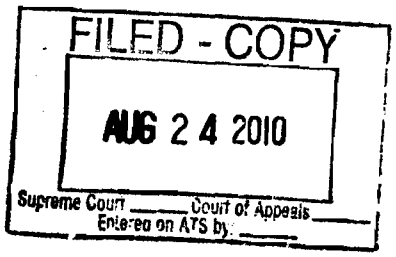
8-24-2010

Fields v. State Appellant's Reply Brief Dckt. 36508

IN THE SUPREME COURT OF THE STATE OF IDAHO

ZANE JACK FIELDS,	)	
	)	
Appellant,	)	**DOCKET NO. 36508-2009**
	)	
v.	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	



APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District for Ada County Honorable Thomas F. Neville, District Judge presiding

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I. INTRODUCTION

This is a case of first impression, involving standards for evaluating and considering evidence under the DNA Innocence statute passed by the Idaho Legislature in 2001.

Zane Fields sought to prove his innocence of capital murder at an evidentiary hearing, after a timely filed request for post-conviction relief. Fields proffered evidence to the district court that he was excluded as a contributor of male DNA found in fingernail scrapings taken by the police from the victim, Mary Vanderford. This DNA evidence was sufficient to preclude summary dismissal.

Mrs. Vanderford was attacked by a lone man in a cramped space behind the counter in the Wishing Well store. While struggling with her attacker, she suffered multiple stab wounds and a knife cut on her left hand that was "consistent with a defensive wound." When the DNA evidence is evaluated in conjunction with the physical evidence of the attack and the description by two witnesses of a man in the store who did not look like Fields, there can be no doubt that a genuine issue of material fact exists and that summary dismissal was error.

Accordingly, this Court should either reverse the district court and declare Fields innocent or remand the case for an evidentiary hearing, after setting the standards for evaluating and considering the scope of evidence available under the DNA statute.

II. LEGAL STANDARD FOR INNOCENCE

The DNA Act passed by the Idaho Legislature controls this case. *See* Idaho Session Laws, ch. 317, pp. 1126-30 (2001) (hereinafter "DNA Act"). The DNA Act is codified in Idaho Code sections 19-4901(a)(6), 19-4902(b) through 19-4902(f), and 19-2719(4). Idaho Code section 19-4902(d) provides that the DNA testing must produce new non-cumulative evidence

that shows "it is more probable than not that the petitioner is innocent." If the "DNA test results demonstrate, *in light of all admissible evidence*, that the person is not the person who committed the offense, the court shall order appropriate relief." I.C. § 19-4902(e) (emphasis added).

The standard for "actual innocence" was recently addressed by this Court. *Rhoades v. State*, 148 Idaho 247, __, 220 P.3d 1066, 1072 (2009). In *Rhoades*, this Court stated that a prima facie case of "actual innocence" requires that "'the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.'" *Id.* (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

As the State noted, "'proof beyond a reasonable doubt marks the legal boundary between guilt and innocence.'" State's Brief at 10 (quoting *Schlup*, 513 U.S. at 328). A reasonable, properly instructed juror will not vote to convict if that juror has a reasonable doubt as to the defendant's guilt.

Finally, the standard for establishing innocence is the preponderance of the evidence standard, not the clear and convincing standard.[1]

III. ALL ADMISSIBLE EVIDENCE MUST BE CONSIDERED

The State argues that this Court may not consider all probative material evidence of Fields' innocence. The State contends that *State v. Drapeau*, 97 Idaho 685, 551 P.2d 972 (1976), and Idaho Code section 19-2719(5) limit the evidence that can be evaluated and considered under the DNA Act. For the following reasons, the State is wrong.

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[1] *See* I.C. § 19-4902(d) (more probable than not that the petitioner is innocent); *Rhoades*, 220 P.3d at 1072 (more likely than not that reasonable juror would not convict); and *Schlup*, 513 U.S. at 327 ("more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt").

A. *Drapeau* Does Not Limit the Admissible Evidence that Must Be Considered

The Legislature enacted a broad, all-encompassing standard of permissible evidence for the evaluation of innocence claims based on DNA analysis. The DNA Act represents a major distinction from both the Uniform Post-Conviction Procedure Act ("UPCPA"), I.C. § 19-4901 et seq., and the Special Appellate and Post-Conviction Procedure for Capital Cases. I.C. § 19-2719. Rather than repeat other statutory limitations or impose diligence requirements (other than timely filing of the claim), the Legislature established "all admissible evidence" as the appropriate evidentiary standard. Idaho Code § 19-4902 (e).

In an effort to restrict review of evidence, the State seeks to import the *Drapeau* newly discovered evidence standard into innocence claims governed by the DNA Act. Neither the plain language of the DNA Act nor a statutory analysis of the language supports this reading.

The post-conviction statute distinguishes between petitions raising traditional guilt or sentencing claims based on new evidence and those raising innocence claims supported by DNA testing. Within the class of traditional post-conviction cases, the statute authorizes new evidence claims based on "evidence of material facts, not previously presented and heard, that requires vacation of the conviction and sentence in the interest of justice." I.C § 19-4901(a)(4). The post-conviction statute was amended in 2001 to authorize a more specific basis for a post-conviction claim: "Subject to the provisions of section 19-4902 (b) through (f), Idaho Code, that the petitioner is innocent of the offense." *See* I.C. § 19-4901(a)(6). Thus, the plain language of the statute draws a distinction between general claims of newly discovered evidence and specific claims of innocence premised on DNA testing. *See* I.C. § 19-4901(a)(4) and 19-4901(a)(6).

When the language of a statute is plain and unambiguous, courts must give effect to the statutory language as written, without engaging in statutory construction. *State v. Jeppesen*, 138 Idaho 71, 74, 57 P.3d 782, 785 (2002). Other than a requirement of timely filing with which Fields complied, the Legislature included no procedural limitation on the facts to be considered in evaluating innocence claims brought under the DNA Act. Instead, the Legislature provided expressly that innocence claims were to be evaluated "in light of *all* admissible evidence." I.C. § 19-4902(e) (emphasis added). Given the Legislature's unambiguous statement of the broad scope of evidence to be considered in proving one's innocence, the only limit on evidence to be considered in innocence cases seeking DNA testing is that the evidence be *admissible.* Section 19-4902(e) broadly and explicitly empowers the reviewing court to determine whether Fields is innocent "*in light of all admissible evidence.*" The State's attempt to limit timely innocence claims, by excluding evidence because a particular fact might have been discoverable earlier, is contrary to the plain language of the new DNA Act.

Notwithstanding the DNA Act's plain language, the State seeks to preclude consideration of additional new facts that support Fields' DNA innocence claim. The State relies on *Drapeau* and *Grube v. State*, 134 Idaho 24, 30, 995 P.2d 794, 800 (2000), for the proposition that "[p]resumably ... Fields must establish the evidence meets the four-part test from *State v. Drapeau.*" State's Brief at 9. That presumption should be rejected by this Court.

Neither *Drapeau* nor *Grube* involved DNA testing requests or post-conviction claims pursuant to sections 19-4901(a)(6) and 19-4902(b) through (e). Indeed, the new DNA testing statute was not passed by the Legislature until 2001, State's Brief at 9 (citing session laws), *after* the decisions in both *Drapeau* and *Grube*. The State's importation of the four-part *Drapeau* test,

applicable generally to petitions premised on newly discovered evidence, is not applicable to the more specific and limited class of innocence cases – based on the statute's plain language, *supra*, as well as principles of statutory construction and sound reasons of public policy.

Even if there were some ambiguity in the meaning of "all admissible evidence" under section 19-4902(e), rules of statutory construction lend further support to the conclusion that the *Drapeau* limitations are inapplicable in evaluating claims of innocence under the Act. The Legislature is charged with knowing the state of existing law when it passes legislation. *Callies v. O'Neal*, 147 Idaho 841, 847, 216 P.3d 130, 136 (2009). Based on the Legislature's presumed knowledge of *Drapeau* and *Grube*, the express provision for review of innocence cases "in light of *all* admissible evidence" is a clear statement of legislative intent to omit any diligence, cumulative or impeaching limitations and to mandate consideration of a broader range of facts than might be allowed under *Drapeau*.[2]

The DNA Act does not limit the scope of admissible evidence and does not include a diligence requirement that could exclude some otherwise admissible evidence. "We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless

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[2] While there are some similarities between the *Drapeau* test for relief based on a general claim of newly discovered evidence and the statutory test for a showing of innocence based on new DNA evidence under section 19-4901(a)(6) and 19-4902(b) through(f), important differences preclude importing the entire *Drapeau* test into the innocence analysis under the statute. The primary congruity between the innocence standard in section 19-4902(d) and (e) and the standard for a new trial in *Drapeau* is that a new trial should be ordered if the new evidence will probably result in an acquittal. *See Drapeau*, 97 Idaho at 691, 551 P.2d at 978 ("will probably result in an acquittal"); I.C. § 19-4902 (more likely than not that petitioner is innocent); *Rhoades*, 148 Idaho at __, 220 P.3d at 1072 (more likely than not that no reasonable juror would have convicted in light of the new evidence)(citing *Schlup*). These standards are essentially the same; if it is "more likely than not" that the petitioner is innocent or that a reasonable juror would not vote to convict, then a vote of the reasonable juror that considers the new evidence will probably result in an acquittal. *See supra* at 2.

intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 341 (2005). "[W]hen 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 452 (2002).

