, DFS performed DNA testing on various pieces of evidence from Brown's ****452** trial beginning in 2008. After five supplemental orders, the testing concluded in 2015 when Bode conducted DNA testing on a vaginal smear slide. The final DNA test formed the basis of Brown's petition for a writ of actual innocence.

***216** 1. DFS Testing

After the doctors at the hospital treated M.B., they "called the GYN Service to make an examination before she left the operating room." Trial Tr. at 118. The Department of Pathology at the University of Virginia issued a report signed by Dr. A.E. Sproul who examined a vaginal smear slide taken from M.B., which was referred for examination by "Dr. Flanagan, GYN." [10] Pet. Ex. C, at 1. The report listed "10/2/69" as the date, listed "349442" as the number for the slide, [11] and stated that "[t]he specimen [was] received on a glass slide" and was "submitted for H&E staining." [12] *Id.* Dr. Sproul's only diagnosis stated: "Sperm present." *Id.* Neither the slide nor the pathology report were entered into evidence at Brown's trial, and neither Dr. Flanagan nor Dr. Sproul testified about the vaginal smear slide.

10 This 1969 report is the only evidence concerning the creation of the vaginal smear slide. The record does not indicate who collected the vaginal sample from M.B. or who placed the sample on the vaginal

smear slide that Dr. Flanagan referred to UVA's Department of Pathology.

11 This same number was on the slide when it was located and tested in 2015. *See, e.g.*, Pet. Ex. G, at 1; MTD Ex. 10, at 2.

12 Staining is a common forensic practice that makes transparent cells visible for microscopic examination, and the stain used on the vaginal smear slide in this case was a combination of hematoxylin and eosin, which stains cytoplasm pink. *See generally* Taber's Cyclopedic Medical Dictionary 822, 2220-21 (Donald Venes et al. eds., 23d ed. 2017); Andrew H. Fischer et al., *Hematoxylin and Eosin Staining of Tissue and Cell Sections*, 3 Cold Spring Harbor Protocols, May 2008, at 1, 1. The record does not reflect who stained the slide for examination.

In 2015, the slide was located at a storage facility for UVA's Department of Pathology. Upon Brown's motion for post-conviction DNA testing, the trial court ordered DFS to perform a DNA analysis of the slide and M.B.'s nightgown and to compare them "with other DNA developed in this matter." *Id.* Ex. D, at 1-2. DFS created a DNA profile for M.B. from DNA recovered from the nightgown but could not create a DNA profile from the vaginal smear slide. *See id.* Ex. E, at 3.

Notes from a DFS forensic scientist stated that the vaginal smear slide was fixed with an "intact" coverslip, but a microscopic examination of the slide revealed that it would be "too difficult to discern cell morphology" because of a "dry" or "cracked" coverslip. MTD Ex. 8, at 1. The "fixative on [the] edges" of the slide was "scraped away from coverslip," and the "coverslip was removed intact." *Id.* Then the forensic scientist scraped both the ***217** slide and the coverslip into a weigh boat and swabbed the scraped debris. *See id.* The scientist also swabbed the slide and coverslip with a second swab. *See id.* These swabs were combined and DNA extracted from them, separating the sperm fraction and non-sperm fraction. *See id.*

A portion of the sperm fraction was used to create a new slide to attempt to identify sperm cells, but none were found. *See id.* at 2; Pet. Ex. E, at 3. The sperm fraction yielded "[n]o DNA typing results," and the non-sperm fraction yielded "[a] DNA type of no value." Pet. Ex. E, at 3. In a conversation with one of the attorneys working on Brown's case, the forensic scientist conveyed that the "DNA type of no value from the non-sperm fraction" resulted in "one type at locus D5, but that it was not compared to the victim." MTD Ex. 9, at 1. When asked by the attorney "if there was any sample remaining on the slide," the forensic scientist answered "that it was possible" because "there could be residue left on the glass." *Id.* Because "D5 is a small locus," the attorney inquired about the use of MiniFiler testing. [13] *Id.* The forensic ****453** scientist stated that DFS did not have "Mini[F]iler online," [14] but the "suitability of the testing could be discussed with the [Commonwealth] and [the] Technical Leader" of DFS. *Id.* DFS performed no further testing on the vaginal smear slide.

13 MiniFiler is a DNA testing kit that can be used for "highly degraded DNA" or "very low amounts of DNA" to amplify DNA for analysis. John M. Butler, Advanced Topics in Forensic DNA Typing: Methodology 295-99 (2012). In their various filings before this Court, both Brown and the Commonwealth refer to and rely on Professor Butler's work, which has been called the "canonical text on forensic DNA typing," *District Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 82, 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009) (Alito, J., concurring). Thus, we also reference Butler's works on forensic DNA typing to further describe the testing used by DFS and Bode as well as the results obtained.

14 The record does not indicate whether MiniFiler testing was available at DFS in some other format.

2. Bode Testing

A couple of months after DFS completed its DNA testing of the vaginal smear slide, Brown made a motion in the circuit court for further post-conviction DNA testing of the slide by Bode, and the Commonwealth made no objection to this request. "[I]n the interests of justice and for good cause shown," the trial court ordered that "the vaginal smear slide and any extracts, scrapings, or other remnants therefrom" be packaged and sent to Bode for ***218** further DNA analysis. Pet. Ex. F, at 1. Bode examined the original vaginal smear slide and determined that it was "inconclusive for the presence of spermatozoa" because of "heavy pink staining/debris which prevented an accurate confirmation of spermatozoa." MTD Ex. 12, at 2; *see also* Pet. Ex. G, at 1-2. The extracts that DFS obtained from the vaginal smear slide and coverslip

were processed with a MiniFiler kit, but "[n]o DNA profiles were obtained." Pet. Ex. G, at 1.

