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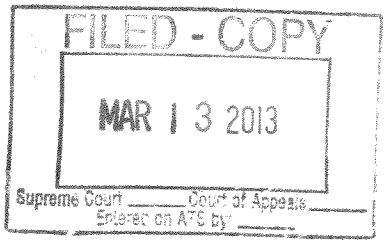
IN THE SUPREME COURT FOR THE STATE OF IDAHO

CHRISTOPHER C. TAPP, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent-Respondent.	)	S.Ct. No. 40197 Bonneville Co. No. CV-2002-6009

APPELLANT'S OPENING BRIEF



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

HONORABLE JOEL E. TINGEY,
District Judge

Dennis Benjamin
ISBA # 4199
Nevin, Benjamin, McKay & Bartlett LLP
303 W. Bannock St.
P.O. Box 2772
Boise, ID 83701
(208) 343-1000

Attorneys for Appellant

Lawrence Wasden
Idaho Attorney General
Jessica Lorello, Deputy
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010
(208) 344-4534

Attorneys for Respondent

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A. *Nature of the Case*

This is a second appeal in a post-conviction case. The first appeal resulted in this Court affirming in part, reversing in part and remanding the case for an evidentiary hearing on two issues. *Tapp v. State*, No. 35536, 2010 Unpublished Opinion No. 412 (March 31, 2010), pg. 1, 18. On remand, the district court again granted summary disposition on one issue and denied relief after an evidentiary hearing on the other issue. Relief should be granted because the district court failed to comply with the directions of this Court upon remand.

B. *Criminal Trial Evidence and Proceedings*

In order to place the remanded post-conviction claims in context, a brief summary of the criminal trial evidence is needed. The trial court took judicial notice of the files and records in the criminal case. CR Vol. II, 134.[1] This Court took judicial notice of the files and records in the criminal case (No. 22295) in the first post-conviction appeal (No. 35536) and it took judicial notice of both those case files in this case by Order dated July 30, 2012.

The Court of Appeals in the direct appeal summarized the facts as follows.

> Early in the morning of June 13, 1996, Angie Dodge was raped and stabbed to death in her apartment in Idaho Falls. On January 7, 1997, twenty-year-old Christopher Tapp voluntarily submitted to police questioning about this crime at the Law Enforcement Building (LEB) in Idaho Falls. Tapp again voluntarily went to the LEB for questioning on January 10. After this interview, Tapp's parents retained private counsel for their son. When Tapp did not appear at the LEB for another scheduled interview on January 11, police officers went to his home to find him. They were informed by Tapp's mother that an attorney had been retained and that Tapp would appear on January 13, with counsel, to answer more questions. Approximately an hour later, the Idaho Falls chief of police arrived at

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[1] The Clerk's Record from the first post-conviction appeal (No. 35536) is cited as "CR." The Limited Clerk's Record prepared for this appeal is cited as "LCR."

the Tapp home and attempted to convince Tapp's mother to change her mind about her son's refusal to be interviewed without assistance of counsel. She refused. Rather than waiting for a voluntary interview on January 13, law enforcement officials obtained a warrant to arrest Tapp on a charge of accessory to a felony, Idaho Code §§ 18-205, -206, and he was arrested on January 11.

After making the arrest, an officer put Tapp in an interview room and called Tapp's attorney. Before the attorney's arrival, the officer initiated a discussion with Tapp about the type of information the police wanted to obtain from him. On January 13, another attorney joined in Tapp's representation as co-counsel. Thereafter, Tapp was interviewed, while under arrest and in police custody, on January 15 and 17. During all interviews at the LEB from January 15 forward, Tapp was separated from his attorneys. The attorneys were placed in a nearby office in the LEB where they were allowed to observe the interviews on a closed-circuit television. Tapp's only contact with his attorneys was during breaks in the interviews. His attorneys apparently made no objection to this arrangement.

In the first few interviews Tapp denied having any knowledge of the crime, then claimed that Ben Hobbs had confessed to killing Dodge and had asked Tapp to help him with an alibi. Tapp denied having ever been at the crime scene. By January 15 and 17, however, Tapp's story was changing, and he admitted that he had accompanied Hobbs to Dodge's apartment on the night of the murder. Tapp told police that Hobbs wanted to confront Dodge because Hobbs believed that she had convinced Hobbs's wife to leave him. Tapp claimed that Hobbs and Dodge started fighting and that Hobbs punched Dodge and then stabbed her twice. Tapp asserted that he ran from the apartment at that point. He admitted that he returned later and found Dodge dead and no one else present. Tapp also implicated a man named Jeremy Sargis in the crime. Tapp said he believed that the murder weapon belonged to Sargis, but he initially claimed that Sargis was not in the apartment that night. Eventually, however, Tapp accused Sargis of helping to rape and murder Dodge.

