3-11-2015

Johnson v. State Clerk's Record Dckt. 42857

IN THE SUPREME COURT OF THE STATE OF IDAHO

SARAH JOHNSON, Petitioner/Appellant, vs. STATE OF IDAHO Respondent/Respondent	)	Supreme Court No. 42857

RECORD ON APPEAL

Appeal from the District Court of the Fifth Judicial District
of the State of Idaho, in and for the County of Blaine.

HONORABLE G RICHARD BEVAN, DISTRICT JUDGE

NEVIN, BENJAMIN, and McKAY, LLP
PO Box 2772
Boise, ID 83701

Attorney for Petitioner/Appellant

ATTORNEY GENERAL'S OFFICE
CRIMINAL APPEALS
PO Box 83720
Boise, ID 83720

Attorney for Respondent/Respondent

Sarah M Johnson, Plaintiff vs State Of Idaho, Defendant

Post Conviction Relief

Date		Judge
4/9/2012	DNA and successive petition for post-conviction relief	G. Richard Bevan
	Affidavit of Dr. Greg Hampikian in support of DNA and successive petition for post-conviction relief	G. Richard Bevan
1/22/2014	Amended DNA and Successive Petition for Post-Conviction Relief	G. Richard Bevan
5/19/2014	New Case Filed - Post Conviction Relief	G. Richard Bevan
	Other party: State Of Idaho Appearance Kenneth K Jorgensen	G. Richard Bevan
	Filing: H10 - Post-conviction act proceedings Paid by: Johnson, Sarah M (subject) Receipt number: 0003170 Dated: 5/19/2014 Amount: $.00 (Cash) For: Johnson, Sarah M (subject)	G. Richard Bevan
	Change Assigned Judge	G. Richard Bevan
	Order on Pending Motions	G. Richard Bevan
	Subject: Johnson, Sarah M Order Appointing Public Defender Public defender Keith Roark	G. Richard Bevan
5/23/2014	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Terry Smith / Mtn Express Receipt number: 0003247 Dated: 5/23/2014 Amount: $2.00 (Cash)	G. Richard Bevan
6/18/2014	Motion for Extension of Time to File Response to Amended DNA and Successive Petition for Post Conviction Relief	G. Richard Bevan
6/27/2014	Order for Extension of Time to File Response to Amended DNA and Successive Petition for Post Conviction Relief	G. Richard Bevan
7/18/2014	Motion to Take Judicial Notice	G. Richard Bevan
	Brief in Support of Motion for Summary Dismissal of Petitioner's Amended DNA and Successive Petition for Post-Conviction Relief	G. Richard Bevan
	Motion for Summary Dismissal of Petitioner's Amended DNA and Successive Petition for Post-Conviction Relief	G. Richard Bevan
8/21/2014	Notice Of Hearing	G. Richard Bevan
	Hearing Scheduled (Motion 09/18/2014 10:00 AM) for Summary Dismissal of Petitioner's Amended DNA and Successive Petition for Post Conviction Relief	G. Richard Bevan
8/25/2014	Objection to Respondent's Motion for Summary Dismissal	G. Richard Bevan
9/3/2014	Second affidavit of Dr. Greg Hampikian	G. Richard Bevan
9/16/2014	Motion to Continue Respondent's Motion for Summary Dismissal of Petitioner's Amend DNA and Successive Petition for Post-Conviction Relief	G. Richard Bevan
	Order Continuing Respondent's Motion for Summary Dismissal of Petitioner's Amended DNA and Successive Petition for Post Conviction Relief	G. Richard Bevan
	Continued (Motion 10/20/2014 01:30 PM) for Summary Dismissal of Petitioner's Amended DNA and Successive Petition for Post Conviction Relief	G. Richard Bevan
10/10/2014	Reply Brief in Support of Motion for Summary Dismissal of Petitioner's Amended DNA and Successive Petition for Post-Conviciton Relief	G. Richard Bevan
10/20/2014	Hearing result for Motion scheduled on 10/20/2014 01:30 PM: Court Minutes for Summary Dismissal of Petitioner's Amended DNA and Successive Petition for Post Conviction Relief HELD IN TWIN FALLS	G. Richard Bevan

Sarah M Johnson, Plaintiff vs State Of Idaho, Defendant

Post Conviction Relief

Date		Judge
10/20/2014	Hearing result for Motion scheduled on 10/20/2014 01:30 PM: District Court Hearing Held Court Reporter: Virginia Bailey Estimated Number of Transcript Pages for this hearing: less 100; HELD IN TWIN FALLS for Summary Dismissal of Petitioner's Amended DNA and Successive Petition for Post Conviction Relief	G. Richard Bevan
	Case Taken Under Advisement	G. Richard Bevan
10/27/2014	no longer u/a	G. Richard Bevan
	Order granting motion for summary dismissal of Petitioner's Amended DNA and successive petition for post conviction relief	G. Richard Bevan
	Judgment	G. Richard Bevan
	STATUS CHANGED: Closed	G. Richard Bevan
	Civil Disposition entered for: State Of Idaho, Other Party; Johnson, Sarah M, Subject. Filing date: 10/27/2014	G. Richard Bevan
11/6/2014	Memorandum in support of Motion to Alter or Amend the Judgment	G. Richard Bevan
	Motion to Alter or Amend the Judgment	G. Richard Bevan
	Renewed Motion to Take Judicial Notice	G. Richard Bevan
12/3/2014	Notice Of Appeal	G. Richard Bevan
	STATUS CHANGED: Inactive	G. Richard Bevan
	Appealed To The Supreme Court	G. Richard Bevan
	Motion to Appoint State Appellate Public Defender	G. Richard Bevan
12/8/2014	Response to Petitioner's Motion to Alter or Amend Judgment	G. Richard Bevan
12/9/2014	Notice and Order Appointing State Appellate Public Defender in Direct Appeal	G. Richard Bevan
12/10/2014	Notice Of Hearing	G. Richard Bevan
	Hearing Scheduled (Motion 02/20/2015 03:00 PM) Twin Falls County Courthouse	G. Richard Bevan
12/17/2014	Continued (Motion 03/02/2015 03:00 PM) Twin Falls County Courthouse	G. Richard Bevan
	Amended Notice Of Hearing	G. Richard Bevan
2/23/2015	Subject: Johnson, Sarah M Appearance Dennis A. Benjamin	G. Richard Bevan
	Subject: Johnson, Sarah M Appearance Deborah Whipple	G. Richard Bevan
	Notice of Association of Counsel	G. Richard Bevan
3/4/2015	Order Denying Motion to Alter or Amend the Judgment	G. Richard Bevan
3/6/2015	Amended Notice of Appeal	G. Richard Bevan

Dennis Benjamin, ISB No. 4199
Deborah Whipple, ISB No. 4355
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
303 W. Bannock
P.O. Box 2772
Boise, ID 83701
(208) 343-1000
(208) 345-8274 (f)

Pro Bono Attorneys for Petitioner

IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SARAH MARIE JOHNSON, Petitioner, vs. STATE OF IDAHO, Respondent.	CV-2006-0000324 **DNA AND SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF**

Sarah Johnson brings this action pursuant to I.C. §§ 19-4901, 4902(b) and 4908, and alleges as follows:

GENERAL ALLEGATIONS:

1. Petitioner Sarah Johnson is currently incarcerated at the Pocatello Women's Correctional Center in Pocatello, Idaho.

2. Sarah is serving a sentence imposed by the District Court of the Fifth Judicial District, State of Idaho, County of Blaine, the Honorable R. Barry Wood, presiding.

3. The Blaine County Court number for that case is CR-2003-18200.

4. Sarah was charged with two counts of first degree murder in the deaths of her parents

Alan and Diane Johnson.

5. Sarah was convicted following a jury trial.

6. Sarah was represented at trial by attorneys Robert Pangburn and Mark Rader.

7. The State was represented by Blaine County Prosecuting Attorney Jim Thomas and Deputy Prosecuting Attorney Justin Whatcott.

8. On June 30, 2005, the District Court sentenced Sarah to two fixed life terms. (The term on Count One was fixed life; the term on Count Two was life plus a fifteen year firearm enhancement with a minimum term of life.)

9. Trial counsel Pangburn and Rader failed to file a timely notice of appeal.

10. On April 19, 2006, Sarah filed a timely *pro se* petition for post-conviction relief.

11. Stephen D. Thompson was appointed to represent Sarah.

12. On July 3, 2006, a new appeal period was granted and the remaining post-conviction proceedings were stayed.

13. An appeal was taken with Sara Thomas and Jason Pintler of the SAPD representing Sarah.

14. The issues on appeal were:

> 1) Did the district court constructively amend the Amended Indictment by giving an aiding and abetting instruction violating Sarah's rights under both the Federal and Idaho constitutions requiring Sarah's conviction to be vacated?
>
> 2) Did giving the aiding and abetting instruction constitute a fatal variance violating Sarah's Fourteenth Amendment right to due process requiring Sarah's conviction to be vacated?
>
> 3) Did the district court deny Sarah her constitutional and statutory rights to a unanimous jury verdict when it failed to give the jury a unanimity instruction?

4) Did the district court deny Sarah's constitutional rights to a jury trial and to a fair trial when, after juror number 85 candidly confessed that he could not follow all of the court's instructions, the court failed to either remove the juror from the jury pool or obtain an unequivocal assurance from the juror that he would in fact follow all of the district court's instructions?

15. On June 27, 2008, the Supreme Court denied appellate relief. *State v. Johnson,* 145 Idaho 970, 188 P.3d 912 (2008) is attached as Appendix A to this petition.

16. On August 4, 2008, the Remittitur was entered.

17. The stay of the remaining post-conviction proceedings was lifted and Christopher Simms was appointed to represent Sarah.

18. On September 15, 2009, the case was reassigned from Judge Wood to Judge G. Richard Bevan.

19. On January 12, 2010, a second amended petition was filed.

20. Some of the claims for relief were ultimately conceded by Sarah, some were dismissed on summary judgment, and some were denied following an evidentiary hearing.

21. The specific claims and resolutions are as follows:

1) Sarah is innocent. This claim was denied in summary judgment on the basis that factual innocence is not a ground for post-conviction relief.

2) The district court lacked jurisdiction to try, convict and sentence Sarah. This claim, based upon the exercise of district court adult jurisdiction without a wavier hearing, was denied in summary judgment on the ground that no waiver hearing was required.

3) Sarah's constitutional rights to due process were violated. This claim was based upon an assertion that the trial judge had conducted an independent investigation and therefore was not neutral and unbiased. In addition, it was alleged that the court had violated the Sixth Amendment and Article 1, Section 13 of the Idaho constitution by impermissibly limiting the cross-examination of Bruno Santos. This claim was dismissed based in part upon a concession that it was without merit (as to the conduct of an independent investigation) and in part

upon summary judgment on the grounds that it could have been raised on appeal.

4) Sarah's state and federal constitutional rights to the effective assistance of counsel were denied. Sarah asserted that the specific allegations of ineffective assistance of counsel stemmed from an overall lack of diligence, failure to investigate the facts and law, chronic tardiness, and unpreparedness for court proceedings which resulted cumulatively and individually in ineffective assistance. The specific instances of ineffectiveness asserted were:

> a) Ineffective assistance in failing to move for a continuance of the trial to investigate and prepare an adequate defense when the state delayed its disclosure of material evidence (that the comforter on the Johnsons' bed covering Diane's body had been discarded and not gathered as physical evidence). This claim was denied following an evidentiary hearing.
>
> b) Ineffective assistance in failing to prepare and investigate and cross-examine the state's witnesses including Matt Johnson, Alan and Julia Dupuis, Kjell Elisson, Walt Femling, Steven Harkin, Bruno Santos, Consuelo Cedeno, Glenda Osuno, Luis Ramirez, Jane Lopez, Becky Lopez, Carlos Ayala, Raul Ornelas, and Stu Robinson. Sarah later conceded that there was no ineffective assistance in the cross-examination of Matt Johnson. The remaining claims were denied following the evidentiary hearing.
>
> c) Ineffective assistance in failing to present the testimony of various neighbors regarding events they observed and heard prior to the offenses. Sarah withdrew the claim as to one neighbor and the claim as to the other neighbors was denied in summary judgment.
>
> d) Ineffective assistance in dealing with fingerprint issues, specifically in failing to adequately investigate all available fingerprint evidence, in failing to object to the untimely disclosure of fingerprint evidence, and in failing to move for a continuance based upon untimely disclosure. Sarah conceded that summary dismissal was appropriate for all claims related to fingerprint evidence except for the allegation that counsel was ineffective in failing to elicit from the defense expert his opinion that latent prints found on the tools of murder were fresh prints. That claim was denied following an evidentiary hearing.
>
> e) Ineffective assistance in failing to lay a proper foundation for

psychological opinion evidence during the hearing to suppress Sarah's statements. Sarah conceded that summary dismissal of this claim was appropriate.

f) Ineffective assistance in dealing with the aiding and abetting theory of guilt. Sarah conceded that summary dismissal of this claim was appropriate.

g) Ineffective assistance in investigating the allegation of Steven Pankey. The district court found that this claim was time barred.

h) Ineffective assistance in failing to utilize readily available psychiatric evidence. The district court dismissed this claim on the basis that the evidence would not have been admissible at trial.

I) Ineffective assistance due to violations of the Rules of Professional Conduct. This claim was dismissed in summary judgment.

j) Ineffective assistance of appellate counsel in failing to raise the issue of error in denying the motion to suppress statements and in failing to raise the issue of insufficient evidence to support an aiding and abetting instruction. This claim was partly conceded and partly dismissed in summary judgment.

5) Newly discovered evidence that Christopher Hill's fingerprints were on the rifle, the rifle scope, and an insert from the ammunition box required a new trial. This claim was denied following an evidentiary hearing.

22. The final judgment in the original post-conviction case was entered on April 8, 2011.

23. A timely appeal was taken and remains pending.

24. Dennis Benjamin and Deborah Whipple represent Sarah on that appeal.

FIRST CAUSE OF ACTION: ***Petitioner Requests DNA Testing On Evidence Secured In Her Trial Which Was Not Subject To The Testing Now Requested Because That Testing Was Not Then Available.***

25. Sarah's parents, Diane and Allen Johnson, were shot with a rifle belonging to their renter, Mel Speegle, around 6:20 a.m. on September 2, 2006.

26. The only question at trial was identity -- whether Sarah or someone else killed her parents.

27. The State's theory was that Sarah wore a bathrobe backwards while shooting her mother at contact or near contact range as her mother slept, and shooting her father from a short range as he came out of the shower.

28. At the time of the original testing, the State had a DNA reference sample from Bruno Santos who had been dating Sarah.

29. Well after the trial, the State obtained a DNA reference sample from Christopher Hill after it discovered that his fingerprints were on the murder weapons.

30. The robe, the rifle, Bruno Santos' pants, and other evidence were seized, analyzed and tested for blood spatter and DNA.

31. The evidence was sent to Orchid Celmark for testing, and a report was issued on May 13, 2004. A copy of the Celmark STR Analysis report is attached as Appendix B to this Petition. A copy of the Celmark mtDNA analysis is attached as Appendix C.

32. An adequate chain of custody of the evidence is established by the fact that the evidence was held admissible at trial and has remained in state custody since.

33. There exists new technology for testing which was not available at the time of trial.

34. The testing done in 2004 was inconclusive in the following respects:

a) Bloodstain 2 from the robe contains a mixture of at least three individuals including an unknown individual. This evidence may now be compared to a reference sample from Christopher Hill which was not available at the time of trial, and deduced profiles may be submitted to the state and federal CODIS databases.

b) The tissue from the left collar area of the robe is from an unknown male. Alan Johnson and Bruno Santos are excluded as potential contributors. This evidence may now be compared to a reference sample from Christopher Hill which was not available at the time of trial, and deduced profiles may be submitted to the state and federal CODIS databases.

c) Bloodstain C on the rifle is from an unknown male excluding Alan Johnson and Bruno Santos. This evidence may now be compared to a reference sample from Christopher Hill which was not available at the time of trial, and deduced profiles may be submitted to the state and federal CODIS databases.

d) No conclusions could be reached due to insufficient amounts of DNA concerning bloodstain 24 from the robe, the tissue from the lower left side of the robe, the tissue from the inside lower back of the robe, the tissue from the inside left sleeve of the robe, the stain from Bruno Santos' pants, the fibers imbedded in unknown material, bloodstain B from the rifle, and bloodstain G from the rifle. This evidence may now be tested using advanced DNA amplification and purification techniques and once analyzed, compared to reference samples from the time of trial and to a reference sample from Christopher Hill which was not available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Celmark and others. These techniques include post amplification cleanup with Montage columns, and Low Copy Number (LCN) DNA analysis. The deduced profiles may be submitted to the state and federal CODIS databases.

e) Robe samples #24-30 were never analyzed and may now be subjected to DNA analysis. This evidence may now be tested using advanced DNA amplification and purification techniques and once analyzed, compared to reference samples from the time of trial and to a

reference sample from Christopher Hill which was not available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Celmark and others. These techniques include post amplification cleanup with Montage columns and Low Copy Number (LCN) DNA analysis. The deduced profiles may be submitted to the state and federal CODIS databases.

f) The results from Robe sample 34, if any, are not listed on the Celmark DNA report. This evidence may now be tested using advanced amplification techniques and once analyzed, compared to reference samples from the time of trial to a reference sample from Christopher Hill which was not available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Celmark and others. These techniques include post amplification cleanup with Montage columns and Low Copy Number (LCN) DNA analysis. The deduced profiles may be submitted to the state and federal CODIS databases.

g) DNA from the unidentified fingerprint on the .264 round (Item # 14) may now be tested using advanced DNA amplification and purification techniques and once analyzed, compared to reference samples from the time of trial to a reference sample from Christopher Hill which was not available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Celmark and others. These techniques include post amplification cleanup with Montage columns and Low Copy Number (LCN) DNA analysis. The deduced profiles may be submitted to the state and federal CODIS databases.

h) DNA from the unidentified fingerprints on the doorknob set on Diane and Alan Johnson's bedroom door (Items # 15-16) may now be tested using advanced techniques not available at the time of trial and compared to reference samples from the time of trial and after

and submitted to a CODIS database.

I) DNA from the palm prints (Items 20-2 and 20-3) may now be tested using advanced DNA amplification and purification techniques and once analyzed, compared to reference samples from the time of trial to a reference sample from Christopher Hill which was not fully available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Celmark and others. These techniques include post amplification cleanup with Montage columns and Low Copy Number (LCN) DNA analysis. The deduced profiles may be submitted to the state and federal CODIS databases.

j) DNA from the print on the empty shell casing (Item 12-1) may now be tested using advanced DNA amplification and purification techniques and once analyzed, compared to reference samples from the time of trial to a reference sample from Christopher Hill which was not available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Celmark and others. These techniques include post amplification cleanup with Montage columns and Low Copy Number (LCN) DNA analysis. The deduced profiles may be submitted to the state and federal CODIS databases.

k) One of the two hair samples recovered from the barrel of the .264 rifle could not be matched to Sarah or any of her maternal relatives by mitochondrial DNA testing. This hair can now be compared to a DNA reference sample from Christopher Hill which was not available at the time of trial.

l) Two of the three hairs removed from Bruno Santo's sweater were excluded as coming from Sarah and could not be identified as coming from a particular maternal line. These hairs can now be compared to a new DNA reference sample from Christopher Hill. One of the

hairs also had a small root and could be analyzed using advanced DNA amplification and purification techniques and once analyzed, compared to reference samples from the time of trial to a reference sample from Christopher Hill which was not available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Celmark and others. These techniques include post amplification cleanup with Montage columns and Low Copy Number (LCN) DNA analysis. The deduced profiles may be submitted to the state and federal CODIS databases.

m) DNA from an unknown contributor found on the inside of the latex glove can now be analyzed using advanced DNA amplification and purification techniques and once analyzed, compared to reference samples from the time of trial to a reference sample from Christopher Hill which was not fully available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Celmark and others. These techniques include post amplification cleanup with Montage columns and Low Copy Number (LCN) DNA analysis. The deduced profiles may be submitted to the state and federal CODIS databases.

n) low levels of DNA from an unidentified source were found on the leather glove from the garbage can. That DNA can now be analyzed using advanced DNA amplification and purification techniques and once analyzed, compared to reference samples from the time of trial to a reference sample from Christopher Hill which was not fully available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Celmark and others. These techniques include post amplification cleanup with Montage columns and Low Copy Number (LCN) DNA analysis. The deduced profiles may be submitted to the state and federal CODIS databases.

o) A bloody handprint was found on the sheet under the pillow beneath Diane. DNA from that handprint can now be amplified using new fingerprint DNA analysis to determine whether the handprint was made by Alan or some other person after Diane was shot. See T Tr. Vol. 6, p. 4238, ln. 25- p. 4239, ln. 12.

35. The 2004 testing was also inconclusive insofar as the results were not compared with Christopher Hill's DNA profile which is now available with an appropriate chain of custody as documented in the Blaine County Sheriff's Office Supplemental Report 6 showing that four buccal swabs were obtained from Mr. Hill on April 7, 2009.

36. The 2004 testing was also inconclusive insofar as the results were not compared with Matthew Johnson's DNA profile.

37. The requested testing has the scientific potential to produce new, non-cumulative evidence that Sarah is innocent.

38. The testing method requested will likely produce admissible results under the Idaho Rules of Evidence.

Why Relief Should Be Granted On This First Cause Of Action

Idaho Code § 19-4902(b) allows a petitioner to file at any time a petition for the performance of fingerprint or forensic DNA testing that was secured in relation to the trial which resulted in the conviction but which was not subject to the testing that is now requested because the technology for the testing was not available at the time of trial.

The petitioner must present a prima facie case that: 1) identity was an issue in the trial; and 2) that the evidence has been subject to a chain of custody sufficient to establish that such evidence has not been substituted, tampered with, replaced or altered in any material aspect. I.C.

§ 19-4902(c). This has been established in this case per the above allegations.

Testing is to be allowed upon a determination that: 1) the result has the scientific potential to produce new, noncumulative evidence that would show that it is more probable than not that the petitioner is innocent; and 2) the testing method requested would likely produce admissible results under the Idaho Rules of Evidence. I.C. § 19-4902(e).

The testing requested does have the scientific potential to produce new, noncumulative evidence that would show it is more probable than not that Sarah is innocent. When Sarah's parents were shot, even according to the State's expert witness, blood spatter and human tissue were broadcast in a very wide area, even out of the room and across the hallway into Sarah's bedroom. However, Sarah had absolutely no blood or any other debris anywhere on her person, which made it highly unlikely that she could have been the shooter. If the testing of the previously untested and/or unidentified DNA on the robe, rifle, round, doorknob, palm print, hair on the rifle, Bruno's sweater, latex, and/or leather glove are shown to match Christopher Hill, Matthew Johnson, or other known persons it would go to show that person committed the crimes, not Sarah.

Further, the State's theory of the case was that Sarah did not have blood on her because her mother's head was covered with a comforter which the State discarded. If Alan's DNA is in the bloody handprint on the sheet, it will go to show that Alan pulled the comforter up over Diane's body after she was shot. This will undermine the theory that Sarah could have committed these crimes without getting any blood or other debris on herself and will show it is more probable than not that she is innocent.

Additionally, as set out in Dr. Hampikian's affidavit which will be filed within 14 days,

the testing requested will likely produce admissible results under the Idaho Rules of Evidence. See IRE 702.

SECOND CAUSE OF ACTION: ***Sarah Was Denied Effective Assistance Of Counsel At Trial And On Appeal In Violation Of The Sixth Amendment and Idaho Constitution Article I, Section 13 Under Strickland v. Washington***

A. Trial Counsel Was Ineffective In Failing To File A Motion To Dismiss Pursuant To Arizona v. Youngblood Following The State's Denial Of Due Process In Discarding The Comforter From The Johnsons' Bed

Facts Pertaining to Claim

39. One of the major weaknesses in the State's case was the fact that Sarah had no blood anywhere on herself except on the bottom of her socks.

40. The State's expert, Mr. Englert, explained this lack of blood by positing that Diane Johnson's head was covered with a comforter at the time she was shot, that the shot was fired through the comforter and the comforter stopped blood from getting on Sarah.

41. The comforter was found tucked in tightly over Diane's head; however, the State presented no evidence to explain how Diane managed to so tightly tuck her own body under it.

42. There was evidence presented that Alan Johnson moved from the bathroom to the side of the bed next to Diane's head before he died.

43. From this it appeared possible that Alan had tucked the comforter over Diane's head after the shooting.

44. If the comforter was pulled over Diane's head after the shooting, it absolutely could not have protected the shooter from blood exposure per the State's theory.

45. The State discarded this comforter after having already formed the hypothesis that Sarah was the shooter despite the lack of blood on her.

46. Officer Kirtley testified that he observed the comforter and did not see any bullet holes in it.

47. The comforter would have provided exculpatory evidence if it had either a hand or fingerprint consistent with Alan having pulled it up over Diane's head or if it did not have a bullet hole it in.

48. The failure of the State to preserve this evidence was the basis for a valid motion to dismiss pursuant to *Arizona v. Youngblood,* 488 U.S. 51 (1988). *See U.S. v. Cooper,* 983 F.2d 928 (1993); *Griffin v. Spratt,* 768 F.Supp. 153 (E.D. Pa. 1991), judgment rev'd in part, 969 F.2d 16 (3rd Cir. 1992); *Stuart v. State,* 127 Idaho 806, 907 P.2d 783 (1994).

49. The failure to move for dismissal was deficient performance of counsel because such a motion would have been successful and there can be no strategic purpose for not seeking dismissal of the charges against the Petitioner.

50. The failure of post-conviction counsel to raise this issue as part of the ineffective assistance of counsel claim was also ineffective and justifies the filing of this successive petition.

Why Relief Should be Granted on This Basis

A defendant in a criminal case is guaranteed the effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution. The Sixth Amendment has been incorporated through the Due Process Clause of the Fourteenth Amendment to apply to the states. *See Powell v. Alabama,* 287 U.S. 44, 73 (1932). Idaho law also guarantees a criminal defendant's right to effective counsel. Idaho Const. Art. I, § 13; I.C. § 19-852. Further, these rights apply to juveniles. *In re Gault,* 387 U.S. 1, 34 (1967).

In general, a claim of ineffective assistance of counsel, whether based upon the state or

federal constitutions, is analyzed under the familiar *Strickland v. Washington,* 466 U.S. 668 (1984) standard. In order to prevail under *Strickland,* a petitioner must prove: 1) that counsel's performance was deficient in that it fell below standards of reasonable professional performance; and 2) that this deficient performance prejudiced the defendant. *Strickland v. Washington,* 466 U.S. at 689. The prejudice prong is shown if there is a reasonable probability that a different result would have been obtained in the case if the attorney had acted properly. *Id.*

In *California v. Trombetta,* 467 U.S. 479, 489, 104 S.Ct. 2528, 2534 (1984), the Supreme Court held that the government violates a defendant's right to due process if evidence it failed to preserve possessed "exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Arizona v. Youngblood,* 488 U.S. 51, 58, 109 S.Ct. 333, 337 (1988), adds the further requirement that the police acted in bad faith in failing to preserve the potentially useful evidence. The presence or absence of bad faith turns on the government's knowledge of the apparent exculpatory value of the evidence at the time it was lost or destroyed. *Youngblood,* 488 U.S. at 56-57 ftnt. *, 109 S.Ct. at 336-337, ftnt. *.

In this case, the State discarded the comforter that they claimed was over Diane's head at the time she was shot. At the time the evidence was discarded, the State had focused on Sarah as a suspect and also knew that Sarah did not have any blood spatter or tissue on her body or pajamas which was extremely inconsistent with its theory that she had killed her mother with a contact shot to the head. Thus, the State knew that it would have to explain this lack of evidence to prove Sarah guilty and that the comforter would be a key element of this explanation. The State's officer also knew that he had looked at the comforter and seen that it did not have a bullet

hole in it and further, state officers knew that the comforter had been tucked in firmly over Diane's head.

Thus, the comforter was of apparent exculpatory value. Its lack of a bullet hole would go to prove Sarah could not have fired the fatal shot and its condition of being firmly tucked in over Diane's head showed that it had been placed there after her death, not before, again going to prove that Sarah was not the shooter.

However, knowing this, the State nevertheless discarded the comforter.

Further, Sarah would not be able to obtain comparable evidence by other reasonably available means. Once the comforter was destroyed, there was no way for Sarah to show that it did not have a bullet hole in it.

Under these conditions, if counsel had moved to dismiss pursuant to *Youngblood,* the motion would have been granted. *Youngblood, supra. See also, U.S. v. Cooper, supra*; *Griffin v. Spratt, supra*; *Stuart v. State,* 127 Idaho 806, 907 P.2d 783 (1994).

Failure to move to dismiss was deficient performance. Further, the deficiency was prejudicial because filing the motion to dismiss would have resulted in dismissal.

On these grounds, post-conviction relief must be granted.

B. Trial Counsel Was Ineffective In Failing To Present Evidence Regarding Janet Sylten's Parole Status At The Time Of The Johnsons' Murders

Facts Pertaining to Claim

51. At trial, evidence was presented that Sarah had stated that a cleaning woman had been accused of stealing (and most likely had stolen) some expensive lotion from the Johnson house.

52. Evidence was presented that this cleaning woman was Janet Sylten and that she had committed a theft from the Johnsons.

53. Evidence was further presented that Sarah said that the cleaning woman had telephoned Diane Johnson (who was planning on going to the police regarding the thefts), and that Diane found the communication frightening, threatening, and upsetting.

54. Additionally, evidence was presented that Sarah said people were outside the Johnson home in the early morning hours on the day of the murders and that Diane Johnson recognized the voice of one of the people present as the cleaning woman.

55. The State's theory at trial was that Sarah's statements were false and intended to divert suspicion from herself.

56. At trial, Ms. Sylten testified that she never took anything from the Johnson house, never spoke with Diane, was not at the house in the early morning of the day of the murders and was not connected in any way with the murders.

57. However, at the time of the Johnsons' murders, Ms. Sylten had just been released from prison on parole on a charge of aggravated battery against a correctional officer. ROA attached as Appendix D.

58. Ms. Sylten's parole status provided a motive for her to threaten Diane when she knew that Diane might go to the police about the theft of her lotion, provided a motive for her to harm or kill the Johnsons, and provided a motive for her to lie at trial about her involvement with the Johnsons.

59. However, trial counsel never presented this evidence to the jury.

60. The failure to present evidence to impeach Ms. Sylten and demonstrate her motives

to lie and harm the Johnsons, especially Diane Johnson, was deficient performance of counsel as the information on Janet's parole status was readily available to counsel and there could be no possible strategic purpose in not presenting evidence in support of the defense theory of alternate perpetrators.

61. The failure of post-conviction counsel to raise this issue as part of the ineffective assistance of counsel claim was also ineffective and justifies the filing of this successive petition.

Why Relief Should Be Granted On This Basis

As discussed above, Sarah had a constitutional right to effective assistance of counsel. *Strickland v. Washington.* To demonstrate ineffective assistance, deficient performance and prejudice must be shown.

The failure to present evidence of Ms. Sylten's parole status was deficient performance because the evidence was readily available and admissible. Even if the evidence was construed to be evidence of other crimes, it would nonetheless be admissible to prove motive to lie and to harm the Johnsons, most especially Diane, because if Diane contacted the police with allegations of theft by Ms. Sylten, it would have endangered Ms. Sylten's parole status. IRE 404(b).

Moreover, failure to present this evidence could not have been strategic because there was absolutely no advantage to Sarah in not presenting the evidence, while presenting the evidence would have had the clear advantage of supporting Sarah's statements that Ms. Sylten had threatened the family and was at the house the morning of the killings. *McKay v. State,* 148 Idaho 567, 225 P.3d 567 (2010).

Lastly, the failure to present this evidence was prejudicial. When questioned about who might have had a motive to harm her parents, Sarah repeatedly stated that her mother was having

a dispute with a cleaning woman who had made threats and who had been in the yard early in the morning the day of the crimes. The State's theory of the case was that Sarah had made up this story to divert attention from her and Ms. Sylten's denial at trial that she had ever threatened Diane, been at the house on the day of the murders, or had anything to do with the murders supported the State's theory of the case. However, had the jury known of Ms. Sylten's parole status, it could have concluded that Ms. Sylten did have a motive to stop Diane from reporting her theft, that she did make threats to Diane, and that she was at the house and even that she had something to do with the murders. At the very least, the jury would have concluded that Sarah's statements that Diane was having a dispute with Ms. Sylten and that Ms. Sylten had said something that scared Diane were accurate. Such a conclusion would have resulted in a reasonable probability of a different result because as noted above, the physical evidence in the case was inconsistent with Sarah's guilt; Sarah had no blood or tissue on her even though blood and tissue was propelled throughout the room when Diane was shot. Had the jury also known that Sarah was not lying about Ms. Sylten's contact with the family, it is reasonably likely that Sarah would not have been convicted.

C. Trial Counsel Was Ineffective In Failing To Object To Prosecutorial Misconduct Throughout The Trial

Facts Pertaining to Claim

62. Throughout the proceedings, prosecutorial misconduct occurred without defense objection.

63. In pretrial proceedings, Mr. Thomas, the prosecuting attorney volunteered to the Court that he had told all state officials involved in the case that they could not talk to the

defense without him or his agent present. T Tr Vol. 2, p. 840, ln. 12-p. 844, ln. 18.

64. The State began its opening statement by telling the jury that although the case was State of Idaho vs. Sarah Johnson, it was about "a whole lot more. It's about these two people, Alan and Diane Johnson. Hard-working, honest, good, decent people, whose murder left a grieving son, a brother, sisters, parents, and a host of good friends." T Tr. Vol. 3, p. 1471, ln. 19-22.

65. This argument was misconduct because it played upon the sympathies of the jury and urged them to return a verdict based on information other than the properly admitted relevant evidence.

66. In closing argument, the State committed misconduct by shifting the burden of proof. The State's argument was based, in part, on the theme that the defense had not proven that someone besides Sarah had committed the murders. T Supp. Tr. p. 175-218.

67. Defense counsel did not object to the above-noted misconduct.

68. The failure to object to prosecutorial misconduct was deficient performance because the misconduct was readily apparent and because there could be no strategic purpose in allowing any of this misconduct.

69. The failure to object at trial prevented a claim of prosecutorial misconduct from being raised on appeal.

70. The failure of post-conviction counsel to raise this issue as part of the ineffective assistance of counsel claim was also ineffective and justifies the filing of this successive petition.

Why Relief Should Be Granted On This Basis

As discussed above, Sarah had state and federal constitutional rights to effective

assistance of counsel. *Strickland, supra.*

The law on prosecutorial misconduct has long been established:

> . . . A prosecuting attorney is a public officer, "acting in a quasi judicial capacity." It is his duty to use all fair, honorable, reasonable, and lawful means to secure the conviction of the guilty who are or may be indicted in the courts of his judicial circuit. He should see that they have a fair and impartial trial, and avoid convictions contrary to law. Nothing should tempt him to appeal to prejudices, to pervert the testimony, or make statements to the jury, which, whether true or not, have not been proved. The desire for success should never induce him to endeavor to obtain a verdict by arguments based on anything except the evidence in the case, and the conclusions legitimately deducible from the law applicable to the same. . . .
>
> It will be observed from the foregoing authorities that the courts do not look with favor upon the action of prosecutors in going beyond any possible state of facts which can be material as to the guilt or innocence of the defendant in a particular case for which he is upon trial. Prosecutors too often forget that they are a part of the machinery of the court, and that they occupy an official position, which necessarily leads jurors to give more credence to their statements, action, and conduct in the course of the trial and in the presence of the jury than they will give to counsel for the accused. It seems that they frequently exert their skill and ingenuity to see how far they can trespass upon the verge of error, and generally in so doing they transgress upon the rights of the accused. It is the duty of the prosecutor to see that a defendant has a fair trial, and that nothing but competent evidence is submitted to the jury, and above all things he should guard against anything that would prejudice the minds of the jurors, and tend to hinder them from considering only the evidence introduced.
>
> *State v. Irwin,* 9 Idaho 35, 43–44, 71 P. 608, 609–11 (1903). *See also State v. Babb,* 125 Idaho 934, 942, 877 P.2d 905, 913 (1994); *State v. Givens,* 28 Idaho 253, 268, 152 P. 1054, 1058 (1915).

State v. Phillips, 144 Idaho 82, 87, 156 P.3d 583, 588 (Ct. App. 2007).

In this case, the prosecutor committed misconduct in seeking a conviction based not upon the evidence, but rather upon the jury's sympathies for the Johnsons and upon a shifting of the burden of proof to Sarah.

Had counsel objected, his objection would have been sustained, the misconduct would

have ceased, and a curative instruction would have been given.

The failure to object was deficient performance.

Moreover, the deficiency was prejudicial. As discussed above, the physical evidence was inconsistent with Sarah's guilt. If Sarah was guilty, she would have had blood residue or tissue somewhere on her. The test for blood residue is extremely sensitive (parts per 100,000), and shortly after the murders, Sarah (who had not showered) was thoroughly swabbed for blood residue, from her face, nostrils, behind her ears and on her hair. These tests were all completely negative for blood residue. Indeed, it seems unlikely that the prosecutors who were clearly intelligent and powerful advocates for the State would have resorted to misconduct had they not entertained fears that a conviction could not be obtained without the misconduct. Lawyers of their caliber likely would not have risked the validity of a conviction in this case by foolish misconduct in the absence of fears that the evidence alone was not sufficient to gain a conviction. Given this state of the evidence, it is reasonably probable that had the prosecutorial misconduct been objected to, Sarah would not have been convicted.

D. Trial Counsel Rendered Ineffective Assistance In Failing To Object To The Jury's Trip From Ada County To Bellevue, Idaho To Visit The Johnson House

Facts Pertaining to Claim

71. During the trial, the jury was taken on a day long bus trip to visit the Johnson house. Tr. Vol. 4, p. 2158, ln. 1-p. 2167, ln. 9.

72. The Court repeatedly instructed the jury that the trip to the house was not evidence and it was not to consider anything it saw there in its deliberations. T Tr. Vol. 4, p. 2361, ln. 7-p. 2265, ln. 15.

73. Defense counsel waived Sarah's presence during the jury view after the State argued that having her at the house would be prejudicial to its case against her. T Tr. Vol. 3, p. 1920, ln. 13- p. 1922, ln. 10.

74. Sarah did not learn until after the jury had been taken to Bellevue that the viewing had occurred.

75. Defense counsel did not object to the jury trip to the house, nor did counsel object to waiving Sarah's state and federal constitutional rights to be present during the proceedings against her. T Tr. Vol. 3, p. 1920, ln. 13-p. 1922, ln. 10.

76. The failure to object to the trip to the house was deficient performance of counsel. The trip presented the jury with information that the Court repeatedly told the jury was irrelevant to its deliberations, further the trip was highly prejudicial. Had defense counsel objected pursuant to IRE 401, 402, and 403, the Court would have denied the trip, or in the alternative, the issue would have been preserved for appeal where the appellate court would have found non-harmless error.

77. Counsel was further deficient in waiving, without her consent, Sarah's constitutional rights to be present at the proceedings against her. The State itself noted that Sarah's presence at the house would have "prejudiced" its case - i.e., would have made it harder for the State to prove its case against Sarah. Yet, Sarah had an absolute right to be present.

78. The failure of counsel to object prevented the claims from being raised on appeal.

79. The failure of post-conviction counsel to raise this issue as part of the ineffective assistance of counsel claim was also ineffective and justifies the filing of this successive petition.

Why Relief Should Be Granted On This Claim

As discussed above, Sarah had state and federal rights to effective assistance of counsel. *Strickland, supra.*

Counsel's performance in not objecting to the jury trip to the Johnson house was deficient performance because it was repeatedly stated to counsel by the Court that the trip was not going to produce relevant evidence and at the same time, it was obvious that the trip would promote the return of a guilty verdict on the basis of matters besides the evidence in case. If counsel would have objected pursuant to IRE 402 and 403, the objection would have been granted and the jury would not have visited the house, because "evidence" with no probative value cannot possibly outweigh the danger of unfair prejudice.

Further, this deficient performance was prejudicial. As noted before, the physical evidence was not consistent with Sarah's guilt. It was impossible that Sarah could have shot her mother and father and not have gotten any blood residue or tissue anywhere on herself. Given the state of the physical evidence, it is reasonably probable that had the jury not been taken on the trip to the Johnson's home, Sarah would not have been convicted.

Each Of These Instances Of Deficient Performance of Trial Counsel Was Individually and Cumulatively Prejudicial.

80. As set out above, each of these instances of deficient performance was individually prejudicial.

81. In addition, the cumulative effect of these instances of deficient performance was prejudicial insofar as but for the cumulative deficient performance, there is a reasonable probability of a different outcome insofar as it is reasonably probable that the State would have

been unable to obtain a conviction when the physical evidence was inconsistent with Sarah being present at the time her parents were killed.

THIRD CAUSE OF ACTION: ***Sarah Was Denied Effective Assistance Of Counsel In Violation Of The Sixth Amendment And Idaho Constitution Article I, Section 13 Under*** **United States v. Cronic** ***When Her Appointed Counsel Labored Throughout The Proceedings Under An Actual Conflict Of Interest***

Facts Pertaining to Claim

82. Sarah was represented at trial and sentencing by Robert Pangburn and Mark Rader pursuant to Mr. Pangburn's contract with Blaine County for the provision of indigent criminal defense.

83. Throughout the proceedings, Mr. Pangburn was involved in disputes with the county over the interpretation of the contract and whether or not he would be paid.

84. These disputes began just ten days after Sarah was charged, as documented in the hearing held on November 11, 2003. T Tr. Vol. 1, p. 1-20.

85. Even at that early date, Mr. Pangburn alerted the Court that the county contract conflicted with the Rules of Professional Conduct in requiring him to provide reports to the Court and the County Prosecutor to support his applications for payments of additional fees. T Tr. Vol. 1, p. 10, ln. 16-p. 11, ln. 8.

86. Disputes over the county contract continued throughout the representation and two years later, at the end of the trial, but prior to the filing of post trial motions and the sentencing, the chair of the Board of County Commissioners sent the Court a letter which resulted in the Court issuing a "show cause" hearing notice to Mr. Pangburn on April 15, 2005. T Supp. Tr. p. 406, ln. 11-22.

87. At the show cause hearing, the Court revoked the appointment of co-counsel Rader and all defense investigators for the remainder of the proceedings against Sarah. T Supp. Tr. p. 407, ln. 14-16.

88. At the show cause hearing, Mr. Pangburn alerted the Court that he had concerns that information about his reports was being improperly shared from a sealed file. T Supp. Tr. p. 411, ln. 20-p. 412, ln. 9.

89. The State argued that it should have access to all Mr. Pangburn's reports because, even though Sarah had not yet been sentenced and was facing the possibility of two terms of fixed life being imposed, there were no more strategic decisions to be made in the case. In the State's words, "Obviously, that's over." T Supp. Tr. p. 411, ln. 11-18.

90. Mr. Pangburn alleged at the show cause hearing that the statements in the County's letter to the Court were defamatory and wrong. T Supp. Tr. p. 414, ln. 12-17.

91. Mr. Pangburn further alleged that the County Commissioners had "mounted other attacks against me in this case," including not renewing his contract. T Supp. Tr. p. 415, ln. 6-8.

92. In response, the prosecutor representing the County Commissioners argued to the Court that the County's position was that "enough is enough," that the bills submitted to date were excessive and that Mr. Pangburn had billed over 1000 hours of attorney time for January and February alone. T Supp. Tr. p. 416, ln. 21-p. 417, ln. 5.

93. In response to these arguments, the Court interpreted the county/public defender contract, noting that the disputes had been existent since the beginning of the case, citing a date in December of 2004, when Mr. Pangburn interrupted the taking of a verdict in another trial, to move to withdraw from representing Sarah due to a contract issue. T Supp. Tr. p. 418, ln. 4-p.

421, ln. 22.

94. The Court further commented that Mr. Pangburn had been billing for advice to Sarah in the PSI process that the Court did not feel was warranted, including advice and assistance in filling out the PSI questionnaire. T Supp. Tr. p. 421, ln. 23-p. 425, ln. 3.

95. In reviewing and commenting on Mr. Pangburn's work for Sarah between conviction and sentencing, the Court noted that it was not making a personal attack on Mr. Pangburn, but that this was a matter of fiscal responsibility and the Court's duties under I.C. § 19-850 *et. seq.* T Supp. Tr. p. 423, ln. 14-24.

96. The Court also noted that there was a long running dispute as to what the rate of compensation was. T Supp. Tr. p. 425, ln. 4-2.

97. At that point, the Court also officially opened the sealed file of reports from Mr. Pangburn for inspection by the county with the offer to allow him to seek non-disclosure of certain items on an individual basis. T Supp. Tr. p. 427, ln. 15-p. 428, ln. 5.

98. The contract disputes generated several memorandums from both the State and defense counsel and resulted in two more hearings before Sarah's sentencing hearing on June 29, 2005. See T Supp. CR Vol. 2, pp. 310-340.

99. At the hearing on May 3, 2005, the prosecutor referred to undisclosed ongoing correspondence between the County Commissioners and Mr. Pangburn. T Supp. Tr. p. 436, ln. 6-13.

100. In response, the Court stated that it simply was not going to authorize any more payments to the defense until after the prosecutor had reviewed Mr. Pangburn's reports on May 17. T Supp. Tr. p. 436, ln. 24-p. 437, ln. 9.

101. On November 2, 2005, the Court entered a 37 page order governing further proceedings on claimed attorneys fees and expenses. T Supp CR Vol. 2, pp. 341-378.

102. This order documents the history of fee and billing disputes that continued throughout Mr. Pangburn's representation of Sarah. Id.

103. Yet another hearing was held on payment for Mr. Pangburn and the defense team on November 23, 2005. T Supp CR Vol. 2, pp. 382-3.

104. On January 31, 2006, the Court entered its final order regarding attorneys fees. In this order, the Court required Mr. Pangburn to immediately return to Blaine County any sums over $65.00 per hour that it had paid him; reduced his bill for time spent preparing billings and for time billed for his associate attorney; and reduced Mr. Pangburn's billing in other ways (for example deducting time Mr. Pangburn billed for researching the Rules of Professional Conduct). T Supp CR pp. 401-410.

105. Post-conviction counsel was ineffective in not raising this conflict as part of the ineffective assistance of counsel claim in the original petition.

Why Relief Should be Granted on this Claim

The Sixth and Fourteenth Amendments and Article I, § 13, guarantee the right to counsel. *Gideon v. Wainwright,* 372 U.S. 335, 342-43, 83 S.Ct. 792, 795-96 (1963). This right to counsel contemplates that counsel's assistance shall be untrammeled and unimpaired by a court order requiring that one lawyer simultaneously represent conflicting interests. *Glasser v. United States,* 316 U.S. 60, 69-70, 62 S.Ct. 457, 464-65 (1942), *superseded on other grounds as stated in Bourjaily v. United States,* 483 U.S. 171, 181, 107 S.Ct. 2775 (1987), and *Jackson v. Virginia,* 443 U.S. 307, 313-20, 99 S.Ct. 2781 (1979). The right to assistance of unconflicted counsel is so

fundamental that prejudice from its denial need not be shown. *Id.*, 315 U.S. at 75-76, 62 S.Ct. at 467-468. *See also, Cuyler v. Sullivan,* 446 U.S. 335, 100 S.Ct. 1708 (1980) (prejudice is presumed when counsel labors under an actual conflict of interest); and *United States v. Cronic,* 466 U.S. 648, 662, n. 31, 104 S.Ct. 2039, 2049, n. 31 (1984).

Mickens v. Taylor, 535 U.S. 162, 122 S.Ct. 1237 (2002), holds that in order to demonstrate a Sixth Amendment violation where the trial court fails to inquire into a potential conflict of interest based upon prior representation of the victim of the current criminal charges a petitioner must establish that the conflict adversely affected the representation. The question of whether a government created conflict through the payment system established for appointed counsel requires a showing of adverse impact or not has not been resolved by the Supreme Court. In this case, Sarah's counsel labored under an actual conflict of interest which had an adverse impact on her representation.

Idaho Rule of Professional Conduct 1.7(a)(2) states that a concurrent conflict of interest exists if there is a significant risk that the representation of a client will be materially limited by a lawyer's responsibilities to a third party. Comment 13 to the Rule states that a lawyer may be paid by a source other than the client, if the client is informed of that fact and consents and the arrangements does not compromise the lawyer's duty of loyalty or independent judgment to the client.

In this case, there was a conflict under RPC 1.7(a)(2) because there was no evidence that Sarah was informed and consented to the payment scheme established by Blaine County and her attorney, and further, and most importantly, the arrangement did compromise her lawyer's duty of loyalty insofar as in order to be paid, her counsel made reports to the county in violation of

RPC 1.6 regarding confidentiality of information. In assessing this, it is important to note that Sarah's lawyer did not just send the county a bill setting out the hours spent and seeking compensation; rather, he sent detailed reports explaining what was done during each billed hour. Such was a violation of the duty of confidentiality.

At least one other conflict of interest existed in the fee arrangement between the county and Sarah's attorney. The arrangement resulted in a violation of RPC 1.8(f) which provides:

> A lawyer shall not accept compensation for representing a client from one other than the client unless:
>
> (1) the client gives informed consent;
> (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
> (3) information relating to representation of a client is protected as required by Rule 1.6.

Sarah did not give informed consent; there was an interference with the client-lawyer relationship insofar as her counsel was torn between his duty to refrain from revealing confidential information to the county, his desire to be paid, his duty to zealously represent Sarah and his time spent arguing with the county about his billings. Also, much of the information relating to his representation of Sarah was not protected, but rather was revealed to the county and to the judge.

There was a conflict and there was an adverse impact on Sarah's representation insofar as confidential information was revealed to the county throughout the proceedings. Therefore, post-conviction relief should now be granted.

FOURTH CAUSE OF ACTION: ***Sarah Was Denied Effective Assistance Of Counsel On Direct Appeal As Guaranteed By The Sixth Amendment And Idaho Constitution Article I, Section 13***

A. Appellate Counsel's Failure to Raise the District Court Error in Denying The Motion to Suppress the Testimony of Malinda Gonzales was Ineffective.

Facts Pertaining to Claim

106. Trial counsel moved to suppress statements Sarah allegedly made to her cellmate Malinda Gonzales (while Sarah was being illegally held in the Blaine County adult jail with an adult cellmate) on the grounds that the statements were obtained in violation of her constitutional rights to remain silent and upon the grounds that the State should not be allowed to profit by using statements obtained during Sarah's illegal detention in an adult jail with convicted and charged adult prisoners. Motion To Suppress Defendant's Statements to Jail Inmates, T CR Vol. 2, p. 360.

107. Following a hearing, the District Court found that Sarah's detention violated Idaho law, but that the remedy is not the exclusion of the alleged incriminated statements, as that would not further the object of the state statutes prohibiting the incarceration of juveniles with adults. Order on Defendant's Motion To Suppress Defendant's Statement To Jail Inmates, Ex. ___ Vol. 3, p. 455.

108. Petitioner appealed from the judgment and sentence.

109. The State Appellate Public Defender was appointed to represent Petitioner on appeal.

110. Appellate counsel did not raise this issue on appeal.

111. Had the issue been raised on appeal, relief would have been granted.

112. The failure to raise this issue was deficient performance.

113. The failure of post-conviction counsel to raise this issue as part of the ineffective assistance of appellate counsel claim was also ineffective and justifies the filing of this successive petition.

Why Relief Should be Granted on This Claim

The right to effective assistance of counsel extends to the direct appeal of the conviction. *Evitts v. Lucey,* 469 U.S. 387, 105 S.Ct. 830 (1985).

With regard to Sarah's motion to suppress statements allegedly made to Malinda Gonzales, the district court found that Sarah's pre-trial incarceration with adult offenders was illegal, but held that the remedy was not suppression of her statements. Appellate counsel did not raise the issue on appeal.

The question of whether suppression of statements of juveniles illegally held in adult jails is proper is an open question in Idaho. However, as noted in *In re Gault,* 387 U.S. at 47:

> The privilege against self-incrimination is, of course, related to the question of the safeguards necessary to assure that admissions or confessions are reasonably trustworthy, that they are not the mere fruits of fear or coercion, but are reliable expressions of the truth. The roots of the privilege are, however, far deeper. They tap the basic stream of religious and political principle because the privilege reflects the limits of the individual's attornment to the state and - in a philosophical sense - insists upon the equality of the individual and the state. In other words, the privilege has a broader and deeper thrust than the rule which prevents the use of confessions which are the product of coercion because coercion is thought to carry with it the danger of unreliability. One of its purposes is to prevent the state, whether by force or psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction.

In illegally confining Sarah in an adult jail and then using statements she allegedly made to her adult cellmate against her at trial, the State violated Sarah's constitutional right against self-incrimination because Sarah spoke to the adult inmate only through the force and

psychological domination of the State in illegally imprisoning her. Moreover, the statements, if any were actually made, were untrustworthy as they were the fruit of fear and coercion – the fear and coercion experienced by a sixteen year old girl in an adult jail in direct contact with male and female adult prisoners – induced by the State's clear violation of the law.

The district court found that the proper remedy would not be exclusion of the statements because "it would not further the essential object of these statutes." However, the purpose of the exclusionary rule is to deter illegal state conduct. *See Terry v. Ohio,* 392 U.S. 1, 10 (1968), stressing that the exclusionary rule's major purpose is to deter lawless police conduct. The rule also serves the purposes of "the imperative of judicial integrity" in keeping courts from becoming accomplices to willful disobedience of the constitution and laws they are sworn to uphold. *See Terry v. Ohio, supra,* citing *Elkins v. United States,* 364 U.S. 206, 222 (1960). And, finally, the exclusionary rule serves to assure the people – all potential victims of unlawful government conduct – that the government will not profit from its lawless behavior, thus minimizing the risk of seriously undermining trust in government. *See State v. Koivu*, 38106, 2012 WL 665990 *5 (Idaho Mar. 1, 2012); ("In [*State v. Arregui*, 44 Idaho 43, 254 P. 788 (1927)] the Court made it clear that the evidence unlawfully obtained should be excluded simply because it was obtained in violation of the defendant's constitutional rights."); *United States v. Calandra,* 414 U.S. 338, 355 (1974) (Brennan, J. dissenting).

Indeed, the federal courts and other state courts have held that suppression is the proper remedy for evidence obtained as a result of police violation of state statutes in the handling of those accused of crimes. *See State v. Rauch,* 99 Idaho 586, 593, 586 P.2d 671, 678 (1978) (suppression appropriate remedy for violation of the "knock and announce" statute); *United*

States v. Mills, 472 F.2d 1231 (D.C. Cir. 1972) (suppression required where police violated statute which required giving defendant opportunity to post collateral for minor offense); *State v. Caldera,* 929 P.2d 482 (Wash. App. 1997) (suppression required where police violated a statute requiring the officer to read an arrest warrant and allow the defendant an opportunity to post bail); *People v. Greenwood,* 484 P.2d 1217 (Colo. 1971) (suppression required where officer erroneously advised defendant as to amount of bond he would have to post for automobile violations).

The district court erred in its determination of the purposes of the exclusionary rule. Had the court analyzed the suppression decision under the actual purposes of the rule – deterrence of illegal police conduct, the imperative of judicial integrity, and the assurance to the public that the state will not profit from illegal conduct – the statements obtained from Sarah while she was in the Blaine County jail in violation of Idaho law would have been suppressed on the grounds raised by trial counsel. Reasonable appellate counsel would have raised this claim on appeal. Appellate relief would have been granted because the district court erred in not suppressing the statements and the error was not harmless as Malinda Gonzales' testimony was the *only* testimony in the entire case that could have been construed by the jury as any sort of a confession. In light of the lack of any blood residue on Sarah, the case for conviction was thin and it cannot be said that use of the statements at trial was harmless. *Chapman v. California,* 386 U.S. 18 (1967).

B. Appellate Counsel's Failure to Argue that the Fixed Life Sentences Were Both Excessive and Unconstitutional was Ineffective.

Facts Pertaining to Claim

114. Petitioner was sentenced to two terms of fixed life even though she was sixteen years old at the time the offenses were committed.

115. Appellate counsel did not argue on appeal that the fixed life sentences were excessive given the facts of the case or that the sentences constituted unconstitutional cruel and unusual punishment under the Eighth and Fourteen Amendments to the United States Constitution and Idaho Constitution Art. I, § 6.

116. The failure to raise these claims on appeal was deficient performance.

117. Had appellate counsel raised either argument, the Idaho Supreme Court would have granted her sentencing relief.

118. Post-conviction counsel was ineffective in not raising an ineffective assistance of appellate counsel claim for failing to argue the excessive and unconstitutional sentence claims in the original petition.

Why Relief Should be Granted on this Claim

Sarah's counsel in direct appeal also rendered ineffective assistance in failing to argue that her sentences were excessive and unconstitutional. In particular, counsel was ineffective in not arguing that the two fixed life terms with a fifteen year enhancement were excessive as, given Sarah's youth and her previously non-existent criminal record, the sentences were excessive under any reasonable view of the evidence. The terms of confinement clearly exceeded that necessary to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution. *State v. Toohill,* 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). *See also, State v. Justice,* 152 Idaho 48, 53, 266 P.3d 1153, 1158 (Ct. App. 2011).

At age 16, Sarah was still a child. She had no prior crimes of any sort. A fixed term short of her entire life would certainly be sufficient to insure public safety. In a number of years, after she reached adulthood, the parole board could examine her record in prison and determine if and when she would pose no danger to society if released from prison.

And, deterrence is equally well served by a fixed sentence followed by an indeterminate term of life, as a fixed life term.

Likewise, any rehabilitative programs most surely can be completed well before the natural expiration of a 16-year-old's life.

And, while Sarah's family was indeed anxious for retribution on her, fixed life for a child is a sentence in excess of any rational and reasonable notice of retribution.

Had Sarah's direct appeal counsel raised the issue of excessive sentence, appellate relief would have been granted.

Moreover, appellate counsel was ineffective in not raising a claim that Sarah's sentences violate the Eighth and Fourteenth Amendments and Idaho Const. Article I, § 6 which prohibit the imposition of cruel and unusual punishments. The question of whether a fixed life sentence imposed on a juvenile violates federal constitutional protections is currently pending before the United States Supreme Court in two cases: *Miller v. Alabama,* SCT Docket Number 10-9646, and *Jackson v. Hobbs,* Docket Number 10-9647, argued March 20, 2012.

Had Sarah's appellate counsel raised the constitutional claim, either relief would have been granted in the Idaho appellate court or certiorari would have been granted in the United States Supreme Court.

Therefore, post-conviction relief should be granted on this claim.

FIFTH CAUSE OF ACTION: ***Sarah Was Denied Due Process Of Law As Guaranteed By The Fifth Amendment And Idaho Constitution Article I, Section 13 When The State Withheld The Material Exculpatory Evidence That The Fingerprints Found On The Rifle, Scope, And Ammunition Box Insert Had Been Run Through AFIS And Matched To Christopher Hill – Brady v. Maryland***

Facts Pertaining to Claim

119. After the trial, the state matched previously unidentified fingerprints on the murder weapon, its scope and its ammunition to Christopher Hill, a friend of Mel Speegle who lived in the Johnson guesthouse.

120. This evidence was exculpatory because it tended to show that Mr. Hill and not Petitioner was the one who shot Diane and Alan Johnson.

121. The state did not turn over this evidence to Petitioner once it was discovered.

122. Rather, a former employee of the Idaho State Police, Robert Kerchusky, learned of the information by informally inquiring of Maria Eguren, an employee of the state crime lab.

123. Ms. Eguren later testified that she knew of the identification and had not told Mr. Kerchusky about it, but that the information accidently "slipped out" after "several conversations" with Mr. Kerchusky. EH T pg. 767, ln. 14.

124. The withholding of exculpatory information from Petitioner violated her right to due process under the Fourteenth Amendment and Art. 1, § 13 of the Idaho Constitution under *Brady v. Maryland,* 373 U.S. 83, 87 (1963), and its progeny.

125. Post-conviction counsel did not raise a *Brady* claim in the original petition.

126. Instead he raised a newly discovered evidence claim based upon Mr. Kerchusky's discovery.

127. This Court denied the claim because it found the newly discovered evidence was

not likely to result in an acquittal.

128. It was ineffective of post-conviction counsel to fail to raise the claim as a *Brady* claim because the petitioner's burden of proof in a *Brady* claim is lower than the burden of proof in a newly discovered evidence claim.

129. Had post-conviction counsel alleged a *Brady* claim, this court would have granted relief because there is a reasonable probability that the withheld evidence would have caused a different result.

Why Relief Should be Granted as to this Claim

Brady v. Maryland, *supra*, holds that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. The *Brady* doctrine has been expanded to include instances where the exculpatory evidence was never requested, or requested only in a general way. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

The duty of disclosure under *Brady* extends to all persons working as part of the prosecution team or intimately connected with the government's case. The Supreme Court has written that "the rule encompasses evidence 'known only to police investigators and not to the prosecutor.' In order to comply with *Brady*, therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.'" *Strickler v. Greene*, 527 U.S. 263, 280 (1999), *quoting Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (internal citation omitted). "Because prosecutors rely so heavily on the police and other law enforcement authorities, the obligations imposed under *Brady* would be largely ineffective if those other members of the prosecution team had no responsibility

to inform the prosecutor about evidence that undermined the state's preferred theory of the crime." *Moldowan v. City of Warren*, 578 F.3d 351, 377 (6th Cir. 2009). Finally, the state's obligation under *Brady* continued past the trial and sentencing. *Thomas v. Goldsmith*, 979 F.2d 746, 749-750 (9th Cir. 1992) (*Brady* duty continues into post-conviction proceedings).

In order to establish a *Brady* violation, only three things need be shown: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Thus, constitutional error results when favorable evidence is withheld from the defendant "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). Sarah is only required to show that there is a reasonable probability of a different result. She is not required to show that it is more likely than not that she would have been acquitted, as she was during the newly discovered evidence proceedings. It is clear that *Brady* sets a lower bar than a newly discovered evidence motion because the "likely to result in an acquittal" standard was specifically rejected in *Strickland* in favor of the reasonable probability of a different result test found in *Brady*: "On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.*, pg. 693. Here, all three *Brady* requirements have been met. The withheld evidence regarding the fingerprint evidence was exculpatory. And, the withholding of that evidence from the jury undermines confidence in the jury's not fully informed verdict.

As Sarah Was Denied Effective Assistance Of Counsel In The Original Petition For Post-Conviction Relief, The Ineffective Assistance Of Counsel Claims and the Brady Claim May Be Raised In A Successive Petition. Further, This Petition Is Timely.

Relevant Facts

130. Proceedings on Sarah's original petition for post-conviction relief have not been completed as the case remains pending in the Supreme Court.

131. The claim that trial counsel was ineffective in failing to file a motion to dismiss pursuant to *Arizona v. Youngblood* following the State's denial of due process by discarding the comforter was not raised in the original or amended petition for post-conviction relief.

132. The claim that trial counsel was ineffective in failing to present evidence regarding Janet Sylten's parole status at the time of the Johnsons' murders was not raised in the original or amended petition for post-conviction relief.

133. The claim that trial counsel was ineffective in failing to object to prosecutorial misconduct throughout the trial was not raised in the original or amended petition for post-conviction relief.

134. The claim that trial counsel was ineffective in failing to object to the jury's trip from Ada County to Bellevue to visit the Johnson house was not raised in the original or amended petition for post-conviction relief.

135. The claim that Sarah was denied effective assistance of counsel when her appointed counsel labored throughout the proceedings under an actual conflict was interest was not raised in the original or amended petition for post-conviction relief.

136. The claim that Sarah was denied effective assistance of appellate counsel in the direct appeal was not raised in the original or amended petition for post-conviction relief.

137. The claim that Sarah was denied due process when the State withheld the material exculpatory evidence that the fingerprints found on the rifle, scope and ammunition box insert had been run through AFIS and matched to Christopher Hill – *Brady* claim, was not raised in the original or amended petition for post-conviction relief.

138. Post-conviction counsel was ineffective in failing to raise these claims in the original or amended petition for post-conviction relief.

Argument

Idaho Code § 19-4908 governs the filing of successive petitions and indicates that successive petitions for post-conviction relief are generally not permissible unless 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 petition.

Deficient representation by counsel in an initial post-conviction proceeding that causes a claim to be inadequately presented to the court, constitutions a "sufficient reason" to allow assertion of the claim in a subsequent post-conviction petition pursuant to I.C. § 19-4908. *See, e.g. Schwartz v. State,* 145 Idaho 186, 189, 177 P.3d 400, 403 (Ct. App. 2008); *Baker v. State,* 143 Idaho 411, 420, 128 P.3d 948, 957 (Ct. App. 2005).

As set out in *Schwartz*:

> The statute of limitation for post-conviction actions provides that an application for post-conviction relief may be filed at any time within one year from the expiration of the time for appeal or from the determination of appeal or from the determination of a proceedings following an appeal, whichever is later. The appeal referenced in that section means the appeal in the underlying criminal case. The failure to file a timely application is a basis for dismissal of the application. However, if an initial post-conviction action was timely filed and has been concluded, an inmate may file a subsequent application outside of the one-year limitation period 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. Ineffective assistance of prior post-conviction counsel may provide sufficient reason for permitting newly asserted allegations or allegations inadequately raised in the initial application to be raised in a subsequent post-conviction application. Additionally, when a second or successive application is presented because the initial application was summarily dismissed due to the alleged ineffectiveness of the initial post-conviction counsel, use of the relation-back doctrine may be appropriate. This is so because failing to provide a post-conviction application with a meaningful opportunity to have his or her claims presented may be violative of due process.

145 Idaho at 189, 177 P.3d at 403 (internal quotations and citations omitted).

The determination of what is a reasonable time for filing a successive petition is to be considered on a case by case basis. *Id.,* at 190, 177 P.3d at 404, citing *Charboneau v. State,* 144 Idaho 900, 905, 174 P.3d 870, 875 (2007).

When a petitioner alleges ineffective assistance of post-conviction counsel as a basis for bringing a successive petition, the relevant inquiry is "whether the second [petition] has raised not merely a question of counsel's performance but substantive grounds for relief from the conviction and sentence." *Nguyen v. State,* 126 Idaho 494, 496, 887 P.2d 39, 41 (Ct. App. 1994) (quoting *Wolfe v. State,* 113 Idaho 337, 339, 743 P.2d 990, 992 (Ct. App. 1987). Thus, to overcome summary dismissal, a petitioner must allege that the claims raised in the successive petition were either not raised or inadequately asserted in the original post-conviction action due to the ineffective assistance of original post-conviction counsel and a valid underlying claim for post-conviction relief. *Nguyen,* 126 Idaho at 496, 887 P.2d at 41.

This, Sarah has done. She has alleged that her original post-conviction counsel was ineffective. In particular, counsel was ineffective insofar as it was deficient performance to fail to raise the meritorious claims that Sarah is now raising in this successive petition and that

deficiency was prejudicial because had counsel raised these claims, post-conviction relief would have been granted. *Strickland v. Washington, supra.*

Moreover, Sarah is raising these claims in a timely manner. The appeal from the denial of relief is still pending. It is not unreasonable in terms of timeliness to file a successive petition even before litigation has concluded on the original petition. Indeed, the language of *Schwartz* quoted above anticipates that a "reasonable time" will not expire until sometime after the proceedings in the original petition are concluded.

PRAYER FOR RELIEF: ***Petitioner requests the following relief:***

1. That counsel be appointed to assist her in the prosecution of this action;

2. That the judgment of conviction be vacated and that a new trial be granted; and/or

3. For such other and further relief as the Court deems just and proper.

Respectfully submitted this 6th day of April, 2012.

Deborah Whipple

Dennis Benjamin

Pro Bono Attorneys for Sarah Johnson

VERIFICATION OF PETITION

I, Sarah Johnson, being duly sworn under oath, state:

I know of the contents of the foregoing DNA and Successive Petition for Post-Conviction Relief and that the matters and allegations set forth are true and correct to the best of my knowledge and belief.

Sarah Marie Johnson

SUBSCRIBED AND SWORN TO BEFORE ME
this 5th day of April, 2012.

Notary Public for the State of Idaho
Residing at: Parma ID
My commission expires: 10-13-13

KELLY KUMM
Notary Public
State of Idaho

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of April, 2012, I caused a true and correct copy of the foregoing to be deposited in the United States Mail postage pre-paid to:

Jim Thomas
Blaine Co. Prosecutor
201 Second Ave S., Suite 100
Hailey, ID 83333

Jessica Lorello
Kenneth Jorgensen
Deputy Attorneys General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010

Dennis Benjamin

IN THE SUPREME COURT OF THE STATE OF IDAHO
Docket No. 33312

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**Boise, May 2008 Term**
	)	
v.	)	**2008 Opinion No. 89**
	)	
SARAH MARIE JOHNSON,	)	**Filed: June 26, 2008**
	)	
Defendant-Appellant.	)	**Stephen W. Kenyon, Clerk**
	)	
	)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Blaine County. Hon. R. Barry Wood, District Judge.

District court conviction of first-degree murder, affirmed.

Molly J. Huskey, State Appellate Public Defender, Boise, for appellant. Jason Curtis Pintler, Deputy State Appellate Public Defender argued.

Hon. Lawrence G. Wasden, Attorney General, Boise, for respondent. Kenneth K. Jorgensen, Deputy Attorney General argued.

BURDICK, Justice

Appellant Sarah Marie Johnson was convicted of two counts of first-degree murder. Johnson appeals her conviction. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On September 2, 2003, Alan and Diane Johnson (the Johnsons) were shot and died in their home. Subsequently, the Johnsons' sixteen year old daughter, Sarah Johnson (Johnson), was charged with two counts of first-degree murder. A jury found Johnson guilty of first-degree murder of both Alan and Diane Johnson. The district court sentenced Johnson to concurrent life sentences, plus fifteen years under I.C. § 19-2520 for a firearm enhancement.

