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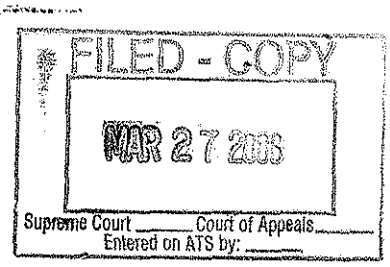
IN THE SUPREME COURT OF THE STATE OF IDAHO

PAUL EZRA RHOADES,	)	
	)	
Appellant,	)	
	)	
v.	)	**Case No. 34236**
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	
	)	
	)	



APPELLANT'S OPENING BRIEF

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT FOR BONNEVILLE COUNTY HONORABLE JON J. SHINDURLING PRESIDING

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3. **Whether denying Petitioner who presented a *prima facie* claim of actual innocence leave to litigate that claim even though he may not otherwise have met the timeliness requirements of Idaho Code Section 19-2719(5)(c) violated his right to bring such claims pursuant to Idaho Code Section 4901(a)(4) and whether it violated his rights against cruel and unusual punishment and to due process as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; the Idaho Constitution, Article I, Sections 6 and 13; and *Sivak v. State*, 134 Idaho 641, 642, 8 P.3d 636, 647 (Idaho 2000) ("Applying this rule as the State requests would result in Idaho courts being unable to entertain evidence of actual innocence in successive post-conviction petitions, even where the evidence was clearly material or had been suppressed by prosecutorial misconduct.").**

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STATEMENT OF THE CASE

In 2002, Petitioner filed with the lower court his postconviction petition seeking to conduct DNA testing on still extant forensic evidence from the investigation into the murder for which he stands convicted and sentenced to death. R. Vol I, p.5 et seq. Petitioner later moved in the court below to amend two counts into his petition. The lower court denied that motion and, because Petitioner then withdrew Count One, dismissed the matter. R. Vol. I, p.222. This is an appeal from the dismissal, addressing the lower court's denial of Petitioner's motion to amend two counts into his successive postconviction petition.

Each of the two counts which Petitioner sought to amend into his petition concerned Federal Bureau of Investigation ("FBI") testing of swabs used to recover evidence, which turned out to be semen, from the victim's mouth and vagina. The prosecution had conducted its own testing on the swabs before having them sent to the FBI. In particular, the Idaho crime lab performed PGM testing. That lab's test results showed that Petitioner could have been the contributor; that is, the state lab determined that Petitioner's and the swab's PGM shared certain features. However, the FBI lab conducted more refined PGM testing. Within forty-two days of filing his *Motion To Amend Petition For Post-Conviction Relief*, Petitioner had learned that the FBI test results "did absolutely exclude Mr. Rhoades as a contributor of the semen."(*See* Vol. I, p.123-7 (*Affidavit In Support Of First Amended Petition For Post-conviction Relief* at Exhibit 2 (Greg Hampikian, Ph.D., sworn statement))).

Petitioner's proposed Count Two alleged prosecutorial misconduct including the functional equivalent of suborning perjury during the jury trial, to the effect that Petitioner was a possible contributor of the semen. Proposed Count Three alleged that Petitioner committed

neither any of the offenses of conviction nor any of their lesser included offenses, and for proof he relied on the FBI's PGM testing results and Dr. Hampikian's affidavit as described above. This count alleged that there was sufficient evidence to demonstrate his factual innocence of the offenses.

A. Proposed Count Two's Three Critical Points: The Prosecution (1) Knew Or Should Have Known That FBI Pre-trial Testing Performed At The Prosecution's Request Excluded Petitioner As A Contributor Of The Semen Removed From The Victim; (2) Elicited But Did Nothing To Correct Patently False Trial Testimony From Its Forensic Expert That Petitioner Was A Potential Contributor Of The Semen Removed From The Victim, And It Failed To Correct That Same Expert's Misleading Testimony On Cross-Examination; And (3) Exacerbated This Misconduct By Asserting In Closing Argument To The Jury That Petitioner "Matched" The Semen When Its Expert Had (Falsely) Testified That Petitioner Was Only a Possible Contributor.