On January 15, Tapp and the State entered into a "limited use immunity" agreement, and on January 17 they entered into a "cooperation and settlement agreement." These agreements (hereinafter referred to collectively as the "immunity agreements") required Tapp to cooperate with the police investigation of Dodge's death and to provide the police with truthful information about the crime. Tapp also agreed to plead guilty to aiding and abetting an aggravated battery, a felony, I.C. §§ 18-903, -907, and the State agreed not to file any other charges against Tapp related to Dodge's death. The State also promised to recommend at the sentencing hearing that the district court retain jurisdiction for a limited period pursuant to I.C. § 19-2601(4), and to allow withdrawal of the guilty plea if the judge did not follow the recommendation. The State also agreed not to

use any of Tapp's statements against him except for impeachment purposes. As a consequence of the immunity agreements, the pending charge against Tapp for accessory to a felony was dismissed on January 17 and he was released from custody.

Tapp was again questioned on January 18 and 29. Before the January 29 interview began, the prosecutor informed Tapp and his attorney that the prosecutor considered the immunity agreements with Tapp to be void because Tapp had not been truthful in describing the crime. The prosecutor explained that Tapp's contention that Hobbs and Sargis were the rapists was contradicted by DNA tests showing that semen found on Dodge's body and clothing did not come from either of those men (or from Tapp). Despite this declaration from the prosecutor, Tapp and one of his attorneys continued with the January 29 interview. On that date, Tapp was given a polygraph test, during which he asked to be taken to the apartment where the murder occurred. Tapp's attorney agreed that the police could take Tapp to the crime scene for further questioning, but the attorney declined to accompany Tapp and the officers. Once at the crime scene, Tapp made statements implicating himself in the crimes. At the crime scene and later the same day at the LEB, Tapp admitted that he had held Dodge's arms and shoulders down throughout the rape and stabbing. In his new account of the events, Jeremy Sargis was replaced by a different male whose name Tapp could not remember. Some details of his story about how Dodge was raped and details of other events of that night changed during this and two subsequent interviews.

Tapp was rearrested after the January 29 interview. The next day, he was again charged with being an accessory to a felony. Tapp was further interviewed on January 30 and 31. On February 3, 1997, charges of rape, I.C. § 18-6101(3), (4), and first degree murder, I.C. §§ 18-4001, -4002, -4003(a), replaced the accessory charge.

Tapp moved to suppress the statements that he made to police on the grounds that his right to counsel was violated during police interviews, that his statements to police were involuntary, and that the immunity agreements were still binding on the State. Before this motion was decided, Tapp's original attorneys withdrew and other attorneys were appointed to represent him. The district court denied the suppression motion except as to statements made on January 11 after Tapp was arrested and before his attorney's arrival.

A jury trial ensued, and Tapp was found guilty of first degree murder and rape. The State's case was based almost entirely upon Tapp's confessions to having helped other men rape and murder Dodge; no physical evidence linked Tapp to the crime. At sentencing, the district court rejected the State's request for the death penalty and instead imposed a unified sentence of life plus fifteen years

> imprisonment with a thirty-year minimum term for first degree murder and a concurrent unified twenty-year sentence with a ten-year minimum term for rape.

State v. Tapp, 136 Idaho 354, 357-58, 33 P.3d 828, 831-32 (Ct. App. 2001) *review denied.*

On appeal, the Court of Appeals held that some, but not all of Mr. Tapp's statements to the police should have been suppressed. It held "that Tapp was not in custody on January 29, and therefore his Fifth Amendment right to counsel did not attach and was not violated. Only Tapp's statements made on January 15, 17, 30, and 31 are suppressible for Fifth Amendment violations." *State v. Tapp*, 136 Idaho at 363, 33 P.3d at 837. However, the Court found the erroneous admission of the January 15, 17, 30 and 31 statements was harmless error. 136 Idaho at 365, 33 P.3d at 839.

Mr. Tapp's petition for review was denied on October 29, 2001.

C. *Course of Original Post-Conviction Proceedings*

Mr. Tapp filed a timely *pro se* verified Petition for Post-Conviction Relief. CR Vol. I, 8. In the petition he alleged six different causes of action, including an ineffective assistance of trial counsel claim. CR Vol. I, 9.

As to the ineffective assistance of counsel claim, Mr. Tapp's *pro se* petition alleged, *inter alia*, that:

> (d) Trial counsel rendered ineffective assistance of counsel when, during the suppression hearing, he failed to investigate and/or present evidence of my diminished mental capacity to the district court in support of my claim that my confessions were coerced and involuntary. (See attached records re: special education services.) Had this evidence been presented, my motion to suppress would have been granted.
>
> (e) Trial counsel rendered ineffective assistance of counsel when he failed to present evidence of the circumstances of the January 29, 1997, interrogation. (See attached affidavit re: circumstances.) Had this information been presented, the

> district court would have found that I was in custody on that date. Alternatively, I would have been able to present a much stronger argument on appeal that I was in custody on that date, and the Idaho Court of Appeals would have found that my statements on that date should have been suppressed. Therefore, my conviction would have been vacated.

