10-22-2013

Tapp v. State Appellant's Brief Dckt. 41056

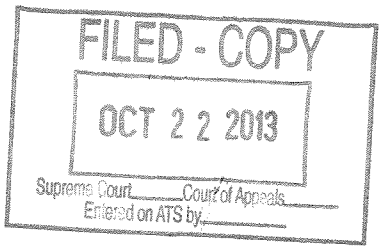
IN THE SUPREME COURT FOR THE STATE OF IDAHO

CHRISTOPHER C. TAPP, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent-Respondent.	)	S.Ct. No. 41056 (Bonneville County 2009-1686)

APPELLANT'S OPENING BRIEF

Appeal from the District Court of the Seventh Judicial District of the State of Idaho In and For the County of Bonneville

HONORABLE JOEL E. TINGEY, District Judge



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II. STATEMENT OF THE CASE

A. *Nature of the Case*

This is a false confession case that has been extensively litigated and has been the subject of national media coverage.[1] This appeal is from the summary dismissal of a successive post-conviction petition. The issue in this case is whether Christopher Tapp was deprived of his right to testify at the criminal trial. As explained below, the district court erred in summarily dismissing the successive petition.

B. *Prior Proceedings*

Mr. Tapp was convicted of the first-degree murder and rape of Angie Dodge after a jury trial. He was sentenced to a life sentence, plus fifteen years, with 30 years fixed on the murder charge. On appeal, the Court of Appeals held that some of Mr. Tapp's statements to the police should have been suppressed, but that the error in admitting the illegally obtained statements was harmless in light of the legally obtained admissions. *State v. Tapp*, 136 Idaho 354, 357-58, 33 P.3d 828, 831-32 (Ct. App. 2001) *review denied* ("*Tapp I*").

Mr. Tapp filed a *pro se* verified Petition for Post-Conviction Relief. CR (#35536) 8.[2] He alleged six different causes of action. CR (#35536) 9. As to the ineffective assistance of counsel claim, Mr. Tapp's *pro se* petition alleged, *inter alia*, that:

(g) Trial counsel rendered ineffective assistance of counsel when he failed to call

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[1] NBC Dateline, "The Confession," (First aired August 24, 2012) (available at http://www.nbcnews.com/video/dateline/48786251#48786251).

[2] This Court has taken judicial notice of the files and records in the criminal case. *State v. Tapp*, Docket No. 25295 (Bonneville Co. No. CR-1997-481) ("*Tapp I*"). It has also taken judicial notice of the original post-conviction case and proceedings upon remand. *Tapp v. State*, Docket Nos. 35536 and 40197) (Bonneville Co. No. CV-02-6009) ("*Tapp II*" and "*Tapp III*").

> me as a witness in my case, (this request by me came during trial), in which my testimony should have been heard by a jury of my peers.

CR (#35536) 11.

The district court summarily dismissed the petition and a timely notice of appeal was filed. CR (#35536) 161, 224.

On appeal, Mr. Tapp argued that the district court erred by dismissing his right to testify claim. On March 4, 2009, fearing that the issue had not been adequately raised by original post-conviction counsel, Mr. Tapp filed a Verified Second Petition for Post-Conviction Relief. CR 4. The successive petition specifically alleged "trial counsel refused to permit petitioner to testify at the criminal trial even though petitioner specifically asked to testify" and argued that his right to testify was violated. CR 5, 6-7.

After the successive petition was filed, the Court of Appeals issued an unpublished decision in the first post-conviction appeal. As feared, the Court of Appeals refused to consider the claim that Mr. Tapp had been deprived of his right to testify:

> Tapp argues, for the first time on appeal, that this claim that counsel was ineffective for failing to call him as a witness should have been analyzed by the district court, not just as an instance of ineffective assistance of counsel, but also as a direct violation of his right to testify. . . . Generally, issues not raised below may not be considered for the first time on appeal. Tapp not only pled the issue as an ineffective assistance of counsel claim, but presented the issue as an ineffective assistance of counsel claim.

Tapp II, 2010 Unpublished Opinion No. 412 (Ct. App., March 31, 2010), pg. 12. The Court of Appeals affirmed in part, but also reversed in part and remanded for an evidentiary hearing on two issues. *Id.,* pg. 18.

Upon remand, the district court summarily dismissed one of the remanded issues and

denied the petition after holding an evidentiary hearing on the other issue. Mr. Tapp appealed. That case is currently pending and is set for oral argument on November 12, 2013. *Tapp III.*

C. *Course of Successive Post-Conviction Petition Proceedings*

The successive petition at issue here was filed while the first appeal in the first post-conviction case was pending. The state filed a Motion to Dismiss wherein it asked the Court to take "judicial notice of the prior petition and proceedings in Bonneville County Case No. CV-02-6009." CR 12. It also filed an Answer. CR 15-16. Mr. Tapp filed a Joinder in the State's Request that Court Take Judicial Notice of the Prior Post-Conviction Proceedings and Request that it Take Judicial Notice of the Prior Criminal Case. CR 29. The district court took judicial notice of the files and records in *Tapp I, II* and *III.* CR 74.

In support of the successive petition, Mr. Tapp filed his affidavit. It alleged, in part, as follows:

> 4. I did not testify at my trial, although I wanted to, because Mr. Booker refused to allow me to do so.
>
> 5. I alleged in the first petition as follows: "Trial counsel rendered ineffective assistance of counsel when he failed to call me as a witness in my cases, (this request by me came during trial), in which my testimony should have been heard by a jury of my peers."
>
> 6. I also filed affidavits during the proceedings on the first petition where I alleged "[t]hat during the trial I requested to take the stand in my own defense" and "[t]hat I requested numerous times to take the stand during this trial, Mr. Booker continued to tell me that I was not competent enough to take the stand[.]")
>
> 7. It wasn't until the trial that Mr. Booker told me he had decided I would not testify. From the time of the preliminary hearing until that moment, I believed I would testify.
>
> 8. I did not voluntarily agree to not testify due to Mr. Booker's advice. I did not know that I had the right to testify even if Mr. Booker didn't want me to testify and believed it was his decision to make.

> 9. If I had known that I had the final say on the question, I would have testified because I knew I had to tell the jury that things I said on the tapes were not true and that I had been manipulated into saying those things.

CR 59-60.

The court denied the state's motion for summary dismissal. However, the court *sua sponte* raised the issue of whether the deprivation of the right to testify claim "should be summarily dismissed under a *Chapman* [*v. California*, 386 U.S. 18 (1967)] analysis." CR 86.

Mr. Tapp filed a Response to the Court's Notice of Intent to Dismiss arguing that: 1) *Chapman* puts the burden of proving that the deprivation of the right to testify was harmless beyond a reasonable doubt on the state and 2) that the state could not meet that burden. CR 88-96. Mr. Tapp referred to his testimony during the evidentiary hearing upon remand in *Tapp III* and asked the district court to take judicial notice of that transcript. CR 99. Mr. Tapp filed a second affidavit where he alleged, in part, that:

> 3. I did not testify at my trial, although I wanted to, because my attorney, Mr. Booker, refused to allow me to do so.
>
> 4. If I had been called to testify in my criminal trial I could have testified to everything I testified to at my evidentiary hearing in CV-2002-6009.
>
> 5. In addition, I would have testified in support of my alibi defense at trial. In particular I would have testified that I was at a party at Jason Hope's home at 725 Saturn, # 9 in Idaho Falls from about 7:00 p.m. on June 12, 1996 until about 11:00 p.m. I left Mr. Hope's home with Britney Morgan and we spent the night together at the apartment that I was sharing with Jeff Blackburn. I did not leave my apartment until after Ms. Morgan left around 10:00 a.m. on June 13, 1996.

CR 101-102.

The state's response to the Court's Order, argued that Mr. Tapp's testimony would not have been deemed to be credible at the criminal trial. CR 107-108. It also argued, for the first

time, that there was no deprivation of Mr. Tapp's right to testify. It noted that Mr. Booker had testified at the evidentiary hearing in *Tapp III* that Mr. Tapp "was adamantly opposed to testifying. Now, that's relative particularly to trial." CR 106 (quoting evidentiary hearing testimony, pg. 162-163).

Mr. Tapp objected to the state raising the issue of whether there had been a deprivation of the right to testify when neither its motion to dismiss (which had already been denied) nor the court's notice of intent to dismiss raised that issue. CR 135. It also argued that Mr. Booker's testimony was of little value given the context in which it was made, was not subject to cross-examination, and that, in any case, the court was required to liberally construe the facts and make all reasonable inferences in favor of Mr. Tapp on summary disposition. CR 136. Finally, Mr. Tapp responded to the state's contention that the error was harmless. CR 89-96.