II. ANALYSIS

Johnson raises four issues on appeal. Johnson argues that because aiding and abetting was not charged in the charging document, the district court's instruction to the jury on aiding

and abetting constructively amended the charging document and resulted in a fatal variance. Johnson also argues she was deprived of her constitutional right to a unanimous jury verdict because the district court did not instruct the jury it must unanimously agree on whether Johnson actually killed the Johnsons or whether she aided and abetted in the killing of the Johnsons. Finally, Johnson argues her constitutional rights were violated when the district court failed to remove a certain juror from the jury pool or obtain an unequivocal commitment that the juror would follow all of the court's instructions. We address each issue in turn.

A. Constructive Amendment and Variance

Johnson asserts that the charging document did not support a jury instruction on aiding and abetting, and that consequently, the jury instruction constituted an impermissible variance or a constructive amendment.[1] Whether there is a variance or constructive amendment is a question of law over which this Court exercises free review. *See State v. Colwell*, 124 Idaho 560, 565, 861 P.2d 1225, 1230 (Ct. App. 1993).

A variance between the charging document and the verdict is fatal when "the record suggests the possibility that the defendant was misled or embarrassed in the preparation or presentation of his defense." *State v. Windsor*, 110 Idaho 410, 418, 716 P.2d 1182, 1190 (1985) (citing *Berger v. United States*, 295 U.S. 78, 82-84 (1935)). Johnson argues there is a variance because the facts the jury would have to find to convict Johnson of aiding and abetting differ from the facts alleged in the indictment. Johnson further argues this variance was fatal because it prejudiced her in the preparation and presentation of her defense.

A constructive amendment occurs when the charging terms of the charging document have been altered literally or in effect. *United States v. Dipentino*, 242 F.3d 1090, 1094 (9th Cir. 2001). The constructive amendment doctrine springs from the Fifth Amendment right to indictment by a grand jury. *See Stirone v. United States*, 361 U.S. 212, 215-16 (1960). The Fifth Amendment right to an indictment by a grand jury is not a due process right that applies to the states through the Fourteenth Amendment. *Branzburg v. Hayes*, 408 U.S. 665, 688 n.25 (1972). Nonetheless, the Idaho Constitution contains a provision with similar wording to the Fifth Amendment, on which the constructive amendment prohibition is based.[2] *See* Idaho Const. art I,

---

[1] On appeal, Johnson does not argue there was insufficient evidence to support the giving of the aiding and abetting instruction.

[2] Article I, section 8 of the Idaho Constitution provides:

§ 8. The Idaho Court of Appeals has appropriately applied the constructive amendment analysis to this Idaho constitutional provision. *See Colwell*, 124 Idaho at 566, 861 P.2d at 1231.

Johnson argues that in Idaho the charging document must contain facts showing the defendant aided and abetted, and that the failure to charge aiding and abetting in the indictment was a violation of due process.

1. Idaho Code § 19-1430 and I.C.R. 7(b) are not in conflict.

Johnson asserts there was a constructive amendment because the jury was asked to determine whether the State proved an element not charged in the indictment. Johnson argues that aiding and abetting contains a separate *mens rea* element—a community of purpose in the unlawful undertaking—and a separate *actus reus* element—proof that the defendant participated in or assisted, encouraged, solicited, or counseled the crime. However, this argument overlooks Idaho's statutory abolition of the distinction between accessories and principals.

Idaho Code § 19-1430 provides:

> **Distinction between accessories and principals abolished.** — The distinction between an accessory before the fact and a principal and between principals in the first and second degree, in cases of felony, is abrogated; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, shall hereafter be prosecuted, tried, and punished as principals, and no other facts need be alleged in any indictment against such an accessory than are required in an indictment against his principal.

Thus, Idaho, consistent with many other jurisdictions, has abolished the distinction between principals and aiders and abettors, and instead treats aiding and abetting as a theory under which first-degree murder can be proved and not as a separate offense or a crime of a different nature. *See State v. Ayres*, 70 Idaho 18, 25, 211 P.2d 142, 145 (1949) (holding the

---

> **Prosecution only by indictment or information.**—No person shall be held to answer for any felony or criminal offense of any grade, unless on presentment or indictment of a grand jury or on information of the public prosecutor, after a commitment by a magistrate, except in cases of impeachment, in cases cognizable by probate courts or by justices of the peace, and in cases arising in the militia when in actual service in time of war or public danger; provided, that a grand jury may be summoned upon the order of the district court in the manner provided by law, and provided further, that after a charge has been ignored by a grand jury, no person shall be held to answer, or for trial therefor, upon information of public prosecutor.

The Fifth Amendment to the U.S. Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . .

information charges one offense (involuntary manslaughter) and that it was sufficient to put defendant on trial upon either the theory that he was a principal or the theory that he was an aider and abettor); *see also, e.g., United States v. Ginyard*, 511 F.3d 203, 211 (D.C. Cir. 2008) ("Aiding and abetting is not a separate offense; it is only a theory of liability—one ground upon which the jury may find him liable for the charged offense."); *United States v. Smith*, 198 F.3d 377, 383 (2d Cir. 1999) (holding aiding and abetting is not a discrete criminal offense); *Londono-Gomez v. Immigration & Naturalization Serv.*, 699 F.2d 475, 476 (9th Cir. 1983) ("[T]he aiding and abetting statute does not define a separate offense but rather makes punishable as a principal one who aids or abets another in the commission of a substantive offense.").

However, Johnson argues the last clause of I.C. § 19-1430, which states that it is unnecessary to allege facts other than what is required in a charging document against a principal, is procedural, is in conflict with I.C.R. 7, and thus, is of no effect. Idaho Criminal Rule 7(b) provides that "[t]he indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

When a statute and rule "can be reasonably interpreted so that there is no conflict between them, they should be so interpreted rather than interpreted in a way that results in a conflict." *See State v. Currington*, 108 Idaho 539, 543, 700 P.2d 942, 946 (1985) (Bakes, J., dissenting).

Here, the statute and the rule, I.C. § 19-1430 and I.C.R. 7, can be reasonably interpreted so that there is no conflict between them. Idaho Criminal Rule 7(b) requires the charging document be "a plain, concise and definite written statement of the essential facts constituting the offense charged." Idaho Code § 19-1430 then provides that in the case of aiding and abetting, the "essential facts" are only those facts that are required in charging the principal. Thus, the rule and the statute can be reasonably interpreted so that there is no conflict between them.

Furthermore, even if a conflict did exist between I.C.R. 7 and I.C. § 19-1430, the statute would prevail. When there is a conflict between a statute and a criminal rule, this Court must determine whether the conflict is one of procedure or one of substance; if the conflict is procedural, the criminal rule will prevail. *State v. Beam*, 121 Idaho 862, 863, 828 P.2d 891, 892 (1992).

> Although a clear line of demarcation cannot always be delineated between what is substantive and what is procedural, the following general guidelines provide a useful framework for analysis. Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.

Id. at 863-64, 828 P.2d at 892-93 (emphasis removed) (quoting *Currington*, 108 Idaho at 541, 700 P.2d at 944 (quoting *State v. Smith*, 527 P.2d 674, 676-77 (Wash. 1974))). "[L]egislation is a constitutional exercise of the Legislature's power to enact substantive law [and] that legislation is to be given due deference and respect." *In re SRBA Case No. 39576*, 128 Idaho 246, 255, 912 P.2d 614, 623 (1995).

Johnson argues that although the first part of I.C. § 19-1430 is substantive, the last clause stating "no other facts need be alleged in any indictment against such an accessory than are required in an indictment against his principal," is procedural. However, the last clause pertains more than to the essentially mechanical operations of the courts; it is defining and regulating the mechanism for giving the defendant notice when that defendant committed a felony as an accessory. The statute abrogates the distinction between principals and accessories and mandates the defendant "be prosecuted, tried, and punished as [a] principal[] . . . ." I.C. § 19-1430. A conclusion that the entire statute is substantive is further supported by I.C. § 18-204, which defines principals as: "[a]ll persons concerned in the commission of a crime . . . whether they directly commit the act constituting the offense or aid and abet in its commission . . . ." Together, I.C. § 18-204 and I.C. § 19-1430 show a legislative intent to consider defendants as principals whether they directly committed the crime or aided and abetted in the commission of the crime. The Legislature's definition of principal and abolishment of the distinction between principal and accessories does not pertain to mechanical operations of the courts; the Legislature is creating, defining, and regulating primary rights. Thus, I.C. § 19-1430 is substantive and does not overlap with this Court's power to create procedural rules. Therefore, even if I.C. § 19-1430 and I.C.R. 7(b) were in conflict, the statute would prevail.

In conclusion, we hold that there is no conflict between I.C. § 19-1430 and I.C.R. 7(b), that I.C. § 19-1430 is substantive, and that in Idaho, it is unnecessary to allege any facts in the charging document other than what is required in a charging document against a principal.

2. Idaho Code § 19-1430 does not violate due process.

Johnson also asserts her due process rights were violated by the lack of reference to aiding and abetting in the charging document.

First, relying on *Gautt v. Lewis*, 489 F.3d 993 (9th Cir. 2007), Johnson argues the notice required by the Fourteenth Amendment must come from the charging document itself. *Gautt* recognizes the Sixth Amendment's and Fourteenth Amendment's right to be informed of the nature and cause of the charges made in order to adequately prepare a defense. *Id.* at 1002-03. The Ninth Circuit expressed doubt that sources outside the charging document could provide the necessary notice. However, *Gautt* does not actually hold sources outside the charging document cannot ever provide the necessary notice. *Id.* at 1010 ("[F]or purposes of our analysis today, we will assume-without deciding-that such sources can be parsed for evidence of notice to the defendant . . . .").

Moreover, in *Gautt*, the Ninth Circuit was looking at notice of the actual underlying charge and not a theory of liabilty; the Ninth Circuit observed that a court can look to sources outside the charging document to determine whether a defendant had adequate notice of a particular theory of the case. *Id.* at 1009 (citing *Murtishaw v. Woodford*, 255 F.3d 926, 953-54 (9th Cir. 2001), in which the Ninth Circuit held that a defendant charged with first-degree murder was provided constitutionally sufficient notice to support a felony murder jury instruction). Here, aiding and abetting was not the actual underlying charge, it was a theory of liability.[3] *See Ayres*, 70 Idaho at 25, 211 P.2d at 145.

Second, Johnson argues the facts constituting the crime of aiding and abetting are elements, and thus, must be charged in the charging document in order to meet due process requirements. Johnson asserts the charging document must contain the elements of the offense and that a defendant must be put on notice of all of the elements of the crime essential to the punishment sought to be inflicted. For support Johnson cites to *Apprendi v. New Jersey*, 530 U.S. 466, 510-18 (2000) (Thomas, J., concurring), and *Jones v. United States*, 526 U.S. 227, 232 (1999), where the Court stated: "Much turns on the determination that a fact is an element of an

[3] Therefore, Johnson's reliance on *Cole v. Arkansas*, 333 U.S. 196 (1948) is misplaced. In *Cole*, the Court held the Fourteenth Amendment was violated when the defendants were charged with violating a certain subsection of a state act but had their conviction upheld based on a different subsection of the state act. *Id.* at 198-99. However, there the Court held the two subsections created separate offenses. *Id.* at 201 n.4. That is not the case here where the Idaho Legislature has made clear that aiding and abetting is not a separate offense. *See* I.C. § 19-1430.

offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt."

The Tenth Circuit considered and rejected the same argument Johnson makes here. *See United States v. Alexander*, 447 F.3d 1290, 1298-99 (10th Cir. 2006), *cert. denied* 127 S. Ct. 315 (2006). In *Alexander* the Tenth Circuit considered *Jones* and *Apprendi* and held that "a charge of the predicate crime puts defendant on notice that the jury may be instructed on aiding and abetting, thus satisfying any due process concerns." *Id.* at 1299; *see also United States v. Creech*, 408 F.3d 264, 273 (5th Cir. 2005) (holding *Apprendi* does not upset the long-standing practice of giving aiding and abetting jury instructions even when that theory is not charged in the indictment; thus, there is no Fifth Amendment violation). Johnson asserts *Alexander* is unpersuasive because it distinguishes *Jones* and *Apprendi* on the basis that those cases addressed what is required to increase a punishment. However, *Alexander's* holding did not depend upon that distinction; it held that due process was satisfied because the defendant had notice of the predicate crime and because aiding and abetting is not a separate offense but is a variant of the underlying offense. 447 F.3d at 1299.

In Idaho there is no distinction between principals and aiders and abettors, and it is unnecessary the charging document allege any facts other than what is necessary to convict a principal. I.C. § 19-1430. Johnson contends that in light of Fourteenth Amendment jurisprudence, *Ayres* and its progeny should be overruled because *Ayres*, which bases its ruling on I.C. § 19-1430, "in essence, holds that the Idaho Legislature can legislate away the rights of individuals protected by the Fourteenth Amendment."

Many jurisdictions have held that it is unnecessary to charge aiding and abetting in the charging document and that there is no due process violation when a court gives an aiding and abetting jury instruction even when aiding and abetting is not charged in the charging document. *See, e.g., United States v. Garcia*, 400 F.3d 816, 820 (9th Cir. 2005) ("We have also held a number of times in different contexts that aiding and abetting is embedded in every federal indictment for a substantive crime."); *United States v. Dodd*, 43 F.3d 759, 762 n.5 (1st Cir. 1995) (stating it is not necessary to plead an aiding and abetting charge because that charge is implicit in all indictments for substantive offenses); *United States v. Clark*, 980 F.2d 1143, 1146 (8th Cir. 1992) ("It is well established that a defendant may be convicted of aiding and abetting even though he was not charged in that capacity. Aiding and abetting is an alternative charge in every

count, whether implicit or explicit.") (citation omitted); *United States v. Iglesias*, 915 F.2d 1524, 1528 (11th Cir. 1990) ("One who has been indicted as a principal may be convicted on evidence showing only that he aided and abetted the offense."); *Quigg v. Crist*, 616 F.2d 1107, 1111 (9th Cir. 1980) ("[T]he giving of an aiding and abetting instruction does not violate due process where the state has abolished the distinction between principals and accessories, and where there is evidence before the jury to support the instruction."); *United States v. Beardslee*, 609 F.2d 914, 919 (8th Cir. 1979) (rejecting the argument that defendant's due process rights were violated by an aiding and abetting instruction when the indictment did not explicitly charge him with aiding and abetting); *Glass v. United States*, 328 F.2d 754, 756 (7th Cir. 1964) (holding there was no error in giving an instruction on aiding and abetting when defendant was not charged with aiding and abetting because "[a]iders and abettors . . . are chargeable directly as principals."); *People v. Garrison*, 765 P.2d 419, 433 n.12 (Cal. 1989) ("[I]n California the definition of a principal has historically included those who aid and abet . . . and notice as a principal is sufficient to support a conviction as an aider or abettor."); *Hoskins v. State*, 441 N.E.2d 419, 425 (Ind. 1982) ("One can be charged as a principal and convicted on proof that he aided or abetted another in committing the crime."); *State v. Satern*, 516 N.W.2d 839, 843 (Iowa 1994) (holding it was not a surprise or unfair to the defendant for the state to pursue a theory of aiding and abetting at trial when the charging document did not refer to aiding and abetting); *State v. Pennington*, 869 P.2d 624, 629 (Kan. 1994) (holding defendant's due process rights were not violated by a jury instruction on aiding and abetting; it is unnecessary for the State to charge aiding and abetting in the charging document in order to pursue that theory at trial); *People v. Rivera*, 646 N.E.2d 1098, 1099 (N.Y. 1995) ("Traditionally, it has been permissible to charge and admit evidence convicting a defendant as an accessory where an indictment charges only conduct as a principal"); *State v. Johnson*, 272 N.W.2d 304, 305 (S.D. 1978) ("It is settled law that a conviction may be supported by proof that the defendant was an aider and abettor even though the charging instrument charges him as a principal.").

Therefore, because Idaho has abolished the distinction between principals and aiders and abettors, and because it is well-established in Idaho that it is unnecessary to charge the defendant with aiding and abetting, we hold there was no variance, constructive amendment, or due process violation. Moreover, even if there were a variance, Johnson was not prejudiced in the preparation of her defense. First, the State did not introduce evidence of a possible third party

shooter; rather, it was Johnson who argued that she could not have been the actual shooter. Second, the State's proposed jury instructions submitted before trial included a jury instruction on aiding and abetting. Thus, Johnson was not misled or embarrassed in the preparation of her defense.

B. Unanimity Instruction

Johnson contends the district court erred in failing to give an instruction requiring the basis for the jury's verdict (aider and abettor or principal) be a unanimous decision.[4] Johnson acknowledges she did not request this instruction below but contends the issue can be raised on appeal because the absence of the instruction was fundamental error.

Though I.C.R. 30(b) requires objections to jury instructions be made below, this Court reviews fundamental errors in jury instructions even in the absence of an objection below. *State v. Anderson*, 144 Idaho 743, __, 170 P.3d 886, 892 (2007). To determine whether there was fundamental error, the Court must first determine whether there was any error. *Id.* at __, 170 P.3d at 891. In this case, as there is no error, there can be no fundamental error.

"When reviewing jury instructions, this Court must determine whether 'the instructions, as a whole, fairly and adequately present the issues and state the law.'" *State v. Sheahan*, 139 Idaho 267, 281, 77 P.3d 956, 970 (2003) (quoting *Silver Creek Computers, Inc. v. Petra, Inc.*, 136 Idaho 879, 882, 42 P.3d 672, 675 (2002)). An erroneous instruction is reversible error only when "the instructions, taken as a whole, misled the jury or prejudiced a party." *Id.*

In all felony cases, the jury's verdict must be a unanimous verdict. Idaho Const. art I, § 8; *State v. Scheminisky*, 31 Idaho 504, 508, 174 P. 611, 612 (1918), *overruled on other grounds by State v. Johnson*, 86 Idaho 51, 62, 383 P.2d 326, 333 (1963).

Johnson relies on a line of cases from the Idaho Court of Appeals which hold that "[a] specific unanimity instruction is required . . . when it appears . . . that a conviction may occur as the result of different jurors concluding that the defendant committed different acts." *State v. Gain*, 140 Idaho 170, 172, 90 P.3d 920, 922 (Ct. App. 2004); *see also State v. Montoya*, 140 Idaho 160, 167-68, 90 P.3d 910, 917-18 (Ct. App. 2004); *Miller v. State*, 135 Idaho 261, 267-68, 16 P.3d 937, 943-44 (Ct. App. 2000). However, these cases do not support Johnson's argument. In those cases the defendants were charged with various sex crimes. In each case there was

[4] The district court did instruct the jury that its verdict must be unanimous.

evidence of more than one criminal act on each count. Thus, the court required that when "several distinct criminal acts support one count, jury unanimity must be protected by the state's election of the act upon which it will rely for conviction *or* by a clarifying instruction requiring the jurors to unanimously agree that the same underlying criminal act has been proven beyond a reasonable doubt." *Gain*, 140 Idaho at 173, 90 P.3d at 923 (emphasis in original). This is not a case where there was "evidence of more criminal acts than have been charged." *See Montoya*, 140 Idaho at 167, 90 P.3d at 917; *see also Miller*, 135 Idaho at 268, 16 P.3d at 944. Here, only one criminal act was charged—first-degree murder—and there was no evidence presented of additional criminal acts.

Schad v. Arizona, 501 U.S. 624 (1991), a United States Supreme Court plurality opinion as to the unanimity issue, supports a conclusion that a specific unanimity instruction was not necessary. Schad challenged his first-degree murder conviction because the jury was not instructed to unanimously agree on the alternative theories of premeditated and felony murder.[5] *Id.* at 630. The plurality recognized that jurors need not reach agreement on the preliminary factual issues underlying the verdict. *Id.* at 632. To determine whether the absence of the specific unanimity instruction violated the defendant's due process, the plurality looked at whether there was "an immaterial difference as to mere means" or whether there was "a material difference requiring separate theories of crime to be treated as separate offenses subject to separate jury findings."[6] *Id.* at 633. The plurality noted:

> [W]e are not free to substitute our own interpretations of state statutes for those of a State's courts. If a State's courts have determined that certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law.

Id. at 636. Here, the Idaho legislature has abolished all distinction between principals and aiders and abettors, I.C. § 19-1430, and this Court treats aiding and abetting as a theory and not as a

---

[5] The plurality noted this right can be analyzed under the Sixth Amendment right to a unanimous verdict or under the Fourteenth Amendment right to due process. *Id.* at 635 n.5. The plurality concluded "the right is more accurately characterized as a due process right than as one under the Sixth Amendment." *Id.*

[6] In a majority opinion, the U.S. Supreme Court later cited *Schad* with approval to support the proposition that "a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime." *Richardson v. United States*, 526 U.S. 813, 817 (1999).

separate offense with distinct elements, *see Ayres*, 70 Idaho at 25, 211 P.2d at 145. Thus, there is no basis for a specific unanimity instruction.

Likewise, several other jurisdictions have held that it is unnecessary to provide a specific unanimity instruction when a defendant can be convicted of an offense based on actions as a principal or as an aider and abettor.[7] *Garcia*, 400 F.3d at 819-20; *United States v. Horton*, 921 F.2d 540, 545-46 (4th Cir. 1990); *United States v. Eagle Elk*, 820 F.2d 959, 961 (8th Cir. 1987) ("Even if the jury was divided on whether [the defendant] committed the principal crime or aided or abetted in its commission, there can be no question that the illegal act was murder."); *People v. Maury*, 68 P.3d 1, 59-60 (Cal. 2003); *State v. Martinez*, 900 A.2d 485, 494-95 (Conn. 2006); *Simms v. United States*, 634 A.2d 442, 445-46 (D.C. 1993); *State v. Allen*, 453 S.E.2d 150, 159-60 (N.C. 1995), *overruled on other grounds by State v. Gaines*, 483 S.E.2d 396 (N.C. 1997); *Holland v. State*, 280 N.W.2d 288, 292-93 (Wis. 1979).

Therefore, we conclude it is unnecessary to instruct the jury that it must be unanimous as to the theoretical basis for committing the offense (aider and abettor or principal) because aiding and abetting is not a separate offense from the substantive crime. Consequently, the district court's failure to instruct the jury to the contrary was not error.

C. Juror 85

Johnson argues that the district court's failure to remove Juror 85 from the jury pool or its failure to obtain an unequivocal assurance from Juror 85 that he would follow all of the district court's instructions was error.

During voir dire, Juror 85 expressed a concern that "if evidence was presented by a specialist, and then for some reason [the court] would tell [the jury] to completely disregard that, and [he] felt that it was good evidence, then [he] [doesn't] know if [he] could completely disregard it."

The State argues Johnson has waived her right to raise this issue on appeal because she did not make a challenge below. Johnson responds that the information regarding Juror 85 did not come forth until after she had already passed the panel for cause and that, in any case, this Court can consider the issue because it constitutes fundamental error.

---

[7] Johnson argues cases from other jurisdictions are not persuasive because they do not analyze the right to a unanimous jury verdict provided by the Idaho Constitution. However, these cases reiterate the applicable principle

This Court has held that the failure to challenge a juror for cause "indicates a satisfaction with the jury as finally constituted." *State v. Bitz*, 93 Idaho 239, 243, 460 P.2d 374, 378 (1969). Furthermore, on appeal a defendant cannot claim dissatisfaction with the jury panel when the defendant "failed to exhaust the means available to her to exclude unacceptable jurors . . . ." *See State v. Mitchell*, 104 Idaho 493, 501, 660 P.2d 1336, 1344 (1983).

Johnson argues she had passed the panel for cause before Juror 85 revealed he might have difficulty disregarding certain evidence. It is true that Johnson passed the panel for cause just prior to Juror 85's statement. Nonetheless, after Johnson passed the panel for cause, the trial court asked the potential jurors whether there was any reason they could not sit as fair and impartial jurors. Juror 85 then voiced his concern, as did several other jurors. The trial court communicated those jurors' concerns with the attorneys and gave them the opportunity to again question the jurors who had voiced concerns. This questioning was to take place outside of the presence of the other jurors. Counsel for both sides stated that they did not wish to further question Juror 85. Counsel then questioned other jurors and after further questioning had the opportunity to object to those jurors remaining on the panel. Thus, both attorneys were given the opportunity to again challenge for cause those jurors who had expressed concern. Nonetheless, Johnson chose not to further question or challenge Juror 85 after he stated he was unsure whether he could disregard certain evidence.

However, this Court will consider issues raised for the first time on appeal if there is fundamental error. *State v. Haggard*, 94 Idaho 249, 251, 486 P.2d 260, 262 (1971) ("In case of fundamental error in a criminal case the Supreme Court may consider the same even though no objection had been made at time of trial.")

> Error that is fundamental must be such error as goes to the foundation or basis of a defendant's rights or must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive. Each case will of necessity, under such a rule, stand on its own merits. Out of the facts in each case will arise the law.

State v. Lewis, 126 Idaho 77, 80, 878 P.2d 776, 779 (1994) (quoting *State v. Knowlton*, 123 Idaho 916, 918, 854 P.2d 259, 261 (1993)). To determine whether there was fundamental error,

---

in this case: aiding and abetting is an alternative means of committing the crime charged and whether the defendant committed the acts as a principal or as an aider and abettor, the defendant's liability is the same.

the Court must first determine whether there was any error. *Anderson*, 144 Idaho at __, 170 P.3d at 891.

"The determination of whether a juror can render a fair and impartial verdict rests in the sound discretion of the trial court." *State v. Luke*, 134 Idaho 294, 298, 1 P.3d 795, 799 (2000). The trial court's determination is reviewed for an abuse of discretion. *Id.* To determine whether an abuse of discretion occurred this Court uses a three-part test: (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason. *Id.*

Johnson first argues an expression of an inability to follow instructions is analogous to a juror expressing a bias towards a party and cites to *State v. Hauser*, 143 Idaho 603, 150 P.3d 296 (Ct. App. 2006). However, *Hauser* is distinct from this case in that Juror 85 did not admit to a bias and here neither attorney nor the court attempted, unsuccessfully, to elicit an unequivocal assurance that the juror would act with impartiality.

In any case, the record does not show the judge acted erroneously in allowing Juror 85 to remain on the panel. The judge asked follow-up questions to Juror 85 and responded with an appropriate explanation addressing Juror 85's concern. Moreover, Johnson has failed to demonstrate she was prejudiced by Juror 85's presence on the panel. Juror 85's concern was that he may have difficulty completely disregarding evidence from a specialist. Johnson has pointed to several instances where the judge instructed the jurors to disregard certain information. However, in most of those instances either the evidence did not come from a specialist or after an appropriate foundation was laid, the evidence was allowed. The only relevant instance of any such instruction Johnson pointed to occurred when the judge instructed the jury to disregard testimony by an expert witness that it was possible during the manufacturing process of making the latex glove, someone's DNA could have gotten inside the gloves. This single instance of the judge instructing the jury to disregard evidence presented by a specialist is insufficient to show Johnson sustained any prejudice by Juror 85's presence on the panel.

We conclude that below there was no error, therefore there was no fundamental error. Hence, we hold Johnson has waived the right to object to Juror 85 remaining on the panel.

III. CONCLUSION

We hold there was no variance or constructive amendment. We also hold it was not necessary to give a specific unanimity instruction. Finally, we hold Johnson has waived the right to object to Juror 85 remaining on the panel. We affirm the decision of the district court.

Justices J. JONES, W. JONES, HORTON and TROUT, Pro tem, **CONCUR.**

ORCHID CELLMARK
2600 Stemmons Freeway · Suite 133 · Dallas, TX 75207 · 214.631.8152 · 800.752.2774 · 214.634.3322 Fax

LABORATORY REPORT - FORENSIC IDENTITY – STR ANALYSIS

CASE DATA:

Referring Agency:	Blaine County Sheriff's Office
Orchid Cellmark Case #:	FOR4035A
Referring Agency Case #:	030900016
Agency Contact:	Jim J. Thomas
Victim's Name:	Alan Johnson
Victim's Name:	Diane Johnson
Suspect's Name:	Sarah Marie Johnson
Report Date:	May 13, 2004

1. **Evidence Received**

Accession #	Sample Description	Receipt Date Method of Delivery
FOR4035-004	Pink robe	01/29/04 – Hand delivered to Orchid by S. Harkins
FOR4035-005	Pants & shirt – Sarah Johnson	
FOR4035-006	Socks – Sarah Johnson	
FOR4035-007	Carpet from hallway	
FOR4035-008	White sandals	
FOR4035-009	Tissue from left collar area of pink robe	
FOR4035-010	Tissue from right side below right pocket of pink robe	
FOR4035-011	Tissue from lower left side of pink robe	
FOR4035-012	Tissue from left front pocket of pink robe	
FOR4035-013	Tissue from top of sleeve near left shoulder of pink robe	
FOR4035-014	Tissue from inside lower back of pink robe	
FOR4035-015	Tissue from inside left sleeve of pink robe	
FOR4035-016	Tissue and bone from blood pool in bathroom	
FOR4035-017	Tissue from blood pool in bathroom	
FOR4035-018	Two hairs removed from barrel of rifle	
FOR4035-019	Pair of brown leather shoes – Bruno	
FOR4035-020	Hairs removed from Bruno's blue sweater	
FOR4035-021	Cutout from Bruno's pants containing stain	
FOR4035-022	Fibers imbedded in unknown material	
FOR4035-023	.264 Cal. "Winchester" Magnum rifle	03/03/04 – Federal Express

2. **Results**

Serology:

005 Presumptive testing for blood was negative for the stains on the pants from Sarah Johnson.

019 Presumptive testing for blood was negative for the stains on the right and left brown leather shoes.

DNA:

DNA from the above specimens, except FOR4035-005 (pants & shirt – S. Johnson), FOR4035-008 (white sandals). FOR4035-018 (two hairs removed from barrel of rifle), FOR4035-019 (brown leather shoes), and FOR4035-020 (hairs removed from Bruno's blue sweater), was amplified and typed using PE Applied Biosystems' Profiler Plus and Cofiler Kits. The results are listed in Table 1 and Table 2.

011017

DNA results were obtained using Short Tandem Repeat analysis. Procedures used in the analysis of this case adhere to the standards adopted by the DNA Advisory Board on DNA analysis methods.

3. Conclusion

Based on these results, Diane Johnson is identified as the donor of the DNA profile obtained from bloodstain #8 from the pink robe, bloodstain #9 from the pink robe, bloodstain #10 from the pink robe, bloodstain #11 from the pink robe, bloodstain #14 from the pink robe, bloodstain #15 from the pink robe, bloodstain #16 from the pink robe, bloodstain #17 from the pink robe, bloodstain #18 from the pink robe, bloodstain #20 from the pink robe, bloodstain #22 from the pink robe, bloodstain #23 from the pink robe, bloodstain #1 from sock A, bloodstain #1 from sock B, the bloodstain from carpet from hallway, the tissue from right side below right pocket of pink robe, the tissue from left front pocket of pink robe, the tissue from top of sleeve near left shoulder of pink robe, the (predominant profile) bloodstain #5 from the pink robe and the (predominant profile) bloodstain #25 from the pink robe.

Alan Johnson is identified as the donor of the DNA profile obtained from the tissue and bone from blood pool in bathroom, the tissue from blood pool in bathroom, bloodstain A from the Winchester rifle, bloodstain E from the Winchester rifle, bloodstain H from the Winchester rifle, the (predominant profile) bloodstain D from the Winchester rifle and the (predominant profile) bloodstain F from the Winchester rifle.

The DNA profiles obtained from bloodstain #1 from the pink robe and bloodstain #3 from the pink robe are mixtures. The major DNA profile is consistent with Diane Johnson, and the minor alleles are consistent with Alan Johnson.

The DNA profile obtained from bloodstain #2 from the pink robe is a mixture of at least three individuals. The major DNA profile is consistent with Sarah Johnson. Diane Johnson, Alan Johnson and an unknown individual cannot be excluded as being potential contributors to this mixture.

The DNA profile obtained from bloodstain #4 from the pink robe is a mixture of at least two individuals. The major DNA profile is consistent with Diane Johnson. Sarah Johnson is included as being a potential contributor to this mixture. Alan Johnson cannot be excluded as being a potential contributor to this mixture.

The DNA profiles obtained from bloodstain #6 from the pink robe and stain #34 from the pink robe are mixtures of at least three individuals. Sarah Johnson, Diane Johnson, and Alan Johnson are included as being potential contributors to this mixture.

The DNA profile obtained from bloodstain #7 from the pink robe is a mixture of at least two individuals. The major DNA profile is consistent with Sarah Johnson. Diane Johnson and Alan Johnson cannot be excluded as being potential contributors to this mixture.

The DNA profiles obtained from bloodstain #12 from the pink robe and bloodstain #19 from the pink robe are mixtures of at least two individuals. The major DNA profile is consistent with Diane Johnson. Sarah Johnson is included as being a potential contributor to this mixture. Alan Johnson cannot be excluded as being a potential contributor to this mixture.

The DNA profile obtained from bloodstain #13 from the pink robe is a mixture of at least two individuals. Diane Johnson and Sarah Johnson are included as being potential contributors to this mixture. Alan Johnson cannot be excluded as being a potential minor contributor to this mixture.

The DNA profile obtained from bloodstain #21 from the pink robe is a mixture of at least two individuals. The major DNA profile is consistent with Diane Johnson. Alan Johnson is included as being a potential contributor to this mixture.

The DNA profile obtained from stain #31 from the pink robe is a mixture of at least two individuals. The major DNA profile is consistent with Sarah Johnson. Diane Johnson and Alan Johnson cannot be excluded as being potential contributors to this mixture.

The DNA profile obtained from stain #32 from the pink robe is a mixture of at least three individuals. The major DNA profile is consistent with Sarah Johnson. Alan Johnson, Diane Johnson and an unknown individual are included as being potential contributors to this mixture. Diane Johnson cannot be excluded as being a potential contributor to this mixture.

The DNA profile obtained from stain #33 from the pink robe is a mixture of at least three individuals. Sarah Johnson is included as being a potential contributor to this mixture. Diane Johnson and Alan Johnson cannot be excluded as being potential contributors to this mixture.

The DNA profile obtained from bloodstain #35 from the pink robe is a mixture of at least two individuals. The major DNA profile is consistent with Diane Johnson. Sarah Johnson and Alan Johnson are included as being potential contributors to this mixture.

The DNA profile obtained from the tissue from left collar area of pink robe is from an unknown male individual. Alan Johnson and Bruno Santos Dominguez are excluded as potential contributors to this profile.

The DNA profile obtained from bloodstain C from the Winchester rifle is from unknown male individual #2. Alan Johnson and Bruno are excluded as potential contributors to this profile.

Due to an insufficient amount of DNA, no conclusions can be reached concerning bloodstain #24 from the pink robe, the tissue from lower left side of pink robe, the tissue from inside lower back of pink robe, the tissue from inside left sleeve of pink robe, the stain from cutout from Bruno's pants, the fibers imbedded in unknown material, bloodstain B from the Winchester rifle, and bloodstain G from the Winchester rifle.

---

4. Statistical Analysis

Samples Compared:

4035-004-8 (bloodstain #8 from pink robe)
4035-004-9 (bloodstain #9 from pink robe)
4035-004-10 (bloodstain #10 from pink robe)
4035-004-11 (bloodstain #11 from pink robe)
4035-004-14 (bloodstain #14 from pink robe)
4035-004-15 (bloodstain #15 from pink robe)
4035-004-16 (bloodstain #16 from pink robe)
4035-004-17 (bloodstain #17 from pink robe)
4035-004-18 (bloodstain #18 from pink robe)
4035-004-20 (bloodstain #20 from pink robe)
4035-004-22 (bloodstain #22 from pink robe)
4035-004-23 (bloodstain #23 from pink robe)
4035-006A-1 (bloodstain #1 from sock A)
4035-006B-1 (bloodstain #1 from sock B)
4035-007 (bloodstain from carpet from hallway)
4035-010 (tissue from right side below right pocket of pink robe)
4035-012 (tissue from left front pocket of pink robe)
4035-013 (tissue from top of sleeve near left shoulder of pink robe)
4035-004-5 (predominant profile – bloodstain #5 from pink robe)
4035-004-25 (predominant profile – bloodstain #25 from pink robe)
VM20032402-26 (bloodstain - Diane Johnson)

The frequency of this thirteen system genetic profile in three North American populations is:

Black	1 in 917 quadrillion
Caucasian	1 in 17.2 quadrillion
Hispanic	1 in 621 quadrillion

010019

Samples Compared:
4035-016 (tissue and bone from blood pool in bathroom)
4035-017 (tissue from blood pool in bathroom)
4035-023A (bloodstain A from Winchester rifle)
4035-023E (bloodstain E from Winchester rifle)
4035-023H (bloodstain H from Winchester rifle)
VM20032402-22A (bloodstain – Alan Johnson)

The frequency of this thirteen system genetic profile in three North American populations is:

Black	1 in 18.7 quintillion
Caucasian	1 in 175 quadrillion
Hispanic	1 in 101 quadrillion

Samples Compared:
4035-023D (predominant profile – bloodstain D from Winchester rifle)
VM20032402-22A (bloodstain – Alan Johnson)

The frequency of this twelve system genetic profile in three North American populations is:

Black	1 in 168 quadrillion
Caucasian	1 in 1.09 quadrillion
Hispanic	1 in 2.21 quadrillion

Samples Compared:
4035-023F (predominant profile – bloodstain F from Winchester rifle)
VM20032402-22A (bloodstain – Alan Johnson)

The frequency of this twelve system genetic profile in three North American populations is:

Black	1 in 345 quadrillion
Caucasian	1 in 5.46 quadrillion
Hispanic	1 in 4.74 quadrillion

Samples Compared:
4035-004-7 (major profile – bloodstain #7 from pink robe)
4035-004-31 (major profile – stain #31 from pink robe)
VM20032402-27A (bloodstain – Sarah Johnson)

The frequency of this thirteen system genetic profile in three North American populations is:

Black	1 in 16 quintillion
Caucasian	1 in 119 quadrillion
Hispanic	1 in 474 quadrillion

5. Disposition of Evidence

All evidence received in this case will be returned to the referring agency.

Orchid Cellmark has maintained complete chain of custody documentation from receipt of evidence to disposition.

6. Technical Review

The results and conclusions described in this report have been reviewed by the individuals below.

Amber G. Moss - Supervisor, Forensic Casework

Judith I. Floyd – Manager, Forensic Laboratory

SIGNED under oath before me this 13th day of May, 2004.

Notary Public

MELLONY CATES
MY COMMISSION EXPIRES
March 14, 2005

ORCHID CELLMARK
2600 Stemmons Freeway · Suite 133 · Dallas, TX 75207 · 214.631.8152 · 800.752.2774 · 214.634.3322 Fax

LABORATORY REPORT - FORENSIC IDENTITY – MITOCHONDRIAL ANALYSIS

CASE DATA:

Referring Agency:	**Blaine County Prosecuting Attorney's Office**
Cellmark Case #:	FOR 4035B
Agency Reference #:	030900016
Agency Contact:	Jim J. Thomas
Victims' Names:	Alan Johnson and Diane Johnson
Suspect's Name:	Sarah Marie Johnson
Report Date:	June 15, 2004

1. **Evidence Received:**

Accession #	Sample Description	Receipt Date/Method of Delivery
4035-004	Pink robe	1/29/04 – Hand delivered to OCD by Steve Harkins
4035-005	Pants and shirt– Sarah Johnson	
4035-006	Socks – Sarah Johnson	
4035-007	Carpet from hallway	
4035-008	White sandals	
4035-009	Tissue from left collar area of pink robe	
4035-010	Tissue – right side below right pocket of pink robe	
4035-011	Tissue – lower left side of pink robe	
4035-012	Tissue – left front pocket of pink robe	
4035-013	Tissue – top of sleeve near left shoulder of pink robe	
4035-014	Tissue – inside lower back of pink robe	
4035-015	Tissue – inside left sleeve of pink robe	
4035-016	Tissue and bone – blood pool in bathroom	
4035-017	Tissue – blood pool in bathroom	
4035-018A	Hair removed from barrel of rifle	
4035-018B	Hair removed from barrel of rifle	
4035-019	Pair of brown leather shoes - Bruno	
4035-020A	Hair removed from exhibit 1C-Bruno's blue sweater	
4035-020B	Hair removed from exhibit 1C-Bruno's blue sweater	
4035-020C	Hair removed from exhibit 1C-Bruno's blue sweater	
4035-021	Cutout from Bruno's pants containing stain	
4035-022	Fibers imbedded in unknown material	
4035-023K	Reference blood – Sarah Johnson	4/21/04 – FedEx

2. **Results:**

Mitochondrial DNA (mtDNA) from the questioned hairs (4035-018A, 4035-018B, 4035-020A, 4035-020B, and 4035-020C) and from the reference blood of Sarah Johnson (4035-023K) was amplified and sequenced at Hypervariable Regions I and II of the Mitochondrial Control Region. Sequence data are presented as variations from the revised Cambridge Reference Sequence (rCRS). Bases not specifically listed are consistent with rCRS.

007282

App C.

HVI (16024-16365)

Sample #	16069	16126	16291
4035-018A	C	T	C
4035-018B	C	T	T
4035-020A	T	C	C
4035-020B	T	C	C
4035-020C	C	T	T
4035-023K	C	T	T
rCRS	**C**	**T**	**C**

HVII (73-340)

Sample #	73	185	188	228	263	295	315.1
4035-018A	A	G	A	G	G	C	C
4035-018B	A	G	A	G	G	C	303-315 INC
4035-020A	G	A	G	A	G	T	303-315 INC
4035-020B	G	A	G	A	G	T	C
4035-020C	A	G	A	G	G	C	303-315 INC
4035-023K	A	G	A	G	G	C	303-315 INC
rCRS	**A**	**G**	**A**	**G**	**A**	**C**	-

(-) no base at this position (INC) inconclusive

Sequences were obtained using standard mitochondrial DNA analysis techniques. Procedures used in the analysis of this case adhere to the standards adopted by the DNA Advisory Board on DNA analysis methods.

3. Conclusions:

The mtDNA profile obtained from one of the questioned hairs removed from the barrel of the rifle (4035-018B) and from one of the questioned hairs removed from Bruno's blue sweater (4035-020C) is consistent with the mtDNA profile obtained from the reference blood of Sarah Johnson (4035-023K). This profile was compared to a database of 4,839 mtDNA sequences compiled by the FBI. Four matching sequences were found. Sarah Johnson, as well as any of her maternal relatives, cannot be excluded as possible contributors of the questioned hairs (4035-018B and 4035-020C).

The mtDNA profiles obtained from two of the hairs from Bruno's blue sweater (4035-020A and 4035-020B) were consistent with one another and cannot be excluded from originating from a common source. However, the mtDNA profiles obtained from these questioned hairs (4035-020A and 4035-020B) are not consistent with the mtDNA profile obtained from the reference blood of Sarah Johnson (4035-023K). Sarah Johnson, as well as any maternal relatives of Sarah Johnson, are excluded as possible contributors of the questioned hairs (4035-020A and 4035-020B).

Based on sequence data obtained from the questioned hair (4035-018A), no conclusion can be reached as to whether or not the hair originated from Sarah Johnson (4035-023K) or a maternal relative of Sarah Johnson.

4. Disposition of Evidence:

All evidence received in this case will be returned to the submitting agency.

Orchid Cellmark has maintained complete chain of custody documentation from receipt of evidence to disposition.

007283

5. Case Review:

The individuals below have reviewed the results and conclusions described in this report.

Joseph Warren
Forensic Supervisor

Rick W. Staub, Ph.D.
Director of Operations

Kristina Paulette
Forensic Analyst

S I G N E D under oath before me this 15th day of June, 2004.

Notary Public

MARISA M. THOMPSON NOTARY PUBLIC STATE OF TEXAS EXPIRES 1-28-2007

067284

Case History

Twin Falls

13 Cases Found.

State of Idaho vs. Janet Rose Hartman
No hearings scheduled

Case: **CR-1999-0003152** **District** Judge: **G. Richard Bevan** Amount due: **$0.00** **Closed**

Charges:	Violation Date	Charge	Citation	Disposition
	08/24/1999	**I18-2403(4) {F} Theft By Receiving/possessing Stolen Property Etc Officer: BENKULA, STEVE, 2000**		**Finding: Guilty Disposition date: 12/05/2000 Fines/fees: $1,096.50 Det Penitentiary: 2 years Indet Penitentiary: 5 years**

Register of actions:	Date	
	08/24/1999	New Case Filed
	08/24/1999	Affidavit In Support Of Complaint Or Warrant For Arrest
	08/24/1999	Hearing Scheduled - (09/03/1999) John M. Melanson
	08/24/1999	Arraignment / First Appearance
	08/24/1999	Notification Of Rights Felony
	08/24/1999	Financial Statement And Order
	08/24/1999	Court Minutes
	08/24/1999	Order Appointing Public Defender
	08/24/1999	Notice Of Hearing
	08/25/1999	Request For Discovery/defendant
	08/25/1999	Response To Request For Discovery/defendant
	08/31/1999	Request For Discovery/plaintiff
	08/31/1999	Response To Request For Discovery/plaintiff
	09/03/1999	Bond Posted - Surety
	09/03/1999	Hearing Waived
	09/03/1999	Court Minutes
	09/03/1999	Ordr Holding Deft To Answer To District Ct
	09/03/1999	Preliminary Hearing Waived (bound Over)
	09/03/1999	Transfer In (from Idaho Court Or County)
	09/03/1999	Hearing Scheduled - Arraignment (09/21/1999) Nathan W. Higer
	09/03/1999	Notice Of Hearing
	09/07/1999	Notice Of Filing Information
	09/07/1999	Information For A Felony, Namely; Grand Theft
	09/07/1999	By Possession Of Stolen Property
	09/21/1999	Failure To Appear For Hearing Or Trial
	09/21/1999	Warrant Issued - Bench
	10/14/1999	Hearing Scheduled - Arraignment (11/02/1999) Nathan W. Higer
	10/14/1999	Notice Of Hearing
	10/19/1999	Order
	10/27/1999	Warrant Returned
	10/28/1999	Bond Exonerated
	11/02/1999	Arraignment / First Appearance

11/02/1999 Court Minutes
11/02/1999 Appear & Plead Not Guilty
11/02/1999 Hearing Scheduled - Pre-trial Conference (03/07/2000) Nathan W. Higer
11/02/1999 Jury Trial Scheduled - (03/08/2000) Nathan W. Higer
02/24/2000 Supplemental Response To Request For Discovery Pursant To Icr 16(a) And Brady
03/02/2000 Hearing Vacated - Jury Trial
03/07/2000 Continued
03/07/2000 Hearing Scheduled - Status (03/14/2000) Nathan W. Higer
03/07/2000 Notice Of Hearing
03/14/2000 Interim Hearing Held - Status
03/14/2000 Court Minutes
03/15/2000 Hearing Scheduled - Pre-trial Conference (04/04/2000) Nathan W. Higer
03/15/2000 Jury Trial Scheduled - (05/02/2000) Nathan W. Higer
03/15/2000 Notice Of Trial
04/04/2000 Interim Hearing Held
04/04/2000 Hearing Vacated - Jury Trial
04/04/2000 Court Minutes
04/04/2000 Hearing Scheduled - Change Of Plea (04/18/2000) Nathan W. Higer
04/05/2000 Order For Transport Of Prisoner
04/18/2000 Interim Hearing Held - Change Of Plea
04/18/2000 Court Minutes
04/19/2000 Hearing Scheduled - Change Of Plea (05/02/2000) Nathan W. Higer
05/02/2000 Interim Hearing Held - Change Of Plea
05/02/2000 Court Minutes
05/05/2000 Hearing Scheduled - Change Of Plea (06/13/2000) Nathan W. Higer
06/13/2000 Interim Hearing Held - Change Of Plea
06/13/2000 Court Minutes
06/13/2000 Jury Trial Scheduled - (09/06/2000) Nathan W. Higer
06/16/2000 Notice Of Hearing
08/31/2000 Supplemental Response To Request For Discovery
09/01/2000 Lodged:plaintiff's Requested Jury Instruction
09/01/2000 Lodged:defendant's Requested Jury Instruction
09/01/2000 Amended Notice Of Filing Information
09/01/2000 Amended Information For A Felony, Namely;
09/01/2000 Grand Theft By Possesion Of Stolen
09/01/2000 Property
09/05/2000 Order For Transport Of Prisoner
09/06/2000 Change Plea To Guilty Before H/t
09/06/2000 Court Minutes
09/06/2000 Hearing Scheduled - Sentencing (11/21/2000) Nathan W. Higer
09/06/2000 Acknowledgement Of Disclosure Of Consequences
09/06/2000 Of A Plea Of Not Guilty And A Plea Of
09/06/2000 Guilty
09/06/2000 Acceptance Of Guilty Plea Questionnaire
09/06/2000 Notice Of Hearing
09/08/2000 Order To Transport For Hrsc 11-21-2000@2:00pm
11/16/2000 Continued
11/16/2000 Hearing Scheduled - Sentencing (12/05/2000) Nathan W. Higer

11/16/2000 Notice Of Hearing
11/16/2000 Order To Transport For Sent 12-5-00 @ 2:00pm
11/16/2000 Order For Updated Presentence Report
12/05/2000 Hearing Held
12/05/2000 Court Minutes
12/05/2000 Final Judgement, Order Or Decree Entered
12/05/2000 Sentenced To Fine And Incarceration
12/05/2000 Judgment Of Conviction & Order Of Commitment
12/05/2000 Case Status Closed But Pending
07/03/2003 Memorandum (From Pardons & Parole)
11/13/2003 Change Assigned Judge (batch process)

State of Idaho vs. Janet Rose Hartman
No hearings scheduled

Case: **CR-1999-0003147** **Magistrate** Judge: **R. Michael Redman** Amount due: **$0.00** **Closed**

Charges:	Violation Date	Charge	Citation	Disposition
	08/24/1999	**I49-319 Drivers License-driving With Expired License Officer: BENKULA, STEVE, 2000**	**112252**	**Finding: Guilty Disposition date: 12/14/1999 Fines/fees: $0.00**

Register of actions:

Date

08/24/1999 New Case Filed
08/24/1999 Arraignment / First Appearance
08/24/1999 Notice Of Rights Misdemeanor
08/24/1999 Court Minutes
08/24/1999 Order Appointing Public Defender
08/25/1999 Response To Request For Discovery/defendant
08/25/1999 Request For Discovery And Inspection &
08/25/1999 Demand For Sworn Complaint
08/26/1999 Hearing Scheduled - Pre-trial Conference (10/26/1999) R. Michael Redman
08/26/1999 Jury Trial Scheduled - (11/03/1999) R. Michael Redman
08/26/1999 Notice Of Hearing
09/03/1999 Bond Posted - Surety
09/17/1999 Request For Discovery, Response To Request For Discovery, Response To Demand For Sworn Complaint
10/08/1999 Motion To Transport
10/14/1999 Order To Transport
10/26/1999 Hearing Vacated - Jury Trial
10/26/1999 Interim Hearing Held
10/26/1999 Court Minutes
10/26/1999 Written Plea Of Guilty
10/26/1999 Change Plea To Guilty Before H/t
11/04/1999 Hearing Scheduled - Sentencing (12/14/1999) R. Michael Redman
11/04/1999 Notice Of Hearing
12/10/1999 Driving Record
12/14/1999 Hearing Held
12/14/1999 Court Minutes

12/14/1999 Judgment
12/14/1999 Sentenced Neither To Fine Or Incarceration
12/14/1999 Bond Exonerated
12/28/1999 Returned/undelverable Mail(copy Of Judgmt)

State of Idaho vs. Janet Rose Hartman
No hearings scheduled

Case: **CR-1998-0001262** **Magistrate** Judge: **Melvin C. Edwards** Amount due: **$0.00** **Closed**

Charges:	Violation Date	Charge	Citation	Disposition
	03/18/1998	**I49-301 Drivers License-fail To Purchase/invalid Officer: xxVawser, Scott Inactive, 5000**	**3251**	**Finding: Guilty Disposition date: 04/27/1998 Fines/fees: $88.50**

Register of actions:

Date

04/01/1998 New Case Filed
04/01/1998 Appear & Plead Not Guilty
04/01/1998 Notice Of Rights Misdemeanor
04/01/1998 Notice Of Hearing
04/01/1998 Court Trial Scheduled - (04/27/1998) Melvin C. Edwards
04/27/1998 Court Trial Started
04/27/1998 Court Minutes
04/27/1998 Found Guilty After Trial
04/27/1998 Final Judgement, Order Or Decree Entered
04/27/1998 Sentenced To Pay Fine
04/27/1998 Misdemeanor Deferred Payment Agreement
04/27/1998 Case Status Closed But Pending

State of Idaho vs. Janet Rose Hartman
No hearings scheduled

Case: **CR-1998-0005382** **Magistrate** Judge: **Court Clerks** Amount due: **$0.00** **Closed**

Charges:	Violation Date	Charge	Citation	Disposition
	03/18/1998	**I49-1232 Insurance-fail To Provide Proof Of Insurance Officer: xxVawser, Scott Inactive, 5000**	**3250**	**Finding: Dismissed By Court Disposition date: 04/01/1998 Fines/fees: $0.00**

State of Idaho vs. Janet Rose Hartman
No hearings scheduled

Case: **CR-1996-0003375** **Magistrate** Judge: **Charles P. Brumbach** Amount due: **$0.00** **Closed**

Charges:	Violation Date	Charge	Citation	Disposition
	06/02/1996	**I49-1401(3) Driving-inattentive/careless Officer: TWIN FALLS SHERIFF,, 1000**	**19939**	**Finding: Guilty Disposition date: 07/01/1996 Fines/fees: $117.00**

	10/09/1996 I18-1801 Contempt Of Court Officer: TWIN FALLS SHERIFF,, 1000	**Finding: Dismissed By Prosecutor Disposition date: 01/07/1997 Fines/fees: $0.00**

Register of actions:

Date	
04/14/1996	Returned Mail-attempted Not Known
10/02/1996	Reopen (case Previously Closed)
10/02/1996	Criminal Complaint
10/02/1996	Affidavit & Notice Of Failure To Pay
10/02/1996	Warrant Issued - Arrest
10/23/1996	Affidavit Of Ftp Processed
10/23/1996	Warrant Served & Arraigned In Blaine Co.
11/05/1996	Warrant Returned
11/05/1996	Interim Hearing Held
11/05/1996	Arraignment And Plea Of Not Guilty On Fail To Pay
11/05/1996	Notice Of Rights Misdemeanor
11/05/1996	Financial Statement And Order (denied)
11/05/1996	Court Minutes (bond Is Cash Only)
11/05/1996	Change Assigned Judge
11/13/1996	Hearing Scheduled - Pre-trial Conference (01/07/1997) Charles P. Brumbach
11/13/1996	Jury Trial Scheduled - (01/16/1997) Charles P. Brumbach
11/14/1996	Bond Posted - Cash
12/06/1996	Notice Of Trial Returned/not At Box 205
12/18/1996	Request For Discovery/plaintiff
12/18/1996	Response To Request For Discovery/plaintiff
01/07/1997	Hearing Vacated - Jury Trial
01/07/1997	Disposition With Hearing
01/07/1997	Court Minutes
01/07/1997	Fine Paid-fail To Pay Dismissed
01/10/1997	Bond Converted / Exonerated
06/04/2010	Scanned

State of Idaho vs. Janet Rose Hartman
No hearings scheduled

Case: **CR-1995-0011182** **Magistrate** Judge: **Court Clerks** Amount due: **$0.00** **Closed**

Charges: Violation Date	Charge	Citation	Disposition
10/27/1995	**I49-1232 Insurance-fail To Provide Proof Of Insurance Officer: TWIN FALLS CITY,, 2000**	**92520**	**Finding: Dismissed By Court Disposition date: 10/30/1995 Fines/fees: $0.00**

State of Idaho vs. Janet Rose Hartman
No hearings scheduled

Case: **CR-1993-0003237** **Magistrate** Judge: **Charles P. Brumbach** Amount due: **$0.00** **Closed**

Violation

Charges:	Date	Charge	Citation	Disposition
	11/05/1993	**I49-301 Drivers License-fail To Purchase Officer: xSchulz, Jason Inactive, 2000**	**76642**	**Finding: Guilty Disposition date: 03/22/1994 Fines/fees: $92.50**
	11/05/1993	**I49-807(2) Stop Sign-fail To Stop/yield From Officer: xSchulz, Jason Inactive, 2000**	**76643**	**Finding: Guilty Disposition date: 02/18/1994 Fines/fees: $45.00**

Register of actions:

Date	
11/12/1993	New Case Filed
11/12/1993	Plea Of Not Guilty
11/12/1993	Notice Of Rights Misdemeanor
11/12/1993	Hearing Scheduled - Pre-trial Conference (01/11/1994) Charles P. Brumbach
11/12/1993	Jury Trial Scheduled (01/19/1994) Charles P. Brumbach
11/12/1993	Bond Posted - Surety
01/11/1994	Change Plea To Guilty Before H/t
01/11/1994	Hearing Vacated - Jury Trial
01/11/1994	Court Minutes
01/13/1994	Court Trial Scheduled (02/07/1994) Charles P. Brumbach
01/13/1994	Letter To Janet Rose Sylten
02/07/1994	Failure To Appear For Hearing Or Trial (on
02/07/1994	Count Ii)
02/07/1994	Court Minutes
02/18/1994	Infraction Default - Fta For Trial
03/07/1994	Hearing Scheduled - Cts I & Ii (03/22/1994) Charles P. Brumbach
03/18/1994	Driving Record
03/22/1994	Bond Exonerated
03/22/1994	Hearing Held - Cts I & Ii
03/22/1994	Court Minutes
03/22/1994	Judgment Of Conviction And Order Of Commit.
03/22/1994	Sentenced To Pay Fine
03/22/1994	Misdemeanor Deferred Payment Agreement
03/22/1994	Case Status Closed But Pending

State of Idaho vs. Janet Rose Hartman
No hearings scheduled

Case: **CR-1993-0009817** **Magistrate** Judge: **Court Clerks** Amount due: **$0.00** **Closed**

Charges:	Violation Date	Charge	Citation	Disposition
	11/05/1993	**I49-1232 Insurance-fail To Provide Proof Of Insurance Officer: xSchulz, Jason Inactive, 2000**	**76643**	**Finding: Guilty Disposition date: 11/19/1993 Fines/fees: $99.50**

State of Idaho vs. Janet Rose Hartman
No hearings scheduled

Case: **CR-1993-0002775** **Magistrate** Judge: **Charles P. Brumbach** Amount due: **$0.00** **Closed**

Charges:	Violation Date	Charge	Citation	Disposition
	09/25/1993	**I18-903 Battery Officer: xHottman, Mike Inactive, 2000**	**77126**	**Finding: Dismissed By Prosecutor Disposition date: 10/15/1993 Fines/fees: $0.00**
	09/25/1993	**I18-903 Battery Officer: xHottman, Mike Inactive, 2000**	**77127**	**Finding: Dismissed By Prosecutor Disposition date: 10/15/1993 Fines/fees: $0.00**

Register of actions:	Date	
	09/28/1993	New Case Filed
	09/28/1993	Appear & Plead Not Guilty
	09/28/1993	Notice Of Rights Misdemeanor
	09/29/1993	Hearing Scheduled - Pre-trial Conference (11/09/1993) Charles P. Brumbach
	09/29/1993	Jury Trial Scheduled (11/17/1993) Charles P. Brumbach
	09/29/1993	Order Appointing Public Defender
	09/29/1993	Financial Statement And Order
	10/01/1993	Request For Discovery/defendant
	10/06/1993	Response To Request For Discovery/plaintiff
	10/15/1993	Motion And Order To Dismiss
	10/15/1993	Dismissed Before Trial Or Hearing
	10/15/1993	Hearing Vacated - Jury Trial
	02/04/2008	Scanned and transferred to State Archive. Box 1271

State of Idaho vs. Janet Rose Hartman
No hearings scheduled

Case: **CR-1993-0000476** **Magistrate** Judge: **Melvin C. Edwards** Amount due: **$0.00** **Closed**

Charges:	Violation Date	Charge	Citation	Disposition
	02/19/1993	**I18-907(B) Battery-aggravated(use Deadly Weapon/instrument) Officer: xFarnworth, Ronald Inactive, 2000**		**Finding: Dismissed By Prosecutor Disposition date: 02/26/1993 Fines/fees: $0.00**

Register of actions:	Date	
	02/19/1993	New Case Filed
	02/19/1993	Affidavit In Support Of Complaint Or Warrant For Arrest
	02/19/1993	Hearing Scheduled - Preliminary (02/26/1993) Melvin C. Edwards
	02/19/1993	Arraignment / First Appearance
	02/19/1993	Notice Of Assertion Of Fifth Amendment Right To Presence Of Counsel
	02/19/1993	Notification Of Rights Felony
	02/19/1993	Court Minutes
	02/19/1993	Notice Of Hearing
	02/19/1993	Order Appointing Public Defender
	02/19/1993	Bond Posted - Surety

02/19/1993 Request For Discovery/defendant
02/24/1993 Response To Request For Discovery/plaintiff
02/24/1993 Request For Discovery/plaintiff
02/26/1993 Dismissed During/after Trial/hearing - Preliminary
02/26/1993 Court Minutes
02/26/1993 Bond Exonerated

State of Idaho vs. Janet Rose Hartman
No hearings scheduled

Case: **CR-1992-0008650** **Magistrate** Judge: **Court Clerks** Amount due: **$0.00** **Closed**

Charges:	Violation Date	Charge	Citation	Disposition
	12/02/1992	**I49-1232 Insurance-fail To Provide Proof Of Insurance Officer: xFarnworth, Ronald Inactive, 2000**	**70269**	**Finding: Guilty Disposition date: 03/01/1994 Fines/fees: $97.50**
	12/02/1992	**I49-807(2) Stop Sign-fail To Stop/yield From Officer: xFarnworth, Ronald Inactive, 2000**	**70269**	**Finding: Guilty Disposition date: 03/01/1994 Fines/fees: $43.00**

State of Idaho vs. Janet Rose Hartman
No hearings scheduled

Case: **CR-1992-0002809** **Magistrate** Judge: **R. Michael Redman** Amount due: **$0.00** **Closed**

Charges:	Violation Date	Charge	Citation	Disposition
	12/02/1992	**I18-8004 {M} Driving Under The Influence Officer: xFarnworth, Ronald Inactive, 2000**	**70267**	**Finding: Guilty Disposition date: 03/23/1993 Fines/fees: $47.50 Jail: 10 days**
	12/02/1992	**I37-2732(C)(3) Controlled Substance-possession Of Officer: xFarnworth, Ronald Inactive, 2000**	**70268**	**Finding: Dismissed By Prosecutor Disposition date: 02/23/1993 Fines/fees: $0.00**

Register of actions: Date

12/02/1992 New Case Filed
12/02/1992 Affidavit In Support Of Complaint Or Warrant For Arrest
12/02/1992 Arraignment / First Appearance
12/02/1992 Appear & Plead Not Guilty
12/02/1992 Notice Of Assertion Of Fifth Amendment Right To Presence Of Counsel
12/02/1992 Financial Statement And Order
12/02/1992 Court Minutes
12/02/1992 Order Appointing Public Defender
12/08/1992 Idaho Code 18-8002 Advisory Form
12/09/1992 Request For Discovery/defendant
12/10/1992 Response To Request For Discovery/plaintiff
12/11/1992 Hearing Scheduled - Pre-trial Conference (02/23/1993) R. Michael Redman

12/11/1992 Jury Trial Scheduled (03/03/1993) R. Michael Redman
12/18/1992 Supplemental Response
02/08/1993 Supplemental Response
02/23/1993 Change Plea To Guilty Before H/t
02/23/1993 Hearing Vacated - Jury Trial
02/23/1993 Written Plea Of Guilty
02/23/1993 Court Minutes
03/01/1993 Hearing Scheduled - Sentencing (03/23/1993) R. Michael Redman
03/19/1993 Driving Record
03/23/1993 Hearing Held - Sentencing
03/23/1993 Court Minutes
03/23/1993 Order Suspending Drivers License
03/23/1993 Final Judgement, Order Or Decree Entered
03/23/1993 Sentenced To Fine And Incarceration
03/23/1993 Misdemeanor Deferred Payment Agreement
03/23/1993 Case Status Closed But Pending

State of Idaho vs. Janet Rose Hartman
No hearings scheduled

Case: **CR-1992-0007863** **Magistrate** Judge: **Court Clerks** Amount due: **$0.00** **Closed**

Charges:	Violation Date	Charge	Citation	Disposition
	10/17/1992	**I49-1401(3) Driving-inattentive/careless Officer: xGarcia, Felix Inactive, 2000**	**68942**	**Finding: Guilty Disposition date: 01/14/1993 Fines/fees: $25.00**

Connection: Public

09/09/1999 Reopen (case Previously Closed)
09/09/1999 Motion And Order For Bench Warrant
09/09/1999 Warrant Issued - Arrest
09/17/1999 Warrant Returned
09/20/1999 Hearing Scheduled - Pv Arraignment (09/24/1999) Monte B Carlson
09/20/1999 Notice Of Hearing
09/20/1999 Sharon Sent Copies Of The Above Document To The Attorneys
09/24/1999 Court Minutes
09/24/1999 Hearing Held - Pv Arraignment
09/27/1999 Hearing Scheduled - Pv Hearing (10/22/1999) Monte B Carlson
09/27/1999 Notice Of Hearing
10/22/1999 Court Minutes
10/22/1999 Hearing Held - Pv Hearing
10/25/1999 Hearing Scheduled - Pv Hearing (10/29/1999) Monte B Carlson
10/26/1999 Amended Notice Of Hearing
10/26/1999 Sharon Sent Copies Of The Above Document To The Attorneys
10/29/1999 Disposition With Hearing
10/29/1999 Court Minutes
10/29/1999 Execution Of Judgment Suspended - (120/180 Days)
10/29/1999 Order Of Commitment
10/29/1999 Isbc 12 Mos D; 36 Mos Ind; 173 Days Credit
11/02/1999 Fof, Conc Of Law & Order Re Pv & Order Of
11/02/1999 Commitment (for 10-29-99)
11/03/1999 Case Status Closed But Pending
03/16/2000 Hearing Scheduled - 120 Day Rev. (03/31/2000) Monte B Carlson
03/16/2000 120-day Evaluation Report
03/16/2000 Order To Attend Review Hearing
03/31/2000 Disposition With Hearing - 120 Day Rev.
03/31/2000 Court Minutes
04/04/2000 Hearing Scheduled - 120 Day Review (04/20/2000) Monte B Carlson
04/04/2000 Notice Of Hearing 4-20-00
04/20/2000 Continued - 120 Day Review
04/20/2000 Court Minutes
04/20/2000 Hearing Scheduled - 120 Day Review (05/04/2000) Monte B Carlson
04/21/2000 Notice Of Hearing
04/21/2000 Sharon Sent Copies Of The Above Document To The Attorneys
05/03/2000 Reopen (case Previously Closed)
05/04/2000 Disposition With Hearing - 120 Day Review
05/04/2000 Court Minutes
05/04/2000 Court Relinquished Jurisdiction
05/04/2000 1-3 Yrs Isbc; Credit For Time Served
05/04/2000 Order Relinquishing Jurisdiction
05/09/2000 Case Status Closed But Pending

Connection: Public

Case History

Cassia

1 Cases Found.

State of Idaho vs. Janet Rose Sylten
No hearings scheduled

Case: **CR-1996-0001687** **District** Judge: **Monte B Carlson** Amount due: **$0.00** **Closed**

Charges:	Violation Date	Charge	Citation	Disposition
	12/31/1996	**I18-903 {F} Battery On Correctional Officer,jailer** **Officer: Burley City Offcr.,, 1000**		**Finding: Guilty** **Disposition date: 01/08/1998** **Fines/fees: $690.50** **Det Penitentiary: 12 months** **Indet Penitentiary: 24 months** **Probation: 24 months**

Register of actions:	Date	
	12/31/1996	New Case Filed
	12/31/1996	Criminal Complaint
	12/31/1996	Affidavit Of Probable Cause
	01/02/1997	Change Assigned Judge
	01/02/1997	Arraignment / First Appearance
	01/02/1997	Order Appointing Public Defender
	01/03/1997	Hearing Scheduled - Prelim/battery (01/14/1997) Roy C. Holloway
	01/14/1997	Hearing Waived - Prelim/battery
	01/14/1997	Preliminary Hearing Waived (bound Over)
	01/14/1997	Transfer In (from Idaho Court Or County)
	01/22/1997	Information: Battery On Correctional Officer
	01/23/1997	Hearing Scheduled - Arraignment (02/03/1997) George Granata Jr.
	01/23/1997	Notice Of Hearing: Arraignment
	02/03/1997	Arraignment / First Appearance
	02/03/1997	Constitutional Rights Warning
	02/03/1997	Court Minutes
	02/03/1997	Hearing Scheduled - Status Hearing (02/28/1997) George Granata Jr.
	02/04/1997	Notice Of State's Request For Discovery
	02/04/1997	Request For Discovery
	02/04/1997	Order Re: Pre-trial Motions S/granata
	02/07/1997	Notice Of Defendant's Request For Discovery
	02/28/1997	Hearing Held - Status Hearing
	02/28/1997	Court Minutes
	02/28/1997	Hearing Scheduled - Status Hearing (04/04/1997) George Granata Jr.
	02/28/1997	Amended Notice Of Hearing: Status Hearing
	03/06/1997	Ncic Indentification Index Response
	04/04/1997	Change Plea To Guilty Before H/t - Status Hrg.
	04/04/1997	Court Minutes
	04/04/1997	Constitutional Rights Warning

04/04/1997 Acceptance Of Guilty Plea Questionnaire
04/04/1997 Order To Attend Psi Interview & Appear For Sentencing
04/04/1997 Motion For Reduction Of Bond To O.r.
04/04/1997 Order Reducing Bond To O.r. S/granata 4/4/97
04/04/1997 Stipulation Sentencing Agreement
04/04/1997 Hearing Scheduled - Sentencing (05/09/1997) George Granata Jr.
04/07/1997 Notice Of Hearing: Sentencing
05/06/1997 Motion To Continue
05/07/1997 Hearing Scheduled - Sentencing (05/29/1997) George Granata Jr.
05/07/1997 Motion To Continue
05/07/1997 Order To Continue S/granata 5/7/97 (5-29-97)
05/09/1997 Continued Sentencing To 5/29/97
05/28/1997 Motion To Continue
05/29/1997 Hearing Scheduled - Sentencing (06/27/1997) George Granata Jr.
05/29/1997 Order To Continue S/granata 5/29/97
06/12/1997 Hearing Scheduled - Sentencing (07/11/1997) George Granata Jr.
06/12/1997 Amended Notice Of Hearing :sentencing 7/11/97
07/08/1997 Hearing Scheduled - Sentencing (07/10/1997) George Granata Jr.
07/08/1997 Amended Notice Of Hearing: Sentencing: 7/10
07/10/1997 Sentencing Continued-def Not Imformed Of Date
07/10/1997 Court Minutes
07/15/1997 Motion To Continue/kerry Mcmurray
07/16/1997 Order To Continue S/hart 7/16/97
07/16/1997 Hearing Scheduled - Sentencing (08/29/1997) George Granata Jr.
08/21/1997 Hearing Vacated
08/21/1997 Amended Notice Of Hearing: Sent. 8/28/97
08/28/1997 Hearing Scheduled - Sentencing (09/26/1997) George Granata Jr.
08/28/1997 Continued Sentencing To 9/26/97
08/28/1997 Notice Of Hearing: Sentencing 9/26/97
08/29/1997 Motion To Continue
08/29/1997 Order To Continue Sent To 9/26/97 S/granata
09/02/1997 Hearing Scheduled - Sentencing (09/26/1997) George Granata Jr.
09/26/1997 Failure To Appear For Hearing Or Trial
09/26/1997 Court Minutes
10/01/1997 Motion And Order For Bench Warrant
10/01/1997 Warrant Issued - Arrest
12/22/1997 Warrant Returned
12/22/1997 Hearing Scheduled - Sentencing (01/08/1998) George Granata Jr.
12/22/1997 Notice Of Hearing: Sentencing 1-8-98
01/08/1998 Hearing Held
01/08/1998 Court Minutes
01/08/1998 Order Of Release S/granata
01/08/1998 Probation Ordered-24 Mos
01/08/1998 123 Days Jail W/wk Rel; 123 Days Credit
01/08/1998 Judgment Of Conviction, Susp Of Sentence And
01/08/1998 Order Of Probation S/granata
01/08/1998 Case Status Closed But Pending
09/08/1999 Change Assigned Judge
09/08/1999 Report Of Probation Violation

Search details:

[New Search] [Result Summary]

JANET ROSE SYLTEN #53631

Status: Discharged

Discharge Date: 02/22/2007

Other Information:

The Idaho Department of Correction updates this information regularly, to ensure that it is complete and accurate; however, this information can change quickly. Therefore, the information on this site may not reflect the true content, location, status, scheduled termination date, or other information regarding an offender.

