6-29-2010

Fields v. State Respondent's Brief Dckt. 36508

IN THE SUPREME COURT OF THE STATE OF IDAHO

ZANE JACK FIELDS,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

NO. 36508-2009

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE THOMAS NEVILLE
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

STEPHEN A. BYWATER
Deputy Attorney General
Chief, Criminal Law Division

L. LaMONT ANDERSON
Deputy Attorney General
Chief, Capital Litigation Unit
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4539

ATTORNEYS FOR
RESPONDENT

BRUCE LIVINGSTON
Federal Defender Services of Idaho
Capital Habeas Unit
702 W. Idaho Street, Suite 900
Boise, ID 83702
(208) 395-1600

DENNIS BENJAMIN
Nevin, Benjamin, McKay & Bartlett
P.O. Box 2772
Boise, ID 83701
(208) 343-1000

ATTORNEY FOR
PETITIONER-APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE CASE

Nature Of The Case

Petitioner-Appellant Zane Jack Fields appeals from the district court's Memorandum and Order of Dismissal based upon allegations in his "Petition for Post-Conviction Scientific Testing," in which he contended DNA evidence found under the victim's fingernails and DNA testing of hair found on her clothing establish his innocence.

Statement Of Facts And Course Of The Underlying Criminal And First Post-Conviction Proceedings

The material facts leading to Fields' conviction for the first-degree murder of Mary Katherine Vanderford and his sentence of death are summarized in State v. Fields, 127 Idaho 904, 907-09, 908 P.2d 1211 (1995) (Fields I), and will be further discussed in detail in the argument below.

An Information was filed charging Fields with Mary's first-degree murder based upon the felony-murder doctrine (##19185/19809, R., pp.17-18).[1] Fields' trial commenced May 2, 1990, and was completed May 16, 1990, after which the jury found him guilty as charged. (Id., pp.67-104.)

[1] Because there are multiple records and transcripts in this appeal, the state will refer to the records and transcripts by their respective supreme court docket numbers. The supreme court docket numbers for Fields' underlying trial, sentencing and first post-conviction case are ##19185 and 19809. The supreme court docket number for Fields' first successive post-conviction case is #24119. The supreme court docket number for his second successive post-conviction case is #35679. The supreme court docket number for his third success post-conviction case, and subject of the instant appeal, is #36508. "Brief" refers to Fields' opening brief in the instant case.

On July 17, 1990, Fields filed a Motion for New Trial, contending an inmate, Salvador Martinez, advised he overheard two state witnesses, Joe Heistand and Scott Bianchi, and another inmate, Raymond Gilcrist, who did not testify at Fields' trial, state "they had lied, or intended to lie, at Fields' trial in exchange for promised benefits from the authorities." (##19185/19809, pp.108-12.) After an evidentiary hearing (id., pp.1716-1905), the district court denied Fields' motion, concluding Martinez's testimony "was not believable to this court and would not be believable to a jury" and "the testimony of the inmate witnesses that they had not spoken to Mr. Martinez is credible" (id., pp.144-49).

After Fields' sentencing hearing (##19185/19809, pp.1907-08), the district court found the state had proven three statutory aggravating factors and, after weighing the collective mitigation against the statutory aggravating factors individually, the court sentenced Fields to death on March 7, 1991 (id., pp.164-77).

On April 18, 1991, Fields filed his first post-conviction petition. (##19185/19809, pp.197-203.) An amended petition was subsequently filed making one additional claim. (Id., pp.218-19.) After conducting an evidentiary hearing (id., pp.221-24), the district court denied Fields' claims, but withdrew the "utter disregard" statutory aggravating factor because of the Ninth Circuit's erroneous conclusion that it was unconstitutionally vague, *see* Creech v. Arave, 947 F.2d 873, 881 (9th Cir. 1991) (id., pp.226-235).[2] Fields filed another amended petition and motion for new trial (##19185/19809, Supp. R., pp.9-10), which was also denied after another evidentiary hearing (id., pp.58-62).

[2] The Supreme Court subsequently reversed the Ninth Circuit's decision in Arave v. Creech, 507 U.S. 463, 471 (1993).

On February 16, 1995, the Idaho Supreme Court affirmed Fields' conviction, sentence and denial of post-conviction relief. Fields I, *supra*.

Statement Of Facts And Course Of Fields' First Successive Post-Conviction Case

After filing a federal writ of habeas corpus, Fields returned to state court and filed his first successive post-conviction petition. (#24119, R., pp.4-51.) The district court concluded Fields failed to satisfy the requirements of I.C. § 19-2719 because his claims were known or reasonably could have been known when he filed his first post-conviction petition, and entered a final order denying relief. (Id., pp.87-96, 130-35.) The Idaho Supreme Court affirmed the district court's decision denying post-conviction relief on September 7, 2000. Fields v. State, 135 Idaho 286, 17 P.3d 230 (2000) (Fields II).