The court, in its decision, claimed that it had "raised the issues of (1) whether Tapp voluntarily waived his right to testify, and if not, (2) was the failure to testify harmless error." CR 123. It went on to conclude that there was a presumption that Mr. Tapp did not want to testify because he had not made an objection during the criminal trial and that he had not overcome that presumption. CR 129. It also concluded "that there is no reasonable doubt that had Tapp testified at the time of trial, such testimony would not have altered the jury's conclusion as to his guilt." In doing so, it refused to consider the portions of Mr. Tapps affidavits relating to his alibi defense. CR 132. The court then summarily dismissed the successive petition. CR 133.

Mr. Tapp filed a timely notice of appeal. CR 149.

III. ISSUES PRESENTED ON APPEAL

A. Did the court err because it dismissed the case on a ground, *i.e.*, that Mr. Tapp's right to testify had not been violated, different than that raised in its notice of intent to dismiss?

B. Assuming *arguendo* that the issue was raised by the court, did the court err by creating a new legal presumption that Mr. Tapp waived his right to testify by his silence at trial and then resolving the factual issue against him during the summary disposition proceedings by applying that presumption?

C. Did the court err because it dismissed a portion of the case on a ground, *i.e.*, that Mr. Tapp was barred from raising the alibi testimony issue because he could have raised it in his first petition, different than that raised in its notice of intent to dismiss?

D. Assuming *arguendo* that issue was raised by the court, did the court err by finding the issue should have been raised in the first petition?

E. Did the court err in concluding that any deprivation of the right to testify was harmless beyond a reasonable doubt?

IV. ARGUMENT

A. *The Court Erred by Dismissing the Case on a Ground Different Than That Raised in its Notice of Intent to Dismiss, to Wit: Mr. Tapp Was Not Deprived of His Right to Testify*

1. The court dismissed on a ground not raised in its notice of intent to dismiss

At the end of the court's Memorandum and Order denying the state's motion to dismiss, it gave the following *sua sponte* notice of intent to dismiss:

> Based upon the foregoing, the Court does not find grounds at this time to summarily dismiss the petition in this matter. While the State in its motion may have intended to assert that the evidence establishes a voluntary waiver of the

> right to testify and/or that the failure to testify was harmless error, it is the Court's opinion that the State's motion was not sufficiently specific to put Tapp on notice, nor does the Court believe that those issues have been fully addressed. Therefore, the Court on its own motion now raises the issue of whether this matter should be summarily dismissed under a *Chapman* [*v. California*, 386 U.S. 18 (1967)] analysis[.]
>
> . . . . [block quotation omitted]
>
> As to the Court's motion, Tapp shall have thirty (30) days from the date of this order to respond to this issue. The State shall then have twenty (20) days to respond. Tapp shall then have (15) [sic] days to reply.

CR 86.

Mr. Tapp filed a timely response and argued why the presumed error was not harmless under *Chapman, supra*. CR 88-96. He also presented a Second Affidavit wherein he explained what he would have testified to at the trial. CR 101-102.

The state's response addressed the harmless error issue, CR 107-108, but also argued that there was no deprivation of Mr. Tapp's right to testify, an issue which was not raised in the Court's notice of intent. CR 106-107. Mr. Tapp objected to the introduction of the new issue in his reply brief. He argued that the state's "argument should be rejected because that is not the basis for dismissal for which the Court gave notice. The state's suggestion is not in response to the Court's Order of February 20 and is logically irrelevant to the precise issue before the Court." CR 135. He continued:

> In addition, the state's suggestion should be rejected because Mr. Tapp is entitled by due process and I.C. § 19-4906(b) to at least 20 days notice of the basis for the court's intended dismissal. The Supreme Court has written: "If the district court decides to dismiss the application, I.C. § 19–4906(b) requires the court to notify the parties of its intention and give the petitioner an opportunity to respond; failure to do so requires reversal of a judgment denying the application for post-conviction relief." *Saykhamchone v. State*, 127 Idaho 319, 321, 900 P.2d 795, 797 (1995). Thus, the state cannot raise a new issue within the context of the

> court's *sua sponte* notice. If the state wanted to move for summary dismissal on that basis it should have done so in its prior motion instead of raising an entirely different theory for the first time in a responsive brief. The state's suggestion made in its response to the Court's notice is not a proper motion and should not be acted upon. *Saykhamchone*, *supra.*

CR 135.

The district court issued an order dismissing the petition because Mr. Tapp had not shown that he was deprived of the right to testify. The court did not directly address Mr. Tapp's objection to the state's improper argument, but instead asserted that it had "raised the issues of (1) whether Tapp voluntarily waived his right to testify, and if not, (2) was the failure to testify harmless error" in its notice of intent to dismiss. CR 123. However, as demonstrated by the quote from the court's notice of intent above, the court never raised the issue of whether Mr. Tapp voluntarily waived his right to testify. To the contrary, the court found that "[w]hile the State in its motion may have intended to assert that the evidence establishes a voluntary waiver of the right to testify . . . the State's motion was not sufficiently specific to put Tapp on notice . . . ." It then gave notice to dismiss on the harmless error question only: "Therefore, the Court on its own motion now raises the issue of whether this matter should be summarily dismissed under a *Chapman* [*v. California*, 386 U.S. 18 (1967)] analysis[.]" CR 86.

Thus the court dismissed the petition on a ground which was not raised in its notice of intent to dismiss, *i.e.* "that Tapp voluntarily waived his right to testify at the time of trial." CR 129. Accordingly, as will be explained below, the portion of the decision dismissing the petition on this basis should be vacated.

2. The first reason for summary dismissal should be reversed because the district court did not comply with I.C. § 19-4906(b)

The district court violated I.C. § 19-4906(b) when it dismissed petition for post-conviction relief on a ground not set forth in its notice of intent to dismiss.

The applicable law is set out in *Buss v. State,* 147 Idaho 514, 211 P.3d 123 (Ct. App. 2009):

> Pursuant to I.C. § 19-4906(b), the district court may *sua sponte* dismiss an applicant's post-conviction claims if the court provides the applicant with notice of its intent to do so, the ground or grounds upon which the claim is to be dismissed, and twenty days for the applicant to respond. Pursuant to I.C. § 19-4906(c), if the state files and serves a properly supported motion to dismiss, further notice from the court is ordinarily unnecessary. *Saykhamchone v. State,* 127 Idaho 319, 322, 900 P.2d 795, 798 (1995). The reason that subsection (b), but not section (c), requires a twenty-day notice by the court of intent to dismiss is that, under subsection (c), the motion itself serves as notice that summary dismissal is being sought. *Id.*

147 Idaho at 517, 211 P.3d at 126 (footnotes omitted). *See also, Kelly v. State,* 149 Idaho 517, 523, 236 P.3d 1277, 1283 (2010) ("Thus, where a trial court dismisses a claim based upon grounds other than those offered – by the State's motion for summary dismissal, and accompanying memoranda – the defendant seeking post-conviction relief must be provided with a 20-day notice period.")

The twenty-day notice period is also required by due process. The due process guarantees under the United States Constitution and the Idaho Constitution both provide protections against deprivations of life, liberty, or property, without due process of law. U.S. Const. amend. XIV; Idaho Const. art. 1, § 13. *Rudd v. Rudd,* 105 Idaho 112, 115, 666 P.2d 639, 642 (1983). "Procedural due process, as it is guaranteed under both the Idaho and U.S. Constitutions, requires that a person involved in the judicial process be given meaningful notice and a meaningful

opportunity to be heard." *State v. Doe*, 147 Idaho 542, 544, 211 P.3d 787, 789 (Ct. App. 2009) *citing Fuentes v. Shevin*, 407 U.S. 67 (1972). *See also Rios-Lopez v. State*, 144 Idaho 340, 343, 160 P.3d 1275, 1278 (Ct. App. 2007) ("procedural due process requires an opportunity to be heard").

The court's notice here can only be understood to relate to the harmless error aspect of *Chapman*. The substantive federal claim in *Chapman* was that the defendant's Fifth and Fourteenth Amendment right to remain silent was violated. The California Supreme Court found there was a constitutional violation but "nevertheless affirmed, applying the State Constitution's harmless-error provision, which forbids reversal unless 'the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.'" The United States Supreme Court granted certiorari limited to these questions: "Where there is a violation of the rule of *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, (1) can the error be held to be harmless, and (2) if so, was the error harmless in this case?" *Chapman v. California*, 386 U.S., at 20. Thus, the only issue in *Chapman* was the harmless error question and the district court's reference to "a *Chapman* analysis" could only mean that Mr. Tapp should address the question of whether the constitutional error in his case can be deemed to be harmless under *Chapman*. As the constitutional violation found in *Chapman* was a violation of the right to remain silent, *id.*, that case has no other application to Mr. Tapp's right to testify claim.

Here, the court's *sua sponte* order of dismissal on a ground not set forth in its notice of intent to dismiss violated both the statutory and due process rights to fair notice and an opportunity to respond. This Court should vacate the order and remand for further proceedings. *Buss v. State*, *supra*; I.C. § 19-4906(b).