The Legislature knows how to impose a diligence requirement, as it imposed a strict waiver provision limiting the consideration of claims that were known or should or could have been known. *See* I.C. 19-2719(5). Had the Idaho Legislature wished to attach a diligence requirement to the evidence considered in evaluating claims of innocence, it could have done so explicitly. Accordingly, the Legislature's inclusion of a broader scope of evidence in DNA innocence claims constitutes a purposeful exclusion of the *Drapeau* limitations.

Further support for the Act's distinction arises from the obvious public policy that timely wrongful conviction cases based on claims of innocence should be evaluated closely based on all material evidence. As a matter of public policy, particularly when the ultimate punishment of death has been imposed, determinations of innocence should be made after considering all relevant facts. The "individual interest in avoiding injustice is most compelling in the context of actual innocence. The quintessential miscarriage of justice is the execution of a person who is entirely innocent." *Schlup*, 513 U.S. at 324-25. Under *Schlup* a credible innocence claim requires "new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." *Id.* at 324. This Court has declined to bar the consideration of new evidence in support of a previously

dismissed claim because it "would result in Idaho courts being unable to entertain evidence of actual innocence in successive post-conviction petitions, even where the evidence *was clearly material* or had been suppressed by prosecutorial misconduct." *Sivak v. State*, 134 Idaho 641, 647, 8 P.3d 636, 642 (2000)(emphasis added). This Court's reservation in *Sivak* of the right to review clearly material evidence of actual innocence expresses a sound public policy and further supports construction of the DNA Act to allow the same.

Construing the statute in favor of this public policy will not introduce a substantial burden on the courts, given the relative rarity of viable actual innocence cases. Substantial claims of innocence are "extremely rare." *Schlup*, 513 U.S. at 324. There have been only 258 DNA exonerations in the entire United States, and only one in Idaho. *Innocence Project Case Profiles*, available online, http://www.innocenceproject.org/know/ . Given the rarity of viable innocence cases and the enormity of the stakes for the unfortunate few who have been convicted despite their innocence, the Legislature instructed the courts to review plausible innocence cases "in light of all admissible evidence." As presumed under *Callies*, the Legislature no doubt took to heart this Court's concern in *Sivak* that clearly material evidence should be considered in cases of actual innocence: "We must be vigilant against imposing a rule of law that will work injustice in the name of judicial efficiency." *Sivak*, 134 Idaho at 647, 8 P.3d at 642.

For similar reasons, other aspects of the *Drapeau* limitations, that "cumulative or impeaching" evidence may not be considered, should likewise be inapplicable to a DNA innocence claim. As with a *Brady* claim, material impeaching evidence is plainly exculpatory. *See United States v. Bagley*, 473 U.S. 667, 676 (1985). Exculpatory evidence, even if it is exculpatory because it is impeaching, is plainly relevant and material to an actual innocence

claim. *See, e.g., State v. Presnall*, 119 Idaho 207, 208-09, 804 P.2d 936, 937-38 (1991)(when absence of impeaching evidence might have contributed to the conviction, evidence impeaching test results was plainly relevant and improperly excluded). When DNA evidence plainly raises the likelihood that an innocent person has been convicted and sentenced to death, additional, admissible evidence that impeaches witnesses who may have been the source of inculpatory evidence is plainly relevant admissible evidence that must be considered under the DNA Act.

The State contends that cumulative portions of the affidavits offered by Fields cannot be considered in this proceeding. To the extent that information in any of Fields' proffered affidavits is truly *cumulative of statements offered by that same witness* at trial, this Court must already consider those facts when reviewing this case "in light of all admissible evidence." The State characterizes some portions of the Betty Heaton[3] and Mari Munk affidavits as "regurgitation" of their trial testimony. *See* State's Brief at 23, 25. Consideration of the truly cumulative portion of Fields' proffered affidavits is at most harmless, because those facts indeed *are* in the trial transcript and constitute part of the admissible evidence which this Court already must consider. Since the facts are scattered throughout a transcript, the organization of the facts in the affidavits offers convenience to this Court, and the affidavits should therefore be considered in their entirety.

The State objects to consideration of Jeff Acheson's affidavit on the ground that it is cumulative and impeaching. State's Brief at 24-25. However, Acheson's statement, that the other inmate "snitch" witnesses admitted making up their stories regarding Fields' alleged

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[3] Betty Heaton was Betty Hornecker at trial. She is referred to herein as Betty Hornecker-Heaton

confessions to them, is not cumulative evidence, notwithstanding its similarity to the testimony of Salvador Martinez. Independent testimony from Acheson that the other inmate informants Heistand, Bianchi and Gilchrist admitted making up their stories is powerful non-cumulative evidence that undercuts the main evidence against Fields, his alleged confessions to the inmate snitches. R. Vol. II, p. 275, Certificate of Exhibits (hereinafter "CE"), Ex. 9, Att. D, p. 2. This Court has held that testimony to the same facts by *different* witnesses is not "cumulative" evidence. *See State v. Harris*, 132 Idaho 843, 847-48, 979 P.2d 1201, 1205-06 (1999). In *Harris*, the State argued that an excluded witness was cumulative, when that witness's testimony was identical on the important point made by a witness who testified. This Court held that the excluded witness's testimony was *not cumulative*, because the testimony more strongly corroborated the defendant's story by virtue of coming from another witness, directly attacked the credibility of the prosecution's main witness, and "reasonably could have affected the outcome of the case." *Id.*

The State's attempt to preclude this Court from considering material, probative evidence that supports Fields' innocence claim should be rejected.

B. For Similar Reasons, 19-2719 Does Not Limit the Evidence to Be Considered

The State also argues that Idaho Code section 19-2719 precludes the consideration of information that could or should have been known, or is cumulative or impeaching, State's Brief at 22-23, 25, even if that evidence wasn't presented at trial. For much of the same reasoning set forth above, regarding the inapplicability of *Drapeau*, *supra* at 3-9, the State's argument about the limitations on the DNA Act arising from section 19-2719 should also be rejected. Several additional reasons specific to section 19-2719 also foreclose the State's argument.

First, section 19-2719 explicitly provides that the "special procedures for ... forensic DNA testing set forth in sections 19-4901(a)(6) and 19-4902(b) through (f), Idaho Code, are *fully applicable* in capital cases...." I.C. § 19-2719(4)(emphasis added). Those applicable procedures are discussed above.

Second, if the State is relying on section 19-2719(3), to preclude the consideration of Fields' innocence claim and supporting affidavits, the time limitation was changed by the Legislature to revive formerly barred innocence claims and allow claimants like Fields to file by July 1, 2002. I.C. § 19-2719(4). Section 19-2719(4) explicitly included a provision that waives the general, 42-day, post-conviction filing requirement of section 19-2719(3) for DNA innocence cases like this one. Fields timely filed his petition on June 27, 2002. R. 7.

Third, if the State is instead relying upon section 19-2719(5) to exclude the affidavits, that provision is inapplicable. Section 19-2719(5) only bars *claims*, not supporting facts. "If the defendant fails to apply for relief as provided in this section and within the time limits specified, he shall be deemed to have waived such *claims* for relief as were known, or reasonably should have been known." I.C. § 19-2719(5)(emphasis added). Fields' innocence *claim* is neither barred nor waived. It was timely filed.

Additionally, sub-sections 19-2719(5)(a), (b), and (c) do not even apply to a timely filed post-conviction petition. Those sub-sections apply only to a petitioner seeking a safe harbor for an untimely claim via an "exception" to the timeliness requirement. Here, Fields raised the claim on time, pursuant to section 19-2719(4).

Even if sub-sections 19-2719(5)(a) and (b)[4] did apply to Fields' timely filed petition, by their terms they do not preclude the consideration of his proffered affidavits. With respect to sub-section 19-2719(5)(a), Fields complied with the procedures prescribed therein. His petition was supported by a precise statement of the issue asserted and by material facts stated under oath or affirmation by credible persons with first hand knowledge. *See* I.C. § 19-2719(5)(a). In supporting his DNA petition with a detailed description of material facts and with proffered affidavits by credible persons with personal knowledge, Fields complied with the "procedures set forth in this section." I.C. § 19-2719(4).