CR Vol. I, 9-11.

The court issued a Memorandum Decision and Order on Motion for Summary Dismissal, granting the Respondent's motion in part, denying it in part and granting an evidentiary hearing on the remaining issues. CR Vol. II, pg. 161. The Respondent then filed a motion to reconsider which the district court granted and the remaining claims were also summarily dismissed. CR Vol. II, 209-222.

A timely notice of appeal was filed. CR Vol. II, 224.

D. ***The First Post-Conviction Appeal***

On appeal, the Court of Appeals, in an unpublished decision, affirmed in part, but also reversed in part and remanded for an evidentiary hearing. *Tapp v. State*, No. 35536, 2010 Unpublished Opinion No. 412 (Ct. App. 2010), pg. 1.

On the issue of whether trial counsel rendered ineffective assistance of counsel when he failed to present evidence of the circumstances of the January 29, 1997, interrogation, the Court wrote:

> The post-conviction court dismissed the claim on the ground that this Court's determination in the direct appeal that Tapp was not in custody on January 29 precluded his relitigating the issue. We disagree . . . [s]ince the district court did not consider the alleged additional facts in granting summary dismissal, we remand for the district court to do so.

Id., pg. 7-8. And on the issue of whether trial counsel rendered ineffective assistance of counsel by failing to investigate and/or present evidence of Mr. Tapp's diminished mental capacity in

support of the suppression motion, the Court of Appeals wrote:

> As with the custody issue, the post-conviction court dismissed the claim on the ground that this Court's determination in the direct appeal precluded his re-litigating the issue and was law of the case. We again disagree to the extent to Tapp's post-conviction claim is, essentially, that because counsel failed to present information regarding his diminished mental capacity, neither the trial court nor this Court on review possessed the facts necessary to make the determination as to the voluntariness of his confession.

Id., pg. 11. The Court concluded, that "[s]ince the district court did not consider the alleged additional facts in granting summary dismissal, we remand for the district court to do so." *Id.*, pg. 12.

In the final paragraph of the opinion, the Court of Appeals specifically remanded for an evidentiary hearing.

> The district court summary dismissal is reversed and remanded for an evidentiary hearing on whether Tapp's trial counsel was ineffective during the suppression hearing for: (1) failing to present evidence Tapp was in custody during the January 29 interview, and (2) failing to present evidence of Tapp's diminished mental capacity to show the confession was involuntary.

Id., pg. 18.

The state did not file either a Petition for Rehearing with the Court of Appeals or a Petition for Review with the Supreme Court. Mr. Tapp filed a Petition for Review. However, he later withdrew that petition and the Remittitur was issued.

E. ***The Proceedings Upon Remand***

1. State's second motion for summary dismissal

Upon remand, the stated filed a "Motion for Summary Dismissal of the Plaintiff[']s Petition for Post-Conviction relief on the remaining issues as remanded from the Idaho Court of Appeals." Limited Clerk's Record ("LCR"), Vol. I, pg. 16. The state's motion did not address

the question of whether the district court was able, under the directions upon remand, to decide the issue without holding an evidentiary hearing. See LCR, Vol. I, pg. 16-24. Mr. Tapp's response to that motion argued that the Court of Appeals ordered the district court to hold an evidentiary hearing on both remanded issues and thus the state's motion should be denied. LCR, Vol. I, pg. 35-36. In reply to Mr. Tapp's argument, the state wrote that it was "unable to find in the Idaho Rules of Civil Procedure where the [C]ourt of Appeals has the authority to take the rights of a party to a lawsuit to file a Motion for Summary Dismissal." LCR, Vol. I, pg. 26. The state repeated this argument at the hearing on its motion: "I've reviewed the Idaho Rules of Civil Procedure as well as the Idaho Appellate Rules. I don't see where the Court of Appeals can dictate whether the State would file that motion, whether the Court can hear that motion." T (1/13/2011) pg. 2, ln. 10-14; *see also* pg. 3, ln. 1-3 ("Just because the Court of Appeals says we need to have an evidentiary hearing, that doesn't take away the State's rights under the Idaho Rules of Civil Procedure."). Mr. Tapp disagreed with the state's position, responding: "I think that there needs to be an evidentiary hearing. And should there not be an evidentiary hearing, I think that the Court of Appeals may come back and say, Hey, I don't think you understood what I was saying. We need to have an evidentiary hearing." T (1/13/2011) pg. 23, ln. 4-9.

Before taking the motion under advisement, the court made the following observation about the remand.