3. The state raising the issue for the first time in its response to the court's notice of intent to dismiss was not a proper motion for summary dismissal on its part and the argument should not have been considered

The district court also should not have dismissed the case based upon a new argument first raised by the state in response to the district court's notice of intent to dismiss. The Supreme Court has written: "If the district court decides to dismiss the application, I.C. § 19–4906(b) requires the court to notify the parties of its intention and give the petitioner an opportunity to respond; failure to do so requires reversal of a judgment denying the application for post-conviction relief." *Saykhamchone v. State*, 127 Idaho at 321, 900 P.2d at 797.

In *Saykhamchone*, the state filed an answer to the petition and asked the court to summarily dismiss the petition in its prayer for relief. The district court, without giving prior notice, issued an order dismissing the petition. On appeal, Saykhamchone argued that the district court did not give notice under I.C. § 19-4906(b). The state argued that the court was not required to give notice because it had requested summary dismissal in its prayer for relief. The Court rejected this reasoning as follows:

> The state correctly argues that no twenty-day notice is required under subsection (c) when the court grants a motion for summary disposition. The state's contention might be dispositive, of course, if the state had ever filed a motion for summary disposition. . . . .
>
> I.R.C.P. 7(b)(1) provides that motions, unless made during trial or hearing, [1] "shall be in writing, [2] shall state with particularity the grounds therefor including the number of the applicable civil rule, if any, under which it is filed, and [3] shall set forth the relief or order sought." Here, the better practice would have been for the state to file a separate motion under subsection (c). But at a minimum, the state's prayer for relief in the Answer was deficient for not stating its grounds with particularity, and for not stating that it was the state's motion for summary disposition under I.C. § 19-4906(c).

127 Idaho at 322, 900 P.2d at 798 (internal citations and emphasis omitted); *compare State v.*

Workman, 144 Idaho 518, 524, 164 P.3d 798, 804 (2007)[3]

Similarly here, the state never argued in its motion for summary dismissal (which was denied by the court in any case) that, according to Mr. Booker, Mr. Tapp did not want to testify. Nor did it file a second motion for summary dismissal raising that issue. Thus, its argument made in response to the court's *sua sponte* notice was not sufficient to be fairly considered as a motion under I.R.C.P. 7(b)(1) and the petition should not have been dismissed on that basis.

4. Even if the state's argument could be considered a second motion for summary dismissal, the court erred by dismissing the petition without giving Mr. Tapp twenty days to respond

Under the court's scheduling order, Mr. Tapp was given 15 days after the filing of the state's response to file a reply brief. CR 86. Thus, even if the state's argument could be considered to be a proper motion, the court erred by dismissing the case without first giving Mr. Tapp twenty-days notice and the same time to respond. As the *Saykhamchone* Court wrote: "After a state files a subsection (c) motion, a petitioner is still entitled to twenty days to respond, so as to afford an opportunity to establish a material fact issue." *Id, citing State v. Christensen,* 102 Idaho 487, 488, 632 P.2d 676, 677 (1981).

The state cannot raise a new issue within the context of the court's *sua sponte* notice and have it be considered a motion under I.R.C.P. 7(b)(1). If the state wanted to move to summary dismissal on that basis it should have done so in its prior motion or it should have filed a second

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[3] In *Workman*, the state filed a separate motion to dismiss along with twenty-two pages of argument. Still the Supreme Court wrote that "[w]hile we conclude the State's answer and motion to dismiss were technically sufficient under I.C. § 19-4906(c) and *Saykhamchone*, we reiterate our direction in *Saykhamchone* that the preferable practice is: (1) to file a motion separate from the answer; (2) to identify that motion as a motion for summary disposition, not a motion to dismiss, and (3) to use the language of I.C. § 19-4906(c) and cite to that specific statutory provision in support of the motion for summary disposition." *Id.*

motion. Further, the court never gave Mr. Tapp notice that it intended to treat the state's suggestion as a motion and then give the required twenty days to respond. As Mr. Tapp received no notice that the issue was before the court upon summary disposition, the argument should not have be acted upon. *Saykhamchone*, *supra*. But, even if the state's new argument could be considered a motion for summary disposition, the court erred by not giving Mr. Tapp twenty days to respond. *Id.*

B. *Alternatively, the Question of Whether Mr. Tapp Validly Waived His Right to Testify is a Material Issue of Fact and the Trial Court Erred by Resolving a Factual Issue Against Mr. Tapp During the Summary Disposition Proceedings*

1. Introduction

The district court erred in dismissing the case based upon its conclusion that Mr. Tapp had validly waived his right to testify when there was still a genuine question of fact on that issue. "In determining whether a motion for summary disposition is properly granted, a court must review the facts in a light most favorable to the petitioner, and determine whether they would entitle petitioner to relief if true." *Saykhamchone*, *supra*; *Baldwin v. State*, 145 Idaho 148, 153, 177 P.3d 362, 367 (2007). Summary disposition may be granted only if the petitioner's evidence, based on the pleadings, depositions and admissions together with any affidavits on file, raises no genuine issue of material fact. *Kelly v. State*, 149 Idaho 517, 521, 236 P.3d 1277, 1281 (2010).

2. Mr. Tapp was entitled to an evidentiary hearing on this issue

Mr. Booker, at the evidentiary hearing in No. 40197 was asked why Mr. Tapp did not testify at the suppression hearing. He said that "Christopher expressed on a number of occasions that he was fearful of taking the stand because he had been manipulated so successfully . . . Now,

that was relative particularly to trial." T (#40197) pg. 171, ln. 21 - pg. 172, ln. 7.[4] However, Mr. Tapp, as set out at pages 3-5 above, alleged under oath that Mr. Booker did not permit him to testify even though he told Mr. Booker that he wanted to do so. CR 59-61; 101-102. Taking Mr. Tapp's allegations in the most favorable light to him, there is a question of material fact as to whether that was the case, even taking Mr. Booker's comment into consideration.

Mr. Tapp is aware that the Court of Appeals stated in *Hayes v. State*, 146 Idaho 353, 195 P.3d 712 (Ct. App. 2008), that

> because the trial court, rather than a jury, will be the trier of fact in the event of an evidentiary hearing, summary disposition is permissible, despite the possibility of conflicting inferences to be drawn from the facts, for the court alone will be responsible for resolving the conflict between those inferences. *State v. Yakovac*, 145 Idaho 437, 180 P.3d 476 (2008). That is, the judge in a post-conviction action is not constrained to draw inferences in favor of the party opposing the motion for summary disposition but rather is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Id.*

Hayes v. State, 146 Idaho at 355, 195 P.3d at 714. However, *Hayes* does not apply here because the district court was not drawing an adverse inference against Mr. Tapp based upon "uncontroverted evidentiary facts." It simply chose to believe Mr. Booker's non-responsive answer to a question about testimony at the suppression hearing instead of Mr. Tapp's directly contrary affidavit. *Hayes* does not permit the court to resolve the sort of controverted issue of material fact present here and consequently the general rule as stated in *Saykhamchone* and *Baldwin* applies.[5] Applying the correct standard, it is clear that there is a genuine issue of

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[4] Mr. Tapp was represented by attorney John Thomas at that hearing. Counsel for Mr. Tapp in this case was not present at that hearing.

[5] This is made clear by *Hayes*' citation to *State v. Yakovac*, 145 Idaho 437, 180 P.3d 476 (2008) as authority for the above quoted material. In *Yakovic*, the Supreme Court stated, "[W]here the evidentiary facts *are not in dispute* . . . summary judgment is appropriate, despite

material fact over whether Mr. Tapp validly waived his right to testify and the court should have granted an evidentiary hearing on that issue.

Moreover, even if the court were allowed to weigh conflicting evidence, it still reached the wrong conclusion. While Mr. Booker made an offhanded comment about trial proceedings during his testimony at the 2002 post-conviction hearing, the question put to him was about why Mr. Tapp did not testify at the motion to suppress hearing. CR 106; T (#40197), pg. 171, ln. 24 - 172, ln. 10. And of note, Mr. Booker's testimony was only that Mr. Tapp was fearful of testifying, not that he wanted to waive his right to testify following advice that he had a absoulte right to do so. Being fearful is not the equivalent to a voluntary waiver of a known right. Further, Mr. Booker was not cross-examined about his recollection regarding Mr. Tapp not testifying at the trial, presumably because it was not relevant to the matter at hand. So it was not made clear to the district court what Mr. Booker's complete recollection about the issue here actually was. Nor has that complete recollection been tested by cross-examination. Finally, the state never filed an affidavit from Mr. Booker or from co-counsel or from local counsel to controvert Mr. Tapp's allegation that Mr. Booker did not allow him to testify. In light of the evidence before the court, it erred in concluding that Mr. Tapp validly waived his right to testify.

Moreover, the trial court did not construe the facts in the light most favorable to Mr. Tapp. Instead, it held as a matter of law that:

Tapp's silence at the time of trial [regarding not being called to testify] at the very

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the possibility of conflicting inferences . . ." 145 Idaho at 444, 180 P.3d at 483, quoting *Riverside Development v. Ritchie*, 103 Idaho 515, 519, 650 P.2d 657, 661 (1982) (emphasis added). It also stated that the trial judge is free to arrive at the most probable inferences "to be drawn from *uncontroverted* evidentiary facts." *Id, quoting Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991) (emphasis added).

