

NO. 12-35427

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD A. LEAVITT,

Petitioner-Appellant,

v.

A.J. ARAVE,

Respondent-Appellee.

Appeal From the United States District Court
In the District of Idaho,
The Honorable B. Lynn Winmill, Presiding

RESPONDENT-APPELLEE'S EXCERPT OF RECORD

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U. S. COURTS

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

RICHARD A. LEAVITT,)	CIVIL NO. 93-0024-S-BLW
)	
Petitioner,)	
	)	<u>CAPITAL CASE</u>
v.)	
	)	ORDER
A. J. ARAVE, Warden, et al.,)	
)	
Respondents.)	
_____)	

Currently pending before the Court is Respondent's Motion for Stay (Docket No. 151), requesting that, pending the appeal in this matter, the Court stay its order requiring that the Defendant be retried or released. For the reasons stated below, the Court will grant the motion.

I. Procedural History

On September 6, 2000, the Court dismissed Petitioner's First Amended Petition for Writ of Habeas. Petitioner filed a Motion to Alter or Amend alleging, among other claims of error, that the Court had wrongly concluded that the jury instructions did not violate his constitutional rights.¹ On December 14, 2000, the Court granted Petitioner's motion to alter

¹ Petitioner also filed a separate motion to amend the petition based on the recent decision of the United States Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The

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or amend in part, and partially reversed its September decision. The Court entered an order granting in part, and denying in part, the petition for writ of habeas corpus. The Court held that Petitioner should be granted habeas relief based upon Claim 11, which alleged that the reasonable doubt instructions were constitutionally flawed. The Court denied relief on the remainder of the claims raised in the motion to alter or amend, and ordered Respondent to initiate trial proceedings against Petitioner within 60 days or release him. On December 21, 2000, Respondent filed a motion to alter or amend. The Court denied that motion on February 2, 2001.

Respondent filed a Notice of Appeal and a Motion for Stay, requesting that the initiation of trial proceedings be postponed pending appeal to the Ninth Circuit Court of Appeals. Petitioner argues that the request for stay should be denied or, in the alternative, that bond should be allowed if a stay is granted.

II. Discussion

When the State appeals a decision granting a writ of habeas corpus, Fed. R. App. Proc. 23(c) provides that the habeas petitioner shall be released from custody "unless the court . . . shall otherwise order." A district court's order regarding custody is presumed to be correct. However, the presumption of correctness may be overcome in the appellate court "for special reasons shown." Fed. R. App. Proc. 23(d). The district court retains jurisdiction to issue orders regarding the custody or release of a petitioner even after an appeal has been taken. *See Workman v. Tate*, 958 F.2d 164, 167 (6th Cir. 1992); *see also Franklin v. Duncan*, 891 F.

Court granted the motion.

ORDER - Page 2

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Supp. 516, 518 (N.D. Cal. 1995).

In *Hilton v. Braunskill*, 481 U.S. 770 (1987), the United States Supreme Court discussed the factors that a district court should consider in determining whether to stay its decision or release a state prisoner pending appeal. The general standards governing stays of civil judgments are the guide: 1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; 2) whether the applicant will be irreparably injured absent a stay; 3) whether issuance of the stay will substantially injure the other parties; and 4) where the public interest lies. *Id.* at 776. The Supreme Court explained the factors to be considered as well as the balancing process that must be undertaken by the district court as follows:

[T]he possibility of flight should be taken into consideration. . . . We also think that, if the State established that there is a risk that the prisoner will pose a danger to the public if released, the court may take that factor into consideration. . . . The State's interest in continuing custody and rehabilitation pending a final determination of the case on appeal is also a factor to be considered; it will be strongest where the remaining portion of the sentence to be served is long, and weakest where there is little of the sentence remaining to be served.

The interest of the habeas petitioner in release pending appeal, always substantial, will be strongest where the factors mentioned in the preceding paragraph are weakest. The balance may depend to a large extent upon determination of the State's prospects of success in its appeal. Where the State established that it has a strong likelihood of success on appeal, or where, failing that, it can nonetheless demonstrate a substantial case on the merits, continued

custody is permissible if the second and fourth factors in the traditional stay analysis militate against release. Where the State's showing on the merits falls below this level, the preference for release should control.

Hilton, 481 U.S. at 777-78 (citations omitted). The Supreme Court also noted that "a court has broad discretion in conditioning a judgment granting habeas relief." *Id.* at 775. Using the factors and the balancing process identified in *Hilton*, the Court will analyze the instant case.

III. Analysis

1. Likelihood of Success on the Merits

As stated in *Hilton*, when the State can demonstrate a strong likelihood of success on appeal, or a substantial case on the merits, continued custody is permissible if the second and fourth factors in the traditional stay analysis militate against release. Respondent alleges that there is a strong likelihood of success on the merits because the Court wrongly concluded that Petitioner was entitled to relief. First, Respondent argues that the Court erred in concluding that the reasonable doubt instructions were constitutionally inadequate. Second, Respondent argues that the Court erred in concluding that evidence pointing to the fact that Petitioner had invited the jury instruction error, and was precluded from relief, was unpersuasive. Third, Respondent argues that the Court incorrectly relied on dicta in the Idaho Supreme Court opinion in finding that the Petitioner's claims, which he failed to raise during his direct appeals, were not procedurally defaulted.

Most of these arguments were raised by Respondent in the extensive briefing that was filed in this proceeding, particularly in the two motions to alter or amend. The Court carefully considered each argument raised by Respondent. Based on the extensive briefing and a careful

consideration of the entire record, the Court does not find that Respondent has shown a "strong likelihood of success on appeal." *See Hilton*, 481 U.S. at 777-78.

Respondent has, however, demonstrated "a substantial case on the merits." The Idaho Supreme Court affirmed Petitioner's sentence on appeal and also affirmed the dismissal of his petition for post-conviction relief by the state district court. Although the Idaho Supreme Court did not specifically address the jury instruction issue, this Court was bound by the language in the Idaho Supreme Court opinion that indicated the court had independently reviewed the record. *See State v. Leavitt*, 121 Idaho 4, 9, 822 P.2d 523, 528 (1992). The Court must assume that the Idaho Supreme Court found the jury instructions to be constitutionally valid. Based on this assumption, it appears the Idaho Supreme Court and this Court have reached opposite conclusions regarding the constitutional sufficiency of the jury instructions. Therefore, Respondent does have "a substantial case on the merits."

2. Irreparable Injury to Respondents and the Public Interest

The second and fourth factors also favor continued custody and a stay of the order. Petitioner argues that denying him release pending appeal will substantially injure him because he is being imprisoned under an unconstitutional conviction. Although Petitioner has a substantial interest in release, that interest is counter-balanced in this case by the risk of flight, danger to the public, and the State's interest in continued custody. *See Hilton*, 481 U.S. at 777-78. In this regard, the United States Supreme Court has stated:

[A] successful habeas petitioner is in a considerably less favorable position than a pretrial arrestee . . . to challenge his continued detention pending appeal. Unlike a pretrial arrestee, a state habeas petitioner has been adjudged guilty beyond a

reasonable doubt by a judge or jury, and this adjudication of guilt has been upheld by the appellate courts of the State. Although the decision of a district court granting habeas relief will have held that the judgment of conviction is constitutionally infirm, that determination itself may be overturned on appeal before the State must retry the petitioner.

Id. at 779.

In the present case, while Petitioner does not have a significant record absent the instant crime, he has been previously convicted of a capital crime which resulted in the imposition of a death sentence. The possibility, or even probability, of the same verdict being returned and the same sentence being imposed following a retrial is obvious. As a result, the Petitioner poses a substantial risk of flight because he has nothing to lose and may have everything to gain by fleeing. Petitioner argues that, prior to his incarceration, he had substantial ties to the community, was married, and was gainfully employed in Blackfoot, Idaho. Petitioner also argues that he had a chance to flee the jurisdiction prior to trial and did not do so. Thus, Petitioner states that he should be entitled to bond pending appeal. However, the stakes are now far different. A jury has heard his case and found him guilty; a judge has imposed the death penalty. The incentive to flee is so much greater now, that the Petitioner's past conduct is of little relevance. The Court concludes that Petitioner poses a danger to the public and a risk of flight. The Respondent will therefore suffer irreparable injury absent a stay.

The Court also notes that a retrial will be extremely costly and time consuming for the State, and presents substantial difficulties due to the passage of time. "It makes little sense for

the State to be required to immediately conduct a murder trial if there is any possibility that trial could be mooted by a reversal of this Court's order on appeal." *Franklin*, 891 F. Supp. at 520. "The public interest [also] favors a stay of retrial in that a possibly unnecessary retrial, with two verdicts, could contribute to a burden on the participants in the trial and lack of public confidence in the judicial system." *Id.* at 521.

Although the Court has the authority to order Petitioner's release on bond under Federal Rule of Appellate Procedure 23(d), the nature of the charged crime, and the severity of the sentence which the defendant faces, precludes that remedy.

3. Conclusion

Respondent has not met the more stringent standard of "likelihood of success on the merits." However, it has met the lower standard of demonstrating "a substantial case on the merits." That is all that is required. However, Respondent may suffer irreparable injury if Petitioner is released from custody, or if the State is required to go forward with a trial pending appeal. Weighing all the factors, the scales tip strongly in favor of continued custody and a stay of the order for retrial. *See Hernandez v. Dugger*, 839 F. Supp. 849 (M.D. Fla. 1993) (granting stay of habeas relief pending appeal); *Hakeem v. Beyer*, 774 F. Supp. 276, 297 (D.N.J. 1991); *Sailor v. Scully*, 666 F. Supp. 50 (S.D.N.Y. 1987).

ORDER

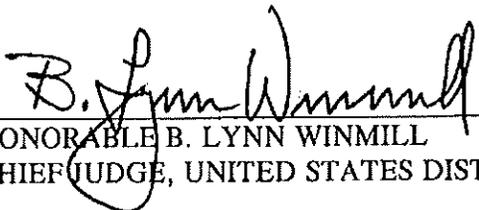
Based upon the foregoing, the court being fully informed in the premises;

IT IS HEREBY ORDERED that:

Respondent's Motion for Stay (Docket No. 151) is **GRANTED**. Petitioner shall remain in custody. The Respondent need not retry Petitioner during the pendency of its appeal

of the Court's December 14, 2000, order and judgment. If the appeal is unsuccessful, the Respondent shall have 60 days after the issuance of the Ninth Circuit's mandate to initiate trial proceedings in state court or release the Petitioner.

Dated this 12th day of April, 2001.



HONORABLE B. LYNN WINMILL
CHIEF JUDGE, UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

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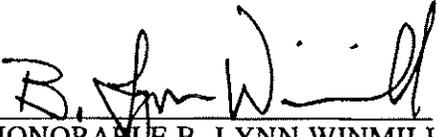
RICHARD A. LEAVITT,)	
)	CIVIL NO. 93-0024 S-BLW
Petitioner,)	
)	CAPITAL CASE
v.)	
)	
A. J. ARAVE, Warden, et al.,)	AMENDED JUDGMENT
)	
Respondents.)	
)	

IT IS HEREBY ORDERED AND ADJUDGED that the Judgment entered on September 6, 2000, is **VACATED**. The Petitioner's Petition for Writ of Habeas Corpus is **GRANTED**. The State of Idaho shall have 60 days from the date of this Judgment in which to initiate new trial proceedings against the petitioner in this matter or to release the petitioner.

IT IS FURTHER ORDERED that the Petitioner is no longer to be classified as a death row inmate.

IT IS FURTHER ORDERED that the Clerk of the Court send copies of this Judgment to the Board of Corrections for the State of Idaho and all counsel of record.

DATED this 14th day of December, 2000.


HONORABLE B. LYNN WINMILL
CHIEF UNITED STATES DISTRICT JUDGE

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U.S. DISTRICT COURT
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

RICHARD A. LEAVITT,)	
	)	CIVIL NO. 93-0024-S-BLW
Petitioner,)	
	)	CAPITAL CASE
v.)	
)	
A. J. ARAVE, Warden, et al.,	)	ORDER ON MOTION
	)	TO ALTER OR AMEND
Respondents.)	
_____)	

Currently before the Court is the petitioner's Motion to Alter or Amend the Judgment under Fed.R.Civ.P 59(e) and For Relief From Judgment under Fed.R.Civ.P 60(b). The petitioner also filed a separate Motion for Leave to Amend the Petition for Writ of Habeas Corpus under Fed.R.Civ.P 59(e). The Court has read the briefs filed by the petitioner and the respondent, and heard oral argument. For the reasons stated below, the Court grants the petitioner's motion to alter or amend on Claim 11, and also grants the petitioner's motion for leave to amend Claim 12.

I. Procedural History

On September 6, 2000, the Court issued a Memorandum Decision and Order, and Judgment dismissing the petitioner's Petition for Writ of Habeas Corpus. On September 20, 2000, the petitioner filed a Motion to Alter or Amend under Fed.R.Civ.P 59(e) and For Relief From Judgment under Fed.R.Civ.P 60(b). In that motion, the petitioner requests that the

Court reconsider four areas of the Memorandum Decision. First, the petitioner contends the Court incorrectly concluded that the evidence at trial established that the petitioner's blood was deposited at the murder scene contemporaneously with that of the victim's. Second, the petitioner argues that the Court erred in concluding that he is not entitled to relief because of shortcomings in the jury instructions given at his trial. Third, the petitioner alleges that the Court failed to consider the cumulative effect of errors when applying the harmless error standard. Finally, the petitioner asks the Court to reconsider its denial of relief on Claim 12 in light of the decision of the United States Supreme Court in *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000). In the alternative, the petitioner seeks to amend Claim 12 to include additional language which challenges Idaho's judge sentencing statute.

II. Standard of Review

A. Federal Rule of Civil Procedure 59(e)

Under Fed.R.Civ.P. 59(e) a Court may alter or amend a judgment when (1) the court is presented with new evidence; (2) the court committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in the controlling law. *See School District No. 1J, Multnomah County, Oregon v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). Although Rule 59(e) permits a district court to reconsider and amend a previous order, the Ninth Circuit has instructed that the rule offers an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (citations omitted); *389 Orange Street Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999). A Rule 59(e) motion may not be used to raise arguments or present evidence for the first time when they could reasonably

have been raised earlier in the litigation. *See id.*

B. Federal Rule of Civil Procedure 60(b)

Under Rule 60(b), relief may be granted if one of the following is established: (1) mistake, inadvertence, surprise or excusable neglect, (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b), (3) fraud, misrepresentation, or other misconduct of an adverse party, (4) the judgment is void, (5) the judgment has been satisfied, released, discharged, reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective applications, and (6) any other reason justifying relief from the operation of the judgment. Fed.R.Civ.P. 60(b). Relief under subsection (6) requires a finding of extraordinary circumstances. *See Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985).

III. Analysis

A. Blood Evidence¹

The petitioner argues the Court erred in concluding that the trial record supported a finding that the petitioner's blood was deposited contemporaneously with the victim's blood at

¹ Arguably, the Court's decision to grant the petitioner's motion, based upon the inadequacy of the reasonable doubt instructions, renders moot the remaining claims contained in the Petition. However, the Court is confident that this decision, as well as its original Memorandum Decision and Order on the Petition for Writ of Habeas Corpus, will be the subject of appeals and cross-appeals. To ensure that the Court of Appeals has a clear picture of this Court's decision on every issue raised by the Petition, the Court will address each issue raised in the petitioner's motions, except for the claim of cumulative harmless error under *Brecht v. Abrahamson*. The Court feels that it is unnecessary to consider and decide whether the cumulative effect of the errors found by the Court so infected the integrity of the proceedings as to warrant habeas relief, since it has found that a specific error - the giving of Instruction No. 12 - was not harmless and requires the granting of the petition.

the crime scene.² The petitioner argues that the Court improperly adopted the language of the Idaho Supreme Court opinion, that the language is not supported by the trial record and, therefore, that it may not be presumed to be correct under 28 U.S.C. § 2254(d)(8). In support of this argument the petitioner states that serologist Ann Bradley's testimony indicates that only the blood group *substances* were mixed, not the blood itself. *Trial Transcript*, pp. 1349-50.

The Idaho Supreme Court determined that the blood of the victim and the petitioner had been deposited contemporaneously.³ In reaching this same conclusion, this Court relied, not only on this finding by the Idaho Supreme Court, but also on testimony by Ann Bradley.

During direct examination Ms. Bradley and the prosecutor engaged in the following colloquy:

Q: Now, showing you, again, then State's Exhibit 33, Mrs. Bradley, and referring back to your - to your test that was done on the evidence in this case, do you have an opinion as to how many types of blood were present -- strike that. *How many persons may have deposited blood in the room of Danette Elg at the time she was killed?*

A: Yes.

Q: How many persons?

² The issue of co-mingling of blood was mentioned three times in the Memorandum Decision.

³ "Blood samples were gathered from the scene of the crime, and serology tests showed that two distinct blood types were present. The victim's blood was type A, and tests of the blood samples from the crime scene reveal that type O blood had been deposited contemporaneously with that of the victim's type A blood." *Leavitt v. State*, 116 Idaho 285, 287-88, 775 P.2d 599, 601-02 (1989).

A: *I concluded there were two people.*

Q: What did you base that conclusion on, Mrs. Bradley?

A: The blood grouping results.

Trial Transcript, p. 1359. (emphasis added).⁴ This testimony is uncontradicted.

Ms. Bradley testified that there were two blood types found at the scene, and that all the samples taken were either A type or O type blood.⁵ *Trial Transcript*, pp. 1359-60. She also testified that the samples contained genetic markers which made the blood distinguishable from other samples of a similar blood type. *Trial Transcript*, p. 1359. Ms. Bradley conducted tests on blood samples from 16 individuals who knew the victim, Ms. Elg, or had been in her home. *Trial Transcript*, p. 1363. In comparing those blood samples with the blood found at the scene, Ms. Bradley determined that the O type blood found in the victim's room could not have come from any of the other individuals tested, and that the petitioner's blood was O type blood which contained the same genetic markers contained in the blood found at the scene. *Trial Transcript*, p. 1368. From this, Ms. Bradley determined that the blood found at the murder scene could only have come from the petitioner. *Trial Transcript*, p. 1368. This conclusion was supported by the petitioner's admission that his blood was in the room.

⁴ Ms. Bradley also testified that a pair of lavender underpants had A type sweat mixed with O type blood. *Trial Transcript*, pp. 1332-33. She further testified that she conducted tests on a pair of the victim's brown shorts, and concluded that there was O type blood on them, as well as some A type substances. *Trial Transcript*, p. 1349. She stated this finding was different from the samples taken from the lavender underpants, and that the A type findings found in some of the samples taken from the brown shorts could have come from a mixture of blood types themselves. *Trial Transcript*, p. 1349-50.

⁵ There were several O type blood-stained items taken from the victim's room: a pillowcase, a blue sleeveless pullover, and a piece of the wall. *Trial Transcript*, pp. 1338-39.

The determination of the Idaho Supreme Court that the blood of the victim and the petitioner was co-mingled at the scene is supported by Ms. Bradley's testimony. Likewise, the conclusion of this Court to the same effect is supported by Ms. Bradley's testimony. The petitioner has not shown that the Court committed clear error, and is therefore not entitled to relief under Fed.R.Civ.P. 59(e).

B. Claim 11

In Claim 11 the petitioner raised several challenges to the constitutionality of the jury instructions. The motion to reconsider focuses on two areas. First, the petitioner alleges that the Court erred in concluding that the reasonable doubt instructions were constitutional. Second, the petitioner alleges the Court improperly relied on the invited error doctrine in determining that Jury Instruction No. 39 (the alibi instruction) did not entitle the petitioner to relief.

1. Reasonable doubt instructions

The petition alleged that Jury Instructions Nos. 10, 11, 12, 13, 36 and 39 impermissibly eroded the requirement that the prosecution prove the elements of the crime beyond a reasonable doubt. In making this argument, the petitioner relied, in large part, on the decision of the United States Supreme Court in *Victor v. Nebraska*, 511 U.S. 1, 7 (1994). Conceding that Jury Instruction No. 11 had been expressly approved in *Victor*, the petitioner argues that it only passed constitutional muster because it was supported by other instructions which cured its shortcomings. By comparison, the petitioner argues, the remaining instructions given during his trial undermined, rather than supported, a proper understanding of the concept of reasonable doubt and the presumption of innocence. The Court disagrees. However, for

somewhat different reasons – reasons unrelated to Jury Instruction No. 11 – the Court concludes that the Jury Instruction No. 12 was erroneous, violated the petitioner's constitutional rights, and require that the petitioner be granted habeas relief. The Court will first explain why it continues to adhere to its earlier position that Instruction No. 11 is not constitutionally deficient, and then explain the basis for its conclusion that other instructions so undermined the concept of reasonable doubt as to violate the petitioner's rights under the Due Process Clause.

In its Memorandum Decision, the Court concluded that "[t]aken as a whole, the reasonable doubt instructions in this case do not 'erode' the validity of Instruction No. 11. Nor do they create a reasonable likelihood that the jury applied the instructions unconstitutionally, thus convicting the petitioner on a finding of less than reasonable doubt."⁶ *Memorandum Decision and Order*, p. 96. In reaching this conclusion, the Court relied heavily on *Victor v. Nebraska*, 511 U.S. 1, which addressed the constitutionality of reasonable doubt instructions containing the troublesome phrase, "moral certainty." In *Victor*, the Court considered the following instruction, which is identical to Instruction No. 11 given during petitioner's trial:

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal. This presumption places upon the State the burden of proving him guilty beyond reasonable doubt.

⁶ In reaching this conclusion, the Court applied the standard of review which requires the Court to inquire whether there is a "reasonable likelihood" that the jury unconstitutionally applied the instruction. See *Estelle v. McGuire*, 502 U.S. 62 (1991).

Reasonable doubt is defined as follows: It is not a mere possible doubt, because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a *moral certainty*, of the truth of the charge.

Victor, 511 U.S. at 7 (emphasis added).

The Supreme Court expressed two related concerns with the trial court's use of the term "moral certainty." First, the Court worried that the use of this term might invite the jury to convict a defendant on a *lesser* standard of proof than is required by the Due Process Clause, i.e., the jury may equate moral certainty as meaning something less than proof beyond a reasonable doubt. Second, the Court was concerned that the use of this term might suggest to the jury a *different* standard of proof which relied upon moral certainty rather than evidentiary certainty, i.e., that the jury might conclude that they have a reasonable doubt based upon the evidence presented, but nevertheless convict because they are convinced to a moral certainty of the defendant's guilt.

With regard to the first concern, the Court concluded that the instruction, as a whole, made clear that moral certainty was the linguistic equivalent of proof beyond a reasonable doubt. The Court was therefore satisfied that the jury understood from the instruction that they needed "to reach a subjective state of near certitude of the guilt of the accused." *Id.* at 15 (quoting *Jackson v. Virginia*, 443 U.S. 307, 315 (1979)).