Two documents were attached to Petitioner's *Affidavit In Support Of First Amended Petition For Post-conviction Relief*: (1) the FBI document dated about six months pre-trial which memorialized the results of its more refined PGM testing, as compared to the PGM testing for the prosecution by the state laboratory, of swabs of semen removed from the victim's mouth and vagina[1] (*see* R.Vol. I, p.120-22 (Exhibit 1)) ; and (2) the June 20, 2005, sworn statement, from Greg Hampikian, Ph.D., an expert in forensic biology and a Boise State University associate professor with a joint appointment in Biology and Criminal Justice Administration,[2] in which he

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[1]The state laboratory and the FBI both conducted what is referred to phosophoglucomutase ("PGM") testing. PGM is a kind of genetic marker which may be found in bodily fluids. Bodily fluids containing PGM can be analyzed to determine the contributor's particular PGM features. There are less refined and more refined kinds of PGM testing. As noted in the text, the FBI testing was more refined, as compared to that conducted by the state laboratory.

[2]Since attesting to that statement, Boise State University has promoted Dr. Hampikian to full professor and granted him tenure.

noted that **while the State of Idaho Forensic Laboratory testing on swabs of semen removed from the victim "did not exclude Mr. Rhoades as a potential contributor of the semen[,] . . .the more refined test performed by the FBI[3], at the request of the Idaho lab, did absolutely exclude Mr. Rhoades as a contributor of the semen."**(*See* R. Vol I., p.123-7 (Exhibit 2)).

To remove the possibility that a court might think that the information in Dr. Hampikian's June, 2005, affidavit was unavailable to forensic experts at and before the time of Petitioner's trial, Petitioner filed a second affidavit from Dr. Hampikian in December, 2005. In that supplemental affidavit, Dr. Hampikian attests that:

> [T]he kind of analysis I conducted to arrive at the conclusions I reached in my June 20, 2005, affidavit was not only universally accepted by forensic biologists and forensic serologists in 1987, it also was a basic tool known to and employed by forensic experts in investigating offenses where evidence containing body fluids might help uncover a perpetrators identity. The kind of analysis I employed using the FBI PGM subtyping test results was, in 1987, on a par with similar uses of blood typing test results. Indeed, the State crime laboratory letter to the FBI Laboratory's Forensic Serology Unit requesting PGM subtyping was a standard and typical request when it was made on June 3, 1987. *See* Appendix 1 (State of Idaho Department of Health and Welfare Bureau of Laboratories' senior Criminalist Ms. Pamela J. Marcum's letter to FBI). . . .Ms. Marcum's correspondence shows clearly that the State of Idaho crime laboratory reflected the universal acceptance by forensic biologists and forensic serologists of PGM subtyping and the kind of analysis I conducted to reach the conclusion I arrived at in my June 20, 2005, affidavit. The results reported by the FBI in its July 13, 1987, letter to Ms. Marcum were clear, unambiguous, and used a standard reporting language that would be understood by any forensic serologist or forensic biologist of the day. *See* appendix 2 (FBI Laboratory report to Ms. Marcum). . . .This result completely excludes Mr. Rhodes [sic] from being the

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[3]Here, Dr. Hampikian is referring to the same FBI test results memorialized in the FBI document attached to the affidavit as Exhibit 1 and dated about six months pre-trial.

> donor of the semen sample found on the victim[.] . .furthermore, there is no indication in the FBI report that this finding could be an artifact, or that there was any evidence of a mixture in the sample. **The standard and universally accepted conclusion in 1987 (as today) is that the known sample from Paul Rhoades [sic] does not match the questioned semen sample (Q1) taken from the victim's body. Paul Rhoades is excluded as a contributor of the semen sample Q1.**

R. Vol. I, p.199-202 (emphasis added).

The Affidavit In Support Of First Amended Petition For Post-Conviction Relief notes that:

> While [the prosecution] knew or should have known that the FBI laboratory report exonerated Petitioner, it not only failed to dismiss the charges against Petitioner, it elicited testimony from its forensic expert. . .that his. . .PGM test results revealed that Petitioner was a potential contributor of the semen recovered from the victim. *See*, e.g. Tr. at 1687-89. [Trial Tr.Vol. VI, p. 1687-89, esp. p. 1689, Ls. 9-13.]