Sub-section 19-2719(5)(b) states that a petition seeking the exception is "facially insufficient" to the extent it alleges matters that are "cumulative or impeaching" or would not "cast doubt on the reliability of the conviction or sentence." I.C. § 19-2719(5)(b). For the same reason that specific directives of the DNA Act control over more general provisions of the UPCPA, *supra* at 3-6, the general objection to "cumulative or impeaching" evidence in section 19-2719 must fall to the more specific directive of the DNA Act that the determination of Fields' innocence be made "in light of all admissible evidence." Section 19-2719(4) enforces that prescription by stating that the new DNA provisions are "fully applicable in capital cases." Moreover, the allegations in Fields' proffered affidavits "cast doubt on the reliability of the conviction or sentence." *See* I.C. § 19-2719(5)(b). If definitions of "cumulative or impeaching" were framed so as to preclude "admissible evidence" and foreclose the consideration of probative, material information that "cast[s] doubt on the reliability of the conviction or

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[4] Sub-section 19-2719(5)(c) prohibits petitions seeking retroactive application of new rules of law. This provision is not implicated by this case.

sentence," the statute would be "palpably absurd." *See Jeppesen*, 138 Idaho at 74, 57 P.3d at 785. Such a contorted construction cannot stand.

Accordingly, based on the plain language of the statute, rules of statutory construction and sound public policy, Fields' proffered affidavits from witnesses Hornecker-Heaton, Munk and Acheson contain admissible material evidence which must be considered in evaluating Fields' claim of innocence under the post-conviction DNA Act.

IV. FIELDS' DNA TEST RESULTS AND WITNESS AFFIDAVITS MADE A POWERFUL CASE OF INNOCENCE WITH NEW MATERIAL EVIDENCE THAT SHOULD HAVE BEEN TESTED AT AN EVIDENTIARY HEARING

Fields has proffered DNA test results and sworn affidavits that offer admissible evidence of his innocence. The State concedes the case against Fields was "not overwhelming," but argues that "compelling" evidence supports the conviction. State's Brief at 11-12. For the reasons set forth in Fields' opening brief and herein, his sworn affidavits strongly support his innocence claim. Accordingly, the district court should have held an evidentiary hearing to determine whether, in light of all admissible evidence, it is more probable than not that no reasonable juror would have convicted Fields.

A. The Male DNA in the Victim's Fingernail Scrapings Most Likely Came From Her Attacker

The State and district court engaged in faulty logic and accepted a circular fallacy, when they concluded, erroneously, that the male DNA found under the victim's fingernails could not have come from her attacker because there was no evidence that Fields was scratched. In the district court the State invited this error:

> The testing only shows that the petitioner's DNA was not found on the scrapings taken from the victim's fingernails. Since there is no evidence that the victim

> scratched the petitioner, or touched him in such a way that his DNA would get under her fingernails, the absence of his DNA, proves nothing.

R. 236.[5] The district court adopted this fallacious reasoning in its opinion. "With respect to the DNA evidence recovered from the victim's fingernail scrapings, there was no evidence that the Petitioner had been scratched." R. 260, Memorandum Decision and Order at 4.

Indeed, there *is* no evidence that Fields was scratched, and the State admits as much. "There was no evidence that the Defendant had scratch marks on him." R. 58. In concluding that the fingernail scrapings are irrelevant because there is no evidence that Fields was scratched, the State and the district court err. The male DNA under Mrs. Vanderford's nails establishes that she scratched *someone*, and the tests exclude Fields. That Fields was not scratched only adds to the proof of his innocence.

The DNA and forensic evidence supports the reasonable inference of innocence because male DNA from someone other than Fields was found under the victim's fingernails. The State's attempts to explain away that DNA are not persuasive.

The State concedes that its pathologist, Dr. Frank Roberts, characterized a cut on Mrs. Vanderford's finger as a "defensive wound." State's Brief at 13. Dr. Roberts described the cut and explained that:

> This was a linear injury on the top of the ring finger.... I described it as a defense wound. Sometimes when people are being attacked they put their hands up to defend themselves, and this appeared to be consistent with a defense wound.

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[5] *See also* State's Brief at 18 (nothing about the defense wound "establish[es] 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.").

T. Tr. Vol. 5, p. 1063. The inference drawn from this evidence is that Mrs. Vanderford was defending herself. While attempting to fend off knife thrusts and deter her attacker, she likely scratched or grabbed him and got his DNA under her nails.

However, the State suggests that "Dr. Roberts' testimony does not come close to supporting" an inference that the victim, Mary Vanderford, scratched her attacker. State's Brief at 18. Instead the State urges that "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." *Id.* "At best," the State concludes, "the testimony establishes the knife [the attacker] used touched Mary's hands, not that her fingernails scratched his skin." *Id.* The State suggests that "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." State's Brief at 19. This "inference" falls short of the reasonable inference that must be drawn in petitioner's favor.

The State argues that 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 the victim." *Id.* This *is* a case involving close proximity. Examination of the pictures of the space where Mrs. Vanderford was killed reveals a narrow space between parallel sets of display cases and shelving. *See* State's [Trial] Exhibits 2, 29 and 31, attached as an addendum.[6]

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[6] On State's [Trial] Exhibit 2, the blood locations are solid blue circles, T. Tr. Vol. V, p. 1305, and the vantage point of the photographs of the scene inside the Wishing Well, State's [Trial] Exhibits 27-31, are indicated by blue numerals corresponding to the exhibit number, paired with an arrow indicating the vantage point of the photographer when each exhibit was taken. T. Tr. Vol. 5, pp. 1292-95, 1302-03.

Mrs. Vanderford was murdered in a knife attack, not by a gunshot from a distance outside her reach. The defensive cut on Mrs. Vanderford's finger, T. Tr. Vol. 5, p. 1063, *see* State's [Trial] Ex.11, is evidence of her struggle within grasping range. Undoubtedly, that is why the police in this case obtained and preserved evidence by use of the sexual assault or rape kit, notwithstanding the lack of evidence of a rape or sexual assault. Fortunately for Fields, the standard rape kit included fingernail scrapings. R. Vol. II, p. 275, CE, Ex. 8 (Affidavit of Pamela Marcum In Support of Petitioner's Motion For Access to Evidence, filed September 15, 2005) ("it was standard practice for a victim's fingernail scrapings to be included in any rape kit," including at the time of Mrs. Vanderford's attack, and "[t]hose fingernail scrapings could be analyzed for DNA," and this "type of testing was not available in 1988").

In the court below, the State specifically fought to deny access and testing of the sexual assault kit. R. 136. Before Fields pointed the State to the sexual assault kit with a specific request, the State had denied him access to the fingernail scrapings by stating: "After diligent search, the State has been unable to find any evidence that Mrs. Vanderford's fingernails were scraped as part of the investigation. If they were, the evidence no longer exists." R. 58. Once Fields filed Pamela Marcum's affidavit noting that a sex crimes kit was standard procedure in 1988, the prosecution found the kit in the evidence, and the District Court granted Fields access to the kit's samples from the victim. R. 154. The fingernail scrapings were collected with toothpicks found inside the rape kit. Transcripts on Appeal, Vol. 5 of 10, Sept. 27, 2005, p. 27.

The State's suggestion that the fingernail scrapings have not been shown to have come from under Mrs. Vanderford's fingernails, State's Brief at 19 ("no evidence establishing how the scrapings were retrieved"), defies comprehension. If the State is suggesting that the toothpicks

yielding "fingernail scrapings" did not scrape material from underneath Mrs. Vanderford's nails, that should be litigated at an evidentiary hearing, as such a practice would defy the standard procedures used at the time.

The State contends that the male DNA more likely came from a handshake or an exchange of money with a customer. The more reasonable inference is that the male DNA found under Mrs. Vanderford's fingernails is much more likely to be from her attacker. Given the defensive cut suffered by Mrs. Vanderford and the ordinary course of handshakes and money exchanges, the State's proposed inference that Mrs. Vanderford did not scratch her attacker is unreasonable. The likelihood of the source of the DNA should be determined after an evidentiary hearing.[7]

B. Witness Testimony Strongly Supports Fields' Innocence

Two sets of witness testimony support Fields' DNA innocence claim. In his Opening Brief, Fields recounted the testimony and new affidavits from one set. Two women, Munk and Hornecker-Heaton, were in the Wishing Well with Mrs. Vanderford and a lone male for the 15 minutes before Vanderford was attacked. Opening Brief at 8-11.

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[7] In addition to the male DNA found in the fingernail scrapings, three hairs were found on Mrs. Vanderford that originated from an unknown man that was not Fields. R. 275, CE, Ex. 9, Att. F at 3-4. (Affidavit of Dr. Randell T. Libby). While the origin of these hairs is not known, it seems likely that when an attacker confronted and stabbed Mrs. Vanderford, hairs from the attacker could have been deposited on her body. The use of hairs from a victim's body to convict a person that left the hairs is a commonplace occurrence. The State contends that there is no evidence of how these unknown hairs were collected. State's Brief at 19. However, these hairs were found on evidence that had been preserved and held by the State, which was examined by Fields' counsel and expert at the State's crime lab in Meridian, Idaho while under observation of Prosecutor Roger Bourne. *See* Transcripts on Appeal, Vol. 6 of 10, p.7 (May 5, 2006).