With regard to the second concern, the Court concluded that "the moral certainty language

cannot be sequestered from its surroundings," and that the remaining instructions made clear that moral certainty could not be "disassociated from the evidence in the case." *Id.* at 16. This was made clear from the "moral certainty" instruction itself, which explicitly told the jurors that their decision had to be based on the evidence in the case, and by other instructions which reinforced this message. *Id.* The jurors were told in other instructions "to determine the facts of the case from the evidence received in the trial and not from any other source," and that "you must not be influenced by pity for a defendant or by prejudice against him. . . . You must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." *Id.* The Court concluded that, in light of these instructions, there was no reasonable likelihood that the jury would have understood moral certainty to be disassociated from the evidence in the case. *Id.* Thus, the Court concluded that in the "context of the instructions as a whole we cannot say that the use of the phrase rendered the instruction given in Sandoval's case unconstitutional."⁷ *Id.*

Here, the petitioner received a reasonable doubt instruction identical to the instruction in *Victor*. See Preliminary Jury Instruction No. 11, *Clerk's Record on Appeal*, p. 771. Thus, he received the benefit of the curative statement contained within the instruction. He also received the benefit of supporting instructions virtually identical to those in *Victor*. The jurors were told that their conclusion had to be based on the evidence in the case and that they must

⁷ In reaching this conclusion the Court noted that the instruction differed from the deficient instruction given in *Cage v. Louisiana*, 498 U.S. 39 (1990), where the phrases "actual substantial doubt" and "grave uncertainty" suggested a higher degree of doubt than is required for acquittal, but did not provide any additional language in the instruction to lend meaning to the phrase. *Victor*, 511 U.S. at 5-6, 16 (citing *Cage*, 498 U.S. at 40-41).

determine the facts from evidence received in trial and not from any other source. They were instructed, "[i]t is your duty to determine the facts . . . from the evidence produced in open court," Preliminary Jury Instruction No. 5, *Clerk's Record on Appeal*, pp. 763-64, "the law requires that your decision be made solely upon the competent evidence before you," Preliminary Jury Instruction No. 6, *Clerk's Record on Appeal*, p. 765, and "in determining whether the defendant is guilty or not guilty, you must be governed solely by the evidence received in this trial and that law stated to you by the Court. Preliminary Jury Instruction No. 15, *Clerk's Record on Appeal*, p. 775. The jurors were also told they must not be influenced by pity for a defendant or prejudice against him, and that they must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. See Preliminary Jury Instructions Nos. 5 & 15. In short, the trial court here gave the same instructions which the Court in *Victor* found sufficient to ensure that the use of the term "moral certainty" in a reasonable doubt instruction did not cause the jury to convict the defendant based upon a lesser or different standard of proof than is required by the Due Process Clause.

While the remaining reasonable doubt instructions given during petitioner's trial have their own problems, they do not undermine the conclusion reached in *Victor*, that a reasonable doubt instruction which uses the term "moral certainty" passes constitutional muster. This is so, because the problems with those instructions do not add to or decrease from the problems which the Court felt might be created by the use of an anachronistic phrase like "moral certainty," when describing the concept of reasonable doubt. Thus, while Instruction No. 10 is certainly troublesome in its suggestion that the jury "should" require the state to prove the

defendant's guilt beyond a reasonable doubt⁸, the use of such precatory language does not bear upon the dual problems with the "moral certainty" instruction which the Court considered in *Victor*. The use of the term "should" does not suggest that "moral certainty" is something less than beyond a reasonable doubt. Nor does it suggest that a moral, rather than an evidentiary, standard should be employed by the jury. In short, it neither adds to nor subtracts from the problems created by the use, in Instruction No. 11, of the antiquated term "moral certainty."

The same can be said for the language in Instruction No. 13 which instructs the jury that not all the facts need to be proven beyond a reasonable doubt, the suggestion in Instruction No. 36 that the jury should not "create sources or material of doubt by trivial and fanciful suppositions or by remote conjectures," and the erroneous shifting of the burden of proof to the defendant in Instruction No. 39.⁹ While each instruction may be criticized as being less than perfect, they do not give the Court reason to abandon the holding in *Victor*, and conclude that Instruction No. 11 was an inadequate explanation of the state's burden of proving the petitioner's guilt beyond a reasonable doubt.

While, the Court does not accept the petitioner's argument that Instruction No. 11 violated his constitutional rights, it does conclude that Instruction No. 12 was constitutionally deficient

⁸ The respondent has suggested that the trial judge added an additional sentence when the instruction was read to the jury, which clarified that "[t]here must be proof beyond a reasonable doubt." This statement was not included in the written instructions. Ultimately, whether the statement was or was not included is irrelevant.

⁹ The Court found that the instruction improperly shifted the burden of proof to the petitioner with respect to his alibi, but concluded that the petitioner was not entitled to relief on the instruction because he had proposed it himself. However, Instruction No. 39 must be considered by the Court when determining whether the instructions, as a whole, confused or mislead the jury as to the reasonable doubt standard.

in suggesting that the presumption of innocence was solely to "protect the innocent." That Instruction reads as follows:

The rule of law which clothes every person accused of a crime with the presumption of innocence and imposes upon the State the burden of proving his guilt beyond a reasonable doubt, is not intended to aid anyone who is in fact guilty to escape, but is a humane provision of law, intended so far as human agencies can to guard against the danger of an innocent person being unjustly accused.

Preliminary Jury Instruction No. 12, *Clerk's Record on Appeal*, p. 772. In its original decision, the Court rejected the petitioner's argument that Instruction No. 12 was erroneous because it allowed the jury to apply two different types of reasonable doubt - one for the guilty and one for the innocent. The Court concluded that although the instruction may be ambiguous, the reasonable doubt instructions taken as a whole were constitutionally adequate under the "reasonable likelihood" standard of review set forth in *Estelle v. McGuire*, 502 U.S. 62, 72 & n.4 (1991). However, upon further reflection, the Court concludes that Instruction No. 12 was erroneous and that the shortcomings of that instruction are sufficiently serious as to create a reasonable likelihood that the jury did not apply the correct standard.¹⁰

¹⁰ The Court does not take this step lightly. It is mindful that a motion to alter or amend the judgment should not be granted under these circumstances unless it is convinced that it committed clear error. Fed. R.Civ.P.59(e)(2). It is so persuaded in this case. Although the Court considered the inadequacies of Instruction No. 12 in reaching its earlier decision, it now concludes that it did not give adequate consideration to the prejudicial effect of that instruction, when considered in the context of other reasonable doubt instructions which were ambiguous. Unfortunately, in the press of considering 15 different claims raised in the petition, none of which were procedurally defaulted, the Court simply overlooked what it now perceives to be a serious constitutional deficiency in the trial court's charge to the jury.

In *Reynolds v. United States*, 238 F.2d 460 (9th Cir. 1956), the Ninth Circuit Court of Appeals reversed a District Court of Alaska conviction for manslaughter, holding that the giving of a jury instruction very similar to Instruction No. 12 was prejudicial error.¹¹ The court concluded that giving the instruction was impermissible because, although it was right to instruct on the presumption of innocence, it was wrong to add a self-defeating qualification. *Id.* at 463.

More recently, the Second Circuit, in *United States v. Doyle*, 130 F.3d 523, 539 (2nd Cir. 1997), reached the same conclusion. The court in *Doyle*, noted that while the Tenth Circuit had approved such an instruction, the Fifth, Ninth, and Seventh Circuits had condemned it. Compare *Moffitt v. United States*, 154 F.2d 402 (10th Cir. 1946), with *Gomila v. United States*, 146 F.2d 372,372 (5th Cir. 1944); *Reynolds*, 238 F.2d at 462; *Shaw v. United States*, 244 F.2d 930, 939 (9th Cir. 1957); and *United States v. Bridges*, 499 F.2d 179 (7th Cir. 1974). The Second Circuit, in finding that the instruction was erroneous, observed that the presumption of innocence and reasonable doubt standards is "woven throughout the cloth of American jurisprudence," and "necessarily encompasses an implicit understanding that the two rules of

¹¹ The jury instruction given in that case reads as follows:

The law presumes every person charged with a crime to be innocent. This presumption of innocence remains with the defendant throughout the trial and should be given effect by you unless and until, by the evidence introduced before you, you are convinced the defendant is guilty beyond a reasonable doubt.

This rule, as to the presumption of innocence, is a humane provision of the law, intended to guard against the conviction of an innocent person, but it is not intended to prevent the conviction of any person who is in fact guilty, or to aid the guilty to escape punishment.

Reynolds v. United States, 238 F.2d at 462.

law must apply to all defendants, regardless of their actual guilt or innocence" *Doyle*, 130 F.3d at 538. Instruction No. 12, like the instruction at issue in *Doyle*, is erroneous in that it contradicts this principle, by eroding the reasonable doubt standard and by suggesting that a person who is actually guilty is not entitled to the presumption of innocence throughout the trial.

However, even if Instruction No. 12 is erroneous, the petitioner is not entitled to habeas relief unless the giving of that instruction created a "reasonable likelihood" that the jury was misled and misapplied the presumption of innocence and reasonable doubt standards.¹² *Estelle*, 502 U.S. at 72-73, n. 4. In *Doyle*, the Second Circuit engaged in this type of review and concluded that the trial court's remaining instructions included a more accurate summation of the reasonable doubt standard and the presumption of innocence. However, the court ultimately concluded that, although correct instructions explaining these concepts, "when given 'repeatedly,' can render a charge in its entirety adequate to avoid reversal, despite inclusion of the objectionable 'protect-the-innocent' language," the entire jury charge was not sufficient to accomplish that task. *See Doyle*, 130 F.3d at 539 (citations omitted).

¹² The Court is mindful of decisions of the Supreme Court suggesting that an erroneous reasonable doubt instruction is not subject to harmless error analysis – nor, presumably, to analysis under the similar "reasonable likelihood" standard – because error in this critical instruction is per se harmful and always requires reversal. *See Sullivan v. Louisiana*, 508 U.S. 275, 278-82 (1993). However, the most recent and more consistent strain of thought by the Supreme Court suggests that the proper inquiry is whether it appears from a review of all of the trial court's instructions that there is a reasonable likelihood that the jury misunderstood and unconstitutionally applied the reasonable doubt standard. *See Victor v. Nebraska*, 511 U.S. 1, 6 (1994); *Estelle v. McGuire*, 502 U.S. 62, 72-73 n.4 (1991); *Boyde v. California*, 494 U.S. 370, 378-80 (1990). However, the result here would clearly be the same if the Court were to accept Justice Scalia's suggestion in *Sullivan* that an error in a reasonable doubt instruction is per se harmful and requires reversal.

The Court reaches the same conclusion here. The majority of the reasonable doubt instructions properly informed the jury of the correct burden of proof required to convict the defendant. However, other instructions were confusing and ambiguous and may have misled the jury. For example, Instruction No. 10 advised the jury that they "should," rather than "must" require the prosecution to prove each element of the offense beyond a reasonable doubt. Instruction No. 11 included the "moral certainty" language discussed above. While such anachronistic language did not make the instruction unconstitutional, the Supreme Court made clear that it did not "condone" its use. *Victor*, 511 U.S. at 16. Instruction No. 39 improperly shifted the burden of proof from the prosecution by requiring the petitioner to establish reasonable doubt based upon his alibi defense.¹³ Therefore, this Court cannot conclude that, taken as a whole, the instructions correctly conveyed the concept of reasonable doubt to the jury. Despite the inclusion of instructions which correctly informed the jury of the concept of reasonable doubt, the Court finds that the giving of Instruction No. 12, and its "protect-the-innocent" language creates a reasonable likelihood that the jury convicted the petitioner upon less than proof beyond a reasonable doubt. The petitioner is therefore entitled to relief on this claim.

2. Invited Error Doctrine

In the Memorandum Decision and Order the Court concluded that the alibi instruction, Jury Instruction No. 39, wrongly characterized an alibi as an affirmative defense. As a result the instruction improperly shifted the burden of persuasion by requiring the petitioner to

¹³ See *infra* p. 11, n.9.

establish his alibi defense through evidence sufficient to raise a reasonable doubt as to his guilt. The Court concluded that although the instruction was improper, the petitioner was not entitled to relief on the issue because he had requested the instruction and, thus, invited the error.

On review, the petitioner takes issue with the Court's application of the invited error doctrine in light of the Court's decision regarding the procedural default status of his habeas claims. In the procedural default decision, this Court determined that the Idaho Supreme Court ruled on all errors occurring at trial.¹⁴ *Memorandum Decision and Order (Procedural Default Order)*, filed 10-22-96, pp. 8-9. The decision allowed the petitioner to present claims to the this Court for habeas review that had not been presented to the state court, and which, under other circumstances, would have been procedurally defaulted.¹⁵ The petitioner's theory is that the Court could have used the invited error doctrine to find that his claims were procedurally defaulted, but the Court was precluded from doing so once it concluded that it would consider the merits of all the claims. Finally, the petitioner argues that the Court's reliance upon the invited error doctrine unfairly prejudices him because the Court dismissed his ineffective assistance of counsel on appeal claim as a matter of law in the procedural default order.

¹⁴ The Court noted that there were several reasons for believing that the petitioner's case had not been independently searched by the Idaho Supreme Court for trial error. *Procedural Default Order*, p. 11. The Court held that this statement was unique to this case and the Idaho Supreme Court had not conducted a fundamental error review.

¹⁵ However, the decision also foreclosed the petitioner's claims that had been presented in some form to the state court. Most significantly, the petitioner had raised an ineffective assistance of counsel claim in the petition for post-conviction relief, and the Court determined that he was limited, in the habeas petition, to raising those factual instances of ineffective assistance that were asserted in the state petition. *Procedural Default Order*, p. 13. Thus, he could not rely on other instances of ineffective assistance of counsel in the trial record to support his claim.

A. Collateral Review

The Court determined that the alibi instruction improperly shifted the burden of persuasion, but that the petitioner had submitted the instruction. Based on that finding, the Court concluded that, on collateral review, it could not grant relief for an error the petitioner had himself invited. *See Shields v. United States*, 273 U.S. 583, 586 (1927) (a court can not be asked by counsel to take a step in a case and later be charged with error because it has complied with such a request). In reaching this conclusion the Court relied on federal habeas review cases, rather than an application of state law.

Upon review of the relevant case law, the Court again concludes that the invited error doctrine precludes habeas relief. In *Parker v. Champion*, 148 F.3d 1219, 1221-22 (10th Cir. 1998), *cert. denied*, 525 U.S. 1151 (1999), the petitioner alleged that a lesser included instruction was improper, and that his appellate counsel was ineffective for failing to raise a due process argument based on the inclusion of such an instruction on appeal. The Tenth Circuit panel considered the merits of the jury instruction claim in determining whether the ineffective assistance of appellate counsel claim had merit. *Id.* (citations omitted). The court stated that appellate counsel's failure to raise the issue could not result in a constitutional violation if the underlying claim had no merit. *Id.* The court found the underlying claim, that the trial court had erred in giving the instruction, lacked merit because the petitioner had invited the error by requesting the instruction. *Id.* at 1222. The court held that the invited error doctrine precluded the reversal of his conviction, as well as the grant of any habeas relief, on the basis of the alleged improper instruction. *Id.*

In a decision even closer to the facts presented here, the Eleventh Circuit, in *Leverett v.*

Spears, 877 F.2d 921 (11th Cir. 1989), considered a claim by the petitioner in a habeas proceeding, that he was entitled to relief because the trial court gave the jury an erroneous lesser included offense instruction. The petitioner had himself submitted the instruction, however. The court held that the doctrine of invited error precluded the petitioner from complaining of the error. *Id.* at 924 (citing *Francois v. Wainwright*, 741 F.2d 1275, 1282 (11th Cir. 1984)). In reaching this conclusion the court did not rely on procedural default rules. *Id.* at 926.

The Court concludes that the invited error doctrine bars habeas relief under the circumstances presented here. This is not because the claim has been procedurally defaulted by the petitioner's failure to raise it before the state trial and appellate courts, but because of the fundamental principle, applicable both on direct review and in habeas proceedings, that a party may not make a request of the court and later complain that he or she is entitled to relief because the court granted the request. The petitioner is not entitled to relief on this claim.¹⁶

B. Ineffective assistance of appellate counsel claim

As stated above, the Court has determined that the Idaho Supreme Court reviewed all trial errors on appeal. *Procedural Default Order*, pp. 8-9. In the habeas petition, the petitioner had raised for the first time a claim of ineffective assistance of appellate counsel based solely on the issue of counsel's failure to challenge the jury instructions on appeal. The Court dismissed this claim as a matter of law because it determined that the Idaho Supreme Court implicitly

¹⁶ However, it does appear that the Court incorrectly indicated that the petitioner may have been able to overcome application of the invited error doctrine by establishing "cause and prejudice." See *Memorandum Decision and Order*, p. 106, n.39. A petitioner may not use the "cause and prejudice" standard to excuse his error. See *Shields*, 273 U.S. at 586.

considered the jury instruction issue, and the petitioner could not, therefore, have been prejudiced by counsel's omission.¹⁷ *Procedural Default Order*, p. 15.

The petitioner now alleges that he was unfairly prejudiced by the application of the invited error doctrine. The petitioner argues that since the Court previously stated that it would consider the jury instruction issue on the merits, and then applied the invited error doctrine to bar relief, the Court should now consider the ineffective assistance of appellate counsel claim. The Court is not persuaded that the petitioner was unfairly prejudiced. The petitioner's claim of ineffective assistance of appellate counsel on the improper jury instruction would have failed. The Idaho Supreme Court has applied the invited error doctrine to preclude review of erroneous jury instructions on appeal. See *State v. Blake*, 133 Idaho 237, 240, 985 P.2d 117, 120 (1999); *State v. Carlson*, 134 Idaho 389, 402, 3 P.3d 67, 80 (Ct. App. 2000); *State v. Lee*, 131 Idaho 600, 604, 961 P.2d 1203, 1207 (Ct. App. 1998); *State v. Rivas*, 129 Idaho 20, 24, 921 P.2d 197, 201 (Ct. App. 1996); *State v. Carsner*, 126 Idaho 911, 916, 894 P.2d 144, 149 (Ct. App. 1995); but see *State v. Nunez*, 133 Idaho 13, 20 n.3, 981 P.2d 738, 745 (1999) (the court suggests, in a footnote, that there is no invited error where the defendant submits improper jury instructions).¹⁸ Thus, as in *Parker*, even if petitioner's appellate counsel had raised the claim, he would not have succeeded on the merits. The petitioner has suffered no prejudice as a result of the dismissal by this Court of the ineffective assistance of appellate

¹⁷ The Court also found that the petitioner was unable to excuse any procedural default by a showing of cause and prejudice. *Procedural Default Order*, p. 17.

¹⁸ The body of the opinion did not mention invited error however, and this statement appears to be dicta.

counsel claim.

C. *Brecht v. Abrahamson* exception

In *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the United States Supreme Court clarified the standard of review applicable in habeas proceedings: the harmless error standard. The Court held that an alleged error would be considered harmless unless it had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 633 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). In a footnote, the Court used the following language to suggest that certain cases might warrant an exception to the rule:

Our holding does not foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict.

Brecht, 507 U.S. at 638 n. 9 (citations omitted).

Prior to the Court's decision, the petitioner argued, in Claim 10, that numerous instances of prosecutorial misconduct warranted application of this exception to the harmless error standard. The Court was not persuaded, and deemed harmless, the errors committed in the petitioner's case.

In its motion to reconsider, the petitioner renews the same argument, but focuses on the trial errors which the Court found in its original decision – (1) the admission of evidence concerning the petitioner's knives, (2) the admission of statements made by the petitioner in violation of his 4th and 5th Amendment rights, (3) improper argument by the prosecutor, and (4) the problematic reasonable doubt instructions. However, the petitioner's request that the Court

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find that the cumulative trial error was not harmless, under the *Brecht* exception, is moot because the Court has now found that the petitioner is entitled to habeas relief because of the inadequacy of the reasonable doubt instructions.

D. Claim 12

The petitioner asks the Court to reconsider its denial of relief on Claim 12, which alleged that the imposition of the death penalty in Idaho is arbitrary and capricious. The petitioner bases his request upon the Supreme Court's recent decision in *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000). The petitioner argues that *Apprendi* created a substantive change in the law, in holding that a jury, rather than a judge, must find any facts used to increase the penalty beyond the statutory maximum. If his current petition is not sufficient to raise the *Apprendi* issue, the petitioner seeks leave to amend the petition to expressly raise the issue. The Court concludes that amendment of the claim is necessary to raise an *Apprendi* claim. The petitioner did not raise this claim in the petition, having correctly concluded that the issue was well-settled by other decisions of the Supreme Court. Since the *Apprendi* decision was issued long after the petition was filed and substantially after the submission of final briefing in this matter, the petitioner could not have anticipated this issue and raised it in his original petition or briefing. Permitting such an amendment at this time will not seriously prejudice the respondent, and will promote judicial efficiency by avoiding piecemeal resolution of the legal issues posed by this case. Therefore, the Court will grant the motion. Claim 12, set forth in paragraph 95 of the Petition, is therefore amended as follows: "Application of Idaho Code § 19-2515 which requires fact-finding and sentencing by a single judge is arbitrary and capricious as it is dependent on a particular judge's moral, philosophical, religious and ethical

attitude toward the punishment of death *and denies the petitioner his right under the Sixth and Fourteenth Amendments to a jury determination beyond a reasonable doubt of the factual determination authorizing an increase in the maximum penalty.*" The petitioner has exhausted his state court remedies, and the Court will review the claim on the merits. *See Beam v. Paskett*, 3 F.3d 1301 (9th Cir. 1994).

In *Apprendi*, the United States Supreme Court found that "a factual determination authorizing an increase in the maximum prison sentence for the offense . . . be made by a jury on the basis of proof beyond a reasonable doubt." 120 S.Ct at 2351, 2366-67. However, the Court expressly stated that this holding did not overrule the decision in *Walton v. Arizona*, 497 U.S. 639 (1990), which held that judge sentencing in capital cases is constitutional.¹⁹ The Court specifically indicated that:

[t]his Court has previously considered and rejected the argument that the principles

¹⁹ In *Walton v. Arizona*, 497 U.S. 639, 647 (1990), the Court held that Arizona's judge sentencing statute did not violate the Sixth Amendment. The Court had reached this same conclusion earlier when reviewing a Florida statute. *See Hildwin v. Florida*, 490 U.S. 638 (1989)(per curiam). In *Walton*, the petitioner attempted to distinguish the Florida statute, where the jury made a non-binding sentence recommendation to the judge, from the Arizona statute, which left sentencing solely to judicial discretion. Walton argued that this difference resulted in the aggravating factors in the Arizona statute constituting elements of the offense. *Walton*, 497 U.S. at 648. The Court noted that it had previously rejected that argument in *Poland v. Arizona*, 476 U.S. 147 (1986), and again concluded that "aggravating circumstances are not separate penalties or offenses but are 'standards to guide the making of [the] choice' between the alternative sentences of death and life imprisonment. Thus, under Arizona's capital sentencing scheme, the judge's finding of any particular aggravating circumstance does not of itself 'convict' a defendant (i.e., require the death penalty), and the failure to find any particular aggravating circumstance does not 'acquit' a defendant (preclude the death penalty)." *Walton*, 497 U.S. at 648 (quoting *Poland*, 476 U.S. at 156). The Court concluded the Arizona capital sentencing scheme did not violate the Sixth Amendment.

guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. *Walton v. Arizona*, 497 U.S. 639, 647-649, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990); *id.*, at 709-714, 110 S.Ct. 3047 (STEVENS, J., dissenting). For reasons we have explained, the capital cases are not controlling: "Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed. . . . The person who is charged with actions that expose him to the death penalty has an absolute entitlement to jury trial on all the elements of the charge." *Almendarez-Torres*, 523 U.S. at 257, n. 2, 118 S.Ct. 1219 (SCALIA, J., dissenting) (emphasis deleted).

Apprendi, 120 S.Ct. at 2366.

The petitioner recognizes that the Court in *Apprendi* expressly declined to overrule *Walton*, but attempts to distinguish the case based on Idaho's statutory scheme. While there may be a distinction between the Idaho statute and the Arizona statute, that difference does not distinguish *Apprendi* and *Walton* from the instant case. In *Apprendi*, the Supreme Court made clear that its holding applied to precisely the type of sentencing scheme which Idaho uses.²⁰ In

²⁰ The sentencing scheme approved by the Court in *Apprendi*, was described as "requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death." *Apprendi*, 120 S.Ct. at 2366. That is precisely how capital cases are handled in Idaho. The governing statute, Idaho

addition, the Ninth Circuit Court of Appeals has not determined that *Apprendi* should be retroactively applied. See *Scott v. Baldwin*, 225 F.3d 1020, 1023, n.7 (9th Cir. 2000). For these reasons, the Court finds that *Apprendi* does not overrule Idaho's capital sentencing scheme. Therefore, the petitioner is not entitled to relief on Claim 12, as amended to include a claim under *Apprendi*.