R. Vol. I, p.115. The prosecution forensic expert also testified that the PGM test results from swabs of the crotch of the victim's sweatpants revealed that Petitioner was a potential contributor.[4] While the prosecution's forensic expert direct examination testimony was true as far as it went, the prosecution omitted to elicit information critical to fully and fairly evaluating the state crime laboratory's test results. Specifically, the prosecution failed to inform the jury through this expert witness or any other witness that the more refined FBI laboratory tests yielded results which contradicted the Idaho crime laboratory test results. In failing to do so, the prosecution engaged in the functional equivalent of suborning perjury. The prosecution exacerbated its misconduct by allowing its expert witness, on cross-examination, to further

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[4]Trial Tr., Vol. VI, p.1661, Ls. 11-12; p. 1663, Ls. 13-25; & p. 1164, Ls. 1-9.

mislead the jury that the scientific testing conducted on the recovered semen inculpated Petitioner even though it knew or should have known that the testing exculpated him:

> Q. . . .Now, as I understand it, there's also other tests available to subtype or subclass the PGM readings?
>
> A. Yes.
>
> Q. And it's a fact that you personally did not run any of those tests, did you?
>
> A. No.
>
> Q. Would that not have been helpful to you in further including or excluding possible donors in this particular case?
>
> A. Those samples were sent off for that subtyping.
>
> Q. *And they were also inclusive weren't they?*
>
> A. *I can't address those results, I did not do the analysis.*
>
> Tr. at 1779. [Tr. Vol. VI, p. 1779.]

R. Vol I, p.115 (emphasis added). Worse, in closing argument, the prosecution transformed its forensic expert's sworn description of Petitioner as a *possible* contributor [in]to a "match."

> Who *matches* that semen? Only the defendant, Paul Ezra Rhoades. . . .He, alone of the persons who had access, *matches*.
>
> . . .
>
> And as between those two men seen in that van this defendant, Paul Ezra Rhoades, is the only one who, *matches* those characteristics.

. . .

> There's an interesting point that both semen samples, that in the vagina and that in the mouth *match* this defendant, they *match* each other. What does that tell us? That they were deposited by the same individual. It's not coincidence that they're the same, but they're the same because they were deposited by this defendant.
>
> Tr. at 2120-21. [Tr. Vol. VIII, p. 2120, Ls. 7-13 & 17-25; p. 2121, Ls. 1-3 & 11-16.]

R. Vol. I, p.115-16 (emphasis added).

Based on the FBI document, Dr. Hampikian's sworn statement, and transcript excerpts, Petitioner moved to amend into his petition two counts (Counts Two and Three). In his proposed Count Two, Petitioner claimed that the prosecution's (1) failure to advise trial counsel or subsequent counsel of the FBI testing's exoneration of Petitioner, (2) failure to dismiss the charges against Petitioner, (3) failure to correct its expert witness' false and misleading testimony, and (4) exaggeration of that witness' testimony in guilt phase closing argument violated Petitioner's rights under *Brady v. Maryland,* 373 U.S. 83 (1963), *Giglio v. United States,* 405 U.S. 150 (1972), and *Napue v. Illinois*, 360 U.S. 264 (1959), the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 6 (cruel and unusual punishment prohibited) and 13 (due process guaranteed) of the Idaho Constitution, as well as *Sivak v. State*, 8 P.3d 636, 647 (Idaho 2000) ("Applying this rule as the State requests would result in Idaho courts being unable to entertain evidence of actual innocence in successive post-conviction petitions, even where the evidence was clearly material or had been suppressed by prosecutorial misconduct."). As it relates to Petitioner's proposed Count Two, this appeal is brought pursuant to those same authorities.

