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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 44182**
Plaintiff-Respondent,	)	
	)	**Kootenai County Case No.**
v.	)	**CRF14-5178**
	)	
ELDON GALE SAMUEL, III,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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District Judge

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STATEMENT OF THE CASE

Nature of the Case

Eldon Gale Samuel, III ("Samuel") appeals from the judgment of the district court entered upon the jury verdict finding him guilty of second degree murder for killing his father, Eldon Samuel Jr. ("Mr. Samuel") and first degree murder for killing his younger brother, J.S.

Statement of Facts and Course of Proceedings

Samuel hated his autistic younger brother, J.S.. (See Exs. 6A at 1:37:45 to 1:37:50, 2:50:39 to 2:51:31, 6C at pp. 58, 123-124.[1]) Samuel blamed J.S. for causing so much stress that their mom ran away and left him with their father, Mr. Samuel. (Id.) After killing both J.S. and Mr. Samuel, Samuel said that he "kind of" felt bad for his dad, but he did not feel bad for his brother. (See Ex. 6A at 3:30:22 to 3:30:38; Ex. 6C at pp. 154-155.)

On the evening of March 24, 2014, Mr. Samuel was on his "medication" and shot off a .45 caliber pistol outside. (See Exs. 6A at 1:13:25 to 1:15:01, 2:07:58 to 2:11:33, 6C at pp. 34-35, 92-96) Mr. Samuel was acting crazy and thought there were zombies outside. (Id.) Mr. Samuel went inside and put the .45 down and Samuel picked it up. (See Ex. 6A at 3:15:30 to 3:23:02; Ex. 6C at pp. 139-147.) Samuel unloaded the .45, but then reloaded it. (Id.) When they were back inside the house Mr. Samuel pushed Samuel in the chest and told Samuel to leave. (See Exs. 6A at 2:07:58 to 2:11:33, Ex. 6C at pp. 92-96.)

[1] The recorded interview (Ex. 6A) and the interview transcript (Ex. 6C) were admitted as evidence during trial. (1/14/16 Tr., p. 1012, L. 7 – p. 1015, L. 4) The time references are approximate and reference the time stamp in the upper left of the video.

When Mr. Samuel pushed Samuel a second time, Samuel shot Mr. Samuel in the stomach with the .45. (See Ex. 6A at 2:07:58 to 2:11:33, 6C at pp. 92-96.) Mr. Samuel then crawled to J.S.'s room, leaving a blood trail on the floor trying to escape. (See Exs. 6A at 2:46:58 to 2:48:58, 6C at pp. 119-121.) Once Mr. Samuel got to J.S.'s room, Samuel shot him three more times. (Id.) Samuel shot him twice in the cheek, but he did not think those shots killed him, so Samuel shot him a third time in the head. (Id.) After killing his father, Samuel turned his attention to his autistic younger brother, J.S. (Id.)

J.S. was hiding under his bed. (See Exs. 6A at 2:35:32 to 2:40:28, 6C at pp. 105-111.) Samuel could only see J.S.'s legs. (Id.) Samuel got the loaded shotgun. (Id.) Samuel shot him under the bed with the shotgun.[2] (Id.) Samuel reloaded the shotgun and continued to shoot J.S. under the bed. (Id.)

Samuel then dropped the shotgun and started to stab at J.S. with a knife. (See Exs. 6A at 4:36:35 to 4:39:05, 6C at pp. 189-192.) Samuel tried to stab J.S. under the bed, but then lifted the mattress off the bed. (Id.) Samuel got a machete. (Id.)

With the mattress off the bed, J.S. was exposed, and only protected by the bed frame's wood planks. (See Exs. 6A at 2:40:20 to 2:43:19, 6C at pp. 111-116.) The wood planks on the bedframe were widely spaced. (See Ex. 5 at 7:48 to 11:11.) Samuel swung at J.S. with the machete through the gaps in the woods planks. (See Exs. 6A at 2:40:20 to 2:43:19, 6C at pp. 111-116.) When J.S. tried to climb out from underneath the bed, Samuel hit him in the back of the head with the machete. (See id.) Samuel stood on the discarded mattresses and repeatedly

[2] Although Samuel did not mention it during his interview, Samuel also shot J.S. with the .45 while J.S. was hiding under the bed. (See 1/19/16 Tr., p. 1168, L. 21 – p. 1176, L. 22; Ex. 35G.)

swung the machete downwards on J.S.'s exposed head, as hard as he could. (Id.) J.S. stopped talking and was quiet. (See Exs. 6A at 2:45:02 to 2:45:32, 6C at p. 117.)

Samuel called 911. (See 1/13/16 Tr., p. 653, L. 3 – p. 654, L. 6; Exs. 1, 1B, 6A at 2:43:19 to 2:44:52, 6C at pp. 114-116.) Samuel told the 911 operator that his dad hit him, so he shot him. (See Exs. 1, 1B.) Samuel told 911 that he was the only one in the house and his dad and brother were dead. (See Exs. 1, 1B.)

Officer Alleman, Sergeant Moore and Officer Noble responded to the 911 call and made contact with Samuel. (1/13/16 Tr., p. 644, L. 12 – p. 652, L. 2; Exs. 2, 3.) Officers Cohen and Rios arrived shortly thereafter. (Id.) Samuel had blood on his arm and a large amount of blood on his leg. (Id.) Samuel had blood all over his clothes, shoes and pants. (1/14/16 Tr., p. 975, L. 3 – p. 977, L. 9; Exs. 36A-L.) Samuel appeared "very calm and expressed no emotion." (1/14/16 Tr., p. 983, Ls. 2-5.) Officer Cohen took photographs of Samuel and transported him to the police department. (1/14/16 Tr., p. 968, L. 11 – p. 970, L. 21, p. 975, L. 3 – p. 980, L. 24; Exs. 4A-C, 36A-L.)

Later that night, officers obtained a search warrant to search Samuel's house. (1/13/16 Tr., p. 668, L. 4 – p. 741, L. 2; Exs. 5, 7, 17A-F, 29A-G, 30A-Y, 31A-E, 32A-Z, 33A-Z, 34A-F, 35A-Q.) That night and the next morning, officers executed the search warrant and took pictures, video and evidence from the house. (Id.)

At the police department, the officers collected evidence from Samuel's clothes and took pictures of Samuel. (1/13/16 Tr., p. 660, L. 9 – p. 668, L. 3; Exs. 37A-Q.)

> [Sergeant McCormick]: Okay, so this is what we're going to do, alright? Remember something, this is all being recorded. Okay? None of us are here to hurt you or do anything to you, okay?
>
> [Samuel]: I know.

> [Sergeant McCormick]: What we're trying to do is we're trying to make sure we preserve any evidence that may be on your clothing. Okay?
>
> [Samuel]: Okay.
>
> [Sergeant McCormick]: Understand?
>
> [Samuel]. Yeah.

(See Ex. 6A at 16:22 to 16:41; Ex. 6C at pp. 8-9.) While the officers were gathering evidence from Samuel's clothes, Detective Reneau made it clear that, if Samuel needed anything or was worried he could talk to him. (See Ex. 6A at 3:38-3:45; Ex. 6C at p. 3.)

After collecting his clothes for evidence, and immediately providing Samuel with clean clothes, Detective Wilhelm and Sergeant McCormick interviewed Samuel. (See 1/14/16 Tr., p. 1011, L. 6 – p. 1015, L. 4; 1/15/16 Tr., p. 1056, L. 15 – p. 1081, L. 25; Exs. 6A-C.) Detective Wilhelm was friendly with Samuel and told him that instead of calling him Detective Wilhelm, the kids called him "Officer Jay." (See Exs. 6A at 54:50 to 55:05, 6C at pp. 15-16.)

> [Detective Wilhelm]: Alright. Now, [Samuel], just-just relax. I'm just here to talk to you a little bit. Okay? So you can take a breath.
>
> [Samuel]: (Nods yes).

(See Ex. 6A at 55:55 to 56:01; Ex. 6C at p. 18.) Samuel knew Detective Wilhelm from a previous incident where Samuel brought handcuffs to school, and Detective Wilhelm had to hold on to them while Samuel was at school. (See Exs. 6A at 56:14 to 56:57:08, 6C at pp. 19-20.)

Detective Wilhelm asked Samuel if he was feeling any physical discomfort. (See Exs. 6A at 57:10 to 59:50, 6C at pp. 20-24.) Samuel said that he "always" hurts. (Id.) Detective Wilhelm did not drop the issue, but continued to inquire further. (Id.) Samuel said he hurt "all over" but that it was "normal." (Id.)

Detective Wilhelm also asked about the last time Samuel ate. (Id.) He said he ate dinner at around 12:00 and had a total of four hotdogs, two with the bun, and two without the bun. (Id.) Detective Wilhelm also asked how much sleep Samuel got, and he said he slept "[g]ood enough" and that he had medication that helped him sleep. (Id.) Samuel said he did not go to school because he had a sore throat, but that the sore throat was gone. (Id.)

Detective Wilhelm asked Samuel if they could talk about "why we're here to talk today." (See Exs. 6A at 1:04:30 to 1:08:24, 6B, 6C at pp. 29-33.) Detective Wilhelm gave Samuel a written copy of the *Miranda*[3] warnings and went over them, one by one, in a friendly tone. (Id.) After explaining the *Miranda* rights, Detective Wilhelm asked Samuel if he wanted to talk to them. (Id.) Samuel, before signing and agreeing to talk, asked a series of questions. (Id.) When they were done with the *Miranda* paperwork, Detective Wilhelm also scooted back in his chair before they talked. (Id.)

Samuel asked to use the bathroom, and asked for more water, both of which were provided. (See Ex. 6A at 1:08:25 to 1:09:10; Ex. 6C at p. 33.) Detective Wilhelm reminded Samuel to breathe. (Id.) When they returned from the bathroom, Detective Wilhelm again reminded Samuel to breathe and gave him some more space. (See Ex. 6A at 1:11:50 to 1:12:04; Ex. 6C at pp. 33-34.)

Samuel admitted he shot Mr. Samuel, but he initially claimed that Mr. Samuel had crawled into J.S.'s room and attacked J.S. with the machete and the shotgun. (See Ex. 6A at 1:11:51 to 1:32:03; Ex. 6C at pp. 33-52.) However, Samuel later admitted this was not accurate, and admitted that he killed both Mr. Samuel and his younger brother. (See Exs. 6A at 2:47:16 to

[3] Miranda v. Arizona, 384 U.S. 436 (1966).

2:47:31, 6C at p. 119.) Samuel admitted he shot his brother with the shotgun while his brother was trying to hide under the bed.

[Sergeant McCormick]: Did you shoot your brother?

[Samuel]: Shotgun.

[Sergeant McCormick]: You shot him with a shotgun[?]

[Samuel]: The leg.

[Sergeant McCormick]: Where else?

[Samuel]: I think I missed the other shots.

[Detective Wilhelm]: Where do you think you hit him? Or where did you try?

[Samuel]: I tried to hit him, just hit him.

[Sergeant McCormick]: Hit him where?

[Samuel]: Like, wherever it's hittable.

[Sergeant McCormick]: Where do you think – what were you aiming at?

[Samuel]: I was aiming at him.

[Sergeant McCormick]: Where on him? Him's a...

[Samuel]: He's under the bed.

[Sergeant McCormick]: Okay. So where were you aiming at?

[Samuel]: I was aiming under the bed.

(See Exs. 6A at 2:05:17 to 2:05:50, 6C at pp. 89-90.) Samuel explained that he hated his younger brother:

[Detective Wilhelm]: Okay. What was your relationship like with [J.S.]?

[Samuel]: I hated him.

(See Ex. 6A at 1:37:45 to 1:37:50, 6C at p. 58.) When Sergeant McCormick asked Samuel why he did it, Samuel blamed J.S. for making everybody mad and breaking up his family.

> [Sergeant McCormick]: Yes. Okay. Why did you do it?
>
> [Samuel]: Because my brother. He was the reason why my dad was taking the medication because he just makes everybody mad. In the stores. So, I just started really hating him.
>
> [Sergeant McCormick]: How long have you been hating him?
>
> [Samuel]: Like years.
>
> [Sergeant McCormick]: Like how many years?
>
> [Samuel]: A lot of years.
>
> [Sergeant McCormick]: You're fourteen.
>
> [Samuel]: Like nine years.
>
> [Sergeant McCormick]: You've been hating him...
>
> [Samuel] Five. Five.
>
> [Sergeant McCormick]: Five years?
>
> [Samuel]: (Nods head yes)
>
> [Sergeant McCormick]: Okay.
>
> [Samuel]: My mom couldn't handle the stress of him anymore, so she ran away. So yeah.
>
> [Sergeant McCormick]: Have you ever thought about hurting your brother before?
>
> [Samuel]: Yeah.

(See Ex. 6A at 2:50:39 to 2:51:31; Ex. 6C at pp. 123-124.) He also blamed J.S. for causing his dad to take all the "medications." (See Ex. 6A at 2:50:39 to 2:53:33; Ex. 6C at pp. 123-127.)

Samuel also mad because Mr. Samuel treated J.S. like "the best one in the house." (See Ex. 6A at 3:23:03 to 3:23:45; Ex. 6C at pp. 147-148.)

> [Sergeant McCormick]: Is that accurate? You hate your brother?
>
> [Samuel]: Yeah.
>
> [Sergeant McCormick]: You hate your brother enough to kill him?
>
> [Samuel]: No. Well, yeah.
>
> [Sergeant McCormick]: You do?
>
> [Samuel]: Yeah.
>
> [Sergeant McCormick]: Okay. And is that why you did it tonight?
>
> [Samuel]: Not just that.
>
> [Sergeant McCormick]: What else?
>
> [Samuel]: He was part of the reason why I did that. If he wasn't here all this time my dad wouldn't be taking medication. My mom wouldn't have left. We would have been a happy family.

(See Exs. 6A at 3:26:09 to 3:26:49, 6C at pp. 151-152.) Samuel was not bothered that his brother was dead, but he did feel "kind of bad" for his dad. (See Ex. 6A at 3:29:18 to 3:30:40; Ex. 6C at pp. 154-156.)

The state charged Samuel with two counts of first degree murder. (R., pp. 84-85.) After a preliminary hearing, the magistrate found probable cause to bind Samuel over on a charge of first degree murder for the murder of J.S.; however, the magistrate did not find that the state had established probable cause on the premeditation element as to the murder of Mr. Samuel, so the magistrate bound Samuel over on a second degree murder charge as to Mr. Samuel. (R., pp. 2290-2312, 2320-2341, 2344-2349, 2373-2375.)

Samuel filed a motion to suppress the statements he made during his interview. (R., pp. 2662-2706.) In support of his argument that he lacked the mental capacity to voluntarily waive his *Miranda* rights, Samuel included a report from a licensed psychologist, Dr. Beaver, who examined Samuel. (See id.) Pursuant to Idaho Code § 18-207, the state filed a motion for its expert to have access to Samuel in order to respond to Samuel's expert. (See R., pp. 2863, 2914-2921.) Several motions and accompanying written orders were filed regarding whether the state should be allowed to have an expert examine Samuel in order to rebut Dr. Beaver. (See R., pp. 2892-2905, 2922-2931, 2952-2962, 2966-2977, 3017-3018, 3027-3036, 3039-3041, 3059-3062, 3080-3085.) The district court granted the state's motion. (See R., pp. 2952-2962, 3027-3036, 3080-3085.) The district court held, in part, that it was only fair to allow the state to have an expert examine Samuel in order to rebut the defense's expert. (See, e.g., p. 3029.)

Samuel filed a notice advising that he would "neither meet with nor talk to the State's mental health expert." (R., pp. 3111-3112.) The State moved to exclude and strike Dr. Beaver's testimony from consideration during the motion to suppress. (See R., pp. 3114-3115.) At the hearing, defense counsel re-iterated that he would not comply with the court's order to make Samuel available and, as a result, the district court excluded Dr. Beaver's testimony on the motion to suppress. (See 11/24/14 Tr., p. 6, L. 20 – p. 7, L. 10, p. 13, L. 21 – p. 14, L. 4; R., pp. 3238-3239, 3259-3260.) The state filed a brief in opposition to Samuel's Motion to Suppress. (R., pp. 3216-3234.) Samuel filed a reply brief. (R., pp. 3382-3392.)

The district court held a hearing on Samuel's motion to suppress the statements he made during the interview. (See R., pp. 3519-3554.) The parties stipulated to introduce both the preliminary hearing transcript and the interview video for purposes of the suppression hearing. (1/20/15 Tr., p. 8, L. 11 – p. 9, L. 15.) The state agreed that Samuel was in custody at the time of

the interview. (1/20/15 Tr., p. 9, Ls. 16-21.) At the suppression hearing, twenty-one witnesses testified. (See 1/20/15 Tr., p. 11, L. 18 – p. 254, L. 23; 1/21/15 Tr., p. 265, L. 16 – p. 363, L. 21; Supp. Exs. 1-9, A-L.[4])

The district court wrote a lengthy and detailed Memorandum Decision and Order on Defendant's Motion to Suppress. (R., pp. 3612-3667.) The district court made 87 specific factual findings. (R., pp. 3612-33.) The district court explained:

> Due to the nature and gravity of both the pending Motion to Suppress and the case as a whole, the Court finds it necessary to provide a detailed, chronological account of the events that resulted in [Samuel's] alleged confession that is now at issue. The Court has thoroughly reviewed all of the briefing, testimony, and exhibits pertaining to this motion.

(R., p. 3612.) The district court found that, during Samuel's initial interaction with officers, the officers were "firm" but polite and they did not raise their voices. (See R., pp. 3616-3623.) The officers were generally calm and polite. (Id.) Throughout the process of gathering Samuel's clothes for evidence, "the officers repeatedly checked in with [Samuel] to ensure he was doing alright." (R., p. 3623.) Samuel told the officers he did not have any injuries. (R., p. 3622.)

During the interview, Detective Wilhelm was respectful of Samuel's personal space. (R., p. 3624, n. 12 (citation omitted).)

> The Court's impression when observing the video of the interrogation is that the officers were respectful of [Samuel's] personal space. The Court notes that prior to approaching [Samuel], Detective Wilhelm requested permission to do so.

(R., p. 3624, n. 12 (citation omitted).)

[4] The exhibits entered into evidence at the 1/20/15 to 1/21/15 suppression hearing are designated "Supp. Exs." and can be found in the pdf file designated "20160826082709.pdf." The state's exhibits list is located on page 2904 and the defendant's exhibit list is located on page 3326 of that pdf file.

The district court made explicit findings regarding the waiver. (R., pp. 3624-3627.) The district court found that Detective Wilhelm advised Samuel that "the *Miranda* rights can be used to tell someone that 'I don't want to talk to you and this is why[.]'" (R., p. 3642 (brackets original).) "Prior to signing the *Miranda* waiver form, [Samuel] indicated that he understood his rights at least five times." (R., p. 3654 (citing Interrogation Tr., pp. 29-31).) "After signing the form [Samuel] indicated one additional time that he understood the rights." (Id. (citing Interrogation Tr., p. 31).) Further, "During the interview, Detective Wilhelm and Sergeant McCormick checked in with [Samuel] several times to ensure he was doing alright." (See R., p. 3633 (citing Interrogation Tr., P. 18, 39, 179).) "Additionally, Detective Wilhelm and Sergeant McCormick were polite and respectful toward [Samuel] for the duration of the interrogation." (R., p. 3633.) The district court denied Samuel's motion to suppress. (R., pp. 3612-3667.)

Samuel filed a motion to reconsider. (R., pp. 3692-3694, 3725-3760, 3851-3874, 4069-4078.) The state responded. (R., pp. 3962-3979.) The district court denied the motion for reconsideration. (R., pp. 4335-4340, 4354-4355; 4/15/15 Tr., p. 50, Ls. 15-23.)

Also before trial the district court held a hearing regarding introduction of evidence under Idaho Rule of Evidence 404(b). The state sought to introduce testimony of Samuel's grandfather, who reported he often saw Samuel commit physical acts of violence upon J.S. (1/21/15 Tr., p. 364, L. 12 – p. 369, L. 18.) The district court found that while evidence of Samuel's prior violence towards J.S. was relevant, its probative value was substantially outweighed by the danger of unfair prejudice and denied the introduction of the evidence. (See R., pp. 3603-3609.)

The case proceeded to a lengthy jury trial. (R., pp. 5477-5479, 5519-5528, 5546-5606, 5624-5644, 5689-5716, 5725-5764, 5767-5785, 5880-5908, 5920-5948, 5974-5986.)

