3-7-2017

State v. Hall Appellant's Reply Brief Dckt. 31528

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**SUPREME COURT NO. 31528**
Plaintiff- Respondent,	)	
	)	**ADA COUNTY NO. H0300518**
v.	)	
	)	
ERICK VIRGIL HALL,	)	
	)	
Defendant-Appellant.	)	
_____	)	
	)	**SUPREME COURT NO. 41059**
ERICK VIRGIL HALL,	)	
	)	**ADA COUNTY NO. CV PC 2005-21649**
Petitioner-Appellant,	)	
	)	
v.	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	**(CAPITAL CASE)**
_____	)	

REPLY BRIEF OF APPELLANT

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

HONORABLE THOMAS F. NEVILLE
District Judge

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ARGUMENT

GUILT-PHASE ISSUES ON DIRECT APPEAL[1]

II. The Court Erred In Denying Mr. Hall's Motion To Dismiss The Indictment

The district court erred in denying his motion to dismiss the indictment where it was not signed by the presiding grand juror and, therefore, did not confer jurisdiction. App. Br., pp.9-10.

The interpretation of a statute is a question of law that is reviewed *de novo*. *See, e.g.*, *State v. Barnes*, 133 Idaho 378, 380 (1999). Where the statutory language is plain, the statute is applied as written, regardless of whether such application would produce absurd results. *Verska v. St. Alphonsus Regional Med. Ctr.*, 151 Idaho 889, 894-96 (2011). In so doing, this Court gives effect to all the words of the statute so that none are rendered void, superfluous, or redundant. *Id.* at 897. Where multiple statutes are involved, the more specific statute controls over a general one. *Barnes*, 133 Idaho at 382; *Ausman v. State*, 124 Idaho 839, 842 (1993). Even where multiple statutes appear to be specific in certain respects, or have overlapping provisions, the statute that more closely addresses the facts of the case controls. *Barnes*, 133 Idaho at 382.

Where a statute or court rule unambiguously directs what a judge must do, the result is a ministerial act rather than a discretionary one. *Ausman*, 124 Idaho at 842-43. Such is the case here. Pursuant to Idaho Code section 19-4901, "An indictment cannot be found without the concurrence of at least twelve (12) grand jurors. When so found it must be endorsed, a true bill, and the endorsement *must be signed by the foreman of the grand jury*." I.C. § 19-1401 (emphasis added). Idaho law specifies that so long as a timely motion is filed, "[t]he indictment *must* be set aside by the court in which the defendant is arraigned ... [w]hen it is not found, endorsed or presented as prescribed in this code." I.C. § 19-1601(1) (emphasis added).

[1]Where a reply to specific claims is not necessitated by the Respondent's Brief, Mr. Hall relies on his prior briefing. For those issues which require a response, for the sake of consistency and ease of reference, Mr. Hall relies on the same numbering as in his Appellant's Brief.

Despite the plain language of the statutes, the State argues the absence of the foreperson's signature on the indictment is a defect in form that should be disregarded under Idaho Code section 19-1419. Resp. Br., p.17. The State fails to acknowledge that while all of the cited jurisdictions, other than the federal system,[2] require an indictment be endorsed and signed by a grand jury foreperson, none appear to have a statute or rule like Idaho's that requires dismissal for lack of proper endorsement, presentment, or signature. Because Mr. Hall's original indictment was not signed by the grand jury foreperson, section 19-1401 was violated. Consequently, it was insufficient to confer subject matter jurisdiction. *See generally State v. Quintero*, 141 Idaho 619, 621-22 (2005); *State v. Rogers*, 140 Idaho 223, 228 (2004). Allowing the State to resubmit the indictment to the grand jury foreperson for a signature is not a remedy allowed by statute, where it clearly states the indictment *must be set aside*. I.C. § 19-1601(1).

The recent decision in *State v. Schmierer*, 159 Idaho 768, 772 (2016), does not dictate differently. In *Schmierer*, there were no defects in the original indictment, but following plea negotiations, the State amended the indictment and replaced an attempted lewd conduct charge with a second enticement charge. *Id.* The prosecutor did not resubmit the matter to the grand jury, but instead signed the amended indictment himself. *Id.* The defendant pled guilty to both enticement counts on the same day it was filed. *Id.* Over three years later, the defendant filed a motion to correct an illegal sentence, contending the failure to resubmit the amended indictment to the grand jury deprived the district court of jurisdiction to convict him on the second count, rendering his sentence illegal. *Id.* at 165. This Court disagreed, observing that although the charging document was called an "indictment," it was really an information masquerading as an

[2]"There is in the federal statutes no mandatory provision requiring such indorsement or authentication, and the matter must therefore be determined on general principles." *Frisbie v. United States*, 157 U.S. 160, 163 (1895).

indictment, and the mislabeling was a defect in form that did not deprive the court of jurisdiction. *Id.* at 166. In *Schmierer,* there were no defects in the original indictment, and the defendant, by pleading guilty, waived his right to a preliminary hearing on the second enticement charge alleged in the amended "indictment." *Id.* Here, by contrast, the original indictment was defective from the outset, having never been signed by the foreperson.

The district court's denial of Mr. Hall's motion to set aside the indictment is contrary to the plain, specific, and mandatory language of section 19-1601, which clearly requires a district court to dismiss an unsigned indictment, unsigned by the foreperson, as a ministerial act.

III. The Court Denied Mr. Hall's 6th, 8th, And 14th Amendment Rights To A Qualified And Impartial Jury By Denying His Motions To Strike Two Biased Jurors

"The 6th and 14th Amendments guarantee a defendant on trial for his life the right to an impartial jury." *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988). The standard for whether a prospective juror must be excused for cause in a capital case because of his or her views on the death penalty is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)).

While peremptory challenges are not themselves of constitutional dimension, *Ross,* 487 U.S. at 88, such challenges are "a means to guard against latent bias and to secure the constitutional end of an impartial jury and a fair trial." *Georgia v. McCollum*, 505 U.S. 42, 57 (1992); *accord Ross,* 487 U.S. at 88. Although peremptory challenges are a "creature of statute" governed by State law, "[t]he right to challenge a given number of jurors without showing cause is one of the most important rights secured to the accused." *Pointer v. United States,* 151 U.S. 396, 408 (1894). Accordingly, a defendant's right to the use of peremptory challenges to vindicate constitutional rights is impaired if the defendant does not receive that which State law

requires.[3] *Ross*, 487 U.S. at 89. The erroneous denial of a for-cause challenge to a juror rises to the level of a constitutional violation if a defendant was forced to use a peremptory challenge on that juror and a biased juror is seated as a result. *Ross*, 487 Idaho at 89; *State v. Ramos*, 119 Idaho 568, 569-70 (1991).

Here, the district court erred in refusing to strike Jurors 1 and 60 for cause, requiring Mr. Hall to expend peremptory challenges on these jurors, resulting in a biased seated jury. The State claims that because "Mr. Hall did not challenge for cause any of the jurors that actually sat on his jury and establish those jurors were actually biased, his claim fails." Resp. Br., p.20. In Section IV of his opening brief, Mr. Hall asserted "many of the seated jurors were biased due to their inability to meaningfully consider mitigation or other factors." App. Br., p.15. Mr. Hall also identified the biased seated jurors by number, and explained why each was biased and unqualified to sit on a capital case. App. Br., pp.15-19. As a result, this Court must address the district court's erroneous denial of Mr. Hall's motions to strike jurors for cause, which forced him to use peremptory strikes to remove them, but failed to prevent the seating of a biased jury.

V. The Court Erred In Allowing A Police Detective To Testify He Believed An Alternate-/Co-Perpetrator Was Innocent

On the question of relevance, the State has *not* argued Det. Smith's testimony was relevant to show why the detective did what he did, *see id*. at 31-32, as the court concluded below, *see* 31528 Tr., p.4140, L.24-p.4141, L.24. Presumably, that is because of *State v. Parker*, 157 Idaho 132, 145 (2014), where evidence offered to show "the effect on the listener" is generally not relevant, and "is often used as a ruse to put inadmissible evidence before the jury improperly." Instead, the State argues Det. Smith's opinion was relevant "because it is evidence

[3]The Supreme Court has recognized a violation of the Due Process Clause of the 14th Amendment may occur if a trial judge repeatedly or deliberately violates the law, or acts in an arbitrary or irrational manner regarding peremptory challenges. *Rivera v. Illinois*, 556 U.S. 148, 158 (2009).

establishing Hall committed [Ms. Henneman's] murder," especially since Mr. Hall raised the inference that Mr. Johnson was involved in Ms. Henneman's death. Resp. Br., pp.31-32. This argument skirts the actual issue. The critical inquiry is whether a police officer's opinion as to a suspect's guilt is relevant. Clearly it is not because it does not make "any fact that is of consequence to the determination of the action more probable or less probable." IRE 401.

On the question of foundation, Mr. Hall asserts the error was preserved through a proper objection. Specifically, he objected to Det. Smith's opinion on the basis that "there's no foundation for his conclusions." 31528 Tr., p.4139, Ls.20-21. Clearly, this was an argument that Det. Smith's opinion testimony was inadmissible under the rules concerning opinion testimony (IRE 701 & 702). And Mr. Hall's argument on appeal—that the detective's opinion was not helpful to the jury and, therefore, not admissible—is based on *State v. Ellington*, 151 Idaho 53, 66-67 (2011), which applied IRE 702. Thus, the argument on appeal falls squarely within the ambit of the objection made below. *See State v. Rodgers*, 119 Idaho 1047, 1049 (1991).

Alternatively, the State argues that because its "case was built upon Hall's DNA in Lynn's vagina and his confession to her family," any error was harmless beyond a reasonable doubt. Resp. Br., p.33. However, the DNA evidence merely placed Mr. Hall with Ms. Henneman; it certainly did not prove he killed her. This is especially true if he had an accomplice. Although the letter Mr. Hall wrote includes vague, cryptic statements from which it could be inferred he killed Ms. Henneman, *see* 31528 Ex.136, other evidence suggests any admissions of guilt were false. Most notably, he consistently maintained he had little memory of the timeframe during which Ms. Henneman died. *See, e.g.*, Suppression Ex.4, pp.7, 8, 20, 32, 34, 37, 46-48, 53, 55-56, 58, 64, 66, 74. Since the jury was free to believe this contrary evidence, it cannot be said that the letter would have surely led to Mr. Hall's conviction.

VI. The Prosecution Engaged In Misconduct In Discussing The DNA Evidence

"Given the persuasiveness of [DNA] evidence in the eyes of the jury, it is important that it be presented in a fair and reliable manner." *McDaniel v. Brown*, 558 U.S. 120, 136 (2010). In this case, the prosecution engaged in misconduct in presenting the DNA evidence—first, by invoking the "prosecutor's fallacy," *i.e.*, seeking to have the jury believe the random match probability (in this case, 1 in 49 quadrillion) was the same as the probability of someone other than Mr. Hall having been the source of sperm found in the victim; and second, by claiming the DNA evidence "exclude[d]" Mr. Johnson "as the *killer*." App. Br., pp.22-25 (emphasis added).

A. The Prosecution Overstated The Significance Of The DNA Match To Mr. Hall

The State claims the prosecution did not invoke the "prosecutor's fallacy"[4] and so, did not commit misconduct rising to the level of fundamental error. Resp. Br., pp.35-37. The State argues the prosecution and its expert witness "did not improperly conflate random match and source probability, but merely allowed the jury to infer Hall's DNA was found in Lynn's vagina based upon statistical probabilities." Resp. Br., pp.35-36. That is not correct.

There is a line between proper and improper use of random match probabilities. Admittedly, the prosecution may use the random match probability to express the strength of the connection between the defendant and the biological evidence, *see* Resp. Br., pp.35-36; however, it may not imply that probability is the same as the chance of another person having committed the crime (or, the chance the defendant is innocent). *Chischilly*, 30 F.3d at 1157, 1158. Here, the prosecution did both and, therefore, crossed the line between advocacy and misconduct.

[4]In an apparent attempt to cast doubt on the legitimacy of the "prosecutor's fallacy," the State claims "the so-called 'prosecutor's fallacy'... is apparently based upon a study completed in 1996." Resp. Br., p.35. The book referred to was not a lone "study," as the State suggests; nor was it the genesis of the criticism of logic. *See, e.g., United States v. Chischilly*, 30 F.3d 1144, 1157 ns.21-23 (9th Cir. 1994) (citing pre-1994 sources discussing the "prosecutor's fallacy"), *overruled on other grounds by United States v. Preston*, 751 F.3d 1008, 1019 (9th Cir. 2014).

The prosecution did more than point out the chances of Mr. Hall's DNA profile appearing randomly in the population would be one in 49 quadrillion. By emphasizing there are not 49 quadrillion people on Earth, the prosecution suggested the chance of someone else being guilty was also one in 49 quadrillion (*i.e.*, essentially zero). In questioning Dr. Finis, the prosecutor inquired about the strength of the DNA match, but in doing so, asked a compound question which betrayed the State's intent to conflate source probability with random match probability. That lengthy compound question included the following: "*How do you know that somebody else doesn't match also?*" 31528 Tr., p.4376, Ls.8-9 (emphasis added). In answering the prosecutor's compound question, Dr. Finis spoke appropriately about random match probabilities, but also volunteered that, given the types of probabilities at issue—one in multiple trillions or quadrillions—"it's much more rare that you'd find it in the general population." *Id.*, p.4376, L.13-p.4377, L.8. The prosecutor then ran with that assertion, eliciting testimony that a random match probability in the quadrillions is "a thousand times over what the [earth's] population is … about 6 billion," and that once "the probability numbers get greatly beyond the current population," it becomes "reasonable to ascertain that *these sources are the same*." *Id.*, p.4377, Ls.9-24 (emphasis added). Together, these questions and answers invited the jurors to infer the random match probability (in this case, one in 49 quadrillion) was the same as the probability of an alternate source of the sperm.

In at least two instances, the prosecutor *explicitly* conflated the random match probability with the source probability. At one point, the prosecutor asked Dr. Finis: "So when you get a probability that is in the trillions ... *does that tell you then that there could not be another person on the planet who would have the same DNA that would match at all 13 of those locations?*" *Id.*, p.4386, Ls.16-21. Dr. Finis replied, "Other than an identical twin, yes, that would be a

reasonable conclusion." *Id*., p.4386, Ls.16-23 (emphasis added). Additionally, going back to the State's opening statement, the prosecutor explicitly argued that it was mathematically impossible for someone else to have been guilty: "And that DNA, Ladies and Gentlemen, is his DNA. It's a match. *Nobody else on this planet has his DNA. Nobody who lives now, nobody whoever will live*. It's his DNA …." 31528 Tr., p.3412, L.24-p.3413, L.2 (emphasis added).

In light of this, the State's current claim that it cited the random match probability figure below to "allow[ ] the jury to infer Hall's DNA was found in Lynn's vagina based on statistical probabilities," rings hollow. This case is remarkably similar to *State v. Ragland*, where an expert from a state crime lab testified that if the random match probability is "over the world's population, then you know there could be no one else other than that person in the world," and that "anything over the world's population, like I said earlier, can be no one other than that person." 739 S.E.2d 616, 624 (N.C. Ct. App. 2013). There, the North Carolina Court of Appeals held the testimony was improper because the witness:

> effectively testified that defendant's DNA profile matched the DNA [from the evidence] . . . and that the probability that a different, unrelated person in the general population was the source of that DNA was zero. The testimony therefore erroneously assumed "that the random match probability is the same as the probability that the defendant was not the source of the DNA sample."

Id. (quoting *McDaniel*, 558 U.S. at 128). Here, the State committed the same error.

B. The Prosecution Mischaracterized The DNA Exclusion Of Mr. Johnson

The State's only attempt to defend the prosecutor's misconduct in falsely claiming the DNA evidence excluded Mr. Johnson "as the *killer*," is a single sentence asserting the prosecutor's statement "was not false, but based upon a reasonable inference stemming from the upcoming expert's testimony." Resp. Br., p.36. That is not true. In his guilt-phase opening statement, the prosecutor stated that a potential alternate-/co-perpetrator, Christian Johnson, "voluntarily gave his DNA, which later turned out that to [sic] exclude him as the killer." 31528

Tr., p.3423, Ls.11-12. This statement was not qualified as an interpretation; it was stated as fact, which suggested the scientific evidence definitively exonerated Mr. Johnson of *murder*. This, however, was a vast overstatement. As discussed in Mr. Hall's opening brief, the DNA evidence went to the question of whether Mr. Johnson had intercourse with Ms. Henneman; it in no way informed the question of whether he killed her. *See* App. Br., p.25. The prosecutor's false claim constituted misconduct.

C. The Prosecution's Misconduct Constituted Fundamental, Reversible Error

The State contends Mr. Hall failed to show fundamental error. Resp. Br., pp.36-37. It first argues Mr. Hall showed no constitutional violation because he failed to show the misconduct "so infect[ed] the trial with unfairness as to make the resulting conviction a denial of due process." Resp. Br., p.36 (quoting *Darden v. Wainwright*, 477 U.S. 168, 181-82 (1986)). However, this conclusory argument is belied by the authorities cited in Mr. Hall's opening brief. *See* App. Br., pp.25-26 (quoting *Perry*, 150 Idaho at 226, and *State v. Givens*, 28 Idaho 253, 268 (1915)).

Next, the State speculates that Mr. Hall's counsel failed to object to the prosecutor's misconduct for a strategic reason, and so Mr. Hall has failed to show the misconduct is "clear or obvious." Resp. Br., pp.36-37. The State guesses that the tactic spawned from a "fear associated with highlighting or emphasizing the DNA evidence." *Id*., p.37. However, this imaginary justification would have been absurd. The DNA-related evidence was the crux of the State's guilt phase case against Mr. Hall and, thus, could not be avoided.[5] Indeed, the State insists on appeal

[5]*See, e.g.*, 31528 Tr., p.3412, L.15-p.3413, L.3, p.3423, Ls.3-12, p.3426, L.2-p.3428, L.22, p.3431, L.5-p.3432, L.4, p.3513, Ls.21-25, p.3660, Ls.10-23, p.3776, Ls.13-15, p.3846, L.10-p.3848, L.24, p.3929, Ls.9-23, p.3930, L.22-p.3932, L.23, p.3956, L.16-p.3961, L.21, p.4138, L.17-p.4145, L.9, p.4145, L.19-p.4150, L.19, p.4155, L.3-p.4158, L.25, p.4271, L.24-p.4273, L.18, p.4289, L.3-p.4306, L.6, p.4310, L.18-p.4313, L.3, p.4314, L.5-p.4316, L.13, p.4352, L.23-p.4354, L.23, p.4356, L.4-p.4404, L.4, p.4409, L.25-p.4411, L.1, p.4423, L.22-p.4427, L.25, p.4429, L.1-p.4475, L.21, p.4527, L.13-p.4533, L.16, p.4619, Ls.13-23, p.4625, Ls.1-3, p.4626,

that many alleged guilt-phase errors were harmless because, "The State's case was built upon Hall's DNA in Lynn's vagina and his confession to her family …." Resp. Br., p.33; *accord id*. at 37, 42-43, 52-53, 54. Given the circumstances of this case, there was no way to avoid, downplay, or minimize the DNA evidence. In fact, it is apparent defense counsel was not trying to do so, as they cross-examined many of the State's witnesses on matters relating to the DNA evidence. *See, e.g.*, 31528 Tr., p.3940, L.13-p.3943, L.4, p.4335, L.25-p.4349, L.9, p.4404, L.12-p.4409, L.21, p.4428, Ls.9-15, p.4476, L.1-p.4494, L.12, p.4498, L.18-p.4526, L.8. Since there was no objectively reasonable basis for counsel to have failed to object to the prosecution's misconduct, the failure was not a tactical decision, and the error is clear and obvious. *See State v. Sutton*, 151 Idaho 161, 166-67 (Ct. App. 2011).

Finally, the State contends Mr. Hall failed to show the prosecutor's misconduct affected the outcome of the proceedings, arguing "there was significant additional evidence establishing Hall's guilt …." Resp. Br., p.37. Such a claim, however, is inconsistent, as the State repeatedly insists that its guilt-phase case was largely built upon the DNA evidence. Further, the State relies upon the wrong standard. "The inquiry … is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). Where the State's case was based primarily on the DNA evidence, it cannot reasonably claim that two instances of misconduct in presenting that evidence had no effect upon the verdict.

Second, the State argues that "[w]hen an expert properly testifies regarding DNA evidence and erroneously invokes the prosecutor's fallacy, the proper testimony is generally

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L.20-p.4627, L.15, p.4630, L.18-p.4631, L.1, p.4632, Ls.1-2, p.4654, Ls.12-14, p.4663, Ls.4-8, p.4666, Ls.1-7.

sufficient to establish any alleged error was harmless." Resp. Br., p.37 (citing *Ragland*, 739 S.E.2d at 625). That is a misleading characterization of the authority. In *Ragland,* the Court neither stated nor intimated that proper testimony regarding DNA evidence generally renders harmless any invocation of the "prosecutor's fallacy."[6] *See Ragland*, 739 S.E.2d at 624-26. The *Ragland* Court evaluated all of the relevant facts of that particular case and concluded that, based on the totality of the circumstances, the defendant failed to show "the jury would probably have reached a different verdict in the absence of the prosecutor's fallacy evidence" so as to satisfy North Carolina's "plain error" standard.[7] *Id.* Contrary to the State's suggestion, this Court should evaluate the totality of the evidence in determining whether Mr. Hall met his burden of showing the prosecutor's misconduct was not harmless. In doing so, it can only conclude that the two separate instances of misconduct regarding the DNA evidence affected the outcome of his trial.

VII. The Admission Of Testimonial Hearsay From One Of The State's DNA Experts Violated Mr. Hall's 6th Amendment Right To Confrontation

At trial, the State's DNA expert, Dr. Carla Finis, testified about the DNA testing of the vaginal swabs from Lynn Henneman's sex crimes kit by Cellmark, and the DNA testing of other suspects done by Idaho State Crime Lab employees Ann Bradley and Cynthia Hall. 31528 Tr., p.4387, L.12-p.4390, L.6, p.4395, L.7-p.4398, L.12, p.4399, L.6-p.4400, L.6. Relying on Ms. Bradley's and Ms. Hall's DNA analysis and testing, Dr. Finis testified that the Crime Lab had initially considered and eliminated 94 suspects, with another 35 later, as the source of the

[6]No bright-line rule was identified, as doing so would only encourage unscrupulous prosecutors to invoke the "prosecutor's fallacy" because as long as they also presented proper testimony there would never be any consequences for trying to mislead the jury.

[7]Notably, North Carolina's "plain error" standard differs from Idaho's "fundamental error" standard in that it appears to require the defendant-appellant to prove that the "the jury would probably have reached a different verdict in the absence of" the error. *See Ragland*, 739 S.E.2d at 624, 626. In contrast, Idaho's fundamental error test requires the defendant-appellant to demonstrate the error was not harmless. *Perry*, 150 Idaho at 225. This appears to be a modified version of the *Chapman* harmless error test, where the burden of persuasion is flipped, but the substantive standard remains the same.

DNA profile on the vaginal swabs through DNA testing. 31528 Tr., p.4396, L.1-p.4398, L.12, p.4399, L.16-p.4400, L.6. Dr. Finis had no personal knowledge of the DNA testing of the eliminated suspects because she did not perform the testing herself. Dr. Finis' testimony was offered to show the jury that suspects other than Mr. Hall had been eliminated through DNA testing.

Neither Ms. Bradley nor Ms. Hall testified at Mr. Hall's trial. Dr. Finis' testimony conveying the results of their DNA testing was testimonial hearsay, which violated Mr. Hall's constitutional right to confront witnesses against him. The facts in this case are virtually identical to *State v. Watkins*, 148 Idaho 418 (2009). In *Watkins*, Dr. Carla Finis testified, as an expert, that testing done at Identigenetix showed the defendant's semen was found on the underwear an in the condom. *Id.* at 420. Dr. Finis, however, neither received the evidence nor performed the tests, but instead relied on the work and notes of a colleague. *Id*. In that case, counsel objected to Dr. Finis' testimony on hearsay grounds, but the objection was overruled. *Id.* at 423-26. On appeal, this Court agreed that Dr. Finis' testimony was inadmissible hearsay. *Id.* Although the testimony was also challenged as a Confrontation Clause violation, this Court declined to address the constitutional argument and granted the defendant a new trial based only on the inadmissible hearsay argument. *Id.* at 427.

The State ignores *Watkins*, claiming Dr. Finis' testimony was neither hearsay nor a violation of the Confrontation Clause because it conveyed her own independent review and analysis of raw data, much like the expert in *State v. Stanfield*, 158 Idaho 327, 336 (2015). Resp. Br., pp.41-42. In *Stanfield*, this Court drew a distinction between situations like *Watkins*, where an expert testifies to factual findings and conclusions reached by another, versus instances like

those in *Stanfield*, where an expert does not convey conclusions drawn by another, but simply testifies about the nature of sources relied upon to reach an opinion. *Stanfield,* 158 Idaho at 91.

Dr. Finis relied on Ms. Bradley's and Ms. Hall's DNA testing profiles for their truth and accuracy. She then compared their testing profiles to the DNA profile from the vaginal swabs. But if the suspect DNA profiles were not accurate, then Dr. Finis' opinion that the suspects were all excluded as contributors could not be reliable. Accordingly, Dr. Finis' testimony about testing and conclusions reached by Ms. Bradley and Ms. Hall, was testimonial hearsay, and it violated Mr. Hall's right to confront and cross-examine witnesses against him.

The State next claims that even if the testimony violated the Confrontation Clause, the error was not clear or obvious because the majority of the cases which support Mr. Hall's argument were not decided until after Mr. Hall's trial. Resp. Br., p.42. Any "new rule for the conduct of criminal prosecutions is to be applied to all cases, state or federal, pending on direct review or not yet final." *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). Because Mr. Hall's case was not final and was pending on direct appeal at the time the cases at issue were decided, the State's argument lacks merit.

Finally, the State suspects counsel did not object to Dr. Finis' testimony for strategic reasons. Resp. Br., p.42. It is unclear how Mr. Hall could have benefitted from the admission of Dr. Finis' hearsay testimony, which convincingly conveyed to jurors that the State had validly excluded at least 129 potential suspects and definitively linked Mr. Hall to Ms. Henneman using DNA profiles and evidence—whose reliability and accuracy was not established by any other evidence at trial. The DNA evidence was critical in making that connection.

VIII. The Prosecution Committed Misconduct In Offering, And The Court Committed Error In Admitting, Exhibits 118 Through 120 And The Opinion Testimony Surrounding Them

Mr. Hall contends the court erred in allowing the State's pathologist, Dr. Glen Groben to

testify that Ms. Henneman was hogtied before or after her death, and in admitting staged photos of Ms. Henneman's corpse as Dr. Groben imagined it may have been tied at some point. *See* App. Br., pp.29-39. He asserts this evidence was based on mere speculation, was irrelevant and unfairly prejudicial, and asserts the prosecutor engaged in misconduct by offering this inadmissible and highly prejudicial evidence. App. Br., pp.33-39.

A. The Court Erred In Admitting The Re-Enactment Evidence

1. Inadequate Foundation For The "Hogtied" Opinion

Assuming Dr. Groben was correct and the "hogtied" theory "*would account for* the marks, the lividity patterns," Resp. Br., p.47, that simply means it was *possible* Ms. Henneman was tied in such a manner. A mere possibility is not the same as a "probability" or a "likelihood." Indeed, as the State concedes, when pressed, Dr. Groben could not definitively opine that Ms. Henneman was hogtied. *Id.*

The State also claims there is no other logical explanation for the livor patterns in Ms. Henneman's legs and feet. Resp. Br., p.48. That is not true. Common sense dictates that as long as Ms. Henneman's body was face down with her feet somewhat elevated (such as if they were resting against a rock or a log, or were simply on an incline), there would be no livor in her feet.[8] Despite the State's arguments, it is apparent that Dr. Groben's "hogtied" theory is just speculation. While it remains a possible explanation for the lividity patterns, it is not a reasonable medical conclusion and, therefore, it should not have been admitted.

2. Inadequate Foundation For The Re-Enactment Photos

With regard to Exhibits 118-20 and Mr. Hall's argument that there was an inadequate foundation for admission of those staged photographs, *see* App. Br., pp.34-35, the State argues

[8]During the post-conviction proceedings, Mr. Hall produced an affidavit of Dr. Sally Aiken, the Chief Medical Examiner for Spokane County, Washington, who disputed the reasonable degree of medical probability and offered alternative explanations. PC Ex.46.

that the exhibits were used for illustrative purposes. Resp. Br., p.49. It then goes on to argue that, because the staged photos were offered to illustrate Dr. Groben's testimony they were automatically admissible because this Court held in *State v. Stevens*, 146 Idaho 139 (2008), that inaccuracy does not render illustrative evidence irrelevant. Resp. Br., pp.49-50.

There are two flaws in this argument. First, it is based on a selective quotation and misleading characterization of Mr. Hall's brief. Mr. Hall's argument is based on more than Dr. Groben's lack of personal knowledge; it is also based on the fact that Dr. Groben's opinion on this subject was rank speculation. *See* App. Br., p.35. There was an insufficient basis to say that the staged photographs correctly portrayed the positioning of Ms. Henneman's body at or before the time of her death and, therefore, insufficient foundation for admission of those photographs under IRE 901(a).