The State responded that another set of witnesses saw Fields in a nearby retail strip mall, the Linda Vista Plaza, also on Fairview Avenue and several blocks from the Wishing Well. State's Brief at 15-16, 25 (collectively, this set of witnesses will be referred to as "the Linda Vista Plaza witnesses"). The Linda Vista Plaza witnesses placed Fields in their respective stores, perhaps "a half mile" from the crime, T. Tr. Vol. 5, p. 1114, within an hour and fifteen minutes of the crime. T. Tr. Vol. 5, pp. 1101, 1127; T. Tr. Vol. 6, p. 1150.

Contrary to the State's supposition that placing Fields in the neighborhood establishes his guilt, the Linda Vista Plaza witnesses help support Fields' claim of innocence. Mrs. Vanderford died from multiple stab wounds to the throat, chest and back. *See* T. Tr. Vol. 5, 1059-61; State's [Trial] Ex. 10. None of the Linda Vista Plaza witnesses mentioned Fields having any blood on him. *See* T. Tr. Vol. 5, pp. 1096-1147 (testimony of Nancy Miller and Vicki Tippetts); T. Tr. Vol. 6, pp. 1148-88 (testimony of Robert Starbard and Timothy McWilliams). In omitting any mention of blood on Fields, the testimony of the Linda Vista Plaza witnesses supports Fields' innocence, not his guilt.

In addition to their failure to observe any blood on Fields, as set forth *infra*, the Linda Vista Plaza witnesses confirm that Fields looks nothing like the actual murderer – the man who was in the Wishing Well with Munk and Hornecker-Heaton until they left him alone with Mrs. Vanderford, just moments before the attack.

Fields' proffered affidavits from Munk and Hornecker-Heaton highlight the weakness of the State's case against Fields. The State is correct that much in their affidavits recounts facts to which they testified at trial. However, that evidence is important and properly before the Court

because under section 19-4902(e) Fields' innocence must be evaluated in light of all admissible evidence. Their trial testimony was obviously admissible.

The man that Munk and Hornecker-Heaton observed in the Wishing Well did not look like Fields. On the day after the murder Hornecker-Heaton went to the police station and helped create a composite sketch of the man she and Munk saw in the Wishing Well. T. Tr. Vol. 5, pp. 936-37. That representation of the man is State's [Trial] Exhibit 5. *Id.* Detective Smith and Lieutenant Wallace acknowledged that the composite sketch of the suspect was distributed to the media, released to the public and broadcast throughout the state and country. T. Tr. Vol. 6, p. 1327, Vol. 7, p. 1380. The composite sketch included a detailed description of the man seen inside the Wishing Well at around 11:20 a.m. on February 11, 1988 and indicated that he was wanted for questioning by the police. State's [Trial] Ex. 5. The "Physical Description" was of a "White male – 48 years – 6'4" – 220# [pounds] – bald on top w/dark brown hair on the sides, smooth skinned – no facial hair." *Id.* The composite sketch noted that the subject was wearing a "Blue sweatshirt with a zippered front." *Id.*


Composite sketch from Defense Ex. 5

At trial, Hornecker-Heaton described the man she saw as follows: "white," "balding," "approximately six foot four" (taller than her six foot two inch husband), wearing a navy blue, zip-front, hooded sweat shirt. T. Tr. Vol. 5, pp. 954-55. He weighed 230 to 240 pounds. *Id.*, p. 932. The man had dark, brownish hair above his ears. *Id.*, p. 933. He was approximately 48 years old. T. Tr. Vol. 5, p. 957. The man in the Wishing Well was not wearing an orange or red

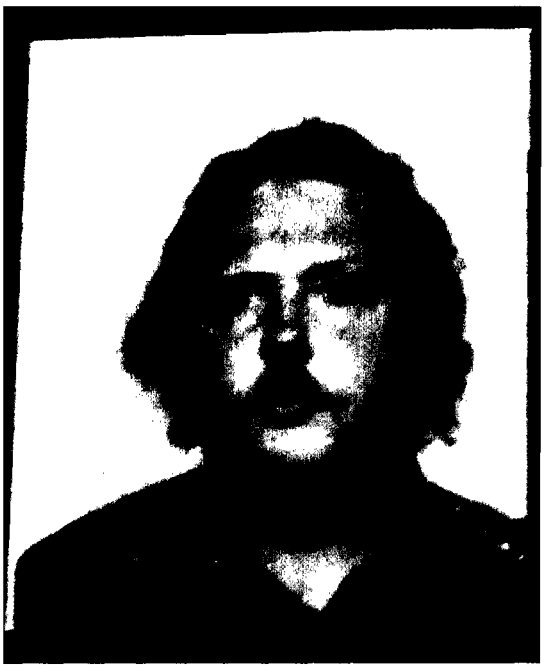
camouflaged parka. *Id.*, p. 965. In her only correction to the original description, she stated that the composite, State's Ex. 5, did not depict the fullness of his face. T. Tr. Vol. 5, pp. 956-57. The face should have been fuller, the eyes weren't as intense. *Id.*, p. 937.

Munk described the suspicious man in the Wishing Well as a big man, "about 230 pounds, over six feet, and about 48 years old," with "grubby, sloppy, dark" clothing. T. Tr. Vol. 5, p. 971. Her best estimate of his height was over six foot and "under six-three." *Id.*, p. 986. Munk was certain the man was not wearing orange or red clothing. *Id.*, p. 987.

The report from Fields arrest on February 22, 1988 at Shopko provides the following objective information. He was 29 years old, five feet eleven inches tall and 200 pounds. Eleven days after the Wishing Well murder, he had long, straight brown hair. R. 275, CE, Ex. 1, Att. I (last two pages of exhibit, "long" and "straight" hair descriptions come from checked boxes on last page). In terms of physical stature, age, hair and clothing, Fields isn't remotely similar to the man that Munk and Hornecker-Heaton described, notwithstanding the State's disingenuous characterization of Hornecker-Heaton's description of the man in the Wishing Well as one that "fit Fields' general description." State's Brief at 15.

On February 22, 1988, Detective Wallace took a picture of Fields, State's [Trial] Ex. 9, at the Boise Police Department. T. Tr. Vol. 6, p. 1322. The picture of Fields that was used in line-ups shown to witnesses was presumably the mug shot taken the same day, as he appears to be wearing the same shirt. *See* State's [Trial] Ex. 8 (Fields is upper right picture); State's [Trial] Ex. 17 (Fields is lower left picture)[both exhibits are included in the addendum to this brief].

Here is what Fields looked like 11 days after the Wishing Well murder:



Line-up picture, State's Ex. 17

In the detectives' offices, State's Ex. 9

As can be seen by these pictures, Fields had long shaggy hair. He was not "bald on top" and did not have short dark hair above the ears, like the man in the composite. *See* State's [Trial] Ex. 5.

The Linda Vista Plaza witnesses testified to the appearance of a man in their stores who was either actually identified as Fields or looked like him. Those witnesses are Nancy Miller of Quilt Crossing, Vicki Tippetts of T-Shirts Plus, and Robert Starbard and Timothy McWilliams of Videon. All of these witnesses testified that the man appeared in their store at around 12:30 p.m on February 11, 1988, a little over an hour after Mrs. Vanderford was atttacked. *See* T. Tr. Vol. 5, p. 1101, 1127, *Id.*, Vol. 6, p. 1150.

The Quilt Crossing store was in Linda Vista Plaza on Fairview Avenue at the corner of Liberty Avenue. T. Tr. Vol. 5, p. 1097. The Wishing Well was at 6805 Fairview Avenue. T. Tr. Vol. 5, pp. 997-98. Nancy Miller of Quilt Crossing stated that the Wishing Well was perhaps a half a mile from her store at the corner of Fairview and Allumbaugh. *Id.*, p. 1114.

Miller identified Fields as having come into the Quilt Crossing. *Id.*, p. 1106-07. She described him as having "strawberry blond" hair that was "wild and bushy." *Id.*, p. 1103. He was six feet tall and between 25 and 30 years old.[8] *Id.*, p. 1103-04. He was wearing an orange coat, *id.*, p. 1104, and the coat was solid orange and didn't have camouflage markings. *Id.*, p. 1109-10.[9]

Another Linda Vista Plaza merchant, Vicki Tippetts, identified Fields as being in her store, T-Shirts Plus. T. TR. Vol. 5, p. 1135. She described Fields as five feet, ten inches to six feet tall, 230 pounds, with "shoulder length hair," that was "dishwater blond" in color and "very stringy." *Id.*, p. 1132. His hair was "dirty, scraggly," "over the collar," wasn't "flat," had "some fullness to it," and *could not have been brown*. *Id.*, p. 1144-45. Fields was wearing a dark orange or red jacket, *id.*, p. 1132, but it was not a camouflage jacket. *Id.*, p. 1136.

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[8] Miller also described Fields as being 250 to 260 pounds, T. Tr. Vol. 5, p. 1103-04, but when Fields was asked to stand up in the courtroom, she said that Fields looked like he weighed 250 to 260. *Id.*, p. 1107. However, Fields' arrest record showed him to be 200 pounds.