Samuel argued that he killed his father in self-defense and killed his brother in a rage. (1/13/16 Tr., p. 641, L. 22 – p. 642, L. 8.)

Dr. Sally Spring Aiken testified that she performed the autopsies. (1/13/16 Tr., p. 763, L. 7 – p. 782, L. 20, p. 786, L. 7 – p. 828, L. 23; Exs. 38A-T, 39A-P, 40A-I.) Dr. Aiken testified that Mr. Samuel was shot in the stomach. (1/13/16 Tr., p. 797, L. 8 – p. 805, L. 7; Exs. 40C-I.) She testified that that the bullet went through part of Mr. Samuel's stomach and bowels, and that it cut a vein in half. (Id.) She testified that this kind of injury can eventually cause enough blood loss to cause death. (Id.) She also testified that Mr. Samuel had a postmortem shotgun pellet wound, and three postmortem bullet wounds in his head. (Id.) Dr. Aiken attributed Mr. Samuel's death to the gunshot wound to the abdomen. (1/13/16 Tr., p. 829, Ls. 1-11.)

Dr. Aiken testified regarding J.S.'s numerous wounds including several wounds caused by a shotgun fired at close range. (1/13/16 Tr., p. 805, L. 8 – p. 828, L. 23; Exs. 38A-T, 39A-P.) Among other wounds, Dr. Aiken testified that J.S.'s right hand was nearly amputated. (1/13/16 Tr., p. 823, L. 19 – p. 824, L. 4; Exs. 39K-L.) J.S. was also shot in the chest with a gun. (1/13/16 Tr., p. 819, L. 19 – p. 821, L. 17; Exs. 39A-D.) Dr. Aiken testified that she attributed J.S.'s death to "multiple firearm wounds." (1/13/16 Tr., p. 829, Ls. 12-21.)

When the officers searched the house they found six empty shotgun shells. (1/14/16 Tr., p. 892, L. 18 – p. 894, L. 8; Ex. 16A.)

Stuart Van Jacobson, a forensic scientist with the Idaho State Police crime lab, testified that the .45, a Tarus Model PT-495 .45-caliber semi-automatic double-action pistol, holds eight rounds, but can hold nine rounds if one is put in the chamber. (1/15/16 Tr., p. 1033, L. 1 – p. 1036, L. 24; Ex. 13.) Mr. Jacobsen testified that, after testing, he determined that all eight

bullets recovered from the crime scene were fired from that .45. (1/15/16 Tr., p. 1039, L. 4 – p. 1041, L. 12; Exs. 14A-D, 15A-F, 17B-C.)

Rod Englert, a crime scene reconstructionist, testified that Mr. Samuel was shot in or near the bedroom in the southeast section of the house. (1/19/16 Tr., p. 1147, L. 21 – p. 1156. L. 7; Exs. 30C, 30U.) Samuel had a .45 caliber gunshot wound to his upper abdomen. (Id.) That bullet exited his body and went into a wall in the living room. (Id.) Mr. Samuel went down to his knees with his blood dripping on the floor. (Id.) Mr. Samuel then crawled to J.S.'s room. (Id.) Mr. Samuel was then shot a second, third, and fourth time in his head as he was seated against an end table in the bedroom in the northwest corner of the house. (1/19/16 Tr., p. 1161, L. 15 – p. 1165, L. 23; Exs. 32C-D.)

Mr. Englert also testified that J.S. was hiding under the bed. (1/19/16 Tr., p. 1168, L. 21 – p. 1176, L. 22; Ex. 35G.) Samuel placed the .45 under the bed and shot J.S. multiple times. (Id.) Samuel also took the shotgun and pointed it underneath the bed where J.S. was hiding and fired it five times. (Id.) Samuel also used a machete to "chop" J.S. (1/19/16 Tr., p. 1167, L. 6 – p. 1168, L. 20; Exs. 30S-T.)

During the trial, the state moved to exclude evidence referencing specific instances of Mr. Samuel's past conduct. (R., pp. 5615-5621) Samuel responded. (R., pp. 5645-5656.) The district court ruled that specific instances of past conduct are not admissible to show character traits. (1/19/16 Tr., p. 1236, L. 13 – p. 1240, L. 20.) However, the defense was allowed to present a substantial amount of evidence regarding Mr. Samuel's violence and drug use. (See, e.g., 1/20/16 Tr., p. 1297, L. 1 – p. 1299, L. 2, p. 1300, Ls. 4-21, p. 1316, L. 18 – p. 1317, L. 3, p. 1320, Ls. 17-19, p. 1424, L. 12 – p. 1428, L. 3; 1/21/16 Tr., p. 1550, L. 4 – p. 1553, L. 2, p. 1565, L. 11 – p. 1567, L. 13, p.1568, L. 9 – p. 1570, L. 7, p. 1571, L. 3 – p. 1572, L. 20, p. 1581, Ls. 2-

20, p. 1632, L. 8 – p. 1634, L. 8; 1/22/16 Tr., p. 1774, L. 21 – p. 1775, L. 18; 1/25/16 Tr., p. 1807, L. 19 – p. 1811, L. 14, p. 1936, L. 9 – p. 1937, L. 24; 1/26/16 Tr., p. 2174, L. 7 – p. 2175, L. 14, p. 2175, L. 15 – p. 2176, L. 6.)

The jury found Samuel guilty of second degree murder and first degree murder. (1/29/16 Tr., p. 2679, L. 10 – p. 2681, L. 18.) At the sentencing several witnesses testified, and the district court made findings. (4/4/16 Tr., p. 2907, L. 18 – p. 2912, L. 19.) The district court entered judgment and sentenced Samuel to 15 years with 10 years fixed for second degree murder and a concurrent sentence of life with 20 years fixed for first degree murder. (R., pp. 6346-6348.) Samuel timely appealed. (R., pp. 6352-6362.)

ISSUES

Samuel states the issues on appeal as:

I. Did the district court err by limiting the evidence Eldon could present in support of his motion to suppress and then by denying his motion to suppress?

II. Did the district court err and abuse its discretion by denying Eldon the ability to present evidence of specific instances of Mr. Samuel's violence and irrational behavior?

III. Did the district court abuse its discretion by not allowing Tina Samuel to testify that she witnessed Eldon's fear of Mr. Samuel?

IV. Did the district court abuse its discretion by unduly limiting Dr. Gentile's testimony?

V. Did the district court abuse its discretion by excluding Dr. Julien's expert opinions regarding Eldon's intoxication from Celexa and how that affected his actions and mental state on the night of the killings?

VI. Did the accumulation of errors, even if individually harmless, deprive Eldon of his Fourteenth Amendment right to a fair trial?

VII. In light of Eldon's horrific upbringing, age, mental health concerns, potential for rehabilitation, accountability, and remorse, did the district court abuse its discretion by imposing excessive sentences?

(Appellant's brief, p. 10.)

The state rephrases the issues as:

I. Has Samuel failed to show the district court erred when it denied Samuel's motion to suppress the statements he made during his interview with police?

II. Has Samuel failed to show the district court abused its discretion when it permitted Samuel to present character evidence showing Mr. Samuel's violence and drug use, but excluded evidence of specific instances of prior conduct?

III. Has Samuel failed to show the district court abused its discretion when it sustained the state's objection to testimony regarding Samuel's fear of Mr. Samuel two years prior to the murders?

IV. Has Samuel failed to show the district court abused its discretion when limited it Dr. Gentile, an academic and a researcher, to expert testimony regarding his field of expertise?

V. Has Samuel failed to show the district court abused its discretion when it excluded part of Dr. Julien's opinion because it was based upon speculation?

VI. Has Samuel failed to show error, let alone an accumulation of errors?

VII. Has Samuel failed to show the district court abused its discretion when it sentenced him for the murder of his father and younger brother?

ARGUMENT

I.
The District Court Did Not Err When It Denied Samuel's Motion To Suppress

A. Introduction

The district court found that Samuel knowingly, intelligently, and voluntarily waived his *Miranda* rights and that his confession was voluntary and not coerced. (R., pp. 3612-3667.) The district court denied Samuel's motion to suppress and motion to reconsider. (See R., pp. 3612-3667, 4354-4355; 4/15/15 Tr., p. 50, Ls. 15-23.) On appeal Samuel argues that the district court erred when it limited the expert mental health evidence that Samuel could present at the suppression hearing and erred when it denied his motion to suppress. (See Appellant's brief, pp. 11-52.) Samuel's arguments fail.

As an initial matter, the district court did not limit the expert mental health evidence that Samuel could present at the suppression hearing, but it did make it conditional. (See R., pp. 2952-2962, 3027-3036, 3080-3085.) The district court ordered that if Samuel were going to present expert mental health evidence, then the state's expert could examine Samuel in order to respond. (See id.) Samuel's attorney then made the tactical decision not to make Samuel available for examination. (See 9/29/14 Tr., p. 47, Ls. 5-11; 4/15/15 Tr., p. 48, Ls. 22-23; R., p. 3111-3112.)

However, the district court did not err when it ruled that if Samuel were to present expert mental health evidence in support of his suppression motion the state was entitled to have its expert evaluate Samuel. (See R., pp. 2952-2962, 3027-3036, 3080-3085.) The district court correctly ruled that Idaho Code § 18-207 applied and that it did not conflict with the Idaho Rules of Evidence. (See id.) The district court also correctly ruled that it was Samuel who raised the

issue of his mental condition by offering a psychologist's report which diagnosed Samuel, among other things, as having less capacity than a typical 14-year-old and as having neurocognitive limitations. (Id.; see also PSI pp. 1378-1390.) The district court did not err when it applied Idaho Code § 18-207.

The district court also did not err when it denied Samuel's motion to suppress. (See R., pp. 3612-3667.) The district court carefully considered all of the evidence and applied the relevant factors and made determinations regarding each one. (See id.) Samuel cannot show the district court erred when it denied his motion to suppress.

B. Standard Of Review

In reviewing an order granting or denying a motion to suppress evidence, the appellate court will defer to the trial court's factual findings unless clearly erroneous, and will exercise free review over a trial court's determination as to whether constitutional requirements have been satisfied in light of the facts found." State v. Doe, 137 Idaho 519, 522, 50 P.3d 1014, 1017 (2002) ("Doe I")[5] (citing State v. Donato, 135 Idaho 469, 470, 20 P.3d 5, 6 (2001)).

Where the constitutionality of a statute is challenged, the appellate court reviews it *de novo*. State v. Korsen, 138 Idaho 706, 711, 69 P.3d 126, 131 (2003). The party challenging the constitutionality of the statute must overcome a strong presumption of constitutionality and clearly show the invalidity of the statute. Id. The appellate court is obligated to seek a construction of a statute that upholds its constitutionality. Id.

[5] The district court designated State v. Doe, 137 Idaho 519, 50 P.3d 1014 (2002) as "Doe I" and designated Doe v. State, 131 Idaho 709, 963 P.2d 392 (Ct. App. 1998), as "Doe II." (R., pp. 3640-3641.) In order to maintain consistency, Respondent will use the same designations on appeal.

C. The District Court Did Not Err When It Refused To Allow Samuel To Present Unchallenged Expert Testimony As Part Of His Motion To Suppress

In support of his motion to suppress statements he made during his interview, Samuel submitted an expert report from Dr. Beaver. (R., pp. 2662-2706; PSI pp. 1378-1390.) Samuel argued, in part, that the district court should grant his motion to suppress because of Dr. Beaver's opinions. (See id.) In order to respond to Dr. Beaver's opinions, the state filed a motion, pursuant to Idaho Code § 18-207, for an order allowing its expert to also examine Samuel. (See R., pp. 2863, 2914-2921.) Samuel objected. (See R., pp. 2892-2905, 2922-2931.) During the hearing, defense counsel explained that if the district court ordered Samuel to be examined by the state's expert, that "[he] won't allow it, and Dr. Beaver won't testify, and I'll just appeal that issue." (9/29/14 Tr., p. 47, Ls. 5-11.) The district court determined that Idaho Code § 18-207 applied and granted the state's motion. (See R., pp. 2952-2962.) Samuel moved for reconsideration. (R., pp. 2966-2977.) The district court denied Samuel's motion for reconsideration. (R., pp. 3027-3036.) The district court held that it was only fair to allow the state to have an expert examine Samuel in order to rebut the defense's expert. (Id.)

> The Court notes that "the overarching rationale [for allowing the State's expert to evaluate [Samuel]] can be described as one of the fundamental fairness and judicial common sense[.]" *State v. Santistevan*, 143 Idaho 527, 529, 148 P.3d 1273, 1275 (Ct. App. 2006). The Court finds that to deny the State's Motion for Examination of Defendant would deprive the State of the only adequate means to meet the defense expert's testimony. *Id.*

(R., p. 3029 (brackets original).) The district court ruled that Samuel's counsel could be present during the examination and expressly limited the scope of the state's expert's examination to the "narrow issue of whether [Samuel] was capable of waiving his *Miranda* rights." (R., pp. 3034-3035.)

The state moved to compel the defense to comply with the court's order regarding examination. (See R., pp. 3088-89.) Samuel then filed a notice indicating that he would "neither meet with nor talk to the State's mental health expert." (R., pp. 3111-3112.) The State moved to exclude and strike Dr. Beaver's testimony from consideration during the motion to suppress. (See R., pp. 3114-3115.) At the hearing, defense counsel re-iterated that he would not comply with the court's order and, as a result, the district court excluded Dr. Beaver's testimony from consideration on the motion to suppress. (11/24/14 Tr., p. 6, L. 20 – p. 7, L. 10, p. 13, L. 21 – p. 14, L. 4; R., pp. 3259-3260.) On appeal, Samuel raises several arguments why he believes the district court erred when it applied Idaho Code § 18-207. Samuel's arguments fail.

1. The District Court Correctly Ruled That Idaho Code § 18-207(4) Does Not Violate The Separation Of Powers Doctrine

As he did below, Samuel argues that Idaho Code § 18-207(4) is unconstitutional because it conflicts with the Idaho Rules of Evidence. (R., pp. 13-16.) Samuel is incorrect. The district court correctly ruled that I.C. § 18-207(4) does not violate the separation of powers doctrine and there is no conflict between Idaho Code § 18-207(4) and the Idaho Rules of Evidence. (See R., pp. 2959-2961, 3029-3033, 3080-3085.)

"The Idaho Constitution vests the power to enact substantive laws in the Legislature." In re SRBA Case No. 39576, 128 Idaho 246, 255, 912 P.2d 614, 623 (1995) (citing Idaho Const. art. III, § 1; Mead v. Arnell, 117 Idaho 660, 664, 791 P.2d 410, 414 (1990) ("[O]f Idaho's three branches of government, only the legislature has the power to make 'law.'")). "This power is not restricted by the Court's authority to enact rules of procedure to be followed in the district courts." Id. (citing State v. Beam, 121 Idaho 862, 863, 828 P.2d 891, 892 (1992) ("[T]his Court's rule making power goes to *procedural*, as opposed to *substantive*, rules.")). A

substantive law "creates, defines, and regulates primary rights," whereas "practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated." Id. (citing State v. Smith, 527 P.2d 674 (Wash. 1974); Beam, 121 Idaho at 863-864, 828 P.2d at 892-893.)

Samuel states that Idaho Code § 18-207(4) "purports to enact procedural rules governing the introduction of expert evidence[.]" (Appellant's brief, p. 14.) Subsection (4) states:

> (4) No court shall, over the objection of any party, receive the evidence of any expert witness on any issue of mental condition, or permit such evidence to be placed before a jury, unless such evidence is fully subject to the adversarial process in at least the following particulars:

I.C. § 18-207(4). The following subsections (4)(a)-(e) set forth the requirements for the admission of expert mental health witnesses. While at first blush these requirements seem to be procedural evidentiary rules, further examination reveals that they are substantive laws because they "create[], define[], and regulate[]s primary rights."

In Beam, the Idaho Supreme Court looked at whether Idaho Code § 19-2719(3), a statute which required a defendant to file any legal or factual challenge to a sentence of death within forty-two (42) days of judgment, was a procedural or substantive rule. Beam, 121 Idaho at 863-864, 828 P.2d at 892-893. The Court determined that Idaho Code § 19-2719(3), which "specifically provides for challenges to a sentence of death, is an absolutely fundamental and integral part of chapter 27, title 19, Idaho Code. Without a provision for challenging a sentence of death, a person who has received a sentence of death might be denied due process of law under the Constitution of the State of Idaho and the United States Constitution." Id. at 864, 828 P.2d at 893. The Court concluded that Idaho Code § 19-2719(3), which provides 42 days to file a challenge to a judgment of death, was not a procedural rule, but rather a "substantive rule." Id.

The same is true here. Without the provisions of Idaho Code § 18-207(4), there would be no specific provisions for acquiring the evidence necessary to challenge expert testimony in a criminal case, and the fundamental adversarial cornerstone of the criminal justice system would be undermined. The legislature acted within its authority when it created, defined, and regulated the right to access mental health evidence in a criminal case.

Even if Idaho Code § 18-207(4) creates a procedural rule it does not violate the separation of powers because there is no conflict with the Idaho Rules. "[W]here conflict exists between statutory criminal provisions and the Idaho Criminal Rules in matters of procedure, the rules will prevail." State v. Currington, 108 Idaho 539, 541, 700 P.2d 942, 944 (1985) (citations omitted); see also State v. Zimmerman, 121 Idaho 971, 974, 829 P.2d 861, 864 (1992) ("To the extent that this statute attempts to prescribe the admissibility of hearsay evidence and is in conflict with the Idaho Rules of Evidence, it is of no force or effect."); State v. Lankford, 162 Idaho 477, 492, 399 P.3d 804, 819 (2017) (same); see also I.R.E. 1102 (2016)[6] ("Statutory provisions and rules governing the admissibility of evidence, to the extent they are evidentiary and to the extent that they are in conflict with applicable rules of Idaho Rules of Evidence, are of no force or effect."). The Idaho Rules of Evidence, like Idaho Code § 18-207(4), removes any privilege when the party relies upon a mental condition as part of his or her claim or defense. See I.C. § 18-207(4)(c) ("Raising an issue of mental condition in a criminal proceeding shall constitute a waiver of any privilege that might otherwise be interposed to bar the production of evidence on the subject[.]"); I.R.E. 503(d)(3) ("There is no privilege under this rule as to a communication relevant to an issue of the physical, mental or emotional condition of the patient in any proceeding in which he relies

[6] Idaho Rule of Evidence 1102 was in effect at the time of the trial in this matter, however the Idaho Rules of Evidence have subsequently been amended and have removed Rule 1102.

upon the condition as an element of his claim or defense[.]"). The district court relied, in part, upon this waiver of privilege when it ruled that in order to present expert mental health evidence, Samuel was required to provide access to the state's mental health expert. (See R., pp. 2952-2962, 3027-3036.)

Nor does Idaho Code § 18-207(4) conflict with the Idaho Rules of Evidence 702-704, which addresses the admissibility of expert witnesses. Samuel argues that Rules 702 through 704 "do not pre-condition the admissibility of the defendant's proffered expert testimony upon the State's ability to examine the defendant[.]" (Appellant's brief, p. 16.) However, that is not the test. As cited above, the test is whether the statute and the rule are in "conflict" with each other. Nothing about Rules of Evidence 702-704 conflicts with a waiver of privilege and the examination of the defendant. The statute and the rules are compatible.

Furthermore, Samuel's premise regarding the admissibility of expert testimony being governed by Rules of Evidence 702-704 is misplaced. As with all evidence, expert testimony must also comply with Rules 401-403, which requires among other things, that the probative value not be outweighed by the danger of unfair prejudice. See I.R.E. 401-403. Allowing unrebutted expert evidence carries the potential for extreme unfair prejudice. Further, the admission of expert testimony is also governed by the applicable disclosure and discovery rules and any pretrial orders by the court. See e.g. I.C.R. 16. Thus comparing Idaho Code § 18-207(4) only to Idaho Rules of Evidence 702-704 is misplaced.

Nor do the disclosure requirements in Idaho Code § 18-207(4) conflict with the Idaho Criminal Rules. Disclosure in a criminal case is governed by Idaho Criminal Rule 16. Idaho Criminal Rule explicitly adopts the requirements of Idaho Code § 18-207 regarding the disclosure of mental health experts.