> Well, there is a threshold question as to whether . . . I'm constrained by the Court of Appeals to go forward with an evidentiary hearing. I think there's an inherent conflict in the decision from the Court of Appeals, which I – you know, once I read that decision, I thought it would have been nice if the Attorney General's Office had sought a clarification of that decision because I think there is a conflict in it.

T (1/13/2011) pg. 25, ln. 5-13. The district court later granted the state's motion in part and denied it in part, resolving the threshold issue as follows:

> In this case, there has been no finding that Tapp has presented a prima facie case or that there is a genuine dispute as to material issues of fact. Understandably, no such conclusion was reached in the opinion of the Court of Appeals. Accordingly, this Court finds that it is not precluded from considering the pending motion for summary dismissal.
>
> It is perhaps worth noting that the Court of Appeals' reference to an evidentiary hearing is logical inasmuch as an evidentiary hearing would likely have been the next step following the remittitur, but for the subsequent filing of a renewed motion for summary dismissal. In any event, this court does not read the Opinion in *Tapp II* as requiring an evidentiary hearing to the exclusion of further consideration of a renewed motion for summary dismissal.

LCR Vol. I, pg. 44.

The court denied the state's motion as to whether there was ineffective assistance of counsel regarding the determination of whether Mr. Tapp was in custody during the interrogation on January 29, 1997. However, the court granted the state's motion as to the issue of whether there was ineffective assistance of counsel regarding the determination whether Mr. Tapp's statements were involuntary in light of the evidence of diminished capacity. It found that Mr. Tapp had not made "a prima facie case that his trial attorney was deficient in failing to present certain evidence as to alleged diminished capacity at the time of the suppression hearing" and that "even if such evidence was presented, it would not have altered the trial court's decision denying suppression of the January 29 confession." LCR Vol. I, pg. 54.

2. Evidentiary hearing

The court held an evidentiary hearing on the remaining claim that Mr. Tapp was in custody for purposes of *Miranda* on January 29 and whether trial counsel was ineffective for not

presenting certain evidence during the original motion to suppress. After post-hearing briefing, the court issued its Findings of Fact Conclusions of Law, and Order. LCR Vol. II, pg. 260.

The court first concluded that:

> The scope of this issue is narrowed by prior proceedings. Specifically, in the underlying criminal action the trial court considered the record, including the video of the January 29th interviews, and concluded that Tapp was not in custody. On appeal, the Court of Appeals in *Tapp I* reviewed the record from the criminal action and agreed . . . Accordingly, the record developed in the criminal case (and the video of the interviews) will not support Tapp's claim.

LCR Vol. II, pg. 264. It went on to state that "evidence of what occurred at the crime scene and "off camera" may, when considering the totality of the circumstances, support the claim that questioning evolved into a custodial interrogation." LCR Vol. II, pg. 265. It went on to find, however, "that the facts of January 29th, considering the totality of the circumstances, do not support a claim of custodial interrogation." LCR Vol. II, pg. 270. It then dismissed the petition. LCR Vol. II, pg. 271.

3. Post-hearing proceedings

A Judgment of Dismissal was entered. LCR Vol. II, pg. 273. A timely notice of appeal was filed. LCR Vol. II, pg. 275. Subsequently, an I.C. § 19-4902 Petition for DNA Testing was filed, by pro bono counsel, under this case number. LCR Vol. II, pg. 281. The petition asserted, as required by the statute, that identity was an issue at trial, that there was DNA evidence relating to the crime which has been subject to a chain of custody, and that there was DNA technology available to test the samples which was not available at the time of the trial. LCR Vol. II, pg. 281-283. A second Petition, which was virtually identical to the first, was filed on July 23, 2012. LCR Vol. II, pg. 289-291. The state filed a Response to the Petition for DNA Testing, which did

"not object to the releasing the extract currently in possession of the State lab," so long as the sample was released only to Orchard Cellmark, LabCorp, for testing. LCR Vol. II, pg. 292. On August 9, 2012, Mr. Tapp filed an Amended Petition for DNA testing, which made the same allegations as above, but asked that the sample be sent to the University of Arizona Genetics Core laboratory instead of Cellmark, as only a very few laboratories are able to conduct the advanced DNA analysis requested. LCR Vol. II, pg. 296. Three days later, on August 14, 2012, without prior notice to Mr. Tapp, the district court dismissed the Amended Petition. LCR Vol. II, pg. 312-313.

The court found that Mr. Tapp had not made a prima facie showing under I.C. § 19-4902(c)(1) that "identity was an issue in the trial which resulted in his or her conviction." LCR Vol. II, pg. 312 (quoting the statute). The court concluded that it could not determine that "the result of testing has the scientific potential to produce new, noncumulative evidence that would show that it is more probable than not that the petitioner is innocent." LCR Vol. II, pg. 313, (quoting I.C. § 19-4902(e)). Further, the court found that since the case had been dismissed prior to the filing of the DNA petition that "[t]o the extent Tapp sought to support his petition for post-conviction relief with DNA test results, that time has passed." *Id.*

A timely amended notice of appeal was filed. LCR Vol. II, pg. 315.