More Information:

This offender search service is designed to provide basic information about an offender. If you need additional basic offender record information, contact inquire@idoc.idaho.gov.

Formal requests for copies of records should be mailed to:

Records Bureau
Idaho Department of Correction
1299 N. Orchard Street, Suite 110
Boise, ID 83706

If you want to learn more about parole procedures, or need specific information about a parole eligibility date, tentative parole date and/or hearing results, please contact the Idaho Commission of Pardons & Parole.

For information on Idaho Department of Correction visitation, please go to:
www.idoc.idaho.gov/content/prisons/visiting

For information on Idaho Department of Correction mail regulations, please go to:
www.idoc.idaho.gov/content/prisons/offender_services/mail_rules

Dennis Benjamin, ISB No. 4199
Deborah Whipple, ISB No. 4355
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
303 W. Bannock
P.O. Box 2772
Boise, ID 83701
(208) 343-1000
(208) 345-8274 (f)

Pro Bono Attorneys for Appellant

IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SARAH MARIE JOHNSON, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV-2006-0000324 **AFFIDAVIT OF DR. GREG HAMPIKIAN IN SUPPORT OF DNA AND SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF**

Dr. Greg Hampikian, being first duly sworn upon oath, hereby says:

1. I am the Director of the Idaho Innocence Project at Boise State University, 1910 University Drive, Boise, ID 83725-1515.

2. The Idaho Innocence Project is participating in Sarah Marie Johnson's post-conviction proceedings on a pro bono basis.

3. My academic degrees and post doctoral training include:

Postdoctoral Associate, Worcester Foundation for Experimental Biology, 1992

National Science Foundation International Centers of Excellence Postdoctoral Award, 1990-91 with Jennifer Graves, La Trobe University, Australia

Ph. D., University of Connecticut, Genetics, 1990

M.S., University of Connecticut, Genetics, 1986

B.S., University of Connecticut, Biology, 1982

4. My curriculum vitae is attached as an appendix to this Affidavit.

5. I have reviewed the reports of the DNA testing completed in connection with the case of *State v. Sarah Johnson.*

6. I have worked extensively with the state and federal CODIS databases and have personal knowledge that these databases have been materially expanded since the time of the original testing in this case, for example mew technology called Mini-STRs can be used for CODIS profiles.

7. Bloodstain 2 from the robe contains a mixture of at least three individuals including an unknown individual. This evidence may now be compared to a reference sample from Christopher Hill which was not available at the time of trial, and deduced profiles may be submitted to the state and federal CODIS databases.

8. The tissue from the left collar area of the robe is from an unknown male. Alan Johnson and Bruno Santos are excluded as potential contributors. This evidence may now be compared to a reference sample from Christopher Hill which was not available at the time of trial, and deduced profiles may be submitted to the state and federal CODIS databases.

9. Bloodstain C on the rifle is from an unknown male excluding Alan Johnson and Bruno Santos. This evidence may now be compared to a reference sample from Christopher Hill which was not available at the time of trial, and deduced profiles may be submitted to the state and federal CODIS databases.

10. No conclusions could be reached due to insufficient amounts of DNA concerning the bloodstain 24 from the robe, the tissue from the lower left side of the robe, the tissue from the inside lower back of the robe, the tissue from the inside left sleeve of the robe, the stain from Bruno Santos' pants, the fibers imbedded in unknown material, bloodstain B from the rifle, and bloodstain G from the rifle. This evidence may now be tested using advanced DNA amplification and purification techniques and once analyzed, compared to reference samples from the time of trial and to a reference sample from Christopher Hill which was not available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Cellmark and others. These techniques include post amplification cleanup with Montage columns, and Low Copy Number (LCN) DNA analysis. The deduced profiles may be of sufficient quality to be submitted to the state and federal CODIS databases.

11. Robe samples #24-30 were never analyzed and may now be subjected to DNA analysis. This evidence may now be tested using advanced DNA amplification and purification techniques and once analyzed, compared to reference samples from the time of trial and to a reference sample from Christopher Hill which was not available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Cellmark and others. These techniques include post amplification cleanup with Montage columns and Low Copy Number (LCN) DNA analysis. The deduced profiles may be of sufficient quality to be submitted to the state and federal CODIS databases.

12. The results from Robe sample 34, if any, are not listed on the Cellmark DNA report. This evidence may now be tested using advanced amplification techniques and once analyzed, compared to reference samples from the time of trial to a reference sample from Christopher Hill which was not available at the time of trial. The new DNA techniques are available at accredited

forensic labs such as Bode, Cellmark and others. These techniques include post amplification cleanup with Montage columns and Low Copy Number (LCN) DNA analysis. The deduced profiles may be of sufficient quality to be submitted to the state and federal CODIS databases.

13. DNA from the unidentified fingerprint on the .264 round (Item # 14) may now be tested using advanced DNA amplification and purification techniques and once analyzed, compared to reference samples from the time of trial to a reference sample from Christopher Hill which was not available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Cellmark and others. These techniques include post amplification cleanup with Montage columns and Low Copy Number (LCN) DNA analysis. The deduced profiles may be of sufficient quality to be submitted to the state and federal CODIS databases.

14. DNA from the unidentified fingerprints on the doorknob set on Diane and Alan Johnson's bedroom door (Items # 15-16) may now be tested using advanced techniques not available at the time of trial and compared to reference samples from the time of trial and after and submitted to a CODIS databank.

15. The results from Robe sample 34, if any, are not listed on the Cellmark DNA report. This evidence may now be tested using advanced amplification techniques and once analyzed, compared to reference samples from the time of trial to a reference sample from Christopher Hill which was not available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Cellmark and others. These techniques include post amplification cleanup with Montage columns and Low Copy Number (LCN) DNA analysis. The deduced profiles may be of sufficient quality to be submitted to the state and federal CODIS databases.

16. DNA from the unidentified fingerprint on the .264 round (Item # 14) may now be tested using advanced DNA amplification and purification techniques and once analyzed,

compared to reference samples from the time of trial to a reference sample from Christopher Hill which was not available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Cellmark and others. These techniques include post amplification cleanup with Montage columns and Low Copy Number (LCN) DNA analysis. The deduced profiles may be of sufficient quality to be submitted to the state and federal CODIS databases.

17. DNA from the unidentified fingerprints on the doorknob set on Diane and Alan Johnson's bedroom door (Items # 15-16) may now be tested using advanced techniques not available at the time of trial and compared to reference samples from the time of trial and after. The deduced profiles may be of sufficient quality to be submitted to the state and federal CODIS databases.

18. DNA from the palm prints (Items 20-2 and 20-3) may now be tested using advanced DNA amplification and purification techniques and once analyzed, compared to reference samples from the time of trial to a reference sample from Christopher Hill which was not available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Cellmark and others. These techniques include post amplification cleanup with Montage columns and Low Copy Number (LCN) DNA analysis. The deduced profiles may be of sufficient quality to be submitted to the state and federal CODIS databases.

19. DNA from the print on the empty shell casing (Item 12-1) may now be tested using advanced DNA amplification and purification techniques and once analyzed, compared to reference samples from the time of trial to a reference sample from Christopher Hill which was not available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Cellmark and others. These techniques include post amplification cleanup

with Montage columns and Low Copy Number (LCN) DNA analysis. The deduced profiles may be of sufficient quality to be submitted to the state and federal CODIS databases.

20. One of the two hairs samples recovered from the barrel of the .264 rifle could not be matched to Sarah or any of her maternal relatives by mitochondrial DNA testing. This hair can now be compared to a DNA reference sample from Christopher Hill which was not available at the time of trial.

21. Two of the three hairs removed from Bruno Santo's sweater were excluded as coming from Sarah and could not be identified as coming from a particular maternal line. These hairs can now be compared to a new DNA reference sample from Christopher Hill. One of the hairs also had a small root and could be analyzed using advanced DNA amplification and purification techniques and once analyzed, compared to reference samples from the time of trial to a reference sample from Christopher Hill which was not available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Cellmark and others. These techniques include post amplification cleanup with Montage columns and Low Copy Number (LCN) DNA analysis. The deduced profiles may be of sufficient quality to be submitted to the state and federal CODIS databases.

22. DNA from an unknown contributor found on the inside of the latex glove can now be analyzed using advanced DNA amplification and purification techniques and once analyzed, compared to reference samples from the time of trial to a reference sample from Christopher Hill which was not available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Cellmark and others. These techniques include post amplification cleanup with Montage columns and Low Copy Number (LCN) DNA analysis. The deduced profiles may be of sufficient quality to be submitted to the state and federal CODIS databases.

23. Low levels of DNA from an unidentified source were found on the leather glove from the garbage can. That DNA can now be analyzed using advanced DNA amplification and purification techniques and once analyzed, compared to reference samples from the time of trial to a reference sample from Christopher Hill which was not available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Cellmark and others. These techniques include post amplification cleanup with Montage columns and Low Copy Number (LCN) DNA analysis. The deduced profiles may be of sufficient quality to be submitted to the state and federal CODIS databases.

24. A bloody handprint was found on the sheet under the pillow beneath Diane. DNA from that handprint can now be amplified using new fingerprint DNA analysis to determine whether the handprint was made by Alan or some other person after Diane was shot. See T Tr. Vol. 6, p. 4238, ln. 25- p. 4239, ln. 12.

25. The 2004 testing was also inconclusive insofar as none of the results were compared with Christopher Hill's DNA profile which is now available with an appropriate chain of custody as documented in the Blaine County Sheriff's Office Supplemental Report 6 showing that four buccal swabs were obtained from Mr. Hill on April 7, 2009.

26. The 2004 testing was also inconclusive insofar as the results were not compared with Matthew Johnson's DNA profile.

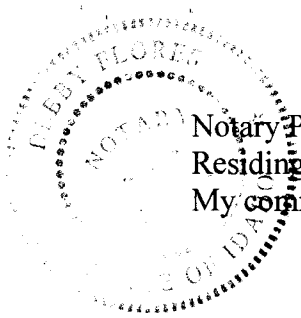
This ends my Affidavit.

Dr. Greg Hampikian

DEBBY FLORES NOTARY PUBLIC STATE OF IDAHO

SUBSCRIBED AND SWORN TO
before me this 9th day of April, 2012.

Debby Flores
DEBBY FLORES, Notary Public
State of Idaho, County of Ada
My commission expires Aug 19 2014
Filing # 38619



Notary Public for the State of Idaho
Residing at: Boise, Idaho
My commission expires: 8-19-2014

Debby Flores
DEBBY FLORES, Notary Public
State of Idaho, County of Ada
My commission expires Aug 19 2014
Filing # 38619

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ___ day of April, 2012, I caused a true and correct copy of the foregoing to be deposited in the United States Mail postage pre-paid and addressed to:

Honorable Richard Bevan
District Judge
474 Shoshone Street
P.O. Box 126
Twin Falls, ID 83303-0126

Jim Thomas
Blaine County Prosecutor
201 Second Ave S., Suite 100
Hailey, ID 83333

Jessica Lorello
Kenneth Jorgensen
Deputy Attorneys General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0012

Dennis Benjamin

Greg Hampikian
E-mail: greghampikian@boisestate.edu
208-781-0438

Education

Ph.D. Genetics, The University of Connecticut, 1990
M.S. Genetics, The University of Connecticut, 1986
B.S. Biological Sciences, The University of Connecticut, 1982

Experience

2006-present
Professor of Biology, with a joint appointment in Criminal Justice, Boise State University (BSU), (Associate Professor, August 2004-2006).
Graduate and undergraduate courses: Forensic Biology, DNA Evidence in Cold Cases, Advanced DNA Analysis, Biotechnology, Cell Biology, Genetics.

2006-present
Founder and Director of the Idaho Innocence Project at Boise State University. Volunteer position. Raised more than $300,000 through grants and donations, organized a Legal Advisory Board with leading lawyers, supervise staff: a full time lawyer, six volunteers, and student interns. Currently working on 10 Idaho cases.

2002-present
DNA Expert for the Georgia Innocence Project
Analyze forensic evidence, assist in legal proceedings, testify, work with and train students. Involved in four exonerations, two of which resulted in the arrests of new suspects more than 20 years after the crime.

1993-2004
Professor, Biology, Clayton State University (CSU)
(Assistant Professor 1993-97, Associate Professor, 1997-2003)
Coordinated the Forensic Science Track for biology major. Courses: Biotechnology, Biotechnology Lab, Genetics, Human Genetics (on-line), Recombinant DNA Laboratory, Bioregulatory Affairs, Microbiology, Microbiology Lab, Anatomy and Physiology (A&P) sequence, A&P Labs, Sex and Reproduction, Introductory Biology (majors and non-majors sequence), Introductory Biology Labs, Biotechnology for teacher education students.

2004
Chair of the Georgia Academic Advisory Committee for Biological Sciences
The Committee included department heads of all Georgia public colleges and universities; coordinated curriculum review, organized corporate partnerships, and responded to the "evolution challenge" in public schools.

2003-2004
Grants Coordinator for the School of Arts and Sciences, CSU
Organized a consortium of six area school systems, wrote two multimillion dollar NSF Math/Science Partnerships proposals.

2001-2002
Biology Coordinator, Natural Science Department, CSU
Wrote a successful degree proposal for new Bachelor of Science in Biology, which includes tracks in Forensic Science, Biotechnology/Biocomputing, Bioregulatory Affairs/Science Management. Hired five new faculty members.

2000
First Presidential Faculty Fellow, CSU
Helped coordinate new majors proposals; acted as faculty liaison to campus departments.

1997- 1998
National Science Foundation Research Opportunity Award, Georgia Tech, Biochemistry Dept., Research Faculty Member
Enzymatic nucleotides, and chromatin structural changes caused by anti-cancer drugs, with Loren Williams.

1994-1995
Visiting Scientist, Emory University and **The Centers for Disease Control and Prevention (CDC), Atlanta**
Sex-determination in malarial mosquitoes with John Lucchesi, Biology Department Chair, Emory University; and Frank Collins of the CDC.

1992
Worcester Foundation for Experimental Biology, Postdoctoral Associate with William Crain
Gene expression in mouse embryogenesis, toxicity of antisense therapies on pregnant mice.

1990-1991
U.S. National Science Foundation, Postdoctoral Fellow with Jennifer Graves, La Trobe University, Australia
The sequence and expression of mammalian sex-determining genes.

1986-1990
Ph.D. thesis with Linda Strausbaugh, The University of Connecticut
Transcriptional regulation of tagged histone genes in relation to the cell cycle in synchronized culture cells. Instructor in the Summer Institute of Molecular

Biology, secured all funding for course from corporate sponsors.

1985-1986
Master's research with Paul Goetinck, University of Connecticut.
Cartilage Link protein c-DNA.

1983-1984
Yale University, School of Medicine, New Haven, Conn.
Research assistant, human keratins and drug response, psoriasis research with Joseph McGuire, Head of Pediatric Dermatology.

Publications

Valverde, L., Rosique, M., Köhnemann, S., Cardoso, S., García, A., Odriozola, A., Aznar, JM, Celorrio, D., Schuerenkamp, M., Zubizarreta, J., Davis, M., Hampikian, G., Pfeiffer, H., de Pancorbo, M. Y-STR variation in the Basque diaspora in the Western USA: evolutionary and forensic perspectives, Int J Legal Med DOI 10.1007/s00414-011-0644-8 (In Press, 2011).

Zubizarreta, J., Davis, M., Hampikian, G., "The Y-STR genetic diversity of an Idaho Basque population, with comparison to European Basques and US Caucasians", Human Biology, Volume 83, Issue 6 , 2011.

Hampikian, G, West, E., Askelrod, O. "The Innocence Network: Analysis of 194 American DNA Exonerations," Annual Review of Genomics and Human Genetics 12, 2011

Dror, I. E. & Hampikian, G. (2011). Subjectivity and bias in forensic DNA mixture interpretation. Science & Justice, 51 (4), 204-208.

Bourland, W., Vdacny, P, Davis, M., and Hampikian, G., Morphology, Morphometrics and Molecular Characterization of Bryophrya gemmea n. sp. (Ciliophora, Colpodea): Implications for the Phylogeny and Evolutionary Scenario for the Formation of Oral Ciliature in Order Colpodida, Journal of Eukaryotic Microbiology, vol 58, Issue 1, p 22-36, January/February 2011

Davis, M., Novak, S., Hampikian, G., Mitochondrial DNA analysis of an immigrant Basque population: loss of diversity due to founder effects, American Journal of Physical Anthropology, Vol. 144, Issue 4, p516-525, April 2011.

Karalova, E. M., Sargsyan, Kh.V., Hampikian G.K., Voskanyan , H. E., Abroyan L. O. , AvetisyanA. S., Hakobyan, & L. A, Arzumanyan , H.H., Zakaryan H. S., Karalyan, Zaven A., Phenotypic and cytologic studies of lymphoid cells and monocytes in primary culture of porcine bone marrow during infection of African swine fever virus, In Vitro Cell. Dev. Biol.—Animal, (2011) 47:200–204.

Bullock, C., Jacob, R., McDougal, O., Hampikian, G., Andersen, T. DockoMatic - Automated Ligand Creation and Docking, BMC Research Notes 2010, 3:289.

Abu B. Kanu, Greg Hampikian, Simon D. Brandt, Herbert H. Hill Jr., Ribonucleotide and ribonucleoside determination by ambient pressure ion mobility spectrometry, Analytica Chimica Acta 658 (2010) 91–97.

D. E. Krane, et al. (39 authors) "Time for DNA Disclosure", Science, Vol. 326. no. 5960, pp. 1631 – 1632, 18 December, 2009.

Lucian A. Lucia, Lambrini Adamapoulos, Jason Montegna, Greg Hampikian, Dimitris S. Argryopoulos, John Heitmann (2007), "A Simple Method to Tune the Gross Antibacterial Activity of Cellulosic Biomaterials, Carbohydrate Polymers 69"; 805–810.

Greg Hampikian and Tim Andersen (2007), "Absent Sequences: Nullomers and Primes," Pacific Symposium on Biocomputing, 12:355-366.

K. Moeller, J. Besecker, G. Hampikian, A. Moll, D. Plumlee, J. Youngsman and J.M. Hampikian, (2007), "A Prototype Continuous Flow Polymerase Chain Reaction LTCC Device," Materials Science Forum Vols. 539-543 pp. 523-528.

G. Hampikian, (2005), "The Future of Forensic DNA," The Canadian Journal of Police and Security Services, (Spring, 2005).

M. Crayton, C. Ladd, M. Sommer, G. Hampikian, L. Strausbaugh, (2004), "An organizational model of transcription factor binding sites for a histone promoter in D. melanogaster," In Silico Biology 4, 40-45 (October, 2004).

"Exit to Freedom," Johnson and Hampikian (University of Georgia Press, 2003): Calvin C. Johnson, Jr.'s autobiography (written by Hampikian). The true story of a man who served 16 years in Georgia prisons for a rape he did not commit until DNA evidence freed him. Afterward by Barry Scheck.
Awarded the 2004 Silver Medal in biography, (ForeWord Magazine's Book of the Year Awards).

- Nominated for the 2004 Robert F. Kennedy Book Award.

- Nominated for the 2004 African American Literary Awards.

P. Henderson, D. Jones, G. Hampikian, Y. Kan, and G. Schuster (1999), "Long-distance charge transport in duplex DNA: The polaron-like hopping mechanism," Proceedings of the National Academy of Sciences, USA, Vol. 96, Issue 15, 8353-8358, July 20, 1999.

G. Hampikian, J. Graves, D. Cooper, (1994), "Sex- determination in the marsupial" in Molecular Genetics of Sex Determination, (Ed. S. Wachtel), Academic Press.

M. Gaudette, G. Hampikian, V. Metelev, S. Agrawal and W. Crain, (1993), "Effect on embryos of phosphorothioate modified oligos. into pregnant mice," Antisense Res. & Dev., 3:391-397.

J. Graves, J. Foster, G. Hampikian, F. Brennan, (1993), "Sex- determination in marsupial mammals," in Sex Chromosomes and Sex Determining Genes, (Editors, K. Reed and J. Graves) Gordon and Breach, Melbourne.

J. Foster, F. Brennan, G. Hampikian, P.N. Goodfellow, A. Sinclair, R. Lovell-Badge, L. Selwood, M. Renfree, D. Cooper and J. Graves, (1992), "Evolution of sex determination and the Y chromosome: SRY- related sequences in marsupials," Nature: 359:531-533.

F. Deak, Y. Kiss, K. Sparks, S. Argraves, G. Hampikian and P. Goetinck (1986), "Amino acid sequence of chicken cartilage link protein from c-DNA clones," Proc. National Academy of Science, U.S.A.: 83:3766- 3770.

Patent Awards and Applications

US Patent 8,008,816: Magnetomechanical Transducer, and Apparatus and Methods for Harvesting Energy, Hampikian and Mullner inventors, awarded August 30, 2011.

US Patent application: a DNA marker to be added to samples as a safeguard. The oligomers are based on sequences not found in GenBank, and can be coded to contain a wide variety of information, Hampikian inventor.

Two invention disclosures regarding micropumps made of magnetic shape memory materials, 2011.

Invention disclosure for novel anticancer peptides, 2011.

Professional Memberships

- American Academy of Forensic Sciences, workshop leader.
- International Society for Forensic Genetics, presenter.

- International Society for Computational Biology.
- American Society of Microbiologists: Editor for education Newsletter (1999-2002), Editor for image archives (1999-2003); Moderator of the Molecular Biology and Biotechnology Education Listserve (1999-2003).
- American Society for Cell Biology, presenter, education committee member, pre-doctoral grants reviewer.

Recent Professional Education

Tutorial Workshops, 2011 Pacific Symposium on Biocomputing, Hawaii: "Mining the Pharmacogenetics Lierature," and, "Identification of Aberrant Pathway and Network Activity from High Throughput Data", Hawaii, January 3-7, 2011

Familial Search Workshop, International Symposium on Human Identification, San Antonio Texas, October 14, 2010

Low Copy Number Analysis Workshop, Ethics and Forensic Science, International Symposium on Human Identification, San Antonio Texas, October 11, 2010

SNP analysis of physical characteristics (ie., eye color) as well as ancestry. HITA/AABB Workshop, International Symposium on Human Identification, San Antonio Texas, October 10, 2010

Ethics and Forensic Science, International Symposium on Human Identification, Las Vegas, October 15, 2009.

Post-conviction DNA Case Management Symposium, US Department of Justice, Office of Justice Programs, National Institute of Justice, invited participant, Tampa, Fla., January 23-24, 2009.

Tutorial Workshops, 2009 Pacific Symposium on Biocomputing, Hawaii: "Open Science: Tools, Approaches and Implications", "Post-Transcriptional Gene Regulation: RNA-Protein Interactions", "RNA Processing" and "mRNA Stability and Localization," 2009.

Applied Biosystems Gene Mapper & ID-X Software Training, Boise State University, May 26-29, 2009.

DNA Mixture Interpretation: Principles and Practice in Component Deconvolution and Statistical Analysis, American Academy of Forensic Sciences workshop, Washington, D.C., Feb. 19, 2008.

Mixture Interpretation Workshop, taught by Gary Schutler, Ph.D., Northwest Association of Forensic Science, Boise, Idaho, 2008.
Forensic Population Genetics Workshop, 19th International Symposium on Human Identification, Hollywood, CA, 2008.

2008 Pacific Symposium on Biocomputing, Hawaii, 2008
Tutorial Workshops: "Multiscale Modeling and Simulation", "Computational Tools for Next-Generation Sequencing."

Applied Statistics Workshop, 18th International Symposium on Human Identification, (covered DNA Mixtures, Statistics, Parentage and Kinship, Pedigree Analysis), Hollywood, CA, 2007.

Pacific Symposium on Biocomputing, Hawaii, 2007: "Computational Proteomics."

DNA Statistics, 17th International Symposium on Human Identification, Workshop, Nashville, TN, 2006.

Advanced Topics in STR DNA Analysis, American Academy of Forensic Sciences, workshop, Seattle, WA, Feb. 20, 2006.

Li-Cor DNA sequencing training for the Li-Cor 4300, Boise State University, 2005.

On-site evaluator training Forensic Science Education Programs Accreditation Commission (FEPAC), American Academy of Forensic Sciences workshop, New Orleans, 2005.

"Symposium: Emerging and Enabling Technologies for Biological and Chemical Detection" and "Federal Bio-Chem Detection R&D Opportunities," 15.5 hours, Information Forecast, Washington, DC, 2005.

Forensic Human Mitochondrial DNA Analysis, American Academy of Forensic Sciences workshop, Dallas, Texas, 2004.

Forensic Science for Medicolegal Professionals Course (co-organizer), Atlanta, 2004.

Mass Fatalities Incident Response Planning Course, (Local coordinator), Atlanta, 2004.

Science in the Courtroom for the 21st Century: Issues in Forensic DNA, Chicago, 2004.

Legal Communication in the 21st Century, 3-hour course, Clayton State

ORIGINAL

R. Keith Roark, ISB No. 2230
THE ROARK LAW FIRM
409 Main Street
Hailey, ID 83333
208-788-3918
keith@roarklaw.com

Attorneys for Sarah Johnson

Deborah Whipple ISB No. 4355
Dennis Benjamin ISB No. 4199
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
P.O. Box 2772
303 W. Bannock
Boise, Idaho 83701
(208) 343-1000
deb@nbmlaw.com
db@nbmlaw.com

Of counsel to the Roark Law Firm

IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SARAH MARIE JOHNSON, Petitioner, vs. STATE OF IDAHO, Respondent.	CV-2006-0000324 **AMENDED DNA AND SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF**

Sarah Johnson brings this action pursuant to I.C. §§ 19-4901, 4902(b) and 4908, and alleges as follows:

GENERAL ALLEGATIONS:

1. Petitioner Sarah Johnson is currently incarcerated at the Pocatello Women's

Correctional Center in Pocatello, Idaho.

2. Sarah is serving a sentence imposed by the District Court of the Fifth Judicial District, State of Idaho, County of Blaine, the Honorable R. Barry Wood, presiding.

3. The Blaine County Court number for that case is CR-2003-18200.

4. Sarah was charged with two counts of first degree murder in the deaths of her parents Alan and Diane Johnson.

5. Sarah was convicted following a jury trial.

6. Sarah was represented at trial by attorneys Robert Pangburn and Mark Rader.

7. The State was represented by Blaine County Prosecuting Attorney Jim Thomas and Deputy Prosecuting Attorney Justin Whatcott.

8. On June 30, 2005, the District Court sentenced Sarah to two fixed life terms. (The term on Count One was fixed life; the term on Count Two was life plus a fifteen year firearm enhancement with a minimum term of life.)

9. Trial counsel Pangburn and Rader failed to file a timely notice of appeal.

10. On April 19, 2006, Sarah filed a timely *pro se* petition for post-conviction relief.

11. Stephen D. Thompson was appointed to represent Sarah.

12. On July 3, 2006, a new appeal period was granted and the remaining post-conviction proceedings were stayed.

13. An appeal was taken with Sara Thomas and Jason Pintler of the SAPD representing Sarah.

14. The issues on appeal were:

1) Did the district court constructively amend the Amended Indictment by giving

an aiding and abetting instruction violating Sarah's rights under both the Federal and Idaho constitutions requiring Sarah's conviction to be vacated?

2) Did giving the aiding and abetting instruction constitute a fatal variance violating Sarah's Fourteenth Amendment right to due process requiring Sarah's conviction to be vacated?

3) Did the district court deny Sarah her constitutional and statutory rights to a unanimous jury verdict when it failed to give the jury a unanimity instruction?

4) Did the district court deny Sarah's constitutional rights to a jury trial and to a fair trial when, after juror number 85 candidly confessed that he could not follow all of the court's instructions, the court failed to either remove the juror from the jury pool or obtain an unequivocal assurance from the juror that he would in fact follow all of the district court's instructions?

15. On June 27, 2008, the Supreme Court denied appellate relief. *State v. Johnson,* 145 Idaho 970, 188 P.3d 912 (2008) is attached as Appendix A to this petition.

16. On August 4, 2008, the Remittitur was entered.

17. The stay of the remaining post-conviction proceedings was lifted and Christopher Simms was appointed to represent Sarah.

18. On September 15, 2009, the case was reassigned from Judge Wood to Judge G. Richard Bevan.

19. On January 12, 2010, a second amended petition was filed.

20. Some of the claims for relief were ultimately conceded by Sarah, some were dismissed on summary judgment, and some were denied following an evidentiary hearing.

21. The specific claims and resolutions are as follows:

1) Sarah is innocent. This claim was denied in summary judgment on the basis that factual innocence is not a ground for post-conviction relief.

2) The district court lacked jurisdiction to try, convict and sentence Sarah. This claim, based upon the exercise of district court adult jurisdiction without a wavier

hearing, was denied in summary judgment on the ground that no waiver hearing was required.

3) Sarah's constitutional rights to due process were violated. This claim was based upon an assertion that the trial judge had conducted an independent investigation and therefore was not neutral and unbiased. In addition, it was alleged that the court had violated the Sixth Amendment and Article 1, Section 13 of the Idaho constitution by impermissibly limiting the cross-examination of Bruno Santos. This claim was dismissed based in part upon a concession that it was without merit (as to the conduct of an independent investigation) and in part upon summary judgment on the grounds that it could have been raised on appeal.

4) Sarah's state and federal constitutional rights to the effective assistance of counsel were denied. Sarah asserted that the specific allegations of ineffective assistance of counsel stemmed from an overall lack of diligence, failure to investigate the facts and law, chronic tardiness, and unpreparedness for court proceedings which resulted cumulatively and individually in ineffective assistance. The specific instances of ineffectiveness asserted were:

> a) Ineffective assistance in failing to move for a continuance of the trial to investigate and prepare an adequate defense when the state delayed its disclosure of material evidence (that the comforter on the Johnsons' bed covering Diane's body had been discarded and not gathered as physical evidence). This claim was denied following an evidentiary hearing.
>
> b) Ineffective assistance in failing to prepare and investigate and cross-examine the state's witnesses including Matt Johnson, Alan and Julia Dupuis, Kjell Elisson, Walt Femling, Steven Harkin, Bruno Santos, Consuelo Cedeno, Glenda Osuno, Luis Ramirez, Jane Lopez, Becky Lopez, Carlos Ayala, Raul Ornelas, and Stu Robinson. Sarah later conceded that there was no ineffective assistance in the cross-examination of Matt Johnson. The remaining claims were denied following the evidentiary hearing.
>
> c) Ineffective assistance in failing to present the testimony of various neighbors regarding events they observed and heard prior to the offenses. Sarah withdrew the claim as to one neighbor and the claim as to the other neighbors was denied in summary judgment.
>
> d) Ineffective assistance in dealing with fingerprint issues, specifically in failing to adequately investigate all available

fingerprint evidence, in failing to object to the untimely disclosure of fingerprint evidence, and in failing to move for a continuance based upon untimely disclosure. Sarah conceded that summary dismissal was appropriate for all claims related to fingerprint evidence except for the allegation that counsel was ineffective in failing to elicit from the defense expert his opinion that latent prints found on the tools of murder were fresh prints. That claim was denied following an evidentiary hearing.

e) Ineffective assistance in failing to lay a proper foundation for psychological opinion evidence during the hearing to suppress Sarah's statements. Sarah conceded that summary dismissal of this claim was appropriate.

f) Ineffective assistance in dealing with the aiding and abetting theory of guilt. Sarah conceded that summary dismissal of this claim was appropriate.

g) Ineffective assistance in investigating the allegation of Steven Pankey. The district court found that this claim was time barred.

h) Ineffective assistance in failing to utilize readily available psychiatric evidence. The district court dismissed this claim on the basis that the evidence would not have been admissible at trial.

I) Ineffective assistance due to violations of the Rules of Professional Conduct. This claim was dismissed in summary judgment.

j) Ineffective assistance of appellate counsel in failing to raise the issue of error in denying the motion to suppress statements and in failing to raise the issue of insufficient evidence to support an aiding and abetting instruction. This claim was partly conceded and partly dismissed in summary judgment.

5) Newly discovered evidence that Christopher Hill's fingerprints were on the rifle, the rifle scope, and an insert from the ammunition box required a new trial. This claim was denied following an evidentiary hearing.

22. The final judgment in the original post-conviction case was entered on April 8, 2011.

23. A timely appeal was taken and remains pending.

24. Dennis Benjamin and Deborah Whipple represent Sarah on that appeal.

FIRST CAUSE OF ACTION: ***Petitioner Requests DNA Testing On Evidence Secured In Her Trial Which Was Not Subject To The Testing Now Requested Because That Testing Was Not Then Available***

25. Sarah's parents, Diane and Allen Johnson, were shot with a rifle belonging to their renter, Mel Speegle, around 6:20 a.m. on September 2, 2003.

26. The only question at trial was identity -- whether Sarah or someone else killed her parents.

27. The State's theory was that Sarah wore a bathrobe backwards while shooting her mother at contact or near contact range as her mother slept, and shooting her father from a short range as he came out of the shower.

28. At the time of the original testing, the State had a DNA reference sample from Bruno Santos who had been dating Sarah.

29. Well after the trial, the State obtained a DNA reference sample from Christopher Hill after it discovered that his fingerprints were on the murder weapons.

30. The robe, the rifle, Bruno Santos' pants, and other evidence were seized, analyzed and tested for blood spatter and DNA.

31. The evidence was sent to Orchid Celmark for testing, and a report was issued on May 13, 2004. A copy of the Celmark STR Analysis report is attached as Appendix B to this Petition. A copy of the Celmark mtDNA analysis is attached as Appendix C.

32. An adequate chain of custody of the evidence is established by the fact that the evidence was held admissible at trial and has remained in state custody since.

33. There exists new technology for testing which was not available at the time of trial.

34. The testing done in 2004 was inconclusive in the following respects:

a) Bloodstain 2 from the robe contains a mixture of at least three individuals including an unknown individual. This evidence may now be compared to a reference sample from Christopher Hill which was not available at the time of trial, and deduced profiles may be submitted to the state and federal CODIS databases.

b) The tissue from the left collar area of the robe is from an unknown male. Alan Johnson and Bruno Santos are excluded as potential contributors. This evidence may now be compared to a reference sample from Christopher Hill which was not available at the time of trial, and deduced profiles may be submitted to the state and federal CODIS databases.

c) Bloodstain C on the rifle is from an unknown male excluding Alan Johnson and Bruno Santos. This evidence may now be compared to a reference sample from Christopher Hill which was not available at the time of trial, and deduced profiles may be submitted to the state and federal CODIS databases.

d) No conclusions could be reached due to insufficient amounts of DNA concerning bloodstain 24 from the robe, the tissue from the lower left side of the robe, the tissue from the inside lower back of the robe, the tissue from the inside left sleeve of the robe, the stain from Bruno Santos' pants, the fibers imbedded in unknown material, bloodstain B from the rifle, and bloodstain G from the rifle. This evidence may now be tested using advanced DNA amplification and purification techniques and once analyzed, compared to reference samples from the time of trial and to a reference sample from Christopher Hill which was not available at the time of trial. The new DNA techniques are available at accredited forensic labs such as

Bode, Celmark and others. These techniques include post amplification cleanup with Montage columns, and Low Copy Number (LCN) DNA analysis. The deduced profiles may be submitted to the state and federal CODIS databases.

e) Robe samples #24-30 were never analyzed and may now be subjected to DNA analysis. This evidence may now be tested using advanced DNA amplification and purification techniques and once analyzed, compared to reference samples from the time of trial and to a reference sample from Christopher Hill which was not available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Celmark and others. These techniques include post amplification cleanup with Montage columns and Low Copy Number (LCN) DNA analysis. The deduced profiles may be submitted to the state and federal CODIS databases.

f) The results from Robe sample 34, if any, are not listed on the Celmark DNA report. This evidence may now be tested using advanced amplification techniques and once analyzed, compared to reference samples from the time of trial to a reference sample from Christopher Hill which was not available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Celmark and others. These techniques include post amplification cleanup with Montage columns and Low Copy Number (LCN) DNA analysis. The deduced profiles may be submitted to the state and federal CODIS databases.

g) DNA from the unidentified fingerprint on the .264 round (Item # 14) may now be tested using advanced DNA amplification and purification techniques and once analyzed, compared to reference samples from the time of trial to a reference sample from Christopher Hill which was not available at the time of trial. The new DNA techniques are available at

accredited forensic labs such as Bode, Celmark and others. These techniques include post amplification cleanup with Montage columns and Low Copy Number (LCN) DNA analysis. The deduced profiles may be submitted to the state and federal CODIS databases.

h) DNA from the unidentified fingerprints on the doorknob set on Diane and Alan Johnson's bedroom door (Items # 15-16) may now be tested using advanced techniques not available at the time of trial and compared to reference samples from the time of trial and after and submitted to a CODIS database.

i) DNA from the palm prints (Items 20-2 and 20-3) may now be tested using advanced DNA amplification and purification techniques and once analyzed, compared to reference samples from the time of trial to a reference sample from Christopher Hill which was not fully available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Celmark and others. These techniques include post amplification cleanup with Montage columns and Low Copy Number (LCN) DNA analysis. The deduced profiles may be submitted to the state and federal CODIS databases.

j) DNA from the print on the empty shell casing (Item 12-1) may now be tested using advanced DNA amplification and purification techniques and once analyzed, compared to reference samples from the time of trial to a reference sample from Christopher Hill which was not available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Celmark and others. These techniques include post amplification cleanup with Montage columns and Low Copy Number (LCN) DNA analysis. The deduced profiles may be submitted to the state and federal CODIS databases.

k) One of the two hair samples recovered from the barrel of the .264 rifle could

not be matched to Sarah or any of her maternal relatives by mitochondrial DNA testing. This hair can now be compared to a DNA reference sample from Christopher Hill which was not available at the time of trial.

l) Two of the three hairs removed from Bruno Santo's sweater were excluded as coming from Sarah and could not be identified as coming from a particular maternal line. These hairs can now be compared to a new DNA reference sample from Christopher Hill. One of the hairs also had a small root and could be analyzed using advanced DNA amplification and purification techniques and once analyzed, compared to reference samples from the time of trial to a reference sample from Christopher Hill which was not available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Celmark and others. These techniques include post amplification cleanup with Montage columns and Low Copy Number (LCN) DNA analysis. The deduced profiles may be submitted to the state and federal CODIS databases.

m) DNA from an unknown contributor found on the inside of the latex glove can now be analyzed using advanced DNA amplification and purification techniques and once analyzed, compared to reference samples from the time of trial to a reference sample from Christopher Hill which was not fully available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Celmark and others. These techniques include post amplification cleanup with Montage columns and Low Copy Number (LCN) DNA analysis. The deduced profiles may be submitted to the state and federal CODIS databases.

n) Low levels of DNA from an unidentified source were found on the leather glove from the garbage can. That DNA can now be analyzed using advanced DNA

amplification and purification techniques and once analyzed, compared to reference samples from the time of trial to a reference sample from Christopher Hill which was not fully available at the time of trial. The new DNA techniques are available at accredited forensic labs such as Bode, Celmark and others. These techniques include post amplification cleanup with Montage columns and Low Copy Number (LCN) DNA analysis. The deduced profiles may be submitted to the state and federal CODIS databases.

o) A bloody handprint was found on the sheet under the pillow beneath Diane. DNA from that handprint can now be amplified using new fingerprint DNA analysis to determine whether the handprint was made by Alan or some other person after Diane was shot. See T Tr. Vol. 6, p. 4238, ln. 25 - p. 4239, ln. 12.

35. The 2004 testing was also inconclusive insofar as the results were not compared with Christopher Hill's DNA profile which is now available with an appropriate chain of custody as documented in the Blaine County Sheriff's Office Supplemental Report 6 showing that four buccal swabs were obtained from Mr. Hill on April 7, 2009.

36. The 2004 testing was also inconclusive insofar as the results were not compared with Matthew Johnson's DNA profile.

37. The requested testing has the scientific potential to produce new, non-cumulative evidence that Sarah is innocent.

38. The testing method requested will likely produce admissible results under the Idaho Rules of Evidence.

Why Relief Should be Granted on this First Cause Of Action

Idaho Code § 19-4902(b) allows a petitioner to file at any time a petition for the

performance of fingerprint or forensic DNA testing that was secured in relation to the trial which resulted in the conviction but which was not subject to the testing that is now requested because the technology for the testing was not available at the time of trial.

The petitioner must present a prima facie case that: 1) identity was an issue in the trial; and 2) that the evidence has been subject to a chain of custody sufficient to establish that such evidence has not been substituted, tampered with, replaced or altered in any material aspect. I.C. § 19-4902(c). This has been established in this case per the above allegations.

Testing is to be allowed upon a determination that: 1) the result has the scientific potential to produce new, noncumulative evidence that would show that it is more probable than not that the petitioner is innocent; and 2) the testing method requested would likely produce admissible results under the Idaho Rules of Evidence. I.C. § 19-4902(e).

The testing requested does have the scientific potential to produce new, noncumulative evidence that would show it is more probable than not that Sarah is innocent. When Sarah's parents were shot, even according to the State's expert witness, blood spatter and human tissue were broadcast in a very wide area, even out of the room and across the hallway into Sarah's bedroom. However, Sarah had absolutely no blood or any other debris anywhere on her person, which made it highly unlikely that she could have been the shooter. If the testing of the previously untested and/or unidentified DNA on the robe, rifle, round, doorknob, palm print, hair on the rifle, Bruno's sweater, latex, and/or leather glove are shown to match Christopher Hill, Matthew Johnson, or other known persons it would go to show that person committed the crimes, not Sarah.

Further, the State's theory of the case was that Sarah did not have blood on her because

her mother's head was covered with a comforter which the State discarded. If Alan's DNA is in the bloody handprint on the sheet, it will go to show that Alan pulled the comforter up over Diane's body after she was shot. This will undermine the theory that Sarah could have committed these crimes without getting any blood or other debris on herself and will show it is more probable than not that she is innocent.

Additionally, as set out in Dr. Hampikian's affidavit which will be filed within 14 days, the testing requested will likely produce admissible results under the Idaho Rules of Evidence. See IRE 702.

SECOND CAUSE OF ACTION: ***Sarah Was Denied Effective Assistance Of Counsel At Trial And On Appeal In Violation Of The Sixth Amendment and Idaho Constitution Article I, Section 13 Under Strickland v. Washington***

A. Trial Counsel Was Ineffective In Failing To File A Motion To Dismiss Pursuant To Arizona v. Youngblood Following The State's Denial Of Due Process In Discarding The Comforter From The Johnsons' Bed

Facts Pertaining to Claim

39. One of the major weaknesses in the State's case was the fact that Sarah had no blood anywhere on herself except on the bottom of her socks.

40. The State's expert, Mr. Englert, explained this lack of blood by positing that Diane Johnson's head was covered with a comforter at the time she was shot, that the shot was fired through the comforter and the comforter stopped blood from getting on Sarah.

41. The comforter was found tucked in tightly over Diane's head; however, the State presented no evidence to explain how Diane managed to so tightly tuck her own body under it.

42. There was evidence presented that Alan Johnson moved from the bathroom to the

side of the bed next to Diane's head before he died.

43. From this it appeared possible that Alan had tucked the comforter over Diane's head after the shooting.

44. If the comforter was pulled over Diane's head after the shooting, it absolutely could not have protected the shooter from blood exposure per the State's theory.

45. The State discarded this comforter after having already formed the hypothesis that Sarah was the shooter despite the lack of blood on her.

46. Officer Kirtley testified that he observed the comforter and did not see any bullet holes in it.

47. The comforter would have provided exculpatory evidence if it had either a hand or fingerprint consistent with Alan having pulled it up over Diane's head or if it did not have a bullet hole it in.

48. The failure of the State to preserve this evidence was the basis for a valid motion to dismiss pursuant to *Arizona v. Youngblood,* 488 U.S. 51 (1988). *See U.S. v. Cooper,* 983 F.2d 928 (1993); *Griffin v. Spratt,* 768 F.Supp. 153 (E.D. Pa. 1991), judgment rev'd in part, 969 F.2d 16 (3rd Cir. 1992); *Stuart v. State,* 127 Idaho 806, 907 P.2d 783 (1994).

49. The failure to move for dismissal was deficient performance of counsel because such a motion would have been successful and there can be no strategic purpose for not seeking dismissal of the charges against the Petitioner.

50. The failure of post-conviction counsel to raise this issue as part of the ineffective assistance of counsel claim was also ineffective and justifies the filing of this successive petition.

Why Relief Should be Granted on this Basis

A defendant in a criminal case is guaranteed the effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution. The Sixth Amendment has been incorporated through the Due Process Clause of the Fourteenth Amendment to apply to the states. *See Powell v. Alabama,* 287 U.S. 44, 73 (1932). Idaho law also guarantees a criminal defendant's right to effective counsel. Idaho Const. Art. I, § 13; I.C. § 19-852. Further, these rights apply to juveniles. *In re Gault,* 387 U.S. 1, 34 (1967).

In general, a claim of ineffective assistance of counsel, whether based upon the state or federal constitutions, is analyzed under the familiar *Strickland v. Washington,* 466 U.S. 668 (1984) standard. In order to prevail under *Strickland,* a petitioner must prove: 1) that counsel's performance was deficient in that it fell below standards of reasonable professional performance; and 2) that this deficient performance prejudiced the defendant. *Strickland v. Washington,* 466 U.S. at 689. The prejudice prong is shown if there is a reasonable probability that a different result would have been obtained in the case if the attorney had acted properly. *Id.*

In *California v. Trombetta,* 467 U.S. 479, 489, 104 S.Ct. 2528, 2534 (1984), the Supreme Court held that the government violates a defendant's right to due process if evidence it failed to preserve possessed "exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Arizona v. Youngblood,* 488 U.S. 51, 58, 109 S.Ct. 333, 337 (1988), adds the further requirement that the police acted in bad faith in failing to preserve the potentially useful evidence. The presence or absence of bad faith turns on the government's knowledge of the apparent exculpatory value of the evidence at the time it was lost or destroyed. *Youngblood,* 488 U.S. at 56-57 ftnt. *, 109 S.Ct. at 336-337, ftnt. *.

In this case, the State discarded the comforter that they claimed was over Diane's head at the time she was shot. At the time the evidence was discarded, the State had focused on Sarah as a suspect and also knew that Sarah did not have any blood spatter or tissue on her body or pajamas which was extremely inconsistent with its theory that she had killed her mother with a contact shot to the head. Thus, the State knew that it would have to explain this lack of evidence to prove Sarah guilty and that the comforter would be a key element of this explanation. The State's officer also knew that he had looked at the comforter and seen that it did not have a bullet hole in it and further, state officers knew that the comforter had been tucked in firmly over Diane's head.

Thus, the comforter was of apparent exculpatory value. Its lack of a bullet hole would go to prove Sarah could not have fired the fatal shot and its condition of being firmly tucked in over Diane's head showed that it had been placed there after her death, not before, again going to prove that Sarah was not the shooter.

However, knowing this, the State nevertheless discarded the comforter.

Further, Sarah would not be able to obtain comparable evidence by other reasonably available means. Once the comforter was destroyed, there was no way for Sarah to show that it did not have a bullet hole in it.

Under these conditions, if counsel had moved to dismiss pursuant to *Youngblood,* the motion would have been granted. *Youngblood, supra. See also, U.S. v. Cooper, supra*; *Griffin v. Spratt, supra*; *Stuart v. State,* 127 Idaho 806, 907 P.2d 783 (1994).

Failure to move to dismiss was deficient performance. Further, the deficiency was prejudicial because filing the motion to dismiss would have resulted in dismissal.

On these grounds, post-conviction relief must be granted.

B. Trial Counsel Was Ineffective In Failing To Present Evidence Regarding Janet Sylten's Parole Status At The Time Of The Johnsons' Murders

Facts Pertaining to Claim

51. At trial, evidence was presented that Sarah had stated that a cleaning woman had been accused of stealing (and most likely had stolen) some expensive lotion from the Johnson house.

52. Evidence was presented that this cleaning woman was Janet Sylten and that she had committed a theft from the Johnsons.

53. Evidence was further presented that Sarah said that the cleaning woman had telephoned Diane Johnson (who was planning on going to the police regarding the thefts), and that Diane found the communication frightening, threatening, and upsetting.

54. Additionally, evidence was presented that Sarah said people were outside the Johnson home in the early morning hours on the day of the murders and that Diane Johnson recognized the voice of one of the people present as the cleaning woman.

55. The State's theory at trial was that Sarah's statements were false and intended to divert suspicion from herself.

56. At trial, Ms. Sylten testified that she never took anything from the Johnson house, never spoke with Diane, was not at the house in the early morning of the day of the murders and was not connected in any way with the murders.

57. However, at the time of the Johnsons' murders, Ms. Sylten had just been released

from prison on parole on a charge of aggravated battery against a correctional officer. ROA attached as Appendix D.

58. Ms. Sylten's parole status provided a motive for her to threaten Diane when she knew that Diane might go to the police about the theft of her lotion, provided a motive for her to harm or kill the Johnsons, and provided a motive for her to lie at trial about her involvement with the Johnsons.

59. However, trial counsel never presented this evidence to the jury.

60. The failure to present evidence to impeach Ms. Sylten and demonstrate her motives to lie and harm the Johnsons, especially Diane Johnson, was deficient performance of counsel as the information on Janet's parole status was readily available to counsel and there could be no possible strategic purpose in not presenting evidence in support of the defense theory of alternate perpetrators.

61. The failure of post-conviction counsel to raise this issue as part of the ineffective assistance of counsel claim was also ineffective and justifies the filing of this successive petition.

Why Relief Should be Granted on this Basis

As discussed above, Sarah had a constitutional right to effective assistance of counsel. *Strickland v. Washington.* To demonstrate ineffective assistance, deficient performance and prejudice must be shown.

The failure to present evidence of Ms. Sylten's parole status was deficient performance because the evidence was readily available and admissible. Even if the evidence was construed to be evidence of other crimes, it would nonetheless be admissible to prove motive to lie and to harm the Johnsons, most especially Diane, because if Diane contacted the police with allegations

of theft by Ms. Sylten, it would have endangered Ms. Sylten's parole status. IRE 404(b).

Moreover, failure to present this evidence could not have been strategic because there was absolutely no advantage to Sarah in not presenting the evidence, while presenting the evidence would have had the clear advantage of supporting Sarah's statements that Ms. Sylten had threatened the family and was at the house the morning of the killings. *McKay v. State,* 148 Idaho 567, 225 P.3d 567 (2010).

Lastly, the failure to present this evidence was prejudicial. When questioned about who might have had a motive to harm her parents, Sarah repeatedly stated that her mother was having a dispute with a cleaning woman who had made threats and who had been in the yard early in the morning the day of the crimes. The State's theory of the case was that Sarah had made up this story to divert attention from her and Ms. Sylten's denial at trial that she had ever threatened Diane, been at the house on the day of the murders, or had anything to do with the murders supported the State's theory of the case. However, had the jury known of Ms. Sylten's parole status, it could have concluded that Ms. Sylten did have a motive to stop Diane from reporting her theft, that she did make threats to Diane, and that she was at the house and even that she had something to do with the murders. At the very least, the jury would have concluded that Sarah's statements that Diane was having a dispute with Ms. Sylten and that Ms. Sylten had said something that scared Diane were accurate. Such a conclusion would have resulted in a reasonable probability of a different result because as noted above, the physical evidence in the case was inconsistent with Sarah's guilt; Sarah had no blood or tissue on her even though blood and tissue was propelled throughout the room when Diane was shot. Had the jury also known that Sarah was not lying about Ms. Sylten's contact with the family, it is reasonably likely that

Sarah would not have been convicted.

C. Trial Counsel Was Ineffective In Failing To Object To Prosecutorial Misconduct Throughout The Trial

Facts Pertaining to Claim

62. Throughout the proceedings, prosecutorial misconduct occurred without defense objection.

63. In pretrial proceedings, Mr. Thomas, the prosecuting attorney volunteered to the Court that he had told all state officials involved in the case that they could not talk to the defense without him or his agent present. T Tr Vol. 2, p. 840, ln. 12-p. 844, ln. 18.

64. The State began its opening statement by telling the jury that although the case was State of Idaho vs. Sarah Johnson, it was about "a whole lot more. It's about these two people, Alan and Diane Johnson. Hard-working, honest, good, decent people, whose murder left a grieving son, a brother, sisters, parents, and a host of good friends." T Tr. Vol. 3, p. 1471, ln. 19-22.

65. This argument was misconduct because it played upon the sympathies of the jury and urged them to return a verdict based on information other than the properly admitted relevant evidence.

66. In closing argument, the State committed misconduct by shifting the burden of proof. The State's argument was based, in part, on the theme that the defense had not proven that someone besides Sarah had committed the murders. T Supp. Tr. p. 175-218.

67. Defense counsel did not object to the above-noted misconduct.

68. The failure to object to prosecutorial misconduct was deficient performance because the misconduct was readily apparent and because there could be no strategic purpose in allowing any of this misconduct.

69. The failure to object at trial prevented a claim of prosecutorial misconduct from being raised on appeal.

70. The failure of post-conviction counsel to raise this issue as part of the ineffective assistance of counsel claim was also ineffective and justifies the filing of this successive petition.

Why Relief Should be Granted on this Basis

As discussed above, Sarah had state and federal constitutional rights to effective assistance of counsel. *Strickland, supra.*

The law on prosecutorial misconduct has long been established:

> . . . A prosecuting attorney is a public officer, "acting in a quasi judicial capacity." It is his duty to use all fair, honorable, reasonable, and lawful means to secure the conviction of the guilty who are or may be indicted in the courts of his judicial circuit. He should see that they have a fair and impartial trial, and avoid convictions contrary to law. Nothing should tempt him to appeal to prejudices, to pervert the testimony, or make statements to the jury, which, whether true or not, have not been proved. The desire for success should never induce him to endeavor to obtain a verdict by arguments based on anything except the evidence in the case, and the conclusions legitimately deducible from the law applicable to the same. . . .It will be observed from the foregoing authorities that the courts do not look with favor upon the action of prosecutors in going beyond any possible state of facts which can be material as to the guilt or innocence of the defendant in a particular case for which he is upon trial. Prosecutors too often forget that they are a part of the machinery of the court, and that they occupy an official position, which necessarily leads jurors to give more credence to their statements, action, and conduct in the course of the trial and in the presence of the jury than they will give to counsel for the accused. It seems that they frequently exert their skill and ingenuity to see how far they can trespass upon the verge of error, and generally in so doing they transgress upon the rights of the accused. It is the duty of the prosecutor to see that a defendant has a fair trial, and that nothing but competent evidence is submitted to the jury, and above all things he should guard against anything that would prejudice the minds of the jurors, and tend to hinder them from considering only the evidence introduced.*State v. Irwin,* 9 Idaho 35, 43–44, 71 P. 608, 609–11 (1903). *See also State v. Babb,* 125 Idaho 934, 942, 877 P.2d 905, 913 (1994); *State v. Givens,* 28 Idaho 253, 268, 152 P. 1054, 1058 (1915).

State v. Phillips, 144 Idaho 82, 87, 156 P.3d 583, 588 (Ct. App. 2007).

In this case, the prosecutor committed misconduct in seeking a conviction based not upon the evidence, but rather upon the jury's sympathies for the Johnsons and upon a shifting of the burden of proof to Sarah.

Had counsel objected, his objection would have been sustained, the misconduct would have ceased, and a curative instruction would have been given.

The failure to object was deficient performance.

Moreover, the deficiency was prejudicial. As discussed above, the physical evidence was inconsistent with Sarah's guilt. If Sarah was guilty, she would have had blood residue or tissue somewhere on her. The test for blood residue is extremely sensitive (parts per 100,000), and shortly after the murders, Sarah (who had not showered) was thoroughly swabbed for blood residue, from her face, nostrils, behind her ears and on her hair. These tests were all completely negative for blood residue. Indeed, it seems unlikely that the prosecutors who were clearly intelligent and powerful advocates for the State would have resorted to misconduct had they not entertained fears that a conviction could not be obtained without the misconduct. Lawyers of their caliber likely would not have risked the validity of a conviction in this case by foolish misconduct in the absence of fears that the evidence alone was not sufficient to gain a conviction. Given this state of the evidence, it is reasonably probable that had the prosecutorial misconduct been objected to, Sarah would not have been convicted.

D. Trial Counsel Rendered Ineffective Assistance In Failing To Object To The Jury's Trip From Ada County To Bellevue, Idaho To Visit The Johnson House

Facts Pertaining to Claim

71. During the trial, the jury was taken on a day long bus trip to visit the Johnson house. Tr. Vol. 4, p. 2158, ln. 1-p. 2167, ln. 9.

72. The Court repeatedly instructed the jury that the trip to the house was not evidence and it was not to consider anything it saw there in its deliberations. T Tr. Vol. 4, p. 2361, ln. 7-p. 2265, ln. 15.

73. Defense counsel waived Sarah's presence during the jury view after the State argued that having her at the house would be prejudicial to its case against her. T Tr. Vol. 3, p. 1920, ln. 13- p. 1922, ln. 10.

74. Sarah did not learn until after the jury had been taken to Bellevue that the viewing had occurred.

75. Defense counsel did not object to the jury trip to the house, nor did counsel object to waiving Sarah's state and federal constitutional rights to be present during the proceedings against her. T Tr. Vol. 3, p. 1920, ln. 13-p. 1922, ln. 10.

76. The failure to object to the trip to the house was deficient performance of counsel. The trip presented the jury with information that the Court repeatedly told the jury was irrelevant to its deliberations, further the trip was highly prejudicial. Had defense counsel objected pursuant to IRE 401, 402, and 403, the Court would have denied the trip, or in the alternative, the issue would have been preserved for appeal where the appellate court would have found non-harmless error.

77. Counsel was further deficient in waiving, without her consent, Sarah's constitutional rights to be present at the proceedings against her. The State itself noted that Sarah's presence at the house would have "prejudiced" its case - i.e., would have made it harder for the State to prove its case against Sarah. Yet, Sarah had an absolute right to be present.

78. The failure of counsel to object prevented the claims from being raised on appeal.

79. The failure of post-conviction counsel to raise this issue as part of the ineffective assistance of counsel claim was also ineffective and justifies the filing of this successive petition.

Why Relief Should be Granted on this Claim

As discussed above, Sarah had state and federal rights to effective assistance of counsel. *Strickland, supra.*

Counsel's performance in not objecting to the jury trip to the Johnson house was deficient performance because it was repeatedly stated to counsel by the Court that the trip was not going to produce relevant evidence and at the same time, it was obvious that the trip would promote the return of a guilty verdict on the basis of matters besides the evidence in case. If counsel would have objected pursuant to IRE 402 and 403, the objection would have been granted and the jury would not have visited the house, because "evidence" with no probative value cannot possibly outweigh the danger of unfair prejudice.

Further, this deficient performance was prejudicial. As noted before, the physical evidence was not consistent with Sarah's guilt. It was impossible that Sarah could have shot her mother and father and not have gotten any blood residue or tissue anywhere on herself. Given the state of the physical evidence, it is reasonably probable that had the jury not been taken on the trip to the Johnson's home, Sarah would not have been convicted.

Each Of These Instances Of Deficient Performance Of Trial Counsel Was Individually And Cumulatively Prejudicial

80. As set out above, each of these instances of deficient performance was individually prejudicial.

81. In addition, the cumulative effect of these instances of deficient performance was

prejudicial insofar as but for the cumulative deficient performance, there is a reasonable probability of a different outcome insofar as it is reasonably probable that the State would have been unable to obtain a conviction when the physical evidence was inconsistent with Sarah being present at the time her parents were killed.

THIRD CAUSE OF ACTION: ***Sarah Was Denied Effective Assistance Of Counsel In Violation Of The Sixth Amendment And Idaho Constitution Article I, Section 13 Under*** **United States v. Cronic** ***When Her Appointed Counsel Labored Throughout The Proceedings Under An Actual Conflict Of Interest***

Facts Pertaining to Claim

82. Sarah was represented at trial and sentencing by Robert Pangburn and Mark Rader pursuant to Mr. Pangburn's contract with Blaine County for the provision of indigent criminal defense.

83. Throughout the proceedings, Mr. Pangburn was involved in disputes with the county over the interpretation of the contract and whether or not he would be paid.

84. These disputes began just ten days after Sarah was charged, as documented in the hearing held on November 11, 2003. T Tr. Vol. 1, p. 1-20.

85. Even at that early date, Mr. Pangburn alerted the Court that the county contract conflicted with the Rules of Professional Conduct in requiring him to provide reports to the Court and the County Prosecutor to support his applications for payments of additional fees. T Tr. Vol. 1, p. 10, ln. 16-p. 11, ln. 8.

86. Disputes over the county contract continued throughout the representation and two years later, at the end of the trial, but prior to the filing of post trial motions and the sentencing, the chair of the Board of County Commissioners sent the Court a letter which resulted in the

Court issuing a "show cause" hearing notice to Mr. Pangburn on April 15, 2005. T Supp. Tr. p. 406, ln. 11-22.

87. At the show cause hearing, the Court revoked the appointment of co-counsel Rader and all defense investigators for the remainder of the proceedings against Sarah. T Supp. Tr. p. 407, ln. 14-16.

88. At the show cause hearing, Mr. Pangburn alerted the Court that he had concerns that information about his reports was being improperly shared from a sealed file. T Supp. Tr. p. 411, ln. 20-p. 412, ln. 9.

89. The State argued that it should have access to all Mr. Pangburn's reports because, even though Sarah had not yet been sentenced and was facing the possibility of two terms of fixed life being imposed, there were no more strategic decisions to be made in the case. In the State's words, "Obviously, that's over." T Supp. Tr. p. 411, ln. 11-18.

90. Mr. Pangburn alleged at the show cause hearing that the statements in the County's letter to the Court were defamatory and wrong. T Supp. Tr. p. 414, ln. 12-17.

91. Mr. Pangburn further alleged that the County Commissioners had "mounted other attacks against me in this case," including not renewing his contract. T Supp. Tr. p. 415, ln. 6-8.

92. In response, the prosecutor representing the County Commissioners argued to the Court that the County's position was that "enough is enough," that the bills submitted to date were excessive and that Mr. Pangburn had billed over 1000 hours of attorney time for January and February alone. T Supp. Tr. p. 416, ln. 21-p. 417, ln. 5.

93. In response to these arguments, the Court interpreted the county/public defender contract, noting that the disputes had been existent since the beginning of the case, citing a date

in December of 2004, when Mr. Pangburn interrupted the taking of a verdict in another trial, to move to withdraw from representing Sarah due to a contract issue. T Supp. Tr. p. 418, ln. 4-p. 421, ln. 22.

94. The Court further commented that Mr. Pangburn had been billing for advice to Sarah in the PSI process that the Court did not feel was warranted, including advice and assistance in filling out the PSI questionnaire. T Supp. Tr. p. 421, ln. 23-p. 425, ln. 3.

95. In reviewing and commenting on Mr. Pangburn's work for Sarah between conviction and sentencing, the Court noted that it was not making a personal attack on Mr. Pangburn, but that this was a matter of fiscal responsibility and the Court's duties under I.C. § 19-850 *et. seq.* T Supp. Tr. p. 423, ln. 14-24.

96. The Court also noted that there was a long running dispute as to what the rate of compensation was. T Supp. Tr. p. 425, ln. 4-2.

97. At that point, the Court also officially opened the sealed file of reports from Mr. Pangburn for inspection by the county with the offer to allow him to seek non-disclosure of certain items on an individual basis. T Supp. Tr. p. 427, ln. 15-p. 428, ln. 5.

98. The contract disputes generated several memorandums from both the State and defense counsel and resulted in two more hearings before Sarah's sentencing hearing on June 29, 2005. See T Supp. CR Vol. 2, pp. 310-340.

99. At the hearing on May 3, 2005, the prosecutor referred to undisclosed ongoing correspondence between the County Commissioners and Mr. Pangburn. T Supp. Tr. p. 436, ln. 6-13.

100. In response, the Court stated that it simply was not going to authorize any more

payments to the defense until after the prosecutor had reviewed Mr. Pangburn's reports on May 17. T Supp. Tr. p. 436, ln. 24-p. 437, ln. 9.

101. On November 2, 2005, the Court entered a 37 page order governing further proceedings on claimed attorneys fees and expenses. T Supp CR Vol. 2, pp. 341-378.

102. This order documents the history of fee and billing disputes that continued throughout Mr. Pangburn's representation of Sarah. Id.

103. Yet another hearing was held on payment for Mr. Pangburn and the defense team on November 23, 2005. T Supp CR Vol. 2, pp. 382-3.

104. On January 31, 2006, the Court entered its final order regarding attorneys fees. In this order, the Court required Mr. Pangburn to immediately return to Blaine County any sums over $65.00 per hour that it had paid him; reduced his bill for time spent preparing billings and for time billed for his associate attorney; and reduced Mr. Pangburn's billing in other ways (for example deducting time Mr. Pangburn billed for researching the Rules of Professional Conduct). T Supp CR pp. 401-410.

105. Post-conviction counsel was ineffective in not raising this conflict as part of the ineffective assistance of counsel claim in the original petition.

Why Relief Should be Granted on this Claim

The Sixth and Fourteenth Amendments and Article I, § 13, guarantee the right to counsel. *Gideon v. Wainwright,* 372 U.S. 335, 342-43, 83 S.Ct. 792, 795-96 (1963). This right to counsel contemplates that counsel's assistance shall be untrammeled and unimpaired by a court order requiring that one lawyer simultaneously represent conflicting interests. *Glasser v. United States,* 316 U.S. 60, 69-70, 62 S.Ct. 457, 464-65 (1942), *superseded on other grounds as stated*

in Bourjaily v. United States, 483 U.S. 171, 181, 107 S.Ct. 2775 (1987), and *Jackson v. Virginia,* 443 U.S. 307, 313-20, 99 S.Ct. 2781 (1979). The right to assistance of unconflicted counsel is so fundamental that prejudice from its denial need not be shown. *Id.,* 315 U.S. at 75-76, 62 S.Ct. at 467-468. *See also, Cuyler v. Sullivan,* 446 U.S. 335, 100 S.Ct. 1708 (1980) (prejudice is presumed when counsel labors under an actual conflict of interest); and *United States v. Cronic,* 466 U.S. 648, 662, n. 31, 104 S.Ct. 2039, 2049, n. 31 (1984).

Mickens v. Taylor, 535 U.S. 162, 122 S.Ct. 1237 (2002), holds that in order to demonstrate a Sixth Amendment violation where the trial court fails to inquire into a potential conflict of interest based upon prior representation of the victim of the current criminal charges a petitioner must establish that the conflict adversely affected the representation. The question of whether a government created conflict through the payment system established for appointed counsel requires a showing of adverse impact or not has not been resolved by the Supreme Court. In this case, Sarah's counsel labored under an actual conflict of interest which had an adverse impact on her representation.