[9] The State claims that Fields was seen with a knife at the Quilt Crossing. State's Brief at 15. The State mis-states the record. Neither Nancy Miller, nor Vicki Tippetts at T-Shirts Plus saw Fields with a knife. Both described seeing a wooden handle, which they assumed was part of a knife, but both acknowledged they didn't see anything but a wooden handle. T. Tr. Vol. 5, pp. 1105, 1131-32. Robert Starbard never saw anything sticking out of Fields' pocket. *Id.*, p. 1176. McWilliams didn't mention any handle, knife or pockets at all.

Another Linda Vista Plaza sales clerk, Robert Starbard, identified Fields as being in his store, Videon. T. Tr. Vol 6, p. 1161. He described Fields as being five feet nine inches to six feet tall, *id.*, p. 1154, though he originally testified to an upper limit of five feet ten inches tall. *Id.*, p. 1164-65. He thought Fields probably weighed 200 pounds. *Id.*, p. 1154. Fields had long sideburns and "dishwater blond" hair, *id.*, that was "very messed up," "over the ear" and reached to "the bottom of the neck in back." *Id.*, p. 1166-67. Fields was wearing a reddish orange to red, puffy, down-filled coat. *Id.*, p. 1169-70. Neither the camouflage coat pictured in Exhibit 18 nor the actual coat itself, which is Exhibit 22,[10] is the coat that Fields was wearing while in the Videon store. *Id.*, p. 1155, 1171-72. Significantly, the camouflage coat, State's [Trial] Ex. 18, cannot be what Fields was wearing, because the coat Fields wore at Linda Vista Plaza *did not have a hood*, whereas the camouflage coat did. *See* T. Tr. Vol. 6, p. 1167-68 (no hood).

Another Videon employee, Timothy McWilliams, observed the same individual, but was unable to positively identify Fields. *Id.*, p. 1187. McWilliams described the man as "six feet," blond, and wearing an orange jacket without any markings. *Id.*, p. 1183.

The description of the coat Fields wore that day establishes more than consistency among the Linda Vista Plaza witnesses. It directly contradicts testimony by Keith Edson that Fields was wearing a camouflage coat. *See* T. Tr. Vol. 6, p. 1218, 1224. As with virtually every aspect of Edson's testimony, *see* Opening Brief at 17-18, his observation of Fields' coat is completely at odds with all other witnesses in the case. The Linda Vista Plaza witnesses uniformly contradicted Edson's assertion that Fields was wearing a camouflage coat that day. Further,

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[10] Exhibit 22 is the coat that Fields wore when he was arrested in the Shopko incident. [cite]

Edson's description is not remotely similar to that of Munk and Hornecker-Heaton: a man wearing a navy blue, zip-front sweatshirt.

The description of Fields by the Linda Vista Plaza witnesses cannot be reconciled with the man that Munk and Hornecker-Heaton saw in the Wishing Well moments before Mrs. Vanderford's murder: a 48 year old man who was bald, had short-dark-brown-hair-on-the-sides, no facial hair, weighed 230 to 240 pounds, and was six feet four or "over six feet and under six three," and was wearing a zip-front solid navy blue, hooded sweatshirt. When Munk and Hornecker-Heaton's descriptions of the man they saw in the Wishing Well are contrasted to both the descriptions of Zane Fields by the Linda Vista Plaza witnesses, and the police report from Fields' arrest in the Shopko case, 11 days after the murder, it is apparent that Fields was not the man who murdered Mrs. Vanderford.

New evidence has been introduced through affidavits executed by Munk and Hornecker-Heaton. That new material evidence of Fields' innocence should be evaluated at an evidentiary hearing along with the DNA evidence and all of the admissible evidence.

Betty Hornecker-Heaton's affidavit brought forth the following new facts:

- After selecting a man's photograph that looked like the large man she had seen in the Wishing Well, the police told her that the man she selected had an alibi. R. 223, ¶ 17.
- That photograph [which was State's [Trial] Ex. 6] failed to capture the look of the man she saw in the Wishing Well only to the extent that the man in the store did not have glasses or a mustache. *Id.*

- On the day after her trip to the Wishing Well, February 12, 1988, and after her second trip to the police station on February 19, 1988, Hornecker-Heaton made notes about her experience at the Wishing Well and those notes were attached to her affidavit as Ex. C.[11] R. 223, ¶ 18.
- Fields did not look like the man she saw in the Wishing Well shortly before the murder. R. 223, ¶22.
- The pictures in the line-up she saw at trial look nowhere near as close to the man she saw at the Wishing Well as did the photograph that she picked out at the police station. *Id.*
- Fields did not look like any of the men she saw at the Wishing Well.[12] R. 223, ¶ 23.

The State suggests that Hornecker-Heaton's affidavit is less credible than her trial testimony because the exhibits to the affidavit were inadvertently omitted from the district court record. State's Brief at 22. The affidavit, with its accompanying exhibits, was also filed in

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[11] The exhibits to Hornecker-Heaton's affidavit do not seem to have been made part of the record. Fields requests this Court take judicial notice of a copy of Hornecker-Heaton's affidavit that was submitted to the federal court in Fields' habeas corpus proceedings, as that copy of the affidavit includes its accompanying exhibits. *Fields v. Klauser*, USDC No. 95-422-S-EJL, Affidavit of Betty Heaton, Dkt. 180-2 (D. Idaho Dec. 12, 2005).

All affidavit exhibits except Hornecker-Heaton's notes are easily identified elsewhere in the existing record. Since her notes are not evident in the record, judicial notice of the federal court filing is appropriate.

[12] Hornecker-Heaton saw three men. As she entered the store, Hornecker-Heaton saw a man outside the store washing windows. T. Tr. Vol. 5, p. 928. Shortly after her arrival inside the store, a man who was already there left. *Id.* The third man that Hornecker-Heaton saw, who entered the store while she was there, *id.*, is the large suspicious man who remained in the store with Mrs. Vanderford when Hornecker-Heaton left. *Id.*, p. 930.

federal court, and this Court can take judicial notice of it. *See supra* note 11. Moreover, three of the four exhibits are easily identifiable and are in the current record. Affidavit Exhibit A is the composite sketch of the suspicious man at the Wishing Well that she made with the assistance of the police. R. 222, ¶ 16. That composite sketch was State's Exhibit 5 at trial. *See* T. Tr. Vol. 5, p. 936. Affidavit Exhibit B is the picture she picked out from photos at the police station. R. 223, ¶ 17. That photo was State's Exhibit 6 at trial. T. Tr. Vol. 5, pp. 958-59. Affidavit Exhibit D are the pictures she saw in a photo line-up at trial. R. 223, ¶22. That photo line-up was State's Exhibit 8 at trial. T. Tr. Vol. 5, p. 938. The only missing exhibit is Hornecker-Heaton's handwritten notes.

Mari Munk testified to the following new facts in her affidavit:

- As she entered the Wishing Well, she passed a woman coming out. R. 225, ¶ 3.
- She "glanced at" the suspicious man, "although I did not get a very good look at his face." R. 225, ¶4.
- Fields did not look like the man she saw in the Wishing Well. R. 226, ¶ 12.
- The only photos she recalls seeing appeared in the newspaper. R. 226, ¶ 13.
- The picture of Weaver, State's Ex. 6, [which is the picture that Hornecker-Heaton identified at the police station as looking like the man she saw in the Wishing Well] looks much more like the man Munk saw in the Wishing Well than does Fields. R. 226, ¶ 14.

Munk and Hornecker-Heaton agreed that the man pictured in State's [Trial] Exhibit 6, looked much more like the man they saw in the Wishing Well. Hornecker-Heaton stated that his picture, minus the glasses and mustache, was the closest photo she saw to the man in the Wishing

Well. Further, when one ignores his glasses and mustache as Hornecker-Heaton instructed, the man looks much more like the composite sketch than does Fields or anyone in the police photo line-ups.

Fields' line-up picture, State's Ex. 17

Composite sketch created by Hornecker-Heaton, Defense Ex. 5

Photo identified by Hornecker-Heaton, Defense Ex. 6

Given the trial evidence, together with the DNA evidence and additional statements by Hornecker-Heaton and Munk that Fields did not look like the man they saw in the Wishing Well, it is clear Fields was not the man in the store who attacked and killed Mrs. Vanderford. Summary dismissal was inappropriate. The district court should have held an evidentiary to fully develop the record and evaluate the credibility of the witnesses and the weight of the new evidence. Reasonable inferences from the new evidence, together with all admissible evidence would not lead any reasonable juror to convict Fields.

C. When Questioned by Police, Fields Did Not React Like a Guilty Person

Almost immediately after Fields' Shopko arrest, the police focused on him as a suspect in the Wishing Well homicide. *See* Supplemental Report by Detective Anderson dated Feb. 29, 1988, pp. 1- 5, (hereinafter "Anderson Supp. Rpt."), attached to Pre-Sentence Investigation Report (part of the Record on Appeal, filed under seal, in underlying criminal case) (hereinafter "PSR"). On February 24, 1988, Detectives Smith and Anderson interviewed Fields about the Wishing Well homicide, and Fields denied any participation. Anderson Supp. Rpt., p.4, attached to PSR. Fields had been interrogated by Detective Wallace earlier, date unspecified, and had also denied any involvement then. *Id.* This focus on Fields for the homicide case occurred while he was in pre-trial detention for the Shopko case. *See* T. Tr. Vol. 7, p. 1430-31.

