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IN THE SUPREME COURT

OF THE

STATE OF IDAHO

STATE OF IDAHO,

Plaintiff-Respondent,

vs.

CHARLES ANTHONY CAPONE,

Defendant-Appellant.

Appealed from the District Court of the Second
Judicial District of the State of Idaho, in
and for the County of Latah

HONORABLE CARL B. KERRICK, DISTRICT JUDGE

SARA B. THOMAS
STATE APPELLATE PUBLIC DEFENDER

ATTORNEY FOR APPELLANT

KENNETH K. JORGENSEN

ATTORNEY FOR RESPONDENT

Filed this ___ day of _____, 2015.

STEPHEN W. KENYON, CLERK

By _____
Deputy

SUPREME COURT CASE NO. ~~43142~~

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SEE AUGMENTATION RECORD

43124

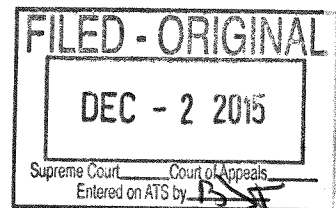


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LATAH COUNTY
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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO,)	
Plaintiff,	)	Case No. CR-2013-0001358
)	
V.	)	STATE'S RESPONSE TO DEFENDANT'S
	)	MOTION TO SUPPRESS #1
CHARLES ANTHONY CAPONE,	)	(STATEMENTS OF DEFENDANT)
Defendant.)	
_____)	

The State of Idaho, by and through Latah County Prosecuting Attorney, submits the following response to Defendant's Motion to Suppress the Statements of Defendant.

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ISSUES

- I. Whether a Defendant's request to call their attorney, followed by an ambiguous statement about wanting to talk but not being allowed to, constitutes an unambiguous invocation of their Fifth Amendment right to have an attorney present?**
- II. Whether the failure to preserve a recording containing a privileged attorney-client conversation, in order to protect that conversation, violates the Defendant's Due Process rights?**

STATEMENT OF FACTS

Following the reported disappearance of Rachael Anderson on April 19, 2010, the police began an investigation into the facts surrounding her disappearance and identified Mr. Charles Capone as a possible suspect. Throughout the investigation, police had numerous contacts with Mr. Capone and his divorce attorney, Mr. Mark Monson. On May 6, 2010, at around 10:00 a.m., Mr. Capone was arrested by ATF agents in regard to the federal offense of Felon in Possession of a Firearm, and transported to the Moscow Police Department. *Agent Hart's Report - Attached as Defendant's Exhibit A.* Upon arrival at the Moscow Police Department, Mr. Capone was taken to an interview room where he remained unhandcuffed. Present with Mr. Capone in the interview room was Captain Dan Hally of the Asotin County Sheriff's Office and ATF Agent Lance Hart. At approximately 10:15 a.m., Mr. Capone was provided a copy of the "Advice of Rights and Waiver" form and read his rights from the form by Agent Hart.

Upon hearing his rights, Mr. Capone stated that he wanted to talk to Agent Hart about the Glock firearm, but wanted to first telephone his divorce attorney, Mr. Mark Monson, before questioning. About six minutes after Mr. Capone was brought to the interview room, following an initial exchange and Agent Hart's explanation of the complaint and his rights, Mr. Capone was provided a phone to call Mr. Monson. Following the phone call, Mr. Capone stated that he "wanted to talk to Agent Hart about the Glock, but his attorney would not let him." Following this statement, Agent Hart ceased questioning, and Capt. Hally asked if he could ask the Defendant about the disappearance of Rachael Anderson. In response to this statement, Mr. Capone stated that it would be "fine" to talk about the disappearance of Rachael. Capt. Hally then stated that "he knew that

Capone killed Rachael and that he knew that Capone knew where Rachael's body was located." In response to this statement, Mr. Capone stated, "one of those statements is correct."

Over an hour after Mr. Capone phoned his divorce attorney, at approximately 11:40 a.m., Mr. Monson arrived at the Moscow Police Station. At that time, Mr. Capone was being processed for prints and photographs, and Mr. Monson was advised that Mr. Capone would contact him after being processed. After Mr. Capone was escorted back into the interview room and while awaiting the arrival of the transport officers, he initiated conversation with Agent Hart, commenting that his life was over and that he didn't want to be viewed as a "monster". During this conversation Mr. Capone agreed to assist the authorities in locating Racahel Anderson's body in exchange for release from custody to get his affairs in order. Mr. Capone also requested that his divorce attorney be there throughout the process. Following this discussion, Latah County Prosecutor Bill Thompson was summoned to the Moscow Police Department, and Agent Hart phoned Assistant United States Attorney Mike Mitchell, to participate in the discussions about Mr. Capone's release from custody. As an agreement was being reduced to writing by AUSA Mitchell, Mr. Monson spoke further with Mr. Capone, and subsequently informed Agent Hart that he would not be able to secure an agreement at that time. Mr. Capone was then transported to Coeur d'Alene by the ATF agents.

On July 30 to August 1, 2013, a preliminary hearing was held in Latah County for the charges of PRINCIPAL TO MURDER IN THE FIRST DEGREE, Idaho Code 18-204, 18-4001, 18-4003(a); CONSPIRACY TO COMMIT MURDER IN THE FIRST DEGREE, Idaho Code 18-4001, 18-4003(a), 18-1701; FAILURE TO NOTIFY CORONER OR LAW ENFORCEMENT OF DEATH, Idaho Code 19-4301A(1)(3) and CONSPIRACY TO COMMIT FAILURE TO NOTIFY CORONER

OR LAW ENFORCEMENT OF DEATH, Idaho Code 19-4301A(1)(3), 18-1701, Felonies in FOUR (4) COUNTS. At the preliminary hearing, it was noted that a recording of the May 6, 2010 interview had been made at the Moscow Police Department. *Preliminary Hearing Transcript (PH): p. 816; 20-25.* Because that recording also held privileged attorney-client communications, the conversations between Mr. Monson and Mr. Capone discussing a possible release from custody to lead authorities to Rachael Anderson's body, the recording was not preserved. *PH: 817; 15-18.* This was done without being listened to first, in order to protect Mr. Capone's conversations with his attorney. *PH: 817; 3-12.* It should be noted that the recording system was new to MPD, motion activated, and, contrary to Sgt. Bruce Fager's initial mistaken understanding and preliminary hearing testimony (as well as the assertion by the Defendant in his brief), Sgt. James Fry was not familiar at that time with how to stop/start the recording. *See attached "Exhibit A" (Affidavit of Sgt. Bruce Fager with relevant reports).* Additionally, on that day, Mr. Monson was in and out of the interview room with Mr. Capone a number of times, sometimes with officers in the room, sometimes without. Although this recording held Mr. Capone's inculpatory statement that Captain Hally had "one of [his] statements . . . correct," it also contained Mr. Capone's conversations with his attorney. Therefore, the officers of the Moscow Police Department decided to not preserve the recording so that none of the attorney-client conversation could be even inadvertently listened to by law enforcement.

The Defendant has moved for a motion to suppress his statements made on May 6, 2010 to Capt. Hally as a violation of his Fifth Amendment rights. Additionally, the Defendant has moved to suppress the statements on the ground that the failure to preserve the May 6, 2010 recording

violated his due process rights when police failed to preserve its content to protect his attorney-client conversations. The State submits the following response.

DISCUSSION

I. THE DEFENDANT DID NOT UNAMBIGUOUSLY INVOKE HIS RIGHT TO HAVE AN ATTORNEY PRESENT DURING QUESTIONING ON MAY 6, 2010, AND, EVEN IF HE DID, HE SUBSEQUENTLY WAIVED THAT RIGHT BY EVINCING A WILLINGNESS TO SPEAK ABOUT THE DISAPPEARANCE OF RACHEL ANDERSON.

A. The Defendant did not unambiguously invoke his right to have an attorney present on May 6, 2010.

1. A defendant must unambiguously invoke his right to counsel.

Law enforcement officers have a duty to cease questioning when a suspect actually invokes his right to counsel. *Davis v. United States*, 512 U.S. 452, 458, 461–62 (1994). But officers are not required to cease questioning when a suspect “might” be invoking the right to counsel by making an “indecisive” request for an attorney. *Id.* at 459–60. In fact, because of the two-layers of protection afforded to defendants through *Miranda* and *Edwards*, the Court specifically declined to extend *Edwards* to “require law enforcement officers to cease questioning immediately upon the making of an ambiguous or equivocal reference to an attorney.” *Edwards v. Arizona*, 451 U.S. 477, 458-59 (1981). The duty to cease questioning is only triggered when the suspect makes a clear and unambiguous invocation of his right to counsel. *Id.* at 460.

Whether or not a defendant unambiguously invoked his right to counsel cannot be viewed through the lens of a defendant’s later regret. Rather, any statements that a defendant purports are an assertion of his right to counsel should be evaluated objectively and will hinge on whether

he “articulate[d] his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.” *Id.* at 459. The objective standard from the view point of a reasonable officer supports a defendant’s right to counsel while not injecting “wholly irrational obstacles to legitimate police investigative activity.” *Id.* at 460.

For example, a suspect told an officer that his attorney advised him to “keep his mouth shut.” *Sechrest v. Ignacio*, 549 F.3d 789, 797 (9th Cir. 2008). The court found that a reasonable officer “would not necessarily have understood” the suspect was actually invoking his right to remain silent because the suspect’s reference to his attorney telling him to “keep his mouth shut” was “sufficiently vague” as to whether the suspect was actually invoking his right to counsel. *Id.* at 797, 806. In the *Davis* case, about an hour and a half after the suspect had been “mirandized” and was being interrogated, he said, “[m]aybe I should talk to a lawyer.” 512 U.S. at 460, 114 S. Ct. at 2355-56. The court found that the statement, “[m]aybe I should talk to a lawyer,” was not an unambiguous request for counsel and that officers were not required to terminate the interview when the suspect “might” be invoking his right to counsel. *Id.* at 462, 2357.

In contrast, a defendant who said “I want an attorney before making a deal” made an unambiguous request for counsel. *Edwards*, 451 U.S. at 479. The defendant’s unambiguous request triggered the officer’s duty to cut off the interrogation. *Id.* at 186-87.

2. It is good police practice to clarify a defendant's ambiguous reference to an attorney.

Instead of requiring officers to cut off all questioning in response to an ambiguous or indecisive statement, a position the United States Supreme Court specifically rejected, it is not only allowable, but is good practice for officers to ask clarifying questions so the officer may ascertain whether the suspect is actually invoking his right to counsel. *Davis*, 512 U.S. at 460-61. Clarifying questions ensure a suspect's rights are protected while minimizing the danger a confession will be suppressed "due to subsequent judicial second-guessing as to the meaning of the suspect's statement regarding counsel." *State v. Eby*, 136 Idaho 534, 537, 37 P.3d 625, 628 (Ct. App. 2001).

For example, in *Sechrest*, after the defendant told the officer that his attorney advised him to "keep his mouth shut," the officer said, "Well, there is nothing we can do to alter that ... do you want to talk to me?" *Sechrest* 549 F.3d at 797. The suspect then said, "I will tell you what, I will make a deal—no, I won't make a deal. You ask some questions, and if I want to answer them, I will answer them, and if not, I won't." *Id.* The officer clarified by asking if that meant the suspect wanted to talk. *Id.* The suspect said yes and eventually confessed to two murders. *Id.* The officer's two clarifying questions were permissible because both of the suspect's statements were unclear. *Id.* at 806.

In *Davis*, after stating, "[m]aybe I should talk to a lawyer," the agents asked the suspect if he was stating that he wanted a lawyer, but he said no. *Davis*, 512 U.S. at 460. The question

was appropriate and the officers followed “good police practice” by clarifying whether or not the suspect wanted an attorney. *Id.* at 461.

3. Clarifying questions are especially appropriate when a defendant gives a limited invocation of the right to counsel.

When a suspect gives a limited invocation as to one aspect of the interrogation, that does not automatically constitute a blanket invocation on the entire interrogation. *Connecticut v. Barrett*. 479 U.S. 523, 529–530 (1987). If the limited invocation is unambiguous, then it does not need clarification. *Id.* However, clarifying questions are needed when an invocation, or any part of it, is unclear, so that officers properly understand and honor the suspect’s rights as invoked. *Id.*

For example, after a suspect was given his *Miranda* warnings, he said he would not give any written statements without an attorney present, but had “no problem” talking about the incident. *Connecticut v. Barrett*. 479 U.S. at 525. He subsequently verbally admitted to sexual assault, but did not sign any written statements. *Id.* While the suspect had clearly invoked his right to counsel before executing a written statement, he had not invoked the right to counsel before making a verbal statement. *Id.* Indeed, because he did not ever invoke his right to counsel before making verbal statements, per *Edwards*, officers were not even required to cease questioning and wait for the suspect to initiate contact with them. *Id.* at 529. “*Miranda* gives the defendant a right to choose between speech and silence” and in *Barrett*, the defendant chose to speak. *Id.*

Here, after Mr. Capone was brought to the Moscow Police Department at about 10:15 a.m., he was advised of his *Miranda* rights. Like the defendant in *Barrett* who said he would make a verbal statement but not a written one, on his own Mr. Capone limited his invocation of the right to counsel by stating he wanted to phone his attorney before speaking about the Glock. See Defendant's "Exhibit A" – Report of Agent Hart. His request was scrupulously honored. Agent Hart provided him with a phone. After talking with his attorney, Mr. Capone told Agent Hart that he wanted to talk about the Glock but his attorney would not let him. Like the suspect in *Sechrest* who did not unambiguously invoke *Miranda* protection when he said his attorney told him to "keep his mouth shut," Mr. Capone gave a "sufficiently vague" statement to the officers present by indicating he wanted to talk about the Glock, but his attorney did not want him to. Even still, Agent Hart treated Mr. Capone's statements as an invocation of *Miranda* as it pertained to the Glock and immediately ceased questioning about the Glock.

However, because Mr. Capone's ambiguous reference to an attorney was limited to the Glock, it left open and unaddressed the issue of Ms. Anderson's disappearance. Since Capt. Hally was present to talk about Ms. Anderson and not the Glock, he simply clarified by asking Mr. Capone whether or not he was willing to talk about Ms. Anderson. Like the officers in *Davis* who clarified whether or not the suspect truly wanted a lawyer when he said "maybe" he should talk to a lawyer, it was "good police practice" for Capt. Hally to clarify whether or not Mr. Capone was willing to talk about Ms. Anderson. Capt. Hally asked one clarifying question in response to a legitimately unclear situation. One question is not badgering. It is good police practice.

Further, Capt. Hally necessarily sought to clarify whether or not Mr. Capone wanted to talk because Mr. Capone had not addressed the issue of Ms. Anderson and had also not broadly invoked his right to counsel. Capt. Hally properly limited the scope of his clarifying question to whether or not Mr. Capone was willing to talk about Ms. Anderson. In response, Mr. Capone said it would be fine to continue talking about Ms. Anderson. Mr. Capone was sufficiently advised of his rights, and of the choice between speech and silence offered by *Miranda*, and he chose to speak about Ms. Anderson. Thus, Mr. Capone's statements should be admitted because he did not invoke his right to counsel as it pertained to Ms. Anderson's disappearance.

B. Attorney Mark Monson did not invoke the Defendant's right to counsel by showing up at the Moscow Police Department on May 6, 2010.

Nothing in *Miranda* specifically states that a third-party can invoke a suspect's right to counsel. See *Miranda*, 384 U.S. at 474 (“[i]f **the individual** states that he wants an attorney, the interrogation must cease until an attorney is present”) (emphasis added). See also *Moran v. Burbine*, 475 U.S. 412, 426 (1986) (“*Miranda* attempted to reconcile these opposing concerns by giving **the defendant** the power to exert some control over the course of the interrogation”) (emphasis added) and *State v. Burbine*, 451 A.2d 22, 28 (R.I. 1982) (“the principles of *Miranda* place the assertion of the right to remain silent and the right to counsel upon **the accused**, and not upon benign third parties, whether or not they happen to be attorneys”) (emphasis added). Further, *Miranda* safeguards do not require that law enforcement terminate an interrogation and “inform [the] suspect of an attorney's efforts to reach him.” *Moran*, at 426. This is because *Miranda* warnings were intended to balance two competing interests. *Id.* First, is the risk that

law enforcement will elicit confessions, even inadvertently, due to the “inherently coercive” environment created in the custodial interrogation setting. *Id.* Second, is the compelling interest society has in the use of custodial interrogation as an effective tool for law enforcement in obtaining voluntary confessions. *Id.*

Logically, a suspect does not make decisions on whether or not to “relinquish a constitutional right” based on information “entirely unknown to him.” *Id.* at 422. Indeed, even when police deliberately withhold information about an attorney’s attempts to contact a suspect, *Miranda* safeguards are not violated when, at the time the suspect is choosing whether or not to invoke his rights, the suspect does not know about the attorney’s attempts to contact him. *Id.* at 423, 1124. Compare *Escobedo v. State of Ill.*, 378 U.S. 478, 481 (1964) (statements a suspect made were excluded after he repeatedly asked for his attorney and was told by law enforcement that his attorney did not want to see him). Good or bad, how police treat an attorney while outside the presence of a suspect has no relevance as to whether or not the suspect was compelled to incriminate himself. *Moran*, 475 U.S. at 425. The essential inquiry is whether “**the suspect** clearly understood that, at any time, he could bring the proceeding to a halt or, short of that, call in an attorney to give advice and monitor the conduct of his interrogators.” *Id.* at 426-427 (emphasis added).

The dissent in *Moran* argued that in cases where an attorney has indicated involvement, ordinary principles of agency should apply. *Id.* at 462. While the majority did not address the dissent’s agency theory, it did specifically decline to extend *Miranda* further, saying that to

require officers to terminate an interview to “inform [the] suspect of an attorney’s efforts to reach him.” was impracticable because:

“[t]he legal questions it would spawn are legion: To what extent should the police be held accountable for knowing that the accused has counsel? Is it enough that someone in the station house knows, or must the interrogating officer himself know of counsel’s efforts to contact the suspect? Do counsel’s efforts to talk to the suspect concerning one criminal investigation trigger the obligation to inform the defendant before interrogation may proceed on a wholly separate matter?”

Id. at 425-426.

For example, a suspect had been arrested and was questioned about a burglary. *Moran*, 475 U.S. at 416. Officers then ended up questioning him about a murder. *Id.* at 416, 1138. During the time the suspect was at the station and being questioned, his family was working to get his public defender involved. *Id.* at 417. An assistant public defender called the police station to talk with detectives. *Id.* That attorney was told that the suspect was currently being held. *Id.* The attorney then stated that she would act as the suspect’s legal counsel, but was told that police would not be questioning the suspect that night. *Id.* at 417. Shortly after the attorney’s call, officers interviewed the suspect who eventually admitted to the murder. *Id.* at 417-418. While it would have been useful for the suspect to know about the attorney’s phone call to the station, and “might have affected his decision to confess,” the Constitution does not require officers to “supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.” *Id.* at 422. In short, the officers’ failure to inform the suspect about the attorney’s call did not affect the suspect’s decision on whether or not to invoke his right to counsel. *Id.*

Another suspect's right to counsel was not invoked, when unbeknownst to him, his family hired an attorney on his behalf. *State v. Waggoner*, 124 Idaho 716, 720, 864 P.2d 162, 166 (Ct. App. 1993). The fact that detectives knew that the family hired an attorney, even though they did not give that information to the suspect, did not invalidate the suspect's statements. *Id.* Officers did not deny the defendant's right to counsel because there was "no evidence in the record that **the defendant** ever requested to speak to an attorney while being questioned." *Id.* (emphasis added).

C. The case of *State v. Tapp* is not applicable to this case.

In his Memorandum in Support of Motion to Suppress, the defense mischaracterizes Mr. Capone's case as one with a "nearly identical situation" to *State v. Tapp*, 136 Idaho 354, 33 P.3d 828 (Ct. App. 2001). The *Miranda* issues addressed in *Tapp* are completely different from this case. In *Tapp*, the Court does not address whether law enforcement denied counsel to the defendant after an unambiguous invocation of that right. *Id.* Instead, it was presupposed that the defendant had invoked his right to counsel. *Id.* at 360, 834. The court then evaluated if the interrogation procedure used by law enforcement effectively denied the defendant his right to counsel. *Id.* at 360-363, 834-837.

In *Tapp*, the defendant and his attorneys consented to interrogations by law enforcement. *Id.* at 357, 831. Officers then used a strange interrogation technique where the defense attorneys were not permitted to be in the room with the defendant. *Id.* Instead, they were only allowed to watch their client being interrogated on closed circuit television from another room. *Id.* The Idaho Court of Appeals strongly condemned this interview technique, saying:

“We doubt that the system under which Tapp was interviewed afforded the cushion from ‘inherently compelling pressures’ that *Miranda* and its progeny require. Although Tapp's attorneys could see him and hear his words, he could not see or hear them; he was as physically alone with the interrogating officers as he would have been if his attorneys were in their own offices. He did not have the psychological reassurance of their physical presence nor the ability to turn to them for an *immediate* consultation. We think it obvious that a suspect's knowledge that his attorney is monitoring the interrogation from some other point in the building cannot provide the same bulwark against the coercive pressures of in-custody interrogation that is afforded by the immediate availability and reassuring presence of an attorney in the same room.”

Id. at 361, 835 (emphasis in original).

This case presents two significant differences from the *Tapp* case. First, unlike the defendant in *Tapp* who had invoked his right to counsel, Mr. Capone had not unambiguously invoked his right to counsel in regards to discussing Ms. Anderson. Second, unlike the defendant in *Tapp* who was knowingly separated from his attorney during an interrogation, Mr. Capone did not even know that Mr. Monson had stopped in at the Moscow Police Department. Mr. Capone's situation is more analogous to the defendants in *Moran* and *Waggoner* whose decision to not invoke the right to counsel could not be effected by information they did not possess about attorneys ready to act on their behalf. Mr. Capone also could not base his decision on whether or not to invoke his right to counsel on Mr. Monson's arrival at the station because that information was outside his knowledge. Regardless of the interaction between officers and Mr. Monson, law enforcement was not even required to tell Mr. Capone that Mr. Monson had been at the station. Additionally, even though Captain Hally knew Mr. Capone had a divorce attorney, knowledge of Mr. Capone's having an attorney on a “wholly separate matter” does not prohibit law enforcement from questioning a suspect under the guidelines of *Miranda*. Further,

Mr. Monson could not invoke Mr. Capone's right to counsel because it is an individual right that will not be extended to third-parties, including attorneys, because a suspect already has two layers of protection against self-incrimination through both *Miranda* and *Edwards*.

D. Even if the Defendant invoked his right to have an attorney present during questioning, he waived that right by evincing a willingness to speak with law enforcement based on his reply to Capt. Hally's clarifying question.

In expanding on the prophylactic protections of *Miranda*, *Edwards* held that once a suspect invokes his right to counsel, he is not subject to further questioning until counsel has been made available to him. 451 U.S. at 484-485, 101 S. Ct. at 1884-1885. However, *Connecticut v. Barrett* recognized that the *Edwards* rule is not absolute, saying, "[i]t remains clear, however, that this prohibition [in *Edwards*] on further questioning—like other aspects of *Miranda*—is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose," which is to prevent coerced confessions. *Barrett*, 479 U.S. at 528. Exclusion is not justified when the statements are not the product of police coercion. *Id.* at 529. Thus, *Barrett* enunciates a narrow exception to the *Edwards* rule. *Brennan*, 123 Idaho at 555, 850 P.2d at 204.

In order to comply with *Barrett's* narrow exception, a suspect must do more than simply "respond[] to further police-initiated questioning." *Id.* at 556, 205. Rather, when a suspect makes a limited request for counsel and also evinces an "affirmative announcement of his willingness to speak with authorities," which is also not the product of coercion, authorities may continue questioning within the limits set by the suspect. *Barrett*, 479 U.S. at 528. The limited request must still comply with the requirements for a valid waiver of the right to counsel, namely

that it be made voluntarily, intelligently, and knowingly. *Brennan*, 123 Idaho at 556, 850 P.2d at 205.

For example, a defendant told a detective “that he did not want their conversation recorded and he would not talk about ‘the night of the shooting’ without first speaking with an attorney.” *Brennan*, 123 Idaho at 554, 850 P.2d at 203. Essentially, the defendant “did not want ‘to talk about anything that would incriminate him.’” *Id.* at 558, 207. The defendant went on to discuss what he and a co-defendant had done earlier, which ended up being incriminating. *Id.* at 554, 203. The defendant’s statements were properly admitted because the detective limited the conversation to what the defendant was willing to talk about and did not question him on subjects that were off-limits. *Id.* at 557, 206. Even though the defendant said he would not voluntarily incriminate himself, the court found the statements were voluntary, saying “[t]he Court ‘has never embraced the theory that a defendant's ignorance of the full consequences of his decision vitiates their voluntariness.’” *Id.* at 558, 207. The court also inferred that the defendant understood his rights because of his specifically limited request for counsel, concluding that because he understood his rights, the statements were made knowingly and intelligently. *Id.*

In this case, like the defendant in *Brennan* who would not talk about a shooting without an attorney and also did not want his conversation recorded, Mr. Capone limited his invocation of the right to counsel by stating he wanted to phone his attorney before speaking about the Glock. But where the defendant in *Brennan* was only being questioned on one crime, Mr. Capone was being questioned by two different law enforcement agencies about two separate crimes. Capt. Hally necessarily sought to clarify the scope of Mr. Capone’s limited invocation.

Capt. Hally did not badger, harass, or coerce Mr. Capone in an attempt to “overcome his free choice” and get him to talk about Ms. Anderson. Capt. Hally simply asked one clarifying question to find out whether or not Mr. Capone was willing to talk about Ms. Anderson. In response, Mr. Capone said it would be fine to continue talking about Ms. Anderson, thereby evincing a willingness to discuss other matters. His response is also direct evidence of his voluntariness. He could just as easily have said that he did not want to talk about Ms. Anderson. Capt. Hally’s one clarifying question would still have been answered, but in the negative instead of the affirmative. Further, like the court in *Brennan* who inferred that the defendant understood his rights by making a limited invocation, it can be inferred that by Mr. Capone’s specifically limiting what he was and was not willing to talk about without an attorney, he understood his *Miranda* rights, thereby his statements were made intelligently and knowingly. Therefore, Mr. Capone’s statements to Captain Hally should be admitted as the product of his free choice.

II. THE DEFENDANT HAS FAILED TO MEET HIS BURDEN TO SHOW THAT THE RECORDING WAS MATERIAL AND THAT HE IS PREJUDICED BY ITS LOSS, AND, EVEN IF HE WAS, THE FAILURE TO PRESERVE WAS DONE IN GOOD FAITH TO PROTECT HIS ATTORNEY-CLIENT PRIVILEGE.

Where officers do not preserve a recording based on a good faith concern that it has privileged attorney-client information, there is no violation of a defendant’s due process rights. Because governmental intrusion into a defendant’s attorney-client privilege may be grounds for a new trial where the evidence from the intrusion is utilized at trial, no issues arise where no such evidence is obtained from the intrusion. *State v. Martinez*, 102 Idaho 875, 879, 643 P.2d 555, 559 (Idaho Ct. App. 1982). Additionally, where the evidence destroyed is only cumulative, in

that similar evidence can also be garnered through witness testimony, there is no violation of a Defendant's due process rights under *Brady*. *State v. Leatherwood*, 104 Idaho 100, 105, 656 P.2d 760, 765 (Idaho Ct. App. 1982). To establish a due process violation under *Brady*, where the nature of the evidence is known, the burden is on the Defendant to show that the evidence was material and that the loss of the evidence was prejudicial. *State v. Lewis*, 144 Idaho 67, 156 P.3d 568 (Idaho 2007). Because the nature of the evidence is known in this case; and the Defendant has failed to meet his burden to demonstrate that the recording was material, the loss of the recording is prejudicial, and that it was done in bad faith; the Defendant's due process rights were not violated by the non-preservation of the recording.

Where an officer testifies about inculpatory statements made by the defendant, and the officer was the only person to hear the statements, issues as to the credibility of the statements are for the trier of fact. In *State v. Rhoades*, the Idaho Supreme Court expressly declined to adopt a requirement in Idaho that inculpatory statements made by a person in custody must be recorded to be admissible. 119 Idaho 594, 601, 809 P. 2d 455, 462 (Idaho 1991). Considering whether the admission of an unrecorded, inculpatory statement made by Mr. Rhoades violated his due process rights in a capital murder prosecution, the Idaho Supreme Court stated:

The United States Supreme Court has imposed many procedural protections for capital cases. *See, e.g., Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). However, the cases do not go so far as to alter the types of evidence or establish a minimum degree of reliability of evidence that may be admissible during the fact finding phase of a potential capital case.

Rhoades, 119 Idaho at 601, 809 P.2d at 462. In *Rhoades*, the Defendant was arrested in Nevada in connection with a murder in Idaho and made an inculpatory statement to officers at the scene of the arrest, and a second inculpatory statement to one Idaho officer later in the interrogation room. *Id.* at 600, 461. Although the officers did not include these statements in their initial reports, they were noted in supplemental reports two months later. *Id.* Additionally, only one officer overheard the second inculpatory statement made in the interrogation room. *Id.* In deciding the admissibility of the statement overheard by one officer, the Idaho Supreme Court found that such evidence was admissible because questions as to the credibility and weight of the evidence were issues for the trier of fact. *Id.* at 601, 462.