III. ISSUES PRESENTED ON APPEAL

A. Did this Court's remand for an evidentiary hearing preclude the district court from granting a new motion for summary disposition?

B. If not, did the court err in finding that taking the evidence in the light most favorably to Mr. Tapp, that he has not made a *prima facie* showing that the confession was coerced and

consequently failed to show there was ineffective assistance of trial counsel regarding the determination whether Mr. Tapp's statements were involuntary in light of the evidence of diminished capacity?

C. Did the court violate Mr. Tapp's statutory right to notice and due process of law by dismissing the DNA petition without giving him twenty days prior notice of its intent to do so?

IV. ARGUMENT

A. *This Court's Remand for an Evidentiary Hearing Precluded the District Court From Granting a New Motion for Summary Disposition*

1. Introduction

In the first post-conviction appeal, this Court reversed the order granting summary dismissal of certain aspects of Mr. Tapp's Ineffective Assistance of Counsel claim and remanded for an evidentiary hearing. On remand, the trial court again granted summary disposition of the mental health evidence aspect of the claim. This was error because the trial court violated the directions of this Court and the state waived any claim that the trial court had the power to reconsider the motion for summary disposition because the Attorney General's Office failed to argue against Mr. Tapp's claim in the first appeal that an evidentiary hearing was the appropriate remedy for the district's error. The Attorney General also failed to challenge the Court of Appeals' order reversing aspects of the district court decision and remanding for an evidentiary hearing in a Petition for Rehearing or by filing a Petition for Review in the Supreme Court. Further, the district court ignored the mandatory language of Idaho Appellate Rule 38 which states that, once a remittitur has been issued by the Idaho Supreme Court, the opinion has become final and "the district court or administrative agency shall forthwith comply with the

directive of the opinion."

This error was based upon the district court's interpretation of law. This Court reviews questions of law *de novo*. *Schultz v. State*, 151 Idaho 383, 385, 256 P.3d 791, 793 (Ct. App. 2011), *review denied* (July 27, 2011).

2. The district court was required to conduct an evidentiary hearing on both issues

a. Pursuant to I.A.R. 38, the district court only had the authority to hold an evidentiary hearing

Idaho Appellate Rule 38 provides, in pertinent part, that:

> When the opinion filed has become final in accordance with this rule, the Clerk of the Supreme Court shall issue and file a remittitur with the district court or administrative agency appealed from and mail copies to all parties to the appeal and the presiding district court judge or chairman of the agency. The remittitur shall advise the district court or administrative agency that the opinion has become final and that the district court or administrative agency shall forthwith comply with the directive of the opinion.

I.A.R. 38(c).

The language of this rule is mandatory – once an opinion becomes final, the district court is required to comply with the specific directives provided by the opinion rendered by either the Court of Appeals or the Supreme Court. Moreover, on remand, the trial court can only "take actions it is specifically directed to take, or those which are subsidiary to the actions directed by the appellate court." *State v. Hosey*, 134 Idaho 883, 886, 11 P.3d 1101, 1104 (2000) (*citing Walters v. Industrial Indem. Co.*, 130 Idaho 836, 838, 949 P.2d 223, 225 (1997)). Accordingly, the district court erred by concluding it was not required to hold an evidentiary hearing. This Court should reverse the district court on this point and remand this case for an evidentiary hearing.

b. The state waived any challenge to whether the district court could simply reconsider the motion for summary disposition

In addition, the state is now precluded from arguing that the district court had the authority to reconsider the motion to summarily dismiss because the "law of the case" doctrine prevents a party from re-litigating an issue on a subsequent appeal, when it had an earlier opportunity to address the same issue, but did not.

In *Swanson v. Swanson*, 134 Idaho 512, 5 P.3d 973 (2000), the Idaho Supreme Court observed:

> The doctrine of the law of the case provides that where an appellate court states a principle of law in deciding a case, that rule becomes the law of the case and is controlling both in the lower court and on subsequent appeals as long as the facts are substantially the same." The decision on an issue of law made at one stage of a proceeding becomes precedent to be followed in successive stages of that same litigation. "[L]ike stare decisis it protects against relitigation of settled issues and assures obedience of inferior courts to decisions of superior courts.

134 Idaho 516, 5 P.3d 977 (*citing Frazier v. Neilson & Co.*, 118 Idaho 104, 106, 794 P.2d 1160, 1162 (Ct. App. 1990). More recently, the Idaho Supreme Court further articulated the "law of the case" doctrine as follows:

> The "law of the case" doctrine provides that when "the Supreme Court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal." The "law of the case" doctrine also prevents consideration on a subsequent appeal of alleged errors that might have been, but were not, raised in the earlier appeal.