Statement Of Facts And Course Of Fields' Second Successive Post-Conviction Petition

On August 2, 2002, relying upon Ring v. Arizona, 536 U.S. 584 (2002), Fields filed a "Petition for Post-Conviction Relief or Writ of Habeas Corpus" and "Motions to Correct Illegal Sentences, to Vacate Sentences of Death and for New Sentencing Trial." (#35679, R., pp.5-14.) The state filed a response asking that the petition be dismissed because Ring does not apply retroactively (id., pp.37-46), which the district court granted, concluding Ring is not retroactive to cases in collateral review and the petition is "expressly barred by Idaho Code Section 19-2719" (id., pp.293-304). Fields' appeal of the district court's decision remains pending before the Idaho Supreme Court.

Statement Of Facts And Course Of Fields' Third And Instant Successive Post-Conviction Petition

On June 27, 2002, Fields filed his instant Petition for Post-Conviction Scientific Testing, requesting testing of "three distinct pieces of evidence" including DNA testing

of Fields' coat admitted at trial as exhibit 22, comparison of nineteen latent fingerprints taken from the murder scene with a national fingerprint data base ("AFIS") and DNA testing of fingernail scrapings from Mary's body. (#36508, R., pp.7-14.) The coat was tested by the Idaho State Police Forensic Lab (id., pp.64-65), but it was determined there was an inadequate sample to do additional testing (id., pp. 77, 92).

Fields responded by filing a Motion for Production of Documents (#36508, R., pp.117-20) and Motion for Access to Evidence requesting "access to all of the evidence collected by the police to determine what additional items merit DNA or fingerprint testing," particularly "access to the sex assault kit with samples taken from the victim in this case" (id., pp.123-31), which the district court generally granted (id., pp.151-54).

After additional testing and comparisons were completed, the state filed a Motion to Dismiss asserting the testing and comparisons failed to produce results favorable to Fields. (#36508, R., pp.176-78.) Fields responded by acknowledging DNA testing was completed on three hairs found on Mary's clothing and scrapings under her fingernails, but contending, because the testing allegedly excluded him as the donor of the DNA, he had established his innocence or was entitled to an evidentiary hearing. (Id., pp.195-220.) On April 3, 2009, the district court granted the state's Motion to Dismiss after "examining all the admissible evidence" and recognizing "there was no evidence that [Fields] had been scratched," and that "the victim worked in a small retail establishment open to the public [and therefore] the fact that [Fields] has been excluded as the producer of the DNA from these sources does not exclude him from committing the crimes alleged." (Id., pp.257-61.) Fields filed a timely Notice of Appeal on May 15, 2009. (Id., pp.262-65.)

ISSUE

Fields has stated the issue on appeal as follows:

> Has Fields shown that it is more probable than not that he would be acquitted by any reasonable juror and that no reasonable juror would vote to convict when considering the new evidence together with all admissible evidence. Alternatively, Fields is entitled to an evidentiary hearing to establish his innocence.

(Brief, p.3.)

The state wishes to rephrase the issue on appeal as follows:

Because neither Fields' new DNA evidence nor his new affidavits from three witnesses who testified at trial, whether viewed collectively or individually with the evidence presented at trial, would probably produce an acquittal, has he failed to establish the district court erred by summarily dismissing his successive post-conviction petition?

ARGUMENT

Fields Has Failed To Establish The District Court Erred By Summarily Dismissing His Successive Post-Conviction Petition

A. Introduction

Based upon newly obtained DNA evidence from Mary's fingernail scraping and three hairs found on her clothing, coupled with new affidavits from three trial witnesses, Fields contends the district court erred by summarily dismissing his post-conviction petition and that he is entitled to a new trial or, alternatively, an evidentiary hearing.

Because Fields proffered no evidence establishing Mary scratched her murderer, he has failed to establish the origin of the DNA from the fingernail scrapings warrants either an evidentiary hearing or new trial. Moreover, he has failed to argue, let alone establish, any evidentiary value associated with the three stray hairs found on Mary's clothing at the time of the autopsy. Finally, because the three affidavits from the trial witnesses are merely cumulative or impeaching and were known or could have been known with reasonable diligence at the time of Fields' trial, they cannot be considered in determining whether he is entitled to a new trial or evidentiary hearing. However, even if considered, because the affidavits are nothing more than a regurgitation of the basic facts presented at trial, they fail to establish, whether collectively or individually, that they would probably produce an acquittal.

B. Standard Of Review

"This Court has free review of questions of law." Rhoades v. State, 148 Idaho 247, ---, 220 P.3d 1066, 1069 (2009). Additionally, in Charboneau v. State, 140 Idaho 789, 793, 102 P.3d 1108 (2004) (quoting Saykhamchone v. State, 127 Idaho 319, 900

P.2d 795 (1995)), the supreme court reaffirmed the standard of review in post-conviction cases in which summary dismissal was granted by the trial court:

> In determining whether a motion for summary disposition is properly granted, a court must review the facts in a light most favorable to the petitioner, and determine whether they would entitle petitioner to relief if accepted as true. A court is required to accept the petitioner's unrebutted allegations as true, but need not accept the petitioner's conclusions. The standard to be applied to a trial court's determination that no material issue of fact exists is the same type of determination as in a summary judgment proceeding. (Citations omitted throughout.)