Later, in the case of *State v. Lewis*, the Idaho Supreme Court was asked to determine whether the loss of a recording by law enforcement, where the defendant had confessed to one officer that the methamphetamine found was his, violated the defendant's due process rights. 144 at 65-66, 156 P.3d at 566-567. Lewis first argued that per the due process clause of the Idaho Constitution, Idaho should require all custodial confessions to be recorded. *Id.* at 66, 567. Rejecting this approach, the Idaho Supreme Court noted the decision in *Rhoades*, holding that the due process clause of the Idaho Constitution does not require the recording of custodial interrogations. *Id.* Next, Lewis argued that the prosecutor violated his due process rights under the Fourteenth Amendment to the United States Constitution by failing to furnish the recording that had been made. *Id.* Noting the decision in *Brady v. Maryland*, 373 U.S. 83 (1963), the court held:

Destruction of evidence is not a per se violation of a defendant's rights and depends upon the nature of the proceeding, nature of the evidence, and the circumstances surrounding the destruction of the evidence. *Garcia v. State Tax Comm'n of the State of Idaho*, 136 Idaho 610, 615, 38 P.3d 1266, 1271 (2002). In a criminal context, this Court has applied a balancing test which examines: "(1) whether the evidence was material to the question of guilt or the degree of punishment; (2) whether the defendant was prejudiced by the loss or destruction of the evidence; and (3) whether the government was acting in good faith when it destroyed or lost the evidence." *Id.* (quoting *State v. Porter*, 130 Idaho 772, 781, 948 P.2d 127, 136 (1997)) . . . Where the value of the evidence is known, the person asserting the due process violation has the affirmative burden of establishing the materiality and prejudice elements of the balancing test. *Id.* Where the value of the evidence is unknown, the materiality and prejudice elements are presumed and the inquiry focuses on the presence of bad faith. *Id.*

Lewis, 144 Idaho at 67, 156 P.3d at 568 (emphasis added).

This case is also similar to *State v. Martinez*, where Martinez challenged the sheriff office's erasure of tape recordings, including two phone calls that Martinez had made from the jail, where the sheriff contended the calls contained no material evidence. 102 Idaho at 879, 643 P.2d at 559. In response to Martinez's argument, the Idaho Court of Appeals concluded that, while "the better practice . . . would be erasure of such taped evidence only after review by the defense counsel," Mr. Martinez failed to show the erased statements might have affected the outcome of the trial. *Id.* The court in *Martinez* also examined the issues related to taping attorney-client conversations, and, although they did not find a violation of that right as none of the evidence from the recording was used at trial, noted that the recording of an attorney-client conversation could violate a defendant's right to counsel. *Id.*

Additionally, in *State v. Leatherwood*, the Idaho Court of Appeals considered whether the failure of police to preserve tape recordings of phone calls between the defendant and a co-defendant constituted a *Brady* violation. 104 Idaho at 102, 656 P.2d at 762. In its holding, the court stated:

. . . [W]here the issue is failure to preserve evidence, as opposed to withholding it, the judicial focus is not necessarily limited to the specificity of a discovery request or to materiality of the evidence. Rather, the courts may also take into consideration the conduct of the police and prosecutor . . . [I]f the nature of the evidence lost or destroyed is unknown, and cannot be established indirectly by other testimony or evidence, then the materiality tests are not meaningful. In those cases, it would appear necessary to focus primarily upon the reasonableness of the government's conduct, placing a heavy burden upon the government to show that none of its procedures, or the conduct of its agents, has been tainted by disregard for an accused's right to a fair trial . . . The instant appeal falls within the ambit of cases where the nature of the evidence lost or destroyed can be established indirectly by other evidence or testimony. The witness who overheard Fazio's telephone conversations testified about them. Moreover, nothing in the record indicates that Leatherwood lacked the opportunity, if he had so chosen, to discover and to call as witnesses the members of the police force who had spoken with Fazio.

104 Idaho at 102-103, 656 P.2d at 762-763. In establishing the test for "materiality" under the *Brady* rule, the court added, "that such evidence is "material" under this standard if, viewed in relation to all competent evidence admitted at trial, it appears to raise a reasonable doubt concerning the defendant's guilt." *Id.* at 105, 765 (emphasis added). Therefore, the Court concluded that the recordings were not material because the defendant's statement that they would have "revealed complicity between the police and [co-defendant] . . . [was] speculative at best." *Id.* Also, the recordings were merely a secondary source of information communicated between the co-defendant and police, and would have been cumulative to the testimony of the

witnesses at trial about the conversations. *Id.* Therefore, where the substance of a recorded attorney-client conversation is not used against the Defendant at trial, and the Defendant does not meet his burden to demonstrate materiality and prejudice, the failure to preserve the recording does not violate the Defendant's due process rights.

In this case, the nature of the evidence is known. The Defendant concedes the "value of the evidence is known." Memorandum in Support of Motion to Suppress, p. 25, line 5. Capt. Hally and Detective Besst testified to the overall substance of the conversation, and it was reduced to reports by Capt. Hally and Agent Hart following the conversation. The conversation was also heard by then MPD Det. Scot Gleason. *See* Exhibit A – Affidavit of Sgt. Bruce Fager. Therefore, the burden is on the Defendant to demonstrate the materiality and prejudice elements of the balancing test. Here, the Defendant fails to meet his burden to demonstrate materiality under the test in *Leatherwood*; where the nature of the evidence is known as established through witness testimony. Although the Defendant notes that the recording is material in the sense that it helps the State's case, the Defendant fails to meet their burden under *Leatherwood* to show that it "raises a substantial doubt concerning the Defendant's guilt." There is no contention that the recording contained exculpatory statements, nor are any arguments put forward that the recording would have held a conversation different than that testified to by Capt. Hally and Detective Besst, and corroborated by Agent Hart's report and Sgt. Fager's report (*see* Defendant's Exhibit A and State's Exhibit A). Rather, the Defendant contends that the recording was necessary to establish the "context" of the conversation. Because the recording would only be cumulative to the testimony of the four officers involved as a secondary source of

information, and the context argument is speculative and unclear, the Defendant fails to meet his burden to show materiality under the tests in *Leatherwood* and *Lewis*.

The Defendant also fails to meet his burden to show that he was prejudiced by the non-preservation of the recording. Although Capt. Hally, Agent Hart, Detective Besst and Scot Gleason are the only officers who heard the Defendant's statements, the credibility of their testimony is for the trier of fact. As in *Lewis*, the loss of the recording impacts the State just as equally as it does the Defendant where playing the Defendant's recitation of the inculpatory statements would be as impactful as providing the context for the conversation. Therefore, because questions pertaining to the credibility of the officer's testimony are for the trier of fact, the Defendant fails to meet his burden to demonstrate prejudice through the non-preservation of the recording.

Because the Defendant has failed to meet his burden to establish materiality and prejudice, the balancing test does not shift to the State to show that the loss of the evidence was done in good faith. However, if the Court does find the Defendant met his burden, or if the Court finds the nature of the evidence is unknown, the failure to preserve the recording to protect the Defendant's attorney-client privilege was done in good faith and not contrary to the Defendant's right to a fair trial. The recording was not preserved in order to protect the Defendant's attorney-client privilege, and not for the surreptitious purpose of preventing the Defendant from obtaining the evidence. Because intrusion into the attorney-client privilege may prejudice a Defendant's right to counsel and taint the State's evidence, the officers were warranted in taking steps to ensure that no part of the attorney-client conversation could be

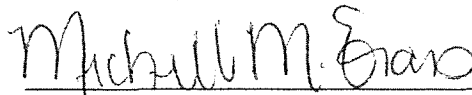
overheard, even inadvertently. Although the better practice may have been to piece apart the recording or put the attorney and client in a separate room, the officers' action of not preserving the recording was not done to deny the Defendant access to the recording or prevent him from receiving a fair trial. The officers felt it necessary to not preserve the recording to ensure they did not overhear anything they "were not supposed to hear." *PH: 817; 4-12*. Note that the events occurred three (3) years before charges were actually filed. Therefore, even though law enforcement may have been able to piece apart the recording, the failure to preserve the recording to guarantee that they did not infringe on the Defendant's attorney-client privilege was not done in bad faith.

The Defendant has failed to show that the loss of the recording has infringed upon his due process rights under *Brady*.

CONCLUSION

Because the Defendant did not unambiguously invoke his right to have counsel present during the May 6, 2010 conversation, and because he failed to demonstrate that the recording was material, and that he was prejudiced by its loss, the State respectfully requests that this Court DENY the Defendant's Motion to Suppress.

DATED this 1st day of April, 2014.



Michelle M. Evans
Sr. Deputy Prosecuting Attorney

CERTIFICATE OF DELIVERY

I hereby certify that true and correct copies of the STATE'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS #1 (STATEMENTS OF DEFENDANT) were served on the following in the manner indicated below:

The Honorable Michael J. Griffin
District Judge
Idaho County Courthouse
320 W. Main Street
Grangeville, ID 83530

U.S. Mail
 Overnight Mail
 Fax: 208-983-2376
 Hand Delivery

D. Ray Barker
Attorney at Law
P.O. Box 9408
Moscow, ID 83843

U.S. Mail
 Overnight Mail
 Fax
 Hand Delivery
 e-mail: D.RayBarker@turbonet.com

Mark T. Monson
Mosman Law Office
P.O. Box 8456
Moscow, ID 83843

U.S. Mail
 Overnight Mail
 Fax
 Hand Delivery
 e-mail: mark@mosmanlaw.com

Dated this 1st day of April, 2014.



AFFIDAVIT OF DETECTIVE SGT. BRUCE FAGER

STATE OF IDAHO)
 :ss.
County of Latah)

Sgt. Bruce Fager, declares and says:

- (1) That I am a detective sergeant employed by Moscow Police Department.
- (2) That I participated in the investigation of Charles Anthony Capone regarding allegations of murder, MPD case #10-M03456.
- (3) That I wrote supplemental reports regarding my involvement with that investigation, including the attached Supplemental Report 67 (Bates #3870-3873) and Supplemental Report 70 (Bates #4268).
- (4) That the above referenced reports are true and accurate.

I declare under penalty of perjury pursuant to the law the State of Idaho that the foregoing is true and correct.

12-31-14
(Date)

Bruce Fager
(Signature)

08/29/13
16:30

Moscow Police Department
Law Supplemental Narrative:

452
Page: 1

Details

Incident Number: 10-M03456
Sequence Number: 67

Name: Bruce Fager
Date: 13:33:00 08/26/13

Narrative
(See below)

=====

Narrative:

Follow-up concerning May 6, 2010 interview with Capone - 105/104
Supplement #67
10-M03456

Narrative: I was assigned the task of trying to document everyone who may have been present in the detective bull pen at the Moscow Police Department on May 6, 2010 when Charles Capone was interviewed by Capt. Hally and ATF Agent Hart. Part of the follow up was to identify anyone who would have overheard statements made directly by Capone and to also document the condition and use of the interview recording system.

During my investigation I learned the following regarding the Moscow PD video recording system in the interview rooms. At the time of the interview the Open Eye video system was working and in use, but was relatively new to the Moscow Police. Det. Gleason had made arrangements with A-tec out of Spokane, Washington to loan us the system for purposes of testing and evaluating it before purchasing it. Our old system crashed and was not repairable. Det. Gleason was the primary user of the Open Eye system and was the most trained on how to use it. As part of his duties he trained Det. Marr and a small number of other officer, but apparently had not trained Det. Sgt. Fry who relied on Det. Gleason and Marr to make recordings for him. (I was under the impression at the preliminary hearing Lt. Fry knew how to use it since it was the detective sergeant at the time. I apparently was mistaken) It is unknown exactly how long the system was in place prior to the interivew with Capone, but it had only been in place a relatively short time at the time of the interview.

I learned from Jesse Flowers with the City Information Systems Department the system was not officially "spec'd out" until 10-21-2010, and it was not paid for until January 2011 due to the fiscal budget issues for the City. (The cost was \$3,300 making it hard to pay for mid-year after the old system crashed.) The fiscal budget year starts in October of each year. No one had records of when the system was installed for testing and evaluation. I spoke to a representative (unknown name) from A-Tec who remembered installing it for testing and evaluation, but he had no record of when it was installed.

The Open Eye system is activated by motion in the interview rooms, or by selecting an option on the monitor that turns it on to record regardless of motion. The system records to a DVR type hard drive. After an interview is done, the start and end dates/times are entered into the system under a save

function and the audio/video is burned to a DVD-R for evidence. In order to locate the start and end times of an particular interview a person has to watch the beginning and end of the interview to determine the exact times down to the second. The only way to prevent it from recording activity in the interview room is to turn the whole system off. When the system is on, the interview rooms can be monitored from the detective bull pen. Simply turning off the monitor does not prevent the system from recording.

On 8-26-13 I spoke to former detective Bob Marr who told me he was working in detectives on 5-6-10. He said he only had vicarious knowledge Capone was being interviewed, and he did not monitor any of it. He did remember brief discussion concerning the protection of attorney/client privelege after Attorney Mark Monson arrived to speak with Capone. His recollection was he may have helped shut the system down to prevent accidental recording or monitoring of the conversation, but said it could have been Det. Gleason who shut it down. Marr said it would have been a "matter or course" to shut the system down anytime an attorney was speaking with his client in an interview room.

After speaking with Marr I spoke to Nez Perce County Under Sheriff Gleason (formerly Det. Gleason). He told me after Monson arrived to speak with Capone he turned the monitors off. After a short period of time he was concerned the system would still be recording their conversation so he turned off the entire system. Gleason told me the first portion of the interview was recorded on the hard drive, but never reviewed or burned to DVD-R because of the concern over attorney/client privelege. Eventually the data on the hard drive is over written and lost unless specifically saved.

During my conversation with Gleason I asked him if he overheard anything Capone said to Capt. Hally during the interview. He said he was monitoring the interview and did hear Capt. Hally make statements to Capone to the effect of "today your going to tell me you killed Rachel and where her body is". He said he heard Capone say something to the effect of "you got it half right". After making the statement to Capt. Hally, Capone requested Monson. Gleason said he thought Detective Besst and S.A. Hart were both monitoring the system with him when the statement was made. Other investigators and officers were around but coming and going.

Neither Det. Gleason or Marr were part of the subsequent negotiations concerning Capone taking the police to Rachel's body. They did not have anything to add. When I spoke to Lt. Fry about the interview he told me the same things. He did not witness any of the statements by Capone or Monson. He did not know who turned the recorder off, and he did not save the first portion of the interview with Capone.

Lt. Fry said no one monitored conversation between Monson and Capone. He said the attorney/client privelege was discussed, but he could not remember the conversation and/or if it included discussion over trying to record just the portion of the interview prior to Attorney Monson arriving. He told me he was in and out of the bull pen area and there was a lot of activity surrounding the investigation at the time.

On 8-27-2013 I spoke to ATF agent Hart who told me Det. Gleason, Det. Besst, and himself all heard Capone make the statement: "one of those is right". The statement was made in reference to Capt. Hally accusing Capone of either killing Rachel or knowing where the body was. SA Hart told me he was specifically up close to the monitor listening to Capt. Hally interview Capone. He was not sure

who else may have heard the statement because he was up close to the monitor and intently listening. There were other officers, agents, and detectives in and out of the detectives bull pen at the time.

SA Hart also told me Det. Gleason was the first to bring up the concern over the attorney/client privilege and took steps to avoid monitoring it. He said Det. Gleason turned off the monitors, but he is unsure if he turned off the entire system since he is not familiar with our system.

SA Hart confirmed Attorney Mark Monson said "he has what you want" after meeting with Capone. He said he, Attny. Monson, P.A. Bill Thompson, and AUSA Mike Mitchell all participated in negotiations over charges in return for Capone's cooperation via speaker phone. He believed Sgt. Fry may have entered and exited the office but could not be sure if he played any part in the negotiations.

SA Hart will check with the other Federal ATF Agents who assisted in the arrest of Capone to see any of them overheard anything from Capone. He will get back to me if there is anything to report.

SA Hart said there was no discussion he was aware of over burning the first part of Capone's interview to DVD. He said he knew the system was recording when he and Capt. Hally were initially interviewing him, but as a matter of course the ATF does not record interviews, so he did not think much about it after Det. Gleason turned off the system. No one monitored negotiations between Monson and Capone.

On 08-27-2013 I spoke to Det. Jackie Nichols. She told me she was in the detective bull pen during the interview with Capone on 5-6-2010 and was trying to listen to the interview but couldn't. She explained there was a lot of activity with officers and investigators coming and going. As a result she did not hear Capone's comments or anything Attorney Monson may have said about Rachel Anderson.

Det. Nichols also did not know who turned the monitor off when Attorney Monson went in to speak with Capone. She did remember there was a conversation centered around not listening to the conversation, but she could not remember who all was involved in the conversation. She said no one monitored or recorded the meeting between Monson and Capone.

When I asked her who all was present and would have overheard Capone speaking with Capt. Hally, she remembered SA Hart, Det. Besst, and possibly Det. Gleason. She thought Det. Wolverton may have also been in the bull pen, but could not remember. She said Lt. Fry was in and out of the bull pen.

During my investigation I attempted to speak with former Det. Wolverton and former LCSO Det. Fork. Both were thought to have been in or around the bull pen during the May 6, 2010 interview, but I have been unable to contact them. I was unable to identify anyone else who may have been present and overheard any statements.

Thu Aug 29 11:43:55 PDT 2013

Bruce Fager
Sgt.

Thu Aug 29 16:11:56 PDT 2013
Reviewed by Lt. Fry

3873

001457

09/25/13
15:23

Moscow Police Department
Law Supplemental Narrative:

452
Page: 1

Details

Incident Number: 10-M03456
Sequence Number: 70

Name: Bruce Fager
Date: 09:52:50 09/04/13

Narrative
(See below)

=====

Narrative:

Additional information regarding Capone IV on 5-6-10 - 105
Supplement #70
10-M03456

Narrative: On 09-03-2013 I spoke to former Latah Co. Detective Carl Fork by phone. He told me he was present around the detective bull pen when Charles Capone was being interviewed by SA Hart and Det. Hally on 5-6-2010. He was not part of the interview and did not hear what was said. He was not aware of any recordings of the interview or discussion over protecting attorney client privelege. He thought Det. Wolverton may have also been present.

On 09-03-2013 I was also able to speak with former Moscow Det. Wolverton. He was also present in the detective bull pen, but did not hear what was being said in the interview. He told me he had been involved in surveillance the previous night and was just wrapping up from that. He did not participate in the interview. Generally they were all aware of what was being said based on statements from the other detectives however he had no first hand knowledge of statements that were made. He could not remember discussions about Attny Mark Monson speaking with Capone.

Wed Sep 04 10:39:01 PDT 2013

Bruce Fager
Sgt.

APPROVED ON HARDCOPY LT FRY/JL

4268
001458

CASE NO. CR 2013-1358

2014 APR -1 PM 3:12

CLERK OF DISTRICT COURT
LATAH COUNTY
BY [Signature] DEPUTY

LATAH COUNTY PROSECUTOR'S OFFICE
William W. Thompson, Jr., ISB No. 2613
Prosecuting Attorney
Michelle M. Evans, ISB No. 4795
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Mia M. Vowels, ISB No. 6564
Deputy Prosecuting Attorney
Latah County Courthouse
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Moscow, Idaho 83843
(208) 883-2246

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO,)	
Plaintiff,	)	Case No. CR-2013-0001358
)	
V.	)	STATE'S RESPONSE TO DEFENDANT'S
	)	MOTION TO SUPPRESS #3
CHARLES ANTHONY CAPONE,	)	(SEARCH WARRANTS)
Defendant.)	
_____)	

The State of Idaho, by and through Latah County Sr. Deputy Prosecuting, Michelle M. Evans, submits the following State's Response to Defendant's Motion to Suppress regarding search warrants.

STATEMENT OF FACTS

Following the reported disappearance of Rachel Anderson on April 19, 2010, the police began an investigation and identified Mr. Charles Capone as a suspect. Capt. Dan Hally of the Asotin County Sheriff's Office was one of the lead officers investigating the disappearance, and compiled and prepared an "Affidavit in Support of Search Warrant" for an E-Machine computer in

ORIGINAL
001459

regards to a federal investigation. The text of that affidavit was copied into Supplemental Report 1 in Asotin Co. Sheriff's Office incident #10-A01684. See Defendant's "Exhibit 1." The Defendant generally asserts that this affidavit/report was the basis of all of the search warrants sought by officers in Nez Perce County and Latah County throughout the investigation in this case (although the Defendant fails to provide the particular sworn affidavits at issue). In response to each of the Defendant's allegations that Capt. Hally's affidavit/report contained false statements, omissions, and misrepresentations, the State submits Capt. Hally's affidavit in response. See attached "Exhibit A" – Affidavit of Capt. Dan Hally. Additionally, the State submits the following Response Brief.

ISSUE

Has the Defendant met his burden to show, by a preponderance of the evidence, that the statements in Capt. Hally's "Affidavit in Support of Search Warrant" were false and made knowingly and intentionally, or with reckless disregard for the truth, and that the statements were material to the Magistrate's finding of probable cause?

ANALYSIS

The issuance of search warrants is governed by the Fourth Amendment: "[N]o Warrants shall issue, but upon probable cause, supported by oath or affirmation . . ." U.S. CONST. amend. IV. Further, it is "well established that statements of law enforcement officer that are based upon the observations of fellow officers participating in the same investigation carry a presumption of reliability." *State v. Wilson*, 130 Idaho 213, 216, 938 P.2d 1251, 1254 (Ct.App. 1997) (citing *U.S. v. Vantresca*, 380 U.S. 102, 111, 85 S.Ct. 741, 747 (1965); *State v. Alger*, 100 Idaho 675, 679 (1979); and *State v. Fowler*, 106 Idaho 3, 9 (Ct.App. 1983).

A defendant challenging a warrant's veracity is entitled to an evidentiary hearing only after making a "substantial preliminary showing." *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978). As the United States Supreme Court has outlined in *Franks*, there is a "presumption of validity with respect to the affidavit supporting the search warrant," and, therefore, a defendant challenging the veracity of the warrant must show that there was "a false statement[, made] knowingly and intentionally, or with reckless disregard for the truth, [that] was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. *Franks*, 438 U.S. at 155-56; *see also State v. Sorbel*, 124 Idaho 275, 279-80, 858 P.2d 814, 818-19 (Idaho Ct. App. 1993), *and State v. Lindner*, 100 Idaho 37, 41, 592 P.2d 852, 856 (Idaho 1979). Any alleged omissions or falsities must also be shown to be "material to the magistrate's finding of probable cause." *Sorbel*, 124 Idaho at 279, 858 P.2d at 818. It is the Defendant's burden to show, by a preponderance of the evidence, both that the false statements were intentional and knowing or made with "reckless disregard for the truth," and that the "statements were necessary to the finding of probable cause." *State v. Kay*, 129 Idaho 507, 511, 927 P.2d 897, 901 (Idaho Ct. App. 1996) (emphasis added). Even if the challenged statements are set aside, if the affidavit still contains sufficient content to support a finding of probable cause, no evidentiary hearing is required. *Franks*, 438 U.S. at 171-72; *State v. Fisher*, 140 Idaho 365, 373, 93 P.3d 696, 704 (Idaho 2004).

Therefore, the Defendant must show that the statements in Capt. Hally's affidavit were false or misleading, that Capt. Hally made the statements intentionally and knowingly, or with

reckless disregard for the truth, and there would not be probable cause to issue the warrant were the allegedly false or misleading statements removed. In this case, the Defendant has failed to meet his burden of proving each of these elements by a preponderance of the evidence, and the Motion to Suppress should be denied.

Additionally, the Defendant has failed to make any arguments as to why there would not be probable cause to support the issuance of the warrant were the alleged statements, misrepresentations, and omissions removed.

I. Captain Hally's statements were not misleading or false, and, even if they were, they were not made knowingly and intentionally, or with reckless disregard for the truth.

A. Captain Hally's computer search warrant affidavit did not contain statements or omissions that were false or misleading.

Because the Defendant must point to specific instances of falsity or misrepresentation, and make an "offer of proof" with each allegation, the Court can only consider the Defendant's specific allegations, noted as "examples" in the Defendant's Motion, and not his conclusory statements that there were falsities and inconsistencies. In developing the requirements for a defendant in showing that a warrant affidavit contains a false statement, Idaho courts have held:

The challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient.

Fisher, 140 Idaho at 370, 93 P.3d at 701 (emphasis added).

While "clear proof of deliberate or reckless omission is not required . . . the defendant [must] make a substantial showing that the affiant intentionally or recklessly omitted facts required to prevent technically true statements in the affidavit from being misleading." *Id.* Where the court finds that the alleged statements were not false or misleading, then no further inquiry is necessary. *State v. Wengren*, 126 Idaho 662, 666, 889 P.2d 96, 100 (Idaho Ct. App. 1995); *see also State v. Peightal*, 122 Idaho 5, 7, 830 P.2d 516, 518 (Idaho 1992).

The Defendant must show that the statements or omissions were false or misleading. Here, the Defendant takes Capt. Hally's statements out of context, nit-picks at small and immaterial discrepancies, and makes unsupported attacks on Capt. Hally's credibility. In each of the eight instances of alleged falsity, omission, or misrepresentation, there is a plausible and credible explanation as to why the statements are correct. *See* Capt. Hally's affidavit *attached as State's Exhibit A*. From a review of the attached affidavit, it is clear that none of the alleged statements were false or misleading. The statements in the original warrant affidavit were based on Capt. Hally's training and expertise, his interviews with Mr. Capone, Ms. Anderson, and the other investigating officers, and his inferences based on his training and experience as a police officer. From a review of the alleged statements and Captain Hally's explanations, it is fair to conclude that the Magistrate was not misled by reading those statements in the original warrant affidavit as they were not false statements.

The Defendant also states in his motion that many of these instances are just an example of falsities contained in the affidavit. *Franks*, however, requires that the Defendant point out each specific instance of alleged falsity, and an example of alleged falsity will not serve to invalidate the

entire affidavit. *Fisher*, 140 Idaho at 370, 93 P.3d at 701. Where the Defendant makes statements in his motion, such as saying there are misrepresentations in police reports, but only notes one example, the statements prior to the specific examples are merely "conclusory" and should not be considered absent the Defendant's showing of specific allegations accompanied by an "offer of proof" and "statement of supporting reasons." *Id.* Therefore, the Defendant has failed to show that the alleged statements, omissions, or misrepresentations mislead the Magistrate or were false.

B. Even if Capt. Hally's statements are false or misleading, they were not made intentionally and knowingly, or with reckless disregard for the truth.

Next, the Defendant must show to a preponderance of the evidence that the false statements or misrepresentations were made knowingly and intentionally, or with reckless disregard for the truth. *Franks*, 438 U.S. at 155-56. Idaho has adopted the rule in *Franks*: "a warrant is valid even if probable cause is based on false evidence so long as the evidence is not presented intentionally or with reckless disregard for the truth." *Fisher*, 140 Idaho at 370, 93 P.3d at 701. In addressing the issue of when a defendant would be entitled to a *Franks* hearing to challenge the veracity of the statements, Idaho courts have maintained that "[a] *Franks* evidentiary hearing is not to be lightly granted but may be allowed only where the defendant makes a substantial preliminary showing of an intentional or reckless falsehood." *Id.* (internal quotations omitted). This "substantial preliminary showing" requires proof by a preponderance of the evidence. *Kay*, 129 Idaho at 511, 927 P.2d at 901. Also, a *Franks* challenge applies only "to the credibility of the warrant affiant." *Dunlap v. State*, 126 Idaho 901, 908, 894 P.2d 134, 141 (Idaho Ct. App. 1995). In developing parameters and circumstances when an officer might have

intentionally and knowingly, or recklessly, withheld or misrepresented information, the Idaho Court of Appeals has stated:

. . . [P]ertinent legal authorities clearly recognize that misrepresentations or omissions may be merely negligent or innocent mistakes, and if they fall in this category, they do not invalidate a warrant . . . Whether an omission was intentional or reckless might be inferred, in part, from the relative importance of the information and its exculpatory power.

State v. Peterson, 133 Idaho 44, 48, 981 P.2d 1154, 1158 (Idaho Ct. App. 1999) (emphasis added).

The Idaho Supreme Court has also noted that "[a] long pattern or practice of negligent misrepresentation could be seen as an indication of a knowing and intentional intelligent omission or falsification of information." *State v. Guzman*, 122 Idaho 981, 984, 842 P.2d 660, 663 (Idaho 1991) (Noting, in *Footnote 1*, that the Court had considered previous cases involving the same detective and allegations of police misconduct, but concluding that he had not intentionally or recklessly omitted information from the warrant in that case). Such is not the case here.