Bode then swabbed both the original vaginal smear slide and the new slide, which was created by DFS from a portion of the sperm fraction, and both of those swabs were combined and sent for differential extraction, which again separated any DNA from the sample into a sperm fraction and a non-sperm fraction. *See id.* at 2; MTD Ex. 12, at 2. Brown's attorney elected to forego further staining of the sample to identify spermatozoa "during the extraction" because "the hospital saw the sperm already" in 1969. MTD Ex. 12, at 4-5. Before Brown's attorney elected to forego this test, the Bode forensic scientist explained that the test "could potentially reduce the available DNA within the sample to obtain a male profile" but cautioned that without this test, Bode "c[ould not] say for sure that the profile is or is not from sperm." *Id.*

After performing the differential extraction on the sample, Bode reported "No Result" for any amount of DNA in the sperm fraction and found it "negative for male DNA." *Id.* at 3. Bode found the non-sperm fraction "inconclusive for male DNA" but quantified the amount of "both human and male DNA" to be less than .001 nanograms per microliter. [15] *Id.* The forensic scientist explained that "[t]his essentially means that very little or no DNA was detected in the samples." *Id.* Brown's attorney was given three different options for testing the DNA but chose to use a Y-STR processing kit that analyzes "Short Tandem Repeat (STR) loci specific to the male Y chromosome (also called Y-STRs)" at 23 different loci in the DNA sequence. Pet. Ex. G, at 1; *see also* MTD Ex. 12, at 3. [16]

15 The record provides no reason for Bode's inconclusive determination for male DNA. Typically, "[i]f a report provides an 'inconclusive' finding, then it is appropriate to provide a reason why this conclusion was reached." John M. Butler, Advanced Topics in Forensic DNA Typing: Interpretation 454 (2015).

16 Y-STR testing amplifies "male DNA components over female DNA, which may be in excess in biological samples recovered in sexual assault cases." *Id.* at 134.

***219** Bode ran the Y-STR test twice, and in an affidavit, Bode's forensic scientist stated that "[r]unning a sample twice is part of Bode's normal processing flow and it was determined based on the testing results that running the sample a second time was appropriate." Reply of Sherman Brown in Opp'n to Mot. to Dismiss Ex. A, at 2 [hereinafter Brown's Reply]. The forensic scientist explained that, during the first run, she "used the maximum volume of sample extract allowed for the DNA amplification kit and did see peaks" of DNA detection, but those peaks "were all below Bode's analytical threshold," [17] which prevented her from reporting any results. *Id.*

17 Bode's forensic scientist explained that "[t]he analytical threshold is the minimum peak height that needs to be reached to confidently determine that the peak is a true allele." Pet. Ex. J, at 1. Below the analytical threshold, "observed peaks cannot be reliably distinguished from instrument noise." Butler, Interpretation, *supra* note 15, at 38 tbl.2.1. "[A] properly set analytical threshold ... by definition means that any peaks observed below this threshold are not appropriate for further consideration as reliable peaks." *Id.* at 41. No argument has been made that Bode improperly set its analytical threshold.

****454** Because peaks were detected in the first run, however, the forensic scientist "decided to concentrate the DNA sample" in the second run such that "a greater quantity of DNA would be tested." *Id.* She "reduce[d] the amount of liquid in the extract" to "allow[ ] more DNA to be included in the maximum allowed volume of liquid that is amplified." *Id.* at 2-3; *see also* Butler, Methodology, *supra* note 13, at 50 ("The process of achieving a DNA concentration that fits the optimal window for analysis is called *normalization*. This involves diluting the sample down to the desired range or concentrating it by removing excess fluid."). After the second run, the forensic scientist "was able to obtain results that satisfied both Bode's peak height detection threshold and analytical threshold," which allowed her to identify "true alleles" [18] at three different DNA loci. Brown's Reply Ex. A, at 3.

18 An "allele" is "[a]ny of two or more different genes containing specific inheritable characteristics that occupy corresponding loci on paired chromosomes," and typically, "an individual has only two of them" at each DNA locus. Taber's Cyclopedic Medical Dictionary, *supra* note 12, at 81.

The results of the second run revealed that "[n]o Y-STR profile was obtained from the sperm fraction" of the sample tested by Bode and that "[a] partial Y-STR profile was obtained" from the non-sperm fraction of the sample at three DNA loci. Pet. Ex. G, at ***220** 1-2.[19] "Due to the limited data obtained" from the non-sperm fraction, however, Bode explained that the "partial profile is only suitable for exclusion purposes." *Id.* at 2. Brown was subsequently "excluded as [a] possible contributor[ ] of the partial Y-STR profile obtained from the [non-sperm] fraction" at one locus out of the three loci detected above Bode's analytical threshold. *Id.* Ex. H, at 2-3; *see also id.* Ex. J, at 1. According to an affidavit submitted by Bode's forensic scientist, Brown's exclusion was also supported by three additional loci detected above Bode's peak detection threshold[20] but below their analytical threshold. *See id.* Ex. J, at 2. This testing and the resulting certificate of analysis ****455** and affidavit submitted by Bode's forensic scientist formed the basis for Brown's petition for actual innocence filed before this Court.