Second, while Mr. Hall's argument was based on IRE 901(a) and this Court's interpretation of that Rule, *see* App. Br., p.34, the State suggests Rule 901(a) has no application because Exhibits 118-20 were "admitted for illustrative purposes," Resp. Br., p.49. However, this argument rests on a false assumption. Unlike in *Stevens*, where the exhibit was admitted for illustrative purposes only and the court gave the jurors a limiting instruction on that point, *see Stevens*, 146 Idaho at 143, here Exhibits 118-20 were admitted without qualification or limitation, *see* 31528 Tr., p.4028, L.19-p.4029, L.4. Thus, from the jury's perspective they were admitted as substantive evidence.

A prerequisite for admission of photographs as substantive evidence is a foundational showing that those photos accurately portray the relevant scene. *See* IRE 901(a); *Shea v. Kevic Corp.*, 156 Idaho 540, 546 (2014). Given the inadequate showing that the exhibits accurately depicted the condition of the body, the court abused its discretion in admitting them.

3. The "Hogtied" Evidence Was Irrelevant

Mr. Hall contends all of the "hogtied" evidence (the opinion testimony and the staged photographs) was irrelevant because it was wholly speculative insofar as it suggested Ms. Henneman was hogtied at all, much less prior to her death. App. Br., pp.35-36. The State seems to concede that, if Ms. Henneman was hogtied, it happened after her death. *See* Resp. Br., p.48 (pointing out Dr. Groben acknowledged his "hogtied" theory is only plausible if Ms. Henneman was already deceased, or unconscious), p.51 ("[T]he condition of Lynn's body after the criminal acts were *fait accompli* is relevant."). But it never offers a cogent theory of how post-mortem hogtying would be relevant to the charged offenses; rather, it suggests that evidence concerning corpses is always admissible, even it relates to post-mortem conduct. *See id.*, pp.50-51.

The State first cites *State v. Winn*, 121 Idaho 850 (1991).[9] Resp. Br., p.50. However, by *Winn*'s own language, photos of the condition of the body are relevant only because they bear on "the question of the degree and atrociousness *of the crime*." *Winn*, 121 Idaho at 853 (emphasis added). By focusing on "the crime," *Winn* suggests photos of the post-mortem condition of the body are relevant only to the extent they reflect pre-mortem conduct. In other words, once the victim is dead, further injuries or indignities do not bear upon the commission of that crime and, therefore, are not relevant to guilt.

The State also cites *State v. Leavitt*, 116 Idaho 285 (1989). Resp. Br., p.51. In that case, the jury was allowed to see gruesome photos of a mutilated corpse, and also hear testimony

[9]Clearly, Exhibits 118-20 are relevant to show Ms. Henneman was deceased. Given that Ms. Henneman's death was never in dispute, and that there was ample, far less prejudicial evidence of her death already in the record, their admission could never withstand the balancing test of IRE 403. The State clearly did not offer the exhibits to show Ms. Henneman was deceased; it offered them to support Dr. Groben's theory that Mr. Hall hogtied Ms. Henneman after she died. *See, e.g.*, 31528 Tr., p.4001, L.22-p.4002, L.6; Resp. Br., p.52. This is not relevant.

concerning the manner in which the defendant had previously sexually mutilated the corpses of game animals on hunting trips. *Leavitt*, 116 Idaho at 290. However, in *Leavitt* all of that evidence was relevant to the defendant's *modus operandi* of "mutilation and removal of the sexual organs of the victim." *Id*. Thus, *Leavitt* stands only for the proposition that post-mortem conduct may be relevant if the unique circumstances make it relevant, such as a *modus operandi*. There is nothing in this case that makes evidence of post-mortem hogtying remotely relevant. Indeed, at no point does the State even attempt to explain how post-mortem hogtying is relevant to the question of whether Ms. Henneman was kidnapped, raped, or murdered, and, if so, whether Mr. Hall committed those crimes.

4. The Re-Enactment Photos Were Unfairly Prejudicial

The probative value of the "hogtied" photos, if any, was substantially outweighed by the risk of unfair prejudice. *See* App. Br., pp.36-37. Speculation about how the corpse may have been bound following the death was, at best, only minimally probative, while the prejudicial effect of those gruesome photos was substantial. The State argues that gruesome photographs are not automatically inadmissible at trial, and it contends the court did not abuse its discretion in admitting Exhibits 118-20 because their gruesome nature did not outweigh their probative value in establishing that Ms. Henneman was hogtied after death. Resp. Br., pp.51-52. The argument is unavailing because the State still cannot explain the relevance of Ms. Henneman being hogtied *after her death*. Even if Dr. Groben's speculative re-enactment was correct, the photos of that re-enactment have no probative value and only served to evoke emotion. Thus, the court abused its discretion under IRE 403.

5. The State Has Failed To Prove The Court's Errors Were Harmless Beyond A Reasonable Doubt

The State also argues that even if the court erred in admitting Dr. Groben's testimony on

his "hogtied" theory, or the re-enactment photos, any such error was "harmless because the state's case was built upon Hall's DNA found in Lynn's vagina and his confession to her family." Resp. Br., pp.52-53. This argument was addressed above, *see* Section V, *supra*, and is not repeated herein.

IX. The Court Erred In Instructing The Jury On The Elements Of First Degree Murder

The State argues any instructional errors were invited by Mr. Hall and, as a result, he "should not be rewarded when he made suggestions resulting in the instructions being modified and then accepting them by stating he had no objection." Resp. Br., pp.55-56. Although Mr. Hall did not *actively* object to the flawed instructions, contrary to the State's claim, neither did he propose them or encourage the district court to give them. The State's misunderstands the law. This Court has repeatedly recognized that counsel's failure to object to flawed instructions is not invited error. *State v. Adamcik,* 152 Idaho 445, 449-50 (2012); *State v. Blake,* 133 Idaho 237, 240 (1999). In circumstances virtually identical to those in this case, this Court found that counsel's response to the district court's after-the-fact summary of an off-record jury instruction conference,[10] stating, "Your Honor, we would concur. We have nothing to say on the record at this time," did not constitute invited error. *Blake,* 133 Idaho at 239-40. As the errors were neither invited nor objected to, this Court must review them for fundamental error. *State v. Draper,* 151 Idaho 576, 588 (2011).

A. The Instruction On The Definition Of "Implied Malice" Was Incomplete

Mr. Hall's jury was instructed as to the first-degree murder of a single victim, alleged to be either a willful, unlawful, deliberate and premeditated killing with malice aforethought, or a willful, unlawful killing, with malice aforethought, committed during the perpetration of a

[10]In *Blake,* the district court gave the parties a chance to make an objection on the record to the instructions the court intended to give. 133 Idaho at 240.

kidnapping and/or rape,[11] or both. 31528 J.I.9. The jury was provided with an incorrect definition of implied malice, which told them implied malice could be proven by an unintentional act committed with a wanton disregard for human life. 31528 J.I.13. This error was compounded by the deficient elements instruction for first degree murder, which reduced the State's burden of proof. *See* Section IX.B, *infra*.

The State argues that because Instruction 13 "virtually mirrors I.C. § 18-4002," it was proper. Resp. Br., p.59. The fact that a portion of Instruction 13 was legally correct does not address the problem that the portion defining implied malice was not. The State also argues Mr. Hall's challenge to Instruction 13 due to its inconsistency with the definition of implied malice in ICJI 703 is misplaced, where the version of the ICJI cited by Mr. Hall was not adopted until after Mr. Hall's trial. Resp. Br., pp.57-59. Nevertheless, Instruction 13 was legally incorrect, regardless of how the ICJI defined implied malice.

Instruction 13 told jurors that implied malice could be shown by an unintentional act accompanied by "wanton disregard for human life." This impermissibly lowered the State's burden by allowing jurors to define first degree murder based on an unintentional act or inadvertent conduct, coupled with less than a knowing and conscious disregard for human life. Such a definition is not far from criminal negligence,[12] while implied malice for first degree

[11]The comments to ICJI 702, have always cautioned trial courts against using it where the charged offense is felony murder because Idaho's felony murder statute, and case law, have long recognized malice aforethought "is satisfied by the fact that the killing was committed in the perpetration of the felony." *State v. Pratt*, 125 Idaho 594, 598 (1994) (citations omitted). Mr. Hall's jury was instructed that if it found Mr. Hall killed Ms. Henneman in the perpetration of a kidnapping or rape, "the element of malice aforethought required for the crime of murder would be satisfied by such finding." 31528 J.I.16.

[12]*See, e.g., Carrillo v. Boise Tire Co., Inc.*, 152 Idaho 741, 752 n.4 (2012) ("Rather, '[c]riminal negligence is gross negligence, such negligence as amounts to a wanton, flagrant, or reckless disregard of consequences or willful indifference to the safety or rights of others ….'" (quoting *State v. Taylor*, 59 Idaho 724, 735 (1939)).

murder requires more. Specifically, malice aforethought requires an intentional act, coupled with such a reckless disregard for the results of that act so as to manifest an extreme indifference to human life. *State v. Hokenson*, 96 Idaho 283, 287 (1974). Contrary to the State's claim, where the heart of Mr. Hall's defense at trial was that the death resulted from a momentary loss of control, not an intentional and deliberate act, the erroneous instruction was prejudicial.

B. The Instruction On The Elements Of First Degree Murder Omitted The Requirements Of Willfulness And Deliberateness

The elements instruction for first degree murder erroneously omitted the willful and deliberate requirements. Instead, jurors were told the State only had to prove the murder was committed with malice aforethought and premeditation, *or* during the perpetration of a felony. 31528 J.I.13A. The State points to Instruction 15 as a cure for this obvious defect. Instruction 15 told jurors that "[a]ll murder which is perpetrated by any kind of willful, deliberate and premeditated killing with malice aforethought is murder of the first degree." 31528 J.I.15. The State claims that because Instruction 15 defined the terms deliberate and premeditation, jurors would have known to read willful and deliberate into the elements instruction. Resp. Br., p.62. The State also argues that if jurors would have read Instruction 9 in conjunction with Instruction 15, they would have known the State had to prove the murder was committed willfully, unlawfully, deliberately, with premeditation and malice aforethought. Resp. Br., p.63. The State's argument presumes that because an instruction was given, it was applied. This cannot be true, especially where Mr. Hall's jury received an instruction for second degree murder but did not find him guilty of that offense. 31528, J.I.13B. The State's argument also ignores Instruction 1, which told jurors not to be influenced by the fact that Mr. Hall was charged with the crimes alleged in the indictment, emphasizing the indictment contained only allegations, not established facts or evidence of guilt. 31528 J.I.1. Without willful and deliberate in the elements instructions,

jurors would have believed the State only had to prove malice aforethought and premeditation, *or* during the perpetration of a felony.

The State also asserts Mr. Hall did not support his argument with authority, ignoring his reliance on *Draper*, 151 Idaho at 588-89, and *Neder v. United States*, 527 U.S. 1, 16-17 (1999). *See* App. Br., pp.42-43. Because jurors were never told the State had to prove, that Mr. Hall acted deliberately and willfully in order to find him guilty of first degree murder, the defective elements instruction relieved the State of its burden of proof. Mr. Hall maintains the omitted elements were essential to the jury's determination of whether his conduct qualified as first degree murder, or the lesser offense of second degree murder. Had Mr. Hall only been found guilty of second degree murder, he would not have been death-eligible. Because the omitted elements were disputed at trial, Mr. Hall was prejudiced by the defective instruction.

X. There Was Insufficient Evidence To Prove Forcible Rape As Charged In This Case

There is insufficient evidence to sustain Mr. Hall's rape conviction because he was charged under a subsection of Idaho's rape statute which required the State to prove Ms. Henneman resisted sexual penetration, but her "resistance [was] overcome by force or violence." I.C. § 18-6101(3) (2000); *see also State v. Jones*, 154 Idaho 412, 418-23 (2013) (holding the "resistance" requirement may be satisfied with evidence of verbal or physical resistance, but not "passive resistance"). Specifically, there is no evidence Ms. Henneman verbally or physically resisted, or that Mr. Hall overcame any such resistance. App. Br., pp.43-44.

The State argues there is sufficient evidence to sustain the conviction. Resp. Br., pp.63-66. It initially points to defense counsel's closing argument, wherein he conceded that Mr. Hall had non-consensual intercourse with Ms. Henneman. Resp. Br., pp.64-65 (citing 31528 Tr., p.4649); *see also* Resp. Br., pp.65-66. First, the arguments of counsel are not evidence. *State v.*

Bounds, 74 Idaho 136, 142 (1953). Second, even if the arguments of counsel were evidence, defense counsel's closing argument would not have satisfied the elements of the charged rape provision. Counsel argued that Ms. Henneman was unconscious and, for that reason, any sexual penetration was non-consensual; he did not concede that Ms. Henneman resisted (verbally or physically), or that any such resistance was overcome by force or violence. 31528 Tr., p.4648, L.18-p.4649, L.17. In fact, under defense counsel's "unconscious" theory, the decedent could not have resisted within the meaning of subsection 3.

Next, the State points out Ms. Henneman's sister testified that Ms. Henneman was cautious and careful, suggesting this commentary somehow proves Ms. Henneman was raped. *See* Resp. Br., pp.65-66. In fact, this evidence tends to show only that Ms. Henneman would not have had consensual intercourse with a stranger, not that she resisted.

The State also relies on Mr. Hall's statement during one of his interrogations—that he would never have sex with a dead woman—as proof that he raped Ms. Henneman. (Resp. Br., p.65.) Here too, the State's argument fails to account for the relevant provision of the rape statute. Even assuming Ms. Henneman was alive during intercourse, that fact does nothing to show that Ms. Henneman resisted, or that such resistance was overcome by force or violence.

Finally, relying on a California Supreme Court case, the State argues the "brutal" manner in which Ms. Henneman was strangled raises the inference that she did not consent to intercourse with Mr. Hall. *See* Resp. Br., pp.65-66 (citing *People v. Story*, 204 P.3d 306 (Cal. 2009)). Assuming the State is correct in claiming Ms. Henneman was strangled,[13] the State's argument has little because *Story* is not controlling law. Further, under the Idaho statute, the State needed

[13]The State has failed to prove Ms. Henneman was strangled. *See* 31528 Tr., p.4068, L.19-p.4072, L.20 (Dr. Groben offering an opinion that Ms. Henneman was strangled because she had a ligature on her neck, but conceding that she could have drowned or bled to death); *see also* 35055 R., p.1532.

to prove Ms. Henneman resisted and Mr. Hall used force or violence to overcome her resistance.

SENTENCING-PHASE ISSUES ON DIRECT APPEAL

In Mr. Hall's prefatory argument to his sentencing-phase issues on direct appeal, he asked this Court to reconsider its pronouncement of a new standard for reviewing capital sentencing errors on appeal in *State v. Dunlap*, 155 Idaho 345, 361-63 (2013), *cert. denied*, 135 S. Ct. 355 (2014), and a newer standard in *State v. Abdullah*, 158 Idaho 386, 449-50 (2015). *See* App. Br., pp.44-51. The State complains that Mr. Hall's argument is improper because it does not have its own section heading, and it argues he has failed to show a basis for this Court to overrule *Dunlap* and/or *Abdullah*.

The failure of undersigned counsel to designate a more specific section heading to Mr. Hall's argument in the opening brief is not fatal. The standard for reviewing all of Mr. Hall's sentencing-phase issues on direct appeal is subsidiary to most of those issues and, did not need to be separately-designated as an issue. *See* IAR 35(a)(4) ("The statement of issues presented will be deemed to include every subsidiary issue fairly comprised therein."). Further, Mr. Hall has properly supported his challenge to the application of a fundamental error review to unobjected-to capital sentencing errors with both argument and citation to authority. *Compare* IAR 35(a)(4) & (6) (requiring appellant to identify issues presented for review with support) *with* App. Br. pp.44-51 (identifying Mr. Hall's challenge to the fundamental error standard for reviewing capital sentencing errors as an issue on appeal with support).

Turning to the merits, this Court's pronouncements of new standards for reviewing capital sentencing errors on appeal—first in *Dunlap*, and again in *Abdullah*[14]—ignores the plain

[14]The State acknowledges this Court may have further limited its review of capital sentencing errors in *Abdullah* to only those errors of constitutional dimension. Resp. Br., p.68, n.19.

language of section 19-2827, violates separation of powers principles, violates federal constitutional requirements, and, if applied to Mr. Hall, will violate his Due Process rights.

Similar arguments were fully briefed in both *Dunlap* and *Abdullah*, and were rejected in both cases. Thus, the State claims this Court in *Dunlap* and *Abdullah* has addressed and rejected Mr. Hall's arguments,[15] and as a result, *stare decisis* requires this Court to follow *Dunlap* and *Abdullah*. However, this Court has *never* addressed the substance of the arguments challenging those standards. In neither *Dunlap* nor *Abdullah* did this Court ever address how its new standards of review comport with the plain language of section 19-2827; and how more than three decades of contrary precedent are impacted by the new standards; whether the new standards violate separation of powers principles; and, whether application of the new standards to capital defendants like Mr. Hall, whose sentencing trials preceded this Court's adoption of the new standards by nearly ten years, violate defendants' federal and state due process rights. Mr. Hall urges this Court to now do so and disavow those standards.

Mr. Hall maintains that by turning applicable standards of review into a moving target—deciding on a case-by-case basis—rather than simply applying section 19-2827 as written, and as informed by more than three decades of precedent, this Court has introduced uncertainty and inconsistency to the review of capital sentencing errors. In *Dunlap*, this Court set forth the

[15]The State places great weight on this Court's passing comment in *Dunlap*, 155 Idaho at 363, that an incentive for "sandbagging" may be greater in capital cases. Resp. Br., pp.67-68. This argument is lacking in merit and support. The "sandbagging" notion presupposes that defense counsel has greater knowledge of the law and procedure than both the judge and the prosecutor, and is remarkably gifted at identifying and disregarding obvious errors, at the expense of a potential benefit, in hopes of someday securing uncertain appellate relief. The United States Supreme Court has rejected such an argument in the strongest terms possible. *See Henderson v. United States*, 133 S.Ct. 1121, 1129 (2013) ("If there is a lawyer who would deliberately forgo objection now because he perceives some slightly expanded chance to argue for "plain error" later, we suspect that, like the unicorn, he finds his home in the imagination, not the courtroom.") An attorney willing to expose his client to such a risk at trial is ineffective *per se*.

applicable standard.[16] *See* 155 Idaho at 363. *Dunlap* says nothing about constitutional errors. In contrast, this Court subjected the unobjected-to capital sentencing errors in *Abdullah* to different standards, requiring that he prove constitutional error on some claims but not others, to qualify for review. *Compare Abdullah*, 158 Idaho at 479 ("The right of allocution derives from the common law and is preserved by statute only. Abdullah has failed to meet the first-prong of the *Perry* analysis based on a claim that his due process rights were violated by the district court's limitations on the scope of his allocution.") *with id*. at 470-71 (reviewing double-counting jury instruction challenge for error for the first time on appeal, but concluding even if the instruction was erroneous, the error was harmless). These cases leave Mr. Hall and other capital defendants guessing which standard they must meet to obtain this Court's review, and which burden they must satisfy to obtain relief.

For the reasons set forth in his opening brief, Mr. Hall urges this Court to reconsider both *Dunlap* and *Abdullah*, and he asks that the Court address the sentencing errors he raises on appeal as though they were objected to below, consistent with section 19-2827. In the event this Court opts to apply one of the new fundamental errors standards retroactively to Mr. Hall's sentencing claims, Mr. Hall asks it to apply the *Dunlap* standard rather than the *Abdullah* standard. The stakes simply cannot be any greater.

XII. The HAC Aggravator Is Unconstitutionally Vague

Eighth Amendment vagueness challenges to aggravating circumstances assess whether an aggravator "fails adequately to inform juries what they must find to impose the death penalty and

[16]The Court will "consider *the issues the defendant has identified*, including those *claimed errors raised for the first time on appeal*." *Dunlap*, 155 Idaho at 363 (emphasis added). If unpreserved error, the defendant has the burden of proving it occurred and that it was not harmless (i.e. there "is a reasonable possibility he would not have been sentenced to death.") *Id.* (citing *Perry*, 150 Idaho at 226). If errors were preserved, the harmless error test would apply. 155 Idaho at 363. Upon a showing of error, the State then has the burden to show the error did not contribute to the death sentence. *Id.* (citing *Perry*, 150 Idaho at 227).

as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia,* 408 U.S. 238 … (1972)." *Maynard v. Cartwright,* 486 U.S. 356, 361-62 (1988). In *Godfrey v. Georgia,* 446 U.S. 420, 428-29 (1980), the United States Supreme Court condoned the use of limiting constructions for otherwise vague aggravating circumstances, so long as those constructions provide juries with detailed guidance, *and* where the constructions themselves are not so vague and broad that they could apply to every murder.

Here, Mr. Hall's jury was instructed that the State had to prove "the murder was especially heinous, atrocious or cruel, manifesting exceptional depravity." 31528 J.I.43. Although the terms "heinous," "atrocious," and "cruel" were defined, 31528 J.I.44, the definitions were just as vague as the terms themselves.[17] Moreover, while jurors were told that whether a murder is especially heinous, especially atrocious, or especially cruel refers to the "actual commission of the first-degree murder," including the "defendant's state of mind at the time of the offense, as reflected by his words and acts," 31528 J.I.44, jurors were never told *how* to decide whether the murder itself "was accompanied by such additional acts as to set the crime apart from *the norm of first-degree murders*." 31528 J.I.44 (emphasis added). Similarly, although jurors were told "exceptional depravity exists only where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence," they were also instructed that "[i]t might be thought that every murder involves depravity."[18] 31528 J.I.44. The definition of exceptional depravity provided was just as vague as the term "exceptional depravity" itself.[19]

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[17]The United States Supreme Court has deemed these exact definitions of "especially heinous, atrocious or cruel" to be unconstitutionally vague in a jury sentencing regime in *Shell v. Mississippi,* 498 U.S.1, 1 (1990) (per curiam); *see also id.* at 2 (Marshall, J., concurring).

[18]These instructions included most, but not all, of the HAC limiting constructions adopted by this Court in *State v. Osborn,* 102 Idaho 405, 417-18 (1981), under judge sentencing.

[19]In *Moore v. Clark,* 904 F.2d 1226, 1227-29 (8th Cir. 1990), the Eighth Circuit Court of Appeals deemed the aggravating circumstance that the murder "manifested exceptional depravity

These limiting constructions for HAC, all adopted during Idaho's judge sentencing regime, are insufficient to satisfy the 8th Amendment requirements of narrowing the sentencer's discretion in a jury sentencing era. The State downplays the importance of jury sentencing to the constitutionality of HAC, relying on this Court's decisions upholding the Utter Disregard aggravator against a vagueness challenge under jury sentencing. Resp. Br., p.71. But these decisions have no bearing on the constitutionality of HAC; the United States Supreme Court has *always* relied on the distinction between jury and judge sentencing to assess the constitutionality of HAC.[20]

By contrast, in *Walton v. Arizona,* 497 U.S. 639 (1990), *overruled on other grounds by Ring v. Arizona,* 536 U.S. 584 (2002), the Court upheld Arizona's aggravating circumstance that the murder was committed in an especially "heinous, cruel or depraved manner" against a vagueness challenge for a judge sentencing. In reaching its conclusion, the *Walton* Court relied upon the difference between judge and jury sentencing regimes, and the degree to which limiting constructions are sufficient to narrow the sentencer's discretion:

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by ordinary standards of morality and intelligence[,]" unconstitutionally vague in a *judge* sentencing regime, even with a limiting construction of "so coldly calculated as to indicate a state of mind senselessly bereft of regard for human life," unresisting victims, or exceptional. *Id.* The aggravator deemed unconstitutional in *Moore* is identical to the limiting construction this Court placed on "manifested exceptional depravity." Notably, the Eighth Circuit later upheld a *different* limiting construction for exceptional depravity. *Moore v. Kinney,* 320 F.3d 767, 772-73 (8th Cir. 2003).

[20]In *Godfrey,* 446 U.S. at 428, the Court held Georgia's aggravating circumstance that the murder was "outrageously or wantonly vile, horrible and inhumane," was unconstitutionally vague for a jury. The Court found there was nothing "that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly character almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" *Id.* at 428-29. Similarly, in *Maynard v. Cartwright,* the Supreme Court held Oklahoma's aggravating circumstance that "the murder was 'especially heinous, atrocious, or cruel,'" was unconstitutionally vague for a jury. 486 U.S. at 364 (quoting OKLA. STAT., tit. 21, §§ 701.12(2) and (4) (1981)). In reaching this conclusion, the Court observed these terms did nothing to guide the jury's discretion, and that an ordinary person could honestly believe every unjustified, intentional killing was especially heinous. *Id.* at 363-64.

> When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. That is the import of our holdings in *Maynard* and *Godfrey*. But the logic of those cases has no place in the context of sentencing by a trial judge. Trial judges are presumed to know the law and to apply it in making their decisions.

Id. at 653–54. Even where capital sentencing decisions were split between a judge and jury, with the judge having ultimate sentencing authority, an "especially wicked, evil, atrocious or cruel" aggravator was deemed unconstitutionally vague. *Espinosa v. Florida*, 505 U.S. 1079, 1080-81 (1992).

This distinction between judge and jury sentencing was essential to this Court's decisions upholding Idaho's HAC aggravator against vagueness challenges similar to those made to Oklahoma's HAC aggravator in *Maynard*. In *State v. Lankford*, this Court held that the distinction between Oklahoma and Idaho is that "Oklahoma has jury sentencing while Idaho adheres to judicial sentencing in capital murder cases. These aggravating circumstances are terms of art that are commonly understood among the members of the judiciary." 116 Idaho 860, 877 (1989); *see also State v. Leavitt*, 121 Idaho 4, 6 (1991) (relying on Idaho's judge sentencing regime to uphold HAC against a vagueness challenge); *State v. Pizzuto*, 119 Idaho 742, 771-73 (1991) (same), *overruled on other grounds by State v. Card*, 121 Idaho 425 (1991). The introduction of jury sentencing in Idaho undermines the logic of *Lankford* and all its progeny.

Jurors do not have the ability to compare murders to determine whether the one at hand is *comparatively* heinous, cruel, atrocious or cruel, and exceptionally depraved, in a way that would set it "apart from the norm of first-degree murder." 31528 J.I.44. Moreover, the United States Supreme Court did not approve the limiting construction "that the murder must be accompanied by acts setting it apart from the norm of murders," Resp. Br., p.71, to save Florida's similar HAC aggravator from a vagueness challenge. *See Proffitt v. Florida*, 428 U.S. 242, 255-56 (1976)

(approving Florida's adoption of "conscienceless or pitiless crime which is unnecessarily tortuous to the victim" instruction to narrow HAC where judge was final sentencing authority). In fact, the United States Supreme Court does not appear to have ever addressed a limiting construction that requires *jurors***,** not judges, to assess whether a specific murder is accompanied by acts that set it apart from the norm of murders. This limiting construction, while useful in judge sentencing, is useless before a jury.

Moreover, even assuming this Court's HAC limiting constructions are constitutionally sufficient, the district court omitted a significant portion of it when instructing Mr. Hall's jury. This Court has held that to be heinous, atrocious or cruel, the actual commission of the murder must be accompanied by additional acts that set it apart from the "norm" of other first-degree murders, reflecting "the conscienceless or pitiless crime which is unnecessarily tortuous to the victim." *Osborn,* 102 Idaho at 212-13 (quoting with approval *State v. Dixon,* 283 So.2d 1, 9 (Fla. 1973), *cert. den*., 416 U.S. 943 (1974)); s*ee also State v. Charboneau,* 116 Idaho 129, 251 (1989), *reversed on other grounds by State v. Card,* 121 Idaho 425 (1991). This limiting construction was the same one relied upon by the Supreme Court to save Florida's HAC aggravator from a vagueness challenge, *Proffitt,* 428 U.S. at 255, and relied upon by the Ninth Circuit to save Idaho's HAC aggravator from a similar challenge. *Leavitt v. Arave,* 383 F.3d 809, 836-37 (9th Cir. 2004). Here, the district court failed to provide Mr. Hall's jury with the "conscienceless or pitiless crime which is unnecessarily tortuous to the victim" limiting construction for HAC. 31528 J.I.44. Because this language is essential to provide adequate guidance to the jury, the jury's HAC finding in Mr. Hall's case is unsupportable and cannot be relied upon to support his death sentence.

XV. The Felony-Murder Aggravator Fails To Serve The Constitutionally-Required Narrowing Function Where The Murder Conviction Is Also Premised Upon Felony-Murder

The district court erred by submitting the Felony-Murder aggravator to the jury to decide Mr. Hall's death eligibility where felony-murder was also the basis for Mr. Hall's first degree murder conviction. Absent a stipulation from the State that it was relying solely on Mr. Hall's first degree premediated murder conviction, rather than his first degree felony-murder conviction for the penalty phase trial, the jury could not impose death upon Mr. Hall based on the Felony-Murder aggravator without violating Mr. Hall's 8th and 14th Amendment rights.

The State argues that duplication of the elements of the underlying offense and the statutory aggravator in a capital case does not violate the 8th Amendment. (Resp. Br., pp.73-75.) For support, it cites *State v. Wood*, 132 Idaho 88, 102-03 (1998), and *Tuilaepa v. California*, 512 U.S. 967, 972 (1994). Rather than explaining why *Wood* applies, the State focuses instead on concurring opinions in *Tuilaepa* and a variety of federal court of appeals' cases holding that felony-murder is a valid aggravator.[21] Resp. Br., pp.74-75. The State misunderstands Mr. Hall's argument. He has never claimed felony-murder is an invalid aggravator; he has simply observed that in Idaho, felony-murder cannot be the basis for the underlying first degree murder conviction *and simultaneously* serve the narrowing function required by aggravating circumstances. The State also makes arguments that confuse the difference between the eligibility decision and the selection decision in capital cases. Resp. Br., pp.73-75.