Finally, where statements in the affidavit might be "subject to different [or 'alternative'] interpretations and inference[s]" the affidavit will be deemed to contain, at most, "[n]egligent or merely innocent misrepresentations" and the warrant will not be invalid. *State v. Wright*, 115 Idaho 1043, 1047-48, 772 P.2d 250, 254-55 (Idaho Ct. App. 1989). Therefore, the determination of whether the allegedly false or misrepresented information was made or omitted intentionally or recklessly is a question of fact. *Id.*

Although the Defendant notes at the outset of his motion that subsequent officers did not do anything to corroborate the information, the issue of whether the affiant acted intentionally or recklessly turns on the credibility of the "warrant affiant." *Dunlap*, 126 Idaho at 908, 894 P.2d at

141. Therefore, the court must look to the credibility of Capt. Hally in determining whether the original affidavit contained false statements, omissions, or misrepresentations made knowing and intentionally, or with reckless disregard for the truth.

Here, even if the statements were found to be false, there is no evidence that the statements were made intentionally and knowingly, or with reckless disregard for the truth. Capt. Hally has been a peace officer for 12 years. There is nothing to indicate he has had any issues with making misrepresentations or false statements to the court. Capt. Hally's statements reflected information gathered from his investigation of the Defendant, recollection of other witnesses' and officers' statements to him, and his interviews with Mr. Capone and Ms. Anderson. Additionally, there are valid explanations in the attached affidavit for each statement that the Defendant suggests might appear misleading at face value or out of context. There is evidence and reasonable inferences that would lead a reasonable officer to reach the conclusions Capt. Hally reached in his affidavit/report. At most, the statements or alleged misrepresentations were merely "negligent or innocent misrepresentations," which do not rise to the level of invalidating the warrant. *See generally State v. Linder*, 100 Idaho 37, 41, 592 P.2d 852, 856 (Idaho 1979) (Finding officer's mistake in naming a source as providing certain information, which officer had actually obtained during his own investigation, to not be intentional or reckless falsehood).

Additionally, as may be the case here, where statements in the affidavit might be "subject to different [or 'alternative'] interpretations and inference[s]" the affidavit will be deemed to contain, at most, "[n]egligent or merely innocent misrepresentations" and the warrant will not be invalid. *Wright*, 115 Idaho at 1047-48, 772 P.2d at 254-55. Beyond the conclusory statement that Capt.

Hally violated the Defendant's *Miranda* rights at some point during the investigation, which is in dispute by the parties, the Defendant fails to point to any other evidence to show that Capt. Hally intentionally and knowingly, or with reckless disregard for the truth, submitted false statements or misrepresentations to the Magistrate. Therefore, the Defendant has failed to show, by a preponderance of the evidence, that Capt. Hally made false or misleading statements intentionally and knowingly, or with reckless disregard for the truth, and a *Franks* hearing is not warranted under the circumstances.

II. The Defendant has failed to meet his burden of showing that, if a *Franks* hearing were held, and all of the allegedly misleading statements were removed from the warrant, there would not have been probable cause to issue the warrant.

The Defendant has failed to meet his burden of showing, by a preponderance of the evidence, that if the allegedly false or misleading statements were omitted, there would not have been probable cause for the Magistrate to issue the warrant. Specifically, although the Defendant alleges that Capt. Hally made the false statements intentionally or recklessly, nowhere in his motion does the Defendant explain why there would not have been probable cause for the Magistrate to issue the warrant were the alleged statements supplemented or omitted. Thus, even if this Court found Capt. Hally's statements to be false or misleading, and that he made those statements knowingly and intentionally or with reckless disregard for the truth, a *Franks* hearing is not necessary because, even if those statements were removed from the affidavit and it was supplemented with the changes the Defendant alleges, the Magistrate would still have had probable cause to issue the warrant.

Additionally, where the defendant alleges that the falsity of the affidavit is due to omissions and/or misleading statements, the defendant must "show that the affidavit purged of those falsities and supplemented by the omissions would not be sufficient to support a finding of probable cause." *Stanert*, 762 F.2d at 781, *citing Franks*, 438 U.S. at 171-72 (emphasis added).

The Defendant bears the burden of showing, by a preponderance of the evidence, "that the false information was material to the magistrate's finding of probable cause." *Kay*, 129 Idaho at 511, 927 P.2d at 901. Under *Franks*, "[a] false statement is 'material' if without it, probable cause would not have been found. *State v. Morris*, 131 Idaho 562, 567, 961 P.2d 653, 658 (Idaho Ct. App. 1998). In deciding whether there is probable cause to issue a warrant:

Probable cause is determined by examining the totality of the circumstances, and making a "practical common-sense decision whether, given all the circumstances set forth in the affidavit before [the court], including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place."

Peterson, 133 Idaho at 49, 981 P.2d at 1159; *quoting Illinois v. Gates*, 462 U.S. 213, 238 (1983).

The issue of probable cause is examined as a question of law. *Id.*

Here, the Defendant has not put forth any evidence or argument as to why the warrant would not have been issued if the allegedly false statements or misrepresentations were omitted and supplemented. The State contends that, even if the allegedly false statements, misrepresentations, or omissions were removed and supplemented with the explanations in Capt. Hally's attached affidavit, there would still have been probable cause for the Magistrate to issue the warrant. Specifically, if each statement were altered with the Defendant's requests, there would still be copious amounts of information and evidence to support a finding of probable cause. *See Defendant's Exhibit 1.*

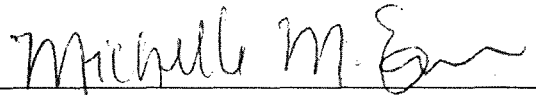
The following information, provided by Capt. Hally in the attached Affidavit of "Exhibit A", supports such a finding of probable cause: Capt. Hally had information from his conversations with Ms. Anderson about the harassing phone calls and stalking; he had admissions from the Defendant about using Spoof.com to leave Ms. Anderson messages; he had heard the messages left on Ms. Anderson's phone and noted that they were "harassing and scary"; he had spoken to Mr. Bogden, who told him that Charles "had described following and doing things that were upsetting to Rachel"; the issue with the amount of beer consumed is immaterial; Capt. Hally's use of the word "emails" where he meant "voice mails" was an inadvertent mistake; Capt. Hally noted that the February 21, 2010 report did involve allegations of harassment as the "RP", Ms. Anderson, was concerned about harassing messages; Capt. Hally was only told the Defendant might not make the April 21, 2010 meeting, and that he did have reason to believe the Defendant was evading surveillance by the Moscow City Police; and finally, although the Defendant alleges constitutional violations at the May 6, 2010 and August 28, 2012 meetings, such allegations do not change the Magistrate's finding of probable cause. State's Exhibit A. Therefore, because the Defendant has failed to meet his burden of showing, by a preponderance of the evidence, that the allegedly false statements and misrepresentations, omitted and supplemented, would negate the probable cause finding by the Magistrate, the Motion to Suppress should be denied.

CONCLUSION

Because the Defendant has failed to show, by a preponderance of the evidence, that the alleged statements and misrepresentations were false and misleading, and made knowingly and intentionally, or with false disregard for the truth, a *Franks* hearing is not required and the motion

should be denied. Additionally, the Defendant has failed to meet his burden of showing that the allegedly false and misleading statements, when omitted and supplemented, would negate the Magistrate's finding of probable cause. Therefore, the State respectfully requests that the Defendant's Motion to Suppress be DENIED.

DATED this 15th day of April, 2014.



Michelle M. Evans.
Sr. Deputy Prosecuting Attorney

CERTIFICATE OF DELIVERY

I hereby certify that true and correct copies of the STATES RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS #3 (SEARCH WARRANTS) were served on the following in the manner indicated below:

The Honorable Michael J. Griffin
District Judge
Idaho County Courthouse
320 W. Main Street
Grangeville, ID 83530

U.S. Mail
 Overnight Mail
 Fax: 208-983-2376
 Hand Delivery

D. Ray Barker
Attorney at Law
P.O. Box 9408
Moscow, ID 83843

U.S. Mail
 Overnight Mail
 Fax
 Hand Delivery
 e-mail: D.RayBarker@turbonet.com

Mark T. Monson
Mosman Law Office
P.O. Box 8456
Moscow, ID 83843

U.S. Mail
 Overnight Mail
 Fax
 Hand Delivery
 e-mail: mark@mosmanlaw.com

Dated this 1ST day of April, 2014.



1. Page 3: *"Charles told me that he was the one who was stalking and harassing Rachael"*.

Response: This is my summary of multiple statements made by Charles Capone on April 20, 2010 in a recorded interview. During that interview Charles stated that "some of the phone calls" she was getting were from him, and "some of the text messages and stuff like that." He also made a statement that he was playing a "stupid game" with her. He stated they started having "a lot more communication." He stated they needed to sit down and "stop all this". He told me the "weird" phone calls started in February. He referred to himself as the "Text King". He described how this "had gotten out of hand."

The statements were made during a portion of the interview with Charles that was focused on Rachael telling me that she had been stalked and harassed by text messaging, phone calls, email and damage to her vehicle since February 19, 2010. As noted above Charles stated the "weird" phone calls started in February.

Charles admitted to using Spoof.com. When asked by me if he was calling Rachael, he admitted: "Absolutely." I had listened to the messages on Rachael's voicemail and they are best described, in my opinion, as creepy, frightening and harassing; Rachael had described them as weird and she was in fear because of what was happening (based upon my conversation with her on April 13, 2010 as noted in my report). Rachael had told me that she had borrowed a pistol for protection and that she was sleeping on her couch rather than her bedroom because of the phone calls and messages (as noted in my report from my interview with her on April 13, 2010).

In my opinion, based upon my training and experience which includes providing training to other agencies on stalking investigations and offender behavior, the information in my affidavit accurately summarizes the information and evidence available to me, and of the statements made by Charles during this interview. At no time did I include any statements that were intended to be misleading.

2. Page 3: *"[Charles Capone] told me...that he had left harassing messages on her phone."*

Response: During the recorded interview on April 20, 2010, Charles Capone admitted that he used Spoof.com for the phone calls. All of the Spoof.com messages I

listened to were harassing and scary types of messages. Rachael described her fear because of the phone messages as outlined above in response to #1, and in my report regarding my conversation with her on April 13, 2010.

3. Page 3: *"He [Charles Capone] had left numerous messages and email to scare her because he believed she was harassing him."*

Response: During the recorded interview on April 20, 2010, Charles Capone describes how he had been receiving calls from blocked numbers and he described how he believed it was Rachael making those calls. The context of the conversation was that these calls were harassing calls made to him. He also stated that he had changed his phone number because of the calls. In the same portion of the interview, he stated "When Rachael and I first started having problems, some of the phone calls she was getting were from me, some of the text messages and stuff like that." My use of the word "scare" summarizes what was occurring. Charles described how he believed Rachael was doing things to him and how this thing had been a "nightmare" for him and his statement of "He was playing back". Considering his demeanor and the totality of the interview, the above statement accurately describes his intentions of what he was doing and what he admitted to doing. My knowledge of the Spoof.com messages and Rachael's statements to me were also factors in my description.

The use of the word "email" was an inadvertent mistake by me. My intention was to describe voicemail not email, and it was in reference to the Spoof.com calls. The phrase "numerous messages" was in reference to text messages. My use of the word numerous is an accurate description of the volume of text messaging Charles had described to me as well as the volume of text messages on his phone. At no time did I attempt to make misleading statements. In my opinion, the use of the word "email" rather than "voicemail" actually lessened the impact of the actions (less personal), particularly in light of the description Rachael provided on April 13, 2010, of how the voicemail messages were affecting her. My report of my initial interview with Rachael Anderson on April 13, 2010 and the recorded interview with Charles Capone on April 20, 2010 support the above.

4. Page 4: *"He [Robert Bogden] said that he had a conversation with Charles because Charles had told him that he had been following and harassing Rachael..."*

Response: On April 21, 2010, I spoke with Robert Bogden by telephone. During that conversation he described how he had told Charles that Charles could no longer live at their home and had to move out that day. He had also described how he had talked to Charles, and that Charles had described following and doing things that were upsetting to Rachael. He also told me that with Rachael now missing, he was too concerned to have Charles still live at his house. He described how he was sending his wife and daughter to Utah that day. He described his actions as being based upon what Charles had told him and that now Rachael was missing.

The complete sentence I used in the affidavit is as follows: "He said that he had a conversation with Charles because Charles had told him that he had been following and harassing Rachael and that with Rachael now being missing he was too concerned to have Charles still live in his house." The language I used in my affidavit was a summary of what was indicated during my phone conversation with Robert Bogden. Had he specifically used the word "harassing" I would have put that word in quotations. At no time was this intended to be misleading; it accurately reflects my conversation with Robert Bogden and the nature of his fears and conversation with Charles Capone.

5. Page 4: *"Deputy Hally's testimony at the preliminary hearing was also inconsistent with the what was included in the search warrant affidavits. As an example, at the preliminary hearing, Deputy Hally testified that Charles Capone told him that Rachel had four beers and Charles Capone had two beers. However, the language in the affidavits for the search warrants state that Charles Capone told Deputy Hally that Rachael Anderson had one beer and Charles had two beers."*

Response: During my recorded interview with Charles Capone on April 20, 2010, Charles described to me what Rachael Anderson was doing while she was sitting in the Yukon in the parking lot of his shop. He described how she was sitting there drinking a beer and doing paperwork for me (which is what I put in the report, not that she "had one beer"). At this point in the interview I had not asked for the total number of beers that Rachael or Charles consumed. Much later in the conversation, Charles was asked

by Det. James Fry (while I was away for a moment) for the total number of beers he believed Rachael drank, he responded by stating that he didn't know, but he had gotten two of the beers from her and she had the four when she left. Upon my return, the conversation was summarized by Det. Fry as Charles stating Rachel probably had four beers, but that he did not think she was intoxicated at all. Charles told us that he asked Rachael if the beer was purchased with his debit card. When she told him it had been, he told her to give him one. However, Det. Fry told me that Charles had told him he had two of the six beers. My testimony at the preliminary hearing is accurate and truthful and is supported by the evidence and information in this matter.

6. Page 4-5: *"Deputy Hally also misrepresents the contents of police reports made by Rachael Anderson to the Clarkston Police Department. These misrepresentations are included in each of the search warrant affidavits used in this case. As an example, each of the affidavits state: "On February 21, 2010 there is a report where Charles allegedly was harassing her by text messages and voice mail messages."*

Response: I did not misrepresent the contents of the police reports because I was not speaking about the content of the police report. It is clear in my report/affidavit that I was describing the nature of the report made by Rachael Anderson on February 21, 2010, to the Clarkston City Police Department. At no time did I make a claim about what the reporting officer stated. In looking at "Exhibit 2" attached to the Defendant's memorandum (Bates#83-85), the referenced incident is "Incident Number 10P00869." The nature of the complaint in the Spillman Police Report System for this case is "Harassment". I note that the defense did not include the fourth page of the report (Bates #86) to their Exhibit 2. That page is attached to this affidavit. On that page, the call comments entered by the dispatcher state the following: "RP would like to talk to an officer about some harassing text messages and phone calls that she has been receiving". The "RP" (reporting person) was Rachael Anderson.

In addition, the responding officer, Jeremy Foss of the Clarkston City Police Department, includes in his report that he explained to Rachael Anderson that the cell phone companies can block the numbers and he recommended that she contact them. He also asked Rachael if she had contacted the courts about a protection order as he had previously recommended to her. It is clear from his report that Rachael believed she was being harassed by these text messages and phone calls. She even returned the

same day to show Officer Foss an additional message she received. The statement complained of above by defense counsel is an accurate summary of the February 21, 2010 report by Rachael Anderson.

7. Page 5: *"Deputy Hally also omits the circumstances surrounding the statement attributed to him in each of the search warrants that "Charles was scheduled to come in to the Moscow Police Department for an interview at 8:00 pm on April 21, 2010. Charles did not show up for the interview and appears to be evading surveillance by the Moscow Police Department with the assistance of acquaintances." "Regarding the 8:00 p.m. interview on April 21, 2010, Deputy Hally failed to include information from Detective Scot Gleason of the Moscow Police Department who contacted Charles Capone on April 21, 2010 at 1245 hour and asked whether Mr. Capone was still planning to meet with Hally that evening. A copy of Detective Gleason's report is attached here to as Exhibit 3. Detective Gleason reported that Charles Capone informed him that he had nothing else to say to the police and referred the police to his attorney, Mark Monson. Detective Gleason then reports that he left Charles Capone's shop and called Detective Hally to report about his contact with Charles Capone."*

Response: In reviewing Det. Gleason's full report (attached to the Defendant's Memorandum as "Exhibit 3" - Bates #269), Det. Gleason states:

"Capone became somewhat agitated and asked me what I wanted. I told Capone I just wanted to see if he was still planning to meet with Hally at our police department at 2000 hours. Capone told me he had nothing else to say to the police because he told them everything yesterday (04-20-2010)." Detective Gleason also states: "He said he was trying to run a business and that meeting was upsetting. As the conversation continued, Capone then told me that maybe "we" (police) should talk with "Mark". I asked him who "Mark" was. He said Mark Monson. I asked Capone who Monson was. He said a friend, a client and also his attorney. I again told Capone that I was not here to talk to him, but just to confirm a meeting. He said he did not know if he would make the meeting because he was busy and that he had Bible study at 1830 hours. I left Capone's shop and called Hally to tell him about our contact".

Capone did not refer us to his attorney, Mark Monson. He simply told Det. Gleason maybe we should contact him. Capone also told Det. Gleason he was unsure if he would make the meeting. He did not say he was not going to attend. So, after hearing that information from Det. Gleason, I went to Moscow City Police Department and

waited for Charles to arrive as scheduled; he failed to show up as he had agreed to do when I previously contacted him.

My statement regarding Capone appearing to be evading surveillance by the Moscow City Police Department is based upon the reported actions of Capone, David Stone and Alisa Stone on April 22, 2010 in police report number 10-M03480 as reported by Sgt. Danny Bruce of the Moscow City Police Department. Based upon the information in the report, it is clear Capone was attempting to evade the surveillance efforts of the Moscow City Police Department with his acquaintances. At no time did I provide misleading or incorrect information to the court.

8. Page 6: *"As noted previously, Deputy Hally knowingly violated Mr. Capone's constitutional rights by intentionally ignoring his request for counsel on May 6, 2010 and again on August 28, 2012."*

Response: At no time including the dates of May 6, 2010 and August 28, 2012, did I violate Mr. Capone's constitutional rights as claimed by Capone's attorneys. The facts of my contact with Charles Capone are as follows:

- On May 6, 2010, at approximately 10:00 a.m., Capone was contacted at his business located at 2216 South Main Street, Moscow, Idaho and placed under arrest by SSA Hart of the ATF for violation of 18 U.S.C. 922 (g)(1)—felon in possession of a firearm. He was transported to the Moscow City Police Department.
- At approximately 10:15 a.m., Capone was escorted to an interview room at the Moscow Police Department and while in the interview room he was unhandcuffed. I was present in the interview room. SSA Hart provided Capone with a copy of ATF 3200.4 Advice of Rights and Waiver. SSA Hart also read aloud the advice of rights to Capone. Capone indicated he wanted to call his attorney Monson and he was allowed to call Monson. After the phone call, Capone informed us that he wanted to talk to SSA Hart about firearm, but his attorney did not want him to do so. SSA Hart terminated his interview.
- I had previously told Charles when he was brought into the interview room that I wanted to talk to him about Rachael Anderson. After SSA Hart terminated his interview about the firearm offense, I asked Capone if he would talk to me about

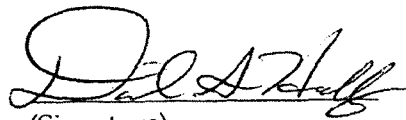
the disappearance of Rachael. Capone agreed to stay and talk with me about Rachael Anderson while waiting for Monson.

- Capone indicated he could take us to Rachael but he wanted to talk to his attorney before he said anything else. I stopped my conversation with him and waited for Mr. Monson before we continued. Capone had previously told me Mr. Monson was his divorce attorney. At the time of this contact with Capone he had not been charged or arrested regarding the disappearance of Rachael Anderson, which was the topic of my discussion. He was in custody only for the firearms violation. None of my conversation was related to his arrest for the firearms violation.
- At approximately 11:40 a.m., Mr. Monson stopped by the Moscow Police Department but was told Capone was being processed for prints and photographs. He was advised by SSA Hart that Capone would contact him when he was done being processed. After Capone was processed, Mr. Monson was contacted by SSA Hart and he returned to the police department and met with Capone. Mr. Monson participated in further discussions with myself, SSA Hart, Latah County Prosecutor Bill Thompson and Assistant U.S. Attorney Mike Mitchell regarding what was disclosed to him by myself and SSA Hart reference comments made by Capone. Mr. Monson made no objections or made any statements at that time regarding my contact with Capone other than he was assisting us in negotiating with Capone for the recovery of Rachael Anderson's body in exchange for Capone being released from Jail. Mr. Monson freely spoke to us about what Capone had told him full knowing these were not conversations regarding a plea agreement. He confirmed what I had told him and what SSA Hart had told him regarding Capone's statements by affirming that Capone had told him he had the information we needed. Mr. Monson's own actions demonstrate I at no time violated Mr. Capone's rights during this contact.
- On August 28, 2012, I went to the Federal Prison located at Sea Tac, Washington with Detective Nichols of the Asotin County Sheriff's Office. We made contact with Charles Capone in an interview room. Charles was in custody because he was serving a sentence related to him being a felon in possession of a firearm. Immediately upon entering the room, I advised Capone that I was not there to interview him and I was not going to ask him questions. I told him I was there to provide him an update on the case involving his missing wife, Rachael

Anderson. Mr. Capone was not in custody for charges related to the investigation of Rachael Anderson's disappearance and he had not been charged. He stated he wanted his attorney and became agitated. I continued to explain to him that I was not asking him to make statements and I was not interviewing him. The delay in us leaving was not created by me; he was allowed to leave as soon as the Federal Corrections Officers responded to open the secured door to the room we were in. I had explained to Capone that I had recovered a letter, that I was not sure he had seen before, that was written by Rachael and was about the way she felt about their relationship. I told him he could look at the letter if he wanted and I also advised him again that I would simply like to update him about the case status. He was allowed to leave as soon as the secured door was opened. Mr. Capone was not questioned without his attorney, and to my knowledge his only attorney regarding the Rachael Anderson matter was his divorce attorney, Mark Monson. I contacted Mr. Monson and informed him of the contact at the Federal Prison. At no time was Capone's rights violated as claimed in this motion

I declare under penalty of perjury pursuant to the law the State of Idaho that the foregoing is true and correct.

4/1/2014
(Date)


(Signature)

Call: Nature: Harassment Type: 1 Priority: 4
Address& : City: CLA

Zones : : : Determ: Alarm:
Directions:
+- Complainant: 87350 -----+
x Lst: ANDERSON Fst: RACHAEL Mid: LEIGH x
x Adr: DOB: x
x Cty: CLARKSTON ST: WA Zip: 99403 SSN: 1 x
x Tel: Sex: F Prev Calls: Wants: Adr: x
x Alrt: x
-----+

Contact: Rachael Tel: () -
Address: in jail lobby L Plate: St:
Info: (See below)
Calls: Dupl: Names: w/Alrts: Wants: Prem: Adr:
How Rcvd: T Telephone Occurred between: 12:42:03 02/21/10
Rcvd by: Rachel Whitmore and: 12:42:03 02/21/10
Hld Until: : : / / When Rptd: 12:43:25 02/21/10

=====

Call Taker Comments:

RP would like to talk to an officer about some harassing text messages and phone calls that she has been receiving. Officer contacted RP, computer report.

Sun Feb 21 13:14:17 PST 2010 rew

Sun Feb 21 12:43:14 PST 2010 rew

- >Where is the suspect now?
- >Do you know the name of the suspect?
- >Description of suspect?
- >What form of harassment occurred?
- >Has this occurred before? How long has this been occurring?
- >Vehicle involved?
- >(If applicable) What is their direction of travel?
- >Does the suspect have any weapons?

CASE NO CR2013-1358

2014 APR -9 AM 10:39

CLERK OF DISTRICT COURT
LATAH COUNTY

BY cm DEPUTY

D. RAY BARKER
Attorney at Law
204 East First Street
P.O. Box 9408
Moscow, Idaho 83843-0118
(208) 882-6749
Idaho State Bar No. 1380

Attorney for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO,)
)
 Plaintiff,)
)
 vs.)
)
 CHARLES ANTHONY CAPONE,)
)
 Defendant.)

Case No. CR-2013-0001358

**AFFIDAVIT OF D. RAY BARKER
RE: DEFENDANT'S MOTION TO
SUPPRESS AS TO EVIDENCE
OBTAINED THROUGH SEARCH
WARRANTS**

State of Idaho)
 : ss.
County of Latah)

D. Ray Barker, being first duly sworn upon his oath, deposes and says:

1. I have reviewed the interview between Dan Hally and Charles Capone on April 20, 2010, through a transcript of the recording of that interview.

2. I have also reviewed the interview between Dan Hally, Charles Capone and Bert Bogden on April 20, 2010.

**AFFIDAVIT OF D. RAY BARKER RE: DEFENDANT'S
MOTION TO SUPPRESS AS TO EVIDENCE OBTAINED
THROUGH SEARCH WARRANTS - 1**

001482

3. On April 20, 2010, Dan Hally and several other law enforcement officers interviewed Charles Capone at his place of business near Moscow, Idaho. I have provided herewith a transcript of the recording of that interview. I will make reference to several isolated statements in that transcript by page number and I have provided the entire transcript in the interest of providing the context for those isolated statements.

4. In the State's responses to Defendant's Motion to Suppress #3 the State has included an Affidavit of Capt. Dan Hally in which he responds to several quotes from the Affidavit in Support of Search Warrant attached to the Defense motion.

5. The first such quote is that "Charles told me that he was the one who was stalking and harassing Rachael." At no point in the recorded interview did Mr. Capone tell Mr. Hally that he was stalking or harassing Rachael. The following is what was said regarding phone calls and other contacts between Mr. Capone and Rachael Anderson:

Beginning at Page 8, Line 19 and continuing to Page 10, Line 13.

Q. Okay, and was any of this weird phone calls going on in November or did this all start --

A. No. After I started getting phone calls in February.

Q. February. Did you get them first or did she get them?

A. No, I got them first.

Q. And then did you tell them about -- did you tell her about them?

A. No, I didn't say a word to her for like two weeks because I thought it was just them harassing me.

Q. Okay.

**AFFIDAVIT OF D. RAY BARKER RE: DEFENDANT'S
MOTION TO SUPPRESS AS TO EVIDENCE OBTAINED
THROUGH SEARCH WARRANTS - 2**

001483

A. I told the police. I told my pastor that the Moscow PD told me to file a restraining order because she would come in the shop, and I didn't want to change the locks in the shop so I just kept checking it, checking the doors to see if she was coming in here at night, because she came in in November during Thanksgiving weekend and just took stuff off the computers, stuff out of the drawers.

Q. Okay. She was telling me that you were helping her trying to figure out (inaudible)?

A. Well, there was other phone calls that weren't what we were -- I kept wanting to get her to tell me that she was the one (inaudible) that's a really good -- the counselor, my pastor, you guys need to sit down. So, I wanted her to tell me the truth like this mail, because I already have a criminal record, and I was like, okay, this is going to be -- this is like a setup to get me in trouble, and I'm not -- I wouldn't by any means put in a change of address to the mailbox, so I thought she did it because this a mailbox and all we get is like garbage mail there. We have a P.O. Box that we've had for seven and a half years (inaudible) so I waited two weeks. Put return to sender on it. Put it back in there. And then after two weeks she didn't say anything. She didn't say she's not getting her mail. And I finally asked her, I said, are you missing your mail? And that's when we went to the Post Office, and that's when it really blew up. I said, well, whoever actually did this, because there's somebody else doing stuff, the day her window got broken out at work, I was at work, and I got 13 phone calls from her. I'm not attacking your car. You don't understand. I am not --

Beginning at Page 13, Line 7 and continuing through Page 13, Line 16.

A. (Inaudible). That's what she drinks. I asked her, I said, did you buy that --because I seen (inaudible) sitting in the passenger seat. She was drinking a beer (inaudible) and she was trying to figure out what Slim's build was or his hair, and I kept saying, you know, Rachael, you know, it's going to be somebody else. It's not him, but she didn't like it because I was defending him, but I wasn't. I just didn't --and the phone calls just didn't add up to what was going on with who.

Beginning at Page 19, Line 9 and continuing through Page 19, Line 24.

A. She says, come down. Hang out fliers. I'll tell you what to do. My family is telling me, don't even go around them. My pastor is telling me, don't go around them. My counselor is telling me don't go around them. My pastor wanted me to just cut all of them --because we were doing, you know, stuff to each other. She was turning me into --I stopped by on a Sunday to talk to her about the date that I was told she is on. She's got two flat tires. She calls the police on me. The Clarkston police pull me over in downtown Clarkston. I mean, every time I turn around the police were calling me, oil filter, the flat tires, and I'm not doing any of that.

Q. Okay.

A. And I kept telling her, I said, Rachael, I'm not attacking your car.

Beginning at Page 25, Line 3 and continuing through Page 25, Line 20.

Q. Are you pretty good with the text stuff?

A. Am I?

Q. Yeah.

**AFFIDAVIT OF D. RAY BARKER RE: DEFENDANT'S
MOTION TO SUPPRESS AS TO EVIDENCE OBTAINED
THROUGH SEARCH WARRANTS - 4**

001485

A. Once I got my iphone I do okay.

Q. Like with Spoof dot com? How did you figure out about Spoof dot com?

A. She said that Amber told her about it, so I looked it up on the computer with her on the phone, and I sent her a call from a tire company (inaudible) any company.