B. Proposed Count Three: Actual Innocence.

In his proposed Count Three, Petitioner claimed that he was actually innocent of the offenses of conviction as well as any of their lesser included offenses. He claimed, alternatively, that if he was unable to meet the actual innocence burden required for release, he would at least meet the burden required to have all previously defaulted claimed considered on their merits. Proposed Count Three rested on the FBI's test report and Dr. Hampikian's sworn statement described above as well as the prosecution's contention that the rapist and killer was a single person. It was brought pursuant to *Herrera v. Collins*, 506 U.S. 390 (1993); *Jackson v. Calderon*, 211 F.3d 1148, 1165 (9th Cir. 2000) ("As we have noted, . . .a majority of the Justices in *Herrera* would have supported a claim of free-standing actual innocence"); *Schlup v. Delo*, 513 U.S. 298 (1995); Idaho Code Sections 19-2719, 19-4901 et seq., 19-4201 et seq., the Idaho Constitution, Article 1, Sections 1 (right to defend life and liberty guaranteed), 2 (equal protection guaranteed), 3 (United States Constitution as supreme law of the land), 5 (habeas corpus guaranteed), 6 (cruel and unusual punishment prohibited), 13 (due process guaranteed), and the United States Constitution, Article1, Section 9 (right to habeas corpus), and the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments. As it relates to Petitioner's proposed Count Three, this appeal is brought pursuant to those same authorities.

C. The Lower Court's Rationale For Denying Petitioner's Motion To Amend: Petitioner Could Have Obtained An Expert Opinion When He Filed The Original Post-Conviction Petition In This Action.

In denying Petitioner leave to amend into his petition either of his two proposed counts, the court below reasoned that because forensic scientists in 1987 would have reached the same conclusion as Dr. Hampikian did in his affidavit,

> Petitioner and his defense counsel could have known of a potential *Brady* claim when the first post-conviction petition was filed in 2002. . . .Petitioner could have obtained an expert to review the report when he filed the Petition for Post-Conviction Scientific Testing in 2002. Therefore, any grounds for a potential *Brady* claim could have been known when the first petition for post-conviction relief was filed in 2002.

R. Vol. I, p.215. Thus, the court concluded that with regard to each of the claims contained in the two proposed counts, Petitioner failed to satisfy the requirements of Idaho Code Section 19-2719(5)(a). *Id.* & *Id.* at 216 ("Because the claim of innocence is based on the same allegations as the *Brady* claim, the Court finds the claim of innocence was known or could have been known when Petitioner filed the first petition in 2002.")

ISSUES ON APPEAL

Petitioner filed a motion to amend two counts (which, between them, included several claims) stemming from the then-very recently obtained opinions of a genetic biology expert regarding a Federal Bureau of Investigation laboratory report considered by itself and, as well, in tandem with Idaho state laboratory test results. Specifically, Petitioner sought to amend into his petition claims of outrageous prosecutorial misconduct as well as the claim that he is actually innocent of the offenses of conviction (and any and all of their lesser included offenses). The prosecutorial misconduct claims include but are not limited to claims that the prosecution elicited but failed to correct its forensic expert's false testimony that his testing established that Petitioner was among the potential contributors of the semen removed from the victim's vagina and mouth even though the prosecution knew or should have known that the FBI laboratory test results, which were more refined and, therefore, trumped the state lab test results, established Petitioner's

actual innocence.

Petitioner was put on notice of those claims when his retained expert genetic biologist, Dr. Hampikian, provided his opinion that the FBI test results excluded Petitioner as a contributor of the semen collected from the victim. Petitioner received that opinion within forty-two days of filing his *Motion To Amend Petition For Post-Conviction Relief* and supporting documents. Petitioner had retained Dr. Hampikian out of an abundance of caution in this case where the Petitioner's life hangs in the balance, *not* because he had at that time evidence of prosecutorial misdeeds. The district court denied the motion to amend, ruling that Petitioner failed to satisfy the timeliness requirements of Idaho Code Section 19-2719(5)(a) because he could have obtained an expert opinion when he filed his 2002 Petition for Post-Conviction Scientific Testing.