The State argues that because the Felony-Murder aggravator requires the jury to find the defendant "killed, intended a killing, or acted with reckless indifference to human life,"[22] while

[21]The United States Supreme Court has made clear that the 8th Amendment does not bar death eligibility in felony-murder cases for major participants in the felony, even if those participants do not themselves kill or intend to kill, so long as they act with reckless indifference to human life. *Tison v. Arizona*, 481 U.S. 137, 156-58 (1987). *Tison*'s analysis applies to individuals who act with others to commit felony offenses during which a murder is committed, but not to individuals who act alone. *See also Enmund v. Florida*, 458 U.S. 782, 797 (1982).
[22] I.C. § 19-2515 (9)(h).

the felony-murder charging statute does not,[23] that language fulfills the constitutional narrowing requirement. Though the State's argument may have merit in cases where a felony-murder charge involves at least two participants and there are questions about degrees of culpability between them, it has no application in cases involving a single defendant. Requiring a jury to find that the *only* person charged with and alleged to have participated in a felony-murder actually killed, does not narrow the class of individuals eligible for the death penalty in Idaho.

Moreover, the State's citation to *State v. Wood,* 132 Idaho 88 (1988), is misplaced. In *Wood,* the defendant pled guilty to, *inter alia,* first degree murder not felony murder. *Id.* at 93, 104-05. The State then alleged the Felony-Murder aggravator at the defendant's sentencing, relying on some of the same facts that formed the basis for his first degree murder conviction. *Id.* at 102. The district court found the existence of the Felony-Murder aggravator and sentenced the defendant to death. *Id.* at 103. The defendant challenged the Felony-Murder aggravator on appeal, arguing "the elements of the (g)(7) aggravator [Felony-Murder] found by the district court are the same as elements found under § 18-4003(d) defining first degree murder." *Id.* In rejecting the defendant's argument, this Court held that although the Felony-Murder "aggravator in I.C. § 19-2515 duplicates *an element* of first degree murder in I.C. § 18-4003 [it] does not violate any constitutional standard." *Id.* (emphasis added).

Where the defendant in *Wood* pled guilty to first degree premeditated, deliberate, and willful murder, not felony-murder,[24] the felony murder aggravator may have duplicated some

[23]The Idaho Code defines felony-murder as "[a]ny murder committed in the perpetration of, or attempt to perpetrate, … arson, rape, robbery, burglary, kidnapping or mayhem …" I.C. § 18-4003(d).

[24]*State v. Wood,* Appellant's Br., 1996 WL 33657734,* 20 (July 24, 1996) ("James Wood was not charged with violating 18-4003(d). His murder was alleged to be first degree murder because there was premeditation (18-4003(a)).")*;* *State v. Wood,* Respondent's Br., 1996 WL 33657733,

elements of premeditated, deliberate and willful murder, but the elements were not identical. For example, premeditated murder did not require that the murder be committed in the perpetration of a felony, whereas the Felony-Murder aggravator did.[25] *Wood* simply does not apply where the State alleges the Felony-Murder aggravator and where the underlying crime is first degree felony-murder.

Mr. Hall maintains that because he was found guilty of first degree felony-murder, the State was precluded from alleging the Felony-Murder aggravator because the aggravator failed to serve the narrowing function required by the 8th and 14th Amendments. The aggravator never should have been before his sentencing jury.[26] Consequently, Mr. Hall was prejudiced.

XVI. The Grand Jury Was Required To Make An Individualized Finding As To The Statutory Aggravating Circumstances Alleged

Mr. Hall asked this Court to reconsider its decision in *State v. Abdullah*, where it held that aggravating circumstances are not elements of a crime that must be alleged in the indictment or information, and which need not be proven by probable cause "to properly notify the defendant of its intent to seek the death penalty." 158 Idaho at 459-60. Mr. Hall already explained why *Abdullah* was wrongly decided. *See* App. Br., pp.62-65. However, the State's

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*15 (August 22, 1996) ("Wood claims that he received insufficient notice . . . because Wood was charged with premeditated murder and not murder committed in the course of a felony.").

[25]Notably, at the time of the defendant's crime and sentencing in *Wood*, the felony-murder aggravator provided: "The murder was one defined as murder in the first degree by section 18-4003, Idaho Code, subsections (b), (c), (d), (e) or (f), and *it was accompanied with the specific intent to cause the death of a human being*." I.C. § 19-2515(g)(7) (1984) (emphasis added). The felony-murder aggravator was amended in 1995 to provide that "[t]he murder was committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, kidnapping or mayhem and the defendant killed, intended a killing, or acted with reckless indifference to human life." I.C. § 19-2515(h)(7).

[26]*Brown v. Sanders*, 546 U.S. 212, 220 (2006) ("An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." (footnote omitted)).

claim that every other state, except one, has found that aggravating circumstances in capital cases need not be alleged in the indictment, is simply wrong. In states that retain capital punishment, facts that trigger death-eligibility can be contained in the definition of the capital crime itself, separately enumerated as aggravating circumstances at the penalty phase, or both. *Tuilaepa*, 512 U.S. at 971-72; *Lowenfield*, 484 U.S. at 244-46.

Contrary to the State's assertion, twelve state courts that have considered the issue have concluded aggravating circumstances which trigger a defendant's death-eligibility are not elements of the offense and need not be charged by indictment or information.[27] In contrast, another twelve jurisdictions, aggravating circumstances *are* alleged in the indictment or information by default, because they are contained within the definition of a capital crime.[28] As a result, courts in these jurisdictions require, if only by default, aggravating circumstances be contained in the charging document and subject to a pretrial probable cause finding.[29] Whether death-eligibility is defined by the charged offense, aggravating circumstances at the penalty

[27]Only capital cases addressing the aggravator by indictment or information issue are included, and only those jurisdictions that retain the death penalty are considered. *See McKaney v. Foreman ex rel. Cnty of Maricopa*, 100 P.3d 18, 20-23 (Ariz. 2004); *People v. Famalaro*, 253 P.3d 1185, 1211-12 (Cal. 2011); *Jones v. State*, 653 S.E.2d 456, 461-62 (Ga. 2007); *Soto v. Commonwealth*, 139 S.W.3d 827, 841-43 (Ky. 2004); *State v. Dixon*, 974 So.2d 793, 799-800 (La. App. 2d Cir. 2008); *State v. Johnson*, 207 S.W.3d 24, 48 (Mo. 2006); *Floyd v. State*, 42 P.3d 249, 256 (Nev. 2002), *overruled on other grounds by Grey v. State*, 178 P.3d 154 (Nev. 2008); *State v. Hunt*, 582 S.E.2d 593, 602-06 (N.C. 2003); *Primeaux v. State*, 88 P.3d 893, 899-900 (Okla. Crim. App. 2004); *State v. Wood*, 607 S.E.2d 57, 61 (S.C. 2004); *Moeller v. Weber*, 689 N.W.2d 1, 18-22 (S.D. 2004); *State v. Reid*, 164 S.W.3d 286, 311-12 (Tenn. 2005).

[28]*See, e.g.*, ALA. CODE ANN. § 13A-5-40; ARK. CODE ANN. §§ 5-10-101, 5-10-102; FLA. STAT. ANN. § 782.04(1)(a); KAN. STAT. ANN. §§ 21-5401, 21-6620; MISS. CODE ANN. §§ 97-3-19(2), 97-3-21; N.H. REV. STAT. ANN. §§ 630:1, 630:1-a; OHIO REV. CODE §§ 2903.01, 2903.02, 2929.02; OR. REV. CODE §§ 163.095, 163.105, 163.115; TEX. PENAL CODE §§ 12.31, 19.02(b)(1), 19.03; UTAH CODE ANN. §§ 76-5-202, 76-5-203; VA. CODE ANN. §§ 18.2-31, 18.2-32; WASH. REV. CODE ANN. §§ 9A.32.030, 9A.32.040, 10.95.030.

[29]Whether the penalty phase aggravating circumstances in these jurisdictions are also elements of capital or aggravated murder which must also be alleged in the indictment or information is an issue not addressed here.

phase, or both, some states—by constitutions, rules or statutes—require aggravating circumstances to be alleged in the charging document and subject to a probable cause determination. *See* IND. CODE ANN. § 35-50-2-9(9)(a)(1); OHIO REV. CODE §§ 2929.02, 2929.03, 2929.04(A), 2941.14; *cf.* Ariz. R. Crim. Proc. 13(a).

Notably, all of the state cases addressing this issue were decided before *Alleyne v. United States,* __ U.S. __, 133 S. Ct. 2151 (2013), where the United States Supreme Court overruled *Harris v. United States,* 536 U.S. 545 (2002), and held that *any fact,* other than a prior conviction, that increases either the *floor* or *ceiling* of punishment, is an element of the offense that must be submitted to the jury and proven beyond a reasonable doubt. *Alleyne*, 133 S. Ct. at 2155. The Supreme Court has also held that aggravating circumstances necessary to render a defendant eligible for the death penalty "operate as 'the functional equivalent of an element of a greater offense'" for purposes of the 6th Amendment. *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (quoting *Apprendi*, 530 U.S. at 494, n.19). Finally, the Court has required the government to observe fundamental constitutional guarantees in capital sentencing proceedings, *Estelle v. Smith*, 451 U.S. 454, 463 (1981), including due process, protections against double jeopardy, the privilege against self-incrimination, the right to an impartial jury, and the right to the effective assistance of counsel.[30]

Because aggravating circumstances are elements of death-eligible murder in Idaho, or their functional equivalent, Mr. Hall should have been extended the same constitutional protections that apply to any other element of a charged offense. Mr. Hall's right to notice and

[30]*See Gardner v. Florida*, 430 U.S. 349, 358 (1977) (due process clause); *Bullington v. Missouri*, 451 U.S.430, 446 (1981) (double jeopardy); *Estelle*, 451 U.S. at 462-63 (privilege against self-incrimination); *Morgan v. Illinois*, 504 U.S. 719, 728-29 (1992) (constitutional right to an impartial jury); *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984) (constitutional right to effective assistance of counsel).

due process through an individualized finding of the statutory aggravators alleged against him should not turn on whether the legislature has arbitrarily placed the death-eligibility question at the penalty phase, rather than in the guilt phase. For these reasons, this Court's decision in *Abdullah* is contrary to plain and obvious principles of federal constitutional law, is manifestly wrong, and overruling it is necessary to remedy continued injustice.

XVII. The Court Erred In Admitting Mr. Hall's "Mugshot" (Exhibit 149)

The district court erred in admitting Mr. Hall's sinister-looking mugshot during the sentencing phase. *See* App. Br., pp.65-68. It was wholly irrelevant, as his appearance at the time of his arrest had no bearing on whether he should live or die, and, because it was such an unflattering photo, the risk of a prejudicial effect substantially outweighed its probative value. The State argues the Rules of Evidence have no application in a capital sentencing proceeding, and so Mr. Hall's appellate argument—based on Rules 401, 402, and 403—fails on that basis. Resp. Br., pp.77-78. This issue was addressed in Mr. Hall's opening brief, wherein he provided a detailed analysis of why the Rules of Evidence should be held to apply in capital sentencing proceedings. *See* App. Br., pp.81-82. Therefore, no further reply is necessary.

Even if the Rules of Evidence do not apply, the State concedes irrelevant evidence is nonetheless inadmissible under I.C. § 19-2515(6). *See* Resp. Br., pp.77-78. The State offers no cogent argument as to how the mugshot is relevant. It relies on a Connecticut case to argue that the photo would be relevant to the reliability of a witness identification where considerable time has elapsed. Resp. Br., p.78 (quoting *State v. Woods*, 370 A.2d 1080 (Conn. 1976)). It goes on to claim that offering the mugshot was necessary "to establish [Michelle] Deen's credibility." *Id.* This argument is misleading. *Woods* was a typical eyewitness identification case, *i.e.*, a case where the assailants were unknown to the victims and, thus, the victims' identification of the assailants was an issue in the case. *See Woods*, 370 A.2d at 1081-82. In contrast, Mr. Hall's

identification was not an issue because Mr. Hall was well-known to Ms. Deen through their previous relationship, *see* 31528 Tr., p.4816, L.6-p.4817, L.7. Thus, the mugshot did not corroborate any testimony of Ms. Deen, or lend to her credibility in any way.

The State also claims that the question of undue prejudice was not preserved below, and so his argument on appeal must be reviewed for fundamental error. Resp. Br., p.79. This is not true because counsel objected on the bases of relevance and prejudice. With regard to prejudice, counsel first argued that Exhibit 149 "portrays [Mr. Hall] in a jail outfit and it's a demeaning type of picture." 31528 Tr., p.4825, Ls.22-25. Moments later, he argued, "I don't think there's any reason for it other than to show him in that kind of a pose …." *Id.*, p.4826, Ls.3-6. Next, he argued, "the only purpose of [Exhibit 149] is to show him in this demeaning position." *Id.*, p.4826, L.24-p.4827, L.1. Finally, he argued, "there's no reason for this photograph other than for the purpose as I stated." *Id.*, p.4827, Ls.18-19.[31] In substance, this was an argument based on the "unfair prejudice" standard of Rule 403. *See State v. Sheahan*, 139 Idaho 267, 277 (2003) ("For an objection to be preserved for appellate review, either the specific ground for the objection must be clearly stated *or the basis of the objection must be apparent from the context*." (citation omitted) (emphasis added)).

The State also addresses the substance of Mr. Hall's "unfair prejudice" argument. *See* Resp. Br., p.79. It claims the court made *factual findings* that: (a) the mugshot does not actually look like a mugshot, and (b) it is in no way demeaning. Resp. Br., pp.77-78. It points out Mr. Hall has not challenged these supposed factual findings as clear error and, therefore, it

[31]Although counsel did not use the phrase "unfair prejudice," the clear thrust of his argument was that the only purpose served by Exhibit 149 was to portray Mr. Hall negatively and prejudice the jury against him.

suggests this Court should defer to the court's "findings." Resp. Br., pp.77-78.[32] However, the court's opinions as to how the jury would perceive the mugshot are not factual findings entitled to deference. First, they are characterizations of the evidence undertaken as part of the court's balancing of probative value versus the risk of unfair prejudice—a legal determination which has been properly challenged as an abuse of discretion. Second, the court's characterizations of the mugshot were based exclusively on the same evidence before this Court—Exhibit 149. The court had no unique ability to evaluate the mugshot, and no special insight into how it would be perceived by the jury. Thus, this Court can ascertain that it was a sinister-looking mugshot, with the natural consequence of creating bias against Mr. Hall.

The State also argues the only potential prejudice created by the mugshot was to inform the jury of Mr. Hall's incarceration. Resp. Br., p.79. It then argues that this was not a concern at the sentencing phase, as the jury had already heard about Mr. Hall's prior offenses, and had already found him guilty. *Id*. This argument is misplaced. First, as explained elsewhere, the sentencing jury should not have heard about Mr. Hall's prior convictions because they were not relevant to any of the statutory aggravators and were not admissible. *See* Section XIX(A) & (B), *infra*; App. Br., pp.79-81. Second, the mugshot did more than establish his prior incarceration; it was a visual depiction of him as a sinister-looking criminal. *See* Ex.149. As the Supreme Court has recognized, when it comes to capital sentencing proceedings, depictions of the defendant as being a dangerous criminal are problematic even after he has been found guilty.[33] Thus, the

[32]Although the State does not explicitly tie its argument to the question of unfair prejudice, the logical relevance of those "findings" clearly goes to the court's balancing of its probative value against the risk of unfair prejudice.

[33]A visual display which depicts the capital defendant as dangerous "inevitably undermines the jury's ability to weigh accurately all relevant considerations—considerations that are often unquantifiable and elusive—when it determines whether a defendant deserves death." *Deck v. Missouri*, 544 U.S. 622, 633 (2005).

mugshot itself was still highly prejudicial, as it "placed a thumb on death's side of the scale" by depicting him as dangerous. *Id*. (quoting *Sochor v. Florida*, 504 U.S. 527, 532 (1992)).

The State is incorrect that even if the court erred it was harmless. Resp. Br., p.79. First, the State's argument rings hollow given that the prosecutor used it *six* times in its closing argument PowerPoint. *See* Ex.45 (Sent. Phase), Slides 45-48, 56, 60. Second, the State's argument rests, in part, on the incorrect assumption that Mr. Hall's prior criminal history was properly considered by the jury. In fact, it was inadmissible. *See* Section XIX, *infra*; App. Br., pp.73-87. Third, the State's argument utterly fails to account for any of the very compelling mitigation heard by the jury.[34]

Finally, to suggest the death penalty was *inevitable* in this case based on nothing more than the nature of the crime and Mr. Hall's criminal history is to fundamentally misunderstand how the death penalty is to be applied. The death penalty is not a one-size-fits-all punishment; it may only be imposed in light of the unique characteristics and circumstances of each capital defendant. *See, e.g., Woodson*, 428 U.S. at 302-04 (rejecting a mandatory death penalty and requiring the sentencer to consider the defendant as a "uniquely individual human being[ ]"). Indeed, other courts have rejected "brutality trumps" arguments such as that which the State makes in this case:

> [O]ur decades of experience with scores of § 2254 habeas cases from the death row of Texas teach an obvious lesson that is frequently overlooked: *Almost without exception, the cases we see in which conviction of a capital crime has produced a death sentence arise from extremely egregious, heinous, and shocking facts.* But, if that were all that is required to offset prejudicial legal error and convert it to harmless error, habeas relief based on evidentiary error in the punishment phase would virtually never be available, so testing for it would amount to a hollow judicial act.

[34]*See, e.g.*, 31528 Tr., p.4971, L.1-p.5028, L.25, p.5049, L.1-p.5075, L.23, p.5076, L.1-p.5099, L.9, p.5099, L.23-p.5140, L.13, p.5140, L.18-p.5163, L.3, p.5191, L.16-p.5289, L.4, p.5290, L.12-p.5390, L.23.

Gardner v. Johnson, 247 F.3d 551, 563 (5th Cir. 2001) (footnote omitted) (emphasis added); *see also Walbey v. Quarterman*, 309 Fed. Appx. 795, 804 (5th Cir. 2009) (unpublished) (per curiam) (rejecting brutality trumps argument in context of 6th Amendment ineffective assistance of counsel claim).

XVIII. Mr. Hall Was Deprived Of Effective Counsel Insofar As His Attorneys Labored Under A Conflict Of Interest Adversely Affecting Their Performance

Mr. Hall's counsel had a conflict of interest because his lead counsel, Amil Myshin, was concurrently representing April Sebastian, one of the State's aggravation witnesses. App. Br., pp.68-73. Specifically, the court erred in failing to remedy the conflict because, not only was there an actual conflict, but that conflict had an adverse effect on counsel's representation. App. Br., pp.70-72. Alternatively, the court failed in its duty to adequately inquire into the conflict. App. Br., pp.72-73.

A. The Court Erred In Failing To Remedy The April Sebastian Conflict

Because his counsel failed to seek relief based on his own conflict of interest, in order to prevail on appeal, Mr. Hall has to show not only an "actual conflict of interest," but also that the conflict "adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). As to whether there was an actual conflict of interest, as opposed to a possible conflict, Mr. Hall asserts that in a criminal case, where the defense attorney not only represents the defendant but also concurrently represents a government witness against the defendant, and possesses confidential, privileged information which could potentially be used to impeach that witness, he has an actual conflict of interest.

Although ethical standards are not strictly controlling of 6th Amendment standards, *Nix v. Whiteside*, 475 U.S. 157, 165-66 (1986), the Idaho Rules of Professional Conduct are nonetheless highly instructive in determining whether a conflict of interest impaired a

defendant's constitutional right to conflict-free counsel. *See State v. Severson*, 147 Idaho 694, 705 (2009); *State v. Wood*, 132 Idaho 88, 98-99 (1998). Under the Rules, it is clear a conflict existed in this case. A conflict exists if "the representation of one client will be directly adverse to another client." IRPC 1.7(a)(1). "[A] directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit." IRPC 1.7 cmt.6. Here, Ms. Sebastian's testimony (alleging Mr. Hall had previously exhibited anger, had exhibited violence with another ex-girlfriend, may have forced himself on women sexually, and had beaten and robbed strangers) was undoubtedly damaging to Mr. Hall in that it was used to implore the jury to sentence him to death. Competent counsel would have had every incentive to undermine her testimony and her credibility generally. Mr. Myshin needed to be able to undermine the credibility of one client (Ms. Sebastian) in order to defend another (Mr. Hall). This was a conflict of interest.

Further, there is a conflict if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client …." IRPC 1.7(a)(2). This includes situations where a lawyer is called upon to "use information relating to the representation of [another] client to the disadvantage of th[at] client," IRPC 1.8(b). In this case, when asked by the court whether he had a conflict of interest, Mr. Myshin responded, "I mean I know things about April." 31528 Tr., p.4870, Ls.2-9. Later, when asked the same question by the court, Mr. Myshin said, "No," but also offered the same enigmatic qualification that, "I think it's more the nature of—I mean I'm very familiar with April's background." *Id.*, p.4872, Ls.9-14. Mr. Myshin's responses raise the inference that as her attorney he was aware of confidential, privileged information which could potentially be used to

impeach her testimony. Given that fact, he could not thoroughly cross-examine her (to benefit Mr. Hall) without revealing privileged matters (to her detriment). This was a conflict under Rules 1.7(a)(2) and 1.8(b).

In response, the State contends there has been no showing of an *actual* conflict, only a *possible* conflict. Resp. Br., pp.81-83, 85-86. The State fails to recognize that representing one client who is adverse to another client is itself an actual conflict. *See* IRPC 1.7(a)(1) & cmt.6. Additionally, the State suggests the opinion of Mr. Myshin is *dispositive*. While a court can rely upon an attorney's disclosures in determining whether there is a potential conflict to be investigated, *Cuyler*, 446 U.S. at 346-47, ultimately the determination of a conflict is a legal determination to be made by the court. *Id*. at 342; *see, e.g., Severson*, 147 Idaho at 704.[35] Thus, deferring to Mr. Myshin was an error because there was evidence establishing an actual conflict. *See* 31528 Tr., p.4875, Ls.3-12.

Given a conflict exists, the next question is whether it adversely affected counsel's performance. The State argues that Mr. Hall's arguments concerning any adverse effect is speculative. *See* Resp. Br., pp.83-84. The State first questions whether Mr. Myshin was even aware of information which would have impeached Ms. Sebastian, pointing out that Mr. Myshin did not disclose any such information below. *Id*., pp.83-84. However, if Mr. Myshin possessed confidential, privileged information which would have impeached Ms. Sebastian, he was not able to use it in Mr. Hall's case. *See* IRPC 1.6 (duty of confidentiality); IRE 502 (attorney-client privilege); IRCP 26(b)(1)(A) & (b)(3) (work-product doctrine). Consequently, it would not appear in the record. That reality is consistent with Mr. Hall's "conflict of interest" argument—

[35]If counsel's loyalties truly lie elsewhere, he is in no position to take proper steps to safeguard his client's interests. *Cf. Trevino v. Thaler*, __ U.S. __, 133 S. Ct. 1911, 1921 (2013) (noting the need for a new lawyer in asserting claims of ineffective assistance of counsel—presumably because a lawyer cannot be counted on to recognize or admit his own failings).

no one can know specifically what Mr. Myshin knew about Ms. Sebastian because he was not at liberty to disclose that information.

Nevertheless, the limited information available reveals the conflict did have an adverse effect on Mr. Hall's case. First, Mr. Myshin's cryptic answers to the court's questions on whether he believed he had a conflict strongly suggested he possessed confidential, privileged information which could have been used to impeach Ms. Sebastian. This is consistent given that he had represented her at sentencing and anticipated representing her at her review hearing, *see* 31528 Tr., p.4868, L.24–p.4870, L.1, and, therefore, should have been familiar with her criminal record and social history. Second, Mr. Myshin treated Ms. Sebastian with exceptional kindness in front of the jury, clearly conveying his affinity for her. *See, e.g.*, 31528 Tr., p.4895, L.18-p.4896, L.8. Third, although Mr. Myshin questioned Ms. Sebastian about her pattern of burglaries/thefts, *compare* 31528 Tr., p.4876, L.12-p.4877, L.17 *with id*., p.4894, L.24-p.4895, L.17, he followed that questioning up with "softball" leading questions which allowed her to testify that she is no longer a dishonest criminal, *see id*., p.4895, L.6-p.4896, L.8. He failed to follow up on her rider performance, her hope to be placed on probation, and her incentive to testify favorably for the State in an effort to increase her chances of a favorable recommendation. *See generally id*., p.4888, L.4-p.4896, L.9.

The State also argues that Mr. Hall's direct appeal claim fails because the subsequent post-conviction investigation revealed no evidence that Mr. Myshin had additional impeachment information on Ms. Sebastian. However, the evidence discovered in conjunction with Mr. Hall's post-conviction investigation has no bearing on his direct appeal claim concerning the conflict

because that evidence was not before the court at the time.[36]

B. The Court Erred In Failing To Inquire Further Into The Conflict

The State argues because Mr. Myshin said there was no actual conflict of interest the court had no duty to inquire further. Resp. Br., pp.84-86. The State focuses on Mr. Myshin's cryptic responses to the court's inquiry, arguing that because these responses were ambiguous there was no conflict. *Id*.

First, the State's argument ignores the fact that Mr. Myshin's representation of Ms. Sebastian was directly adverse to his representation of Mr. Hall. *See* IRPC 1.7(a)(1) & cmt.6. The question of whether Mr. Myshin had confidential, privileged information with which to impeach Ms. Sebastian goes only to the second basis to find a conflict, *see* IRPC 1.7(a)(2), and the question of whether any conflict adversely affected the representation.

Second, the State's reliance on a selected portion of *Hall v. State*, 155 Idaho 610 (2013), is misplaced. In *Hall*, this Court acknowledged that, "In determining whether a conflict exists, a trial court may rely on the representations made by counsel, or may inquire further into the facts." *Id*. at 618-19. However, this does not mean that where there is evidence of a conflict, the court may defer to counsel's determination of whether a conflict exists. The Court spoke of "the representations made by counsel"—presumably referring to representations of fact; it said nothing of deferring to counsel's legal conclusions. Indeed, the *Hall* Court went on to distinguish the vague possibility of a conflict (as in *that* case) from the situation where there is evidence to substantiate a possible conflict (as in *this* case), and suggested that while the duty of inquiry does not exist in the former instance, it does in the latter. *See id*. at 619. Here, because there were facts in the record from which the court knew of a conflict, it had had a duty to inquire. *See Mickens v.*

[36]This evidence is not relevant to the direct appeal claim, it is relevant to his post-conviction claim on this same topic, so Mr. Hall responds to the State's arguments concerning the post-conviction evidence in section XLVI, *infra*.

Taylor, 535 U.S. 162, 168-69 (2002); *Hall*, 155 Idaho at 619.

Third, in this case there were objective facts putting the court on notice of a conflict. Mr. Myshin's concurrent representation of Ms. Sebastian was directly adverse to his representation of Mr. Hall. Mr. Myshin's comments about knowing things about Ms. Sebastian raised the inference that Mr. Myshin possessed confidential, privileged information about Ms. Sebastian which could be used to impeach her testimony. The court had a duty to make a thorough inquiry.

XIX. The Court Erred In Admitting Evidence Of Mr. Hall's Bad Acts As "Non-Statutory Aggravation" Evidence Or Evidence Of A "Propensity To Commit Murder"

The district court erred in admitting copious bad act/character evidence at sentencing because: (A) it was not relevant to the Propensity aggravator; (B) insofar as it was "non-statutory aggravation" evidence, it was irrelevant under Idaho's death penalty statute; (C) it was inadmissible under IRE 403 and/or 404; (D) its admission violated Mr. Hall's 8th and 14th Amendment rights; and (E) admission of the evidence concerning Norma Jean Oliver violated Mr. Hall's 6th and 14th Amendment rights. *See* App. Br., pp.73-87.

A. The Bad Act/Character Evidence Was Not Relevant To The Propensity Aggravator

The State acknowledges that under the plain language of I.C. § 19-2515(h)(8) as it existed in 2000, the Propensity aggravator could only be proved with evidence of prior conduct or evidence of conduct in commission of the murder, not *subsequent* conduct. (Resp. Br., pp.88-89.) Thus, the State concedes evidence of bad acts committed after Ms. Henneman's death in 2000 was improperly admitted in support of the Propensity aggravator. *See id*. Since three of the State's aggravation witnesses—Michelle Deen, Evelyn Dunaway, and Rebekka McCusker—testified only to events occurring in 2001-2002, their testimony should have been excluded *in toto*. In addition, since much, if not all, of Ms. Sebastian's testimony concerned events in 2001-

2002, it should have also been excluded.

Nevertheless, the State dismisses the fact that a significant portion of its aggravation evidence was improperly admitted in support of the Propensity aggravator and claims the jury would have known to disregard evidence of subsequent conduct in considering the Propensity aggravator. *See* Resp. Br., p.89. However, the prosecutor expressly urged the jury to consider it for this purpose. *See* 31528 Tr., p.4733, Ls.2-12 (State's opening, explaining that the State's entire sentencing-related evidentiary presentation was aimed at proving the Propensity aggravator), p.5457, L.17-p.5459, L.21 (State's closing, arguing the subsequent conduct proved the Propensity aggravator), p.5507, L.6-p.5509, L.25 (State's rebuttal closing, arguing, in part, that the subsequent conduct proved the Propensity aggravator). The notion that a lay jury parsed out the instructions, and chose to ignore the State's arguments after realizing they were inconsistent with the instructions, is absurd given that neither the prosecutor nor the court understood that subsequent conduct could not be used to support the Propensity aggravator.[37] Thus, the error to allow the consideration of subsequent conduct in support of the Propensity aggravator is not so easily dismissed.