Q. Okay.

A. And you put in any number, and it was -honestly, it was Oklahoma Big O Tire.

Q. Is that a free service?

A. You can get them, yeah.

Q. I mean, is Spoof dot com free?

A. No, you have to pay for it, but they give you a bunch of calls for free.

Beginning at Page 34, Line 9 and continuing through Page 34, Line 24.

A. I mean, you're more than welcome to --here is all my text messages, I mean --

Q. (Inaudible)?

A. No, I won't.

Q. (Inaudible)?

A. They'll hold.

Q. Got any examples from her?

A. I'm the text king. At 8:42 on Friday she texted me the account number for the car.

Q. Okay.

A. So --because I make the car payment, and she hated it --and you can listen to some of the

voice messages. She can't get texts so she's are my texts. And I can go all the way back. So, those are hers where she was telling me stuff. So, sorry (inaudible) go right back to it.

6. The second quote is "Charles told me [...] that he had left harassing messages on her phone." At no point in the recorded interview did Mr. Capone tell Mr. Hally that he had left harassing messages on her phone. The above quotes are relevant to this second quote from Mr. Hally's affidavit.

7. The third quote is "He [Charles Capone] had left numerous messages and emails to scare her because he believed she was harassing him." In Mr. Hally's response he attempts to justify the use of the word "scare" as his summarization of what was occurring and states that his statement was partially based on statements Rachael had made to him. That is not consistent with Mr. Hally's statement made to Mr. Capone in a recorded interview with Charles and Mr. Bogden on April 20, 2010. A copy of that transcript is also attached hereto. An excerpt from the transcript of that recording shows the following:

Beginning at Page 8, Line 21 and continuing through Page 9, Line 12.

MALE SPEAKER: The husband is always the suspect, and that bothers me a lot.

MALE SPEAKER: Well, that's --but that's what I'm trying to tell you. The indications I've got from her, she indicated to me she wasn't afraid. Everything that she gave me and talked to me about points to the other guy I was telling you about.

MALE SPEAKER: Well, I mean, when she told me that I was shocked because I was running around the truck together (inaudible.)

**AFFIDAVIT OF D. RAY BARKER RE: DEFENDANT'S
MOTION TO SUPPRESS AS TO EVIDENCE OBTAINED
THROUGH SEARCH WARRANTS - 6**

001487

MALE SPEAKER: That's why I wanted to talk to you because the information she got was you were pretty up to speed on this guy.

MALE SPEAKER: Only what she told me, though.

MALE SPEAKER: Okay.

MALE SPEAKER: I don't know him. I never even knew his last name.

7. In the above quote Mr. Capone is identified as the first male speaker in the first line as the husband. Mr. Hally is the other male speaker.

8. The fourth quote is "He [Robert Bogden] said that he had a conversation with Charles because Charles had told him that he had been following and harassing Rachael." Unfortunately this quote is based on an unrecorded telephone conversation between Mr. Hally and Mr. Bogden and not subject to review.

9. I have intentionally not addressed the fifth quote because it does appear from the transcript that Mr. Hally may have not been present when Mr. Capone stated that he had two beers and Rachael Anderson had four.

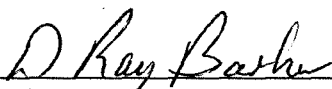
10. The sixth quote states "deputy Hally also misrepresents the content of police reports made by Rachael Anderson to the Clarkston Police Department [...] On February 21, 2010, there is a report where Charles allegedly was harassing her by text messages and voicemail messages." The report dated February 21, 2010, states that Rachael Anderson spoke about some text messages she had received which said things like "I am praying for you and Charles", "We missed you at church on Sunday", "I heard about you and Charles getting a divorce in pray circle

and we are praying for you.” It also included a later message Rachael reviewed which said something along the lines of “what happened to the Rachel I used to know, the fun one”. These statements were misrepresented in the affidavit as being harassment and but for the last message are misrepresented as being from Mr. Capone. He would not have sent messages describing himself in the third person.

11. The seventh quote deals with Charles’ failure to meet with Mr. Hally at 8:00p.m. on April 21 and implies that Charles did something wrong by not appearing after he had informed Detective Scott Gleason that he had nothing else to say to the police and referring him to his attorney, Mark Monson, and Detective Gleason had made Mr. Hally aware of what Mr. Capone had told him. Mr. Capone was not scheduled to come in for an interview and failed to appear. He was asked to come in for another interview and he declined the request by telling Detective Gleason of the Moscow City Police that he had nothing more to say to the police and telling him that maybe they should speak with his attorney. It is a misrepresentation in that the statement implies that Mr. Capone did something wrong in not appearing.

I declare under penalty of perjury pursuant to the Law of the State of Idaho that the forgoing is true and correct.

Dated this 9th day of April, 2014.



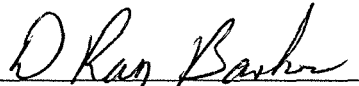
D. Ray Barker
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of April, 2014, a true and correct copy of the foregoing documents was served, by first class mail, postage prepaid, and addressed to, or by personally delivering to or leaving with a person in charge of the office of or serving by facsimile:

Latah County Prosecutor's Office
Latah County Courthouse
Moscow, ID 83843

- First-class mail
 Hand-delivered
 Facsimile

By: 
D. Ray Barker

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IN THE SECOND JUDICIAL DISTRICT,
SITTING WITHIN AND FOR LATAH COUNTY,
STATE OF IDAHO

TRANSCRIPT OF CAPONE INTERVIEW 1

TRANSCRIBED BY: KEITH M. EVANS, RPR, CSR NO. 655

K & K REPORTING (208) 743-1380
kkreport@wildblue.net

1 (Thereupon the following oral proceedings
2 were had as follows, to-wit:)

3 EXAMINATION

4 Q. How you doing?

5 A. Doing good.

6 Q. Steve Frei, Moscow Police Department.

7 MALE SPEAKER: Dan Hally, Asotin County. How you
8 doing?

9 Q. Rachael, yeah, I was hoping you would kind of
10 help me with that.

11 A. Yeah, I'd love to.

12 Q. (Inaudible.) Okay.

13 A. (Inaudible) was not -- this whole thing is
14 way out of -- excuse me just a moment.

15 Q. No problem. What can you tell me about
16 (inaudible)?

17 A. Let me tell you (inaudible) because this is
18 something I talk about (inaudible) last couple of
19 weeks. We went in -- I started getting phone calls
20 back in February. I went to -- you guys got to excuse
21 me because this whole thing is like a nightmare for me,
22 and it's been that way. My pastor was just here. I
23 started getting phone calls in February. I'm still
24 getting them, too, and they're still coming through the
25 phone as out of area, and they just hang up. When I

1 changed my phone numbers after I while I stopped
2 getting blocked calls. But I thought they were
3 Rachael, so when Rachael and I first started having
4 problems some of the phone calls she was getting were
5 from me, some of the text messages and stuff like. Her
6 and I had been talking about it, and I kept trying to
7 get us to sit down so that we would stop having this
8 issue. When her mail started coming to my mailbox I
9 called my attorney, because I have a divorce attorney,
10 and I said I don't know what's going on but now I'm
11 getting her mail. Well, we don't get mail to this
12 mailbox here. Everybody knows we get it through the
13 Post Office box, and that's when she thought that it
14 was this guy doing this. And I said, you know,
15 ex-boyfriend, I don't know, did you see the
16 handwriting? She keeps telling me it's him. I keep
17 telling her it is not. I went down there with her. I
18 said, you got to make sure, you know, what's going
19 on -- because she thinks it's him. I said, I don't
20 think it's the phone calls.

21 Q. You don't think it's him?

22 A. No, because the phone calls were all women
23 that I kept getting that were telling me that she was
24 fooling around. She was -- so, I'm playing a stupid
25 game with her, and she said, well, I guess it could

1 have been my family, but I don't know if it's my
2 family, you know. We started having a lot more
3 communication. She's got me down there. I'm driving
4 around with her in the truck. We go by his house. She
5 shows me the letters. I never saw the change of
6 address thing. I wanted to see it because I wanted to
7 see if she did it.

8 Q. Okay. She told me that you guys were driving
9 around or something, and you saw or she saw Slim at a
10 phone booth or something?

11 A. That's what she said, but, you know, I don't
12 know.

13 Q. Oh, you weren't there?

14 A. No. I was up here working. When I would get
15 phone calls -- we thought it was the neighbor across
16 the street because I get a phone call saying she's out
17 on a date, and she's going to come home in a white Ford
18 pickup.

19 Q. And that was a woman calling you?

20 A. It's always been a woman.

21 Q. Did it sound digitally altered?

22 A. No. It's just been a straight woman, and
23 it's always -- and now they're just hangups. And if
24 you look at my phone -- I mean, it only saves so many
25 phone calls, but there's out of areas on the 13 to the

1 15th. Yesterday I got an out of area with a phone
2 number yesterday, but I get out of areas and I pick
3 them up and there's nobody on there. They just hang up
4 after a couple of seconds.

5 Q. Yeah, because I listened to some messages she
6 had. Did you hear the messages on her voicemail?

7 A. Yes, and then she --

8 Q. The one that sounds all digital altered?

9 A. Yeah.

10 Q. Okay. Do you have any ideas on who that
11 might have been?

12 A. Yeah.

13 Q. Who do you think that was?

14 A. Well, I would rather sit down with them
15 because her and I with the phone calls, there's some
16 that are me and there's some that aren't me.

17 Q. Okay.

18 A. And I thought she was doing them to me.

19 Q. So, were you calling her?

20 A. Yeah, absolutely.

21 Q. You were calling her? Okay, so you were
22 calling.

23 A. Oh, yeah. I was playing back, and that's --

24 Q. Were you using like spoof dot com?

25 A. (Inaudible) She told me about it. I didn't

1 even know about it until she told me about it
2 (inaudible.)

3 Q. So, that's where you're kind of like, crap,
4 this (inaudible)?

5 A. That's what I thought it was at first because
6 I went to my brother's for a week, and I would get
7 blocked calls. My pastor's phone call is blocked. His
8 snap-ons phone call is blocked. There is a few of them
9 that are blocked so I answer them. Well, when I first
10 started answering blocked calls then somebody would
11 tell me she is sleeping around. And I thought it was
12 her and her sister were angry at me because we haven't
13 had a good breakup. And I kept trying to get us to sit
14 down and stop all this. I tried to arrange meetings
15 with the pastor and her attorney.

16 Q. Okay, and who is your pastor? Is he kind of
17 helping out?

18 A. John Houser. He's tried. He's talked to her
19 quite a bit.

20 Q. Okay.

21 A. And then she (inaudible) calls, and I have a
22 counselor over in Pullman. And she's just agreed to go
23 tonight, and then --

24 Q. What time were you guys supposed to go
25 tonight?

1 A. At 7:00. We arranged it because she can't do
2 it (inaudible.)

3 Q. Who was that with?

4 A. His name is Dr. Williams.

5 Q. Dr. Williams?

6 A. Yeah.

7 Q. Okay, and that was for tonight at 7:00?

8 A. Yeah. I didn't see him because I didn't want
9 to fight anymore with her.

10 Q. Okay. All right. Okay.

11 A. This whole thing (inaudible).

12 Q. Did you talk to Clarkston PD about the phone
13 messages just being a game?

14 A. Well, I had Moscow PD come out here, because
15 Clarkston told me to do that. Then they said I'm in
16 the County so the Sheriff's Department came out. And
17 they listened to like 27 messages. The problem is a
18 lot of them were from Rachael.

19 Q. Oh, right.

20 A. And just like my cellphone, before I moved,
21 you know, before I got kicked out of the house, she
22 took this and she deleted 400 pictures off of it and
23 400 text messages off of it. And we got in a big fight
24 over that, and her attorney knew about the pictures.
25 She has access to this phone, and she got in this phone

1 and deleted all of her messages off of this phone.

2 Q. So you guys are kind of like back and forth?

3 A. It's been -- when I moved out of the house
4 she had taken -- Thanksgiving she came -- yeah, it's
5 just childish, and the pastor and everybody is trying
6 to get us -- my family is mad because I'll be talking
7 to her and I'm like, no, I mean, what we're doing is
8 childish. She comes in here on Thanksgiving weekend,
9 and she cleans out the file cabinet. She cleans out
10 pictures, boxes. I was really upset over that.

11 Q. Now, were you guys living in Clarkston?

12 A. No -- at one point for three months.

13 Q. Okay. When did you live in Clarkston?

14 A. I lived there September, October, and
15 November.

16 Q. Okay. So, you haven't lived there since
17 (inaudible).

18 A. No.

19 Q. Okay, and was any of this weird phone calls
20 going on in November or did this all start --

21 A. No. After I started getting phone calls in
22 February.

23 Q. February. Did you get them first or did she
24 get them?

25 A. No, I got them first.

1 Q. And then did you tell them about -- did you
2 tell her about them?

3 A. No, I didn't say a word to her for like two
4 weeks because I thought it was just them harassing me.

5 Q. Okay.

6 A. I told the police. I told my pastor that the
7 Moscow PD told me to file a restraining order because
8 she would come in the shop, and I didn't want to change
9 the locks in the shop so I just kept checking it,
10 checking the doors to see if she was coming in here at
11 night, because she came in in November during
12 Thanksgiving weekend and just took stuff off the
13 computers, stuff out of the drawers.

14 Q. Okay. She was telling me that you were
15 helping her trying to figure out (inaudible)?

16 A. Well, there was other phone calls that
17 weren't what we were -- I kept wanting to get her to
18 tell me that she was the one (inaudible) that's a
19 really good -- the counselor, my pastor, you guys need
20 to sit down. So, I wanted her to tell me the truth
21 like this mail, because I already have a criminal
22 record, and I was like, okay, this is going to be --
23 this is like a setup to get me in trouble, and I'm
24 not -- I wouldn't by any means put in a change of
25 address to the mailbox, so I thought she did it because

1 this a mailbox and all we get is like garbage mail
2 there. We have a P.O. Box that we've had for seven and
3 a half years (inaudible) so I waited two weeks. Put
4 return to sender on it. Put it back in there. And
5 then after two weeks she didn't say anything. She
6 didn't say she's not getting her mail. And I finally
7 asked her, I said, are you missing your mail? And
8 that's when we went to the Post Office, and that's when
9 it really blew up. I said, well, whoever actually did
10 this, because there's somebody else doing stuff, the
11 day her window got broken out at work, I was at work,
12 and I got 13 phone calls from her. I'm not attacking
13 your car. You don't understand. I am not --

14 Q. Okay.

15 A. Everybody knows me, my friends, my family, I
16 was just taking the car. I would have had a wrecker go
17 down there if I had wanted the car and just take it.

18 Q. Yeah, I talked to her Friday. Talking to her
19 and she (inaudible) when is the last time that you
20 actually talked to her?

21 A. 7:00 Friday.

22 Q. On Friday?

23 A. Yeah.

24 Q. Was that on the phone?

25 A. Yeah. She was here because I had --

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1 Q. Okay. She came here?

2 A. I had her car. Matter of fact, my roommate
3 is really upset over the whole drama thing, and now
4 what's going on because --

5 Q. So 7:00 p.m. Friday she was here?

6 A. No, it was a phone call.

7 Q. Oh, phone call.

8 A. She parked in a spot out here in the Yukon.
9 She took the car seat, a bag, her purse, some trash.
10 She threw the trash in the trash cans, and I told her,
11 I said, your car is not done, take my truck. And I had
12 already texted her a lot. I said, just take my truck
13 because I'm not finished with your car because I'm
14 trying to do other jobs.

15 Q. What time was that on Friday that she was
16 here?

17 A. She might have rolled up 4:30, I guess. If
18 you guys do like Office Depot, because she was in there
19 and she called me from Office Depot. She had my debit
20 card. She was going to buy a -- I don't know if she
21 told you. Her computer was whacked out.

22 Q. She was at Office Depot?

23 A. Yeah.

24 Q. In Moscow?

25 A. Yep. (Phone ringing) Palouse Multiple

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1 Services. Hey, Mike, can I give you a call? I have
2 some business going on at the office, and I really
3 can't talk. Okay, I'll give you a call back. Okay.
4 Sorry.

5 Q. Okay, so about 4:30 on Friday --

6 A. That's a guess of when she got here.

7 Q. So she came here?

8 A. Yep.

9 Q. Okay, and she had said she'd been at Office
10 Depot?

11 A. No. She came here. I gave her her debit
12 card so she could buy a new computer. I don't know if
13 she told you, but her computer has got a virus and she
14 went to the college and printed out -- she tried to do
15 it at home, but her computer has been really sick. And
16 they tried to fix it. And I said, well, Office Depot
17 has a Compact Presario that somebody told me was a
18 really good deal. So she went over, but they didn't
19 have any. So, then she went to Staples. Then she came
20 back and parked in the driveway. I still wasn't done
21 with her car. The kids were nextdoor. She wouldn't
22 get out and talk to the kids. Her and I just have
23 this, I don't know, there's none trust issue or
24 whatever is going on. We've been at each other for a
25 long time, ever since I got kicked out of the house.

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1 Q. Did you get your debit card back from her?

2 A. After she went and bought a six pack of
3 (inaudible) beer.

4 Q. Where did she buy that at?

5 A. I have no idea.

6 Q. Okay. What did she buy?

7 A. (Inaudible). That's what she drinks. I
8 asked her, I said, did you buy that -- because I seen
9 (inaudible) sitting in the passenger seat. She was
10 drinking a beer (inaudible) and she was trying to
11 figure out what Slim's build was or his hair, and I
12 kept saying, you know, Rachael, you know, it's going to
13 be somebody else. It's not him, but she didn't like it
14 because I was defending him, but I wasn't. I just
15 didn't -- and the phone calls just didn't add up to
16 what was going on with who.

17 Q. Did you -- so, did you talk to her? So, you
18 talked to her at 7:00, you said. You talked to her at
19 7:00 p.m.?

20 A. She went down to Computer Crazy to buy
21 Kevin's \$140 computer or at least talk to Kevin about
22 it. Kevin at Computer Crazy, he said was really good.
23 140 bucks.

24 Q. About what time was that?

25 A. I don't know, 7:00. Check phone records. I

1 mean, that was the last time I actually spoke to her.
2 Q. She -- okay. So when did she leave here?
3 A. Maybe 6:58. I don't know. (Inaudible)
4 guess.
5 Q. Guess, so you are thinking about 7:00 she
6 left here?
7 A. Yeah.
8 Q. Leaving your shop? You said she was here
9 4:30?
10 A. I don't know. She left before Lyle left
11 nextdoor. Lyle stays late. I stay late. (Inaudible).
12 Q. She showed up here about 4:30 from Office
13 Depot, right?
14 A. No. She showed up here from Clarkston.
15 Q. Okay. So she came up from Clarkston?
16 A. She called me on her way. She told me she
17 was ticked off at Welfare because she showed up with
18 all the paperwork, and they told her she would have to
19 come back on Monday (inaudible) nothing to help her
20 with.
21 Q. So, she came up to Clarkston? Got here about
22 4:30?
23 A. I'm guessing, yeah.
24 Q. And then you gave her the debit card?
25 A. To you buy the computer. You guys don't have

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1 an Office Depot down there.

2 Q. Right. So then she went to Office Depot?

3 She shows back up here --

4 A. At some point.

5 Q. At some point with the beer, working on

6 paperwork for me?

7 A. Yep.

8 Q. And then --

9 A. She left again.

10 Q. She left again.

11 A. To go to Kevin's, and then she left from

12 there because she called and said I'm going home. I'm

13 not going to wait.

14 Q. So, did she leave from here with your debit

15 card to go to Kevin's?

16 A. No.

17 Q. Okay. So, she left about what time?

18 A. (Inaudible).

19 Q. About what time did she leave from here to go

20 to Kevin's?

21 A. I honestly don't know.

22 Q. If you had to guess. I mean, I'm just trying

23 to timeline where this gal was at.

24 A. 6:00 something.

25 Q. Okay. So 6:00 something?

1 A. It had to be somewhere between 6:00 and, I
2 don't know, 7:15.

3 Q. 6:00 and 7:15. Okay. And then she called.
4 Did she say where she was calling you from at 7:00?

5 A. No. She said -- excuse me. (phone ringing.)
6 Palouse Multiple Services. Okay. Well, I have some
7 gentlemen in the office. I got to go. Okay. I'll
8 call you back. All right. Bye. Sorry. Lots of
9 family and friends calling.

10 Q. I can understand that. Okay, so you talked
11 to her about 7:00 on the phone?

12 A. Yep.

13 Q. You think she was headed home or --

14 A. That's what she told me she was. She had
15 been on the phone multiple times on the parking lot, so
16 I don't know who she was talking to.

17 Q. Okay. While she was here?

18 A. Oh, yeah.

19 Q. Okay. How much total time do you think she
20 was here?

21 A. In the parking lot?

22 Q. Uh-huh (affirmative.)

23 A. Maybe an hour and a half, maybe, I guess,
24 waiting.

25 Q. Waiting on the car?

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1 A. Yeah, which I needed to get another one that
2 was behind hers done. Hers was -- I mean, we made an
3 agreement that I would fix her car as -- I needed to
4 take it to Pullman to get another key made because she
5 locked her keys in the car at a friend's house. Paid a
6 locksmith. Broke the window out of her house because
7 she couldn't get access to her keys because we never
8 had a key to the car, so I took it over to (inaudible)
9 motors, and I made a key. We got the program
10 organized. I did brakes, a tune-up, changed the oil.
11 Tinted the windows which was something -- she was mad
12 because I haven't done that. She always told me, I
13 never lived up to my word or -- but Rachael is always
14 impatient, and just like going to Lewiston on Superbowl
15 Sunday with a friend, I was a half an hour late and she
16 split and texted me for an hour mean stuff and never
17 did show up with the car. So this was just par for the
18 course.

19 Q. Did you talk to her Saturday at all?

20 A. Nope. I got up. Came to work at 8:00 for an
21 appointment. (Inaudible) every morning I was calling
22 her or texting, every single morning. I never miss a
23 morning. I said, I know you're mad, just call.
24 (Inaudible.) She won't answer her phone when she goes
25 to work for Dennis.

1 Q. She indicated she was going anywhere?

2 A. Nope.

3 Q. She say anything more about Slim?

4 A. Nope. She just was mad because I told her, I
5 said, you got to know who filled out the change of
6 address form. These phone calls that I was getting was
7 not --

8 Q. And I know you guys have had some problems?

9 A. Oh, yeah. (Inaudible) I talked to Dennis at
10 length on the phone. Actually Dennis called me, but
11 there wasn't a lot of honest sharing going on. The
12 fight we had after Christmas was way different than
13 what people were hearing. She wasn't telling people we
14 were talking. I texted her. I said, now I know you
15 won't take my truck, so my roommate (inaudible) telling
16 her she can take my truck, and she didn't want to take
17 my truck. And I was like, okay. And Carol said that
18 she could borrow the Yukon. So, that's how she ended
19 up with the Yukon.

20 Q. Okay.

21 A. But Carol didn't tell her husband because he
22 is not into the drama because Rachael would call at
23 like 6:00 in the morning. She called the pastor at
24 6:00 in the morning. This whole thing is a nightmare,
25 I mean, from day one. And I don't know what to do

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1 (inaudible) calls me yesterday. Now you want me to
2 come down. I'm like, wait, I'm the enemy. You guys
3 are all -- I talk to --

4 Q. You mean, to come down when?

5 A. Yesterday.

6 Q. Yesterday.

7 A. Yeah.

8 Q. They wanted you to come down?

9 A. She says, come down. Hang out fliers. I'll
10 tell you what to do. My family is telling me, don't
11 even go around them. My pastor is telling me, don't go
12 around them. My counselor is telling me don't go
13 around them. My pastor wanted me to just cut all of
14 them -- because we were doing, you know, stuff to each
15 other. She was turning me into -- I stopped by on a
16 Sunday to talk to her about the date that I was told
17 she is on. She's got two flat tires. She calls the
18 police on me. The Clarkston police pull me over in
19 downtown Clarkston. I mean, every time I turn around
20 the police were calling me, oil filter, the flat tires,
21 and I'm not doing any of that.

22 Q. Okay.

23 A. And I kept telling her, I said, Rachael, I'm
24 not attacking your car.

25 Q. And if you did something like that you would

1 be straight up with me?

2 A. I am straight up. People that know me. I
3 don't need the headache. I've been living my life very
4 clean in Moscow, Idaho for a long time.

5 Q. Now, were you wanting to get back with her?

6 A. That was something that we could work out
7 together. Obviously if one person wants it and the
8 other one doesn't.

9 Q. Okay, were you wanting to? I mean --

10 A. Anybody that's married wants to, I guess.

11 Q. Well, I was married and I didn't want to. I
12 mean --

13 A. We get along fine when we're not fighting,
14 but I don't look at the same things --

15 Q. I'm just saying my ex -- I mean --

16 A. Well, Rachael is a scorekeeper.

17 Q. I was (inaudible) for my divorce happened
18 because I was tired of her. I didn't want to put up
19 with the crap, and sounds like you guys had a lot of
20 crap going on, fighting and headaches and didn't know
21 whether you wanted to --

22 A. Well, we fought over dumb stuff. We fought
23 over Vogue Magazine in the shop. We fight over stuff
24 that really (inaudible) Rachael is a scorekeeper. I
25 mean, she lashes out. I lash back. She lashes out. I

1 lash back. I'm the bad guy. Her sister Kristina was
2 inferring that when I moved out -- Rachael had taken a
3 whole bunch of my personal items and hid them and so I
4 took her clothes.

5 Q. Anything ever physical between you guys?

6 A. Only the night after -- the two days after
7 Christmas where she came in and -- the first time she
8 came into bed -- her and I had drank a whole bottle of
9 (inaudible.)

10 Q. Okay.

11 A. And nobody knew this. (Inaudible) and we
12 started drinking about 4:00. We rented a couple of
13 movies. (inaudible) was with us. I went to bed.
14 (Inaudible.) She came in the room maybe 15, 20 minutes
15 after (inaudible) went to bed. She turned on the
16 light. She threw off the covers. She goes, move out
17 (inaudible) tomorrow. And then she left and turned the
18 light off. And I yelled (inaudible) because the walls
19 are really thin in the house, and I yelled, okay, what
20 did I do now? Well, because I'm not emotionally -- I
21 don't know what it is. I'm not that smart, I guess.
22 And that's one of the reasons I went to counseling.
23 The next time she came in she turned on the light,
24 threw the covers off. Threw my ring at me and jumped
25 on me, and I told (inaudible,) I said, this is the

1 truth. And she jumped on me because she was absolutely
2 bent out of shape, and I threw her off of me. And we
3 stood up and she starts yelling at me. And I took off
4 my ring, and I did shove her. And I said, and that's
5 the extent of it. When she told everybody six, seven
6 days later when she went to the police to get me out of
7 the house, which is why she said she went to the
8 police, she said, I choked her. And I said, you can't
9 tell people that, Rachael. That's unfair to put that
10 on me. So, she's telling all these people that I've
11 been choking her.

12 Q. (Inaudible) She's pretty detailed about it.
13 She said that (inaudible)?

14 A. No, I didn't. And I told Dennis the same
15 thing. I said, and when the police came I said, why
16 are you doing this? Well, she told me later, because I
17 had talked to Bill, her ex-husband. She thought I was
18 going to try to take (inaudible) away from her. And
19 she kicked me out of the house. That's why she said
20 she went to the cops six or seven days later because
21 the fight was - and then she was home the next three
22 days.

23 Q. So, when is the last time you've been down to
24 see her in Clarkston?

25 A. When we went around in the truck and went to

1 the post office Wednesday.

2 Q. Last Wednesday?

3 A. Yes, sir. Right after counseling.

4 Q. Nothing you can think of that may be where

5 she went (inaudible)?

6 A. No, I really don't.

7 Q. What do you think has happened during that?

8 Just be straight up, man.

9 A. I don't know. I really don't.

10 Q. No idea?

11 A. I don't know who she knows. She knows a

12 whole group of people different than I do.

13 Q. Okay. Are you concerned for her safety at

14 all right now?

15 A. Oh, yeah, of course. I mean, she's not

16 calling anybody.

17 Q. Yeah, that seems pretty unusual --

18 A. Yeah.

19 Q. -- that she's not calling anybody.

20 A. Yeah. Nope, and her kids --

21 Q. Do you know of anybody that would want to

22 harm her?

23 A. No, but -- no. I mean, there's people that

24 get angry at her, I guess. I don't know. I don't know

25 the relationship with the girl she's trying to collect

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1 \$3,000 from. I don't know the relationship with Bill
2 Wilcox. You know, I do know my relationship with me,
3 you know.

4 Q. How would you describe -- in one word how
5 would you describe your relationship with her?

6 A. Frustrated.

7 Q. Frustrated?

8 A. Yeah.

9 Q. Ever volatile? Was she pretty upset when she
10 left here?

11 A. No.

12 Q. She wasn't mad at all?

13 A. No. She was mad because the car wasn't done,
14 but that's --

15 Q. How mad would you describe on a 1 to 10
16 scale?

17 A. Rachael is impatient with everything. So,
18 that's -- I don't know how to describe that. It's
19 always the same way. The time that I went -- and when
20 I went to Paul Langworthy this week on Superbowl Sunday
21 to trade cars he just thought it would be, you know --
22 I mean, he goes, I'll go with you. So, and he deleted
23 text messages for an hour after -- I mean, that's
24 Rachael, you know. She gets frustrated because she's
25 not getting what she thinks she needs to get, I guess.