> (4) *Expert Witnesses*. Upon written request of the prosecutor the defendant must shall provide a written summary or report of any testimony that the defense intends to introduce pursuant to Rules 702, 703 or 705 of the Idaho Rules of Evidence at trial or hearing. The summary provided must describe the witness's opinions, the facts and data for those opinions and the witness's qualifications. ***Disclosure of expert opinions regarding mental health shall also comply with the requirements of I.C. § 18-207.*** The defense is not required to produce any materials not subject to disclosure under paragraph (h) of this Rule, or any material otherwise protected from disclosure by his constitutional rights.

I.C.R. 16(c)(4) (2016) (emphasis added). There is no conflict between the Idaho Rules and Idaho Code § 18-207. See also State v. Arrasmith, 132 Idaho 33, 42, 966 P.2d 33, 42 (Ct. App. 1998) ("Disclosure of a party's intent to call an expert to testify on an issue of mens rea is governed by I.C. § 18–207(4)(b) and must otherwise comply with the pretrial discovery orders of the district court under I.R.C.P. 16.")

Further, the Idaho Supreme Court held that it is proper for a court to condition the presentation of a defendant's mental health evidence upon the waiver contained within Idaho Code § 18-207(4). State v. Payne, 146 Idaho 548, 571, 199 P.3d 123, 146 (2008). In the context of a death penalty sentencing the Idaho Supreme Court found, in part:

> Here, however, the court did not bar the presentation of relevant mitigation evidence, it merely conditioned the presentation of the mental health evidence on the waiver of privilege found in I.C. § 18–207(4)(c). The issue for this Court, then, is whether the choice between not presenting mental health evidence or presenting mental health evidence at sentencing but waiving Fifth Amendment privileges as presented by I.C. § 18–207(4)(c) is constitutional. We hold that it is constitutional.

Id.; see also Santistevan, 143 Idaho at 528, 148 P.3d at 1274 ("[V]irtually all federal circuit courts and state appellate courts considering the matter have held that if a defendant announces an intention to introduce psychiatric evidence to support a claim of mental defect, a court-ordered mental examination of the defendant by an expert for the State does not violate the privilege against self-incrimination."); People v. Bondurant, 296 P.3d 200, 207-208 (Co. Ct. App. 2012)

(statute requiring the defendant to submit to court-ordered examination before introducing expert testimony on the defendant's mental condition was not a purely procedure rule and did not violate the separation of powers) As noted by Idaho the Idaho Court of Appeals, it is an issue of fundamental fairness and common sense when the defense seeks to introduce expert mental health evidence to compel an examination of the defendant. See Santistevan, 143 Idaho at 529-531, 148 P.3d at 1275-1277.

Samuel has failed to show Idaho Code § 18-207 is unconstitutional. Samuel has failed to overcome a strong presumption of constitutionality and clearly show the statute is invalid.

2. Idaho Code § 18-207(4) Applies To "Any Legal Proceeding"

The district court determined that Idaho Code § 18-207(4) applied to Samuel's pre-trial motion to suppress because the statute applies to any issue of mental condition in "'*any* legal proceeding at which the defendant's mental condition may be at issue.'" (R., pp. 2954-2955 (quoting I.C. § 18-207(4) (adding emphasis).) The relevant section states:

> (4) No court shall, over the objection of any party, receive the evidence of any expert witness on any issue of mental condition, or permit such evidence to be placed before a jury, unless such evidence is fully subject to the adversarial process in at least the following particulars: ...
>
> (c) Raising an issue of mental condition in a criminal proceeding shall constitute a waiver of any privilege that might otherwise be interposed to bar the production of evidence on the subject and, upon request, the court shall order that the state's experts shall have access to the defendant in such cases for the purpose of having its own experts conduct an examination in preparation for ***any legal proceeding*** at which the defendant's mental condition may be in issue.

I.C. § 18-207(4)(c) (emphasis added).

On appeal, Samuel argues that the "any legal proceeding" clause is limited by the "criminal proceeding" language and argues that "criminal proceeding" actually means "criminal

action," which is defined by Idaho Code § 19-103 as "[t]he proceedings by which a party charged with a public offense is accused and brought to trial and punishment...". (Appellant's brief, p. 18 (emphasis removed).) Samuel's attempt to restrict the application of the plain language of Idaho Code § 18-207(4) is contradicted by a recent Idaho Supreme Court decision.

In State v. Hall, 163 Idaho 744, ___, 419 P.3d 1042, 1100 (2018), the Idaho Supreme Court held that Idaho Code § 18-207(4) is not limited to trial, and "by its plain language, Idaho Code section 18-207(4) does not have limited application[.]" The Supreme Court analyzed the statute, in the context of a sentencing hearing, and held that "[t]he lack of specificity grants the statute broad application; by its plain language it is applicable to all courts, unless stated otherwise." Id. The Court reasoned:

> The plain text of section 18-207(4) does not limit its application to trial. It begins with a statement that "***[n]o court*** ...," which is taken to mean no sentencing court as much as it means no trial court (emphasis added). The lack of specificity grants the statute broad application; by its plain language it is applicable to all courts, unless stated otherwise. Additionally, the requirement in subsection (a) that notice be given "ninety (90) days in advance of trial, or other such period as justice may require" refers to trial, but not to the exclusion of sentencing. *Id*. It merely sets a deadline for disclosure, it does not indicate which proceeding that disclosure is applicable to. Subsection (a) provides that the deadline could also be "such other period as justice may require," which further underlines that the reference to trial is solely for the purpose of establishing a timeline, not for limiting the application of the section. *Id.* Similarly, the language in subsection (c) "[r]aising an issue of mental condition ***in a criminal proceeding***" does not limit the application of the requirements to trial. I.C. § 18-207(4)(c) (emphasis added). Thus, by its plain language, Idaho Code section 18-207(4) does not have limited application; it is as applicable to sentencing as it is to trial. The district court did not err in concluding that Idaho Code section 18-207(4) applies to sentencing proceedings.

Id. (emphasis original). Thus, contrary to Samuel's argument on appeal, the Idaho Supreme Court has determined that Idaho Code § 18-207(4) has broad applicability and under its plain language, applies to "any legal proceeding." Samuel has failed to show the district court erred.[7]

3. The District Court Properly Found That Samuel Raised The Issue Of His "Mental Condition" When He Submitted A Report From Dr. Beaver Regarding His Mental Condition And Waiver Of *Miranda*

The district court found: "Here, [Samuel] has raised the issue of whether his mental condition prevented him from knowingly, intelligently, and voluntarily, waiving his *Miranda* rights." (R., pp. 2954-2955.) On appeal, Samuel argues it was the state who raised the issue of his mental condition when it attempted to admit Samuel's statements, because it is the state's burden to show a valid *Miranda* waiver. (See Appellant's brief, pp. 20-21.) Samuel's argument is misplaced.

While it is true that the state has the burden to show that the defendant made a knowing, voluntary, and intelligent *Miranda* waiver, nothing about the state's burden requires the state to introduce expert testimony about the defendant's mental condition. "Generally, the prosecution can meet its burden of proving a *prima facie* [case] of voluntariness by eliciting from the interrogating officer that the suspect had not been threatened or promised anything and appeared to freely decide for himself to forego the assistance of counsel, and to provide an incriminating

[7] Even if the district court erred, and Idaho Code § 18-207(4) was not applicable to the motion to suppress, he still would have been potentially subject to an examination by the state's expert because of the privilege waiver contained in Idaho Rule of Evidence 503(d)(3) (2016).

statement." State v. Fabeny, 132 Idaho 917, 921, 980 P.2d 581, 585 (Ct. App. 1999) (quoting C. McCormick et. al., McCormick on Evidence § 151 (4th Ed. 1992)); see also State v. Davila, 127 Idaho 888, 891, 908 P.2d 581, 584 (Ct. App. 1995). Nothing about presenting evidence of police conduct equates to raising an issue regarding the defendant's "mental condition."

In addition, Samuel's argument is not logical. If Samuel's argument is accepted, every time the state sought to introduce statements made after a *Miranda* waiver, the defense could introduce expert testimony that that the state could not respond to, because the state would not be allowed to have its own expert examine the defendant. This undermines the nature of the adversarial process and is counter to both Idaho Code § 18-207 and Idaho Rule of Evidence 503(d)(3).

When Samuel filed his motion to suppress, he raised the issue of his mental condition, because he included argument and evidence from a mental health expert, Dr. Beaver. There simply is no evidence to contradict the district court's finding that by submitting Dr. Beaver's expert report, that Samuel raised the issue of his "mental condition."

4. Idaho Code § 18-207(4)(c) Applies Because Samuel Offered Expert Opinion On His "Mental Condition"

In support of his motion to suppress, Samuel offered a forensic examination report written by a psychologist, Dr. Beaver, in which Dr. Beaver opined regarding Samuel's mental capacity to waive his *Miranda* rights. (See R., pp. 2662-2706; PSI pp. 1378-1390.) The district court found that because Samuel claimed his mental condition prevented him from knowingly, intelligently, and voluntarily waiving his *Miranda* rights, he was subject to Idaho Code § 18-207(4)(c) and the state was allowed to have an expert examine him in order to rebut Dr. Beaver's conclusions. (See R., pp. 2952-2961.) On appeal, Samuel argues that Dr. Beaver's report was

not evidence of his "mental condition" because Dr. Beaver opined regarding the factors used to determine a valid waiver and his conclusion was not based upon any specific mental condition diagnosis. (Appellant's brief, pp. 21-23.) Samuel's argument is flawed.

As an initial matter, Dr. Beaver's report did diagnose Samuel. (See PSI pp. 1378-1390.) Dr. Beaver spent approximately ten hours interviewing Samuel over four separate occasions. (See PSI pp. 1378-1390.) Dr. Beaver reported that Samuel underwent "neuropsychometric examination" on four occasions for a total of approximately five hours. (Id.) Dr. Beaver repeatedly diagnosed Samuel as having less capacity than a typical 14-year-old. (See id.) For example, Dr. Beaver concluded that "[Samuel] shows strong evidence he even has less capacity than would be expected even of a 14 year old." (See PSI p. 1387; see also PSI p. 1383 ("Eldon Samuel had less capacity than even the 'typical' 14 year old."); PSI p. 1383 (a review of medical records "illustrates Eldon Samuel was not even a 'typical' 14 year old");PSI pp. 1383-1384 ("The multiple issues in his life history as well as his psychological struggles further limited his capacity in this circumstance. These types of difficulties hinder normal neuronal development in adolescence.").) Dr. Beaver concluded, in part, "Therefore, not only is there the issue of concern that Eldon Samuel was only 14 years of age at the time these events took place, *but he also has neurocognitive limitations* that further impede his abilities to knowingly and voluntarily reach appropriate decisions in waiving his Miranda Rights." (R., p. 1384 (emphasis added).) Contrary to Samuel's argument on appeal, Dr. Beaver did diagnose Samuel as having neurocognitive limitations.

Samuel also argues that Dr. Beaver's report did not raise Samuel's "mental condition" because the report addressed some of the factors used to determine whether a juvenile waived his or her *Miranda* rights. (Appellant's brief, p. 21 (citing Fare v. Michael C., 442 U.S. 707, 724-

725 (1979); Doe I, 137 Idaho at 523, 50 P.3d at 1018).) Samuel's argument is misplaced. The fact that a court has to consider a totality of the circumstances surrounding a *Miranda* waiver has no bearing on whether a party has raised a mental condition as an issue addressing some of those factors. Put another way, a court can consider all of the relevant circumstances without having to consider competing mental health expert reports or mental conditions. The totality of circumstances that a court must consider are:

> "the juvenile's age, experience, education, background and intelligence," and "whether he had the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights."

Doe I, 137 Idaho at 523, 50 P.3d at 1018 (citing Doe II, 131 Idaho at 712, 963 P.2d at 395; Fare, 442 U.S. at 725). Age, experience, education, background, intelligence, capacity to understand, the nature of his Fifth Amendment rights, and the consequences are all factors that do not necessarily require a mental health exam. Like what happened here, all of these factors can be addressed by fact witnesses, such as teachers, family members, friends, etc. (See 1/20/15 Tr., p. 11, L. 18 – p. 254, L. 23; 1/21/15 Tr., p. 265, L. 16 – p. 363, L. 21; Supp. Exs. 1-9, A-L.) If the defendant wishes to present expert testimony regarding his particular mental condition as it relates to these factors, he (or she) is entitled to do so; if the defendant elects to do so then the state is also permitted to present competing expert testimony. See I.C. § 18-207; I.R.E. 503(d)(3).

The district court did not err when it ruled that Samuel raised the issue of his mental condition and that, if Samuel wished to present expert testimony about his mental condition, then the state was also allowed to do the same.

5. Even If The Order To Make Samuel Available To The State's Expert Was Error, That Error Was Harmless Because The Outcome Of The Suppression Motion Would Have Been The Same And The Court Could Have Ordered The Examination Even Absent I.C. § 18-207

The State bears the burden of proving harmless error. State v. Perry, 150 Idaho 209, 225, 245 P.3d 961, 977 (2010). To meet this burden, the State must show beyond a reasonable doubt that the error did not affect the outcome of the case. Id. Here, it was not error to order Samuel be made available for examination by the state's mental health expert. Even if it was error, and even if Samuel had presented Dr. Beaver's evidence, it would not have affected the outcome of the motion.

This case is similar to State v. Stone, 154 Idaho 949, 303 P.3d 636 (Ct. App. 2013). The state charged Stone with murder for shooting his estranged wife. Id. at 951-952, 303 P.3d at 638-639. Stone moved to suppress his statements to police. See id. In support of his motion Stone called Dr. Beaver who "testified regarding Stone's psychological makeup and Stone's medical status during the interrogation." Id. at 952, 303 P.3d at 639. The state objected on relevancy grounds. Id. "[T]he district court ruled that it would consider Dr. Beaver's testimony regarding Stone's medical status, but it would not consider his testimony regarding Stone's psychological makeup." Id. The Idaho Court of Appeals found that the district court should have considered Dr. Beaver's testimony regarding Stone's psychological makeup, but even if it had, the totality of the circumstances showed that Stone's statements were voluntary. Id. at 960, 303 P.3d at 647. The Idaho Court of Appeals noted that "[o]n the whole, the district court had before it the audio recordings of Stone's interrogation, the transcript of the interrogation, expert testimony regarding police interrogation tactics, and expert testimony regarding Stone's mental acuity and physical condition at the time he made incriminating statements." Id. Here, the district court had twenty-

one witnesses testify at the suppression hearing. (See 1/20/15 Tr., p. 11, L. 18 – p. 254, L. 23; 1/21/15 Tr., p. 265, L. 16 – p. 363, L. 21; Supp. Exs. 1-9, A-L.[8]) Many of those witnesses testified regarding Samuel's intelligence and capability to understand. Further the district court had a transcript and a video of the interrogation showing Samuel's behavior, responses and the police conduct. (See Exs. 6A; 6C.) Thus, even if Dr. Beaver's testimony had been offered and admitted, it would not have changed the outcome of the suppression hearing.

In addition, even if it was error to order Samuel to be available for examination under Idaho Code § 18-207, the district court could still have likely ordered Samuel be available under Idaho Rule of Evidence 503(3) and the holdings of Payne and Santistevan. While not as specific as Idaho Code § 18-207, the combination of the Fifth Amendment Waiver as outlined in Payne and Santistevan and the privilege waiver in I.R.E. 503(d)(3),would give the court the power to order Samuel to be available for examination. Even if the district court erred when it applied Idaho Code § 18-207, which it did not, that error was harmless.

D. The District Court Properly Denied Samuel's Motion To Suppress Statements He Made To Police

"In determining whether a defendant has voluntarily, knowingly and intelligently waived his *Miranda* rights, [the] Court must consider the totality of the circumstances." State v. Adamcik, 152 Idaho 445, 468, 272 P.3d 417, 440 (2012) (citing Doe I, 137 Idaho at 523, 50 P.3d at 1018; Payne, 146 Idaho at 559, 199 P.3d at 134). The factors the Court must consider include:

[8] The exhibits entered into evidence at the 1/20/15 to 1/21/15 suppression hearing are designated "Supp. Exs." and can be found in the pdf file designated "20160826082709.pdf." The state's exhibits list is located on page 2904 and the defendant's exhibit list is located on page 3326 of that pdf file.

"(1) Whether *Miranda* warnings were given; (2) The youth of the accused; (3) The accused's level of education or low intelligence; (4) The length of detention; (5) The repeated and prolonged nature of the questioning; and (6) Deprivation of food or sleep." Id. (citing Doe I, 137 Idaho at 523, 50 P.3d at 1018). "Any waiver of *Miranda* warnings must be knowing, intelligent, and voluntary." Id. (citing Doe I, 137 Idaho at 523, 50 P.3d at 1018).

When the suspect is a juvenile, the court is required to inquire into all the circumstances surrounding the interrogation, including an "evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." State v. Draper, 151 Idaho 576, 592, 261 P.3d 853, 869 (2011) (quoting Fare, 442 U.S. at 725).

The factors used to determine whether a confession is voluntary are similar. To determine whether a juvenile's confession is voluntary, the court will examine the totality of the circumstances to determine whether the defendant's will was overborne. Doe I, 137 Idaho at 523, 50 P.3d at 1018 (citing State v. Radford, 134 Idaho 187, 191, 998 P.2d 80, 84 (2000). "The following factors must be considered in determining whether a confession was voluntary: (1) Whether *Miranda* warnings were given; (2) The youth of the accused; (3) The accused's level of education or low intelligence; (4) The length of detention; (5) The repeated and prolonged nature of the questioning; and (6) Deprivation of food or sleep." Id. (citing State v. Troy, 124 Idaho 211, 214, 858 P.2d 750, 753 (1993); Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)).

In a 55-page memorandum decision, the district court concluded that, "based upon the totality of the circumstances" Samuel's *Miranda* waver was knowing, intelligent and voluntary. (R., p. 3667.) The district court also found, "based upon the totality of the circumstances that

"[Samuel's] will was not overborne by police conduct, and therefore his confession was voluntary." (Id.)

On appeal Samuel divides his argument into three sections. First, Samuel argues the district court did not use the proper legal standards because it "muddled the *Miranda* and voluntariness issues together" and "downplayed evidence favorable to [Samuel]." (See Appellant's brief, pp. 35-41 (capitalization altered, underlining omitted).) Second, Samuel argues that the district court erred when it found he knowingly, intelligently and voluntarily waived his *Miranda* rights. (See Appellant's brief, pp. 41-49.) Third, Samuel argues that even if he waived his *Miranda* rights, his statements to policed were coerced and not voluntary. (See Appellant's brief, pp. 49-52.)

As an initial matter, Samuel's factual assertions are refuted by the district court's findings of fact and the videotaped evidence. As found by the district court, and is apparent on the video, the officers "were polite and considerate of [Samuel]," they "respected [Samuel's] personal space," and "overall the interrogation tactics employed did not overbear [Samuel's] will." (R., p. 3662.) The video evidence supports the district court's extensive factual findings. (Compare R., pp. 3612-3634 with Exs. 6A, 6C.)

The district court also properly applied the controlling authority regarding juvenile confessions. (See R., pp. 3642-3645, 3667 (citing Doe I, 137 Idaho 519, 50 P.3d 1014; Doe II, 131 Idaho 709, 963 P.2d 392).) The district court correctly found that Samuel voluntarily waived his *Miranda* rights and made a voluntary statement to the police. (See R., pp. 3612-3667.)

1. The District Court Applied The Legal Standards And Correctly Determined That Samuel Knowingly, Intelligently And Voluntarily Waived His *Miranda* Rights

Samuel argues that the district court erred because it analyzed the *Miranda* waiver issue and the voluntariness of the confession issue at the same time. (See Appellant's brief, pp. 35-41.) He further argues that the district court was required to make all factual presumptions in favor of Samuel and that it impermissibly shifted the burden and required Samuel to prove he did not understand his waiver. (See Appellant's brief, pp. 39-41.) Samuel's arguments are not supported by the record or the law.

The district court applied the correct tests to determine whether Samuel waived his *Miranda* rights and whether Samuel's confession was voluntary. (See R., pp. 3635-3667.) The district court first determined that Samuel was in custody and was subject to interrogation. (See R., pp. 3635-3636.) The district court then correctly articulated both the test to determine a knowing, intelligent and voluntary waiver, and the test for determining whether a confession was voluntary. (See R., pp. 3641-3642.)