Given the State's concession, the only aggravation evidence the State can argue about is that which pertained to alleged *prior* conduct—the Oliver rape case, Mr. Hall's prior criminal history, and perhaps one minor car crash incident testified to by Ms. Sebastian.[38] The State

[37]*See, e.g.*, 31528 R., pp.236-37 (State arguing that although the alleged Hanlon murder was subsequent to the Henneman murder, it should nonetheless be admitted to prove Propensity); 31528 Tr., p.754, L.23-p.756, L.21 (court reversing its prior ruling and determining the Hanlon evidence would be properly admitted in support of the Propensity aggravator, excepting its prejudicial effect); 31528 R., pp.378-81 (court ruling other "non-statutory aggravating circumstances" admissible to prove Propensity).

[38]The State suggests Mr. Hall conceded *other* evidence presented to the jury related to prior conduct. Resp. Br., p.89. While Mr. Hall indeed argued that evidence was not indicative of a propensity to murder, he never admitted it was prior conduct. *See* App. Br., pp.79-80.

argues Mr. Hall's alleged violence toward Ms. Oliver is indicative of "an escalation in the nature of his violence" and is similar to the evidence found to be properly admitted in *State v. Porter*, 130 Idaho 772, 789-90 (1997). Resp. Br., pp.89-90. However, two data points do not demonstrate a trend toward increasing violence. As discussed in Mr. Hall's opening brief, to the extent that *Porter* or other authorities have held prior non-lethal violence somehow evidences a proclivity to commit murder, those authorities are manifestly wrong and should be overruled. *See* App. Br., pp.79-80 & n.28.

The State also argues Mr. Hall's prior "escape" conviction was particularly probative, as it showed his propensity to commit murder is a "continuing threat to society." Resp. Br., p.90. However, the "escape" evidence was not indicative of a continuing threat that was in any way attendant to *a propensity to commit murder*. Further, the "escape" evidence served only to mislead the jury. Since the circumstances of Mr. Hall's incarceration in 1994 were so dissimilar from those he could expect in relation to this case, *see* 31528 Tr., p.4920, L.18-p.4921, L.9, p.4948, L.23-p.4949, L.18, the fact that Mr. Hall walked away from a dairy outside the walls of a minimum security facility in 1994 had no bearing whatsoever on the threat attendant to any tendency to commit murder.

Finally, the State argues that any error in admitting the bad act/bad character evidence in support of the Propensity aggravator is necessarily harmless because the jury also found the other charged aggravators. Resp. Br., p.90. As the United States Supreme Court has recognized, where a capital jury is permitted to consider irrelevant facts and circumstances—whether related to an eligibility factor or not—the death sentence is unconstitutional and cannot stand. *See Brown v. Sanders,* 546 U.S. 212, 220-21 (2006). That is because of the risk that inadmissible facts added to the aggravation side of the scale "in the weighing process *unless* one of the other sentencing

factors enables the sentencer to give aggravating weight to the same facts and circumstances." *Id*. Here, none of Mr. Hall's alleged prior bad acts had any relevance to the Propensity aggravator. Consequently, the evidence added improper weight to the aggravating scale and impacted the jury's decision.

The State's harmless error argument is based on *Abdullah*, where this Court held that any error would be harmless because the jury voted for death based on a second aggravator. 158 Idaho at 463-64. However, there is no suggestion in *Abdullah* that additional evidence, unique to the aggravator, was improperly admitted to prove that aggravator.[39] *See id*. Thus, *Abdullah* does not appear inconsistent with *Brown v. Sanders*, and it does not have any application in this case. Here, because the bad act evidence should not have been admitted to prove the Propensity aggravator, the jury wound up hearing aggravation evidence it never should have heard. Under *Brown*, that error is not harmless.

B. The Bad Act/Character Evidence Was Not Relevant As "Non-Statutory Aggravation" Evidence Because It Had No Proper Role In The Jury's Deliberations

First, while the State recognizes that Idaho's death penalty statute includes no provision for a capital jury's consideration of non-statutory aggravation evidence, it insists that such evidence is relevant. It argues that because the statute calls for admission of "all relevant evidence in aggravation and mitigation," all evidence in aggravation and mitigation must therefore be relevant. Resp. Br., pp.90-91 (quoting I.C. § 19-2515(6)). This reasoning is circular. The statute qualifies what is admissible by requiring that the aggravation and mitigation be relevant. "Relevant," therefore, must mean something other than that which it modifies ("evidence in aggravation and mitigation"). It clearly limits the aggravation and mitigation

[39]The challenged aggravator in *Abdullah* was "knowingly creat[ing] a great risk of death to many persons," I.C. § 19-2515(9)(c), so it is unlikely that the State introduced additional aggravating facts which had not already been heard by the jury during the guilt phase.

evidence to that which is pertinent to the issues to be decided by the jury, *i.e.*, whether the State proved the statutory aggravators beyond a reasonable doubt and, if so, whether in light of any such aggravator found, mitigating circumstances make the imposition of the death penalty unjust. *See* I.C. § 19-2515(8)(a).

Second, the State argues the use of non-statutory aggravation evidence is constitutionally permissible. (Resp. Br., p.92.) However, that argument is nonresponsive. Mr. Hall readily concedes the legislature *could* have written a statute allowing for consideration of non-statutory aggravation evidence, but maintains it did not. *See* App. Br., pp.80-81. The State's preference to rewrite the death penalty statute does not give this Court license to do so. *See Verska,* 151 Idaho at 896.

Conspicuously absent from the State's brief is any explanation of how non-statutory aggravation evidence could be relevant to the jury's determinations under Idaho's statute.[40] As noted, under I.C. § 19-2515(8)(a) there is no room in the analysis for consideration of any non-statutory aggravation evidence. *See Corcoran v. State*, 774 N.E.2d 495, 498-99 (Ind. 2002) (holding that under a similar death penalty statute, Indiana Code § 35-50-2-9(b) (2000), the sentencer could consider only the statutory aggravators, not non-statutory aggravation evidence).

[40]Subsection (8) of Idaho's death penalty statute provides that a sentencing jury in a capital case shall decide: "(i) Whether the statutory aggravating circumstance has been proven beyond a reasonable doubt; and (ii) If the statutory aggravating circumstance has been proven beyond a reasonable doubt, whether all mitigating circumstances, when weighed against the aggravating circumstance, are sufficiently compelling that the death penalty would be unjust." I.C. § 19-2515(8). In other words, the statute prescribes a very precise formula, which does not allow for consideration of non-statutory aggravation evidence. The State's brief cited a series of cases. *See* Resp. Br., pp.216-17 (citing *United States v. Taylor*, 302 F.Supp.2d 901 (N.D. Ind. 2003), *Lawrie v. State*, 643 A.2d 1336 (Del. 1994), *State v. Anderson*, 306 S.W.3d 529 (Mo. 2010), and *Whatley v. State*, 509 S.E.2d 45 (Ga. 1998)). But in each of those states, the relevant statutes specifically provided for consideration of non-statutory aggravation evidence. *See* 18 U.S.C. § 3592(b), (c) & (d); DEL. CODE ANN. tit. 11, § 4209(c)(1) & (4); GA. CODE ANN. § 17-10-30(b); MO. REV. STAT. § 565.030.

E. Admission Of The Bad Act/Character Evidence Concerning Ms. Oliver Violated Mr. Hall's 6th And 14th Amendment Rights

Rather than parse out each of Mr. Hall's contentions concerning his inability to defend himself against the Oliver allegations, this Court should view them as a whole. This is not a case where just one witness died, or where just the PSI mysteriously disappeared; it is one where two witnesses died, the PSI went missing, the State failed to provide discovery in a timely fashion, and the complaining witness was uncooperative.[41] Mr. Hall asserts that under the *totality of the circumstances*, he was denied a full and fair opportunity to defend himself. *See Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.").[42]

With regard to the fundamental error standard, the State argues Mr. Hall satisfied none of the three-prongs of the *Perry*/*Abdullah* standard.[43] Mr. Hall has already argued the

[41]To an extent, the State blames trial counsel for Mr. Hall's failure to sooner and more fully prepare to meet the Oliver evidence. Mr. Hall's counsel were woefully deficient in failing to investigate the critical Oliver evidence. Indeed, they were constitutionally ineffective. *See* App. Br., pp.195-98; Section XXXIX, *infra*. However, owing to the loss of evidence, Mr. Hall could not fully defend himself against the State's allegations.

[42]It is wrong for the State to suggest the core principle from *State v. Larsen*, 42 Idaho 517 (1926)—that it is unfair and unjust to use one crime as a pretext in order to make the accused defend himself for another offense against which he is unprepared to defend himself—has no application here. The State used the sentencing phase in this case to essentially "convict" Mr. Hall of a forcible rape which it never proved 13 years earlier.

[43]The State claims Mr. Hall "conceded … he must establish fundamental error." Resp. Br., p.94 (citing App. Br., p.86). That is untrue. Mr. Hall simply explained that trial counsel objected to admission of the Oliver evidence on the basis that, owing to the passage of time and loss of evidence, he was unable to defend against the State's current allegations, and acknowledged that counsel failed to cite any specific authority in support of this objection. *See* App. Br., p.86; *see also id.*, p.225. He then said, "To the extent this Court concludes Mr. Hall's current argument was not preserved, Mr. Hall contends admission of the Oliver evidence constitutes fundamental error …." App. Br., pp.86-87. This Court could just as easily conclude the issue *was* preserved because, given the context and substance of trial counsel's objection, that objection could not have been anything other than a due process argument. *See Hansen v. Roberts*, 154 Idaho 469, 473 (2013). Indeed, the district court subsequently stated its belief that this issue *had* been argued by counsel. *See* 41059 R., pp.2353.

inapplicability of the *Perry*/*Abdullah* standard (and the *Dunlap* standard), so no further response is needed. However, the State's arguments as to the third-prong of the *Perry*/*Abdullah* standard, *i.e.*, its "harmless error" argument, warrants a response. First, the State has no basis to make any representations as to the *actual* grounds for the jury's verdict.[44] Second, the State later contradicts itself when arguing that a different error is harmless, claiming Mr. Hall was sentenced to death based on the brutal nature of the crime, the evidence in support of the aggravators, "and the non-statutory aggravation" evidence. Resp. Br., p.141. Finally, the State's "brutality trumps" claim misapprehends the nature of a jury's selection decision in a capital case, as discussed in Section XVII, *supra*.

XXIII. The Court Incorrectly Instructed The Jury During The Penalty Phase

A. The Court Failed To Instruct The Jury That The Same Evidence Could Not Be Used To Support More Than One Aggravator

The district court erred in failing to instruct Mr. Hall's jury that it could not rely on the same evidence, without more, to find more than one aggravating circumstance. Such an instruction was particularly important in Mr. Hall's case where the State alleged four separate aggravators. In response, the State concedes that the absence of such an instruction is error, *see Dunlap*, 155 Idaho at 365, but it claims this Court cannot address it for the first time on appeal because it is not of constitutional dimension. Resp. Br., pp.103-05. Even assuming the State is correct, this Court reviewed the same instructional error for the first time on appeal in both

[44]In a "harmlessness" inquiry the Court does not inquire into the actual basis of the jury's verdict; it employs an objective standard, asking "whether there is a reasonable possibility that the evidence complained of might have contributed" to the verdict. *Chapman v. California*, 386 U.S. 18, 23 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)). However, if it were to delve into the jury's actual deliberations, it would find it clear that the Oliver evidence had a profound effect upon the jury's decision, as one of Mr. Hall's jurors later revealed to a reporter that the jury was split as to whether to impose the death penalty, but one witness in particular had a great impact on the jury: "It was a runaway. He raped and strangled her when she was 17." PC Ex.86.

Dunlap, 155 Idaho at 365, and *Abdullah*, 158 Idaho at 470-71. Presumably this Court would not have reviewed the errors for the first time on appeal in either case had it not considered them to be fundamental. Because the instructional error in *Hall* is identical to the errors reviewed in those cases, the error is fundamental and can only be harmless if at least one aggravating circumstance passes constitutional muster.

B. The Court Erroneously Instructed The Jury It Had To Be Unanimous In Its Finding Of Whether The Mitigating Factors Were Sufficiently Compelling To Render The Death Penalty Unjust

Mr. Hall explained the error and inconsistency of the jury instructions regarding unanimity in his Appellant's Brief. *See* App. Br., pp. 98-100. The State argues the same challenge was rejected by this Court in *Abdullah.* Resp. Br., pp.105-06. In *Abdullah,* this Court concluded that the instructions as a whole adequately informed jurors that they did not have to unanimously agree that the death penalty would be unjust. 158 Idaho at 471-72. The State, in Mr. Hall's case, and this Court in *Abdullah*, relied upon other jury instructions to reach the conclusion that the instructions, as a whole, did not improperly tell jurors they had to be unanimous in deciding whether mitigating evidence made death an unjust sentence. Resp. Br., pp.106-08; *Abdullah*, 158 Idaho at 472.

This Court's decision in *Abdullah* regarding the unanimity instruction is contrary to well-established precedent of the United States Supreme Court and cannot stand. In *McKoy v. North Carolina*, 494 U.S. 433 (1990), the Supreme Court deemed the unanimity instructions[45]

[45]In *McKoy*, if jurors unanimously found a mitigating circumstance had been proven by a preponderance of the evidence, they were instructed to write "yes" on the verdict form; if the jurors did not unanimously find a mitigating circumstance had been proven by a preponderance, they were instructed to write "no." 494 U.S. at 436. Jurors were then asked whether they unanimously found, beyond a reasonable doubt, that the mitigating circumstance(s) found was/were insufficient to outweigh the aggravating circumstance(s) found. *Id.* at 437. If the answer was "yes," jurors were asked whether they unanimously found, beyond a reasonable

erroneous and vacated the defendant's death sentence, holding "North Carolina's unanimity requirement violates the Constitution by preventing the sentencer from considering all mitigating evidence," *id.* at 435, and "impermissibility limits jurors' consideration of mitigating evidence …." *Id.* at 443 (citing *Mills v. Maryland*, 486 U.S. 367 (1988)).

Similarly, the instruction telling Mr. Hall's jurors they could only consider mitigating evidence if they unanimously agreed it existed, violated the Constitution by preventing Mr. Hall's sentencing jury from adequately considering mitigating evidence. At a minimum, the instructions requiring unanimity regarding mitigating circumstances on the one hand, and requiring jurors to individually determine the existence of mitigating circumstances on the other, were confusing and misleading.[46]

Like in *McKoy*, there is a reasonable likelihood Mr. Hall's jury applied Instruction 48 and the verdict forms in a way that required all jurors to agree on the existence of mitigating circumstances before such circumstances could be considered at all in sentencing. This is apparent from the verdict form where jurors found that "all mitigating circumstances *are not* sufficiently compelling to make imposition of the death penalty unjust." 31528 R., pp.610-12.

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doubt, that the aggravating circumstance(s) found was/were sufficiently substantial to call for the imposition of death when considered in light of the mitigating circumstance(s) found. *Id.*

[46]In *Jones v. United States*, 527 U.S. 373, 390 (1999), the Supreme Court explained:

> [w]e have considered similar claims that allegedly ambiguous instructions caused jury confusion. *See, e.g., Victor v. Nebraska,* 511 U.S. 1 … (1994); *Estelle v. McGuire*, 502 U.S. 62 … (1991); *Boyde v. California*, 494 U.S. 370 … (1990). The proper standard for reviewing such claims is "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle, supra,* at 72 … (quoting *Boyde, supra,* at 380 …); *see also Victor, supra,* at 6 … (applying reasonable likelihood standard to direct review of state criminal conviction).

See also State v. Young, 138 Idaho 370, 372 2002) (holding instructions that mislead the jury or prejudice the complaining party constitute reversible error).

The error was plain and Mr. Hall was prejudiced because his jury found the mitigating circumstances in his case were not sufficiently compelling to render death unjust.

C. The Court Should Not Have Instructed The Jury On The Penalties For Rape And Kidnapping

The State argues that Instruction 49, which told jurors the penalties for rape and first degree kidnapping, cannot be challenged because the erroneous instruction was invited, or at least acquiesced to, by counsel. Resp. Br., pp.107-08. The only support for this proposition is a statement by the district court that "49 is some pride of authorship on your part." 31528 Trial Tr., p.5422, Ls.6-7. There is no indication which portion of Instruction 49 trial counsel *may* have authored because those discussions took place off the record. There are indications *the State* authored or edited Instruction 49, where the prosecutor in response to the judge's inquiry about objections stated, "[n]o. Once we changed this No. 49 we don't have." 31528 Trial Tr., p.5421, Ls.16-20. Accordingly, the most that can be said is the record reflects a failure of defense counsel to object to Instruction 49. This Court has repeatedly recognized that counsel's failure to object to flawed instructions is *not* invited error. *Adamcik*, 152 Idaho at 449-50; *State v. Blake*, 133 Idaho 237, 240 (1999). In nearly identical circumstances, this Court even found that counsel's response to the district court's after-the-fact summary of an off-record jury instruction conference,[47] stating, "Your Honor, we would concur. We have nothing to say on the record at this time," was not invited error. *Blake*, 133 Idaho at 239-40. Because the error in Instruction 49 was neither invited nor objected to, this Court must review it for fundamental error. *Draper*, 151 Idaho at 588.

The Supreme Court has long recognized that when a jury does not impose sentence, it must be instructed to "reach its verdict without regard to what sentence might be imposed."

[47]In *Blake*, in summarizing an off-the-record instructions conference, the district court gave the parties a chance to make an objection on the record. 133 Idaho at 240.

Rogers v. United States, 422 U.S. 35, 40 (1975). In the capital sentencing realm informing jurors of potential penalties for non-murder offenses invites jurors to consider matters outside their role and to craft a penalty for murder based on speculation about matters in the judge's hands. Further, by instructing jurors that there was no minimum mandatory sentences for rape and kidnapping, the court improperly suggested to jurors that it would treat Mr. Hall with leniency when sentencing him for those crimes, thereby inducing jurors to hedge their bets by imposing a death sentence for first degree murder. *See, e.g.*, *State v. Koch*, 673 P.2d 297, 303-04 (Ariz. 1983). Finally, by instructing jurors that the maximum possible penalty for rape and kidnapping was life without parole (LWOP), the court improperly suggested to jurors that the only way to *meaningfully* punish Mr. Hall for Ms. Henneman's death was to impose death, because a sentence of LWOP was already an appropriate punishment for his non-lethal crimes.

E. The Court Erred In Instructing The Jury Regarding The Supposed Potential For The Governor To Grant A Pardon Or Commutation

The State argues that any error attendant to Instruction 49 was invited error. For the reasons explained above, the failure to object to an instruction is not invited error. *See* subsection C, *supra*. The State then argues Instruction 49 accurately informed jurors of the Governor's power to commute or pardon a death sentence. Resp. Br., pp.109-14.[48] That is not the case. The Idaho Constitution *exclusively* entrusts the board of pardons with the pardoning power, subject to limitations imposed by the legislature. IDAHO CONST. art. IV, § 7. In contrast, the Idaho Constitution and Idaho Code section 20-240 restrict the Governor's power to "grant respites or reprieves in all cases of convictions for offenses against the state, except treason or imprisonment on impeachment, but such respites or reprieves shall not extend beyond the next session of the commission." In Idaho, the Governor has *no* authority, constitutional or otherwise,

[48]Presumably, the State meant to cite § 20-240 throughout its argument, not § 19-240.

to pardon or commute a sentence for murder. Moreover, the Board's own rules preclude a person serving a fixed life sentence or a death sentence from being eligible for a pardon. Instead, such a person may seek a commutation through the Board, which then may provide a recommendation to the Governor. *See* IDAPA 50.01.01.550.05.a. "Commutation is a process whereby clemency may be considered and granted to modify a sentence imposed by the sentencing jurisdiction." IDAPA 50.01.01.450.04 & .05. Such recommendations for commutation are not effective until presented to and approved by the Governor. If not approved within thirty days of the recommendation, the recommendation is deemed denied. IDAPA 50.01.01.450.04.a.–c. For these reasons, and because commutation is not only extraordinary but rare,[49] Instruction 49 misstated the law to the jury by telling jurors that Mr. Hall was eligible for pardon or commutation by the Governor, when such authority is explicitly vested with the Board of Pardon. Because this instruction did not accurately inform jurors of the powers of the Governor and the Board of Pardons with respect to reprieves, respites, commutations and pardons, the instruction was legally incorrect. *Cf. California v. Ramos*, 463 U.S. 992, 995 (1983) (finding no constitutional defect in capital jury instruction *accurately* advising jurors of the Governor's power to commute). In addition to being legally inaccurate, informing jurors of the responsibility or ability of anyone, other than the sentencing jury, to modify a death sentence relieved the jurors of their sense of responsibility for imposing a death sentence. Although the State relies on *Ramos* to support its argument that Instruction 49 was proper, *Ramos* provides no such support.[50] This

[49]IDAPA 50.01.01.450.03.

[50]In *Ramos*, the defendant challenged the district court's instruction telling jurors about the Governor's power to commute a LWOP sentence, but also argued if such an instruction was given, jurors must also be told of the Governor's power to commute a death sentence. *Id.* at 1012. Although the Court upheld the instruction with respect to the Governor's power to commute a LWOP sentence, it reached a different conclusion with respect to the Governor's power to commute a death sentence. The Supreme Court observed, "It is precisely this

minimization of the importance of the jury's decision to impose death in a capital case is precisely what the Supreme Court prohibited in *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985) ("[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.").

Because Instruction 49 was an improper statement of the law and reduced jurors' sense of responsibility by telling them Mr. Hall's final sentencing decision was vested in the Governor, the instruction violated Mr. Hall's 6th and 8th Amendment rights to a qualified jury.

XXIV. The Prosecution Engaged In Numerous Instances Of Misconduct

On appeal, Mr. Hall has identified ten types of misconduct infecting the prosecution's case. *See* App. Br., pp.105-30. In response, the State claims there was no misconduct or, if there was, it was not that bad. *See* Resp. Br., pp.114-41. For the reasons detailed below, the State's attempts to persuade this Court to turn a blind eye to the prosecution's egregious behavior, are without merit.[51]

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perception that the defendant is prejudiced by an instruction on the possible commutation of a death sentence that led the California Supreme Court in *People v. Morse* … 388 P.2d 33 (1964), to prohibit the giving of such an instruction." *Ramos,* 463 U.S. at 1011-12 (footnote omitted). In *Morse,* the California Supreme Court held, "by suggesting that some other authority would review the propriety of the jury's decision to impose death, the instruction tended to reduce the jury's sense of responsibility in fixing the penalty." *Ramos,* 463 U.S. at 1012 n.26 (citing with approval *Morse,* 388 P.2d at 46).

[51]In addition to the accepted standards for reviewing claims of prosecutorial misconduct, the State, citing a Tenth Circuit case, claims that "in the context of capital sentencings, 'Inquiry into fundamental fairness requires examination of the entire proceedings, including the strength of the evidence against the petitioner, both as to the guilt stage of the trial and as to moral culpability at the sentencing phase.'" Resp. Br., p.115 (quoting *Le v. Mullin*, 311 F.3d 1002, 1013 (10th Cir. 2002)). Notably, *Mullin* cites *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974), for this proposition, although *Donnelly* says no such thing. *See Donnelly*, 416 U.S. at 643. While *Donnelly* holds that in evaluating whether a prosecutor's misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process," and a reviewing court should engage in an "examination of the entire proceedings in [the] case," it does not hold that the strength of the government's evidence is a critical factor in determining whether a trial was

A. Using Closing Arguments To Mislead Jurors As To The Definition Of "Mitigation Evidence"

In a series of arguments which tainted the whole of the prosecution's closing arguments, the prosecution told jurors that evidence of Mr. Hall's horrendous childhood and his emotional disturbances as an adult are "not mitigation" and are "not relevant" to the selection decision because they did not *cause* him to kill Ms. Henneman. The State led the jury to believe moral culpability and criminal liability are the same, so unless the jury could find the killing to be legally excused it had to impose the death penalty. This recurring theme grossly distorted the law and was prosecutorial misconduct. *See* App. Br., pp.105-08.

Preliminarily, the State would have this Court believe the improper comments were isolated "snippets." Resp. Br., p.116. However, the entire theme of the State's rebuttal was "choice," and a critical component of the "choice" theme was that Mr. Hall's background and mental state were not relevant and should not be considered. *See generally* 31528 Tr., p.5490, L.11-p.5513, L.14. Far from being isolated comments, the improper arguments infected the whole of Mr. Bourne's rebuttal closing.

The State also wants this Court to believe that Mr. Bourne's argument was something it was not—a simple request to weigh the mitigation against the aggravation. Resp. Br., pp.116-18. At no point did Mr. Bourne ever recognize that the evidence concerning Mr. Hall's background and mental condition was mitigating. *See generally* 31528 Tr., p.5490, L.11-p.5513, L.14. At no point did Mr. Bourne ever implore the jury to give the defense evidence *less weight*, or to find that its *weight* was comparatively less than the aggravation. *See generally id*. Instead, he told the jury to *disregard* the defense's evidence in its entirety. The argument amounted to the improper

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fair. *Id*. To focus on the strength of the government's evidence is to approach a dangerous standard where those who are "obviously" guilty can never be found to have received an unfair trial. *Also see Screws v. United States*, 325 U.S. 91, 107 (1945) ("Even those guilty of the most heinous offenses are entitled to a fair trial.").

claim that evidence is only relevant to mitigation if it is causally connected to commission of the offense. *See Tennard v. Dretke*, 542 U.S. 274, 284-87 (2004); *see also Smith v. Texas*, 543 U.S. 37, 45 (2004).

Alternatively, the State argues the prosecutor's misconduct was not prejudicial because the jury was instructed as to the definition of mitigation.[52] Resp. Br., pp.118-19. This argument is weak because the presumption to follow instructions is tempered by realism. Where there is a substantial risk that jurors will be influenced by an error, Idaho's courts do not turn a blind eye to that error just because the jury should have, in theory, ignored it. The jury was repeatedly misled by the prosecutor as to perhaps the most critical issue in a capital sentencing hearing, and one with which jurors naturally struggle.[53] To suggest the jury would have disregarded these arguments in favor of their own reading of the instructions is unrealistic.

B. Questioning A Witness In Such A Way As To Mislead Jurors As To The Definition Of "Mitigation Evidence"

The prosecution's attempts to mislead jurors as to the meaning of "mitigation" were not limited to closing arguments, but were also part of its cross-examination of Dr. Pettis. The State's primary response is to argue once again that the prosecution did not seek to have the jury disregard the mitigation evidence, but only to give it little or no weight. Resp. Br., pp.120-21. For the reasons set forth above, this is not an honest reading of the prosecution's tactics. *See* subsection A, *supra*.

[52]If Mr. Bourne, an experienced prosecutor, did not properly understand the instruction defining "mitigation," how could the lay jurors? Otherwise, the State's argument only survives if one assumes Mr. Bourne knowingly misstated the law to manipulate the jurors into imposing death.

[53]The prosecution understood that jurors often struggle with the concept. A cursory review of the jury selection in this case reveals a typical prospective juror tended to come into this case with a simplistic view of the death penalty: if the defendant committed premeditated murder, he should be executed. *See, e.g.*, 31528 Tr., p.933, Ls.4-24 (prospective juror explaining her view that the death penalty should be imposed unless the killing was accidental), p.1073, Ls.8-23 (prospective juror stating her view that the background and character of the defendant do not matter because "as adults we are responsible for our actions").

The State next asks this Court to disregard its own language in *State v. Payne*, where it indicated it was "improper" to question the defendant's "mental health witnesses as to whether his conditions caused the rape and murder," 146 Idaho 548, 569 n.10 (2008), in favor of *Dunlap*, where the Court held that while it is improper to argue that "mitigation evidence is not relevant simply because there is no nexus between the evidence and the defendant's commission of the offense," a prosecutor is not "barred from arguing that the jury should give little or no weight to mitigation evidence that lacks a nexus to the crime," 155 Idaho at 372. Resp. Br., pp.120-21. However, *Payne* need not be disregarded because the prosecution in this case did not use the cross-examination in question to buttress an argument about how to assign weight to the mitigation evidence; it explicitly used it to argue the jury should *not consider* the mitigation evidence. *See* subsection A, *supra*; App. Br., pp.105-10.

Finally, the State argues Mr. Hall failed to show the prosecutor's improper cross-examination of Dr. Pettis was prejudicial. Resp. Br., p.121. It argues that because this Court found to be harmless the sentencing judge's error in failing to consider mitigation evidence that lacked a nexus to the crime in *Payne*, the misconduct in seeking to impose a nexus requirement in this case must be harmless as well. *Id*. The State's argument fails for at least two reasons. First, harmlessness is determined on a case-by-case basis. *See Chapman*, 386 U.S. at 24-26. Second, as discussed in subsection A, *supra*, the misconduct was highly prejudicial because it went to a critical issue in the case and took advantage of the jurors' struggles with the concept of "mitigation." Furthermore, as already discussed, the misconduct in questioning Dr. Pettis facilitated the State's improper closing. *See* App. Br., pp.109-110.

C. Distorting And Mischaracterizing Mr. Hall's Mitigation Case

The State also mischaracterized the mitigation evidence by falsely claiming the defense was trying to say that Mr. Hall's childhood abuse and neglect *caused* him to become a murderer.