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1 I don't know. It's just like with the computer. She
2 was pretty disappointed at those guys at Office Depot.

3 Q. Are you pretty good with the text stuff?

4 A. Am I?

5 Q. Yeah.

6 A. Once I got my iphone I do okay.

7 Q. Like with Spoof dot com? How did you figure
8 out about Spoof dot com?

9 A. She said that Amber told her about it, so I
10 looked it up on the computer with her on the phone, and
11 I sent her a call from a tire company (inaudible) any
12 company.

13 Q. Okay.

14 A. And you put in any number, and it was --
15 honestly, it was Oklahoma Big O Tire.

16 Q. Is that a free service?

17 A. You can get them, yeah.

18 Q. I mean, is Spoof dot com free?

19 A. No, you have to pay for it, but they give you
20 a bunch of calls for free.

21 Q. Okay. How do you pay for it? I mean --

22 A. You have to pay for it, I don't know, a debit
23 card.

24 Q. Did you pay for yours?

25 A. No, never.

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1 Q. You didn't pay for yours?
2 A. No, sir.
3 Q. Okay. They just gave you a free one like an
4 experimental --
5 A. Yep, try it out for free.
6 Q. Okay. Do you know when that would have been?
7 A. Probably for a whole month.
8 Q. You get it free for the whole month?
9 A. No, if you -- never mind.
10 Q. Okay, I'm just not -- I'm not a tech guy.
11 A. Okay.
12 Q. That's why I'm asking. I don't know. And
13 this may help me figure out who's been the other
14 caller.
15 A. Yeah.
16 Q. I don't know.
17 A. I don't know.
18 Q. I'm not a tech guy either, so --
19 A. You know --
20 Q. I mean, what you have given me so far helps.
21 I mean, this spoof dot com thing (inaudible) so --
22 A. Well, she said you were going to subpoena the
23 (inaudible) --
24 Q. Yeah, that's what we're working on. Okay. I
25 just was curious if you had to pay for it.

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1 A. No. You guys have to understand. I'm
2 nervous.

3 Q. Oh, sure. Yeah, I understand.

4 A. Okay.

5 Q. I was just wondering if you could come up
6 with anything at all that you might think of where she
7 might have gone?

8 A. No. I don't know. Did -- if anybody pays
9 attention to her -- I mean, she's not -- she's been
10 pretty upset, I mean, over bills. I've paid what bills
11 I could.

12 Q. All right. So, do you think she's been
13 depressed?

14 A. Oh, yeah. I'm sure.

15 Q. Do you think she would harm herself?

16 A. I don't know. I don't think so because the
17 way she loves her grandkids. I just don't know, and
18 not talking to her over the weekend to see how her
19 attitude was --

20 Q. How about on Friday? Did you get any
21 inkling that --

22 A. She was mad because she went down to Health
23 and Welfare, and they wouldn't give her any assistance.
24 She made too much money. So, I let her know -- I said,
25 you know what, Walmart has a stocking job at night I

1 can take because I had been paying -- you know, she
2 borrowed money from Dennis. I paid a chunk of her
3 bills. I sold a truck I had so I could pay some of her
4 bills. You know, we had difficulties over, obviously,
5 bills.

6 Q. Now, were you riding around with her -- was
7 it the Yukon you were riding around in?

8 A. No. We were riding around in my truck.

9 Q. Your truck?

10 A. Yep.

11 Q. Okay. Have you ever driven the Yukon?

12 A. Oh, yeah. I've worked on it. That's how I
13 found the license plate number from Amber that she used
14 to turn around and (inaudible.)

15 Q. (Inaudible)?

16 A. Absolutely.

17 Q. Okay. You said that you moved out, right?

18 A. Yep.

19 Q. That what when, again?

20 A. (Inaudible) December 27th. Had to be five
21 days, six days later, January 2nd, maybe.

22 Q. And you're living with a roommate now?

23 A. I came here.

24 Q. Uh-huh (affirmative.)

25 A. And I put stuff in storage, and then I lived

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1 at the Hillcrest Hotel for three weeks. And then I
2 moved in with Burt and Carol Bogden. He's a DA
3 scientist. He has a lab in Pullman. I've known him
4 forever.

5 Q. Is that the guy that has the Yukon, Bogden?

6 A. Right.

7 Q. Yeah, (inaudible.)

8 MALE SPEAKER: So you're still staying with them?

9 A. Yeah, I've been living with them for --
10 because from a scripture part of view I'm not supposed
11 to do anything until she decides what she's going to
12 do.

13 Q. I just want to grab (inaudible.)

14 A. Okay.

15 MALE SPEAKER: So you're (inaudible) in Pullman,
16 then?

17 A. No. We live in Viola.

18 MALE SPEAKER: Oh. How much do you think she had
19 had to drink?

20 A. I don't know. I got two of the (inaudible)
21 from her because I said, hey, if I paid for those, you
22 know.

23 MALE SPEAKER: Right.

24 A. So I did have two of them. So she had the
25 four, but she left.

1 MALE SPEAKER: She drank quite often where four
2 wouldn't maybe affect her?

3 A. I -- you know, no, because we weren't -- I
4 mean, she went to -- you know, she (inaudible) tell me
5 when she was drinking beer, like a week ago Friday she
6 was outside. She had a fire in her firepit.

7 (Inaudible.) She was having a couple of them.

8 MALE SPEAKER: Is that a heavy malt or -- I've
9 never heard of those.

10 A. (Inaudible) I guess, yeah. It's pretty
11 strong.

12 MALE SPEAKER: Like an old English, maybe?

13 A. I don't know if it's that strong.

14 MALE SPEAKER: It's not a malt liquor so much --

15 MALE SPEAKER: (Inaudible) might be a little
16 zinged.

17 A. Oh, if I drank four of them I would have a
18 pretty good buzz.

19 MALE SPEAKER: And she's smaller than you?

20 A. Yeah, a lot smaller. I don't know. I don't
21 know her tolerance to -- you know, hard alcohol is
22 not -- I mean, for both of us we found that out with
23 that fight.

24 MALE SPEAKER: Right.

25 A. We didn't drink a lot of hard alcohol. We

1 didn't drink a lot. I mean, I go up to Lewiston and
2 get her (inaudible) for her.

3 Q. Sorry about that.

4 MALE SPEAKER: That's all right. I'm just asking
5 him how many of those (inaudible) she drank, and he
6 said he had gotten two from her, and she probably had
7 four.

8 Q. That was what I was going to ask.

9 A. Yeah, I actually just -- she bought those
10 with my debit card. Okay, give me one. And she bought
11 a little church key, you know.

12 Q. What is a church key?

13 A. You don't know what a church key is?
14 (Inaudible) anyway, she had one of those. She thought
15 it was funny.

16 Q. You think she was intoxicated at all?

17 A. No. I think she was probably was getting a
18 buzz.

19 Q. (Inaudible) on the way home?

20 A. No. No, because said she wasn't going to
21 drink anymore.

22 Q. What was the route that she would take
23 between here and Clarkston?

24 A. 95.

25 Q. Just 95? She wouldn't (inaudible)?

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1 A. She drove here over a hundred times when we
2 were dating.

3 Q. You know, I'm not as convinced as you are
4 with Slim. I mean, (inaudible) it would help me out if
5 you would just write out a statement, kind of timeline
6 of when you talked to her, because I'm curious to see
7 if things I can't track can't be possibly (inaudible).
8 Give me an idea of where she was at, when she was at,
9 and then you can either just turn it into the Moscow
10 PD. That would be great. If you can do that, and even
11 kind of over the last week.

12 A. Okay.

13 Q. Because she indicated to me that she had been
14 talking to you a lot, and she was -- I mean --

15 A. Oh, yeah.

16 Q. She was, you know, for the most part I think
17 you were helping her a lot, so --

18 A. For the most part, it's -- well, I wanted the
19 truth to come out between both of us.

20 Q. Okay. Now, did you tell Moscow PD -- I mean,
21 Clarkston PD, did you ever call them because they have
22 a phone message, but they didn't know who it came from
23 that, hey, this was just a, you know --

24 A. No.

25 Q. Okay.

1 A. I called them yesterday. I tried to get them
2 to go to her house, and they wouldn't.
3 Q. Okay.
4 A. That was about 9:30. I called them
5 (inaudible) --
6 Q. Okay, and why did you call her house? Why
7 did you call the PD?
8 A. Because she'll ignore me for a while, but she
9 won't ignore me that long.
10 Q. Okay, so you were calling her when?
11 A. All weekend.
12 Q. All weekend?
13 A. Yep.
14 Q. Okay, and so no answer?
15 A. No (inaudible) text messages.
16 Q. (Inaudible)?
17 A. (Inaudible).
18 Q. You were calling her Saturday and Sunday?
19 A. Yep.
20 Q. And then you called --
21 A. I call her every day anyway.
22 Q. Okay, and then you called her -- you called
23 Clarkston PD yesterday?
24 A. Yesterday because I needed the Yukon back
25 because Burt didn't know that he had loaned her the

1 Yukon. Carol gave me permission to do it, and he's
2 coming by here today. He texted me. He says, you
3 know, I need to talk. I'm running errands and
4 (inaudible) around 1:30. I said, okay. He said, I
5 have a meeting. I said, I'm sorry I brought this drama
6 into your house, because he didn't know that we had
7 loaned her the Yukon.

8 Q. Okay.

9 A. I mean, you're more than welcome to -- here
10 is all my text messages, I mean --

11 Q. (Inaudible)?

12 A. No, I won't.

13 Q. (Inaudible)?

14 A. They'll hold.

15 Q. Got any examples from her?

16 A. I'm the text king. At 8:42 on Friday she
17 texted me the account number for the car.

18 Q. Okay.

19 A. So -- because I make the car payment, and she
20 hated it -- and you can listen to some of the voice
21 messages. She can't get texts so she's are my texts.
22 And I can go all the way back. So, those are hers
23 where she was telling me stuff. So, sorry (inaudible)
24 go right back to it.

25 Q. Do you have a way to like load that onto

1 something else or --

2 A. No. Text messages you can't. The iphone is
3 limited. For voicemails you can only hold 40, and for
4 text messages I can't download them to you.

5 Q. Okay.

6 A. And if you try -- like if you delete them --
7 the 400 that she deleted in October, November, and
8 December that I was going to show Kristina, she deleted
9 them. You can only see that you had text messages.
10 (Inaudible). They go all the way back.

11 Q. So let me ask Alisa.

12 MALE SPEAKER: We got one.

13 MALE SPEAKER: (Inaudible).

14 MALE SPEAKER: Hey, Scott. Both the iphone will
15 self download.

16 UNKNOWN PERSON: (Inaudible).

17 MALE SPEAKER: Maybe.

18 UNKNOWN PERSON: Yeah.

19 A. (Inaudible.) You got to understand I'm
20 scared to death for everything. As soon as Amber tells
21 me what she tells me yesterday on the phone, the first
22 thing that goes through your head is, okay, this is
23 messed up.

24 Q. Do you think something has happened to her?

25 A. I don't know. I'm hoping that she just --

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1 Q. And I don't know either but (inaudible)?
2 A. You know --
3 Q. (Inaudible)?
4 A. No, I think just everything was so bad, you
5 know, with us breaking up, with what her friends had
6 been telling her, because she has conversations with
7 them I don't know about. She vents a lot.
8 Q. Okay.
9 A. And we talk on the phone a lot. If you guys
10 did my phone records you'll see that we talked a lot.
11 Q. (Inaudible)?
12 A. (Inaudible).
13 Q. Do you think (inaudible)?
14 A. I (inaudible).
15 Q. (Inaudible)?
16 A. I don't know. It's possible. Where would
17 she go, though? No money. You know, she says she has
18 no money, you know.
19 Q. That's what she told you?
20 A. Yeah.
21 MALE SPEAKER: Maybe the iphone -- maybe get
22 some -- some of them keep it. We will try. Can we
23 borrow your phone or --
24 Q. Just bring it down to the police station.
25 (Inaudible)?

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1 A. I use it a lot.

2 Q. I understand that. I don't want to interrupt
3 business.

4 MALE SPEAKER: Yeah, we can hook up to it, and
5 hand it back to you in a half an hour, probably.

6 A. Yeah. That's fine. Just tell me when.

7 MALE SPEAKER: When are you available?

8 A. Anytime after probably 3:00. I have two
9 people (inaudible.) That's why I have to get done by
10 1:30. (phone ringing) Palouse Multiple Services. No,
11 Ronnie, it's in the shop, but I have not diagnosed it
12 yet. No, sir. No. All right. Bye.

13 Q. Yeah, if you could bring it down as soon as
14 you're freed up. 3:00 would be great, around then --

15 MALE SPEAKER: Or we can bring it to you. We can
16 just -- I can have my guy bring it right out here. We
17 can hook it up, and then you're not having to break
18 away from your business.

19 MALE SPEAKER: Let me give you my card, okay. I
20 appreciate your help. Anything you think of at all let
21 me know. And then if you could write out a timeline
22 (inaudible). We're sorry you're going through all this
23 stuff. So, thank you, sir.

24 A. Okay.

25 Q. (Inaudible) Charles, I was the guy who came

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1 out. I think you had a business partner at one time.

2 A. Oh, Gary.

3 Q. Yeah, and I came out and searched your
4 computer. Is Gary still there?

5 A. I think he lives in Arizona.

6 Q. What was his last name?

7 A. Young.

8 Q. Young. I'll bring my guy out. Then you
9 won't have to (inaudible) keep you still working and
10 stuff (inaudible). All right. Thank you.

11 (Interview concluded.)

12 - - - - -

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CERTIFICATE OF TRANSCRIPTION

The undersigned does hereby certify that he correctly and accurately transcribed and typed the foregoing transcript from the RECORDING of the interview in the above-entitled action or proceeding.

Dated this 6th day of February, 2014.

Keith M. Evans, RPR, CSR NO. 655
Court Reporter

\$	affirmative [2] 16/22 28/24	fore [3] 7/20 7/21 14/10
\$140 [1] 13/21	after [12] 3/1 5/4 8/21 10/5 13/2 18/12 21/6	and [1] 17/2
\$3,000 [1] 24/1	21/6 21/15 23/3 24/23 37/8	being [1] 7/13
1	again [3] 15/9 15/10 28/19	bent [1] 22/2
10 [1] 24/15	ago [1] 30/5	between [4] 16/1 21/5 31/23 32/19
13 [2] 4/25 10/12	agreed [1] 6/22	big [2] 7/23 25/15
140 [1] 13/23	agreement [1] 17/3	Bill [2] 22/17 24/1
15 [1] 21/14	alcohol [2] 30/21 30/25	bills [5] 27/10 27/10 28/3 28/4 28/5
15th [1] 5/1	Alisa [1] 35/11	bit [1] 6/19
1:30 [2] 34/4 37/10	all [28] 3/22 5/8 6/14 7/10 8/1 8/20 10/1	blew [1] 10/9
2	14/18 16/8 17/19 19/3 19/13 22/10 23/14	blocked [6] 3/2 6/7 6/7 6/8 6/9 6/10
20 [1] 21/14	24/12 27/6 27/12 31/4 31/16 33/11 33/12	Bogden [2] 29/2 29/5
2014 [1] 39/7	34/10 34/22 35/10 37/12 37/20 37/22 38/10	booth [1] 4/10
27 [1] 7/17	along [1] 20/13	borrow [2] 18/18 36/23
27th [1] 28/20	already [2] 9/21 11/12	borrowed [1] 28/2
2nd [1] 28/21	altered [2] 4/21 5/8	both [3] 30/22 32/19 35/14
3	always [5] 4/20 4/23 17/12 17/13 24/19	bottle [1] 21/8
3:00 [1] 37/8	am [3] 10/13 20/2 25/4	bought [3] 13/2 31/9 31/10
3:00 would [1] 37/14	Amber [3] 25/9 28/13 35/20	box [2] 3/13 10/2
4	angry [2] 6/12 23/24	boxes [1] 8/10
40 [1] 35/3	another [2] 17/1 17/4	boyfriend [1] 3/15
400 [3] 7/22 7/23 35/7	answer [3] 6/9 17/24 33/14	brakes [1] 17/10
4:00 [1] 21/12	answering [1] 6/10	break [1] 37/17
4:30 [3] 11/17 14/9 14/22	any [10] 5/10 8/19 9/24 12/19 19/21 25/11	breaking [1] 36/5
4:30 from [1] 14/12	25/14 27/20 27/23 34/15	breakup [1] 6/13
4:30 on [1] 12/5	anybody [5] 20/10 23/16 23/19 23/21 27/8	bring [5] 36/24 37/13 37/15 37/16 38/8
6	anymore [2] 7/9 31/21	Broke [1] 17/6
655 [2] 1/25 39/11	anything [6] 10/5 18/3 21/5 27/6 29/11 37/20	broken [1] 10/11
6:00 [1] 18/24	Anytime [1] 37/8	brother's [1] 6/6
6:00 and [2] 16/1 16/3	anyway [2] 31/14 33/21	brought [1] 34/5
6:00 in [1] 18/23	anywhere [1] 18/1	bucks [1] 13/23
6:00 something [2] 15/24 15/25	appointment [1] 17/21	build [1] 13/11
6:58 [1] 14/3	appreciate [1] 37/20	bunch [2] 21/3 25/20
6th [1] 39/7	are [14] 5/16 6/9 8/2 10/7 14/5 19/3 21/19	Burt [2] 29/2 33/25
7	22/16 23/13 25/3 32/3 34/21 34/22 37/7	business [4] 12/2 37/3 37/18 38/1
7:00 [5] 7/1 7/7 13/18 13/25 16/4	area [2] 2/25 5/1	buy [7] 11/20 12/12 13/4 13/6 13/8 13/20
7:00 Friday [1] 10/21	areas [2] 4/25 5/2	14/25
7:00 on [1] 16/11	aren't [1] 5/16	buy a [1] 11/20
7:00 p.m [2] 11/5 13/19	Arizona [1] 38/5	buzz [2] 30/18 31/18
7:00 she [1] 14/5	around [15] 3/24 4/4 4/9 6/11 19/11 19/12	Bye [2] 16/8 37/12
7:15 [2] 16/2 16/3	19/13 19/19 22/25 28/6 28/7 28/8 28/14 34/4	C
8	37/14	cabinet [1] 8/9
8:00 for [1] 17/20	around them [1] 19/12	call [15] 4/16 6/7 6/8 11/6 11/7 12/1 12/3
8:42 on [1] 34/16	arrange [1] 6/14	16/8 17/23 18/22 25/11 32/21 33/6 33/7
9	arranged [1] 7/1	33/21
95 [2] 31/24 31/25	as [9] 2/2 2/25 17/3 32/3 32/3 35/20 35/20	called [12] 3/9 11/19 14/16 15/12 16/3 18/10
9:30 [1] 33/4	37/13 37/13	18/23 33/1 33/4 33/20 33/22 33/22
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IN THE SECOND JUDICIAL DISTRICT,
SITTING WITHIN AND FOR LATAH COUNTY,
STATE OF IDAHO

TRANSCRIPT OF CAPONE AND BODGEN

TRANSCRIBED BY: KEITH M. EVANS, RPR, CSR NO. 655

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1 (Thereupon the following oral proceedings
2 were had as follows, to-wit:)

3 EXAMINATION

4 MALE SPEAKER: How is it going?

5 MALE SPEAKER: Pretty good. How you doing?

6 MALE SPEAKER: How is it going?

7 MALE SPEAKER: Well, I've had better years.

8 MALE SPEAKER: I hear that. I hear that.

9 (inaudible.)

10 MALE SPEAKER: (Inaudible.)

11 MALE SPEAKER: I don't think it happened here.

12 Matter of fact, let me go over and talk to these people
13 over here. You know what I mean?

14 MALE SPEAKER: Yeah, I do.

15 MALE SPEAKER: Yes, sir.

16 MALE SPEAKER: This is actually the owner of the
17 Yukon.

18 MALE SPEAKER: Oh, great. How are you doing.

19 Well, you know, I think probably sure we don't know
20 where the vehicle is at yet. I have your cellphone
21 number, at least I got some contact information. If it
22 surfaces at all we'll contact you, and I understand you
23 were going to be going to Japan?

24 MALE SPEAKER: Going to Japan, but I was told I
25 would have cell service in Japan.

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1 MALE SPEAKER: Okay. Great.

2 MALE SPEAKER: So, go ahead and leave a message
3 or a text or whatever and everything -- my point of
4 view everything is totally, you know, copasetic. I'm
5 not --

6 MALE SPEAKER: Well, okay, good. I mean, you
7 know, every indication I've gotten, both from, you
8 know, with talking with Rachael -- because I had talked
9 with her last week on this whole thing and, yeah,
10 everything seemed like it was okay. So, we're just
11 hoping she just was upset with everything and drove
12 somewhere. That's what we're hoping. That's what
13 we're hoping.

14 MALE SPEAKER: He saw her cruising by Baskin
15 Robbins at 6:15 Friday night.

16 MALE SPEAKER: 6:15, okay.

17 MALE SPEAKER: About 6:15 on Friday night I was
18 having ice cream with my kids at Baskin Robbins.

19 MALE SPEAKER: Okay.

20 MALE SPEAKER: And my youngest says, hey, here
21 comes William, who is our -- my (inaudible).

22 MALE SPEAKER: Okay.

23 MALE SPEAKER: Who drove the truck for six
24 months.

25 MALE SPEAKER: Okay.

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1 MALE SPEAKER: It's an extra vehicle that we
2 have.

3 MALE SPEAKER: Okay, and that was Friday night?

4 MALE SPEAKER: Friday night at 6:15, and here it
5 comes. I said, well, that's the Yukon, but it's not
6 really driving. And it was definitely Rachael
7 (inaudible.)

8 MALE SPEAKER: It was Rachael, by herself,
9 anybody --

10 MALE SPEAKER: I couldn't tell. You know, she's
11 going by like this, and I looked and -- yep, and the
12 way that I ID'd that truck is it's got a little
13 (inaudible) sticker on the back right-hand corner of
14 the windshield -- or the rear glass. And being it's
15 like that's the one -- because there's lots --

16 MALE SPEAKER: Kind of the time you were telling
17 us, that would have been probably -- because where is
18 Baskins? I'm not familiar with --

19 MALE SPEAKER: It's right over here on the Moscow
20 Pullman Highway.

21 MALE SPEAKER: Moscow Pullman Highway, okay,
22 because she left --

23 MALE SPEAKER: She was going this way.

24 MALE SPEAKER: Okay, and she left here about what
25 time was it again? 6:30? Roughly? Yeah, trust me, I

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1 understand. You didn't like write down times. I
2 understand that. But that would fit, okay, and was she
3 headed --

4 MALE SPEAKER: She was headed this way.

5 MALE SPEAKER: She was headed towards Moscow?

6 MALE SPEAKER: Yeah.

7 MALE SPEAKER: Okay, and let me give you my card.
8 I'm about out of them, and then if anything comes up,
9 your car or anything -- does your car, it doesn't -- I
10 think -- it doesn't have --

11 MALE SPEAKER: GPS.

12 MALE SPEAKER: GPS, Global Star?

13 MALE SPEAKER: It's (inaudible) Onstar.

14 MALE SPEAKER: Onstar.

15 MALE SPEAKER: Yeah. That's what I thought. It
16 was too old and --

17 MALE SPEAKER: And it doesn't have any GPS.

18 MALE SPEAKER: Okay, and no like cellphone in it
19 or anything that would --

20 MALE SPEAKER: Nothing built in like that, no.

21 MALE SPEAKER: Okay. I was just thinking of
22 something we could activate and GPS it, but okay. I'll
23 let you know if we locate the vehicle.

24 MALE SPEAKER: Okay, and I can give you one of my
25 cards, too.

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1 MALE SPEAKER: That would be fantastic,
2 absolutely. That's good. I was just wondering if
3 maybe somebody was with her, but -- no, I mean, when he
4 saw her, because I didn't know whether she -- see, I'm
5 kind of thinking, what do you think the possibility is
6 she just took a hiatus from all this and went away?

7 MALE SPEAKER: I don't know. If I look at her
8 demeanor and her phone calls, and if you want to listen
9 to her voicemails, the demeanor of things, one minute
10 she's up and the next minute she's down. And Burt's
11 spoken to her on the phone, because he was kind of
12 trying to feel her out when I first moved in with them.

13 MALE SPEAKER: Okay. Okay.

14 MALE SPEAKER: So, he knows her. I don't know.

15 MALE SPEAKER: Okay, and I know you can't
16 predict. I'm just wondering, do I think it's even
17 possible that she would do something like that?

18 MALE SPEAKER: Dude, you're asking me a question
19 that you, yourself, can go yes or no.

20 MALE SPEAKER: Well, sure. Just you know her
21 better than I do.

22 MALE SPEAKER: I thought I did.

23 MALE SPEAKER: Okay. When you talked to her did
24 you happen to notice -- what are your thoughts on, did
25 she seem pretty down? Did she seem --

1 MALE SPEAKER: I have not talked to Rachael since
2 about a five-minute phone call in January.
3 MALE SPEAKER: Okay.
4 MALE SPEAKER: I did have a message on my phone.
5 I can check and see if it's still there, what she said.
6 I'm sick of it. I've had enough. I'm going to put out
7 a restraining order on Charles. I just wanted you and
8 Carol to know. That was in March.
9 MALE SPEAKER: Okay, in March? Okay, and that
10 was -- okay.
11 MALE SPEAKER: When I saw her --
12 MALE SPEAKER: When the tires happened, that's
13 what --
14 MALE SPEAKER: The tires, exactly.
15 MALE SPEAKER: (Inaudible) time or something like
16 that.
17 MALE SPEAKER: Okay.
18 MALE SPEAKER: I kind of -- I've stayed kind of
19 out of it. You know, she's living at my house.
20 MALE SPEAKER: Yes.
21 MALE SPEAKER: And he's actually going to get a
22 hotel because I'm going out of town, and I got a new
23 girl. And I just want things to be cool for them.
24 MALE SPEAKER: Not a problem.
25 MALE SPEAKER: Nothing (inaudible) I'm upset.

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1 (Inaudible) I wouldn't want this (Inaudible.) I don't
2 want it in mine.

3 MALE SPEAKER: Well, Charles, you're going
4 through a lot, and I understand that. So, the more
5 support systems you can have --

6 MALE SPEAKER: I have a lot.

7 MALE SPEAKER: Have you ever worked with -- I
8 mean, you were going to a counselor, correct?

9 MALE SPEAKER: I have been.

10 MALE SPEAKER: Okay, keep on.

11 MALE SPEAKER: (Inaudible).

12 MALE SPEAKER: Keep working with them. You have
13 my phone.

14 MALE SPEAKER: I do.

15 MALE SPEAKER: Okay, you can call me if stuff
16 comes up. I mean, you're in a tough boat. I mean,
17 it's -- what's happened, all that kind of stuff, I
18 understand that. And like I said, this happened to a
19 family member of mine so I know what it's like to be
20 where you're at.

21 MALE SPEAKER: The husband is always the suspect,
22 and that bothers me a lot.

23 MALE SPEAKER: Well, that's -- but that's what
24 I'm trying to tell you. The indications I've got from
25 her, she indicated to me she wasn't afraid. Everything

1 that she gave me and talked to me about points to the
2 other guy I was telling you about.

3 MALE SPEAKER: Well, I mean, when she told me
4 that I was shocked because I was running around the
5 truck together (inaudible.)

6 MALE SPEAKER: That's why I wanted to talk to you
7 because the information she got was you were pretty up
8 to speed on this guy.

9 MALE SPEAKER: Only what she told me, though.

10 MALE SPEAKER: Okay.

11 MALE SPEAKER: I don't know him. I never even
12 knew his last name.

13 MALE SPEAKER: Okay, okay.

14 MALE SPEAKER: She finally told me. She would
15 never tell me, him or anybody else, because I wanted to
16 root out her and her family as the phone calls that
17 were coming to me.

18 MALE SPEAKER: Coming to you, okay.

19 MALE SPEAKER: That started this whole nightmare
20 that we got into.

21 MALE SPEAKER: Now, you've been straight up with
22 me. I mean, you admitted to the stupid stuff you guys
23 did with the spoof.com and that kind of stuff. So, I
24 mean, you've been straight up. Everything -- you know,
25 I don't want you thinking you're -- of course, I look

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1 at everybody that had contact with her recently.

2 MALE SPEAKER: Oh, I know.

3 MALE SPEAKER: Hell, I'm on that list, you know.

4 MALE SPEAKER: I know.

5 MALE SPEAKER: But you're much more of an asset
6 for me in timelining things, and that's what's
7 important. Timeline, that's what's important,
8 timeline. And I know you have been in trouble before.
9 You already told me that.

10 MALE SPEAKER: Right.

11 MALE SPEAKER: Okay, but this is what I need you
12 to not worry about that kind of stuff and focus more on
13 the timeline aspect. And just like you've seen her.
14 That's great information.