> least creates a presumption that he knowingly and voluntarily waived his right to testify. Tapp's belated testimony alone in post-conviction proceedings that he wanted to testify is insufficient to rebut the presumption. Based upon the foregoing, the Court finds that Tapp voluntarily waived his right to testify at the time of trial.

CR 129. However, there is no such "presumption" in the state of Idaho.

The well-established and long-standing law regarding the evaluation of conflicting evidence during summary disposition proceedings in Idaho is expressed in *Saykhamchone, Baldwin* and *Kelly.* And, there is no Idaho case regarding a Sixth Amendment right to testify claim which has deviated from those standards. *See, Aragon v. State,* 144 Idaho 758, 763, 760 P.3d 1174, 1179 (1988) (Court finds no violation of right to testify based upon testimony of trial attorney at hearing where he was subject to cross-examination.); and *DeRushé v. State*, 146 Idaho 599, 604, 200 P.3d 1148, 1153 (2009) ("Because DeRushé alleged admissible facts showing that his counsel denied him the right to testify in his own behalf, we vacate the dismissal of this claim[.]")

In creating this "presumption" the court relied on some cases from the Seventh and Ninth Circuit Courts of Appeal. CR 124-128. However, while the precedent of the United States Supreme Court is binding upon the Idaho Supreme Court, *V-1 Oil Co. v. Idaho State Tax Com'n,* 134 Idaho 716, 719, 9 P.3d 716 (2000), the same is not true of the Federal Circuit or District Courts. *See State v. Harmon,* 107 Idaho 73, 76, 685 P.2d 814, 817 (1984) (federal district court). None of the cases cited by the district court are binding on this Court and furthermore are inconsistent with the rule as announced by the Idaho Supreme Court.

Moreover, the presumption applied by the district court does not even find complete acceptance within the federal system. *See, Gallego v. United States*, 174 F.3d 1196. 1198 (11th

Cir. 1999) ("The fact that defendant's testimony is uncorroborated is not enough standing alone to support a credibility finding" that would render an evidentiary hearing unnecessary. "Counsel's testimony was also unsubstantiated by other evidence.") Furthermore, it is inconsistent with long-standing United States Supreme Court precedent that a waiver of an important constitutional right will not be presumed from a silent record. To the contrary, the "courts indulge every reasonable *presumption against* waiver of fundamental constitutional rights and that *we do not presume* acquiescence in the loss of fundamental rights." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), *overruled in part on other grounds by Edwards v. Arizona*, 451 U.S. 477 (1981) (emphasis added, internal quotation marks omitted); *see also Brewer v. Williams*, 430 U.S. 387, 404 (1977).

Under the proper standard for reviewing evidence at this point in the proceedings, the trial court erred in resolving a disputed question of material fact against Mr. Tapp and that portion of the order should be reversed.

C. *The Court Erred by Partially Dismissing the Case on a Ground Different Than That Raised in its Notice of Intent to Dismiss, to Wit: Mr. Tapp Was Barred From Raising His Claim Regarding Not Being Allowed to Testify in Support of an Alibi Defense*

1. Introduction

The district court also found the deprivation of the right to testify was harmless. CR 133. In reaching that conclusion, it refused to consider any of Mr. Tapp's allegations regarding his alibi defense because:

> Tapp in his first Petition did not raise any issue regarding an alibi defense. To the extent Tapp had a valid alibi defense which wasn't pursued by defense counsel, such should have been raised in the first Petition.
>
> > "I.C. § 19-2719 places a heightened burden on a petitioner which requires a prima facie showing by petitioner that the issues raised

> were not known and could not have been known within 42 days of judgment." *Paz v. State*, 123 Idaho 758, 760, 852 P.2d 1355, 1357 (1993). Even when the required prima facie showing is made, the issues must still be asserted "within a reasonable time" after they are known or reasonably could have been known. *Id.* A court must summarily dismiss any successive petition that does not meet the requirements of I.C. § 19-2719(5). I.C. § 19-2719(11).
>
> *McKinney v. State*, 133 Idaho 695, 701, 992 P.2d 144, 150 (1999).
>
> Accordingly, allegations of an alibi defense will not be considered. The failure to raise the alibi allegations as ineffective assistance of counsel and/or a constitutional violation in the first Petition preclude the consideration of alibi allegations in this successive petition.

LCR 131. The court erred by so ruling because it did not raise this argument in its notice of intent to dismiss. CR 86. The only issue raised by the court was whether the "matter should be summarily dismissed under a *Chapman* analysis." *Id.* Thus, Mr. Tapp was never given notice that the court was considering partially dismissing the claim under I.C. § 19-2719(5), and consequently never had a chance to respond to it. As argued at length above, both I.C. § 19–4906(b) and *Saykhamchone v. State*, *supra*, require the court to notify the parties of its intent to dismiss and the basis thereof, and give the petitioner an opportunity to respond.

Not only did the district court fail to give notice that it intended to partially dismiss the petition as an improper successive petition, it had previously rejected the state's argument that the successive petition was not properly filed. CR 84 ("Tapp has presented sufficient/prima facie evidence to the effect that counsel in the original petition were ineffective for failing to raise that issue. As such, the Court declines to dismiss the second petition as being an impermissible successive petition under § 19-4908.") Thus, Mr. Tapp had absolutely no reason to suspect that the court intended to summary dismiss the alibi testimony claim as improperly raised in a successive petition.

In light of the court's utter failure to give any advance notice of its intent to partially dismiss on that basis, this Court should vacate the order under both I.C. § 19–4906(b) and *Saykhamchone*, *supra.*

D. ***Alternatively, the Court Erred in Dismissing the Alibi Claim as Mr. Tapp Was Not Barred From Raising That Claim in a Successive Petition for Post-Conviction Relief***

1. The court should have considered the alibi evidence

In refusing to consider Mr. Tapp's affidavit regarding his alibi evidence, the court said, "To the extent Tapp had a valid alibi defense which wasn't pursued by defense counsel, such should have been raised in the first Petition." LCR 131. Mr. Tapp, however, could not have raised such a claim because alibi was the defense at trial. Obviously then, Mr. Tapp could not have made a claim on ineffective assistance of counsel based upon a failure to put on that defense. And more to the point, Mr. Tapp's affidavit regarding his alibi defense was offered to show why the violation of his right to testify had a substantial and injurious effect on his trial. Thus, the court should have considered Mr. Tapp's affidavit in this case.

Moreover, the court's reliance upon *McKinney v. State*, 133 Idaho 695, 701, 992 P.2d 144, 150 (1999), is misplaced. *McKinney* was a capital case. Capital cases are subject to the special appellate and post-conviction procedure found in I.C. § 19-2719. Successive post-conviction proceedings in capital cases are governed by subsection (5) thereof. That subsection places severe restrictions on the filing of successive post-conviction petitions in capital cases. However, non-capital post-conviction petitions, like this one, are governed by I.C. § 19- 4901 *et. seq.*, and successive petitions in non-capital cases are governed by the rules found in I.C. § 19-4908.

This successive petition was properly filed under I.C. § 19-4908. That statute specifically

allows a petitioner to file a successive petition if "the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application." Both the Idaho Supreme Court and the Court of Appeals have found that the ineffective assistance of post-conviction counsel can be "sufficient reason" for the court to consider the claims raised in a successive petition. *Palmer v. Dermitt*, 102 Idaho 591, 635 P.2d 955 (1981); *Hernandez v. State*, 133 Idaho 794, 798, 992 P.2d 789, 793 (Ct. App. 1999). *See Martinez v. Ryan*, — U.S. —, 132 S. Ct. 1309, 1316-18 (2012) (equitable relief from the failure to present issues in state post-conviction may be available in federal habeas corpus when the failure was due to ineffective assistance of post-conviction counsel). Here, it was ineffective assistance of post-conviction counsel to fail to properly raise the right to testify claim.

In the original petition for post-conviction relief (*Tapp II*), Mr. Tapp was represented by attorney John Stosich. (Prior to Mr. Stosich appearing, Mr. Tapp was represented by Jordan Crane, Neal Randall, Jeromy Stafford and Rocky Wixom, all attorneys from the Bonneville Public Defender's Office.) One of the facts alleged by Mr. Tapp was that he was not permitted to testify at trial contrary to his request to his attorney. The district court construed this claim as a claim of ineffective assistance of counsel under the Sixth Amendment, found that the trial counsel's decision did not prejudice petitioner because it was not reasonably probable that any such testimony would have changed the outcome of the trial, and summarily dismissed the post-conviction petition. The Court of Appeals affirmed. *Tapp II, supra.* However, all post-conviction counsel were ineffective for failing to raise this claim as a right to testify claim instead of an ineffective assistance of counsel claim.