Fields agreed to talk to the police about the Wishing Well murder and signed a waiver of his rights. *Id.* He consented to a search of his residence. *Id.* He offered to "take a polygraph examination to further clear himself of any involvement in the homicide." *Id.*

While in detention and housed with Acheson, Fields *knew* the police were trying to make a case against him for the Wishing Well homicide. Anderson Supp. Rpt., p.4, attached to PSR. Given that context, reacting as he did to the "Crime Stoppers" announcement on the Wishing Well murder – turning down the volume, changing the channel – and reacting angrily to the ads and to police efforts to "pin" an unwarranted murder charge on him are more like the protestations of an innocent man than the furtive attempt of a guilty one trying to distance himself from the crime.

D. The Inmate Informants Are Highly Unreliable

The case against Fields was bereft of physical evidence and relied almost entirely upon inmate informant testimony to the effect that Fields confessed to the crime more than a year later, while in prison. New evidence establishes that the inmate snitch witnesses were housed together, discussed their proposed testimony with each other, and admitted that they were making up their stories that implicated Fields. In a case as thin as this one, with the informant inmates playing a critically important role as the only direct evidence against Fields, new evidence showing the unreliability of those informant inmates removes the only basis upon which reasonable jurors could return a guilty verdict.

Witness Jeff Acheson states in his affidavit:

> I thought it was weird that the police would allow us, the (4) people/inmates testifying in the trial to be house[d] in the same cell together prior to trial, and also during the trial. During this time, we would all stay up late and talk about the trial and what we each testified about, or what we were going to say when we got up on stand.

Affidavit of Jeff Acheson, R. 275, CE, Ex. 9, Att. D. "Also, the other state witnesses, Howie G[ilchrist], Joe H[eistand], and Scott Bianchi told me of how they had made up most of what they were saying, in order to get out of Orofino." *Id.* Acheson's affidavit is strikingly similar to the testimony of Salvador Martinez. Martinez exposed the conspiracy of inmate snitches to testify falsely against Fields. T. Tr. Vol 8, pp. 1720-21 (Bianchi and Heistand admitted to Martinez that they made up their testimony); *id.*, pp. 1732-33 (the inmate informants admitted to Martinez that their testimony "was all a bunch of lies").

One of the inmate informants, Scott Bianchi must be regarded as questionable at best. Bianchi has recanted his testimony only to later retract the recantation. *See* Supplemental Trial

Clerk's Record, pp. 5-21. Moreover, Bianchi couldn't get the story straight at trial. According to Bianchi, Fields said he killed Mrs. Vanderford in Linda Vista Plaza. T. Tr. Vol. 7, p. 1569. Bianchi repeated that testimony on cross examination. When asked if he was sure that Fields said the murder occurred at the at Linda Vista Plaza, Bianchi responded "I'm certain about that." T. Tr. Vol. 7, p. 1613. Linda Vista Plaza is not the location of the Wishing Well. The Wishing Well was about a half mile from Linda Vista Plaza. *See supra* at 21. Bianchi's invocation of the unrelated Linda Vista Plaza lends support to the position that the inmate informants made up their stories from information fed them by the police and the other informant witnesses.

Informant "Turkey" Joe Heistand repeatedly stated that Fields told him that the Wishing Well cash register was in the back of the store. T. Tr. Vol. 7, p. 1480 ("went to the back of the store where the till area was and was getting the money"); *id.*, p. 1519 (Fields said the till was in the back of the store, not the front of the store); *id.*, p. 1520 (Fields didn't say the till was in the side counter, he said he went to the back of the store). In fact, the cash register is in the front of the store, near the front door. *See* T. Tr. Vol. 6, p. 1299 (cash register is where the diagonal marks are on the diagram that is State's [Trial] Ex. 2); State's [Trial] Ex. 2 (cash register indicated by diagonal marks in counter near front of store). *See also* State's [Trial] Exs. 29, 31 (drawer open and key hanging out per testimony of Detective Wallace, T. Tr. Vol 6, p. 1319).

New corroborating evidence establishes that the inmate informants were making up their stories – and with the assistance from the police themselves, *infra* at 30-31, who provided information about the crime. Combined with the significant errors in inmate informant testimony at trial, the trial testimony of inmates Heistand, Bianchi and Acheson would not be believed by a

reasonable juror evaluating the DNA evidence and other new evidence, all of which points to Fields' innocence.

E. Evidence Tainted by Police Coaching Eliminates All Confidence in the Jury's Verdict and Further Points to Fields' Innocence

New evidence also establishes gross police misconduct in providing information to inmate informant Jeff Acheson. In a case built almost entirely on informant testimony, disturbing examples of police willingness to coach witnesses casts further doubt on the reliability of the verdict and supports Fields' claim of innocence.

Jeff Acheson's affidavit contains the most blatant example of improper conduct. R. 275, CE, Ex. 9, Att. D. Acheson states that:

> When I told the investigators about how I thought that Zane said that he had tossed the "Gun" into the construction site, I 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. I never had this information until the police told me.

Id.

When Fields related that he disposed of the "gun" in the "construction site," he plainly was discussing the weapon in the Shopko case. *Cf. State v. Fields*, 115 Idaho 1101, 1102, 772 P.2d 739, 740 (Idaho Ct. App. 1989)("suspect [Fields] fled to a nearby area where another store was then under construction" and police did not recover the gun that suspect had brandished, but "did recover a gun holster and ammunition from the construction site"). The investigating officer's "correction" of Acheson on this point led to the jury receiving inaccurate information that wrongly implicated Fields in the murder. More significantly, the investigating officer's "correction" establishes that the police were willing to supply information to inmate informant witnesses in order to obtain Fields' conviction for the unsolved Wishing Well murder.

Testimony from Salvador Martinez corroborated this misconduct and corruption of the system. Martinez stated that the police were "schooling" the inmate informants on the facts of the case. T. Tr. Vol. 8, pp. 1727-28. Informant Scott Bianchi told Martinez that Detective Smith was talking to inmates and "telling [them] exact facts of cases." T. Tr. Vol. 8, p. 1727-28. Bianchi said Smith was telling "Turkey" [Joe Heistand] and Gilchrist, too. Gilchrist admitted to Martinez that Detective Smith "was tutoring us this long." T. Tr. Vol. 8, p. 1733-34.

Keith Edson also appears to have been coached by the police to change his story. Edson made a written statement on the day he spoke to the detectives within a couple of days of Fields' arrest on February 22, 1988 for the Shopko incident. T. Tr. Vol. 6, p. 1246. In that statement, Edson wrote that "[o]n the day or day after the stabing (sic) at the wishwell, (sic) I was standing in the old Boise cascade parking lot." *See* State's [Trial] Ex. 23. At trial, Edson changed his story and claimed that he was definitely present on the day of the murder. T. Tr. Vol. 6, p. 1194, 1247-49. Asked what caused him to change his story, Edson answered, "going over what I saw that day with the detectives." T. Tr. Vol. 6, p. 1249.

The State argues that Fields ignores inmates able to recount information not disclosed to the media or public, the amount of money taken from the Wishing Well. State's Brief at 25. Relating "non-public" information is unremarkable, however, once one understands that the police were feeding information about the crime to the informant witnesses. The fact that the informants testified that the murder at the Wishing Well involved a robbery of about $50 is no longer compelling evidence of Fields' guilt.

F. The "Blood" Evidence on Fields' Jacket is Unworthy of Any Weight

The State argues that "Fields conspicuously ignores significant pieces of evidence such as Ann Bradley's finding of blood on his jacket." State's Brief at 25. Bradley's trial testimony was equivocal at best and did not merit any response. Since the State has chosen to elevate Bradley's findings to "significant" in this Court, Fields will address them with the State's own concessions below.

Bradley's finding of "blood" was on a presumptive test, not a definitive test. "[M]y preliminary screening test for the *possible* presence of blood gave me a positive result." T. Tr. Vol. 7, p. 1410 (emphasis added). However, the possibility raised by the presumptive test was not confirmed: "my tests for human origin failed to produce any positive result." *Id.* The substances Bradley found on the camouflage jacket "certainly could have" been animal blood, T. Tr. Vol. 7, p. 1413, which would be completely unsurprising since a camouflage jacket would be used for hunting.

In the district court, prosecutor Bourne characterized the trial testimony of the purported blood on the camouflage coat as follows: "The jury was never given any reason to believe that the sample was the victim's blood to begin with." R. 82 (State's Response to Motion for Independent Scientific Testing at 3). Similarly, "the jury was told in unmistakable terms that the State Laboratory could not say that the blood stains were human." R. 54 (State's Response to the Petition for Post-Conviction Scientific Testing at 3). Given the facts and the State's concessions, the purported finding of "blood" on Fields' jacket is of no significance. The State's reliance upon such an empty, meaningless "finding" only undermines the State's case, underscores the weakness of the physical evidence and could result in the execution of an innocent man.