15 MALE SPEAKER: (Inaudible.)

16 MALE SPEAKER: That's --

17 MALE SPEAKER: That was Mackenzie spotting her.
18 (Inaudible.)

19 MALE SPEAKER: That's great information, okay.
20 So, and it's impossible to relax and feel better so
21 I'll not even going to tell you. But the more -- even
22 if you could just write out -- and sometimes writing
23 these things will come to you, and sometimes they can
24 even be a little therapeutic. Okay. I appreciate your
25 time. I'll be in contact with you as any developments

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1 --

2 MALE SPEAKER: You can see everything that I've

3 been up to.

4 MALE SPEAKER: That helps.

5 MALE SPEAKER: I'm on the phone a lot.

6 MALE SPEAKER: That's understandable.

7 MALE SPEAKER: And I've talked to people. I talk

8 to my sister every morning, my brother every morning.

9 MALE SPEAKER: Okay. All right.

10 MALE SPEAKER: Okay.

11 MALE SPEAKER: If anything comes up, though,

12 you'll be one of the first to call, so, okay?

13 MALE SPEAKER: (Inaudible.)

14 MALE SPEAKER: I can't think of anything.

15 MALE SPEAKER: (Inaudible) that thing on the

16 internet. (Inaudible.) Because I don't have TV. I

17 haven't watched TV.

18 MALE SPEAKER: Yeah, there's not a lot. I mean,

19 right now I've got four counties trying to locate her.

20 We've got a lot of people out. I know apparently her

21 daughters think we've given up or something. I don't

22 know why that is, but that's their thoughts.

23 MALE SPEAKER: Are they allowed to have -- I

24 offered --

25 MALE SPEAKER: They can have it back, as far as

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1 I'm concerned I don't -- you know, you were working on
2 it so --

3 MALE SPEAKER: My brother is like are you going
4 to give them a bill. I am like, this isn't even funny
5 anymore.

6 MALE SPEAKER: Yeah.

7 MALE SPEAKER: My family is just mad because
8 we kept going -- you know, my sister Theresa asked me
9 back in December why we got married because she thought
10 I would change. And I just want to close the whole --
11 I need to go sit somewhere and do this thing.

12 MALE SPEAKER: Okay.

13 MALE SPEAKER: So I can give you some information
14 that you need.

15 MALE SPEAKER: Okay. All right. Well, call me
16 or just -- you know, you can drop off the statement at
17 Moscow City because we're all working this thing
18 together so, okay.

19 MALE SPEAKER: That's not a normal --

20 UNKNOWN PERSON: Doesn't bother me (inaudible).

21 MALE SPEAKER: Do you have any questions for me?

22 MALE SPEAKER: I don't know what to ask.

23 MALE SPEAKER: Okay. I wanted to know what was
24 going on at her house over the weekend and why nobody
25 called me. I don't have Amber and Ashley's -- I didn't

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kkreport@wildblue.net

1 have any of their phone numbers so I didn't know how to
2 contact them, and we didn't really talk anyway.

3 MALE SPEAKER: Okay. Okay.

4 MALE SPEAKER: You know.

5 MALE SPEAKER: Okay, well --

6 MALE SPEAKER: I don't know what else to ask. I
7 mean --

8 MALE SPEAKER: We'll just keep hoping for the
9 best.

10 MALE SPEAKER: (Inaudible) tells me last night
11 they found her phone. I'm like, that's a good sign.

12 MALE SPEAKER: Yeah, see we didn't. All we got
13 is a general location. It's like looking for a needle
14 in a haystack.

15 MALE SPEAKER: Well, when -- yeah, okay. I
16 understand how GPS stuff works so --

17 MALE SPEAKER: Yeah, okay.

18 (Interview concluded.)

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CERTIFICATE OF TRANSCRIPTION

The undersigned does hereby certify that he correctly and accurately transcribed and typed the foregoing transcript from the RECORDING of the interview in the above-entitled action or proceeding.

Dated this 5th day of February, 2014.

Keith M. Evans, RPR, CSR NO. 655
Court Reporter

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

- COURT MINUTES -

Michael J. Griffin
District Judge

Keith Evans, Court Reporter
Recording No. Z:01/2014-4-9

Date: April 9, 2014

Time: 1:32 P.M.

STATE OF IDAHO,

Case No. CR-13-01358

Plaintiff,

vs

APPEARANCES:

CHARLES ANTHONY CAPONE,

William Thompson, Jr., Prosecutor
Michelle Evans, Deputy Prosecutor
Mia Vowels, Deputy Prosecutor

Defendant.

Defendant present with counsel,
D. Ray Barker and Mark Monson;
Court appointed counsel.

Subject of Proceedings: Pretrial Motions

This being the time set for hearing the pretrial motions in this case, Court noted the presence of counsel and the defendant.

Court made an inquiry of Mr. Barker and Mr. Monson whether they have any objections to any of the State's motion in limine, #1-#11 filed February 7, 2014. Mr. Barker had no objection to #1 in the State's motion in limine. Mr. Barker stated he did not have an objection to item #2 on the condition that they are allowed the same privilege. Mr. Thompson having no objection, Court granted the State's motion in limine to items #1 and #2. Mr. Barker stated that he had no objection to the State's motion in limine #3 as long as they were allowed the same privilege as the State, to which Mr. Thompson agreed. Court granted the State's motion in limine in regard to item #3. Mr. Barker having no objection to item #4 in the State's motion in limine, Court granted the State's motion in limine in regard to item #4. Mr. Barker stated his objection to the State's motion in limine in regard to item #5 and presented argument. Court stated that he will come back to this motion. Mr. Barker stated his objection to item #6 of the State's motion in limine and presented argument. Court stated that he will come back to this motion. Mr. Barker having no objection to item #7 of the State's motion in limine, Court granted the motion stating that evidence would not be allowed until a foundation is laid outside the presence of the jury. Mr. Barker stated his objection to item #8 of the State's motion in limine. Mr. Barker stated his objection to item #9 of the State's

Maureen Coleman
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motion in limine. Court questioned Ms. Evans. Court granted the motion as long as the venue or where it was testified to is not mentioned. Mr. Barker having no objection to item #10 of the State's motion in limine, Court granted the State's motion in limine in regard to item #10. In response to inquiry from the Court, Mr. Thompson made an explanation of item #11 of the State's motion in limine. Mr. Barker agreed to item #10 of the State's motion in limine as long as the testimony is within the scope of the authority. Court granted item #11 of the State's motion in limine.

Court took up the matters in the State's motion in limine that were objected to by the defense. Court took up item #5 of the State's motion in limine to prohibit the defense from mentioning or introducing evidence of Joshua Voss' criminal history that falls outside the scope of I.R.E 609 and other times he had been incarcerated due to misdemeanor offenses or probation violations. Ms. Vowels presented argument in support of the State's motion in limine in item #5. Mr. Barker presented argument in opposition. Court questioned Ms. Vowels. Ms. Vowels stated that her argument would be the same in regard to items #5 and #6. Mr. Barker stated that his argument would be the same in item #5 as it would be in regard to item #6. Court took the State's motion in limine #5 and #6 under advisement.

Mr. Barker stated his objection to the State's motion in limine in regard to item #8, prohibiting the defense from introducing evidence of any motivations of the Asotin County Prosecuting Attorney and law enforcement regarding Charles Capone and presented argument. Ms. Evans presented argument in support of item #8 of the State's motion in limine. Court took item #8 of the State's motion in limine under advisement.

Court took up the State's proposed charts to be used during trial. Court ruled that on Exhibit #1 the word "after" should not be bolded. Court questioned Mr. Thompson in regard to the words "obtained from a search warrant" on Page 3. Court ruled that on Page 3 the words "obtained from a search warrant" be taken out. Court ordered the words that are underlined not be underlined on Page 8. Court ruled that on Page 9 the officer's name be removed. Court ordered that any reference to search warrants or highlighted references be removed.

In response to inquiry from the Court, Mr. Thompson stated that the State is not agreeing to any of the defendant's motions. Court took up the defendant's motion for a change of venue. Mr. Monson presented argument in support of the defendant's motion for a change of venue. Mr. Thompson presented argument in opposition, stating that he believes the motion is premature at this time. Mr. Barker presented argument in support of the defendant's motion for a change of venue. Court denied the defendant's motion for change of venue at this time. Court stated that he may revisit this motion after reading the juror questionnaires.

Court took up the defendant's motion to suppress the defendant's statements of May 6, 2010 and August 28, 2012. Mr. Monson presented argument in support of their motion to suppress statements of the defendant made on May 6, 2010. Ms. Evans presented argument in objection to the defendant's motion to suppress the defendant's statements of May 6, 2010. Ms. Evans informed the Court that they will not be presenting evidence regarding August 28, 2012 at trial. Court questioned Ms. Evans.

Court recessed at 2:38 P.M.

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Court Minutes-Page 2

Court reconvened at 2:54 P.M., with Court, counsel and the defendant being present in the courtroom.

Court took up the defendant's motion in limine regarding the defendant's arrest on May 6, 2010, being incarcerated at various places after May 6, 2010 and prior domestic violence charges of the defendant. Mr. Barker presented argument in support of the defendant's motion in limine. Court questioned Mr. Thompson in regard to the defendant's prior convictions. Mr. Thompson stated that the State would like to present to the jurors that Mr. Capone had been previously convicted of prior felony offenses and that Mr. Capone could not possess firearms. Court further questioned Mr. Thompson. Mr. Barker requested the ruling be dealt when they arise at trial. Court further questioned Mr. Thompson.

Court questioned Mr. Thompson in regard to the reason for the jurors knowing that the defendant was arrested on May 6, 2010. Mr. Thompson responded to the Court's questions. Court questioned Mr. Barker and Mr. Thompson.

Court questioned Mr. Thompson regarding the State's 404(b) motion regarding prior domestic violence charges of the defendant. Mr. Barker stated his objection and presented argument.

Court questioned Mr. Barker on the defendant's motion to suppress evidence of the search warrant as a result of Mr. Hally's statement. Ms. Evans presented argument in opposition. Mr. Barker presented further argument. Court took that motion under advisement.

Court took up the defendant's motion to suppress statements made by Rachael Anderson. Mr. Monson presented argument in support of the defendant's motion to suppress statements made by Rachael Anderson. Ms. Vowels presented argument in opposition. Court took the motion under advisement.

Court took up the defendant's motion to retain a forensic anthropologist. Mr. Monson presented argument in support of the defendant's motion to retain a forensic anthropologist. Court questioned Mr. Thompson. Mr. Thompson left this motion to the Court's discretion, requesting that a cap be placed on the amount if the Court does grant the defendant's motion to retain a forensic anthropologist. Court further questioned Mr. Thompson.

Court took up the defendant's motion to authorize additional funds for the investigator, stating that he will not authorize any secretarial or paralegal work. Mr. Monson presented argument in support of the defendant's motion to retain a forensic anthropologist, stating that he had no objection to capping the amount at \$1,000.00. Mr. Monson presented argument in support of the defendant's motion for additional funds for the investigator. Mr. Barker presented argument in support of the defendant's motion for additional funds for the investigator. Mr. Thompson presented argument. Mr. Monson made a clarification to the Court. Mr. Barker made a statement to the Court.

Court took the motion for a forensic anthropologist and motion for additional funding for the investigator under advisement. Court took the defendant's motions to suppress the statements of Rachael Anderson and the evidence regarding the search warrants under advisement. Court granted the defendant's motion in limine regarding the statements made by the defendant on May 6, 2010. Court stated that the motions in limine in regard to the 404(b) evidence will have to be dealt with at trial. Court denied the defendant's motion for change of venue. The Court was informed that the State will not be seeking any testimony regarding the visit by law enforcement on August 28, 2012.

Court questioned Mr. Monson regarding the motion to file an affidavit under seal. Mr. Barker informed the Court that he plans to file an additional motion next week regarding the interview with David Stone. Court stated that if the State will not stipulate then a hearing will be scheduled.

Mr. Thompson moved the Court extend the no contact order. There being no objection, Court signed the no contact order presented to the Court. Mr. Thompson made an inquiry of the Court whether a new scheduling order would be prepared. Court stated that he will meet with counsel at the conclusion of this hearing to discuss scheduling deadlines. In response to inquiry from the Court, counsel stated that they had nothing further.

Court recessed at ^{4:36}~~2:55~~ p.m.

APPROVED BY:



MICHAEL J. GRIFFIN
DISTRICT JUDGE

CASE NO. CR2013-1358

2014 APR -9 PM 4:38

CLERK OF DISTRICT COURT
IDAHO COUNTY
BY AM DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO

Plaintiff,

v.

CHARLES ANTHONY CAPONE

Defendant.

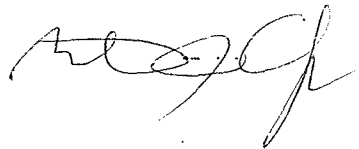
Case No. CR-2013-1358

**ORDER AUTHORIZING FUNDS
REGARDING INVESTIGATOR**

THE COURT, having reviewed Defendant's *Motion for Additional Funds Regarding Investigator* dated March 12, 2014, and good cause appearing therefore,

IT IS HEREBY ORDERED that an additional \$ 4,000.00 for investigative costs is hereby authorized. Investigative costs in the amount of \$46,500.00 were previously approved. Such costs shall not exceed \$ 50,500.00 in total until and unless the defendant obtains authorization for additional investigative costs.

DATED this 9th day of April 2014.

JUDGE 

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order Authorizing Funds Regarding Investigator was served on the following individuals by the method indicated;

Mark T. Monson
Co-Counsel for Defendant
PO Box 8456
Moscow, ID 83843

Via Facsimile: (208) 882-0589
 U.S. Mail
 Hand Delivery

D. Ray Barker
Co-Counsel for Defendant
PO Box 9408
Moscow, ID 83843

Via Facsimile: (208) 882-7604
 U.S. Mail
 Hand Delivery

on this 10 day of April, 2014.

SUSAN PETERSON
Latah County Clerk of the Court

By: 
Deputy Clerk

CASE NO. CR 2013-1358

2014 APR -9 AM 11:59

CLERK OF DISTRICT COURT
BY *AM* DEPUTY

MARK T. MONSON, P.A.
MOSMAN LAW OFFICES
803 S. Jefferson, Suite 4
P.O. Box 8456
Moscow, ID 83843
(208) 882-0588
(208) 882-0589 FAX
Idaho State Bar No. 6165
Washington State Bar No. 30497

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO

Plaintiff,

v.

CHARLES A. CAPONE

Defendant.

Case No. CR-2013-1358

**MOTION FOR ORDER TO FILE
AFFIDAVIT UNDER SEAL**

COMES NOW the Defendant, by and through his court-appointed counsel, and moves the court for an order allowing an Affidavit of Mark T. Monson, to be filed under seal.

This motion is based on the fact that the subject of the Affidavit contains materials regarding federal grand jury proceedings that is protected by federal regulations and law.

DATED this 9 day of April 2014.

Mark T. Monson

Mark T. Monson



Certificate of Service

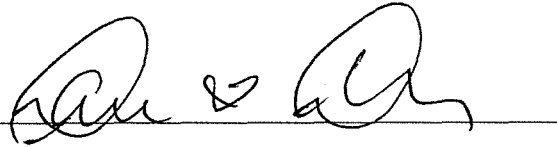
I HEREBY CERTIFY that a true and correct copy of the foregoing **Motion for Order to File Affidavit Under Seal** was served on the following individuals by the method indicated:

William Thompson
Latah County Prosecuting Attorney
PO Box 8068
Moscow, ID 83843

Via Facsimile: (208) 883-2290
 U.S. Mail
 Hand Delivery

on this 7 day of April, 2014.

By:



CASE NO. CR 2013-1358

2014 APR -9 PM 4:38

CLERK OF DISTRICT COURT
BY AM DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO

Plaintiff,

v.

CHARLES A. CAPONE

Defendant.

Case No. CR-2013-1358

**ORDER GRANTING MOTION TO FILE
AFFIDAVIT UNDER SEAL**

(Filed under seal)

THIS MATTER came before the court on the Defendant's Motion for Order to File Affidavit Under Seal. The Court finds that good cause exists to enter the following orders:

IT IS HEREBY ORDERED that the Defendant's motion is granted and the Affidavit of Mark T. Monson shall be filed under seal.

IT IS FURTHER ORDERED that the Motion for Order to file Affidavit Under Seal and this Order shall be filed under seal.

DATED this 9th day of April 2014.



Judge

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH COUNTY

CASE NO. CR13-1358

2014 APR -9 PM 4:55

STATE OF IDAHO, Plaintiff

Case No. CR-2013-01358

vs. CHARLES ANTHONY CAPONE

NO CONTACT ORDER

Defendant

DOB: [REDACTED]

BY: [Signature] Eff. July 1, 2009

The Defendant has been charged with or convicted of violating Idaho Code Section(s):

- 18-901 Assault
 - 18-903 Battery
 - 18-905 Aggravated Assault
 - 18-907 Aggravated Battery
 - 18-909 Assault with Intent to Commit Felony
 - 18-911 Battery with Intent to Commit Felony
 - 18-913 Felonious Administering of Drug
 - 18-915 Assault or Battery upon Certain Personnel
 - 18-918 Domestic Assault or Battery
 - 18-919 Sexual Exploitation by Medical Provider
 - 18-6710 Use of Telephone – Lewd/Profane
 - 18-6711 Use of Telephone – False Statements
 - 18-7905 Stalking (1st °)
 - 18-7906 Stalking (2nd °)
 - 39-6312 Violation of a Protection Order
- x Other: Principal to Murder in the First Degree, I.C. 18-204, 18-4001, 4003; Conspiracy to Commit Murder in the First Degree, I.C. 18-4001, 4003, 18-1701; Failure to Notify Coroner or Law Enforcement of Death, I.C. 19-4301A(1)(3) and Conspiracy to Commit Failure to Notify Coroner or Law Enforcement of Death, I.C. 19-4301A(1)(3).

THE COURT, having jurisdiction, and having provided the Defendant with notice of his/her opportunity to be heard, either previously or herein, ORDERS THE DEFENDANT TO HAVE NO DIRECT OR INDIRECT CONTACT except through an attorney, WITH THE FOLLOWING PROTECTED PERSON(S): Amber Griswold, Ashley Colbert, Kristina Bonefield, Dennis Plunkett and Jennifer Norberg. The Defendant shall not harass, follow, contact, attempt to contact, communicate with (in any form or by any means including another person), or knowingly go or remain within 1000 feet of the protected person(s) or the protected person(s)' property, residence, workplace or school. This order is issued under Idaho Code 18-920, Idaho Criminal Rule 46.2 and Administrative Order 2009 - 2.

IF THIS ORDER REQUIRES THE DEFENDANT TO LEAVE A RESIDENCE SHARED WITH THE PROTECTED PERSON(S), the Defendant must contact an appropriate law enforcement agency for an officer to accompany the Defendant while the Defendant remove any necessary personal belongings, including any tools required for Defendant's work. If disputed, the officer will make a preliminary determination as to what are necessary personal belongings; and in addition, may restrict or reschedule the time spent on the premises.

NOTICE OF RIGHT TO A HEARING: The Defendant is hereby notified of the right to a hearing before a Judge on the continuation of this Order within a reasonable time of its issuance. To request that hearing, and TO AVOID GIVING UP THIS RIGHT the Defendant must contact the Clerk of Court, Latah County Courthouse, 522 S. Adams, Moscow ID 83843, 208-883-2255.

A VIOLATION OF THIS ORDER IS A SEPARATE CRIME UNDER Idaho Code 18-920 for which bail will only be set by a judge; it is punishable by up to one year in jail and up to a \$1,000 fine. If the Defendant has pled guilty to or been found guilty of two violations of Idaho Code 18-920 and/or a substantially conforming foreign criminal violation within five years, then a violation of this order is a felony punishable up to five years imprisonment and a \$5,000 fine. THIS ORDER CAN ONLY BE MODIFIED BY A JUDGE AND WILL REMAIN IN EFFECT UNTIL 11:59 P.M. ON July 31, 2014, OR UNTIL THIS CASE IS DISMISSED.

If another DOMESTIC VIOLENCE PROTECTION ORDER IS IN PLACE PURSUANT TO IDAHO'S DOMESTIC VIOLENCE CRIME PREVENTION ACT (Title 39, Chapter 63 of the Idaho Code), the most restrictive of any conflicting provisions between the orders will control; however, entry or dismissal of another order shall not result in dismissal of this order.

The Clerk of the Court shall give written notification to the records department of the sheriff's office in the county of issuance IMMEDIATELY and this order shall be entered into the Idaho Law Enforcement Telecommunications System.

April 9, 2014
Date of Order
04 09 2014
Date of Service
4.9.14
Date of Service

JUDGE [Signature]
DEFENDANT/ATTORNEY Signature of Service
213/338
OFFICER/AGENCY SERVING (include badge no.)

cc: Arresting Agency, County Sheriff, Victim, Prosecuting Attorney, Defendant/Defendant's Attorney

001562

CR 2013-1358

CASE NO _____

2014 APR 14 AM 9:29

CLERK OF DISTRICT COURT
LATAH COUNTY

BY aw DEPUTY

LATAH COUNTY PROSECUTOR'S OFFICE
WILLIAM W. THOMPSON, JR.
PROSECUTING ATTORNEY
Latah County Courthouse
P.O. Box 8068
Moscow, Idaho 83843-0568
Phone: (208) 883-2246
ISB No. 2613

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

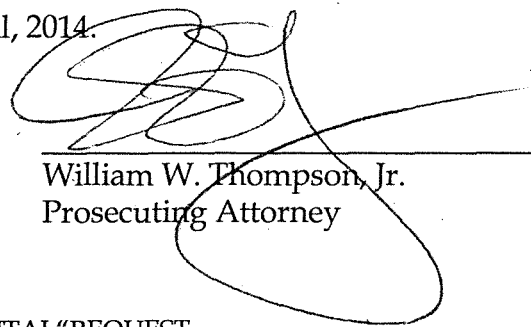
STATE OF IDAHO,)
Plaintiff,)
V.)
CHARLES ANTHONY CAPONE,)
Defendant.)

Case No. CR-2013-01358

RESPONSE TO DEFENDANT'S
SUPPLEMENTAL "REQUEST
FOR DISCOVERY" (DATED
APRIL 10, 2014)

COMES NOW the State of Idaho, by and through the Latah County Prosecuting Attorney, and responds to the defendant's April 10, 2014, "Request for Discovery" by advising Court and Counsel that it has asked the Latah County Jail Commander to locate, preserve and provide copies of, any audio or video of Mr. Capone or his cell from the date in question. Whatever discoverable information is received from the jail will be provided to defense counsel.

DATED this 14 day of April, 2014.



William W. Thompson, Jr.
Prosecuting Attorney

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CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing RESPONSE TO DEFENANT'S SUPPLEMENTAL "REQUEST FOR DISCOVERY" (DATED APRIL 10, 2014) was served on the following in the manner indicated below:

D. Ray Barker
Attorney at Law
P.O. Box 9408
Moscow, ID 83843

U.S. Mail
 Overnight Mail
 Fax
 Hand Delivery
 E-mail - d.raybarker@turbonet.com

Mark T. Monson
Mosman Law Office
P.O. Box 8456
Moscow, ID 83843

U.S. Mail
 Overnight Mail
 Fax
 Hand Delivery
 E-mail - mark@mosmanlaw.com

The Honorable Michael J. Griffin
District Judge
320 W. Main Street
Grangeville, ID 83530

U.S. Mail
 Overnight Mail
 Fax - 208-983-2376
 Hand Delivery

Dated this 14th day of April, 2014.

Kate Micham

CASE NO. CR2013-13

2014 APR 16 PM 12:55

CLERK OF DISTRICT COURT
LATAH COUNTY
BY CEM DEPUTY

LATAH COUNTY PROSECUTOR'S OFFICE
MICHELLE M. EVANS
DEPUTY PROSECUTING ATTORNEY
Latah County Courthouse
P.O. Box 8068
Moscow, Idaho 83843-0568
(208) 883-2246
ISB No. 4795

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO,)	
Plaintiff,	)	Case No. CR-2013-0001358
)	
V.	)	NOTICE OF INTENT TO OFFER
	)	FORENSIC TESTIMONY BY
CHARLES ANTHONY CAPONE,	)	VIDEO TELECONFERENCE
Defendant.	)	PER I.C.R. 43.3
_____)	

TO: The Court; CHARLES ANTHONY CAPONE, Defendant; and Defendant's counsel, Mark T. Monson and D. Ray Barker.

NOTICE IS HEREBY GIVEN that pursuant to Idaho Criminal Rule 43.3(2), the State of Idaho intends to submit testimony from Melody Josserand, UNT Center for Human Identification - Missing Persons Unit, via video teleconference for the jury trial set to commence on the 23rd day of June, 2014.

DATED this 16th day of April, 2014.

Michelle M. Evans
Michelle M. Evans
Deputy Prosecuting Attorney

ORIGINAL
001565

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing NOTICE OF INTENT TO OFFER FORENSIC TESTIMONY BY VIDEO TELECONFERENCE PER I.C.R. 43.3 was served on the following in the manner indicated below:

D. Ray Barker
Attorney at Law
P.O. Box 9408
Moscow, ID 83843

U.S. Mail
 Overnight Mail
 Fax
 Hand Delivery
 E-mail - d.raybarker@turbonet.com

Mark T. Monson
Mosman Law Office
P.O. Box 8456
Moscow, ID 83843

U.S. Mail
 Overnight Mail
 Fax
 Hand Delivery
 E-mail - mark@mosmanlaw.com

The Honorable Michael J. Griffin
District Judge
320 W. Main Street
Grangeville, ID 83530

U.S. Mail
 Overnight Mail
 Fax - 208-983-2376
 Hand Delivery

Dated this _____ day of April, 2014.

CR 2013-1358

CASE NO _____

2014 MAY -5 PM 3:57

CLERK OF DISTRICT COURT
LATAH COUNTY

BY CM DEPUTY

D. RAY BARKER
Attorney at Law
P.O. Box 9408
Moscow, ID 83843
(208) 882-6749
Idaho State Bar No. 1380

MARK T. MONSON, P.A.
Attorney at Law
P.O. Box 8456
Moscow, ID 83843
(208) 882-0588
Idaho State Bar No. 6165
Washington State Bar No. 30497

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO

Plaintiff,

v.

CHARLES ANTHONY CAPONE

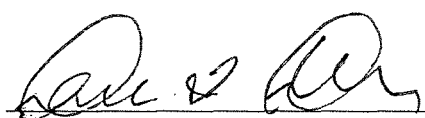
Defendant.

Case No. CR-2013-1358

**SECOND MOTION FOR
AUTHORIZATION TO RETAIN SERVICES
OF FORENSIC PATHOLOGIST**

COMES NOW the defendant, Charles A. Capone, by and through his court-appointed counsel, and hereby moves the court for authorization to retain the services of Dr. Todd Grey, MD, an expert in forensic pathology, to review records and discovery materials, and to assist with the forensic aspects of this case at the expense of Latah County. This motion is based on the Affidavit of Mark T. Monson, attached hereto.

DATED: May 5, 2014



Mark T. Monson
Co-Counsel for Defendant

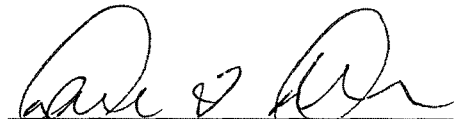
STATE OF IDAHO)
) §
County of Latah)

Mark T. Monson, being first duly sworn, upon oath states:

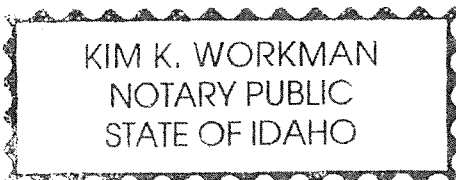
1. I am one of the attorneys appointed by the court to represent Charles A. Capone.
2. In representing Mr. Capone, it has been necessary to retain the services of an expert in the field of forensic pathology. The state has disclosed evidence of death by strangulation. In addition, the co-defendant, David Stone, has provided substantive details regarding the sequence of events he allegedly witnesses in connection with the strangulation.
3. A hearing was held on February 10, 2014, on the defendant's Motion for Authorization to Retain Services of Forensic Pathologist, at which time the defendant articulated the basis for the request for funding. Specifically, defendant articulated that that an expert was necessary in order to determine whether evidence relevant to the crime was discovered or missed by the state. The defendant also articulated that an expert in forensic pathology would be necessary to determine the relevance of any evidence the state had collected from the scene. The state opposed the defendant's motion and articulated its reasons on the record. The Court denied the defendant's request, but allowed the defendant to reapply for funding in the future.
4. Subsequent to the hearing on the defendant's first Motion for Authorization to Retain the Services of a Forensic Pathologist, the State has continued to investigate the scene of the alleged strangulation. The state has disclosed to the defendant that they have collected certain items of evidence at the scene of the alleged crime that are being examined by the

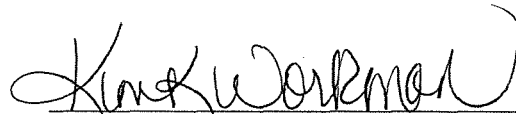
Washington State Patrol crime lab. It is unknown when the results of those examinations will be made available to the defendant, or whether those results will be admitted at trial.