Thus, there are three related issues in this appeal:

(1) Whether the district court abused its discretion in denying Petitioner's motion to amend even though Petitioner had no notice of the prosecutorial misconduct claims until he consulted an expert out of an abundance of caution, and even though neither trial defendants nor postconviction petitioners have any obligation to search for evidence of prosecutorial misdeeds, absent notice of their existence;

(2) Whether the district court abused its discretion in denying Petitioner's motion to amend even though Petitioner had no notice of the factual basis of the actual innocence claim, and even though neither trial defendants nor postconviction petitioners have any obligation to search for evidence of actual innocence; and

(3) Whether denying Petitioner who presented a *prima facie* claim of actual innocence leave to litigate that claim even though he may not otherwise have met the timeliness

requirements of Idaho Code Section 19-2719(5)(c) violated his right to bring such claims pursuant to Idaho Code Section 4901(a)(4) and whether it violated his rights against cruel and unusual punishment and to due process as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; the Idaho Constitution, Article I, Sections 6 and 13; and *Sivak v. State*, 134 Idaho 641, 642, 8 P.3d 636, 647 (Idaho 2000) ("Applying this rule as the State requests would result in Idaho courts being unable to entertain evidence of actual innocence in successive post-conviction petitions, even where the evidence was clearly material or had been suppressed by prosecutorial misconduct.").

ARGUMENT

THE COURT BELOW ABUSED ITS DISCRETION BY CHARGING PETITIONER WITH THE DUTY TO VERIFY THAT THE PROSECUTION DID NOT OBTAIN HIS CONVICTION THROUGH DECEIT VIA AN EXPERT WITNESS.

Despite the fact that neither trial defendants nor postconviction petitioners are duty-bound to search for prosecutorial deceit and other misdeeds absent notice of its existence, the court below ruled that, "Since Petitioner has possessed the FBI report since 1987, and there is no contrary evidence, the Court finds that Petitioner could have obtained an expert to review the report when he filed the Petition for Post-Conviction Scientific Testing in 2002."

Idaho law is clear that a successive postconviction petition is timely if (1) it was not reasonable to expect the petitioner to have known of its underlying facts at the time of his first petition and (2) if the successor petition was filed within a reasonable amount of time of his

discovering the underlying facts. In *Porter v. State*, 136 Idaho 257, 261, 32 P.3d 151, 155 (Idaho 2001), this Court held "that even if the State violated a petitioner's right to due process by withholding evidence, the petitioner was required to raise this issue, like other constitutional issues, within the time frame mandated by I..C. §19-2719. *See McKinney [v. State]*, 133 Idaho [695,] 706-07, 992 P.2d [144,] 155-56 [(Idaho 1999)]." When considering successive postconviction petitions, "the Court initially examines whether the information alleged by [the petitioner] to be exculpatory reasonably should have been known at the time of [the petitioner's] first post-conviction petition." *Id.*

This Court has noted several strict rules created and enforced to ensure the integrity of trials as a truth finding process. These rules and their purpose are relevant here.

> Defense attorneys are entitled to rely on the presumption that prosecutors have fully discharged their official duties, including the duty to disclose exculpatory material. [*Strickler v. Greene*, 527 U.S. 263, 286-87 (1999)].
>
> . . .
>
> A State may not knowingly use false evidence, including false testimony, to obtain a conviction[,] *Napue v. Illinois*, 360 U.S. 264 (1959)[, and that] [t]his standard applies not only to false evidence solicited by the prosecution, but also to false evidence that the prosecution allows to go uncorrected. *Id.* A stricter materiality standard applies to cases involving the prosecution's knowing use of false testimony than to cases where the prosecution has failed to disclose exculpatory evidence. *Agurs,* 427 U.S. at 103-04. This is because these cases "involve a corruption of the truth-seeking function of the trial process." *Id.* at 104. In *Bagley,* the U.S. Supreme Court quoted *Agurs* for "the well-established rule that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is *any reasonable likelihood* that the false testimony *could have affected* the judgment of the jury." *Bagley,* 473 U.S. at 678 (quoting *Agurs,* 427 U.S. at 103) (emphasis added). "[T]he fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt." *Id.* at 680.

Sivak v. State, 134 Idaho 641, 647 & 649, 8 P.3d 636, 642 & 644 (2000).