> In order to make a finding as to whether a confession is voluntary, the Court must consider [the] totality of the circumstances to determine whether the defendant's will was overborne. *State v. Radford*, 134 Idaho 187, 191, 998 P.2d 80, 84 (2000).
>
> To determine whether a juvenile has voluntarily waived his *Miranda* rights, a court must consider "the juvenile's age, experience, education, background and intelligence," and "whether he had the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." *Doe 1*, 137 Idaho 519, 523, 50 P.3d 1014, 1018; *State v. Doe*, 131 Idaho 709, 712, 963 P.2d 392, 395 (Ct. App. 1998) (hereinafter "*Doe II*").
>
> Additionally, "[t]he voluntariness of a confession is determined by consideration of "the effect that the totality of the circumstances had upon the will of the defendant." *Doe II*, 131 Idaho at 713, 963 P.2d at 396 (quoting *State v. Davila*, 127 Idaho 888, 892, 908 P.2d 581, 585 (Ct. App. 1995). In other words, the Court must determine whether the defendant's will was overborne when he

> confessed as a result of coercive police conduct. *Doe II*, 131 Idaho at 713, 963 P.2d at 396. The Idaho Court of Appeals has stated that in evaluating the voluntariness of a juvenile's confession, consideration must be given to "the child's age, maturity, intelligence, education, experience with police and access to a parent or other supportive adult." *Doe II*, 131 Idaho at 713, 963 P.2d at 396. Additional factors in the voluntariness determination include whether *Miranda* warnings were given, the length of the detention, the repeated and prolonged nature of the questioning, and deprivation of food or sleep. *Id.*
>
> The State has the burden to provide substantial evidence to demonstrate that under the circumstances [Samuel] voluntarily, knowingly and intelligently waived his *Miranda* rights. *Doe II*, 131 Idaho at 712, 963 P.2d [at] 395.

(R., pp. 3641-3642.)

Samuel fails to identify any error in the district court's articulation of the applicable standards but instead argues that the district court "muddled" the *Miranda* waiver analysis and the voluntaries of the confessions analysis (See Appellant's brief, pp. 36-37.) A review of the district court's memorandum decision contradicts Samuel's argument. The district court understood the two tests it was applying and it applied them both. (See R., pp. 3640-3667.) The district court's analysis addressed all of the factors regarding the *Miranda* waiver, and it also addressed the conduct of the police and the lack of coercion. (See id.)

Even Samuel concedes that the voluntariness test and the *Miranda* test overlap. (See Appellant's brief, p. 50 ("For many of the same reasons that [Samuel's] *Miranda* waiver was not knowing, intelligent and voluntary, [Samuel's] statements to the police were not voluntary.").) In fact, the only support Samuel provides for his argument that the district court "muddled" the issues is the district court's statement: "[Samuel] asserts that his *Miranda* waiver was not knowing, intelligent, and voluntary *because* his waiver was the product of coercion[.]" (Appellant's brief, p. 36 (citing R., p. 3640 (emphasis added)).) This statement does not reflect any confusion on the part of the district court, because the district court was actually articulating

Samuel's argument below. (See R., pp. 2684-2693.) Samuel's motion to suppress repeatedly argued that the police acted improperly when they obtained Samuel's *Miranda* waiver. (See id.) Samuel's motion even concluded by arguing, "This Court must suppress his statements as a product of a *coerced* and unknowing *waiver*." (R., p. 2693 (emphasis added).) Thus, contrary to Samuel's interpretation, the district court was not muddling the issues, but instead was articulating the issue as Samuel presented it below.

The district court did not muddle any tests. The court correctly articulated both of the standards and applied them both. Simply because some of that application took place in the same section of the memorandum decision does not mean the district court got the law wrong.

Nor did the district court simply "list" the applicable factors, contrary to Samuel's argument. (See Appellant's brief, pp. 35-36.) Again it is difficult to find support for Samuel's argument when the district court's 55-page memorandum decision, which not only articulates each factor, but discusses each one, is considered. (See R., pp. 3612-3667.)

Samuel also argues that the district court was required to draw every presumption in favor of Samuel, but instead drew every presumption in favor of the State. (Appellant's brief, pp. 37-40.) Samuel's argument is not supported by either the law or the facts. Samuel asserts, "Courts must 'indulge every reasonable presumption against waiver of fundamental constitutional rights, and [will] not presume acquiescence in the loss of fundamental rights[.]'" (Appellant's brief, p. 36 (citing Colorado v. Spring, 479 U.S. 564, 581 (1987) (original quotation marks omitted)).) This is not the holding of Colorado v. Spring. Samuel's citation comes from the dissent. See Spring, 479 U.S. at 577-582. The majority held, in part, "There is no doubt that Spring's decision to waive his Fifth Amendment privilege was voluntary. He alleges no 'coercion of a confession by physical violence or other deliberate means calculated to break [his] will, and the

trial court found none." Id. at 573-574 (internal citation omitted). The Court went on to hold that "a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege." Id. at 577.

Nor does the United States Supreme Court case on which Samuel primarily relies, Fare v. Michael C., include a requirement that when reviewing *Miranda* waivers the district court is required to indulge every reasonable presumption in favor of the defendant. See Fare, 442 at 716-728. Nor do the applicable Idaho cases mandate this indulging of presumptions. See e.g. Doe I, 137 Idaho 519, 50 P.3d 1014; Doe II, 131 Idaho 709, 963 P.2d 392. Instead, it appears that Samuel's "indulging of presumptions" argument is simply an invitation for this Court to re-weigh and second guess the factual findings of the district court. As is well established, the appellate courts "will defer to the trial court's factual findings unless clearly erroneous." See Doe I, 137 Idaho at 522, 50 P.3d at 1017. The district court was not required to make factual presumptions in favor of Samuel. The district court applied the correct law when it made its findings.

Nor did the district court shift the burden and require Samuel to prove he did not understand the *Miranda* waivers. As cited above, the district court correctly recognized the burden was on the state to show the waiver was valid. Further, the district court made several findings regarding Samuel's understanding of the *Miranda* rights. For example the court found: "Prior to signing the *Miranda* waiver form, [Samuel] indicated that he understood his rights at least five times." (R., p. 3654 (citation omitted).) "After signing the form [Samuel] indicated one additional time that he understood the rights." (Id. (citation omitted).) The district court also found there was no evidence in the record that Samuel indicated he did not understand the rights

he said he understood. (Id.) This is not burden shifting. The district court found substantial evidence in the record that Samuel understood his *Miranda* rights and did not find any evidence to the contrary. This is not burden shifting, this is evaluating evidence.

The district court provided thorough factual findings based upon the testimony at the suppression hearing and the video evidence. (See R., pp. 3612-3634.) The district court examined Samuel's age and maturity, his experience with law enforcement, education, intelligence, background, access to a parent, whether *Miranda* warnings were given, Samuel's capacity, the length of his detention, whether he was deprived of food or sleep, and whether there were coercive interrogation tactics. (R., pp. 3645-3661.) After explicitly considering all of these factors, the district court, applying the correct standards, found that Samuel's waiver of his *Miranda* rights was knowing, intelligent and voluntary. (See R., pp. 3661-3663.)

2. The District Court Correctly Found That Samuel Knowingly, Intelligently And Voluntarily Waived His *Miranda* Rights

Samuel next argues that his *Miranda* waiver "was not knowing, intelligent, or voluntary." (See Appellant's brief, pp. 41-49.) Samuel argues that Detective Wilhelm "did not clearly and correctly inform [Samuel] of his rights." (Appellant's brief, pp. 43-45.) Second, he argues that Detective Wilhelm "did not present [Samuel's] rights in a way that made sure he actually understood them." (Appellant's brief, p. 45.) Third, Samuel argues that Detective Wilhelm "trivialized" the *Miranda* warnings. (Appellant's brief, p. 46.) Fourth, Samuel argues his waiver was invalid because he was in a "horrible mental and physical state during the interrogation." (Appellant's brief, p. 47.) Finally Samuel argues that he did not have a parent or "friendly adult" and his age and education "amplified the deficiency of these warnings and coercive force of the officers' tactics." (Appellant's brief, pp. 47-48 (citation omitted).) While it is true that Samuel

did not have a parent present during the interview, this was understandable given the circumstances. His father was recently deceased as a result of Samuel's own actions, and his mother had left them in California two years prior. (See 1/20/16 Tr., p. 1299, Ls. 14-18.) When the officers asked Samuel for his mother's information, Samuel did not know her phone number in California, was not entirely sure how to spell her last name, and was not sure what city she lived in. (See Ex. 6A at 1:37:51 to 1:39:50; Ex. 6C at pp. 58-60.) Samuel's remaining arguments are not supported by the record.

Detective Wilhelm correctly, and repeatedly, informed Samuel of his *Miranda* rights. Samuel's argument focuses on a single comment made by Detective Wilhelm. Detective Wilhelm asked Samuel if he wanted to talk, and Samuel responded:

> [Samuel]: Right now?
>
> [Detective Wilhelm]: Yeah. That's why we're here. Do you wanna talk?
>
> [Samuel]: Like, where will I, where will I stay?
>
> [Detective Wilhelm]: Just right here. We'll just chat right here.
>
> [Sergeant McCormick]: Yeah, we're just gonna chat in this room.
>
> [Detective Wilhelm]: No, we're not gonna keep you all night. We'll just chat right now. So, this is just – because you have, you have the right to talk to me. Like I said, I have the right to talk to you, so this is just saying having these rights in mind do you want to talk to me right now?
>
> [Samuel]: Right now?
>
> [Detective Wilhelm]: Yeah.

(See Ex. 6A at 1:04:30 to 1:08:24; Ex. 6C at pp. 29-33.)

Samuel argues that Detective Wilhelm's comment about that he had a right to talk to Samuel invalidated the entirety of the *Miranda* warnings. (Appellant's brief, pp. 43-45.) The

district court found Detective Wilhelm's comment was "inaccurate" but it did not invalidate Samuel's *Miranda* waiver. (See R., pp. 3650-3659.) However, as an initial matter, the district court could have held that Detective Wilhelm's statement was not even inaccurate. The Fifth Amendment provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. "The Fifth Amendment privilege against self-incrimination protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature....'" State v. Akins, 164 Idaho 74, ___, 423 P.3d 1026, 1030 (2018) (citing Schmerber v. California, 384 U.S. 757, 761 (1966)). Thus, the Fifth Amendment protects an individual from having to talk *to* the police – however, there is nothing about the Fifth Amendment that prevents the police from talking *to* that individual.[9] The individual has a right to remain silent, but that right does not require the police to be silent; as a result, Detective Wilhelm's statement was not actually incorrect.

Further, and more importantly, Samuel's argument takes Detective Wilhelm's comment completely out of context. Even if Detective Wilhelm's single comment was inaccurate, the district court properly considered the totality of the circumstances, including the repeated written and oral explanations to Samuel that Samuel did not have to talk to the police. Even in the same quote, immediately after the comments about a "right," Detective Wilhelm asked, "do you want

[9] Even if a suspect invokes *Miranda* the police are not required to stop talking to the suspect. An invocation of *Miranda* only prevents an officer from interrogating a suspect, which means asking questions that are reasonably likely to elicit an incriminating response. See, e.g., State v. Salato, 137 Idaho 260, 267-268, 47 P.3d 763, 770-771 (Ct. App. 2001); Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980). Thus, as long as the officers are not interrogating the suspect, the officers can talk to the suspect.

to talk to me right now?" (Ex. 6C at p. 32.) If Samuel was compelled to talk, there would be no reason to ask if he wanted to talk. The weakness in Samuel's argument is further exposed when the entirety of the *Miranda* warnings are considered.

Detective Wilhelm asked Samuel if they could talk about "why we're here to talk today." (See Exs. 6A at 1:04:30 to 1:08:24, 6B, 6C at pp. 29-33.) Detective Wilhelm gave Samuel a written copy of the *Miranda* warnings and went over them, one by one, in a friendly tone. (Id.) Detective Wilhelm made it clear that the officers were not "slamming" him up against a car, like they do on television. (Id.) He also provided examples of how *Miranda* can be invoked in order not to talk to him. (Id.) Detective Wilhelm also frequently stopped and asked Samuel if he understood these rights. (Id.) He even asked if Samuel was "sure" before he signed his understanding. (Id.)

The officers were respectful of Samuel's personal space and, from the video, appear to have taken great pains to be non-threatening and put Samuel at ease. (See id.) Before signing, Samuel felt comfortable enough to ask questions of the officers, which they answered. (See id.)

> [Detective Wilhelm]: I'm gonna scoot forward a little bit so I can go over this with you, okay?
>
> [Samuel]: Okay.
>
> [Detective Wilhelm]: We didn't go over this in the office, but 99% of the kiddos in my office we give them this warning because sometimes we talk to the parents about what we're gonna talk about and sometimes we won't. Okay? So, I've actually got two of these, so I'm gonna explain it to you, okay? So this is a – I've got one for you, too, sir.
>
> [Sergeant McCormick]: Thanks.
>
> [Detective Wilhelm]: This is a Miranda warning. You know you see on TV, you see like these cop shows? They're just TV shows. Let me tell ya, they're made up. But they slam guys against the car.

[Samuel]: (Nods head yes).

[Detective Wilhelm]: They're slamming them up against the car and then they read these rights to them. And it's kind of at the same time, sometimes they slam up against the car, put them in jail, then they read his rights. And so that's not anything like this. Alright.

[Samuel]: (Nods head yes).

[Detective Wilhelm]: These are just some rights that everyone is entitled to. Like if I were to talk to my boss or, um, someone that came to my house and said, "Man I need to talk to you about this." I probably wouldn't but I could pull out these Miranda rights and, "You know what, Officer Joe, I don't want to talk to you, and this is why." Okay? Does that make sense?

[Samuel]: Yeah. (Nods head yes).

[Detective Wilhelm]: Okay, so I'm gonna read them to ya, and I'll just read them in order, okay? This is Miranda warning. It says first you have the right to remain silent. Number two. Anything you say can and will be used against you in a court of law. Third. You have the right to talk to a lawyer and have them present with you while you're being questioned. Good so far?

[Samuel]: (Nods head yes) Um-hum.

[Detective Wilhelm]: Okay. So fourth. If you can't afford to hire a lawyer one will be appointed to represent you before any questioning if you wish on[e]. So in full print there it says – you're a smart guy. So do you understand each of these rights as I've explained them to you?

[Samuel]: (Nods head yes).

[Detective Wilhelm]: Do you understand those rights?

[Samuel]: Um-hum.

[Detective Wilhelm]: One through four?

[Samuel]: Um-hum.

[Detective Wilhelm]: Okay. Would you mind signing right there?

[Samuel]: (Grabs pen).

[Detective Wilhelm]: You sure?

[Samuel]: Yeah.

[Detective Wilhelm]: [Samuel], can you circle yes for me, too, if you don't mind?

[Samuel]: Yes.

[Detective Wilhelm]: I didn't know you were a lefty.

[Samuel]: A lefty?

[Detective Wilhelm]: Yeah. Did you have left handed handcuffs? I'm just teasing you.

[Sergeant McCormick]: (Laughs).

[Samuel]: I screwed up.

[Detective Wilhelm]: I messed you up didn't I? Go ahead and sign. I'm sorry, I'll keep my mouth shut. Can you do me another favor? How about the date? Can you date it for me? It is still 3/24/14 or its March 24th 2014, however you wanna write.

[Samuel]: 3/24?

[Detective Wilhelm]: 14. 2014.

[Samuel]: (Signing paper).

[Detective Wilhelm]: Okay. So hang on to that for just a second okay. Now, that was the tough part. So you said that you understood each of those rights...

[Samuel]: ... yeah ...

[Detective Wilhelm]: ... as I explained them to you, okay? It's because I did such a great job. Secondly, this, it says having these rights in mind, do you wish to talk to us right now? Do you want to talk to me and my boss about what's going on tonight?

[Samuel]: Right now?

[Detective Wilhelm]: Yeah. That's why we're here. Do you wanna talk?

[Samuel]: Like, where will I, where will I stay?

[Detective Wilhelm]: Just right here. We'll just chat right here.

[Sergeant McCormick]: Yeah, we're just gonna chat in this room.

[Detective Wilhelm]: No, we're not gonna keep you all night. We'll just chat right now. So, this is just – because you have, you have the right to talk to me. Like I said, I have the right to talk to you, so this is just saying having these rights in mind do you want to talk to me right now?

[Samuel]: Right now?

[Detective Wilhelm]: Yeah.

[Samuel]: Like how much time will it take?

[Detective Wilhelm]: It won't take long.

[Sergeant McCormick]: Thirty minutes to an hour tops is what I imagine.

[Detective Wilhelm]: Yeah, I've got stuff to do, so. Do you want to chat?

[Samuel]: Sure.

[Detective Wilhelm]: Okay. Do you want to do that same? Do you want to circle yes for me? And then you can put the date?

[Samuel]: Yeah.

(See Exs. 6A at 1:04:30 to 1:08:24, 6B, 6C at pp. 29-32; see also R., pp. 3624-3627.) The form that Detective Wilhelm read to Samuel clearly stated Samuel's *Miranda* rights:

MIRANDA WARNING

1. You have the right to remain silent.

2. Anything you say can and will be used again you in a court of law.

3. You have the right to talk to a lawyer and have him present with you while you are being questioned.

4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one.

(Ex. 6B.) Then underneath these written warnings, in all capital letters, was the question, "DO YOU UNDERSTAND EACH OF THESE RIGHTS I HAVE EXPLAINED TO YOU?,"

followed by a place to circle "Yes" and a signature and date line. (Id.) Underneath that signature line was the capitalized and underlined word "WAIVER," followed by the question "HAVING THESE RIGHTS IN MIND, DO YOU WISH TO TALK TO US NOW?" (Id.) Samuel circled and signed both. (Id.) The lone potentially inaccurate comment cited by Samuel, when considered in full context and under the totality of the circumstances, does not invalidate the *Miranda* waiver.

Based on the totality of the circumstances, Detective Wilhelm's oral and written recitation of the warnings reasonably conveyed Samuel's rights as required by *Miranda.* See State v. McNeely, 162 Idaho 413, 416, 398 P.3d 146, 149 (2017) (citing Florida v. Powell, 559 U.S. 50, 60 (2010)). The district court considered the totality of the circumstances and correctly found that Samuel gave a valid, knowing, intelligent and voluntary waiver of his *Miranda* rights.

Nor was Samuel in a "horrible mental and physical state during the interrogation." (Appellant's brief, p. 47.) The district court found that Samuel was not deprived of any food or sleep and Samuel was "calm and engaged in the conversation." (R., p. 3655.) When the officers provided Samuel with pizza he indicated he was not hungry. (See Ex. 6A at 3:46:59 to 3:47:04; Ex. 6C at p. 176.)

> [Samuel] told the officers that the amount of sleep he had gotten the prior night was "good enough" and he had last eaten around 12:00 when he had eaten four hotdogs. Throughout the interrogation [Samuel] was provided with water, and a little more than halfway through [Samuel] was given pizza. Despite being provided with food, [Samuel] chose not to eat and indicated that he was not hungry. [Samuel] only indicated that he was tired in the moments before he was placed under arrest and the interrogation was terminated. The Court notes that throughout the interrogation, [Samuel] appeared calm and engaged in the conversation. Finally, the Court notes that throughout the interrogation, [Samuel] was allowed to go to the bathroom when he requested.

(R., p. 3655 (citations omitted).) Samuel did say that he "always feels like hurt" but clarified that it was "normal." (See R., p. 3656 (brackets omitted).) Further, while Samuel did not go to school on March 24, 2014, because of a "sore throat," he also told the officer that he had "lost it." (R., p. 3656.) The district court explained:

> As to this argument, the Court first notes that [Samuel] takes, what the Court perceives as, a liberal construction of the facts of the interrogation. For example, while [Samuel] did state that he "always feel[s] like hurt[.]" [Samuel] also indicated that it was "normal." Additionally, while [Samuel] told the officers that he didn't go to school on March 24, 2014 because he "had a sore throat[,]" [Samuel] also indicated that he had "lost it[.]"

(Id. (internal citations omitted).)

Samuel's argument that the the officers "degraded" Samuel when they took his clothes for evidence is contradicted by the record and the findings of the district court. (See R., pp. 3659-3660.) The district court found that, while the officers had to take his clothes for evidence, the officers "immediately" provided him with fresh clothes and made a "concerted effort to keep [Samuel] comfortable and maintain his privacy." (Id.)