Mr. Tapp provided the district court with the affidavits of Jordan Crane, John Stosich,

Neal Randall and Jeromy Stafford. All of them stated that the failure to raise the direct claim was inadvertent and not a strategic decision. CR 38-45; 63-65. Rocky Wixom stated in his affidavit that he does not have a specific recollection of the issue being discussed with Mr. Tapp, but that he "seriously doubt[s]" he "ever intended to waive that claim." CR 33. The affidavit of attorney Andrew Parnes stated that there would be no strategic reason to omit the issue. CR 47.[6]

Finally, the second affidavit of Mr. Tapp shows that he was never consulted about the issue and never intentionally waived the issue. CR 60-61. In light of the absence of a knowing, intelligent and voluntary waiver of the direct right to testify issue and because post-conviction counsel did not effectively present the claim in the original petition, there was "sufficient reason" under I.C. § 19-4908 and *Palmer v. Dermitt* to permit Mr. Tapp to raise the issue in the successive petition.

In sum, while the district court was correct in rejecting the state's argument that the successive petition was improperly filed, CR 84, it erred in partially dismissing on that same basis.

2. The alibi evidence was corroborated by the testimony at trial

The court also refused to consider the alibi evidence because "such uncorroborated and

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[6] Mr. Parnes is a graduate of Williams College (B.A.), Stanford University (Ph.D) and Boalt Hall at the University of California at Berkeley (J.D.). He is AV rated by Martindale-Hubbell, has been named one of the "Best Lawyers in America," and served as President of the Idaho Association of Criminal Defense Lawyers. He said, "[t]here would not be a strategic reason for post-conviction counsel to fail to raise the direct right to testify claim in addition to the ineffective assistance of counsel claim." In addition, "[r]aising a direct right to testify claim would have benefitted Mr. Tapp because once a violation of the right to testify is established the less demanding *Chapman v. California*, 386 U.S. 18 (1967), harmless error test applies. An ineffective assistance of counsel claim under *Strickland* requires the Petitioner to prove he was prejudiced, while *Chapman* requires the State to prove the error was harmless beyond a reasonable doubt. *State v. Hoffman*, 116 Idaho 689, 692, 778 P.2d 81, 814 (Ct. App. 1989)."

self-serving assertions should not be allowed to forestall a summary dismissal . . . . The only evidence in this case is the single assertion by Tapp that he could have testified that he was somewhere else at the time of the crime. There is no evidence from any other source that would confirm or support Tapp's assertion." LCR 131-132. Findings of fact will be upheld on review if "they are supported by substantial and competent evidence in the record[.]" *Herrera v. Estay*, 146 Idaho 674, 678-79, 201 P.3d 647, 651-52 (2009).

In this case, the court's finding cannot be upheld because there was ample evidence to corroborate Mr. Tapp's alibi defense. Jason Hope testified at trial that Mr. Tapp was at his house on June 12, 1996, from about 6:00 - 7:00 p.m. to 10:30 - 11:00 p.m. T (No. 25295) pg. 1416, ln. 17 - pg. 1419, ln. 23. Mr. Hope saw Mr. Tapp leave with Britney Morgan. *Id*, pg. 1420, ln. 1-23.

Britney Morgan testified that she and Mr. Tapp were at a party at Jason Hope's house. Mr. Tapp arrived at about 8:00 or 9:00 p.m., and they left there together. T (No. 25295) *Id*, pg. 1440, ln. 6 - pg. 1442, ln. 1. They went to a bar on Broadway, stayed there for a short time and then went to the apartment that Mr. Tapp and Jeff Blackburn shared. *Id.*, pg. 1442, ln. 4 - pg. 1443, ln. 23. They arrived at the apartment around 11:00 p.m. *Id*, pg. 1444, ln. 1-3. (While Detective Grimes spoke to her prior to trial and tried to suggest that she and Mr. Tapp arrived at the apartment around 2:00 or 3:00, she continued to believe it was earlier. *Id*, pg. 1446, ln. 1-15.) Mr. Blackburn was at the apartment when they arrived. *Id*, pg. 1447, ln. 4-19. That was the only time she spent the night at the apartment. *Id*, pg. 1447, ln. 25 - pg. 1448, ln. 5. She spent the entire night there with Mr. Tapp and did not leave until 10:00 a.m., the next day.

Mr. Tapp's roommate, Jeff Blackburn, testified that Mr. Tapp and a female arrived at the apartment in the early hours of June 13. *Id.*, pg. 785, ln. 4-24.

Mr. Tapp's girlfriend, Ashli Washburn, testified that she called Mr. Tapp about 8:00 a.m. on June 13, 1996, to see if he had gone to work. When Mr. Tapp answered the call, she knew he had missed work and simply hung up the telephone. She then decided "to go over to the apartment and yell at him." *Id,* pg. 1458, ln. 17 - pg. 1459, ln. 22. She arrived at about 9:30-10:00 a.m. When she arrived, Mr. Tapp answered the door and Britney Morgan was inside the apartment. *Id*, pg. 1460, ln. 8 - pg. 1461, ln. 18. Mr. Tapp admitted to Ms. Washburn that Ms. Morgan had spent the night of the 12th-13th with him at the apartment. *Id*, pg. 1462, ln. 2-15. Ms. Washburn was sure that it was June 13, because the day before had been their anniversary. *Id*, pg. 1464, ln. 2-14.

Here, there is no evidence to support the district court's finding because, as set forth above, alibi was the defense at trial and evidence was presented in support of that defense. Thus, this Court should reject the district court's finding and vacate the partial summary dismissal made due to the unsupported finding of fact. *Id.*

E. The Court Erred in Concluding That The Violation of Mr. Tapp's Right to Testify Was Harmless Beyond a Reasonable Doubt

Finally, the court concluded that Mr. Tapp's alibi evidence, by itself, would not have changed the verdict at the criminal trial, CR 132, and also dismissed the claim that Mr. Tapp's testimony about the circumstances of his statements to the police could have made a difference at trial.

> Turning to the additional evidence relating to the circumstance of the January 29, 1997 interrogations, the Court is again in a position to compare that evidence with the evidence actually received by the jury in the criminal trial. . . . The jury at the time of the trial also received additional evidence that corroborated Tapp's involvement in the crime. In considering the evidence heard by the jury and the testimony now proffered by Tapp, this court concludes that there is no reasonable

> doubt that had Tapp testified at the time of trial, such testimony would not have altered the jury's conclusion as to guilt.

LCR pg. 132. An examination of the evidence, however, shows that both of these conclusions are in error.

1. Standard of review

When the district court assumed for the purposes of the motion for summary disposition that Mr. Tapp was deprived of his right to testify, the burden shifted to the state to prove the error was harmless. For example, the Court of Appeals noted in *Rossignol v. State*, 152 Idaho 700, 274 P.3d 1 (Ct. App. 2012), *review denied* (2012):

> However, if the failure of a defendant to testify is considered in the context of deprivation of a fundamental constitutional right, then pursuant to *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the defendant has the burden to show he or she was deprived of the right to testify, and *the state must then convince the reviewing court beyond a reasonable doubt that the deprivation did not contribute to the defendant's conviction—that it was harmless error.*

Rossignol, 152 Idaho at 704, 274 P.3d at 5 (emphasis added). Here, the court erred in determining that the error was harmless beyond a reasonable doubt.

It appears that there is no Idaho case setting forth the standard of review of a trial court's determination of harmless error. However, if the question is one of law, the standard is free review because this Court reviews questions of law *de novo*. *State v. Larios*, 125 Idaho 727, 728, 874 P.2d 538, 539 (1994). If the determination is a mixed question of fact and law, the standard of review is still *de novo*. "Because mixed questions of fact and law are primarily questions of law, we review them *de novo*." *The Highlands, Inc. v. Hosac*, 130 Idaho 67, 69, 936 P.2d 1309,

1311 (1997).[7]

2. The exclusion of the alibi evidence and the evidence of the circumstances of the January 29 interrogation was not harmless

As shown below, the violation of Mr. Tapp's right to testify was not harmless beyond a reasonable doubt. The trial court erred in concluding otherwise.