IV. Conclusion

In conclusion, the Court finds that the petitioner is not entitled to relief on the issue of the blood evidence. The Court's finding on this issue is supported by the record. However, the Court concludes there is a reasonable likelihood that the jury misunderstood the burden of proof required to convict the petitioner. Therefore, the petitioner's claim for relief on the reasonable doubt instructions will be granted. The Court concludes that it correctly applied the invited error doctrine to bar consideration of the alibi instruction. Given the Court's decision on the reasonable doubt instructions, the Court finds that the petitioner's claim under the *Brecht v. Abrahamson* harmless error standard is moot. Finally, the Court grants the motion to amend the petition to include an *Apprendi* claim, but denies the claim on the merits.

Code § 19-2515(c), provides that "[w]here a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless . . . the court finds at least one (1) statutory aggravating circumstance." The statute further provides that a specified list of statutory aggravating circumstances "must be found to exist beyond a reasonable doubt before a sentence of death can be imposed. . . ." I.C. § 19-2515(h). The statute does not provide specified mitigating circumstances, but states that the death penalty need not be imposed if "mitigating circumstances which may be presented are sufficiently compelling that the death penalty would be unjust." I.C. § 19-2515(c). While there are differences between Idaho's death penalty statute and the sentencing scheme in Arizona, which was specifically approved in *Walton* and reaffirmed in *Apprendi*, it is clear that the language of *Apprendi* is broad enough to encompass the Idaho statutory scheme.

ORDER

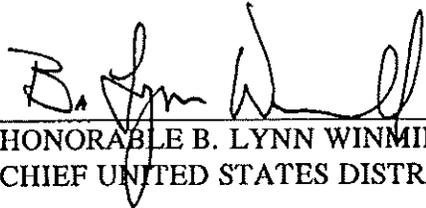
Based on the foregoing, and the Court being otherwise fully advised in the premises;

IT IS HEREBY ORDERED that:

1) The petitioner's Motion for Leave to Amend the Petition for Writ of Habeas Corpus (dkt. #124) is **GRANTED**.

2) The petitioner's Motion to Alter or Amend under Fed.R.Civ.P. 59(e) and for Relief from Judgment under Fed.R.Civ.P. 60(b) (dkt. #122) is **GRANTED in part, and DENIED in part**.

DATED this 14th day of December, 2000.


HONORABLE B. LYNN WINMILL
CHIEF UNITED STATES DISTRICT JUDGE

U. S. COURTS

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

RICHARD A. LEAVITT,)	CIVIL NO. 93-0024-S-BLW
)	
Petitioner,)	
	)	CAPITAL CASE
v.)	
	)	MEMORANDUM DECISION
A. J. ARAVE, Warden, et al.,	)	AND ORDER ON PETITION
	)	FOR WRIT OF HABEAS CORPUS
Respondents.)	
_____)	

I. Overview.

Currently before the Court is the petitioner's Final Petition for Writ of Habeas Corpus. After consideration of the arguments of counsel and thoroughly reviewing the briefs submitted on the merits of the petition and on the Motion for Summary Judgment, as well as the state court record, the Court concludes that the petitioner has not raised a constitutional violation and will deny the petition for the reasons stated in this decision.¹

¹ In addition to reviewing the Idaho Supreme Court opinions in Leavitt's appeals of his conviction and denial of his post-conviction petition, the Court has reviewed the Leavitt trial transcript and court clerk's record, and the testimony and record of the federal evidentiary hearing.

**MEMORANDUM DECISION
AND ORDER - PAGE 1**

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II. State Procedural History.

On December 19, 1985, the petitioner was sentenced to death after being convicted of first degree murder for the killing of Danette Elg in Blackfoot, Idaho. The petitioner filed a Petition for Post-Conviction Relief which was dismissed by the trial court on April 30, 1997. On appeal of the sentence and dismissal of the post-conviction petition, the Idaho Supreme Court affirmed the conviction, and held the death sentence was not disproportionate, but reversed the sentence because the trial court failed to adequately weigh the mitigating and aggravating circumstances, and failed to consider alternative sentences. *See State v. Leavitt (Leavitt I)*, 116 Idaho 285, 775 P.2d 599 (1989). The petitioner was resentenced to death on February 19, 1989. This second sentence was affirmed by the Idaho Supreme Court. *See State v. Leavitt (Leavitt II)*, 121 Idaho 4, 822 P.2d 523 (1991).

III. Federal Procedural History.

On April 29, 1993, a Petition for Writ of Habeas Corpus was filed with this Court. On February 20, 1996, an Amended Petition for Writ of Habeas Corpus was filed, alleging the following claims:

- 1) Extensive pre-trial publicity denied the petitioner a fair trial.
- 2) The heinous, atrocious or cruel aggravating circumstance is unconstitutionally vague.
- 3) The heinous, atrocious or cruel aggravating circumstance is supported by insufficient evidence.
- 4) The Idaho Supreme Court upheld the petitioner's conviction on a charge not

presented to the jury.

- 5) The State failed to disclose exculpatory evidence.
- 6) The State failed to preserve evidence.
- 7) The trial court improperly admitted evidence against the petitioner.
- 8) The petitioner's 5th Amendment rights were violated.
- 9) Ineffective assistance of counsel.
- 10) Prosecutorial misconduct.
- 11) The failure of the trial court to adequately instruct the jury on the burden of proof, presumption of innocence, and proof beyond a reasonable doubt.
- 12) The imposition of the death penalty in Idaho is arbitrary and capricious.
- 13) Inadequate proportionality review by the Idaho Supreme Court.
- 14) Idaho's post-conviction statute denies petitioner equal protection and due process.
- 15) Juror bias.
- 16) The trial Judge was prejudiced against the petitioner.
- 17) The trial court erred in denying the petitioner's motion for a new trial.
- 18) The seizure of the petitioner's blood violated his 4th Amendment rights.

On October 22, 1996, following briefing and oral argument, the Court issued a Memorandum Decision and Order denying claims 4, 9, and 14 on the basis of procedural default. In that Order, the Court also found that claims 7, 8, 10, 11, and 18, although not presented to the state court, were not procedurally defaulted under a state rule that constitutes

an adequate and independent state-law ground. In addition, the parties were ordered to file motions and briefs on the merits.

On February 18, 1997, the petitioner filed a Motion for Evidentiary Hearing on claims 1, 5, 6, 12, 13, 15, 16, and 18. At that time, the petitioner also filed a Motion for Summary Judgment on claims 2, 3, 7, 8, 10, and 11.² On June 30, 1998, the Court heard oral argument on both motions. At oral argument, the petitioner and the State indicated that the briefs filed in support of these motions were intended to be the final briefing on the merits. On September 30, 1998, the Court issued a Memorandum Decision and Order denying the petitioner's request for an evidentiary hearing on claims 1, 5, 6, 12, 13, 16, and 18. The Court granted the request for evidentiary hearing on claim 15, the petitioner's claim that there was a biased juror. An evidentiary hearing on this claim was held on January 29, 1999. At that hearing, the Court informed the parties that upon review of the record and the briefs, the Court found summary judgment to be inappropriate and, in the interests of judicial economy, merged the motion for summary judgment into the final decision.

IV. Factual History.³

At some point on or about July 18, 1984, Danette Elg was murdered in her bed at her home in Blackfoot. She had been attacked with a knife and suffered fifteen separate stab and

² Claim 17 was not raised in either motion.

³ The summary of facts is largely recounted from the decision in *State v. Leavitt*, 116 Idaho 285, 775 P.2d 599 (1989), and the trial transcript.

slash wounds, some of which were fatal. In addition, her sexual organs had been removed.⁴ The attack took place on Ms. Elg's waterbed, which was punctured and torn. Ms. Elg's body was not discovered for three to four days after the death. The combination of waterbed liquid, body fluids and delay, resulted in decomposition of her body which prevented a determination of whether Ms. Elg was raped.

Ms. Elg and the petitioner were acquainted with each other. On July 16, 1984, Ms. Elg had called the police to report a prowling incident and identified the petitioner as the prowler trying to enter her home. Following Ms. Elg's death, but prior to the discovery of her body, the petitioner contacted the police and Ms. Elg's friends expressing curiosity regarding her absence. The petitioner claimed that Ms. Elg's co-workers and employer called him after she did not appear for work. These calls could not be confirmed. In addition, prior to the discovery of Ms. Elg's body, the Blackfoot police received two phone calls from a man identifying himself as "Mike Jenkins" stating facts which would have only been known to the murderer. While the identity of "Mike Jenkins" has never been verified, the State introduced evidence at trial of these phone calls through the testimony of Blackfoot Police Department dispatchers.

On July 21, 1984, the petitioner obtained permission from Ms. Elg's parents to enter her home. Entry was made by the petitioner and the Blackfoot Police Department, and Ms. Elg's body was discovered. Following a Special Inquiry Proceeding, the petitioner was formally charged and arrested on December 5, 1984.

⁴ The sexual organs were not recovered.

At trial, the evidence against the petitioner was mostly circumstantial. Evidence was introduced that the petitioner sustained a cut to his index finger, and was treated in the emergency room of the Bingham Memorial Hospital for that wound on July 18, 1984. Also introduced were serology reports taken from blood samples at the scene. This evidence indicated that two different blood types were present at the scene of the murder and had been deposited contemporaneously; type A, belonging to Ms. Elg, and type O. Blood samples were taken from sixteen suspects, including the petitioner pursuant to a warrant. The serologist opined that the petitioner was the only likely source of the type O blood.

Prior to trial the petitioner offered explanations regarding the wound to his finger and the discovery of his blood in Ms. Elg's bedroom. First, he denied that his blood could be in Ms. Elg's bedroom. Later he admitted being in her bedroom one week prior to her murder while hiding from Ms. Elg's roommate, and suffering a nosebleed. The petitioner stated that he had incurred the injury to his finger in his own home attempting to upright a fan. The fan was provided for testing and the tests showed that the fan lacked any blood residue or any indication that it had been cleaned. In addition, reconstruction testing failed to duplicate the type of injury suffered by the petitioner.

At trial, the petitioner admitted that he and his wife had perjured themselves with respect to the fan story and indicated that the injury had occurred while he was trying to prevent his wife from attempting suicide. In addition, evidence was introduced of a letter written by the petitioner to his wife regarding her prospective testimony during his trial. The letter was seized from the petitioner while in jail; the trial court ruled the letter had been

properly seized, and the prosecutor used the letter to impeach the petitioner. Finally, testimony was offered by petitioner's ex-wife indicating the petitioner had morbid curiosity regarding sexual organs and possessed a number of knives. The petitioner's former girlfriend, Barbie Rich, testified that he had displayed a knife prior to sexual intercourse.

V. Discussion of Remaining Claims.

A. Claim 1.

In this claim, the petitioner alleges that extensive pre-trial publicity denied him a fair trial. As a result of the publicity, the petitioner alleges he was subject to "presumed prejudice" because the community was saturated with publicity regarding the upcoming trial. He further alleges that he was subject to "actual prejudice" because the seated jurors had expressed partiality to the State's case.

Prior to trial the petitioner moved for a change of venue and for permission to conduct an opinion survey of the jury pool to determine the extent of juror bias. The trial court denied the motion to conduct an opinion survey, but conducted an evidentiary hearing to determine the nature and effect of the publicity surrounding Danette Elg's death. Seven media witnesses testified extensively about the extent and prejudicial nature of the publicity. They were also asked whether they had formed opinions about the petitioner's guilt. Each of the witnesses denied any prejudicial effect of the reporting and publicity. On this basis, the trial court denied the petitioner's motion for a change of venue and held:

In all of the news coverage and publicity, there appears to be no editorials where the gravity of the crime was discussed or where the guilt or innocence of the

defendant was in any way discussed. In all of the news coverage reviewed by the court, there was little or no evidence of anything but dispassionate coverage of the homicide, the arrest of the defendant and news of the various hearings held.

Trial Transcript, pp. 518-19.

The petitioner requested, in this proceeding, that he be granted an evidentiary hearing on the pretrial publicity issue. The Court found no merit in the petitioner's argument that he was deprived of a full and fair hearing by the trial court's denial of his request for a community opinion survey. The Court also found unpersuasive the petitioner's allegation that the prior hearing was inadequate due to the trial court's failure to conduct an opinion survey of the jury pool to determine the extent of juror bias. The trial court conducted an evidentiary hearing where numerous media representatives were extensively questioned. No evidence was shown of prejudicial or inflammatory publicity. The record reflects that the publicity in this case was not "extreme" because there was no evidence that the media reporting was inflammatory or excessively prejudicial. *See Harris v. Pulley*, 885 F.2d 1354, 1361 (9th Cir. 1993); *see also Jeffries v. Blodgett*, 5 F.3d 1180, 1189 (9th Cir. 1993). The Court has found no authority requiring that a request for an opinion survey must be granted under these facts.

The petitioner alleges that his claim of "presumed prejudice" is supported by the existing record. In *Harris* the court held that "[p]rejudice is presumed when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime." *Id.* at 1361. This holding was clarified in *Jeffries*, where the court observed, that "[c]ourts rarely find presumed prejudice because

'saturation' defines conditions found only in extreme situations." *Jeffries*, 5 F.3d at 1189 (citing *Harris*, 885 F.2d at 1361). The petitioner contends that this case satisfies the "extreme situations" condition because of the extensive media coverage of the murder, coupled with the numerous people in the community who knew either the victim or the defendant.

The petitioner also claims that the record supports his claim of actual prejudice. Actual prejudice is shown if "the jurors demonstrated actual partiality or hostility that cannot be laid aside." *Jeffries*, 5 F.3d at 1189 (citing *Harris*, 885 F.2d at 1361). Petitioner contends that actual prejudice is established because several jurors were dismissed because they had formed opinions about the case, and his attorneys were unable to effectively remove all jurors with preconceived opinions because they exhausted all their peremptory challenges.

The record reflects that these two allegations of prejudice – presumed and actual – were extensively considered by the trial court at an evidentiary hearing. The Idaho Supreme Court concluded, on appeal, that the trial court's factual determination was supported by the record. This Court agrees. The record of the evidentiary hearing indicates that the trial court carefully considered the nature of the publicity surrounding this case. While finding that the pretrial publicity was extensive, the trial court concluded that the publicity was factual in nature, rather than prejudicial or inflammatory. Thus, the record does not support a claim of "presumed prejudice." In addition, the record of the jury voir dire reflects that the jury was not adversely affected by the publicity; each of the jurors gave assurances as to their impartiality as well as to their ability to judge the case as presented. As a result, there is no compelling evidence of "actual prejudice." *See Murphy v. Florida*, 421 U.S. 794 (1975) (it is

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sufficient that the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court). The fact that petitioner used all his peremptory challenges does not support a finding that the jury was biased.

In conclusion, the petitioner has failed to persuade this Court that the trial court erred in concluding there was no presumed prejudice to the petitioner due to prejudicial or inflammatory pre-trial publicity. The petitioner has presented no additional evidence which establishes that a community opinion survey was warranted. The petitioner's use of all peremptory challenges, in and of itself, does not indicate actual prejudice of the jury, when the jury voir dire clearly demonstrated no prejudice on the part of the chosen jurors. In short, the petitioner has failed to state a constitutional violation which entitles him to relief.

B. Claim 2.

The petitioner alleges that the statutory aggravating factor relied upon by the trial court in imposing the death penalty is unconstitutionally vague. In Idaho, the legislature has attempted to satisfy the requirements of the Eighth and Fourteenth Amendments, as applied to the imposition of the death penalty, through the adoption of I.C. § 19-2515. This statute attempts to channel the sentencer's discretion by requiring that the sentencing judge, after receiving evidence and argument in aggravation and mitigation, not impose a sentence of death unless at least one of the ten statutorily-identified aggravating circumstances is found to exist beyond a reasonable doubt, and each aggravating circumstance so found, when considered individually, outweighs all of the mitigating circumstances, considered collectively. I.C. § 19-2515(e)-(h). The petitioner contends that the aggravating circumstance relied upon by the trial

court, authorizing the imposition of the death penalty where "the murder was especially heinous, atrocious or cruel, manifesting exceptional depravity," I.C. § 19-2515(h)(5), is unconstitutionally vague. Relying upon a decision of the Eighth Circuit Court of Appeals, *Moore v. Clarke*, 904 F.2d 1226 (8th Cir. 1990), the petitioner contends that the Idaho Supreme Court's attempt to save the statutory aggravating factor from a vagueness challenge by adopting a narrow interpretation of the statute is insufficient to pass constitutional muster. These same arguments have been raised before this Court in *Hoffman v. Arave*, 73 F.Supp.2d 1192 (D. Idaho 1998). In that case, the Court analyzed the current case law, including *Moore*, and determined the limiting language to be sufficient.

In *Arave v. Creech*, 507 U.S. 463 (1993), the Supreme Court reaffirmed the principle that in order to satisfy the Eighth and Fourteenth Amendments, a capital sentencing scheme must "suitably direc[t] and limi[t]" the sentencer's discretion "so as to minimize the risk of wholly arbitrary and capricious action." *Creech*, 507 U.S. at 470 (citing *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990) (quoting *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.))). In addition the State must "channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death." *Jeffers*, 497 U.S. at 774 (quoting *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion)). It is also well established that the objective standards must narrow the class of people eligible for the death penalty. *See Jeffers*, 497 U.S. at 776; *see also Zant v. Stephens*, 462 U.S. 862, 877 (1983).

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The adequacy of statutory aggravating factors in establishing clear and objective criteria for limiting the sentencer's discretion has been closely scrutinized by both state and federal appellate courts. In *Walton v. Arizona*, 497 U.S. 639 (1989), the Supreme Court outlined federal review of aggravating factors as follows:

When a federal court is asked to review a state court's application of an individual statutory aggravating or mitigating circumstance in a particular case, it must first determine whether the statutory language is itself too vague to provide any guidance to the sentencer. If so, then the federal court must attempt to determine whether the state courts have further defined the vague terms and, if they have done so, whether those definitions are constitutionally sufficient, *i.e.*, whether they provide *some* guidance to the sentencer.

Walton, 497 U.S. at 654.

The heinous aggravating factor, delineated in I.C. §19-2515(h)(5), and relied upon by the sentencing court in this case, has been scrutinized under this standard and found wanting. In *Maynard v. Cartwright*, 486 U.S. 356 (1988), the United States Supreme Court found that the "especially heinous, atrocious, or cruel" aggravating factor was too vague, on its face, to provide the required guidance for the sentencer, so that it can only pass constitutional muster if appropriately limited by the state courts. The facial invalidity of the "especially heinous, atrocious, or cruel" aggravating factor is overcome by the limiting construction supplied by the Idaho Supreme Court in *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981). In *Osborn*, the court held that in order to apply the heinous aggravating factor, "the murder must be

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accompanied by acts setting it apart from the norm of murders and that its commission manifests such depravity as to offend all standards of morality and intelligence." *Osborn*, 102 Idaho at 419, 631 P.2d at 201.

Relying upon the *per curiam* decision of the United States Supreme Court in *Shell v. Mississippi*, 498 U.S. 1 (1990), the petitioner contends that the *Osborn* decision does not appropriately narrow the heinous aggravating factor. In *Shell*, the Court remanded a petitioner's death sentence for resentencing because the limiting instruction given to the sentencing jury in an attempt to clarify the "especially heinous, atrocious, or cruel" aggravating factor was not constitutionally sufficient. *Id.* The limiting instruction found by the Court to be inadequate advised the sentencing jury that, "the word heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of[,] the suffering of others." *Shell*, 498 U.S. at 2. While it is true that the limiting guidelines of *Osborn* contain many of the definitions of the instruction found to be inadequate in *Shell*, the decision in *Osborn* further restricted the application of I.C. § 19-2515(h)(5) to those cases "where the actual commission of the capital felony was *accompanied by such additional acts* as to set the crime apart from the norm of capital felonies – the *conscienceless or pitiless crime which is unnecessarily torturous to the victim.*" *Osborn*, 102 Idaho at 418, 631 P.2d at 200. (emphasis added). This language has been found by the United States Supreme Court to provide adequate guidance to the sentencing court applying the heinous aggravating factor. *Proffitt v. Florida*, 428 U.S. 242, 255-56 (1976). Thus, the limiting construction of the

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"especially heinous, atrocious, or cruel" aggravating factor provided by the Idaho Supreme Court in *Osborn* is clearly distinguishable from the limiting jury instruction found inadequate in *Shell*.⁵

The petitioner makes the further argument that, based on an analysis of Idaho cases in which the heinous aggravating factor was applied by sentencing courts, it is evident that the limiting construction provided in *Osborn* is inadequate because of its inconsistent application. However, such a case-by-case analysis of Idaho cases to determine whether the *Osborn* limiting construction has been consistently applied is not within the purview of this Court. In *Creech*, the United States Supreme Court held that "a federal court may consider state court *formulations* of a limiting construction to ensure that they are consistent. But our decisions do not authorize review of state court cases to determine whether a limiting construction has been

⁵ The *Shell* decision is distinguishable for another reason. In *Shell*, the limiting construction of the statutory aggravating factor found to be inadequate was contained in a jury instruction, since the decision whether to impose the death penalty in Mississippi is made by the jury. In Idaho, the state district court is charged with that responsibility. As the Supreme Court explained in *Walton*, that is a critical distinction:

When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facts of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. That is the import of our holdings in *Maynard* and *Godfrey*. But the logic of those cases has no place in the context of sentencing by a trial judge. Trial judges are presumed to know the law and to apply it in making their decisions. If the Arizona Supreme Court has narrowed the definition of the "especially heinous, cruel or depraved" aggravating circumstance, we presume that Arizona trial judges are applying the narrower definition. It is irrelevant that the statute itself may not narrow the construction of that factor.

Walton, 497 U.S. at 653-54.

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applied consistently." *Creech*, 507 U.S. at 477. At the heart of this view is the acknowledgment that whether a state trial court has properly applied the decisions of a state appellate court which construe and apply a state statute is fundamentally a question of state law. It is well established that federal habeas relief does not lie for errors of state law. *Jeffers*, 497 U.S. at 780 (habeas review of the state court's application of a constitutionally narrowed aggravating factor is limited to a determination whether the state court finding was arbitrary or capricious so as to constitute an independent due process violation). The petitioner's argument appears to be an invitation for the Court to engage in just such an improper review to determine whether the Idaho trial courts have properly applied the *Osborn* limiting construction. The petitioner has not shown that the limiting construction of the aggravating factor is unconstitutional, and this Court is therefore required, under *Walton*, to presume that the trial court applied this factor in accordance with the language of the narrowing construction of the "especially heinous, atrocious or cruel" aggravating factor.

Finally, the petitioner contends that this Court should not rely upon the *Osborn* decision's limiting construction of I.C. § 19-2515(h)(5), because of its reliance upon *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), a decision of the Nebraska Supreme Court since called into question by the Eighth Circuit Court of Appeals in *Moore*, 904 F.2d 1226. However, the Court is not persuaded that the *Moore* decision creates any serious question as to the continuing vitality of *Osborn*.

In *Osborn*, the Idaho Supreme Court, recognized that the statutory aggravating factor stated in I.C. § 19-2515(h)(5) contained two concurrent requirements. First, the statute

requires that the murder have been "especially heinous, atrocious or cruel." Second, the statute also requires that the murder have "manifested exceptional depravity." In trying to place a limiting construction upon the statutory aggravating factor embodied in I.C. § 19-2515(h)(5), the Court looked first to the Florida Supreme Court's construction of the "especially heinous, atrocious or cruel" language in *State v. Dixon*, 283 So.2d 1 (Fla. 1973), and adopted the following language from that decision:

It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies – the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Osborn, 102 Idaho at 418, 631 P.2d at 200 (quoting *Dixon*, 283 So.2d at 9). In adopting this definition of "heinous, atrocious, or cruel," the Idaho Supreme Court also noted that this limiting construction was approved by the United States Supreme Court in *Proffitt*, 428 U.S. at 255-56.