C. Applicable Legal Standards

1. Post-Conviction

"'[P]etitions for post-conviction relief are civil proceedings governed by the Idaho Rules of Civil Procedure.'" Pizzuto v. State, 146 Idaho 720, 724, 202 P.3d 642 (2008) (quoting Storm v. State, 112 Idaho 718, 720, 735 P.2d 1029 (1987)). "Like the plaintiff in a civil case, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based." State v. Yakovac, 146 Idaho 437, 443, 180 P.3d 476 (2008).

However, a post-conviction petition differs from a complaint in an ordinary civil action because the petition must contain much more than "a short and plain statement of the claim." Dunlap v. State, 141 Idaho 50, 56, 106 P.3d 376 (2004). "The application must be present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal." State v. Payne, 146 Idaho 548, 561, 199 P.3d 123 (2008). Bare or conclusory allegations, unsubstantiated by any fact, are inadequate to entitle a petitioner to an evidentiary hearing. Baruth v. Gardner, 110 Idaho 156, 159, 715 P.2d 369 (Ct. App. 1986); Stone v. State, 108 Idaho 822, 826, 702 P.2d

860 (Ct. App. 1985). The district court may also take judicial notice of the records, transcripts and exhibits from the underlying criminal case. Hays v. State, 113 Idaho 736, 739, 747 P.2d 758 (Ct. App. 1987), *aff'd*, 115 Idaho 315, 766 P.2d 895 (1988), *overruled on other grounds*, State v. Guzman, 122 Idaho 981, 842 P.2d 660 (1992); Matthews v. State, 122 Idaho 801, 808, 839 P.2d 1215 (1992).

Idaho Code § 19-4906(c) states, "The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." "Summary dismissal of an application is the procedural equivalent of summary judgment under I.R.C.P. 56." Yakovac, 145 Idaho at 444. "To withstand summary dismissal, a post-conviction applicant must present evidence establishing a *prima facie* case as to each element of the claims upon which the applicant bears the burden of proof." State v. Lovelace, 140 Idaho 53, 72, 90 P.3d 278 (2003). "A 'prima facie case' means the 'production of enough evidence to allow the fact-finder to infer the fact at issue and rule in the party's favor.'" Pizzuto, 146 Idaho at 728 (quoting *Black's Law Dictionary* 1209 (Bryan A. Garner ed., 7th ed., West 1999)). "However, summary dismissal may be appropriate even where the State does not controvert the applicant's evidence because the court is not required to accept either the applicant's merely conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law." Payne, 146 Idaho at 561 (internal quotes and citations omitted); *see also* Ridgley v. State, 148 Idaho 671, ---, 227 P.3d 925, 929 (2010).

2. Newly Discovered Fingerprint And DNA Evidence

In 2001, the Idaho Legislature amended the UPCPA by adding a new provision permitting petitioners to seek fingerprint or 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." 2001 Idaho Sess. Laws, ch.317, § 3, pp.1129-30 (codified at I.C. § 19-4902(b)). "In the event the fingerprint or forensic DNA test 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." Id. (codified at I.C. § 19-4902(e)). This new provision for fingerprint and DNA testing also applies to capital cases, but is "subject to the procedures set forth in [I.C. § 19-2719], and must be pursued through a petition filed within the time limitations of [I.C. § 19-2719(3)] or by July 1, 2002, whichever is later." 2001 Idaho Sess. Laws, ch.317, § 1, p.1127 (codified at I.C. § 19-2719(4)).

Presumably, once the requirements for testing under I.C. § 19-4902(c) and (d) have been met and the testing has been completed, because the fingerprint and DNA claims are premised upon newly discovered evidence, Fields must establish the evidence meets the four-part test from State v. Drapeau, 97 Idaho 685, 691, 551 P.2d 972 (1976), which includes, "that the newly discovered evidence was unknown to the defendant at the time of trial; the evidence is material, not merely cumulative or impeaching; the evidence will probably produce an acquittal; and the failure to learn of the evidence was due to no lack of diligence on the part of the defendant." Grube v. State, 134 Idaho 24, 30, 995 P.2d 794 (2000).

However, even if the four-part Drapeau standard is not applicable and this Court adopts the federal habeas standard under Schlup v. Delo, 513 U.S. 298, 327 (1995), Fields must meet a very high standard. As explained by the Supreme Court:

> To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted **in light of the new evidence. The petitioner thus is required to make a stronger showing than that needed to establish prejudice.** At the same time, the showing of "more likely than not" imposes a lower burden of proof than the "clear and convincing" standard required under *Sawyer*.

Id. 513 U.S. at 327 (emphasis added) (footnote omitted).

In Schlup, the Court made several observations regarding the actual innocence standard. First, in assessing the adequacy of a petitioner's showing, the court is not bound by the rules of admissibility that would govern at trial. "Instead, the emphasis on 'actual innocence' allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial." Id. The reviewing court makes its determination "in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial." Id. at 328.

Second, the reasonable doubt standard is not discarded. Rather, "the analysis must incorporate the understanding that proof beyond a reasonable doubt marks the legal boundary between guilt and innocence." Id.

Third, the standard is not based upon the mere showing that reasonable doubt exists in light of the new evidence. Rather, the Court explained the standard is:

> [T]hat no reasonable juror would have found the defendant guilty. It is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district

> court to make a probabilistic determination about what reasonable, properly instructed jurors would do. Thus, a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.

Id. at 329.