Idaho Rule of Professional Conduct 1.7(a)(2) states that a concurrent conflict of interest exists if there is a significant risk that the representation of a client will be materially limited by a lawyer's responsibilities to a third party. Comment 13 to the Rule states that a lawyer may be paid by a source other than the client, if the client is informed of that fact and consents and the arrangements does not compromise the lawyer's duty of loyalty or independent judgment to the client.

In this case, there was a conflict under RPC 1.7(a)(2) because there was no evidence that Sarah was informed and consented to the payment scheme established by Blaine County and her

attorney, and further, and most importantly, the arrangement did compromise her lawyer's duty of loyalty insofar as in order to be paid, her counsel made reports to the county in violation of RPC 1.6 regarding confidentiality of information. In assessing this, it is important to note that Sarah's lawyer did not just send the county a bill setting out the hours spent and seeking compensation; rather, he sent detailed reports explaining what was done during each billed hour. Such was a violation of the duty of confidentiality.

At least one other conflict of interest existed in the fee arrangement between the county and Sarah's attorney. The arrangement resulted in a violation of RPC 1.8(f) which provides:

> A lawyer shall not accept compensation for representing a client from one other than the client unless:
>
> (1) the client gives informed consent;
> (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
> (3) information relating to representation of a client is protected as required by Rule 1.6.

Sarah did not give informed consent; there was an interference with the client-lawyer relationship insofar as her counsel was torn between his duty to refrain from revealing confidential information to the county, his desire to be paid, his duty to zealously represent Sarah and his time spent arguing with the county about his billings. Also, much of the information relating to his representation of Sarah was not protected, but rather was revealed to the county and to the judge.

There was a conflict and there was an adverse impact on Sarah's representation insofar as confidential information was revealed to the county throughout the proceedings. Therefore, post-conviction relief should now be granted.

FOURTH CAUSE OF ACTION: ***Sarah Was Denied Effective Assistance Of Counsel On Direct Appeal As Guaranteed By The Sixth Amendment And Idaho Constitution Article I, Section 13***

A. Appellate Counsel's Failure To Raise The District Court Error In Denying The Motion To Suppress The Testimony Of Malinda Gonzales Was Ineffective

Facts Pertaining to Claim

106. Trial counsel moved to suppress statements Sarah allegedly made to her cellmate Malinda Gonzales (while Sarah was being illegally held in the Blaine County adult jail with an adult cellmate) on the grounds that the statements were obtained in violation of her constitutional rights to remain silent and upon the grounds that the State should not be allowed to profit by using statements obtained during Sarah's illegal detention in an adult jail with convicted and charged adult prisoners. Motion To Suppress Defendant's Statements to Jail Inmates, T CR Vol. 2, p. 360.

107. Following a hearing, the District Court found that Sarah's detention violated Idaho law, but that the remedy is not the exclusion of the alleged incriminated statements, as that would not further the object of the state statutes prohibiting the incarceration of juveniles with adults. Order on Defendant's Motion To Suppress Defendant's Statement To Jail Inmates, Ex. ___ Vol. 3, p. 455.

108. Petitioner appealed from the judgment and sentence.

109. The State Appellate Public Defender was appointed to represent Petitioner on appeal.

110. Appellate counsel did not raise this issue on appeal.

111. Had the issue been raised on appeal, relief would have been granted.

112. The failure to raise this issue was deficient performance.

113. The failure of post-conviction counsel to raise this issue as part of the ineffective assistance of appellate counsel claim was also ineffective and justifies the filing of this successive petition.

Why Relief Should be Granted on this Claim

The right to effective assistance of counsel extends to the direct appeal of the conviction. *Evitts v. Lucey,* 469 U.S. 387, 105 S.Ct. 830 (1985).

With regard to Sarah's motion to suppress statements allegedly made to Malinda Gonzales, the district court found that Sarah's pre-trial incarceration with adult offenders was illegal, but held that the remedy was not suppression of her statements. Appellate counsel did not raise the issue on appeal.

The question of whether suppression of statements of juveniles illegally held in adult jails is proper is an open question in Idaho. However, as noted in *In re Gault,* 387 U.S. at 47:

> The privilege against self-incrimination is, of course, related to the question of the safeguards necessary to assure that admissions or confessions are reasonably trustworthy, that they are not the mere fruits of fear or coercion, but are reliable expressions of the truth. The roots of the privilege are, however, far deeper. They tap the basic stream of religious and political principle because the privilege reflects the limits of the individual's attornment to the state and - in a philosophical sense - insists upon the equality of the individual and the state. In other words, the privilege has a broader and deeper thrust than the rule which prevents the use of confessions which are the product of coercion because coercion is thought to carry with it the danger of unreliability. One of its purposes is to prevent the state, whether by force or psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction.

In illegally confining Sarah in an adult jail and then using statements she allegedly made to her adult cellmate against her at trial, the State violated Sarah's constitutional right against

self-incrimination because Sarah spoke to the adult inmate only through the force and psychological domination of the State in illegally imprisoning her. Moreover, the statements, if any were actually made, were untrustworthy as they were the fruit of fear and coercion – the fear and coercion experienced by a sixteen year old girl in an adult jail in direct contact with male and female adult prisoners – induced by the State's clear violation of the law.

The district court found that the proper remedy would not be exclusion of the statements because "it would not further the essential object of these statutes." However, the purpose of the exclusionary rule is to deter illegal state conduct. *See Terry v. Ohio,* 392 U.S. 1, 10 (1968), stressing that the exclusionary rule's major purpose is to deter lawless police conduct. The rule also serves the purposes of "the imperative of judicial integrity" in keeping courts from becoming accomplices to willful disobedience of the constitution and laws they are sworn to uphold. *See Terry v. Ohio, supra,* citing *Elkins v. United States,* 364 U.S. 206, 222 (1960). And, finally, the exclusionary rule serves to assure the people – all potential victims of unlawful government conduct – that the government will not profit from its lawless behavior, thus minimizing the risk of seriously undermining trust in government. *See State v. Koivu*, 38106, 2012 WL 665990 *5 (Idaho Mar. 1, 2012); ("In [*State v. Arregui*, 44 Idaho 43, 254 P. 788 (1927)] the Court made it clear that the evidence unlawfully obtained should be excluded simply because it was obtained in violation of the defendant's constitutional rights."); *United States v. Calandra,* 414 U.S. 338, 355 (1974) (Brennan, J. dissenting).

Indeed, the federal courts and other state courts have held that suppression is the proper remedy for evidence obtained as a result of police violation of state statutes in the handling of those accused of crimes. *See State v. Rauch,* 99 Idaho 586, 593, 586 P.2d 671, 678 (1978)

(suppression appropriate remedy for violation of the "knock and announce" statute); *United States v. Mills,* 472 F.2d 1231 (D.C. Cir. 1972) (suppression required where police violated statute which required giving defendant opportunity to post collateral for minor offense); *State v. Caldera,* 929 P.2d 482 (Wash. App. 1997) (suppression required where police violated a statute requiring the officer to read an arrest warrant and allow the defendant an opportunity to post bail); *People v. Greenwood,* 484 P.2d 1217 (Colo. 1971) (suppression required where officer erroneously advised defendant as to amount of bond he would have to post for automobile violations).

The district court erred in its determination of the purposes of the exclusionary rule. Had the court analyzed the suppression decision under the actual purposes of the rule – deterrence of illegal police conduct, the imperative of judicial integrity, and the assurance to the public that the state will not profit from illegal conduct – the statements obtained from Sarah while she was in the Blaine County jail in violation of Idaho law would have been suppressed on the grounds raised by trial counsel. Reasonable appellate counsel would have raised this claim on appeal. Appellate relief would have been granted because the district court erred in not suppressing the statements and the error was not harmless as Malinda Gonzales' testimony was the *only* testimony in the entire case that could have been construed by the jury as any sort of a confession. In light of the lack of any blood residue on Sarah, the case for conviction was thin and it cannot be said that use of the statements at trial was harmless. *Chapman v. California,* 386 U.S. 18 (1967).

B. Appellate Counsel's Failure To Argue That The Fixed Life Sentences Were Both Excessive And Unconstitutional Was Ineffective

Facts Pertaining to Claim

114. Petitioner was sentenced to two terms of fixed life even though she was sixteen years old at the time the offenses were committed.

115. Appellate counsel did not argue on appeal that the fixed life sentences were excessive given the facts of the case or that the sentences constituted unconstitutional cruel and unusual punishment under the Eighth and Fourteen Amendments to the United States Constitution and Idaho Constitution Art. I, § 6.

116. The failure to raise these claims on appeal was deficient performance.

117. Had appellate counsel raised either argument, the Idaho Supreme Court would have granted her sentencing relief.

118. Post-conviction counsel was ineffective in not raising an ineffective assistance of appellate counsel claim for failing to argue the excessive and unconstitutional sentence claims in the original petition.

Why Relief Should be Granted on this Claim

Sarah's counsel in direct appeal also rendered ineffective assistance in failing to argue that her sentences were excessive and unconstitutional. In particular, counsel was ineffective in not arguing that the two fixed life terms with a fifteen year enhancement were excessive as, given Sarah's youth and her previously non-existent criminal record, the sentences were excessive under any reasonable view of the evidence. The terms of confinement clearly exceeded that necessary to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution. *State v. Toohill,* 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). *See also, State v. Justice,* 152 Idaho 48, 53, 266 P.3d

1153, 1158 (Ct. App. 2011).

At age 16, Sarah was still a child. She had no prior crimes of any sort. A fixed term short of her entire life would certainly be sufficient to insure public safety. In a number of years, after she reached adulthood, the parole board could examine her record in prison and determine if and when she would pose no danger to society if released from prison.

And, deterrence is equally well served by a fixed sentence followed by an indeterminate term of life, as a fixed life term.

Likewise, any rehabilitative programs most surely can be completed well before the natural expiration of a 16-year-old's life.

And, while Sarah's family was indeed anxious for retribution on her, fixed life for a child is a sentence in excess of any rational and reasonable notice of retribution.

Had Sarah's direct appeal counsel raised the issue of excessive sentence, appellate relief would have been granted.

Moreover, appellate counsel was ineffective in not raising a claim that Sarah's sentences violate the Eighth and Fourteenth Amendments and Idaho Const. Article I, § 6 which prohibit the imposition of cruel and unusual punishments. The question of whether a fixed life sentence imposed on a juvenile violates federal constitutional protections ~~is currently pending before the United States Supreme Court in two cases: *Miller v. Alabama*, SCT Docket Number 10-9646, and *Jackson v. Hobbs*, Docket Number 10-9647, argued March 20, 2012.~~ was decided in *Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 2455 (2012). There the Court held mandatory sentencing schemes imposing fixed life unconstitutional.

Had Sarah's appellate counsel raised the constitutional claim, either relief would have

been granted in the Idaho appellate court or certiorari would have been granted in the United States Supreme Court.

Therefore, post-conviction relief should be granted on this claim.

FIFTH CAUSE OF ACTION: ***Sarah Was Denied Due Process Of Law As Guaranteed By The Fifth Amendment And Idaho Constitution Article I, Section 13 When The State Withheld The Material Exculpatory Evidence That The Fingerprints Found On The Rifle, Scope, And Ammunition Box Insert Had Been Run Through AFIS And Matched To Christopher Hill – Brady v. Maryland***

Facts Pertaining to Claim

119. After the trial, the state matched previously unidentified fingerprints on the murder weapon, its scope and its ammunition to Christopher Hill, a friend of Mel Speegle who lived in the Johnson guesthouse.

120. This evidence was exculpatory because it tended to show that Mr. Hill and not Petitioner was the one who shot Diane and Alan Johnson.

121. The state did not turn over this evidence to Petitioner once it was discovered.

122. Rather, a former employee of the Idaho State Police, Robert Kerchusky, learned of the information by informally inquiring of Maria Eguren, an employee of the state crime lab.

123. Ms. Eguren later testified that she knew of the identification and had not told Mr. Kerchusky about it, but that the information accidently "slipped out" after "several conversations" with Mr. Kerchusky. EH T pg. 767, ln. 14.

124. The withholding of exculpatory information from Petitioner violated her right to due process under the Fourteenth Amendment and Art. 1, § 13 of the Idaho Constitution under *Brady v. Maryland,* 373 U.S. 83, 87 (1963), and its progeny.

125. Post-conviction counsel did not raise a *Brady* claim in the original petition.

126. Instead he raised a newly discovered evidence claim based upon Mr. Kerchusky's discovery.

127. This Court denied the claim because it found the newly discovered evidence was not likely to result in an acquittal.

128. It was ineffective of post-conviction counsel to fail to raise the claim as a *Brady* claim because the petitioner's burden of proof in a *Brady* claim is lower than the burden of proof in a newly discovered evidence claim.

129. Had post-conviction counsel alleged a *Brady* claim, this court would have granted relief because there is a reasonable probability that the withheld evidence would have caused a different result.

Why Relief Should be Granted as to this Claim

Brady v. Maryland, *supra*, holds that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. The *Brady* doctrine has been expanded to include instances where the exculpatory evidence was never requested, or requested only in a general way. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

The duty of disclosure under *Brady* extends to all persons working as part of the prosecution team or intimately connected with the government's case. The Supreme Court has written that "the rule encompasses evidence 'known only to police investigators and not to the prosecutor.' In order to comply with *Brady*, therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this

case, including the police.'" *Strickler v. Greene*, 527 U.S. 263, 280 (1999), *quoting Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (internal citation omitted). "Because prosecutors rely so heavily on the police and other law enforcement authorities, the obligations imposed under *Brady* would be largely ineffective if those other members of the prosecution team had no responsibility to inform the prosecutor about evidence that undermined the state's preferred theory of the crime." *Moldowan v. City of Warren*, 578 F.3d 351, 377 (6th Cir. 2009). Finally, the state's obligation under *Brady* continued past the trial and sentencing. *Thomas v. Goldsmith*, 979 F.2d 746, 749-750 (9th Cir. 1992) (*Brady* duty continues into post-conviction proceedings).

In order to establish a *Brady* violation, only three things need be shown: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Thus, constitutional error results when favorable evidence is withheld from the defendant "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). Sarah is only required to show that there is a reasonable probability of a different result. She is not required to show that it is more likely than not that she would have been acquitted, as she was during the newly discovered evidence proceedings. It is clear that *Brady* sets a lower bar than a newly discovered evidence motion because the "likely to result in an acquittal" standard was specifically rejected in *Strickland* in favor of the reasonable probability of a different result test found in *Brady*: "On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the

outcome in the case." *Id.*, pg. 693. Here, all three *Brady* requirements have been met. The withheld evidence regarding the fingerprint evidence was exculpatory. And, the withholding of that evidence from the jury undermines confidence in the jury's not fully informed verdict.

SIXTH CAUSE OF ACTION: ***The Two Fixed Life Sentences Imposed On Sarah Procedurally and Substantively Violate The Eighth Amendment Protection Against Cruel And Unusual Punishments***

Facts Pertaining to Claim

130. Petitioner was sentenced to two concurrent terms of fixed life, plus a firearm enhancement of 15 years.

131. At the sentencing hearing, Richard Worst, M.D., a psychiatrist, testified that he evaluated Sarah and found that she was believable. Tr. Vol. 9, p. 6283, ln. 19-20.

132. Dr. Worst further testified that Sarah is amenable to rehabilitation. Tr. Vol. 9, p. 6289, ln. 2-3.

133. Dr. Worst testified that he did not find anything that would allow a prediction that Sarah would be prone to violence. Tr. Vol. 9, p. 6289, ln. 11-14.

134. Dr. Worst also testified as to the development of the adolescent brain and why the American Psychiatric Association, the American Psychological Association, the American Academy of Adolescent Medicine, and the American Academy of Psychiatry and the Law have all taken a stance against the death penalty for juveniles based upon the scientific understanding of brain development over the lifespan. Tr. Vol. 9, p. 6289, ln. 19-p. 6292, ln. 17.

135. Dr. Worst lastly testified that even though he looked very hard to find evidence that Sarah had conduct disorder, he could not find any substantial evidence to support that diagnosis. Tr. Vol. 9, p. 6294, ln. 23-p. 6295, ln. 6.

136. Dr. Craig Beaver, a neuropsychologist, testified at the sentencing hearing that he evaluated Sarah. Tr. Vol. 9, p. 6367, ln. 16-p. 6368, ln. 7.

137. Dr. Beaver testified to the current state of the scientific understanding of brain development and that the development of the areas of the brain associated with high-level decision making, organization, problem solving, inhibitory control, and higher-level adult reasoning and functioning do not fully develop until sometime in the mid-twenties. Tr. Vol. 9, p. 6370, ln. 3-p. 6371, ln. 10.

138. Dr. Beaver also testified as to the effects of age, stress, and Ambien on memory. Tr. Vol. 9, ln. 6379, ln. 17-p. 6385, ln. 11.

139. Dr. Beaver testified that Sarah has rehabilitative potential. Tr. Vol. 9, ln. 4-20.

140. Dr. Beaver cited the facts that Sarah does not have a mental health disorder, does not have a drug or alcohol dependency problem, is of average intelligence, and did not have a prior history of violence in support of the conclusion that she can eventually be successful in the community. Tr. Vol. 9, p. 6399, ln. 4-22.

141. Dr. Beaver testified that the research indicates that people who have killed a parent have a very low recidivism rate compared to other people who go to prison. Tr. Vol. 9, p. 6400, ln. 1-7.

142. Dr. Beaver further testified that the testing done on Sarah does not indicate that she is a sociopath. Tr. Vol. 9, p. 6400, ln. 18-p. 6401, ln. 3.

143. Dr. Beaver testified that in his opinion, Sarah is not a substantial risk to reoffend. Tr. Vol. 9, p. 6413, ln. 5-p. 6515, ln. 8.

131. In imposing the two fixed life sentences, the District Court made only the

following observations regarding Sarah's age (16) at the time of the offenses:

A. "Part of the notion here, to me at least, is that society cannot tolerate and will not tolerate a child rebelling against parents and killing them, the very people who in this circumstance were trying to protect you. And, clearly, absent any justification or excuse. That's precisely what happened here." Tr. Vol. 9, p. 6469, ln. 22-p. 6470, ln. 3.

B. "While I recognize that some of the psychological evidence presented here at this sentencing hearing was to the effect that adolescents can act impulsively, the evidence in this case is not impulsive evidence." Tr. Vol. 9, p. 6473, ln. 9-13.

C. "Another way for me to look at it is to do what I call a T account. . . . And on the mitigating side, there is in fact your age. At the time you committed these crimes, you were 16 years of age." Tr. Vol. 9, p. 6477, ln. 12-20.

D. "I think Dr. Worst is right in the sense that you have this distorted view of yourself and reality, and the truth escapes you, frankly. And I don't think it's a product of your age. I just think it's a product of your makeup that you find the fact of being truthful difficult to get a hold of." Tr. Vol. 9, p. 6489, ln. 15-20.

E. "As to Dr. Beaver's testimony about children, what I would respond is children normally don't act the way you act. You had many options to do many different things, and you chose to do what you did." Tr. Vol. 9, p. 6492, ln. 13-17.

F. "And then the state brought up this question about your age, and made the comment that you had already received the benefit of your age; and you had already received the benefit of your age because the state had not sought the death penalty. And of course, the United States Supreme Court has ruled that this is not a death penalty case. I understand it's not

a death penalty case. It's never been a death penalty case." Tr. Vol. 9, p. 6492, ln. 25-p. 6493, ln. 8.

G. Following this statement, the Court reviewed the case, "pretending" it was a death penalty case to guide its discretion. Tr. Vol. 9, p. 6493, ln. 18-p. 6497, ln. 12. The Court concluded this analysis by stating, "So if, hypothetically, if this were a death penalty case, you would be a candidate for it; and that's the purpose of this exercise." Tr. Vol. 9, p. 6497, ln. 13-15.

H. "As to general deterrence, this -- the community and people in this state have to understand, and the kids in this state have to understand the first time they get grounded by – when they get grounded by their parents, I shouldn't say the first, when they get grounded by their parents when they refuse to follow family rules, when the parents are simply trying to protect them from an improper, illegal relationship, kids can't just go kill parents. We would have absolute disarray in our society if that was sanctioned behavior." Tr. Vol. 9, p. 6499, ln. 18-p. 6500, ln. 3.

132. The District Court violated the Eighth Amendment by failing to take into account how children are different from adults and how those differences counsel against irrevocably sentencing a child to a lifetime in prison. *Miller v. Alabama*, ___ U.S. ___, ___, 132 S.Ct. 2455, 2469 (2012).

133. The two fixed life sentences violate the Eighth Amendment because a fixed life sentence may only be imposed the most unusual of circumstances, circumstances which do not exist in this case. *Id.*

134. In the alternative, the two fixed life sentences violate the Eighth Amendment

because fixed life sentences for juveniles are categorically impermissible. *Id.*

Why Relief Should be Granted as to This Claim

In June 2012, the United States Supreme Court held in *Miller* that statutory schemes mandating life imprisonment without parole for those under age 18 at the time of the offense violate the Eighth Amendment prohibition against cruel and unusual punishment. In reaching its decision, the Court clarified that "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." 132 S.Ct. at 2466. The Court further clarified that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon" and indicated that the penalty is only appropriate for "the rare juvenile offender whose crime reflects irreparable corruption." 132 S.Ct. at 2470. Moreover, as noted in the dissents of Chief Justice Roberts, Justice Thomas, and Justice Alito, the prohibition against fixed life sentences will likely soon be extended to all juvenile offenders, including those convicted of homicide in states which do not mandate fixed life terms. 132 S.Ct. at 2481, 2486, 2489-90.

Miller relied on two prior cases: *Roper v. Simmons*, 543 U.S. 551 (2005), which invalidated the death penalty for all juvenile offenders under the age of 18; and *Graham v. Florida*, 560 U.S. ___, 130 S.Ct. 2011 (2010), which invalidated life without parole sentences imposed on juvenile non-homicide offenders.

In *Roper*, the Supreme Court held that the death penalty cannot be applied to juveniles. In reaching this decision, the Court looked to "the evolving standards of decency that mark the progress of a maturing society." 543 U.S. at 561. To measure this evolution, the Court looked not only at the number of states that allowed executions of juveniles, but also at the consistency

of the direction of change in state laws. 543 U.S. at 566. The Court also looked to the laws of other countries and to the international authorities as instructive. 543 U.S. at 574. Lastly, the Court brought its own independent judgment to bear on the proportionality of the penalty for a particular class of crimes or class of offenders. *Id.*

Graham and *Miller* likewise looked to the evolving standards of decency, as evidenced by state laws, direction of change in state laws, and international standards as well as the Court's own independent judgment.

In exercising its own judgment, the Court considered several factors. First, the Court made clear in *Roper* that society views juveniles as "categorcially less culpable than the average criminal." 543 U.S. at 567. The Court also cited three general differences between juveniles and adults that demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders: 1) as any parent knows and as the scientific and sociological studies confirm, juveniles are less mature and responsible than adults; 2) juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and 3) the character of a juvenile is not as well formed as that of an adult. 543 U.S. at 569-70. The Court concluded that [t]hese differences render suspect any conclusion that a juvenile falls among the worst offenders." 543 U.S. at 570. "The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Id.* In short, juveniles have a lesser culpability than adults. And, this lesser culpability affects the analysis of retribution, deterrence, and rehabilitation - retribution is not proportional if the law's most severe penalty is imposed on one whose culpability is diminished by reason of youth and immaturity. And, rehabilitation is

more likely as "the signature qualities of youth are transient." 543 U.S. at 570-71. Children grow up.

Roper adopted a categorical prohibition against the death penalty for juveniles because of the difficulties in judging and predicting in juvenile cases. The Court noted the likelihood that the "brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course" and remarked that in some cases, it is even possible that the defendant's youth would wrongly be counted against him or her. 543 U.S. at 573. The Court concluded that even trained psychiatrists do not diagnose patients under age 18 as having antisocial personality disorder - and that if trained professionals do not believe that they can determine that a youth is irreparably depraved, then states cannot ask jurors to make that determination and extinguish the life and potential for a mature understanding of one's own humanity for anyone under age 18 by imposing the death penalty. *Id.*

Graham applied the same analytic framework to life without possibility of parole sentences as had been applied to death penalty sentences in *Roper*. In doing so, the Court noted that life without parole is an especially harsh penalty for a juvenile - a harsher penalty than the same sentence imposed on an adult because a juvenile will spend more years and a greater proportion of his or her life in prison than an adult. "This reality cannot be ignored." ___ U.S. at ___, 130 S.Ct. at 2028.

The Court noted that life without possibility of parole sentences are like death penalty sentences in that they alter the offender's life by a forfeiture that is irrevocable. The sentence "deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency – the remote possibility of which does not mitigate the harshness

of the sentence." ___ U.S. at ___, 130 S.Ct. at 2027. "This sentence 'means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.'" *Id., quoting Naovarath v. State,* 779 P.2d 994, 996 (Nev. 1989).

The Court also noted that the developments in psychology and brain science since *Roper* continued to show fundamental differences between juvenile and adult minds. "Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." ___ U.S. at ___, 130 S.Ct. at 2026, *citing Roper*. From both a scientific and a moral standpoint it is misguided to equate the actions of a juvenile with those of an adult. *Id.*

In determining that the proper result was a categorical prohibition on fixed life sentences for non-homicide juvenile offenders, the Court looked at the penological justifications for sentencing and held that none - retribution, deterrence, incapacitation, or rehabilitation - provides an adequate justification for the harsh sentence. The Court held that retribution does not justify imposition of the penalty because juveniles are less culpable than adults. ___ U.S. at ___, 130 S.Ct. at 2028. Deterrence does not justify the sentence because the same characteristics that render juveniles less culpable than adults also make them less susceptible to deterrence. ___ U.S. at ___, 130 S.Ct. at 2028-29. Incapacitation does not justify the sentence because the characteristics of juveniles make the judgment that a specific youth is incorrigible and can never be safely in the community again questionable. "A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity." ___ U.S. at ___. 130 S.Ct. at 2029. And finally, rehabilitation does not justify the penalty because the penalty

forswears altogether the rehabilitative ideal. ___ U.S. at ___, 130 S.Ct. at 2030.

Noting an on-going concern with the "unacceptable likelihood" that the brutality or cold-blooded nature of a particular crime would overpower mitigating arguments based on youth as a matter of course, the Court determined both that a criminal procedure that failed to take into account the defendant's youth is constitutionally flawed and further that a categorical prohibition against mandatory fixed life sentences was the proper course. ___ U.S. at ___, 130 S.Ct. at 2030-2032.

In *Miller*, the Court again applied the same analytical framework - noting *Graham's* foundational principle: "that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." ___ U.S. at ___, 132 S.Ct. at 2466. And, *Miller* emphasized that this is true in all cases - even in cases involving vicious murders. ___ U.S. at ___, 132 S.Ct. at 2469.

Miller concluded:

> We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. Cf. *Graham*, 560 U.S. at ___, 130 S.Ct. at 2030 ('A State is not required to guarantee eventual freedom,' but must provide 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation'). By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment. Because that holding is sufficient to decide these cases, we do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger. But given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' *Roper*, 543 U.S.

> at 573, 125 S.Ct. at 1183; *Graham*, 560 U.S. at ___, 130 S.Ct. at 2026-2027. Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

___U.S. at ___, 132 S.Ct. at 2469.

As discussed above, the dissenters in *Miller* all noted that *Miller* is "an invitation to overturn life without parole sentences" and that the prohibition will likely soon extend to all fixed life sentences even for homicides and even in states which allow judicial discretion. And, since *Miller*, the Court has in fact vacated a judgment and remanded for further consideration in light of *Miller* in *Bear Cloud v. Wyoming*, 133 S.Ct. 183 (2012). Bear Cloud committed first degree murder (felony murder) and was sentenced to life imprisonment. He challenged his sentence in state court on the basis that life sentences are categorically unconstitutional as applied to all juveniles and, more specifically, as applied to juveniles who are 'mere accomplices' to a homicide. *Bear Cloud v. State*, 275 P.3d 377 (Wyo. 2012). Upon remand by the United States Supreme Court, the Wyoming Court vacated the juvenile fixed life sentence and detailed the *Miller* factors which must be considered by the sentencing court. *Bear Cloud v. State*, 294 P.3d 36, 47–48 (Wyo. 2013). The vacation and remand may be indicative that the dissenting opinions predictions in *Miller* will be proven correct. *See also, People v. Williams*, 982 N.E.2d 181 (Ill. App. 2012) (holding that *Miller* applies retroactively and that the sentencing court violated the Eighth Amendment when it did not graduate and proportion punishment for a defendant's crimes including first degree murder considering his status as a juvenile at the time of the offense. *Accord, People v. Morfin*, 981 N.E.2d 1010 (Ill. Ct. App. 2012). *Jones v. State*, 122 So.3d 698, 703 (Miss. 2013) ("We are of the opinion that *Miller* created a new, substantive

rule which should be applied retroactively to cases on collateral review."); *see also, Diatchenko v. District Attorney,* — N.E.2d — (Supreme Judicial Court Mass. December 24, 2013) ("[W]e conclude that the 'new' constitutional rule announced in *Miller* . . . has retroactive application to cases on collateral review[.]").

In addition, the United States Supreme Court has remanded other juvenile fixed life sentences for further consideration in light of *Miller v. Alabama.* First, in *Maurico v. California,* ___ U.S. ___, 133 S.Ct. 524 (2012), the Supreme Court vacated the judgment of the California Court of Appeals which had affirmed the imposition of three consecutive terms of life without the possibility of parole for multiple first-degree murder convictions remanding the case for further proceedings. The California Court held that "Mauricio's sentence here was not cruel and/or unusual, in light of the severity of the crimes he committed." *People v. Mauricio,* 2011 WL 5995976 (Cal. App. 2 Dist. 2011). And more recently, the Supreme Court vacated the fixed life sentence of a seventeen-year-old who was convicted of first-degree murder with special circumstances and remanded for further proceedings. *Blackwell v. California,* USSCt No. 12-5832 (January 7, 2013), *vacating People v. Blackwell,* 202 Cal.App.4th 144, 155, 134 Cal.Rptr.3d 608, 618 (Cal. App. 1 Dist. 2011). (Upon remand in both *Mauricio* and *Blackwell,* the California Court of Appeals vacated the fixed life sentences and remanded to the superior court. The California Supreme Court has granted review in *Maurico* and a request for review has been filed in *Blackwell.*) Importantly, California, unlike Alabama but like Idaho, does not have a mandatory fixed life sentencing scheme. Thus, it appears that *Miller v. Alabama* applies even in cases where the trial court retains the discretion to impose less than a fixed life sentence and that fixed life sentences in those states must comply with *Miller.* And in *Blackwell* the

question of whether a fixed life sentence is categorically prohibited for juveniles who are convicted of murder under an aiding and abetting theory is presented. 134 Cal.Rptr 3d at 618. In this case, the Idaho Supreme Court found that Sarah could be found guilty under an accomplice liability theory. 145 Idaho at 475, 188 P.3d at 918.

In *Miller*, the Supreme Court has directed that a trial court must undertake an analysis of "[e]verything [it] said in *Roper* and *Graham*" about youth. *Miller*, 567 U.S. at ——, 132 S.Ct. at 2467. This means more than a generalized notion of taking age into consideration as a factor in sentencing. A sentencing court's passing reference to the defendant's youth does not eliminate need to resentence in light of *Miller* requirements. Sentencing courts are now required to apply the core teachings of *Roper*, *Graham*, and *Miller* in making sentencing decisions. *See e.g., State v. Simmons*, 99 So.3d 28, 28 (La. 2012) (*per curiam*) (remanding to the district court for reconsideration of the defendant's sentence of life imprisonment at hard labor without possibility of parole imposed in 1995 in light of *Miller* and requiring the court to make findings on the record); *and State v. Fletcher*, 112 So.3d 1031, 1036 (La. Ct. App.2013) (finding that while sentencing court considered some of the factors enumerated in *Miller*, the court's consideration lacked depth).

The Iowa Supreme Court has issued a series of cases involving juvenile sentences. On August 16, 2013, the Iowa Supreme Court vacated a mandatory juvenile fixed life sentence and remanded for resentencing. *State v. Null*, 836 N.W.2d. 41 a(Iowa 2013). On the same day it issued *Null*, the Iowa Court vacated a 35 year fixed sentence imposed on a juvenile in *State v. Pearson*, 836 N.W.2d 88 (Iowa 2013) and a 60 year fixed sentence imposed on a juvenile in *State v. Ragland*, 836 N.W.2d 107 (Iowa 2013). (In *Ragland*, the defendant had been sentenced

to a fixed life term. In 2012, the Iowa Supreme Court remanded the case for reconsideration. In response to the *Miller* decision, Iowa's Governor commuted 38 juvenile fixed life sentences to life sentences with 60 years fixed. In 2013, the Iowa Supreme Court found that *Miller* applied to the 60 year fixed term because it was the functional equivalent to a fixed life term.) On that same day, the Missouri Supreme Court vacated a juvenile fixed life sentence in *State v. Hart*, 404 S.W.3d 232 (Mo. 2013).

In *Null*, the Iowa Court wrote that the district court must recognize that because "children are constitutionally different from adults," they ordinarily cannot be held to the same standard of culpability as adults in criminal sentencing due to the juvenile's lack of maturity, underdeveloped sense of responsibility, vulnerability to peer pressure, and the less fixed nature of the juveniles character." 836 N.W.2d at 74, *citing Miller*, 567 U.S. at ___, 132 S.Ct. at 2464. And, if a district court believes a case presents an exception to this generally applicable rule, the district court should make findings discussing why the general rule does not apply. *Id.*, *citing Simmons*, 99 So.3d at 28; *Fletcher*, 112 So.3d at 1036–37.

There are no such findings in Sarah's case. And, under the analysis in *Null*, the sentencing court's comments are no substitute for formal findings, because "the district court must go beyond a mere recitation of the nature of the crime, which the Supreme Court has cautioned cannot overwhelm the analysis in the context of juvenile sentencing." *Id.*, *see Graham*, 560 U.S. at ___, 130 S.Ct. at 2032; *Roper*, 543 U.S. at 572–73.

"Second, the district court must recognize that '[j]uveniles are more capable of change than are adults' and that as a result, 'their actions are less likely to be evidence of 'irretrievably depraved character.'" 836 N.W.2d at 75.., *citing Graham*, 560 U.S. at ___, 130 S.Ct. at 2026, *in*

turn quoting Roper, 543 U.S. at 570; *accord Miller*, 567 U.S. at ___, 132 S.Ct. at 2464. And, "the district court must recognize that most juveniles who engage in criminal activity are not destined to become lifelong criminals." *Id., citing Miller*, 567 U.S. at ___, 132 S.Ct. at 2464; *Graham*, 560 U.S. at ___, 130 S.Ct. at 2029; *Roper*, 543 U.S. at 570. In other words, the "'signature qualities' of youth are all 'transient.'" *Miller*, 567 U.S. at ___, 132 S.Ct. at 2467, *quoting Johnson v. Texas*, 509 U.S. 350, 368 (1993). Because "incorrigibility is inconsistent with youth," care should be taken to avoid "an irrevocable judgment about [an offender's] value and place in society." *Miller*, 567 U.S. at ___, 132 S.Ct. at 2465.

Finally, "the district court should recognize that a lengthy prison sentence without the possibility of parole such as that involved in this case is appropriate, if at all, only in rare or uncommon cases." *Null, supra., citing Miller*, 567 U.S. at ___, 132 S.Ct. at 2469.

More recently, a United States District Court ordered that the state of Michigan create an administrative structure for the purpose of processing and determining the appropriateness of paroles for prisoners sentenced to life without parole sentences for crimes committed as juvenile. It also required the state to give notice to all such persons who have completed 10 years of imprisonment that their eligibility for parole will be considered in a meaningful and realistic manner. *Hill v. Snyder*, No. CV-10-14568 (Dkt #107) (D.Ct. E. Michigan November 26, 2013).

Applying *Roper, Graham* and *Miller* to this case, an Eighth Amendment violation exists. First, the District Court did not take into account Sarah's status as a juvenile in sentencing her. The Court rejected all the defense evidence presented regarding Sarah's youth - dismissing both Dr. Beaver and Dr. Worst's testimony regarding brain development and Sarah's potential for rehabilitation and low likelihood of reoffense. Instead of considering that Sarah's youth made

her less culpable than an adult, that she was more vulnerable to negative influences and outside pressures, and that her character not as well formed and less fixed than an adult's, the Court held Sarah's youth against her. The Court did exactly what the Supreme Court cautioned against and forbade; it allowed the nature of the crime to overpower the mitigation arguments based on youth. The Court determined that Sarah was more deserving of the harshest possible penalty because she was a child and because the Court found that children killing parents cannot be tolerated and social chaos might result from a lesser penalty. Had Sarah been an adult who killed her parents, the Court would have, by its reasoning, given her a lesser sentence because adult children who kill their parents do not threaten the social fabric as seriously as juveniles who kill their parents do. This failure to properly consider Sarah's youth violated the Eighth Amendment.

The Eighth Amendment was also violated because this case does not present the unusual circumstances which would allow such a penalty. While the offense of conviction was violent, Sarah had no prior record of violence. There was substantial evidence that Sarah was amenable to rehabilitation. There was no evidence that she would forever be a danger to society. In fact, two experts testified that she was unlikely to reoffend and likely could eventually be safety released into the community.

Miller considered the legitimate penological justifications for imposing the harshest sentence possible, life without possibility of parole, on juveniles and determined that the sentence cannot be justified on the basis of retribution because retribution relates to blameworthiness and the case for blameworthiness and thus retribution is not as strong with children as with adults. The Court further found that the sentence cannot be justified by

deterrence because the same characteristics that render juveniles less culpable than adults, including immaturity, recklessness, and impetuosity, make them less likely to consider potential punishment. And, incapacitation cannot justify the sentence except where a finding can be made that the child will forever be a danger to society - a finding that "is inconsistent with youth." (In particular, that finding is inconsistent with youth in this case because both Dr. Beaver and Dr. Worst testified that Sarah cannot be said to be incorrigible.) And, lastly, the sentence cannot be justified on the basis of rehabilitation because the sentence imposed disregards the possibility of rehabilitation. ___ U.S. ___, 132 S.Ct. at 2465- 2469.

In this case, the imposition of two fixed life sentences cannot be reconciled with the Eighth Amendment. The sentences cannot be justified by retribution, deterrence, incapacity, or rehabilitation.

Lastly, the sentences violate the Eighth Amendment because as noted in the dissents in *Miller*, following *Miller*, fixed life sentences for juveniles convicted of murder will not be allowed. All the bases for finding the sentences unconstitutional in *Miller* including the trend of state laws, international law, and the Court's own judgment, will be applied to find the sentences unconstitutional regardless of what sentencing discretion is given to the trial court.

For these reasons, should Sarah's convictions not be vacated as a result of this post-conviction petition, her sentences should be vacated and the matter set for a new sentencing hearing.

Sarah Was Denied Effective Assistance Of Counsel In The Original Petition For

Post-Conviction Relief, The Ineffective Assistance Of Counsel Claims And The Brady Claim May Be Raised In A Successive Petition, And Further, This Petition Is Timely

Relevant Facts

135. Proceedings on Sarah's original petition for post-conviction relief have not been completed as the case remains pending in the Supreme Court.

136. The claim that trial counsel was ineffective in failing to file a motion to dismiss pursuant to *Arizona v. Youngblood* following the State's denial of due process by discarding the comforter was not raised in the original or amended petition for post-conviction relief.

137. The claim that trial counsel was ineffective in failing to present evidence regarding Janet Sylten's parole status at the time of the Johnsons' murders was not raised in the original or amended petition for post-conviction relief.

138. The claim that trial counsel was ineffective in failing to object to prosecutorial misconduct throughout the trial was not raised in the original or amended petition for post-conviction relief.

139. The claim that trial counsel was ineffective in failing to object to the jury's trip from Ada County to Bellevue to visit the Johnson house was not raised in the original or amended petition for post-conviction relief.

140. The claim that Sarah was denied effective assistance of counsel when her appointed counsel labored throughout the proceedings under an actual conflict was interest was not raised in the original or amended petition for post-conviction relief.

141. The claim that Sarah was denied effective assistance of appellate counsel in the direct appeal was not raised in the original or amended petition for post-conviction relief.

142. The claim that Sarah was denied due process when the State withheld the material exculpatory evidence that the fingerprints found on the rifle, scope and ammunition box insert had been run through AFIS and matched to Christopher Hill – *Brady* claim, was not raised in the original or amended petition for post-conviction relief.

143. The claim that the fixed life sentences violate the Eighth Amendment was not raised in the original or amended petition for post-conviction relief.

144. Post-conviction counsel was ineffective in failing to raise these claims in the original or amended petition for post-conviction relief.

Argument

Idaho Code § 19-4908 governs the filing of successive petitions and indicates that successive petitions for post-conviction relief are generally not permissible unless 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 petition.

Deficient representation by counsel in an initial post-conviction proceeding that causes a claim to be inadequately presented to the court, constitutions a "sufficient reason" to allow assertion of the claim in a subsequent post-conviction petition pursuant to I.C. § 19-4908. *See, e.g. Schwartz v. State,* 145 Idaho 186, 189, 177 P.3d 400, 403 (Ct. App. 2008); *Baker v. State,* 143 Idaho 411, 420, 128 P.3d 948, 957 (Ct. App. 2005).

As set out in *Schwartz*:

> The statute of limitation for post-conviction actions provides that an application for post-conviction relief may be filed at any time within one year from the expiration of the time for appeal or from the determination of appeal or from the determination of a proceedings following an appeal, whichever is later. The appeal referenced in that section means the appeal in the underlying criminal case.

> The failure to file a timely application is a basis for dismissal of the application. However, if an initial post-conviction action was timely filed and has been concluded, an inmate may file a subsequent application outside of the one-year limitation period 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. Ineffective assistance of prior post-conviction counsel may provide sufficient reason for permitting newly asserted allegations or allegations inadequately raised in the initial application to be raised in a subsequent post-conviction application. Additionally, when a second or successive application is presented because the initial application was summarily dismissed due to the alleged ineffectiveness of the initial post-conviction counsel, use of the relation-back doctrine may be appropriate. This is so because failing to provide a post-conviction application with a meaningful opportunity to have his or her claims presented may be violative of due process.

145 Idaho at 189, 177 P.3d at 403 (internal quotations and citations omitted).

The determination of what is a reasonable time for filing a successive petition is to be considered on a case by case basis. *Id.,* at 190, 177 P.3d at 404, citing *Charboneau v. State,* 144 Idaho 900, 905, 174 P.3d 870, 875 (2007).

When a petitioner alleges ineffective assistance of post-conviction counsel as a basis for bringing a successive petition, the relevant inquiry is "whether the second [petition] has raised not merely a question of counsel's performance but substantive grounds for relief from the conviction and sentence." *Nguyen v. State,* 126 Idaho 494, 496, 887 P.2d 39, 41 (Ct. App. 1994) (quoting *Wolfe v. State,* 113 Idaho 337, 339, 743 P.2d 990, 992 (Ct. App. 1987). Thus, to overcome summary dismissal, a petitioner must allege that the claims raised in the successive petition were either not raised or inadequately asserted in the original post-conviction action due to the ineffective assistance of original post-conviction counsel and a valid underlying claim for post-conviction relief. *Nguyen,* 126 Idaho at 496, 887 P.2d at 41.

This, Sarah has done. She has alleged that her original post-conviction counsel was

ineffective. In particular, counsel was ineffective insofar as it was deficient performance to fail to raise the meritorious claims that Sarah is now raising in this successive petition and that deficiency was prejudicial because had counsel raised these claims, post-conviction relief would have been granted. *Strickland v. Washington, supra.*

Moreover, Sarah is raising these claims in a timely manner. The appeal from the denial of relief is still pending. It is not unreasonable in terms of timeliness to file a successive petition even before litigation has concluded on the original petition. Indeed, the language of *Schwartz* quoted above anticipates that a "reasonable time" will not expire until sometime after the proceedings in the original petition are concluded.

PRAYER FOR RELIEF: ***Petitioner requests the following relief:***

1. That counsel be appointed to assist her in the prosecution of this action;
2. That the judgment of conviction be vacated and that a new trial be granted; and/or
3. That the sentences be vacated and the matter set for a new sentencing hearing; and/or
4. For such other and further relief as the Court deems just and proper.

Respectfully submitted this 22nd day of January, 2014.

R. Keith Roark
Attorney for Sarah Johnson

VERIFICATION OF PETITION

I, Sarah Johnson, being duly sworn under oath, state:

I know of the contents of the foregoing Amended DNA and Successive Petition for Post-Conviction Relief and that the matters and allegations set forth are true and correct to the best of my knowledge and belief.

Sarah Marie Johnson

SUBSCRIBED AND SWORN TO BEFORE ME
this 3rd day of January, 2014.

Notary Public for the State of Idaho
Residing at: Jerome ID
My commission expires: Nov. 29, 2019

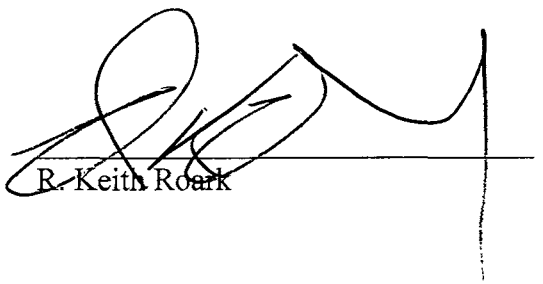
FELICIA FUNK NOTARY PUBLIC STATE OF IDAHO

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of January, 2014, I caused a true and correct copy of the foregoing to be deposited in the United States Mail postage pre-paid to:

Jim Thomas
Blaine Co. Prosecutor
201 Second Ave S., Suite 100
Hailey, ID 83333

Jessica Lorello
Kenneth Jorgensen
Deputy Attorneys General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010



R. Keith Roark

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SARAH JOHNSON Petitioner, vs. STATE OF IDAHO, Respondent.	**Case No. CV-06-324** **ORDER ON PENDING MOTIONS**

The Court, having considered the pending motions and after conducting a hearing related to said motions on May 5, 2014, hereby enters the following order:

Petitioner's oral motion to withdraw the Motion for Relief from Judgment, filed April 9, 2012, is GRANTED. The DNA and Successive Petition for Post-Conviction Relief filed April 9, 2012, in support of the Motion for Relief from Judgment, shall be filed *nunc pro tunc* to April 9, 2012, in a separate case and assigned a separate case number. The following documents shall also be filed *nunc pro tunc* to their original filing dates in the same case number assigned to Petitioner's DNA and Successive Petition for Post-Conviction Relief: (1) Affidavit of Dr. Greg Hampikian in Support of DNA and Successive Petition for Post-Conviction Relief (originally filed on April 13, 2012), and (2) Petitioner's Amended DNA and Successive Petition for Post-Conviction Relief (originally filed on January 22, 2014). The Court's prior order appointing counsel, Keith Roark, to represent Petitioner on her DNA and Successive Petition for Post-Conviction Relief shall remain in effect in the newly filed case.

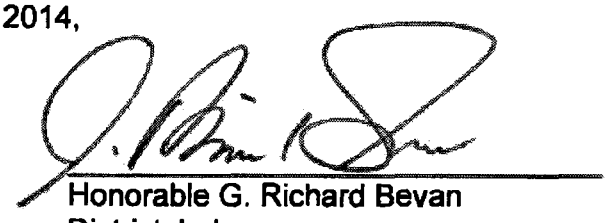
Petitioner's Motion for Summary Disposition, filed May 10, 2012, shall be denied without prejudice to refiling it in the new case.

Respondent's Motion to Stay Successive Post-Conviction Proceedings, filed July 3, 2012, is DENIED as moot.

Respondent's Motion for Ruling on Johnson's 60(b) Motion and Request for Summary Dismissal of Petitioner's Amended DNA and Successive Petition for Post-Conviction Relief Or, Alternatively, to Stay, filed March 24, 2014, is DENIED to the extent it is moot since Petitioner has withdrawn her Motion for Relief from Judgment. Respondent's alternative request to stay is denied without prejudice to Respondent seeking a stay in the new case should the Respondent choose to do so.

IT IS SO ORDERED.

DATED this 19 day of May, 2014,



Honorable G. Richard Bevan
District Judge

LAWRENCE G. WASDEN
Idaho Attorney General

PAUL R. PANTHER
Chief, Deputy Attorney General
Criminal Law Division

JESSICA M. LORELLO ISB #6554
KENNETH K. JORGENSEN ISB #4051
Deputies Attorney General and
Special Prosecuting Attorneys
P.O. Box 83720
Boise, Idaho 83720-0010
Telephone: (208) 332-3096
Facsimile: (208) 854-8074

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SARAH JOHNSON Petitioner, vs. STATE OF IDAHO, Respondent.	**Case No. CV-2014-0353** **MOTION FOR EXTENSION OF TIME TO FILE RESPONSE TO AMENDED DNA AND SUCCESSIVE PETITION FOR POST CONVICTION RELIEF**

COMES NOW, Jessica M. Lorello, Deputy Attorney General and Special Prosecuting Attorney for Blaine County, and hereby moves for an extension of time in which to file the state's answer and/or motion for summary disposition and/or other appropriate pleading in response to Petitioner's Amended DNA and Successive Petition for Post-Conviction Relief ("Amended Successive Petition"). The grounds for this motion are as follows.

As this Court is aware, Johnson's Amended Successive Petition was previously filed in Johnson's original post-conviction action (Case No. 2006-324) in support of

Johnson's request for relief pursuant to I.R.C.P. 60(b). The state filed a response to that request and, ultimately, the Rule 60(b) issue was resolved by agreement of the parties that Johnson's Amended Successive Petition should be filed in a new case (the above-captioned case), which occurred on May 19, 2014.[1] Based on the May 19, 2014 filing date, the state's response is due June 18, 2014. Since May 19, 2014, undersigned counsel has been unable to finalize the state's response to Petitioner's Amended Successive Petition due to a death in the family and other personal matters that have required time away from work. In addition, during the past 30 days, undersigned counsel has had briefing deadlines in Melton v. Reinke, Federal District Court Case No. CV-10-364-CWD, Loftis v. Wengler, Federal District Court Case No. CV-12-379-REB, Salinas v. State, Idaho Supreme Court No. 40902, State v. Pedersen, Idaho Supreme Court Docket No. 41431, State v. Stewart, Idaho Supreme Court Docket No. 41011, State v. Skiles, Idaho Supreme Court No. 41628, and Padilla v. State, Idaho Supreme Court No. 41772. Undersigned counsel will also be on vacation from June 24 through June 30, 2014, and will be teaching a full day at POST on July 2, 2014.

In light of the foregoing, the state requests an extension of 30 days in which to prepare a response to Petitioner's Amended Successive Petition, making the due date July 18, 2014.

DATED this 18th day of June 2014.

JESSICA M. LORELLO
Deputy Attorney General

[1] However, for purposes of the statute of limitation, the parties agreed that the filing date would be the same date the Amended Successive Petition was filed in Case No. CV-2006-324.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of June 2014 I caused to be faxed a true and correct copy of the foregoing Motion For Extension Of Time To File Response to Amended DNA and Successive Petition for Post Conviction Relief to:

Blaine County Court Clerk
Fax (208) 788-5527

_X_ Facsimile

R. Keith Roark
THE ROARK LAW FIRM
409 Main Street
Hailey, ID 83333

_X_ U.S. Mail Postage Prepaid
___ Hand Delivered
___ Overnight Mail
___ Facsimile

Rosean Newman, Legal Secretary

LAWRENCE G. WASDEN
Idaho Attorney General

PAUL R. PANTHER
Chief, Deputy Attorney General
Criminal Law Division

JESSICA M. LORELLO ISB #6554
Deputies Attorney General
Special Prosecuting Attorney
P.O. Box 83720
Boise, Idaho 83720-0010
Telephone: (208) 332-3096
Facsimile: (208) 854-8074

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SARAH JOHNSON

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

Case No. CV-2014-353

ORDER FOR EXTENSION OF TIME TO FILE RESPONSE TO AMENDED DNA AND SUCCESSIVE PETITION FOR POST CONVICTION RELIEF

The Respondent's Motion for Extension of Time having come before this Court and with good cause appearing;

IT IS HEREBY ORDERED, that the Respondent be allowed an additional 30 days extension of time to file its response on July 18, 2014.

DATED this 27 day of June 2014.

G. Richard Bevan
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3 day of ~~June~~ July, 2014 I caused to be faxed a true and correct copy of the foregoing ORDER FOR EXTENSION OF TIME TO FILE RESPONSE TO AMENDED DNA AND SUCCESSIVE PETITION FOR POST CONVICTION RELIEF to:

R. Keith Roark
THE ROARK LAW FIRM
409 Main St.
Ketchum, ID 83340
Fax (208) 622-7921

___ U.S. Mail Postage Prepaid
___ Hand Delivered
___ Overnight Mail
_/_ Facsimile

Jessica M. Lorello
Deputy Attorney General
P.O. Box 83720
Boise, ID 83720-0010
Fax (208) 854-8083

___ U.S. Mail Postage Prepaid
___ Hand Delivered
___ Overnight Mail
_/_ Facsimile

C Raby

PAUL R. PANTHER
Chief, Deputy Attorney General
Criminal Law Division

JESSICA M. LORELLO ISB #6554
KENNETH K. JORGENSEN ISB #4051
Deputies Attorney General and
Special Prosecuting Attorneys
P.O. Box 83720
Boise, Idaho 83720-0010
Telephone: (208) 332-3096
Facsimile: (208) 854-8074

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SARAH JOHNSON Petitioner, vs. STATE OF IDAHO, Respondent.	**Case No. CV-2014-0353** **MOTION TO TAKE JUDICIAL NOTICE**

COMES NOW, Jessica M. Lorello, Deputy Attorney General and Special Prosecuting Attorney for Blaine County, and, pursuant to I.R.E. 201, hereby requests that the Court take judicial notice of the following:

1. Clerk's Record, State v. Johnson, Blaine County Case No. 2003-18200, Idaho Supreme Court Docket No. 33312
2. Exhibits, State v. Johnson, Blaine County Case No. 2003-18200, Idaho Supreme Court Docket No. 33312
3. Trial Transcript, Volumes I – IX, State v. Johnson, Blaine County Case No. 2003-18200, Idaho Supreme Court Docket No. 33312

4. Supplemental Transcript on Appeal, State v. Johnson, Blaine County Case No. 2003-18200, Idaho Supreme Court Docket No. 33312
5. Second Supplemental Transcript on Appeal, State v. Johnson, Blaine County Case No. 2003-18200, Idaho Supreme Court Docket No. 33312
6. Index, State v. Johnson, Blaine County Case No. 2003-18200, Idaho Supreme Court Docket No. 33312
7. Clerk's Record, Johnson v. State, Blaine County Case No. CV-2006-324, Idaho Supreme Court Docket No. 38769
8. Transcript on Appeal, Johnson v. State, Blaine County Case No. CV-2006-324, Idaho Supreme Court Docket No. 38769
9. Supplemental Transcript on Appeal, Johnson v. State, Blaine County Case No. CV-2006-324, Idaho Supreme Court Docket No. 38769
10. Exhibits, Johnson v. State, Blaine County Case No. CV-2006-324, Idaho

The foregoing items are relevant to adjudication of the Petitioner's Amended DNA and Successive Petition for Post-Conviction Relief filed in this case as they relate to the Petitioner's underlying criminal case from which she seeks relief and her prior post-conviction action filed in relation thereto.

DATED this 18th day of July 2014.

JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of July 2014 I caused to be delivered a true and correct copy of the foregoing Motion to Take Judicial Notice to:

Blaine County Court Clerk
Fax (208) 788-5527

_X_ Facsimile

R. Keith Roark
THE ROARK LAW FIRM
409 Main Street
Hailey, ID 83333

_X_ U.S. Mail Postage Prepaid
___ Hand Delivered
___ Overnight Mail
___ Facsimile

Marilyn Gerhard

Marilyn Gerhard, Legal Secretary

LAWRENCE G. WASDEN
Idaho Attorney General

PAUL R. PANTHER
Chief, Deputy Attorney General
Criminal Law Division

JESSICA M. LORELLO ISB #6554
KENNETH K. JORGENSEN ISB #4051
Deputies Attorney General and
Special Prosecuting Attorneys
P.O. Box 83720
Boise, Idaho 83720-0010
Telephone: (208) 332-3096
Facsimile: (208) 854-8074

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SARAH JOHNSON Petitioner, vs. STATE OF IDAHO, Respondent.	**Case No. CV-2014-0353** **BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISMISSAL OF PETITIONER'S AMENDED DNA AND SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF**

COMES NOW, Jessica M. Lorello, Deputy Attorney General and Special Prosecuting Attorney for Blaine County, and hereby files this brief in support of the state's motion to summarily dismiss Petitioner's ("Johnson") "Amended DNA and Successive Petition for Post-Conviction Relief" (hereinafter "Amended Successive Petition").

BACKGROUND

The state charged Johnson with, and a jury convicted her of, two counts of first-degree murder for murdering her parents, Alan and Diane, early in the morning on September 2, 2003. See State v. Johnson ("Johnson I"), 145 Idaho 970, 188 P.3d 912 (2008). The court entered Judgment on June 30, 2005, imposing concurrent life sentences, plus 15 years for a firearm enhancement. Id. at 972, 188 P.3d at 914.

On April 19, 2006, Johnson filed a "*pro se*"[1] petition for post-conviction relief in Blaine County Case No. CV-2006-324, in which she alleged, among other claims, that her attorneys were ineffective for failing to file a timely notice of appeal. (Petition for Post-Conviction Relief (hereinafter "Petition"), pp.3-5.) Johnson also filed a "*pro se*" Motion for Appointment of Counsel and a "*pro se*" Motion for Court to Rule on "Notice of Appeal" Issue and Suspend Remaining Post-Conviction Claims Pending Outcome of Direct Appeal. The state filed an Answer, an objection to Johnson's motion to suspend, and a motion for discovery requesting authorization to depose Johnson's two trial attorneys – Bobby Pangburn and Mark Rader.

The Court appointed counsel and granted Johnson's request to reinstate her appellate rights and to stay the post-conviction case pending the outcome of her appeal. (Order on Motion for New Appeal Period and Motion to Stay, and Order on Motion to Seal Motions to Withdraw filed July 3, 2006.) On appeal, Johnson raised

[1] Although Johnson's pleadings, on their face, purport to be *pro se*, Johnson's petition was, in fact, prepared by the State Appellate Public Defender. (See Affidavit of Sara B. Thomas filed June 5, 2006.)

three issues: (1) the aiding and abetting instruction constructively amended the charging document and resulted in a fatal variance; (2) denial of the "constitutional right to a unanimous jury verdict because the district court did not instruct the jury it must unanimously agree on whether [she] actually killed [her parents] or whether she aided and abetted in the killing;" and (3) "her constitutional rights were violated when the district court failed to remove a certain juror from the jury pool or obtain an unequivocal commitment that the juror would follow all of the court's instructions." Johnson, 145 Idaho at 972, 188 P.3d at 914. The Idaho Supreme Court denied relief on all claims and affirmed Johnson's convictions. Id. The Remittitur issued July 18, 2008. Johnson filed a petition for writ of certiorari, which the United States Supreme Court denied on December 1, 2008.

On August 15, 2008, the Court issued an order lifting the stay and appointing new counsel, Christopher Simms, to represent Johnson in her post-conviction case. Johnson thereafter filed an amended petition and various motions for discovery and expert assistance. On July 29, 2009, Johnson filed a motion for leave to file a second amended petition, to which the state objected. The Court granted Johnson's motion without prejudice to the state's ability to raise the objections and defenses set forth in the state's objection to the amendment. Johnson filed her Second Amended Petition for Post-Conviction Relief (hereinafter "Second Amended Petition") on January 12, 2010. In her Second Amended Petition, Johnson alleged the following claims: (1) she is "innocent"; (2) lack of jurisdiction because there was no juvenile waiver hearing; (3) a due process violation because the district judge reviewed a transcript of the grand jury

proceeding and police reports and related claims of judicial bias and ineffective assistance of counsel for failing to file a motion to disqualify the judge; (4) ineffective assistance of trial counsel; (5) ineffective assistance of counsel "in dealing with fingerprint evidence issues"; (6) ineffective assistance of counsel for "failing to lay the proper foundation to allow the admission into evidence, during the hearing on Defendant's Motion to Suppress Statements, of Dr. Craig Beaver, PhD regarding his opinion whether under all the circumstances Sarah Johnson knowingly and voluntarily waived her right to counsel"; (7) ineffective assistance of counsel in handling the "aiding and abetting theory of guilt"; (8) ineffective assistance of counsel "in failing to investigate and follow up on a phone call received from Steven Pankey informing trial counsel that he had important information"; (9) ineffective assistance of counsel "in failing to pursue and present a defense that included expert psychiatric testimony which would have informed the jury that a double patricide-matricide, is an incredibly rare phenomena" and even "rarer still with a girl of tender years, such as the Petitioner, who has not been physically and/or sexually abused, is not schizophrenic and/or intoxicated"; (10) ineffective assistance of counsel for violating the rules of professional conduct by "communicating with the media in a self promotional manner"; (11) ineffective assistance of appellate counsel; and (12) newly discovered evidence. (See generally Second Amended Petition.) Claim 4 of Johnson's Second Amended Petition was based on allegations that counsel was ineffective for (a) failing to move for a continuance after discovering "that a comforter, that would have contained physical evidence, had been discarded and not gathered as physical evidence"

(Second Amended Petition, pp.7-8, ¶ a); (b) failing to "object to the re-enactment proffered by the States' [sic] forensic expert Rod Englert, as without adequate foundation" (Second Amended Petition, p.8, ¶ b); (c) failing to "adequately investigate the scientific basis of a proffered experiment and fail[ing] to adequately investigate the relevant evidence following the State's delayed disclosure" (Second Amended Petition, p.8, ¶ c); (d) failing to "provide expert testimony as to comforters" (Second Amended Petition, p.9, ¶ d); (5) failing to "adequately prepare and investigate and to cross-examine the State's witnesses for the relevance and accuracy of their testimony and or to make any effort to attack witness veracity, with factual inconsistencies from prior statements or testimony" (Second Amended Petition, p.9, ¶ 16); and (6) failing to "elicit" testimony from the Johnsons' neighbors regarding what they saw or heard prior to the murders (Second Amended Petition, pp.13-14, ¶ 17). The state sought summary dismissal of all claims in Johnson's Petition, which the Court granted in part, and denied in part. The Court dismissed additional claims pursuant to the state's request for reconsideration. Ultimately, Johnson's Second Amended Petition proceeded to hearing on the following claims:

> **Claim 4(a)** – Ineffective assistance of counsel for failure to move for a continuance after discovering the comforter on the bed where Diane Johnson was murdered was not collected as evidence. (Second Amended Petition, pp.7-8, ¶ 15.a.)
>
> **Claim 4(c)** – Ineffective assistance of counsel for failing to adequately investigate the scientific basis for the proffered coconut experiment. (Second Amended Petition, p.8, ¶ 15.c.)
>
> **Claim 4(e)** – Ineffective assistance of counsel with respect to the cross-examination of Alan Dupuis, Julia Dupuis, Kjell Ellison, Walt Femling, Steve Harkins, Bruno Santos, Consuelo Cedeno, Glenda Osuno, Luis Ramirez, Jane Lopez, Becky Lopez, Carlos Ayala, Raul

Ornelas, and Stu Robinson. (Second Amended Petition, pp.9-13, ¶ 16.)

Claim 4(f) – Ineffective assistance of counsel for failing to present evidence of an audio recording that allegedly illustrates the police "focused" on Johnson "to the exclusion of all other possible suspects and theories, because [Johnson] was the easiest target." (Second Amended Petition, p.13, ¶ 16.c.)

Claim 12 – Newly discovered evidence based upon the identification of fingerprints belonging to Christopher Hill. (Second Amended Petition, pp.22-24, ¶¶ 27-29.)

Following a four-day evidentiary hearing, at which numerous witnesses testified, and upon consideration of post-hearing briefing, the Court denied Johnson's Second Amended Petition for post-conviction relief on April 5, 2011. Johnson filed a notice of appeal from that decision on April 29, 2011.

Approximately one year later, on April 9, 2012, while her appeal was pending, Johnson, with the assistance of *pro bono* attorneys Dennis Benjamin and Deborah Whipple, filed the following documents in Johnson's original post-conviction case (Case No. CV-2006-324): (1) a DNA and Successive Petition for Post-Conviction Relief ("Successive Petition"); (2) Motion for Appointment of Counsel; (3) Motion for Relief from Judgment pursuant to I.R.C.P. 60(b); and (4) Affidavit of Dr. Greg Hampikian in Support of DNA and Successive Petition for Post-Conviction Relief.

The state responded to these pleadings by asking this Court to deny the 60(b) motion and to strike the other documents filed with it, contending, in part, that Johnson's pursuit of a successive petition in her original post-conviction case was improper. In response Johnson argued, *inter alia*, that her Successive Petition does not commence new proceedings, but is instead merely a continuation of the

old proceedings. Johnson also filed a motion seeking summary disposition of her Successive Petition, to which the state objected.

Following a hearing on Johnson's request for counsel, at which Johnson was represented by *pro bono* attorney Dennis Benjamin, on June 6, 2012, the Court entered an Order Appointing New Counsel, ordering Blaine County to "appoint new counsel" for Johnson "pursuant to its standard rotation and public defender contract."

On July 19, 2012, the Court entered a Second Amended Order Appointing New Counsel in which the Court appointed the Roark Law Firm to represent Johnson "pursuant to that law firm's contract with Blaine County." Pursuant to that appointment, on July 23, 2012, newly appointed counsel, Keith Roark, and *pro bono* counsel, Dennis Benjamin, submitted a Stipulation for Substitution of Counsel in which the two attorneys "stipulate[d] and agree[d] that Mr. Roark shall be substituted in as counsel of record for Petitioner Sarah Marie Johnson in the above-entitled action and Mr. Benjamin has withdrawn. All future notice, pleadings and other mailings should be addressed to R. Keith Roark."

On October 10, 2012, the Court entered a Further Order Appointing Counsel noting the Court's prior "provisional" appointment of Mr. Roark as counsel "pending review of all issues related to potential conflict of interest" and that Mr. Roark had "inform[ed] the court that he has met with the Petitioner and has explained to her, in writing and in person, potential issues of conflict and Ms. Johnson . . . waived any such conflict."

On January 22, 2014, just a few months short of two years after she filed her original Successive Petition, Johnson filed her Amended Successive Petition,[2] again filing it in the original post-conviction action, Case No. CV-2006-324. Approximately one month later, on February 18, 2014, the Idaho Supreme Court affirmed this Court's decision denying Johnson post-conviction relief Case No. CV-2006-324. Johnson v. State ("Johnson II"), 156 Idaho 7, 319 P.3d 491 (2014). The Remittitur issued on March 12, 2014.

In light of the resolution of Johnson's post-conviction appeal, but because she still had a pending Rule 60(b) motion related to her original petition, on March 24, 2014, the state filed a motion requesting a ruling on Johnson's 60(b) Motion along with a supporting brief. Specifically, the state submitted that the dispute over the accuracy of Johnson's belief that pursuit of a successive petition was appropriate as part of a request for 60(b) relief in Case No. CV-2006-324 should be resolved prior to proceeding further. Although Johnson did not file a written response to the state's request, the court conducted a hearing on the motion at which the Johnson agreed that her Amended Successive Petition should be pursued in a separate case and orally withdrew her 60(b) Motion that was filed on April 9, 2012. (See Order on Pending Motions, filed May 19, 2014.) The Court, therefore, ordered the following documents to be filed *nunc pro tunc* to their original filing dates in a separate case and assigned a separate case number (Case No.

[2] Although Mr. Roark and Mr. Benjamin filed a stipulation noting Mr. Roark was substituting as counsel for Mr. Benjamin and "Mr. Benjamin has withdrawn," the Amended Successive Petition indicates that Mr. Benjamin and Ms. Whipple are "Of counsel to the Roark Law Firm."

CV-2014-353): Successive Petition, Amended Successive Petition, and Affidavit of Dr. Greg Hampikian in Support of DNA and Successive Petition for Post-Conviction Relief ("Hampikian Aff."). (Order on Pending Motions.) Those documents were filed in Case No. CV-2014-353 on May 19, 2014, but will be deemed filed on their original filing dates in Case No. CV-2006-324 for purposes of the statute of limitation. The state previously requested an extension of time to file its response to Johnson's Amended Successive Petition, which the Court granted. (Order for Extension of Time to File Response to Amended DNA and Successive Petition for Post Conviction Relief, filed June 27, 2014.) The state now files its response to Johnson's Amended Successive Petition and submits that the petition should be summarily dismissed.

ARGUMENT

I.
Johnson's DNA Claim (Claim 1) Should Be Summarily Dismissed

In Claim One of her Amended Successive Petition, Johnson seeks relief pursuant to I.C. § 19-4902(b). (Amended Successive Petition, pp.6-13.) This request should be denied.

Idaho Code § 19-4902(b) provides, in relevant part:

> A petitioner may, at any time, file a petition before the trial court that entered the judgment of conviction in his or her case for the performance of fingerprint or forensic deoxyribonucleic acid (DNA) testing on evidence that was secured in relation to the trial which resulted in his or her conviction but which was not subject to the testing that is now requested because the technology for the testing was not available at the time of trial.

Subsection (c) of I.C. § 19-4902 requires the petitioner to present a prima facie case that "(1) Identity was an issue in the trial which resulted in his or her conviction; and (2) The evidence to be tested has been subject to a chain of custody sufficient to establish that such evidence has not been substituted, tampered with, replaced or altered in any material aspect." The court must allow the testing only if it determines that: "(1) The result of the testing has the scientific potential to produce new, noncumulative evidence that would show that it is more probable than not that the petitioner is innocent; and (2) The testing method requested would likely produce admissible results under the Idaho rules of evidence." I.C. § 19-4902(e).