In attempting to define "exceptional depravity," the Court in *Osborn* then turned to the *Simants* decision. In *Simants*, the Nebraska Supreme Court confronted a statutory aggravating factor which required that the murder have "manifested exceptional depravity by ordinary standards of morality and intelligence." Finding a parallel between that language and the

"exceptional depravity" language of the Idaho statute, the Court in *Osborn* adopted the following explanation from the *Simants* decision:

In interpreting this portion of the statute, the key word is "exceptional." It might be argued that every murder involves depravity. The use of the word "exceptional," however, confines it only to those situations where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence.

Osborn, 102 Idaho at 418, 631 P.2d at 200 (quoting *Simants*, 250 N.W.2d at 891).

The petitioner is correct in asserting that the *Moore* decision clearly calls into question the *Simants* decision which the Idaho Supreme Court relied upon in *Osborn*. In *Moore*, the Eighth Circuit Court of Appeals looked at the limiting construction adopted by the Nebraska Supreme Court, including the decision in *Simants*, and held that "the body of law developed by the Nebraska Supreme Court construing the challenged statute provides insufficient guidance to a sentencing body called upon to determine whether a particular murder 'manifested exceptional depravity.'" *Moore*, 904 F.2d at 1233. However, the *Moore* decision does not have the same effect on the decision of the Idaho Supreme Court in *Osborn*.

As noted above, the *Osborn* court relied upon *Simants*, not to construe the entire provision of the I.C. § 19-2515(h)(5) aggravating factor, but only to explain and interpret that portion of the statute which required that the murder "manifest exceptional depravity." While the *Simants* construction of "manifesting exceptional depravity" may be inadequate to pass constitutional muster when applied to that language, standing alone as an aggravating factor, it

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is not inadequate when applied to similar language which makes up only one part of an aggravating factor. This is particularly so, when the balance of the language employed in the statutory aggravating factor - that the murder be heinous, atrocious, or cruel - has been defined and limited by the Idaho Supreme Court in language which has been found by the United States Supreme Court to provide adequate guidance to the sentencing court. For this reason, the Court declines the petitioner's invitation to strike down the limiting construction in *Osborn*, based upon the decision of the Eighth Circuit in *Moore*.

In summary, the petitioner has not shown that the limiting construction of the "heinous, atrocious or cruel, manifesting exceptional depravity" aggravating factor provided in *Osborn* is inadequate to provide adequate guidance to the sentencing court and avoid the arbitrary imposition of the death penalty. The Court is persuaded that the *Osborn* limiting construction is distinguishable from the limiting construction rejected by the United States Supreme Court in *Shell*. The Court also rejects the petitioner's argument that the limiting construction provided in *Osborn* is inadequate because of its inconsistent application. Finally, the Court does not accept petitioner's argument that *Osborn* has in some way been overturned or called into question by the Eighth Circuit's decision in *Moore*. For all of these reasons, the Court concludes that the petitioner's challenge to I.C. § 19-2515(h)(5) must be rejected.

C. Claim 3.

In this claim, the petitioner alleges that even if the heinous aggravating factor is not unconstitutionally vague, the trial court's finding that the murder was heinous, atrocious or cruel, manifesting exceptional depravity, was not supported by the evidence and thus violates

the petitioner's rights under the Eighth and Fourteenth Amendments. *Memorandum in Support of Motion for Summary Judgment, filed 2-18-97, p. 18.* In its findings, the trial court found the victim had sustained multiple stab wounds, several of which could have been the cause of death; there were multiple slash wounds which appeared to be wounds inflicted while the victim attempted to ward off the knife attack; and as part of the attack which caused her death or as part of its aftermath, sexual organs were removed from her body. *Findings of Fact in Support of the Death Penalty, December 19, 1985, p. 21.* The petitioner alleges that these three findings in support of the heinous aggravating factor are inappropriately applied, and the heinous aggravating factor is subject to a narrow construction which precludes consideration of several findings relied upon by the trial court in imposing the death penalty. First, the petitioner argues that there was no evidence to support the finding that the mutilation of the sexual organs occurred prior to death; thus, it was inappropriate to use this finding to support the application of the heinous aggravating factor.⁶ Second, the petitioner contends that the presence of multiple stab wounds supports an impulsive killing rather than a premeditated first degree murder. Finally, the petitioner argues that the defensive wounds noted by the trial

⁶ A finding of post-mortem mutilation would support the application of the utter disregard aggravating factor, but not the heinous aggravating factor. The heinous aggravating factor concerns the manner in which the murder was committed, while the utter disregard factor concerns the state of mind of the murderer. *State v. Fain*, 116 Idaho 82, 99, 774 P.2d 252, 269 (1989). Consistent with this distinction the Idaho Supreme Court has upheld the use of a post-mortem wound as a finding that supports the utter disregard aggravating factor. *See State v. Wood*, 132 Idaho 88, 104, 967 P.2d 702, 718 (1998). On the other hand, the Florida Supreme Court, in interpreting its nearly identical statute, has held that post-mortem mutilation cannot form the basis for applying the heinous aggravating factor. *Halliwell v. State*, 323 So.2d 557, 561 (Fla. 1975). For the purposes of this decision, the Court will assume that post-mortem mutilation would not support the application of the heinous aggravating factor.

court suggest that she fought back, when the fact of the defenselessness of the victim was used to narrow the imposition of the heinous, atrocious or cruel aggravating factor. After reviewing the applicable standard of review, the Court will consider each of the petitioner's arguments.

Federal habeas corpus relief does not lie for errors of state law, and "federal habeas review of a state court's application of a constitutionally narrowed aggravating circumstance is limited, at most, to determining whether the state court's finding was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation." *Jeffers*, 497 U.S. at 780 (citations omitted). The standard of review for determining whether a state court's application of its constitutionally adequate aggravating circumstance was so erroneous as to raise an independent due process or Eighth Amendment violation is the "rational fact finder" standard established in *Jackson v. Virginia*, 443 U.S. 307 (1979):

Where a federal habeas corpus claimant alleges that his state conviction is unsupported by the evidence, federal courts must determine whether the conviction was obtained in violation of *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), by asking "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Jeffers, 497 U.S. at 781 (citing *Jackson*, 443 U.S. at 319).

In *Jackson*, the Supreme Court explained its reasoning in adopting the "rational fact finder" standard as follows:

This familiar standard gives full play to the responsibility of the trier of fact fairly

to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution.

Jeffers, 497 U.S. at 782 (quoting *Jackson*, 443 U.S. at 319 (footnote omitted)).

These considerations apply with equal force to federal habeas review of a state court's finding of aggravating circumstances. *Jeffers*, 497 U.S. at 782. "Although aggravating circumstances are not 'elements' of any offense, the standard of federal review for determining whether a state court has violated the Fourteenth Amendment's guarantee against wholly arbitrary deprivations of liberty is equally applicable in safeguarding the Eighth Amendment's bedrock guarantee against the arbitrary or capricious imposition of the death penalty." *Id.* (citations omitted). Like findings of fact, state court findings of aggravating circumstances often require a sentencer to "resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id.* at 782 (quoting *Jackson*, 443 U.S. at 319). The *Jackson* standard applies even when the federal court reviews the decision of a state appellate court that has independently reviewed the evidence:

If a State's aggravating circumstances adequately perform their constitutional function, then a state court's application of those circumstances raises, apart from due process and Eighth Amendment concerns, only a question of the proper application of state law. A state court's finding of an aggravating circumstance in

a particular case - including a de novo finding by an appellate court that a particular offense is "especially heinous . . . or depraved" - is arbitrary or capricious if and only if no reasonable sentencer could have so concluded. Indeed, respondent agrees that "a state court's 'especially heinous . . . or depraved' finding, insofar as it is a matter of state law, is reviewable by the federal courts only under the 'rational factfinder' rule of *Jackson v. Virginia*.

Jeffers, 497 U.S. at 782.

The finding by the trial court concerning the petitioner's infliction of numerous wounds on the victim - some of which may have been post-mortem, some of which may have been defensive wounds, and some of which may have been impulsive - is one that a rational fact finder could have made. In light of the Idaho Supreme Court's narrowing construction of the "especially heinous . . . or depraved" aggravating circumstance,⁷ and construing all the evidence in a light most favorable to the respondent, the trial court could reasonably have concluded that the petitioner committed the murder in an "especially heinous . . . or depraved manner." This conforms to the standard set forth in *Jackson*. As a result, the petitioner has not alleged a violation which entitles him to relief on the facts presented.

D. Claim 5.

In this claim, the petitioner alleges he was denied his due process rights guaranteed

⁷ As discussed above, in the analysis of Claim 2, the Idaho Supreme Court has narrowly limited the heinous aggravating factor so that for the factor to apply, "the murder must be accompanied by acts setting it apart from the norm of murders and that its commission manifests such depravity as to offend all standards of morality and intelligence." *Osborn*, 102 Idaho at 419, 631 P.2d at 201.

under the Fifth and Fourteenth Amendments to the Constitution because the State failed to disclose certain exculpatory and material evidence. The petitioner requested an evidentiary hearing on this claim which was denied by this Court.

The petitioner argues that three items of exculpatory evidence were withheld by the State; evidence that one of its witnesses had formed a belief based on voice comparisons that the caller known as "Mike Jenkins" was not the petitioner, evidence that the forensic pathologist who examined Danette Elg's body suspected that her cat may have caused post-mortem damage to her body, and the existence of certain tests tending to identify the murder weapon with the knife which slashed Elg's bed.

1. Identity of "Mike Jenkins."

Prior to the discovery of Danette Elg's body, two phone calls were made to the police department by an individual calling himself "Mike Jenkins." These calls were received by police dispatchers Lisa Pugmire and Theta Duchscher. In each of the two phone calls "Mike Jenkins" expressed an interest in the investigation and attempted to provide detailed information regarding the homicide of Danette Elg. At trial, Pugmire and Duchscher testified as witnesses for the State. Pugmire testified about receiving the first phone call on July 19, 1984, described the nature of the phone call, and indicated that she knew the petitioner because he had worked at the auto body shop where she took her car for service. She also testified that she did not reveal her first name to Mike Jenkins. On cross-examination, Pugmire stated that when she was asked to identify the voice of the petitioner as "Mike Jenkins" she was not able to do so. *Trial Transcript, p. 868.* Duchscher testified about receiving the second call from

"Mike Jenkins," indicated that the caller spoke about an incident at Danette Elg's house, and relayed to the jury that the caller initially asked to speak with Pugmire by asking for "Lisa." *Trial Transcript, p. 873.* Duchscher was not asked on either direct or cross examination whether she could identify the voice.

At some point after the phone calls, Duchscher became a jailor and thus had contact with the petitioner while he was incarcerated during trial. Following the close of testimony, and prior to the final jury instructions, the petitioner's attorney informed the court that Duchscher had told the petitioner the previous evening that she had tried to identify his voice as being "Mike Jenkins" and was unable to do so. *Trial Transcript, pp. 2099-2100.*

Petitioner's counsel argued before the court that the fact that Duchscher had attempted to identify the voice and failed was exculpatory and should have been disclosed. The court held that the matter of voice identification was solely for expert testimony; thus, Duchscher would not have been allowed to testify on any matter concerning voice recognition unless she was an expert.⁸ Following that ruling, the prosecutor noted that his office had questioned Duchscher regarding the voice identification on two occasions; once she was unable to identify the voice, the second time she thought the voice might belong to the petitioner.

According to the United States Supreme Court, the failure to disclose to the defense favorable evidence violates due process only if it "undermines confidence in the outcome of the trial." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). In *Kyles*, the United States Supreme

⁸ This ruling by the trial court seems inconsistent with Pugmire's testimony that she was unable to identify the voice of "Mike Jenkins" as the petitioner.

Court reiterated that the "touchstone" of materiality under *United States v. Bagley*, 473 U.S. 667 (1985), was "reasonable probability" of a different result. In *Bagley*, the United States Supreme Court held that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* at 682.

In the present case, the petitioner alleges the prosecutor's argument that the petitioner was, in fact, "Mike Jenkins" would not have been made if the information that Duchscher could not identify the voice as belonging to the petitioner had been disclosed. In addition, the petitioner argues that defense counsel was limited in his closing argument to merely stating, that the petitioner testified that he wasn't "Mike Jenkins" and was curtailed, by the failure of the prosecutor to disclose exculpatory information, from saying more. The Court disagrees. The inability of Duchscher to identify the petitioner's voice as that of "Mike Jenkins" does not constitute material evidence, and the prosecution's failure to disclose that information did not undermine confidence in the outcome of the trial. At best, Duchscher's potential testimony would have been the same as Pugmire's testimony regarding her inability to identify the voice. If anything, Duchscher's potential testimony would have been less persuasive than Pugmire's testimony, since Pugmire testified that she knew the petitioner prior to receiving the first call, and was, nevertheless, unable to identify the voice as belonging to the petitioner. Pugmire's testimony did not prevent the prosecutor from implying that the calls from "Mike Jenkins" came from the petitioner. Nor did Pugmire's testimony persuade defense counsel to argue that

a woman who knew the petitioner, at the time the call was made, was unable to identify his voice as that of "Mike Jenkins."⁹ *Trial Transcript*, pp. 2165-2206. Testimony by Duchscher that she could not identify the voice of "Mike Jenkins" as belonging to the petitioner does not constitute favorable material evidence, and the failure of this information to be presented to the jury does not create a reasonable probability that the outcome would have been different. *See Bagley*, 473 U.S. at 675. As a result, the failure of the prosecution to disclose this evidence does not constitute a violation of the petitioner's due process rights or undermine confidence in the trial.

2. The cat.

At the petitioner's post-conviction hearing, it was disclosed to the petitioner that the forensic pathologist who examined Danette Elg's body believed that some of the post-mortem damage may have been caused by her cat. The primary evidence in the record comes in the form of a question from the prosecutor to the petitioner at the hearing. *Transcript of Post-*

⁹ As part of his closing argument, defense counsel made the following statement about the identity of Mike Jenkins:

Now, the Mike Jenkins' calls. Rick testified that it wasn't him. If it wasn't him and he denies it, what else can he say? How can you explain it any further than that? It wasn't him. There is no indication in the evidence that it was. It's speculation on the part of State [sic] that it was Rick. Speculation isn't sufficient to meet the burden beyond a reasonable doubt. You've got to have more than speculation, and there's no evidence indicating that that call was from Rick Leavitt. The killer made the call. Maybe. I suspect the killer did. No indication that that couldn't have been someone else with the same knowledge of the facts as Rick may have had.

Trial Transcript, pp. 2197-98.

Conviction Hearing, 4-23-87, p. 117. During his lengthy testimony at trial, the examining pathologist, Dr. Ramsey, made no mention of the cat's presence in the victim's house causing any post-mortem damage. *Trial Transcript, pp. 1065-1120.*

The petitioner alleges that the possibility that the cat contributed to some degree to the mauling of the victim was exculpatory with respect to both the guilt and sentencing phases of the trial. The petitioner further alleges that the trial court was affected by the degree of mutilation of the body when imposing the sentence. In support of these allegations, the petitioner points to the comments of the court at the time of the imposition of the death penalty:

It became the unpleasant duty of the Court to view the graphic photographs of Danette Elg, the deceased victim in this case.

....

It is difficult to conceive of any circumstance that would outweigh the picture presented to the Court of the crime scene.

....

To attempt to view this scene leaves one with a disgusted sick feeling.

Findings, Conclusion and Order, pp. 21, 22, 31, 32.

The petitioner alleges that the pathologist's testimony would have assisted him in his motion to exclude the autopsy photographs because the testimony would have undermined the relevance of the photos to the murder.¹⁰ Exclusion of these photographs, it is argued, would

¹⁰ The petitioner's allegation that the trial court improperly admitted photographs of Ms. Elg's wounds is discussed in claim 7.

undermine the confidence in the outcome of the trial. *See Bagley*, 473 U.S. at 667. The Court is not persuaded by the petitioner's allegation that the disclosure of evidence of post-mortem damage to Elg by her cat would have been exculpatory. The record indicates that during the course of the attack Danette Elg was stabbed once above the right eye, six times across the chest, several of those wounds penetrated her vital organs, and she had wounds on her extremities. Elg was disemboweled; her sexual organs were removed. In addition, at the time of the discovery of her body, she had been lying in water for several days in a very warm house on the remains of a damaged waterbed mattress. At the time of the autopsy, her body was badly decomposed, putrefied, and bloated. The uncontroverted testimony at trial was that all of the nine stab wounds and five incised wounds, as well as the disemboweling were done by someone with a knife. Obviously Elg was neither disemboweled nor stabbed by the house cat. In addition, the record also reveals that the photographs admitted into evidence focused on the knife wounds sustained by the victim, and the relation of the victim's body to the bedroom. The trial court was careful to include only those photographs which were relevant to the knife wounds. Finally, a review of the entire transcript of the sentencing indicates that the trial court's statements quoted by the petitioner in support of this claim need to be considered in the context of the entire sentencing procedure. When considered in that light, those statements appear to be a natural and appropriate reaction to a capital crime which, by its very nature, is often heinous, atrocious, and exceptionally depraved. Based on the record before the Court, the allegations of the petitioner do not entitle him to relief on this issue.

3. Untimely disclosure of murder weapon identification test

During the trial, the State called Don Wyckoff, a criminalist with the State Forensic Lab, to testify regarding blood spatter patterns and cuts on the victim's waterbed sheet. Apparently the sheet contained both straight and oval shaped cuts, and the prosecution was attempting to tie both types of cuts to the murder weapon. That morning, Wyckoff had conducted an experiment with a sheet to confirm his theory as to how the cuts were made by the murder weapon. Using a roast to simulate Elg's body under a sheet, Wyckoff determined that the oval cuts were made when the murder weapon stabbed Elg while she was under the sheet. The petitioner objected to the experiment and argued that the test should have been disclosed. The trial court then took the matter up in chambers, where the prosecutor noted that he understood the duty to disclose evidence, but stated that he did not disclose the tests earlier because they had only been performed that morning. The prosecutor further noted that Wyckoff could testify to the same theory without conducting the experiment and contended that the petitioner had known about the different types of cuts on the sheets and could have found its own expert to perform various tests on the sheets. The trial court permitted Wyckoff to testify, stating:

It's really not that type of evidence that interjects any great degree of surprise. There is some previous evidence that the State feels that they must answer, and I think it is appropriate. In one sense, I think it's making a to-do out of not very much.

Possibly they may feel that they may need to answer this, and it's - I'll allow the State to ask a hypothetical in regard to the question that they seek to get

an answer to. The case is going to go over the weekend several days. If the Defendant wants to do any experimenting themselves - I don't know if it takes an expert, anyone could perform the experiment. So, the evidence will be made available to the Defendant to make whatever experiment or trial or whatever they want to do.

The Court feels that there's plenty of time to do whatever you feel you need to do to check out what they say is the case. So, the Court will allow it.

Trial Transcript, p. 1309.

The petitioner argues that the delay in conducting the experiments and the failure of the trial court to either exclude Wyckoff's testimony or grant a continuance substantially prejudiced the petitioner. The petitioner contends that pretrial disclosure rules required that the State conduct and disclose the results of the experiment prior to trial. In the alternative, petitioner contends that the trial court was required to grant a continuance because an expert was needed to assess the validity of Wyckoff's experiment.

On appeal, the Idaho Supreme Court held that there had been no violation of the state discovery rules. *See Leavitt I*, 116 Idaho at 290, 775 P.2d at 605. While this Court is bound, on habeas review, by Idaho's interpretation of its own rules, that interpretation may have federal constitutional significance. *Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991). Although the evidence at issue was inculpatory, rather than exculpatory, late disclosure of inculpatory evidence may render a trial fundamentally unfair, and thus, violative of the petitioner's due process rights. *Lindsey v. Smith*, 820 F.2d 1137, 1151 (11th Cir. 1987)

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(quoting *Machin v. Wainright*, 758 F.2d 1431, 1434 (11th Cir. 1985)). However, "habeas relief is justified only upon a showing that the impairment to the defense affected the outcome of the trial." *Lindsey*, 820 F.2d at 1151. In this case the petitioner had time to conduct tests and respond to the evidence prior to the end of the trial. The petitioner has not shown what additional testing might have been done by an expert or how such testing and expert testimony would have been exculpatory. As such, the petitioner has failed to show that he was prejudiced by the untimely disclosure. The untimely disclosure of the experiment did not violate the petitioner's due process rights.

4. Conclusion

In summary, the Court has considered the petitioner's contention that the evidence at issue in this claim was material and the failure to disclose said evidence was a constitutional violation under *Kyles* and *Brady v. Maryland*, 373 U.S. 83(1963). The Court has reviewed the record and relevant case law, and concludes that the undisclosed evidence – the voice identification by Duchscher, and the alleged mutilation caused by the cat – lack any materiality or exculpatory value which might have caused an unreliable verdict. Likewise, the petitioner has failed to show that the trial court's denial of his request for a continuance to respond to the Wyckoff testimony deprived him of the opportunity to obtain expert, exculpatory evidence. The petitioner's claim for relief is therefore denied.

E. Claim 6.

In this claim the petitioner alleges that the State failed to preserve evidence taken from the crime scene and Ms. Elg, and this evidence was used against the petitioner in violation of

his due process rights under the Fourteenth Amendment. The Blackfoot Police Department collected samples of blood from the crime scene and sent the samples to the state laboratory. The tests performed at the state laboratory indicated that the petitioner's blood was at the crime scene, and that it had been deposited contemporaneously with Ms. Elg's blood. The record indicates that the samples were sent to California after being tested in Idaho, and the laboratory in California did not find the sample usable. *Trial Transcript, p. 305*. For this reason, the samples were not preserved and were not available for subsequent testing by the defense. The police also had an autopsy performed on Ms. Elg; the samples taken from her body were not preserved.

Prior to trial, the petitioner filed a motion to exclude evidence of the tests which the State had performed on the blood. The trial court dealt with this motion twice, first on July 15, 1985, and then on September 13, 1985, prior to reading preliminary instructions to the seated jurors. The petitioner argued that, although he could not point to any exculpatory evidence which might have been obtained by re-testing the blood samples, the State's failure to preserve the samples prevented him from conducting his own tests to determine whether he had a basis to challenge the State's evidence. The petitioner did not allege that the failure to preserve the blood samples was the result of bad faith, stating ". . . we are not suggesting it was an intent thing. We are not suggesting that the State meant to do that to intentionally stop us from completing those examinations." *Trial Transcript, pp. 302-303, & 307*.

The trial court denied the petitioner's motion to exclude the evidence of the State's testing, stating "there is in the record an indication that there will be a witness come on for the

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State that the Defendant in this case made a statement to an officer to the effect that he wanted to explain why his blood was at the premises." *Trial Transcript, p. 415*. The trial court found the petitioner's argument that the evidence might be exculpatory was flawed because there was already evidence to place his blood at the scene. The petitioner then argued that retesting the blood samples could be exculpatory if it showed that his blood was not deposited at the scene at the same time as Ms. Elg's blood. The trial court then held " I think that's the case here, that reasonable minds would not differ that there's no - any type of substantial evidence at all that there could be any exculpatory basis for the problem that you present." *Trial Transcript, p. 418*. At trial a serologist testified that tests showed convincingly that the blood samples taken from Ms. Elg's house were a mixture of Elg's blood and the petitioner's blood and supported the conclusion that the two types of blood had been deposited contemporaneously. *Leavitt I*, 116 Idaho at 289, 775 P.2d at 603. On appeal the Idaho Supreme Court held that the "bare assertion of the defendant that additional blood samples may somehow have been exculpatory" was not persuasive, and it was "incumbent upon a defendant to demonstrate such exculpatory value." *Leavitt I*, 116 Idaho at 290, 775 P.2d at 604 (citing *United States v. Scott*, 789 F.2d 795 (9th Cir. 1986)).