Finally, the Court highlighted the word "reasonable," noting, "It must be presumed that a reasonable juror would consider fairly all of the evidence presented. It must be presumed that such a juror would conscientiously obey the instructions of the trial court requiring proof beyond a reasonable doubt." Id.

The Ninth Circuit has emphasized that this standard "is not easy to meet," Gandarela v. Johnson, 286 F.3d 1080, 1086 (9th Cir. 2002), and is "narrow" in scope, Shumway v. Payne, 223 F.3d 982, 990 (9th Cir. 2000). Further, "[t]o be credible, a claim of actual innocence must be based on reliable evidence not presented at trial." Id. at 982. Because such evidence is rare, "in virtually every case, the allegation of actual innocence has been summarily rejected." Id. Further, the Eighth Circuit has concluded not only must the evidence be new because it was unavailable at trial, the petitioner must establish it could not have been discovered earlier through the exercise of due diligence. Amrine v. Bowersox, 128 F.3d 1222, 1230 (8th Cir. 1997); Morris v. Dormire, 217 F.3d 556, 559 (8th Cir. 2000); *see also* Lyons v. Lee, 316 F.3d 528, 533 (4th Cir. 2003).

D. The Compelling Evidence Presented At Fields' Trial

Fields' contention that the evidence presented at trial was "very weak" (Brief, p.6) is simply not true. While the state's case may not have been overwhelming, such as cases that establish guilt with a confession to law enforcement, DNA or fingerprint evidence,

ballistics testing or an eyewitness who actually saw the murder, as demonstrated below, it was certainly very compelling.

On February 11, 1988, at approximately 11:00 a.m., Mary's husband, Herbert Vanderford, left his wife working at the Wishing Well gift shop in Boise, Idaho, which was owned by their daughter, Karen Vanderford. (##19185/19809, Tr., pp.916-18.) Mary was still alive when Herbert left that morning. (Id., p.917.) On that same date at 11:18 a.m., dispatcher Jackie Pyle received a 911 telephone call from Mary stating, "I've just been stabbed. I'm bleeding." (Id., p.997.) Mary was able to explain she had been stabbed in the neck and chest, her assailant was no longer at the shop, the assailant was male and she had been robbed. (Id., pp.997-99.)

During Mary's 911 call, Ralph Simmons entered the store and saw her "propped up against the corner" of the counter "sitting on her legs in a crouched position facing the window . . . toward the front of the store" with a "telephone in one hand and her other hand was to her throat." (##19185/19809, Tr., pp.1008-10.) Simmons "saw a lot of blood on the front of [Mary's] blouse and sweater. There was blood on her hand that was holding her throat and blood on the hand that was holding the telephone." (Id., p.1011.) Simmons took the phone from Mary, spoke with the dispatcher and tried to administer first aid. (Id., pp.999-1000, 1011-12.) Mary stated and gestured that her assailant had fled through the front door. (Id., pp.1012-13.)

Ada County Detective Randy Folwell was the first law enforcement officer to arrive and found Mary with Simmons trying to assist her. (##19185/19809, Tr., pp.1021-22.) While Mary was unable to speak, she moved her head and confirmed her assailant was male, no longer in the store and alone. (Id., p.1022.) Emergency medical personnel

dispatched to the Wishing Well administered first aid and transported Mary to Saint Alphonsus Hospital. (Id., pp.1038-44.)

Upon arrival at the emergency room, Mary was in full cardiac arrest and "bleeding quite a bit from a stab wound in the right side of her neck." (##19185/19809, Tr., p.1091.) Pressure was placed on Mary's neck to stop the bleeding and she was immediately transported to the operating room, however, she could not be resuscitated. (Id., p.1093.) Mary was pronounced dead approximately forty-five minutes after first arriving at the emergency room from the "stab wound in her neck [which] caused her to lose enough blood that she was not able to sustain adequate blood pressure. She basically bled to death." (Id., p.1094.)

Dr. Frank Roberts completed an autopsy of Mary's body the following day and found six wounds on her body, including: (1) "a long incised, . . . cleanly cut wound that extended from behind the right ear and came around under the right side of the chin"; (2) "a puncture-type wound located just above the nipple of the right breast"; (3) "a puncture wound located just on the back at approximately – slightly lower than the one on the breast"; (4) "[t]he fourth was six inches towards the middle of the body and just slightly lower than the No. 3"; (5) "[t]he fifth was a small laceration between the eyebrows"; and (6) the sixth wound was "located on the top of the ring finger of the left hand" and was a "defensive wound." (##19185/19809, Tr., pp.1061-63.) Dr. Roberts opined a "knifelike instrument" caused all six wounds. (Id., p.1067.) Dr. Roberts concurred with Dr. Fazzio that Mary bled to death from the major wounds caused by the "knifelike instrument." (Id., pp.1074-75.)

In February 1988, a Shopko customer observed a man attempting to steal a cassette tape who was wearing a "distinctive orange camouflage jacket." State v. Fields, 115 Idaho 1101, 1102, 772 P.2d 739 (Ct. App. 1989). While the specifics of this "Shopko incident" were not presented to the jury in the murder case, the jacket, which was confiscated at the time of the "Shopko incident," was admitted during the murder trial. (##19185/19809, Tr., p.1171.) At least one witness, Keith Edson, identified the coat as being worn by Fields on the morning of Mary's murder. (Id., p.1218.) Ann Bradley, a forensic scientist, examined Fields' jacket and found two "extremely small" spots that, in a "preliminary screening" tested positive for blood. (Id., pp.1407-12.) While Bradley was unable to determine whether the blood was human, she explained that did not necessarily mean it was not human blood. (Id., pp.1410-11.)