5. It is necessary to consult with a forensic pathologist regarding the alleged manner of death as recounted by the co-defendant David Stone, and the type of evidence expected in such a death.
6. It is necessary for an expert to review all relevant discovery materials and conduct whatever tests may be deemed necessary in order to assist counsel in representing Mr. Capone. Failure to retain the assistance of such an expert would result in inadequate representation of Mr. Capone.
7. I have contacted Dr. Todd Grey, MD, regarding obtaining assistance in this case. Dr. Grey is the Chief Medical Examiner for the State of Utah Medical Examiner's Office located in Salt Lake City, Utah. Dr. Grey's rate schedule was previously disclosed in the defendant's Motion for Authorization to Retain Services of Forensic Pathologist.

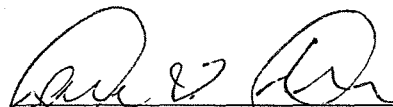

MARK T. MONSON

SUBSCRIBED AND SWORN TO before me this 5 day of May 2014




Notary Public for Idaho
Residing in Bovill, Idaho
My commission expires: 8/7/18

I hereby certify that on May 5, 2014 I caused a true and correct copy of the foregoing motion to be hand delivered to the offices of the Latah County Prosecuting Attorney's office.



For the Firm

CASE NO. CR 2013-1358

2014 MAY -9 AM 9:39

CLERK OF DISTRICT COURT
LATAH COUNTY

BY SA DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO,	)	CASE NO. CR 2013-1358
)	
Plaintiff,	)	ORDER RE: MOTIONS IN
	)	LIMINE
vs.)	
)	
CHARLES CAPONE,)	
)	
Defendant.)	

The state's motion in limine to prohibit the defense from mentioning or introducing evidence of Joshua Voss' criminal history (a 2010 conviction for Burglary, misdemeanor theft, and probation violations) is granted. Such evidence is not relevant to the witness' credibility.

The state's motion in limine to prohibit the defense from mentioning or introducing evidence of Brent Glass' criminal history (a 2006 conviction for Burglary, and 4 other felony convictions that occurred more than 10 years ago) is granted. Such evidence is not relevant to the witness' credibility.

The state's motion in limine to prohibit the defense from using evidence from a federal grand jury is granted in part. Both the State and defense may use prior sworn testimony as set forth in the rules of evidence, but may not tell the jury the venue or circumstances under which the testimony was given.

ORDER IN LIMINE-1

001571

The state's motion in limine to prohibit the defense from mentioning, arguing or introducing evidence of any motivations of the Asotin County Prosecuting Attorney and/or Law Enforcement personnel for any actions they took in filing charges against the defendant or disposition of those charges is granted. The motivations of those potential witnesses are not relevant.

The defense objects to the state offering prior statements made by Rachael Anderson to police officers and non-police officers (friends and family). If the state can produce evidence that Rachel Anderson is unavailable to testify at trial, then the state may offer statements pursuant to IRE 803 and 804. Statements made to non-police officers are non-testimonial, but will be examined at trial to determine if they are offered for the truth, and if so, whether or not they constitute a recognized exception to IRE 803 or 804. Statements of past events to a police officer, that are not made as part of an emergency are testimonial and may not be admitted. The court will consider each statement based upon the foundation laid prior to the offered statement.

The defense' motion to suppress evidence obtained through search warrants issued based completely or at least in part on the affidavit of Deputy Hally is denied. There is insufficient evidence to show that the affidavit contained false or misleading evidence. Even if the allegedly erroneous statements attributed to Deputy Hally were removed from his affidavit the remaining statements are sufficient to support the issuance of the search warrants.

The defendant's motion to retain a forensic pathologist is denied.

The state's motion to allow immediate family members to be present during the entire trial, even if they are potential witnesses, is granted.

The state's motion allowing the admission of telephone records without live testimony from a records keeper from the individual telephone companies is granted.

Both parties may offer proper summaries and timelines at trial.

The state's motion in limine to prohibit the defense from mentioning or introducing evidence of Robert Bogden's criminal history (a prior misdemeanor conviction) is granted.


The state's motion in limine to prohibit the defense from mentioning or introducing evidence of the possible use of alcohol or controlled substances by Rachel Anderson or any of the witnesses without proper foundation being shown outside of the presence of the jury is granted.

The state's motion in limine to prohibit the defense from offering evidence of any polygraph examination is granted.

The state's motion in limine to prohibit the defense from attempting to elicit testimony from federal agents which is outside of their scope of authority is granted.

The defense motion to exclude any statements made to the police on May 6, 2010 in their case in chief is granted. Such statements may be relevant in rebuttal.

Dated this 24 day of May, 2014..


Michael J. Griffin
District Judge

CERTIFICATE

I, the undersigned Deputy Clerk of the above entitled Court, do hereby certify that a true and accurate copy of the foregoing was mailed to, faxed to, or delivered by me on the 9 day of May, 2014, to:

Latah County Prosecuting Attorney

U. S. Mail
 Facsimile

D. Ray Barker
P.O. Box 9408
Moscow, ID 83843
Idaho County Sheriff

U. S. Mail
 Facsimile 882-7604

Mark T. Monson
P.O. Box 8456
Moscow, ID 83843

U. S. Mail
 Facsimile 882-0589

Sue Anderson
Deputy Clerk

CASE NO. CR 2013-135

2014 MAY 13 AM 9:30

CLERK OF DISTRICT COURT
LATAH COUNTY
BY [Signature] DEPUTY

LATAH COUNTY PROSECUTOR'S OFFICE
WILLIAM W. THOMPSON, JR.
PROSECUTING ATTORNEY
Latah County Courthouse
P.O. Box 8068
Moscow, Idaho 83843-0568
Phone: (208) 883-2246
ISB No. 2613

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO,)	
Plaintiff,)	
	)	Case No. CR-2013-01358
V.)	
	)	MOTION FOR PERMISSION TO
CHARLES ANTHONY CAPONE,	)	SUPPLEMENT DISCOVERY
Defendant.)	
_____)	

COMES NOW the State of Idaho, by and through the Latah County Prosecuting Attorney, and respectfully seeks the Court's permission to continue to supplement discovery to the defense pursuant to the State's constitutional disclosure obligations and the obligations imposed by the Idaho Supreme Court under Idaho Criminal Rule 16(j).

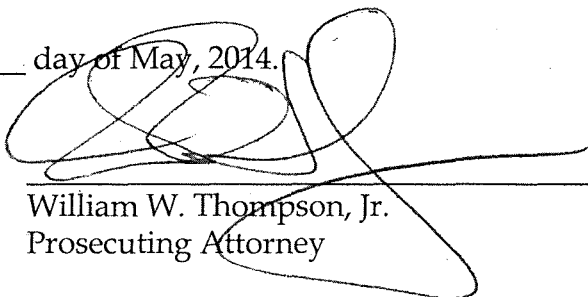
In further support of this request, the State respectfully advises the Court that subsequent to the May 1 discovery deadline contained in this Court's "Second Scheduling Order," the Washington State Crime Lab has delivered its report of analysis of the trace evidence found in the Durango (which is essentially a finding of no results). The State has

ORIGINAL
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also learned that investigators only recently became aware of a possible new witness who was not identified and interviewed until May 1 - the report of such interview was received on May 5 by the State - and the State has just received a supplemental report from investigators pertaining to an ongoing experiment to recreate the disposal of the victim's body. As to both of these, the State respectfully represents that the State could not have reasonably foreseen and planned for these eventualities. Additionally, the basic facts underlying the identity and substance of statements from the previously unknown witness, and the re-creation of the disposal of the victim's body, have been shared with defense counsel by virtue of correspondence dated May 9 - approximately six weeks prior to the commencement of trial. The State respectfully submits that given these circumstances, no undue prejudice can be claimed by the defense.

The State respectfully seeks the Court's permission and guidance so it understands how to continue to honor its obligations to supplement discovery, and its responsibility to honor this Court's scheduling orders.

Respectfully submitted this 13 day of May, 2014.



William W. Thompson, Jr.
Prosecuting Attorney

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing Motion for Permission to Supplement Discovery was served on the following in the manner indicated below:

D. Ray Barker
Attorney at Law
P.O. Box 9408
Moscow, ID 83843

U.S. Mail
 Overnight Mail
 Fax
 Hand Delivery
 E-mail - d.raybarker@turbonet.com

Mark T. Monson
Mosman Law Office
P.O. Box 8456
Moscow, ID 83843

U.S. Mail
 Overnight Mail
 Fax
 Hand Delivery
 E-mail - mark@mosmanlaw.com

The Honorable Michael J. Griffin
District Judge
320 W. Main Street
Grangeville, ID 83530

U.S. Mail
 Overnight Mail
 Fax - 208-983-2376
 Hand Delivery

Dated this 13th day of May, 2014.

Kate Mecham

D. RAY BARKER
Attorney at Law
204 East First Street
P.O. Box 9408
Moscow, Idaho 83843-0118
(208) 882-6749
Idaho State Bar No. 1380

CASE NO. CR 2013-1358

2014 MAY 14 PM 1:48

CLERK OF DISTRICT COURT
LATAH COUNTY
BY CM DEPUTY

MARK T. MONSON
Attorney at Law
803 S. Jefferson, Ste. 4
P.O. Box 8456
Moscow, Idaho 83843
(208) 882-0588
Idaho State Bar No. 6165
Washington State Bar No. 30457

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH


STATE OF IDAHO,	)	Case No. CR-2013-01358
Plaintiff,)	
	)	MOTION TO ALLOW DEFENSE TO
V.	)	SHOW VIDEO OF CODEFENDANT'S
	)	STATEMENTS TO LAW ENFORCEMENT
CHARLES ANTHONY CAPONE,)	
Defendant.)	
_____)	

COMES NOW THE DEFENDANT, Charles Anthony Capone, by and through his attorneys of record, D. Ray Barker and Mark T. Monson, and moves the court for an order allowing the defense to show to the jury portions of videos of the statements made to law enforcement on November 12, 2013, and November 20, 2013, by David Stone.

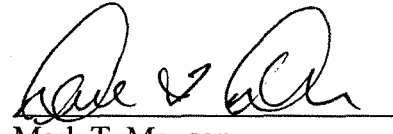
**MOTION TO ALLOW DEFENSE TO SHOW
VIDEO OF CODEFENDANT'S STATEMENTS
TO LAW ENFORCEMENT**

This motion is supported by a Memorandum in Support of Motion to Allow Defense to Show Video of Codefendant's Statements to Law Enforcement, filed herewith.

DATED this 14th day of May, 2014.



D. Ray Barker
Attorney for Defendant



Mark T. Monson
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of May, 2014, a true and correct copy of the foregoing documents was served, by first class mail, postage prepaid, and addressed to, or by personally delivering to or leaving with a person in charge of the office of or serving by facsimile:

Latah County Prosecutor's Office
Latah County Courthouse
Moscow, ID 83843

- First-class mail
- Hand-delivered
- Facsimile

By: D. Ray Barker
D. Ray Barker

CASE NO. CR 2013-1358

D. RAY BARKER
Attorney at Law
204 East First Street
P.O. Box 9408
Moscow, Idaho 83843-0118
(208) 882-6749
Idaho State Bar No. 1380

2014 MAY 14 PM 1:48

CLERK OF DISTRICT COURT
LATAH COUNTY
BY *[Signature]* DEPUTY

MARK T. MONSON
Attorney at Law
803 S. Jefferson, Ste. 4
P.O. Box 8456
Moscow, Idaho 83843
(208) 882-0588
Idaho State Bar No. 6165
Washington State Bar No. 30457

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO,)
Plaintiff,)
V.)
CHARLES ANTHONY CAPONE,)
Defendant.)
_____)

Case No. CR-2013-01358

**MEMORANDUM IN SUPPORT OF
MOTION TO ALLOW DEFENSE TO SHOW
VIDEO AND CO-DEFENDANT'S
STATEMENTS TO LAW ENFORCEMENT**

ISSUE

Under Idaho Rules of Evidence, which prohibit the use of hearsay evidence, can Charles Anthony Capone submit a video of David Stone's statements into evidence for the non-hearsay purpose of showing how well Mr. Stone can lie?

**MOTION TO ALLOW DEFENSE TO SHOW
VIDEO AND CO-DEFENDANT'S
STATEMENTS TO LAW ENFORCEMENT**

STATEMENT OF FACTS

The State of Idaho initially charged Charles Anthony Capone and David Stone with first degree murder, conspiracy to commit first degree murder, failure to notify coroner or law enforcement of death, and conspiracy to commit failure to notify coroner or law enforcement of death. The charge of conspiracy to commit first degree murder has been withdrawn as to both defendants and the charge of first degree murder has been withdrawn as to David Stone.

Mr. Capone is charged in the three counts regarding the disappearance and death of Rachael Anderson on April 16, 2010 and a trial date has been set for June 23, 2014. On November 12, 2013, Mr. Stone contacted the law enforcement and said he would talk to the police and give them information regarding Rachael Anderson. In a video recorded meeting at the Moscow police station, Mr. Stone told law enforcement that Mr. Capone was responsible for the death of Rachael Anderson. Statements Mr. Stone provided the police during this meeting directly contradicted what Mr. Stone had previously told the police during their investigations. Later on November 20, 2013, Mr. Stone made a second statement, some or which was video-recorded, to law enforcement and said that some of what he told them in the first video-recorded meeting was not true. Mr. Capone intends to show both video-recorded statements to the jury for the non-hearsay purpose of showing how good of a liar Mr. Stone is.

DISCUSSION

Mr. Capone intends to have the video of Mr. Stone's November 2013 statements to law enforcement, "the video" admitted under the non-hearsay theory of showing Mr. Stone to be a good liar, because the purpose would not be to prove the truth of the assertions made that Mr. Stone was visited by four different persons for the purpose of intimidating him into continuing his silence. Idaho Rule of Evidence 801 defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Idaho R. Evid. 801(c). Thus, there are two requirements for evidence to be considered hearsay. First, the desired statements to be admitted into evidence have to be made by the declarant outside of court. Second, the statements have to be submitted into evidence to prove the truth of the matter the out-of-court statement is asserting. Here, there is no question that Mr. Stone's statements to law enforcement in November 2013 were made outside of court. Consequently, the remaining requirement to be examined is whether submitting the video would be offered into evidence to prove the truth of the matter asserted.

"Hearsay" does not encompass all out-of-court statements, just those offered to prove the truth of the matter asserted. *State v. Agundis*, 903 P.2d 752, 759 (Idaho Ct. App. 1995). If evidence is provided for a non-hearsay purpose, there is no err in a court overruling a hearsay objection. *Id.* Therefore, a statement that would otherwise be inadmissible hearsay if offered to prove the truth of the assertion is admissible if the mere fact the statement was made is itself relevant. *Herrick v. Leuzinger*, 299, 900 P.2d 201, 207 no.1 (Idaho Ct. App. 1995). For instance, in *State v. Agundis*, a pre-booking sheet for Juan Agundis and a Western Union record for a David Lopez had the same address, and both documents were submitted into evidence by the prosecutor merely to allow an inference that Agundis and Lopez were associates. *Agundis*, 903 P.2d at 759. It did not matter whether the two had ever lived at the address or whether a

residence even existed. *Id.* Because the purpose of the evidence was merely to permit inferences that the two were associates based on the fact alone that they both used the same address, the purpose was found to be a non-hearsay purpose and the court did not err in overruling the hearsay objection. *Id.*

There are different ways that a non-hearsay purpose can be met. For example, a note that contained several assertions including, "I'm not married," "I was not here on the 13th of Sept. and you me or Mike did not have or do anything," and "I love you with all my heart" was offered to prove the opposite of what the assertions meant. *State v. Harris*, 117 P.3d 135, 140-41 (Idaho Ct. App. 2005). Instead of using the note to prove that the Defendant did not "do anything," the note was used to show that the Defendant attempted to cover up the crime by dissuading information from being divulged to the police. *Id.* at 141. Using the note under this theory, to prove the opposite of what the assertions meant, was not found to be hearsay. *Id.*

In addition to using the out-of-court statements to prove the opposite of their assertions, the Idaho Rules of Evidence also "exclude nonverbal conduct from the definition of 'hearsay' unless it was 'intended' by the actor to be an assertion." *State v. Rosencrantz*, 714 P.2d 93, 96 (Idaho Ct. App. 1986). Such nonverbal conduct could be a victim who looks nervously at the street when cars approach the house, who places blankets over curtains on the front window, and who parks her car in different place so it would be less obvious. *Id.* Such non-verbal conduct was enough to permit testimony that the victim was "afraid" in *Rosencrantz*. *Id.* Non-verbal purposes of hearsay can also include time lapses in an audiotape between events recorded, or to illustrate the slurred speech of the Defendant. *State v. Davis*, 307 P.3d 1242, 1246 n.1 (Idaho Ct. App. 2013), review denied (Sept. 17, 2013).

Also, it has been found that evidence presented to rehabilitate a witness after being impeached is admissible as a non-hearsay purpose. *State v. Howell*, 54 P.3d 460, 464 (Idaho Ct. App. 2002). In *State v. Howell*, the State called K.B., who rehabilitated B.S. by verifying B.S.'s testimony after being impeached with her preliminary hearing testimony on cross examination by Howell's attorney. *Howell*, 54 P.3d at 463-64. Because the testimony was used for the non-hearsay purpose of rehabilitating a witness, the Court found that the admission of K.B.'s testimony was not erroneous. *Id.* at 464.

No matter the non-hearsay purpose used, it would be important for the district court to indicate the reason that the evidence was admitted. In *State v. Gerardo*, the State argued two men's statements providing a common address served the non-hearsay purpose of circumstantial evidence to create a connection between the two. *State v. Gerardo*, 205 P.3d 671, 674 (Idaho Ct. App. 2009). However, because the court never indicated that it was admitting the statements for this limited purpose, the opposing party was never alerted to request a limiting instruction to restrict the jury's use of the evidence for the limited purpose. *Id.* Therefore, the evidence was not submitted for a limited purpose, and the Court concluded that the statements were admitted erroneously to prove the truth of the matter asserted, that the men lived at a certain address. *Id.*

In the instant case, Mr. Capone intends to have the videos of Mr. Stone's November 2013 statements to law enforcement admitted into evidence under the non-hearsay theory of showing how good of a liar Mr. Stone is, because that purpose, along with other possible non-hearsay theories, would prevent a viable hearsay objection because the video would not be submitted for the truth of the assertions stated. Admitting the video for the purpose of showing that Mr. Stone is a good liar is similar to the addresses on the documents being admitted to imply that the two

men were associates in *Agundis*. Just as in *Agundis* where the purpose of the admission of the addresses made it irrelevant whether either had lived at the residence or whether the residence even existed, the submission of the video to show how Mr. Stone is a good liar would make it irrelevant as to whether Mr. Stone was or was not actually visited by four different person to intimidate Mr. Stone into continuing his silence. Because the truth of the statements Mr. Stone made to the police in November would not be the purpose of submitting the videos, the actual purpose would be a non-hearsay purpose and the court would not err in overruling a hearsay objection.

Given that there are different non-hearsay purposes that can be used, other theories may have the possibility of supporting the admission of the video for the purpose of showing how good of a liar Mr. Stone is. The fact that in *Harris* the note was admitted for the non-hearsay purpose of proving the opposite of what the note alleged seems to imply that a non-hearsay purpose exists merely because the video will be used to show that Mr. Stone was lying instead of to prove he was telling the truth.

Additionally, the use of the video to demonstrate nonverbal conduct would likely be an allowable non-hearsay purpose under *Rosencrantz*, because the video would show non-verbal conduct of Mr. Stone that is unintended as assertions during the conversation. Instead of *Rosencrantz*'s non-verbal conduct of looking nervous when cars approach the house, placing blankets over curtains, or parking a car in different locations, the video would be able to show Mr. Stone's body language and facial expressions as he talks to law enforcement. Moreover, the allowance under *Davis* for inferences from time lapses and the tone and manner of speech of an audio recording as a non-hearsay purpose also seems to mean that the video could be admitted

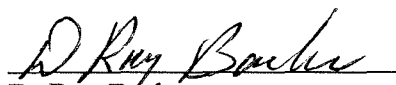
also for the purpose of drawing inferences from Mr. Stone's intonation, the ebb and flow of the conversation, and the timing between police questions and Mr. Stone's responses.

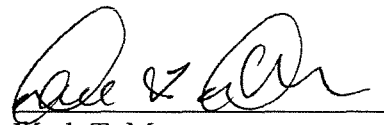
In admitting the video it is important for the district court to indicate the limited reason that the evidence is being admitted, regardless of which non-hearsay theory is used. In *Gerardo*, the court never advised that the statements were being admitted for a limited purpose; thus, the opposing party was never alerted so that a request for a limiting instruction could be made to restrict the jury's use of the evidence to that specific purpose. Consequently, if the evidence is not indicated as being admitted for a limited purpose, according to *Gerardo*, it seems the evidence is assumed admitted for the truth of the assertions presented.

CONCLUSION

Mr. Capone should be able to show the videos of Mr. Stone's November statements to the jury under the non-hearsay theory of showing how good of a liar Mr. Stone is, because it is being submitted for a purpose other than to prove the truth of assertions contained in the video. Additionally, proving the opposite of the assertions the evidence presents, showing non-verbal conduct that is unintended as assertions, and rehabilitating witnesses who have been impeached have been found to be non-hearsay purposes that coincide with proving Mr. Stone a liar. The district court needs to state the limited purpose for the video's admission so notice is given to the opposing party.

DATED this 14th day of May, 2014.


D. Ray Barker
Attorney for Defendant


Mark T. Monson
Attorney for Defendant


**MOTION TO ALLOW DEFENSE TO SHOW
VIDEO AND CO-DEFENDANT'S
STATEMENTS TO LAW ENFORCEMENT**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of May, 2014, a true and correct copy of the foregoing documents was served, by first class mail, postage prepaid, and addressed to, or by personally delivering to or leaving with a person in charge of the office of or serving by facsimile:

Latah County Prosecutor's Office
Latah County Courthouse
Moscow, ID 83843

- First-class mail
- Hand-delivered
- Facsimile

By: 
D. Ray Barker

CASE NO. CR 2013-1358

2014 MAY 14 PM 1:49

CLERK OF DISTRICT COURT
LATAH COUNTY
BY GM DEPUTY

D. RAY BARKER
Attorney at Law
P.O. Box 9408
Moscow, ID 83843
(208) 882-6749
Idaho State Bar No. 1380

MARK T. MONSON, P.A.
Attorney at Law
P.O. Box 8456
Moscow, ID 83843
(208) 882-0588
Idaho State Bar No. 6165
Washington State Bar No. 30497

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO

Plaintiff,

v.

CHARLES ANTHONY CAPONE

Defendant.

Case No. CR-2013-1358

**MOTION FOR ADDITIONAL FUNDS
FOR INVESTIGATOR**

COMES NOW the defendant, Charles A. Capone, by and through his appointed counsel, and hereby moves the court for an order authorizing additional funds for investigation costs in the above-referenced matter. The court has previously approved investigative costs in this matter. Additional funds of \$4,000 are hereby requested. Counsel has retained Chuck Schoonover, dba Action Agency, as investigator in the above-entitled case. Mr. Schoonover has expended the funds previously approved by meeting with Counsel on multiple occasions, meeting with the defendant, locating and interviewing

MOTION FOR ADDITIONAL FUNDS FOR INVESTIGATOR

Page 1 of 3

001589

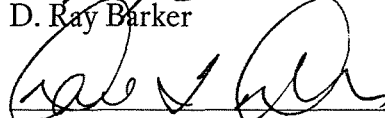
potential trial witnesses, traveling to Lewiston, Idaho on multiple occasions to review and document evidence in police custody and locate additional witnesses, and consulting with court-appointed counsel regarding this case. It is anticipated that Mr. Schoonover will continue to perform these functions. In addition, Mr. Schoonover has assisted in organizing voluminous amounts of cell phone data that has taken the state a significant amount of time to compile. Mr. Schoonover is also assisting in organizing witness testimony and extrapolating data from specific reports provided by the state in discovery in anticipation of preparing specific trial exhibits. Mr. Schoonover has also met with expert witnesses and counsel in Spokane and has been available and on call in order to locate specific items of evidence as requested by counsel. It is anticipated that Mr. Schoonover will continue to assist in locating witnesses, interviewing witnesses, serving subpoenas and other activities as described above.

The Defendant notes that the State has objected to payment of additional investigative costs, and anticipates further objection. The Defendant respectfully notes that the state has formed a taskforce to investigate the disappearance of Rachel Anderson, which includes most, if not all, of the local law enforcement agencies in Latah County, Nez Perce County, and Asotin County Washington. The state has also involved the United States Coast Guard, the ATF, FBI, and law enforcement agencies from Florida. These agencies have been investigating the disappearance for approximately four years. The Defendant also respectfully notes that updated information continues to be discovered to the defense and expects additional discovery. The Defendant anticipates that the state will continue to involve the previously mentioned agencies up to the point of trial.

DATED this 14 day of May, 2014




D. Ray Barker



Mark T. Monson

CERTIFICATE OF SERVICE

I hereby certify that on May 14 2014 I caused a true and correct copy of the foregoing motion to be hand delivered to the offices of the Latah County Prosecuting Attorney's office.



For the Firm

CASE NO. CR 2013-1358

2014 MAY 16 PM 3:26

CLERK OF DISTRICT COURT
LATAH COUNTY
BY *AM* DEPUTY

LATAH COUNTY PROSECUTOR'S OFFICE
William W. Thompson, Jr., ISB No. 2613
Prosecuting Attorney
Michelle M. Evans, ISB No. 4795
Sr. Deputy Prosecuting Attorney
Mia M. Vowels, ISB No. 6564
Deputy Prosecuting Attorney
Latah County Courthouse
P.O. Box 8068
Moscow, Idaho 83843
(208) 883-2246

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO,)	
Plaintiff,	)	Case No. CR-2013-01358
)	
V.	)	MOTION TO QUASH
	)	SUBPOENA DUCES TECUM
CHARLES ANTHONY CAPONE,	)	AND FOR PROTECTIVE
Defendant.	)	ORDER
_____)	

COMES NOW, the State of Idaho, by and through the Latah County Prosecuting Attorney, and respectfully moves the Court for an order quashing the "Subpoena Duces Tecum" obtained by the defense on May 14, 2014, and directed to Sprint regarding phone records associated with 509-552-9858. A copy of said subpoena is attached.

ORIGINAL
001592

In support of this motion, the State respectfully represents as follows:

1. The subject phone number is the personal and business cell phone number for Asotin County Sheriff's Office Captain Dan Hally, one of the investigators in this case. As such, it contains information pertaining to numerous matters unrelated to any potential issues in the case at bar, many of which are private or confidential.

2. The State, through discovery and investigation to date, has provided the defense with telephone records of relevant individuals such as the defendant, the co-defendant (David Stone) and the victim, Rachael Anderson. To the extent that Captain Hally had telephone contact with any of these individuals, that information has already been disclosed in these records.

3. The defendant's attempt to proceed by subpoena duces tecum is, in reality, more appropriately a matter to be addressed under I.C.R. 16(b)(9) which allows a defendant to make a motion for additional discovery by showing "substantial need in the preparation of the defendant's case" and "that the defendant is unable without undue hardship to obtain the substantial equivalent by other means." Prior to authorizing this additional disclosure/discovery, the defense must first satisfy the Court there is such "substantial need," and "undue hardship" in obtaining the substantial equivalent. The State respectfully submits that given the telephone

information provided to date, the defense is unable to do so.

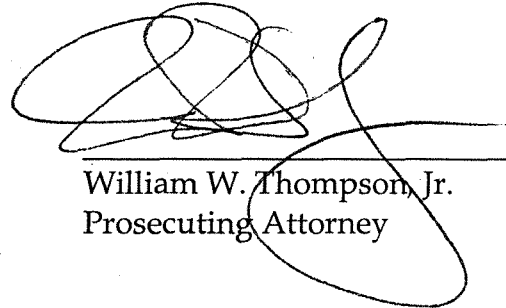
4. Pursuant to I.C.R. 16(l) the State respectfully submits that a protective order is appropriate to either deny the defense's attempt to access Captain Hally's cell phone records, or restrict it to only such records as can be demonstrated to the Court, *in camera*, that are relevant and material to the case at bar.

5. The defendant's "Subpoena Duces Tecum" improperly directs that the requested records be sent directly to defense counsel. Idaho Criminal Rule 17(b) contemplates that if the requested documents are to be produced "at a time prior to the trial or prior to the time when they are to be offered in evidence," the Court would direct that the items "designated in the subpoena be produced before the Court" at such prior time and the Court "may upon their production permit the books, papers, documents, or objections or portions thereof to be inspected by the parties and their attorneys." Consequently, even if the use of a subpoena is an appropriate mechanism to seek the additional discovery in this case, the records should be produced to the Court, in which event, as requested above, the Court can review them *in camera* for relevancy and determine whether the subpoena should be quashed in whole or in part.

Based on the above, the State respectfully moves that the Court quash the above-referenced subpoena and issue a protective order prohibiting the defense from further

pursuing the cell phone records of Captain Hally absent an adequate showing of "substantial need" and inability "without undue hardship to obtain the substantial equivalent by other means" as required by I.C.R. 16(b)(9).

DATED this 16 day of May, 2014.