(a) evidence at trial

The state's case against Mr. Tapp was not a strong one, as the Court of Appeals noted, "[t]he State's case was based almost entirely upon Tapp's confessions to having helped other men rape and murder Dodge; no physical evidence linked Tapp to the crime." *State v. Tapp*, 136 Idaho at 358, 33 P.3d at 832. The district court, however, stated (without giving specific examples or citations to the record) that the jury at the time of trial heard evidence which "corroborated [Mr.] Tapp's involvement." CR 132.[8] And, during the original post-conviction proceedings, the Court of Appeals noted that:

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[7] The New York Court of Appeals has held the question of whether a trial error is harmless is one of law. *People v. Reddick*, 482 N.E.2d 920, 921 (N.Y. Ct. App. 1985). Several Courts have found that the determination of whether an error is harmless is a mixed question of fact and law. *See e.g., Duest v. Singletary*, 997 F.2d 1336, 1339 & n. 4 (11th Cir. 1993) (As "[h]armless error is a mixed question of law and fact subject to *de novo* review," the Circuit Court found that "we are not bound by the Florida Supreme Court's determination on state postconviction review that Duest's ... claim was harmless"); *Orndorff v. Lockhart*, 998 F.2d 1426, 1432 (8th Cir.1993); *see also Lowery v. Collins*, 988 F.2d 1364, 1372 & n. 34 (5th Cir.1993) (collecting authorities); *Dickey v. Lewis*, 859 F.2d 1365, 1370 (9th Cir. 1988) ("The district court's determination that the unconstitutional instruction was harmless is a mixed question of law and fact. We review this question *de novo*. Once a defendant has established *Sandstrom* error, the burden is on the State to establish that the error was harmless.")

[8] Given the district court's lack of familiarity with the criminal trial record regarding the alibi evidence, one wonders what, if any, corroborative evidence it had in mind when it made this statement.

> the State provided other evidence which tended to corroborate the confession. The State called forensic experts to testify regarding how the crime was committed based upon the physical evidence. The crux of the State's case was that Tapp's confession provided accurate forensic details which the officers had not divulged to him prior to his confession. The officers testified about consistencies between Tapp's confession and the forensic evidence that the public did not know. J.S. testified that a month after the murders she overheard Hobbs tell a nervous Tapp to keep calm or he 'was going to blow his alibi.' D.O. testified that a few days after the murder she overheard Tapp say that he stabbed Dodge because she owed money for crank, he held her down while she was raped and killed, Hobbs slit her throat, and Tapp got blood on his shirt. J.B. lived with Tapp during the time of the murder and testified Tapp left the night of the murder wearing his favorite shirt and returned at 3:00 or 4:00 am without it and J.B. did not see the shirt again. F.E. testified that one day in June or July of 1996, Hobbs returned home with blood on his shoes. A.O. testified that one morning after the murder she saw Hobbs down by the river with his shirt slung over his shoulder and crying because Dodge had been killed. Other evidence showed this was before Dodge's murder had become public information.

Tapp II, 2010 Unpublished Opinion No. 412, pg. 13.

However, Mr. Tapp respectfully submits that the district court's unsupported assertion of corroborative evidence and the paragraph quoted above greatly overstate the strength of the state's case, especially in light of the defense alibi evidence.

First, the Court of Appeals is correct that "the State called forensic experts to testify regarding how the crime was committed based upon the physical evidence." *Id.* And, certainly the state contended that "Tapp's confession provided accurate forensic details which the officers had not divulged to him prior to his confession." However, the officer's testimony about these alleged consistencies between Mr. Tapp's statements and the forensic evidence was vague.

The state summarized its theory of the case with this question to the case detective:

> Q: How is it that as an investigator – how is it that we as officers of the court, both the jury and those of us here, can rely on what Chris Tapp tells us about what was committed, what was done at the scene of Angie's death, when he has told us Hobbs had sex with Angie, but there's no DNA there, his DNA doesn't show up,

> his fingerprints don't show up? The question is essentially what Mr. Booker has been asking. Can you reflect on that for us?
>
> A: Yeah. The statements that were given all during this interview by Christopher Tapp, as far as what happened in the crime scene; how the crime was committed; again, the position of her clothing; where she was stabbed at; the tear marks in her shirt; where she was stabbed at; the tear marks in her skirt; description of how she was killed; that she was killed by a person; there's forensic evidence showing bruising on the right side of her face, consistent with somebody being hit, all these statements corroborate the facts that were at the scene itself.

T (No. 25295), pg. 1347, ln. 20 - pg. 1348, ln. 13. As is obvious from the above, the detective's answer is long on generalities, but short on specifics. He does not say what Mr. Tapp said that was confirmed by "what happened at the crime scene," or "how the crime was committed," or "where she was stabbed at," or "by the position of her clothing," or by "[t]he tear marks in her skirt."

Moreover, the detective is talking about all the statements by Mr. Tapp which were admitted at the trial. However, most of those statements should not be considered at this junction. The Court of Appeals held in *Tapp I* that all the interviews other than the one on January 29th were illegally obtained: "We hold that Tapp was not in custody on January 29, and therefore his Fifth Amendment right to counsel did not attach and was not violated. Only Tapp's statements made on January 15, 17, 30, and 31 are suppressible for Fifth Amendment violations." *Tapp I*, 136 Idaho at 363, 33 P.3d at 837. There is no indication in the record that the district court distinguished between the evidence actually admitted at trial and the evidence which would be admissible at a new trial. To the contrary, it is clear that the court considered all the evidence,

inadmissible and admissible, presented at the first trial. See CR 132[9]

In addition, the specifics cited by the detective do not bear scrutiny. Obviously, the fact "that she was killed by a person" does not corroborate Mr. Tapp's statement that he was involved. Moreover, the transcript of the January 29 station house interview clearly shows that it was Detective Fuhriman who first suggested to Mr. Tapp how the "crime was committed," *i.e.*, that Mr. Tapp held Angie down while the co-defendants stabbed her.

> FUHRIMAN: All right? Talkin' with, uh, the prosecutor, okay, this contract [the immunity agreement] is dissolved.
>
> TAPP: Yeah, okay.
>
> FUHRIMAN: Right now the way it looks you're goin' to jail and then prison. Okay?
>
> TAPP: He said I wasn't going to jail?
>
> FUHRIMAN: Not today.
>
> TAPP: Oh.
>
> FUHRIMAN: Okay. 'Cuz, 'cuz, he understands the medical things that's goin' on in your dads's life and, everything else. Like I say, he's a compassionate man, but . . .
>
> TAPP: It still doesn't matter.
>
> FUHRIMAN: Yeah. Ya don't, ya don't screw with him, okay? So that's hanging over your head right now. Now, in talking to him, hypothetically, if CHRIS TAPP was holdin' onto Angie as she was being cut and if some other stuff was goin' on, or if CHRIS TAPP, took part in the knife in any way, shape or form, and cutting her, okay?

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[9] The court wrote, "even if Tapp had testified at trial regarding an alibi, it is the conclusion of this Court *when considering the record*, there is no reasonable doubt that . . . such testimony would not have altered the jury's conclusion as to his guilt." And, [t]urning to the additional evidence relating to the circumstances of the January 29, 1997 interrogations, *the Court is again in a position to compare that evidence with the evidence actually received by the jury in the criminal trial. . .*" *Id.* (Emphasis added.)

TAPP: But I didn't.

FUHRIMAN: Would you listen?

TAPP: Yes, sir.

FUHRIMAN: Okay. Hypothetically, I said.

TAPP: Okay.

FUHRIMAN: So if CHRIS TAPP was involved in any way more than what you've told us, which it sounds like you possibly were, okay? To some degree. Okay? A contract could possibly c-, be constructed.

TAPP: Right. But why would I pass the lie detector test, then, JARED?

CR (#40197), pg. 196-197. It was not until after Detective Fuhriman told Mr. Tapp that he might be able to get his immunity agreement back if he admitted to holding Angie Dodge's arms down during the attack did Mr. Tapp make such an admission. *Id*, pg. 207 (report of Fuhriman of statements made at the Dodge apartment). Thus, Mr. Tapp's admission was not corroborated by the forensic evidence. Rather the detective manipulated Mr. Tapp into making an admission consistent with the forensic evidence by suggesting that the previous immunity agreement could be reinstated.

Finally, while the detective said "there's forensic evidence showing bruising on the right side of her face, consistent with somebody being hit," a review of the testimony from the state's criminal investigator and the pathologist's testimony does not reveal that evidence. *See* T (No. 25295), pg. 880, ln. 1 - pg. 968, ln. 23 (testimony of Leslie Stimpson and Gary Ellwein, M.D.).[10]

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[10] Dr. Ellwein testified that there was a one inch bruise on the top of the right ear, which is certainly not the facial bruise testified to by the detective. *Id*, pg. 911, ln. 1 - pg. 912, ln. 24.

The non-forensic, non-confession evidence cited by the Court of Appeals is insubstantial.

First, Jenna Shaw only testified that she overheard Mr. Tapp ask Ben Hobbs "[w]hat are we going to do, Ben?" T (25295), pg. 619, ln. 2-6. It was Ben Hobbs who used the word "alibi," not Mr. Tapp. *Id*, pg. 618, ln. 9-11. "Alibi" was not an unusual word for Hobbs to use because he was often in trouble with the law. *Id,* pg. 625 ln. 10-19; pg. 626, ln. 4-9. Further, Ms. Shaw was not a participant in the conversation and could not even testify as to its subject matter. *Id*, pg. 618, ln. 16-19; *see also* pg. 16-14 (Q: "Did you hear what the context was for this discussion about the alibi?" A: "No, I didn't."). Even though Ms. Shaw was eavesdropping on the conversation, both Hobbs and Mr. Tapp "acted like it was no big deal" when they realized she was listening to them. Their nonchalance about being overheard makes it seem unlikely they were secretly discussing a murder. *Id*, pg. 619, ln. 17-22. In addition, while the alleged conversation took place in July, Ms. Shaw did not report it to the police until October, even though she knew Angie Dodge and had seen Angie at the river on June 12, just a few hours prior to the murder. *Id*, pg. 604, ln. 11-16; pg. 611, ln. 16-23. On cross-examination, Ms. Shaw explained her delay in reporting by saying that she "had forgotten about the conversation" and admitted that she "was taking drugs back then." *Id*, pg. 627, ln. 16-23.