To further establish Fields murdered Mary, the state called a number of witnesses who were in or near the Wishing Well on the morning of her murder. Edson testified he saw Fields go into the Wishing Well on the morning of Mary's murder, but, because he could not remember who it was, waited to report the sighting until February 22, 1988, after watching the news and hearing the name "Zane," which triggered Edson's memory. (##19185/19809, Tr., pp.1197-1214.) Edson had met Fields while both were in prison. (Id., pp.1190-92.) Edson reported the sighting to police and identified Fields from a photo array and subsequently in court. (Id., pp.1214-18.) Edson also identified the coat taken from Fields during the "Shopko incident" as the coat Fields was wearing when entering the Wishing Well. (Id., p.1218.)

Betty Hornecker was at the Wishing Well at approximately 11:00 a.m. and saw a man enter the store who "immediately went" to the back of the store "farthest from the

door." (##19185/19809, Tr., p.929.) Hornecker kept her eyes on him "all the time" because "his presence made me very uneasy and I also felt like he was trying to avoid me and move around the store." (Id., p.929.) While Hornecker could not positively identify Fields as the man, the description she provided fit Field's general description. (Id., pp.932-34, 954-55.) Mari Munk, who was in the Wishing Well shortly after Hornecker, provided a similar description, although she did not see the man's face. (Id., pp.967-73.)

Nancy Miller, who worked at the Quilt Crossing, a fabric store two blocks from the Wishing Well, testified that at approximately 12:30 p.m. on the day of Mary's murder, a man entered the Quilt Crossing "searching and looking very wild-eyed." (##19185/19809, Tr., pp.1100-01.) The man's description fit Fields, who was wearing an orange coat and jeans with a knife in the coat with a brown wooden handle. (Id., pp.1103-04.) On February 24, 1988, Miller identified Fields as the man in the shop from a series of photographs shown her by police and subsequently identified him in court. (Id., pp.1105-08.) Miller also identified a coat obtained from Fields as the coat he was wearing in her shop. (Id., pp.1109-10.) Miller explained that after Fields left her store, he approached the neighboring T-Shirt Plus shop. (Id., p.1122.)

Vicky Tippetts testified a man came into her shop, T-Shirts Plus, at approximately 12:30 p.m. Tippetts' attention was drawn to the man because "when he first came in he came and stood right by the cash register and stared at me." (##19185/19809, Tr., p.1128.) After stating Tippetts could not help him, the man "looked at me, looked at the register, looked at the people in the shop and then he looked at me and looked at the register." (Id., p.1128.) Tippetts was frightened because "[h]is eyes were very wild looking. They were just very scary eyes to look at. They were evil." (Id., p.1128.)

Tippets provided the same general description of the man as the prior witnesses, acknowledged she had identified the man in a photo array and subsequently identified Fields in court. (Id., pp.1132-35.) Like Miller, Tippetts also identified a coat obtained from Fields as the coat he was wearing in her shop. (Id., pp.1136-37.)

Robert Starbard, an employee at the Videon, a video store near the Wishing Well, testified that at approximately 12:30 p.m. on the afternoon of Mary's murder, a man also came into his shop "act[ing] real nervous." (#19185/19809, Tr., p.1150.) Starbard had received a telephone call about the robbery at the Wishing Well at 12:15 p.m. (Id., p.1151.) After giving a general description of the man that matched Fields, Starbard later identified him as the man from a photo array and subsequently identified him in court. (Id., pp.1154, 1159-61.) Starbard was so concerned about Fields' appearance and mannerisms that he contacted store manager Timothy McWilliams. (Id., p.1158.) McWilliams testified regarding his contact with Starbard, gave a general description of the man and identified the man as Fields from a photo array. (Id., pp.1180-85.)

Detective Dave Smith testified regarding information that was provided to the media, which did not include information regarding whether money had been taken from the Wishing Well, the location of any money taken from the Wishing Well, the motive for Mary's murder or the amount of money taken from the Wishing Well. (State's lodging A-41, pp.1369-70.)

Jeffrey Acheson, an inmate at the Idaho State Penitentiary (#19185/19809, Tr., p.1420), testified that in late March 1988, Fields initiated several conversations regarding Mary's murder after the show, Crimestoppers, came on television. (Id., pp.1428-30.) During the show Fields "would sometimes go up and either change the channel, turn the

TV off, or turn the volume down." (Id., p.1430.) Fields' behavior was "[v]ery full of anxiety, pretty angry sometimes." (Id., p.1430.) After changing channels or "calm[ing] down," Fields would say, "They can't pin that on me," or "They're trying to pin that on me but I took care of that." (Id., pp.1430-31.) Fields indicated "they wouldn't be able to link him with the [murder]" because "he had taken care of the evidence." (Id., p.1431.)