William W. Thompson, Jr.
Prosecuting Attorney

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing Motion to Quash Subpoena Duces Tecum and for Protective Order was served on the following in the manner indicated below:

D. Ray Barker
Attorney at Law
P.O. Box 9408
Moscow, ID 83843

U.S. Mail
 Overnight Mail
 Fax
 E-mail - d.raybarker@turbonet.com

Mark T. Monson
Mosman Law Office
P.O. Box 8456
Moscow, ID 83843

U.S. Mail
 Overnight Mail
 Fax
 E-mail - mark@mosmanlaw.com

The Honorable Michael J. Griffin
District Judge
320 W. Main Street
Grangeville, ID 83530

U.S. Mail
 Overnight Mail
 Fax - 208-983-2376
 Hand Delivery

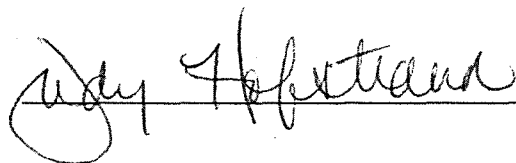
Sprint - Corporate Security
Subpoena Compliance
6480 Sprint Parkway
Overland Park, KS 66251

U.S. Mail
 Overnight Mail
 Fax - 816-600-3111
 Hand Delivery

Captain Dan Hally
Asotin County Sheriff's Office
Asotin, WA

U.S. Mail
 Overnight Mail
 E-mail - dhally@co.asotin.wa.us

Dated this 16th day of May, 2014.



D. RAY BARKER
Attorney at Law
204 East First Street
P.O. Box 9408
Moscow, Idaho 83843-0118
(208) 882-6749
Idaho State Bar No. 1380

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO,	)	Case No. CR-2013-1358
Plaintiff,)	
	)	SUBPOENA DUCES TECUM
v.)	
)	
CHARLES ANTHONY CAPONE,)	
Defendant.)	
_____)	

THE STATE OF IDAHO TO: **Sprint - Corporate Security - Subpoena Compliance**
6480 Sprint Parkway
Overland Park, KS 66251
FAX: 816-600-3111

YOU ARE HEREBY REQUIRED to provide to D. Ray Barker, Attorney for Defendant, to be used as evidence by the above-named defendant in the above-entitled matter, the following information pertaining to subscriber information for the Sprint Wireless Accounts for the assigned phone number: **509-552-9858** during the period of **April 10, 2010 to April 19, 2010:**

1. Cell tower data
2. Call detail records
3. Billing records

Said records need to be faxed, or delivered to:

D. Ray Barker
P.O. Box 94087
Moscow, ID 83843
Facsimile: (208) 882-7604

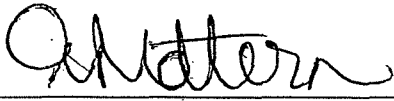
SUBPOENA DUCES TECUM- 1

001597

Herein fail not, under penalty of law.

DATED this 14 day of May, 2014.

SUSAN PETERSEN: Clerk of the Court

By 
Deputy Clerk

CASE NO. CR 2013-1358

2014 MAY 19 AM 11:37

CLERK OF DISTRICT COURT
LATAH COUNTY
BY DEPUTY

D. RAY BARKER
Attorney at Law
204 East First Street
P.O. Box 9408
Moscow, Idaho 83843-0118
(208) 882-6749
Idaho State Bar No. 1380

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO,)
)
 Plaintiff,)
)
vs.)
)
CHARLES ANTHONY CAPONE,)
)
 Defendant.)

Case No. CR-2013-1358

MOTION FOR EXPEDITED HEARING

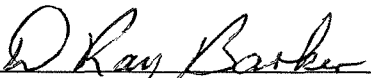
COMES NOW the Defendant, Charles Anthony Capone, by and through his appointed counsel, D. Ray Barker, and hereby moves the court for an expedited hearing on the Motion for Additional Funds for Investigator filed on May 14, 2014.

The Court has set a hearing on pending motion for April 30, 2014, at 2:00 p.m. The Defense needs the continued services of Mr. Schoonover in order to continue with preparation for trial on June 23, 2014. As the trial date approaches the need for his services increases and the Defense cannot afford a delay of eleven (11) days. There are many witnesses to be located and contacted as well as discovery to be reviewed. The delay is similar to telling the Prosecution that

they cannot have any assistance from the law enforcement agencies involved in this case for a period of time. This interruption in investigating services will affect the ability of the Defense to provide effective assistance of counsel.

An expedited hearing to be conducted by telephone in hereby requested.

DATED this 19th day of May, 2014.



D. Ray Barker
Attorney for Defendant

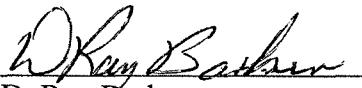
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19 day of May, 2014, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

Latah County Prosecuting Attorney
Latah County Courthouse
P.O. Box 8068
Moscow ID 83843

- First-class mail
- Hand-delivered
- Facsimile

By:


D. Ray Barker

CASE NO. CR 2013-1358

2014 MAY 19 PM 4:41

D. RAY BARKER
Attorney at Law
204 East First Street
P.O. Box 9408
Moscow, Idaho 83843-0118
(208) 882-6749
Idaho State Bar No. 1380

CLERK OF DISTRICT COURT
LATAH COUNTY
BY QM DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO,)	
	)	Case No. CR-2013-1358
Plaintiff,)	
	)	AMENDED
vs.	)	MOTION FOR EXPEDITED HEARING
)	
CHARLES ANTHONY CAPONE,)	
)	
<u>Defendant.</u>)	


COMES NOW the Defendant, Charles Anthony Capone, by and through his appointed counsel, D. Ray Barker, and hereby moves the court for an expedited hearing on the Motion for Additional Funds for Investigator filed on May 14, 2014.

The Court has set a hearing on pending motion for April 30, 2014, at 2:00 p.m. The Defense needs the continued services of Mr. Schoonover in order to continue with preparation for trial on June 23, 2014. As the trial date approaches the need for his services increases and the Defense cannot afford a delay of eleven (11) days. There are many witnesses to be located and contacted as well as discovery to be reviewed. The delay is similar to telling the Prosecution that

they cannot have any assistance from the law enforcement agencies involved in this case for a period of time. This interruption in investigating services will affect the ability of the Defense to provide effective assistance of counsel.

An expedited hearing to be conducted by telephone in hereby requested.

DATED this 19th day of May, 2014.



D. Ray Barker
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of May, 2014, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

Latah County Prosecuting Attorney
Latah County Courthouse
P.O. Box 8068
Moscow ID 83843

- First-class mail
- Hand-delivered
- Facsimile

By:


D. Ray Barker

2014 MAY 21 AM 9:07

Juror # _____ CLERK OF DISTRICT COURT
LATAH COUNTY
BY MB DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO,
Plaintiff,
vs.

Charles A. Capone,
Defendant.

)
) Case No. CR 2013-1358
)
)
) JUROR QUESTIONNAIRE
)
)

A. **USE BLACK INK PEN ONLY.**

B. Please print your answers.

C. Answer these questions by yourself. Do not discuss your answers with other anyone else, including other potential jurors. We recognize that some of the questions are of a personal nature. Nonetheless, it is important that you answer all questions candidly and truthfully.

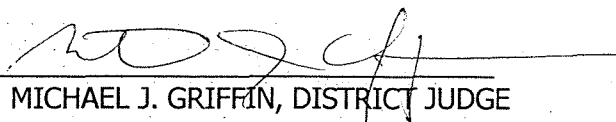
D. The information you provide is confidential and for use by the lawyers, the parties, and the Court during questioning associated with jury selection. You will be questioned both in open court and individually. **This questionnaire will be part of the sealed court file and will not be available for public inspection or use.**

E. If you do not understand a question, please put a question mark (?) in the space provided for the answer. The court and the attorneys will attempt to clarify the question for you during questioning.

F. If the space provided for your answers is not sufficient, please turn to the last page of this questionnaire which has been provided to allow for supplemental answers and information. If you supplement your answers please make reference to the question number that you are referring to.

G. **YOU ARE UNDER OATH AND MUST ANSWER ALL QUESTIONS TRUTHFULLY.**

H. Do not do any investigation into this case. Do not listen to or view any reports about this case, whether on TV, radio, the internet, or any social network. Do not discuss this case with anyone.


MICHAEL J. GRIFFIN, DISTRICT JUDGE

SECTION I: FAMILY HISTORY

1. Name: _____
Last First Middle (maiden or former names)

2. Age: _____

3. Have you been married? Yes ___ No ___
What is your current marital status? Single married separated divorced widowed

Current spouse or partner: _____

4. Do you have children? Yes ___ No ___

If yes, please list below their age, sex, education, and occupation.

Age	Sex	Education	Occupation
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

SECTION II: EDUCATIONAL/OCCUPATIONAL INFORMATION

5. Current occupation: _____
(if self-employed in or outside of the home, please describe)

Who is your current employer? _____

Previous two jobs: _____

6. Education:
Highest grade completed: _____
Degrees earned: _____

Law Enforcement training: ___ Yes ___ No
If Yes, please describe: _____

Have you ever served in the military? ___ Yes ___ No
When _____ Where _____
Job duties _____
Type of Discharge _____

7. Medical background: Please describe any medical training you have received _____

SECTION III: PERSONAL ATTITUDES AND ACTIVITIES

8. What newspaper(s) do you read, and how often? _____
9. Do you watch television? Yes ____ No ____
What do you tend to watch? _____

SECTION IV: PREVIOUS JURY EXPERIENCE

10. Have you ever served on a grand jury? Yes ____ No ____ Not sure ____
If yes, when and where? _____
11. Have you ever been a juror in a coroner's inquest? Yes ____ No ____ Not sure ____
If yes, when and where? _____
12. Have you ever served as a trial juror (or alternate juror) in state or federal court?
Yes ____ No ____
If yes, please indicate the following.
When: _____
Where? _____
Type of case: Civil ____ Criminal ____ Unsure ____
What was the case about? _____
Was a verdict reached? Yes ____ No ____
If a verdict was not reached was it due to the inability of jurors to agree on a verdict or because of some other reason? Please explain. _____

13. Have you been called as a juror but not selected? Yes ____ No ____
If yes, how many times? _____
14. Do you have any concerns about the jury system? Yes ____ No ____
If yes, please explain. _____

SECTION V: PRIOR EXPERIENCES WITH LAW ENFORCEMENT PERSONNEL

15. Do you have any friends or relatives who have law enforcement experience of any kind? This includes being a police officer, sheriff's deputy, security guard, FBI agent, jail guard, probation/parole officer, prosecuting or city attorney, or any other position whatsoever connected with law enforcement. Yes ____ No ____

If yes, please describe:

Name	Relationship to you	Law enforcement	Years experience
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

16. Do you know any lawyers or judges? Yes _____ No _____

If your answer is yes to the above question, please provide the names of the lawyers you are acquainted with and what their area of practice is. _____

SECTION VI: EXPERIENCES WITH CRIMINAL JUSTICE SYSTEM

17. Have you or any of your friends or relatives been the victim of a crime (reported or unreported, including crimes of violence, domestic violence, sexual crimes, property crimes, etc.)?

Yes _____ No _____

If yes, please describe each incident, including when, where, a description of the circumstances, and whether a report was made. _____

18. Have you or any of your friends or relatives experienced, been present during, or been affected by a violent crime (including domestic violence)? Yes _____ No _____

If yes, please describe, including when, where, and a description of the circumstances.

19. Have you or any of your friends or relatives testified in court? Yes _____ No _____

If yes, please describe each incident, including when, where, and a description of the circumstances. _____

20. Have you or any of your friends or relatives ever been investigated for, arrested for, or charged with a crime? Yes _____ No _____

If yes, please describe each incident, including when, where, a description of the circumstances, and the outcome of the case. _____

21. Do you know of anyone who has received or requested a domestic violence no-contact order from a court? Yes _____ No _____

If yes, please describe: _____

22. Have you ever been a member of a group that advocates for crime victims?

Yes _____ No _____

If yes, please describe: _____

23. Do you know of anyone who has been the victim of, charged with, or a witness to the crime of stalking? Yes _____ No _____

If yes, please describe: _____

SECTION VII: PUNISHMENT OF CRIMINAL BEHAVIOR

24. Which of the following best describes your personal beliefs concerning the effectiveness of the criminal justice system in punishing those found guilty of criminal behavior? (please check one) Highly Effective _____ Somewhat Effective _____ Not Effective _____

25. Are there any particular types of crimes which you believe are punished too much or not punished enough by the criminal justice system? If so, please relate your thoughts on the subject. _____

SECTION VIII: PUBLICITY

The following questions are not intended to suggest that you have, should have, or will hear anything about this case. However, if you have been exposed to information concerning this case prior to today, please answer the following questions candidly:

26. Do you know, or have you read, or heard anything, from any source, at any time, about this case? Yes _____ No _____

27. If yes, please indicate the source(s) of your information: _____ radio _____ friends or family _____ newspaper _____ law enforcement _____ television _____ Internet _____ other: _____

SECTION IX: CONCLUDING QUESTIONS

28. Do you have any medical condition(s) that you would like to have considered by the lawyers, parties, and judge as part of the process of being selected for jury service?

Yes _____ No _____ If yes, please explain. _____

29. Do you have any personal circumstances or other considerations that might cause you to want to "hurry along" the process of this case? Yes _____ No _____

If yes, please explain. _____

30. Is there anything not covered by this questionnaire that you feel we should know about you? If so, please explain. _____

31. A list of potential witnesses and court personnel has been provided as an attachment to this questionnaire. Please review this list and circle the name of any person that you believe you are acquainted with or otherwise may know.

32. If, because of the nature of the case, you wish to discuss any issues in private, please mark the following box. Yes _____

EXTRA SPACE FOR SUPPLEMENTAL RESPONSES

Please remember to note the number of the question you are answering.

Lined area for writing answers.

SIGNATURE UNDER PENALTY OF PERJURY:

I hereby declare, under penalty of perjury, that the answers given on this questionnaire are true and correct to the best of my knowledge and belief.

Printed name: _____

Signature: _____

Juror number: _____

Date: _____

DEFENDANT'S WITNESS LIST FOR JURY QUESTIONNAIRE
STATE V. CHARLES CAPONE
CR-2013-1358

Avila, Luis	Schoonover, Chuck
Bennett, Brett Thomas	Snyder, Mack
Button, Ed	Soule, Louis
Capone, Anthony	Spindler, Nancy
Capone Mullen, Teresa	Stamper, Debbie
Colbert, David	Steckel, Gary
Comer, Eddy	Stone, Alisa Jo
Donner, Nathan Douglas	Sullivan, Skyler
Evans, Dan	Sweet, Debbie
Everson, Alisha	Thacker, Jesse D
Gibbs, Mark	Tournay, Matthew
Jaeger, Bradley	Wheaton, Jon
Johnson, Jeff	Williams, Joe
Keeney, Lyle	Williams, Travis
Langworthy, Paul	Wilson, Greg
McPherson, Dan	
Mastro, Mike	
Montambo, Christopher	
Nelson, Blake	
Rath, Stephanie (McPherson)	
Reed, Donald L	
Rivera, Angel	

STATE'S WITNESS LIST FOR JURY QUESTIONNAIRE
STATE V. CHARLES ANTHONY CAPONE
CR-2013-001358

Anderson, Alisa (Stone)
Moscow, ID 83843

Combs, Dan
Clarkston, WA 99403

Aston, Earl
Moscow, ID 83843

Cummings, Patrick
Moscow, ID 83843

Avila, Luis
Washington State

Dahl, Chelsey
Lewiston, ID 83501

Benjamin, Rick
Moscow, ID 83843

Donner, Nathan
Lewiston, ID

Besst, Tim
Moscow, ID 83843

Edwards, Ryan
Spokane, WA 99210-1494

Birdsell, Brian
Lewiston, ID 83501

Fager, Bruce
Moscow, Idaho 83843

Bogden, Carole
Viola, ID 83872

Fountain, Tim
Moscow, ID 83843

Bogden, Robert
Viola, ID 83872

Fry, James
Moscow, Idaho 83843

Bottomly, Vic
Clarkston, WA 99403

Gallina, Scott
Lewiston, ID 83501

Boyd, Chad
Moscow, ID 83843

Gibson, James
Clarkston, WA 99403

Bonefield, Kristina
Belle Fourche, SD 57715

Glass, Brent
Clayton, WA 99110

Colbert, Ashley
Clarkston, WA 99403

Griswold, Amber
Pomeroy, WA 99347

Hally, Dan
Asotin, WA 99402

Houser, John
Moscow, ID 83843

Hund, K'Sandra
Clarkston, WA 99403

Kjorness, Eric
Lewiston, ID 83501

Lehmitz, Dave
Moscow, Idaho 83843

Mabbutt, Cathy
Moscow, ID 83843

Meyer, Noah
Moscow, ID 83843

Mooney, Mike
Lewiston, ID 83501

Nichols, Jackie
Asotin, WA 99402

Norberg, Jennifer
Clarkston, WA 99403

Ogden, Ethan
Moscow, ID 83843

Palmer, Tyler
Moscow, ID 83843

Phillips, Jesse
Moscow, Idaho

Plunkett, Dennis
Clarkston, WA 99403

Plunkett, Gavin
Clarkston, WA 99403

Richmond, Seth
Moscow, ID 83843

Rogers, JD

Spence, Brian
Moscow, ID 83843

Stone, David
Moscow, ID 83843

Voss, Joshua
Sandpoint, ID 83864

Whiteley, Chas
Moscow, ID 83843

Wilcox, Adin
Clarkston, WA 99403

Wilcox, William
Clarkston, WA 99403

Zachow, Kent
Moscow, ID 83843

CASE NO. CR-13-1358

2014 MAY 21 AM 10:01


CLERK OF DISTRICT COURT
LATAH COUNTY
BY MB DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO,	)	CASE NO. CR 2013-1358
)	
Plaintiff,	)	ORDER RE: JUROR
	)	QUESTIONNAIRE
vs.)	
)	
CHARLES CAPONE,)	
)	
Defendant.)	

The attached juror questionnaire must be completed and returned to the Latah County Clerk of Court by May 30, 2014.

Dated this 20th day of May, 2014.


Michael J. Griffin
District Judge

001615

CASE NO CR 2013-1358

2014 MAY 22 PM 12:40

CLERK OF DISTRICT COURT
LATAH COUNTY

BY [Signature] DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO

Plaintiff,

v.

CHARLES ANTHONY CAPONE

Defendant.

Case No. CR-2013-1358

ORDER AUTHORIZING FUNDS
REGARDING INVESTIGATOR

THE COURT, having reviewed Defendant's *Motion for Additional Funds Regarding Investigator* dated May 14, 2014, and good cause appearing therefore,

IT IS HEREBY ORDERED that an additional \$4,000.00 for investigative costs is hereby authorized. Such costs shall not exceed ~~the additional~~ \$4,000.00 in total until and unless the defendant obtains authorization for additional investigative costs.

DATED this 22nd day of May 2014.

[Signature]
JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Order Authorizing Funds Regarding Investigator** was served on the following individuals by the method indicated:

Mark T. Monson
Co-Counsel for Defendant
PO Box 8456
Moscow, ID 83843

Via Facsimile: (208) 882-0589
 U.S. Mail
 Hand Delivery

D. Ray Barker
Co-Counsel for Defendant
PO Box 9408
Moscow, ID 83843

Via Facsimile: (208) 882-7604
 U.S. Mail
 Hand Delivery

on this 22 day of May, 2014.

SUSAN PETERSON
Latah County Clerk of the Court

By: Sue Anderson
Deputy Clerk

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH**

- COURT MINUTES -

Michael J. Griffin
District Judge, participating by telephone

No Court Reporter

Date: May 20, 2014

Recording No. Z:02/2014-5-20

Time: 2:32 P.M.

STATE OF IDAHO,)
)
Plaintiff,)
vs)
)
CHARLES ANTHONY CAPONE,)
)
Defendant.)

Case No. CR-13-01358

APPEARANCES:

William Thompson Jr., Prosecutor
Mia Vowels, Deputy Prosecutor

Defendant present with counsel,
D. Ray Barker and Mark Monson
Court Appointed Counsel

Subject of Proceedings: Hearing Regarding Witness Lists

Court questioned Mr. Monson regarding the number of witnesses they intend to call at trial. Mr. Monson stated they have subpoenaed two or three witnesses and are awaiting service on eight or nine more. Court questioned Ms. Vowels. Ms. Vowels stated that they have approximately forty-five factual witnesses. Court directed counsel to reduce their witness lists to factual witnesses they intend to call at trial and get their witness lists to the clerk tomorrow morning.

Mr. Barker made an inquiry on the defendant's motion for an expedited hearing for additional funds for the investigator. Court questioned Ms. Vowels. Court questioned Mr. Barker. Court stated he will review the motion when he returns to Grangeville tonight and sign the order tomorrow. Ms. Vowels made an inquiry of the Court. Court stated that he will hear the State's motion to quash subpoenas at the motion hearing on May 30, 2014. Mr. Monson directed remarks to the Court. Court again stated he would hear the State's motion to quash subpoenas on May 30,

2014. Mr. Monson made an inquiry of the Court regarding the invoice from the dog expert. Court stated that he review the motion when he returns to Grangeville tonight.

Court recessed at 2:50 p.m.

APPROVED BY:



MICHAEL J. GRIFFIN
DISTRICT JUDGE

CASE NO. CR 2013-1358

2014 MAY 23 PM 2:33

CLERK OF DISTRICT COURT
LATAH COUNTY
BY EW DEPUTY

LATAH COUNTY PROSECUTOR'S OFFICE
WILLIAM W. THOMPSON, JR.
PROSECUTING ATTORNEY
Latah County Courthouse
P.O. Box 8068
Moscow, Idaho 83843-0568
Phone: (208) 883-2246
ISB No. 2613

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO,)	
Plaintiff,)	
	)	Case No. CR-2013-01358
V.)	
	)	MOTION FOR LEAVE TO AMEND
CHARLES ANTHONY CAPONE,	)	CRIMINAL INFORMATION
Defendant.)	
_____)	

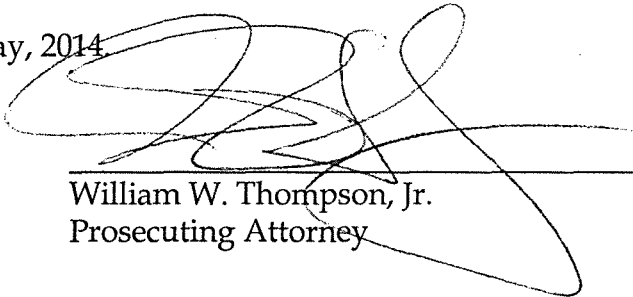
COMES NOW the State of Idaho, by and through William W. Thompson, Jr., Latah County Prosecuting Attorney, and pursuant to Idaho Criminal Rule 7(e), respectfully moves this Court for leave to amend the Criminal Information filed in the above-entitled case. In support, the State respectfully represents that the Court has now ruled on various pre-trial motions, including excluding evidence of the defendant's statements made to investigators on May 6, 2010, which statements form the factual basis for the ninth overt act alleged in Count III. Consequently, the proposed Second Amended Criminal Information deletes that overt act.

ORIGINAL
001620

Additionally, the proposed Second Amended Criminal Information corrects a typographic error (duplicate periods) at the end of Count I, and deletes the words "Principal to" in the title/caption to Count II. In preparing draft proposed Jury Instructions, and reviewing the applicable law on principals under Idaho Code 18-204, the State is concerned that preserving the words "Principal to" in the title/caption to Count II will be potentially confusing or misleading to the trial jury.

In all other respects, the remaining language of Counts I, II, III and the Part II sentencing enhancement, remain the same.

DATED this 23 day of May, 2014.



William W. Thompson, Jr.
Prosecuting Attorney

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing MOTION FOR LEAVE TO AMEND CRIMINAL INFORMATION was

mailed, United States mail, postage prepaid

hand delivered

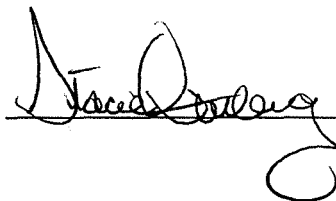
sent by facsimile, original by mail

e-mailed, d.raybarker@turbonet.com, mark@mosmanlaw.com

to the following:

D. Ray Barker
Mark Monson
Attorney at Law
P.O. Box 9408
Moscow, ID 83843

Dated this 23 day of May, 2014.



CASE NO. CR 2013-1358

2014 MAY 27 AM 10:47

LATAH COUNTY PROSECUTOR'S OFFICE
MIA M. VOWELS
DEPUTY PROSECUTING ATTORNEY
Latah County Courthouse
P.O. Box 8068
Moscow, Idaho 83843-0568
Phone: (208) 883-2246
ISB No. 6564

CLERK OF DISTRICT COURT
LATAH COUNTY
BY [Signature] DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO,)
Plaintiff,)
V.)
CHARLES ANTHONY CAPONE,)
Defendant.)
_____)

Case No. CR-2013-0001358
MOTION FOR ISSUANCE OF
CERTIFICATE OF ENDORSEMENT
PURSUANT TO IDAHO CODE
19-3005(2)

COMES NOW the State of Idaho, by and through the Deputy Prosecuting Attorney, Mia M. Vowels, and hereby moves this Court for the issuance of a Certificate of Endorsement under the Uniform Act to Secure Attendance of Witnesses in Criminal Cases, Idaho Code 19-3005, for Luis A. Avila. This motion is based upon the Affidavit of Mia M. Vowels.

DATED this 27 day of May, 2014.

[Signature]
Mia M. Vowels
Deputy Prosecuting Attorney

MOTION FOR ISSUANCE OF CERTIFICATE
OF ENDORSEMENT PURSUANT TO IDAHO
CODE 19-3005(2)

ORIGINAL
001623

CASE NO. CR 2013-1358

2014 MAY 27 AM 10:48

CLERK OF DISTRICT COURT
LATAH COUNTY
BY Qm DEPUTY

LATAH COUNTY PROSECUTOR'S OFFICE
MIA M. VOWELS
DEPUTY PROSECUTING ATTORNEY
Latah County Courthouse
P.O. Box 8068
Moscow, Idaho 83843-0568
(208) 883-2246
ISB No. 6564

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO,)
Plaintiff,)
V.)
CHARLES ANTHONY CAPONE,)
Defendant.)
_____)

Case No. CR-2013-0001358
AFFIDAVIT IN SUPPORT OF
MOTION FOR ISSUANCE OF
CERTIFICATE OF ENDORSEMENT

Mia M. Vowels, being first duly sworn, states as follows:

1. That the affiant is the Deputy Prosecuting Attorney for the County of Latah, State of Idaho;
2. That the Defendant, Charles Anthony Capone, is charged with the felony offenses of MURDER IN THE FIRST DEGREE, Idaho Code 18-4001, 18-4003(a); PRINCIPAL TO FAILURE TO NOTIFY CORONER OR LAW ENFORCEMENT OF

ORIGINAL
001624

DEATH, Idaho Code 18-204, 19-4301A(1)(3) and CONSPIRACY TO COMMIT FAILURE TO NOTIFY CORONER OR LAW ENFORCEMENT OF DEATH, Idaho Code 19-4301A(1)(3), 18-1701;

3. That the above-entitled case has been set for trial to begin on June 23, 2014, at 9:00 a.m., and the trial is expected to last for three (3) weeks;

4. That Luis A. Avila is a necessary and material witness to the state in this case and his testimony may include, but not be limited to, the following: Luis Avila was in custody at the Asotin County Jail with Charles Capone. While incarcerated together, they spoke about their ex-wives. Capone told Mr. Avila to bury his ex-wife. Capone told Mr. Avila it would be easy to just dig a hole and cover her. On a different day, Mr. Capone got upset with Mr. Avila and told him something to the effect of "You're not the first one I'm going to bury." In another conversation Mr. Capone told Mr. Avila the police were never going to find Rachael Anderson;

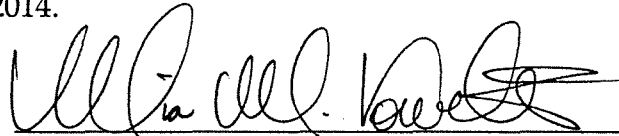
5. That Luis A. Avila's testimony is estimated to occur between the dates of June 27, 2014 to July 7, 2014;

6. That Luis A. Avila, DOC# 369547, is currently residing at Airway Heights Correctional Center, 11919 W. Sprague Avenue, Spokane County, Airway Heights, WA 99001-1899, approximately eighty-five (85) miles from Moscow, Idaho;

7. That the witness will be transported to the Latah County Jail by Interstate Transport.

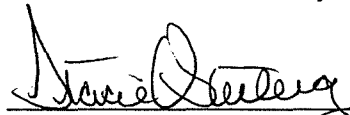
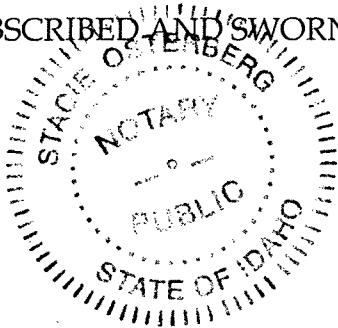
FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 27 day of May, 2014.



Mia M. Vowels
Deputy Prosecuting Attorney

SUBSCRIBED AND SWORN to before me this 27 day of May, 2014.



Notary Public for Idaho
Residing at Latah County
Commission expires: 5/23/19