I. The Court Below Abused Its Discretion In Denying Petitioner's Motion To Amend Proposed Count Two's Claims Into The Petition On The Ground That Petitioner Could Have Consulted With An Expert At Time He Filed The Original Post-Conviction Petition In This Action. Denying Legal Recourse To Petitioner For The Prosecution's Egregious Misconduct Violated Petitioner's Rights Under *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959); The Fifth, Sixth, Eighth, And Fourteenth Amendments To The United States Constitution; Article I, Sections 6 (Cruel And Unusual Punishment Prohibited) And 13 (Due Process Guaranteed) Of The Idaho Constitution; As Well As *Sivak v. State*, 134 Idaho 641, 647, 8 P.3d 636, 642 (2000).

Just as defense attorneys "are entitled to rely on the presumption that prosecutors have fully discharged their official duties, including the duty to disclose exculpatory material," *Sivak* at 642, 647, they are entitled "to assume that. . .prosecutors [will] not stoop to improper litigation conduct to advance prospects for gaining a conviction" such as eliciting false testimony. *Banks v. Dretke*, 540 U.S. 668, 694 (2004). However, defense lawyers and their clients may not play the ostrich by ignoring available evidence putting them on notice of a claim until they have gathered "a complete cache of evidence." *Charboneau v. State*, 144 Idaho 900, 905, 174 P.3d 870, 875 (2008) (noting that in capital cases, the Court "has measured timeliness [for successive postconviction petitions] from the date of notice, not the date a petitioner assembles a complete cache of evidence."). Thus, despite the misconduct in *Sivak*, the Court held that because (1) the witness had admitted in a deposition to facts contradicting his trial testimony regarding what the prosecution gave him in exchange for his testimony and (2) that deposition was available to Mr. Sivak at the time of his first postconviction petition, he had waived his related prosecutorial

misconduct claims.

In stark contrast to *Sivak*, here Petitioner had no deposition or other evidence putting him on notice that the prosecution elicited false testimony from its forensic expert, that the FBI testing exonerated Petitioner, and, therefore, that the prosecutor failed to correct either its forensic expert's false testimony or his grossly misleading testimony. The facts relevant to the petition's timeliness in the case at bar is strongly analogous to those in *Stuart v. State*, 118 Idaho 932, 934, 801 P.2d 1283, 1284-5 (Idaho 1990). The district court denied relief in Mr. Stuart's *first* postconviction action in May, 1987. On the appeal of that court's denial of relief in his second postconviction action, this Court ruled that:

> The accompanying affidavits make it very evident that the facts surrounding the second petition were not known until the summer of 1988. It was not until a Mr. Oliver, a former Police Officer for the city of Pierce, informed the appellant's attorney that he was aware of the recording of the appellant's conversations that these facts came to the attention of the appellant and his attorney. Since the facts were unknown at the time of the first petition, we hold that the second petition is timely and proper.

Id. Similarly, here, Petitioner filed his successive postconviction petition within forty-two days of learning that "Dr. Hampikian determined that the FBI report excluded Petitioner as a contributor of the seamen [sic] discovered at the murder scene and tested by the FBI." R. Vol. I, p. 214 (lower court's decision denying motion to amend). Out of an abundance of caution based in part on their keen awareness that Petitioner stands sentenced to death and not at all on any evidence (because there was none) putting him on notice of any of the claims in his proposed two count amendment, Petitioner's counsel consulted with Dr. Hampikian. Dr. Hampikian's opinion was the sole evidence putting Petitioner on notice of each of the claims in his proposed two count

amendment. As in *Stuart*, the Court should reverse and remand with instructions to conduct an evidentiary hearing on Petitioner's claims.