The United States Supreme Court has long interpreted the standard of fundamental fairness, implicit within the Due Process Clause of the Fourteenth Amendment, as requiring that criminal defendants be afforded a meaningful opportunity to present a complete defense. *California v. Trombetta*, 467 U.S. 479, 485 (1984). To safeguard that right, the Court has developed "what might loosely be called the area of constitutionally guaranteed access to

evidence." *Id.* (quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982)). The purpose of this constitutional guarantee is to deliver exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system. *Id.* For example, in *Brady v. Maryland*, 373 U.S. at 87, the Court held that a defendant has a constitutionally protected privilege to obtain from the prosecution evidence that is either material to the guilt of the defendant or relevant to the punishment to be imposed. Even in the absence of a specific request, the prosecution has a constitutional duty to turn over exculpatory evidence that would raise a reasonable doubt about the defendant's guilt. *United States v. Agurs*, 427 U.S. 97, 112 (1976). If the evidence withheld is exculpatory and material, the defendant's rights are violated, "irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87.

A somewhat different, but analogous, problem arises where the evidence is only potentially exculpatory, but has been lost or destroyed by the prosecution. The problem was first considered by the Supreme Court in *Trombetta*. There, the Court was confronted with a claim that evidence of blood alcohol content based upon a breath-analysis test should not be admissible in a subsequent DUI prosecution where the state authorities had the ability to preserve the breath samples for later testing by defense experts, but failed to do so. In addressing this problem, the Court noted the difficulty of developing rules to deal with evidence destroyed through prosecutorial neglect or oversight:

Whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown

and, very often, disputed. Moreover, fashioning remedies for the illegal destruction of evidence can pose troubling choices. In nondisclosure cases, a court can grant the defendant a new trial at which the previously suppressed evidence may be introduced. But when evidence has been destroyed in violation of the Constitution, the court must choose between barring further prosecution or suppressing . . . the State's most probative evidence.

Id. at 486-87 (citations omitted). In light of these concerns, the Court concluded that the Due Process Clause of the Fourteenth Amendment does not require that law enforcement agencies preserve breath samples in order to introduce the results of breath-analysis tests at trial. In so holding, the Court noted that the state officials did not destroy the samples in a bad faith effort to circumvent their disclosure obligations under *Brady* and *Agurs*. *Id.* at 488. The Court further noted that the duty which the Constitution imposes upon the States to preserve evidence applies only to evidence that might be expected to play a significant role in the suspect's defense, and that the breath samples in question did not meet this "standard of constitutional materiality." *Id.* at 488-89. The Court's finding of a lack of constitutional materiality was based, in large part, on (1) the defendant's inability to demonstrate any real likelihood that the device used to make the breath analysis provided inaccurate results, and (2) the defendant's ability to demonstrate equipment malfunctions and operator errors without having the breath samples available. *Id.* at 489-90.

In *Arizona v. Youngblood*, 488 U.S. 51 (1988), the United States Supreme Court revisited the issue of the extent to which the Due Process Clause requires a State to preserve

evidentiary material that might be useful to a criminal defendant. In *Youngblood*, the defendant was charged with molesting a 10 year old boy. Following the assault, the boy's mother took him to the emergency room, where the physician collected fluid samples using a sexual assault kit. The physician also collected the boy's clothes, but did not properly store them for testing. The police collected the samples and clothes from the hospital. The samples failed to detect blood group substances which would have helped to establish the assailant's identity. Tests performed on the boy's clothes indicated the presence of semen, but could not establish the assailant's identity. At trial, the state criminologist and the defendant's expert witness testified that other tests could have been performed on the clothes and sexual assault kit after the attack. The defendant was convicted of child molestation, sexual assault and kidnaping. This conviction was overturned by the Arizona Court of Appeals which found that the destruction of evidence by the police denied the defendant due process. The Court of Appeals concluded, based on the expert testimony at trial, that the "timely performance of tests with properly preserved semen samples could have produced results that might have completely exonerated respondent." *Youngblood*, 488 U.S. at 55.

In reversing the decision of the Arizona Court of Appeals, the United States Supreme Court distinguished *Brady*, and its refusal to consider the good faith of the police in failing to disclose exculpatory evidence to the defense:

The Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady*, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process

Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. Part of the reason for the difference in treatment is found in the observation made by the Court in *Trombetta*, that "[w]henver potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed."

Id. at 57-58 (citations omitted). Given this difficulty, the Court concluded that requiring a showing of bad faith on the part of the police was appropriate, because such a requirement both:

[L]imits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.

Id. at 58. The Court therefore concluded that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process. *Id.*

In the present case, it is clear that the blood samples at issue here, like the breath samples in *Trombetta*, and the body fluid samples in *Youngblood*, were potentially exculpatory. There is no doubt that subsequent testing of the samples *might* have produced evidence that would be helpful to the defense. However, it is this precise uncertainty as to the exculpatory

nature of the evidence which led the Supreme Court to find in *Trombetta* and again in *Youngblood* that the destruction of the samples will only violate a defendant's due process rights if the prosecution has acted in bad faith. Since there is no allegation or proof of bad faith, the destruction of the blood samples did not violate the petitioner's due process rights.

The petitioner argues that *Youngblood* is factually distinguishable from this case because there the State did not introduce into evidence the results of any tests performed on the body fluid samples prior to their destruction, but instead relied upon the victim's identification of the defendant. In the present case the prosecution introduced the evidence and the expert testimony by the serologist to establish that the petitioner's and victim's blood were discovered mixed together at the crime scene.

The petitioner's attempt to distinguish *Youngblood* is not persuasive. The Court in *Youngblood* did note that the prosecution in that case did not attempt to introduce evidence at trial concerning the body fluid samples. However, that comment was made to show that its earlier holding in *Trombetta* should be extended to the facts before it, despite the fact that the body fluid samples in *Youngblood* had a greater potential for exonerating the defendant, than did the breath samples in *Trombetta*. Specifically, the Court stated that, "[i]n the present case, the likelihood that the preserved materials would have enabled the defendant to exonerate himself appears to be greater than it was in *Trombetta*, but here, unlike in *Trombetta*, the State did not attempt to make any use of the materials in its own case in chief." *Id.* at 56. This language may be fairly read to suggest that the Supreme Court would have been more willing to find a due process violation if the samples had been used at trial; however, nothing else in

the Court's decision suggests this conclusion. Thus, the Court's comment appears to be dicta.

Given the Court's refusal to exclude evidence derived from destroyed samples in *Trombetta*, the above-quoted language from *Youngblood* can only amount to more than dicta if it is read as creating a flexible, two-pronged test: If the destroyed evidence has minimal exculpatory value, as in *Trombetta*, then the defendant's due process rights are not violated, even if the evidence is admitted at trial; however, if the destroyed evidence has greater exculpatory value, as in *Youngblood*, then the destruction of the evidence would not violate the defendant's due process rights, but its admission as evidence at trial would. This is an unnecessarily complex and unworkable rule. To apply the test, the courts would have to undertake a case-by-case analysis of the potential exculpatory value of the destroyed samples, and then engage in an unguided process of determining whether the potential exculpatory value of the evidence is sufficient to justify exclusion of the evidence at trial. This was the precise difficulty – i.e., the "treacherous task of divining the import of materials whose contents are unknown and, very often, disputed," – which the Court in *Youngblood* indicated it was trying to avoid by focusing on the good or bad faith of the police as the critical factor in determining whether a due process violation has occurred. *Youngblood*, 488 U.S. at 57-58.

Even if the Court accepts the strained reading of *Youngblood* suggested by the petitioner, the potential exculpatory value of the blood samples here was much closer to the limited exculpatory value of the breath samples in *Trombetta*, than the substantial exculpatory value of the body fluid samples in *Youngblood*. The premise for the Court's observation in *Youngblood*, that the body fluid samples at issue in that case had greater exculpatory potential

than the breath samples at issue in *Trombetta*, was that the Arizona Court of Appeals "concluded on the basis of the expert testimony at trial that timely performance of tests with properly preserved semen samples could have produced results that might have completely exonerated respondent." *Id.* at 55. That was not the case in *Trombetta* and that is not the case here.

In *Trombetta*, the defendants sought the breath samples, not to obtain complete exoneration, but "to challenge incriminating test results produced with the Intoxilyzer." *Trombetta*, 467 U.S. at 488. Indeed the Court noted that "[a]lthough the preservation of breath samples might conceivably have contributed to respondents' defenses," the chances were "extremely low that preserved samples would have been exculpatory." *Id.* at 489. The same observation can be made here. Further testing of the blood samples could not have conclusively exonerated the petitioner, since other evidence indicated that his blood was at the scene of the crime. Rather, further testing might have enabled him to challenge the State's evidence that his blood was mixed with that of Ms. Elg. Thus, the destroyed samples here would have had an exculpatory value much more like that involved in *Trombetta*, i.e., permitting the defendant to challenge the State's own tests and evidence, but not providing any real hope of exoneration. Thus, even under the petitioner's reading of *Youngblood*, the destroyed evidence does not have the type of exculpatory potential that would have justified its exclusion at trial.

In summary, the State's destruction of the blood samples would only constitute a violation of the petitioner's due process rights, under *Youngblood*, if the blood samples were

potentially exculpatory *and* the prosecution acted in bad faith. While the samples may have had limited exculpatory potential, the petitioner has not alleged or shown that the State officials acted in bad faith in failing to preserve the samples. Thus, under *Trombetta* and *Youngblood*, the State's failure to preserve the blood samples, and the court's admission of evidence derived from those samples, did not violate the petitioner's due process rights.

F. Claim 7.¹¹

In this claim the petitioner alleges the trial court improperly admitted certain evidence during trial. First, the petitioner complains of the trial court's decision to admit the following "other acts" evidence:

- (1) testimony by his former wife that while hunting he had used a hunting knife to probe, cut out, remove, and dissect the sexual organs of a female deer, and had later showed a similar fascination with the sex organs of a male deer;
- (2) testimony from a woman with whom he had had an affair approximately two months prior to the murder in which he displayed a knife prior to their engaging

¹¹ The failure of the petitioner to raise all the claims in the state court, and the further failure to allege a claim of error under I.R.E. 404 did not subject him to procedural default in his habeas petition. This Court held that the claims asserted by the petitioner alleging trial error, and reviewable on the record, had not been defaulted under a state rule that constituted an independent state-law ground. The Court based that conclusion on a statement made by the Idaho Supreme Court in *Leavitt* that the court had "carefully reviewed the record for any indication of prejudicial error occurring at trial, regardless of whether or not error has been specifically asserted by the defendant." *Memorandum Decision on Procedural Default, filed 10-22-96* (citing *Leavitt I*, 116 Idaho at 288, 775 P.2d at 602). The respondent maintains that this claim is procedurally defaulted, but argues in the alternative that the evidence was properly admitted under Idaho Rule of Evidence 404(b).

in consensual sexual relations; and

- (3) testimony concerning his possession of two additional knives which he frequently carried on his person but which were not connected to the murder of Danette Elg.

Second, the petitioner alleges the trial court improperly admitted highly prejudicial photos of the decomposed body of Ms. Elg. Third, the petitioner alleges that the trial court improperly admitted a letter from the petitioner to his wife, written by the petitioner during trial, which discussed her trial testimony. Finally, the petitioner alleges the trial court improperly admitted statements of the victim. The Court will separately consider each of the petitioner's allegations that the trial court improperly admitted evidence during trial.

At the outset, the Court notes the standard which must govern its review of the trial court's decision to admit evidence. In reviewing evidentiary rulings by a state trial court upon a petition for habeas corpus relief, it is not within a federal court's province to consider whether such rulings violate state rules of evidence or procedure. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Rather, "[i]n conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Id.* at 68. The question then before this Court is whether the admission of the evidence by the state trial court violated the petitioner's federal constitutional rights.

1. "Other Acts" Evidence.

"Other acts" evidence is a term used to describe evidence of acts not directly related to the charges before the trial court. Such evidence may be "relevant to a fact of consequence,"

or it may be relevant only to prove the character of the defendant in order to show that the crime with which the defendant is charged would be consistent with that character. *McKinney v. Rees*, 993 F.2d 1378, 1380 (9th Cir. 1993). If used to show the defendant's character, such "other acts" evidence is not only impermissible under state rules of evidence, *see, e.g.*, Idaho R. Evid. 404(a), but is "contrary to firmly established principles of Anglo-American jurisprudence," *McKinney*, at 1380, and will render a defendant's trial fundamentally unfair in violation of the Due Process Clause of the Fourteenth Amendment if it "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 1385 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). On the other hand, if the "other acts" evidence is relevant to any issue in the case, it is not necessary to engage in a review of whether its admission violated the due process guaranteed by the Fourteenth Amendment. *Estelle*, 502 U.S. at 70 (declining to consider, on habeas review, whether the admission of evidence violated the Due Process Clause after finding that evidence of battered child syndrome was relevant to an issue in the case).

Typically, however, "other acts" evidence cannot be exclusively and neatly categorized as being either impermissible character evidence or permissible evidence relevant to an issue in the case. Evidence of "other acts" will often raise more than one inference – some permissible, some not. In that situation, we are instructed by the Ninth Circuit that the federal courts on habeas review must rely on the jury to sort out those inferences in light of the court's instructions. *See Jammal*, 926 F.2d at 920. "Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process." *Id.* Thus, the

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question before the Court is whether there were permissible inferences which the jury could draw from the "other acts" evidence admitted during the petitioner's trial.

Turning first to the evidence at trial that the petitioner displayed an excessive interest in the sexual organs of a female deer, it is important to precisely understand the testimony of the petitioner's ex-wife which was admitted by the trial court. Specifically, the petitioner's ex-wife, Kelly Schofield, testified that she was hunting with the petitioner, approximately two years prior to the murder, when she unexpectedly came upon the petitioner while he was field dressing a doe. She testified that she saw the petitioner put the knife into the doe's sex organs, twist it and pull it out. After the petitioner noticed her presence, he discontinued this activity. However, after he slit the deer open, he pulled out the sex organs, looked at them, and cut them open. When Schofield asked the petitioner what he was doing, he responded that he wanted to see how they worked. *Trial Transcript, p. 1151.*

At first blush, such evidence would seem irrelevant. However, that is not the case when the evidence is considered in the context of the other evidence at trial. The sexual organs of the victim, Danette Elg, were cut out and removed from the murder scene by the perpetrator. When the victim's body was discovered, there were no obvious signs that her body had been so mutilated, and the removal of the sexual organs was not discovered until the autopsy was performed. The pathologist who performed the autopsy testified that the victim's sex organs were removed through a relatively small incision, that it would be difficult to remove the organs in this manner, and that this manner of removal indicates that the perpetrator had some knowledge of anatomy. *Trial Transcript, p. 1118.* In short, the

pathologist's testimony provided a unique characteristic of the perpetrator, which made the petitioner's interest in and knowledge of the anatomy of female sexual organs highly probative on the issue of motive, identity, and opportunity.

The Idaho Supreme Court reached this same conclusion when this issue was raised on direct appeal. As the court indicated in upholding the trial court's admission of Ms.

Schofield's testimony:

The fact that certain evidence is horrifying and gruesome, is not in and of itself sufficient reason for exclusion. In the instant case the corpse of the victim had been brutalized by the removal of her sexual organs by a person who clearly had certain anatomical knowledge. That evidence tended to indicate that the defendant had a morbid and sadistic interest in sexual organs, had a knowledge of anatomy, a possible motive for the crime, and a modus operandi which tended to identify the defendant as the killer.

Leavitt I, 116 Idaho at 290, 775 P.2d at 604. This Court agrees, and concludes that this "other acts" evidence gave rise to a permissible inference which bears upon the issues of motive, identity and opportunity. As such, its admission did not violate due process. *Jammal*, 993 F.2d at 1384.

The petitioner also alleges that he is entitled to habeas relief because of the admission of "other acts" evidence in the form of testimony that he had an affair approximately 2 months prior to the murder in which he displayed a knife to his companion immediately prior to engaging in consensual sexual relations. It is again important to put this evidence into context.

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The testimony in question came from Barbie Rich, who was called by the defense to lay a foundation for the admission of a note which Rich had sent to the petitioner sometime prior to the murder.¹² On cross-examination, the prosecutor inquired, without objection from defense counsel, as to an incident, occurring roughly two months before the Elg murder, in which the petitioner displayed a knife to Rich prior to their engaging in sexual intercourse. *Trial Transcript, pp. 1645-46*. The prosecutor also established on cross-examination that the knife which the petitioner displayed was not the knife which the petitioner customarily carried and which had been ruled out as a possible murder weapon. *Trial Transcript, pp. 1244-45 & 1646*. Again, there was no objection from defense counsel. On appeal, the petitioner did not challenge the jury's consideration of the Rich testimony.

Again, the question before the Court is whether there are any permissible inferences which the jury could have drawn from the Rich testimony. *Jammal*, 926 F.2d at 920. It is clear that a defendant's access to a weapon capable of inflicting the fatal wounds in a murder case is probative on the issues of opportunity and the identity of the murderer. *McKinney*, 993 F.2d at 1383-84 & 1384 n.7. Here, the petitioner was linked to three knives. Two of the knives were common hunting or pocket knives, and the petitioner typically carried one or the other of these knives with him. *Trial Transcript, pp. 1153-54*. These knives had been ruled out as possible murder weapons. However, the third was a knife which the petitioner displayed to Rich two months before the Elg murder. This knife was never located and had

¹² The letter apparently provided indirect support for the petitioner's explanation as to how he received a cut requiring medical attention at or about the time of Danette Elg's death.

not been ruled out as a possible murder weapon. The prosecutor, during closing argument, used this evidence to suggest that the knife displayed to Barbie Rich may well have been the murder weapon. *Trial Transcript*, pp. 2158-59. Moreover, the fact that this third knife was displayed to Rich just prior to their engaging in sexual intercourse, adds some probative value to the evidence, given the mutilation of Danette Elg's sexual organs by her murderer. While this evidence may have been more prejudicial than probative under Idaho's evidence law, *see Idaho R. Evid. 403*, our only inquiry is whether the evidence is relevant. *See McKinney*, 993 F.2d at 1384. In other words, does it make a fact of consequence - the petitioner's opportunity to commit the crime and his identity as the murderer of Danette Elg - more probable. The Court concludes that it does. Since the jury could draw a permissible inference from this evidence, it necessarily follows that the petitioner has not stated a due process violation.¹³

Finally, the Court will consider the petitioner's claim that his due process rights were violated by the admission of testimony concerning his possession of two knives which he frequently carried on his person but were not connected to the murder of Danette Elg. The evidence on this issue was straightforward and limited. Kelly Schofield, as well as Detective Robinson, testified that the petitioner had two knives, one a folding knife and the other a hunting knife, and generally carried one or the other in a pouch or scabbard on his belt. *Trial*

¹³ Even if the Court were to conclude that this evidence was not directly relevant to an issue in the case, it could not conclude that the trial court's admission of the evidence, without objection from counsel, was "so prejudicial that it rendered the trial fundamentally unfair," *Walters v. Maass*, 45 F.3d 1355, 1357 (9th Cir. 1995), so as to violate the petitioner's due process rights. *See Kealohapauole v. Shimoda*, 800 F.2d 1463, 1465 (9th Cir. 1986).

Transcript, pp. 1153-54 & 1244-45. The prosecutor did not contend that either knife was used in the murder of Danette Elg, and one was affirmatively ruled out as the murder weapon. *Trial Transcript, pp. 1244-45 & 2158.* While the prosecutor referred to the petitioner during closing argument as having "a great fascination with knives," the primary focus of his argument was on the Barbie Rich incident and the petitioner's use of a knife to remove and dissect a deer's sexual organs. *Trial Transcript, pp. 2158-59.* The prosecutor made only a passing reference to the other knives which the petitioner possessed.

Here, the Court finds that evidence of the petitioner's possession of knives beyond the knife involved in the Barbie Rich incident was not relevant. The fact that he had knives in his possession which were clearly not involved in the murder, does not make it more likely that the petitioner murdered Danette Elg. However, that is not the end of the inquiry, since the admission of irrelevant evidence at trial only gives rise to habeas relief if it violates the petitioner's due process rights by depriving him of a fair trial. The Court is unpersuaded that the evidence relating to those knives,¹⁴ was "of such quality as necessarily prevents a fair trial," *Kealohapauole v. Shimoda*, 800 F.2d 1463, 1465 (9th Cir. 1986) (quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941)), or was "so prejudicial that it rendered the trial fundamentally unfair," *Walters v. Maass*, 45 F.3d 1355, 1357 (9th Cir. 1995). The evidence that the petitioner carried a knife with him on a regular basis was not, by itself, a primary focus of the State's case. While the prosecutor argued that the defendant had a "great

¹⁴ One of the knives was admitted into evidence over the objection of counsel, and the other knife was not offered into evidence but was referred to by Schofield, Robinson, and others during the trial.

fascination with knives," a review of the trial transcript makes clear that his focus in making this statement was almost exclusively on evidence which was relevant to critical issues in the case. For this reason, the Court is unpersuaded that this testimony deprived the petitioner of a fair trial or constituted a violation of his due process rights.

Finally, the petitioner argues that the trial court's admission of the "other acts" evidence requires the granting of habeas relief under the Ninth Circuit's decision in *McKinney*. The Court disagrees. In *McKinney*, the state trial court had admitted evidence in McKinney's trial on charges that he had murdered his mother by slitting her throat in January of 1984. The murder weapon was never identified and the fatal wounds could have been inflicted through the use of almost any knife. The evidence admitted at trial, of which the petitioner complained, consisted of evidence that he possessed a "Gerber" knife which was confiscated by the police before the murder, and a "Tekna" knife which he had in his possession in the fall of 1983, but which could not be conclusively shown to have been the murder weapon. The court in *McKinney* further characterized the evidence as follows:

There was also testimony that McKinney was proud of his "knife collection," that on occasion he strapped a knife to his body while wearing camouflage pants, and that he used a knife to scratch the words "Death is His" on the door to his closet in his dormitory room. The prosecutor questioned McKinney about his "fascination" with knives, and about whether he enjoyed looking at, talking about, and possessing knives. In his closing argument, the prosecutor described his case as concentrating on three things, one of which was "any knives the defendant may

have owned." He reiterated that the connection McKinney had to any knives that could have been used in this crime was important.

McKinney, 993 F.2d at 1382.

Upon habeas review, the Ninth Circuit Court of Appeals concluded that evidence regarding the Tekna knife was relevant because it showed that McKinney could have been the owner of a knife on the date of the murder which could have been used in its commission. *Id.* at 1383-84. Thus, the admission of such evidence did not violate McKinney's due process rights. *Id.*

On the other hand, the court also concluded that the remaining evidence – McKinney's possession of the Gerber knife, his wearing of camouflage pants with a knife, and the "Death is His" carving – was not relevant to any issue in the case, since it did not tend to prove a fact of consequence. The court concluded that it was only offered to prove McKinney's character and to establish an impermissible propensity inference. Having made this determination, the court proceeded to consider whether the admission of that evidence was so prejudicial as deprive him of a fair trial and violate his due process rights. The court's characterization of the prosecutor's use of that irrelevant evidence explains its holding that McKinney did not receive a fair trial and was entitled to habeas relief:

The prosecution used evidence of the Gerber knife, which could not possibly have been used to commit the murder, to help paint a picture of a young man with a fascination with knives and with a commando lifestyle. The prosecutor raised the issue on cross-examination of why McKinney had purchased a knife with a black

blade, asking him whether it was because such knives are favored by commandos because they do not reflect light. The jury was offered the image of a man with a knife collection, who sat in his dormitory room sharpening knives, scratching morbid inscriptions on the wall, and occasionally venturing forth in camouflage with a knife strapped to his body. This evidence, as discussed above, was not relevant to the questions before the jury. It served only to prey on the emotions of the jury, to lead them to mistrust McKinney, and to believe more easily that he was the type of son who would kill his mother in her sleep without much apparent motive.

Id. at 1385.