> The Court notes that it appears the officers brought [Samuel] his own clothing from home to change in to, and [Samuel] was immediately provided with the fresh clothing after his clothing was removed and the necessary evidence was preserved. The Court finds that, based upon its review of the interrogation video and transcript, [Samuel] was not denied shoes, socks or underwear in an effort to demean or embarrass him, rather it appears from the record that the officers simply did not have any underwear, socks, or shoes, available to provide to [Samuel]. At one point Sergeant McCormick tells [Samuel] that "the guys" forgot to grab a pair of [Samuel's] underwear and expressed his understanding as to the discomfort that may be causing for [Samuel]. The Court also finds that during the removal of [Samuel's] clothing, and during the interrogation as a whole, the officers made a concerted effort to keep [Samuel] comfortable and maintain his privacy.

(Id (citation and footnote omitted).) The video evidence and transcript support the district court's findings. At the outset of the interview, while the officers were gathering evidence from

Samuel's clothes, Detective Reneau made it very clear that if Samuel needed anything or was worried about anything he could talk to him. (See Ex. 6A at 3:38-3:45; Ex. 6C at p. 3.) During the collection of Samuel's clothes, the officers made it clear that if Samuel had any questions he should ask. (See Ex. 6A at 13:18 to 13:34; Ex. 6C at p. 7 ("Okay. If you have any questions don't hesitate to ask me, alright?").) The officers treated Samuel with respect and told him what they were doing before they did it. (See Ex. 6A at 16:22 to 16:41; Ex. 6C at pp. 8-9.) Samuel's argument is without support in the record.

The reasoning of Doe I supports the district court's determination. Twelve-year-old Doe was playing with a rifle, loaded it, and shot his ten-year-old friend in the neck. Doe I, 137 Idaho at 522, 50 P.3d at 1017. Police and emergency personnel arrived at the scene and Doe was taken to the Boise Police Station. (Id.)

That night, June 12, 1999, at 3:40 a.m. the detective interviewed 12-year-old Doe without his parents present. Id. at 522, 50 P.3d at 1017. At the start of the interview the detective downplayed the importance of the *Miranda* warnings, "stating that before he can speak with Doe, he needs to 'read ... this little piece of paper.'" See id. at 523-524, 50 P.3d at 1018-1019. Doe indicated that he was familiar with *Miranda* warnings. Id. The detective read Doe his *Miranda* rights and Doe signed a waiver. Id. at 523, 50 P.3d at 1018.

When the detective asked about the shooting, and Doe expressed reluctance, the detective said, among other things, "You're going to have to answer some questions." Id. at 523-524, 50 P.3d at 1018-1019.

> Detective Dehlin finally asks Doe if he wants to talk about the day's events, and Doe responds, "Well, sort of. I don't like talking about it because it hurts me." Detective Dehlin then tells Doe, "You're going to have to answer some questions. Because we're going to have to ask you a few things about what happened, what was there, okay? If you want to talk to me, I just need to have you sign right

> there." Doe replies "okay" and signs the waiver form. The questioning regarding the shooting then begins.

Id. at 524, 50 P.3d at 1019. The detective interviewed Doe again on June 17, 1999, and again on June 18, 1999. (Id.) The state charged Doe with aggravated battery. (Id.) Doe filed a motion to suppress the statements he made on June 12, 1999. Id. at 523, 50 P.3d at 1018. The magistrate denied the motion to suppress and the district court affirmed. Id. at 522, 50 P.3d at 1017.

On appeal, Doe argued that statements he made on June 12, 1999, at 3:40 a.m. without a parent present should be suppressed because, "although his *Miranda* warnings were read to him, his waiver of these rights was not voluntary." See id. at 523, 50 P.3d at 1018. Doe argued that his waiver was involuntary because of "his age, experience, lack of sleep, and Detective Dehlin's insistence that he answer questions[.]" Id.

The Idaho Supreme Court considered the detective's downplaying of *Miranda*, the detective's statement that Doe was "going to have to answer some questions[,]" and the 3:40 a.m. time and held both that Doe knew what his *Miranda* rights were and held that Doe's waiver was voluntary. See id. at 523-524, 50 P.3d at 1018-1019.

> It is clear that Detective Dehlin does state that the *Miranda* warnings are just a "little sheet of paper." He also states, "You're going to have to answer some questions." However, he carefully recites the warnings to Doe, and Doe makes it clear that he knows what the warnings are, and that they have been read to him before. Taking Doe's age and experience into account, it is clear that he had dealt with law enforcement before. While he was young, he knew what the *Miranda* rights were and understood what they meant.
>
> Another factor is deprivation of food or sleep. The interview occurred at 3:40 a.m., and Doe had been awake since 9 a.m. the previous morning. He told Detective Dehlin that he was tired. However, Doe sounds alert on the tape, and answers all of the questions articulately.

Id.

When the facts of Doe are compared to the present case, it is clear this district court made the correct decision. First, Detective Dehlin's command that Doe was "going to have to answer some questions" is far more inaccurate and potentially damaging than Detective Wilhelm's statement to Samuel about the police having a "right to talk to you." Unlike Detective Wilhelm's statement, Detective Dehlin's statement is actually an affirmative refutation of the right to remain silent, and the Supreme Court in Doe held that this statement did not invalidate the *Miranda* warnings. See id. Further, while Doe had some previous contact with law enforcement he was also two years younger than Samuel. Twelve-year-old Doe was interviewed at 3:40 a.m. without a parent present, which is similar to Samuel's situation. The district court properly considered Doe and ultimately correctly found that Samuel's *Miranda* waiver, like Doe's waiver, was valid. (See R., pp. 3643-3644.)

3. The District Court Correctly Found That Samuel's Confession Was Not Coerced And Was Voluntary

The district court found that Samuel's confession was voluntary and the police did not coerce his confession. (See R., pp. 3640-3667.) On appeal, Samuel argues that even if his *Miranda* waiver was valid, his statements should still be suppressed because he argues his statements were coerced. (Appellant's brief, pp. 49-52.) Samuel relies upon the same arguments he made regarding the *Miranda* waiver. (See Appellant's brief, pp. 50-51.) Again, Samuel's arguments are without support in the record.

To determine whether a juvenile's confession is voluntary, the court will examine the totality of the circumstances to determine whether the defendant's will was overborne. Doe I, 137 Idaho at 523, 50 P.3d at 1018 (citing Radford, 134 Idaho at 191, 998 P.2d at 84). "In order to find the statement was not voluntary, the defendant's free will must have been overcome by

coercive police conduct at the time of the confession." Fabeny, 132 Idaho at 922-923, 980 P.2d at 586-587 (citing Schneckloth, 412 U.S. at 225-226; State v. Wilson, 126 Idaho 926, 929, 894 P.2d 159, 162 (Ct. App. 1995)). "If the defendant's free will is undermined by threats or through direct or implied promises, then the statement is not voluntary and is inadmissible." Id. (citing Wilson, 126 Idaho at 929, 894 P.2d at 162). The following factors must be considered in determining whether a confession was voluntary: "(1) Whether *Miranda* warnings were given; (2) The youth of the accused; (3) The accused's level of education or low intelligence; (4) The length of detention; (5) The repeated and prolonged nature of the questioning; and (6) Deprivation of food or sleep." Id. (citations omitted).

Here, the *Miranda* warnings were given. (See Exs. 6A at 1:04:30 to 1:08:24, 6B, 6C at pp. 29-33; see also R., pp. 3624-3627.) Samuel again argues that the lone comment by Detective Wilhelm somehow invalidated the thorough and written *Miranda* warnings. (Appellant's brief, pp. 50-51.) As explained above, when the comment is viewed in context it is clear that Samuel was given accurate *Miranda* warnings.

Samuel argues that even though he is of "average intelligence" he did not have average education or maturity. (Id.) The district court reviewed several grade level assessments, and the testimony of several teachers. (See R., pp. 3646-3650.) The district court also considered Samuel's capabilities during the interview and the report from juvenile corrections that Samuel "has no problems communicating, reading, writing, responding to conversation, or discussion questions he has about the curriculum." (Id.) The district court concluded, "Based upon the totality of the evidence discussed above and based upon the Court's observation of the video recording of the interrogation, the Court finds that [Samuel] is of at least average intelligence, particularly with regards to written and oral communication." (Id.)

While the length of the questioning was about four and half hours, the district court found that Samuel "was given several breaks during the interrogation and was allowed to use the bathroom." (R., p. 3654 (citation omitted).) The Idaho Court of Appeals held that the confession of a 17-year-old juvenile, obtained during a five-hour interview, was voluntary:

> In Fabeny's case, he was read his Miranda rights, indicated that he understood them, briefly explained what they signified, and then signed a waiver form. Although Fabeny was a juvenile, the district court properly found that he was of at least average intelligence and maturity. Fabeny was detained for interviewing for approximately five hours, from 7:00 p.m. until 12:00 a.m., and went through two distinct interviews with the same officer. The officer did not threaten Fabeny. There is no indication that Fabeny requested food or time to sleep or that he was deprived of either.

Fabeny, 132 Idaho at 923, 980 P.2d at 587. The same is true here. While the length of the interview was substantial, the officers did not threaten Samuel nor was Samuel deprived of sleep or food.

Samuel also argues that the officers coerced Samuel into confessing about killing his brother. (Appellant's brief, pp. 51-52.) Samuel's assertions are simply not supported by the record. The officers were not coercive, but were instead polite and considerate of Samuel during the entirety of the interview. The district court rejected Samuel's assertions that calling him "buddy" and "pal" amounted to coercion:

> [Samuel] takes issue with the fact that the officers repeatedly called [Samuel] "bud," "buddy," and "pal," and that the officers told him several times that he was a "smart guy." [Samuel] also argues that coercion arose out of the officers' directions to [Samuel] to "breath[e]." Again, the Court notes that it has reviewed both the video of the interrogation and the interrogation transcript in their totality. The Court finds that the use of the terms, "bud," "buddy," and "pal," and telling [Samuel] that he was a "smart guy," are not indications of overbearing [Samuel's] will but rather support the Court's observations that the officers were polite and considerate towards [Samuel] for the duration of their contact with him starting at [Samuel's] home and concluding with the termination of the interrogation.

(R., p. 3660.)

Lack of coercion can also be found in the evidence of Samuel's demeanor during the interview. Samuel remained "calm and engaged" and the officers never threated Samuel in anyway. (R., pp., 3660-3661.) Nor was Samuel's will overborne when the officers confronted him about holes in his story. (See R., p. 3663.) Samuel remained calm. (Id.)

> The Court has considered the officers' reminders to [Samuel] to be honest and assertions that honest[y] would help them help [Samuel] and that it would make [Samuel] feel better. The Court finds that the officers never told [Samuel] in any way that his statements would not be used against him. The Court further finds that at most those statements constituted "vague assurances of leniency." Finally, the Court finds that even when the officers confronted [Samuel] about not being truthful, [Samuel] remained calm, and proceeded to answer the officers questions.

(Id. (citing Stone, 154 Idaho at 954, 303 P.3d at 641.

The district court's conclusions are amply supported in the record. For example, even when Detective Wilhelm began challenging Samuel's fabrication he did it politely and apologized:

> [Detective Wilhelm]: But, and I apologize [Samuel], if I'm not asking this the right way. So how do you know if you weren't in [J.S.'s] room how do you know he was in the room?

(See Ex. 6A at 1:54:40 to 1:54:05; Ex. 6C at p. 78.) The officers used a pleasant tone of voice, and stayed seated when he continued to question Samuel about his brother, for example:

> [Sergeant McCormick]: And then what?
>
> [Samuel]: I moved the cushions off of the bed, the mattresses, and, uh, I told him to get out.
>
> [Sergeant McCormick]: You told your brother?
>
> [Samuel]: Yeah, he said, "Fuck you, fuck you," you know, so I just got mad and I just, I just hit him.

[Sergeant McCormick]: With the machete?

[Samuel]: Yeah.

(See Ex. 6A at 2:03:05 to 2:03:37; Ex. 6C at p. 86.) It was during this line of questioning about killing his brother that the officers gave Samuel a break and got him pizza. Sergeant McCormick returned with several slices of pizza, because he did not know which kind Samuel liked so he got him "a couple of each" and got Samuel some more water. (See Ex. 6A at 3:00:09 to 3:07:43; Ex. 6C at p. 130.) Late in the interview, Samuel smiled and made a joke. (See Ex. 6A at 4:04:03 to 4:04:12; Ex. 6C at p. 177.)

([Detective Wilhelm]: came back in)

[Detective Wilhelm]: I forgot to ask upi how tall you are? How tall are ya?

[Samuel]: I don't know. (Stands up) This tall.

[Detective Wilhelm]: (Laughs) that's a good one. Last time you were measured at the doctor what did they say?

(Id.) Also after demonstrating how hard he hit his brother with the machete, Samuel chuckled about the use of the term "F bomb":

[Sergeant McCormick]: Was [J.S.] saying anything?

[Samuel]: No.

[Detective Wilhelm]: I thought he was F bombing ya.

[Samuel]: F bombing? (Chuckles).

(See Ex. 6A at 2:45:17 to 2:45:24; Ex. 6C at p. 117.) Thus, the district court's findings that Samuel appeared calm during the interview and that he was not coerced are supported by the evidence.

The officers were polite and respectful during the entirety of the interview and they respected Samuel's personal space. The district court's conclusions are supported by substantial evidence. The district court properly considered all of the applicable factors and Samuel has failed to show the district court erred when it denied his motion to suppress.

II.
The District Court Did Not Abuse Its Discretion When It Permitted Samuel To Introduce Character Evidence Of Mr. Samuel's Violence And Drug Use, But Excluded Evidence Of Specific Instances of Mr. Samuel's Past Behavior

A. Introduction

The district court permitted Samuel to introduce a substantial amount of evidence of Mr. Samuel's violent reputation and character, as well as evidence of Mr. Samuel's drug use. (See, e.g., 1/20/16 Tr., p. 1297, L. 1 – p. 1299, L. 2, p. 1300, Ls. 4-21, p. 1316, L. 18 – p. 1317, L. 3, p. 1320, Ls. 17-19, p. 1424, L. 12 – p. 1428, L. 3; 1/21/16 Tr., p. 1550, L. 4 – p. 1553, L. 2, p. 1565, L. 11 – p. 1567, L. 13, p.1568, L. 9 – p. 1570, L. 7, p. 1571, L. 3 – p. 1572, L. 20, p. 1581, Ls. 2-20, p. 1632, L. 8 – p. 1634, L. 7; 1/22/16 Tr., p. 1774, L. 21 – p. 1775, L. 18; 1/25/16 Tr., p. 1807, L. 19 – p. 1811, L. 14, p. 1936, L. 9 – p. 1937, L. 24; 1/26/16 Tr., p. 2174, L. 7 – p. 2178, L. 18.) The district court ruled that, while evidence bearing on Mr. Samuel's character was admissible, evidence regarding specific instances of his past conduct was inadmissible. (See 1/19/16 Tr., p. 1236, L. 13 – p. 1239, L. 1, p.1240, Ls. 4-19, p. 1248, L. 19 – p. 1249, L. 4; 1/20/16 Tr., p. 1387, L. 14 – p. 1397, L. 14; 1/21/16 Tr., p. 1582, L. 24 – p. 1592, L. 3.) On appeal, Samuel argues that the district court abused its discretion because it "precluded [Samuel] from presenting *any* evidence of specific instances of [Mr. Samuel's] past violent and irrational behavior[.]" (Appellant's brief, pp. 53-65 (emphasis original).) Samuel's argument is not supported by the record or the applicable law. The district court properly exercised its discretion

and permitted Samuel to introduce character evidence, but properly excluded specific instances of prior conduct. The district court did not abuse its discretion. Even if the district court abused its discretion, the error was harmless because Samuel repeatedly introduced evidence of Mr. Samuel's violence and drug use.

B. Standard Of Review

"The trial court has broad discretion as to the admission of evidence, and its judgment will be reversed only where there has been a clear abuse of discretion." State v. Ormesher, 154 Idaho 221, 225, 296 P.3d 427, 431 (Ct. App. 2012) (citing State v. Perry, 150 Idaho 209, 218, 245 P.3d 961, 970 (2010)).

When determining whether a trial court has abused its discretion, the appellate court looks at "(1) [W]hether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason." Perry, 150 Idaho at 218, 245 P.3d at 970 (citations omitted).

C. The District Court Did Not Abuse Its Discretion When It Granted The State's Motion In Limine And Limited Evidence Regarding Specific Instances Of Mr. Samuel's Conduct

"Although character evidence is ordinarily inadmissible for the purpose of showing an individual acted in conformity therewith, a criminal defendant may offer evidence of a pertinent character trait, provided the prosecution is afforded an opportunity to rebut the same." Ormesher, 154 Idaho at 225, 296 P.3d at431 (citing I.R.E. 404(a)(1); State v. Harvey, 142 Idaho 527, 533, 129 P.3d 1276, 1282 (Ct. App. 2006)). "Idaho Rule of Evidence 405 provides that

character evidence may usually be admitted only as testimony in the form of an opinion or testimony as to reputation, but on cross-examination, a party may inquire about relevant *specific instances* of conduct." Id. (emphasis original).)

The state moved to exclude evidence of specific instances of Mr. Samuel's past conduct pursuant to Idaho Rule of Evidence 404(a) and 405. (R., p. 5615-5621) Samuel responded. (R., pp. 5645-5656.) The district court ruled that pursuant to Idaho Rule of Evidence 405(a), specific instances of conduct are not admissible to show character traits. (1/19/16 Tr., p. 1236, L. 13 – p. 1240, L. 20.)

> THE COURT: All right. How this evidence might have come in has been a question in the Court's mind for some time as we've gone through this case. I can think of ways it might come in, and I can think of several. We got into this a little bit the other day when we were getting statements about character, I forget which witness it was, not based upon opinion but based upon specific instances. It gave me pause at that time. There were some objections interposed, and I ruled on them. I dealt with them in the form of hearsay rulings at the time.
>
> I agree with you, [defense counsel], your client has the right to put on a defense, but that right is subject to the application of case law of this state, the 9th Circuit as it may apply, the U.S. Supreme Court. It's also subject to the Rules of Evidence, and while I agree with you that under 404(a)(2) that evidence of a character trait of a victim may come in, it comes in as a pertinent trait of character, not specific instances, and that's made exceptionally clear when one looks at 405. 404 talks about character evidence not generally being admissible. It lists exceptions under two. Then you go to 405(a), "Reputation or opinion. In all cases in which evidence of character of a trait or character of a person is permissible, proof may be made by testimony as to reputation or opinion regarding a propensity of the individual." It does not allow inquiring into specific instances. The case law is very clear on that.
>
> Some of the decision that you cited in your objection dealt with 404(b) which is a completely different issue. That's prior bad acts. That requires notice. It requires some other considerations. So the Court is looking at the character of the evidence and how it might come in.
>
> I'm also looking at the pretrial order. It wasn't clear to me how you were going to tender this evidence until the opening statement either. Once it became clear, that raised the same concerns in my mind as it did with [the prosecutor].

> The State's motion is granted to exclude evidence of specific instances of conduct relevant to proving the propensity of Eldon Samuel, Jr. [Mr. Samuel], for violence, quarrelsomeness, drug addiction or other specific issues. You can still get it in through reputation or opinion, but you're going to have to lay an appropriate foundation that any witness that you use for that purpose has a sufficient foundation to offer a credible opinion, specifically the Court is going to order that there are to be no questions propounded regarding specific instances of Eldon Samuel [Mr. Samuel] or [J.S.'s] conduct prior to the evening of March 24th in the presence of the jury. If something comes up as we go through this – and that's from the defense. If the State wants to go into those specific instances, it may do so. I doubt they will.
>
> In effect, the defendant in this case has already been allowed to testify as to some of those specific instances through the admission of his interrogation tape, so that went farther than he probably – than he might have been allowed to go under the Rules of Evidence. If you feel a burning need to go outside of that order, [defense counsel], or [other defense counsel], do it outside the presence of the jury.

(1/19/16 Tr., p. 1236, L. 13 – p. 1239, L. 1.) The district court ruled that the provisions of I.R.E. 405(b) were inapplicable under the facts in the present case. (1/19/16 Tr., p. 1239, Ls. 2-18.) The court gave instructions regarding the ruling. (1/19/16 Tr., p.1240, Ls. 4-19.)

After the district court's ruling and instructions, defense counsel attempted to introduce evidence regarding specific instances of Mr. Samuel's prior conduct, including an arrest from August of 2005 in California. (1/19/16 Tr., p. 1243, L. 22 – p. 1252, , L. 24.) After an offer of proof outside the presence of the jury, the district court ruled, in part, that the proposed evidence lacked sufficient foundation and would be unduly prejudicial to the state:

> THE COURT: Based upon the offer of proof, the Court finds there is insufficient foundation. The opinion, if held at all, is based upon hearsay or hearsay upon hearsay. It is the kind of thing that – the kind of evidence that Rule 405(a) is intended to exclude. It's not sufficiently reliable to be admitted. The opinion itself without a proper foundation would be unduly prejudicial to the state. I'm going to exclude the testimony. You've made a record for purpose of appeal regarding what his opinion would have been. He's not going to be allowed to testify as his opinion.