As well, the prosecutor's misconduct relating to false testimony in this case far outstripped that in *Sivak*. Among the claims considered in *Sivak* was one which concerned testimony from a lay witness to whom Mr. Sivak purportedly made admissions regarding the offense of conviction. That witness testified falsely about what he had asked for and what he had received in exchange for his testimony from the prosecutor's office. Much of that "testimony the prosecutor knew to be inaccurate." *Id.* at 645, 650. As in *Sivak*, the prosecution elicited false testimony, knew it, and failed to correct it. But the relevant similarities stop there. Most important, the defense in this case did not have a deposition or any other evidence contradicting or even suggesting that the prosecution's expert forensic witness' testimony was false. As well, there were critical differences between the testifying witnesses in the instant case and in *Sivak*, including:

- Here, the testifying witness was a forensics expert who testified about the results of scientific testing, thereby carrying with him an assumption of credibility, and who had no prior convictions. By contrast, the testifying witness in *Sivak* was a former Ada County inmate who testified to jailhouse conversations with the petitioner. The *Sivak* jury knew that the testifying witness had recent prior convictions for burglary (1978) and passing insufficient funds checks (1979), had recently escaped from an Idaho penitentiary (September, 1979), that while escaped had committed another burglary, was captured and again placed in jail and again escaped, and that he was charged with having committed another burglary during

that second escape. *Id.* at 639, 644 at n. 3. Consequently, the withheld information in *Sivak*–the fact and particulars of the testifying witness' deal with the prosecution in exchange for his testimony–would likely have had much less impact than the jurors in the instant case learning that the professional expert forensics expert had testified falsely that scientific testing showed that Petitioner was a potential contributor of the semen.

- Here, there is no record evidence suggesting and no reason to believe that the testifying witness requested or received from the prosecution benefits of any kind in exchange for his testimony. However, in *Sivak*, the testifying witness testified that after testifying at the preliminary hearing, "'my escape charge got dismissed for me.'" *Id.* 639, 644. Again, then, the testifying witness' credibility in *Sivak* was already suspect, as compared to the prosecution's expert forensic witness in this case who was presented as an objective scientist without any stake in his testimony or the case. Consequently, the withheld information would likely have had much more impact on the jurors here than those in *Sivak*.

The relevant critical differences between this case and *Sivak* extend beyond those between the testifying witnesses. They include:

- In this case, the witness testified to scientific testing and results, not conversations. But in *Sivak*, the witness testified to having had a conversation in which the petitioner had implicitly admitted to killing the victim, explained that he had shot and stabbed her so many times "'[b]ecause she kept on moving,'"stated that he threw the knife handle into the river, stated that he used a

.22 and that he had held a grudge against the victim. *Id.* at 644, 639. Conversations are much more easily subject to misperception and misinterpretation than are scientific tests and their results.

- In *Sivak*, the witness did not testify in a misleading or false way on cross-examination. Here, however, the prosecution's forensic expert testified in a grossly misleading way on cross-examination, and the prosecution did nothing to correct it.
- In *Sivak*, the prosecution did not grossly exaggerate the witnesses testimony. By contrast, in this case, the prosecution transformed its expert's testimony that Petitioner was included within the universe of possible contributors of the semen (and thus possibly the guilty party) into his being the "match."

Each of these differences underscores the particular role which the false testimony played in the respective cases. In the instant case, except for the vigorously contested "I did it" statement, the inculpatory evidence was wholly circumstantial. Consequently, considered individually or cumulatively, each of the prosecutorial misconduct claims contained in proposed Count Two was more egregious here than in *Sivak*.

II. This Court Should Not Put Its Imprimatur On Killing An Individual Who Has Proffered A Prima Facie Case Of Actual Innocence. Affirming The Lower Court's Ruling Will Have This Effect Because There Is No Other Legal Recourse Open To Petitioner For Pressing His Actual Innocence Claim.

Petitioner's claim in his proposed Count Three, actual innocence, was based on the same supporting facts as his proposed Count Two and were set out in the Affidavit In Support Of First

Amended Petition For Post-Conviction Relief, together with (1) an FBI document dated about six months pre-trial and memorializing the results of its more refined PGM testing, as compared to the PGM testing for the prosecution by the state laboratory of swabs of semen removed from the victim's mouth and vagina[5] (*see* R. Vol. I, p.120-22 (Exhibit 1)); and (2) a June 20, 2005, sworn statement, from Greg Hampikian, Ph.D., an expert in forensic biology and a Boise State University associate professor with a joint appointment in Biology and Criminal Justice Administration,[6] in which he noted that **while the State of Idaho Forensic Laboratory testing on swabs of semen removed from the victim "did not exclude Mr. Rhoades as a potential contributor of the semen[,] . . .the more refined test performed by the FBI[7], at the request of the Idaho lab, did absolutely exclude Mr. Rhoades as a contributor of the semen."**(*See* R. Vol. I, p.123-7 (Exhibit 2))