19 Brown submitted an affidavit from Dr. Robin Cotton, who reviewed Bode's test results at Brown's request. Cotton noted that "degradation of DNA can take place over time," and "[d]egradation causes breaks to occur in the DNA molecules," which "accumulate over time." Brown's Reply Ex. B, at 4. This degradation "is observed as a loss of DNA data (peaks) in areas of the profile where longer DNA fragments are required for amplification of a locus." *Id.* Further, "[w]ith increased age of a sample the length of DNA fragments present in the sample is reduced by degradation," which "causes there to be less and less amounts of any specific intact DNA sequence." *Id.* Cotton noted that a full Y-STR DNA profile was obtained from the four-year-old's shirt, despite the fact that the DNA "exhibit[ed] signs of degradation similar to the partial Y STR profile from the vaginal smear slide" because the shirt contained "a significantly larger amount of DNA" compared to the vaginal smear slide that "contain[ed] less biological material." *Id.*

Cotton also opined about the absence of sperm cells in the sperm fraction while a partial Y-STR profile was obtained from the non-sperm fraction. Cotton noted that the "[d]rying and dehydration of cells may cause sperm to be more fragile when they are subsequently re-hydrated," even during the first phase of differential extraction, which lyses (or ruptures the cell membranes of) only the non-sperm cells to access their DNA. *Id.* at 4-6 (citing C.M. Hennekens et al., *The Effects of Differential Extraction Conditions on the Premature Lysis of Spermatozoa*, 58 J. Forensic Sci. 744-52 (2013)). Cotton stated that "[g]iven the age of the sample, my opinion is that the sperm cells *could* be sufficiently compromised to break open under these conditions," and as a result, "male DNA from sperm cells *could* be present and detected in the [non-sperm] fraction." *Id.* at 5 (emphases added).

20 Bode's forensic scientist explained that a "peak detection threshold is the minimum peak height at which a peak can be designated from the baseline as a *possible* allele." Pet. Ex. J, at 2 (emphasis added). Peaks detected "between the peak detection threshold and the analytical threshold may be used to further support an exclusion for single source profiles," but "exclusions cannot be made on these peaks alone." *Id.* Professor Butler, however, explains that "the primary purpose of a threshold is to exclude unreliable data from further consideration and base that further analysis only on reliable data." Butler, Interpretation, *supra* note 15, at 36.

In his petition, Brown requested a stay of the proceeding in order to pursue further testing that could exclude M.B.'s husband as a contributor to the partial Y-STR profile obtained from the ***221** non-sperm fraction, which this Court granted.[21] Bode conducted further testing, and M.B.'s husband, who is now deceased, was also excluded as a possible contributor when full Y-STR DNA profiles obtained from both his living son and the deceased four-year-old son excluded both of them as possible contributors at one locus out of the three loci detected above the analytical threshold. *See* Suppl. Pet. Ex. 2, at 2-4; *id.* Ex. 3, at 1-2; Pet. Ex. J, at 2.[22] The record does not reflect that DFS ever certified or verified any of Bode's testing results, and nothing in the record suggests that either Brown's attorney or Bode ever requested that DFS do so.

21 Because "sperm can survive several days in the vaginal cavity," Butler, Interpretation, *supra* note 15, at 131, Brown sought to also exclude M.B.'s husband as a potential source of DNA.

22 Because the "Y chromosome is inherited paternally" and because the "Y markers tested in the Y-STR test are passed on from father to son," the exclusion of the children of M.B.'s husband, who likely had identical Y-STR DNA profiles to their father, also satisfied Bode's requirements to exclude their father as a contributor to the partial Y-STR profile obtained from the non-sperm fraction. Suppl. Pet. Ex. 3, at 2.

II.

As noted earlier, our authority to issue a writ of actual innocence derives exclusively from the 2002 amendment to the Constitution of Virginia and its express limitation on the use of that authority "in *such cases* and in *such manner* as may be provided by the General Assembly." Va. Const. art. VI, § 1 (emphases added). *See generally* John Dinan, The Virginia State Constitution 164-65 (2d ed. 2014). Under the statute governing this case, Brown can only obtain a writ of actual innocence if we find by "clear and convincing evidence that [he] has proven all of the allegations contained in clauses (iv) through (viii) of subsection A of § 19.2-327.3"[23] and "that no rational trier of fact would have found proof of guilt ... beyond a reasonable doubt," Code § 19.2-327.5. Brown alone must shoulder the "burden of proof" on each of these elements. *Id.*

23 Code § 19.2-327.3(A) requires the petitioner to "allege categorically and with specificity, under oath," inter alia:

> (iv) that the evidence was not previously known or available to the petitioner or his trial attorney of record at the time the conviction or adjudication of delinquency became final in the circuit court, or if known, the reason that the evidence was not subject to the scientific testing set forth in the petition; (v) the date the test results under § 19.2-327.1 became known to the petitioner or any attorney of record; (vi) that the petitioner or his attorney of record has filed the petition within 60 days of obtaining the test results under § 19.2-327.1; (vii) the reason or reasons the evidence will prove that no rational trier of fact would have found proof of guilt or delinquency beyond a reasonable doubt....

The General Assembly expressly limited the application of clause (viii) in Code § 19.2-327.3(A) to final convictions after June 30, 1996, which is inapplicable in this case. *See generally* 2001 Acts ch. 873; 2009 Acts. ch. 139.