What clearly distinguishes this case from *McKinney* is that the evidence which had the potential to inflame the jury here – the dissection of a deer’s sexual organs and the brandishing of a knife during consensual sex – were relevant to issues of motive, opportunity, and identity. This makes such evidence akin to the evidence of McKinney’s possession of a knife that could have been used to commit the murder – evidence which the court in *McKinney* found to be relevant and therefore not the proper subject of a due process claim. *Id.* at 1384-85. While such relevant evidence may also have given rise to an inference which is impermissible under state evidentiary rules, that does not state a proper basis for a constitutional due process claim. *See Jammal*, 926 F.2d at 920. Having concluded that such evidence was relevant to an issue in the case, the Court need go no further. *Estelle*, 50 U.S. at 70.

In summary, the Court concludes that the evidence offered at trial concerning the

petitioner's dissection of a deer's sexual organs and the displaying of a knife prior to engaging in sexual intercourse were relevant to issues in the case and therefore not a proper basis for a due process claim in this habeas proceeding. On the other hand, the evidence of the petitioner's possession of two other knives was not relevant to any issue in the case, but the admission of that evidence was not so prejudicial as to deprive the petitioner of a fair trial.

2. The Admission of Photos of the Victim's Body.

The petitioner alleges that his due process rights were violated by the trial court's admission of gruesome and prejudicial photographs of the victim, when the manner of the victim's death was not disputed and the photographs were irrelevant to the central issue of the case - i.e., the identity of the perpetrator. For the reasons stated below, the Court finds that the admission of the photographs did not violate the petitioner's rights under the Due Process Clause of the Fourteenth Amendment, and the petitioner is therefore not entitled to habeas relief.

Prior to trial, petitioner's counsel offered the following stipulation as to the manner of Ms. Elg's death.

Proof of corpus delicti and identification, your Honor, we are prepared to stipulate that Danette Elg was murdered by knife wounds. We have identification of the body. We are prepared to stipulate to that. We are prepared to stipulate that she died through the infliction of knife wounds. That matter is not in issue. We would suggest that other evidence, which we believe the State intends to introduce, will talk about the very same thing, those same types of matters, those same two

matters. Thus, photographs could not arguably be introduced for that purpose. *Trial Transcript, Vol. I, p. 314.* The prosecution argued that the stipulation didn't cover the element of intent. The trial court ruled that the "[d]efense can't stipulate away your case in chief or admit things to admit away your case in chief," and determined that he would admit certain photographs following an *in camera* review. *Trial Transcript, Vol. I, p. 322.*

During the *in camera* review, the judge, defense counsel and prosecutor reviewed all photographs available. The prosecutor then identified several that he intended to offer into evidence, arguing that those selected were necessary for the pathologist to illustrate his testimony. *Trial Transcript, p. 715.* The prosecutor argued that in addition to the photographs which showed the knife wounds inflicted on the victim, some of the photographs showed proximity and location of the victim in relation to the room and bloodstains. Defense counsel countered that several of the photographs were cumulative, and argued that there were less prejudicial ways to place that information before the jury, including the use of the prosecutor's proposed mannequin. The petitioner was particularly opposed to the introduction of exhibit 15, a photograph of the knife wound over the victim's eye in which the victim's eyeball extruded from the socket. *Trial Transcript, p. 719.* The trial court again found that the prosecution was entitled to photographs to show relevant evidence rather than just the pathologist report or the mannequin, excluded exhibit 23 as cumulative, and allowed exhibit 15 only after the offending portion of the photograph was redacted. *Trial Transcript, pp. 725-26.* Upon review, the Idaho Supreme Court affirmed the admittance of the photographs, concluding that "[t]he jury is entitled to have an accurate picture of all the circumstances, and

although such information may be gruesome in nature it is necessary to make an intelligent fact finding decision The State is not obligated to present evidence which has a lesser impact." *Leavitt I*, 116 Idaho at 290, 775 P.2d at 604 (citations omitted).

In reviewing a habeas petition, the Court cannot disturb a state court's finding on due process grounds unless the admission of the photographs rendered the trial fundamentally unfair. *Kealohapauole*, 800 F.2d at 1466 (citing *Batchelor v. Cupp*, 693 F.2d 859, 865 (9th Cir. 1982)). The petitioner argues that the pathologist report was sufficient to show the wounds sustained by the victim, and that the admission of any photographs was therefore superfluous. This argument is not supported by the case law. In *Rivers v. United States*, 270 F.2d 435, 437 (9th Cir. 1959)¹⁵, the court noted the standard for admission of potentially prejudicial photographs:

Such photographs should be excluded where their principal effect would be to inflame the jurors against the defendant because of the horror of the crime; on the other hand, if they have a probative value with respect to a fact in issue that outweighs the danger of prejudice to the defendant, they are admissible, and the resolution of this question is primarily for the trial court in the exercise of its discretion.

¹⁵ Although decided 41 years ago, the *Rivers* decision has subsequently and repeatedly been cited with approval. *United States v. Brady*, 579 F.2d 1121, 1129 (9th Cir. 1978); *Maxwell v. United States*, 368 F.2d 735, 739 (9th Cir. 1966); *United States v. Hoog*, 504 F.2d 45, 50 (8th Cir. 1974); *United States v. Smith*, 490 F.2d 789, 794 (D.C. Cir. 1974); *United States v. Stifel*, 433 F.2d 431, 441 (6th Cir. 1970); *United States v. Leach*, 429 F.2d 956, 962 (8th Cir. 1970).

Id. (quoting *People v. Chavez*, 329 P.2d 907, 916 (Cal. 1958)). The defendant in *Rivers* had argued for the exclusion of highly prejudicial and improper photographs. In affirming the trial court's decision to admit the photos, the court held that the photographs at issue were properly admitted to show mode, manner and purpose, and stated "[i]f the mere gruesomeness of the evidence were ground for its exclusion, then it would have to be said that the more gruesome the crime, the greater the difficulty of the prosecution in proving its case." *Id.* at 438. "The persistent assertion in criminal cases that the jury should not be permitted the benefit of relevant evidence because it is thought to be 'gruesome' constitutes, in effect, an attack upon the entire jury system. If a jury is incapable of performing its function without being improperly influenced by evidence having probative force, then the jury system is a failure." *Id.* (quoting *State v. Long*, 244 P.2d 1033, 1052 (Or. 1952)). In *United States v. Goseyun*, 789 F.2d 1386 (9th Cir. 1986), the court affirmed the admission by the trial court of photographs of the victim's head injury. The court cited *United States v. Brady*, 579 F.2d 1121, 1129 (9th Cir. 1978), for the proposition that "[t]he trial judge's exercise of discretion in balancing the prejudicial effect and probative value of photographic evidence of this type is rarely disturbed." *Id.* at 1387. In *Goseyun*, the court found that, where the photograph was relevant to both the cause of death and the willful, deliberate, and premeditated nature of the murder, the judge did not abuse his discretion in admitting the evidence. *Id.*

In the present case, the trial court undertook a reasoned process to determine which photographs would be shown to the jury. It appears from the record that every effort was made to ensure that the jurors saw a straightforward representation of the wounds inflicted

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upon the victim and of the victim's body in relation to the crime scene. The petitioner's proposed stipulation did not include stipulating to the element of intent necessary for a murder conviction.¹⁶ Under these facts the trial court correctly ascertained that the prosecution was not required to accept the petitioner's stipulation. *Old Chief v. United States*, 519 U.S. 172, 186-87 (1997) (the prosecution is entitled to prove its case by evidence of its own choice; a criminal may not stipulate or admit his way out of the full evidentiary force of the case as the government chooses to present it). In *Old Chief*, the United States Supreme Court found that the "persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them." *Id.* at 187. The photographs may have been graphic depictions which were exacerbated by the decomposition of the victim's body; however, they also had probative value with respect to a fact at issue. The proposed stipulation did not address the element of intent, and the prosecution was not required, under *Old Chief*, to accept the stipulation. This Court is unpersuaded, following review of the record and the relevant case law, that the trial court violated the petitioner's due process rights in admitting the photographs.

3. Letter from petitioner to his wife

The petitioner claims the trial court improperly admitted into evidence a letter from the petitioner to his wife seized during a search of his legal materials following a court appearance. The petitioner alleges the search was not a proper contraband search, *see Proconier v. Martinez*, 416 U.S. 396 (1974), but was a pretextual search intended to provide the

¹⁶ I.C. §§ 18-4001, 18-4003.

prosecution with an opportunity to review petitioner's legal materials and seize a document which was later used to impeach the petitioner. The petitioner argues that this violates his due process rights to "adequately prepare his defense for trial and his right to meaningful access to the court." *Memorandum, p. 32.*

Following a pre-trial court hearing, the petitioner returned to the jail with the briefcase he used to carry his materials from his cell to court. Upon his return, the guards at the jail requested permission to search the briefcase, and the request was granted. *Trial Transcript, p. 478.* The guard searching the briefcase then seized an item that appeared to be correspondence from the petitioner to his wife. The guard seized the item, believing that the petitioner intended to pass the correspondence to his wife in the courtroom in violation of jail rules. The guard sealed it with evidence tape, and informed the petitioner that it would be delivered to the prosecutor. *Trial Transcript, p. 479.*

At trial, the petitioner sought to exclude this document on the basis that it was work product, prepared in aid of his defense. At that time, the petitioner did not challenge the right of the jail to inspect outgoing and incoming letters and packages, *see Trial Transcript, p. 480,* but argued that the seizure violated his due process rights and the work product privilege. The prosecutor represented to the court that on September 11th the petitioner had been informed by Bingham County Jail officials that, as part of a standard jail procedure, the petitioner and his briefcase would be searched going in and out of jail. *Trial Transcript, p. 484.* Apparently, there had been a problem in the past with the petitioner attempting to smuggle letters and correspondence out of the jail. Jail personnel had informed the petitioner and his counsel that

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the briefcase would be inspected upon exiting and entering the jail, and the guard would take any court documents and thumb through them looking for contraband. When the guard picked up the transcript, the 8 page document fell out, and the bottom of the document said "I love you, Rick." *Trial Transcript, pp. 484-85.* The prosecutor alleged the document was clearly a personal letter, since it was signed "I love you, Rick." The prosecutor further contended that, in the letter, the petitioner coached his wife, Kathy, to commit perjury. Specifically, the letter contained the following statement, "Now honey, make sure that you memorize this, especially the times. Because if our times are not the same, then they will think we are lying, and I will probably get convicted. So, please, keep reading it until you get it down pat."¹⁷ *Trial Transcript, p. 482.* The prosecutor argued that the letter constituted evidence of the petitioner's continuing effort to cover up his crime, and to obtain the help of a witness in the cover up. As such, the prosecution would be entitled to use the document to impeach either the petitioner or Kathy Leavitt, should either take the witness stand and tell a story "in accord with or different from that letter." In support of its argument, the prosecutor noted that the instructions to Kathy in that letter instructed her to tell a different story than that which she had told at the Magistrate's Inquiry. *Trial Transcript, pp. 486-87.*

The trial court ruled that the seizure of the document was not a violation of the petitioner's rights, but took under advisement the question of how the letter could be used at trial. On September 23, 1986, during the cross-examination of the petitioner, the prosecutor

¹⁷ The letter was not contained in the record presented to this Court. Statements quoting the letter are the prosecutor's representations to the trial court.

sought to impeach the petitioner's statement that he had not attempted to coach his wife's testimony with the seized letter. The following day the trial court ruled that "the intercepted instrument is and appears to the Court to be an intercepted letter to the wife of the Defendant. And based on the Defendant's testimony, the Court feels that the instrument has become relevant for impeachment purposes. And the Court will allow the introduction of the letter." *Trial Transcript, pp. 1864-65.*

On appeal the petitioner argued that marital privilege prevented the introduction of the letter. The Idaho Supreme Court found the marital privilege inapplicable since the petitioner denied the document constituted a letter to his wife, and further denied any intent to deliver the letter to his wife. *Leavitt I*, 116 Idaho at 291, 775 P.2d at 605. The court further held that it was not subject to a work product privilege, and was confiscated during a routinely conducted protective search of jailhouse inmates entering and exiting the facility. *Id.* Finally, the court found the document could be properly admitted for impeachment purposes. *Id.*

The petitioner alleges that the review of the petitioner's legal materials, the culling out of selective documents, and the use of those documents for impeachment purposes had a chilling effect on his ability to prepare for trial. The petitioner argues that his inability to freely communicate with his defense counsel impaired his right to adequately prepare a defense and denied him meaningful access to the courts.

The petitioner correctly argues that he has a right to meaningful access to the courts. *See Bounds v. Smith*, 430 U.S. 817, 823 (1977). In *Bounds*, the issue concerned access to the courts by incarcerated prisoners. In that decision, the United States Supreme Court held that

certain measures were necessary to ensure access of inmates to the courts. While later cases have not eroded that fundamental right, *Bounds* has been modified by *Lewis v. Casey*, 518 U.S. 343 (1996). In *Casey*, the United States Supreme Court held that to show a denial of access under *Bounds* an inmate must show actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to present a claim. *Id.* at 349. In the present case, the petitioner has failed to show actual prejudice, and instead argues that the seizure of the document had a chilling effect. However, the petitioner was represented by counsel, and there has been no showing that he was prevented from communicating or meeting with his attorney. One could assume, under the facts presented, that the petitioner could have handed any legal materials of relevance in his briefcase to his attorney while they sat together at the defendant's table. Clearly, the document at issue was not a legal document. The petitioner does not allege the document to be anything other than a non-legal letter, but instead argues that it was improperly seized from within confidential legal materials. This argument is not persuasive because it would immunize any document from scrutiny merely by hiding it among legitimate work product. The petitioner was prevented from passing documents to waiting family or friends in the courtroom, had been previously warned about this practice, and was aware of measures taken by jail personnel to prevent this practice. Under these facts, the Court is not persuaded that the document at issue is legal material or that the trial court violated the petitioner's rights to access to the courts by allowing the seized document to be used to impeach the petitioner.

4. Statements to police by Danette Elg

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In this claim the petitioner alleges that the trial court violated his Sixth Amendment right of confrontation and deprived him of a fair trial by admitting into evidence two statements made by Ms. Elg – the first to a police dispatcher who received her call concerning a prowler at her home, and the second to a police officer who was dispatched to investigate her complaint. In support of this claim, the petitioner argues that the trial court improperly admitted Elg's statements although they did not fall into any exception to the hearsay rule. For the reasons stated below, the Court finds the petitioner's constitutional rights were not violated.

The prosecution introduced evidence that on July 16, 1984, the night before her death, Ms. Elg called the police to report a prowler at her window attempting to gain entry to her house. The police dispatcher, Lynn Thompson, testified that she recorded the call when it came in and noted, at the time, that Ms. Elg believed the prowler to be the petitioner. *Trial Transcript, pp. 777-805*. In addition, Ms. Thompson indicated that at time of the call, Ms. Elg was whispering, was breathing heavily and quickly, and was crying. *Trial Transcript, p. 782*. Officer Ray Reifschneider testified at trial that he was dispatched to Elg's home where he met with her. Ms. Elg appeared nervous and scared, and reported to Reifschneider that she had heard a scratching noise below her bedroom window, and what sounded like someone climbing over the chain link fence in her backyard. *Trial Transcript, pp. 805-30*. In addition, Reifschneider testified that Elg told him the petitioner had come to her home earlier that evening, asked to use her telephone, and informed her that the police were looking for him.

The petitioner filed a motion to exclude Elg's statements. The prosecutor argued the

statements fell within an exception to the hearsay rule and were relevant because they tended to show that the victim would not have let the petitioner willingly into her home, and that any sexual conduct would have been non-consensual. The prosecutor further argued that the statements were trustworthy because Elg had made the same statement to two people.¹⁸ The trial court ruled that evidence of the call that Elg made to the police department would be allowed as an official record of the police department, and felt that it was relevant because it "has to do with activities on the premises where the homicide took place within a reasonable length of time of when the homicide probably took place." *Trial Transcript, Vol. II, p. 419.* Petitioner's counsel then argued that Elg's statements to police were hearsay within hearsay, and not allowed under that exception. *Trial Transcript, Vol. II, p. 421.* The court clarified that it was allowing testimony of statements made by Elg under Idaho Rule of Evidence 804(b)(5)¹⁹:

And the Court feels that there is a circumstantial guaranty of trustworthiness in that

¹⁸ Ms. Elg allegedly repeated the attempted break-in story to Thelma Wilkins. However, Wilkins did not testify regarding those statements.

¹⁹ Idaho Rule of Evidence 804 allows for an exception to the hearsay rule when the declarant is unavailable under certain conditions. I.R.E. 804(b)(5) provides:

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

when you make – first of all, you make a report to an officer soon after something allegedly happens, people know that that’s going to be written down, and I think there is some guaranty of trustworthiness.

. . . You have to decide whether the statement is offered as evidence of a material fact, and the Court believes that it is evidence of material fact and evidence of persons having contact with the victim within a reasonable length of time of the homicide and is relevant. I mean, it’s evidence of a material fact.

Also, I have to test it by whether or not the statement must be more probative on the point for which it is offered than any other evidence the State may produce through reasonable efforts. And in this particular case, there is no reasonable effort that could be exerted by the State by which they might come up with this same evidence. Mainly since the declarant is dead, there’s no other source of the evidence.

Trial Transcript, Vol. II, pp. 422-23. Petitioner’s counsel questioned the materiality of the statements and the trial court responded by suggesting that the materiality was the contact with the victim within a reasonable length of time prior to homicide. *Trial Transcript, Vol. II, p.424.*

The petitioner has a constitutional right under the Sixth and Fourteenth Amendments to "be confronted with the witnesses against him." *Pointer v. Texas*, 380 U.S. 400 (1965). The purpose of this Confrontation Clause is to ensure the reliability of evidence against a defendant by subjecting it to rigorous testing in the context of an adversarial proceeding before the trier

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of fact. *Maryland v. Craig*, 497 U.S. 836, 845 (1990). The Confrontation Clause bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule. *Idaho v. Wright*, 497 U.S. 805, 814 (1990).

In *Ohio v. Roberts*, 448 U.S. 56 (1980), the Court held that the veracity of hearsay statements is sufficiently dependable to allow the untested admission of such statements against an accused when (1) "the evidence falls within a firmly rooted hearsay exception" or (2) it contains "particularized guarantees of trustworthiness" such that adversarial testing would be expected to add little, if anything, to the statements' reliability. *Lilly v. Virginia*, 527 U.S. 116, 124-25 (1999) (quoting *Roberts*, 448 U.S. at 66). In *Wright*, the Court found that Idaho's residual hearsay exception listed as Idaho Rule of Evidence 803(24) was not a firmly rooted hearsay exception for Confrontation Clause purposes. *Wright*, 497 U.S. at 817. The Court held that hearsay statements admitted under the residual exception, which allows, under certain conditions and within the trial court's discretion, the ad hoc admission of out-of-court statements, lacks the same tradition of reliability which supports admission under a firmly rooted exception to the hearsay rule. *Id.* The statements in this case were admitted under a similar residual hearsay exception, I.R.E. 804(b)(5), and thus would only be admissible under the Confrontation Clause if they had a particularized guarantee of trustworthiness.

In *Wright*, the Court held that the particularized guarantees of trustworthiness required for admission under the Confrontation Clause must "be drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief." *Wright*, 497 U.S. at 820. In this case, where the trial court has

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failed to make particularized findings of the trustworthiness of the admitted statements, the appellate court may review the record to determine if such guarantees exist. *United States v. George*, 960 F.2d 97, 100 (9th Cir. 1992). Upon review, the Court concludes that the record supports a finding that Elg's hearsay statements had particularized guarantees of trustworthiness, so that their admission did not violate the petitioner's rights under the Confrontation Clause.

Although the trial court admitted the statements under the residual hearsay exception of I.R.E. 804(b)(5), it seems clear that Ms. Elg's initial statement to the police dispatcher would have been admissible under the excited utterance hearsay exception under I.R.E. 803(2),²⁰ while the statement to the police officer would have been admissible as a present sense impression under I.R.E. 803(1).²¹ These exceptions are generally firmly rooted exceptions to the hearsay rule. Under *White v. Illinois*, 502 U.S. 346, 355 n.8 (1992), the excited utterance is clearly a firmly rooted exception. While no court has specifically held that present sense impression qualifies as a firmly rooted hearsay exception, this Court finds that it carries with it the same guarantees of trustworthiness and reliability sufficient to allow its admission. The

²⁰ I.R.E. 803(2) allows an excited utterance exception to the hearsay rule.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

²¹ I.R.E. 803(1) allows for a present sense impression exception to the hearsay rule.

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

fact that Elg's statements qualify for admission under such firmly rooted exceptions, provide adequate guarantees of trustworthiness to allow this untested admission. *Roberts*, 448 U.S. at 66. Although, the petitioner did not have an opportunity to confront Ms. Elg regarding her belief, the hearsay statements had sufficient "indicia of reliability" so that their admission by the trial court did not violate the petitioner's rights under the Confrontation Clause.

5. Conclusion

In summary, the Court concludes that the admission of the evidence, of which petitioner complains, did not violate the petitioner's constitutional rights. Nothing in the admission of this evidence, either individually or cumulatively is "of such quality as necessarily prevents a fair trial." *Kealohapauole*, 800 F.2d at 1465 (quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941)), or was "so prejudicial that it rendered the trial fundamentally unfair," *Walters*, 45 F.3d at 1357. The petitioner's request for relief on this claim is therefore denied.

G. Claim 8.

The petitioner alleges that his Fifth Amendment rights were violated by the prosecution's reference to his failure to testify at a special inquiry proceeding, and his failure to produce a blood sample. These facts also provide the predicate for his allegations of prosecutorial misconduct, as discussed in claim 10.

1. Comment on Petitioner's failure to testify at Special Inquiry²²

The petitioner alleges that, at trial, the prosecutor improperly commented on his

²² The record of the Magistrate's Inquiry provided to the Court was incomplete.

invocation of the right to remain silent at a Special Inquiry proceeding held December 5, 1984.²³ Prior to the Special Inquiry, the petitioner had spoken with the police several times. At the proceeding, the petitioner was represented by counsel, and informed of his Fifth Amendment right against self-incrimination. During the course of the proceeding the petitioner was allowed to consult with his attorney, and that attorney made a preliminary statement and raised objections to questions. The petitioner answered several questions, and then, on advice of counsel, invoked his Fifth Amendment right when asked certain questions about Ms. Elg. Following this inquiry, the petitioner was arrested and did not provide any further statements to the police prior to trial.

At trial, the prosecution focused on evidence that the petitioner's blood, mixed with Ms. Elg's blood, had been found at the murder scene, and that the petitioner had sustained a severe cut to his finger at or around the time of Ms. Elg's death. During his direct testimony, the petitioner explained that he was in the victim's bedroom and suffered a nosebleed a week prior to her death. He further testified that he cooperated with police in the investigation, but did not tell the police this story because he was afraid they would twist the facts to make him appear guilty. *Trial Transcript*, pp. 1718, 1727. In cross-examining the petitioner, the prosecutor attempted to show that the petitioner had fabricated his story after he learned his blood was found in Ms. Elg's room. The petitioner and the prosecutor then engaged in the following colloquy:

Q: At one point, Mr. Leavitt, you were invited to answer that question before a

²³ This proceeding was conducted pursuant to Idaho Code § 19-1116.

Magistrate, a Judge, who was making an inquiry. A Mr. Michael Kennedy, who is a magistrate from up in Jefferson County came down here investigating into this matter. Now, he's a man not tied with law enforcement, isn't he?

A: That's true.

Q: And at that time you were asked if you could explain that, and you declined to do so, didn't you?

A: Yes, my attorney advised me that any questions to ask - he was in the courtroom at that time, and says, "Stand on the Fifth on everything. It is not going to make a difference what you say here. You would be arrested, anyway."

Because I knew from October 28th I was going to be arrested.

Trial Transcript, pp. 1807-08.

The prosecutor then cross-examined the petitioner about his finger injury. Expert testimony had been presented during the prosecution's case in chief which tended to rebut the petitioner's pre-trial explanation that he had sustained the cut to his finger from a fan. The expert testified that the cut on the petitioner's hand could not have been caused by the fan in his home. On direct examination, the petitioner testified that the story about the fan was a ruse to protect the honor of his wife, and that he had been cut by a razor blade while trying to prevent her attempted suicide. On cross-examination the prosecutor attempted to show that the petitioner had changed his story about how he received the cut only after the expert testimony rebutting the fan story had been admitted:

Q: You wouldn't answer questions about the fan at the Magistrate's Inquiry, would

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you?