Taylor v. Maile, 146 Idaho 705, 709, 201 P.3d 1282, 1286 (2009) (internal citations omitted).

During the first appeal in this case, the state never argued that remand for an evidentiary hearing was not the appropriate remedy, even though Mr. Tapp specifically requested that relief

in his Opening Brief. See Opening Brief in No. 35563, pg. 26 ("The district court's order summarily dismissing this claim should be reversed and the matter remanded for an evidentiary hearing.") After the Court reversed and remanded for an evidentiary hearing, the state did not argue that this Court's choice of remedy was incorrect in a Petition for Rehearing, nor did it file a Petition for Review to the Supreme Court. Thus, while the state had the opportunity during the first appeal to argue that the district court's order should only be vacated, and not reversed, and that the case should be remanded for reconsideration of the motion for summary disposition, instead of remanded for an evidentiary hearing, it failed to do so.

Pursuant to *Taylor*, the state is foreclosed from raising that claim in the instant appeal because it failed to challenge the alleged errors which occurred during a prior appeal. The state was given two opportunities, first before this Court of Appeals, and then in the Supreme Court, to argue that the order granting the motion for summary disposition should only be vacated, not reversed. Effectively, the district court permitted the state to litigate the issue of appellate remedy which it neglected to raise when the issue was properly in front of the appellate court. Because the remedy that Mr. Tapp was entitled to an evidentiary hearing was necessary to this Court's decision in *Tapp v. State*, No. 35536 and it was not challenged by the state at that time, the state was prevented from challenging that ruling on remand under the "law of the case" doctrine and may not challenge it now.

B. ***Alternatively, the Trial Court Erred in its Determination That Mr. Tapp Had Not Established a Prima Facie Showing That There Was Ineffective Assistance of Trial Counsel Regarding His Failure to Present Evidence of Mr. Tapp's Diminished Capacity During the Proceedings to Determination Whether Mr. Tapp's Statements Were Involuntarily Obtained by the Police***

1. Introduction

In its Memorandum Decision and Order, the district court considered the "additional evidence as to Tapp's mental capacity," and found it to be "of limited utility." LCR Vol. I, pg. 50-51. (Of course, one reason why the evidence was not more fully developed was that the court did not set the matter for an evidentiary hearing, as directed by this Court.) It considered Mr. Tapp's grades, the Affidavit of Lisa Barini-Garcia, one of Mr. Tapp's original trial attorneys, Mr. Tapp's affidavit and the affidavit of psychologist Mark Crogaint, Ph.D. LCR Vol. I, pg. 50-51. It then considered some of the circumstances of the interrogation. LCR Vol. I, pg. 52-53. It then concluded:

> [A] critical part of an involuntary confession is police coercion. There is no evidence that the officers who interviewed Tapp were aware of some diminished capacity and tried to exploit it. On at least four occasions, a court has reviewed the January 29 video taped interview and confession and found no police coercion. In *Tapp I*, the Court of Appeals performed a detailed analysis of the taped interview concluding that ". . . the district court Tapp's disclosures to the police were not the result of police coercion."
>
> When considering the totality of the evidence, this Court concludes that Tapp has failed to raise a genuine issue to the effect that his confession was involuntary and that his will was overcome by police coercion. Indeed, it is this Court's opinion that no reasonable person could view the videotaped interviews and conclude that Tapp's will was overcome by police coercion.

LCR Vol. I, pg. 53-54.

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

The district court erred in its analysis of the voluntariness issue. It was not required to

find that the police exploited Mr. Tapp's mental deficiencies in order to find the statements were coerced. Rather, it was to consider the evidence of his mental condition as part of the totality of the circumstances when determining whether there was police overreaching and whether Mr. Tapp's will was overborne.

In Idaho, as in all states, the test for voluntariness requires the court to consider "the totality of the circumstances," a standard which originated with *Haynes v. Washington*, 373 U.S. 503 (1963). In *Colorado v. Connelly*, 479 U.S. 157 (1986), the United States Supreme Court stated that "while each confession case has turned on its own set of factors justifying the conclusion that police conduct was oppressive, all have contained a substantial element of coercive police conduct." *Id.*, 479 U.S. at 163-4. While police overreaching is *necessary* to establish involuntariness, once that is shown, the court looks to all the circumstances of the interrogation to determine whether the defendant's will was in fact overborne.

Connelly's case was one simply of a person spontaneously providing a confession to police, without any element of overreaching, or indeed of any questioning whatsoever. Even Connelly agreed that "the police committed no wrongful acts. . . ." *Id.,* at p. 165. Indeed, the only state action found by the lower courts was that the confession had been admitted into evidence in a state court. *Id.* Here, unlike *Connelly,* there was a finding of police misconduct. As this Court wrote in the first post-conviction appeal: "The [trial] court found the officers did offer an implied promise of leniency," which was premised upon certain conditions.