(1/19/16 Tr., p. 1248, L. 19 – p. 1249, L. 4.) During subsequent questioning regarding Samuel's fear of his father, the district court ruled that because there was already evidence in the record regarding Samuel's fear, the additional evidence would be more prejudicial than probative. (1/20/16 Tr., p. 1317, L. 25 – p. 1318, L. 12.) Samuel offered the testimony of Dr. Ngo, who would testify about Ms. Samuel's injuries caused by Mr. Samuel on December 28, 2010. (1/20/16 Tr., p. 1383, L. 10 – p. 1397, L. 14.) The district court ruled Dr. Ngo's testimony would be too prejudicial. (1/20/16 Tr., p. 1387, L. 17 – p. 1397, L. 14.) After addressing the timeliness of the motion, the district court ruled:

> THE COURT: ... With regard to the testimony, there's already testimony in the record, both from the defendant and from [Ms. Samuel], that this is a violent individual; that being [Samuel]. That's an opinion. It does relate to the element of self-defense. However, it is a specific instance of bad conduct which is tendered to bolster reputation, if you will, of the defendant.
>
> I'm going to exclude under the ruling yesterday. It's not an element of the offense. It's excludable under 404(5), 404(2), so I'm going exclude the testimony. You've made an adequate record here, and the Court also finds it would be cumulative under the circumstances, would be extremely hard to rebut by the State. Any probative value is exceeded by the risk of prejudice.

(1/20/16 Tr., p. 1396, Ls. 3-23.)

The district court continued to make rulings regarding the admissibility of specific instances of Mr. Samuel's past conduct. (See 1/21/16 Tr., p. 1582, L. 24 – p. 1591, L. 3.) The district court ruled, in part that the proposed evidence of prior instances of Mr. Samuel's conduct were too prejudicial to the state. (Id.)

Samuel raises several arguments that he should have been allowed to present evidence of specific instances of Mr. Samuel's past conduct. Each of those arguments is without merit and will be addressed in turn.

1. Evidence Of Specific Instances Of Mr. Samuel's Past Conduct Was Not Admissible Under Idaho Rules Of Evidence 404(B)

The district court ruled that evidence of specific instances of Mr. Samuel's past conduct was inadmissible. (See 1/19/16 Tr., p. 1236, L. 13 – p. 1239, L. 1, p.1240, Ls. 4-19, p. 1248, L. 19 – p. 1249, L. 4; 1/20/16 Tr., p. 1387, L. 14 – p. 1397, L. 14; 1/21/16 Tr., p. 1582, L. 24 – p. 1592, L. 3.) On appeal, Samuel concedes that specific instances of conduct "may not have been admissible pursuant to IRE 404(a) and 405," but instead argues the evidence was admissible pursuant to I.R.E. 404(b). (Appellant's brief, p. 55.) Samuel argues that, even though it is not articulated in I.R.E. 404(b), that evidence of Mr. Samuel's prior acts was admissible to show Samuel's state of mind in support of his self-defense clam. (Appellant's brief, pp. 55-56.)

The two-prong test to determine the admissibility of evidence under I.R.E. 404(b) is well established:

> In determining the admissibility of evidence of prior bad acts under Rule 404(b), this Court applies a two-prong analysis. First, the evidence must be relevant to a material and disputed issue concerning the crime charged. Whether evidence is relevant is an issue of law. Therefore, when considering a district court's admission of evidence of prior misconduct, we exercise free review of the trial court's relevancy determination. The second step in the analysis is the determination that the probative value of the evidence is outweighed by unfair prejudice. A court's decision that evidence is more probative than prejudicial is reviewed for abuse of discretion."

State v. Custodio, 136 Idaho 197, 205, 30 P.3d 975, 983 (Ct. App. 2001) (citations omitted).

Here, Samuel fails both prongs of the 404(b) test. Samuel fails to show the specific instances evidence is "relevant to a material and disputed issue concerning the crime charged." In support of his argument that testimony of third parties regarding specific instances of Mr. Samuel's behavior was admissible, Samuel cites to Custodio, 136 Idaho at 205, 30 P.3d at 983,

and State v. Hernandez, 133 Idaho 576, 584-585, 990 P.2d 742, 750-751 (Ct. App. 1999). (Appellant's brief, p. 56.) Neither case supports Samuel's argument.

A jury found Custodio guilty of voluntary manslaughter, involuntary manslaughter, aggravated battery, burglary, plus a deadly weapon enhancement. Custodio, 136 Idaho at 201, 30 P.3d at 979. On appeal, "Custodio argue[d] that the district court improperly excluded the testimony of a defense witness relating to a specific instance of prior aggressive conduct on the part of the victims. Specifically, the challenged evidence would have portrayed the stabbing of the witness by the victims in the instant case as being racially motivated." Id. at 203, 30 P.3d at 981. The Court of Appeals first held that because the testimony related to a specific instance of conduct, the district court properly excluded it under I.R.E. 405. Id. at 203-204, 30 P.3d at 981-982. Next, the Court of Appeals held the evidence of the specific instance of conduct was properly excluded under I.R.E. 404(b) because Custodio failed to show it was necessary to show a motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. See id. at 204-205, 30 P.3d at 982-983. Finally, the Court of Appeals held the specific instance was not admissible to show Custodio's state of mind. Id. at 205-206, 30 P.3d at 983-984.

> Thus, the district court concluded that although Custodio's knowledge of prior violent behavior on the part of the victims was relevant, extrinsic evidence tending to prove or disprove the truth of such knowledge was not relevant because it did not affect Custodio's mental state at the time of the shootings. We agree.
>
> The challenged evidence in this case consisted of a third person's recollections regarding an alleged stabbing by the victims. However, the recollections of a third person are, by their very nature, incapable of proving a defendant's state of mind.

Id. at 205, 30 P.3d at 983. The same rationale applies here. Samuel sought to introduce evidence of specific instances of Mr. Samuel's prior conduct through the recollection of third parties. As

cited above, this included doctor testimony regarding Ms. Samuel's injuries, police officer testimony about a prior arrest, and other doctors testifying about Mr. Samuel's drug seeking behavior. The recollection of these third parties was not relevant to a material and disputed issue.

In Hernandez, the Idaho Court of Appeals held that the trial court erred when it excluded reputation evidence under I.R.E. 404(a). Hernandez, 133 Idaho at 584, 990 P.2d at 750 ("We agree that the district court erred in granting the prosecutor's motion to exclude evidence of [the victim's] reputation for violence in the face of Hernandez's assertion that he would claim self-defense or defense of others.") The court's ruling in this case was consistent with Hernandez. The district court allowed Samuel to present evidence regarding Mr. Samuel's violent reputation.

Even if Samuel could show that his proffered evidence was relevant to a "material and disputed issue" under 404(b) he has failed to show the district court abused its discretion when it determined that any probative value was outweighed by the risk of unfair prejudice. "[S]pecific instances of the victim's conduct, while probative, tends to be highly prejudicial. The bad character of the deceased is likely to be thought of by the jury as an excuse for the killing." State v. Dallas, 109 Idaho 670, 679, 710 P.2d 850, 589 (1985) (citation omitted).

> Learning of the victim's bad character could lead the jury to conclude that the victim merely "got what he deserved" and to acquit for that reason. Accordingly, the majority view is to disallow such evidence.

Id. at 679, 710 P.2d at 589. That is what the district court ruled here. In order to minimize the potential for unfair prejudice it limited the testimony regarding specific instances of Mr. Samuel's prior bad acts.

Further, the probative value of the specific prior instances was slight, particularly in light of the fact that the district court permitted Samuel to present a substantial amount of evidence

regarding Mr. Samuel's reputation for violence and drug abuse. For example, Ms. Samuel testified that Mr. Samuel was taking pain medication that he was "moody" and "high" a lot of the time, and that he was "controlling, [and] physically, and mentally abusive." (1/20/16 Tr., p. 1297, L. 1 – p. 1299, L. 2.) Dr. Beaver testified that Samuel would often talk about Mr. Samuel "being very violent towards him when [Mr. Samuel] was taking his, quote, medicines[.]" (1/26/16 Tr., p. 2174, L. 7 – p. 2175, L. 14.) Dr. Beaver also testified that Mr. Samuel was "very violent" with Samuel and that Mr. Samuel would punch and hit him, and beat him with hangers and go into rages. (1/26/16 Tr., p. 2175, L. 15 – p. 2176, L. 9.) Dr. Beaver went on to explain that Mr. Samuel would go into "rages" and break Samuel's things, including Samuel's Legos. (1/26/16 Tr., p. 2175, L. 15 – p. 2177, L. 5.)

Dr. Jean Marie Prince, Samuel's former pediatrician, testified that Mr. Samuel would abuse Samuel whenever he was not sober, and that he would hit Samuel on his arms, never his stomach. (1/20/16 Tr., p. 1424, L. 12 – p. 1428, L. 3.) Deputy Mitchell, an officer who had contact with the Samuel family when they lived in California, testified that Mr. Samuel was a danger to his wife. (1/21/16 Tr., p. 1565, L. 11 – p. 1567, L. 13.) Dusty Lockett, a licensed clinical social worker from California, testified that in 2006 Mr. Samuel was a danger to others and that Ms. Samuel was abused. (1/21/16 Tr., p.1568, L. 9 – p. 1570, L. 7.) Officer Enero testified, based on her contact with Samuel in 2010, that Mr. Samuel was "angry and dangerous." (1/21/16 Tr., p. 1571, L. 3 – p. 1572, L. 20.) Ernest James Crites, a former landlord, testified that he felt that Mr. Samuel "was a very violent person." (1/21/16 Tr., p. 1581, Ls. 2-20.) Natasha Samuel, Samuel's half-sister, testified that Mr. Samuel "was pretty much violent all the time." (1/25/16 Tr., p. 1936, L. 9 – p. 1937, L. 24.)

Because the jury already had substantial information regarding Samuel's violence so it is not clear how much probative value would be gained by spending more time discussing specific prior instances. The probative value is minimal, and the risk of unfair prejudice is substantial. The district court did not abuse its discretion.

2. Specific Instances Of Mr. Samuel's Past Conduct Was Not Admissible Under Idaho Rules Of Evidence 702 And 703

Samuel also argues that he should have been allowed to have Dr. Gentile and Dr. Beaver testify about specific instances of Mr. Samuel's conduct under the guise of an expert opinion pursuant to I.R.E. 703. (See Appellant's brief, pp. 58-60.) Contrary to Samuel's argument, Idaho Rule of Evidence 703 does not allow an expert witness to serve as a conduit for the introduction of otherwise inadmissible evidence. State v. Watkins, 148 Idaho 418, 427, 224 P.3d 485, 494 (2009) ("The amendment to I.R.E. 703 serves to prevent an expert witness from serving as a conduit for the introduction of otherwise inadmissible evidence."). The Idaho Rules of Evidence Advisory Committee looked to the federal rule and determined that simply because an expert opinion is admissible it does not mean that all underlying information is admissible:

> The federal rule was amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted. Some Idaho courts have allowed inadmissible evidence to come in through an expert who testifies on direct about what he or she relied on in forming the opinion and this has been a back door for getting this evidence in the record. The intent of the rule is just that the opinion does not have to be excluded because part of the basis was evidence that would not be admissible itself.

Id. at 426, 224 P.3d at 493 (quoting Evidence Rules Advisory Committee Minutes of Meeting of November 2, 2001 at 3). Samuel argues the opposite. Contrary to Samuel's argument, the

doctors' expert opinions could be used as a backdoor to introduce otherwise inadmissible evidence.

In addition, to even be admissible the expert's testimony has to assist the trier of fact. I.R.E. 702, 703. Dr. Gentile and Dr. Beaver repeating stories they heard about Mr. Samuel would not have assisted the trier of fact. Dr. Beaver and Dr. Gentile were able to present their opinions to the jury. Further, as explained above, the jury already had substantial evidence regarding Mr. Samuel's violence and drug use, so any additional testimony regarding specific instance would have had minimal probative value and been unfairly prejudicial.

Finally, any error was harmless. See e.g. I.C.R. 52. In addition to the reasons articulated above, Dr. Beaver did, in fact, testify to specific instances of Mr. Samuel's violence. Dr. Beaver testified that Mr. Samuel would punch and hit Samuel, and beat him with hangers. (1/26/16 Tr., p. 2175, L. 15 – p. 2176, L. 6.) Dr. Beaver went on to explain that Mr. Samuel would go into "rages" and break Samuel's things, including Samuel's Legos. (1/26/16 Tr., p. 2175, L. 15 – p. 2177, L. 5.) Thus, despite the district court's ruling, Dr. Beaver was able to testify to specific instances of Mr. Samuel's past conduct.

3. The District Court's Exclusion Of Testimony Relating To Specific Instances Of Mr. Samuel's Past Conduct In Accordance With The Idaho Rules Of Evidence Did Not Violate Samuel's Right To Present A Defense

Samuel argues that the district court's ruling that he not be allowed to introduce evidence of specific conduct deprived him of his right to present a defense. (Appellant's brief, pp. 60-61.) This argument is not supported by the record or applicable case law. The Idaho Supreme Court has explained that a defendant's Sixth Amendment right to present a defense is subject to reasonable limitations, and the rules of evidence must be complied with to assure both fairness

and reliability in the ascertainment of guilt or innocence. State v. Perry, 139 Idaho 520, 523, 81 P.3d 1230, 1233 (2003) ("Perry 2003").

> A defendant's Sixth Amendment right to present evidence is fundamental; however, this right is subject to reasonable limitations. The exclusion of evidence does not impair the defendant's right "to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they serve.'" The exclusion is "unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused." With the exercise of the defendant's right to present evidence, the rules of procedure and evidence must be complied with to assure both fairness and reliability in the ascertainment of guilt or innocence.

Id. (internal citations omitted).

The United States Supreme Court has determined that the exclusion of evidence under the evidentiary rules does not violate the Sixth Amendment right to present a defense so long as the evidentiary rules are not "arbitrary" or "disproportionate to the purposes they are designed to serve." United States v. Scheffer, 523 U.S. 303, 308 (1998) (citations omitted).

> [S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not "arbitrary" or "disproportionate to the purposes they are designed to serve."

Id.

In State v. Meister, 148 Idaho 236, 239-242, 220 P.3d 1055, 1058-1061 (2009), the Idaho Supreme Court explained that a defendant's right to present evidence is subject to the Idaho Rules of Evidence. The state charged Meister with first degree murder and conspiracy to commit murder. Id. at 238, 220 P.3d at 1057. At trial Meister sought to introduce evidence that another individual, Lane Thomas, was responsible for the murder. Id. The district court refused to allow Meister to introduce any evidence which showed Lane Thomas was responsible for the murders, including a confession by Lane Thomas. Id. at 238-239, 220 P.3d at 1057-1058.

On appeal, Meister claimed that the district court's refusal to allow him to admit evidence of Lane Thomas' confession deprived him of his constitutional right to provide a full and complete defense. Id. at 239-240, 220 P.3d at 1058-1059. The Idaho Supreme Court held that the district court applied the wrong standard to determine whether Lane Thomas' confession was admissible. Id. The Court held that the district court should have analyzed whether Lane Thomas' confession was admissible under the Idaho Rules of Evidence. Id. at 240-241, 220 P.3d at 1059-1060.

> Although Thomas' confessions are included under the umbrella of alternate perpetrator evidence, the confessions also constitute hearsay. Therefore, the confessions must then be analyzed for admission pursuant to the hearsay rules.

Id. at 239, 220 P.3d at 1058.

> As previously stated, this Court adopts an approach which holds that the Rules of Evidence generally govern the admission of *all evidence* in the courts of this State.

Id. at 240, 220 P.3d at 1059 (emphasis original). The Idaho Rules of Evidence "embody the balancing test which safeguards a defendant's constitutional right to present a defense along with protection of the state's interest in the integrity of the criminal trial process." Id.

> Meister should be afforded the opportunity to present his complete and full defense, which includes the presentation of all relevant evidence in the context of trial *pursuant to any limitations of the Idaho Rules of Evidence.*

Id. at 241, 220 P.3d at 1060 (emphasis added). Thus, contrary to Samuel's argument on appeal, Samuel's right to present a defense is protected by the Idaho Rules of Evidence. Here, as described above, and in more detail below, the district court complied with the applicable rules.

Idaho law holds that, even in self-defense type cases, a defendant may not present specific instances of the victim's bad conduct. In State v. Dallas, the defendant was convicted of shooting and killing two Fish and Game conservation officers. Dallas, 109 Idaho at 671-672,

710 P.2d at 581-582. The defendant argued he shot both officers in self-defense. Id. at 672-673, 710 P.2d at 583-584. At trial, the defendant "sought to introduce evidence of specific acts by the victims that would show a tendency toward aggressive behavior." Id. at 678, 710 P.2d at 588. The trial court initially limited the defense to presenting character evidence concerning the victims' general reputation. Id. However, the trial court eventually permitted the defense to introduce evidence of specific conduct regarding one of the victims, "which tended to show a character trait for hostility or violence." Id. The trial court based its ruling on Federal Rules of Evidence 404 and 405 because Idaho was developing its rules of evidence based, in part, on the federal rules. Id. at 678-679, 710 P.2d at 588-589. After he was convicted, the defendant appealed and argued that the district court erred when it restricted his ability to present specific instances of the victims' violent conduct in support of his self-defense claim. Id.

On appeal, applying the common law, the Idaho Supreme Court explained the rationale behind not allowing evidence of specific instances of conduct is that such evidence is "highly prejudicial." Id. at 679, 710 P.2d at 589.

> It is clear from this language that Idaho law did not permit the accused to introduce evidence of specific instances of the victim's prior conduct in order to support an inference that the victim was the first aggressor. The reason for this prohibition is that evidence of specific instances of the victim's conduct, while probative, tends to be highly prejudicial. The bad character of the deceased is likely to be thought of by the jury as an excuse for the killing. Learning of the victim's bad character could lead the jury to conclude that the victim merely "got what he deserved" and to acquit for that reason. Accordingly, the majority view is to disallow such evidence.

Id. at 679, 710 P.2d at 589 (internally citing 22 C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5237, at 399 (1978); Comment, Admissibility of Evidence of Homicide Victim's Character Where Defendant Pleads Self-Defense, 13 Suffolk L.Rev. 1135, 1140

(1979)). The Idaho Supreme Court noted that the district court should not have even allowed the specific instances of the victim's violent conduct that it did allow. See id.

The Court noted that these instances of specific conduct would also have been inadmissible under the Federal Rules of Evidence and that Idaho Rules of Evidence 404 and 405 are identical to the federal rules. Id. at 679 n.3, 710 P.2d at 589 n.3.

In Arrasmith, the defendant was convicted of shooting Luella Bingham and Ronald Bingham. Arrasmith, 132 Idaho at 38, 966 P.2d at 38. The defendant's fifteen-year-old daughter, Cynthia, was living with the Binghams and the Binghams were giving Cynthia methamphetamine and marijuana. Id. The Binghams were also molesting and raping Cynthia. Id. When the police did not immediately arrest the Binghams, the defendant went to their house and shot and killed them both. Id.

At trial the defendant sought to introduce evidence that the Binghams were sexual predators because "he could have a reasonable belief that there was imminent danger to others or a reasonable belief that he was coming to the aid of someone who had been the victim of the Binghams." Id. at 40, 966 P.2d at 40. On appeal, the Court of Appeals held that, while general character evidence may be introduced if it serves to buttress a claim of self-defense or show reasonable fear of immediate danger, specific instances of conduct are not admissible:

> There are two generally recognized purposes for which evidence of character of a victim in a homicide case may be adduced. The evidence may serve to buttress a claim of self-defense and to establish that the victim was the first aggressor. The second use of evidence of the reputation of the deceased for violence is to show the defendant's reasonable apprehension of immediate danger.
>
> Adhering to precedent from the Idaho Supreme Court, the district court held that Rule 404(a)(2) does not extend to the admission of specific acts of the victims, for reasons that evidence of specific instances of conduct tends to be highly prejudicial and could lead the jury to acquit based on a conclusion that the victim

> merely "got what he deserved. Hence, the victims' testimony of specific acts of sexual abuse by the Binghams was properly excluded.