***222** The Commonwealth has moved to dismiss Brown's petition on two independent grounds: (i) Brown's petition relies on DNA testing not performed or certified by DFS, as the statute requires; and (ii) in any event, the private DNA testing results do not provide clear-and-convincing evidence —when placed in the context of the evidence presented by the Commonwealth at Brown's 1970 trial and the post-trial evidence presented in the Commonwealth's response to Brown's petition—such that "no rational trier of fact would have found proof of guilt ... beyond a reasonable doubt." *Id.* We agree with both contentions.

A. THE STATUTORY NECESSITY FOR DFS TEST RESULTS

[5] Among the allegations that Code § 19.2-327.5 requires Brown to prove by clear-and-convincing evidence are the factual assertions required by clauses (iv) through (viii) of Code § 19.2-327.3(A). Two of those clauses deal with the "test results under § 19.2-327.1." Code § 19.2-327.3(A)(v)-(vi). Both clauses necessarily presuppose that the ****456** certified test results come from DFS. Several provisions in the testing statute, Code § 19.2-327.1, make this clear:

> A. Notwithstanding any other provision of law or rule of court, any person convicted of a felony or any person who was adjudicated delinquent by a circuit court of an offense that would be a felony if committed by an adult may, by motion to the circuit court that entered the original conviction or the adjudication of delinquency, apply for a new scientific investigation of any human biological evidence related to the case that resulted in the felony conviction or adjudication of delinquency if [among other things] ... (iv) *the testing requested involves a scientific method employed by the Department of Forensic Science*; and (v) the person convicted or adjudicated delinquent has not unreasonably delayed the filing of the petition after the evidence or the test for *the evidence became available at the Department of Forensic Science.*

***223**

> ....
>
> D. The court shall, after a hearing on the motion, set forth its findings specifically as to each of the items enumerated in subsections A and B and either (i) dismiss the motion

for failure to comply with the requirements of this section or (ii) dismiss the motion for failure to state a claim upon which relief can be granted or (iii) *order that the testing be done by the Department of Forensic Science* based on a finding of clear and convincing evidence that the requirements of subsection A have been met.

E. The court shall order *the tests to be performed by the Department of Forensic Science* and prescribe in its order, *pursuant to standards and guidelines established by the Department*, the method of custody, transfer, and return of evidence submitted for scientific investigation sufficient to insure and protect the Commonwealth's interest in the integrity of the evidence. The results of any such testing shall be furnished simultaneously to the court, the petitioner and his attorney of record and the attorney for the Commonwealth. *The Department of Forensic Science shall give testing priority* to cases in which a sentence of death has been imposed. The results of any tests performed and any hearings held pursuant to this section shall become a part of the record.

Code § 19.2-327.1(A), (D)-(E) (emphases added).

[6] **[7]** We "presume that the legislature chose, with care, the words it used when it enacted the relevant statute." *Tvardek v. Powhatan Vill. Homeowners Ass'n*, 291 Va. 269, 277, 784 S.E.2d 280, 284 (2016) (citation omitted). "The act of choosing carefully some words necessarily implies others are omitted with equal care." *Rickman v. Commonwealth*, 294 Va. 531, 540 n.3, 808 S.E.2d 395, 399 n.3 (2017) (citation omitted). [24]

24 The General Assembly has authorized private laboratory testing in at least one other context. *See* Code § 18.2-268.7(B) (providing a procedure for the testing of blood samples by an independent laboratory retained by the accused).

***224** We have no authority to go outside the boundaries of the statutory scheme to grant a writ of actual innocence based on test results uncertified by DFS. The General Assembly has created and funded DFS to provide objective scientific analyses. *See generally* Code § 9.1-1101 (outlining the powers and duties of DFS); Virginia Department of Forensic Science, Preface, 6 VAC § 40 (describing DFS as "an internationally accredited laboratory system" that "is authorized to provide forensic laboratory services in criminal matters"). In doing so, the legislature has given DFS the role of expert gatekeeper with respect to DNA test results offered in support of actual innocence petitions. That decision belongs to the General Assembly, not the courts. As the United States Supreme Court has observed:

> The availability of technologies not available at trial cannot mean that every criminal conviction, or even every criminal conviction involving biological evidence, is suddenly in doubt. The dilemma is how to harness DNA's power to prove innocence without unnecessarily overthrowing the established system of criminal justice. That task belongs primarily to the legislature.

****457** *District Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 62, 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009), *quoted in* 5 Ronald J. Bacigal, Virginia Practice Series: Criminal Procedure § 21:10, at 688 (2017-2018 ed.).

[8] **[9]** We acknowledge but disagree with Brown's argument that the law-of-the-case doctrine precludes the Commonwealth from "collaterally attacking" the circuit court orders authorizing the Bode testing on appeal. Answer of Sherman Brown at 1; *see also* Brown's Reply at 12-13; Oral Argument Audio at 3:57 to 5:38. "The law-of-the-case doctrine has no binding effect on a trial court prior to an appeal." *Robbins v. Robbins*, 48 Va. App. 466, 474, 632 S.E.2d 615, 619 (2006). [25] We do not sit as an appellate court reviewing the testing orders of the circuit court, and the question ***225** before us is not whether the circuit court should have entered orders authorizing the Bode testing instead of DFS testing. [26] The question is whether we, exercising our original jurisdiction, have statutory authority to consider these test results. The law-of-the-case doctrine has no bearing on this issue.

25 *See also Commonwealth v. Virginia Ass'n of Ctys. Grp. Self Ins. Risk Pool*, 292 Va. 133, 141 n.6, 787 S.E.2d 151, 154 n.6 (2016); Martin P. Burks, Common Law and Statutory Pleading and Practice § 431, at 850 (T. Munford Boyd ed., 4th ed. 1952) ("The decision of the appellate court, right or wrong, is final after the rehearing period has

passed.... From this naturally follows the rule commonly called 'the law of the case.' ").