Another inmate, Joe Heistand, also testified regarding conversations initiated by Fields between May 2-10, 1989, while they were both in custody. (##19185/19809, Tr., pp.1471-73.) Fields told Heistand "what the store looked like, who was running the store, where it was located" and that he "had been by it a few times . . . [j]ust to look at it for a possible score," meaning "a theft or something of that nature . . . [b]urglary, robbery, whatever." (Id., pp.1477-79.) Fields had learned "that an older lady ran the store" and that "[w]hen he had seen her she was in there alone." (Id., p.1479.) Fields told Heistand, "[he] entered the store, went to the back of the store where the till area was and was getting the money. The lady from the store came from the back room, startled him – and screaming and hollering. She was asked to cooperate, nothing would happen, and she didn't cooperate and that's when the stabbing occurred." (Id., p.1480.) Fields stated he stabbed her "[i]n the neck and upper shoulder, upper back area . . . a few times" with "an old hickory butcher knife." (Id., p.1481.) Fields acknowledged getting "48 to 50 bucks" in "[p]aper and change." (Id., pp.1481-82.) Fields conceded when he left Mary was "still alive" and people were in the area of the store that could have seen the knife. (Id., p.1482.)

A third inmate, Scott Bianchi, also testified that on November 10, 1989, while he and Fields were in custody together, Fields initiated a conversation regarding Mary's

murder, stating, "he killed the lady, that he didn't mean to kill her, and that he felt really bad for her." (##19185/19809, Tr., p.1569.) Fields explained the murder occurred "in the Linda Vista Plaza" in a "gift shop." (Id., p.1569.) Fields stated, "he got startled and he acted on impulse . . . he said once he got started it was like he had to finish the job." (Id., p.1570.)

E. Fields Has Failed To Establish The DNA Evidence Regarding The Fingernail Scrapings And Three Hairs Would Probably Produce An Acquittal

Fields' principle argument surrounding the fingernail scrapings is based upon Dr. Frank Roberts' testimony describing "Wound No. 6," which "was a linear injury on the top of [Mary's] ring finger" described as a "defensive wound." (##19185/19809, Tr., p.1063.) Fields contends, "[g]iven Mrs. Vanderford's defensive cut and the presence of male DNA in her fingernail scrapings, it is a reasonable inference that she scratched her attacker." (Brief, p.13.) However, Dr. Roberts' testimony does not come close to supporting such an inference. As explained by Dr. Roberts, "Sometimes when people are being attacked they put their hands up to defend themselves, and this appeared to be consistent with a defense wound." (##19185/19809, p.1063.) Putting one's hands "up" to defend against an attacker is in stark contrast to actually scratching the attacker such that DNA would be collected under Mary's fingernails. Fields' contention is based upon a bare and conclusory allegation supported by no evidence. There is nothing about Dr. Roberts' description of the wound establishing Fields' DNA should be underneath Mary's fingernails. At best, the testimony establishes the knife Fields used touched Mary's hand, not that her fingernails scratched his skin.

Moreover, there is no evidence establishing the manner in which the DNA was collected from Mary's body during the autopsy. While there is certainly evidence the DNA was collected from scrapings, there is no evidence establishing how the scrapings were retrieved. It is certainly plausible that DNA from the top or edge of Mary's fingernail is what was retrieved, and, based upon the fact that she worked in a public setting where she would have contact with many people, it is more probable the DNA was from one of her customers either through direct contact, like shaking hands, or some other manner such as the exchange of money, neither of which are any more speculative than Fields' contention that Mary scratched the murderer. This was not a sexual assault case where DNA evidence from the attacker is sometimes found in fingernail scrapings because of the close proximity of the rapist with his victim. Rather this was a robbery where Fields used a knife to murder Mary and she attempted to fend off that attack with her hand. Irrespective, because Fields failed to explain how the DNA was collected or otherwise provide any evidence supporting his contention that Mary scratched her attacker, his argument fails.

Apparently recognizing any argument regarding the stray hairs found on Mary's clothing would be even more dubious, Fields does not address the three hairs or otherwise explain why they should be attributed to her murderer. Obviously, particularly since Mary worked in a public setting, the three hairs could have come from anyone. There is simply no evidence to support an inference that the hairs came from Mary's murderer, particularly since there is no evidence explaining how they were collected.

F. New Affidavits Provided By Fields' Investigator Cannot Be Considered

Apparently, recognizing the futility of his new "forensic" evidence, Fields attempts to bolster his claim with new affidavits from Betty Heaton[3] dated September 26, 2003 (#36508, R., pp.221-24), Mari Munk dated October 2, 2003 (id., pp.225-28), and Jeffrey Acheson dated July 16, 2004 (id., p.275, exhibit 9, attachment D), all witnesses who testified at Fields' trial.