Id. at 41, 966 P.2d at 41 (citing Wright & Graham, Federal Practice and Procedure: Evidence § 5231, n. 11 (1978); Dallas, 109 Idaho at 679, 710 P.2d at 589)). Here, the district court properly excluded evidence of specific instances of Mr. Samuel's past conduct under the Idaho Rules of Evidence, and thus Samuel's constitutional right to present a defense was not infringed.

4. The District Court Properly Exercised Its Discretion By Limiting The Amount Of Prejudicial Evidence Presented To The Jury

Samuel argues that the state opened the door to evidence of specific instances of Mr. Samuel's past conduct because Samuel referenced some of those specific instances in his police interview, which the state introduced in its case in chief. (See Appellant's brief, pp. 62-65.) Samuel's argument ignores that the trial court has the discretion to limit the amount of prejudicial evidence presented to the jury. Simply because some prejudicial evidence was admitted does not mean that the party who benefited from the presentation of that evidence can then present even more prejudicial evidence. The district court has the direction to exclude evidence if "its probative value is substantially outweighed by a danger of...unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needless presenting cumulative evidence" See I.R.E. 403.

Even when a trial court admits relevant evidence, it may limit the extent to which the jury may use that evidence. In that event, the district court may cure any potential prejudice with a limiting instruction to the jury. See State v. Parmer, 147 Idaho 210, 222, 207 P.3d 186, 198 (Ct. App. 2009). Here the district court instructed the jury on the limitations of the evidence relating to Mr. Samuel's violent character. (See R., p. 6029.)

Instruction No. 35

> Evidence has been admitted concerning the reputation of [Mr. Samuel], for being quarrelsome, violent and dangerous. You may consider this evidence only for the limited purpose of making your determination as to the reasonableness of the defendant, [Samuel's] beliefs under the circumstances then apparent to him, but only if he was aware of such reputation.

(R., p. 6029.)

Samuel claims that by not allowing him to present evidence of specific instance of Mr. Samuel's past conduct he was denied the ability to present corroborating evidence. (See Appellant's brief, pp. 62-65 (citing United States v. James, 169 F.3d 1210 (9th Cir. 1999).) The Ninth Circuit opinion is inapplicable. In James, the victim bragged to the defendant about committing various violent crimes. See James, 169 F.3d at 1214. James' defense to the murder charge was that she believed the victim's stories about his violent past and, thus, had good reason to fear him. Id. The trial court excluded the victim's criminal records because the criminal records were unknown to the defendant. Id. On appeal, the Ninth Circuit held that the victim's criminal records could be admissible because "[t]he records proved that he had done them so that the stories of his wild exploits would have had the ring of truth to her, and the records proved that what [the defendant] testified to had actually taken place." Id. Here, there was no dispute about the violent incidents that Samuel referenced during his interview. Samuel told the officers what he saw and experienced, and Samuel, unlike James, was not merely relating stories he had heard. Further, the argument that Samuel was somehow prevented from provided corroborating evidence is not supported by the record. As cited above, Samuel presented substantial evidence regarding Mr. Samuel's violence and drug use.

Even if James was not distinguishable from the present case, the Idaho precedent in both Dallas, 109 Idaho at 679, 710 P.2d at 589, and Arrasmith, 132 Idaho at 42, 966 P.2d at 42, controls over Ninth Circuit case law.

Samuel, not the state, also initially brought up Mr. Samuel's bad conduct. Defense counsel's opening statement dwelled extensively on prior specific acts by Mr. Samuel. (See, e.g., 1/13/16 Tr., p. 622, Ls. 18-20 ("You'll hear when the landlord comes, [Mr. Samuel] pulls a gun, and threatens the landlord, and gets arrested."); p. 623, Ls. 8-17 ("Somehow [Ms. Samuel's] wrist gets broken. You'll hear about all the injuries that [Mr. Samuel] inflicted upon her...threatened to kill her with a gun[.]"); p. 624, Ls. 3-11 ("[Mr. Samuel] takes boys and he moves in with a convicted sex offender, and there's lot of problems there, too[.]"); p. 624, L. 17 – p. 626, L. 21 (describing Mr. Samuel's drug use).

The district court did not abuse its discretion when it permitted Samuel to introduce evidence of Mr. Samuel's violent character and drug use. Nor did the district court abuse its discretion when it excluded evidence of prior specific acts. Even if the district court abused its discretion, that error was harmless. See e.g. I.C.R. 52. "A defendant appealing from an objected-to, non-constitutionally-based error shall have the duty to establish that such an error occurred, at which point the State shall have the burden of demonstrating that the error is harmless beyond a reasonable doubt." Perry, 150 Idaho at 222, 245 P.3d at 974. "In other words, the error is harmless if the Court finds that the result would be the same without the error." State v. Montgomery, 163 Idaho 40, 44, 408 P.3d 38, 42 (2017) (citing State v. Almaraz, 154 Idaho 584, 598, 301 P.3d 242, 256 (2013)). Here the verdict would have been the same without yet more evidence of Mr. Samuel's past conduct. Samuel shot Mr. Samuel in the stomach, and after

Mr. Samuel crawled into J.S.'s room, Samuel shot him three more times in the head. More evidence of Mr. Samuel's past conduct does not make this justified or self-defense.

Nor would additional evidence of Mr. Samuel's past conduct change the verdict regarding Samuel's conviction for first degree murder. Samuel hated J.S. Samuel shot, stabbed and slashed J.S. as J.S. was cowering under his bed. There was no error, but if there was, it was harmless.

III.
The District Court Did Not Abuse Its Discretion When It Sustained The State's Objection To Ms. Samuel's Testimony Regarding Samuel's Fear Of Mr. Samuel Two Years Before The Murders

A. Introduction

The district court sustained a relevance objection to a question posed by defense counsel to Ms. Samuel regarding whether Samuel was afraid of Mr. Samuel two years prior to the murders. (1/20/16 Tr., p. 1317, L. 25 – p. 1318, L. 12.) The district court did not abuse its discretion.

B. Standard Of Review

"The trial court has broad discretion as to the admission of evidence, and its judgment will be reversed only where there has been a clear abuse of discretion." Ormesher, 154 Idaho at 225, 296 P.3d at 431 (citing Perry, 150 Idaho at 218, 245 P.3d at 970.) When determining whether a trial court has abused its discretion, the appellate court looks at "(1) [W]hether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason." Perry, 150 Idaho at 218, 245 P.3d at 970 (citations omitted).

C. The District Court Did Not Abuse Its Discretion When It Excluded Ms. Samuel's Testimony Regarding Samuel's Fear Of Mr. Samuel

Ms. Samuel separated from Mr. Samuel on May 1, 2012. (1/20/16 Tr., p. 1299, Ls. 14-18.) Ms. Samuel testified that in 2012, when she left, Mr. Samuel had a reputation for being violent. (1/20/16 Tr., p. 1316, L. 6 – p. 1317, L. 3.) The following exchange then occurred:

> Q. (BY [Defense Counsel]): Did you ever see if [Samuel], was afraid of his father?
>
> [Prosecutor]: Objection; relevance.
>
> [Other Defense Counsel]: It's a self-defense case.
>
> THE COURT: Only one counsel.
>
> [Defense Counsel]: Your Honor, it goes to our defense.
>
> THE COURT: I'm going to sustain the objection, and I'm doing it based upon the fact that there is already independent evidence in the record of his fear of his father. The answer would be more prejudicial than probative, so I'm going to exclude that line of questioning.

(1/20/16 Tr., p. 1317, L. 25 – p. 1318, L. 12.) On appeal, Samuel argues that the district court abused its discretion because the proposed testimony was not unfairly prejudicially and the only evidence of Samuel's fear was in the video interview. (See Appellant's brief, pp. 65-67.) The district court did not abuse its discretion.

"I.R.E. 403 allows the trial court to exclude relevant information where the probative value of the evidence is substantially outweighed by its prejudicial nature." State v. Raudebaugh, 124 Idaho 758, 765, 864 P.2d 596, 603 (1993). "I.R.E. 403 requires the trial court to balance the probative and the prejudicial nature of the evidence presented and to determine whether to admit the evidence." Id. (citations omitted). The decision whether to admit the evidence is a matter of discretion for the trial court." Id. (citation omitted).

The district court correctly determined that prejudicial nature of Ms. Samuel's testimony outweighed its probative value. As Ms. Samuel testified, she left in 2012, and thus her testimony about Samuel's fear, years prior to the murders, would have limited, if any, probative value. Nor was there evidence that Samuel and his mother were close. The evidence showed Samuel did not know where his mother lived, her last name, or her phone number. (See Ex. 6A at 1:37:51 to 1:39:50; Ex. 6C at pp. 58-60.) Ms. Samuel's testimony had minimal probative value and was potentially unfairly prejudicial. The district court did not abuse its discretion.

Further, in addition to the videotaped evidence of Samuel talking about his fear, other witnesses also testified about Mr. Samuel's violence towards Samuel. In addition to the raft of testimony regarding Mr. Samuel's violence, which was detailed in part above, Dr. Beaver testified that Samuel was "very worried a lot of the time about his dad when his dad was taking his medicine, as he called it, and what would happen because he would talk often about his dad being very violent towards him when he was taking his, quote, medicines[.]" (1/26/16 Tr., p. 2174, L. 7 – p. 2175, L. 14.) Dr. Beaver testified that Samuel was afraid of his father:

> Q. Let me ask you about that, some of the history he gave you on his relationship with his mother and father at home. Did you discuss what that was like? You said he was afraid of his father. Tell us what he told you about what it was like living with his father.
>
> A. Um, well, you know, the last two years he had been primarily just – he had been just with his father and his brother [J.S.], but before that there had been a long history with his father. Talked a lot about his father – for example, his father, according to [Samuel] actually and other family members I've talked with, was very violent with him, punched him, hit him, beat him with hangers so he couldn't go to school because of marks on his feet and legs. He talked quite a bit about that, and that it was very unpredictable. He would never know quite what he had done to deserve those things, although he knew that if his father – or he would talk about if his father was using more of his, quote, medicine that he was more likely that his father would start hitting him.

(1/26/16 Tr., p. 2175, L. 15 – p. 2176, L. 6.) Dr. Beaver testified that Samuel felt like his life was in danger from his father and that he was fearful of his father because his father would beat him and point guns at his mother. (1/26/16 Tr., p. 2177, L. 14 – p. 2178, L. 18.) Ms. Samuel's testimony that Samuel feared his father would have minimal probative value and the district court did nto abuse its discretion by excluding it.

Even if the district court abused its discretion, the error to exclude evidence of Mr. Samuel's specific conduct was harmless. "[T]he error is harmless if the Court finds that the result would be the same without the error." Montgomery, 163 Idaho at 44, 408 P.3d at 42 (2017) (citation omitted). Through the testimony of Dr. Beaver, and others, the jury knew Samuel was afraid of Mr. Samuel. Nor would Ms. Samuel's statement have changed the physical evidence regarding the murders of Mr. Samuel and J.S. The verdict would have been the same.

IV.
The District Court Did Not Abuse Its Discretion When It Limited Dr. Gentile's Testimony To His Area Of Expertise

A. Introduction

Samuel offered the testimony of Dr. Gentile, a professor of child psychology and researcher, regarding the effects of media violence on juveniles. (See R., pp. 5796-5816; 1/26/16 Tr., p. 2070, L. 25 – p. 2084, L. 17.) The district court ruled that Dr. Gentile was qualified to discuss the effects of violent media on juveniles, but he was not qualified to testify regarding any specific mental disorders that Samuel may have, including whether Samuel formed the intent to kill. (See 1/26/16 Tr., p. 1980, L. 10 – p. 1993, L. 22.) The district court did not abuse its discretion. And even if the district court did abuse its discretion any error was harmless because

the jury heard from Dr. Beaver that, in his opinion, Samuel did not have the intent to kill. (See 1/26/16 Tr., p. 2220, L. 5 – p. 2223, L. 24.)

B. Standard Of Review

"A district court has broad discretion in determining whether a witness is qualified as an expert." State v. Herrera, ___ Idaho ___, ___ P.3d ___, 2018 WL 4265640, at *7 (Idaho 2018) (quoting Weeks v. E. Idaho Health Servs., 143 Idaho 834, 837, 153 P.3d 1180, 1183 (2007); Warren v. Sharp, 139 Idaho 599, 605, 83 P.3d 773, 779 (2003)). "Admissibility of expert testimony is also a matter committed to the discretion of the trial court and will not be overturned absent an abuse of that discretion." Id. (citations omitted). "Similarly, '[t]his Court reviews a district court's conclusion that evidence is supported by proper foundation under an abuse of discretion standard.'" Id. (citing State v. Sheahan, 139 Idaho 267, 276, 77 P.3d 956, 965 (2003); State v. Groce, 133 Idaho 144, 146, 983 P.2d 217, 219 (Ct. App. 1999)).

C. The District Court Did Not Abuse Its Discretion By Limiting Dr. Gentile's Testimony To His Area Of Expertise, His Research Regarding The Effects Of Media Violence On Children

Samuel offered the testimony of Dr. Gentile, a researcher. (See R., pp. 5793-5851.) The state moved to limit the testimony of Dr. Gentile to the areas in which Dr. Gentile was an actual expert. (See R., pp. 5786-5792.) Dr. Gentile is not a licensed psychologist in either Idaho or Iowa, where he lives. (See id.) The state argued that while Dr. Gentile was qualified to testify about his research regarding adults and adolescents he was not qualified to diagnose or testify regarding specific mental disorders. (See id.) The state also argued "[w]here the normal experiences and qualifications of lay jurors permit them to draw proper conclusions from given facts and circumstances, then expert conclusions or opinions are inadmissible." (R., p. 5790

(citing Rockefeller v. Grabow, 136 Idaho 637, 647, 39 P.3d 577, 587 (2001).) As part of its motion to limit, the state identified and objected to specific parts of Dr. Gentile's report. (See R., pp. 5786-5851.)

At the hearing on the motion, the parties and the court went through Dr. Gentile's report and addressed each specific objection. (1/26/16 Tr., p. 1956, L. 3 – p. 1966, L. 17.) The defense agreed to some of the state's objections and agreed to limit parts of Dr. Gentile's testimony, but argued that other areas should be admissible. (Id.) The state responded to each of the remaining areas of dispute. (1/26/16 Tr., p. 1966, L. 19 – p. 1979, L. 14.) The Court ruled that Dr. Gentile was an expert in the "area of neuroscience as it relates to risk factors for violence as they may be tied to violent movies, video games, environmental factors, specifically those that are listed on Page 8 [of his report]." (1/26/16 Tr., p. 1980, Ls. 10-22 (See R., p. 5824).) The district court then went through the state's specific objections to Dr. Gentile's report and issued a ruling on each one. (See 1/26/16 Tr., p. 1980, L. 10 – p. 1993, L. 22.)

On appeal, Samuel appears to argue that the district court erred when it prevented Dr. Gentile from testifying from page 23 of his report, where Dr. Gentile stated that, in his opinion, Samuel was powerless to stop killing because he had a "teenage brain" and he did not plan or intend to kill J.S. and Mr. Samuel. (See Appellant's brief, pp. 68-72.) Specifically Dr. Gentile wrote:

> In conclusion, it is my expert opinion that [Samuel] committed these acts, but not because he intended to or planned them. Once he was provoked and felt threatened enough to pull the trigger, there was no stopping because of how the teenage brain works and how he had been conditioned by his father to be ready to defend himself from threats.

(R., p. 5839; see also PSI, p. 1679.) In conjunction with all of its other rulings on Dr. Gentile's report, the district court also held:

> Same thing as to the last entry, the last paragraph on Page 23. Whether or not he intended to or planned it is the province of the jury. It's one of the ultimate questions. Same thing regarding once provoked, felt threatened enough to pull the trigger, no stopping. That goes to self-defense which is the province of the jury.

(1/26/16 Tr., p. 1983, L. 23 – p. 1984, L. 4.) The Court further clarified that Dr. Gentile could testify about his research risk factors, and how teenagers are likely to respond, but he could not tie it to Samuel because "he's not qualified as an expert as a licensed psychologist." (1/26/16 Tr., p. 1985, Ls. 5-17.)

At trial, Dr. Gentile testified extensively about the effects of violence on the teenage brain and how an adolescent's brain wiring is different than an adult's brain wiring. (See 1/26/16 Tr., p. 2089, L. 8 – p. 2096, L. 5; p. 2103, L. 6 – p. 2151, L. 9; Exs. DG1-10, D12, D32, D35.)

On appeal Samuel argues that Idaho Rule of Evidence 702 "does not require an expert to hold an Idaho-issued professional license in order to render an opinion." (See Appellant's brief, p. 71 (citing I.R.E. 702).) While it is true that a professional license is not required to be an expert, what is required is that the proponent of the testimony lay foundational evidence showing that the individual is an expert on the subject of his or her testimony:

> In short, "[a] qualified expert is one who possesses 'knowledge, skill, experience, training, or education.'" "Formal training is not necessary, but practical experience or special knowledge must be shown to bring a witness within the category of an expert." Further, "[t]he proponent of the testimony must lay foundational evidence showing that the individual is qualified as an expert on the topic of his or her testimony."

Herrera, ___ Idaho ___, ___ P.3d ___, No. 44596, 2018 WL 4265640, at *7 (internal citations omitted).

Here, Samuel did not provide any foundational evidence that Dr. Gentile was qualified to diagnose or opine specifically about Samuel's intent on the night of March 24, 2014. (See R., pp. 5796-5816; see also 1/26/16 Tr., p. 1956, L. 3 – p. 1966, L. 17.) It is apparent from Dr.

Gentile's curriculum vitae and testimony that he is an eminently qualified researcher and academic regarding media violence on juveniles, but Samuel did not present any evidence that he was qualified to diagnose Samuel. (See R., pp. 5796-5816; 1/26/16 Tr., p. 2070, L. 25 – p. 2084, L. 17.) Dr. Gentile described his background as studying media and youth aggression:

> Q. Have we pretty much covered it?
>
> A. I think we've covered it. I've spent, you know, the past twenty years studying youth aggression and specifically how – the main aspect being media and youth aggression.

(1/26/16 Tr., p. 2084, Ls. 13-17.) Thus, it was within the district court's discretion to limit Dr. Gentile's testimony to the "area of neuroscience as it relates to risk factors for violence as they may be tied to violent movies, video games, environmental factors, specifically those that are listed on Page 8 [of his report]." (1/26/16 Tr., p. 1980, Ls. 10-22; R., p. 5824). Samuel has failed to show the district court abused its discretion. This Court can affirm to on this basis alone and need not reach the district court's alternate basis for excluding Dr. Gentile's testimony because it invaded the province of the jury and went to the ultimate issue.

Regardless, even if the district court erred when it limited Dr. Gentile's testimony, this error was harmless because the verdict would have been the same without the error. See Montgomery, 163 Idaho at 44, 408 P.3d at 42 (citing Almaraz, 154 Idaho at 598, 301 P.3d at 256.) While Dr. Gentile was prevented from testifying regarding Samuel's intent because he was not a psychologist, Dr. Beaver, who is a psychologist, was permitted to testify regarding Samuel's intent. (See 1/26/16 Tr., p. 2220, L. 5 – p. 2223, L. 24.) Dr. Beaver testified that in his opinion, Samuel, "lacked the ability at that time to understand what he was doing or to weigh or contemplate what was going on at the moment[,]" and "I don't think he had the capacity to form the intent and to weigh what his actions were going to be[,]" and "In my opinion he wasn't

capable of deliberating as we think of it." (See id.) Thus, the jury heard the same opinion that Dr. Gentile was going to testify to; however, instead of the opinion coming from an academic, the opinion came from a qualified psychologist. The result would have been the same had the jury heard Dr. Gentile's opinions from page 23 of his report, because they heard that same opinion from a more qualified witness.

V.
The District Court Did Not Abuse Its Discretion When It Excluded The Portion Of Dr. Julien's Testimony That Was Speculative

A. Introduction

Samuel offered the testimony of Dr. Julien, a pharmacologist. (See 1/27/16 Tr., p. 2280, L. 22 – p. 2282, L. 18.) Outside the presence of the jury Dr. Julien testified that he did not know if Samuel had the drug, Celexa, in his system the day of the murder because there was no blood test done. (1/27/16 Tr., p. 2304, L. 11 – p. 2311, L. 4.) Despite not knowing this information, the defense sought to have Dr. Julien testify that, in his opinion, Samuel had enough Celexa in his system on the day of the murders to be suffering from Celexa intoxication. (See id.) This opinion was based upon speculation. The district court properly exercised its discretion and excluded this speculative testimony.