26 *See generally* 5 Bacigal, *supra*, § 21:10, at 688 (stating that the circuit court "shall order the tests to be performed by the Division of Forensic Science and prescribe in its order the method of custody, transfer, and return of evidence submitted for scientific investigation sufficient to ensure and protect the Commonwealth's interest in the integrity of the evidence").

[10] We also disagree with the premise, embedded in Brown's argument, that the Attorney General is somehow estopped from making his statutory argument because it constitutes an impermissible collateral attack on the circuit court's testing orders to which the Commonwealth's Attorney had previously agreed. As we just explained, the Attorney General's position is not a collateral attack. He is not seeking to vacate the circuit court's testing order. He is seeking to enforce the terms of the actual-innocence and testing statutes, which preclude us from considering the private laboratory's test results produced in response to the order.

It is also irrelevant that the Attorney General and the Commonwealth's Attorney disagree on this issue. They are separate constitutional officers and are entitled to their separate opinions. *See Hackett v. Commonwealth*, 293 Va. 392, 398 n.2, 799 S.E.2d 501, 504 n.2 (2017); *In re : Commonwealth of Va. Dep't of Corr.*, 222 Va. 454, 465, 281 S.E.2d 857, 863 (1981). The Attorney General and the Commonwealth's Attorney each have distinct, although at times complementary, responsibilities. *See, e.g.*, Code § 2.2-511 (specifying the limited role of the Attorney General in criminal prosecutions); Code § 15.2-1627(B) (specifying that the duty of prosecuting felony warrants, indictments, or informations rests with the Commonwealth's Attorneys). The duty to represent the Commonwealth in petitions for writs of actual innocence rests exclusively with the Attorney General. *See* Code § 19.2-327.3(C) (writs based on biological evidence); Code § 19.2-327.10(C) (writs based on non-biological evidence).

Finally, Brown claims that our ruling would be inconsistent with prior actual innocence cases in which we have relied upon private laboratory results. We see this as an overstatement. It is true that DFS contracted with Bode to conduct testing on DNA evidence ***226** from eligible cases decided between 1973 and 1988 at the direction of the Governor in 2004 and 2005. *See* Press Release, Governor Mark Warner, Governor Warner Announces Two Men Exonerated with Assistance of DNA Testing Not Available at Trial—Results of Random Sample Review of Old Serology Files Prompt Full-Scale Review (Dec. 14, 2005). But in each case, DFS conducted its own independent review of the testing data and provided its own interpretation of the test results as evidenced by DFS certificates of analysis. *See id.* Our recent actual innocence case, *In re: Watford*, 295 Va. 114, 809 S.E.2d 651 (2018), is an example of this very process as evidenced by the DFS certificate of analysis that interpreted Bode's DNA testing in that case.

****458** Moreover, in all prior cases in which we have issued writs of actual innocence, we have expressly relied on DFS certificates of analysis. *See In re: Harward*, Record No. 160353, slip op. at 1-2 (Va. Apr. 7, 2016) (unpublished); *In re: Diamond*, Record No. 121462, slip op. at 1 (Va. Mar. 8, 2013) (unpublished); *In re: Barbour*, Record No. 120372, slip op. at 1-2 (Va. May 24, 2012) (unpublished); *In re: Cunningham*, Record No. 100747, slip op. at 1 (Va. Apr. 12, 2011) (unpublished); *In re: Haynesworth*, Record No. 090942, slip op. at 1-2 (Va. Sept. 18, 2009) (unpublished).

In Brown's case, DFS did not engage Bode as an independent contractor, did not review Bode's test results, and did not issue any certificate of analysis confirming Bode's test results. Because the actual-innocence statutes require us to base our determination upon certified DFS test results, we have no authority to issue a writ of actual innocence based upon the Bode test results proffered by Brown.

B. THE "NO RATIONAL TRIER OF FACT" STANDARD

[11] Even if we were authorized to consider the private laboratory results, Brown would still have the burden of proving that the evidence submitted to us in this writ proceeding—*i.e.*, Bode's DNA test results, the factual proffers in his petition, the post-trial evidence presented in the Commonwealth's response, along with the evidence presented at the original trial—provide, in the aggregate, clear-and-convincing proof that "no rational trier of fact would have found proof of guilt ... beyond a reasonable ***227** doubt," Code § 19.2-327.5. A few observations are necessary before we determine whether Brown can shoulder this burden of proof. 27

27 The burden of proof at all times remains with Brown, *see* Code § 19.2-327.5, because "[o]nce a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears," *Osborne*, 557 U.S. at 69, 129 S.Ct. 2308 (alteration in original) (quoting *Herrera*, 506 U.S. at 399, 113 S.Ct. 853).

1.

[12] **[13]** "The term 'clear and convincing evidence' has been defined as 'that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established.' " *Judicial Inquiry & Review Comm'n of Va. v. Pomrenke*, 294 Va. 401, 409, 806 S.E.2d 749, 753 (2017) (citation omitted). This standard is considerably higher than a "mere preponderance," *id.*, and has been fairly characterized as a "heavy burden," *Commonwealth v. Allen*, 269 Va. 262, 275, 609 S.E.2d 4, 12 (2005); *United States v. Watson,* 793 F.3d 416, 420 (4th Cir. 2015). Such a standard cannot be met with evidence that leaves "competing inferences 'equally probable.' " *Edmonds v. Edmonds,* 290 Va. 10, 22, 772 S.E.2d 898, 904 (2015) (citation omitted). Put another way, the persuasive quality of clear-and-convincing evidence must establish that "the thing to be proved is highly probable or reasonably certain." Black's Law Dictionary 674 (10th ed. 2014).