V. CONCLUSION

Credible new evidence establishes Fields' innocence in this case. DNA test results show that male DNA in the victim's fingernail scrapings and three hairs found on her body all came from someone other than Fields. Fields has shown that evidence against him was concocted and unreliable, and that the police fed incriminating evidence to convicted felons who were the only significant witnesses against Fields at trial. Betty Hornecker-Heaton and Mari Munk, on the other hand, offer strong eyewitness testimony of a perpetrator who wasn't Fields. They affirmatively state that Fields did not look like the man they saw in the Wishing Well moments before the murder. The district court relied on erroneous logic in concluding that Fields' new DNA evidence was of no import because Fields wasn't scratched. To correct that error and to allow Fields the opportunity to establish his innocence at a hearing in the district court, this Court should reverse the decision below and remand for further proceedings.

Respectfully submitted this 24th day of August, 2010.

Bruce D. Livingston, *Pro Hac Vice*

Teresa A. Hampton

Capital Habeas Unit
Federal Defender Services of Idaho
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Facsimile: 208-331-5559

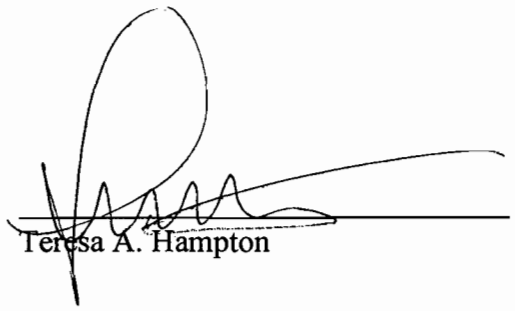
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of August, 2010, I caused to be served two true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, addressed to:

L. LaMont Anderson
Deputy Attorney General
Chief, Capital Litigation Unit
PO Box 83720
Boise ID 83720-0010

X U.S. Mail
____ Hand Delivery
____ Facsimile
____ Federal Express

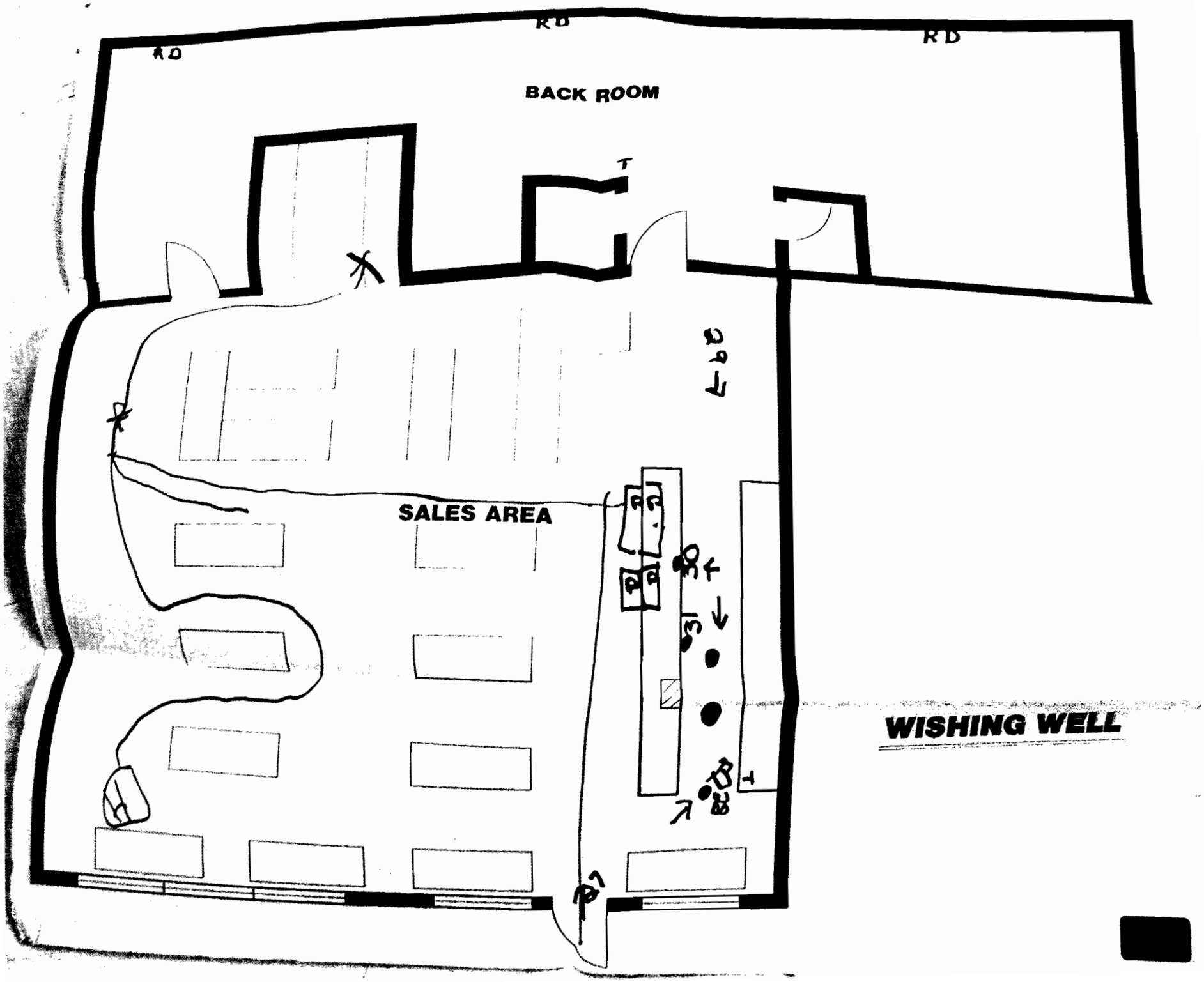


Teresa A. Hampton

Fields v. Idaho, Case No. 36508-2009
Filed in Support of Appellant's Reply Brief

ADDENDUM

(Trial Exhibits 2, 5, 6, 8, 9, 17, 29 and 31)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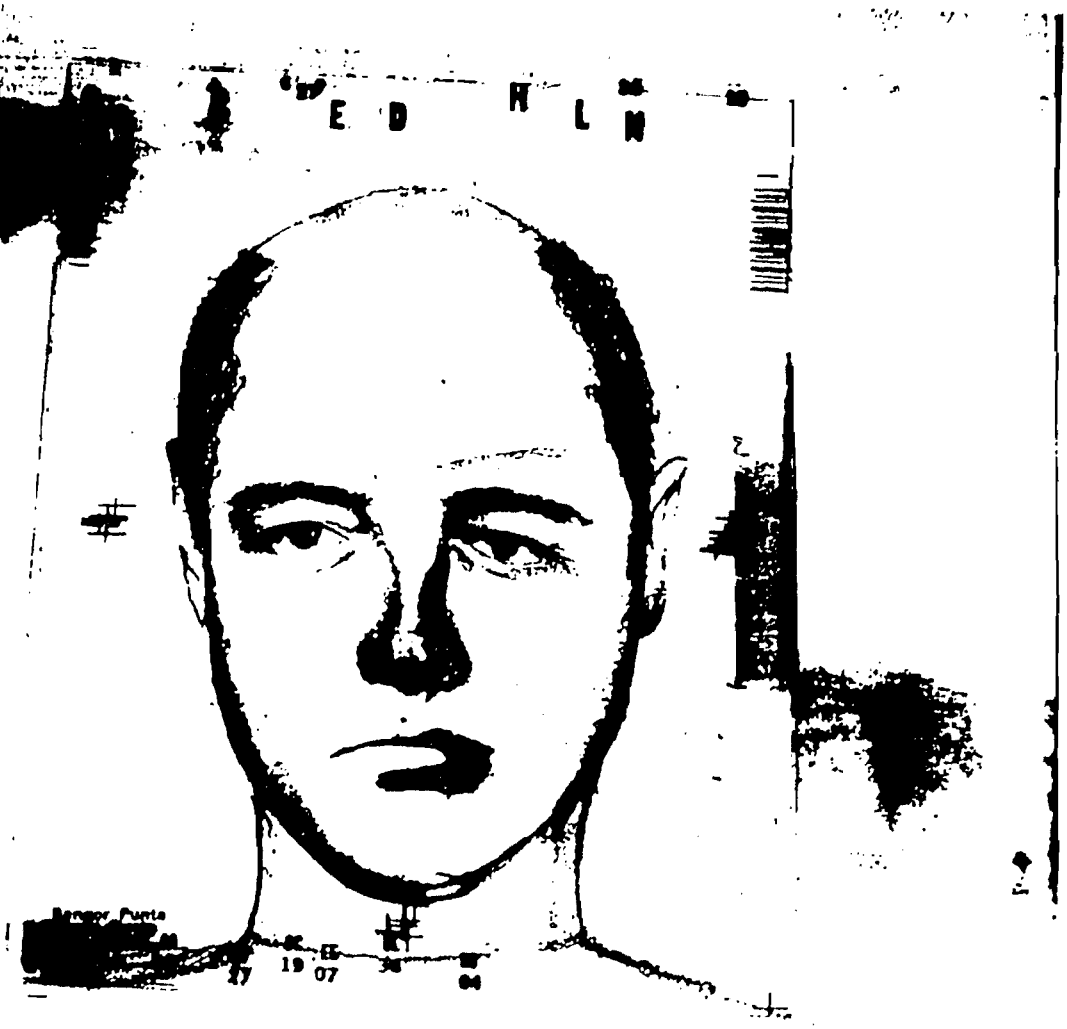


This subject was in the Wishing Well Gift Shop prior to or during the robbery/murder of Kay Vanderford on 2-11-88 around 11:20 a.m.