Destiny Osborne also admitted her drug use had affected her ability to accurately perceive and relate events. She testified:

> I'm sure it does, because a lot of times I would black out, and so I wouldn't really remember what would happen or I wouldn't – it was kind of like a blank chip in my head. I don't – you know, it just kind of depended on how much drugs I did or

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Moreover, Dr. Ellwein did not testify the bruise on the ear was consistent with somebody being hit.

how much I drank, or like if I combined all the drugs or just different things.

Id, pg. 721, ln. 5-11. Just three months prior to her testimony, Osborne had been released from 15 months of drug treatment at the Port of Hope and the Behavioral Health Center. *Id*, pg. 719, ln. 5-11. (The BHC is a secured facility housing juveniles. *Id*, pg. 755, ln. 7-23. She was sent there after a probation violation. *Id*, pg. 775, ln. 3-13.) She admitted that she had abused drugs for "a good three of four years" prior to entering treatment and she "used daily, every day," although she did not know if that qualified as a "severe" drug problem. *Id*, pg. 719, ln. 1-24. She was high on drugs when she overheard Mr. Tapp's alleged statements, although she claimed that those drugs "probably" did not affect her recollection of the conversation. *Id*, pg. 728, ln. 18 - 22. She explained that:

> once you do so many drugs your body like gets immune to them. . . . I could take so many, you know, to a point where, hey, you know, maybe I shouldn't do anymore. So I wasn't to the point to where I couldn't focus, or I couldn't see, or my eyes were blurry. You know, I could still kind of hear things with the loud music and realize, yeah, it is pretty loud and I am pretty high or whatever.

Id, pg. 728, ln. 24 - pg. 729, ln. 13. On cross-examination, Ms. Osborne admitted she was using marijuana every day around the time of Angie's death and used at least an ounce per day. She would also use methamphetamine and cocaine, but less frequently. *Id*, pg. 770, ln. 9 - pg. 771, ln. 25. Overall, however, "it was fair to say" that she was high "most of the time during June of 1996[.]" *Id*, pg. 777, ln. 1-3.

Like Jenna Shaw, Destiny Osborne did not report this alleged conversation to the police, even though she was a friend of Angie Dodge and the conversation occurred only "a few days" after Angie Dodge's death. *Id*, pg. 740, ln. 22 - pg. 741, ln. 8; pg. 747, ln. 13-17. She also did not tell her parents or any of her friends, as might be expected from a 16-year-old. *Id*, pg. 752,

ln. 14-18. She not tell the police about the alleged conversation until the detectives came to visit her at the BHC sometime during the year preceding the trial. *Id*, pg. 754, ln. 17-25. It is telling that no one else at the party reported this conversation to the police or corroborated Ms. Osborne's testimony at trial, even though she claimed four other people heard Mr. Tapp make the admission. *Id,* pg. 750, ln. 9 - pg. 751, ln. 9. (Q: "So there were five people who were supposed to have heard this conversation?" A: "Yes."). Finally, the evidence showed that Ms. Osborne had bad feelings toward Mr. Tapp. In fact, she had gotten into a verbal argument with Mr. Tapp during which she threatened to cut off his penis with a knife. *Id*, pg. 725, ln. 6-19.

Fred Ehlert did not testify that Hobbs once came home with blood on his shoes. He testified that "believe[d]" that Hobbs returned home with some "stains" on his shoes and there was a conversation about the origin of those stains possibly involving Hobbs's pets. *Id*, pg. 803, ln. 2-17. Ehlert also testified that he was housed with Mr. Tapp at the Bonneville County Jail, but Mr. Tapp never made any admissions to him about the murder. *Id*, pg. 804, ln. 7-10.

Audra Owens's testimony that she saw Hobbs crying because Angie had been killed does not incriminate Mr. Tapp in any way. However, it does tend to discredit Destiny Osborne's testimony that Hobbs and Tapp were laughing and bragging about killing Angie only two or three days later.

Finally, while Jeff Blackburn testified Mr. Tapp left the night of the murder wearing his favorite shirt and returned at 3:00 or 4:00 a.m. without it, he did not testify that he never saw that shirt again. What he said was that he did not know whether he saw it again. (Q: "Did you ever see that shirt again?" A: "Not that I remember. I don't think I ever saw that shirt again." *Id*, pg. 786, ln. 1-5.) Mr. Blackburn also testified about the verbal fight between Destiny Osborne and

Mr. Tapp recalling that "Destiny went to get a knife to cut it [Mr. Tapp's penis] off." *Id*, pg. 787, ln. 10-16. However, the important part of his testimony was that Mr. Tapp returned to their apartment during the early morning hours of June 13, 1996, "drunk as a skunk" and that he "came in with this redheaded girl." *Id,* pg. 785, ln. 4-24. The redheaded girl was Britney Morgan. Thus, this part of Mr. Blackburn's testimony corroborated Mr. Tapp's alibi defense.

In sum, the state's evidence against Mr. Tapp, excluding the one interview found to be admissible by the Court of Appeals, was not strong and Mr. Tapp had an alibi defense. More important, the burden is on the state to prove the error was harmless beyond a reasonable doubt. *Chapman v. California, supra.* As will be shown below, it cannot be said that the state's evidence was so strong that Mr. Tapp's testimony could not have changed the verdict.

(b) Mr. Tapp's testimony about January 29 and its effect

In fact, it is likely the jury would have acquitted Mr. Tapp if had it heard his testimony about the circumstances of the January 29 statements. Mr. Tapp in his Affidavit in Support of Petition for Post-Conviction Relief, alleged that he "requested to take the stand in [his] own defense, so [he] could explain to the jury as to how Sgt. Fuhriman and Detective Finn threatened [him], and coerced [him] into a confession in this crime, and [to] explain the events concerning this crime." Exhibit in # 35536. The statements made on this day are central to the state's case because this is when Mr. Tapp went to the crime scene and admitted that he held the victim's arms and shoulders down during the crimes. These statements were found to be admissible by the Court of Appeals. *Tapp I*, 136 Idaho at 358, 33 P.3d at 832.

If Mr. Tapp had been able to exercise his right to testify, he would have told the jury many things which were not on the videotapes shown to the jury. In particular, he could have

described how the facts of the interrogation affected him and about conversations which took place off camera. Based on that testimony, the jury could have concluded that Mr. Tapp had made a false confession.

In particular, Mr. Tapp could have testified to all the facts and circumstances of January 29, that he testified to at the evidentiary hearing in CV-PC-2002-6009 (now on appeal as Supreme Court No. 40197). His testimony included:[11]

- That he was driven to the police station by his father on the morning of the 29th, and had not eaten anything when he arrived. T pg. 13, ln. 8-16.

- That he met with his attorney, Kurt Taylor, who told him he needed to meet with Detective Fuhriman. T pg. 14, ln. 21-25.

- That Kurt Taylor told him that the police were going to pull the immunity agreement with him. T pg. 16, ln. 1-7.

- That prosecutor Kipp Manwaring told him the same thing. Mr. Manwaring was very mad at that time and spoke to him in a loud voice. T pg. 17, ln. 3-8.

- That, at this point, he thought that he was going to jail because the agreement was void. T pg. 17, ln. 19-25.

- That, after Mr. Manwaring left, Detective Fuhriman told him that they could still help him. T pg. 18, ln. 4-12.

- That his attorneys were never with him during the interrogation on the 29th. T pg. 19, ln. 17-19.

- That his attorney told him that the only way he could help himself was by cooperating with the police. T pg. 18, ln. 23-25.

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[11] The district court resolved certain credibility issues against Mr. Tapp in that case. But that is not the inquiry here. The question here is not whether Mr. Tapp's testimony is believed by the district court, but whether the state can prove beyond a reasonable doubt that Mr. Tapp's testimony would not have had an effect on the verdict. Thus, if Mr. Tapp's testimony could have raised a reasonable doubt as to his guilt, the error cannot be deemed harmless.

• That in his mind he believed that he would not be allowed to go home if he did not talk to the police. T pg. 23, ln. 6-9.

• That anytime he left the interview room in the Law Enforcement Building, he was escorted by a police officer. T pg. 31, ln. 12-18.

• That Detective Fuhriman claimed to a compassionate man and expressed concern about Mr. Tapp's father's health. T pg. 37, ln. 16-19.