2010 Unpublished Opinion No. 410, pg. 9.[2]

There is no doubt that the promise of leniency is a form of governmental misconduct. The Idaho Supreme Court held in a post-*Colorado v. Connelly* case that implied promises of leniency are a factor to be considered under the totality of the circumstances. *State v. Radford*, 134 Idaho 187, 192, 998 P.2d 80, 85 (2000). And this Court has noted that "[i]f the defendant's free will is undermined by threats or through direct or implied promises, then a statement cannot be considered voluntary and is inadmissible." *State v. Wilson*, 126 Idaho 926, 929, 894 P.2d 159, 162 (Ct. App. 1995).

As stated in *Bram v. United States*, 168 U.S. 532, 542-43 (1897), "a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence[.]" While *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991), replaced the *Bram* test with the current totality of the circumstances test, *Bram* still establishes that direct or implied promises of leniency are the type of coercive police misconduct required by *Colorado v. Connelly*. "If the defendant's free will is undermined by threats or through direct or implied promises, then the statement is not voluntary and is inadmissible." *State v. Valero*, — Idaho —, 285 P.3d 1014, 1016 (Ct. App. 2012).

It is not required that the police make an express promise of leniency. Nor does it matter that the police officer cannot personally make good on the implied promise. In fact, it aggravates

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[2] In addition, at the time of the summary disposition there were allegations by Mr. Tapp which showed police coercion, which were not considered by the district court in granting summary disposition. Addendum to Affidavit in Support of Petition for Post-Conviction Relief (in No. 35536 Exhibits). However, those allegations were later rejected by the district court after the evidentiary hearing on the *Miranda* issue. LCR Vol. II, pg. 265-268.

the misconduct if that is the case because the police officer is implying that he can do something the law does not permit him to do. As the Court of Appeals recently said,

> while the detective may have made no direct promises, by virtue of the themes developed and tactics used by the detective, how "telling the truth would be better" than lying certainly implicated matters outside of the detective's control. . . . By suggesting that the court would want to know why Valero committed the acts charged, and that it was very important to be able to tell the court that Valero was not a molester, rapist, or sexual deviant, the detective implied that telling the truth could result in favorable treatment by the court, again something he could not deliver. Most critically, the detective's representation that Valero could be charged with a more serious crime of lying to police if he did not confess was inherently coercive. It is precisely the type of coercive tactic that could induce an innocent person to confess.

State v. Valero, 285 P.3d at 1019-20.

In short, unlike in *Connelly*, there was "police conduct causally related to the confession." 479 U.S. at 164. Mr. Tapp does not suggest, as it was argued in *Connelly*, that the "defendant's mental condition, by itself and apart from its relation to official coercion should . . . dispose of the inquiry into constitutional 'voluntariness.'" *Id.* Rather, he agrees with the *Connelly* Court which recognized that "mental condition is surely relevant to an individual's susceptibility to police coercion[.]" 479 U.S. at 165.[3] Once police misconduct has been found, Idaho courts have looked to subjective information regarding defendants, whether known to the police or not, in assessing whether the defendant's will was overborne, considering the totality of the circumstances. *See, e.g., Woodward v. State,* 142 Idaho 98, 108, 123 P.3d 1254, 1264 (Ct. App. 2005) (among other factors, court looks to facts that defendant was "of normal intelligence," and

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[3] Idaho courts have reached similar results in the absence of coercion. *Hollon v. State*, 132 Idaho 573, 579, 976 P.2d 927, 933 (1999), for example, was a case in which the defendant did "not assert that any police coercion occurred and focuses only on his mental state to support his argument that counsel should have moved to suppress his confession ... ."

had "had prior experience with law enforcement officers . . . "); *State v. Cordova*, 137 Idaho 635, 639, 51 P.3d 449, 453 (Ct. App. 2002) (court lists whether defendant had "a history of mental illness" as a consideration bearing on the voluntariness of his statements, but notes that only counsel's representation to this effect, as opposed to actual evidence, was presented at the suppression hearing). *See also*, *Colorado v. Connelly*, *supra*, 479 U.S. at 164 ("Respondent correctly notes that as interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the 'voluntariness' calculus," *citing Spano v. New York,* 360 U.S. 315 (1959); *Bailey v. Comm.*, 194 S.W.3d 296 (Ky. 2006) (Defendant had a desire to be compliant, particularly with authority figures, as a result of a "mental deficiency.") When police officers take unfair advantage of interrogation subjects, they take their victims as they find them, including when they have developmental deficits.