A: That's right. Because no matter what questions I answered now, I was going to be arrested, anyway. So, my lawyer just said to take the Fifth.

Q: As a matter of fact, at the Magistrate's Inquiry you were told: "Mr. Leavitt, if you have an explanation as to how your blood could be in that room, would you give it to us?" You had none. You refused to answer that question, didn't you?

A: That's right. I took the Fifth Amendment as advised by my lawyer.

Q: So, I guess, it is fair to -

Trial Transcript, pp. 1852-53. At this point, the petitioner's attorney objected to the last question and asked that the answer be stricken because the prosecution had improperly commented on the petitioner's silence at the Inquiry. The trial court overruled the objection after the prosecutor argued that the objection was untimely. *Trial Transcript, pp. 1853-54.* Petitioner's counsel raised this objection again in chambers, and made the following motion for a mistrial based on the prosecutor's allusion to the petitioner's silence at the Inquiry Proceeding.

MR. KOHLER (defense counsel): The Defense would like to make a motion for the record, and we would move to have the Court declare a mistrial on the basis that the State strongly alluded to the Defendant's right to remain silent, and the State used that in such a way to give the impression to the jury that he's somehow culpable because he exercised his constitutional right to remain silent. And for the State to be allowed to do that, I think puts the Defendant in a real quandary.

If, on the one hand, he makes statements, the State will use those statements against him. On the other hand, if he remains silent, the State uses his silence against him. And I think that renders the Fifth Amendment, the right to remain silent, a great big, meaningless, hollow nothing. It is of no benefit to the Defendant at all if the State can allude to that, and thereby infer that because the Defendant did not speak, he's guilty.

Trial Transcript, pp. 1861-62. The trial court denied the motion for mistrial without explanation.

Upon review of the record and case law, the Court finds that the comments by the prosecutor about the petitioner's silence at the Special Inquiry violated the petitioner's Fifth Amendment right against self-incrimination, but determines the petitioner is not entitled to relief under the harmless error standard for habeas review outlined in *Brecht*, 507 U.S. at 637.

The Fifth Amendment guarantees an accused the right to remain silent during his criminal trial and prevents the prosecution from commenting on the silence of a defendant who asserts the right. *Griffin v. California*, 380 U.S. 609, 614 (1965). However, the Supreme Court has held that when a witness takes the stand in his own behalf, "he does so as any other witness, and within the limits of the appropriate rules he may be cross-examined as to the facts in issue." *Raffel v. United States*, 271 U.S. 494, 497 (1926) (citations omitted). The *Raffel* Court explicitly rejected the contention that the possibility of impeachment by prior silence is an impermissible burden upon the exercise of Fifth Amendment rights. *Jenkins v. Anderson*,

447 U.S. 231, 236-37 (1980).²⁴ The Court later held that when a prosecutor sought to impeach a witness with silence from a prior proceeding, additional scrutiny was necessary to determine if the cross-examination should be excluded because its probative value on the issue of credibility was so negligible as to be outweighed by its impermissible impact on the jury. *Grunewald v. United States*, 353 U.S. 391, 420 (1957). The Court determined this scrutiny was required since the defendant's prior silence was before a grand jury proceeding where his attendance was compelled, he was unable to summon witnesses, and was not represented by counsel. *Id.* at 419, 422. In reaching this conclusion, the Court was persuaded that "[t]hese factors are crucial in weighing whether a plea of the privilege is inconsistent with later exculpatory testimony on the same questions, for the nature of the tribunal which subjects the witness to questioning bears heavily on what inferences can be drawn from a plea of the Fifth Amendment." *Id.* at 422.²⁵

While the Special Inquiry proceeding was a judicial proceeding, conducted with his attorney present, the petitioner was not allowed the benefit of testifying through direct

²⁴ The Court in *Jenkins* stated that the practice of impeachment of a defendant on cross-examination might enhance the reliability of the criminal process. "Use of such impeachment on cross-examination allows prosecutors to test the credibility of witnesses by asking them to explain prior inconsistent statements and acts. A defendant may decide not to take the witness stand because of the risk of cross-examination. But this is a choice of litigation tactics." *Jenkins*, 447 U.S. at 237.

²⁵ The Court's rationalized that "[i]nnocent men are more likely to plead the privilege in secret proceedings, where they testify without advice of counsel and without opportunity for cross-examination, than in open court proceedings, where cross-examination and judicially supervised procedure provide safeguards for the establishing of the whole, as against the possibility of merely partial, truth." *Id.* at 422-23.

examination, but was instead ordered to answer questions posed by the prosecutor. In addition, the petitioner testified at trial that he thought he might be arrested following the Special Inquiry proceeding. Thus, while the petitioner's silence at the Special Inquiry was not entirely consistent with his direct testimony that he was a cooperative witness who lacked a prior opportunity to tell his story, the Court does not find that the petitioner's silence at the Inquiry was wholly inconsistent with his testimony at trial. Based on the record of the trial, it appears the prosecutor could have achieved the same result without the comments, and as a result, the probative value on the issue of credibility which resulted from the improper comments did not outweigh the impermissible impact on the jury.

Having found a constitutional violation occurred as a result of the prosecutor's comments, the Court reviews the violation under the harmless error standard for habeas review outlined in *Brecht*, 507 U.S. at 638.²⁶ In *Brecht*, the Court held that in order to obtain relief on collateral review, the alleged error must have had "substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 637 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). The Court further held that under this standard, "habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" *Brecht*, 507 U.S. at 637. In applying this standard, "if a judge has 'grave doubt' about whether an error affected a jury . . . the judge must treat the error as if it did so." *O'Neal v.*

²⁶ The standard outlined in *Brecht* applies retroactively to the petitioner's case. See *McKinney v. Rees*, 993 F.2d 1378, 1385 (9th Cir. 1993).

McAnnich, 513 U.S. 432, 438 (1995).

In this case, the prosecutor's comment on the petitioner's silence was an attempt to impeach the petitioner's testimony that he had cooperated with the police, but had been previously unable to give an explanation regarding the cut to his finger. However, a review of the record reveals that this line of inquiry was only a small part of the prosecutor's impeachment of the petitioner. The prosecutor, without commenting on the petitioner's silence, also challenged the petitioner's credibility with questions which implied that he waited until after the expert witness testified that the cut on the petitioner's hand did not come from the fan before fabricating another story about how he sustained the cut to his finger. The petitioner's prior inconsistent statements to the police, his contradictory testimony at trial, as well as contradictory testimony from other witnesses provided additional material to allow the prosecutor to impeach the petitioner's testimony.

The improper reference by the prosecutor comprises one half page of testimony in a 2200 page transcript. There was significant evidence of guilt, other than that which might have been drawn from the prosecutor's comment on the petitioner's invocation of his Fifth Amendment right at the Special Inquiry - the petitioner's blood was mixed with Ms. Elg's blood at the crime scene, his finger injury at or around the time of the murder, and most importantly his inconsistent statements to the police and later contradictory testimony. As a result, this Court cannot find that the violation had a "substantial and injurious effect or influence in determining the jury's verdict," and the petitioner is not entitled to relief on this claim.

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In summary, while the Court concludes that the prosecutor's comment on the petitioner's Fifth Amendment right resulted in a constitutional violation under *Grunewald*, the petitioner has failed to meet the required showing of prejudice that would entitle him to relief on habeas review under harmless error review.

2. The Prosecutor's Comment Upon the Petitioner's Refusal to Provide a Blood Sample

The petitioner alleges the prosecutor improperly commented on his refusal to give a blood sample absent a court order. Following the discovery of two types of blood in the victim's bedroom, the police sought blood samples from all the known suspects - 16 in all. The request to the petitioner was made through his attorney. Apparently relying on advice from counsel, Stephen Blaser, the petitioner declined to provide a sample absent a court order. The court order was obtained and the petitioner gave a blood sample on August 22, 1984.

At trial, Officer Robinson testified that the petitioner was the only suspect that did not give blood voluntarily. *Trial Transcript, pp. 1283-84*. During his direct testimony the petitioner denied that he refused to provide a blood sample. He explained that when he received the request, he asked to give the sample at a time when he was off work, and that when Officer Robinson insisted that the petitioner give blood immediately, he refused. *Trial Transcript, pp. 1728-29*. On cross-examination, the prosecutor asked two questions which intimated that petitioner's attorney had recommended that he give the blood sample, but the petitioner refused to follow that advice. In closing argument, the prosecutor made reference to Leavitt's refusal to give a blood sample voluntarily, and his attempt to "hide" behind his

attorney's advice. *Trial Transcript*, pp. 2133-34. Petitioner's counsel did not object to any comments regarding the petitioner's refusal to give blood.²⁷

The petitioner now argues that Officer Robinson's testimony, the cross-examination of the petitioner, and the prosecutor's closing argument, were improper comments on his Fourth Amendment right to be free from an unreasonable search and seizure. As a preliminary matter, the Court notes that petitioner's counsel failed to object to prosecutor's comments regarding the petitioner's refusal to give blood absent a court order. The petitioner's failure to comply with Idaho's contemporaneous objection requirement at trial and subsequent failure to raise these issues on direct appeal normally would have constituted procedural default on habeas review. *Engle v. Isaac*, 456 U.S. 107, 129 (1982) (petitioner who fails to observe the contemporaneous objection rule of the State may not challenge the constitutionality of the conviction in federal court absent a showing of cause and prejudice); *Wainwright v. Sykes*, 433 U.S. 72, 81-82 (1977) (failure to comply with State's contemporaneous objection requirement amounts to independent and adequate state procedural ground for affirming the conviction on that issue); *State v. Major*, 105 Idaho 4, 10, 665 P.2d 703, 709 (1983) (defendant is required to object at trial to preserve errors on appeal). However, in *Leavitt I*, 116 Idaho at 288, 775 P.2d at 602, the Idaho Supreme Court stated that it had "carefully reviewed the record for any indication of prejudicial error occurring at trial, regardless of whether or not error has been specifically asserted by the defendant." As a result the Court was unable to find that any of the

²⁷ Petitioner's counsel did object, on the grounds of attorney-client privilege, to the prosecutor's question as to whether the petitioner refused to give blood on Mr. Blaser's advice. The trial court overruled the objection.

petitioner's claims of trial error, not specifically raised in the appeal or state post-conviction petition, were procedurally defaulted under an independent or adequate state ground.²⁸

Memorandum Decision and Order, filed, 10/22/96, p. 12. Therefore, since the Idaho Supreme Court did not specifically dismiss these claims under the contemporaneous objection rule, the Court assumes that the Idaho Supreme Court reached the merits of the claims, and will therefore consider the merits of these claims. *County Court of Ulster County v. Allen*, 442 U.S. 140, 147-48 (1979); *Dickey v. Lewis*, 859 F.2d 1365, 1368 (9th Cir. 1987) (an ambiguous state court dismissal is presumed to be on the merits).

The petitioner requests that the Court extend the holding of *Griffin*, 380 U.S. at 614, which prohibits any comment by the prosecution on a defendant's exercise of his or her Fifth Amendment rights, to prohibit any comment on a defendant's exercise of the Fourth Amendment right to be free from unreasonable search and seizure. Under precedent of the Ninth Circuit, the petitioner is correct that the rationale of *Griffin* extends to comments upon the assertion of rights under the Fourth Amendment. The Court concludes that Officer Robinson's testimony, the cross examination of the petitioner, and the prosecutor's comments in closing argument, may have impinged upon the petitioner's rights under the Fourth Amendment, but that the petitioner has failed to show "substantial and injurious effect or influence in determining the jury's verdict," as required for relief on habeas review under *Brecht*, 507 U.S. at 637.

²⁸ The Court also found that the respondent has specifically waived the exhaustion requirement with respect to these claims. *Memorandum Decision and Order, filed 10/22/96, p. 2, fn. 2.*

It is well settled that obtaining a blood sample from a suspect is a search that is subject to the requirements of the Fourth Amendment. See *Schmerber v. California*, 384 U.S. 757, 766-72 (1966); *Burnett v. Municipality of Anchorage*, 806 F.2d 1447, 1449 (9th Cir. 1986). It is also well established that "refusal to consent to a warrantless search is privileged conduct which cannot be considered as evidence of criminal wrongdoing." *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978); *United States v. Taxe*, 540 F.2d 961, 969 (9th Cir. 1976). Moreover, "where an underlying right to refuse such a blood test is present, it would be improper to draw adverse inferences from failure of the accused to respond to a request for a blood test because the accused would thereby be penalized for exercising his rights to refuse the test." *Newhouse v. Misterly*, 415 F.2d 514, 518 (9th Cir. 1969). Echoing these concerns, the Ninth Circuit Court of Appeals held in *Taxe*, albeit with little elaboration and only an unexplained citation to *Griffin*, that a prosecutor's comment on a defendant's refusal to consent to a search is improper. *Taxe*, 540 F.2d at 969. The court then found that although the comments were improper, the error was harmless because a subsequent curative instruction was given.

The Circuit's decision in *Taxe* has been cited and followed in at least two other circuits, *United States v. McNatt*, 931 F.2d 251, 257 (4th Cir. 1991); *United States v. Thame*, 846 F.2d 200, 207 (3rd Cir. 1988) (court reviewing under 28 U.S.C. § 2254 found it was error for the prosecutor to argue that Thame's reliance on his fourth amendment rights constituted evidence

of his guilt),²⁹ and three additional circuits have explicitly or implicitly suggested they would reach the same result. *United States v. Dozal*, 173 F.3d 787, 794 (10th Cir. 1999) (citing *McNatt* and *Thame*, and concluding that asking a jury to draw adverse inferences from a refusal to consent to a search may be impermissible if the testimony is not admitted as a fair response to a claim by the defendant or for some other proper purpose); *United States v. Ferguson*, 935 F.2d 1518, 1526-29 (7th Cir. 1991) (court assumes that comment on defendant's refusal to consent to search of his luggage would violate defendant's constitutional rights, but finds any error to be harmless because of curative instruction); *United States v. Wood*, 834 F.2d 1382, 1387-88 (8th Cir. 1987) (error to permit testimony that defendant refused to consent to a warrantless search, but error was harmless because comment was an isolated remark during a six-day trial, the trial court immediately issued a curative instruction, the prosecution did not elicit the offending testimony and made no use of it during the course of the trial, the search was peripheral to the case, and the other evidence of guilt was overwhelming).

Despite the holding in *Taxe*, the Courts of Appeal have been reluctant to treat a

²⁹ The Court has some reservation about the holding in *Taxe*. It strikes the Court that there are relevant distinctions between an assertion of one's rights under the Fourth Amendment and the assertion of one's privilege against self-incrimination under the Fifth Amendment. Evidence of the exercise of the right against self-incrimination will almost always be overwhelmingly prejudicial since, by its terms, invocation of the right suggests a consciousness of guilt. On the other hand, exercising one's right to refuse to consent to a search does not necessarily suggest consciousness of guilt, since privacy concerns – not just fear of incrimination – may motivate reliance on those rights. *Thame*, 846 F.2d at 206 n. 2. Moreover, the continuing vitality of *Taxe*, at least in the context of submission to blood tests, is called into question by decisions of the United States Supreme Court and Ninth Circuit, holding that a defendant's post-arrest refusal to submit to a blood test is admissible to show consciousness of guilt. *South Dakota v. Neville*, 459 U.S. 553 (1983); *Deering v. Brown*, 839 F.2d 539, 541 (9th Cir. 1988).

comment on a defendant's assertion of a Fourth Amendment right with the same gravity as a comment upon a defendant's decision to assert his or her Fifth Amendment privilege and not testify at trial. For example, virtually every case which has considered such a claim in the context of the Fourth Amendment has concluded, for a variety of reasons, that the error was harmless. *See Ferguson*, 935 F.2d at 1526-29 (error harmless because of curative instruction); *Wood*, 834 F.2d at 1387-88 (error harmless because comment was isolated remark, curative instruction, prosecution did not elicit the offending testimony and made no use of it during trial, and evidence of guilt overwhelming); *Taxe*, 540 F.2d at 969 (reversal is not necessary when the record as a whole indicates that comments on the refusal to consent to a search were harmless); *Thame*, 846 F.2d at 207 (the use of the defendant's refusal to consent to a search as evidence of guilt did not require reversal because there was considerable other evidence of guilt).

Unlike the cases cited above, which found the error to be harmless for a variety of reasons – e.g., the refusal to consent to the search was first raised by the defense, the trial court gave a curative instruction, or the comment was an isolated remark by the prosecutor – the record here reveals that the prosecutor solicited the testimony that the petitioner refused to give blood without a court order, the court did not issue a curative instruction, and the prosecutor used this testimony in his closing remarks. As a result, the Court finds the comments on the petitioner's Fourth Amendment right to refuse to give a blood sample resulted in a constitutional violation.

Having concluded that there was a violation under the Fourth Amendment, the Court

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must analyze this violation under the *Brecht* harmless error standard to determine if the petitioner is entitled to relief. The initial comment on the petitioner's refusal to give blood absent a court order was testimony given by Officer Robinson. Petitioner's counsel attempted to minimize the effect of this testimony, through the petitioner's explanation that he had refused to give blood out of fear of losing his job. Officer Robinson's testimony offered some support for this explanation, since Robinson testified that he had shown up at the petitioner's place of employment to obtain a sample of the petitioner's blood. Thus, the petitioner was able to offer a rational explanation of his decision not to submit to a blood test. Moreover, as explained in greater detail in this decision, there was other substantial evidence that the petitioner killed Ms. Elg, including his blood found in her bedroom. As a result, the Court cannot conclude that the comments had a "substantial and injurious effect or influence" upon the jury or resulted in actual prejudice to the petitioner.

H. Claim 10.

In this claim, the petitioner alleges that prosecutorial misconduct denied him due process and a fair trial. The petitioner focuses on five areas of specific prosecutorial misconduct:

- a) The failure to disclose exculpatory evidence concerning (1) voice comparisons, (2) the suspicions of the forensic pathologist that the decedent's cat may have caused post-mortem damage to the decedent's body, and (3) tests which identified the murder weapon (also raised as claim 5).

- b) The failure to preserve samples of blood in violation of *Youngblood v. Arizona* (also raised in claim 6).
- c) Comments on the petitioner's post-*Miranda* silence during trial (also raised in claim 8).
- d) Attacks on the petitioner's constitutional right to counsel.
- e) Improper closing argument.

The Court will address each claim in turn, after reviewing the applicable standard of review in this habeas proceeding.

1. Standard of Review

To constitute a due process violation, prosecutorial misconduct must be "of sufficient significance to result in the denial of the defendant's right to a fair trial." *Bagley*, 473 U.S. at 676 (quoting *United States v. Agurs*, 427 U.S. at 108). The standard of review of a prosecutor's closing argument is "whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting convictions a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). The United States Supreme Court has cautioned the federal courts that on habeas review, the appropriate standard of review is "the narrow one of due process, not the broad exercise of supervisory power." *Id.* (quoting *Donnelly*, 416 U.S. at 642).

Claims of prosecutorial misconduct are subject to "harmless error" analysis requiring reversal only if the error had "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 633. The petitioner appears to concede that the alleged

prosecutorial misconduct did not influence the jury's verdict. *Petitioner's Memorandum in Support of Motion for Summary Judgment*, p. 74. However, the petitioner urges this Court to find an exception to this harmless error analysis, focusing on a footnote in *Brecht* which indicates the United States Supreme Court "does not foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict." *Brecht*, 507 U.S. at 638 n. 9 (citations omitted).

2. Claims 5, 6, and 8

Claims 5, 6, and 8 have been extensively analyzed in this Memorandum Decision, and the Court did not find the petitioner was entitled to relief on the underlying claim of a constitutional violation. In claim 5, the Court failed to find any violation of the petitioner's constitutional rights in the State's failure to make a timely disclosure of evidence regarding voice identification, cat mutilation or the Wyckoff tests. In claim 6, the Court found that the failure to retain the blood evidence did not create a constitutional violation, since the petitioner did not allege bad faith on the part of the police or prosecutor. In claim 8, the Court found that although the prosecutor's comments may have been improper, the error was harmless and the petitioner was not entitled to relief. For the reasons stated in the Court's discussion of those underlying claims, the Court finds that the prosecutor's actions did not amount to prosecutorial misconduct and, even if they did, the petitioner was not denied his right to a fair trial. The Court will therefore focus on the petitioner's claims which have not been previously

addressed.

3. Comment upon the petitioner's right to counsel

This claim is based on comments by the prosecutor during his cross-examination of the petitioner, and during closing argument, in which he challenged the petitioner's right to counsel. During the trial the prosecutor asked the petitioner the following question on cross-examination:

As a matter of fact, I notice that even in your attorney's opening statement in this case he didn't tell what you were going to say. Isn't it true, Mr. Leavitt, that that's the way you wanted it, so that the State couldn't prepare to cross-examine you and couldn't prepare to meet that kind of story?

Trial Transcript, p. 1809. During closing argument, the prosecutor stated:

There's a lot of this going on. Even, ladies and gentlemen, and I hesitate to attack opposing counsel because I respect them very much, but even in the opening argument of this case, the Defense Attorney played the same type of games with you. It is called hide the ball. It is called not tell the whole story. You were told in opening argument, opening statement, the Defendant would take the stand, and he would tell you a reasonable and exculpating version of the blood in the room. But you weren't told what that would be, were you? It wasn't until after this Defendant had sat through this entire trial and listened to all the State's evidence that he took the stand and for the first time, day before yesterday, publicly told his version of this thing. Interesting.

It was only the day before yesterday, after he had been in his cell for six months – at least he had in his cell for six months – all the police officers [sic] reports and statements in this case, before he publicly took the stand and gave his version of it. There's a lot of hide the ball going on here, ladies and gentlemen. And you need to take this into account.

Trial Transcript, pp. 2134-35. The prosecutor then went on to comment on inconsistencies in the petitioner's attempts to explain why his blood was found in the victim's bedroom.

The petitioner argues that these statements by the prosecutor "struck at the core of a defendant's right to counsel," *Petitioner's Memorandum in Support of Motion for Summary Judgment*, p. 70, and that the attacks on defense counsel and the petitioner's right to counsel were an improper attempt to convince the jury that the petitioner was guilty because he hired an attorney and relied upon his attorney's advice. In support of this position, the petitioner relies on *Bruno v. Rushen*, 721 F.2d 1193 (9th Cir. 1983). There, the Ninth Circuit Court of Appeals held that the prosecutor's comments regarding a witness and in closing argument were improper and affirmed the district court's grant of the petitioner's writ of habeas corpus. *Id.* at 1193-94. In *Bruno*, the prosecutor's opening statement commented on a defense witness' repudiation of prior testimony and implied that it occurred after consulting with lawyers. More relevant to the instant case, at closing, the prosecutor in *Bruno* made the following statement:

There is a Judas syndrome at work here and the criminal justice system is the cathedral. And it's been a terrible sight to see it sullied the way it has been

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during this trial with the most blatant lies. But to complete the Judas syndrome the - the defense is the Judas in this case, and they have betrayed that system and there are thirty pieces of silver, or the \$12,000 given over by the defendant to his counsel.

Id. at 1194 n. 3.

The Ninth Circuit Court of Appeals characterized this attack as vicious, and found that the prosecutor had openly hinted to the jury that the fact that the defendant had hired counsel was probative of the defendant's guilt. *Id.* at 1194. Further, the court found that "the obvious import of the prosecutor's comments was that all defense counsel in criminal cases are retained solely to lie and distort the facts and camouflage the truth in an abominable attempt to confuse the jury as to their client's involvement with the alleged crimes." *Id.*

Here the statements at issue do not attack the accused's right to counsel, but instead focus on the veracity of the petitioner's story, and the benefit he received by delaying the telling of his story until after presentation of the evidence. Since the petitioner took the stand, he is not immune from comment on his veracity. The prosecutor was attempting to properly challenge the petitioner's story by implying that the petitioner had waited to hear all the evidence before he told his version in an attempt to refute the damaging evidence presented by the prosecutor.