App. Br., pp.111-12. The State concedes that neither Dr. Pettis nor Dr. Cunningham ever testified that Mr. Hall's abuse and neglect caused him to commit the crimes in this case, but it argues they *implied* as much. *See* Resp. Br., pp.121-23. However, both were explicit in testifying that they were *not* claiming a causal effect. *See* 31528 Tr., p.5282, L.5-p.5285, L.19 (Dr. Pettis), p.5300, Ls.15-22 (Dr. Cunningham). Both made it clear they were simply talking about risk factors and protective factors, which both correlate to negative life outcomes. *See generally* 31528 Tr., p.5191, L.16-p.5390, L.23. For the State to equate this discussion of risk factors and protective factors with a cause-and-effect relationship, is to argue that correlation implies causation. There is no reason to employ such a fallacy with regard to the defense experts' testimony in this case, and there is certainly no reason to believe the jurors would have done so.

E. Disparaging The Defense Experts

As already detailed, the prosecution encouraged jurors to mistrust and disbelieve Drs. Pettis and Cunningham because they were not from Idaho and had impressive credentials; it claimed they were "in the business of supplying criminal defendants with excuses"; it denigrated them by dismissing their testimony as "performances"; it ascribed to them motives that were not fairly supported by the record and suggested they intentionally sought to mislead or distract the jury; and it sought to anger jurors by highlighting the cost of their testimony to taxpayers. *See* App. Br., pp.114-18. At one point the State asserts that, "as explained above, [the challenged prosecutorial comments] constituted appropriate comment on the experts' bias and credibility." Resp. Br., p.128. However, the argument actually made is that, even if the prosecutors' arguments were improper, they did not rise to the level of a constitutional violation. *See id*., pp.126-28. This is the argument to which Mr. Hall replies.

The State begins by disagreeing with two of the authorities cited in Mr. Hall's opening brief—*Butler v. State*, 102 P.3d 71 (Nev. 2004), and *State v. Lundbom*, 773 P.2d 11 (Or. Ct. App.

1989). *See* Resp. Br., p.126. In *Butler*, the Nevada Supreme Court found prosecutorial misconduct rising to the level of a constitutional violation where the prosecutor disparaged defense witnesses in much the same way that the prosecution disparaged the defense experts in this case—by casting one of them as an elite, who was getting paid too much, and selling a product, and by calling another witness a "pseudo expert" who makes a living off of taxpayer funds, and who was less than truthful as a matter of course. *Butler*, 102 P.3d at 899. The State criticizes this holding on two grounds. First, it claims the *Butler* Court did not apply "the correct test for a due process violation based upon a prosecutor's closing argument—whether the alleged error 'so infect[ed] the trial with unfairness as to make the resulting conviction a denial of due process.'" Resp. Br., p.126 (quoting *Darden*, 477 U.S. at 181-82). However, this is false because the *Butler* Court adopted the US Supreme Court's standard from *Darden*:

> To determine if prejudicial prosecutorial misconduct occurred, the relevant inquiry is whether a prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process. However, a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, and the alleged improper remarks must be read in context.

Butler, 102 P.3d at 896 (internal quotation marks and footnotes omitted). Second, the State points out that *Butler* was a plurality opinion, and it argues the one-justice dissent was correct. Resp. Br., p.126. It is unclear why a lone dissent should carry more weight than the plurality.

In *Lundbom*, the Oregon Court of Appeals found reversible prosecutorial misconduct where the prosecutor disparaged a defense expert by claiming he was paid to testify a certain way because "[t]hat's his job" and "[t]hat is what he is hired to do," by calling the expert a "pimp," and by asserting that if the expert did not testify favorably for the defendant, "he would not make a dime. And no defense attorney would hire him." 773 P.2d at 12-13. The State attempts to diminish the force of the *Lundbom* opinion by arguing it did not apply "the correct

test for a due process violation ….” Resp. Br., p.126. However, this argument is misleading, as it suggests the *Lundbom* Court applied an *incorrect* test. The *Lundbom* Court did not analyze the misconduct as a due process violation, because the misconduct was not challenged on due process grounds. *See Lundbom*, 773 P.2d at 12-13. Thus, *Lundbom* stands only for the limited proposition that disparaging a defense expert is misconduct. Mr. Hall has never suggested otherwise. Interestingly, the *Lundbom* Court's prejudice analysis made it clear that, had the prosecutor's misconduct been challenged as a due process violation, the defendant likely would have prevailed on that basis as well—precisely because the misconduct infected the trial:

> In this case, the prosecutor's remarks were not only inappropriate in and of themselves, but highly likely to influence the jury. . . . To attempt to establish a defendant's guilt by making unwarranted personal attacks on his attorney and the witness is not only unfair, but it impugns the integrity of the system as a whole. *Such comments dangerously overshadow what a defendant's case is really about, and we presume that they prejudice a defendant*.

Id. (emphasis added).

The State cites a number of authorities of its own—*Dickerson v. Commonwealth*, 485 S.W.2d 310 (Ky. 2016), *People v. Emerson*, 727 N.E.2d 302 (Ill. 2000), *State v. Jones*, 595 S.E.2d 124 (N.C. 2004), and *State v. Clayton*, 995 S.W.2d 468 (Mo. 1999). *See* Resp. Br., pp.127-28. However, most of these authorities are not helpful to the State. *Jones* simply held it is proper for a prosecutor to argue that a defense expert is not credible. *Jones*, 595 S.E.2d at 141-42. That is not in dispute and Mr. Hall readily concedes the prosecution could have argued that Drs. Pettis and Cunninghman should not be believed, or that their testimony should carry little weight. In *Emerson*, the prosecution argued the defendant was a "con man," that his mitigation evidence was a "con job," and that his mitigation expert was "a hired gun" who was involved in that "con job." *Emerson*, 727 N.E.2d at 343. The Supreme Court of Illinois held these arguments were *improper*. *Id*. Ultimately, the *Emerson* Court concluded that the prosecutor's misconduct

"was not so highly inflammatory, in and of itself, that it require[d]" a new sentencing hearing. *Id*. However, the misconduct was not recurrent, as it was Mr. Hall's case.

Dickerson actually cuts *against* the State's argument. Initially, the standard actually applied by the Kentucky Supreme Court appears similar enough to the Constitutional standard to make the case relevant. *See Dickerson*, 485 S.W.2d at 329, 335. The *Dickerson* Court held the prosecutor committed misconduct by arguing the expert's testimony was offensive and outrageous because the prosecutor labeled the expert a "hired gun" who "says whatever the person paying the money to say," "takes facts and twists them for a dollar," and who the prosecutor characterized as "some hired whore who comes in here and tells you all this crap and has become a multimillionaire on the backs of dead children …." *Id*. at 332-33. The Court found two factors that weighed in favor of a finding of flagrancy (the misconduct was prejudicial and the misconduct was not accidental), while two did not (the misconduct was isolated, and the defendant was clearly guilty), so the Court focused primarily on the weight of the evidence against the defendant and concluded that because the evidence against him was so overwhelming the misconduct did not render the trial unfair. *Id*. at 333-35. Here, as in *Dickerson*, two factors—prejudice and intent—weigh in favor of a finding of overall unfairness. But unlike *Dickerson*, it is not beyond doubt that the jury would have reached the same conclusion, *i.e.*, a death sentence, regardless of the misconduct. The jury could very easily have found the mitigation evidence rendered the death penalty unjust.

The only case cited that is supportive of the State's position is *Clayton*. In that case, the prosecutor argued the defense expert was not credible, claimed the expert's opinion was "voodoo," and asserted the expert "hopes that he can fool you." *Clayton*, 995 S.W.2d at 479-80. The Supreme Court of Missouri found no fault with any of these tactics, holding that

"[p]rosecutors may … comment on the evidence and the credibility of witnesses, even to the point of belittling and/or discussing the improbability of specific testimony." *Id*. at 480. Thus, *Clayton* seems to adopt an "anything goes" approach with regard to prosecutors impugning, disparaging, and demeaning defense experts. However, as already shown, this is not the prevailing approach. Further, as already discussed, this is not consistent with the approach of either the United States Supreme Court or the Idaho Supreme Court. *See* App. Br., pp.114-15 (discussing *United States v. Young*, 470 U.S. 1, 9 & n.6 (1985), and *State v. Sheahan*, 139 Idaho 267, 280-81 (2003)).

F. Imploring Jurors To Impose Death To Deter Future Crime, Save The Lives Of Future Would-Be Victims, And Give The Victim's Family Retribution

The State offers little defense of prosecutorial arguments seeking to have the jury render a verdict based on concerns about general deterrence, other hypothetical victims, larger societal issues concerning crime, or sympathy for victims. *See* Resp. Br., pp.130-31. Rather, it assumes the challenged prosecutorial statements "were clumsy or improper," and goes on to argue that they do not rise to the level of a due process violation. *Id*., pp.131-33. In presenting this argument though, the State assumes the improper arguments were isolated "snippets" which do not reflect the prosecution's closing arguments as a whole. *Id*., pp.131-32 & n.30. However, the improper arguments were not isolated, but were quite extensive. *See* 31528 Tr., p.5462, L.3-p.5463, L.8, p.5510, L.22-p.5512, L.21. Furthermore, these improper pleas were part of closing arguments that were littered with misconduct. *See* subsections A, C, D, E, G, H, I & J; App. Br., pp.105-08, 111-18, 123-30.

The State also focuses on the portion of the prosecution's rebuttal argument where Mr. Bourne spoke of the value of Ms. Henneman's life, sought to compare her death to Mr. Hall's execution, and argued that only the taking of Mr. Hall's life would give

Ms. Henneman's own life value, *see* 31528 Tr., p.5510, L.22-p.5512, L.21, and tries to spin those arguments into something less offensive—a proper discussion of the mercy (or lack thereof) shown during the commission of the murder. *See* Resp. Br., pp.132-33. However, the State's attempt to repackage the argument should be rejected. Mr. Bourne was not speaking of the nature of the offense,[54] but was seeking to have the jurors rely on sympathy for Ms. Henneman and her surviving family, and on a desire to send a broader message, in making their selection decision, *see* 31528 Tr., p.5510, L.1-p.5513, L.14, all of which was improper.

G. Mischaracterizing The Jury's Role As A Link In The Law Enforcement Chain And Comparing Jurors To Soldiers

The State offers an argument concerning the prosecutor's effort to compare the jurors to soldiers. It attempts to distinguish the challenged arguments in this case from those at issue in *Brooks v. Kemp*, 762 F.2d 1383 (11th Cir. 1985), and *Weaver v. Bowersox*, 438 F.3d 832 (8th Cir. 2006)—the authorities primarily relied upon by Mr. Hall—on the basis that the comparisons of the jurors to soldiers were far more explicit in those cases than here. Resp. Br., pp.135-36. The State attempts to whitewash the prosecutorial comments in this case, claiming there was "no reference to soldiers" and "not even a reference to duty." Resp. Br., p.136. That is not a fair characterization of the arguments in question.[55] When the prosecutor referred to "the citizens of our country" doing "a hard thing on the beach of a foreign country," he was unambiguously referring to soldiers engaged in combat. 31528 Tr., p.5512, L.24-p.5513, L.14. Likewise, when the prosecutor spoke of asking American citizens "to do hard things," he talked about how "certain things are expected of citizens" and told jurors to "go and do" what they knew "needs to be done," he was indisputably speaking of "duty." *Id.* In light of these references to soldiers and

[54]As was the case cited by the State, *Reese v. Secretary, Florida Department of Corrections*, 675 F.3d 1277 (11th Cir.). The holding was very clear that the victim's suffering was properly considered by the jury because it was relevant to Florida's HAC aggravator. *Id.* at 1292.

[55]The arguments made by the prosecution are set forth in Mr. Hall's Appellant's Brief at p. 126.

duty, the message sent to the jurors in Mr. Hall's case was that it was their patriotic and civic duty to impose the death penalty. That was misconduct.

H. Expressing A Personal Belief As To The Appropriate Punishment

The State relies upon a single Court of Appeals case—*State v. Timmons*, 145 Idaho 279 (Ct. App. 2007)—to argue there was nothing wrong with the prosecutor's argument because it did not suggest to the jury that he was privy to additional information, not presented to the jury, which corroborated the State's theory. Resp. Br., pp.136-37. However, the fear of jurors assuming the prosecution is privy to additional evidence is not the only concern underlying the prohibition against prosecutors offering their personal opinions concerning the guilt of the defendant or whether he should be subjected to the death penalty. As the United States Supreme Court has explained, "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Young*, 470 U.S. 1, 16-19 (1985); *accord State v. Garcia*, 100 Idaho 108, 110-11 (1979); *State v. Rosencrantz*, 110 Idaho 124, 131 (Ct. App. 1986).

I. Stating As Fact A Claim Not Supported By The Record, *i.e.*, That Lethal Injection Is Painless And Humane

The State seeks to defend the prosecutor's argument regarding the application and nature of lethal injection as being based on "common sense," not evidence. Resp. Br., p.138. However, the painless peacefulness of lethal injection is not common sense; it is an *assumption*. And while this may be an appealing assumption to jurors, life does not necessarily mirror the assumptions we make about it. As was discussed in the post-conviction proceedings, lethal injections are not always peaceful and painless; further, the unavailability of certain anesthetics in recent years has caused states to experiment with alternative drugs—which may be insufficient to properly anesthetize the condemned and cause them to remain conscious for an excruciating death. *See*

35055 R., pp.1272-73; 41059 R., pp.1834-36, 1841-42, 1850-84; PC Exs.81 & 123.

J. Asking Jurors To Speculate About Post-Mortem Acts In Finding The HAC Aggravator

The State argues because HAC encompasses post-mortem conduct, the prosecutor properly relied on post-mortem acts in his argument urging jurors to find HAC. For support, the State cites this Court's decisions in *State v. Wood,* 132 Idaho at 103-04, and *State v. Leavitt,* 121 Idaho 4, 6-7 (1991). In *Wood,* this Court condoned the district court's reliance on the defendant's post-mortem mutilation and sexual abuse of the victim's body to find *Utter Disregard,* not HAC. 132 Idaho at 103-04. This Court observed the sentencing judge "properly considered additional evidence to support its finding of the [Utter Disregard] aggravator." *Id.* Based on this Court's opinion and analysis of the relevance of post-mortem conduct to the Utter Disregard finding, it seems clear that the post-mortem conduct was the "additional evidence" the district court relied on to find Utter Disregard and it was not relied upon for HAC. Thus, the State's reliance on *Wood* is misplaced.

In *Leavitt,* 121 Idaho at 6-7, this Court affirmed the district court's finding of the HAC aggravator based on specific facts: the defendant's infliction of multiple knife wounds on the victim, several of which could have caused her death and several of which appeared to be defensive wounds; and "as part of the death dealing attack or as a grisly aftermath, there was an anal cutting and removal of certain sexual organs from the nude body of the victim." *Id.* To the extent *Leavitt* suggests post-mortem acts can be relied upon to support HAC, such an interpretation is incorrect and irreconcilable with both HAC's plain language and this Court's limiting constructions.[56] The State cannot both rely on this Court's HAC limiting constructions to withstand a vagueness challenge, and disregard them as mere suggestions when they do not

[56]Mr. Hall maintains the limiting constructions are insufficient to save HAC from a vagueness challenge. *See* Section XII, *supra*; App. Br., pp.51-54.

support its arguments. Where this Court's limiting constructions are the only things saving HAC from unconstitutional vagueness, these constructions must be scrupulously honored.

XXV. Because Mr. Hall's Convictions For Kidnapping And Rape Merged With His Conviction For Felony-Murder, The Sentences For The Lesser Offenses Violated Double Jeopardy

The State's response assumes Idaho applies only a statutory theory and not a pleading theory to determine whether a crime is a lesser-included offense of another. Resp. Br., pp. 143-44. The State argues that even assuming the pleading theory applies, it is premised only on the Idaho Constitution, to which fundamental error analysis does not clearly apply. Resp. Br., p.144. The State's arguments lack merit because this Court has applied both the statutory and pleading theories to determine whether one offense is a lesser included offense of another, for both state and federal double-jeopardy purposes. *See, e.g.*, *State v. Flegel*, 151 Idaho 525, 527-29 (2011); *Sivak v. State*, 112 Idaho 197, 211-12 (1986); *State v. Thompson*, 101 Idaho 430, 433-44 (1980).

Here, the issue is whether Mr. Hall's rape and kidnapping convictions and sentences can stand where Mr. Hall has been convicted and sentenced to die for felony-murder committed by means of the same rape and kidnapping. Mr. Hall concedes the district court had the power to sentence him for felony-murder, but maintains that his sentences for the lesser-included offenses of rape and kidnapping merge with his felony-murder sentence. In *Sivak*, this Court held that where an offense is alleged in the information as a means or element of the commission of the higher offense, it is included and must merge with the greater. 112 Idaho at 211-12. Applying this test to the facts in *Sivak*, this Court held the defendant's conviction for felony-murder by way of robbery merged with his robbery conviction, requiring the robbery conviction to be vacated. *Id.* at 213. Similarly, in *State v. Pizzuto*, the defendant was charged with and convicted of two counts of first degree premeditated murder, two counts of felony murder, one count of robbery and one count of grand theft, in connection with the deaths of two people. 119 Idaho

742, 756 (1991). This Court held that even though the two murders were premeditated, deliberate and willful, *and* committed during the course of a robbery, robbery was a lesser included offense of felony-murder and merged with that conviction. *Id.* at 757-58.

In passing, the State relies on *State v. McKinney*, 153 Idaho 837, 841 (2013), for the proposition that "when a jury finds a defendant guilty of both felony-murder and premeditated murder, the resulting sentence [for the underlying felony] does not violate the Double Jeopardy Clause." Resp. Br., p.173. The State's characterization of *McKinney* is inaccurate. In *McKinney*, this Court allowed the defendant's sentences for *premeditated* murder and robbery to stand because they "each require proof of separate elements." *McKinney*, 153 Idaho at 841. In that case, the defendant was convicted of robbery and first degree murder, premised on both felony and premeditated murder for a single killing. *Id.* at 839-40. After his death sentence was vacated by a federal court, the defendant entered a sentencing agreement pursuant to Idaho Criminal Rule 11 and "consented to a sentence of fixed life without possibility of parole for first degree murder." *Id.* at 839. Thereafter, the defendant filed a motion arguing his sentences were illegal. Specifically, he claimed his fixed life sentence for first degree felony murder was illegal on double jeopardy grounds because he had already been sentenced for the lesser-included offense of robbery. *Id.* at 839-40.

In evaluating the contractual nature of the Rule 11 agreement, this Court noted it was silent as to the felony-murder/premeditated-murder distinction, but held it "defied belief that the State would gratuitously absolve McKinney of serving any sentence whatsoever for premeditated murder." *Id.* at 841 n.7. As a result, this Court concluded the defendant's *premeditated* murder and robbery convictions and sentences were not lesser included offenses of each other and would stand, under both the Rule 11 agreement and double-jeopardy principles. This Court's decisions

in *Pizzuto* and *Sivak*, both of which compel merger of Mr. Hall's kidnapping and rape convictions with his felony murder conviction, are unaltered by *McKinney*.

The State also claims Mr. Hall has suffered no prejudice as a result of the double-jeopardy violations because his non-capital sentences are consecutive to his death sentence, and therefore, he will never serve them. Resp. Br., pp.144-45. This is simply wrong. Absent merger, Mr. Hall will serve fixed life sentences, regardless of any relief he may receive on the murder conviction and sentence. If his sentences for rape and kidnapping merge with his felony-murder sentence, and his death sentence is vacated, Mr. Hall may receive a sentence of less than fixed life because at the time of his offenses, absent a death sentence, first degree murder was punishable by a minimum fixed ten-year term, up to life. The difference between Mr. Hall having a sentence where parole is a possibility and a fixed life sentence constitutes prejudice.

ISSUES ON POST-CONVICTION APPEAL

The State incorrectly identifies the standards governing this Court's review of Mr. Hall's summarily dismissed ineffective assistance claims, essentially arguing such claims are virtually unchallengeable. *See* Resp. Br., pp.148-50. In so doing, the State improperly conflates the standards applicable to claims denied *after* an evidentiary hearing with those governing Mr. Hall's claims, which were dismissed *without the benefit of such a hearing*. Summary dismissal may only be granted if a petitioner's evidence raises *no* genuine issue of material fact that, if resolved in his favor, would entitle him to relief. *Dunlap*, 155 Idaho at 383. If a factual issue is presented, a hearing must be conducted. *Id.*

> When reviewing an order for summary judgment, the standard of review for this Court is the same standard as that used by the district court in ruling on the motion. Summary judgment is appropriate if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). Disputed facts should be construed

> in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. This Court exercises free review over questions of law.

Vavold v. State, 148 Idaho 44, 45 (2009) (quoting *Armstrong v. Farmers Ins. Co. of Idaho,* 147 Idaho 67, 69 (2009) (citations omitted)); *accord Dunlap,* 155 Idaho at 383. In contrast, when this Court reviews a district court's denial of post-conviction relief *after* an evidentiary hearing, the evidence is viewed in the light most favorable to the district court's findings. *Abdullah,* 158 Idaho at 417.

The State also urges this Court to apply the doubly-deferential review standards for evaluating ineffective assistance of counsel claims lifted from two Supreme Court decisions reviewing cases in federal habeas corpus proceedings: *Cullen v. Pinholster,* 563 U.S. 170, 188-89 (2011) ("We take a highly deferential look at counsel's performance, through the deferential lens of § 2254(d) …." (internal citations and quotations omitted)), and *Harrington v. Richter,* 562 U.S. 86, 105 (2011) (reiterating that *Strickland v. Washington* and the Antiterrorism and Effective Death Penalty Act (AEDPA)[57] standards are highly deferential, and "when the two apply in tandem, review is 'doubly' so …." (citation omitted)). *Pinholster* and *Richter* involved federal review of ineffective assistance claims under AEDPA, *after* state court review of the same claims deemed them undeserving of relief. *Id.* On federal review of a state supreme court decision, the Supreme Court observed "[w]e take a 'highly deferential' look at counsel's performance, through the 'deferential lens of § 2254(d) ….'" *Pinholster,* 563 U.S. at 190 (citations omitted). This doubly-deferential standard has no application to this Court's initial

[57]Under AEDPA, the federal court *shall not* grant an application for a writ of *habeas corpus* on a claim adjudicated on the merits in state court unless the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or was based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C.A. § 2254(d).

review of the district court's summary dismissal of Mr. Hall's ineffective assistance claims.

In addition, the State asks this Court to impose an improperly high burden on Mr. Hall to prove prejudice arising from his counsels' deficient performance. Specifically, the State argues Mr. Hall must prove his counsels' performance was objectively unreasonable and that the deficiency *would have* changed the outcome. Resp. Br., p.147. This standard argued by the State is wrong. "The defendant must show that there is a *reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694 (emphasis added). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* However, a "defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. Indeed, the "reasonable probability" standard is a less than a preponderance of the evidence:

> An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. *The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome*.

Strickland, 466 U.S. at 694 (emphasis added).

XXVIII. The Court Erred In Summarily Dismissing Mr. Hall's Claim That Counsel Were Ineffective For Failing To: Conduct An Adequate *Voir Dire*, Move To Strike Certain Jurors For Cause, And Use A Peremptory Strike On A Biased Juror

Mr. Hall's counsel were ineffective for failing to adequately *voir dire* jurors, and for failing to move to strike biased, unqualified jurors. Counsels' deficient *voir dire* stemmed from a lack of preparation and ignorance of capital jury selection standards,[58] both of which repeatedly revealed themselves during *voir dire* through counsels' failure to move to strike objectively

[58]Trial counsel had never conducted jury selection in a capital case or presented a mitigation case to a capital jury. PC Ex. 15, p.108, L.22-p.109, L.16; PC Ex.13, p.80, L.15-p.81, L.6.

biased jurors. The State, like the district court,[59] mischaracterizes Mr. Hall's challenges to his counsels' *voir dire* performance as limited only to counsels' failure to follow the Colorado Method.[60] The State argues counsels' failure to comply with the Colorado Method was not objectively unreasonable, given that counsels' use of this method purportedly angered jurors. Resp. Br., pp.151-52. The State also argues counsel were not deficient for failing to provide the district court with Supreme Court case law which bars mitigation-impaired jurors—jurors who cannot give meaningful consideration to mitigation evidence—from serving on a capital jury, because no such authority exists. Resp. Br., pp.152-53.

While Mr. Hall does not suggest trial counsel must engage in jury selection tactics designed to alienate jurors, counsel in a capital case must be willing and able to question potential jurors about their opinions and beliefs regarding the death penalty. Both Idaho and United States Supreme Court precedent recognize the general importance of *voir dire* in criminal cases. A criminal defendant has a constitutional and statutory right to trial before an impartial jury. *See* U.S. CONST. amends. V, VI, VIII, XIV; IDAHO CONST. art. I, §§ 7, 13; I.C. §§ 19-1902, -2019, -2020. The right to a fair and impartial jury is protected by *voir dire*, through which potential jurors with actual or implied bias can be identified and removed. *See* ICR 24.

> The rule in this jurisdiction is that great latitude is allowed in the examination of veniremen upon their voir dire for the purposes of determining whether there is sufficient ground to challenge the veniremen for statutory cause, I.C. §§ 19-2017 to 19-2022, or whether it is expedient to challenge them peremptorily, I.C. §§ 19-2015 and 19-2016.

State v. McKeehan, 91 Idaho 808, 819-20 (1967) (citations omitted).

[59]The district court erroneously characterized Mr. Hall's claim, identifying it as a challenge to "counsel's failure to properly implement the Colorado Method." 41059 R., pp.2277-78.
[60]The Colorado Method is a manner of selecting a jury, grounded in well-established Supreme Court case law, which considers only the juror's views on the death penalty. *See Abdullah*, 158 Idaho at 524-25 & n.10.

Moreover, established Supreme Court precedent recognizes the special significance of capital *voir dire* and outlines the parameters imposed by the 6th and 14th Amendments to ensure the impartiality of jurors in capital cases. *Morgan v. Illinois,* 504 U.S. 719, 729 (1992); *Wainwright v. Witt,* 469 U.S. 412, 423-24 (1985); *Witherspoon v. Illinois,* 391 U.S. 510, 522 (1968). In *Morgan,* the Supreme Court made it clear the right to an impartial jury includes the right to conduct adequate *voir dire* to identify unqualified jurors:

> Were *voir dire* not available to lay bare the foundation of petitioner's challenge for cause against those prospective jurors who would *always* impose death following conviction, his right not to be tried by such jurors would be rendered as nugatory and meaningless as the State's right, in the absence of questioning, to strike those who would *never* do so.

504 U.S. at 733-34. In a capital case, a juror's assent to general questions about fairness and impartiality and their willingness to follow the law and the judge's instructions, is *insufficient* to identify bias; instead, *exacting* and *thorough voir dire* is necessary to determine whether a juror can be fair and impartial. *Id.* at 735-36, 738-39.

Contrary to trial counsels' belief—and now the State on appeal—that "the phrase, 'meaningful consideration to mitigation' is nowhere to be found in Supreme Court precedent," Resp. Br., p.153, n.31, the United States Supreme Court has long recognized jurors' ability to meaningfully consider and give effect to mitigation as a predicate to capital jury qualification:

> *sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence* that might provide a basis for refusing to impose the death penalty on a particular individual, *notwithstanding the severity of his crime or his potential to commit similar offenses in the future*. Three of the five cases decided on the same day in 1976—*Woodson v. North Carolina,* 428 U.S. 280 …, *Proffitt v. Florida,* 428 U.S. 242 …, and *Jurek v. Texas,* 428 U.S. 262 … —identified the background principles we would apply in later cases to evaluate specific rules inhibiting *the jury's ability to give meaningful effect to such mitigating evidence*.

Abdul-Kabir v. Quarterman, 550 U.S. 233, 246 (2007) (emphasis added). There is no explanation for counsels' failure to question jurors about their ability to give meaningful

consideration and effect to mitigating evidence, and no explanation for counsels' failure to provide this authority to the district court to support the exclusion of mitigation-impaired jurors from the jury. Counsels' failure to undertake a thorough and exacting *voir dire* of potential jurors in Mr. Hall's case, and their failure to move to strike mitigation-impaired jurors was deficient and unreasonable, as explained in Mr. Hall's opening brief and is not repeated. *See* App. Br., pp.140-46. In summarily dismissing this claim, the district court engaged in an unwarranted but lengthy, fact-intensive analysis, which accorded no deference to Mr. Hall and which failed to liberally construe inferences in Mr. Hall's favor. *Dunlap,* 155 Idaho at 361. Instead, the district court attributed counsels' failures in *voir dire* to reasonable strategies, even though this attribution finds no support in the record. To the contrary, the record supports a reasonable inference that counsels' shortcomings in *voir dire* and jury selection resulted from inadequate preparation and ignorance of the law, not strategy. *See* PC Ex.13, p.77, Ls.13-14, p.79, Ls.20-25, p.80, Ls.9-14, p.107, L.10-p.108, L.16, p.155, Ls.15-18; PC Ex.15, p.176, Ls.10-14. "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland.*" *Hinton v. Alabama,* __ U.S. __, 134 S. Ct. 1081, 1089 (2014).

XXIX. The Court Erred In Summarily Dismissing Mr. Hall's Claim That Counsel Were Ineffective For Eliciting Evidence Of Other Bad Acts

The State claims that because Mr. Hall has acknowledged that similar questioning of a witness under different facts may not constitute deficient performance, 41059 R., p.1347, he has somehow "conceded" there was no deficient performance in *this* case. Resp. Br., p.160. This ignores the reality that each case has to be judged on its own facts. Here, counsel's performance was deficient because when he asked the question that elicited the prejudicial testimony, he knew or should have known what the answer was going to be, and he should have recognized the

danger in asking that question. Indeed, Mr. Hall pointed out the uniqueness of this case: "Trial counsel knew that Mr. Hall was charged in another rape-murder [in the Hanlon case], and should have known that the second box [containing a second saliva swab from Mr. Hall] would have been used for evidence against Mr. Hall in that case." 41059 R., p.1347.