The Court below denied the motion to amend, ruling that, "[b]ecause the claim of innocence is based on the same allegations as the *Brady* claim, the Court finds the claim of innocence was known or could have been known when Petitioner filed the first petition in 2002." R. Vol. I, p.216 (Opinion....). Petitioner incorporates the arguments from Section I, *supra*. For

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[5]The state laboratory and the FBI both conducted what is referred to phosophoglucomutase ("PGM") testing. PGM is a kind of genetic marker which may be found in bodily fluids. Bodily fluids containing PGM can be analyzed to determine the contributor's particular PGM features. There are less refined and more refined kinds of PGM testing. As noted in the text, the FBI testing was more refined, as compared to that conducted by the state laboratory.

[6]Since attesting to that statement, Boise State University has promoted Dr. Hampikian to full professor and granted him tenure.

[7]Here, Dr. Hampikian is referring to the same FBI test results memorialized in the FBI document attached to the affidavit as Exhibit 1 and dated about six months pre-trial.

the same reasons that Petitioner contends that he could not have reasonably been expected to know of the claims contained in his proposed Count One when he filed his 2002 petition or at any earlier date, he also contends he could not have reasonably been expected to know of the factual basis of the actual innocence claim at that time either.

Affirming the lower court's denial will close the door to Petitioner who has proffered a *prima facie* case of actual innocence. Denying Petitioner the ability to litigate his *prima facie* claim would violate his rights under *Herrera v. Collins*, 506 U.S. 390 (1993); *Jackson v. Calderon*, 211 F.3d 1148, 1165 (9th Cir. 2000) ("As we have noted, . . .a majority of the Justices in *Herrera* would have supported a claim of free-standing actual innocence"); *Schlup v. Delo*, 513 U.S. 298 (1995); Idaho Code Sections 19-2719, 19-4901 et seq., 19-4201 et seq., the Idaho Constitution, Article 1, Sections 1 (right to defend life and liberty guaranteed), 2 (equal protection guaranteed), 3 (United States Constitution as supreme law of the land), 5 (habeas corpus guaranteed), 6 (cruel and unusual punishment prohibited), 13 (due process guaranteed), and the United States Constitution, Article1, Section 9 (right to habeas corpus), and the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments. As it relates to Petitioner's proposed Count Three, this appeal is brought pursuant to those same authorities.

CONCLUSION

Because Petitioner filed his motion to amend two counts into his pending postconviction petition within forty-two days of having notice of the claims contained in those proposed counts, the court below abused its discretion in denying that motion. As well, because Petitioner presented a *prima facie* claim of actual innocence, denying him leave to litigate that claim

violated his rights under *Herrera v. Collins*, 506 U.S. 390 (1993); *Jackson v. Calderon*, 211 F.3d 1148, 1165 (9th Cir. 2000) ("As we have noted, . . .a majority of the Justices in *Herrera* would have supported a claim of free-standing actual innocence"); *Schlup v. Delo*, 513 U.S. 298 (1995); Idaho Code Sections 19-2719, 19-4901 et seq., 19-4201 et seq., the Idaho Constitution, Article 1, Sections 1 (right to defend life and liberty guaranteed), 2 (equal protection guaranteed), 3 (United States Constitution as supreme law of the land), 5 (habeas corpus guaranteed), 6 (cruel and unusual punishment prohibited), 13 (due process guaranteed), and the United States Constitution, Article1, Section 9 (right to habeas corpus), and the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments; and it also violated his right to bring such claims pursuant to Idaho Code Section 4901(a)(4).

For all these reasons, this Court must remand the case to the district court with instructions to allow the proposed amendments and to hold an evidentiary hearing on the claims contained therein.

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Dated this 25th day of March, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of March, 2008, I caused to be served a true and correct copy of the attached document upon the attorneys named below by the method indicated below, first-class postage prepaid where applicable.

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