2.

[14] As we recently recognized in *In re: Watford*, the General Assembly amended the actual-innocence statutes, effective July 1, 2013, by requiring petitioners to prove by clear-and-convincing evidence that "no rational trier of fact *would* have found proof of guilt beyond a reasonable doubt" instead of requiring them to prove that no rational trier of fact "could" have done so. 295 Va. at 121, 809 S.E.2d at 655 (emphasis in original) (citing 2013 Acts chs. 170, 180 (codified as amended at Code §§ 19.2-327.3(A)(vii), 19.2-327.5, 19.2-327.11(A)(vii), 19.2-327.13)).

In this context, the substitution of "would" for "could" changes the decision-making paradigm from a threshold sufficiency analysis to a more predictive analysis. *See* ***228** *id.* at 125-27, 809 S.E.2d at 655–58; *cf. House v. Bell*, 547 U.S. 518, 538-40, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006) (contrasting the "would have" standard in an analogous federal habeas context involving the "actual innocence" exception to procedural default with the "could have" standard for sufficiency of the evidence); *Schlup v. Delo*, 513 U.S. 298, 330, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995) (same), *superseded in part by statute*, Antiterrorism and ****459** Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 104, 106, 110 Stat. 1214 (codified as amended at 28 U.S.C. §§ 2244(b)(2)(B), 2254(e)(2)). Under the former statute, it was unnecessary to consider the likelihood of a conviction if the new evidentiary record rose a single increment above the bare sufficiency threshold. Now, we must ask whether clear-and-convincing evidence proves that *no* rational factfinder *would* find the petitioner guilty.

[15] To calibrate the standard that "no rational trier of fact would have found proof of guilt," we must factor in the overarching burden of proof—clear-and-convincing evidence—at the proper level of probability. Code § 19.2-327.5 (requiring a "finding of clear and convincing evidence" that the petitioner has proven the "allegations" in clause (vii), among others); Code § 19.2-327.3(A)(vii) (requiring the allegation, under oath, "that no rational trier of fact would have found proof of guilt"). As noted earlier, clear and convincing is higher than preponderance but lower than absolute certitude. *See* Black's Law Dictionary, *supra*, at 674. Lying within the spectrum between them, "clear and convincing evidence" must be convincing enough to render the assertion to be proved "*highly probable* or *reasonably certain*." *Id.* (emphases added). "More likely than not" proof falls short of that standard, *see In re: Watford*, 295 Va. at 124 n.12, 809 S.E.2d at 657 n.12 (citation omitted), as does, all the more, a mere evidentiary equipoise.

[16] **[17]** **[18]** **[19]** **[20]** Equally important, we must apply the statutory standard not simply to fragments of the evidence but to all of the evidence in the aggregate—including the testimony and exhibits at the original trial, any previous records from the original case, the facts proffered by the petitioner, the factual proffers in the Commonwealth's ***229** response,[28] any records of pertinent evidentiary hearings, and any findings certified to us by a circuit court pursuant to a remand order. *See id.* at 125, 809 S.E.2d at 657–58 (citing Code § 19.2-327.5). The actual-innocence statutes require us to take all of the factual information, which is reviewed in its totality, and to test it under the clear-and-convincing standard. We do not limit our analysis to the arguments raised by the parties in the original trial. "In

other words, the statute effectively requires us to draw our conclusion from a hypothetical new trial in which a rational factfinder hears all of the evidence in the aggregate....” *Id.* at 125, 809 S.E.2d at 657. This admixture of old and new evidence necessarily means that the petitioner and the Commonwealth are free to assert their respective theories of innocence or guilt that correspond to their competing versions of the aggregate fact pattern.

28 The Attorney General may “proffer” in response to an actual innocence petition “any evidence pertaining to the guilt ... of the petitioner that is not included in the record of the case, including evidence that was suppressed at trial.” Code § 19.2-327.3(C); Rule 5:7B(f)(2) (same); *see* 5 Bacigal, *supra*, § 21:10, at 690 (stating that the Attorney General's “response may contain a proffer of any evidence pertaining to the guilt of the defendant that is not included in the record of the case, including evidence that was suppressed at trial”); John L. Costello & Craig S. Lerner, Virginia Criminal Law and Procedure § 62.13[2], at 1090 (4th ed. 2008 & Supp. 2017) (noting that the Attorney General “may add to the record any additional evidence bearing on the issue of guilt, including evidence suppressed at trial”); *see also Schlup*, 513 U.S. at 328, 115 S.Ct. 851 (holding that a federal habeas court reviewing an actual innocence claim “must make its determination concerning the petitioner's innocence ‘in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial’ ”).

3.

[21] Applying these principles, we find that Brown has failed to prove by clear-and-convincing evidence that no rational factfinder would find him guilty of the murder of M.B.’s four-year-old son in light of the totality of the evidence now before us. Several reasons account for this failure of proof.

To begin with, Brown's theory of exoneration based upon Bode's DNA test results rests on a flawed assumption. Brown sees this as a rape and murder case. Because his DNA was not found on M.B.’s vaginal sample, Brown syllogizes that he cannot be the rapist, and thus, he cannot be the murderer ****460** of M.B.’s four-year-old son. Brown's syllogism falls apart on several levels.