He is being sought by Boise Police for questioning. If you know of this subject, call Boise Police at:

377-6790

Physical Description: White male - 48 years - 6'4" - 220# - bald on top w/dark brown hair on the sides, smooth skinned - no facial hair.

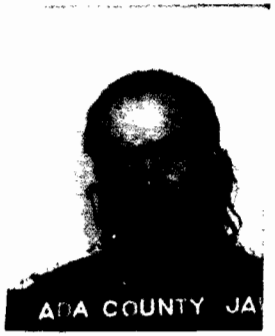
Possibly wearing: Blue sweatshirt with a zippered front - revealing a white or grey shirt and navy blue pants.

Admitted in [illegible]

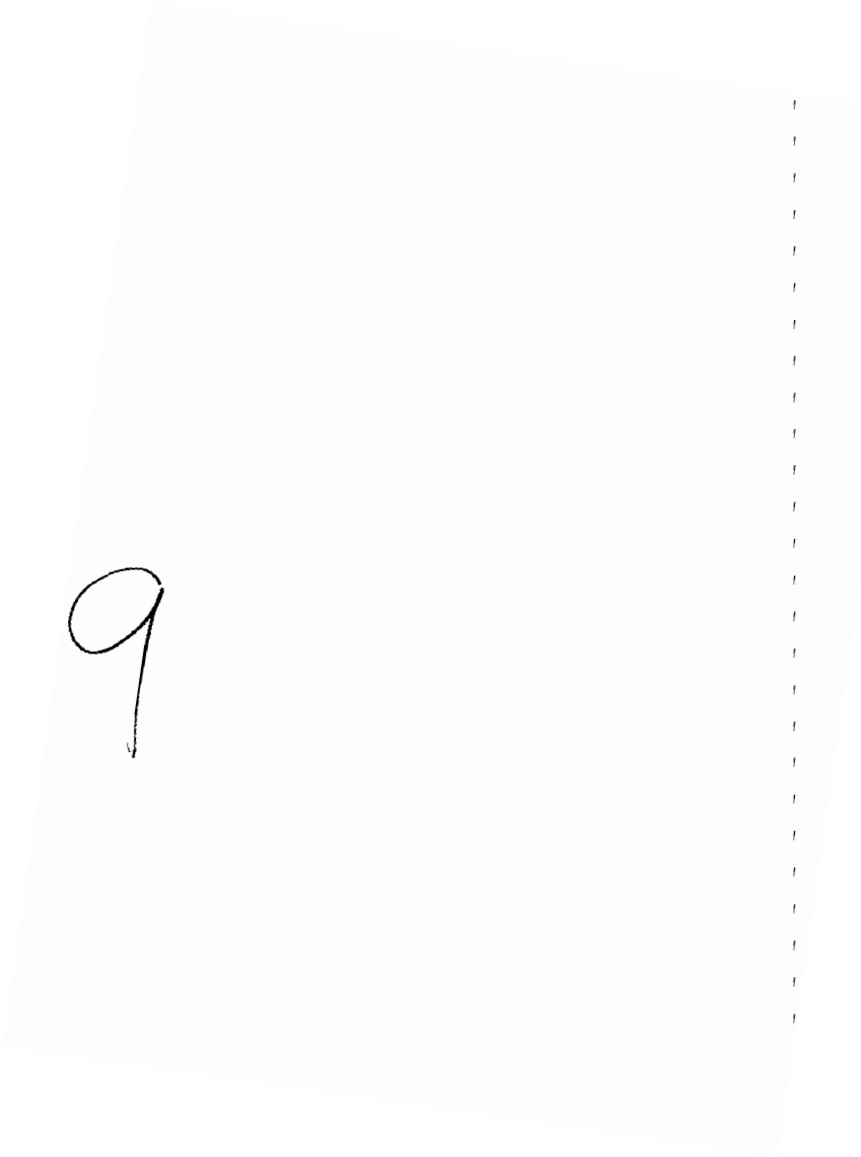
MAY [illegible]

DEFENDANT'S EXHIBIT 5 16259

DEFENDANT'S EXHIBIT
6
6259


ADA COUNTY JA


ADA COUNTY J



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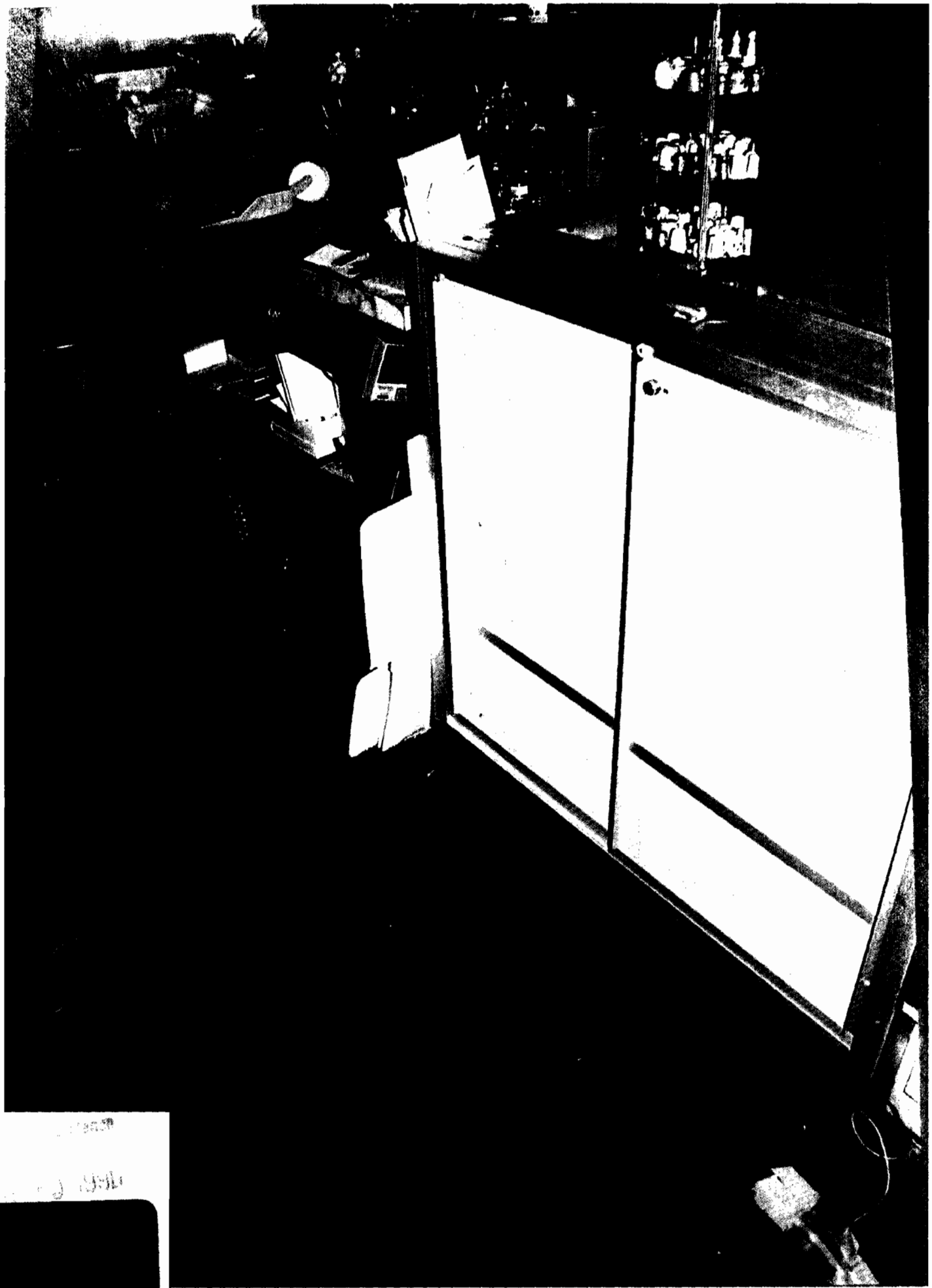
For the convience of the court the exhibit sticker from the back of the exhibit has been copied to the front.

31



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