The State also argues that counsel's subsequent admission of his mistake should be ignored. *See* Resp. Br., p.160. While counsel's after-the-fact assessment of his own performance is by no means dispositive, his testimony is highly probative. For example, it will indicate whether there was a strategic basis for his act or omission. And here, counsel's testimony that "it just happened," and it was a "horrible mistake," PC Ex.13, p.27, Ls.1-4, suggests he did not think through his question in advance and did not have a strategic reason for asking it.

XXX. The Court Erred In Summarily Dismissing Mr. Hall's Claim That Counsel Were Ineffective For Failing To Consult A Forensic Pathologist

The State's primary argument is that counsel were not ineffective for failing to investigate the pathology evidence so long as they knowingly chose not to investigate that evidence. Resp. Br., pp.161-62 (relying upon *Richter*, *supra*). This argument fundamentally misconstrues the applicable standard. Under *Strickland*, "strategic choices made *after thorough investigation of law and facts relevant to plausible options* are virtually unchallengeable …." 466 U.S. at 690 (emphasis added). Thus, before the State may hide behind the strategic decisions of counsel, counsel must have first engaged in an appropriate investigation.

> [S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. . . . counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Id. at 690-91; *accord Wiggins v. Smith*, 539 U.S. 510, 521-23 (2003) (examining whether the investigation supporting counsel's decision was itself reasonable.). Here, counsel chose to cross-

examine Dr. Groben without first investigating the appropriateness of his actions or the soundness of his opinions. Thus, when counsel made that decision, they had an insufficient basis to do so under *Strickland* and its progeny.[61]

Next, the State attempts to argue that counsel's cross-examination of Dr. Groben was somehow an adequate substitute for use of a defense expert in forensic pathology. Resp. Br., pp.162-63. The State emphasizes that counsel asked a lot of questions of Dr. Groben and elicited a concession that he could not be 100% certain of various conclusions. *Id*. The number of questions asked by counsel is irrelevant, and the concessions cited by the State are minor, and did little to challenge the legitimacy of Dr. Groben's expert opinions. The only thing that could have undermined his critical opinions was the testimony of a qualified forensic pathologist (such as Dr. Aiken), who, imbued with the aura of her own expertise, could have directly challenged Dr. Groben's fanciful "hogtied" theory—either by persuading the court that it was too speculative to be admitted in the first instance or by persuading the jurors to give it little weight. An expert like Dr. Aiken could have testified that Dr. Groben's testimony was not based on a reasonable degree of medical probability. App. Br., pp.149-50 (citing PC Ex.46).

Next, the State argues that Dr. Aiken's disagreements with Dr. Groben's testimony would not have affected the outcome. Resp. Br., p.163. It claims her attack on the "hogtied" testimony and re-enactment evidence would have made no difference because that evidence was properly admitted and because Dr. Groben conceded his opinion was "not … definitive." *See id*. However, the State's arguments at the time the testimony was admitted has no bearing on

[61]The State's reliance on *Richter* is misplaced because that case simply acknowledged that, because the question is reasonableness, counsel need not engage every conceivable expert in every case. Nevertheless, counsel's decisions must be evaluated based on the unique facts of the case. *See Richter*, 562 U.S. at 106-10. Again, *Richter* involved federal review of an ineffective assistance claim under AEDPA, after state court review of the same claims deemed them undeserving of relief, meaning the Court was applying a doubly-deferential standard.

whether the successful rebuttal of that testimony by the defense may have impacted the verdict. It does not even impact the question of whether Dr. Groben's "hogtied" evidence may have been excluded if the court had additional information, such as a defense pathologist's testimony revealing just how speculative and inappropriate Dr. Groben's theory was. The State also claims the discrepancy between Dr. Aiken and Dr. Groben's opinions concerning the manner of death was "of little value" because Dr. Groben ultimately conceded there were other possible causes of death. Resp. Br., p.163. However, this argument overlooks the fact that Dr. Groben stuck by his opinion that Ms. Henneman was strangled with her own shirt. 31528 Tr., p.4069, L.3-p.4071, L.22. This, in turn, lent credibility to his speculative "hogtied" theory.

Finally, the State complains that Dr. Aiken had an "agenda to discredit [Dr. Groben's] work." Resp. Br., p.164. This allegation of a personal vendetta, however, is without any basis in the record. In addition, there is no reason why one expert cannot criticize the work of another without having an improper motive.

XXXI. The Court Erred In Summarily Dismissing Mr. Hall's Claim That Counsel Were Ineffective For Failing To Challenge The State's DNA Evidence

The State first argues that the defense *did* have a DNA expert; it asserts "Myshin testified that a DNA expert was retained [and] *assisted in cross-examining the state's experts* even though the expert was not in court at the time …." *Id.*, pp.164-65 (emphasis added). While Mr. Hall concedes his counsel consulted a DNA expert in advance of trial, *see* PC Ex.95; *see also* App. Br., p.153, there is no factual basis for the State to claim that expert assisted in cross-examination. During his deposition, Mr. Myshin clearly had no memory of any assistance in this regard. When asked whether the expert assisted his cross-examination preparation, Mr. Myshin said, "*I guess*." PC Ex. 13, p.205, Ls.5-8 (emphasis added). Additionally, when asked if he prepared his cross-examination of the State's experts in advance and wrote things down,

Mr. Myshin responded, "probably," but then conceded, "I don't know." *Id*., p.205, Ls.12-29.

The State next argues any failure to more fully utilize a defense expert was a "tactical decision" immune from challenge. *See* Resp. Br., pp.165-66. This argument suffers from two flaws. First, the court's conclusion that counsel's failure to more fully utilize a defense expert was a strategic decision was clearly erroneous, *see* App. Br., pp.154-55, and the State has not demonstrated otherwise, *see* Resp. Br., pp.165-66. The State tries to circumvent this error by claiming the court *presumed* counsel made a strategic decision. Resp. Br., p.166. However, that is not true. The court asserted—as *fact*—that counsel made a tactical decision; there was nothing in the court's language that suggested it was discussing a presumption. *See* 41059 R., p.2309 ("Trial counsel's decision … was a tactical decision that was not objectively unreasonable ….").

Second, even if counsel had made a strategic decision, that fact would not be dispositive. The "relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000). Here, the failure to utilize an expert at trial was objectively unreasonable for reasons already discussed. *See* App. Br., p.155.

The State also argues that Mr. Hall cannot rely on a new expert, whose opinions were first identified in post-conviction proceedings, to establish the ineffectiveness of his trial counsel. *See* Resp. Br., pp.165-66. The State is incorrect. In order to survive dismissal, Mr. Hall was required to present evidence sufficient to raise a genuine issue of material fact with regard to whether his counsel's performance was deficient and, if so, whether he was prejudiced. The affidavits of Dr. Hampikian do just that—they reveal that a qualified defense expert, if called to testify, could have made it clear that the State's expert had minimized the significance of the 13 allele, and that allele indicates, to a reasonable degree of medical certainty, there was a second male contributor to the DNA found in Ms. Henneman's vagina. This would have undermined the

State's theory that if Mr. Hall had sex with Ms. Henneman, he must have also killed her.

The State also argues that Mr. Hall's claim was properly dismissed because any attempt to use a defense expert would have been more harmful than helpful. Resp. Br., pp.166-67. The State reasons that a defense expert would have had to concede Mr. Hall's DNA was found inside Ms. Henneman, thereby "confirming Hall was Lynn's rapist, kidnapper, and murderer." *Id*., p.167. This does not follow. The relevant question was whether Mr. Hall acted alone, because if he did not, that information alone would raise a reasonable doubt. The State then argues that a defense DNA expert would not have changed the outcome of the case. Resp. Br., p.167. As noted, if Mr. Hall was not the only assailant, it is impossible to say that he was Ms. Henneman's killer. Even if he participated in the killing, it is impossible to say how culpable he was. These doubts raise a reasonable probability that the result of the trial would have been different.

XXXII. The Court Erred In Summarily Dismissing Mr. Hall's Claim That Counsel Were Ineffective For Failing To Adequately Investigate An Alternate-/Co-Perpetrator

The State first posits that because counsel were aware of some of the Hoffert evidence, recognized it was a "double-edged sword," and made the strategic decision not to investigate further, their actions are immune from challenge. Resp. Br., p.170. However, a "reasonable" investigation is one that is curtailed only if a "reasonable professional judgment[ ] support[s] the limitation[ ] …." *Strickland*, 466 U.S. at 691; *accord Wiggins*, 539 U.S. at 521-23. Here, the decision not to pursue the Hoffert lead was based on incomplete information caused by errors of the defense team. Counsel stopped pursuing the Hoffert evidence because they felt they could not link Mr. Hoffert's suicide to Ms. Henneman's murder. PC Ex.14, p.411, L.3-p.413, L.19; PC Ex.15, p.221, L.16-p.22, L.10. However, unknown to counsel at the time, their investigator, Glenn Elam, *did* possess such a link. Mr. Elam knew Mr. Hoffert said "something about raping some girl" shortly before he killed himself, PC Ex.38, p.8, Ls.13-21, p.21, Ls.14-20, but that

critical evidence was apparently never shared with counsel, PC Ex.14, p.413, L.20-p.414, L.9; PC Ex.15, p.219, L.4-p.220, L.2; *see also* PC Ex.13, p.72, Ls.17-23. Thus, the decision not to use the Hoffert evidence at trial was itself based on inadequate preparation.

The State makes no attempt to defend the court's ruling that the Hoffert evidence would have been inadmissible hearsay. *See* Resp. Br., p.170 & n.36. Rather, it simply argues the Hoffert evidence was not relevant. *See id*. at 170-71. It reasons that because Mr. Hoffert's statement about "raping some girl" was not as explicit as it could have been, *i.e.*, it did not identify Ms. Henneman nor did it specifically say the rape occurred the previous day, it was somehow *irrelevant*. *Id*. This argument misapplies the meaning of "relevance."[62] Evidence is relevant if it has "*any tendency* to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." IRE 401 (emphasis added). This standard is a liberal one. Any evidence which *raises an inference* with regard to a fact of consequence is relevant. *See State v. Rocha*, 157 Idaho 246, 251 (Ct. App. 2014); *see, e.g., State v. Richardson*, 95 Idaho 446, 449 (1973). And under the facts of this case—where Mr. Hoffert was seen with Ms. Henneman shortly before her disappearance, claimed to have seen to it that she made it back to her hotel, and killed himself the very next day—his comment about raping a girl, made shortly before committing suicide, raises the very reasonable inference that he was involved in the rape the previous day, and that his suicide was indicative of a guilty conscience.

Finally, the State argues that had the Hoffert evidence been fully uncovered and

[62]The State's argument relies upon a case cited as "*State v. Lynch*, 135 Idaho 55, 530-31 [sic] (Ct. App. 2001)," Resp. Br., p.171; presumably, the State meant to refer to *State v. Leach*, 135 Idaho 525 (Ct. App. 2001). *Leach* does not support the State's argument. There, the Court of Appeals questioned the admissibility and relevance of a conclusory statement in an affidavit because that statement was an attempt to assert as fact the state of mind of another. *Id*. at 530-31. Here, in contrast, no one would testify as to what Mr. Hoffert was thinking, only what he said.

presented, it would not have made a difference in the case. Resp. Br., p.171. The State reasons that even if they heard all of the Hoffert evidence, the jury simply would not have believed it. *Id*. The question is simply whether there is a "*reasonable probability*" that the failure to present the Hoffert evidence affected the outcome. *See Strickland*, 466 U.S. at 694 (emphasis added). Given the State's burden of proving guilt, as well as the aggravators, all beyond a reasonable doubt, and the weighing process dictated by I.C. § 19-2515, it cannot be said that there is no reasonable probability that raising an inference of a second assailant would not have changed the outcome.

XXXIII. The Court Erred In Summarily Dismissing Mr. Hall's Claim That His Constitutional Rights Were Violated When He Was Noticeably Shackled

The State first tries to invoke a procedural bar under the UPCPA. It argues Mr. Hall's claim was correctly dismissed because it was not a proper post-conviction claim and must be raised on direct appeal. Resp. Br., p.173. As authority, the State relies upon *Shackelford v. State*, 160 Idaho 317, 372 P.3d 372 (2016). However, *Shackelford* was not a capital case and, thus, was based solely on the UPCPA. *See* 372 P.3d at 377. Even assuming the State correctly construes the UPCPA,[63] because this is a capital case, the more specific capital post-conviction statute, I.C. § 19-2719, controls over the UPCPA. *See Fields v. State*, 155 Idaho 532, 534-35 (2013). Under section 19-2719, someone sentenced to death "must file any legal or factual challenge to the sentence or conviction that is known or reasonably should be known" within 42 days of entry of judgment, I.C. § 19-2719(3), and his failure to do so "waive[s] such claims as were known, or

[63]Mr. Hall does *not* concede the State correctly construes and applies the relevant portion of the UPCPA. Under the UPCPA, "[a]ny issue *which could have raised on [direct] appeal*, but was not, is forfeited and may not be considered in post-conviction proceedings …." I.C. § 19-4901(b) (emphasis added). Mr. Hall's claim regarding his noticeable shackling could not have been raised as part of his direct appeal because the direct appeal record does not contain evidence sufficient to assert that claim. Specifically, because trial counsel failed to object to the shackling, *see* Section XXXIV, *infra*; App. Br., pp.168-70, and because the district court failed to make the appropriate findings before allowing Mr. Hall to be shackled, *see* App. Br., p.167 & n.72, the direct appeal record contains only a vague description of the restraints used, *see* 31528 Tr., p.592, Ls.2-16, and virtually no evidence as to how obvious those restraints were to the jury.

reasonably should have been known," I.C. § 19-2719(5). Under Idaho's capital post-conviction scheme, there is no prohibition against raising claims that theoretically could be pursued on direct appeal. Further, the forfeiture language of the UPCPA would make no sense if applied in the capital context. Under section 19-2719, post-conviction proceedings occur *before* the direct appeal is even required to be filed. I.C. § 19-2719(1), (2) & (6). It would be illogical to say that a claim that "could have been raised" in a proceeding that has not yet occurred is forfeited by virtue of its not having been raised in that very same proceeding.

The State argues Mr. Hall's claim was correctly dismissed because the only evidence suggesting the restraints were noticeable appears in Mr. Hall's affidavit, where he averred the leg brace made a clicking noise when he stood up. Resp. Br., p.174. It argues, "there is no evidence establishing any juror, or anyone else for that matter, *actually heard* any noise, let alone a noise that could be associated with the leg brace." *Id*. Insofar as the State suggests Mr. Hall cannot prevail in the absence of evidence of what the individual jurors actually heard, its argument should be rejected. As the State well knows, Mr. Hall was not permitted to contact the jurors in his case, *see Hall v. State*, 151 Idaho 42 (2011), and, even if he had been, he would have been limited in his ability to use their statements in evidence, *see* IRE 606(b); *Payne v. State*, 159 Idaho 879, 885 (Ct. App. 2016); *see also Roberts v. State*, 132 Idaho 494, 496 (1999).

The State attempts to suggest that Mr. Hall's counsel disputes his allegations. *See* Resp. Br., pp.173-74. In doing so, it claims *inter alia* that co-counsel, D.C. Carr "affirmed the brace did not make any noises." Resp. Br., p.174. However, the State neglects to mention that while Mr. Carr twice said the brace was silent, Ex.15, p.199, Ls.7-9; Ex.16, p.307, Ls.2-6, he later conceded he suffered from hearing loss, such that if the brace did make a noise he would not have heard it. Ex.16, p.307, Ls.5-13. Even if the State's characterization of the facts were

correct, it would have succeeded only in highlighting a genuine issue of material fact necessitating a hearing. *See* I.C. § 19-4906(c).

Finally, the State argues Mr. Hall's claim was correctly dismissed because he "failed to explain how any alleged error was not harmless." Resp. Br., pp.174-75. However, Mr. Hall has no obligation to prove prejudice. In *Deck v. Missouri*, the Supreme Court held that, absent adequate justification and findings relating to the specific circumstances of the case, noticeable restraints are inherently prejudicial. 544 U.S. at 635.

XXXIV. The Court Erred In Summarily Dismissing Mr. Hall's Claim That Counsel Were Ineffective For Failing To Object To His Noticeable Shackling

On appeal, Mr. Hall has argued the district court's dismissal based on his claim being vaguely drafted was improper because he had no prior notice of this reason for dismissal, and because his claim was, in fact, sufficiently clear. App. Br., p.169. The State does not respond to the latter argument, apparently conceding that Mr. Hall's claim was, in fact, sufficiently clear. *See* Resp. Br., p.175. However, in a footnote, the State argues Mr. Hall's notice argument should fail because: (1) pursuant to *Kelly v. State*, 149 Idaho 517 (2010), he cannot challenge the adequacy of the notice he received; and (2) "the necessity of giving prior notice of a reason for dismissal in a capital case is exceptionally questionable" in light of I.C. § 19-2719(11). Both of the State's arguments turn on its misreading of the authorities relied upon. First, while Mr. Hall cannot challenge the *sufficiency* of the court's notice for the first time on appeal, he can challenge a *complete lack* of notice, *see Kelly*, 149 Idaho at 521-22, and here Mr. Hall's argument is that he did not receive *any* notice of this reason for dismissal. Second, the State is incorrect to rely on section 19-2719(11) because, although it contains language which, if read in isolation, would seem helpful to the State ("Such [dismissal] order shall not be subject to any requirement for the giving of notice of the court's intent to dismiss."), that language appears in a

portion of the statute pertaining to *successive* petitions for post-conviction relief. Since Mr. Hall's petition is not successive, subsection 11 does not apply.

Turning to the merits, the State argues Mr. Hall's counsel could not be ineffective for failing to object to his noticeable shackling because any such motion would have been overruled. Resp. Br., p.175. It reasons that the court made findings that special circumstances existed to support the shackling, and those findings (there were allegations of kidnapping, rape, and murder in this case; Mr. Hall was a suspect in the Hanlon case; and Mr. Hall had a criminal record) meant there was no reasonable possibility Mr. Hall could have remained unshackled. *Id*. First, the specific findings presently relied upon by the State were made many years later, during the post-conviction case. *See* 41059 R., p.2317. Thus, they were a *post hoc* justification and carry little weight. Second, to say that shackling was inevitable is to overlook the controlling standard of *Deck*. In *Deck*, the Court held "courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding." 544 U.S. at 633. Since capital sentencings will *only* involve individuals convicted of murders (and should only involve individuals convicted of the most heinous murders), and there can be no routine shackling of such defendants, clearly there is more to consider than just the brutal nature of the crime. As already detailed, the totality of the circumstances did not justify noticeable shackles in this case. *See* App. Br., p.170 n.73.

XXXVII. The Court Erred In Summarily Dismissing Mr. Hall's Claim That Counsel Were Ineffective For Failing To Adequately Investigate And Present Evidence Of Mr. Hall's Neurological Damage

The State appears to argue this issue as though Mr. Hall had received the benefit of an evidentiary hearing, rather than having his petition summarily dismissed. Ignoring that the standard of review requires the facts and inferences be drawn in Mr. Hall's favor, the State argues at length about conflicting evidence that *could* contravene Mr. Hall's assertions. *See*

Resp. Br., pp.181-89. Based on what has been submitted by Mr. Hall, he has demonstrated a genuine issue of material fact which making summary dismissal inappropriate.

A. Trial Counsels' Failure To Adequately Investigate And Present Readily Available Evidence Of Mr. Hall's Neurological Damage Was Objectively Unreasonable

To perform effectively in the penalty phase of a capital case, competent counsel must investigate, present, and explain "the significance of all the available [mitigating] evidence." *Williams v. Taylor*, 529 U.S. at 399. Counsel act outside of the bounds of reasonableness, and thereby tender deficient performance, when they are aware of potential mitigating evidence, but fail to investigate it. *Williams*, 529 U.S. at 362; *Correll v. Ryan*, 539 F.3d 938, 943-945 (9th Cir. 2008). Particular instances in a defendant's history that indicate a brain injury may be present can give rise to the duty on the part of counsel to investigate further, and have been found to be the basis of a finding of deficient performance. *Sears v. Upton*, 561 U.S. 945, 950-51 (2010); *Correll*, 539 F.3d at 943-45*; see also Perkins v. Hall*, 708 S.E.2d 335, 340 (Ga. 2011). Even if counsel conduct a limited investigation into mitigating evidence, their representation may nevertheless be deficient if the investigation is unreasonably limited. *Correll*, 539 F.3d at 943-945. Such was the case here.

The State relies largely upon statements made by Mr. Hall's trial counsel to argue their failure to present readily available evidence of neurological damage was not deficient. The State cites claims by Mr. Hall's counsel about seeking to avoid a *psychiatric* diagnosis as a purported strategy for not investigating evidence of brain damage. Resp. Br., p.181. But the "relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Flores-Ortega*, 528 U.S. at 481. Trial counsel's reliance on information gleaned from psychologists in determining not to conduct investigation into potential neurological damage was objectively unreasonable.

Neurological testing can show damage to the brain and reveal information that other psychological, or even neuropsychological, testing cannot. As Dr. Merikangas put it, "Neuropsychological testing is not a substitute for brain imaging." PC Ex.3. This is because neuropsychological tests can only give rise to *inferential* data about potential damage based on a limited set of brain functions. *Id*. In contrast, brain images show conclusively areas of *actual* damage to the brain. *Id*. A critical limitation for non-imaging tests for neuropsychological damage relates to damage to the frontal lobes—crucial to behavior, impulse control, judgment, and reasoning. According to Dr. Merikangas, non-imaging tests are inadequate to show functioning or damage to this area. PC Ex.3. In his expert opinion, no reasonable neurologist would substitute psychological testing for brain imaging. *Id*.

Moreover, the State's claim that trial counsel relied on the assessments of various experts in deciding whether to investigate is both inaccurate and unavailing. *See* Resp. Br., p.182. The State claims counsel's failure to investigate can be justified through counsel's consultation with five experts: Dr. Ward, Dr. Froming, Dr. Gummow, Dr. Pettis, and Dr. Cunningham. Resp. Br., p.182. However, trial counsel admitted that, "*Gummow, Pettis, and Cunningham were the ones I actually consulted with*. I didn't do much with Clay Ward or Karen Froming." PC Ex.14, p.394, Ls.13-21 (emphasis added). Accordingly, by counsel's own account, he only consulted three out of these five experts. And of those three, counsel admitted he had no recollection of Drs. Cunningham or Pettis ever seeking to dissuade him from conducting brain imaging tests. PC Ex.13, p.58, Ls.11-13. Trial counsel did, however, admit that this type of evidence—showing Mr. Hall had damage to critical areas of his brain—would have been helpful to Mr. Hall's case, and would not necessarily have contradicted the testimony of Drs. Cunningham and Pettis. *Id*., p.58, L.14-p.59, L.2.

More importantly, Dr. Cunningham provided an affidavit in support of Mr. Hall's petition that underscored the critical nature of brain imaging tests in this case, and counsel's deficiency in failing to investigate such tests. PC Ex.11, pp.2-4. This is the *same* Dr. Cunningham relied upon by the State in seeking to minimize the importance of this information. *See* Resp. Br., p.182. Dr. Cunningham characterized the evidence revealed by Mr. Hall's brain scans as, "extraordinarily important" information that was "critically absent from the information available to [him] at trial," and said this documentation of Mr. Hall's brain function presented a "profoundly important conclusion" that could have been incorporated into his testimony. PC Ex.11, pp.2-4. By Dr. Cunningham's account, Mr. Hall's MRI and PET scans showing his abnormal brain functioning as an adult would have significantly enhanced the mitigation evidence presented at sentencing:

> *Had I had these findings of brain abnormalities in Mr. Hall I would have offered testimony supporting a nexus between Mr. Hall's brain dysfunction and his criminal history and offense conduct*. I would have testified that there is a relationship between brain dysfunction and violent offending, particularly in the face of traumatic experience and substance abuse. I would have cited and discussed psychological, psychiatric, and neurological literature which identify that brain damage is present in disproportionately high incidence among violent offenders.

PC Ex.11, p.3 (emphasis added). The MRI of Mr. Hall's brain also showed evidence of brain damage consistent with Fetal Alcohol Spectrum Disorder (FASD). PC Exs.4 & 11. According to Dr. Cunningham, "The information available at trial resulted in me suspecting FASD, but I lacked sufficient confirmatory data to offer this factor to the jury." PC Ex.11, p.3. Had Dr. Cunningham had the confirmatory evidence of damage indicative of FASD, he would have offered this and explained to the jury "both the childhood implications of FASD as well as FASD-related deficits in impulse control and judgment that persist in adulthood." *Id*., pp.3-4.

A review of the materials provided to trial counsel by Dr. Gummow supports the conclusion that trial counsel were in possession of evidence that called for further investigation into brain imaging, and that the failure to do so was objectively unreasonable. These materials included a synopsis of her preliminary findings after a review of a variety of Mr. Hall's mental health, education, and correctional records, as well as information from his family members. PC Ex.14, p.400, L.17 p.405, L.10; *see also* PC Ex.14, ex.E. After completing test data analysis, Dr. Gummow's *very first* preliminary finding indicated: "1. *Moderate brain damage*." PC Ex.14, ex.E, p.17051 (emphasis added). In this same document, Dr. Gummow also noted the need to rule out brain damage due to fetal alcohol exposure. *Id*. In her records summary, Dr. Gummow identified several instances of trauma in Mr. Hall's history that gave rise to the inference that significant brain damage may have resulted. On one occasion when Mr. Hall was outside with his step-father and siblings, he fell off a bicycle and was knocked unconscious. *Id*., ex.E, p.17104. When Mr. Hall was only five years old, his step-father picked him up by the throat and threw him across the room for breaking a toy. *Id*. Mr. Hall lost consciousness as a result of being slammed to the ground, but was not taken to the hospital. *Id*., ex.E, pp.17104-05. Mr. Hall reported that similar incidents happened more than once in his early childhood. *Id*. Around this same time frame, Mr. Hall's mother reported that he would have episodes of blacking out. *Id*. There was ample evidence of cognitive and developmental deficits, as well as extensive trauma in Mr. Hall's early school years. *Id*., ex.E, pp.17102-12. Thus, it is clear that the evidence trial counsel received from Dr. Gummow established the *need* for brain imaging tests, rather than the absence thereof. This was not the only source of information that demonstrated this need.

Trial counsel also knew, or reasonably should have known, there was specific evidence—requiring further investigation—as to whether Mr. Hall had suffered brain damage that would be

easily revealed by brain imaging tests. Mr. Hall's family members spoke of severe abuse, such as his siblings frequently throwing rocks at Mr. Hall, or the multiple black eyes and facial injuries he had received at his father's hand. 31528 Tr., p.4998, L.14-p.5004, L.13. This abuse persisted to the point where one of his siblings used to tease Mr. Hall that, if they shaved his head, "he'd have all kinds of scars there." *Id.*, p.4998, Ls.14-23. In addition, there was also evidence that Mr. Hall's older brother once delivered a blow to his head that was severe enough to knock Mr. Hall unconscious. *Id.*, p.5056, Ls.18-25. This particular type of violence was commonplace. *Id.*, p.5057, Ls.6-17, p.5081, Ls.1-12.

Various other sources also made clear the need for brain imaging. Upon his review of Mr. Hall's educational, medical, social, and criminal records, Dr. Merikangas determined that both neurological and psychological testing were warranted. PC Ex.3. This conclusion was based, in part, on reports that: Mr. Hall's mother abused drugs and alcohol, possibly throughout her pregnancy with Mr. Hall; he suffered from extensive, severe physical abuse throughout his early life; he had very early signs of an emotional disturbance; he struggled in school and was, at one point, diagnosed with mild mental retardation; and he began using alcohol and drugs at an early age. *Id.*

Finally, counsels' claim that they were somehow reasonable not to conduct an investigation because they did not know what that investigation would reveal reflects a core misunderstanding of their duty to investigate—or, more basically—the very purpose of investigation. *See* PC Ex.13, p.56, L.20-p.57, L.7; Resp. Br., pp.182-85. A similar justification tendered by defense counsel was dismissed by the Sixth Circuit Court of Appeals as one that simply "does not make sense." *Hamblin v. Mitchell*, 354 F.3d 482, 492 (6th Cir. 2003) ("Because trial counsel does not know what an investigation will reveal is no reason not to conduct the

investigation. Counsel was obligated to find out the facts, not to guess or assume or suppose some facts may be adverse.").

Additionally, counsels' claim is called into question by other evidence. Mr. Hall's mitigation specialist, Rosanne Dapsauski, provided an affidavit in support of his petition where she repeatedly and specifically disavowed the notion that there was anything inconsistent with the theory of mitigation used at trial and evidence of actual brain injury as demonstrated by Mr. Hall's MRI and PET scans. *See* PC Ex.10. Ms. Dapsauski also recalled the issue of brain scans being raised in discussions about mitigation. *Id.* What she did *not* recall was any specific decision not to conduct such an examination. *Id*. Her affidavit indicates that the omission of this evidence was likely the product of oversight, as opposed to a tactical decision.

B. Trial Counsel's Failure To Present Evidence Of Mr. Hall's Neurological Damage Was Prejudicial

Mr. Hall also created a genuine issue of material fact as to whether the failure to investigate neurological damage was prejudicial, particularly in light of Idaho's capital sentencing scheme. For jurors charged with determining whether to impose death, Idaho has adopted a weighing scheme whereby each alleged aggravator—standing alone—has to be weighed against all the mitigating evidence collectively. I.C. § 19-2515(8)(a)(ii). If even one juror finds the balance tips in favor of mitigation, a defendant cannot receive the death penalty. I.C. § 19-2515(7)(b). Therefore, Mr. Hall merely had to show a genuine issue of material fact as to whether even a single juror reasonably might have struck a different balance in favor of life had the jury received the mitigating evidence at issue. He did so.