Here, the district court erred by requiring Mr. Tapp to present a *prima facie* case that the police were aware of his mental condition and then exploited it. That is not the legal test. In determining whether a defendant's will was overborne in a particular case, the court must review the totality of all the surrounding circumstances, including "the characteristics of the accused and the details of the interrogation[.]" *State v. Cordova*, 137 Idaho 635, 638, 51 P.3d 449, 452 (Ct. App. 2002). When police misconduct is found, the court then considers all factual circumstances surrounding the confession, assessing the psychological impact on the accused and evaluating the legal significance of how the accused reacted. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). In this case, there is a trial court finding that the officers made an implied promise of leniency to Mr. Tapp. Thus, Mr. Tapp's developmental deficits are part of the totality of

circumstances which trial counsel should have presented to the court for consideration. The remand court, however, by requiring that Mr. Tapp show the police engaged in misconduct by exploiting his development disabilities instead of considering the disabilities as part of the totality of the circumstances, failed to engage in the proper analysis of the voluntariness question. Consequently, the court also misanalyzed the ineffective assistance of counsel claim.

Accordingly, this Court should reverse the district court's order granting summary disposition on the police coercion claim and remand with directions to hold an evidentiary hearing.

C. *The Sua Sponte Dismissal of the DNA Petition Violated Mr. Tapp's Statutory and Due Process Rights to Notice and an Opportunity to Respond*

1. The petition is not untimely

Idaho Code § 19-4902(b) provides that a "petitioner may, at any time, file a petition before the trial court that entered judgment of conviction in his or her case for the performance of fingerprint or forensic deoxyribonucleic acid (DNA) testing[.]" Thus, the petition is clearly timely. While it is arguable whether the petition should have been filed under a new case number, since judgment had been entered and a notice of appeal already filed, that is not a basis to dismiss the DNA petition. Instead, the district court could have instructed the court clerk to assign the petition a new case number.

2. The Order of Summary Dismissal should be reversed because the district court did not provide the required 20-day notice

The district court violated I.C. § 19-4906(b) when it *sua sponte* dismissed the DNA petition for post-conviction relief without giving Mr. Tapp any notice. The appropriate remedy is reversal of the order of dismissal and a remand for further proceedings.

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

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

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

The 20-day notice period is also required by due process. The due process guarantees under the United States Constitution and the Idaho Constitution both provide protections against deprivations of life, liberty, or property, without due process of law. U.S. Const. amend. XIV; Idaho Const. art. 1, § 13. *Rudd v. Rudd*, 105 Idaho 112, 115, 666 P.2d 639, 642 (1983). "Procedural due process, as it is guaranteed under both the Idaho and U.S. Constitutions, requires that a person involved in the judicial process be given meaningful notice and a meaningful opportunity to be heard." *State v. Doe*, 147 Idaho 542, 544, 211 P.3d 787, 789 (Ct. App. 2009) *citing Fuentes v. Shevin*, 407 U.S. 67 (1972). *See also Rios-Lopez v. State*, 144 Idaho 340, 343, 160 P.3d 1275, 1278 (Ct. App. 2007) ("procedural due process requires an opportunity to be

heard"). Here, the court's *sua sponte*, unwarned order of dismissal violated both the statutory and due process rights to fair notice and an opportunity to respond.

In this case, the error in not giving the 20-day notice was not harmless. Had Mr. Tapp had notice, he could have shown that identity was the issue at the criminal trial. The defense at trial was still identity. The defense argued that Mr. Tapp's statements that he assisted others to commit the offenses were false and that Mr. Tapp was not involved in any way in the crimes and was at most merely present while the crime occurred. And, in fact, the state failed to present any forensic evidence linking Mr. Tapp to the charged offenses. Advanced forensic testing of the DNA evidence now has the potential of leading to the killer/rapist of the victim. When the DNA is analyzed, the results can be compared to the DNA profiles stored in CODIS.[4] The CODIS match will be someone unknown to Mr. Tapp and Mr. Tapp will be unknown to that person, thus making it highly improbable that Mr. Tapp was his accomplice. Further, that person will likely provide testimonial evidence that Mr. Tapp was not involved in the offense.

V. CONCLUSION

For all the reasons set forth above, this Court should reverse the district court's summary dismissal of the ineffective assistance of counsel for failing to present evidence of mental deficiency claim and remand the case to the district court for an evidentiary hearing. It should also vacate the order dismissing the DNA petition and remand for further proceedings.

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[4] The FBI website states that "CODIS is the acronym for the 'Combined DNA Index System' and is the generic term used to describe the FBI's program of support for criminal justice DNA databases as well as the software used to run these databases. The National DNA Index System or NDIS is considered one part of CODIS, the national level, containing the DNA profiles contributed by federal, state, and local participating forensic laboratories." http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet (last visited 3/12/13).

Respectfully submitted this 13th day of March, 2013.

Dennis Benjamin
Attorney for Christopher Tapp

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of March, 2013, I caused two true and correct copies of the foregoing to be mailed to:

Jessica Lorello
Deputy Attorney General
P.O. Box 83720
Boise, ID 83720-0010

Dennis Benjamin