At Fields' trial, Heaton detailed her actions on the morning of Mary's murder beginning with an errand to the Max Store. (##19185/19809, Tr., p.925.) After attending to other errands, Heaton arrived at the Wishing Well "[r]ight around eleven, give or take one or two minutes at the most." (Id., p.927.) Before entering the Wishing Well, Heaton "saw a man that had looked like he had just finished washing the windows and going around the corner of the store outside." (Id.) Heaton also saw a second man who "left," and spoke with a "lady [that] appeared to . . . be . . . in charge." (Id.) A third man came in the store and "very quickly" went to the back of the store "farthest from the door." (Id., pp.928-29.) Heaton noted the man "doesn't look like he fits in the store," and that Mary "came over right away and started to talk to him." (Id., p.929.) Heaton further explained, "I kept an eye on him all the time. I felt his presence made me very uneasy and I also felt like he was trying to avoid me and moved around the store, and I just tried to avoid him." (Id., p.930.) When asked if she saw the man's face, Heaton testified she "took a look . . . across the room" and saw his face "[f]ive to ten seconds maybe at the most." (Id., p.931.) In describing the man, Heaton stated, "he was a large man in comparison to Mrs. Vanderford," and "guessed" he was "six-four" and "probably the

[3] Heaton was known as Hornecker when she testified at Fields' trial.

weight would be 230, 240, somewhere in that vicinity, somewhere in that, well into the two hundreds." (Id., p.932.) Further describing the man, Heaton testified she "thought he was balding on the crown of his head, and definitely receding type hairline" "above his ears," which was "[d]ark, that's all," "probably in the brownish." (Id., pp.932-33.) Heaton could not remember seeing the man wearing a hat or face covering or whether he had facial hair. (Id., p.933.) Describing the man's clothing, Heaton stated, "I remember basically Navy blue is the color I think of when I look back to think of him, especially the pants." (Id.)

Heaton attempted to develop a composite sketch of the man with law enforcement, but explained it was not an accurate composite because "[t]he face was fuller," "eyes aren't quite as intense," but it was "the best" she could do. (##19185/19809, Tr., pp.937-38.) When provided a photo array with six photographs, which included Fields' photo, (id., p.258, exhibit 8), the best Heaton could say was "[t]here are some similarities in some of them," explaining, "One, two, three, four, five, six. Photo five, the eyes seem, to me, somewhat like this man's. Photo no. 3, I would say the lips, the mouth and the -- between the two of them the fullness of the face, hairline seems to be somewhat right" (id., pp.938-39). When expressly asked, "can you say whether the person that you saw in the store is pictured in that group of photos," Heaton stated, "No, I cannot." (Id., p.939.)

On cross-examination, Heaton agreed the man was "white," "balding," "approximately six foot four," which was taller than her husband who was six-two," and wore a "Navy blue, hooded, zip front sweat shirt." (##19185/19809, Tr., p.954.) Heaton explained she was provided a number of other photos and chose exhibit 6 (id., p.258,

exhibit 6 (picture of Mike Weaver)), which was not a photograph of Fields, as the one she "felt was close to the man that was in the store" (id., pp.958-60). Finally, Heaton stated she did not think the man was wearing an orange or red camouflaged parka. (Id., p.965.)

Heaton's latest affidavit recounts her trial testimony; the basic facts are no different than her trial testimony. (#36508, R., pp.221-24.) Heaton does reference Exhibits A through D, however, contrary to her affidavit the exhibits are not attached and are not part of the record. (#36508, pp.221-24.) Rather, Mari Munk's affidavit commences immediately after the final page of Heaton's affidavit. (#36508, p.225.) There are some "exhibits" following the completion of Munk's affidavit, but they do not correspond with those referenced in Heaton's affidavit. (#36508, pp.227-30.) Therefore, Heaton's affidavit is of even less value than her trial testimony and certainly would not "probably produce an acquittal" whether alone or in conjunction with any of the other evidence. *See* Drapeau, 97 Idaho at 691.

More importantly, Heaton's latest affidavit does not meet two other Drapeau elements. Not only is the content of the affidavit "merely cumulative or impeaching," but it was known or could have been known with reasonable diligence on Fields' part at the time of his trial. *See* Drapeau, 97 Idaho at 691. Furthermore, the affidavit is contrary to the dictates of I.C. § 19-2719 because it was known or reasonably could have been known at the time Fields filed his first post-conviction petition. Therefore, Heaton's affidavit cannot even be considered in determining whether Fields has met his burden.

The same is true with Munk's latest affidavit (#36508, R., p.225); because it is "merely cumulative or impeaching" and it was known or could have been known with reasonable diligence on Fields' part at the time of his trial, it does not meet two of the

elements under Drapeau, 97 Idaho at 691, nor can it be used under I.C. § 19-2719. Additionally, Munk's latest affidavit is basically a regurgitation of her trial testimony, containing no new facts that would bolster the DNA evidence. At trial, Munk explained on the morning of Mary's murder between 10:30 and 11:00 a.m. she was watching a television show, Classic Concentration. (##19185/19809, Tr., p.967.) When the show was finished, Munk went to the Wishing well, arriving "[b]etween 11:05 and 11:10 maybe" to find her grandmother a birthday present. (Id., pp.967-68.) Upon entering the shop, Munk's attention was immediately drawn to a woman who appeared to be a clerk or employee who was on the telephone and "smiled and acknowledged" Munk. (Id., p.968.) Going to the rear of the shop, Munk saw a man "just standing there looking at the things that were in that room." (Id., p.969.) While Munk didn't pay particular attention to the man, she was "wondering what he was looking at." (Id.) Munk never looked at the man's face. Munk could see the man was looking at "junk," so she "left and went back down the other side of the store." (Id., p.970.) Munk was in the shop "[a]t most, ten minutes," never making a purchase. (Id.) When she left, the man was still in the store. (Id.) Describing the man's general features, Munk explained he was "big and sloppy, about 230 pounds, over six feet, and about 48 years old." (Id., p.971.) His clothing was "[g]rubby, sloppy, dark." (Id.) Munk was provided a photograph of Fields at trial (trial exhibit 9) and agreed she could not say "anything about the face," and could not "tell the height" by the photograph, but concluded "it is a fat body similar to the one that was -- that I said." (Id., p.973.)