***230** This case is not and never was a rape case. Brown was never charged with rape, and M.B. never testified that she was raped. Nor did she testify to vaginal pain, injury, or trauma or offer any other physical evidence of nonconsensual intercourse. Neither the Commonwealth nor Brown mentioned the subject of rape in their opening statements or during the questioning of any of the witnesses. The subject of rape first appeared at trial during closing arguments when the Commonwealth told the jury that whether “[Brown] tried to rape [her] or did rape her[,] *we will never know*.” Trial Tr. at 402 (emphasis added). Brown's theory of actual innocence, to the extent that Bode's DNA test results have any weight at all, only proves, *at best*, that Brown did not vaginally rape M.B. Perhaps he did not do so. But that possibility does not prove that Brown did not bludgeon and stab M.B. almost to death and murder her child —either because she dared to refuse his sexual advances and he exploded his vengeance upon her and her child or because he violently, but unsuccessfully, attempted to rape M.B. and he murdered her child to eliminate the only witness to the crime.

Also relevant, Brown's statements to the Parole Board undermine his present protestations of innocence. In a 1991 statement to the Parole Board, Brown confessed, “I accept full responsibility for my crime and I feel sorry for the victim, but I can't undo what's been done.” MTD Ex. 7, at 12; *see also id.* Ex. 5, at 1. Brown first offered a detailed account of how the crimes occurred in a 1984 statement to the Parole Board. After a bout of “drinking” alcohol and “taking some LSD,” Brown approached M.B. at her home knowing that “she did not want to see him.” *Id.* Ex. 6, at 1. Brown could not recall the specific acts of stabbing M.B. and murdering her four-year-old son, but he did remember that M.B. “turned into a snake” after she gave him water to drink. *Id.* Brown also remembered “that he had blood all over him,” *id.*, and he later stated in a 1991 parole interview that he stood over M.B. holding only a “knife handle,” the blade itself still lodged in her chest, *id.* Ex. 7, at 4 (capitalization omitted). In short, Brown told the Parole Board that he believed “he committed the crimes, stabbed [M.B.] and killed her 5 y/o son.” [29] *Id.* (capitalization ***231** omitted). If we were to take Brown at his word in his 1984 parole interview, he openly discussed the crimes with the parole officer on multiple occasions because “he now kn[ew] what drugs and alcohol can do to a person”

and because he did not "want another 4 year old's life taken in vain." *Id.* Ex. 6, at 1.

29 *See supra* note 8.

In the present writ proceeding, Brown has no explanation for his numerous confessions in statements submitted to the Parole Board other than that he lied to the Parole Board in order to secure his freedom.[30] A rational factfinder, Brown now argues, would have sympathy for his self-interested prevarication and trustingly accept his present protestations of innocence. We think this supposition highly unlikely. It is far more probable that a typical jury would find that Brown's recantation of his confessions, particularly given his professed reason for the confessions, diminishes his newly articulated claim of actual innocence.

30 *See* Brown's Reply at 11-12; Oral Argument Audio at 14:18 to 14:40.

Nor do we believe that DNA test results from the Bode laboratory (even if they were statutorily cognizable) erect a firewall against the overwhelming circumstantial evidence of Brown's guilt and his subsequent detailed confessions. The DNA test results do not have the probative weight Brown sees in them.[31] They were based on a low amount ****461** of DNA (.001 nanograms per microliter), which correspondingly affects their probative weight. "It is well known that low amounts of DNA template (e.g. 50 [picograms]) do not behave as consistently as optimal DNA target quantities (e.g. 1 [nanogram]) and that additional measures which account for potential allele drop-out are necessary." Butler, Interpretation, *supra* note 15, at 166; *cf. Osborne*, 557 U.S. at 81, 129 S.Ct. 2308 (Alito, J., concurring) (listing factors negatively affecting the probative value of DNA samples, including "minimal or insufficient quantity, especially as investigators push DNA testing to its limits and seek ***232** profiles from a few cells," which makes "DNA testing in the forensic context far more subjective than simply reporting test results").

31 We disagree with Brown's bifurcated framework for our review of actual innocence petitions. Brown's framework sees the DNA evidence as the only piece of evidence necessary to satisfy the clear-and-convincing standard required by statute, and the other evidence is reviewed under a standard similar to harmless error. *See generally* Pet. at 18-52. As we have previously stated, the actual-innocence statute "requires us to draw our conclusion from a hypothetical new trial in which a rational factfinder hears all of the evidence in the aggregate," or in other words, "only after the *totality of the evidence* is considered ... can we determine whether to grant or deny the writ." *In re: Watford*, 295 Va. at 125, 809 S.E.2d at 657-58 (emphasis added); *see also* Code § 19.2-327.5.

Bode only tested .001 nanograms of DNA obtained from the sample, *see* MTD Ex. 12, at 3, which is equivalent to 1 picogram and well below the typical optimal target quantity suggested by Professor Butler. *See* Butler, Interpretation, *supra* note 15, at 166; Taber's Cyclopedic Medical Dictionary, *supra* note 12, at 1592, 1826 (defining "nanogram" as "[o]ne billionth ... of a gram" and "picogram" as "1 trillionth of a gram"). Furthermore, Bode acknowledged that they "c[ould not] say for sure that the profile is or is not from sperm" due to Brown's election to forego testing to identify spermatozoa before running the Y-STR test. MTD Ex. 12, at 4-5.