• That he did not walk out of the interview room because he did not believe he would be able to, because Detective Fuhriman was blocking his way with his body and because he was scared. T pg. 38, ln. 20-24.

• After he was transferred to the polygraph room, Detective Finn asked him if being taken back to the crime scene might help him to remember. T pg. 45, ln. 11-14.

• He did not want to go to the crime scene nor did he suggest doing so. T pg. 45, ln. 15-17.

• That he was left in the polygraph room and he believed the door was locked. T pg. 50, ln. 2-6.

• He was transported to the crime scene in the back seat of an unmarked police car and he believed that the door was locked. T pg. 52, ln. 18 - pg. 53, ln. 8.

• That while going up the stairs to the upstairs apartment, one of the officers made a threatening comment to him to the effect of "that something should happen to me like it happened to Angie." T pg. 55, ln. 1-6.

• That comment frightened him and he knew that both officers had their side arms with them. T pg. 55, ln. 7-10; pg. 57, ln. 19-25.

• That he was hungry and tired during the interrogation at the crime scene. T pg. 58, ln. 21 - pg. 59, ln. 3.

• After the police were done at the crime scene, the police officers escorted him out the apartment and drove him back to the LEB and placed him in an interrogation room. T pg. 59, ln. 8-25.

• He didn't leave the interrogation room because he didn't believe he had that option. T pg. 60, ln. 1-4.

• When the police begin to interrogate again, he asked to leave, but was told they had "other stuff to do or that we've got to hammer this out first." He did not feel he was free to go after that. T pg. 64, ln. 12 - pg. 65, ln. 11.

• After that, Detective Fuhriman continued to question him and moved closer to Mr. Tapp, which intimated him. T pg. 66, ln. 19-23.

• That when the detective told him that he was "running out of options" he believed that he was going to jail. That frightened him and caused him to continue talking to the police. T pg. 67, ln. 7-17.

• That during the interrogation he was "making up whatever they want to hear, whatever they want me to tell them. Whatever they want to hear is what I'm telling them." T pg. 68, ln. 6-12.

This testimony, by itself, is sufficient to show the error is not harmless beyond a reasonable doubt. In addition, however, Mr. Tapp provided the district court with his affidavit stating that he would have also testified in support of the alibi defense which was presented at the criminal trial, *i.e.*, that he was at a party at Jason Hope's house on June 12, 1996, left there at about 10:30-11:00 p.m. with Britney Morgan and spent the night with her. CR 102.

Moreover, Mr. Tapp could have supplemented his trial testimony with that of June Elizabeth Bloxhan-Nielsen. Ms. Bloxhan-Nielsen testified at the evidentiary hearing upon remand in CV-PC-2002-6009. She is an independent witness to what happened when Mr. Tapp and the police arrived at Angie Dodge's apartment on January 29, 1997. She testified that Detective Fuhriman, Mr. Tapp and another officer came to the apartment. She stayed in the apartment with them the entire time, about "20, 30 minutes." T (Evidentiary Hearing in #40197) pg. 327, ln. 17 - pg. 328, ln. 20. She observed Mr. Tapp's demeanor and described it, as "just unbelievable. He had – all the color had drained out of his face and his eyes were like the size of silver dollars and he just – he looked like a ghost or something." Transcript, pg. 329, ln. 308.

She noticed the look "[w]hen we first opened the door" and she said "I will remember 'til the day I die the look on Chris's face." Transcript, pg. 33, ln 21-22; pg. 335, ln. 16-17. This would corroborate Mr. Tapp's testimony that it was not his idea to go to crime scene and that he felt frightened and trapped by the police.

Further, Detective Finn partially corroborated Mr. Tapp's testimony about being threatened with physical harm by the police:

> Q. Did Detective Fuhriman at any time say anything to that effect while going up the stairs?
> A. Kind of yes, . . . I remember Mayor Fuhriman laughingly say "You know, I guess we could take you out and shoot you" and all three of us laughed about the whole thing.

T pg. 281, pg. 3-9. Whether or not the police thought this was a laughing matter, Mr. Tapp testified he took it very seriously.

Mr. Tapp's subjective thoughts and fears could have been testified to as they are relevant to the question of whether the circumstances of the interrogation caused Mr. Tapp to confess falsely. The Utah Supreme Court has observed:

> It is beyond dispute that some people falsely confess to committing a crime that was never committed or was committed by someone else. See Richard A. Leo & Richard J. Ofshe, *Criminal Law: The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J.Crim. L & Criminology 429, 432–33 & n. 10 (1998); Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 Denv. U.L.Rev. 979, 983 (1997). Because "the experience of the courts, the police and the medical profession recounts a number of false confessions voluntarily made," *Smith v. United States*, 348 U.S. 147, 153, 75 S.Ct. 194, 99 L.Ed. 192 (1954) (citation omitted), "the doubt persists that ... the aberration or weakness of the accused under the strain of suspicion may tinge or warp the facts of the confession." *Opper v. United States*, 348 U.S. 84, 89–90, 75 S.Ct. 158, 99 L.Ed. 101 (1954). This is particularly true with respect to those who have a mental disease or deficiency, "those who lack fluency in the language in which they confess," and those who fail to comprehend "the legal significance of

their actions and words." Mullen, supra, at 402 & n. 79.

State v. Mauchley, 67 P.3d 477, 483 (Utah 2003). Thus, Mr. Tapp's testimony would have been highly significant at the trial.

Further, Mr. Tapp has a constitutional right to present evidence to support his claim that the confession was false.

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. *That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence.* In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing.

Crane v. Kentucky, 476 U.S. 683, 690-91 (1986) (emphasis added, internal citations and quotation marks omitted).

In addition to presenting his own relevant evidence about why the confession was false, Mr. Tapp could have presented an expert to explain how police interrogation techniques can cause false confessions. Such expert testimony has been held admissible in many cases. For example in *Miller v. State*, 770 N.E.2d 763, 770-74 (Ind. 2002), the trial court excluded the testimony of Dr. Richard Ofshe, a psychologist called by the defense as an expert in the field of "social psychology of police interrogation and false confessions." Dr. Ofshe testified that there are "demonstrated cases of people confessing to crimes, being convicted, and subsequently being exonerated." *Id.* He also testified that the "mentally handicapped are more suggestible and more

likely to give a false confession,[12]" stating that they are "easier to manipulate," less able to appreciate long-range consequences, easier to persuade to see the facts as asserted by the interrogator, and easier "to get to give both true and false confessions." *Id.* On appeal, Miller argued that even when a trial court determines a defendant's statement to be sufficiently voluntary for admission in evidence, the defendant may still dispute its voluntariness to the jury. The Indiana Court agreed, writing that "[a]lthough the court has previously determined voluntariness in connection with the statement's admissibility, the jury may find that the statement was involuntarily given. If the jury makes such a determination, then it should give the statement no weight in deciding the defendant's guilt or innocence." *Id., quoting Morgan v. State*, 648 N.E.2d 1164, 1170 (Ind. Ct. App.1995). The Court reversed the trial court, noting that "a trial court's determination that a defendant's statement was voluntary and admissible does not preclude the defense from challenging its weight and credibility" and further finding that it was error to exclude the proffered expert testimony. *Id. See also*, *Boyer v. State*, 825 So. 2d 418, 420 (Fla. Dist. Ct. App. 2002) (reversing because excluded testimony "went to the heart" of the defendant's defense of false confession); *People v. Kogut*, 806 N.Y.S.2d 366, 372 (N.Y. Sup. Ct. 2005) (holding that "the nature of Dr. Saul Kassin's psychological studies on the voluntariness of confessions generally and the phenomenon of eliciting false confessions will be admissible at trial"); *State v. Miller*, 86 Wash. App. 1064 (1997) (Trial court abused its discretion by denying

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[12] There is evidence that Mr. Tapp suffers from a mental deficiency as well. The Court had before it in *Tapp II* evidence of Mr. Tapp's grades, the Affidavit of Lisa Barini-Garcia, one of Mr. Tapp's original trial attorneys, Mr. Tapp's affidavit and the affidavit of psychologist Mark Corgaint, Ph.D. Evidence of this type, which was available at the time of the criminal trial, would have bolstered Mr. Tapp's testimony that the confession was false.

requested funding for expert testimony on false confessions).

In short, Mr. Tapp could have testified that he made a false confession because he was isolated from others, kept against his will, harangued, manipulated, and threatened with prison and worse if he did not confess. He also could have testified that he was with Britney Morgan at the time of the murder. This is sufficient to raise a reasonable doubt whether the error was harmless under *Chapman*. The district court erred in dismissing the claim on this basis.

V. CONCLUSION

For all the reasons set forth above, this Court should vacate the district court's summary dismissal of the successive petition and remand for further proceedings.

Respectfully submitted this 22nd day of October, 2013.

Dennis Benjamin
Attorney for Christopher Tapp

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of October, 2013, I caused two true and correct copies of the foregoing to be mailed to:

Jessica Lorello
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Dennis Benjamin