In support of Claim One, Johnson submitted the Affidavit of Dr. Greg Hampkian ("Hampkian Aff."). Dr. Hampkian avers that new "advanced DNA amplification and purification techniques" are now available, and were not available at the time of trial, and such techniques may be used to test various evidentiary items that were admitted at trial. (See generally Hampikian Aff.) Dr. Hampikian identifies the new "techniques" as including "post amplification cleanup with Montage columns, and Low Copy Number (LCN) DNA analysis." (Hampikian Aff., p.3.)

Regarding the statutory requirement that the tests Johnson seeks to have performed are based on "technology" that was not available at the time of trial, the statute does not define what that means. DNA testing was obviously available at the time of trial and a significant amount of DNA testing was done in Johnson's case and the results of those tests were introduced at trial. (See Trial Tr., Vol. V,

pp.3088-3209 (DNA testimony by forensic scientist Cindy Hall).) That new "techniques" for DNA testing may be available does not mean the technology for DNA testing was unavailable at the time of trial; clearly it was.[3]

It is also apparent from Dr. Hampikian's affidavit that much of the testing Johnson seeks is not based on new technology, but is simply a request to compare previously unidentified DNA to the DNA sample provided by Christopher Hill. (See, e.g., Hampikian Aff., p.6 ¶¶ 20, 21.) That Hill's DNA sample was not available at the time of trial is not equivalent to demonstrating, as Johnson must, that the technology she wants to employ was not available at the time of trial. Johnson's request to compare Hill's DNA to the DNA samples collected in her underlying criminal case does not fall within the purview of I.C. § 19-4902(b).

The next statutory requirement Johnson must satisfy is a prima facie case that identity was an issue at trial. I.C. § 19-4902(c)(1). The statute provides no guidance on what this requirement means and the state is unaware of any existing authority interpreting this language. If identity is an issue whenever a defendant denies guilt,[4] then identity was at issue in Johnson's case. If identity is not an issue when there is undisputed evidence that the defendant was present at the scene of the crime and there is evidence, including DNA evidence, that the defendant committed the crime, then identity was not an issue in Johnson's case and she is foreclosed from obtaining any relief under I.C. § 19-4902(b). Also relevant to the

[3] The state notes that nowhere in his affidavit does Dr. Hampikian identify when these "advanced" techniques became available.

[4] This is presumably not the standard since the statute allows even those who plead guilty to seek relief. I.C. § 19-4902(d) ("A petitioner who pleaded guilty in the underlying case may file a petition under subsection (b) of this section.").

question of whether identity was an issue at trial is the fact that the jury was fully aware that, in addition to Johnson's DNA, there was DNA at the crime scene that was unidentified,[5] just as it was aware that there were fingerprints on the murder weapon that did not belong to Johnson. Nevertheless, the jury convicted Johnson based on the evidence linking **her** to the murders since it could find her guilty as either a principal or an aider and abettor. The identity of the person who contributed the samples that were unidentified at trial does not mean that identity was an issue as to Johnson because she was clearly identified as an individual whose DNA was found on several incriminating pieces of evidence.

Even if Johnson has established the predicate technology requirement of subsection (b) and has alleged a prima facie case that identity was an issue at trial as required by subsection (c)(1), this Court should deny her request under subsection (e)(1) because the result of any testing does not have the "scientific potential to produce new, noncumulative evidence that would show that it is more probable than not that [Johnson] is innocent." This Court has already detailed the overwhelming evidence of Johnson's guilt in its Findings of Fact and Conclusions of Law in Case No. CV-2006-324. As noted by this Court:

> The court also does not find it surprising that Johnson's fingerprints were not on the weapon, the scope, or any of the ammunition or packaging, given that a leather glove was found in her room in the trash can, and the matching glove was wrapped in

[5] For example, the "majority" of the DNA found on the latex glove matched Johnson's, but there was, as Dr. Hampikian notes, "another DNA source in a lower concentration present;" however, "it was not a complete profile." (Trial Tr., Vol. V, p.3110, Ls.17-20, p.3112, Ls.5-9; Hampikian Aff, p.7.) Johnson's request to pursue further testing of an item such as this supports the conclusion that Claim One should be denied.

> Johnson's robe ready for trash pickup, along with a latex glove containing Johnson's DNA.
>
> . . .
>
> Nothing presented to this court during the post-conviction evidentiary hearing establishes that Johnson, even if she were not the actual shooter, was not complicit as an aider and abettor.
>
> It is undisputed that Johnson was home at the time of the murders. There was no forced entry in this case, either to the Johnson home or the guesthouse; Johnson's bedroom contained .264 caliber cartridges, a 9mm magazine and a right-handed leather glove matching the left one wrapped in Johnson's robe in the garage; both gloves belonged to Diane and were kept in the family vehicle; the knives found in the guest bedroom and at the foot of the Johnsons' bed were located where an intruder or stranger would have difficulty finding them; Johnson had a key to the guesthouse; Johnson was angry with her parents because they disapproved of her relationship with Santos; and Johnson gave numerous conflicting stories about what she allegedly was doing when her parents were shot.
>
> . . .
>
> This court's reference to the aiding and abetting theory is not to say that this court is unconvinced of Johnson's direct culpability for the murder of her parents, as argued by the state at trial. Add to the above-noted circumstances the DNA evidence, Johnson's motive for the crimes, her access and her opportunity . . ..
>
> . . .
>
> . . . The evidence against Ms. Johnson which exists in this record is, indeed, "overwhelming."

(Findings of Fact and Conclusions of Law, Case No. CV-2006-324, pp.89-92 (numbering of paragraphs omitted).)

This Court has also noted the trial judge's apt assessment of the evidence against Johnson:

> [T]o suggest to a reasonable jury such things that somebody off of the street could come and find that gun in the guest house, find

those bullets in the guest house, know when the parents were going to be there; find the knives in the kitchen that are hidden, the one knife that's hidden behind the microwave or bread box, whatever it was, in the dark, no less; go out past the family dog that the evidence was would bark, and the dog didn't bark. Take the same route that Sarah Johnson told the police she took out of the house, past the trash can where the robe is found. Get her bathrobe out of the bathroom next to her room, and not awaken or bother her.

Both doors being open, according to her experts, the parents' bedroom door and her bedroom door. Do all of this in the dark and not disturb the parents just defies common sense.

(Findings of Fact and Conclusions of Law, Case No. CV-2006-324, p.90 (quoting Supp. Appeal Transcript, pp.449-450).)

Again quoting the trial judge:

The jury heard all of the evidence about the robe. The jury doesn't have to believe that the crime occurred exactly the way the defense theory is that it occurred. The argument of no blood, no guilt; well, the converse of that is if there's blood, there is guilt. And there's blood. There's blood all over the robe, blood on the socks.

. . . There's not one piece of evidence that excludes the defendant from the commission of this crime that I heard. She's right there. And her defense – I mean her defense people, Howard and Mink, testify – and Iman, I believe, all three – at least two of them testified that the doors were open. The door to the parents' bedroom, which is propped open by the pillows, and the door to Sarah Johnson's room is open.

The match to the leather glove, one leather glove that was taken out of the Suburban, that's something else that this unnamed killer would have had to have known, is where the gloves were located, the mother's gloves in the Suburban. Located those in the dark, as well, and brought them into the house to help commit this crime. And leave one in Sarah Johnson's room with two cartridges for the .264; unspent, unfired cartridges in Sarah Johnson's room that part of her mother's body parts were found on; and leave those in Sarah Johnson's room, all while not disturbing Sarah Johnson, it just doesn't make sense to me.

And I don't think it would make sense to the jury. One of the leather gloves found in her room, the other one found out – wrapped

> up in the trash can inside the pink robe. That's what I mean by the circumstantial evidence here, and she admits being there.
>
> The evidence is overwhelming.

(Findings of Fact and Conclusions of Law, Case No. CV-2006-324, pp.91-92 (quoting Supp. Appeal Transcript, pp.450-451).)

Just as the identification of Hill's fingerprints was inadequate to warrant a new trial, Johnson II, there is no basis for concluding that additional DNA testing "would show that it is more probable than not that [Johnson] is innocent," much less that Hill was involved, which is the theory she obviously wants to continue to pursue through DNA testing. Claim One should be dismissed.

II.

Claims Two Through Six Should Be Dismissed Pursuant To I.C. § 19-4908

The Uniform Post-Conviction Procedure Act specifically provides that "[a]ll grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application." I.C. § 19-4908. "Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless 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." Id.

Johnson attempts to avoid the bar to successive petitions by relying on the principle that "[d]eficient representation by counsel in an initial post-conviction proceeding that causes a claim to be inadequately presented to the court,

constitutions [sic] a 'sufficient reason' to allow assertion of the claim in a subsequent post-conviction petition." (Amended Successive Petition, p.57.) This is no longer the law.

In Murphy v. State, 2014 WL 712965 (2014), issued on February 25, 2014, *rehearing denied*,[6] the Idaho Supreme Court overruled the principle on which Johnson relies and held: "because [there is] no statutory or constitutional right to effective assistance of post-conviction counsel, Murphy cannot demonstrate 'sufficient reason' for filing a successive petition based on ineffectiveness of post-conviction counsel." Likewise, Johnson cannot rely on the alleged ineffectiveness of post-conviction counsel as sufficient reason for filing a successive petition. Her Amended Successive Petition, at least as to the claims not related to her request for DNA testing, *i.e.*, Claims Two through Six, must be dismissed.

III.
Claims Two – Six Are Also Subject To Dismissal As Untimely

With the exception of Johnson's first claim, which is governed by I.C. § 19-4902(b), all of the claims in her Amended Successive Petition are untimely and should be dismissed.

Idaho Code § 19-4902(a) requires that a post-conviction proceeding be commenced by filing a petition "any time within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of proceedings following an appeal, whichever is later." In the case of successive petitions, the Idaho Supreme Court has "recognized that rigid application of I.C. §

[6] The state recognizes that Johnson's sufficient reason argument was made prior to the issuance of Murphy.

19-4902 would preclude courts from considering 'claims which simply are not known to the defendant within the time limit, yet raise important due process issues.'" Rhoades v. State, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009) (quoting Charboneau v. State, 144 Idaho 900, 904, 174 P.3d 870, 874 (2007)). However, absent a showing by the petitioner that the limitation period should be tolled, the failure to file a timely petition for post-conviction relief is a basis for dismissal of the petition. Rhoades, 148 Idaho 247, 220 P.3d 1066; Evensiosky v. State, 136 Idaho 189, 30 P.3d 967 (2001); Kriebel v. State, 148 Idaho 188, 190, 219 P.3d 1204, 1206 (Ct. App. 2009).

Claims Two, Three, and Four in Johnson's Amended Successive Petition allege trial and appellate counsel were ineffective for various reasons. These claims were known, or reasonably could have been known, when Johnson filed her original petition or even her Second Amended Petition. Rhoades, supra. Claim Six, which asserts that Johnson's fixed life sentences violate the Eighth Amendment was also known, or reasonably could have been known, at that same time. Contrary to Johnson's assertion in her Amended Successive Petition, these claims are not timely just because she thinks it is "not unreasonable in terms of timeliness to file a successive petition even before litigation has concluded on the original petition." (Amended Successive Petition at p.59.)

As for Johnson's fifth claim – that the state allegedly withheld exculpatory evidence regarding the identity of Christopher Hill's fingerprints – this claim was not only known when Johnson filed her Second Amended Petition, those fingerprints were the subject of the evidentiary hearing on Johnson's Second Amended Petition

and her claim that she was entitled to a new trial based on newly discovered evidence. That Johnson would like to re-frame the claim as a Brady violation does not make it timely (nor is it a meritorious claim).

Because Claims Two through Six of Johnson's Amended Successive Petition are untimely, they should be dismissed.

For the foregoing reasons, the state respectfully requests that this Court dismiss Johnson's Amended Successive Petition and enter Judgment accordingly.[7]

DATED this 18th day of July 2014.

JESSICA M. LORELLO
Deputy Attorney General

[7] Should the Court deny the state's motion to summarily dismiss Claims Two through Six based upon I.C. § 19-4908 (and Murphy, supra) or as untimely under I.C. § 19-4902, the state asks that the Court set a briefing schedule for the purpose of addressing whether the claims are subject to summary dismissal due to Johnson's failure to raise a genuine issue of material fact entitling her to an evidentiary hearing on those claims.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of July 2014 I caused to be delivered a true and correct copy of the foregoing Brief in Support of Motion for Summary Dismissal of Petitioner's Amended DNA and Successive Petition for Post-Conviction Relief to:

Blaine County Court Clerk Fax (208) 788-5527	_X_ Facsimile
R. Keith Roark THE ROARK LAW FIRM 409 Main Street Hailey, ID 83333	_X_ U.S. Mail Postage Prepaid ___ Hand Delivered ___ Overnight Mail ___ Facsimile

Marilyn Gerhard

Marilyn Gerhard, Legal Secretary

PAUL R. PANTHER
Chief, Deputy Attorney General
Criminal Law Division

JESSICA M. LORELLO ISB #6554
KENNETH K. JORGENSEN ISB #4051
Deputies Attorney General and
Special Prosecuting Attorneys
P.O. Box 83720
Boise, Idaho 83720-0010
Telephone: (208) 332-3096
Facsimile: (208) 854-8074

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SARAH JOHNSON Petitioner, vs. STATE OF IDAHO, Respondent.	**Case No. CV-2014-0353** **MOTION FOR SUMMARY DISMISSAL OF PETITIONER'S AMENDED DNA AND SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF**

COMES NOW, Jessica M. Lorello, Deputy Attorney General and Special Prosecuting Attorney for Blaine County, and hereby requests summary dismissal of Petitioner's Amended DNA and Successive Petition for Post-Conviction Relief. The bases for the state's motion are contained in the supporting brief filed contemporaneously herewith.

DATED this 18th day of July 2014.

JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of July 2014 I caused to be delivered a true and correct copy of the foregoing Motion for Summary Dismissal of Petitioner's Amended DNA and Successive Petition for Post-Conviction Relief to:

Blaine County Court Clerk
Fax (208) 788-5527

_X_ Facsimile

R. Keith Roark
THE ROARK LAW FIRM
409 Main Street
Hailey, ID 83333

_X_ U.S. Mail Postage Prepaid
___ Hand Delivered
___ Overnight Mail
___ Facsimile

Marilyn Gerhard

Marilyn Gerhard, Legal Secretary

LAWRENCE G. WASDEN
Idaho Attorney General

PAUL R. PANTHER
Chief, Deputy Attorney General
Criminal Law Division

JESSICA M. LORELLO ISB #6554
KENNETH K. JORGENSEN ISB #4051
Deputy Attorney General
Special Prosecuting Attorney
P.O. Box 83720
Boise, Idaho 83720-0010
Telephone: (208) 332-3096
Facsimile: (208) 854-8083

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SARAH JOHNSON,

Petitioner,

vs.

STATE OF IDAHO ,

Respondent.

Case No. CV-14-353

NOTICE OF HEARING

TO: R. Keith Roark, Petitioner's Attorney of Record, you will please take notice that on the 18th day of September 2014, at the hour of 10:00 a.m. at the Twin Falls County Courthouse there will be a Hearing on the Motion for Summary Dismissal of Petitioner's Amended DNA and Successive Petition for Post-Conviction Relief.

DATED this 21st day of August 2014.

JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of August 2014, I caused to be served a true and correct copy of the foregoing Notice of Hearing to:

R. Keith Roark THE ROARK LAW FIRM 409 Main St. Hailey, ID 83333	_X_ U.S. Mail Postage Prepaid ___ Hand Delivered ___ Overnight Mail ___ Facsimile
Hon. Richard G. Bevan Fax (208) 736-4155	_X_ Facsimile
Blaine County Court Clerk Fax (208) 788-5527	_X__ Facsimile

Rosean Newman, Legal Secretary

ORIGINAL

R. Keith Roark, ISB No. 2230
THE ROARK LAW FIRM
409 Main Street
Hailey, ID 83333
208-788-3918
keith@roarklaw.com

Attorneys for Sarah Johnson

Deborah Whipple ISB No. 4355
Dennis Benjamin ISB No. 4199
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
P.O. Box 2772
303 W. Bannock
Boise, Idaho 83701
(208) 343-1000
dwhipple@nbmlaw.com
dbenjamin@nbmlaw.com

Of counsel to the Roark Law Firm

IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SARAH MARIE JOHNSON, Petitioner, v. STATE OF IDAHO, Respondent.	CV-2014-0353 **OBJECTION TO RESPONDENT'S MOTION FOR SUMMARY DISMISSAL**

Sarah Johnson respectfully submits the following in support of her objection to the Respondent's Motion for Summary Dismissal.

A. *The DNA Claim States a Prima Facie Cause of Action and Testing Should be Allowed.*

1. **There is DNA technology which was not available at the time of trial which could be used here.**

The state first notes that while I.C. § 19-4902(b) requires that "the technology for the testing was not available at the time of trial," the statute "does not define what that means." State's Brief, p. 10. That is true. Likewise, Sarah is unaware of any Idaho case law interpreting the meaning of the word "technology," nor could she find any legislative history. However, the meaning seems obvious after applying the well-known rule of statutory construction "[t]hat the language of a statute should be given its plain, usual and ordinary meaning." I.C. § 73-113; *Albee v. Judy*, 136 Idaho 226, 231, 31 P.3d 248, 253 (2001).

The word "technology," in this context, means " a manner of accomplishing a task especially using technical processes, methods, or knowledge <new *technologies* for information storage>." www.merriam-webster.com/dictionary/technology (emphasis in original). Thus while DNA testing, of a sort, was available at the time of the trial, new processes and methods of testing DNA and new knowledge about DNA are now available. Consequently, the "technology" Sarah proposes to use now was not available at the time of trial.

According to Dr. Hampikian, post amplification cleanup with Montage columns and Low Copy (LCN) DNA analysis allows DNA testing on much smaller samples than was available at the time of Sarah's 2005 trial. In particular, post amplification cleanup with Montage columns was not used by the forensic community until 2006, and the new more sensitive Globalfiler DNA amplification kit has only been made available since 2012 by Life technologies. This new DNA kit amplifies 24 regions of DNA yielding up to 48 alleles, rather than the 16 DNA regions (up to

32 alleles) available in the older Identifiler DNA amplification kit. These techniques represent new DNA "technology" that has produced results from samples that had been declared "untestable" due to low amounts of DNA, or that produced "inconclusive" results. In addition, there are new computational tools called intelligent systems which have been developed since 2005. These tools, like TrueAllele Casework, can deal with low level DNA results, and produce meaningful results that human analysts may overlook. After the DNA is processed in the lab, intelligent systems can be used to analyze the data and generate profiles from data that had previously led to "inconclusive" results. This new technology will permit DNA testing to be done on samples that could not have been tested at the time of the trial

Paragraphs 10-19 and 21-24 of Dr. Hampikian's first affidavit set forth evidence which was not DNA tested at the time of trial or was tested but the tests used were not powerful enough to obtain useable results. In addition, additional DNA samples are now in the CODIS database and samples which could not be matched to a donor should now be rerun. See first Hampikian affidavit, Paragraphs 6-9. Finally and obviously, Chris Hill's DNA should be compared against the new DNA results obtained via the application of the new technology. It should also be compared to the pre-trial testing results which could not be matched to an individual, as set out in Paragraphs 7-9 and 20 in Dr. Hampikian's first affidavit.

2. <u>Identity was the issue at trial.</u>

The state also observes that "[t]he statute provides no guidance on what [the identity] requirement means and the state is unaware of any existing authority interpreting this language." State's Brief, p. 11. And again, Sarah is also unaware of any Idaho case law interpreting the identity requirement, nor could she find any legislative history. But again, the plain, usual and

ordinary meaning of the word "identity" is not difficult to discern. "Identity," used in this context, means "the condition of being the same with something described or asserted." An example of its use is, "They arrested the wrong man. It was a case of *mistaken identity*." www.merriam-webster.com/dictionary/identity (emphasis in original). The state asserted at trial that Sarah was the principal or accomplice to the murder; she denied that. She did not deny that her parents had been murdered. She denied killing them. Identity of the murderer(s) was the issue at trial.

Perhaps there is no Idaho case law addressing the state's question because the meaning of the statute admits of only one interpretation, *i.e.*, that identity is at issue at the trial if the defendant does not concede that he was the one who committed the act constituting the crime. Identity would not be an issue only when the defendant admitted committing the act, such as when a defendant accused of murder admits killing the victim but claims self-defense or when a defendant accused of rape admits to sexual intercourse but argues it was consensual.

According to Justin Brooks & Alexander Simpson, Blood Sugar Sex Magik: A Review of Postconviction DNA Testing Statutes and Legislative Recommendations, 59 Drake L. Rev. 799, 822-23 (2011), twenty-one state post-conviction DNA statutes and the federal statute limit DNA testing to cases where the identity of the perpetrator was at issue at trial. Another six states require that identity was or "should have been" an issue at trial. *Id*, at 821-822.

The California legislative history of its DNA statute explains the meaning of the identity requirement.

> [T]he only persons who could request DNA testing under this bill are those who had cases in which "identity" was the key issue. Thus, these are cases where a person was identified by a victim or witness as the person who had committed the

> crime and no defense such as self-defense or consent was used. This will limit the number of cases that this bill will apply to.

Id, quoting discussion from the California Senate Committee meeting on April 11, 2000, regarding California Penal Code Section 1405.

The out-of-state cases also support Sarah's common-sense interpretation of the statute. The Missouri Supreme Court wrote as follows:

> The phrase "identity at issue" encompasses "mistaken identity," but it also includes all cases in which the defendant claims that he did not commit the acts alleged-as opposed to cases where the defendant admits his actions but puts forth an affirmative defense. *See Weeks* [*v. State*], 140 S.W.3d [39] at 47 n. 8 [Mo. 2004).
>
> Other states have similarly held. *See Anderson v. State*, 831 A.2d 858, 865 (Del.2003) ("Identity is always an issue in a criminal trial unless the defendant admits having engaged in the alleged conduct and relies on a defense such as consent or justification."); *State v. Donovan*, 853 A.2d 772, 776 (Me. 2004) ("[I]dentity may be at issue during a trial even when the alleged victim identifies only the defendant as the perpetrator of a crime but the defendant claims no crime was committed."); *People v. Urioste*, 316 Ill. App.3d 307, 249 Ill. Dec. 512, 736 N.E.2d 706, 714 (2000) ("Where a defendant contests guilt based upon self-defense, compulsion, entrapment, necessity, or a plea of insanity, identity ceases to be the issue.").

State v. Ruff, 256 S.W.3d 55, 57 (Mo. 2008). Similarly, the Montana Supreme Court states that "[a] petitioner may satisfy this requirement by showing that identity was a legitimate contested issue at trial. This is the case when a defendant denies having committed the acts alleged." *Haffey v. State*, 233 P.3d 315, 318 (Mt. 2010). *Accord, State v. Peterson*, 836 A.2d 821 (N.J. App. Div. 2003) (Identity was issue in the case for purposes of post-conviction DNA statute where defendant's only defense at trial was that he was not the perpetrator, even though the state's evidence that he was the perpetrator was strong.).

It is odd that the state now claims that identity was not an issue at trial because it argued

the opposite to the jury. The prosecutor said in closing argument:

> Now what kind of defense did the defense put up? It's called a SODDI defense, S-O-D-D-I. And you know, that's a defense that's well-worn, that the defense resorts to when the facts are against them and the law is against them.
>
> Now, what is it? It's Some Other Dude Did It.

Supplemental Transcript ("Supp. Tr.") p. 177, ln. 3-10. In rebuttal the state again hit on this theme:

> The defense has tried to convince you that there is a reasonable doubt in this case due to the possibility of an unknown shooter.

Supp. Tr. p. 315, ln. 24 - p. 316, ln. 8.

The defense at Sarah's trial was "No blood, no guilt," *i.e.,* that she was not the one who killed her parents. She also argued that she was not an accomplice to the murders. She did not admit killing her parents nor did she argue that it was justified or excused. Thus identity was an issue at trial.

3. <u>The evidence to be tested is subject to chain of custody.</u>

The state does not dispute that the evidence Sarah asks to be tested is subject to a reliable chain of custody.

4. <u>Results have the scientific potential to produce new, noncumulative evidence that would show petitioner is innocent.</u>

(a) *The testing has the scientific potential to produce new noncumulative evidence.*

Dr. Hampikian's two affidavits set forth what new evidence could be produced. There is the scientific potential for the testing to produce new evidence regarding the identity of the killer.

(b) *That evidence could show Sarah is innocent.*

The state next asserts that the new DNA evidence could not show Sarah was innocent as

the trial evidence was "overwhelming." State's Brief, p. 12. It is incorrect for two reasons.

First, if DNA evidence exists and shows someone besides Sarah killed her parents, its discovery would show Sarah is innocent. As noted above, identity of the killer was the issue at trial.

Second, as shown below, the evidence regarding identity is not overwhelming, especially when considered along with the newly discovered evidence found after the trial.

(i) trial evidence

Nineteen hundred latent fingerprints were processed by the state's experts. None matched Sarah's. Trial Transcript ("T Tr.") Vol. 5, p. 3018, ln. 14-15; p. 3068, ln. 9-21.

Starting shortly after the police arrived on the scene, Sarah's body was also repeatedly inspected and tested, but she did not have any blood on her. T Tr. Vol. 3, p. 1818, ln. 15 - p. 1819, ln. 16; p. 1858, ln. 10-13; Vol. 4, p. 2249, ln. 6-9; p. 2280, ln. 11 - p. 2282, ln. 8; p. 2472, ln. 19-23; Vol. 6, p. 3653, ln. 1-11; Vol. 7, p. 5032, ln. 19-24; Vol. 8, p. 5754, ln. 13.

The absence of any blood on Sarah is exonerating because the bedroom and hallway were "covered with blood and flesh and brain material running up to the ceiling, across the ceiling of the bedroom, going towards the bathroom." T Tr. Vol. 3, p. 1658, ln. 11-17. "Things were dripping off the wall and off the ceiling on the floor," T Tr. Vol. 3, p. 1659, ln. 7-10. The state's expert described the explosion of Diane Johnson's head as a "massive amount of eruption" with "massive energy." He described bone and tissue "hitting and ricocheting off and coming back to that area. That's how powerful it gets." T Tr. Vol. 6, p. 4169, ln. 14-19; p. 4172, ln. 10-14. Dr. Grey, a forensic pathologist, testified that Alan, shot in his lung, could have been coughing out blood in a high-velocity spatter pattern. T Tr. Vol. 8, p. 5376, ln. 21-25. The robe had blood from

both Diane and Alan Johnson in patterns indicating that the blood was moving very quickly at high energy when it was deposited. T Tr. Vol. 6, p. 4205, ln. 9-17. The state's expert testified that "one thing, again, that can't ever be changed, it's a fact that can't be taken away, is the evidence that the robe is covered in a (sic) waist-down with the blood of Diane Johnson and Alan Johnson in a high velocity particulate." T Tr. Vol. 6, p. 4211, ln. 14-18. The state's expert testified, "The shooter in this case did block the [blood] spatter coming back, yes." T Tr. Vol. 6, p. 4251, ln. 5-6.

The T-shirt and pajama bottoms Sarah was wearing were carefully inspected and tested, but did not have any blood on them. T Tr. Vol. 5, p. 3188, ln. 18 - p. 3189, ln. 5.

The robe had gunshot residue on it. Supp. Tr. p. 206, ln. 24. There was no gunshot residue on Sarah or her pajamas. See T Tr.

Fibers were found on the rifle, but they did not come from any material that was matched to Sarah's clothing or anything belonging to Sarah or even the Johnson household. T Tr. Vol. 6, p. 4243, ln. 12-1.

The robe also had DNA on it, including DNA in a piece of human tissue which belonged to a male other than Bruno Santos or Alan Johnson. Clerk's Record on Appeal, Vol. 4, p. 1036. So, this man other than Bruno or Alan had lost body tissue while wearing or in very close proximity to the robe.

The state posited that a comforter was tightly tucked over Diane's head at the time she was shot blocking her blood from the shooter. Supp Tr. p. 197, ln. 13-20. But, it did not explain why the robe the shooter wore was covered with Diane's blood. T Tr. Vol. 6, p. 4211, ln. 14-18. The state also failed to explain how Diane had tucked a comforter in over her own head so tightly that

it took force for Officer Kirtley to pull it down when he entered the bedroom. T Tr. Vol. 7, p. 5223, ln. 10 - p. 5225, ln. 6. Further, the state failed to collect the comforter as evidence so that its theory could be tested, because its investigators did not see any relevance in it. In fact, both Officer Kirtley and the officer in charge of the crime scene, Stu Robinson, testified that they looked at the comforter at the scene and did not see a bullet hole in it. T Tr. Vol. 3, p. 1946, ln. 16-22; Vol. 7, p. 4680, ln. 24 - p. 4683, ln. 23; p. 5223, ln. 19 - p. 5225, ln. 6. And, the state offered no explanation at all as to why Alan's blood was on the rifle and the robe, but not on Sarah. See Supp Tr. p. 175, ln. 10 - p. 218, ln. 10; p. 313, ln. 13 - p. 344, ln. 12.

The state found the scope from the rifle used to kill the Johnsons on the guesthouse bed. T Tr. Vol. 3, p. 1842, ln. 16-18. The rifle, scope and ammunition all had latent fingerprints on them, but those fingerprints were not Sarah's. The existence of the fingerprints was inconsistent with the state's theory that Sarah used the rifle while wearing gloves, as the handling would have obscured older prints. T Tr. Vol. 5, p. 3028, ln. 10-12; p. 3044, ln. 15-21; p. 3052, ln. 11-21.

The state noted that Sarah asked for the key to a gun safe two days before her parents were murdered. However, Sarah's brother Matthew, who was a witness for the state, testified that Sarah kept jewelry in the safe, an innocent reason for a request for the key. T Tr. Vol. 7, p. 4562, ln. 15-24.

Sarah, sixteen years old, of average or low average intelligence and ability to learn, orphaned through a violent event, was repeatedly questioned. She was questioned by experts in interrogation repeatedly on the day she lost her parents. She was questioned in the absence of counsel. She was questioned right after having been given a hypnotic drug. She was questioned many times. She was accused of patricide. But, despite the state's very best efforts, she did not

confess. T Tr. Vol. 3, p. 2106, ln. 1; Vol. 4, p. 2177, ln. 1 - p. 2179, ln. 5; p. 2425, ln. 23 - p. 2444, ln. 14; p. 2488, ln. 2-14; p. 2446, ln. 23 - p. 2452, ln. 1; p. 2446, ln. 8 - p. 2454, ln. 19; p. 1544, ln. 3-12; Vol. 4, p. 2176, ln. 10-15; p. 1749, ln. 1 - p. 1750, ln. 1; p. 2099, ln. 23 - p. 2102, ln. 23; p. 2430, ln. 11-13; Vol 1, p. 654, ln. 9 - p. 655, ln. 21; Vol. 4, p. 2424, ln. 20 - p. 2425, ln. 12; Vol. 5, p. 3368, ln. 8 - p. 3371, ln. 5; p. 3377, ln. 1 - p. 3378, ln. 6; Vol. 4, p. 2179, ln. 6-20.

The trial evidence against Sarah was not overwhelming as the state asserts.

(ii) evidence from the first post-conviction hearing.

In addition, the question before this Court needs to be considered in light of both the trial evidence and the newly discovered evidence in the first post-conviction petition and the evidence which could have, but was not, presented to the jury by trial counsel.

The fingerprint evidence at the evidentiary hearing centered around two topics. First, Mr. Kerchusky testified that Mr. Pangburn failed to bring out highly pertinent facts during his testimony at the criminal trial, particularly that the unknown prints found on the rifle and elsewhere had been recently deposited.

> Q. All right. And didn't you also come up with, have an opinion that certain of those latent prints were – were fresh prints?
>
> A. Oh, yes. Yeah.
>
> Q. And upon which did you base your opinion that those prints were fresh? And if you could, just tell us which prints is it that it was your opinion that they were fresh; and upon what did you base your opinion?
>
> A. Okay. We could start with the scope. The scope was – there was three latent fingerprints that were recovered from that scope, And when I looked at the, the scope it appeared, the drawing that I had that they were in an upward position or they could have been on the side latent fingerprints.
>
> Q. All right.

A. According to the arrow that she had pointing up. And also that the fingers were real close together, as if somebody was pushing it real hard as you would unscrew a screw, is what it comes down to. And two of the latent prints were from the number 3 finger, which is the [right] middle finger. And one came from the number 4 finger, which is the [right] index finger. And I felt that, with that and also the fact that the scope is covered twice with clothing – when he moved I don't know if the clothing was on there. If it was, there would have been no latent fingerprints on there from the beginning. But if he moved and then put the clothing on, he would have left his fingerprints on there; and then when he went ahead and put the, either the material or – I think it was clothing is what he said – and then you come to realize that when he went two weeks before the wedding, he went in, took the gun out and then checked the gun out and the scope was on there and everything else, and then he went back and wrapped it up again and put it back, so that was twice that it was wrapped.

Q. And when you say "he" you're referring to Mel Speegle?

A. Mel Speegle, that's correct.

Q. All right. Go on.

A. Mel Speegle, right?

Q. Okay. And go on with your answer.

A. And with those factors, it was my opinion it had to be fresh prints, because most – Mr. Speegle's fingerprints were not on that gun after him handling it and all. So what happened to them? Most likely they were wiped off when this clothing or whatever he had to cover it up, because he covered these things up. So if that happened, that would be the same thing as far as the stock is concerned, it would be the same thing. And also the fact that there were fresh prints, because there were no etched prints going into that, that metal scope, And that was two of the key factors as far as those latents were concerned.

Now as far as the bullet is concerned, that is the one where they got a latent fingerprint off the one bullet, That was a loaded bullet. It had a – one of the best latents I'd ever seen on there. And the reason why I'm saying this is because a bullet is cylinder, and a lot of times you don't leave a lot of friction ridge on, but this was an excellent latent print, and that was not etched into the bullet itself. It was lifted off. Once you could lift it off, its not etched into there.

And then as far as the insert, the plastic insert, well, he moved. And that insert was not, according to the testimony he gave in trial. He stated that that insert, he was

> never inside that, those box of bullets to take an inventory. He was asked about an inventory. He said for ten years it was, he never went in there to take an inventory on there. So that means those latents had to be fresh because they were not – that insert was not touched for ten years.

Evidentiary Hearing Transcript ("EH Tr.") p. 825, ln. 4 - p. 828, ln. 13.

Mr. Kerchusky summarized his professional opinions as follows:

> [T]he prints that were on the scope were fresh because, first of all, they had material on them that wiped them down a couple times, and that the latents were in that position where it was held real tight like this (indicating). In my opinion, it was somebody that was trying to unscrew the scope. And also that they were not etched into that metal at all, because they lifted them off; and it had to be a fresh print that was on that.

EH Tr. p. 847, ln. 22 - p. 848, ln. 17.

In addition, the location of the prints on the scope also indicated that it had been recently handled. Mr. Kerchusky testified that the fingerprints appeared to be in an upwards position which would consistent with someone removing the scope, but inconsistent with someone grabbing or touching it to sight it. EH Tr. p. 849, ln. 3 - p. 850, ln. 20. It is apparent that the scope was removed just before the murders as it was found on the bed in Mel Speegle's bedroom.

As to the live bullet, Mr. Kerchusky's opinion was "that was a fresh print, because it would have etched into the brass if it was not a fresh print, because it only takes months before the acid starts eating into that brass surface." EH Tr. p. 851, ln. 2-6.

It was Mr. Kerchusky's opinion that whomever left the unknown prints (later to be identified as Christopher Hill) was the last person to touch the .264 rifle and the last person to touch the scope. EH Tr. p. 854, ln. 7-19.

Second, there was evidence of a post-trial match of the previously unidentified prints on the rifle, its scope and ammunition. In addition to the testimony about the freshness of the prints,

there was also evidence that the previously unidentified prints on the murder tools had been matched after the trial to Christopher Hill, a friend of Mel Speegle.

Maria Eguren, an Idaho State Police employee in the Bureau of Criminal Identification, received the unknown fingerprints from the murder weapon and elsewhere on November 21, 2003. EH Tr., p. 751, ln. 25 - p. 752, ln. 1. She entered them into the AFIS (Automated Fingerprint Identification System) unit and did not come up with a hit. EH Tr. p. 762, ln. 3-10. She continued to run the prints on a regular basis until January of 2009, when she received a match. EH Tr. p. 764, ln. 1-3. The match was Christopher Kevin Hill, who, it turned out, was a former employee and friend of Mr. Speegle. EH Tr. p. 766, ln. 4-7. Mr. Hill's fingerprints were not entered into the AFIS system until March 15, 2007, well after the 2005 criminal trial. EH Tr. p. 772, ln. 23 - p. 773, ln. 25. Ms. Eguren did not confirm the match herself, instead she turned the matter over to Tina Walthall, for examination.

Ms. Walthall, a fingerprint examiner, compared Mr. Hill's prints to the unknown prints and confirmed that three of his prints were on the rifle scope and two of his prints were on the box of that rifle's ammunition which was found in Mel Speegle's closet. EH p. 891, ln. 18 -p. 892, ln. 13. In particular, prints from Mr. Hill's right middle finger and right ring fingers were found on the scope. She also found Mr. Hill's left thumbprint on a live cartridge from the ammunition and another right middle fingerprint on the plastic insert found in the ammunition box. Finally, Mr. Hill's left palm print was also found on the rifle. EH Tr. p. 893, ln. 2 - pg. 896, ln. 5.

Even though a match had been made, no one from the State alerted Sarah or her lawyers. Instead, that information only came to light because Mr. Kerchusky called Ms. Eguren at home to inquire about the case. She said that, "[h]e called me several times, And I wasn't telling him. He

told me, well, I have to rerun the case. And then after several conversations with him, it slipped out that I did get a hit." EH p. 767, ln. 10-15.

It was Mr. Kerchusky's opinion that Christopher Hill was the last person to touch the .264 rifle and the last person to touch the scope. EH p. 854, ln. 7-19. Here, the state's theory of the case was that Sarah got the rifle out of Mel Speegle's closet, removed the scope, carried the weapon to the house and accurately fired the weapon twice, all without leaving any of her own fingerprints on the gun and at the same time not destroying the unknown fingerprints. Consequently, the evidence that Christopher Hill's fresh fingerprints were on the gun and ammunition, that he was the one who took off the scope shortly before the murders, and he was the last person to touch the weapon further undermines the state's theory.

The fact that the jury was aware that unidentified prints were on the scope, gun and some of the shells does not diminish the importance of identifying Mr. Hill. Unidentified prints are profoundly different from identified prints. One of the big questions in this case was obviously "If not Sarah, then who? And the state emphasized in closing arguments that the unknown prints did not come from anyone associated with the household. This emphasis makes sense because if the prints had come from someone who knew the house, there was less reason to believe that Sarah was involved. Supp. Tr. p. 336, ln. 21-24. Clearly the fact that the unknown fingerprints could not be matched to any specific person was key to the state's argument. But, once the prints were matched, they were linked to someone who knew where to find the guns and had a connection to the Johnson house.

Christopher Hill and Mel Speegle both testified that Christopher had helped Mel move into the guesthouse and so he knew the Johnson guesthouse and knew where the guns were stored.

EH Tr. p. 938, ln. 1-3; p. 940, ln. 25 - p. 941, ln. 6; p. 948, ln. 9 - p. 948, ln. 5; p. 964, ln. 10-12. See also PC R Vol. 2, p. 549, a police report documenting that Mel Speegle stated that Mr. Hill helped him move the guns into the guesthouse. And, Mr. Hill did not have anyone who came forward to verify his claim that he was camping by himself on the Magic Reservoir on the day the Johnsons were killed. EH Tr. p. 975, ln. 2-19. And, further, Janet Sylten testified at trial that she and Russ Nuxoll had also been living at the Reservoir - which created a possible connection between Mr. Hill and Ms. Sylten, who had a documented violent history, had scared Ms. Lehat, had already likely committed a theft from the Johnsons and made threatening or frightening statements to Diane Johnson. And, moreover, who knew the Johnson house intimately having just cleaned it.

If the jury had known not only that there were unidentified prints on the murder weapon and ammunition, but also that the prints belonged to someone who knew where the gun and ammunition were hidden, who was familiar with the guesthouse, and who may have been connected with a woman who had likely committed one crime against the Johnsons and had a motive to commit another to stop them from making allegations that could result in revocation of her newly minted parole, and who knew the Johnson house well, the outcome would have been different. Combining this knowledge with the lack of any forensic evidence tying Sarah to the crimes, weakens the state's case against Sarah.

Speegle and Hill testified that Hill had touched the rifle although their testimony was not exactly consistent. Hill claimed that he had touched the rifle scope and ammunition while target shooting sometime in 2000 (three years before the murders). EH Tr. p. 965, ln. 21 - p. 968, ln. 21. Speegle did not know that Hill had used his rifle. Rather, he only knew that Hill had helped him

move the rifle. EH Tr. p. 957, ln. 9-15. Most importantly, Speegle could not testify that Hill did not touch the rifle the morning of the shootings and touching the weapon in the past does not exclude Hill from having touched the rifle and removing its scope on the morning of the shootings.

To the contrary, the state's evidence makes it more likely that Hill was the shooter because it shows that he was aware of the location of the weapon and ammunition and was familiar with how it worked due to personal experience. (This personal experience with the weapon made him far more likely than Sarah to be capable of committing the offenses with only the minimum two shots.) The additional fact that Hill's identity is now known exonerates Sarah because it shows she was not the one who fired the weapon that morning and shows she was not an accomplice as there is no evidence that she and Hill even knew each other much less had a reason to act in concert.

Further, Hill's testimony that he placed the fingerprints on the weapon when he was target practicing in 2000 was challenged by Mr. Kerchusky's testimony that the prints would not be on the weapon after a year and were, in fact, deposited just before the shootings. Moreover, Hill testified that he had sighted the scope in 2000. But his prints were on the scope in a way less consistent with sighting it than with removing it. EH Tr. p. 848, ln. 8 - p. 850, ln. 20.

In sum, the evidence here is not so strong that it could not be overcome by new DNA evidence showing another person killed Sarah's parents.

5. Conclusion.

Sarah has made a *prima facie* showing under I.C. § 19-4902. The Court should permit the testing of the requested items.

B. ***Claims Two - Five Appear to be Foreclosed by the Intervening Case of Murphy v. State, 156 Idaho 389, 327 P.3d 365 (2014).***

Subsequent to the filing of the petition here, the Supreme Court issued its opinion in *Murphy v. State, supra.* In *Murphy*, the Court overruled *Palmer v. Dermitt*, 102 Idaho 591, 635 P.2d 955 (1981), which held that ineffective assistance of post-conviction constituted sufficient reason to bring a successive petition under I.C. § 19-4908. 156 Idaho at 390, 327 P.3d at 366. Claims Two-Five could have been raised in the original post-conviction petition, but were not due to the ineffective assistance of post-conviction counsel, and thus could have been raised in this successive petition pursuant to *Palmer*. However, *Murphy* now appears to present a bar to their presentation. Accordingly, Sarah will file a Petition for a Writ of Habeas Corpus raising the ineffective assistance of counsel claims as now permitted by *Martinez v. Ryan*, — U.S. —, 132 S.Ct. 1309 (2012) and *Trevino v. Thaler*, — U.S. —, 133 S.Ct. 1911 (2013).

Martinez holds that inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance of counsel raised in federal court, when the state courts do not provide a mechanism to raise such claims. When first decided, *Martinez v. Ryan* did not apply to such procedural defaults in Idaho courts because *Palmer v. Dermitt* permitted Idaho prisoners to file a successive post-conviction petition raising the ineffective assistance of trial/appellate counsel claims which had been omitted in the first petition due to the ineffective assistance of post-conviction counsel. Now that *Palmer* has been overruled by *Murphy*, *Martinez* permits Sarah to raise the ineffective assistance of counsel claims in this petition directly in federal court and bypass the state courts entirely.

C. ***There is Sufficient Reason to Raise the Eighth Amendment Claim (Claim Six) in a Successive Petition and it is Timely.***

The state argues that "Claim Six, which asserts that Johnson's fixed life sentences violate the Eighth Amendment was also known, or reasonably could have been known" when she filed her original petition. State's Brief, pg. 17. However, that is not the case. Sarah's Eighth Amendment Claim is based upon the Supreme Court's opinion in *Miller v. Alabama*, — U.S. —, 132 S.Ct. 2455 (2012), a case banning mandatory life sentences for juveniles. *Miller* was not decided until June 25, 2012, six years after Sarah filed her original petition for post-conviction relief (CV-2006-324) on April 19, 2006. In fact, judgment was entered in that case on April 8, 2011, and the case was on appeal before the Idaho Supreme Court when *Miller* was issued. Clearly, she could not have raised her *Miller* claim in her first petition.

Sarah filed this case on April 9, 2012, two months before *Miller* was decided. And she raised her *Miller* claim when she filed her Amended DNA and Successive Petition for Post-Conviction Relief on January 22, 2014, while the appeal in the Idaho Supreme Court was still pending. (The Supreme Court did not issue its opinion in the appeal from the first petition until February 20, 2014, and the case was not remitted until March 26, 2014.)

Since Sarah filed this petition prior to the final decision in her original petition, this petition is timely. As set out in *Schwartz v. State,* 145 Idaho 186, 177 P.3d 400 (Ct. App. 2008):

> The statute of limitation for post-conviction actions provides that an application for post-conviction relief may be filed at any time within one year from the expiration of the time for appeal or from the determination of appeal or from the determination of a proceeding following an appeal, whichever is later. The appeal referenced in that section means the appeal in the underlying criminal case. The failure to file a timely application is a basis for dismissal of the application. However, if an initial post-conviction action was timely filed and has been concluded, an inmate may file a subsequent application outside of the one-year

> limitation period 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.

145 Idaho at 189, 177 P.3d at 403 (internal quotations and citations omitted). The successive petition must be filed within a reasonable amount of time. What is a reasonable amount of time is to be considered on a case by case basis. *Id.*, at 190, 177 P.3d at 404, citing *Charboneau v. State,* 144 Idaho 900, 905, 174 P.3d 870, 875 (2007). However, the Court of Appeals has found that a successive petition filed one year after the decision on the appeal from the original petition was timely. *Hernandez v. State*, 133 Idaho 794, 799, 992 P.2d 789, 794 (Ct. App. 1999). Here Sarah raised her Eighth Amendment claim *before* her post-conviction appeal was decided and is timely under *Hernandez*. Moreover, she amended her successive petition in a reasonable amount of time as the state had not yet filed an answer and she was permitted to amend the petition as a matter of course. I.R.C.P. 15(a).

Further, the fact that *Miller* was not decided until after both her original and successive petition had been filed is "sufficient reason" to permit her to raise the claim in her amended successive petition. *Miller* created a substantive change in Eighth Amendment law, especially as the cruel and unusual punishment clause had been interpreted in Idaho. For example, the Idaho Supreme Court affirmed the imposition of a fixed-life sentence on a sixteen-year-old defendant in *State v. Windom*, 150 Idaho 873, 253 P.3d 310 (2011). In doing so, the Court held that "the nature and the gravity of the underlying offense may, standing alone, be sufficient to justify a determinate life sentence." 159 Idaho at 880, 253 P.3d at 317. That position was squarely rejected by the *Miller* Court as it applies to fixed life sentences imposed upon juveniles and consequently Mr. Windom's sentence violates the Eighth Amendment under *Miller*.

The *Windom* case was cited by the Idaho Supreme Court in affirming two other juvenile fixed-life cases, both prior to the issuance of *Miller*. *State v. Draper*, 151 Idaho 576, 599, 261 P.3d 853, 876 (2011) ("We hold that Draper's fixed life sentence does not constitute cruel and unusual punishment under the United States Constitution."); *State v. Adamcik*, 152 Idaho 445, 487, 272 P.3d 417, 459 (2012) ("[T]he gravity of the first-degree murder . . . supports the severity of his fixed life sentence.")[1]

The substantive change in the law under *Miller* provides sufficient reason for the filing of a successive petition. In fact, the Illinois Supreme Court recently allowed a *Miller* claim to be raised in a fourth petition for post-conviction relief because Miller was not available to the defendant either on direct appeal or in his previous post-conviction petitions. *People v. Davis*, 6 N.E.3d 709, 722 (Ill. 2014).

Further, this claim is not barred by *Murphy v. State*. Sarah does not claim she can raise the *Miller* claim now because original post-conviction counsel was ineffective. She can raise the claim now because it was not available to her during her direct appeal or during her post-conviction proceedings because *Miller* had not yet been decided.

Finally, *Miller* applies retroactively to Sarah's case. This is obvious because the Supreme Court applied *Miller* to *Jackson v. Hobbs*, a companion case decided in the same opinion as *Miller*. *Jackson* was a case on collateral review. 132 S.Ct., at 2461 (Noting Jackson raised his Eighth Amendment claim in a state petition for habeas corpus). In addition, many state courts have found that *Miller* is retroactive because it created a new substantive rule. *See e.g., State v.*

---

[1] Sarah believes that Ethan Windom, Brian Draper and Torey Adamcik are the only other juveniles who have been sentenced to fixed life terms in Idaho.

Mantich, 842 N.W.2d 716 (Neb. 2014); *People v. Davis*, 6 N.E.3d 709, 722 (Ill. 2014); *Jones v. State*, 122 So.3d 698, 703 (Miss. 2013) ("We are of the opinion that *Miller* created a new, substantive rule which should be applied retroactively to cases on collateral review."); *Diatchenko v. District Attorney for Suffolk Dist.*, 1 N.E.3d 270, (Mass. 2013); *State v. Ragland*, 836 N.W.2d 107, 117 (Iowa 2013); *see also Toye v. State*, 133 So.3d 540, 547 (Fla. Dist. Ct.App. 2014).

While there are no Idaho cases addressing the retroactivity of *Miller*, the cases above used the retroactivity rule from the United States Supreme Court case of *Teague v. Lane*,489 U.S. 288 (1989), to find the *Miller* retroactive. *Mantich*, 842 N.W.2d at 724, *Davis*, 6 N.E.3d at 722; *Jones v. State*, 122 So.3d at 703; *Diatchenko*, 1 N.E.3d at 278; *State v. Ragland*, 836 N.W.2d at 114. Under *Teague*, new constitutional rules of criminal procedure are not applicable to those cases that have become final before the new rules are announced with two exceptions: rules that render types of primary conduct beyond the power of the criminal law-making authority to proscribe are retroactive as are "watershed rules that implicate the fundamental fairness of the trial." *Teague*, 489 U.S., at 310. The cases above all found *Miller* to fall into the second *Teague* exception.

Idaho has also adopted "the *Teague* approach when determining whether decisions of the U.S. Supreme Court . . . should be given retroactive effect." *Rhoades v. State*, 149 Idaho 130, 138, 233 P.3d 61, 69 (2010). But, at the same time, Idaho state courts are "not required to blindly follow [the U.S. Supreme Court's] view of what constitutes a new rule or whether a new rule is a watershed rule" of fundamental fairness, *i.e.*, a rule which improves accuracy and alters our understanding of the bedrock procedural elements essential to the fairness of a proceeding. *Id.* Of course, the U.S. Supreme Court has not decided whether *Miller* is retroactive, but even if it does so during the pendency of this case this Court would not be bound by that ruling under

Rhoades.

This Court should adopt the position taken by the out-of-state cases cited above and hold that *Miller* applies retroactively. As very recently explained by the Court of Appeals, " the *Rhoades* Court held, in considering whether to give retroactive effect to a rule of law, Idaho Courts should reflect independent judgment, based upon the concerns of this Court and the uniqueness of our state, our Constitution, and our long-standing jurisprudence." *Gutierrez-Medina v. State*, — Idaho —, — P.3d —, 2014 Opinion No. 66, p. 9 (Ct. App. August 20, 2014) (internal quotation marks omitted). Nevertheless, "[it] still stands that in order to be considered a watershed rule, a procedural rule must be one which the likelihood of an accurate conviction is seriously diminished." *Gutierrez-Medina*, p.12. Here, the *Miller* rule does not concern convictions, but does significantly improve accuracy in determining the proper sentence for a juvenile. Now, under *Miller*, the facts of the offense of conviction are no longer sufficient alone to justify a fixed life sentence for a juvenile offender. To the contrary, the Supreme Court has directed that trial courts must undertake an analysis of "[e]verything [it] said in *Roper* and *Graham*" about youth. *Miller*, 567 U.S. at ——, 132 S.Ct. at 2467. *Roper v. Simmons,* 543 U.S. 551 (2005), is the case which invalidated the death penalty for all juvenile offenders under the age of 18; and *Graham v. Florida,* 560 U.S. ___, 130 S.Ct. 2011 (2010), invalidated life without parole sentences imposed on juvenile non-homicide offenders. Thus *Miller* requires far more than a generalized notion of taking age into consideration as a factor in sentencing. A sentencing court's passing reference to the defendant's youth does not eliminate the need to resentence in light of *Miller* requirements. Sentencing courts are now required to apply the core teachings of *Roper*, *Graham*, and *Miller* in making sentencing decisions.

Why Sarah's fixed life sentence is in violation of *Miller* is set forth at pages 40-55 of the Amended Petition and will not be repeated here in the interests of brevity.

D. ***Conclusion.***

For the reasons above, this Court should deny the state's motion to dismiss Claims One and Six. It should permit DNA testing to be conducted on the requested items and it should grant summary disposition in favor of Ms. Johnson on Claim Six.

Respectfully submitted this 25th day of August, 2014.

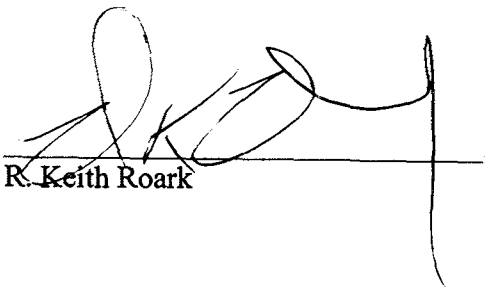
R. Keith Roark
Attorney for Sarah Johnson

Dennis Benjamin
Of counsel to The Roark Law Firm

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of August, 2014, I caused a true and correct copy of the foregoing to be deposited in the United States Mail postage pre-paid to:

Jessica Lorello
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010



R. Keith Roark

R. Keith Roark, ISB No. 2230
THE ROARK LAW FIRM
409 Main Street
Hailey, ID 83333
208-788-3919
keith@roarklaw.com

Attorneys for Appellant

Deborah Whipple, ISB No. 4355
Dennis Benjamin, ISB No. 4199
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
303 W. Bannock
P.O. Box 2772
Boise, ID 83701
(208) 343-1000
dwhipple@nbmlaw.com
dbenjamin@nbmlaw.com

Of counsel to the Roark Law Firm

IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SARAH MARIE JOHNSON, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV-2014-0353 **SECOND AFFIDAVIT OF DR. GREG HAMPIKIAN**

Dr. Greg Hampikian, being first duly sworn upon oath, hereby says:

1. I am the Director of the Idaho Innocence Project and a professor of Biology at Boise State University, 1910 University Drive, Boise, ID 83725-1515.

2. I have previously filed an affidavit in this case.

ORIGINAL

3. My curriculum vitae was attached as an appendix to that affidavit.

4. In my first affidavit I stated that many items of "evidence may now be tested using advanced DNA amplification and purification techniques[.]"

5. I have reviewed the State of Idaho's Brief in Support of Motion for Summary Disposition of Petitioner's Amended DNA and Successive Petition for Post-Conviction Relief.

5. That on page 10 of its Brief, the state questions whether the new techniques I identified are based upon new technology.

6. Post amplification cleanup with Montage columns and Low Copy (LCN) DNA analysis are new technology which allows DNA testing on much smaller samples than was available at the time of Sarah Johnson's trial in 2005.

7. Post amplification cleanup with Montage columns was not used by the forensic community until 2006, and the new more sensitive Globalfiler DNA amplification kit has only been made available since 2012 by Life technologies. This new DNA kit amplifies 24 regions of DNA yielding up to 48 alleles, rather than the 16 DNA regions (up to 32 alleles) available in the older Identifiler DNA amplification kit (available since 2001).

8. Specifically, these techniques represent new DNA technology that has produced results from samples that had been declared "untestable" due to low amounts of DNA, or that produced "inconclusive" results.

9. Forensic validation by the company that produced the Identifiler forensic DNA kit, and the new GlobalFiler Kit (released 2012) show that the new kits can produce results from samples that were not analyzable by the old kits.[1]

---

1 http://resource.lifetechnologies.com/pages2013/WE213221/documents/4_Challenging_Samples_Using_the_GlobalFiler_Kit_Matt_Phipps.pdf, last accessed August 24, 2014.

9. Another important component of DNA analysis that has become available since Ms. Johnson's trial are computational tools called intelligent systems that can deal with low level DNA results, and produce meaningful results that human analysts overlook. After the DNA is processed in the lab, intelligent systems like TrueAllele Casework can be used to analyze the data and generate profiles from data that had previously led to "inconclusive" results[2]. This technology was not available until after 2006.

10. This new technology will permit DNA testing to be done on samples that could not have been tested at the time of the trial

11. In particular, no conclusions could be reached due to insufficient amounts of DNA concerning the bloodstain 24 from the robe, the tissue from the lower left side of the robe, the tissue from the inside lower back of the robe, the tissue from the inside left sleeve of the robe, the stain from Bruno Santos' pants, the fibers imbedded in unknown material, bloodstain B from the rifle, and bloodstain G from the rifle. This evidence may now be tested using advanced DNA amplification, purification, and analysis techniques.

12. Robe samples #24-30 were never analyzed and may now be tested using advanced DNA amplification, purification, and analysis techniques.

13. DNA from the unidentified fingerprint on the .264 round (Item # 14) could not have been tested at the time of trial, but may now be tested using advanced DNA amplification, purification, and analysis techniques.

14. DNA from the unidentified fingerprints on the doorknob set on Diane and Alan Johnson's bedroom door (Items # 15-16) could not have been tested at the time of trial, but now

[2] Perlin MW, Dormer K, Hornyak J, Schiermeier-Wood L, Greenspoon S (2014) TrueAllele Casework on Virginia DNA Mixture Evidence: Computer and Manual Interpretation in 72 Reported Criminal Cases. PLoS ONE 9(3): e92837. doi:10.1371/journal.pone.0092837

may now be tested using advanced techniques not available at the time of trial and compared to reference samples from the time of trial and after and submitted to a CODIS databank.

15. DNA from the palm prints (Items 20-2 and 20-3) could not have been tested at the time of trial, but may now be tested using advanced DNA amplification, purification, and analysis techniques.

16. DNA from the print on the empty shell casing (Item 12-1) could not have been tested at the time of trial, but now may now be tested using advanced DNA amplification, purification, and analysis techniques.

17. One of the hairs removed from Bruno Santo's sweater has a small root and could now be analyzed using advanced DNA amplification, purification, and analysis techniques.

18. DNA from an unknown contributor found on the inside of the latex glove can now be further analyzed using advanced DNA amplification, purification, and analysis techniques.

18. Low levels of DNA from an unidentified source were found on the leather glove from the garbage can. That DNA can now be analyzed using advanced DNA amplification, purification and analysis techniques.

This ends my Affidavit.

Dr. Greg Hampikian

SUBSCRIBED AND SWORN TO September 6th
before me this 3rd day of ~~August,~~ 2014.

Kenneth Drew Navarro
Notary Public for the State of Idaho
Residing at: Ada. Co.
My commission expires: 7/18/2019

KENNETH DREW NAVARRO NOTARY PUBLIC STATE OF IDAHO

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of September, 2014, I caused a true and correct copy of the foregoing to be deposited in the United States Mail postage pre-paid and addressed to:

Honorable Richard Bevan
District Judge
474 Shoshone Street
P.O. Box 126
Twin Falls, ID 83303-0126

Jessica Lorello
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0012

Dennis Benjamin

R. KEITH ROARK, ISBN 2230
THE ROARK LAW FIRM, LLP
409 North Main Street
Hailey, Idaho 83333
TEL: 208/788-2427
FAX: 208/788-3918

Attorneys for Petitioner Sarah Marie Johnson

DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SARAH MARIE JOHNSON, Petitioner, vs STATE OF IDAHO, Respondent.	2014-353 Case No. CV-~~2006-324~~ **MOTION TO CONTINUE RESPONDENT'S MOTION FOR SUMMARY DISMISSAL OF PETITIONER'S AMENDED DNA AND SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF**

COMES NOW the Petitioner, Sarah Johnson, by and through her attorney of record, R. Keith Roark of The Roark Law Firm, and hereby moves this court for an ORDER vacating the Oral Argument on Respondent's Motion For Summary Dismissal of Petitioner's Amended DNA and Successive Petition for Post-Conviction Relief currently set for the 18th day of September, 2014 and resetting it for the 20th day of October, 2014 at 1:30 p.m. The basis for this motion is that counsel for the Petitioner will be in a two-day Jury Trial in Gooding County starting on the 17th of September, 2014.

Counsel has contacted Jessica Lorello at the Attorney General's Office, and she has no objection to this motion.

DATED this 15th day of September, 2014.

THE ROARK LAW FIRM, LLP

R. KEITH ROARK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of September, 2014, I served a true and correct copy of the within and foregoing document upon the attorney(s) named below in the manner noted:

Jessica Lorello
Kenneth Jorgensen
Deputy Attorney General
Criminal Law Division
Post Office Box 83720
Boise, Idaho 83720-0010

____ By depositing copies of the same in the United States Mail, postage prepaid, at the local post office.

____ By hand delivering copies of the same to the office of the attorney(s).

✓ By telecopying copies of same to said attorney(s) at the telecopier number(s): 208-854-8074

R. KEITH ROARK

R. KEITH ROARK, ISBN 2230
THE ROARK LAW FIRM, LLP
409 North Main Street
Hailey, Idaho 83333
TEL: 208/788-2427
FAX: 208/788-3918

Attorneys for Petitioner Sarah Marie Johnson

DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SARAH MARIE JOHNSON, Petitioner, vs STATE OF IDAHO, Respondent.	Case No. CV-~~2006-324~~ 2014-353 **ORDER CONTINUING RESPONDENT'S MOTION FOR SUMMARY DISMISSAL OF PETITIONER'S AMENDED DNA AND SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF**

Based upon the Motion to Continue the Oral Argument on Respondent's Motion For Summary Dismissal of Petitioner's Amended DNA and Successive Petition for Post-Conviction Relief filed by the Petitioner, and it appears that the Respondent has no objection to this motion and good cause appearing therefor;;

IT IS HEREBY ORDERED that Respondent's Motion for Summary Dismissal of Petitioner's Amended DNA and Successive Petition for Post-Conviction Relief currently set for the 18th day of September, 2014 is VACATED and reset for the 20th day of October, 2014 at 1:30 p.m.

DATED this 16 day of September, 2014.

HONORABLE G. RICHARD BEVAN
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17 day of September, 2014, I served a true and correct copy of the within and foregoing document upon the attorney(s) named below in the manner noted:

Jessica Lorello
Kenneth Jorgensen
Deputy Attorney General
Criminal Law Division
Post Office Box 83720
Boise, Idaho 83720-0010

R. Keith Roark
The Roark Law Firm
409 North Main Street
Hailey, Idaho 83333

X By depositing copies of the same in the United States Mail, postage prepaid, at the local post office.

____ By hand delivering copies of the same to the office of the attorney(s).

____ By telecopying copies of same to said attorney(s) at the telecopier number(s): _____.

CLERK

LAWRENCE G. WASDEN
Idaho Attorney General

PAUL R. PANTHER
Chief, Deputy Attorney General
Criminal Law Division

JESSICA M. LORELLO ISB #6554
KENNETH K. JORGENSEN ISB #4051
Deputies Attorney General and
Special Prosecuting Attorneys
P.O. Box 83720
Boise, Idaho 83720-0010
Telephone: (208) 332-3096
Facsimile: (208) 854-8074

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SARAH JOHNSON Petitioner, vs. STATE OF IDAHO, Respondent.	**Case No. CV-2014-0353** **REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISMISSAL OF PETITIONER'S AMENDED DNA AND SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF**

COMES NOW, Jessica M. Lorello, Deputy Attorney General and Special Prosecuting Attorney for Blaine County, and hereby files this reply brief in support of the state's motion to summarily dismiss Petitioner's ("Johnson") "Amended DNA and Successive Petition for Post-Conviction Relief" (hereinafter "Amended Successive Petition").

ARGUMENT

I.
Johnson's DNA Claim (Claim One) Should Be Summarily Dismissed

The court must allow additional DNA testing only if it determines that: "(1) The result of the testing has the scientific potential to produce new, noncumulative evidence that would show that it is more probable than not that the petitioner is innocent; and (2) The testing method requested would likely produce admissible results under the Idaho rules of evidence." I.C. § 19-4902(e). For the reasons already set forth in the state's brief filed in support of its motion for summary dismissal, the state maintains Johnson has failed to meet her burden of showing additional testing is warranted. Nothing in Johnson's Objection to Respondent's Motion for Summary Dismissal ("Objection") changes the state's position in this regard. Claim One should be dismissed.

II.
Claims Two Through Six Should Be Dismissed Pursuant To I.C. § 19-4908

The state requested dismissal of Claims Two through Five because each of those claims could have been raised in Johnson's initial petition, and Johnson cannot raise them in a successive petition absent a showing that there is a sufficient reason for not asserting the claims in her first post-conviction case. I.C. § 19-4908. In her Amended Successive Petition, Johnson asserted that the "[d]eficient representation by counsel in [her] initial post-conviction proceeding" constitutes a sufficient reason that would allow her to avoid the successive petition bar. (Amended Successive Petition, p.57.) This assertion is, however, contrary to the Idaho Supreme Court's recent opinion in Murphy v. State, 156 Idaho 389, 327

P.3d 365 (2014). Johnson concedes Murphy "appears to present a bar" to consideration of Claims Two, Three, Four, and Five. (Objection, p.17.) The claims must therefore be dismissed.

Johnson does not, however, concede that Claim Six should be dismissed. In Claim Six, Johnson alleges her two fixed life sentences violate the Eighth Amendment. (Amended Successive Petition, pp.40-55.) Johnson argues that she could not have raised Claim Six in her initial petition because it is based on Miller v. Alabama, 132 S.Ct. 2455 (2012), a United States Supreme Court decision that did not issue until after her original petition was filed and judgment had entered. (Objection, p.18.) The date the Supreme Court issued Miller is irrelevant. Johnson did not need existing authority from the United States Supreme Court in order to advance an Eighth Amendment claim. If that were a requirement, Miller could never have brought a successful claim. Johnson's argument that she could not have presented her Eighth Amendment claim before Miller is without merit. See United States v. Harms, 371 F.3d 1208, 1211-12 (10th Cir. 2004) (counsel's failure to anticipate the Supreme Court's decision in Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002), was not ineffective); Bullock v. Carver, 297 F.3d 1036, 1052 (10th Cir. 2002) (quoting United States v. Gonzales-Lerma, 71 F.3d 1537, 1542 (9th Cir. 1995) ("we have rejected ineffective assistance claims where a defendant faults his former counsel not for failing to find existing law, but for failing to predict future law and have warned 'that clairvoyance is not a required attribute of effective representation'").

Further, the holding in Miller does not compel the conclusion Johnson wants this Court to reach. The Court in Miller held that a statutory scheme that *requires* imposition of mandatory fixed life sentence for juvenile murderers, without the possibility of parole, violates the Eighth Amendment because it "runs afoul" of the Court's cases that require "individualized sentencing for defendants facing the most serious penalties." 132 S.Ct. at 2460. The district court sentenced Johnson to two fixed life terms for first-degree murder as authorized by I.C. § 18-4004. Idaho Code § 18-4004 requires a "life sentence with a minimum period of confinement of not less than ten (10) years"; it does not require a mandatory life sentence without the possibility of parole. Thus, the statute under which the court sentenced Johnson does not "run[ ] afoul" of the Eighth Amendment.[1]

Because Claims Two through Six are barred by I.C. § 19-4908, they should be dismissed.

III.

Claims Two – Six Are Also Subject To Dismissal As Untimely

The state requested dismissal of Claims Two through Six on the alternative basis that the claims are untimely. Johnson does not address the state's argument regarding the timeliness of Claims Two through Five, but instead concedes the claims are barred by Murphy and states her intention to raise the claims "in federal

[1] Because Miller has no application to Idaho's statute, this Court need not address Johnson's claim that Miller is retroactive. (Objection, pp.20-22.) Nevertheless, with respect to Johnson's assertion regarding retroactivity, the state notes there is a split in authority on this issue and several courts have held, contrary to the cases Johnson cites, that Miller is not retroactive. See, e.g., Commonwealth v. Lawson, 90 A.3d 1, 8-10 (citing cases on both sides of retroactivity issue and rejecting defendant's claim that Miller is retroactive to final judgments).

court and bypass the state courts entirely." (Objection, p.17.) However, with respect to Claim Six, Johnson contends it is timely because she "filed this petition prior to the final decision in her original petition." (Objection, p.18.) Johnson relies on Hernandez v. State, 133 Idaho 794, 992 P.2d 789 (Ct. App. 1999), to support this claim. (Objection, p.19.) Johnson's reliance on Hernandez is misplaced.

In Hernandez, the court reiterated the rule that the provision in I.C. § 19-4902(a) that allows for the filing of a post-conviction petition "within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal" "does not encompass a separately filed proceeding under the UPCPA." 133 Idaho at 797, 992 P.2d at 792 (citing Freeman v. State, 122 Idaho 627, 836 P.2d 1088 (Ct. App. 1992)). While, as Johnson correctly notes, the court found Hernandez's successive petition timely even though it was filed more than one year after the Idaho Supreme Court affirmed the dismissal of Hernandez' original petition, the court did so on the theory that it "relate[d] back to the date of filing of the first application." Hernandez, 133 Idaho at 798, 992 P.2d at 793. Johnson fails to acknowledge the basis for the court's decision much less explain why her successive petition should be timely based on a relation back theory. (Objection, p.19.) Nor could Johnson make such a showing given that the relation back principle applied in Hernandez, 133 Idaho at 798, 992 P.2d at 793, was based on Palmer v. Dermitt, 102 Idaho 591, 635 P.2d 995 (1981), which Johnson concedes was overruled by Murphy, supra (Objection, p.17). Indeed, any attempt by Johnson to relate Claim Six back to the filing of her original petition would be contrary to her contention that it is the proper subject of a

successive petition because the case upon which she relies did not exist when she filed her first petition.