Risks of contamination are also possible with low amounts of DNA and sensitive DNA testing. "Increased sensitivity with newer STR kits means that contamination risks are real," Butler, Interpretation, *supra* note 15, at 173, and "application of low level DNA results should be approached with caution due to the possibilities of allele drop-out, allele drop-in, and increased risks of collection-based and laboratory-based contamination,"[32] Butler, Methodology, *supra* note 13, at 321-22. *See also Osborne*, 557 U.S. at 82, 129 S.Ct. 2308 (Alito, J., concurring) (noting that "the extraction process is probably where the DNA sample is more susceptible to contamination in the laboratory than at any other time in the forensic DNA analysis process" (alteration omitted) (quoting John Butler, Forensic DNA Typing 42 (2d ed. 2005))).

32 "Allele drop-out" occurs when the testing process "fails to amplify and thus to not fully represent all of the alleles present in a DNA sample," and "allele drop-in" is caused by "contamination" during "highly sensitive detection methods that can be used to try to recover more information from low-level DNA samples." Butler, Interpretation, *supra* note 15, at 333.

[22] Professor Butler notes that "many laboratories are seeing an increasing number of poor quality/quantity samples being submitted" because of the "success of DNA testing and its value to the criminal justice system." Butler, Interpretation, *supra* note 15, at 175. Although "the ability

to recover information from low-level DNA samples has increased as the sensitivity of DNA testing methods has improved," this "[s]ensitivity is in many ways a two-edge sword—although more information can be recovered, ***233** interpretation becomes more challenging and time-consuming." *Id.* "Contamination and potential secondary or tertiary transfer becomes a more significant issue when working to recover low-level DNA," and "[d]epending on the case context, recovering DNA information from the equivalent of a few cells may not be considered probative." *Id.*; *see also Osborne*, 557 U.S. at 82, 129 S.Ct. 2308 (Alito, J., concurring) (recognizing that "modern DNA testing technology is so powerful that it actually increases the risks associated with mishandling evidence"). These well-recognized risks should be factored into any court's consideration of test results obtained from low amounts of DNA.

[23] **[24]** Further diminishing the weight of the test results is the weak chain of custody of the vaginal smear slide from its creation in 1969 until its discovery by Brown and its testing by DFS and Bode in 2015. The "basic rule for admitting [real] evidence is that the burden is upon the party offering the evidence to show with reasonable certainty that there has been no alteration or substitution of it," and "*reasonable certainty* is not met when some vital link in the chain of possession is not accounted for, because then ****462** it is as likely as not that the evidence analyzed was not the evidence originally received." *Robinson v. Commonwealth*, 212 Va. 136, 138, 183 S.E.2d 179, 180 (1971) (emphasis in original) (citation omitted). Establishing a chain of possession demonstrates that the evidence presented is "in the same condition when analyzed as [it was] when taken from the victim." *Id.*

[25] **[26]** The burden is on the proponent of the evidence, when scientific analysis of a sample is offered, "to establish each vital link in the chain of custody by showing the possession and handling of the evidence from when it is obtained to its presentation." *Herndon v. Commonwealth*, 280 Va. 138, 143, 694 S.E.2d 618, 620 (2010). The determination of whether a proponent has established a proper chain of custody for evidence is in the sound discretion of the court determining the admissibility of the evidence. *See Essex v. Commonwealth*, 228 Va. 273, 285, 322 S.E.2d 216, 223 (1984). But "[w]here the possibility of contamination is mere speculation, the court should admit the evidence, and let any remaining doubt go to the weight of the evidence." Friend & Sinclair, *supra*, § 16-7[b], at 1133.

***234** Brown, as the proponent of the DNA evidence at question in this case, has only identified who referred the vaginal smear slide to UVA's Department of Pathology for examination on October 2, 1969 (the day after M.B. was treated), who examined the slide at the Department of Pathology and issued an initial report, and who located the slide nearly 47 years later in a UVA storage facility. Brown has not identified who initially prepared the slide, who stained the slide for examination, or who handled the slide after it had been examined by the Department of Pathology. Brown also did not establish the conditions under which the slide was prepared, stained, or initially stored. These gaps in the chain of custody, including one spanning nearly 47 years, may not necessarily render the ultimate test results inadmissible, but they surely affect their probative value.

III.

In sum, we dismiss Brown's petition for two independent reasons.

First, the governing actual-innocence and testing statutes limit our review of allegedly exculpatory biological evidence to test results certified by DFS. Because DFS has not certified the private laboratory's test results proffered by Brown, Bode's test results cannot be a basis for granting his petition for a writ of actual innocence.

Second, even if we were statutorily authorized to consider private laboratory test results, Brown has not shouldered the burden of proving that the evidence submitted to us in this writ proceeding—DNA test results from the Bode laboratory, the factual proffers in Brown's petition, the post-trial evidence presented in the Commonwealth's response, along with the evidence presented at the original trial—provides, in the aggregate, clear-and-convincing proof that "no rational trier of fact would have found proof of guilt ... beyond a reasonable doubt." Code § 19.2-327.5. As the United States Supreme Court has observed, "DNA testing alone does not always resolve a case. Where there is enough other incriminating evidence and an explanation for the DNA result, science alone cannot prove a prisoner innocent." *Osborne*, 557 U.S. at 62, 129 S.Ct. 2308 (majority opinion).

Petition dismissed.

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FILED: June 6, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-6522
(7:16-cv-00576-EKD-JCH)

SHERMAN BROWN

Petitioner - Appellant

v.

KEVIN MCCOY

Respondent - Appellee

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge Quattlebaum, and Judge Rushing.

For the Court

/s/ Nwamaka Anowi, Clerk