B. Standard Of Review

"Admissibility of expert testimony is also a matter committed to the discretion of the trial court and will not be overturned absent an abuse of that discretion." Herrera, ___ Idaho ___, ___ P.3d ___, 2018 WL 4265640, at *7 (citations omitted). "Similarly, '[t]his Court reviews a district court's conclusion that evidence is supported by proper foundation under an abuse of discretion standard.'" Id. (citations omitted).

C. The District Court Did Not Abuse Its Discretion When It Excluded Dr. Julien's Speculative Opinion Regarding Celexa Intoxication

Dr. Julien, a pharmacologist, testified that he could not determine the drugs in Samuel's system on the day of the murders because there was only a hair test, and not a blood test done. (See 1/27/16 Tr., p. 2304, L. 11 – p. 2306, L. 12.) Despite not knowing the drugs in Samuel's system on the day of the murders, the defense attorney asked Dr. Julien, if in his opinion, Samuel could form the intent to kill on that day, the state objected that the proposed opinion was speculative. (Id.) The district court sustained the objection. (Id.) Eventually the matter was taken up outside the presence of the jury.

> Q. Doctor, could you determine from the hair sample whether [Samuel], was given Prozac pursuant to that prescription that particular day?
>
> A. No. His first proscription for Prozac was the day the of the event. Apparently no pills were taken, so there was none on board. There was none – and there was none in the hair sample, so likely he had not been taking it chronically.
>
> Q. Why wouldn't there have been any in his hair sample?
>
> A. Well, hair sample's not sensitive enough to pick up a single dose. It was just prescribed that day.
>
> Q. If a blood draw had been done by someone would that have shown whether there was Prozac in his system as well?
>
> A. In his blood, yes, it would've shown.
>
> Q. Now, based on your education, training and experience and your review of these records, I'm going to ask you your opinion regarding whether [Samuel] would've had the ability to formulate a specific intent to kill. In your opinion would he have been?
>
> [PROSECUTOR]: Objection. I'm going to object to foundation. It's outside the scope of his opinion and –
>
> THE COURT: Sustained as to lack of foundation.
>
> [DEFENSE COUNSEL]: Pardon me.

> Q. (BY [DEFENSE COUNSEL]): Did you form an opinion as to whether, given his state of medication/drugs that night that we're aware of, if he would've been able to formulate a specific intent to kill?
>
> [PROSECUTOR]: I'm going to object, Your Honor. Can we approach?
>
> THE COURT: You may.
>
> (Discussion at the bench off the record)
>
> Q. (BY [DEFENSE COUNSEL]): What is the effect of SSRI – of the SSRI on [Samuel's] cognitive abilities?
>
> A. If the dose was significantly high, and we do not know because no blood sample was drawn, I would expect to see some cognitive –
>
> [PROSECUTOR]: I'm going to object, Your Honor, to him speculating as to what the effect would be.
>
> THE COURT: Sustained. There's no evidence as what the level was.
>
> Q: (BY [DEFENSE COUNSEL]): Doctor, what about the behaviors that [Samuel] displayed during the killings? What where those and how do they apply here?
>
> [THE PROSECUTOR]: Your Honor, I'm going to object. Could I ask a couple of questions in aid?
>
> THE COURT: Why don't we excuse the jury a minute and let's explore it? Please remember the admonition.

(1/27/16 Tr., p. 2304, L. 11 – p. 2306, L. 12.)

During the questioning, out of the presence of the jury, Dr. Julien clarified he was not positive that Samuel had the drug in his system the night of the murders. (1/27/16 Tr., p. 2306, L. 14 – p. 2311, L. 4.)

> THE COURT: All right. Let me make sure I understand the other aspect to this, Doctor. My understanding of what you've testified to is he had Celexa in his blood stream, but you have no quantification because it was a hair sample – or he had it in his hair sample?

> [DR. JULIEN]: We're not positive he had it in his blood stream on the moment of the incident.

(1/27/16 Tr., p. 2307, Ls. 9-17.)

> [DR. JULIEN]: He had – for a considerable period of time he had it so that it was present in his hair sample. Whether there was any in his blood at that time of the incident we have no idea because no blood sample was obtained and no blood level was obtained – was therefore performed.

(1/27/16 Tr., p. 2308, Ls. 7-12.) When asked about his report, which referenced Samuel's prescription, he again could not say whether the drugs were in Samuel's system on the day of the murder. (1/27/16 Tr., p. 2308, L. 13 – p. 2309, L. 10.)

Dr. Julien also could not tie any of Samuel's behavior on the night of the murders to drug effects because Dr. Julien never saw the video of Samuel's interview, nor had he read the transcript of that interview. (1/27/16 Tr., p. 2306, L. 14 – p. 2307, L. 4.) Thus Dr. Julien was unable to testify to either the level of drugs in Samuel's system the night of the murder and unable to testify regarding Samuel's behavior. The district court ruled accordingly:

> THE COURT: All right. The Court's going to exclude any opinions of this witness based upon intoxication from Celexa because he only knows there was Celexa in his system at one point based upon the hearsay. He doesn't know if there was any in his system other than supposition on that particular day.
>
> Further, I find he doesn't have the factual basis to tie any ultimate opinion regarding intoxication to specific conduct he's not aware of, so I'm going to exclude testimony regarding intoxication as to [Samuel].

(1/27/16 Tr., p. 2309, L. 19 – p. 2310, L. 4.)

In response to additional questioning from defense counsel, Dr. Julien apparently contradicted himself and testified that, even though he had "no idea" if Celexa was in Samuel's blood stream, he was confident to a "reasonable degree of medical certainty" that Samuel had it in his system the day of the murders because some of the pills were missing. (1/27/16 Tr., p.

2310, L. 5 – p. 2311, L. 5.) The district court then again found that Dr. Julien's opinion was speculative and did not have much probative value. (Id.)

> THE COURT: I'm still going to exclude it because it's based upon supposition: The pill count and the dates. Its probative value is diminished by those facts. The risk of prejudice is high.

(Id.)

On appeal, Samuel makes four arguments and each will be addressed in turn. First, Samuel argues the district court excluded Dr. Julien's testimony because it was based upon hearsay. (Appellant's brief, pp. 77-78.) Samuel argues that an expert can properly base his or her opinion on hearsay. (Id.) Samuel's argument is misplaced and does not reflect what the district court actually ruled. The district court did not exclude Dr. Julien's testimony because it was based upon hearsay. (See 1/27/16 Tr., p. 2309, L. 19 – p. 2310, L. 4.) The district court excluded Dr. Julien's testimony about Celexa intoxication because "[h]e doesn't know if there was any in his system other than supposition on that particular day." (1/27/16 Tr., p. 2309, L. 19 – p. 2310, L. 4.) The court reiterated its ruling, stating, "I'm still going to exclude it because it's based upon supposition[.]" (1/27/16 Tr., p. 2311, Ls. 1-4.) When the district court referred to "hearsay" it was highlighting that Dr. Julien had no direct evidence of Celexa intoxication at the relevant time. (See 1/27/16 Tr., p. 2307, L. 9 – p. 2311, L. 4.) The objection to Dr. Julien's testimony was foundation and speculation, not hearsay. (See 1/27/16 Tr., p. 2304, L. 11 – p. 2306, L. 12, p. 2307, L. 9 – p. 2311, L. 4.) And this is what the district court ruled on. (See 1/27/16 Tr., p. 2307, L. 9 – p. 2311, L. 4.) There was no discussion or argument that Dr. Julien was impermissibly relying upon hearsay evidence; instead the argument, and the eventual ruling, focused on the fact that Dr. Julien did not have any evidence that Samuel actually had the drug in his blood stream at the relevant time.

Second, Samuel argues that, even though Dr. Julien did not have direct evidence that Samuel had Celexa in his blood system during the relevant time period, that Dr. Julien should still have been able to testify based upon the inference that he did. (Appellant's brief, p. 78.) Samuel is wrong. "Expert opinion which is speculative, conclusory, or unsubstantiated by facts in the record is of no assistance to the jury in rendering its verdict and, therefore, is inadmissible as evidence." Weeks, 143 Idaho at 838, 153 P.3d at 1184. "When an opinion is not based upon a proper factual foundation, that opinion is speculative." State v. Caliz-Bautista, 162 Idaho 833, 836, 405 P.3d 618, 621 (Ct. App. 2017) (citing Bromley v. Garey, 132 Idaho 807, 811, 979 P.2d 1165, 1169 (1999)). "The Supreme Court explained: 'Testimony is speculative when it theorizes about a matter as to which evidence is not sufficient for certain knowledge.'" Id. (citing Adams v. State, 158 Idaho 530, 538, 348 P.3d 145, 153 (2015)). "An opinion that is speculative suggests only possibilities and may be properly excluded since the opinion would not assist the trier of fact." Id. (string citation omitted). Dr. Julien's proposed testimony regarding Celexa intoxication testimony was based upon double speculation. Dr. Julien had to speculate, first, that Samuel actually had Celexa in his blood stream and, second, that it was enough Celexa to cause intoxication. Dr. Julien's testimony was speculative and would not have been useful to the jury. The district court did not abuse its discretion.

Third, Samuel argues that Dr. Julien had sufficient knowledge of Samuel's behavior during the relevant time period to testify regarding Celexa intoxication on the night of the murders. (See Appellant's brief, pp. 78-79.) Dr. Julien only read the police reports. (See id.) Dr. Julien never saw Samuel's behavior the night he murdered his brother and father. Dr. Julien did not watch the videos, which had documented hours of Samuel's behavior that night, nor did he even read the transcript of the interview. (See 1/27/16 Tr., p. 2306, L. 14 – p. 2307, L. 6.)

Further, as described above, Dr. Julien did not know if Celexa was even in Samuel's blood stream that night, let alone enough of it to cause intoxication. (See 1/27/16 Tr., p. 2306, L. 14 – p. 2311, L. 4.) Dr. Julien did not have the proper factual basis regarding Samuel's behavior the night of the murders and was basing his opinion on speculation.

Fourth, Samuel argues that Dr. Julien's testimony was not unduly prejudicial. (See Appellant's brief, pp. 79-80.) The district determined that the probative value of Dr. Julien's Celexa intoxication testimony was low, because it was primarily based upon counting missing pills. (1/27/16 Tr., p. 2311, Ls. 1-4.) The district court correctly determined that Dr. Julien's testimony had little probative value, and that the risk for prejudice was "high." Dr. Julien's speculation and conjecture regarding both if there was Celexa in Samuel's system, and enough Celexa to cause intoxication, had little, if any probative value, but had the potential to mislead and confuse to the jury.

Even if it was error to exclude Dr. Julien's opinion regarding Samuel's intoxication, that error would be harmless because the verdict would have been the same without the error. See Montgomery, 163 Idaho at 44, 408 P.3d at 42 (citing Almaraz, 154 Idaho at 598, 301 P.3d at 256)). As cited above, Dr. Beaver testified that Samuel did not have the intent to kill and, thus, the jury heard evidence regarding Samuel's intent. Further, even if they had heard Dr. Julien's testimony it was based upon counting the number of pills that were missing from the house, and misplaced pills do not establish enough drugs in Samuel's blood stream necessary the night of the murders to cause intoxication.

VI.
Samuel Has Failed To Show Any Error, Let Alone An Accumulation Of Errors

Samuel argues the doctrine of cumulative error requires reversal of his convictions. (See Appellant's brief, p. 80.) Under the doctrine of cumulative error, a series of errors, harmless in and of themselves, may in the aggregate show the absence of a fair trial. "However, a necessary predicate to the application of the doctrine is a finding of more than one error." State v. Parker, 157 Idaho 132, 149, 334 P.3d 806, 823 (2014) (quoting State v. Perry, 150 Idaho 209, 230, 245 P.3d 961, 982 (2008)). Because Samuel has failed to show any error, there is no error to cumulate in this case. Alternatively, even if errors in the trial had been shown, they would not amount to a denial of due process that would require reversal. State v. Gray, 129 Idaho 784, 804, 932 P.2d 907, 927 (Ct. App. 1997); State v. Barcella, 135 Idaho 191, 204, 16 P.3d 288, 301 (Ct. App. 2000) (accumulation of errors deemed harmless).

Even if there were errors, none of the errors dispute the physical evidence. That evidence showed Samuel shot Mr. Samuel with a .45 after which Mr. Samuel went down to his knees with his blood dripping on the floor and crawled to J.S.'s bedroom where Samuel shot him a second, third, and fourth time in his head. (1/19/16 Tr., p. 1147, L. 21 – p. 1156. L. 7, p. 1161, L. 15 – p. 1165, L. 23; Exs. 30C, 30U, 32C-D.) The evidence also showed J.S. was hiding under the bed when Samuel shot him multiple times with the same .45. (1/19/16 Tr., p. 1168, L. 21 – p. 1176, L. 22; Exs. 35G.) Samuel also repeatedly shot J.S. with a shotgun while he was under the bed. (Id.) Samuel also repeatedly "chopped" J.S. with a machete. (1/19/16 Tr., p. 1167, L. 6 – p. 1168, L. 20; Exs. 30S-T.) Given the physical evidence, there is no reasonable possibility the verdict would have been different even absent any alleged errors.

VII.
The District Court Did Not Abuse Its Discretion When It Sentenced Samuel

A. Introduction

The district court properly considered the mitigating evidence and the applicable factors when it sentenced Samuel to 15 years with 10 years fixed for the second degree murder of Mr. Samuel, and a concurrent life term with 20 years fixed for the first degree murder of his younger brother, J.S.

B. Standard Of Review

"Where a sentence is within statutory limits, it will not be reversed on appeal absent an abuse of the sentencing court's discretion." State v. Findeisen, 133 Idaho 228, 229, 984 P.2d 716, 717 (Ct. App. 1999) (citing State v. Brown, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992); State v. Toohill, 103 Idaho 565, 650 P.2d 707 (Ct. App. 1982)). When examining a trial court's exercise of discretion, an appellate court inquires whether: (1) the lower court rightly perceived the issue as one of discretion; (2) the court acted within the outer boundaries of such discretion and consistently with the applicable legal standards; and (3) the court reached its decision by an exercise of reason. Id. (citations omitted).

C. The District Court Did Not Abuse Its Discretion When It Imposed Sentence

The objectives of sentencing are well established: "(1) protection of society, (2) deterrence of the individual and the public generally, (3) possibility of rehabilitation, and (4) punishment or retribution for wrongdoing." Toohill, 103 Idaho at 568, 650 P.2d at 710 (citing State v. Wolfe, 99 Idaho 382, 384, 582 P.2d 728, 730 (1978); State v. Moore, 78 Idaho 359, 363, 304 P.2d 1101, 1103 (1956)). As a matter of policy in Idaho the "primary consideration" is the

"good order and protection of society" and "[a]ll other factors must be subservient to that end." Id. (citing Moore, 78 Idaho at 363, 304 P.2d at 1103).

At the sentencing hearing, the district court took evidence. The defense offered the testimony of Dr. Rehil-Crest, a clinical psychologist who evaluated Samuel. (4/4/16 Tr., p. 2708, L. 14 – p. 2740, L. 9.) She testified that, while she had hopes for Samuel's successful treatment, she considered him a low risk for instrumental violence, but a "high risk for reactive violence." (Id.) She testified in part:

> Q. After you stated your opinion in that paragraph on Page 9 of your report, you wrote, quote, His particular individual risk factors include his history of violence, comma. Do you remember that?
>
> A. Um-hmm.
>
> Q. And what were you referring to there?
>
> A. His – well his – the killing of his father and his brother would be the big thing. Um, his – there were some allegation of things like killing animals, being aggressive with his brother was one of them, so all of those things kind of play into that.

(4/4/16 Tr., p. 2739, Ls. 5-15.) After listening to all of the testimony and considering all of the evidence, the district court expressed that this case had weighed heavily on its mind and made findings. (4/4/16 Tr., p. 2907, L. 18 – p. 2912, L. 19.) The district court noted that even the defense experts testified that Samuel had a high risk for violence in the right circumstances:

> THE COURT: All right. Let's go back on the record. This case has weighed very heavily on the Court. I don't even want to tell you how many times I've woken up in the night, thought about [Samuel]. I don't want to tell you how much time I've been – I've spent deciding what to do with the case, trying to make sure what my options are, making sure that I understand what my duties to society are, what my duties to [Samuel] are.
>
> I will never forget the evidence in the case. I saw most of it several times. I have all of the psychologists in the case finding Reactive Attachment Disorder. I have

> two defense experts today testify he had a high risk for violence in the future if confronted, if trapped. That's consistent with the Court's expert.
>
> This case has been a tragedy since [Samuel] was about five years old, and that's when it started. Nobody should have to go through what he went through in terms of a life. The results of that life are what we're dealing with today. The results of that life are not necessarily [Samuel's] fault.

(4/4/16 Tr., p. 2907, L. 18 – p. 2908, L. 14.)

The district court reviewed the PSI, the arguments, and the allocution. (4/4/16 Tr., p. 2908, Ls. 15-24.) The district court considered the applicable Toohill factors. (4/4/16 Tr., p. 2908, L. 25 – p. 2910, L. 20.) The district court explicitly put little weight on punishment. (Id.)

> THE COURT: … It would be tempting to punish [Samuel] for the death of his brother. What that child went through in the last few minutes of his life had to be absolutely terrifying, especially considering his inability to regulate his emotions through no fault of his own. I don't put a lot of weight into punishment.

(4/4/16 Tr., p. 2909, L. 24 – p. 2910, L. 4.)

> THE COURT: ... So the Court is predominantly left with the issues of protecting society and the issues of rehabilitation. Testimony today here pretty much universally said you're going to need treatment for a long time, that when stressed you are at a substantial risk for violent outbreaks. That's probably what happened here is you acted in response to that. That goes to the issue of protection of the public.
>
> I think we had a very thorough examination today, and I commend both sides for the expert testimony and for the examination of what the alternatives are.

(4/4/16 Tr., p. 2910, Ls. 13-23.) The district court imposed a sentence of life with twenty years fixed for first degree murder and fifteen years with ten years fixed on the second degree murder. (4/4/16 Tr., p. 2910, L. 21 – p. 2911, L. 3.) The Court explained that, based upon the expert testimony, the risk of violence because of the Reactive Detachment Disorder was too great. (See 4/4/16 Tr., p.2912, Ls. 9-19.)

The district court's concern regarding Samuel's violence and the need for long term treatment is well founded in the record. During his interview, Samuel displayed disturbing cognitive issues. Samuel explained that if both he and J.S. had a candy bar, he would get mad at his brother because he wanted both candy bars:

> JW: What makes you really mad? The most mad thing that [J.S.] did, what was it?
>
> [Samuel]: Like, if I like, my dad bought a candy bar for [J.S.] and-and I told him not to eat it and I'd walk back he'd eat it. I'd see him eating it and I would get mad.
>
> JW: Why would you tell him not to eat it?
>
> [Samuel]: Because I would want to eat it.
>
> JW: Oh, right, and he would just buy one for [J.S.]?
>
> [Samuel]: Yeah.
>
> BM: Why wouldn't he buy one for you?
>
> [Samuel]: Oh, well he did but...
>
> JW: So, you wanted both?
>
> [Samuel]: Yeah.

(See Ex. 6A at 3:14:30 to 3:15:03; Ex. 6C at p. 138.) Samuel also admitted that he hated J.S. enough to kill him. (See Ex. 6A at 3:26:09 to 3:27:34; Ex. 6C at pp. 151-153.) Samuel hated his brother more than his dad. (Id.) Samuel was not bothered that his brother was dead, but he did feel "kind of bad for my dad." (See Ex. 6A at 3:29:18 to 3:30:40; Ex. 6C at pp. 154-156.)

> BM: But you're not upset over them being dead?
>
> [Samuel]: I kind of feel bad for my dad.
>
> BM: You kind of feel bad for your dad but not at all for your brother?

[Samuel]: Yeah.

BM: Is that right?

[Samuel]: Yeah.

(See Ex. 6A at 3:30:22 to 3:30:38; Ex. 6C at pp. 154-155.) The district court's concern regarding Samuel's anger and violence was well founded. The district court gave thoughtful consideration to Samuel's awful upbringing and properly applied the applicable law. The district court did not abuse its discretion.

CONCLUSION

The state respectfully requests this Court affirm the judgment of the district court.

DATED this 7th day of December, 2018.

/s/ Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 7th day of December, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorneys listed below by means of iCourt File and Serve:

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