The proper analysis for deciding whether Claim Six is timely requires a showing, by Johnson, that the general one-year limitation period for post-conviction petitions should be tolled. Rhoades v. State, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009). Johnson has not and cannot satisfy that standard because the ability to bypass the limitation period is premised on a recognition that "rigid application of I.C. § 19-4902 would preclude courts from considering 'claims which simply are not known to the defendant within the time limit, yet raise important due process issues.'" Rhoades, 148 Idaho at 250, 220 P.3d at 1069 (quoting Charboneau v. State, 144 Idaho 900, 904, 174 P.3d 870, 874 (2007)). As noted, Johnson's sixth claim is one that could have been raised in her original petition even without the benefit of Miller, which does not apply to her case.

Further, the state notes that Johnson's position in her Amended Successive Petition was that she does not believe it is "unreasonable in terms of timeliness to file a successive petition even before litigation has concluded on the original petition." (Amended Successive Petition at p.59.) Johnson's belief does not make it so. To endorse such a standard would allow petitioners the ability, in some instances, to wait years before asserting their claims regardless of whether they have knowledge of them just because they have another action pending. Not even capital defendants have that luxury and the state fails to see any reason why Johnson should. Pizzuto v. State, 146 Idaho 720, 727, 202 P.3d 642, 649 (2008) ("[W]e hold that a reasonable time for filing a successive petition for post-conviction

relief is forty-two days after the petitioner knew or reasonably should have known of the claim, unless the petitioner shows that there were extraordinary circumstances that prevented him or her from filing the claim within that time period. In that event, it still must be filed within a reasonable time after the claim was known or knowable."). Johnson filed her Amended Successive Petition on January 22, 2014; the purpose of the amendment was to include Claim Six. The Supreme Court decided Miller, on which Claim Six is based, on June 25, 2012. Eighteen months is not a reasonable time by any standard, including the one-year limitation period set forth in I.C. § 19-4902(a). Johnson's claim to the contrary fails and this Court can dismiss Claim Six on the alternative basis that it is untimely.

For the foregoing reasons, the state respectfully requests that this Court dismiss Johnson's Amended Successive Petition and enter Judgment accordingly.

DATED this 10th day of October 2014.

JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of October 2014 I caused to be delivered a true and correct copy of the foregoing Reply Brief in Support of Motion for Summary Dismissal of Petitioner's Amended DNA and Successive Petition for Post-Conviction Relief to:

Blaine County Court Clerk
Fax (208) 788-5527

_X_ Facsimile

R. Keith Roark
THE ROARK LAW FIRM
409 Main Street
Hailey, ID 83333

___ U.S. Mail Postage Prepaid
___ Hand Delivered
___ Overnight Mail
_X_ Facsimile

JESSICA M. LORELLO

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE
DISTRICT COURT

COURT MINUTES

CV-2014-353
Sarah Johnson vs. State of Idaho
Hearing type: Motion for Summary Dismissal
Hearing date: 10-20-2014 Time: 1:30 pm Courtroom: 1
Judge: G. Richard Bevan
Court reporter: Virginia Bailey Minutes Clerk: Shelley Bartlett
Petitioner Attorney: R. Keith Roark and Dennis Benjamin
Respondent Attorney: Jessica Lorello

1:30 Court called the case and reviewed the file.

1:32 Ms. Lorello gave argument.

1:41 Mr. Roark gave argument.

1:52 Mr. Benjamin gave argument.

1:57 Ms. Lorello gave final comment.

2:03 Mr. Benjamin gave final comment.

2:03 The Court took the matter under advisement and will issue a written decision.

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SARAH MARIE JOHNSON,	)	
	)	Case No. CV 2014-0353
Petitioner,	)	
	)	**ORDER GRANTING**
vs.	)	**MOTION FOR SUMMARY**
	)	**DISMISSAL OF**
STATE OF IDAHO,	)	**PETITIONER'S AMENDED**
	)	**DNA AND SUCCESSIVE**
Respondent.	)	**PETITION FOR POST-**
	)	**CONVICTION RELIEF**

This matter is before the court on the State's Motion for Summary Dismissal of Petitioner's Amended DNA and Successive Petition for Post-Conviction Relief, filed on 07/18/14. The Amended DNA and Successive Petition for Post-Conviction Relief was filed on 01/22/14. A hearing on the State's motion was held on 10/20/14. At the hearing,

Jessica Lorello represented the State. The petitioner, Sarah Marie Johnson, was not in attendance, but her counsel, R. Keith Roark and Dennis Benjamin, were present. After reviewing the briefs, hearing oral arguments, and researching the applicable law, the Motion is GRANTED.

I. BACKGROUND

Sarah Marie Johnson ("Johnson") was convicted of two counts of first-degree murder following a lengthy jury trial. The court sentenced Johnson on 06/30/05 to two fixed life sentences (concurrent), plus fifteen years for a firearm enhancement. Johnson's first direct appeal was dismissed for being untimely. Thereafter, Johnson filed a petition for post-conviction relief, claiming ineffective assistance of counsel and denial of due process. The district court found ineffective assistance of counsel in the failure to file a timely notice of appeal and Johnson's appellate rights were reinstated.

Johnson immediately filed a direct appeal and the district court stayed proceedings on her remaining post-conviction claims. In her appeal, Johnson argued that (1) the aiding and abetting instruction constructively amended the charging document and resulted in a fatal variance; (2) she was denied her constitutional right to a unanimous jury verdict because the district court did not instruct the jury that it must unanimously agree on whether she actually killed her parents or whether she merely aided and abetted in their killing; and (3) her constitutional rights were violated when the district court failed to remove a certain juror from the jury pool or obtain an

unequivocal commitment that the juror would follow all of the court's instructions. The Idaho Supreme Court, in *State v. Johnson*, 145 Idaho 970, 188 P.3d 912 (2008), denied Johnson any relief and affirmed the district court on each claim. A remittitur was issued on 07/18/08.

On 08/15/08, the stay was lifted and on 01/12/10, Johnson filed a Second Amended Petition for Post-Conviction Relief, in which she alleged lack of jurisdiction, due process violations, multiple instances of ineffective assistance of both trial and appellate counsel, and newly discovered evidence. The State filed a motion for summary dismissal, which was granted in part and denied in part. An evidentiary hearing was then held, after which the court denied relief on Johnson's six remaining claims. Johnson then appealed.

On 04/09/12, while the appeal was pending, Johnson filed a DNA and Successive Petition for Post-Conviction Relief under CV-2006-0324 (her original post-conviction action). On 01/22/14, Johnson filed an Amended DNA and Successive Petition for Post-Conviction Relief ("Successive Petition"), again under CV-2006-0324. The Successive Petition includes six broad claims for relief that can be boiled down to three categories: (1) a request for DNA testing under I.C. § 19-4902(b); (2) ineffective assistance of post-conviction counsel; and (3) a claim that Johnson's fixed life sentences constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

On 02/18/14, the Idaho Supreme Court affirmed[1] the district court's decision to deny Johnson's original post-conviction petition, and a remittitur was issued on 03/12/14. The district court then ordered that Johnson's Successive Petition and all supplemental filings be filed *nunc pro tunc* to their original filing dates with a new case number assigned (CV-2014-0353).

On 07/18/14, the State filed a Motion for Summary Dismissal of Johnson's Successive Petition. Johnson, represented by R. Keith Roark and Dennis Benjamin, filed an Objection to Respondent's Motion for Summary Dismissal on 08/25/14, dropping four of her six original claims. The court heard the State's motion on 10/20/14.

II. SUMMARY DISMISSAL STANDARD

Summary dismissal of a post-conviction petition is appropriate where "there exists no genuine issue of material fact which, if resolved in the applicant's favor, would entitle him to the requested relief." *Remington v. State*, 127 Idaho 443, 446, 901 P.2d 1344, 1347 (Ct. App. 1995). The court, in determining whether a genuine issue of material fact exists, "does not give evidentiary value to mere conclusory allegations that are unsupported by admissible evidence." *Id.* *See also Roman v. State*, 125 Idaho 644, 873 P.2d 898 (Ct. App. 1994) (Bare or conclusory allegations, unsubstantiated by any fact, are inadequate to entitle a petitioner to an evidentiary hearing.)

[1] *Johnson v. State*, 156 Idaho 7, 319 P.3d 491 (2014).

A petitioner's application "must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal." *Goodwin v. State*, 138 Idaho 269, 272, 61 P.3d 626, 629 (Ct. App. 2002). If a petitioner fails to present evidence establishing an essential element on which she bears the burden of proof, summary dismissal is appropriate. *Mata v. State*, 124 Idaho 588, 592, 681 P.2d 1253, 1257 (Ct. App. 1993). Where the alleged facts, even if true, do not entitle the petitioner to relief as a matter of law, the trial court may dismiss the application without an evidentiary hearing. *Cooper v. State*, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975).

III. ISSUES

A. Claims Two Through Five Are Dismissed By Stipulation of the Parties.

Johnson conceded in her Objection to Respondent's Motion for Summary Dismissal that Idaho case-law precludes her from proceeding on four of the six claims included in her Successive Petition.[2] At the hearing held on 10/20/14, both parties stipulated to the dismissal of these claims. Therefore, claims two through five of Johnson's Successive Petition are summarily dismissed.

[2] *See Murphy v. State*, 156 Idaho 389, 327 P.3d 365 (2014) (holding that there is no right to effective post-conviction counsel).

B. Claim One (Johnson's DNA Claim) Is Dismissed For Failure to Satisfy I.C. § 19-4902(e)(1).

Johnson petitions this court to allow the DNA testing of evidence, available at trial, based on the existence of new DNA technology not available at the time of trial. I.C. § 19-4902(b), Idaho's DNA testing statute, allows a petitioner to

> at any time, file a petition before the trial court that entered the judgment of conviction in his or her case for the performance of fingerprint or forensic deoxyribonucleic acid (DNA) testing on evidence that was secured in relation to the trial which resulted in his or her conviction but which was not subject to the testing that is now requested because the technology for the testing was not available at the time of the trial.

In short, the existence of new DNA technology can be the basis of a post-conviction claim.

The State argues that just because new "techniques" for DNA testing have become available that were not available at the time of Johnson's trial, the underlying technology for DNA testing did exist. Therefore, this argument goes, the ability to amplify and test samples that were previously untestable does not constitute new technology as contemplated by the statute. The State also argues that Johnson's requests to run previously tested but unidentified DNA samples against an updated database (that now includes Christopher Hill) fall outside the parameters of I.C. § 19-4902(b).

The State's first argument, that new DNA amplification techniques do not constitute new technology because DNA testing existed at the time of Johnson's trial, is

without merit. The statute in question does not define "technology," but a well-known rule of statutory construction requires that statutory language "be given its plain, usual and ordinary meaning." *Albee v. Judy*, 136 Idaho 226, 231, 31 P.3d 248, 253 (2001). Technology is commonly defined as "a manner of accomplishing a task esp. using technical processes, methods, or knowledge." *Merriam-Webster's Collegiate Dictionary* 1206 (10th ed. 2001).

New technology need not be radically different technology, as the State seems to be asserting. A stagecoach and an SUV are the same technology (i.e., four wheeled transportation devices), but to say that the latter is not newer technology than the former would be untenable. Thus, while certain DNA testing methods existed at the time of Johnson's trial, DNA technology has advanced significantly since then, and these processes and methods that allow for testing of smaller and smaller samples satisfy the requirements of I.C. § 19-4902(b).

The State's second argument has considerably more merit. Many of Johnson's DNA requests do not involve testing samples too small to be tested under technology existing at the time of trial. Instead, Johnson wants to compare a number of *already*

analyzed but unidentified[3] DNA samples with Christopher Hill's DNA profile and with an updated DNA database.[4]

Such comparisons do not utilize new DNA testing techniques. The existence of new DNA profiles with which to compare samples tested prior to trial by DNA technology existing at the time, does not satisfy the requirements of I.C. § 19-4902(b). Therefore, any requests in Johnson's Successive Petition seeking the comparison of previously tested but unidentified DNA samples with newly acquired profiles (e.g., that of Christopher Hill), will be dismissed.

I.C. § 19-4902(c) further requires that a petitioner seeking DNA testing make a prima facie showing that

> (1) Identity was an issue in the trial which resulted in his or her conviction; and (2) The evidence to be tested has been subject to a chain of custody sufficient to establish that such evidence has not been substituted, tampered with, replaced or altered in any material aspect.

The State does not dispute the second requirement, but it does dispute whether identity was an issue at trial.

---

[3] By "unidentified" the court does not mean unidentifiable. Instead, the court is referring to samples that resulted in valid profiles that were simply never matched to a particular individual.

[4] For example, Johnson seeks to run the following tested, but unidentified DNA samples against a reference sample taken from Christopher Hill: (1) "[b]loodstain 2 from the robe" that "contains a mixture of at least three individuals including an unknown individual," (2) "tissue from the left collar area of the robe" that "is from an unknown male," (3) "[b]loodstain C on the rifle...from an unknown male," (4) "[o]ne of the two hair samples recovered from the barrel of the .264 rifle" that "could not be matched to Sarah or any of her maternal relatives," "[t]wo of the three hairs removed from Bruno Santo's sweater" that "were excluded as coming from Sarah," and (5) "DNA from an unknown contributor found on the inside of the latex glove." *See Successive Petition*, pp. 7-10.

Again, as the statute does not define "identity," it should be given its plain, usual, and ordinary meaning. Identity is defined as "the condition of being the same with something described or asserted." *Merriam-Webster's Collegiate Dictionary* 574 (10th ed. 2001). At trial, the State asserted that Johnson was the individual that murdered her parents. Voluminous evidence was presented to this end. The defense argued that Johnson was not the murderer, pointing the finger at an unknown third party. The jury, based on the evidence before it, was asked to decide whether Johnson was indeed the murderer (either directly, or by aiding and abetting the shooter). Therefore, because the identity of the murderer *was* at issue in Johnson's trial, the requirements of I.C. § 19-4902(c) have been met.

Once a prima facie showing has been made, a petitioner must clear two remaining statutory hurdles. I.C. § 19-4902(e) states that the trial court

> shall allow the testing...upon a determination that: (1) The result of the testing has the scientific potential to produce new, non-cumulative evidence that would show that it is more probable than not that the petitioner is innocent; and (2) The testing method requested would likely produce admissible results under the Idaho rules of evidence.

As with I.C. § 19-4902(c)(2), the State is not disputing that the requested testing methods would likely produce admissible results. The State does argue, however, that the testing requested by Johnson does not have the scientific potential to produce new, non-cumulative evidence that would show that it is more likely than not that Johnson is innocent. The court agrees.

At trial, a considerable amount of evidence was presented that placed Johnson at the scene and that linked her to the murders.[5] Her stories were inconsistent and conflicted with the evidence. Her DNA was found in a latex glove, found wrapped in her blood splattered robe, and discarded in a trash can on the property. She knew where the murder weapon was kept (in the guest house safe) and had requested the key a few days earlier. *See also* this court's opinion in *Johnson v. State*, CV-2006-0324, pp. 89-92 (Outlining the "mountain of evidence" against Johnson and quoting Judge Wood as stating at trial that the amount of evidence against Johnson was "overwhelming.")

Evidence was also presented that suggested the possible involvement of another party, in the form of unidentified fingerprints and unidentified DNA. The defense argued Johnson's innocence under the theory that a stranger entered the house and murdered Johnson's parents. The jury considered this evidence and heard these arguments and still convicted Johnson of first degree murder.

Therefore, the possibility of identifying a third party DNA source from previously untestable samples will not make it more probable than not that Johnson is innocent, just as the post-trial discovery that the fingerprints on the murder weapon belonged to Christopher Hill did not entitle Johnson to a new trial.[6] The jury was aware

---

[5] The court uses the term "linked" because the jury could have convicted Johnson if they believed that she was the shooter or if they believed that she aided and abetted the shooter.

[6] The Idaho Supreme Court held that the post-trial identification of these fingerprints as Hill's would not likely produce an acquittal because the jury knew at trial that the prints did not belong to Johnson and

that DNA that did not belong to Johnson was present at the scene of the murders, just as they were aware that the fingerprints on the rifle were not hers. Even with that knowledge, the jury convicted Johnson, deciding that Johnson either (1) fired the murder weapon herself while wearing gloves or (2) aided and abetted the actual shooter. Either theory was sufficient for a conviction. Given the fact that the possibility of a third party shooter, as evidenced by the presence of unidentified fingerprints and DNA, failed to convince the jury that Johnson was innocent of murdering her parents, the slim possibility[7] that a name or face might now be given to that shooter adds little to the mix.

The Supreme Court of Idaho faced a strikingly similar situation in *Fields v. State*, 151 Idaho 18, 253 P.3d 692 (2011). There, Fields was accused of robbing and stabbing to death the sole employee of a gift shop. Two witnesses testified on Fields' behalf at trial, claiming to have seen an unidentified male that did not match Fields' description in the store shortly before the murder. Fields was convicted and later brought a DNA claim under I.C. § 19-4902, requesting the testing of unidentified DNA found under the victim's fingernails and on her clothing. Testing was allowed and the DNA did not

---

still convicted her. *Johnson v. State*, 156 Idaho 7, 319 P.3d 491 (2014) (affirming the district court's order denying Johnson post-conviction relief on newly discovered evidence claims).

[7] The court uses the term "slim possibility" because this previously unidentifiable DNA could just as likely remain unidentifiable, could turn out to be Johnson's DNA, or the DNA of an unknown individual, whereupon we would be left in the exact same position as before. Additionally, merely establishing the source of this unidentified DNA does nothing to show that the DNA actually came from the killer.

belong to Fields. However, in applying I.C. § 19-4902(f), under which relief must be granted where the DNA test results demonstrate that the petitioner is not the person who committed the offense, the court held that Fields failed to meet this burden. *Id.*, 151 Idaho at 24, 253 P.3d at 698.

According to the Court, this evidence failed to establish Fields' innocence because there was no evidence linking this DNA, found underneath the victim's fingernails and on her clothes, to the victim's attacker. *Id.* Without such evidence, the Court concluded that the test results could not show that Fields was not the murderer. *Id.*

The same is true in this case. Further testing might reveal the source of DNA samples found on Johnson's robe, on the gun, and elsewhere, but that knowledge does nothing to establish that the source of those samples was present in the Johnson's home on the morning of the crime, that the source of those samples was the shooter, or that Johnson didn't aid and abet the murderer of her parents.[8] Consequently, because an analysis of previously untestable DNA samples will not make it more probable than not that Johnson is innocent, her request for DNA testing will not be granted.

[8] Johnson's counsel admitted at the 10/20/14 hearing that the standard required by I.C. § 19-4902(e)(1) has not been met. R. Keith Roark stated on the record that "we are not at this point in a position to say that the evidence either is or is not cumulative. We are not in a position to say that the evidence will or will not, more probably than not, demonstrate the innocence of Ms. Johnson...but we need the testing."

C. Claim Six Is Dismissed Under I.C. §§ 19-4901(b) and 19-4908.

Johnson claims that her fixed life sentences constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. This claim has been waived because (1) Johnson did not raise the issue on direct appeal, (2) she did not raise the issue in her initial post-conviction petition, and (3) *Miller v. Alabama*, 132 S.Ct. 2455 (2012), does not provide sufficient reason for failure to do so.

Johnson did not raise an Eighth Amendment issue on direct appeal. I.C. § 19-4901(b) states that a post-conviction "remedy is not a substitute for...an appeal from the sentence or conviction." *See also Rodgers v. State*, 129 Idaho 720, 923 P.2d 348 (1997) (any claim or issue that could have been raised on appeal, but was not, may not be considered in post-conviction proceedings). The statute goes on to say that

> [a]ny issue which could have been raised on direct appeal, but was not, is forfeited and may not be considered in post-conviction proceedings, *unless it appears to the court,* on the basis of a substantial factual showing by affidavit, deposition or otherwise, *that the asserted basis for relief raises a substantial doubt about the reliability of the finding of guilt* and could not, in the exercise of due diligence, have been presented earlier.

I.C. § 19-4901(b) (emphasis added). Therefore, a court may not consider, as part of a post-conviction petition, issues that could have been raised on direct appeal, unless the court determines that the claim for relief raises a substantial doubt about the reliability of the finding of guilt.

Johnson claims that her sentence violated her Eighth Amendment rights. A claim that a sentence was excessive or illegal can be raised on direct appeal. *Hollon v. State*, 132 Idaho 573, 580-81, 976 P.2d 927, 934-35 (1999). Additionally, a claim that a sentence was excessive or illegal, by its very nature, cannot raise a substantial doubt about the reliability of the finding of guilt.[9] Consequently, because Johnson failed to raise this issue on direct appeal, and because the asserted basis for relief does not raise a substantial doubt about the reliability of the finding of guilt, this issue is forfeited and may not be considered in a post-conviction proceeding.

Even if this claim was not barred by I.C. § 19-4901(b) for failure to assert it on direct appeal, I.C. § 19-4908 would act as an additional barrier. I.C. § 19-4908 states that any grounds for post-conviction relief not raised in an original petition are permanently waived absent "sufficient reason" for failure to do so. *See also Dunlap v. State*, 126 Idaho 901, 894 P.2d 134 (Ct. App. 1995) (I.C. § 19-4908 prohibits the filing of a second petition unless the petitioner shows sufficient reason why the issues could not have been raised in the original petition). Idaho courts have refused to find sufficient reason where the grounds for relief were known or should have been known at the time of the original petition. *Lake v. State*, 126 Idaho 333, 336, 882 P.2d 988, 991 (Ct. App. 1994).

[9] Sentencing occurs post-conviction; therefore, no claim regarding the legality of a particular sentence can have any bearing on the reliability of the finding of guilt.

Johnson did not raise this issue in her initial post-conviction petition. Therefore, absent sufficient reason for failing to do so, this issue is waived. To this end, Johnson must show that these grounds for relief were unknown at the time that her original petition was filed.

Johnson argues that because her claim is based on *Miller v. Alabama*, a case decided by the United States Supreme Court in 2012, these grounds for relief could not have been known when she filed her original post-conviction petition.[10] However, this argument falters for two reasons.

First, if Johnson believed that her sentence (and fixed life sentences for juveniles in general) constituted cruel and unusual punishment, she should have known that when the sentence was handed down. As such, she should have claimed as much in her original petition. Instead, Johnson claims that because case-law at the time that she filed her original petition would not have supported such a claim,[11] these grounds for relief were "unknown." However, the lack of established case-law supporting one's argument or the presence of case-law directly adverse to one's argument is a far cry from sufficient reason for failure to bring that argument as required by statute.

---

[10] Johnson argues that *Miller* completely changed the legal landscape surrounding fixed life sentences for juvenile offenders.

[11] Under Idaho law at the time that Johnson filed her original post-conviction petition, fixed life sentences for juveniles convicted of murder did not constitute cruel or unusual punishment under Idaho's Constitution or the Constitution of the United States. This is still the case today, as affirmed in a number of recent appellate cases. *See, e.g., State v. Draper*, 151 Idaho 576, 261 P.3d 853 (2011); *State v. Adamcik*, 152 Idaho 445, 272 P.3d 417 (2012).

Johnson's case may have changed the law; such is the purpose of the appellate and post-conviction process.[12]

Second, *Miller* is not the panacea that Johnson claims. *Miller* has not been found to be retroactive, by either the United States Supreme Court or the Idaho Supreme Court. Additionally, the holding in *Miller* has no bearing on Johnson's situation. *Miller* held that *mandatory* fixed life sentences for juveniles convicted of homicide violate the Eighth Amendment. Idaho does not have a mandatory fixed life sentencing scheme, for juveniles or adults. Johnson's sentence was discretionary.

Johnson argues that *Miller* means more than that. She argues that *Miller* requires a sentencing court to take a juvenile's youth into account as a sentencing factor. However, assuming that Johnson's interpretation of *Miller* is correct, Johnson admits in her Successive Petition that her youth was taken into account at her sentencing.

Dr. Richard Worst testified at Johnson's sentencing as to the development of the adolescent brain. *Successive Petition*, p. 40. Dr. Craig Beaver testified that the development of the areas of the brain associated with high level decision making, organization, problem solving, inhibitory control, and higher-level adult reasoning and functioning do not fully develop until sometime in the mid-twenties. *Id.*, at p. 41. Johnson's sentencing judge heard this testimony and acknowledged on the record (1) that psychological evidence had been presented to the effect that adolescents can act

[12] *Miller* itself was argued on appeal in the face of adverse case-law.

impulsively and (2) that he considered Johnson's young age to be a mitigating factor. *Id.*, at p. 42.

These statements, included in Johnson's Successive Petition, and as supported in the record of Judge Wood's sentencing colloquy, show that Johnson's youth *was* taken into account as a sentencing factor. Therefore, even if Idaho courts were to hold that *Miller* is to be retroactively applied and even if they were to agree with Johnson that *Miller* requires a sentencing court to take a juvenile's youth into account as a sentencing factor, *Miller* provides Johnson with no new grounds for relief and cannot establish sufficient reason for Johnson's failure to raise her Eighth Amendment claim in her original petition. Absent such sufficient reason, Johnson's failure to assert this claim in her original post-conviction petition permanently waived the issue.

IV. CONCLUSION

Based on the foregoing, the Motion for Summary Dismissal of Petitioner's Amended DNA and Successive Petition for Post-Conviction Relief is GRANTED.

IT IS SO ORDERED.

October 29, 2014
Date

G. RICHARD BEVAN
District Judge

CERTIFICATE OF MAILING/DELIVERY

I hereby certify that on the 23 day of October, 2014, a true and correct copy of the foregoing document was mailed, postage paid, faxed and/or hand-delivered to the following persons:

Mr. R. Keith Roark
The Roark Law Firm
409 N. Main St.
Hailey, ID 83333
fax 788-3918

Ms. Jessica M. Lorello
Deputy Attorney General and
Special Prosecuting Attorney
P.O. Box 83720
Boise, Idaho 83720-0010
Fax 854-8074

Mr. Dennis Benjamin
NEVIN, BENJAMIN, McKAY
& BARTLETT, LLP
P.O. Box 2772
Boise, ID 83701
Fax 345-8274

Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SARAH MARIE JOHNSON,	)	
	)	Case No. CV 2014-0353
Petitioner,	)	
	)	**JUDGMENT**
vs.	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	
_____	)	

The Amended DNA and Successive Petition for Post-Conviction Relief is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

DATED this 23 day of October, 2014.

G. RICHARD BEVAN
District Judge

CERTIFICATE OF MAILING/DELIVERY

I hereby certify that on the 23 day of October, 2014, a true and correct copy of the foregoing document was mailed, postage paid, faxed and/or hand-delivered to the following persons:

Mr. R. Keith Roark
The Roark Law Firm
409 N. Main St.
Hailey, ID 83333
Fax 788-3918

Ms. Jessica M. Lorello
Deputy Attorney General and
Special Prosecuting Attorney
P.O. Box 83720
Boise, Idaho 83720-0010
Fax 854-8074

Mr. Dennis Benjamin
NEVIN, BENJAMIN, McKAY
& BARTLETT, LLP
P.O. Box 2772
Boise, ID 83701
Fax 345-8274

Deputy Clerk

ORIGINAL

R. Keith Roark, ISB No. 2230
THE ROARK LAW FIRM
409 Main Street
Hailey, ID 83333
208-788-3918
keith@roarklaw.com

Attorneys for Sarah Johnson

Deborah Whipple ISB No. 4355
Dennis Benjamin ISB No. 4199
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
P.O. Box 2772
303 W. Bannock
Boise, Idaho 83701
(208) 343-1000
dwhipple@nbmlaw.com
dbenjamin@nbmlaw.com

Of counsel to the Roark Law Firm

IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SARAH MARIE JOHNSON, Petitioner, v. STATE OF IDAHO, Respondent.	CV-2014-00353 **MEMORANDUM IN SUPPORT OF MOTION TO ALTER OR AMEND THE JUDGMENT**

Petitioner, Sarah Johnson, submits the following in support of her I.R.C.P. 59(e) motion to alter or amend the judgment.

A. Introduction.

As the Supreme Court has written that "Rule 59(e) . . . does not explain what constitutes a

motion to alter or amend." *Vierstra v. Vierstra*, 153 Idaho 873, 878, 292 P.2d 264, 269 (2012). Luckily, however, the Court went on to explain "that a Rule 59(e) motion to alter or amend a judgment provides the trial court with an opportunity to correct legal and factual errors." *Id.* Here, Sarah Johnson asks the Court to correct the factual and legal errors detailed below and alter and/or amend the judgment to permit DNA testing. Ms. Johnson's decision to not seek relief in this motion from the dismissal of her Eighth Amendment claim should not be construed as a concession that the Court is correct. She merely wishes to raise that issue on appeal.[1]

The Court, in its Order Granting Summary Disposition, first notes that identity was an issue at trial. Thus, the requirement in I.C. § 19-4902(c)(1) has been met. Subsection (c)(2), that the evidence was subject to a sufficient chain of custody, was not contested by the respondent. Likewise, the requirement in I.C. § 19-4902(e)(2), that the testing method requested would likely produce admissible results, was also not disputed by the respondent. The rub lies in the Court's analysis of subsection (e)(1), *i.e.,* that "the result of the testing has the scientific potential to produce new, non-cumulative evidence that would show that it is more probable than not that the petitioner is innocent." The Court has misconstrued the legal meaning of this requirement and when the correct interpretation is applied to the facts of this case, Sarah has established it as well.

---

[1] Likewise, we do not believe we "stipulated" to the dismissal of Claims 2-4 or that we raised claims of "ineffective assistance of post-conviction counsel" as a basis for relief as stated by the Court. Court's Order, pg. 3, 5. We argued that we should be able to raise claims of ineffective assistance of trial counsel under *Palmer v. Dermitt*, 102 Idaho 591, 635 P.2d 955 (1981), due to the ineffective assistance of post-conviction counsel. We acknowledge that *Palmer* was overruled in *Murphy v. State*, 156 Idaho 389, 327 P.3d 365 (2014) and have raised those claims in a federal habeas petition. *Johnson v. Kirkman*, CV-2014-395-CWD.

B. The Petitioner only needs to show that the result of the testing has the "scientific potential" to develop evidence of probable actual innocence.

First, Sarah's counsel did not "admit[] at the 10/20/14 hearing that the standard required by I.C. § 19-4902(e)(1) has not been met." Court's Order, pg. 12, ft. 8. He said, "We are not in a position to say that the evidence will or will not, more probably than not, demonstrate the innocence of Ms. Johnson . . . but we need the testing." *Id.* Counsel was merely making the commonsense observation that no one can know what the results of the testing will be until the testing is done. That was not an admission that the requested testing does not have the "scientific potential" to produce evidence of actual innocence. It was a request to permit such testing to see if the new DNA evidence is exonerating.

Sarah does not need to prove in advance of the testing what the results will be. A showing that the testing methods have the "scientific potential" to produce evidence of actual innocence is not the same as the showing of actual innocence based upon those test results. A reading of subsection (e)(1) that conflates the two concepts is contrary to the plain language of the statute and the interpretation of a statute must begin with the literal words of the statute. "[T]hose words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole." *Verska v. Saint Alphonsus Regional Medical Center*, 151 Idaho 889, 894, 265 P.3d 502, 506 (2011). Here there is no requirement in the text of the statute that the petitioner prove in advance what the results of the testing will turn out to be.

Further, that reading would make a nullity of the statute because no petitioner could ever say that he or she knows what the testing will actually show. Thus, even if it could be said that the statute is ambiguous, "[i]t is incumbent upon a court to give an ambiguous statute an

interpretation which will not render it a nullity." *State v. Trusdall*, 155 Idaho 965, 969, 318 P.3d 955, 959 (Ct. App. 2014). What counsel was telling the Court is that Sarah "need[s] the testing" to produce the evidence which could show she is actually innocent in order to be granted appropriate relief under subsection (f) of the statute.[2] She should be granted the testing due to the scientific potential of the advanced DNA testing to produce such evidence.

As will be explained in detail below, Sarah has shown that the advanced DNA testing requested has the scientific potential to produce evidence of actual innocence. She does not need to prove anything more. Acknowledging the indisputable fact that the actual testing may end up with inconclusive results does not change that fact.

C. Sarah has made the required showing under the facts of the case.

The advanced DNA testing has the scientific potential to produce new, non-cumulative evidence that would show that it is more probable than not that Sarah is innocent. The DNA testing has the scientific potential to identify the person who fired the murder weapon. If that person is not Sarah, the DNA evidence would show that she is innocent of first-degree murder as a principal.

The Court, however, found that DNA testing was not likely to produce proof of actual innocence due to "the 'mountain of evidence' against Johnson." Court's Order, pg. 10. This, however, is not the case. It should be recalled that the state's theory of the case was far-fetched. It was that Sarah was so selfish, so obsessed with Bruno, and so enraged by being grounded that, even though she had never before committed any act of serious or gun violence against anyone,

---

[2] Idaho Code § 19-4902(f) provides that: "In the event the fingerprint or forensic DNA tests results demonstrate, in light of all admissible evidence, that the petitioner is not the person who committed the offense, the court shall order the appropriate relief."

she stayed up all night plotting her parents' murder, which in a stoke of lucky coincidence was also the night before the regular garbage collection day. After coming up with this plot on the fly, she took the rifle from its hiding place in the guesthouse, wore some combination of the three gloves without getting her fingerprints or any blood on any of them, took the scope off the rifle without harming fingerprints placed there previously by the last person to shoot the rifle, put on the robe and a shower cap, and shot her sleeping mother from a left-handed position, although she is right-handed. She was not upset or deterred by the horrible result of the explosion of tissue and blood and next shot her father in the chest while he tried to reach out to her, all while she avoided getting any blood or tissue on her pajama pants, gloves, hands, face, or hair. She flushed the shower cap down the toilet, again without getting any blood on herself or causing any plumbing problems, and placed the knives on the beds without getting her fingerprints or DNA on them. She then ran out of the house and put the robe and two gloves in the garbage, again without getting blood from the robe on her hands. Then, in a pretended hysteria, she sought "help" from the neighbors, all the while forgetting or not caring that she had left cartridges, her keys including a key to the guesthouse, one of the gloves, and a pistol magazine in her bedroom, pistol ammunition in the robe, and a cartridge shell and another gun in the garage, and forgetting whether she wanted to tell the police that the door to her bedroom was open or closed at the time of the shootings. T Supp. Tr. p. 175, ln. 11 - p. 218, ln. 10; p. 313, ln. 13 - p. 344, ln. 11. In fact, the state's theory was far-fetched, its evidence entirely circumstantial and was certainly not overwhelming.

In addition, the evidence the Court states "placed Johnson at the scene and linked her to the murders," Court's Order, pg. 10, is not strong. Each area specifically listed by the Court is

discussed below.

1. "Her stories were inconsistent and conflicted with the evidence." (Court's Order, pg. 10).

On the morning of the murders, within minutes of Sarah arriving in hysterics at the Richards' house, the police arrived. Throughout that day and the days to follow, Sarah was questioned numerous times. The questioning included two 20-minute interviews with Detective Harkins on the day her parents were killed, first at 8:30 a.m. and then at 11:30 a.m. Detective Harkins described the second interview as accusatory and said that he read *Miranda* warnings but he had to initial the form as Sarah was too upset to sign. T Tr. Vol. 3, p. 2106, ln. 1; Vol. 4, p. 2177, ln. 1- p. 2179, ln. 5. The next day, Sarah was questioned at the sheriff's office and her statements that she had an attorney went unheeded. T Tr. p. 2425, ln. 23 - p. 2444, ln. 14; p. 2488, ln. 2-14. She was again questioned on September 12 and 13 at the sheriff's office. T Tr. p. 2446, ln. 23 - p. 2452, ln. 1. On the 13th, the sheriff directly accused her of murdering her parents but she maintained her innocence. T Tr. p. 2446, ln. 8 - p. 2454, ln. 19.

At least two of the interviews on the day of her parents' deaths were conducted after Sarah had been given Ambien, a hypnotic which makes people suggestible, to calm her down. T Tr. Vol. 3, p. 1544, ln. 3-12; Vol. 4, p. 2176, ln. 10-15. Officer Tremble, who questioned Sarah after she had been given the Ambien, described her as "disoriented." T Tr. Vol. 3, p. 1870, ln. 8-14. Others did not share this observation. See T Tr. Vol. 4, p. 2176, ln. 5-22.

Throughout the questioning, Sarah remained consistent that she had been in bed, heard two shots, ran to her parents' bedroom door, called out, did not hear a response, fled the house, and heard the sliding screen door to the bedroom open and shut as she ran. T Tr. Vol. 3, p. 1749,

ln. 1 - p. 1750, ln. 1; p. 2099, ln. 23 - p. 2102, ln. 23; Vol. 4, p. 2430, ln. 11-13.

Her statements both volunteered and in response to police questioning were not consistent in some details. Sometimes she said she was asleep when she heard the first shot; sometimes she said that she had been awakened by the shower before she heard the shot. T Tr. Vol. 3, p. 1749, ln. 1-2. Sometimes she said that she got out of bed upon hearing the first shot; sometimes she said that she stayed in bed until after hearing the second shot. T Tr. Vol. 3, p. 1749, ln. 12-17; p. 2101, ln. 5; Vol. 4, p. 2430, ln. 1-4. Sometimes she said that her bedroom door was open; sometimes she said that it was closed; and still other times she said that it was partly open. T Tr. Vol. 3, p. 2100, ln. 22-24; Vol. 4, p. 2428, ln. 12-13; p. 2492, ln. 13 - p. 2492, ln. 9. Sometimes she said that her parents' bedroom door was closed; sometimes she said that it was open. T Tr. Vol. 3., p. 1812, ln. 11-12; Vol. 4, p. 2430, ln. 15-19. (According to the State's expert, both bedroom doors had to be open. T Tr. Vol. 6, p. 4143, ln. 17-23.)

Sarah did not give inconsistent stories about what she was doing when her parents were killed. She said she was in her room in her bed when the first shot was fired, she went to her parents' room and called out, and then she fled the house. While some details within this statement changed, the thrust of the statement did not.

Any normal person would have difficulty remembering details under such circumstances. Think of sitting at the bed of a dying loved one - at a death not welcomed, but expected and not violent. Could someone going through that be expected to remember whether the last moment of life was preceded by a cough and then a rattling breath or a rattling breath and then a cough? Could someone state for certain whether the window by the bed was open or closed? Could someone state without hesitation or error whether the flowers were on the night stand or on the

dresser? No one remembers all the details of a moment precisely and clearly. This is especially true when unimaginable trauma has occurred.

It was no surprise and certainly not incriminating evidence that Sarah was unable to remember whether she was asleep or awake when the first shot was fired, the exact words that she said when she called out, and whether the bedroom doors were open or closed.

If Sarah gave "inconsistent stories" about what she was doing it was more likely to be a result of the shock and distress felt by a young girl who saw her family destroyed by another's crime than evidence of a carefully planned and cooly executed premeditated murder. Sarah's story would have been totally straight, well thought out and consistent over time had the crime described by the State actually taken place.

Much more remarkable is that Sarah never confessed or even made incriminating statements notwithstanding the best efforts of the state to obtain them. Sarah was particularly vulnerable to police interrogation technics being only sixteen years old, of average or low average intelligence and ability to learn, orphaned through a violent event. She maintained her innocence through repeated questioning. She was questioned by experts in interrogation repeatedly on the day she lost her parents. She was questioned in the absence of counsel. She was questioned right after having been given a hypnotic drug. She was questioned many times. She was accused of patricide and matricide. But, despite the state's very best efforts, she did not confess. T Tr. Vol. 3, p. 2106, ln. 1; Vol. 4, p. 2177, ln. 1 - p. 2179, ln. 5; p. 2425, ln. 23 - p. 2444, ln. 14; p. 2488, ln. 2-14; p. 2446, ln. 23 - p. 2452, ln. 1; p. 2446, ln. 8 - p. 2454, ln. 19; p. 1544, ln. 3-12; Vol. 4, p. 2176, ln. 10-15; p. 1749, ln. 1 - p. 1750, ln. 1; p. 2099, ln. 23 - p. 2102, ln. 23; p. 2430, ln. 11-13. Vol. 1, p. 654, ln. 9 - p. 655, ln. 21; Vol. 4, p. 2424, ln. 20 - p. 2425,

ln. 12; Vol. 5, p. 3368, ln. 8 - p. 3371, ln. 5; p. 3377, ln. 1 - p. 3378, ln. 6; Vol. 4, p. 2179, ln. 6-20.

The evidence against Sarah was not overwhelming as has been asserted.

> 2. "Her DNA was found in a latex glove, found wrapped in a blood splattered robe, and discarded in a trash can on the property." (Court's Order, pg. 10).

First, while the State's DNA expert found DNA matching Sarah's on the latex glove, the glove was so old that it had become discolored and the expert could not say the DNA was of recent origin. T Tr. Vol. 5, p. 3110, ln. 1-3. The expert also found DNA from someone else, not matched to any known sample, on that glove. The contributor of that sample could have been male or female. T Tr. Vol. 5, p. 3110, ln. 17-20; p. 3120, ln. 17-20. There is no evidence that the latex glove was worn by Sarah on the morning of the murders and not at some other time in the far past.

Another problem with the Court's analysis is this: the gloves, unlike the rifle and the robe, did not have blood on them. According to the expert testimony and common sense, this means that they were not worn during the shooting. It is impossible to imagine a scenario wherein anyone could have worn the gloves in an environment where both the gun being held and the robe on the arms holding the gun get blood on them but the gloves remain pristine. This disproves the State's theory that Sarah wore the latex gloves underneath the driving glove when she fired the rifle.

Finally, the presence of the gloves in Sarah's room and the garbage can outside is more consistent with an intent by the real killer to divert suspicion to Sarah than some theory that Sarah carefully plotted and planned the murders and then left gloves not even used in her room

and the trash where they were quickly discovered by the police.

3. "She knew where the murder weapon was kept (in a guest house safe) and had requested a key a few days earlier." (Court's Order, pg. 10).

The murder weapon was not kept in the guest house safe. It was kept, covered by blankets, in a closet of the guest house. It was not in a safe. At trial, Mr. Speegle testified that he kept the rifle in his closet along with three other guns. (TT 2702:8-2703:2). He also testified that Sarah had a garage door opener to the guest house and that the weapons and ammunition were in the closet when she cleaned his apartment and stayed there with friends. (TT 2693:17-20, 2694:25-2696:6, 2715:12-25). While Sarah had cleaned the guest house, there was no evidence that she knew where the rifle was hidden nor is it likely she would be cleaning the inside of a closet. Matt Johnson testified that he had been in the guest house after Mr. Speegle had moved in but he did not know there were guns in the closet. T Tr Vol. 7, pg. 4527, ln. 1-3.

Since there was no safe in the guest house, Sarah could not have asked for the key. There was testimony that she asked for the key to the Johnsons' gun safe two days before her parents were murdered. However, Sarah's brother Matthew, a witness for the state, testified that Sarah kept jewelry in the safe, an innocent reason for a request for the key. T Tr. Vol. 7, p. 4562, ln. 15-24.

The Court's analysis is also flawed because it evaluates the evidence both under a principal theory ("[T]he jury could have convicted Johnson if they believed that she was the shooter . . .") and as under an accomplice theory (". . . or if they believed that she aided and abetted the murder."). Court's Order, pg. 10, ft. 2. In fact, however, we know the jury found that she was the shooter because it also returned a deadly weapon enhancement. The enhancement

finding would be impossible if the jury found that someone else was the shooter but that Sarah was her/his accomplice. This is so because the court's jury instruction required the jury find Sarah possessed the weapon.[3] There is no accomplice liability for the firearm enhancement as it is a sentencing enhancement and not an offense itself. Thus, the jury must have unanimously found Sarah was the shooter and rejected the state's accomplice liability theory. In light of that, any new DNA evidence which shows that Sarah was not the shooter is evidence of innocence.

But even if an accomplice liability theory is considered, evidence showing who the shooter actually was would show innocence if that person were Bruno Santos or someone totally unconnected with Sarah, such as a member of a criminal gang with connections to Mr. Santos. Mr. Santos testified at the criminal trial that he was not involved in the murder. T Vol. IV pg. 2769, ln. 11-13. If his DNA or the DNA of one of his associates appears on the rifle or spent shell casings it would exonerate Sarah as the shooter. At the same time, it would exonerate her under an aiding and abetting theory as the state argued in closing argument at the criminal trial that Mr. Santos was not the one Sarah aided and abetted in the murder. Supp. T., pg. 210, ln. 25 - pg. 211, ln. 24. ("He's the reason for this. Again, Sarah's the means. The fact of the matter is we had an extensive investigation of his involvement." "If he's the killer, if he's the real murderer, is he going to come back [to the United States] voluntarily?) The state cannot argue it both ways, claiming here that evidence that Bruno Santos was the shooter would not exonerate Sarah when it

---

[3] The court's instruction was: "If you find the defendant guilty of murder, you must next consider whether *the defendant* displayed, used, threatened or attempted to use a firearm in the commission of the crime." TT Vol. 9, pg. 6093, ln. 24 - pg. 6094, ln. 2 (emphasis added). The court continued: "If you unanimously find beyond a reasonable doubt that *the defendant* used, displayed, threatened with or attempted to use a firearm in the commission of the above crime, then you must indicate on the verdict form submitted to you." TT Vol. 9, pg. 6094, ln. 8-12 (emphasis added).

argued at trial that Sarah did not aid and abet Mr. Santos in the killings.

In addition, identifying a third-party DNA source from previously untested samples could make it more probable than not that Sarah is innocent. For example, the DNA testing has the scientific potential to show that Christopher Hill, whose fingerprints were found on the murder weapon, also loaded the weapon if, for example, his DNA is found on the spent cartridge. That evidence would also exonerate Sarah because there is no link between her and Mr. Hill. There would be no reason to believe that Sarah aided and abetted Mr. Hill in the murders. Or, the DNA evidence could implicate someone else totally unconnected to Sarah, such as a total stranger. Evidence showing the shooter had no connection to Sarah would be evidence of innocence. Or there could be DNA from Janet Sylten, the employee of Whirlwind Cleaners. See T Tr. Vol. 4, p. 2804, ln. 4-6. Evidence at trial showed that Ms. Sylten had recently been released from prison on parole. She had served some number of years (she claimed that she could not remember the details) for grand theft and battery on a correctional officer. T Tr. Vol. 4, p. 2824, ln. 1 - p. 2827, ln. 5; Vol. 5, p. 2889, ln. 4-6. After Whirlwind cleaned the Johnson home, Diane Johnson discovered she was missing two expensive bottles of Estee Lauder lotion. Similar products were later found in Ms. Sylten's living area and she was fired from her job. T Tr. Vol. 4, p. 2433, ln. 4-6; Vol. 6, p. 3764, ln. 7 - p. 3765, ln. 25. Of course, Ms. Sylten's parole could be revoked if it were discovered she had been stealing from clients. Again, if DNA from a person like Ms. Sylten is discovered, that type of evidence would exonerate Sarah because there would be no link between Sarah and the shooter, making the already weak accomplice liability theory, which was rejected by the jury, untenable.

D. In fact, the evidence is far from overwhelming.

The Court overlooks substantial evidence showing that Sarah is innocent. This is detailed on pages 7-10 of Petitioner's Opposition to State's Motion for Summary Disposition and is incorporated herein by this reference. In short, there was no DNA evidence, fingerprints or gun shot residue linking Sarah to the murder weapon. Instead, the fingerprints of Christopher Hill were found on both the rifle and the scope. She did not have any biological evidence on her face, hair, t-shirt or pajama bottoms even though the robe worn by the shooter was covered with human flesh and gore.

E. *Fields v. State* is not apposite.

Finally, the Court's reliance on *Fields v. State*, 151 Idaho 18, 253 P.3d 692 (2011), is misplaced. In *Fields*, the victim was a store clerk who was stabbed to death during a robbery. The district court permitted DNA testing of scrapings found under the victim's fingernails and of some hairs found on her clothing. The DNA profile obtained did not match Mr. Fields, but also could not be matched to any other person. Mr. Fields argued this showed he was actually innocent because the victim likely scratched the attacker and therefore the absence of his DNA proved he was not the killer. The Supreme Court held that DNA evidence was not sufficient to show that he was actually innocent. The Court said that, "Under Idaho Code § 19-4902(f), it is the fingerprint or DNA test results that must demonstrate that the petitioner is not the one who committed the offense. In this case there would have to be admissible evidence showing that the hairs or fingernail scrapings tested came from the murderer." 151 Idaho at 24, 253 P.3d at 698. This case is in a totally different procedural posture because, unlike *Fields*, the Court has not permitted the evidence to be tested.

Nevertheless, the Court writes that, "[t]he same is true in this case. Further testing might reveal the source of the DNA samples found on Johnson's robe, on the gun, and elsewhere, but that knowledge does nothing to establish that the source of those samples was present in the Johnson home on the morning of the crime, that the source of those samples was the shooter, or that Johnson didn't aid and abet the murder of her parents." Court's Order, pg. 12. In fact, however, whether further testing revealing the source of the DNA samples establishes any of those things depends on what evidence is found. If the piece of flesh with unknown male DNA found on the collar of the robe is Christopher Hill's, we can be sure it got there on the morning of the murders. Likewise, if it is his DNA on the fingerprints found on the cartridges still loaded in the rifle or on the spent shell casing we can be sure he was the one who loaded the rifle before entering the house and firing the fatal shots. The DNA evidence would be corroborated by the fact that his fingerprints were found on the rifle and the scope which was removed just prior to the shootings. This evidence would exonerate Sarah both as the principal and as an accomplice because there is no reason to suspect the two acted in concert.

The same is true if the Bloodstain 2 from the robe has the DNA from Christopher Hill. That bloodstain could not have been placed at any time other than when the murders occurred.

Bloodstain C on the rifle is from an unknown male excluding Alan Johnson and Bruno Santos. The source of that bloodstain is most likely the shooter. If that person has no connection to Sarah it shows her innocence both as a principal and an accomplice. The same is true concerning bloodstain 24 from the robe, the tissue from the lower left side of the robe, the tissue from the inside lower back of the robe, the tissue from the inside left sleeve of the robe, bloodstain B from the rifle, and bloodstain F from the rifle. And the same is true regarding the

DNA from the unidentified fingerprints on the doorknob set on Diane and Alan Johnson's bedroom door and the unidentified palm prints. The same is true of the two hair samples recovered from the barrel of the .264 rifle which could not be matched to Sarah or any of her maternal relatives by mitochondrial DNA testing. If this hair came from Christopher Hill it was placed there at the time of the murder not when he was target shooting with the rifle many years prior. Likewise, the DNA from an unknown contributor which was found on the inside of the latex glove can now be analyzed using advanced DNA amplification and purification techniques. Assuming, as the Court does, that evidence shows the identity of the shooter, if that DNA came from Christopher Hill, it would be exonerating to Sarah. She could have placed her DNA at anytime the glove was in the home but Mr. Hill's DNA could only have been placed there at the time of the murders as there is no evidence he used the glove prior to that day. The same is true regarding the low levels of DNA from an unidentified source that were found on the leather glove from the garbage can. If the DNA from the bloody handprint found on the sheet under the pillow beneath Diane Johnson is Mr. Hill's, it was placed there at the time of the murder. Most of the statements above can be repeated substituting the name Matthew Johnson or Janet Sylten or even Bruno Santos for Christopher Hill.

Again, the Court apparently conflates the requirement under subsection (e)(1) that, in order to obtain testing, "the result of the testing has the scientific potential to produce new, non-cumulative evidence that would show that it is more probable than not that the petitioner is innocent," with the petitioner's ultimate burden of proof under subsection (f) that "the fingerprint or DNA evidence must demonstrate that the petitioner is not the person who committed the offense," which is to be applied as testing is completed. As previously stated by Counsel, "we

need the testing" to meet subsection (f), but, as *Fields* illustrates, we can get the testing without showing what the results will ultimately be.

F. Conclusion.

We cannot tell, at this point, whether the evidence will be of an unknown person as in *Fields* or a known person with no connection to Sarah but with a motive to commit the murders. If it is the former, that would be evidence of Sarah's innocence since we know that the jury found her to be the shooter because of the jury's finding that she possessed a firearm during the commission of the offense. If the testing shows the latter, then Sarah is likely to be able to meet her burden of proof under subsection (f). In either case, it is enough, at this point, to say that the "the result of the testing has the scientific potential to produce new, non-cumulative evidence that would show that it is more probable than not that the petitioner is innocent" under subsection (e)(1).

The Court should grant the Motion to Alter or Amend and permit DNA testing.

Respectfully submitted this 5 day of November, 2014.

R. Keith Roark
Attorney for Sarah Johnson

Deborah Whipple
Attorney at Law

Dennis Benjamin
Attorney at Law

Of counsel to The Roark Law Firm

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6 day of November, 2014, I caused a true and correct copy of the foregoing to be deposited in the United States Mail postage pre-paid to:

Jessica Lorello
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010

R. Keith Roark

ORIGINAL

R. Keith Roark, ISB No. 2230
THE ROARK LAW FIRM
409 Main Street
Hailey, ID 83333
208-788-3918
keith@roarklaw.com

Attorneys for Sarah Johnson

Deborah Whipple ISB No. 4355
Dennis Benjamin ISB No. 4199
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
P.O. Box 2772
303 W. Bannock
Boise, Idaho 83701
(208) 343-1000
dwhipple@nbmlaw.com
dbenjamin@nbmlaw.com

Of counsel to the Roark Law Firm

IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SARAH MARIE JOHNSON, Petitioner, v. STATE OF IDAHO, Respondent.	CV-2014-00353 **MOTION TO ALTER OR AMEND THE JUDGMENT**

Petitioner, Sarah Johnson, hereby moves this Court for an order altering or amending the judgment entered in this case so to permit the DNA testing of evidence. This motion is brought pursuant to I.R.C.P. 59(e) and is supported by the memorandum filed herewith.

Respectfully submitted this 5 day of November, 2014.

R. Keith Roark
Attorney for Sarah Johnson

Dennis Benjamin
Of counsel to The Roark Law Firm

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6 day of November, 2014, I caused a true and correct copy of the foregoing to be deposited in the United States Mail postage pre-paid to:

Jessica Lorello
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010

R. Keith Roark

ORIGINAL

R. Keith Roark, ISB No. 2230
THE ROARK LAW FIRM
409 Main Street
Hailey, ID 83333
208-788-3918
keith@roarklaw.com

Attorneys for Sarah Johnson

Deborah Whipple ISB No. 4355
Dennis Benjamin ISB No. 4199
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
P.O. Box 2772
303 W. Bannock
Boise, Idaho 83701
(208) 343-1000
dwhipple@nbmlaw.com
dbenjamin@nbmlaw.com

Of counsel to the Roark Law Firm

IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SARAH MARIE JOHNSON, Petitioner, v. STATE OF IDAHO, Respondent.	CV-2014-00353 **RENEWED MOTION TO TAKE JUDICIAL NOTICE**

COMES NOW Petitioner Sarah Johnson and moves this Court pursuant to I.R.E. 201 for an order taking judicial notice of the following materials in the Court's possession for proceedings on her DNA and Successive Petition for Post-Conviction Relief:

1. The District Court file in *State v. Sarah Marie Johnson,* No. CR-2003-18200, as

described in the attached Register of Actions, including all documents in the Court file as well as all transcripts prepared for appeal.

2. The District Court file in *Sarah Johnson v. State,* No. CV-2006-00324, as described in the attached Register of Actions, including all documents in the Court file as well as all transcripts prepared for appeal.

Ms. Johnson previously filed a similar motion in this case on 7/18/2014, but the Register of Actions does not reflect that the motion was ever ruled upon.

Good cause exists to grant this motion. The Court in its Order Granting Motion for Summary Disposition of Petitioner's Amended DNA and Successive Petition for Post-Conviction Relief referred to the record in both *State v. Sarah Marie Johnson,* No. CR-2003-18200 and *Sarah Johnson v. State,* No. CV-2006-00324. Thus, those records should become part of the record here.

Respectfully submitted this 5 day of November, 2014.

R. Keith Roark
Attorney for Sarah Johnson

Dennis Benjamin
Of counsel to The Roark Law Firm

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6 day of November, 2014, I caused a true and correct copy of the foregoing to be deposited in the United States Mail postage pre-paid to:

Jessica Lorello
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010

R. Keith Roark

09/08/2008	Hearing result for Motion held on 09/08/2008 04:00 PM: District Court Hearing Held Court Reporter: Susan Israel Estimated Number of Transcript Pages for this hearing: Motion for order for disbursement of funds and other relief-less than 100 pages
09/08/2008	STATUS CHANGED: closed
09/10/2008	Bond Converted (Transaction number 403 dated 9/10/2008 amount 222,908.31)
09/10/2008	Order on motion for order granting renewed motion for order for stay of relief, for disbursement of funds & other relief
09/15/2008	Bond Posted - Cash (Receipt 5156 Dated 9/15/2008 for 32202.84)
09/15/2008	Bond Converted (Transaction number 410 dated 9/15/2008 amount 32,202.84)
09/15/2008	STATUS CHANGED: closed
09/19/2008	Affidavit Of Mailing

State of Idaho vs. Sarah M Johnson
No hearings scheduled

Case: **CR-2003-0018200 District** Judge: **G. Richard Bevan** Amount due: **$15,088.50** **Closed pending clerk action**

Charges:	Violation Date	Charge	Citation	Degree	Disposition
	09/02/2003	**I18-4001-I Murder I Officer: Blaine Prosecutor,, 9500**		**Felony**	**Finding: Guilty Disposition date: 06/30/2005 Fines/fees: $5,088.50 Credited time (Yes): 609 days**
	09/02/2003	**I18-4001-I Murder I Officer: Blaine Prosecutor,, 9500**		**Felony**	**Finding: Guilty Disposition date: 06/30/2005 Fines/fees: $5,000.00**
	09/02/2003	**I19-2520 Enhancement-use Of Deadly Weapon Comm Of Felony Officer: Blaine Prosecutor,, 9500**		**Felony**	**Finding: Guilty Disposition date: 06/30/2005 Fines/fees: $0.00 Det Penitentiary: 15 days**

Register of actions:	Date
	10/29/2003 New Case Filed, Indictment
	10/29/2003 Prosecutor assigned Jim Thomas
	10/29/2003 Case Sealed
	10/29/2003 Warrant Issued - Arrest Bond amount: 2000000.00
	10/29/2003 Motion to Seal Indictment
	10/29/2003 Order Setting Bail (no bail)
	10/29/2003 Order Sealing Indictment
	10/30/2003 Defendant: Johnson, Sarah Marie Order Appointing Public Defender Court appointed Bob Pangburn
	10/30/2003 Defendant: Johnson, Sarah Marie Order Appointing Public Defender Public defender Bob Pangburn
	10/30/2003 Order Appointing Public Defender

10/30/2003 Motion to Unseal Indictment
10/30/2003 Notice of Intent Not to Seek the Death Penalty
10/30/2003 Notice of Intent to Seek Sentencing Enhancement
10/30/2003 Court Minutes
10/30/2003 Interim Hearing Held, Initial Appearance and Motion to Unseal the Indictment
10/30/2003 Case Unsealed
10/30/2003 Hearing Scheduled (Arraignment 11/03/2003 09:00 AM)
10/30/2003 Notice Of Hearing
10/31/2003 Request to Obtain Approval to Broadcast and/or Photograph a Court Proceeding (Mountain Express)
10/31/2003 Request to Obtain Approval to Broadcast and/or Photograph a Court Proceeding (KMVT)
11/03/2003 Motion for Grand Jury Transcript
11/03/2003 Motion for Order Controlling Pre-Trial Publicity, Motion to Shorten Time & Notice of Hearing
11/03/2003 Request for Discovery
11/03/2003 Hearing result for Arraignment held on 11/03/2003 09:00 AM: Arraignment / First Appearance
11/03/2003 Hearing Scheduled (Hearing Scheduled 11/05/2003 10:00 AM)
11/03/2003 Notice Of Hearing
11/03/2003 Scheduling Order, Notice Of Trial Setting And Initial Pretrial Order
11/03/2003 Court Minutes
11/03/2003 Hearing Scheduled (Jury Trial 02/10/2004 09:00 AM)
11/03/2003 Hearing Scheduled (Pretrial Conference 01/12/2004 09:00 AM)
11/03/2003 Notice Of Hearing
11/03/2003 Request To Obtain Approval to Broadcast and/or Photograph a Court Proceeding (Wood River Journal)
11/05/2003 Hearing result for Hearing Scheduled held on 11/05/2003 10:00 AM: Hearing Held
11/05/2003 Court Minutes
11/05/2003 Hearing Scheduled (Evidentiary 11/20/2003 09:30 AM)
11/05/2003 Notice Of Hearing
11/05/2003 Order for Grand Jury Transcript
11/07/2003 Amended Notice of Hearing
11/07/2003 Request to Obtain Approval to Broadcast and/or Photograph a Court Proceeding (Court TV)
11/10/2003 Hearing Held
11/10/2003 Court Minutes
11/10/2003 ExParte Motion for Leave to Employ Investigator and Declaration In Support
11/10/2003 ExParte Motion for Appointment of Co-Counsel and Declaration in Support
11/10/2003 Court Minutes
11/10/2003 Memorandum in Response to Defense Request for Additional Attorney at County Expense
11/20/2003 Hearing result for Evidentiary held on 11/20/2003 09:30 AM: Hearing Held
11/20/2003 Court Minutes
11/20/2003 OrderRegarding the Grand Jury Transcript
11/24/2003 Motion for Extension of Time to File Pre-Trial Motions
11/24/2003 Affidavit In Support Motion for Investigation Services
11/25/2003 Court Minutes Hearing type: Re: Appointment of Defense Co-Counsel Hearing date: 11/25/2003 Time: 10:00 am Court reporter: Sue Israel Audio tape number: D-837
11/25/2003 Order Granting Motion for Investigation Services
11/25/2003 Hearing Held

11/25/2003 Court Minutes, Lee Ritzau as co-counsel appointed
11/26/2003 Memorandum Decision on Defendant's Motion for Appointment of Co-Counsel
11/26/2003 Order Re: Defendnt's Motion for Appointment of Co-Counsel
12/01/2003 State's Amended Reqestt For Discovery/demand For Alibi
12/01/2003 Response To Request For Discovery/State's
12/02/2003 Motion for Order for Leave to Withdraw as Attorney of Record and Notice of Hearing Thereon
12/02/2003 Hearing Scheduled (Hearing Scheduled 12/08/2003 09:00 AM)
12/04/2003 Lodged/Reporter's Transcript of Grand Jury Proceedings
12/08/2003 Defendant: Johnson, Sarah Marie Order Appointing Public Defender Public defender Stephen D. Thompson
12/08/2003 Court Minutes
12/08/2003 Hearing result for Motion to Withdraw held on 12/08/2003 09:00 AM: Hearing Held
12/09/2003 State's 1st Supplemental Response To Request For Discovery
12/10/2003 Motion for Hearing to Clarify Order Prohibiting Pre-Trial Publicity
12/10/2003 Hearing Scheduled (Hearing Scheduled 12/15/2003 09:00 AM)
12/11/2003 Request to Obtain Approval to Broadcast and/or photograph a court proceeding (Court TV)
12/12/2003 State's 2nd Supplemental Response To Request For Discovery
12/12/2003 Motion To Transfer And Unseal Search Warrant Affidavits, Returns and Motions
12/15/2003 Hearing result for Hearing Scheduled held on 12/15/2003 09:00 AM: Hearing Held
12/15/2003 Court Minutes
12/15/2003 Ex Parte Motion For Case Expenses and Declaration In Support
12/16/2003 Motion to Seal
12/17/2003 Amended Order Regarding Pre-Trial Publicity
12/17/2003 Memorandum Decision On Plaintiff's Motion For Order Clarifying Pre-Trial Publicity Order
12/19/2003 Order Granting Leave to Withdraw as Attorney of Record (Ritzau)
12/22/2003 Motion for Case Expenses and Declaration in Support
12/22/2003 Hearing Scheduled (Hearing Scheduled 12/29/2003 09:00 AM)
12/22/2003 Motion for Transcript
12/23/2003 Order Sealing
12/23/2003 Receipt, Inventory & Return of Detention Warrant
12/23/2003 Order Transferring And Unsealing Search Warrant Affidavits, Returns and Motions
12/29/2003 Hearing result for Hearing Scheduled held on 12/29/2003 09:00 AM: Motion for Case Expenses, Hearing Held; Motion granted.
12/29/2003 Court Minutes
12/30/2003 Appearance & Stipulation for Substitution of Counsel
01/05/2004 Motion to Continue Trial & to Extend Procedural Deadlines
01/05/2004 Order for case expenses
01/05/2004 Fee Payment Authorization
01/06/2004 Hearing Scheduled (Motion 01/12/2004 09:00 AM)
01/06/2004 Notice Of Hearing
01/06/2004 Order for Transcript
01/12/2004 Hearing result for Motion held on 01/12/2004 09:00 AM: Court Minutes
01/12/2004 Hearing result for Pretrial Conference held on 01/12/2004 09:00 AM: Court Minutes
01/12/2004 Hearing result for Jury Trial held on 02/10/2004 09:00 AM: Continued
01/12/2004 Hearing Scheduled (Jury Trial 06/01/2004 09:00 AM)
01/12/2004 Notice Of Hearing
01/15/2004 Corrected Motion For Transcript
01/15/2004 Waiver Of Speedy Trial

01/16/2004	Order For Investigative Expenses
01/20/2004	Letter from Commissioners Assigning Mark Rader as co-counsel for Defendant
01/21/2004	Order To Continue Trial And To Extend Procedural Deadlines
02/03/2004	Motion For Access To 1193 Glen Aspen Drive
02/06/2004	Notice Of Hearing On Defendant's Motion For Access To 1193 Glen Aspen Drive
02/06/2004	Hearing Scheduled (Motion 02/13/2004 09:00 AM)
02/10/2004	Notice Of Hearing On Defendant's Motion For Order That The Defendant Appear In Court In Street Clothes
02/10/2004	Notice Of Hearing On Defendant's Motion To Compel Discovery Regarding Bruno Santos
02/10/2004	Notice Of Hearing On Defendant's Motion To Compel Discovery Regarding Malinda Gonzalez
02/10/2004	Hearing Scheduled (Motion 02/17/2004 02:00 PM)
02/11/2004	Motion For Order Directing that the Defendant be Unshackled & Dressed in Civilian Clothes at all Court Appearances; Memorandum in Support
02/11/2004	Motion to Compel Discovery Regarding Malinda Gonzales
02/11/2004	Motionto Compel Discovery Regarding Burno Santos
02/13/2004	Memorandum Objecting To Defense Motion To have Defendant Unshackled And Dressed In Civilian Clothes At All Court Appearances
02/13/2004	Hearing result for Motion held on 02/13/2004 09:00 AM: Court Minutes
02/13/2004	Hearing result for Motion held on 02/13/2004 09:00 AM: Court Minutes
02/17/2004	Order Granting Limited Access into Residence of 1193 Glen Aspen Drive
02/17/2004	Court Minutes
02/17/2004	Hearing result for Motion held on 02/17/2004 02:00 PM: Hearing Held
02/17/2004	Lodged/Transcript of Hearings: Defendant's Motion for Appointment of Co-Counsel and Hearing Re Public Defender Contract Nov. 25, 2003 and Motion to Withdraw, Dec. 8, 2003
02/17/2004	Lodged/Initial Appearance, Oct. 30, 2003; Arraignment, Nov. 3, 2003; Cont'd Motion on Pretrial Publicity, Nov. 5, 2003
02/19/2004	Hearing Scheduled (Hearing Scheduled 02/24/2004 01:00 PM)
02/19/2004	Notice Of Hearing
02/23/2004	Hearing result for Hearing Scheduled held on 02/24/2004 01:00 PM: Hearing Held
02/23/2004	Court Minutes
02/23/2004	State's Third Supplemental Response To Request For Discovery
02/25/2004	Order Denying Defendant's Motion to Have Defendant in Civilian Clothes and Unshackled at all Pretrial Hearings
02/25/2004	Lodged/Transcripts of various motions
03/08/2004	Hearing Scheduled (Hearing Scheduled 03/11/2004 03:00 PM)
03/08/2004	Notice Of Hearing
03/10/2004	Request for Reassignment of Presiding District Judge
03/10/2004	Order of Reassignment of Presiding District Judge
03/10/2004	Change Assigned Judge
03/15/2004	Motion to Continue Trial and to Extend Procedural Deadlines
03/15/2004	Continued (Hearing Scheduled 03/18/2004 03:00 PM)
03/16/2004	Supplemental Request For Discovery
03/18/2004	Hearing result for Hearing Scheduled held on 03/18/2004 03:00 PM: Court Minutes
03/19/2004	State's 4th Supplemental Response To Request For Discovery
03/25/2004	Notice Of Intent Of The Court To Enter An Amended Order Unsealing Grand Jury Exhibits For The Limited Purpose Of Viewing By The Court
03/25/2004	Order Granting Continuance And Procedural Deadlines
04/08/2004	Motion To Extend Deadline For Submission Of Jury Questionnaire
04/08/2004	Hearing Scheduled (Hearing Scheduled 04/12/2004 09:30 AM)