On cross-examination, Munk confirmed she did not look at the man's face. (#19185/19809, Tr., p.979.) Based upon the man's attire and "what he was looking at,"

Munk thought he might be a "junk dealer." (Id., p.980.) She also confirmed she was in the store "less than ten minutes." (Id.) Munk was also questioned regarding her husband who was forty-one, approximately 175 pounds and six-three. (Id., pp.983-84.) She explained the man in the shop was "[s]horter and heavier maybe" than her husband (id., p.984) and reaffirmed that belief (id., pp.984-86).

Munk's latest affidavit recounts her trial testimony (#36508, R., pp.225-26); the basic facts are no different than her trial testimony with her recounting that the man was "over six feet tall, about 230 lbs and 48 years old" (id., p.225). Admittedly, Munk contends she was shown a picture of Mike Weaver and that it "looks much more like the man that I saw in the Wishing Well store shortly before the murder than did the defendant, Zane Fields" (id., p.226), but because she never recants her trial testimony that she did not get a good look at the man's face, this minor fact is of no consequence, particularly fifteen years after Mary's murder. Clearly, Munk's 2003 affidavit is of even less value than her trial testimony and certainly would not "probably produce an acquittal" whether it could be used alone or in conjunction with any of the other evidence. *See* Drapeau, 97 Idaho at 691.

Acheson's latest affidavit is likewise unavailing. Although Fields contends Acheson's latest affidavit establishes "these snitch witnesses received information about the crime from the State" (Brief, p.15) Fields' sole focus from Acheson's affidavit is the contention that Acheson was "corrected by the investigators as to the fact that it was not a gun but a knife that was used to do the murder" and that Acheson "never had this information until the police told [him]." (#36508, R., p.275, exhibit 9, attachment D, p.1.) However, like the new affidavits of Heaton and Munk, because Acheson's latest

affidavit is "merely cumulative or impeaching" and it was known or could have been known with reasonable diligence on Fields' part at the time of his trial, it does not meet two of the elements under Drapeau, 97 Idaho at 691, nor can it be considered under I.C. § 19-2719. Moreover, considering the manner in which Acheson was impeached at trial (#19185/19809, Tr., pp.1441-56), the impeachment value of tidbits from his latest affidavit are of dubious value.

Finally, Fields attempts to revisit many aspects of his trial and explain why, based upon the evidence that was presented, it was impossible for him to have murdered Mary. However, Fields' attempt fails to explain how this regurgitation of the trial evidence is linked to the new forensic DNA evidence and is merely an attempt to rehash his version of the evidence that was rejected by the jury's finding of guilt. More importantly, Fields conspicuously ignores significant pieces of evidence such as Ann Bradley's finding of blood on his jacket (#19185/19809, Tr., pp.1407-12) and all of the witnesses who saw Fields near the Wishing Well shortly after Mary's murder, including Nancy Miller (id., pp.1100-10), Vicky Tippetts (id., pp.1128-37), Robert Starbard (id., pp.1150-61) and Timothy McWilliams (id., pp.1180-85). Fields also ignores the vast majority of the testimony from the three inmates, which included information that, according to Detective Dave Smith, had not been disclosed to the media or the witnesses. (Id., pp.1369-70.) Finally, despite Fields' best efforts, despite the fact he has obtained new affidavits from three trial witnesses, nowhere do any of the three witnesses recant any of their trial testimony.

Even if the three new affidavits could be considered in conjunction with the latest DNA evidence, neither the affidavits nor the DNA evidence, whether considered

collectively or individually and reviewed with the compelling evidence presented at trial, establish Fields has met his burden of proving they would probably produce an acquittal.

CONCLUSION

The state respectfully requests that the district court's Memorandum and Order of Dismissal summarily dismissing Fields' post-conviction claims be affirmed.

Dated this 29th day of June, 2010.

L. LaMONT ANDERSON
Deputy Attorney General
Chief, Capital Litigation Unit

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on or about the 29th day of June, 2010, I caused to be serviced a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, and addressed to the following:

Bruce Livingston Federal Defender Services of Idaho Capital Habeas Unit 702 W. Idaho Street, Suite 900 Boise, ID 83702	X ____ ____ ____ ____	U.S. Mail Hand Delivery Overnight Mail Facsimile Electronic Court Filing
Dennis Benjamin Nevin, Benjamin, McKay & Bartlett P.O. Box 2772 Boise, ID 83701	X ____ ____ ____ ____	U.S. Mail Hand Delivery Overnight Mail Facsimile Electronic Court Filing

L. LaMONT ANDERSON
Deputy Attorney General
Chief, Capital Litigation Unit