In its argument, the State (as did the district court) seeks to isolate the issue of whether counsel's failure to present brain imaging evidence was prejudicial. *See* Resp. Br., pp.186-89. This is not the proper standard. When reviewing claims of ineffective assistance of counsel for

the failure to present readily available mitigating evidence in a capital sentencing trial, this Court examines prejudice in light of the totality of the evidence—"both that adduced at trial, and the evidence adduced in the [post-conviction] proceeding"—in reweighing it against each aggravating factor found by the jury. *Williams v. Taylor*, 529 U.S. at 397-98. "In assessing prejudice, we reweigh the evidence in aggravation against the *totality* of the mitigating evidence." *Wiggins*, 539 U.S. at 534. If, after viewing the whole of the mitigating evidence that was and could have been presented, there is a reasonable probability that even one juror would have struck a different balance, prejudice has been shown. *Wiggins*, 539 U.S. at 537.

The determination of whether to impose the death penalty is one that, under the 8th Amendment, must be rooted in a meaningful review of the culpability of the offender. *See, e.g., Atkins v Virginia*, 536 U.S. 304, 311-321 (2002). The same concerns that motivated the United States Supreme Court to hold that intellectually disabled defendants are categorically exempt from capital punishment are also relevant to those defendants with organic brain injury in areas that are crucial to informed decision making and impulse control. The identified critical areas of concern are those involving one's "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Id*. These are the very areas where evidence of Mr. Hall's brain injury demonstrates he lacks the culpability for which the death penalty is reserved. *See* App. Br., pp.177-80.

Contrary to the State's assertion, other courts have recognized that mitigating evidence of organic brain damage has an impact on jurors that is of a special quality and character. As noted by the Tenth Circuit Court of Appeals:

> Evidence of organic brain damage is something that we and other courts, including the Supreme Court, have found to have a powerful mitigating effect….

> And for good reason—the involuntary alteration of brain structures, with its attendant effects on behavior, tends to diminish moral culpability, altering the causal relationship between impulse and action.

Littlejohn v. Trammell, 704 F.3d 817, 860 (10th Cir. 2013) (quoting *Hooks v. Workman*, 689 F.3d 1148, 1205 (10th Cir. 2012)) (alterations in original). Here, as in *Atkins*, the same rationale can be applied, where "[b]ecause of their impairments, they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Atkins*, 536 U.S. at 318. Moreover, this Court has held that easily available mitigation evidence related to mental health "cannot be ignored," and has found that the failure to present such evidence creates a genuine issue of material fact as to whether counsel was constitutionally ineffective. *Dunlap*, 155 Idaho at 388.

Taken as a whole, evidence of Mr. Hall's brain damage and abnormalities provides significant scientifically reliable evidence that would have made a compelling case to the jury that Mr. Hall has the type of diminished culpability that renders the death penalty fundamentally unjust. Had even one juror struck a different balance in light of the *totality* of mitigating evidence, the result of his proceedings would have been altered in favor of life.

XXXVIII. The Court Erred In Summarily Dismissing Mr. Hall's Claim That Counsel Were Ineffective For Failing To Adequately Investigate And Present Mitigating Evidence

Although the State relies on *State v. Abdullah*, the petitioner in that case received the benefit of an evidentiary hearing on his claims; therefore the Court applied a more deferential standard of review when assessing the trial court's denial of relief. In order to survive summary dismissal, Mr. Hall merely had to raise a *genuine issue of material fact* as to whether his counsel tendered deficient performance and whether he was prejudiced as a result. *Dunlap*, 155 Idaho at 361. In conducting this review, this Court liberally construes the facts, and draws reasonable

inferences, in favor of the petitioner. *Id*.

Additionally, the State overlooks the individualized nature of this Court's review under *Strickland*. The State cites an excerpt from this Court's decision in *State v. Row*, 131 Idaho 303, 313 (1998), but substitutes Mr. Hall's name for Ms. Row's regarding this Court's holding denying Ms. Row relief. *See* Resp. Br., p.179. But the reasonableness of counsel's actions can only be determined under the facts present in this particular case. The *Strickland* test "of necessity requires a case-by-case examination of the evidence." *Williams v. Taylor*, 529 U.S. at 391. To the extent that the State's articulation of this Court's holding in *Row* merely substitutes Mr. Hall's name for Ms. Row's as though these two cases were interchangeable, the State misstates the proper standard of review of this Court.

Further, *Row* was decided prior to seminal United States Supreme Court decisions that delineate capital defense counsel's duty to investigate mitigation: *Williams*, *Wiggins*, and *Rompilla v. Beard*, 545 U.S. 374 (2005). Unlike *Row*, these cases focused not on the actions taken and evidence that counsel chose to present, but rather on the reasonableness of counsel's failure to uncover and present additional mitigation evidence that was readily identifiable and available. *See Williams*, 529 U.S. at 395; *Wiggins*, 539 U.S. at 522; *Rompilla*, 545 U.S. at 385-89. Even when trial counsel pursues an alternate mitigation strategy, such a decision is unreasonable if undertaken without a "thorough investigation of the defendant's background," and the decision not to present readily available mitigating evidence must itself be reasonable. *Wiggins*, 539 U.S. at 522-23. These refinements in the law alter the analysis from *Row*, which focused instead on what counsel did at the sentencing phase of Ms. Row's capital case, instead of looking at the reasonableness of what counsel *failed* to investigate or present.

Finally, the State discourages this Court from relying on or considering the standards vetted and promulgated by the American Bar Association (ABA) as the prevailing professional norms for evaluating the reasonableness of an attorney's actions. *See* Resp. Br., p.180. There is one glaring problem with the State's suggestion: the standard relied on by Mr. Hall for this claim is one that—while originally promulgated by the ABA—*has been expressly adopted by the United States Supreme Court*, and is therefore part of the standard attendant to Mr. Hall's claim. *See Wiggins*, 539 U.S. at 524; *see also* App. Br., p.182. This standard has also been cited to and relied upon by this Court. *See, e.g., Dunlap*, 155 Idaho at 388. To the extent the State now appears to be arguing against the application of this standard to Mr. Hall's claim, the State does so in contravention of clearly established precedent.

Moreover, the ABA Guidelines have historically been cited as an important resource—or even the starting place—in the analysis of whether counsel's performance was reasonable under prevailing professional norms.[64] Refusal to consider the ABA Guidelines as reflective of prevailing professional norms would be contrary to established Idaho and United States Supreme Court precedent recognizing the Guidelines and related ethical standards as a *starting point* for evaluating the reasonableness of counsel's performance. *See, e.g., Rompilla*, 545 U.S. at 387-89 & ns.6-7; *Florida v. Nixon*, 543 U.S. 175 (2004); *Wiggins*, 539 U.S. at 524; *Williams*, 529 U.S. at 396; *Strickland*, 466 U.S. at 688; *Mitchell v. State*, 132 Idaho 274, 279 (1998); *Charboneau*, 116 Idaho at 137; *State v. Bingham*, 116 Idaho 415, 424 (1989); *State v. Aragon*, 114 Idaho 758, 761 (1988).

[64]The State, relying on *State. v. Porter*, 130 Idaho 772, 782 (1997), claims this Court has declined to adopt the ABA Guidelines generally. Resp. Br., p.180. The State's reliance on *Porter* for this generalization is incorrect. *Porter* only rejected adoption of the ABA Guideline which provides for the assignment of two defense attorneys when death is sought. 130 Idaho at 772. By the following year, Idaho adopted the two lawyer requirement. *See* ICR 44.3(2)(a).

A. Traumatic Childhood

Although the State admits that some evidence was presented attesting to Mr. Hall's "abysmal childhood," Resp. Br., p.190, it fails to acknowledge that trial counsel barely scratched the surface of the volumes of information that was readily available regarding the extent of the abuse—even torture—that Mr. Hall endured in his most tender years. This volume of information was readily available had counsel engaged in a reasonable investigation.

Counsel could have discovered that the violence pervading the Hall home was the product of generations of abuse reaching back into both sides of Mr. Hall's family tree. Mr. Hall's father was the product of an abusive home. PC Ex.6. Jean Hall was likewise raised in a verbally and physically abusive home that held out virtually no love or affection for the children. *Id*. As with her own children, Jean Hall was also sexually abused—at the hands of her uncle. *Id*. The jury never learned this, or that this same uncle later attempted to sexually abuse Mr. Hall and his brother. PC Ex.20. The jury was also never told that Mr. Hall's mother was using amphetamines during her pregnancy with him, she drank during her pregnancies, and Mr. Hall was born prematurely. PC Exs.6, 20.

While there was a general description of the violence that occurred within and among the family members when Mr. Hall was growing up, the jury only received a sliver of the information available. What passed for "games" among the children in the cramped home was brutal, and likely would have inspired the compassion and mercy of the jury. For example, one of Mr. Hall's cousins recalled a game the children would play, whereby the older children would convince Mr. Hall to climb a tree and then they would set the tree on fire. PC Ex.9, p.2. He also recalled the boys would shoot each other with BB guns, and they would give Mr. Hall an unloaded gun so he was unable to defend himself. *Id*., p.3. Multiple family members also reported going to a nearby rock quarry and throwing rocks at Mr. Hall. *Id*.; PC Ex.20. On several

occasions, Mr. Hall's brother and cousin tied him up and dragged him behind a tractor. PC Ex.9, p.3. Sometimes during these episodes of "play," Mr. Hall hit his head and apparently lost consciousness. *See id*. He also received other head injuries as a child. These included falling out of the back of a pickup truck and off a hay trailer. *Id*.

Even with regard to the testimony of the few witnesses that were presented in the anemic mitigation case at Mr. Hall's trial, there were critical pieces of information that counsel should have elicited. This included the fact that Mr. Hall was abused by his father in utero. According to his sister, Deanna Hormann, during his mother's pregnancy with Mr. Hall, his father would hit or kick his mother in the stomach based on his father's belief that Mr. Hall was not his child. PC Ex.5. This was in addition to the drug abuse that Jean Hall admitted occurred while she was pregnant with Mr. Hall. PC Ex.6.

Ms. Hormann also saw signs of maladaptive behavior from the time that Mr. Hall was little, and she believes Mr. Hall had some form of "imbalance"—apparent to her from an early age—and that Mr. Hall was on the receiving end of the majority of the physical abuse in the household. PC Ex.5. After years of unrelenting abuse, Mr. Hall eventually came to have episodes of unprovoked rage as a teenager, but would have no memory or recall of these episodes after his mental storm had passed. *Id*. Despite these episodes, Ms. Hormann also could have relayed to the jury Mr. Hall's strong, innate protective instinct. Had she been asked about Mr. Hall's compassionate side, the jury could have learned that Mr. Hall kept his little sister "safe and protected" from the violence of their family home, that she never felt Mr. Hall was a threat to her, and that he was a model big brother. *Id*.

Had counsel asked more questions of Cookie Quirk, Mr. Hall's juvenile probation officer, the jury would also have received a much richer picture of her observations of Mr. Hall

and his home life during the five years she knew him. Ms. Quirk could have told the jury about what she saw during her periodic unannounced home visits: a home devoid of all the normal mementos of family life, without pictures of the family, or signs of the children who lived there, like toys or drawings stuck to the refrigerator. PC Ex.29. What she did see during her visits with Mr. Hall was a child who wore the exact same clothes every time she saw him. *Id*. He was often dirty. Mr. Hall would tell her about having to steal food and he had visibly lost weight. *Id*. Based on her training, and her experiences with Mr. Hall, he seemed to be a boy who had been abandoned to the streets for quite some time. *Id*.

B. Circumstances Surrounding Mr. Hall's Placement In Foster Care

With regard to the failure to investigate Mr. Hall's years in foster care, the State relies primarily on an assertion (unsupported by any citation to the record) that the nearly non-existent efforts engaged in by counsel were somehow sufficient. Resp. Br., pp.196-97. In doing so, the State ignores the only information on this issue in the record—the affidavit of Mr. Hall's mitigation specialist. Ms. Dapsauski attested to the inadequacy of the investigation into Mr. Hall's time in foster care. In her words, "We should have conducted a greater investigation of Erick's foster parents. *I conducted little investigation in that regard*." PC Ex.10 (emphasis added). She also acknowledged she made *no* attempt to contact Linda McQuery, one of Mr. Hall's foster parents, despite having information from Mr. Hall about the sexual abuse that occurred within the McQuery home. *Id*. Ms. Dapsauski could recall no reason why Mr. Hall's counsel failed to follow up on this lead. *Id*. The State's argument is contrary to the record and to this Court's standard of review upon summary dismissal.

Jeff Langston was likewise never contacted by the defense. Mr. Langston lived with Mr. Hall for a time in Ms. McQuery's home. He noticed Mr. Hall had issues with hygiene, would constantly wear the same clothes, and would seem to hide away and hoard any new clothes he

received. PC Ex.26. Mr. Langston also could have told the jury of the severe and frequent headaches that Mr. Hall suffered, as well as Mr. Hall's reports of hearing voices, agitated behavior, and irrational belief systems that he observed. *Id*. Additionally, Mr. Langston could have informed the jury of his own experience of sexual abuse within the McQuery home. *Id*.

One of the very few safe harbors in Mr. Hall's childhood was the foster home of Sophronia and Harry Selby. When Mr. Hall was first dropped off at the Selby home, he had absolutely no belongings of his own—just the clothes on his back. PC Exs.27 & 28. Despite the availability of clean clothing—a whole closet to choose from—Mr. Hall seemed to cling desperately to his clothing. *Id*. It took the Selbys almost a week to convince Mr. Hall that it was safe to change his clothes. *Id*. Mr. Hall also seemed reluctant to shower. The Selby family could only convince him to do so a couple of times per week. *Id*. Ms. Selby had fostered many children throughout her years as a foster parent. From her experience, she believed Mr. Hall's behavior was consistent with sexual abuse. PC Ex.27. Mr. Selby thought Mr. Hall was clinging to his threadbare, smelly clothing as some form of protection. PC Ex.28.

The jury never got to hear from the Selby family about the scared, quiet, and insecure little boy who constantly sought to blend in to his surroundings and avoid notice. PC Exs.27 & 28. They did not hear that Mr. Hall would cling to Mr. Selby, and almost never dared to leave the Selby home without Mr. Selby by his side. PC Ex.27. None of the jurors were told that it took nearly four months for Mr. Hall to work up the courage to leave the Selby home without Mr. Selby. *Id*. They never got to hear of the Selbys stopping by Mr. Hall's home to pick up some familiar clothes or belongings for him, and seeing a place strewn with garbage, both inside and out. PC Exs.27 & 28. They never heard that Mr. Selby saw two little girls—he estimated their ages as two and four years old—inside this squalor with no apparent adult supervision. *Id*. Both

girls were dirty and had uncombed hair. The two year old had only a diaper on. The four year old was dressed only in her underwear. PC Ex.28. When he asked the four year old where her mother was, Mr. Selby was told that she was not home. *Id*. The jury never received this vivid picture of the chaos and neglect that Mr. Hall struggled to survive, because the Selbys were never contacted or asked to testify by trial counsel.

All of these stories could have provided the jury with a more complete picture of Mr. Hall's humanity, as well as the extreme trauma that followed him even as he sought temporary reprieve from his family home. But it could have also more fully informed the expert testimony that was given. As explained by Dr. Cunningham, "Such descriptions provide a compelling understanding of the trauma of [Mr. Hall's] childhood, as well as the resultant inadequacy and fearfulness that later took expression in his violent offense conduct." PC Ex.11. These clear markers of severe trauma and fear could help explain behaviors occurring in adult life that the jury might otherwise have simply viewed as "volitionally predatory." *Id*.

Dr. Cunningham also identified information from Mr. Hall's life in foster care as having crucial significance in demonstrating that he suffered from significant psychological dysfunction in his early to mid-teens. PC Ex.11. The vivid descriptions of Mr. Hall's lack of basic self-care and hygiene were indicative of parental deprivation and neglect, as well as "deficient social development and socialization." *Id*. Dr. Cunningham could have also testified about the molestation in the McQuery home. Mr. Hall told Dr. Cunningham he was molested while he was supposed to be under Ms. McQuery's care. PC Ex.11. However, Dr. Cunningham did not discuss this in his testimony because he lacked corroboration of this relationship. *Id*. Had he been aware that Mr. Langston had given similar reports of sexual abuse, he "would have viewed this as providing important confirmation of perverse sexuality in this setting and inferentially

supporting of [Mr. Hall's] reports of also being sexually abused," and he "would have testified to these implications at trial had [he] been aware of Mr. Langston's report." *Id.*

C. Good Character As An Adult

Trial counsel also utterly failed to investigate and present evidence of Mr. Hall's good character as an adult. The State claims such evidence would have "contradict[ed]" the strategy of presenting evidence of Mr. Hall's childhood trauma by showing that he had the capacity for caring, nurturing, and supportive conduct as an adult. *See* Resp. Br., pp.198-99. While the totality of evidence of Mr. Hall's brutalization at the hands of his family, as well as the evidence of head injury and brain trauma, helps to explain some of the deficits Mr. Hall experienced in impulse control, judgment, planning, emotional response, and behavior, these deficits do not render him incapable of empathy, compassion, or love. The fact that Mr. Hall—*despite* his own history of the most extreme abuse and neglect—often sought to care for and protect others only could have attested to his humanity and his worth as an individual, and would have humanized him to the jury. But the jury never got to hear about the depths of Mr. Hall's caring, because trial counsel never bothered to investigate and present evidence of the positive aspects of Mr. Hall's character.

The State relies upon a Ninth Circuit case for the notion that the failure to investigate a viable theory of mitigating evidence is acceptable, so long as counsel believed they were investigating the "strongest defense." *See* Resp. Br., p.199 (citing *Turk v. White*, 116 F.3d 1264, 1266-67 (9th Cir. 1997)). The State's reliance is misplaced for several reasons. First, *Turk* concerned a guilt phase trial, *see Turk* 116 F.3d at 1266-67, not a capital sentencing proceeding where every bit of mitigation would be placed in the balance against each single aggravator in

weighing the ultimate penalty.[65] Second, *Turk* involved a decision between competing and totally incongruous theories of defense. There was a direct contradiction between the theory of self-defense at trial (which was predicated on acting as a reasonable person would) and pursuit of the insanity defense (which required proof that the defendant did not know what he was doing). There is no such contradiction here. Third, *Turk* was decided in the context of the doubly-deferential standard of AEDPA review, which is inapposite to this Court's review of the summary dismissal of Mr. Hall's post-conviction petition. Fourth, *Turk* predates the holdings in *Williams*, *Wiggins*, and *Rompilla*, which rejected the notion that pursuit of one mitigation theory somehow sanctions the failure to conduct reasonable investigation into other theories of mitigation.

Beginning with the understanding that counsel had a duty to conduct a reasonable investigation into readily available evidence of mitigation, counsel's failure to do so regarding Mr. Hall's good character as an adult fell below the most basic prevailing professional norms. For example, Evelyn Dunaway, who testified on behalf of the State at Mr. Hall's sentencing, was not contacted by the defense even though she had volumes of information about Mr. Hall's caring nature that she could have shared with the jury. The jury received only slivers of information about the positive side of Mr. Hall's character through her testimony compared to what could have been presented.

The jury was told that Mr. Hall tried to help keep Ms. Dunaway off of drugs. 31528 Tr., p.4853, Ls.11-12. But trial counsel never investigated or pursued this issue. Had counsel done so,

[65]Notably, even at the guilt stage, the reach of *Turk* is limited. The very court which issued *Turk* recently rejected a request to extend its holding to cases where counsel failed to investigate other potentially viable defenses. *See Bemore v. Chappell*, 788 F.3d 1151, 1162-69 (9th Cir. 2015). It held the mere fact that counsel selected one defense at trial did not excuse the duty to reasonably investigate other potential defenses. *Id*. at 1166-68.

the jury would have learned of Mr. Hall's efforts to save Ms. Dunaway from the debilitating effects of her methamphetamine addiction. The jury never learned, that Mr. Hall was kind and patient with Ms. Dunaway as he tried to help her kick her drug habit, and made efforts to keep other drug users away from their home to reduce her temptation to use meth. PC Ex.40, p.2.

Trial counsel elicited testimony that there was another family with small children staying in their home when the two lived together. 31528 Tr., p.4850, Ls.9-13. But counsel never asked any questions that would have shown how Mr. Hall stepped into the role of caretaker for these children. The jury was never told how Mr. Hall took care of one of the young boys, Wesley, when he was sick with a cough. Mr. Hall would "sit Wesley up to ease his cough, and then … spoon fe[e]d him some medicine to make him feel better." PC Ex.40, p.2.

The jury heard about the fights and the eventual drug use that Mr. Hall and Ms. Dunaway engaged in, but never heard that Mr. Hall would bring Ms. Dunaway flowers almost every day. *Id*., p.3. They never heard of how he would help to fix up old bicycles for people who otherwise would have no transportation, and allowed people into his home who otherwise would have no place to stay. *Id*. The jury also never heard of Mr. Hall's insecurity, his lack of adaptive skills, or his need for Ms. Dunaway's near-constant presence. *Id*. They were not told that Mr. Hall seemed to lack basic life skills, and struggled with even a rudimentary understanding of managing money. *Id*.

This description of Mr. Hall as having limited life skills and low self-esteem, but a strong ethic of care, could have also been attested to by Wendy Levy and her daughter, Jennifer Demunbrun. Ms. Levy was a friend of Mr. Hall. They shared a common bond as survivors of childhood sexual abuse. PC Ex.2, p.2. During the time they stayed together, Mr. Hall would help around the house with all of the chores. *Id*. But he had a particular talent when it came to taking

care of the children in the home, including Ms. Levy's special needs daughter. *Id*. The children began to refer to Mr. Hall as their "uncle" because of the protection and support he would show them. *Id*.; PC Ex.41, p.2. While their mother was at work, he would take the children to the park to feed the ducks, watch over them vigilantly, and prepare their meals. PC Ex.41, pp.2-3. He would take care of the children if they fell ill. *Id*. Mr. Hall never raised his voice or lost his temper with the children, and never behaved violently toward their family. *Id*., p.3.

Ms. Demunbrun was the beneficiary of Mr. Hall's caretaking. Like Ms. Dunaway, Ms. Demunbrun saw how Mr. Hall used his talent with his hands and mechanical intuition to rebuild bicycles for the children. *Id*., p.5. When Ms. Demunbrun eventually had a daughter herself, Mr. Hall drew pictures of Winnie the Pooh and Tigger for her little girl. *Id*. He helped Ms. Demunbrun in her struggle to get off drugs, and was even there for her when she was occasionally hospitalized for ulcers on her tonsils. *Id*. During those times, Mr. Hall would visit Ms. Demunbrun, watched her children for her, and helped her with the painful process of eating, drinking, and taking her medicine. *Id*.

Timothy Turley, a friend of Mr. Hall's for nearly 20 years, also never had the chance to tell the jury about the positive contributions Mr. Hall made to the lives of those around him. When Mr. Turley's pregnant wife went into labor, it was Mr. Hall who drove her to the hospital. He stayed with her throughout the birth of Mr. Turley's child while Mr. Turley was taken to a detox center at Port of Hope. PC Ex.42. Mr. Hall eventually became the godfather of one of Mr. Turley's daughters. *Id.*

When Mr. Turley was at a nadir in his life, and planning to kill himself, it was Mr. Hall who intervened. Mr. Hall literally took the gun from Mr. Turley's mouth and stayed with Mr. Turley for several hours until he was more emotionally stable. PC Ex.42, p.4. During times

when Mr. Turley was "drug sick" from heroin, Mr. Hall would sit with him and hold him in his arms, all the while encouraging Mr. Turley to quit the drugs that were making him ill. *Id.*, pp.4-5. Mr. Turley also spoke of Mr. Hall giving shelter and food to anyone who needed it. *Id.*, p.4.

Defense counsel spoke to Ms. Demunbrun through their mitigation specialist. PC Ex.41, p.2. Defense counsel also spoke to Mr. Turley and were aware of the critical information he could have presented at Mr. Hall's trial. PC Ex.42, p.2. Though counsel possessed this compelling mitigation evidence showing the depths of Mr. Hall's capacity for nurturing and compassion, they failed to present any of it. Thus, they missed an opportunity to provide a critical counter-narrative to the State's claim that Mr. Hall was nothing but a monster.

D. Prejudice

Throughout the State's response it repeats the claim that this information was merely cumulative of what was already presented at trial. Resp. Br., pp.189-200. Even a cursory comparison of the volumes of mitigating evidence that was never developed or discovered, with the paltry amount of evidence that the jury received, reveals this claim to be false. Moreover, the crux of the State's claim is that because trial counsel presented some small measure of mitigating evidence, it is not material to examine the full weight of what was omitted or ignored. This argument is contrary to the weighing process required by Idaho's capital sentencing scheme, controlling precedent of the Supreme Court, and the nature of mitigating evidence itself. In Idaho, a jury weighing whether to impose a death sentence is charged with weighing the cumulative mitigation from throughout the trial and sentencing against each individual aggravator. I.C. § 19-2515(3)(b). Given the nature of this process, every piece of information about a particular defendant that makes him more human or relatable, or provides evidence of diminished overall culpability, tips that balance toward life. The State's argument asks this Court

to overlook the cumulative and substantial weight of the evidence that the jury never had the chance to consider. This is the opposite of the review that the law requires.

In evaluating prejudice from counsel's failure to investigate or present readily available mitigating evidence, the focus of this Court's review is not on what was presented, but on what was not. Moreover, this review is *cumulative* as it relates to mitigating evidence. *See Williams*, 529 U.S. at 397-98. The cumulative nature of review requires both that: (1) all of the evidence that could have been presented, but was not, be weighed as a whole against the State's case in aggravation, rather than in isolation; and (2) this entirety of the evidence not presented also be weighed as a whole alongside the mitigation that was presented against the State's aggravating evidence. *Id*. Thus, the proper question for this Court is not whether trial counsel presented *something* in the nature of a mitigation case, but whether, in light of the totality of *all* of the mitigating evidence that was and should have been presented, confidence in the jury's verdict has been undermined.

The omitted evidence would have painted a picture for the jury of a little boy who was tied up and dragged behind vehicles, pelted with rocks, sexually and physically abused, deprived of basic life necessities like food and clothing, and left a terrified shell of a child who was afraid to leave the confines of his foster home without the protective presence of a safe adult. The jury could have heard from experts about how that trauma leaves scars on a person's psyche, which carry through to adulthood and manifest through behavior and emotional development. The jury could have also learned, despite all of that, Mr. Hall retained a drive to care for and protect others, particularly the vulnerable. Each piece of evidence, and each humanizing vignette, would have weighed the scale further toward life. In so doing, Mr. Hall raised a genuine issue of material fact as to prejudice.

XXXIX. The Court Erred In Summarily Dismissing Mr. Hall's Claim That Counsel Were Ineffective For Failing To Adequately Investigate The State's Evidence Regarding Ms. Oliver

The State argues counsel had ample preparation time in response to Mr. Hall's direct appeal claim that the Oliver evidence should not have been admitted because the passage of time and loss of evidence made it impossible for Mr. Hall to adequately defend against the Oliver allegations.[66] Resp. Br., p.96. Thus, the State suggests counsels' deficiencies led to Mr. Hall's inability to adequately defend himself against the Oliver allegations. *See id*. Now, however, the State takes the opposite position, arguing counsel were not deficient in failing to more thoroughly investigate the Oliver case because defense lawyers have "limited time and resources," *id*. at 200-01 (quoting *Mahaffey v. Page*, 151 F.3d 671, 685 (7th Cir. 1998), *vacated in part*, 162 F.3d 481 (7th Cir. 1998)), and suggesting an attorney's heavy workload excuses a failure to properly investigate in a particular case. Besides the obvious fact that the State cannot have it both ways, the State's argument fails because it is misleading regarding the proper standard for evaluating a failure to investigate. When *Mahaffey* spoke of a defense lawyer's time and resources, it did so in the context of explaining why the Constitution does not required a "scorch-the-earth" investigation strategy; it requires a "reasonable" investigation strategy. *Mahaffey*, 151 F.3d at 685. And a "reasonable" investigation is one that is curtailed only if a "reasonable professional judgment[ ] support[s] the limitation[ ] …." *Strickland*, 466 U.S. at 691; *accord Wiggins*, 539 U.S. at 521-23. If counsel simply lacked the time or resources to investigate, that fact alone does not justify curtailing the investigation. The ABA Guidelines make it clear that counsel have an obligation to thoroughly and independently investigate issues relating to the penalty phase of a capital case. *See* ABA Standard 10.7.A (available at PC Ex.1, p.77). This includes an obligation to investigate potential aggravation evidence, including prior

[66]*See* Section XIX.E, *supra*; App. Br., pp.85-87.

convictions. ABA Standard 10.7 cmt. (available at PC Ex.1, p.86), *see also Wiggins*, 539 U.S. at 524 (reiterating that the ABA Guidelines are "guides to determining what is reasonable" investigation).