04/08/2004 Notice Of Hearing
04/09/2004 State's Proposed Juror Questionnaire
04/12/2004 Hearing result for Hearing Scheduled held on 04/12/2004 09:30 AM: Court Minutes
04/12/2004 Order Granting Motion To Extend Deadline For Submission Of Jury Questionnaire
04/13/2004 Continued (Jury Trial 09/27/2004 09:00 AM)
04/14/2004 Hearing Scheduled (Hearing Scheduled 04/16/2004 01:00 PM)
04/15/2004 Subpoena Returned/Heather Saunders
04/15/2004 Lodged/Transcript of Motion to View Premises; Motions to Compel
04/16/2004 Lodged/Transcript of Proceedings, Defendant's Motion to Extend Deadline for Submission of Jury Questionnaire
04/20/2004 Fee Payment Authorization (Bob Pangburn - $730.11)
04/26/2004 (Hearing Scheduled 05/03/2004 02:30 PM) Motion to Compel
04/26/2004 Defendant's Second Supplemental Request for Discovery
04/26/2004 Motion to Compel Discovery Re: Subpoenas, Subpoena Returns, Releases, Letters & Notices
04/26/2004 State's Objection to Motion to Compel Discovery and Notice of Hearing Setting
04/29/2004 Motion to Continue Motion to Compel Discovery
04/30/2004 State's Proposed Juror Questionnaire (amended)
05/03/2004 Proposed Juror Questionnaire
05/03/2004 Hearing result for Motion held on 05/03/2004 02:00 PM: Court Minutes
05/03/2004 Hearing Scheduled (Motion 05/24/2004 11:00 AM)
05/03/2004 Order Granting Continuance
05/03/2004 Defendant's Proposed Juror Questionnaire
05/05/2004 Notice Of Hearing
05/17/2004 Amended Indictment
05/17/2004 State's 5th Supplemental Response To Request For Discovery
05/19/2004 State's 6th Supplemental Response To Request For Discovery
05/20/2004 Motion to Strike Purported Amended Indictment
05/21/2004 State's Motion Objecting To Hearing Date For Lack Of Proper Notice On Defendant's Motion To Strike Amended Indictment
05/24/2004 Hearing Scheduled (Hearing Scheduled 05/26/2004 11:30 AM)
05/24/2004 Hearing result for Motion held on 05/24/2004 11:00 AM: Hearing Held
05/24/2004 Court Minutes
05/24/2004 Hearing Scheduled (Motion 05/26/2004 12:00 PM)
05/25/2004 Memorandum In Response To Defendant's Motion To Strike Amended Indictment
05/25/2004 State's 7th Supplemental Response To Request For Discovery
05/26/2004 Hearing result for Jury Trial held on 09/27/2004 09:00 AM: Hearing Held
05/26/2004 Court Minutes
06/08/2004 State's 8th Supplemental Response To Request For Discovery
06/08/2004 Hearing Scheduled (Status 06/10/2004 02:00 PM)
06/08/2004 Notice Of Hearing
06/08/2004 Hearing Scheduled (Jury Trial 09/27/2004 09:00 AM)
06/10/2004 Hearing result for Status held on 06/10/2004 02:00 PM: Court Minutes
06/10/2004 Hearing result for Status held on 06/10/2004 02:00 PM: Hearing Held
06/10/2004 Motion for order directing sheriff immediately to resume custody of def & return def to the Blaine County Jail
06/10/2004 Hearing Scheduled (Scheduling Conference 06/29/2004 01:30 PM)
06/10/2004 Hearing Scheduled (Scheduling Conference 07/15/2004 01:30 PM)
06/10/2004 Hearing Scheduled (Scheduling Conference 08/10/2004 01:30 PM)
06/10/2004 Hearing Scheduled (Scheduling Conference 08/31/2004 01:30 PM)
06/10/2004 Hearing Scheduled (Pretrial Motions 08/12/2004 01:30 PM)

06/10/2004 Hearing Scheduled (Scheduling Conference 09/16/2004 09:00 AM)
06/10/2004 Notice Of Hearing
06/14/2004 State's proposed juror questionnaire
06/16/2004 State's addendum to proposed juror questionnaire
06/21/2004 State's 9th Supplemental Response To Request For Discovery
06/23/2004 Def's motion to compel discovery & request for sanctions
06/23/2004 Notice Of Hearing on Def's motion to compel discovery & request for sanctions
06/23/2004 Hearing Scheduled (Motion to Compel 06/29/2004 01:30 PM)
06/24/2004 Continued (Scheduling Conference 06/30/2004 09:00 AM)
06/24/2004 Continued (Motion to Compel 06/30/2004 09:00 AM)
06/24/2004 Notice Of Hearing
06/29/2004 Def's amended motion to compel discovery & request for sanctions
06/30/2004 Reporter Transcript pretrial scheduling conference held on June 10, 2004
06/30/2004 Hearing result for Motion to Compel held on 06/30/2004 09:00 AM: Court Minutes
06/30/2004 Hearing result for Motion to Compel held on 06/30/2004 09:00 AM: Hearing Held
06/30/2004 Hearing Scheduled (Pretrial Motions 07/07/2004 10:00 AM)
06/30/2004 Notice Of Hearing
07/01/2004 Motion for order directing the State to render up evidence for independent scientific examination & testing
07/01/2004 Motion to shorten time
07/01/2004 Notice Of Hearing
07/02/2004 Affidavit for search warrant
07/02/2004 Search Warrant Returned
07/02/2004 Receipt, Inventory & Return of Warrant
07/02/2004 Def's Response To Request For Discovery
07/02/2004 Motion for leave to supplement discovery
07/07/2004 Reporter transcript motion to compel/scheduling hearing on 6-30-04
07/07/2004 Def's amended proposed juror questionnaires
07/07/2004 Hearing result for Pretrial Motions held on 07/07/2004 10:00 AM: Court Minutes
07/07/2004 Hearing result for Pretrial Motions held on 07/07/2004 10:00 AM: Hearing Held
07/08/2004 State's 10th Supplemental Response To Request For Discovery
07/08/2004 State's 2nd Request for Discovery/demand For Alibi
07/08/2004 Motion to continue trial
07/08/2004 Notice Of Hearing on def's motion to continue trial
07/09/2004 State's response to Def's motion to continue jury trial
07/15/2004 Hearing Scheduled (Motion to Continue 07/15/2004 01:30 PM)
07/15/2004 Court Minutes Hearing type: Motion to Continue Hearing date: 07/15/2004 Time: 1:34 pm Court reporter: Linda Ledbetter Audio tape number: D907
07/15/2004 Hearing result for Motion to Continue held on 07/15/2004 01:30 PM: Hearing Held
07/15/2004 Court Minutes-review of the Johnson home
07/15/2004 Motion to continue denied
07/15/2004 Reporter transcript on motion for order re: testing dated July 7, 2004
07/16/2004 Motion for status conference
07/21/2004 Hearing Scheduled (Status 07/21/2004 12:00 PM)
07/21/2004 Hearing result for Status held on 07/21/2004 12:00 PM: Court Minutes
07/21/2004 Hearing result for Status held on 07/21/2004 12:00 PM: Hearing Held
07/21/2004 Hearing result for Jury Trial held on 09/27/2004 09:00 AM: Continued
07/22/2004 Hearing Scheduled (Jury Trial 02/01/2005 09:00 AM)
07/22/2004 Notice Of Hearing

07/27/2004	Motion for order to fix mute button on defense table microphone
07/27/2004	Motion re: juror badges
07/27/2004	Motion for order directing that the Def be unshackled and dressed in civilian clothes at trial; memorandum in support of motion
07/27/2004	Motion re: use of conclusory legal terms at trial
07/30/2004	Motion to exempt jurors from courthouse security measures
07/30/2004	Motion re: excuses from jury duty
07/30/2004	Motion to conduct individual & sequestered voir dire of prospective jurors
08/10/2004	Hearing result for Scheduling Conference held on 08/10/2004 01:30 PM: Hearing Vacated
08/10/2004	Hearing result for Pretrial Motions held on 08/12/2004 01:30 PM: Hearing Vacated
08/10/2004	Motion to exclude evidence re: Def's interactions w/ counselors
08/10/2004	Motion to exclude Def's medical & prescription records & related evidence
08/10/2004	Motion to exclude Def's school records & related evidence
08/10/2004	Motion for deadline to complete jury questionnaires
08/10/2004	Def's 4th Supplemental Request For Discovery
08/12/2004	State's Motion for discovery specificity & objection to release of evidentiary items
08/12/2004	Lodged: State's memorandum in support of objection to releasing evidence & demand for specificity
08/12/2004	Motion to suppress Def's statements to law enforcement personnel
08/12/2004	Motion to suppress Def's statements to James & Linda Vavold
08/12/2004	Motion to suppress Def's statements to jail inmates
08/12/2004	Motion to suppress Def's statements to Malinda Gonzales
08/12/2004	Def's 5th Supplemental Request For Discovery
08/18/2004	Continued (Scheduling Conference 09/15/2004 09:00 AM)
08/20/2004	Notice Of Bond Forfeiture
08/23/2004	Memorandum in Support of Motion to Suppress Defendnat's Statements to Jail Inmates
08/23/2004	State's Eleventh Supplemental Response to Request for Discovery
08/23/2004	Def's Motion to Compel Discovery and Response to State's Motion for Discovery Specificity and Objection to Release of Evidentiary Items
08/23/2004	Notice Of Hearing on Plaintiff's Motion for Discovery Specificity and Objection to Release of Evidentiary Items
08/23/2004	Notice Of Hearing on Defendant's Motion for Order Directing that the Defendant be Unshackled and Dressed in Civilian Clothes at Trial
08/23/2004	Notice Of Hearing on Defendant's Motion Re: Excuses from Jury Duty
08/23/2004	Notice Of Hearing on Defendant's Motion Re: Juror Badges
08/23/2004	Notice Of Hearing on Defendant's Motion to Exempt Jurors from Courthouse Security Measures
08/23/2004	Notice Of Hearing on Defendant's Motion Re: Use of Conclusory Legal Terms at Trial
08/23/2004	Notice Of Hearing on Defendant's Motion for Order to Fix Mute Button on Defense Table Microphone
08/23/2004	Notice Of Hearing on Defendant's Motion to Suppress Defendant's Statements to Jail Inmates
08/23/2004	Notice of Hearing on Defendant's Motion for Defendant's Motion for Deadline to Complete Jury Questionairesl
08/23/2004	Notice Of Hearing on Defendant's Motion to Conduct Individual and Sequestered Voir Dire of Prospective Jurors
08/24/2004	Lodged: Memorandum in support of motion to suppress Def's statements to jail inmates
08/25/2004	Affidavit Of Service- Subpoena, Greg Sage Lt. Blaine County Sheriff
08/25/2004	Affidavit Of Service - Suboieba Duces Tecum Greg Sage, Blaine County Sheriff
08/25/2004	Affidavit Of Service - Subpoena Stenve Harkins Blaine County Sheriff

08/25/2004	Affidavit Of Service - Subpoena, Walt Femling Blaine County Sheriff
08/27/2004	Lodged: Memorandum objecting to defense motion to prevent the state from using certain words at trial
08/27/2004	Lodged: Memorandum in opposition to def's motion to suppress Def's statements made to jail inmates
08/30/2004	State's Response To Motion For Order Directing That The Defendant Be Unshackled And Dressed In Civilian clothes At Trial
08/30/2004	State's Response To Defense Motion To Exempt Jurors From Courthouse Security Measures
08/30/2004	State's Response To Defense Motion For Deadline To Complete Jury Questionnaires
08/30/2004	State's Response To Defense Motion RE: Excuses From Jury Duty
08/30/2004	State's Response To Defense Motion To Conduct Individual And Sequestered Voir Dire Of Prospective Jurors
08/31/2004	Court Minutes Hearing type: Motion Hearing date: 08/31/2004 Time: 2:15 pm Court reporter: Linda Ledbetter Audio tape number: CD 28
08/31/2004	State's Motion to dismiss or in the alternative for a more definite statement, re: school records
08/31/2004	State's Motion to dismiss or in the alternative for a more definite statement, re: to James & Linda Vavold
08/31/2004	State's Motion to dismiss or in the alternative for a more definite statemetn, re: medical & prescription records
08/31/2004	State's Motion to dismiss or in the alternative for a more definite statement, re: school records
08/31/2004	Hearing result for Scheduling Conference held on 08/31/2004 01:30 PM: Hearing Held
08/31/2004	Lodged: Reporter Transcript of hearing on July 21, 2004
09/01/2004	Hearing Scheduled (Motion 10/06/2004 09:00 AM)
09/01/2004	Notice Of Hearing
09/15/2004	Request for briefing
09/21/2004	Notice Of Hearing on Def's motion to exclude evidence re: Def's interactions with counselors
09/21/2004	Notice Of Hearing on Def's motion to exclude Def's medical & prescription records & related evidence
09/21/2004	Notice Of Hearing on Def's motion to exclude Def's school records & related evidence
09/21/2004	Notice Of Hearing on Def's motion to suppress Def's statements to James & Linda Vavold
09/21/2004	Notice Of Hearing on Def's motion to suppress Def's statements to law enforcement personnel
09/21/2004	Notice Of Hearing on Def's motion to suppress Def's statements to jail inmates
09/28/2004	Lodged: memorandum in opposition to Def's motion to suppress Def's statements to James & Linda Vavold
09/28/2004	Lodged: Memorandum in opposition to Def's motion to suppress Def's statements to law enforcement personnel
09/28/2004	Lodged: Memorandum in support of motion to exclude Def's medical & prescription records & related evidence
09/28/2004	Lodged: Memorandum in support of motion to exclude testimony of Linda & James Vavold
09/28/2004	Lodged: Memorandum in support of motion to exclude Def's school records & related evidence
09/28/2004	Lodged: Memorandum in support of motion to evidence regarding Def's interactions with counselors
09/28/2004	Lodged: Memorandum in support of motion to suppress Def's statements to Law Enforecement Personnel
09/30/2004	Stipulation to prevent destruction of evidence by the defense
09/30/2004	Lodged: State's Release Inventory
10/01/2004	State's 12th Supplemental Response To Request For Discovery

10/04/2004 Affidavit Of Service
10/04/2004 Subpoena Returned-Linda Vavold
10/04/2004 Affidavit Of Service
10/04/2004 Subpoena Returned-Walt Femling
10/04/2004 Affidavit Of Service
10/04/2004 Subpoena Returned-Steve Harkins
10/04/2004 Affidavit Of Service
10/04/2004 Subpoena Returned-Tammy Hugh
10/04/2004 Affidavit Of Service
10/04/2004 Subpoena Returned-Greg Sage
10/04/2004 Affidavit Of Service
10/04/2004 Subpoena Returned-Doug Nelson
10/04/2004 Affidavit Of Service
10/04/2004 Subpoena Duces Tecum Returned-Greg Sage
10/06/2004 Court Minutes Hearing type: Motion to Suppress Hearing date: 10/06/2004 Time: 9:00 am Audio tape number: D2
10/06/2004 Order on request to obtain approval to broadcast and/or photograph a court proceeding
10/06/2004 Lodged: reporter's transcript hearing on August 31, 2004
10/06/2004 Hearing result for Motion held on 10/06/2004 09:00 AM: Hearing Held
10/07/2004 Hearing result for Motion held on 10/06/2004 09:00 AM: Case Taken Under Advisement
10/08/2004 Hearing Scheduled (Motion to Suppress 10/29/2004 09:00 AM)
10/08/2004 Notice Of Hearing
10/12/2004 Lodged: Amended Release Inventory
10/12/2004 Emergency motion for order directing State to remove Def from Solitary confinement, to house Def in accordance with the law, and to cease & desist isolating Def from her counsel
10/12/2004 Affidavit of Patrick Dunn
10/12/2004 Affidavit of Bob Pangburn
10/12/2004 Hearing Scheduled (Motion 10/13/2004 11:00 AM)
10/12/2004 State's motion to continue suppression hearing
10/13/2004 Hearing Held
10/13/2004 Court Minutes
10/13/2004 Hearing result for Motion held on 10/13/2004 11:00 AM: Hearing Held
10/13/2004 Notice Of Hearing
10/13/2004 Continued (Motion to Suppress 11/05/2004 11:00 AM)
10/13/2004 Order Setting Pre-Trial Motion Cutoff Date
10/13/2004 Order granting continuance of suppression motion
10/14/2004 State's Third Request For Discovery and Demand For Alibi
10/18/2004 Order re: access to Sarah Marie Johnson
10/22/2004 Notice to counsel of un-readable exhibits
10/22/2004 State's motion for reconsideration of denial of defense motion to conduct individual & requestered voir dire of prospective jurors
10/22/2004 Notice Of Hearing
10/22/2004 State's Motion for status hearing on juror questionnaires
10/22/2004 Notice Of Hearing
10/22/2004 Hearing Scheduled (Motion for Reconsideration 11/05/2004 11:00 AM)
10/25/2004 Order of Def's motion to suppress Def's statement to jail inmates
10/29/2004 State's motion to compel
10/29/2004 State's motion to shorten time for notice of hearing
10/29/2004 Notice Of Hearing
10/29/2004 Hearing Scheduled (Motion to Compel 11/02/2004 01:00 PM)
10/29/2004 Def's Response To Request For Discovery
Def's motion to compel State to cease and desist instructing State

10/29/2004	employees not to speak to the Defense
10/29/2004	Notice Of Hearing on Def's motion to compel State to cease and desist instructing State employees not to speak to the defense
10/29/2004	Def's motion to compel discovery for purposes of testing & request for sanctions
10/29/2004	Notice Of Hearing on Def's motion to compel discovery & request for sanctions
10/29/2004	Def's motion to compel State to permit examination of fingerprint evidence outside the presence of State investigators
10/29/2004	Notice Of Hearing on Def's motion to compel State to permit examination of fingerprint evidence outside the presence of State investigators
10/29/2004	Def's motion for order directing State to run fingerprint check of Bruno Santos
10/29/2004	Notice Of Hearing on Def's motion for order directing State to run fingerprint check of Bruno Santos
11/01/2004	State's motion to compel discovery
11/01/2004	Notice Of Hearing
11/01/2004	Hearing Scheduled (Motion to Compel 11/05/2004 11:00 AM)
11/01/2004	Affidavit Of Service
11/01/2004	Subpoena Duces Tecum Returned-James Boyle
11/01/2004	Certificate of true copy of subpoena (Duces Tecum)
11/01/2004	Hearing result for Motion to Compel held on 11/02/2004 01:00 PM: Hearing Vacated
11/01/2004	Ex parte motion to commit witness to bail
11/01/2004	Ex parte affidavit of Jim J. Thomas in support of motion to commit witness to bail
11/01/2004	Hearing Scheduled (Defendant's Motion to Compel 11/05/2004 11:00 AM)
11/01/2004	Hearing Scheduled (Motion for status hearing on jury questionnaires 11/05/2004 11:00 AM)
11/02/2004	Def's motion to compel photographic evidence
11/02/2004	Motion to shorten time
11/02/2004	Notice Of Hearing on Def's motion to compel photographic evidence & motion to shorten time
11/02/2004	Hearing Scheduled (Motion to Shorten Time 11/05/2004 11:00 AM)
11/02/2004	Ex Parte Order setting witness bail
11/03/2004	State's Response to Defendant's Motion for Order Directing State to Run Fingerprint Check of Bruno Santos
11/03/2004	State's Response to Defendant's Motion to Compel State to Cease and Desist Instructing State Employees not to Speak to the Defense
11/03/2004	State's Response to Defendant's Motion to Compel State to Permit Examination of Ringerprint Evidence Outside the Presence of State Investigators
11/03/2004	State's Response to Defendant's Motion to Compel Discovery for Purposes of Testing and Request for Sanctions
11/03/2004	State's Response to Defendant's Motion to Compel Photographic Evidence
11/04/2004	Order to Transport Defendant
11/04/2004	State's Motion for Order to Transport Defendant
11/04/2004	Notice Of Appearance; motion to quash witness bond; motion to shorten time; and notice of hearing-Doug Werth for Bruno Santos
11/04/2004	Discovery Request-Doug Werth for Bruno Santos
11/05/2004	Motion to Dismiss
11/05/2004	Motion to Exclude Evidence
11/05/2004	Motion To Suppress Illegally Obtained Physical Evidence
11/05/2004	Court Minutes Hearing type: Motion Hearing date: 11/05/2004 Time: 11:00 am Court reporter: Linda Ledbetter Audio tape number: D4
11/05/2004	Lodged: Reporter's transcript hearing on October 13, 2004
11/05/2004	Lodged: Reporter's transcript hearings on October 6 & 7, 2004
	Hearing result for Motion to Shorten Time held on 11/05/2004 11:00 AM:

11/05/2004	Hearing Held
11/05/2004	Hearing result for Motion for status hearing on jury questionnaires held on 11/05/2004 11:00 AM: Hearing Held
11/05/2004	Hearing result for Defendant's Motion to Compel held on 11/05/2004 11:00 AM: Hearing Held
11/05/2004	Hearing result for State's Motion to Compel held on 11/05/2004 11:00 AM: Hearing Held
11/05/2004	Hearing result for Motion for Reconsideration held on 11/05/2004 11:00 AM: Hearing Held
11/05/2004	Hearing result for Motion to Suppress held on 11/05/2004 11:00 AM: Hearing Held
11/05/2004	Hearing Scheduled (Motion 11/09/2004 10:00 AM)
11/05/2004	Affidavit of Consuelo Cederro
11/09/2004	Affidavit of Rick Filkins
11/09/2004	Affidavit of Douglas A. Werth
11/09/2004	Motion for Witness Pursuant to ICR 15 For Taking of Deposition and Discharge
11/09/2004	Hearing Scheduled (Status/Jury Procedures 11/24/2004 09:00 AM)
11/09/2004	Notice Of Hearing
11/09/2004	Hearing result for Motion held on 11/09/2004 10:00 AM: Hearing Held
11/09/2004	Second Affidavit of Douglas A. Werth
11/15/2004	Special State's Response To Request For Discovery Re: Bruno Santos Witness Bail Proceedings
11/16/2004	Stipulation for defense access to State's evidence
11/16/2004	State's motion for witness video deposition of Bruno Santos
11/16/2004	Affidavit of Jim J. Thomas in support of motion to take video deposition of Bruno Santos
11/16/2004	Notice Of Hearing
11/16/2004	State's motion for witness deposition of Consuelo Cedeno/Cederra
11/16/2004	Affidavit of Jim J. Thomas in support of motion to take video deposition of Consuelo Cedeno/Cederro
11/16/2004	Notice Of Hearing
11/17/2004	State's Thirteenth Supplemental Response To Request For Discovery
11/18/2004	Hearing Scheduled (Motion for Witness Deposition 11/24/2004 09:00 AM)
11/19/2004	Notice Of 2nd Hearing on Def's motion to compel discovery for purposes of testing
11/19/2004	Hearing Scheduled (Motion to Compel 11/24/2004 09:00 AM)
11/22/2004	Def's 6th supplemental request for discovery
11/23/2004	Lodged: Def's objection to State's motions to depose witnesses & memorandum in support
11/23/2004	Affidavit Of Service
11/23/2004	Subpoena Returned-Greg Sage
11/24/2004	Court Minutes Hearing type: Motion for Witness Deposition Hearing date: 11/24/2004 Time: 9:24 am Court reporter: Susan Israel Audio tape number: D6
11/24/2004	Hearing result for Motion to Compel held on 11/24/2004 09:00 AM: Hearing Held
11/24/2004	Hearing result for Motion for Witness Deposition held on 11/24/2004 09:00 AM: Hearing Held
11/24/2004	Hearing result for Status/Jury Procedures held on 11/24/2004 09:00 AM: Hearing Held
11/24/2004	Hearing Scheduled (Status/Jury Procedures 12/03/2004 09:00 AM)
11/24/2004	Notice Of Hearing
12/01/2004	Order on Def's motion to exclude Def's school records & related evidence, motion to exclude Def's interaction with counselors, and Def's motion to exclude medical & prescription records & related evidence
12/02/2004	State's 14th Supplemental Response To Request For Discovery

12/03/2004 Hearing result for Status/Jury Procedures held on 12/03/2004 09:00 AM: Hearing Held
12/03/2004 Court Minutes
12/03/2004 Lodged: reporter transcript for November 9, 2004
12/03/2004 Lodged: reporter transcript for November 5, 2004
12/03/2004 Jury Questionnaire
12/09/2004 Hearing Scheduled (Status/Jury Procedures 12/14/2004 01:00 PM)
12/09/2004 Notice Of Hearing
12/09/2004 Affidavit Of Service
12/09/2004 Subpoena Duces Tecum Returned-Lt. Dennis Dexter
12/09/2004 Certificate of true copy of subpoena duces tecum
12/14/2004 Subpoena Returned/Mark Dalton
12/14/2004 Subpoena Returned/Ed Fuller
12/14/2004 Court Minutes Hearing type: Status Hearing date: 12/14/2004 Time: 11:00 am Court reporter: Linda Ledbetter Audio tape number: D8
12/14/2004 Order denying Bob Pangburn's motion to withdraw
12/14/2004 Order denying Mark Rader's motion to withdraw
12/14/2004 Lodged: reporter's transcript from December 3, 2004
12/14/2004 Hearing Held
12/14/2004 Return Of Service
12/14/2004 Subpoena Returned- served on 12/13/04 to Ed Fuller
12/14/2004 Return Of Service
12/14/2004 Subpoena Returned- served on 12/13/04 to Mark Dalton
12/14/2004 Court Minutes Hearing type: Status/Jury Procedures Hearing date: 12/14/2004 Time: 9:00 am Court reporter: Linda Ledbetter Audio tape number: D8
12/14/2004 Hearing result for Status/Jury Procedures held on 12/14/2004 01:00 PM: Hearing Held
12/15/2004 State's Supplemental Response To Request For Discovery
12/15/2004 Subpoena Returned/Phil High 12/10/04
12/15/2004 Subpoena Returned / Gene Ramsey 12/10/04
12/15/2004 Subpoena Returned / Walt Femling 12/10/04
12/15/2004 Subpoena Returned / Greg Sage 12/10/04
12/15/2004 Subpoena Returned /Connie Burrell 12/10/04
12/15/2004 Subpoena Returned / Bryan Carpita 12/10/04
12/15/2004 Subpoena Returned/ Brad Gelskey 12/10/04
12/15/2004 Subpoena Returned / James Shaw 12/10/04
12/15/2004 Subpoena Returned/ Salen Mink 12/15/2004
12/15/2004 Subpoena Returned / Gary Kaufman
12/15/2004 Subpoena Returned/ Nathan Corder
12/15/2004 Subpoena Returned/ Cliff Katona
12/15/2004 Subpoena Returned / Cloyce Corder
12/15/2004 Subpoena Returned/ Stu Robinson
12/15/2004 Subpoena Returned / Ron Taylor
12/15/2004 Subpoena Returned / Steve Harkins
12/15/2004 Court Minutes
12/15/2004 Hearing Held
12/17/2004 Hearing Scheduled (Status 12/29/2004 09:00 AM)
12/17/2004 Hearing Scheduled (Status 01/07/2005 09:00 AM)
12/17/2004 Hearing Scheduled (Status 01/24/2005 09:00 AM)
12/17/2004 Hearing Scheduled (Order to Show Cause 12/23/2004 09:00 AM)
12/17/2004 Notice Of Hearing
12/20/2004 Subpoena Returned / Lorna Kolash
12/20/2004 Subpoena Returned Christian Ayala
12/20/2004 Subpoena Returned Pat Alder

12/20/2004 Subpoena Returned Mitch Marcroft
12/20/2004 Subpoena Returned Kjell Elisson
12/20/2004 Subpoena Returned Steve England
12/20/2004 Subpoena Returned Dorothy Schinella
12/20/2004 Subpoena Returned Karen's Pharmacy
12/20/2004 Subpoena Returned Kyle Worthington
12/20/2004 Subpoena Returned Marguerite Sowersby
12/20/2004 Subpoena Returned/ Megan Sowersby
12/20/2004 Subpoena Returned/ George Dondero
12/20/2004 Subpoena Returned/ Karen Soracco
12/20/2004 Subpoena Returned/ Mark Roemer
12/20/2004 Subpoena Returned/ Rachel Richards
12/20/2004 Subpoena Returned/ Tim Richards
12/20/2004 Subpoena Returned/ Kim Richards
12/20/2004 Subpoena Returned/ Terri Sanders
12/20/2004 Subpoena Returned/ Russ Mikel, Coroner
12/20/2004 Subpoena Returned/ Randy Tremble
12/20/2004 Subpoena Returned/ Chante Caudle
12/20/2004 Subpoena Returned/ Raul Ornelas
12/21/2004 Personal Return Of Service Subpoena Returned/ Matt Johnson
12/21/2004 Personal Return Of Service Subpoena Returned/ Julie Weseman Johnson
12/21/2004 Not Found Return Of Service/ Carlos Ayala
12/21/2004 Not Found Return Of Service/ Cami Fahey
12/21/2004 Subpoena Returned/ Rod Englert
12/21/2004 Subpoena Returned/ Rick Sanford, INS
12/21/2004 Subpoena Returned-Scott Birch
12/21/2004 Subpoena Returned-Gary Deulen
12/21/2004 Subpoena Returned=Michael Dillon
12/22/2004 Lodged/Memorandum in Support of Motion to Suppress Defendant's Statements to Malinda Gonzales
12/22/2004 Subpoena Returned-Cam Daggett
12/22/2004 Subpoena Returned-Timothy Neville
12/22/2004 Subpoena Returned-Mark Palmer
12/22/2004 Subpoena Returned-Barbara Coleman
12/22/2004 Subpoena Returned-Syringa Stark
12/23/2004 Court Minutes Hearing type: Order to Show Cause Hearing date: 12/23/2004 Time: 9:00 am Court reporter: Linda Ledbetter Audio tape number: D11
12/23/2004 Notice Of Hearing on Def's motion suppress Def's statements to Malinda Gonzalez
12/23/2004 Hearing result for Order to Show Cause held on 12/23/2004 09:00 AM: Hearing Held
12/23/2004 Hearing Scheduled (Motion to Suppress 12/29/2004 09:00 AM)
12/23/2004 Subpoena Returned/ Becky Lopez
12/23/2004 Lodged: reporter transcript for hearing on December 14th & 15th, 2004
12/23/2004 Order on Def's motion to suppress Def's statements to law enforcement personnel
12/27/2004 Subpoena Returned-Malinda Gonzales
12/27/2004 Subpoena Returned-Jennifer Babbitt
12/28/2004 Hearing result for Motion to Suppress held on 12/29/2004 09:00 AM: Hearing Vacated
12/28/2004 Lodged: letter from Bob Pangburn vacating motion to suppress hearing on December 29, 2004
12/28/2004 Subpoena Returned-John Koth
12/28/2004 Subpoena Returned-Mark Fields
Lodged: Memorandum in opposition to Def's motion to suppress Def's

12/28/2004 statements made to Malinda Gonzales

12/29/2004 Hearing result for Status held on 12/29/2004 09:00 AM: Court Minutes

12/29/2004 Hearing result for Status held on 12/29/2004 09:00 AM: Hearing Held

12/29/2004 Hearing Scheduled (Status/Jury Procedures 01/06/2005 12:00 PM)

12/29/2004 Lodged: Reporter's transcript for hearing on December 23,2004

12/29/2004 Subpoena Returned-Dan Tiller

12/29/2004 Summons Issued-juror Richard Grandlich

12/29/2004 Summons Issued-juror Ruben Lopez

12/29/2004 Summons Issued-juror George Paddi

12/29/2004 Summons Issued-juror Kimball Luff

12/29/2004 Summons Issued-juror Rebecca Austin

12/30/2004 Notice Of Hearing

12/30/2004 Subpoena Returned-Carlos Ayala

12/30/2004 Notice Of Hearing on Def's motion to suppress Def's statements to Malinda Gonzales

12/30/2004 Notice Of Hearing on Def's motion to suppress illegally obtained physical evidence

01/03/2005 Affidavit Of Service-subpoena duces tecum for Lt. Greg Sage

01/03/2005 Motion to shorten time

01/03/2005 Notice Of Hearing on motion to shorten time

01/03/2005 Motion for order to disclose certain documents

01/03/2005 Lodged: Memorandum in support of motion to suppress illegally obtained physical evidence

01/03/2005 Lodged: State's memorandum regarding jury selection

01/04/2005 Affidavit Of Service

01/04/2005 Subpoena Duces Tecum Returned

01/04/2005 Certificate Of true copy of subpoena duces tecum

01/04/2005 Return Of Service Ross Kirtley

01/06/2005 Subpoena Returned Served Robin Lehat

01/06/2005 Subpoena Returned Served Leslie Luccesi

01/06/2005 Subpoena Returned Served Russell Nuxoll

01/06/2005 Subpoena Returned Served Janet Sylten

01/06/2005 Subpoena Returned Served Jane Jiminez

01/06/2005 Subpoena Returned Served Cami Mae Bustos

01/06/2005 Subpoena Returned Served Carlos Ayala

01/06/2005 Subpoena Returned Served Mike Oosting

01/06/2005 Court Minutes Hearing type: Status/Jury Procedures Hearing date: 01/06/2005 Time: 12:07 pm Court reporter: Linda Ledbetter Audio tape number: D12

01/06/2005 Return Of Service

01/06/2005 Subpoena Returned Served John Schrader on 12/30/04

01/06/2005 Return Of Service

01/06/2005 Subpoena Returned Served Jim Vavold on 1/4/05

01/06/2005 Court Minutes

01/07/2005 Court Minutes Hearing type: Motion to Suppress Hearing date: 01/07/2005 Time: 9:00 am Court reporter: Linda Ledbetter Audio tape number: D12

01/07/2005 Subpoena Returned Served Linda Vavold

01/07/2005 State's Motion to Shorten Time for Notice of Hearing

01/07/2005 State's Motion to Continue Jury Trial

01/07/2005 Notice Of Hearing

01/07/2005 Hearing Scheduled (Motion to Continue 01/10/2005 09:00 AM)

01/07/2005 Hearing result for Motion to Suppress held on 01/07/2005 09:00 AM: Hearing Held

01/07/2005 Order on Def's oral motion to remove action before trial IC 19-1801 &

	notice to the parties
01/10/2005	State's Objection to Consumption of Sample and Motion to Require Disclosure of Consumed Sample
01/10/2005	Subpoena Returned Served Jeff Brown
01/10/2005	Subpoena Returned Served Andrew Stark
01/10/2005	Court Minutes Hearing type: Motion to Continue Hearing date: 01/10/2005 Time: 1:03 pm Court reporter: Linda Ledbetter Audio tape number: 9393
01/10/2005	Hearing result for Motion to Continue held on 01/10/2005 09:00 AM: Hearing Held
01/10/2005	Subpoena Returned-Scott Ward
01/10/2005	Subpoena Returned-Rob Stiles
01/10/2005	Subpoena Returned-Amber Moss
01/10/2005	Subpoena Returned-Kristina Paulette
01/10/2005	Subpoena Returned-Wayne Niemeyer
01/10/2005	Subpoena Returned-William Chapin
01/10/2005	State's 16th Supplemental Response To Request For Discovery
01/11/2005	Return Of Service
01/11/2005	Subpoena Returned- Served 1/11/05 Joey Jaramillo
01/11/2005	Return Of Service
01/11/2005	Subpoena Returned- Served 1/10/05 Karen Chase
01/11/2005	Amended order on Def's oral motion to remove action before trial & notice to the parties regarding further proceedings
01/13/2005	Request to obtain approval to broadcast and/or photograph a court proceeding & order-ABC News in New York
01/13/2005	Request to obtain approval to broadcast and/or photograph a court proceeding & order-Court TV in New York
01/14/2005	Subpoena Returned-No Found Consuelo Cedeno
01/14/2005	Amended order re: access to Sarah Marie Johnson
01/18/2005	Subpoena Returned Robin Lahat
01/18/2005	Subpoena Returned Carlos Ayala
01/18/2005	Subpoena Returned Jim Hopkins
01/18/2005	Subpoena Returned Marguerite Sowersby
01/18/2005	Subpoena Returned Walt Femling
01/18/2005	Subpoena Returned Chante Caudle
01/18/2005	Subpoena Returned Scott Ward
01/18/2005	Subpoena Returned Noveta Hartmann
01/18/2005	Subpoena Returned Max Bailey
01/18/2005	Subpoena Returned Susan Choat
01/18/2005	Subpoena Returned Autumn Fisher
01/18/2005	Subpoena Returned Randy Trenble
01/18/2005	Subpoena Returned Ann Gasaway
01/18/2005	Subpoena Returned Melissa Miller
01/18/2005	Subpoena Returned Tim Richards
01/18/2005	Subpoena Returned Dorothy Schinella
01/18/2005	Subpoena Returned Andrea Karle
01/18/2005	Subpoena Returned Tina Olson
01/18/2005	Subpoena Returned Mark Palmer
01/18/2005	Subpoena Returned George Dondero
01/18/2005	Subpoena Returned Brenda Annen
01/18/2005	Subpoena Returned Karen Chase
01/18/2005	Subpoena Returned Janet Sylten
01/18/2005	Subpoena Returned Linda O'Connor
01/18/2005	Subpoena Returned Mark Fields
01/18/2005	Subpoena Returned Christian Ayala

01/18/2005 Subpoena Returned Pat Alder
01/18/2005 Subpoena Returned Mitch Marcroft
01/18/2005 Subpoena Returned Kjell Elisson
01/18/2005 Subpoena Returned Terri Sanders
01/18/2005 Subpoena Returned Kim Richards
01/18/2005 Subpoena Returned Rachel Richards
01/18/2005 Subpoena Returned Cloyce Corder
01/18/2005 Subpoena Returned Bryan Carpita
01/18/2005 Subpoena Returned Megan Sowersby
01/18/2005 Subpoena Returned Jane Lopez-Jiminez
01/18/2005 Subpoena Returned Becky Lopez
01/18/2005 Subpoena Returned Stu Robinson
01/18/2005 Subpoena Returned Steve Harkins
01/18/2005 Subpoena Returned Ron Taylor
01/18/2005 Subpoena Returned Mark Roemer
01/18/2005 Subpoena Returned Russell Nuxoll
01/19/2005 Subpoena Returned Lorna Kolash
01/19/2005 Subpoena Returned Mike Oosting
01/19/2005 Subpoena Returned Lois Standley
01/19/2005 Subpoena Returned Syringa Stark
01/19/2005 Subpoena Returned Karen Soracco
01/19/2005 Subpoena Returned Mel Speegle
01/19/2005 Subpoena Returned Barbara Coleman
01/20/2005 State's Third Motion To Compel Discovery
01/20/2005 Notice Of Hearing
01/20/2005 Hearing Scheduled (Motion to Compel 01/24/2005 09:00 AM)
01/20/2005 State's Motion to Shorten Time for Notice of Hearing
01/20/2005 Subpoena Returned Steve England
01/20/2005 Subpoena Returned Timothy Neville
01/20/2005 Subpoena Returned Cami Fahey
01/20/2005 Subpoena Returned John Koth
01/20/2005 Subpoena Returned Jeff Brown
01/20/2005 Subpoena Returned Gene Ramsey
01/20/2005 Subpoena Returned Raul Ornelas
01/20/2005 Subpoena Returned Gary Kaufman
01/20/2005 Subpoena Returned Selena Mink
01/20/2005 Subpoena Returned Nathan Corder
01/20/2005 Subpoena Returned Malinda Gonzales
01/20/2005 Subpoena Returned Cliff Katona
01/20/2005 Subpoena Returned Kevin Haight
01/20/2005 State's Trial Witness List
01/20/2005 State's Proposed Jury Instructions
01/20/2005 State's Motion to Allow the Jury to Visit the Crime Scene
01/20/2005 State's 17th Supplemental Response To Request For Discovery
01/21/2005 State's anticipated trial exhibit list
01/21/2005 Subpoena Returned-US Cellular Records Custodian
01/21/2005 Subpoena Returned-Cingular Records Custodian
01/21/2005 Subpoena Returned-Qwest Records Custodian
01/21/2005 Subpoena Returned-Verizon Wireless Records
01/21/2005 Subpoena Returned-Edge Wireless
01/21/2005 Subpoena Returned-Roberta Dachtler
01/21/2005 Subpoena Returned-Phil High
01/21/2005 Subpoena Returned-Russ Mikel
01/21/2005 Subpoena Returned-Brad Gelskey

01/21/2005 Subpoena Returned-Mark Dalton
01/21/2005 Subpoena Returned-Connie Burrell
01/21/2005 Subpoena Returned-Conseulo Cedeno
01/21/2005 Subpoena Returned-Leslie Luccesi
01/24/2005 Stipulation & order re: jury questionnaires
01/24/2005 Addendum to State's proposed jury instructiosn
01/24/2005 Lodged: Reporter's transcript from January 6, 2005
01/24/2005 Lodged: Reporter's transcript from January 7, 2005
01/24/2005 Lodged: Reporter's transcript from January 10, 2005
01/24/2005 Request to obtain approval to broadcast and/or photograph a court proceeding
01/24/2005 Hearing result for Motion to Compel held on 01/24/2005 09:00 AM: Court Minutes
01/24/2005 Hearing result for Motion to Compel held on 01/24/2005 09:00 AM: Hearing Held
01/24/2005 Hearing Scheduled (Status 01/31/2005 01:00 PM)
01/25/2005 Subpoena Returned-Mark Sliwicki
01/25/2005 Subpoena Returned-Greg Sage
01/25/2005 Subpoena Returned-Karen's Pharmacy
01/25/2005 Subpoena Returned-Vicki Theis
01/26/2005 Request to obtain approval to broadcast and/or photograph a court proceeding & order-KMVT News in Twin
01/27/2005 Subpoena Returned Matt Johnson
01/27/2005 Subpoena Returned Danny Thornton
01/27/2005 Subpoena Returned James Shaw
01/27/2005 Subpoena Returned Joey Jaramillo
01/27/2005 Subpoena Returned Bruno Santos
01/27/2005 Subpoena Returned Michael Fishman
01/27/2005 State's 18TH Supplemental Response To Request For Discovery
01/27/2005 Subpoena Returned-Ed Fuller
01/27/2005 Subpoena Returned-Matt Johnson
01/28/2005 Court Minutes Hearing type: Status Hearing date: 01/28/2005 Time: 10:00 am Court reporter: Linda Ledbetter
01/28/2005 Hearing Held
01/28/2005 Affidavit Of Service
01/28/2005 Subpoena Duces Tecum Returned-Greg Sage
01/28/2005 Affidavit Of Service
01/28/2005 Subpoena Duces Tecum Returned-Dennis Dexter or Lt. Mike Fehlman
01/28/2005 Affidavit Of Service
01/28/2005 Subpoena Duces Tecum Returned-Lt. Dennis Dexter or Lt. Mike Fehlman
01/28/2005 Request to obtain approval to broadcase and/or photograph a court proceeding-The Wood River Journal
01/31/2005 Motion to exclude defense witnesses & evidence due to late disclosure
01/31/2005 State's motion to shorten time for notice of hearing
01/31/2005 Order granting motion to shorten time
01/31/2005 Notice Of Hearing
01/31/2005 Hearing result for Status held on 01/31/2005 01:00 PM: Court Minutes
01/31/2005 Hearing result for Status held on 01/31/2005 01:00 PM: Hearing Held
01/31/2005 Def's witness & exhibit list
02/01/2005 Hearing result for Jury Trial held on 02/01/2005 09:00 AM: Jury Trial Started
02/01/2005 Court Minutes
02/01/2005 Initial Instructions to the Prospective Jury Part I
02/02/2005 Court Minutes

02/02/2005 Order
02/02/2005 Initial Instructions to the Prospective Jury Part II
02/03/2005 Subpoena Returned Rae Whittaker
02/03/2005 Court Minutes
02/04/2005 State's 19th Supplemental Response To Request For Discovery
02/04/2005 State's notice of intent to seek exclusion of defense witnesses & evidence due to late disclosure
02/04/2005 Court Minutes
02/04/2005 Subpoena Returned-Tina Walthall
02/04/2005 Subpoena Returned-Claudia Hooten
02/04/2005 Subpoena Returned-Debbie Davis
02/04/2005 Subpoena Returned-Katie Metzger
02/04/2005 Subpoena Returned-Brian Perkins
02/04/2005 Subpoena Returned-Kathryn Wallace
02/04/2005 State's witness list
02/04/2005 Subpoena Returned-Gary Craven
02/04/2005 Subpoena Returned-Kassie Weber
02/04/2005 Subpoena Returned-Jim Vavold
02/04/2005 Subpoena Returned-Dean Dishman
02/04/2005 Subpoena Returned-Linda Vavold
02/04/2005 Subpoena Returned-Patricia Dishman
02/04/2005 Subpoena Returned-Jennifer Babbitt
02/04/2005 Subpoena Returned-Cynthia Hall
02/04/2005 Subpoena Returned-Nicole Settle
02/04/2005 Subpoena Returned-Ross Kirtley
02/04/2005 Subpoena Returned-Julia Dupuis
02/04/2005 Subpoena Returned-Helen Speegle
02/04/2005 Subpoena Returned-Dwight Vanhorn
02/04/2005 Subpoena Returned-John Schrader
02/04/2005 Subpoena Returned-Andrew Stark
02/04/2005 Subpoena Returned-Scott Birch
02/04/2005 Subpoena Returned-Alan Dupois
02/07/2005 Court Minutes
02/07/2005 Amended Def's witness list
02/07/2005 Preliminary Instructions to the Jury
02/08/2005 Court Minutes
02/08/2005 Subpoena Returned-Michael Dillon
02/08/2005 Subpoena Returned-Gary Deulen, not served
02/08/2005 Subpoena Returned-Debbie Davis, not served
02/08/2005 Subpoena Returned-Mel Speegle, not served
02/08/2005 Subpoena Returned-Helen Speegle, not served
02/08/2005 Subpoena Returned-Cynthia Hall, not served
02/08/2005 Subpoena Returned-Tina Walthall, not served
02/08/2005 Subpoena Returned-Glen Groben, not served
02/08/2005 Subpoena Returned-Katie Metzger, not served
02/08/2005 Subpoena Returned-Julia Dupois, not served
02/08/2005 Subpoena Returned-Alan Dupois, not served
02/08/2005 Certification of Material Witness
02/08/2005 Trial Points & Authorities re: objections to testimony of Walt Femling
02/08/2005 Subpoena Returned-Ariadne Condos
02/08/2005 Subpoena Returned-Bryan Higgason, Jr
02/09/2005 Court Minutes
02/10/2005 Court Minutes
02/11/2005 Court Minutes

02/14/2005 Court Minutes
02/15/2005 Court Minutes
02/15/2005 Lodged: letter from Jim Thomas to Doug Werth
02/15/2005 Motion to dismiss witness bail
02/15/2005 State's Motion in limine re: Bruno Santos Dominguez
02/16/2005 Court Minutes
02/16/2005 State's 20th Supplemental Response To Request For Discovery
02/16/2005 Lodged: State's memorandum regarding lesser included offenses
02/17/2005 Court Minutes
02/17/2005 State's 21st Supplemental Response To Request For Discovery
02/18/2005 Court Minutes
02/18/2005 Order to transport defendant-Malinda Gonzalez
02/22/2005 Court Minutes
02/22/2005 Lodged: State's memorandum in support of motion in limine
02/22/2005 State's offered caselaw in support of aider & abetter instruction
02/22/2005 State's Motion in limine
02/22/2005 Notice of intent not to introduce contents of October 29, 2003 interview
02/23/2005 Court Minutes
02/23/2005 Def's 7th Supplemental Request For Discovery
02/24/2005 Court Minutes
02/24/2005 State's 22nd Supplemental Response To Request For Discovery
02/24/2005 Request to obtain approval to broadcast and/or photograph a court proceeding
02/25/2005 Court Minutes
02/25/2005 Def's second amended witness list
02/25/2005 Objection to State's motion in limine & memorandum in support
02/28/2005 Court Minutes
03/01/2005 Court Minutes
03/02/2005 Court Minutes
03/03/2005 Court Minutes
03/03/2005 Subpoena Returned-Jeannie Frost
03/04/2005 Court Minutes
03/07/2005 Court Minutes
03/07/2005 Defendant's third amended witness list
03/08/2005 Court Minutes
03/08/2005 Defendant's proposed jury instruction
03/09/2005 Court Minutes
03/09/2005 Lodged: State's memorandum in support of aiding & abetting instruction
03/10/2005 Court Minutes
03/10/2005 Order granting motion to dismiss witness bail
03/10/2005 Ex Parte Motion to Quash Witness Bond
03/11/2005 Court Minutes
03/14/2005 Court Minutes
03/14/2005 Def's objections to the Court's findings of fact in support of jury instruction No. 30
03/14/2005 Final Instructions to the Jury
03/15/2005 Court Minutes
03/15/2005 Court Minute Entry (Supplemental)
03/15/2005 Court Minute Entry (supplemental)
03/15/2005 Court Minute Entry (supplemental)
03/15/2005 Post Verdict Jury Instruction
03/16/2005 Court Minutes
03/16/2005 Verdict Form
03/16/2005 Found Guilty After Trial
03/16/2005 Hearing Scheduled (Sentencing 05/19/2005 09:00 AM)

03/17/2005	Notice of sentencing hearing & order regarding preparation for sentencing hearing
03/17/2005	Exhibit list-receipt
03/21/2005	Hearing Scheduled (Status 03/24/2005 01:00 PM) Status regarding sentencing
03/21/2005	Notice Of Hearing
03/24/2005	Court Minutes Hearing type: Status Hearing date: 03/24/2005 Time: 1:00 pm Court reporter: Linda Ledbetter Audio tape number: d19
03/24/2005	Notice Of Hearing
03/24/2005	Hearing Scheduled (Status 04/19/2005 01:30 PM) regarding sentencing, may be held by phone conference per 43.1 ICR
03/24/2005	Hearing Scheduled (Status 05/17/2005 01:30 PM) regarding sentencing, may be held by phone conference per 43.1 ICR
03/24/2005	Hearing Scheduled (Status 06/14/2005 01:30 PM) regarding sentencing, may be held by phone conference per 43.1 ICR
03/24/2005	Hearing result for Status held on 03/24/2005 01:00 PM: Court Minutes Status regarding sentencing
03/24/2005	Hearing result for Status held on 03/24/2005 01:00 PM: Hearing Held Status regarding sentencing
03/25/2005	Motion to relocate the Def to the Ada County Jail
03/28/2005	Motion for new trial
03/28/2005	Motion for judgment of acquittal
03/28/2005	Motion for arrest of judgment
03/30/2005	Sentencing 06/29/2005 09:00 AM
03/30/2005	Hearing Scheduled (Motion 04/12/2005 02:30 PM) for relocation
03/30/2005	Notice Of Hearing
03/30/2005	Lodged Memorandum
04/07/2005	Letter from Bob Pangburn advising the Court they have chosen Richard Worst, PHD to perform psychological evaluation on Def
04/07/2005	Lodged: Memorandum objecting to Def's motion for judgment of acquittal
04/07/2005	Lodged: Memorandum objecting to Def's motion for arrest of judgment
04/07/2005	Lodged: Memorandum objecting to Def's motion for a new trial
04/11/2005	Motion for OTSC why Sheriff Walt Femling, Lieutenant Greg Sage and Deputy Bear Dachtler & additional persons yet unknown should not be held in contempt of court
04/11/2005	Affidavit of Linda Dunn
04/11/2005	Affidavit of Patrick Dunn
04/11/2005	Motion for access to client in accordance with constitutional guarantees
04/11/2005	Motion to shorten time for notice of hearing
04/12/2005	Continued (Motion 04/12/2005 02:00 PM) for relocation
04/12/2005	Hearing result for Motion held on 04/12/2005 02:00 PM: Court Minutes for relocation
04/12/2005	Hearing result for Motion held on 04/12/2005 02:00 PM: Hearing Held for relocation
04/14/2005	Hearing Scheduled (Motion 05/03/2005 01:00 PM) Motion for a new trial
04/14/2005	Hearing Scheduled (Motion 05/03/2005 01:00 PM) Motion for acquittal
04/14/2005	Hearing Scheduled (Motion 05/03/2005 01:00 PM) Motion for Arrest of Judgment
04/14/2005	Notice Of Hearing
04/15/2005	Hearing Scheduled (Order to Show Cause 04/27/2005 10:00 AM)
04/18/2005	Hearing Scheduled (Order to Show Cause 04/27/2005 10:00 AM)
04/18/2005	Order To Show Cause - Issued sua sponte
04/19/2005	Hearing result for Status held on 04/19/2005 01:30 PM: Court Minutes regarding sentencing, may be held by phone conference per 43.1 ICR
04/19/2005	Hearing result for Status held on 04/19/2005 01:30 PM: Hearing Held regarding sentencing, may be held by phone conference per 43.1 ICR
04/25/2005	Order for Transport

04/27/2005 Hearing result for Order to Show Cause held on 04/27/2005 10:00 AM: Court Minutes

04/27/2005 Hearing result for Order to Show Cause held on 04/27/2005 10:00 AM: Hearing Held

04/29/2005 Lodged Memorandum in Support of Motion for New Trail

04/29/2005 Lodged Memorandum in Support of Motion for Judgment of Aquittal

04/29/2005 Affidavit of Patrick Dunn

04/29/2005 Affidavit of Linda Dunn

05/02/2005 Affidavit of Anita Moore

05/02/2005 Lodged Supplemental Memorandum in Support of Motion for New Trial

05/03/2005 Hearing result for Motion held on 05/03/2005 01:00 PM: Court Minutes Motion for Arrest of Judgment

05/03/2005 Hearing result for Motion held on 05/03/2005 01:00 PM: Hearing Held Motion for Arrest of Judgment

05/03/2005 Continued (Motion 05/17/2005 01:00 PM) Motion for a new trial

05/12/2005 Subpoena Returned-Hal Cloutier

05/12/2005 Subpoena Returned-Steve McKissick

05/13/2005 Affidavit of Jurors

05/13/2005 Lodged Supplemental Memorandum Objecting to Defendant's Motion for a New Trial

05/16/2005 Request to Obtain Approval to Broadcast and/or Photograph Court Proceedings

05/16/2005 Order to Broadcast and/or Photograph Court Proceedings

05/17/2005 Affidavit of Juror in the Sarah Marie Johnson Trial

05/17/2005 Hearing result for Motion held on 05/17/2005 01:30 PM: Court Minutes Motion for a new trial

05/17/2005 Hearing result for Motion held on 05/17/2005 01:30 PM: Hearing Held Motion for a new trial

05/20/2005 Affidavit of juror in the Sarah Marie Johnson trial

06/02/2005 Lodged Letter

06/07/2005 Motion for order to disclose certain documents

06/07/2005 Notice Of Hearing

06/07/2005 Hearing Scheduled (Motion 06/14/2005 01:30 PM) motion for order to disclose certain documents

06/10/2005 State's Objection to Payment of Services and Motion to Reconsider Previous Authorizations of Payment

06/10/2005 State's Objection to Motion for Order to Disclose Certain Documents

06/10/2005 Notice Of Hearing

06/10/2005 Hearing Scheduled (Motion 06/14/2005 01:30 PM) State's Motion to Reconsider Previous Authorization of Payment

06/14/2005 Hearing result for Motion held on 06/14/2005 01:30 PM: Court Minutes motion for order to disclose certain documents

06/14/2005 Hearing result for Motion held on 06/14/2005 01:30 PM: Hearing Held motion for order to disclose certain documents

06/14/2005 Motion to Recuse Prosecutor and Memorandum in Support

06/15/2005 Hearing Scheduled (Motion 06/23/2005 10:00 AM)

06/15/2005 Notice Of Hearing

06/15/2005 Subpoena Issued-Doug Nelson

06/15/2005 Request to Obtain Approval to Broadcast and/or Photograph a Court Proceeding

06/15/2005 Order to Broadcast or Photograph a Court Proceeding

06/15/2005 State's Motion to Obtain Certain Documents from Dr. Worst

06/15/2005 State's Motion to Shorten Time for Notice of Hearing

06/17/2005 Court Minutes Hearing type: Motion Hearing date: 06/17/2005 Time: 11:15 am Court reporter: Linda Ledbetter Audio tape number: d28

06/17/2005 Lodged Memorandum Objecting to Defendant's Motion to Recuse Prosecutor

06/17/2005 Order on State's Motion to Obtain Certain Documents from Dr. Worst

06/17/2005 Order on Defendant's Motion to Recuse Prosecutor
06/17/2005 Order Granting Motion to Shorten Time
06/17/2005 Hearing Held
06/21/2005 Order for Request to Obtain Approval to Broadcast and/or Photograph a Court Proceeding
06/22/2005 Order Request to Obtain Approval to Broadcast and/or Photograph a Court Proceeding
06/27/2005 Order Request to Obtain Approval to Broadcast and/or Photogtaph A Court Proceeding
06/28/2005 Order Request to Obtain Approval to Broadcast and/or Photograph A Court Proceeding
06/29/2005 Court Minutes Hearing type: Sentencing Hearing date: 06/29/2005 Time: 9:00 am Court reporter: Linda Ledbetter Audio tape number: D29
06/30/2005 Sentenced To Incarceration (I18-4001-I Murder I) Confinement terms: Credited time: 609 days.
06/30/2005 Sentenced To Incarceration (I18-4001-I Murder I) Confinement terms:
06/30/2005 STATUS CHANGED: closed pending clerk action
06/30/2005 Sentenced To Incarceration (I19-2520 Enhancement-use Of Deadly Weapon Comm Of Felony) Confinement terms: Penitentiary determinate: 15 days.
06/30/2005 Judgment of conviction upon a jury verdict of guilty to two felony counts, and order of commitment
06/30/2005 Civil Judgment for crime of violence
06/30/2005 Order of restitution
06/30/2005 Order transmitting PSI
06/30/2005 Subpoena Returned ServedOfficer Fragler Mini-Cassia Justice Center
07/01/2005 Subpoena Returned Served Rob Neiwert
07/01/2005 Subpoena Returned Served Clay Anderson
07/01/2005 Subpoena Returned Served Sheldon Ray Wilkinson
07/06/2005 Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Kneeland Korb & Collier Receipt number: 0003913 Dated: 7/6/2005 Amount: $8.00 (Check)
07/06/2005 Miscellaneous Payment: For Certifying The Same Additional Fee For Certificate And Seal Paid by: Kneeland Korb & Collier Receipt number: 0003913 Dated: 7/6/2005 Amount: $1.00 (Check)
07/06/2005 State's response to Court's inquiry regarding defense expert payments
07/06/2005 Order authorizing payment to Richard W. Worst, M.D.
07/07/2005 Lodged: Memorandum in support of State's objection to payment of services & motion to reconsider previous authorizations of payment
07/07/2005 Lodged: Memorandum in opposition to government's objection & motion re: defense attorney fees
07/08/2005 State's motion for Court review of investigative services
07/08/2005 Amended judgment upon a jury verdict of guilty to two felony counts, and order of commitment
07/11/2005 2nd bill from Dr. Richard Worst
07/19/2005 Order authorizing payment to Richard W. Worst, MD
07/29/2005 Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: david kerrick & assoc Receipt number: 0004455 Dated: 07/29/2005 Amount: $11.00 (Check)
07/29/2005 Miscellaneous Payment: For Certifying The Same Additional Fee For Certificate And Seal Paid by: david kerrick & assoc Receipt number: 0004455 Dated: 07/29/2005 Amount: $2.00 (Check)
08/04/2005 Hearing Scheduled (Motion 08/25/2005 10:00 AM) motion re: Pat Dunn's expenses
08/04/2005 Notice Of Hearing
08/17/2005 Notice Of Appeal
08/17/2005 Appealed To The Supreme Court
08/17/2005 STATUS CHANGED: Inactive

08/19/2005	Notice & order appointing State Appellate Public Defender on appeal
08/22/2005	Notice Of Hearing
08/22/2005	Continued (Motion 09/13/2005 02:00 PM) motion re: Pat Dunn's expenses
08/25/2005	Order on State's objection to payment of services & order on motion to reconsider previous authorizations of payment
09/02/2005	Remittitur-2 appeal cases were opened, one dismissed by Supreme Court
09/13/2005	Court Minutes Hearing type: Motion Hearing date: 9/13/2005 Time: 2:00 pm Court reporter: Linda Ledbetter Audio tape number: 9399
09/13/2005	Hearing result for Motion held on 09/13/2005 02:00 PM: Hearing Held motion re: Pat Dunn's expenses
10/07/2005	Patrick Dunn's billings
10/07/2005	Affidavit of Patrick Dunn
10/07/2005	Affidavit of Mark Rader
10/07/2005	Affidavit of Bob Pangburn
10/07/2005	Motion for order to show cause why Def's counsel shall not be held in contempt of court
10/14/2005	Notice Of Demand Letter And Request For Payment
10/21/2005	Order for payment of Peter Smith, Investigator
10/24/2005	Notice Of Intent To Use Letter As Evidence
11/02/2005	Order governing further proceedings on claimed attorneys fees & expenses
11/02/2005	Addendum to order governing further proceedings on claimed attorneys fees & expenses
11/04/2005	Hearing Scheduled (Hearing Scheduled 11/23/2005 09:00 AM) argument or additional evidence
11/07/2005	Order on State's motion for court review of investigative services & order on Def's motion for reconsideration of Court's prior oral ruling
11/15/2005	State's Objection To Payment Of Services Without Additional Clarification
11/23/2005	Court Minutes Hearing type: Hearing Scheduled Hearing date: 11/23/2005 Time: 9:04 am Court reporter: Susan Israel Audio tape number: D42
11/23/2005	Hearing result for Hearing Scheduled held on 11/23/2005 09:00 AM: Hearing Held argument or additional evidence
11/23/2005	Hearing Scheduled (Clerk's Status 12/06/2005 09:00 AM) Pangburn's statement filed? under advisement
12/15/2005	Lodged: State's objection & memorandum in support of denial of additional funds for defense experts
12/22/2005	Lodged: letter to counsel from the Court setting deadline re: payments
01/31/2006	Order on Defendant's motions for additional funds for a criminology expert & for payment to Michael Howard; and additional funds for firearms/blood spatter expert and for payment to Rocky Mink
01/31/2006	Final Appealable Order re: attorney's fees; in particular, order on attorney Bob Pangburn's failure to comply iwth the Court's August 25, 2005, order on State's objection to payment of services & order on motion to reconsider authorizations of payment; and order on attorney Bob Pangburn's affidavits in support of fee application filed May 9, 2005, June 9, 2005, July 11, 2005 and November 14, 2005 and affidavit in support of expenses application filed November 16, 2005
04/10/2006	Order
05/04/2006	Remittitur-appeal dismissed
05/04/2006	STATUS CHANGED: closed pending clerk action
07/05/2006	Second Amended Judgment of Conviction upon a Jury Verdict of Guilty to Two Felony Counts, and Order of Commitment
07/06/2006	Notice & order appointing State Appellate Public Defender on Appeal
07/28/2006	Appealed To The Supreme Court
07/28/2006	Notice Of Appeal
07/28/2006	STATUS CHANGED: Inactive
08/07/2006	Order
09/12/2006	Minute Entry

01/24/2007	State's Motion to release exhibits
01/31/2007	Objection to State's motion to release exhibits & statement in support
02/26/2007	State's motion to dismiss, State's motion to release exhibits
03/01/2007	Order dismissing State's motion to release exhibits
03/21/2007	Order granting motion to augment & suspend the briefing schedule
05/31/2007	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Bob Pangburn Receipt number: 0003313 Dated: 5/31/2007 Amount: $3.00 (Credit card)
05/31/2007	Miscellaneous Payment: Technology Cost - CC Paid by: Bob Pangburn Receipt number: 0003313 Dated: 5/31/2007 Amount: $3.00 (Credit card)
06/27/2008	Supreme Court of the State of Idaho 2008 Opinion No. 89
08/04/2008	Remittitur
08/04/2008	Remanded
08/04/2008	STATUS CHANGED: closed pending clerk action
02/10/2009	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: ABC News Receipt number: 0008070 Dated: 2/10/2009 Amount: $52.00 (Credit card)
02/10/2009	Miscellaneous Payment: Technology Cost - CC Paid by: ABC News Receipt number: 0008070 Dated: 2/10/2009 Amount: $3.00 (Credit card)
10/22/2009	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Felicia Banegas Receipt number: 0013550 Dated: 10/22/2009 Amount: $48.00 (Credit card)
10/22/2009	Miscellaneous Payment: Technology Cost - CC Paid by: Felicia Banegas Receipt number: 0013550 Dated: 10/22/2009 Amount: $3.00 (Credit card)
12/03/2010	Hearing Scheduled (Motion 12/07/2010 09:30 AM) motion to release trial exhibit will be heard in Twin Falls
12/03/2010	Respondent's motion to release state's exhibit
12/03/2010	Respndent's motion to shorten time for hearing and notice of hearing
12/03/2010	Notice Of Hearing
12/03/2010	Affidavit in support of motion to shorten time for hearing
12/03/2010	Respondents Motion to release states exhibits
12/03/2010	Respondents Motion to shorten time for hearing and notice of hearing
12/03/2010	Notice Of Hearing
12/03/2010	Affidavit in support of motion to shorten time for hearing
12/03/2010	Order of reassignment
12/03/2010	Change Assigned Judge
12/06/2010	Hearing result for Motion held on 12/07/2010 09:30 AM: Hearing Vacated motion to release trial exhibit will be heard in Twin Falls
12/06/2010	Order releasing State's Exhibit No. 123
12/06/2010	Stipulation to release State's exhibit No. 123

Sarah M Johnson, Plaintiff vs State Of Idaho, Defendant

Case: **CV-2006-0000324 District** Filed: **04/19/2006** Subtype: **Post Conviction Relief** Judge: **G. Richard Bevan** Status: **Closed 05/20/2014**

Subjects: **Johnson, Sarah M**
Other Parties: **State Of Idaho**

Disposition: Date	Judgment Type	Disposition Date	Disposition Type	Parties	In Favor Of
04/08/2011	Petition Denied			Johnson, Sarah M (Subject), State Of Idaho (Other Party)	Other Party

Register of actions:

Date	
04/19/2006	Filing: 9SPC - Post Conviction Relief Filing Paid by: Johnson, Sarah M (subject) Receipt number: 0002226 Dated: 4/19/2006 Amount: $.00 (Cash)
04/19/2006	Subject: Johnson, Sarah M Appearance Stephen D. Thompson
04/19/2006	Other party: State of Idaho Appearance Jim Thomas
04/19/2006	Petition for post-conviction relief
04/19/2006	Motion to proceed in forma pauperis & supporting affidavit
04/19/2006	Order for waiver of prepaid fees
04/19/2006	Motion for appointment of counsel
04/19/2006	Affidavit in support of motion for appointment of counsel
04/19/2006	Motion for court to rule on "notice of appeal" issue & suspend remaining post-conviction claims pending outcome of direct appeal
04/19/2006	Affidavit of inability to pay
04/19/2006	Order Appointing Public Defender
04/19/2006	New Case Filed
04/24/2006	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Terry Smith- Id. Mtn. Express Receipt number: 0002289 Dated: 4/24/2006 Amount: $29.00 (Cash)
04/25/2006	Order appointing special prosecutor
04/27/2006	Petition for appointment of special prosecutor
05/10/2006	Change Assigned Judge
05/19/2006	Answer To Petition For Post-Conviction Relief
05/19/2006	Other party: State of Idaho Appearance Justin D. Whatcott
05/19/2006	Hearing Scheduled (Hearing Scheduled 05/23/2006 03:00 PM)
05/23/2006	Court Minutes Hearing type: Hearing Scheduled Hearing date: 5/23/2006 Time: 3:00 pm Court reporter: Linda Ledbetter
05/23/2006	Hearing result for Hearing Scheduled held on 05/23/2006 03:00 PM: Hearing Held
05/24/2006	Hearing Scheduled (Motion 06/06/2006 02:00 PM) Motion for Court to Rule on "Notice of Appeal" Issue & Suspend Remaining Post Conviction Claims Pending Outcome of Direct Appeal
05/24/2006	Notice Of Hearing
05/31/2006	Respondent's memorandum objecting to Petitioner's motion to rule on appeal issue & suspend remaining post-conviction claims
05/31/2006	Motion for discovery pursuant to ICR 57(b)
06/05/2006	Affidavit of Sara B. Thomas Chief Appellate Unit State Appellate Public Defender
06/05/2006	Motion For Appointment Of New Public Defender
06/05/2006	Motion to Seal
06/05/2006	Motion to Stay Proceedings
06/06/2006	Court Minutes Hearing type: Hearing Scheduled Hearing date: 6/6/2006 Time: 2:00 pm Court reporter: Linda Ledbetter Audio tape number: D61
	Hearing result for Motion held on 06/06/2006 02:00 PM: Hearing Held

06/06/2006	Motion for Court to Rule on "Notice of Appeal" Issue & Suspend Remaining Post Conviction Claims Pending Outcome of Direct Appeal
06/06/2006	Case Taken Under Advisement
06/06/2006	Memorandum in Support of Motion for New Appeal and For Stay
06/06/2006	Request to obtain approval to broadcast and/or photograph a court proceeding
06/07/2006	Request to obtain approval to broadcast and/or photograph a court proceeding
06/09/2006	Request for additional briefing
06/15/2006	Motion to Extend Briefing Deadline and Rule on Conflict and representation and for Special Counsel
06/16/2006	Respondent's Supplemental Memorandum objecting to Petitioner's motions
06/19/2006	Order on ex parte motion to extend briefing deadline
06/21/2006	Motion for clarification of request for additional briefing & order on ex parte motion to extend briefing deadline
06/21/2006	Petitioners Statement of Supplemental Authorities in Support of Motion for Clarification
06/21/2006	Brief of Amicus Curiae
06/21/2006	Memorandum In Response to Request for Additonal Briefing
06/23/2006	Motion to appoint office of the State Appellate Public Defender for purposes of determining conflict
06/23/2006	Notice Of Telephonic Hearing (no hearing date set)
06/28/2006	Amended motion to appoint office of the State Appellate Public Defender for purposes of determining conflict
06/30/2006	Affidavit of Mark Rader
07/03/2006	no longer u/a
07/03/2006	Order on motion for new appeal period, and motion to stay, and order on motion to seal motions to withdraw
07/03/2006	Motion to stay all issues pending resolution of conflicts issues & appointment of special counsel; and Motion for appointment of a new public defender; and motion to seal are Denied (no Document)
07/03/2006	Motion for new appeal period; and motion to stay post-conviction proceedings pending the outcome of the direct appeal are Granted (No Document)
07/05/2006	STATUS CHANGED: inactive
07/14/2006	Order
07/14/2006	Hearing Scheduled (Status 08/08/2006 02:00 PM) Status on sealed documents in file
07/14/2006	Notice Of Hearing
08/01/2006	Hearing result for Status held on 08/08/2006 02:00 PM: Hearing Vacated Status on sealed documents in file
11/02/2006	Hearing Scheduled (Status 11/21/2006 03:30 PM) Status on Steve Thompson's bill
11/02/2006	Notice Of Hearing
11/16/2006	Hearing result for Status held on 11/21/2006 03:30 PM: Hearing Vacated Status on Steve Thompson's bill
07/03/2008	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Cassidy Friedman Receipt number: 0003517 Dated: 7/3/2008 Amount: $26.00 (Credit card)
07/03/2008	Miscellaneous Payment: Technology Cost - CC Paid by: Cassidy Friedman Receipt number: 0003517 Dated: 7/3/2008 Amount: $3.00 (Credit card)
08/15/2008	Order lifting stay of psot conviction porceedings and order appointing counsel and order setting status/scheduling conference
08/15/2008	Subject: Johnson, Sarah M Order Appointing Public Defender Public defender Christopher P. Simms
08/19/2008	Hearing Scheduled (Scheduling Conference 09/05/2008 01:30 PM)
08/19/2008	Order Appointing Public Defender

08/19/2008	Notice Of Hearing
08/22/2008	Notice Of Appearance
08/22/2008	Motion to prepare transcript and legal file at County cost
08/25/2008	Motion for appointment of separate district judge
08/27/2008	Order granting motion for appointment of separate district judge
09/04/2008	Continued (Scheduling Conference 09/05/2008 09:00 AM) do not need to transport Johnson for this hearing Please hear this last on the calendar. Justin Whatcott is driving in from Boise
09/05/2008	Court Minutes Hearing type: Scheduling Conference Hearing date: 9/5/2008 Time: 9:07 am Court reporter: Linda Ledbetter Audio tape number: D148
09/05/2008	Hearing result for Scheduling Conference held on 09/05/2008 09:00 AM: Hearing Held do not need to transport Johnson for this hearing Please hear this last on the calendar. Justin Whatcott is driving in from Boise
09/05/2008	Hearing Scheduled (Scheduling Conference 10/07/2008 01:30 PM)
09/08/2008	Motion for appointment of co-counsel at County expense
09/08/2008	Motion for appointment of investigator at County expense
09/08/2008	Affidavit of Christopher P. Simms in support of motion for appointment of co-counsel & of investigator at County expense
09/16/2008	State's Objection to Petitioner's motion for appointment of co-counsel at County expense
09/16/2008	State's Objection to Petitioner's motion for appointment of investigator at County expense
09/30/2008	Order granting motion to prepare transcript & clerk's record
10/06/2008	Continued (Scheduling Conference 10/07/2008 03:30 PM)
10/07/2008	Court Minutes Hearing type: Scheduling Conference Hearing date: 10/7/2008 Time: 3:53 pm Court reporter: Linda Ledbetter Audio tape number: D150
10/07/2008	Hearing result for Scheduling Conference held on 10/07/2008 03:30 PM: District Court Hearing Held Court Reporter: Linda Ledbetter Estimated Number of Transcript Pages for this hearing: less 100 pages
10/09/2008	Hearing Scheduled (Scheduling Conference 11/05/2008 03:00 PM)
10/09/2008	Notice Of Hearing
11/05/2008	Stipulation regarding scheduling
11/05/2008	Hearing result for Scheduling Conference held on 11/05/2008 03:00 PM: District Court Hearing Held Court Reporter: Linda Ledbetter Estimated Number of Transcript Pages for this hearing: less than 100 pages
11/05/2008	Hearing Scheduled (Status 06/09/2009 01:30 PM)
11/06/2008	Notice Of Hearing
02/13/2009	Motion for order of discvoery relating to newly discovered evidence
02/13/2009	Notice Of Hearing motion for order of discovery relating to newly discovered evidence
02/17/2009	Hearing Scheduled (Hearing Scheduled 02/24/2009 01:30 PM) motion for admission of discovery regarding newly discovered evidence
02/23/2009	Continued (Status 06/16/2009 01:30 PM)
02/23/2009	Amended Notice Of Hearing
02/24/2009	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: terry Receipt number: 0008403 Dated: 2/24/2009 Amount: $4.00 (Cash)
02/24/2009	Amended Notice Of Hearing Motion for Order of Discovery Relating to Newly Discovered Evidence
02/24/2009	Affidavit Of Service of Subpoena
02/24/2009	Affidavit Of Service of Subpoena
02/24/2009	Subpoena-Maria
02/24/2009	Affidavit OF Robert J. Kerschusky in Support of Motion for Order of Discovery Relating Newly Discovered Evidence

02/25/2009	Stipulation regarding photographic evidence
02/26/2009	Continued (Hearing Scheduled 03/03/2009 01:30 PM) motion for admission of discovery regarding newly discovered evidence
02/26/2009	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Ariel Hansen Receipt number: 0008456 Dated: 2/26/2009 Amount: $7.00 (Cash)
02/26/2009	Motion for State to Appear by Telephone
02/27/2009	Continued (Hearing Scheduled 03/04/2009 02:30 PM) motion for admission of discovery regarding newly discovered evidence
02/27/2009	Amended Notice Of Hearing
03/02/2009	Continued (Status 06/02/2009 01:30 PM)
03/02/2009	Second Amended Notice Of Hearing
03/03/2009	Request to obtain approval to video record or broadcast a court proceeding & order
03/03/2009	Order granting State's motion to appear by telephone
03/04/2009	Court Minutes Hearing type: Hearing on New Evidence Hearing date: 3/4/2009 Time: 12:00 am Court reporter: Linda Ledbetter Audio tape number: D168
03/04/2009	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Terry Smith Receipt number: 0008616 Dated: 3/4/2009 Amount: $2.00 (Cash)
03/04/2009	Hearing result for Hearing Scheduled held on 03/04/2009 02:30 PM: District Court Hearing Held Court Reporter: Linda Ledbetter Estimated Number of Transcript Pages for this hearing: motion for admission of discovery regarding newly discovered evidence LESS THAN 100 PAGES
03/04/2009	Order of discovery relating to newly discovered evidence
03/04/2009	Order releasing duplicate photographic evidence
03/05/2009	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Ariel Hansen Receipt number: 0008628 Dated: 3/5/2009 Amount: $2.00 (Cash)
03/05/2009	Motion for Order of Discovery Relating To Independent Judicial Investigation
03/05/2009	Motion for Disqualification of District Judge
03/05/2009	Brief in Support of Motion for Reconsideration/ clarification Regarding Appointment of Experts
03/05/2009	Motion for reconsideration/ clarification Regarding Appointment of Experts
03/13/2009	Objection To Petitioner's Motion for Disqualification of District Judge
03/16/2009	First Amended Petition for Post-Conviction Relief
03/16/2009	Motion for Appointment of Psyciatric Expert at County Expense
03/16/2009	Motion for Apopintment of Fingerprint Expert At County Expense
03/16/2009	Amended Motion for Appointment of Investigatot at County Expense
03/16/2009	Motion for Appointment of Legal Expert at County Expense
03/16/2009	Motion to Take Judicial Notice of COurt Files
03/16/2009	Memorandum of Law in Support of Petition for Post-Conviction Relief
03/18/2009	Hearing Scheduled (Motion 04/21/2009 01:30 PM) motion to disqualify district judge
03/18/2009	Notice Of Hearing motion for disqualification of district judge
03/19/2009	Motion to Strike ""First Amended Petition for Post-Conviction Relief"
03/19/2009	Notice of intent to read reporter's transcript of underlying criminal case no. CR03-18200
03/25/2009	Objection to Motions For Experts
03/27/2009	Plaintiffs Response to Strike Motion to Strike First Amended Petition for Post-Conviction Relief or Alternatively Motion for Leave To Amend
04/01/2009	Reply on Motion to Strike "First Amended Petition for Post-Conviction Relief"
04/03/2009	Hearing Scheduled (Clerk's Status 04/07/2009 04:59 PM) check for objects

06/10/2009	States Withdrawal of Objections to First Amended Petition
06/10/2009	Order granting motion for discovery deposition of Kerchusky & Dunn
06/10/2009	Order denying Plt's motions for appointment investigator & experts
06/11/2009	Objection to proposed Order Denying Plaintiffs Motions for Appointment of Investigator [sic] and Experts
06/22/2009	Answer to first Amended Petition for Post-Conviction Relief
06/30/2009	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Ariel Hansen/Times News Receipt number: 0011001 Dated: 6/30/2009 Amount: $7.00 (Check)
07/10/2009	Notice Of Taking Deposition
07/10/2009	Notice Of Taking Deposition
07/10/2009	Notice Of Taking Deposition
07/14/2009	Acceptance Of Service-Bobby
07/14/2009	Subpoena Duces Tecum
07/14/2009	Subpoena Duces Tecum
07/14/2009	Acceptance Of Service-Robert
07/29/2009	Motion or Leave to Amend and File Second Amended Petition for Post-Conviction Relief
08/06/2009	Objection to Motion for Leave to Amend
08/17/2009	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Terry Smith Receipt number: 0011982 Dated: 8/17/2009 Amount: $15.00 (Cash)
08/31/2009	Response to the Biased Idaho Mountain Express Front Page Article of August 19, 2009
09/15/2009	Order of reassignment
09/15/2009	Change Assigned Judge
09/28/2009	Hearing Scheduled (Status 10/01/2009 10:30 AM) via telephone in Twin Falls County
09/28/2009	Notice Of Hearing
09/28/2009	Motion to compel discovery
10/01/2009	Hearing result for Status held on 10/01/2009 10:30 AM: Court Minutes via telephone in Twin Falls County
10/01/2009	Hearing result for Status held on 10/01/2009 10:30 AM: District Court Hearing Held Court Reporter: Virginia Bailey Estimated Number of Transcript Pages for this hearing: less 100 pages via telephone in Twin Falls County
10/02/2009	Notice Of Hearing
10/05/2009	Hearing Scheduled (Motion for Leave 11/06/2009 09:00 AM) to Amend & File Second Amended Petition for Post-Conviction
10/14/2009	Notice of filing exhibits omitted from intitial filing of motion to compel discovery
10/16/2009	Order for scheduling conference & order re: motion practice
10/16/2009	Hearing Scheduled (Scheduling Conference 11/06/2009 09:00 AM) to be held via telephone in Twin Falls, Simms to initiate call
10/19/2009	Request to obtain approval to video record broadcast or photograph a court proceeding
10/19/2009	Order
11/03/2009	Hearing result for Scheduling Conference held on 11/06/2009 09:00 AM: Hearing Vacated to be held via telephone in Twin Falls, Simms to initiate call
11/03/2009	Hearing result for Motion for Leave held on 11/06/2009 09:00 AM: Hearing Vacated to Amend & File Second Amended Petition for Post-Conviction to be held via telephone in Twin Falls, Simms to initiate call
11/13/2009	Response To Motion To Compel
11/23/2009	Notice Of Hearing
11/23/2009	Hearing Scheduled (Status 12/18/2009 09:00 AM) phone

11/23/2009	Notice Of Hearing
11/23/2009	Stipulation Relating to Scheduling
11/24/2009	Hearing Scheduled (Motion for Leave 12/18/2009 09:00 AM) to amend & File Second Amend Petitions for Post-conviction relief and petitions Motion to Compel Discovery
12/04/2009	Request to Obtain Approval to Video Record Broadcast or Photogragh a Court Prcedding
12/08/2009	Notice Of Hearing Motion for Leave to Amend & File Second Amended Petition for PCR, Motion to Compel Discovery and Status Conference
12/09/2009	Hearing Scheduled (Motion for Leave 12/21/2009 04:00 PM) to amend & File Second Amended Petition for Post-Conviction Relief, Motion to Compel Discovery & Status Conference
12/24/2009	Amended Stipulation relating to scheduling
12/24/2009	Memorandum withdrawing motion to compel discovery
12/28/2009	Order granting leave to amend & file second amended petition for post conviction relef
12/29/2009	Response to Memorandum Withdrawing Motion to Compel Discovery
01/12/2010	Second Amended Petition for post conviction relief
02/08/2010	Petitioners Motion for Summary Disposition
02/08/2010	Memorandum of Law in Support of Petitioners Motion for Summary Disposition
02/08/2010	Respondent's Motion for summary dismissal of petitioner's second amended petition for post conviction relief
02/08/2010	Memorandum in support of Respondent's motion for summary dismissal of petitioner's second amended petition for post conviction
03/05/2010	List of Exhibits in Support of Petition for Post-Conviction Relief and in Opposition to Motion for Summary Dismissal
03/05/2010	Petitioners Memorandum Response to Respondents Motion for Summary Dismissal of Petitioners Second Amended Petitioners Second Amended Petition for Post-Conviction relief
03/05/2010	Memorandum in Opposition to Petitioners Motion for Summary Judgment
03/10/2010	Hearing Scheduled (Motion 04/30/2010 10:00 AM) motion for summary disposition
03/10/2010	Notice Of Hearing
03/10/2010	Amended Certificate Of Service Petitioners Memorandum Response to Respondents Motion for Summary Dismissal of Petitioners Seconf Amended Petition for Post-Conviction Relief
03/19/2010	Petitioner's Memorandum reply to Respondent's memorandum in opposition to Petitioner's motion for summary dismissal
03/19/2010	Reply in Support of Respondents Motion for Summary Dismissal of Petitioners Second Amended Petition for Post-Conviction Relief
04/09/2010	Request to obtain approval to video record, broadcast or photograph a court proceeding & Order
04/13/2010	Amended Notice Of Hearing
04/30/2010	Hearing result for Motion held on 04/30/2010 10:00 AM: Court Minutes motion for summary disposition to be held in Twin Falls
04/30/2010	Hearing result for Motion held on 04/30/2010 10:00 AM: District Court Hearing Held Court Reporter:Virginia Bailey Estimated Number of Transcript Pages for this hearing: motion for summary disposition to be held in Twin Falls less 100
05/19/2010	Order for Scheduling Conference and ORder Re: Motion Practice
05/19/2010	Hearing Scheduled (Scheduling Conference 07/19/2010 04:00 PM) In Twin Falls
05/21/2010	Memorandum Decision and Order Regarding Claims Taken Under Advisement
07/13/2010	Notice Of Telephonic Hearing
07/19/2010	Court Minutes
	Hearing result for Scheduling Conference held on 07/19/2010 04:00

07/22/2010 PM: District Court Hearing Held Court Reporter:Virginia Bailey Estimated Number of Transcript Pages for this hearing: In Twin Falls - telephonic less 100

07/22/2010 Hearing Scheduled (Court Trial 11/30/2010 09:00 AM) In Twin Falls

07/22/2010 Hearing Scheduled (Pretrial Conference 11/08/2010 10:30 AM) In Twin Falls

07/22/2010 Order on Cross Motions for Summary Disposition

07/22/2010 Scheduling Order, Notice of Trial Setting and Pre-Trial Order

08/04/2010 Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Ariel Hansen Receipt number: 0005094 Dated: 8/4/2010 Amount: $6.00 (Cash)

08/09/2010 Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Teri Smith Receipt number: 0005166 Dated: 8/9/2010 Amount: $25.00 (Cash)

09/13/2010 Amended Scheduling Order, Notice of Trial Setting and PRetrial Order

09/30/2010 Respondents Motion to Reconsider

09/30/2010 Memorandum in Support of Respondents Motion to Reconsider

10/05/2010 Notice Of Hearing

10/05/2010 Hearing Scheduled (Motion for Reconsideration 11/08/2010 10:30 AM) In Twin Falls

10/13/2010 Continued (Court Trial 12/07/2010 09:00 AM) In Twin Falls

11/01/2010 Request to obtain approval to video record, broadcast or photograph a court proceeding

11/01/2010 Respondent's Pretrial Memorandum

11/01/2010 Pre-Trial Memorandum

11/01/2010 Petitioner's Trial Exhibit List

11/01/2010 Petitioners Trial Witness List

11/03/2010 Addendum to Petitioners Trial Exhibit List

11/05/2010 Motion for order to transport petitioner to Twin Falls County Jail

11/05/2010 Petitioner's Memorandum response to Respondent's motion to reconsider

11/08/2010 Order to transport petitioner to Twin Falls County Jail

11/08/2010 Hearing result for Pretrial Conference held on 11/08/2010 10:30 AM: Court Minutes In Twin Falls

11/08/2010 Hearing result for Pretrial Conference held on 11/08/2010 10:30 AM: Hearing Held In Twin Falls

11/08/2010 Hearing result for Motion for Reconsideration held on 11/08/2010 10:30 AM: Case Taken Under Advisement In Twin Falls

11/09/2010 Continued (Court Trial 12/07/2010 10:00 AM) In Twin Falls

11/12/2010 Memorandum in support of motion to reconsider

11/15/2010 Petitioners Amended Trial Witness list

11/15/2010 Petitioner's Supplemental Memorandum in opposition to respondents motion to reconsider

11/22/2010 Petitioners Filing Memorandum

11/22/2010 Order on Respondent's motion to reconsider

11/22/2010 Motion for appointment of interpreter

11/22/2010 Motion for order to transport witness for production of testimony at post-conviction relief hearing, oral argument waived

11/23/2010 Respondents Proposed findings of fact and conclusions of law

11/26/2010 Order appointing interpreter for Spanish language witnesses

11/26/2010 Order to transport Burno Antonio Santos for production of testimony for post conviction relief hearing

11/29/2010 Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Johnson, Sarah M Receipt number: 0007675 Dated: 11/29/2010 Amount: $31.00 (Cash)

11/29/2010 Petitioner's Trial Brief

11/30/2010 Respondents witness list

11/30/2010 Respondents Exhibit List

11/30/2010 Petitioners filing memorandum
11/30/2010 Petitioners restated trial witness list
11/30/2010 petitioners restated trial exhibit list
12/01/2010 Certificate Of Service
12/01/2010 Request to obtain approval to video record, broadcast or photograph a court proceeding (KMVT)
12/01/2010 Request to obtain approval to video record, broadcast or photograph a court proceeding (Terry Smith)
12/02/2010 Petitioners filing Memorandum
12/03/2010 Memorandum decision granting respondent's motion for reconsideration
12/03/2010 Petitioner's filing memorandum
12/06/2010 Request to obtain approval to video record broadcast or photograph a court proeeding (Times News)
12/06/2010 Request to obtain approval to video record broadcast or photograph a court proeeding (KTVB)
12/06/2010 Request to obtain approval to video record broadcast or photograph a court proeeding (KIVI-TV)
12/06/2010 Petitioner's memorandum dismissing claim
12/07/2010 Order re: cameras in the courtroom
12/07/2010 Court Minutes
12/07/2010 Hearing result for Court Trial held on 12/07/2010 10:00 AM: District Court Hearing Held Court Reporter: Virginia Bailey Estimated Number of Transcript Pages for this hearing: more than 100 pages
12/08/2010 Court Minutes
12/09/2010 Court Minutes
12/10/2010 Request to obtain approval to video record broadcast or photograph a court proeeding (Matt Furber)
12/10/2010 Court Minutes
12/14/2010 Motion for order to prepare transcript of post-conviction relief hearing at county cost
12/15/2010 Order to prepare transcript of post-conviction relief hearing at county cost
12/15/2010 Motion for order to transport petitioner to Pocatello Women's Correctional Center
12/15/2010 Order to transport petitioner to Pocatello Women's Correctional Center
12/21/2010 Petitioners Filing memorandum
01/05/2011 Reporter's Transcript of Court Trial December 7-10, 2010 filed
01/13/2011 Order regarding post trial briefing and citations to the record
01/27/2011 Stipulation & Order relating to briefing schedule
02/14/2011 Petitioner's proposed Findings Of Fact And Conclusions Of Law and Order
02/14/2011 Respondent's Post-Evidentiary hearing proposed Findings Of Fact And Conclusions Of Law
02/28/2011 Petition reply to respondents proposed findings of fact and conclusion of law
02/28/2011 Response to petitioner's proposed findings of fact and conclusion of law and order
03/03/2011 Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Terry Smith Receipt number: 0001410 Dated: 3/3/2011 Amount: $16.00 (Cash)
04/05/2011 Findings Of Fact And Conclusions Of Law
04/05/2011 no longer u/a
04/06/2011 Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Times News Receipt number: 0002265 Dated: 4/6/2011 Amount: $94.00 (Credit card)
04/06/2011 Miscellaneous Payment: Technology Cost - CC Paid by: Times News Receipt number: 0002265 Dated: 4/6/2011 Amount: $3.00 (Credit card)
04/08/2011 Judgment

04/08/2011	STATUS CHANGED: Closed
04/08/2011	Civil Disposition entered for: State Of Idaho, Other Party; Johnson, Sarah M, Subject. Filing date: 4/8/2011
04/29/2011	Notice Of Appeal
04/29/2011	Appealed To The Supreme Court
04/29/2011	STATUS CHANGED: Inactive
04/29/2011	Motion for appointment of State Appellate Public Defender
05/03/2011	Order for appointment of State Appellate Public Defender
05/04/2011	Motion for order to pay for clerk's record & transcript on appeal at County cost
05/05/2011	Order for Blaine County to pay for clerk's record & transcript on appeal
05/26/2011	Motion to proceed in forma pauperis and supporting affidavit
06/06/2011	Notice Of Lodging Transcript On Appeal
12/20/2011	Order Granting Motion to Augment and Suspend Briefing Schedule
12/22/2011	Notice of supplemental transcript Mailed/Lodged
02/15/2012	Order granting second motion to augment the record & motion for stay
04/05/2012	Notice Of Withdrawal Of Attorney
04/09/2012	Motion to proceed in forma pauperis and affidavit in support
04/09/2012	Motion for appointment of counsel
04/09/2012	Motion for relief from judgment
04/09/2012	DNA and successive petition for post-conviction relief
04/11/2012	Subject: Johnson, Sarah M Appearance Dennis A. Benjamin
04/13/2012	Affidavit of Dr. Greg Hampikian in support of DNA and successive petition for post-conviction relief
04/16/2012	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Terri Receipt number: 0003033 Dated: 4/16/2012 Amount: $47.00 (Cash)
04/16/2012	Response to "Motion for Relief from Judgment" and supporting documents
04/18/2012	Response to "motion for relief from judgment" and supporting documents
04/20/2012	Reply to "Response to 'Motion for Relief from Judgment' and supporting Documents" and alternative motion to correct clerical error pursuant to IRCP 60(a)
04/30/2012	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Terry Smith Receipt number: 0003377 Dated: 4/30/2012 Amount: $14.00 (Cash)
05/10/2012	Petitioners motion for summary disposition
05/15/2012	Objection to "petitioners motion for summary disposition"
05/23/2012	Notice Of Hearing on motion for appointment of counsel
05/24/2012	Hearing Scheduled (Motion 06/04/2012 11:45 AM) Appointment of counsel in twin falls-telephonically
05/31/2012	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Terry / mtn express Receipt number: 0004303 Dated: 5/31/2012 Amount: $10.00 (Cash)
06/04/2012	Court Minutes
06/04/2012	District Court Hearing Held in Twin Falls Court Reporter: Virginia Bailey Estimated Number of Transcript Pages for this hearing: less 100
06/04/2012	Hearing result for Motion scheduled on 06/04/2012 11:45 AM: District Court Hearing Held Court Reporter: Virginia Bailey Estimated Number of Transcript Pages for this hearing: Appointment of counsel in twin falls-telephonically less 100 pages
06/06/2012	Order appointing new counsel
06/25/2012	Amended Order Appointing New Counsel
06/29/2012	Notice of conflict of interest
07/03/2012	Motion to stay successive post-conviction proceedings
07/03/2012	Brief in support of motion to stay successive post conviction proceedings
	Objection to states motion to stay successive post-conviction

07/06/2012	proceedings
07/06/2012	Affidavit in support of motion to amend and/or augment brief
07/06/2012	Brief in support of objection to states motion to stay post-conviction proceedings
07/09/2012	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Terry Smith Receipt number: 0005395 Dated: 7/9/2012 Amount: $5.00 (Cash)
07/17/2012	Court Minutes
07/17/2012	District Court Hearing Held in Twin Falls Court Reporter: Virginia Bailey Estimated Number of Transcript Pages for this hearing: less 100
07/19/2012	Second Amended Order Appointing new counsel
07/19/2012	Stipulation for substitution of counsel
07/19/2012	Subject: Johnson, Sarah M Appearance Keith Roark
07/20/2012	Stipulation for substitution of counsel
10/10/2012	Further Order Appointing Counsel
01/22/2014	Amended DNA and Successive Petition for Post-Conviction Relief
02/12/2014	Motion for Extension of Time to File Response to Amended DNA and Successive Petition for Post Conviction Relief
02/20/2014	Order for extension of time to file response to amended DNA and successive petition for post conviction relief
02/20/2014	2014 Opinion No. 21
03/12/2014	Motion for Second Extension of Time to File Response to Amended DNA and Successive Petition for Post Conviction Relief
03/14/2014	Order for Extension of Time to File Response to Amend DNA and Successive Petition for Post Conviciton Relief
03/21/2014	Motion for additional one-day extension of time to file response to amended DNA and successive petition for post conviction relief
03/24/2014	Motion for ruling on Johnson's 60(b) motion and request for summary dismissal of Petitioner's Amended DNA and successive petition for post conviction relief or, alternatively, to stay
03/24/2014	Brief in support of Motion for ruling on Johnson's 60(b) motion and request for summary dismissal of Petitioner's Amended DNA and successive petition for post conviction relief or, alternatively, to stay
03/26/2014	Remittitur
03/26/2014	Remanded
03/26/2014	STATUS CHANGED: Reopened
03/31/2014	Motion for State to appear by telephone
03/31/2014	Notice Of Hearing
04/01/2014	Order denying State's motion to appear by telephone
04/01/2014	Hearing Scheduled (Motion 04/22/2014 04:00 PM) Respondent's Motion for Ruling on Johnson's 60(b) motion and request for TO BE HELD IN TWIN FALLS VIA PHONE summary dismissal of petitioner's amended DNA and successive petition for post conviction relief or alternatively stay
04/01/2014	amended notice of hearing
04/01/2014	Continued (Motion 05/05/2014 01:30 PM) Respondent's Motion for Ruling on Johnson's 60(b) motion and request for TO BE HELD IN TWIN FALLS VIA PHONE summary dismissal of petitioner's amended DNA and successive petition for post conviction relief or alternatively stay
05/19/2014	Order on Pending Motions
05/20/2014	STATUS CHANGED: closed
05/22/2014	Hearing result for Motion scheduled on 05/05/2014 01:30 PM: Hearing Vacated Respondent's Motion for Ruling on Johnson's 60(b) motion and request for TO BE HELD IN TWIN FALLS VIA PHONE summary dismissal of petitioner's amended DNA and successive petition for post conviction relief or alternatively stay

04/08/2009	Plaitiffs Response to States Objection to Motion for Experts Request for Argument
04/09/2009	Notice of intent to decide motion for disqualification & motion for order of discovery without oral argument IRCP 7(b)(3)(D)
04/10/2009	Notice Of Hearing on motion for order of discovery relating to independent judicial investigation
04/10/2009	Amended Notice Of Hearing on motion for disqualification of District Judge
04/10/2009	Stipulation to depose trial counsel & extend discovery deadline
04/15/2009	Continued (Motion 05/19/2009 01:30 PM) motion to disqualify district judge
04/15/2009	Hearing Scheduled (Motion 05/19/2009 01:30 PM) motion for order of discovery relating to independent judicial investigation
04/15/2009	Request to obtain approval to video record, broadcaste or photograph a court proceeding & Order
04/16/2009	Orders re: motion for disqualification of District Judge & Motion for order of discovery relating to independent judicial investigation
04/16/2009	Hearing result for Motion held on 05/19/2009 01:30 PM: Hearing Vacated motion for order of discovery relating to independent judicial investigation
04/16/2009	Hearing result for Motion held on 05/19/2009 01:30 PM: Hearing Vacated motion to disqualify district judge
04/20/2009	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Terry Smith Receipt number: 0009555 Dated: 4/20/2009 Amount: $10.00 (Cash)
04/22/2009	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Ariel M. Hansen Receipt number: 0009616 Dated: 4/22/2009 Amount: $10.00 (Check)
05/08/2009	Notice Of Hearing
05/08/2009	Hearing Scheduled (Motion 06/09/2009 01:30 PM) Pending Motions Held in Gooding County
05/08/2009	Notice Of Hearing
05/08/2009	Hearing Scheduled (Motion 08/04/2009 01:30 PM) Pending Motions
05/14/2009	Notice Of Taking Deposition Of Mark Stephen Rader
05/14/2009	Stipulation to provide criminal records from counsel
05/15/2009	Motion for Extension of Time to File Motion for Summary Disposition
05/18/2009	Notice Of Taking Deposition of Bobby Eugene Pangburn
05/19/2009	Order to provide criminal records from counsel
05/19/2009	Continued (Status 06/16/2009 01:30 PM)
05/19/2009	Notice Of Hearing
06/02/2009	Request to obtain approval to video record, broadcast or photograph a court proceeding & Order
06/09/2009	Hearing result for Motion held on 06/09/2009 01:30 PM: Court Minutes Pending Motions-Plts motion for leave to amend, motion take judicial notice files, amend motion for investigator, motion appt legal expert, appt psychiatric expert, appt fingerprint expert; respondents motion to reconsider/clarify re: experts, motion strike 1st amend petition post conviction Held in Gooding County
06/09/2009	Hearing result for Motion held on 06/09/2009 01:30 PM: District Court Hearing Held Court Reporter: Linda Ledbetter Estimated Number of Transcript Pages for this hearing: Pending Motions-Plts motion for leave to amend, motion take judicial notice files, amend motion for investigator, motion appt legal expert, appt psychiatric expert, appt fingerprint expert; respondents motion to reconsider/clarify re: experts, motion strike 1st amend petition post conviction Held in Gooding County less 100 pages
06/09/2009	Hearing result for Status held on 06/16/2009 01:30 PM: Hearing Vacated
06/09/2009	Memorandum relating to the filing date of petitioner's first amended petition for post conviction relief

ORIGINAL

R. Keith Roark, ISB No. 2230
THE ROARK LAW FIRM
409 Main Street
Hailey, ID 83333
208-788-3918
keith@roarklaw.com

Attorneys for Sarah Johnson

IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SARAH MARIE JOHNSON, Petitioner, v. STATE OF IDAHO, Respondent.	CASE NO. CV-2014-00353 **NOTICE OF APPEAL**

TO: THE ABOVE NAMED RESPONDENT, State of Idaho, AND ITS ATTORNEY, the Idaho Attorney General, AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellant, Sarah Johnson, appeals against the above named Respondent to the Idaho Supreme Court from the final judgment summarily dismissing Appellant's petition for post-conviction relief filed on the 27th day of October, 2014, the Honorable G. Richard Bevan, presiding.

2. That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(1) I.A.R.

3. A preliminary statement of the issues on appeal is listed below which the Appellant then intends to assert in the appeal; provided, any such list of issues on appeal shall not prevent the Appellant from asserting other issues on appeal.

• Did the Court err in failing to permit DNA testing of requested items?

• Did the Court err in dismissing the Eighth Amendment claim?

4. No order sealing any portion of the record has been issued.

5. Transcript:

(a) A reporter's transcript is requested.

(b) The Appellant requests the preparation of the following portions of the reporter's transcript in both hard copy and electronic format:

• 10/20/2014 Motion Hearing
Reporter: Virginia Bailey
Estimated Number of Transcript Pages: less than 100
HELD IN TWIN FALLS

6. The Appellant requests the following documents to be included in the clerk's record in addition to those automatically included Rule 28, I.A.R:

• 04/09/2012 DNA and Successive Petition for Post-Conviction Relief

• 04/09/2012 Affidavit of Dr. Greg Hampikian in support of DNA and successive petition for post-conviction relief

• 01/22/2014 Amended DNA and Successive Petition for Post-Conviction Relief

• 05/19/2014 Order on Pending Motions

• 06/18/2014 Motion for Extension of Time to File Response to Amended DNA and Successive Petition for Post Conviction Relief

• 06/27/2014 Order for Extension of Time to File Response to Amended DNA and Successive Petition for Post Conviction Relief

• 07/18/2014 Motion to Take Judicial Notice

• 07/18/2014 Brief in Support of Motion for Summary Dismissal of Petitioner's Amended DNA and Successive Petition for Post-Conviction Relief

• 07/18/2014 Motion for Summary Dismissal of Petitioner's Amended DNA and Successive Petition for Post-Conviction Relief

• 08/25/2014 Objection to Respondent's Motion for Summary Dismissal

• 09/03/2014 Second Affidavit of Dr. Greg Hampikian

• 09/16/2014 Motion to Continue Respondent's Motion for Summary Dismissal of Petitioner's Amend DNA and Successive Petition for Post-Conviction Relief

• 09/16/2014 Order Continuing Respondent's Motion for Summary Dismissal of Petitioner's Amended DNA and Successive Petition for Post Conviction Relief

• 10/10/2014 Reply Brief in Support of Motion for Summary Dismissal of Petitioner's Amended DNA and Successive Petition for Post-Conviction Relief

• 10/27/2014 Order Granting Motion for Summary Dismissal of Petitioner's Amended DNA and Successive Petition for Post Conviction Relief

• 10/27/2014 Judgment

• 11/06/2014 Memorandum in Support of Motion to Alter or Amend the Judgment

• 11/06/2014 Motion to Alter or Amend the Judgment

• 11/06/2014 Renewed Motion to Take Judicial Notice

7. The Appellant requests the following documents, charts, or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court: None.

8. I certify:

(a) That a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:

Virginia Bailey
Official Court Reporter
P.O. Box 126
Twin Falls, ID 83303-0126

(b) That the Appellant is exempt from paying the estimated transcript fee because the Court has previously found her to be indigent and a motion for appointment of the State Appellate Public Defenders will be filed along with this Notice of Appeal.

(c) That the Appellant is exempt from paying the estimated fee for the preparation of the record for the reasons set forth above.

(d) That Appellant is exempt from paying the appellate filing fee because there is no filing fee for post-conviction petitions.

(e) That service has been made upon all parties required to be served pursuant to Rule 20 (and the Attorney General of Idaho pursuant to Section 67-1401(1), Idaho Code).

Respectfully submitted this 3rd day of December, 2014.

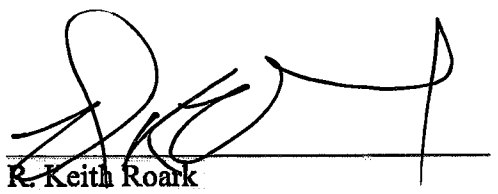
R. Keith Roark
Attorney for Sarah Johnson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30 day of December, 2014, I caused a true and correct copy of the foregoing to be deposited in the United States Mail postage pre-paid to:

Jessica Lorello
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010

Virginia Bailey
Official Court Reporter
P.O. Box 126
Twin Falls, ID 83303-0126



R. Keith Roark

ORIGINAL

R. Keith Roark, ISB No. 2230
THE ROARK LAW FIRM
409 Main Street
Hailey, ID 83333
208-788-3918
keith@roarklaw.com

Attorneys for Petitioner-Appellant

IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SARAH JOHNSON, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent.	CASE NO. CV-2014-00353 **MOTION TO APPOINT STATE APPELLATE PUBLIC DEFENDER**

Sarah Johnson asks this Court to issue an order appointing the Office of the State Appellate Public Defender to represent her on appeal. Good cause exists to grant this motion because Ms. Johnson has previously been found to be indigent by this Court and she has filed a Notice of Appeal in this case.

This motion is brought pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, Article 1, § 13 of the Idaho Constitution and I.C. § 19-4904 and is based upon the Court's previous finding of indigence.

DATED this 3rd day of December, 2014.

R. Keith Roark

CERTIFICATE OF SERVICE

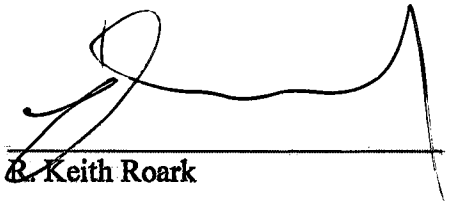
I CERTIFY that on December 30, 2014, I caused a true and correct copy of the foregoing document to be:

✓ mailed

___ hand delivered

___ faxed

to: Jessica Lorello
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010



R. Keith Roark

LAWRENCE G. WASDEN
Idaho Attorney General

PAUL R. PANTHER
Chief, Deputy Attorney General
Criminal Law Division

JESSICA M. LORELLO ISB #6554
KENNETH K. JORGENSEN ISB #4051
Deputies Attorney General and
Special Prosecuting Attorneys
P.O. Box 83720
Boise, Idaho 83720-0010
Telephone: (208) 332-3096
Facsimile: (208) 854-8074

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SARAH JOHNSON Petitioner, vs. STATE OF IDAHO, Respondent.	**Case No. CV-2014-0353** **RESPONSE TO PETITIONER'S MOTION TO ALTER OR AMEND THE JUDGMENT**

COMES NOW, Jessica M. Lorello, Deputy Attorney General and Special Prosecuting Attorney for Blaine County, and hereby files this response to Petitioner's ("Johnson") Motion to Alter or Amend the Judgment and the memorandum filed in support thereof ("Memorandum").

Johnson asks this Court to alter or amend the judgment only with respect to her DNA Claim - Claim 1 of her Amended Successive Petition. "Pursuant to I.R.C.P. 59(e), a district court can correct legal and factual errors occurring in

proceedings before it." Schultz v. State, 155 Idaho 877, 883, 318 P.3d 646, 652 (Ct. App. 2013) (citation omitted).

Johnson contends this Court's Order Granting Motion for Summary Dismissal of Petitioner's Amended DNA and Successive Petition for Post-Conviction Relief ("Order") must be corrected because, according to Johnson, the Court "misconstrued the legal meaning" of I.C. § 19-4902(e)(1). (Memorandum, p.2.) Johnson is incorrect.

Section 19-4902(e)(1) provides that the Court must permit testing only if it determines that "The result of the testing has the scientific potential to produce new, noncumulative evidence that would show that it is more probable than not that the petitioner is innocent." As an initial matter, it is important to note that the Court correctly found that "[m]any of Johnson's DNA requests do not involve testing samples too small to be tested under technology existing at the time of trial." (Order, p.7.) Any request by Johnson to "compare a number of *already analyzed* but unidentified DNA samples with Christopher Hill's DNA profile and with an updated DNA database" do not properly fall within the purview of I.C. § 19-4902(b) and are, therefore, irrelevant to the question of whether the result of testing theoretically authorized by the statute "has the scientific potential to produce new, noncumulative evidence that would show that it is more probable than not that [Johnson] is innocent." (See Order, pp.7-8 (footnote omitted, emphasis original).)

As to Johnson's burden to show that the proposed "testing has the scientific potential to produce new, non-cumulative evidence that would show that it is more

probable than not that [she] is innocent," the Court correctly concluded she has not satisfied this requirement. (Order, p.9.) The Court stated:

> At trial, a considerable amount of evidence was presented that placed Johnson at the scene and that linked her to the murders.[FN5] Her stories were inconsistent and conflicted with the evidence. Her DNA was found in a latex glove, found wrapped in her blood splattered robe, and discarded in a trash can on the property. She knew where the murder weapon was kept (in the guest house safe) and had requested the key a few days earlier. *See also* this court's opinion in *Johnson v. State*, CV-2006-0324, pp.89-92 (Outlining the "mountain of evidence" against Johnson and quoting Judge Wood as stating at trial that the amount of evidence against Johnson was "overwhelming.").
>
> Evidence was also presented that suggested the possible involvement of another party, in the form of unidentified fingerprints and unidentified DNA. The defense argued Johnson's innocence under the theory that a stranger entered the house and murdered Johnson's parents. The jury considered this evidence and heard these arguments and still convicted Johnson of first degree murder.
>
> Therefore, the possibility of identifying a third party DNA source from previously untestable samples will not make it more probable than not that Johnson is innocent, just as the post-trial discovery that the fingerprints on the murder weapon belong to Christopher Hill did not entitle Johnson to a new trial.[FN 6] The jury was aware that DNA that did not belong to Johnson was present at the scene of the murders, just as they were aware that the fingerprints on the rifle were not hers. Even with that knowledge, the jury convicted Johnson, deciding that Johnson either (1) fired the murder weapon herself while wearing gloves or (2) aided and abetted the actual shooter. Either theory was sufficient for a conviction. Given that the fact that the possibility of a third party shooter, as evidenced by the presence of unidentified fingerprints and DNA, failed to convince the jury that Johnson was innocent of murdering her parents, the slim possibility[FN7] that a name or face might now be given to that shooter adds little to the mix.
>
> [FN 5] The court uses the term "linked" because the jury could have convicted Johnson if they believed that she was the shooter or if they believed that she aided and abetted the shooter.

> [FN 6] The Idaho Supreme Court held that the post-trial identification of these fingerprints as Hill's would not likely produce an acquittal because the jury knew at trial that the prints did not belong to Johnson and still convicted her. *Johnson v. State*, 156 Idaho 7, 319 P.3d 491 (2014) (affirming the district court's order denying Johnson post-conviction relief on newly discovered evidence claims).
>
> [FN 7] The court uses the term "slim possibility" because this previously unidentifiable DNA could just as likely remain unidentifiable, could turn out to be Johnson's DNA, or the DNA of an unknown individual, whereupon we would be left in the exact same position as before. Additionally, merely establishing the source of this unidentified DNA does nothing to show that the DNA actually came from the killer.

(Order, pp.10-11.)

Johnson disagrees with the Court's analysis, contending that the "DNA testing has the scientific potential to identify the person who fired the murder weapon." (Memorandum, p.4.) Johnson also rejects the Court's statement that there was a "mountain of evidence" against her and claims the "state's theory of the case was far-fetched." (Memorandum, p.4.) Certainly 12 jurors did not find the state's theory far-fetched, nor was the trial court's conclusion, or this Court's conclusion both now and in Johnson's prior post-conviction case, which the Idaho Supreme Court affirmed, that there was substantial evidence of Johnson's guilt erroneous. In the end, Johnson's Memorandum merely rehashes her spin on the evidence presented at trial. (Memorandum, pp.6-13.) Johnson's disagreement with this Court regarding the weight of the evidence does not demonstrate a factual error that requires correction under Rule 59(e).

Johnson also challenges this Court's reliance on Fields v. State, 151 Idaho 18, 253 P.3d 692 (2011), arguing such reliance "is misplaced" because "[t]his case is in a totally different procedural posture because, unlike *Fields*, the Court has not permitted the evidence to be tested." (Memorandum, p.13.) This Court, however, specifically noted that procedural distinction, but that difference has no bearing on the analysis or the Court's reason for citing Fields. (Order, pp.11-12.)

In Fields, the Supreme Court noted DNA "test results themselves will never show that the petitioner is not the person who committed the offense." 151 Idaho at 23, 253 P.3d at 697. The Court elaborated:

> For example, in this case the DNA test results do not show who was the source of the biological material tested. In order to prove that the DNA test results demonstrate that the petitioner is not the person who committed the offense, there will have to be admissible evidence showing that the material tested came from the person who committed the crime. Under Idaho Code § 19-4902(f), it is the fingerprint or DNA test results that must demonstrate that the petitioner is not the person who committed the offense. In this case there would have to be admissible evidence showing that the hairs or fingernail scrapings tested came from the murderer. Without such admissible evidence, the test results could not show that Fields was not the murderer.

Fields, 151 Idaho at 24, 253 P.3d at 698.

The Court then rejected Fields' argument that the Court "should assume that the fingernail scrapings came from the murderer based upon the testimony of the pathologist that the victim had a cut on the top of the ring finger of her left hand that appeared to be a defensive wound." Id. The flaw in Fields' argument was that "there is no evidence that the victim scratched or even touched her attacker with her hands. There is not even any evidence that she struggled with her attacker." Id. Although Fields thought he was "entitled to the inference that the victim

scratched her attacker because the attacker was close enough to stab her multiple times, because she apparently raised her hand to ward off the attack, and because she was still alive when she was discovered by a customer coming into the store," the Court disagreed because Fields' argument was premised on "nothing but speculation . . . that the scrapings from the victim's fingernails or the hairs from her clothing came from the attacker." Id.

This Court correctly relied on Fields because the foregoing analysis applies in this case. Johnson, like Fields, failed to establish any link between the possibility that previously unidentified DNA, even if matched to an individual, would show that Johnson was not the murderer. As this Court explained, while "[f]urther testing might reveal the source of DNA samples found on Johnson's robe, on the gun, and elsewhere, . . . that knowledge does nothing to establish that the source of those samples was present in the Johnson's home on the morning of the crime, that the source of those samples was the shooter, or that Johnson didn't aid and abet the murderer of her parents." (Order, p.12.) This evidentiary failure is evident even in Johnson's Memorandum, which is predicated solely on a series of speculative "ifs." (Memorandum, p.14.) Moreover, as the Court already noted, the jury was already aware of the unmatched DNA at trial and found Johnson guilty regardless. The jury was also well aware of the implications, Johnson reasserts now, that "Matthew Johnson, Janet Sylten or even Bruno Santos" could be the real killer. (Memorandum, p.15.) The jury also rejected these possibilities as well and, notably, Johnson's attempt to rehabilitate suspicion towards Sylten and Santos ignores that they were excluded as contributors to the DNA that was tested.

Johnson also disregards what the bulk of the DNA evidence showed. First, most of the 30 stain samples taken from the robe matched Diane and others were consistent with Johnson's profile and Diane and Alan could not be excluded as contributors. (Trial Tr., Vol. V, pp.3115-3117, 3439-3455.) The fact that there were a few "unknown" stains out of the 30 stains tested from the robe pales in comparison to the volume of positively identified DNA. (Trial Tr., Vol. V, pp.3446, 3454-3455.) Also notable is that the unknown DNA from the top of the gun barrel did not match the unknown DNA from the robe, and the stains on the gun barrel that were positively identified matched Alan's DNA. (Trial Tr., Vol. V, pp.3461-3465.) This is notable for at least two reasons. First, Johnson's continued attempt to impugn Christopher Hill (or anyone else) seems to rely, in part, on the DNA from the gun matching the DNA on the robe, but we already know the samples don't match. (Memorandum, p.14.) Second, Johnson's repeated assertion that the real murderer would have been soaked in blood is inconsistent with the fact that the gun barrel itself was not soaked in blood and, for that matter, neither was the robe. While those two objects had small spatter stains on them, they were not covered in blood, which explains why Johnson wasn't blood soaked either and whatever drops she may have gotten on her skin were easily washed off in the manner suggested by the state, and supported by the evidence. In addition, Johnson's implication that the murderer deposited blood on the gun barrel is entirely speculative. As in Fields, there is no reason to conclude the murderer suffered any injury that would cause her to bleed and Johnson is certainly not entitled to a contrary inference.

Other positively identified DNA that implicated Johnson included DNA from the bottoms of Johnson's socks, which matched Diane, and the major DNA profile from the first cutting from the leather glove matched Diane and neither Alan nor Diane could be excluded as possible contributors of the minor DNA; however, Santos and Sylten were eliminated as contributors. (Trial Tr., Vol. V, pp.3121-3122, 3124-3127.) The profile from the second cutting from the leather glove contained a mixture of DNA with both Diane and Johnson as possible contributors and the other known profiles (such as Santos and Sylten) were excluded. (Trial Tr., Vol. V, pp.3127-3128.) In fact, comparisons to Sylten's DNA were "negative all the way through." (Trial Tr., Vol. V, p.3151; see also p.3159.) Johnson's attempt to impugn her brother at this point is also completely inconsistent with the evidence.

In short, this Court's conclusion that Johnson has not met her burden under I.C. §19-4902 is supported by the evidence, the facts, and the law. Johnson has offered no legitimate reason for this Court to amend its Order. Johnson's motion should therefore be denied.

DATED this 8th day of December 2014.

JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of December 2014 I caused to be delivered a true and correct copy of the foregoing Response to Petitioner's Motion to Alter or Amend the Judgment to:

Blaine County Court Clerk Fax (208) 788-5527	_X_ Facsimile
R. Keith Roark THE ROARK LAW FIRM 409 Main Street Hailey, ID 83333	_X_ U.S. Mail Postage Prepaid ___ Hand Delivered ___ Overnight Mail ___ Facsimile

Marilyn Gerhard

Marilyn Gerhard, Legal Secretary

ORIGINAL

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

SARAH JOHNSON,

Petitioner-Appellant,

vs

STATE OF IDAHO,

Defendant/Appellant.

CASE NO. CV-2014-353

NOTICE AND ORDER APPOINTING STATE APPELLATE PUBLIC DEFENDER IN DIRECT APPEAL

TO: The Office of the Idaho State Appellate Public Defender:

The above named Defendant/Appellant has filed a notice of appeal on December 3, 2014, and has moved the Court for appointment of an appellate public defender in direct appeal of the Honorable G. Richard Bevan, District Judge, special judge for Blaine County.

This Court being satisfied that said defendant-appellant is a needy person entitled to the services of the State Appellate Public Defender per §19-863A, Idaho Code.

IT IS HEREBY ORDERED, that you are appointed to represent the plaintiff-appellant in all matters as indicated herein, or until relieved by further order of the court.

IT IS HEREBY ORDERED, pursuant to I.A.R. Rule 1, the parties, the Clerk of the Court and the Court Reporter, shall follow the established Idaho Appellate Rules in the preparation of this appeal record.

IT IS FURTHER ORDERED, Court Reporter(s) transcripts and the clerk's record shall be prepared at County expense.

IT IS FURTHER ORDERED that the State Appellate Public Defender's Office is provided the following information by the Court:

1) The plaintiff is in the custody of the Idaho State Board of Corrections.
2) A copy of the Notice of Appeal or Application.

3) A copy of the Register of Actions in this matter.

IT IS SO ORDERED,

DATED this 3 day of December, 2014.

District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 10 day of December, 2014, a true and correct copy of the foregoing Order was mailed, postage paid, e-mailed and/or hand-delivered to the following persons:

State Appellate Public Defender
3050 North Lake Harbor Lane
Suite 100
Boise, Idaho 83703

Jessica Lorello
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010

R. Keith Roark
The Roark Law Firm
409 North Main Street
Hailey, Idaho 83333

Idaho Supreme Court
Attn: Appeals
451 W. State St.
Boise, Idaho 83720

Deputy Clerk

R. KEITH ROARK, ISBN 2230
THE ROARK LAW FIRM, LLP
409 North Main Street
Hailey, Idaho 83333
TEL: 208/788-2427
FAX: 208/788-3918

Attorneys for Petitioner Sarah Marie Johnson

DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SARAH MARIE JOHNSON, Petitioner, vs STATE OF IDAHO, Respondent.	Case No. CV-2014-353 **NOTICE OF HEARING**

TO: CLERK OF THE COURT

YOU WILL PLEASE TAKE NOTICE that on the 20th day of February, 2015, at 3:00 o'clock p.m. of said day, or as soon thereafter as counsel can be heard, at the above named court at the **TWIN FALLS COUNTY COURTHOUSE**, in the City of Twin Falls, County of Twin Falls, State of Idaho, the above named Petitioner will call up her MOTION TO ALTER OR AMEND THE JUDGMENT.

DATED this 10 day of December, 2014.

THE ROARK LAW FIRM, LLP

R. KEITH ROARK

ERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the _____ day of December, 2014, I served a true and correct copy of the within and foregoing document upon the attorney(s) named below in the manner noted:

Jessica Lorello
Kenneth Jorgensen
Deputy Attorney General
Criminal Law Division
Post Office Box 83720
Boise, Idaho 83720-0010

Judge Bevan (courtesy copy)
Via Facsimile: 208-736-4155

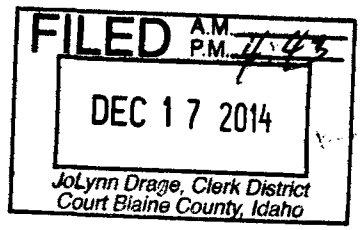
Sarah Johnson
Via US Mail

____ By depositing copies of the same in the United States Mail, postage prepaid, at the local post office.

____ By hand delivering copies of the same to the office of the attorney(s).

✓ By telecopying copies of same to said attorney(s) at the telecopier number(s): 208-854-8074.

R. Keith Roark by HBS
R. KEITH ROARK



R. KEITH ROARK, ISBN 2230
THE ROARK LAW FIRM, LLP
409 North Main Street
Hailey, Idaho 83333
TEL: 208/788-2427
FAX: 208/788-3918

Attorneys for Petitioner Sarah Marie Johnson

DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SARAH MARIE JOHNSON, Petitioner, vs STATE OF IDAHO, Respondent.	Case No. CV-2014-353
	AMENDED NOTICE OF HEARING

TO: CLERK OF THE COURT

YOU WILL PLEASE TAKE NOTICE that the Motion to Alter or Amend the Judgment currently set for the 20th day of February, 2015, at 3:00 o'clock p.m. has been VACATED and reset for the 2nd day of March, 2015 at 3:00 o'clock at the **TWIN FALLS COUNTY COURTHOUSE,** in the City of Twin Falls, County of Twin Falls, State of Idaho

DATED this 17th day of December, 2014.

THE ROARK LAW FIRM, LLP

R. KEITH ROARK

ERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of December, 2014, I served a true and correct copy of the within and foregoing document upon the attorney(s) named below in the manner noted:

Jessica Lorello
Kenneth Jorgensen
Deputy Attorney General
Criminal Law Division
Post Office Box 83720
Boise, Idaho 83720-0010

Judge Bevan (courtesy copy)
Via Facsimile: 208-736-4155

Sarah Johnson
Via US Mail

✓ By depositing copies of the same in the United States Mail, postage prepaid, at the local post office.

___ By hand delivering copies of the same to the office of the attorney(s).

✓ By telecopying copies of same to said attorney(s) at the telecopier number(s): 208-854-8074.

R. KEITH ROARK

Deborah Whipple ISB No. 4355
Dennis Benjamin ISB No. 4199
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
P.O. Box 2772
303 W. Bannock
Boise, Idaho 83701
(208) 343-1000
dwhipple@nbmlaw.com
dbenjamin@nbmlaw.com

Attorneys for the Petitioner

IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SARAH MARIE JOHNSON, Petitioner, v. STATE OF IDAHO, Respondent.	CV-2014-00353 **NOTICE OF ASSOCIATION OF COUNSEL**

Deborah Whipple, Dennis Benjamin and Nevin, Benjamin, McKay & Bartlett LLP hereby associate with R. Keith Roark and The Roark Law Firm as counsel for Petitioner, Sarah Johnson. Ms. Whipple and Mr. Benjamin have been appointed as conflict attorneys by the State Appellate Public Defenders in this case.

Respectfully submitted this 23nd day of February, 2015.

Dennis Benjamin

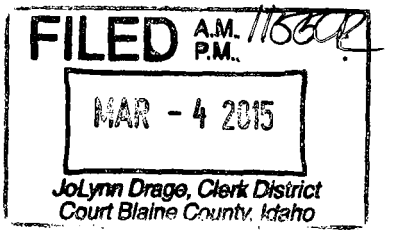
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of February, 2015, I caused a true and correct copy of the foregoing to be deposited in the United States Mail postage pre-paid to:

Jessica Lorello
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010

R. Keith Roark
THE ROARK LAW FIRM
409 Main Street
Hailey, ID 83333

Dennis Benjamin



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SARAH MARIE JOHNSON,	)	
	)	Case No. CV 2014-0353
Petitioner,	)	
	)	**ORDER DENYING MOTION**
vs.	)	**TO ALTER OR AMEND THE**
	)	**JUDGMENT**
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

This matter is before the court on the petitioner's Motion to Alter or Amend the Judgment, filed on 11/06/14. The state filed a Response to petitioner's Motion to Alter or Amend the Judgment on 12/08/14. A hearing on the motion was held on 03/02/15. At the hearing, Jessica Lorello represented the State. The petitioner, Sarah Marie Johnson, was not in attendance, but her counsel, Deborah Whipple and Dennis Benjamin, were

present. After reviewing the briefs, hearing oral arguments, and researching the applicable law, the Motion is DENIED.

I. LEGAL STANDARD

A motion brought under I.R.C.P. 59(e), if brought within fourteen days after entry of judgment, provides a trial court the mechanism to correct legal and factual errors occurring in the proceedings before it and thus, as long as the trial court recognizes the matter as discretionary and acts within the outer boundaries of its discretion, reaching its conclusions through an exercise of reason, the decision will not be disturbed on appeal. *Slaathaug v. Allstate Ins. Co.*, 132 Idaho 705, 707, 979 P.2d 107, 109 (1999). Given their procedural nature, Rule 59(e) motions must be directed to the status of the case as it existed when the court rendered the decision upon which the judgment is based. *City of Pocatello v. Idaho*, 152 Idaho 830, 837, 275 P.3d 845, 852 (2012).

Therefore, such a motion may not be used to raise new arguments, information, or present evidence for the first time when such matters could reasonably have been raised earlier in the litigation. *Id; see also Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (holding that F.R.C.P 59(e) is an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources and should not be granted, absent highly unusual circumstances, unless the court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law). Where such a motion attempts to present

new information not addressed to the court prior to the decision resulting in the judgment, the proper motion is for relief from the judgment under I.R.C.P. 60(b). *Lowe v. Lym*, 103 Idaho 259, 263, 646 P.2d 1030, 1034 (Ct. App. 1982).

II. ISSUES

A. Petitioner's Interpretation of the Burden Imposed by § 19-4902(e)(1) is not Supported by a Plain Reading of the Statute.

Petitioner contends that this court erred by misconstruing the legal meaning of I.C. § 19-4902(e)(1), incorrectly expecting petitioner to prove in advance what the results of the proposed DNA testing will be. Petitioner seems to argue that the word "potential" in I.C. § 19-4902(e)(1) requires a court to order DNA testing whenever the evidence *could potentially* produce evidence of actual innocence.[1]

This interpretation of § 19-4902(e)(1) was advanced by the petitioner in her Amended DNA and Successive Petition for Post-Conviction Relief, filed on 01/22/14, and was argued by the petitioner at the 10/20/14 hearing on the State's motion to dismiss. This court rejected that interpretation, finding that the standard contained in I.C. § 19-4902(e)(1) requires a showing by the petitioner that the requested testing has the scientific potential to produce new, non-cumulative evidence that would show *that it is more likely than not that she is innocent*, and that based on the overwhelming amount

[1] It should be noted here, as this court pointed out in its Order Granting Motion for Summary Dismissal of Petitioner's Amended DNA and Successive Petition for Post-Conviction Relief, that many of plaintiff's DNA requests fall outside of the scope of § 19-4902(b) because they seek to merely compare previously tested but unidentified DNA samples with newly acquired DNA profiles and an expanded DNA database. As conceded by plaintiff's counsel at the hearing on the current motion, such requests are not cognizable under the statute.

of evidence presented against the petitioner at trial, that burden has not been met. To find that the statute requires a showing lower than "more probable than not," or one of "could," as argued by the petitioner, is unsupported by either case-law or the plain language of the statute itself.

B. A Rule 59(e) Motion is Not the Proper Avenue Through Which to Collaterally Attack Previous Findings of Fact.

In support of petitioner's argument, her motion goes to considerable length attempting to counter this court's reliance on the overwhelming amount of evidence presented against her at trial. For this purpose, petitioner's motion makes numerous citations to the trial transcript.

However, a motion under I.R.C.P. 59(e) only provides a trial court the mechanism to correct legal and factual errors occurring in the proceedings resulting in the judgment over which amendment is sought. *Slaathaug*, 132 Idaho at 707, 979 at 109. Such a motion is not the proper device through which to collaterally attack findings of fact entered in the first post-conviction relief case (Blaine County Case No. CV 2006-0324), on which the court relied in this case, and thereby re-litigate the underlying trial. The petitioner had the opportunity to contest those findings of fact subsequent to the trial and in her appeal in the first post-conviction relief case. Having failed to do so, or failing to convince the Idaho Supreme Court in that regard, those findings and conclusions establish the law of the case and are therefore not subject to relitigation now, particularly in the form of a Rule 59(e) motion. *See State v. Creech*, 132 Idaho 1, 9

n. 1, 966 P.2d 1, 9 n. 1 (1998) ("[t]he decision on an issue of law made at one stage of a proceeding becomes precedent to be followed in successive stages of that same litigation.") (quoting *Sun Valley Ranches, Inc. v. Prairie Power Coop.*, 124 Idaho 125, 129, 856 P.2d 1292, 1296 (Ct.App.1993)). The amount of evidence against Johnson, and the weight to be given to that evidence has been established at trial and in Johnson's first post-conviction case. Therefore, the court will not revisit those matters here.[2]

III. CONCLUSION

Based on the foregoing, and understanding that denying or granting a motion under I.R.C.P. 59(e) is a matter of the court's discretion, the petitioner's Motion to Alter or Amend the Judgment is DENIED.

IT IS SO ORDERED.

March 4, 2015

Date

G. RICHARD BEVAN
District Judge

[2] The court is aware that the murder weapon was kept in the guest house closet and not in a safe, as pointed out in the plaintiff's motion. *See Findings of Fact*, ¶¶ 32-33, Blaine County Case No. CV 2006-0324 (1st Petition for Post-Conviction Relief) (April 5, 2011). This fact does nothing to reduce in any way, the court's conclusion, based on the record before it, that the evidence presented at trial placing Johnson at the scene and linking her to the murders was considerable.

CERTIFICATE OF MAILING/DELIVERY

I hereby certify that on the 4 day of March, 2015 a true and correct copy of the foregoing document was mailed, postage paid, faxed and/or hand-delivered to the following persons:

Mr. R. Keith Roark
The Roark Law Firm
409 N. Main St.
Hailey, ID 83333
Fax 788-3918

Ms. Jessica M. Lorello
Deputy Attorney General and
Special Prosecuting Attorney
P.O. Box 83720
Boise, Idaho 83720-0010
Fax 854-8074

Mr. Dennis Benjamin
NEVIN, BENJAMIN, McKAY
& BARTLETT, LLP
P.O. Box 2772
Boise, ID 83701
Fax 345-8274

Deputy Clerk

R. Keith Roark, ISB No. 2230
THE ROARK LAW FIRM
409 Main Street
Hailey, ID 83333
208-788-3918
keith@roarklaw.com

Deborah Whipple ISB No. 4355
Dennis Benjamin ISB No. 4199
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
P.O. Box 2772
303 W. Bannock
Boise, Idaho 83701
(208) 343-1000
dwhipple@nbmlaw.com
dbenjamin@nbmlaw.com

Attorneys for Sarah Johnson

IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SARAH MARIE JOHNSON, Petitioner, v. STATE OF IDAHO, Respondent.	CASE NO. CV-2014-00353 **AMENDED NOTICE OF APPEAL**

TO: THE ABOVE NAMED RESPONDENT, State of Idaho, AND ITS ATTORNEY, the Idaho Attorney General, AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellant, Sarah Johnson, appeals against the above named Respondent to the Idaho Supreme Court from the final judgment summarily dismissing Appellant's petition for post-conviction relief filed on the 27th day of October, 2014, and from the Order Denying Motion to Alter or Amend the Judgment filed on the 4th day of March, 2015

the Honorable G. Richard Bevan, presiding.

2. That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(1) and (a)(7) I.A.R.

3. A preliminary statement of the issues on appeal is listed below which the Appellant then intends to assert in the appeal; provided, any such list of issues on appeal shall not prevent the Appellant from asserting other issues on appeal.

- Did the Court err in failing to permit DNA testing of requested items?

- Did the Court err in dismissing the Eighth Amendment claim?

- Did the Court err in denying the Motion to Alter or Amend?

4. No order sealing any portion of the record has been issued.

5. Transcript:

(a) A reporter's transcript is requested.

(b) The Appellant requests the preparation of the following portions of the reporter's transcript in both hard copy and electronic format:

- 10/20/2014 Motion Hearing
Reporter: Virginia Bailey
Estimated Number of Transcript Pages: less than 100
HELD IN TWIN FALLS

- 3/2/2015 Motion Hearing
Reporter: Roxanne Patchell
Estimated Number of Transcript Pages: less than 100
HELD IN TWIN FALLS

6. The Appellant requests the following documents to be included in the clerk's record in addition to those automatically included Rule 28, I.A.R:

- 04/09/2012 DNA and Successive Petition for Post-Conviction Relief

- 04/09/2012 Affidavit of Dr. Greg Hampikian in support of DNA and successive petition for post-conviction relief

• 01/22/2014 Amended DNA and Successive Petition for Post-Conviction Relief

• 05/19/2014 Order on Pending Motions

• 06/18/2014 Motion for Extension of Time to File Response to Amended DNA and Successive Petition for Post Conviction Relief

• 06/27/2014 Order for Extension of Time to File Response to Amended DNA and Successive Petition for Post Conviction Relief

• 07/18/2014 Motion to Take Judicial Notice

• 07/18/2014 Brief in Support of Motion for Summary Dismissal of Petitioner's Amended DNA and Successive Petition for Post-Conviction Relief

• 07/18/2014 Motion for Summary Dismissal of Petitioner's Amended DNA and Successive Petition for Post-Conviction Relief

• 08/25/2014 Objection to Respondent's Motion for Summary Dismissal

• 09/03/2014 Second Affidavit of Dr. Greg Hampikian

• 09/16/2014 Motion to Continue Respondent's Motion for Summary Dismissal of Petitioner's Amend DNA and Successive Petition for Post-Conviction Relief

• 09/16/2014 Order Continuing Respondent's Motion for Summary Dismissal of Petitioner's Amended DNA and Successive Petition for Post Conviction Relief

• 10/10/2014 Reply Brief in Support of Motion for Summary Dismissal of Petitioner's Amended DNA and Successive Petition for Post-Conviction Relief

• 10/27/2014 Order Granting Motion for Summary Dismissal of Petitioner's Amended DNA and Successive Petition for Post Conviction Relief

• 10/27/2014 Judgment

• 11/06/2014 Memorandum in Support of Motion to Alter or Amend the Judgment

• 11/06/2014 Motion to Alter or Amend the Judgment

• 11/06/2014 Renewed Motion to Take Judicial Notice

• 12/03/2014 Notice Of Appeal

3 • AMENDED NOTICE OF APPEAL

• 12/03/2014 Motion to Appoint State Appellate Public Defender

• 12/08/2014 Response to Petitioner's Motion to Alter or Amend Judgment

• 12/09/2014 Notice and Order Appointing State Appellate Public Defender in Direct Appeal

• 02/23/2015 Notice of Association of Counsel

• 03/04/2015 Order Denying Motion to Alter or Amend the Judgment

• 03/--/2015 Order Granting Request for Judicial Notice

7. The Appellant requests the following documents, charts, or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court: Exhibits 1 to 3 of the Affidavit of Kristin Brown

8. I certify:

(a) That a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:

Virginia Bailey
Official Court Reporter
P.O. Box 126
Twin Falls, ID 83303-0126

Roxanne Patchell
Official Court Reporter
1559 Overland Ave.
Burley, ID 83318

(b) That the Appellant is exempt from paying the estimated transcript fee because the Court has previously found her to be indigent and a motion for appointment of the State Appellate Public Defenders will be filed along with this Notice of Appeal.

(c) That the Appellant is exempt from paying the estimated fee for the preparation of the record for the reasons set forth above.

(d) That Appellant is exempt from paying the appellate filing fee because there is no filing fee for post-conviction petitions.

(e) That service has been made upon all parties required to be served pursuant to Rule 20 (and the Attorney General of Idaho pursuant to Section 67-1401(1), Idaho Code).

Respectfully submitted this 12 day of March, 2015.

THE ROARK LAW FIRM

R. Keith Roark

NEVIN, BENJAMIN, McKAY & BARTLETT LLP

Dennis Benjamin

Attorneys for Sarah Johnson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of March, 2015, I caused a true and correct copy of the foregoing to be deposited in the United States Mail postage pre-paid to:

Jessica Lorello
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010

Virginia Bailey
Official Court Reporter
P.O. Box 126
Twin Falls, ID 83303-0126

Roxanne Patchell
Official Court Reporter
1559 Overland Ave.
Burley, ID 83318

Dennis Benjamin

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SARAH JOHNSON, Petitioner / Appellant, vs. STATE OF IDAHO, Respondent/Respondent	)	Supreme Court No. 42857 CLERK'S CERTIFICATE

STATE OF IDAHO)
) ss.
County of Blaine)

I, Crystal Rigby, Deputy Clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Blaine, do hereby certify that the above and foregoing Clerk's Record on Appeal was compiled my direction and is a true, full and correct Record of the pleadings and documents as are automatically required under Rule 28 of the Idaho Appellate Rules as well as those requested by the Appellant.

I do further certify that all exhibits offered or admitted in the above-entitled cause and exhibits requested by the Appellant will be duly lodged with the Clerk of the Supreme Court along with the Clerk's Record and the Court Reporter's Transcript on Appeal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Hailey, Idaho, this 9 day of April, 2015.

Jolynn Drage, Clerk of the Court

By _____
Crystal Rigby, Deputy Clerk

CLERK'S CERTIFICATE – 1

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

SARAH JOHNSON, Petitioner / Appellant, vs. STATE OF IDAHO, Respondent/Respondent	)	Supreme Court No. 42857 CERTIFICATE OF SERVICE

I, Crystal Rigby, Deputy Clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Blaine, do hereby certify that I have personally served or mailed, by United States mail, one copy of the Supplemental Clerk's Record and Court Reporter's Transcript to each of the Attorneys of Record in this cause as follows:

Idaho State Appellate Public Defender's Office 3050 Lake Harbor Lane Ste 100 Boise, Idaho 83703	Attorney General's Office CRIMINAL APPEALS P.O. Box 83720 Boise, Idaho 83720-0010
Attorney for Defendant/Appellant	Attorney for Plaintiff/Respondent

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 9 day of APRIL, 2015.

JOLYNN DRAGE, Clerk of the Court

By C Rigby
Crystal Rigby, Deputy Clerk