The State alternatively argues that since Mr. Myshin later sought to defend his failure to investigate the Oliver evidence on the basis that he "wasn't worried about [the Oliver] case" because it was not similar to this one and it would not be "significant aggravation," it was a tactical decision immune from challenge. Resp. Br., p.201 (quoting PC Ex.13, p.19); *see also* PC Ex.13, p.274, Ls.15-21. However, to the extent Mr. Myshin truly believed evidence of a prior forcible rape, including allegations of strangulation, was dissimilar to this case and/or would not impact the jury's decision on whether to impose the death penalty, his assessment was objectively unreasonable. *See Wiggins*, 539 U.S. at 527 ("In assessing the reasonableness of an attorney's investigation … a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further …. *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy."). At least a year before trial, the State put Mr. Hall's counsel on notice that it intended to argue the Oliver evidence fit a pattern of behavior—choking women during sex, particularly with their own clothing. *See* 31528 R., pp.107-08. The State went so far as to claim the similarities suggested a *modus operandi* which would have made the Oliver evidence admissible during the guilt phase to show the identity of Ms. Henneman's killer. *See generally* 31528 R., pp.98-119. And while the State later withdrew its request to use the Oliver evidence during the guilt phase, it gave notice of its continuing intent to use it at sentencing. 31528 R., pp.165-66. Thus, counsel was

aware that the State would be trying to use the Oliver evidence to portray Mr. Hall as a monstrous person, no longer deserving of life. *See* 31528 R., pp.373, 405. Specifically, counsel knew the State would argue, as it ultimately did,[67] that Mr. Hall should die because his pattern of sexual violence against women proved the Propensity aggravator. *See* 31528 R., p.405. Since this evidence would be relied upon to prove a critical aggravator, counsel should have been prepared to defend against it. While the Oliver evidence was not actually relevant to the Propensity aggravator because it did not tend to show that Mr. Hall has a propensity *to commit murder*, *see* Section XIX.A, *supra*; App. Br., pp.79-80, it did show repeated sexual misconduct, and even violence, against women, which is itself extraordinarily prejudicial. Effective counsel would have recognized the aggravating nature of evidence of a prior forcible rape, regardless of whether it was offered to prove a statutory aggravator. *See, e.g., State v. Stuart*, 110 Idaho 163, 175-77 (1985) (affirming death sentence, in part, based on defendant's history of raping, beating, and strangling women), *overruled, in part, on other grounds by State v. Tribe*, 123 Idaho 721 (1993). Rape is an odious offense, but *forcible* rape is especially abhorrent. Competent counsel would have recognized the risk that the jury would impose the death penalty based on nothing more than a pattern of sexual violence against women.

The State also attempts to downplay the significance of the undiscovered trove of evidence concerning Ms. Oliver's mental health problems, arguing the jury would have known of those problems because: (1) she explained she had been "at Intermountain Hospital, a well-known in-patient psychiatric hospital"; (2) she testified she had a "chemical imbalance"; and (3) Mr. Myshin later testified it was obvious to him—primarily when he interviewed her outside the presence of the jury—that "she was having problems." Resp. Br., p.202. These arguments are

[67] *See* 31528 Tr., p.5456, L.20-p.5457, L.11 (comparing the crimes in arguing Propensity), p.5507, L.6-p.5509, L.25 (arguing that his violence against women proves Propensity).

unpersuasive. First, the State simply *assumes* jurors would have known that Intermountain Hospital is a psychiatric facility because that fact was never put into evidence; however, that is not a reasonable assumption. Unless one has had significant contact with the criminal justice system, worked in the mental health field, or had a close relationship with someone with severe mental illness, the average person would have absolutely no basis to know that Intermountain Hospital is a psychiatric institution, as opposed to a "regular" hospital. Second, to say Ms. Oliver had a "chemical imbalance" is to seriously understate her problems. The phrase "chemical imbalance" is so ambiguous as to be unhelpful. On the other hand, bipolar disorder and borderline personality disorder are identifiable diagnoses with specific symptoms. Finally, Mr. Myshin's testimony as to Ms. Oliver's fragile state, her "hysteria," and the fact that "[s]he was a mess" and "[i]t was obvious to [him] she has mental problems," during his interview with her, PC Ex.14, p.329, L.5-p.330, L.8, is unhelpful; he admitted that by the time she took the witness stand at trial, "she was a little bit better," *id.*, p.333, Ls.11-12. He did say that when Ms. Oliver testified, "She looked like she was having a lot of problems"; however, he did not say she looked like she had mental health problems. *Id.*, p.33, L.13. It could very easily have appeared that Ms. Oliver was simply upset about trauma inflicted upon her by Mr. Hall. Indeed, Mr. Myshin acknowledged that even during the interview—when Ms. Oliver was more hysterical—her symptoms of being mentally ill were that she was "upset," "confused," "pathetic," "pitiful," "afraid," and "afraid to relive the case." *Id.*, p.329, Ls.5-9, p.388, L.18-p.389, L.3. These symptoms could easily be taken for trauma (which would tend to suggest Mr. Hall's guilt), as opposed to mental illness (which could suggest she was fabricating or exaggerating her story). Indeed, Mr. Myshin acknowledged that his belief that she was mentally ill stemmed from his unique perspective (he observed Ms. Oliver during the interview, he was

exposed to Ms. Oliver when he represented Mr. Hall in the Oliver case in 1991, and he was an experienced criminal defense lawyer). *See id.*, p.329, L.5-p.330, L.8. Thus, his opinion of Ms. Oliver's state cannot necessarily be imputed to the lay jurors.

The State argues counsel's failure to delve into the substantial delay between the alleged forcible rape and Ms. Oliver's disclosures is irrelevant because such delayed disclosures are common. Resp. Br., p.203. However, even if the State would have been permitted to offer expert opinion testimony informing the jury that such delayed disclosures are common, that does not mean the jury would have had to believe the State's expert and completely discount the significance of the delay. *See State v. Blackstead*, 126 Idaho 14, 22 (1994) (finding no error in the admission of expert testimony on the phenomenon of delayed disclosure, and making it clear that it is for the jury to ultimately determine whether the late-disclosed allegations are credible). Further, had counsel actually investigated the Oliver evidence, they could have presented evidence that not only was there a significant delay in Ms. Oliver's reporting, but during the intervening period she visited friends at a motel where she exhibited behavior seemingly inconsistent with recently having suffered a brutal forcible rape: "her behavior was flirtatious and was she [sic] comfortable engaging in physical and sexual behavior with the other males …." PC Ex.54, p.2.

The State also argues that Mr. Hall "fails to explain why N.O. would embellish her story when he admitted to having intercourse" with a minor. Resp. Br., p.203. That is not true. Mr. Hall has argued Ms. Oliver had a motive to lie because Mr. Hall had previously reported her as a runaway,[68] causing her to be arrested. *See* App. Br., p.196. If Ms. Oliver wanted retribution,

[68]The State contends evidence of Ms. Oliver's runaway status was already before the jury because Det. Hess testified that Mr. Hall knew she was a runaway, and said he "had run her off." Resp. Br., p.203 (quoting 31528 Tr., p.4799, Ls.4-8). However, Det. Hess' testimony did not

it would have obviously been far more impactful to allege a violent forcible rape, than to simply allege a "statutory" rape.[69] Alleging forcible rape, as opposed to admitting willing participation in "statutory" rape also would have allowed Ms. Oliver to avoid responsibility for her own actions if she feared her abusive father would blame her for having sex with Mr. Hall.

The State also argues about the photos depicting bruises on Ms. Oliver's body that were attributed to Mr. Hall. Resp. Br., pp.203-04. The State contends there is no evidence suggesting those bruises were caused by Ms. Oliver's father in the time between the alleged rape and its reporting. *Id*. The State is correct, to an extent. There is no evidence to suggest Ms. Oliver went home between the alleged rape and its reporting.[70] However, that does not mean Mr. Hall's argument fails. The fact remains that, had the defense conducted a proper investigation and discovered that Ms. Oliver's father was physically abusive, counsel could have presented this evidence as an alternate theory for the source of Ms. Oliver's injuries. *See* PC Ex.57B, p.34, L.1-p.37, L.13.

The State also takes issue with Mr. Hall's contention that effective counsel would have discovered Ms. Oliver's arrest history, including evidence of her dishonesty with the police. *See* Resp. Br., p.204. The State claims there is no evidence to support Mr. Hall's contention. *Id*.

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capture the full gravity of the situation. The testimony about Mr. Hall having "run her off" is ambiguous and certainly does not convey the fact that Mr. Hall, *clearly concerned for Ms. Oliver's well-being*, called the police on December 2, 1991, to report her as a runaway (two days before the alleged forcible rape), and thus caused her to be arrested that night. *See* PC Ex.61, pp.1-2. Because it does not make it clear that Mr. Hall caused Ms. Oliver to be arrested, the testimony relied upon by the State in no way informed the jury that Ms. Oliver had a reason to be angry with Mr. Hall and, therefore, had a motive to make a false report.

[69]Ms. Oliver may not have even understood that, because she was seventeen at the time, Mr. Hall committed the crime of rape by having sex with her.

[70]When making this claim originally, *see* App. Br., p.197, undersigned counsel misinterpreted the evidence. In early December 1991, Ms. Oliver was arrested as a runaway on two different occasions just two days apart, both times at the Sands Motel. In preparation of the opening brief, it appears undersigned counsel mixed up the two arrests. Counsel apologizes for any confusion this error caused.

However, Ms. Oliver had many prior adjudications—for running away (three times), joyriding (twice), battery, and assault. *See* PC Ex.58. In addition, it appears she was arrested for running away on at least three *other* occasions. *See* PC Exs.60, 61, 62. And during these arrests Ms. Oliver used at least two different aliases. *See* PC Exs.60 & 61. So there is ample support for the contention that counsel were ineffective for failing to investigate Ms. Oliver's arrest record.

Finally, the State takes issue with Mr. Hall's representation that, after his trial, one of the jurors said the Oliver evidence had "the greatest impact on the jury." Resp. Br., pp.204-05 (quoting App. Br., p.197 (citing PC Ex.87)[71]). The State assumes Mr. Hall relied on an affidavit of a juror and, thus, accuses his counsel of engaging in misconduct for procuring such an affidavit. Resp. Br., pp.204-05. However, the State's objection is misplaced. Mr. Hall's contention is amply supported by a portion of the record obtained properly. He meant to cite Exhibit 86 of the final amended petition, which consists of copy from a local news outlet's coverage of Mr. Hall's case. *See generally* PC Ex.86. Included was copy from a December 10, 2006, broadcast which included a quote from a juror who stated Ms. Oliver's testimony had the greatest impact on the sentencing verdict. PC Ex.86.[72]

XLI. The Court Erred When It Summarily Dismissed Mr. Hall's *Brady* Claims Regarding Several Of The State's Witnesses

The State violated Mr. Hall's due process rights by suppressing exculpatory evidence, including impeachment evidence that could have been used to discredit and undermine Ms. Oliver's and Ms. Deen's testimony. Specifically, the State withheld evidence of Ms. Oliver's

[71]The citation to exhibit 87 in the opening brief was a typographical error. It should have read, "PC Ex.86."

[72]Having said that, Mr. Hall recognizes he likely could not use the juror's testimony to prove the prejudice prong of the ineffectiveness standard. *See* IRE 606(b); *Payne*, 159 Idaho at 885; *see also Roberts*, 132 Idaho at 496.

various mental disorders and Ms. Deen's felony convictions—evidence that could have been used to undermine the credibility of both witnesses and cast doubt on their testimony.

Brady v. Maryland, 373 U.S. 83 (1963), holds that a State violates a defendant's due process rights when it suppresses evidence favorable to a defendant, where such evidence is material either to a defendant's guilt or punishment. *Id.* at 87. There are three components to a *Brady* violation: (1) the evidence must be favorable to the accused, which includes impeachment evidence relating to state witnesses; (2) the evidence must have been suppressed by the state, either intentionally or inadvertently; and (3) prejudice must have ensued. *Stickler v. Greene,* 527 U.S. 263, 281-82 (1999).

The State argues that because Jay Rosenthal was no longer employed by Ada County at the time of Mr. Hall's trial in this case, his knowledge of exculpatory evidence from the Oliver case cannot be imputed to the State. Resp. Br., p.224. However, knowledge of exculpatory information is imputed to prosecutors, even when the evidence is not personally known by the particular prosecutor, so long as it is known by prosecutorial staff (including fellow prosecutors in the same office) or government agents investigating a particular case. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 438 (1995) (police investigator); *Giglio v. United States,* 405 U.S. 150, 154 (1972) (fellow prosecutor); *United States v. Thornton*, 1 F.3d 149 (3d Cir.1993) (Drug Enforcement Administration agents); *United States v. Morell*, 524 F.2d 550, 555 (2d Cir. 1975) (government agent supervising confidential informant); *see also Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987) (assuming, *sub silentio,* that a state prosecutor had constructive knowledge of information contained in state child services division's investigative files). Prosecutors are also constitutionally obligated to look for exculpatory evidence that can be had by a routine investigation of their own files, or the files of other agencies. *See, e.g., Crivins v. Roth*, 172 F.3d

991, 997-98 (7th Cir. 1999); *Hollman v. Wilson*, 158 F.3d 177, 181 (3d Cir. 1998); *United States v. Santiago*, 46 F.3d 885, 893-95 (9th Cir. 1995); *United States v. Wood*, 57 F.3d 733, 737 (9th Cir. 1995). Thus, Mr. Rosenthal's knowledge of the Oliver case was imputed to the prosecution team from the same office in this case.

Moreover, the State seems to suggest that counsels' failure to *independently* learn of exculpatory impeachment evidence regarding Ms. Deen and Ms. Oliver somehow excuses it from complying with its constitutional obligations under *Brady*. Resp. Br., pp.226-28. However, the Supreme Court has explicitly rejected the argument that a prosecutor's constitutional duties are excused by a defendant's (or his counsels') lack of diligence. *Banks v. Dretke*, 540 U.S. 668 (2004). In. *Banks*, the Supreme Court held:

> Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed. […]
>
> The State here nevertheless urges, in effect, that "the prosecution can lie and conceal and the prisoner still has the burden to ... discover the evidence," so long as the "potential existence" of a prosecutorial misconduct claim might have been detected. *A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process*.

Id. at 695-98 (internal citations omitted) (emphasis added). *See also Amado v. Gonzalez*, 758 F.3d 1119, 1136-37 (9th Cir. 2014) ("a prosecutor should not be excused from producing that which the law requires him to produce, by pointing to that which conceivably could have been discovered had defense counsel expended the time and money to enlarge his investigations."). Because there is no due diligence requirement, the State's reliance on such an argument to excuse its failure to comply with its *Brady* obligations, must be rejected.

XLIII. The Court Erred In Denying And Summarily Dismissing Mr. Hall's Claims Alleging Prosecutorial Misconduct During Sentencing[73]

The State primarily argues that Mr. Hall's misconduct claims were inappropriately raised in post-conviction and it cites a Court of Appeals case—*Bias v. State*, 159 Idaho 696 (Ct. App. 2015)—in support of this proposition. Resp. Br., pp.236-39. However, *Bias* was decided under the UPCPA, not Idaho's capital post-conviction statute. As explained in Section XXXIII, *supra*, because this is a capital case, section 19-2719 controls over the UPCPA, and under that section there is no prohibition against raising claims that theoretically could be pursued on direct appeal.

XLVI. The Court Erred In Summarily Dismissing Mr. Hall's Claim That Counsel Were Ineffective Insofar As They Labored Under A Conflict Of Interest Adversely Affecting Their Performance At Sentencing

The State's arguments addressing the denial and dismissal of Mr. Hall's ineffectiveness claim relating to his counsel's conflict of interest are unremarkable, *see* Resp. Br., pp.209-10, and are adequately addressed in Mr. Hall's opening brief, *see* App. Br., pp.220-22. Thus, no further argument is needed.

However, in response to Mr. Hall's related direct appeal claim concerning the conflict of interest, *see* Section XVIII, *supra*; App. Br., pp.68-73, the State offers arguments based on evidence submitted during post-conviction proceedings. *See* Resp. Br., pp.83. In addressing the question of whether Mr. Myshin forwent potentially effective cross-examination of Ms. Sebastian concerning her motive to shade her testimony for the benefit of the State (*i.e.*, her hope for probation following her rider), the State says there was not "any evidence" that

[73]The section heading for this claim, along with Claims XLIV, XLV, and XLVIII, in Mr. Hall's opening brief omitted the words, "Denying And." Thus, they read as if his arguments were solely that the court erred in summarily dismissing these claims. However, the body of his arguments make it clear that he contends the court not only erred in dismissing these claims, but also that it erred in failing to grant him relief. *See* App. Br., pp.214-20, 229-35. In this brief, the section heading better reflects the argument actually made. Further, because this is an error that occurred with regard to multiple ineffectiveness claims in Mr. Hall's opening brief, in each instance it should be corrected.

Ms. Sebastian was not a good candidate for probation. Resp. Br., p.84. That is not true. While on her rider, Ms. Sebastian received a DOR for lying to IDOC staff.[74] *See* 41059 Supp. R., p.979; PC Ex.111.

The State also cites Mr. Myshin's deposition, during which he defended his decision to proceed with his cross-examination of Ms. Sebastian despite the existence of a conflict of interest. *See* Resp. Br., p.84. The State suggests Mr. Myshin's testimony supports the conclusion that he did not "pull punches" in cross-examining Ms. Sebastian. *See id*. However, the reality is that Mr. Myshin's testimony is of no value. Although he chose to believe he had not performed unethically or incompetently, Mr. Myshin readily admitted he could not remember the details of his examination of Ms. Sebastian:

> Q. … [T]he petitioners claim that you could have pushed, so to speak, you could have cross-examined harder on April Sebastian and that you didn't do that because of what he claims is a conflict between you and April Sebastian because you represented her during that period of time. Do you remember your thinking about April Sebastian and what you thought you could accomplish by cross-examining her differently than you did?
>
> A. *I guess the only way I could answer that is in a general way*. And that is, I thought I was getting what I needed out of her. I think there is a finesse element in it where you can come off as a bully …. *I don't know because it's been a while* since I looked at that transcript, but I thought she was saying things that were helping us as well.
>
> [….]
>
> Q. Did you not ask her any question or probe any area because you represented her and you were trying to be nice to her, for her sake I mean?
>
> A. *I don't remember*. I don't think so. I did like her. I still do.
>
> Q. I guess what my question is, did you think that there was information that she had that you just didn't ask her about because you liked her?
>
> A. I don't think I would do that, no.
>
> Q. I mean, was the fact that you represented her and represented Erick both at the same time, was that a conflict that caused you to not ask her questions that you could have?

[74]The DOR occurred on September 24, 2004. PC Ex.111. That was a month before Ms. Sebastian testified at Mr. Hall's trial on October 23, 2004. *See* 31528 Tr., p.4875, L.19-p.4896, L.17. Thus, it is feasible that Mr. Myshin knew about the DOR when he cross-examined Ms. Sebastian at Mr. Hall's trial.

> A. Well, *I don't remember*. I don't think so, but *I don't remember*. I don't know what that would be other than to try to belittle her.
>
> Q. Did you think —
>
> A. I really try not to let my personal feelings affect the way I perform…. And *to sit here now and think about two or three years ago and why I did something, I just don't know*. I think I told you guys before, my cross-examination is generally all in my head ….
>
> So that's why it's really hard for me now to say, "I had this feeling when I was doing it or that feeling when I was doing it." *I can't honestly tell you today that there was anything I held back about her. I just don't think I would do that. But I can't—honest to God, I just don't remember*.

PC Ex.14, p.385, L.13-p.388, L.5 (emphasis added). And in terms of Mr. Myshin's assumption that he would not have acted unprofessionally, his speculative denials of culpability are hollow because no lawyer would *assume* he was unethical and/or incompetent and, even if he suspected he was, he would be unlikely to readily admit as much. After all, he chose to proceed with Mr. Hall's case knowing he concurrently represented two clients with adverse interests, suspecting that this concurrent representation was unethical. *See* 31528 Tr., p.4871, Ls.22-25.

XLVII. The Court Erred In Summarily Dismissing Mr. Hall's Claim That Counsel Were Ineffective For Failing To Adequately Challenge Admission Of The Oliver Evidence

The State's arguments addressing the dismissal of Mr. Hall's ineffectiveness claim relating to his counsel's failure to make fuller objections to the Oliver evidence are unremarkable as to subclaims A through D and are adequately addressed in Mr. Hall's opening brief. However, the State's response regarding subclaim E warrants a response.

In subclaim E, Mr. Hall argues that, "[a]ssuming *arguendo* the Oliver evidence was generally admissible … it was error to have admitted certain of its specifics," *i.e.*, the assessment of the prosecutor from the 1991 Oliver case as to the strength of a forcible rape charge, and that counsel should have objected to that testimony as prosecutorial misconduct. App. Br., pp.226-29. In response, the State argues the prosecutor's opinion testimony about the strength of the forcible rape case was not offered to vouch for Ms. Oliver's testimony, but rather to explain why the

prosecutor did what he did in the 1991 case. *See* Resp. Br., pp.212-13. The question of why the charge was amended was irrelevant. This Court has noted that why a law enforcement representative acted as he did is generally not relevant, and eliciting such testimony "is often … a ruse to put inadmissible evidence before the jury improperly." *Parker*, 157 Idaho at 145 (rejecting the State's argument that, for the sake of showing "the effect on the listener," it was entitled to expose the jury to inadmissible hearsay). Clearly, the State just wanted the jury to know Prosecutor Rosenthal believed he had a strong case for a forcible rape conviction.

Further, even if an explanation of the State's reasoning in the 1991 case was somehow relevant to Mr. Hall's sentencing in this case, the State went too far. The substance of Prosecutor Rosenthal's testimony was as follows:

> Q. Did there come a time when you amended the charges in that case from forcible rape to statutory rape?
>
> A. Yes, we did.
>
> Q. Can you explain to the jury why you did that?
>
> A. Norma Jean Oliver, when the crime was committed, was just barely 17. I think had turned 17 within a month or so of the crime. She was vulnerable, she was fragile, she was terrified and simply was unable to effectively go on with the case in front of a jury.
>
> Q. Did you discuss her testimony with her medical health professionals?
>
> A. I did.…
>
> Q. And ultimately did you decide that you could not proceed to trial with her [Ms. Oliver] as a witness?
>
> A. I did. It was my decision, as well as the recommendation of the those [sic] people who were treating her.
>
> Q. So how did you proceed?
>
> A. Proceeded with a reduction to a statutory rape and a negotiated resolution.
>
> *Q. And that was because of the weakness in your case?*
>
> *A. It was because of the inability of Norma Jean to be able to sit in a situation like this and in front of a jury and be subjected to cross examination.*

31528 Tr., p.4952, L.25-p.4954, L.9 (emphasis added). By the time it came to the final question and answer, the reasoning behind the plea agreement had been made clear; the final piece of testimony was gratuitous. Any honest reading of that testimony reveals it was a naked attempt to

elicit testimony vouching for Ms. Oliver's account of the 1991 case.

XLIX. The Court Erred In Denying And Summarily Dismissing Mr. Hall's Claim That Counsel Were Ineffective For Failing To Challenge The Non-Statutory Aggravation Evidence

With regard to the failure to instruct, the State misses the primary thrust of Mr. Hall's argument.[75] His contention is that, in the absence of some instruction from the court, the jury had no way of knowing how to utilize non-statutory aggravation evidence (assuming, without conceding, that it was somehow properly admitted). *See* App. Br., pp.236-37. The jury instructions said nothing about consideration, or weighing, of non-statutory aggravation evidence; in fact, they specifically instructed jurors on a weighing process that omitted any reference to non-statutory aggravation evidence. 31528 J.I.39 & J.I.48.[76] Thus, the jurors would have had no idea how to utilize the non-statutory aggravation evidence, and it is likely different jurors used it differently.

L. The Court Erred In Denying And Summarily Dismissing Mr. Hall's Claim That Counsel Were Ineffective For Failing To Challenge The Victim Impact Evidence

The district court erred in denying and dismissing Mr. Hall's claim that counsel were ineffective for failing to seek limitation on the jury's use of victim impact evidence (VIE). App. Br., pp.237-41. Specifically, since VIE is not relevant to any of the jury's tasks under Idaho's death penalty statute, the jury should have either heard that evidence after reaching its sentencing verdicts or, at a minimum, it should have been strongly admonished not to consider the VIE in its verdicts, and the failure of counsel to ensure the jury did not use the VIE incorrectly constituted ineffective assistance. *Id*., pp.239-41 & n.91.

[75]The State focuses primarily on whether non-statutory aggravation evidence must be proved beyond a reasonable doubt. *See* Resp. Br., pp.215-18. However, this is a side issue. The burden of proof is an important question only if this Court determines non-statutory aggravation evidence is, in fact, admissible under Idaho's death penalty statute.

[76]In contrast, jurors *were* instructed as to how to consider the evidence specifically contemplated by the statute. 31528 J.I. 39, 42, 43 & 48.

In response, the State invokes the district court's erroneous conclusion that counsel's acquiescence to a pattern jury instruction defining a victim impact statement was tactical, as was counsels' decision not to ask for an instruction explaining how VIE should be utilized. Resp. Br., pp.218-20. Further, it suggests such a "tactical decision" is immune from challenge. *See* Resp. Br., pp.218-20.

First, Mr. Hall has argued the court clearly erred in finding that counsel made a tactical decision. *See* App. Br., pp.238-39 n.90. In response, the State does not attempt to argue the court's finding was supported by substantial, competent evidence (indeed, there is no such evidence); instead, it claims the court's finding was actually something different—a *presumption*. *See* Resp. Br., pp.219-20. The court did not invoke any presumption; it simply described counsels' failure as a "strategic decision," as if it were fact. *See* 41059 R., p.2184 ("[T]rial counsel's strategic decision not to object to the language of Idaho Criminal Jury Instruction 1710 was not objectively unreasonable.").[77] Thus, the State's argument is without merit.

Second, merely labeling an act or omission of counsel "strategic" or "tactical" does not immunize counsels' conduct from scrutiny. As noted, the Supreme Court has held that the "relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Flores-Ortega*, 528 U.S. at 481. Here, even if counsels' failure to seek a limitation on the jury's use of the VIE is labeled "strategic," it was objectively unreasonable and, therefore, deficient. There is no reason for competent defense counsel to refrain from seeking to prevent the sentencer in a capital case from considering highly-emotional VIE when deciding whether a

[77]Mr. Hall did not claim simply that counsel should have objected to ICJI 1710; he argued more broadly that the jury should have been instructed as to how to utilize the VIE (if at all). 41059 R., pp.1211-12. This could have been done by modification of ICJI 1710, or by an additional instruction.

statutory aggravator has been proved, or in electing whether to impose the death penalty, where state law does not provide for the jury's consideration of such evidence at either stage. There could virtually never be anything mitigating in VIE evidence, and such evidence is likely to be extremely prejudicial. *See Payne v. Tennessee*, 501 U.S. 808, 825-27 (1991). Accordingly, there was no objectively reasonable basis for counsel to have failed to attempt to limit the jury's consideration of the VIE in this case.

LI. The Court's Summary Dismissal Of Mr. Hall's Capital Petition For Post-Conviction Relief Violated His Right To Procedural Due Process

The State argues Mr. Hall failed to provide sufficient authority to support his claim that the district court violated his procedural due process rights by failing to grant him an evidentiary hearing. Resp. Br., pp.220-21. The State ignores Mr. Hall's citation to both United States and Idaho Supreme Court authority in support of this claim, *see* App. Br., pp.241-43, and instead focuses on court decisions addressing the 42-day filing requirement of Idaho Code section 19-2719, arguing the principles announced in those decisions are controlling of this issue. Resp. Br., pp.221-22.

The standard for determining the constitutionally mandated process for ensuring that Mr. Hall's due process right to be heard on his post-conviction claims, at a meaningful time, in a meaningful manner, is set forth in *Mathews v. Eldridge*, 424 U.S. 319, 333 (1978). This Court has adopted *Mathews*' three-factor test for determining whether a challenged process affords a defendant due process when the State seeks to deprive him of liberty or property within the meaning of the 14th Amendment's Due Process Clause. *See, e.g., State v. Roger*, 144 Idaho 738, 840-41 (2007).

The State argues that because the states are not constitutionally obligated to provide defendants with collateral review of their criminal convictions, and when they opt to do so, there

is no requirement that the State supply a lawyer too, citing *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987), Mr. Hall's claim fails. The State argues that simply by providing defendants with a means of collaterally attacking their convictions, Idaho provides defendants like Mr. Hall more process than they are due. Resp. Br., p.222.

The State ignores recent pronouncements from the United States Supreme Court that have rendered the continued viability of *Finley* doubtful, and which have emphasized the importance of making procedures available to vindicate a defendant's 6th Amendment right to effective *trial* counsel. Specifically, in *Martinez v. Ryan*, 566 U.S. 1, 5 (2012), the Court was asked to reconsider whether the constitutional right to counsel extends to initial review collateral proceedings. Rather than reaching the constitutional claim, the Supreme Court held instead that:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Martinez, 566 U.S. at 17. The following year, in *Trevino v. Thaler*, __ U.S. __, 133 S. Ct. 1911 (2013), the Court applied the holding of *Martinez* to cases "where, as here, state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal ...." *Trevino,* 133 S. Ct. at 1921. In light of *Trevino* and *Martinez,* and contrary to the State's claim, the district court cannot deny Mr. Hall a meaningful opportunity to raise claims that his trial counsel were ineffective without violating his right to due process.

In addition to his protected liberty interest in his life, Mr. Hall's protected interest in vindicating his 6th Amendment right to the effective assistance of trial counsel, entitled him to an evidentiary hearing on his post-conviction claims involving disputed issues of material fact.

CONCLUSION

For the reasons set forth above and in his opening brief, Mr. Hall requests the Court vacate any or all of his convictions and/or sentences. He asks that the case be remanded for a new trial or a new sentencing proceeding. Alternatively, he requests that the order summarily dismissing his post-conviction case be vacated and remanded for further proceedings.

Dated this 7th day of March, 2017.

/s/ERIK R. LEHTINEN
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 7th day of March, 2017, I served a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT as follows:

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