In summary, the Court concludes that the prosecutor's comment was not improper and the petitioner's rights were not violated. The comment did not result in a denial of the petitioner's right to a fair trial. *See Bagley*, 473 U.S. at 676. As a result the Court is

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unpersuaded that the comment infected the integrity of the proceeding so as to entitle the petitioner to habeas relief. *Brecht*, 507 U.S. at 638 n. 9.

4. Improper "final link" statement during closing argument

The petitioner alleges that a portion of the prosecutor's closing argument improperly suggested that the jury was a link in the chain of law enforcement, misstating the role of the jury and placing the jury on the side of the prosecutor and against the defendant. The portion of the closing argument at issue is as follows:

In closing let me just say that you are part of a very important chain called the chain of law enforcement. And law enforcement and justice don't work in our country unless you do your part. The police officers can be as well trained as you want them and the forensic scientists can be as well trained as you want in the sciences. And they can go out an [sic] investigate crimes as competently and professionally as this group has done. And I think that Officer Robinson and those associated with him have done an excellent job. You can have the best prosecutors around. And I want to tell you that I believe that Mr. Moss is one of the best prosecutors in the State. And they work together like this (Indicating) because they are part of the chain of law enforcement that keeps our community safe.

But the third link in that chain is a jury, which when they're given the proper evidence and they are given the proof beyond a reasonable doubt, they have the fortitude to be able to act upon that and to preserve that chain unbroken.

And the fourth link in the chain, of course, is the judge who has the courage

and also the wisdom to impose the appropriate sentence. Now, none of this works unless you do your job.

The police in this case, the forensic scientists, they have performed their duties. Mr. Moss and I have performed our duties. We've carried that heavy burden. We told you we would. I don't shrink from it. But now that we have, you have a duty under the law to do your duty, to do your part. And, therefore, I call upon you as you go to the jury room to return the only fair and just verdict, the one required by law, and that is guilty of Murder in the First Degree. Thank you very much.

Trial Transcript, pp. 2223-24.

The petitioner alleges that *Coleman v. Brown*, 802 F.2d 1227 (10th Cir. 1986), clearly deems the "final link" argument improper. In *Coleman*, the prosecutor stated, in closing argument during the guilt phase, that the jury was the final link in the chain of law enforcement. *Id.* at 1238. On appeal from denial of the habeas petition, the Tenth Circuit Court of Appeals held that the argument misstated the role of the jury, placing it in an adversarial position with respect to the defendant and was improper, but that the remark did not rise to the level of constitutional error. *Id.* The petitioner concedes that in *Coleman*, the Court of Appeals found no other improper arguments and did not find a constitutional violation. However, the petitioner urges this Court to find a constitutional violation because the improper comments in *Coleman* were limited to statements made at the introduction of a lengthy closing argument, while here, the prosecutor's closing argument was laced with

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improper comments regarding the petitioner's right to silence and right to counsel, and ended forcefully with the "final link" argument. Further, the petitioner argues that the comment was made as the final comment to the jury, and included the implication that other "links" had performed their duty, and charged the jury to "preserve the chain unbroken." *Trial Transcript*, p. 2224. Thus, the petitioner argues the prosecutor's closing argument is more egregious than the statement found improper in *Coleman*, and rises to a constitutional violation in this case.³⁰

The prosecutor's argument in *Coleman* was not provided and the Court has no basis with which to ascertain if the "final link" argument in the instant case is more egregious than that found improper, but not a constitutional violation, in *Coleman*. In this case, the statement in question comprises one page of 64 pages of closing argument, albeit close to the end of the argument. Considering the entirety of the prosecutor's closing argument, and the fact that he spent the majority of the time arguing to the jury the improbability of the petitioner's story and his contradictory testimony, the Court cannot find the "final link" argument so improper that it rises to the level of a constitutional violation. Accordingly, the petitioner's request for relief on this claim is denied.

I. Claim 11.

In this claim, the petitioner alleges that the jury instructions were constitutionally

³⁰ In addition to *Coleman*, the petitioner relies on two state cases which held the link in the chain argument to be improper, *see Fulgham v. State*, 386 So.2d 1099 (Miss. 1980); *see also State v. Brown*, 358 S.E.2d 1, 18 (N.C. 1996). However, as in *Coleman*, neither of those cases held the improper comment required reversal. The Court also notes that Idaho has rejected the contention that the final link argument is improper. *State v. Gibson*, 106 Idaho 54, 61, 675 P.2d 33, 40 (1984).

inadequate with respect to the proper burden of proof, proof beyond a reasonable doubt, the presumption of innocence, and the alibi defense. The trial court read 17 preliminary instructions prior to opening statements, and 33 additional instructions following the conclusion of the evidence. In this claim, the petitioner alleges that six of the instructions, Nos. 10, 11, 12, 13, 36 and 39, violated his constitutional rights.

1. Standard of Review

The due process clause of the Constitution requires the State to prove guilt beyond a reasonable doubt in criminal prosecutions. *In Re Winship*, 397 U.S. 358, 364 (1970). It is well settled that jury instructions that shift the burden of proof to the defendant or vitiate the reasonable doubt standard raise claims of constitutional proportion. *Sandstrom v. Montana*, 442 U.S. 510 (1979); *In Re Winship*, 397 U.S. at 364. In *Cupp v. Naughten*, 414 U.S. 141, 147 (1973), the Supreme Court reiterated a long established principle that, in determining the effect of a jury instruction on the validity of the conviction of a habeas petitioner, "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." This principle stems from a recognition that, not only is a challenged instruction one of many instructions, but a judgment of conviction is the culmination of a trial encompassing the testimony of witnesses, argument of counsel, receipt of exhibits in evidence, as well as the judge's instructions to the jury. *Id.* Even if certain parts of the instructions might be viewed differently if this was direct review in a federal criminal case, the standard is quite different in reviewing a state proceeding pursuant to federal habeas jurisdiction. *Patterson v. New York*, 432 U.S. 197, 207 (1977). The burden of demonstrating that an

erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court judgment is even greater than the showing required to establish plain error on direct appeal. *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). The degree of prejudice required is "not merely whether 'the instruction is undesirable, erroneous, or even universally condemned.'" *Id.* (quoting *Cupp*, 414 U.S. at 146). Rather, the habeas petitioner has the burden of meeting a very high standard – "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Id.* at 147.

2. Reasonable Doubt

The petitioner's argument on this claim concerns four preliminary instructions given regarding reasonable doubt, Nos. 10, 11, 12 and 13, and two post-evidentiary instructions, Nos. 36 and 39, which are discussed in the following section. The petitioner argues that the effect of these instructions is to erode the requirement that the prosecution must prove the elements of the crime beyond a reasonable doubt. The petitioner concedes that Instruction No. 11³¹ conforms to the instruction found to be constitutionally valid in *Victor v. Nebraska*, 511

³¹ Instruction No. 11 informed the jury that:

[a] defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal. This presumption placed upon the State the burden of proving him guilty beyond reasonable doubt. Reasonable doubt is defined as follows: It is not a mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

U.S. 1 (1994), regarding reasonable doubt. However, the petitioner argues that although the instruction conforms with the instruction approved in *Victor*, here it was presented in connection with the other reasonable doubt instructions, which "far from buoying up the troubled language of the . . . instruction, drag it further down, making conditional, misallocating, trivializing, and ultimately extinguishing altogether the requirement for proof beyond a reasonable doubt." *Petitioner's Memorandum*, p. 81.

In *Victor*, the Court upheld the murder convictions and death sentences of petitioners Sandoval and Victor, and rejected arguments that their due process rights were violated by jury instructions defining "reasonable doubt" that were given in both cases. Petitioners Sandoval and Victor both objected to the use of an instruction using the phrase "moral certainty" based upon the Supreme Court's decision in *Cage v. Louisiana*, 498 U.S. 39 (1990), modified by *Estelle*, 50 U.S. at 73 n.4.³² In addition, Sandoval objected to the use of the term "moral evidence" in the instruction. In denying relief to Sandoval, the Court found that it had

Preliminary Jury Instruction No. 11, *Clerk's Record on Appeal*, p. 771.

³² In *Cage v. Louisiana*, 498 U.S. 39 (1990), the Court held a jury instruction on reasonable doubt to be unconstitutional. In concluding the jury instruction was unconstitutional the Court held:

It is plain to us that the words "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable-doubt standard. When those statements are then considered with the reference to 'moral certainty,' rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

Id. at 41.

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previously approved the use of moral certainty in a reasonable doubt instruction, having held that "proof to a 'moral certainty' is equivalent to 'beyond a reasonable doubt.'" *Victor*, 511 U.S. at 12 (quoting *Fidelity Mut. Life Ass'n v. Mettler*, 185 U.S. 308, 317 (1902)). However, the Court expressed a concern that such an antiquated term may be confusing to a modern juror. *Victor*, 511 U.S. at 16. The Court nevertheless found that in the "context of the instructions as a whole we cannot say that the use of the phrase rendered the instruction given in Sandoval's case unconstitutional." *Id.* Thus, unlike in *Cage*, the Court was persuaded that the balance of the language in the challenged instruction, when read with the Court's other instructions to the jury, properly defined reasonable doubt.³³ The Court further held the instruction at issue provided a definition to the phrase "moral evidence." *Id.* at 13.

In petitioner Victor's appeal, the petitioner challenged the "moral certainty" portion of the instruction, also citing *Cage*. The Court was unpersuaded, noting that "the problem in *Cage* was that the rest of the instruction provided insufficient context to lend meaning to the phrase. But the Nebraska instruction is not similarly deficient." *Id.* at 21. In reaching this

³³ At Sandoval's trial, reasonable doubt was defined as "that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge." *Victor*, 511 U.S. at 38. The instruction thus explicitly told the jurors that their conclusion had to be based on the evidence in the case. Other instructions reinforced this message. The jury was told "to determine the facts of the case from the evidence received in the trial and not from any other source." *Id.* The judge continued "you must not be influenced by pity for a defendant or by prejudice against him. . . . You must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." *Id.* at 39. Accordingly, there was no reasonable likelihood that the jury would have understood moral certainty to be disassociated from the evidence in the case. *Id.*

conclusion the Court observed that the jurors in *Victor* were also told, "[i]n determining any questions of fact presented in this case, you should be governed solely by the evidence introduced before you. You should not indulge in speculation, conjectures, or inferences not supported by the evidence." *Id.* at 21-22. This same observation can be made here, since the same instruction was given at petitioner's trial as paragraph 2 of Preliminary Jury Instruction No. 15. *Clerk's Record on Appeal*, p. 775.

In *Victor*, the Court ultimately held:

There is accordingly no reasonable likelihood that the jurors understood the reference to moral certainty to allow conviction on a standard insufficient to satisfy *Winship*, or to allow conviction on factors other than the government's proof. Though we reiterate that we do not countenance its use, the inclusion of the "moral certainty" phrase did not render the instruction given in *Victor's* case unconstitutional.

Id. at 22. In drawing this conclusion, the Court determined that the proper inquiry is "not whether the instruction 'could have' been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury did so apply it. *Victor*, 511 U.S. at 6 (quoting *Estelle*, 502 U.S. at 72, and n. 4).

In this case, the petitioner argues that Instruction No. 11 is unconstitutionally weakened by the trial court's other instructions. For example, Instruction No. 10³⁴, states "you *should*

³⁴ Instruction No. 10 reads as follows:

Before you can convict a defendant of the crime charged against him by the

require the Prosecution to prove every material allegation contained in the Information beyond a reasonable doubt." Petitioner argues that using the precatory term "should" rather than the mandatory terms "shall" or "must," implies that the jury has the option of whether to put the prosecution to its burden, a concept which violates the Due Process Clause.

Similarly in Instruction No. 12, the petitioner argues that the language permits conviction even in the absence of proof beyond a reasonable doubt. Instruction No. 12 states:

The rule of law which clothes every person accused of a crime with the presumption of innocence and imposes upon the State the burden of proving his guilt beyond a reasonable doubt, is not intended to aid anyone who is in fact guilty to escape, but is a humane provision of law, intended so far as human agencies can to guard against the danger of an innocent person being unjustly accused.

Preliminary Jury Instruction No. 12, *Clerk's Record on Appeal*, p. 772. The petitioner argues that this instruction changes the jury's duty from that of seeking the presence of reasonable doubt, to one of determining whether the petitioner is "in fact" guilty or innocent, thereby permitting the jury to find guilt even in the absence of proof beyond a reasonable doubt.

Similarly, the petitioner argues that Instruction No. 13 impermissibly advises the jury

Information, you should require the prosecution to prove every material allegation contained in the Information beyond a reasonable doubt; and if, after a consideration of all the evidence in the case, you entertain a reasonable doubt of the truth of any one of these material allegations, then it is your duty to give the defendant the benefit of such doubt and acquit him. Probabilities, or that the greater weight or preponderance of the evidence supporting the allegations of the Information, will not support a conviction.

Preliminary Jury Instruction No. 10, *Clerk's Record on Appeal*, p. 770.

that all the facts and circumstances need not be proven beyond a reasonable doubt.

Specifically, the instruction advises the jury that:

It is not necessary that all the facts and circumstances surrounding the testimony and evidence that is given on behalf of the State shall be established beyond a reasonable doubt. All that is necessary is that all the facts and circumstances in evidence, together, shall establish the defendant's guilt beyond a reasonable doubt.

Preliminary Jury Instruction No. 13, *Clerk's Record on Appeal*, p. 773.

In *Reynolds v. United States*, 238 F.2d 460 (9th Cir. 1956), the Ninth Circuit Court of Appeals reversed a District Court of Alaska conviction for manslaughter, holding that giving a jury instruction, similar to Instruction No. 12 in the present case, was prejudicial error. The jury instruction given, reads as follows:

The law presumes every person charged with a crime to be innocent. This presumption of innocence remains with the defendant throughout the trial and should be given effect by you unless and until, by the evidence introduced before you, you are convinced the defendant is guilty beyond a reasonable doubt.

This rule, as to the presumption of innocence, is a humane provision of the law, intended to guard against the conviction of an innocent person, but it is not intended to prevent the conviction of any person who is in fact guilty, or to aid the guilty to escape punishment.

Id. at 462. Giving this instruction was impermissible, the court concluded, because although it was right to instruct on the presumption of innocence, it was wrong to add a self-defeating

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qualification. *Id.* at 463. Here, the petitioner does not specifically argue that this decision on direct review of the instructions given in a federal prosecution dictates the result in this habeas review of a state criminal proceeding. Rather, the petitioner argues that Instructions Nos. 12 and 13, when read in conjunction with Instruction No. 11, causes the latter instruction to not pass constitutional muster under the *Victor* standard requiring careful scrutiny of the totality of all jury instructions focusing on the issue of reasonable doubt.

This Court has reviewed the entire body of reasonable doubt instructions given in this case. The petitioner concedes that Instruction No. 11 is not unconstitutional, but nonetheless argues that the remainder of the instructions given were substantially weaker than those given in the *Victor* case, and which the Supreme Court found to be adequate to avoid a violation of the defendant's rights under the Due Process clause. The instructions given to the Sandoval jury are not reproduced in their entirety in the *Victor* case, but the Supreme Court did cite some of the "affirming" instructions given to the *Victor* jury, which the Court found persuasive. One of those is identical to an instruction given in the instant case. Taken as a whole, the reasonable doubt instructions in this case do not "erode" the validity of Instruction No. 11. Nor do they create a reasonable likelihood that the jury applied the instructions unconstitutionally, thus convicting the petitioner on a finding of less than reasonable doubt. *See Victor*, 511 U.S. at 6 (quoting *Estelle*, 502 U.S. at 72, and n. 4). The petitioner is not entitled to relief on this claim.

3. Alibi Instruction

The petitioner argues that the trial court's instruction on his alibi defense, Instruction

No. 39,³⁵ improperly placed the burden on him to establish a reasonable doubt as to his guilt based upon his alibi defense, rather than placing the burden on the prosecution to disprove the defense beyond a reasonable doubt. Although agreeing with the petitioner that Instruction No. 39 improperly shifted the burden of proof on the alibi issue, the Court concludes that the petitioner is not entitled to habeas relief on this issue. The petitioner offered no objection to the proposed instruction and, indeed, it was the petitioner who proposed to the trial court that the instruction be given. As such, the trial court's error was invited by the petitioner and is therefore not subject to review in this proceeding. Moreover, even if the invited error doctrine is not applied, it is clear that the petitioner has not shown "cause and actual prejudice" as he is required to do in order to obtain habeas relief where no objection was made at the time of trial.

The United States Supreme Court has made clear that it is constitutionally permissible to place the burden on a criminal defendant to establish an affirmative defense. In *Patterson v. New York*, 432 U.S. 197 (1977), the Supreme Court upheld the conviction of a defendant, where state law imposed upon the defendant the burden of establishing, by a preponderance of

³⁵ Instruction No. 39 reads as follows:

You are further instructed that an alibi is an affirmative defense and it is incumbent upon the defendant where he relies upon the defense of an alibi to prove it, not beyond a reasonable doubt, nor a preponderance of the evidence, but by such evidence and to such a degree of certainty as will, when the whole of evidence is considered, create and leave in the minds of the jury a reasonable doubt of his guilt."

Jury Instruction No. 39, *Clerk's Record on Appeal*, p. 800.

the evidence,³⁶ his affirmative defense that he acted under the influence of extreme emotional disturbance. In reaching this conclusion, the Court began with the observation that:

It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion," and its decision in this regard is not subject to proscription under the Due Process Clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Id. at 201-02 (citations omitted). The Court then noted that the Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 204 (citing *In re Winship*, 397 U.S. at 364). However, once the facts constituting a crime are established beyond a

³⁶ The situation here is, of course, distinguishable from the situation confronted in *Patterson*, since Instruction No. 39 appears to place the burden on the defendant to establish his alibi defense, but only to such an extent as to create reasonable doubt as to his guilt, while the defendant in *Patterson* was required to prove the affirmative defense by a preponderance of the evidence. However, the issue which the Court confronted in *Patterson*, focused on who may constitutionally be required to carry the burden of persuasion, rather than on the quantum of evidence which must be established to carry that burden. In this regard, the decision in *Patterson* clearly teaches that due process "requires *the prosecution to prove* beyond a reasonable doubt all elements included in the definition of the offense of which the defendant is charged." *Patterson*, 432 U.S. at 210 (emphasis supplied).

reasonable doubt, based on all the evidence, the State may properly impose upon the defendant the burden of establishing an affirmative defense, and even require that it be demonstrated by a preponderance of the evidence. *Id.* at 206.

In reaching this conclusion, however, the Court warned that a different result would occur if the affirmative defense, rather than providing for a defense after the State has established all elements of the crime beyond a reasonable doubt, simply negates any elements of the crime which the State is required to prove in order to obtain a conviction. *Id.* at 207. The Court also warned that, its decision should not be viewed as permitting "state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes," since "there are obviously constitutional limits beyond which the States may not go" *Id.*

Given the *Patterson* decision, the critical inquiry here is whether the alibi defense is an affirmative defense, which applies after the State has established all elements of the crime, or is a defense which simply negates an element of the crime which the State is required to prove beyond a reasonable doubt. Virtually every court that has squarely confronted this issue, both before and after *Patterson*, has concluded that it is the latter rather than the former, and has declared unconstitutional any attempt to place a burden on the defendant to establish an alibi defense. For example, in *Stump v. Bennett*, 398 F.2d 111 (8th Cir. 1968), the Eighth Circuit ruled *en banc* that an Iowa rule requiring defendants to prove alibis by a preponderance of the

evidence violated due process.³⁷ Every other federal court which has considered the issue has reached the same conclusion. *See Fulton v. Warden*, 744 F.2d 1026, 1036 (4th Cir. 1984) (concluding that it is well settled "that because, as a matter of federal law, [the alibi defense] relates to an element of the crime charged, the burden of proof upon it may not constitutionally be shifted to the accused"); *Smith v. Smith*, 454 F.2d 572, 577-78 (5th Cir. 1971) (holding that a Georgia jury charge that alibi as a defense must be established to reasonable satisfaction of jury was violative of due process in that it tended to burden the defendant with proving that he was not present at the scene of the crime); *United States v. Booz*, 451 F.2d 719, 723 (3rd Cir. 1971) (indicating that a jury instruction must make clear that, on the issue of alibi, the government had to convince the jury beyond a reasonable doubt that the alibi was not true); *Rogers v. Redman*, 457 F.Supp. 929 (D.Del. 1978) (holding, in habeas proceeding, that State cannot classify an alibi as an affirmative defense and place the burden of proof on the defendant, because an alibi is really another way of denying guilt of the crime). *See also United States v. Simon*, 995 F.2d 1236, 1244 (3rd Cir. 1993) (suggesting that improper alibi instruction may be "constitutional" error, to the extent that it suggests that the accused bears a burden of persuasion on the alibi defense); *Johnson v. Spaulding*, 510 F.Supp. 164, 167 (E.D.Wash. 1981) (suggesting, in habeas proceeding, that if alibi instruction requires

³⁷ It is of some significance that the Supreme Court has twice referred to the *Stump* decision with approval. For example, in *Engle v. Isaac*, 456 U.S. 107, 133 n. 39 (1982), the Court referred to *Stump* in noting that the lower courts have long "perceived that placing a burden of proof on the defendant may violate due process." In *Johnson v. Bennett*, 393 U.S. 253 (1968), the Court vacated and remanded a lower court decision for reconsideration in light of *Stump*.

defendant to produce evidence and convince the jury as to innocence of elements of the crime, the instruction would offend the presumption of innocence and require reversal). For this reason, the Court concludes that Jury Instruction No. 39 improperly shifted the burden of persuasion to the petitioner, requiring him to establish his alibi defense through evidence sufficient to raise a reasonable doubt as to his guilt.

The Court nevertheless concludes that the petitioner is not entitled to habeas relief on this issue. Instruction No. 39 was proposed to the court by the defendant during trial. Defendant's Requested Instruction No. 21, *Clerk's Record, Vol. III, p. 695; Trial Transcript, p. 2068*. As such, the error of the trial court in giving the proffered instruction was invited error. It has uniformly been held in the federal courts, both in habeas proceedings and on direct review, that a defendant may not complain of error which he has invited and reversal cannot be predicated upon such invited error. *Parker v. Champion*, 148 F.3d 1219, 1221-22 (10th Cir. 1998), *cert. denied*, 525 U.S. 1151 (1999) ("Even if the trial court erred in giving the second degree felony murder instruction, Parker invited the error by requesting this instruction at trial. This invited error precludes the reversal of Parker's conviction, as well as the grant of any habeas relief, on the basis of the alleged improper instruction."); *United States v. Herrera*, 23 F.3d 74, 75-76 (4th Cir. 1994) (holding that doctrine of invited error precludes grant of habeas relief to petitioner convicted of unindicted offense where petitioner's counsel requested instruction on that offense); *United States v. Schaff*, 948 F.2d 501, 506 (9th Cir. 1991) (direct appeal); *Leverett v. Spears*, 877 F.2d 921, 924 (11th Cir. 1989) (applying invited error doctrine to deny habeas relief for state trial court's giving of lesser included offense

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instruction which petitioner had submitted and argued for).

Applying the invited error doctrine in this case is not without difficulty, however, because of a recent decision in this circuit which substantially restricts the application of the doctrine. The Ninth Circuit is regarded as generally taking a more restrictive view of invited error than other circuits, which have generally viewed the doctrine as an effective and absolute bar to appellate or habeas review of a trial court's error. *See Herrera*, 23 F.3d at 76 (citing language from the dissenting opinion of Judge Widener in *Wilson v. Lindler*, 995 F.2d 1256, 1265 (4th Cir. 1993), later adopted by the Fourth Circuit in its *en banc* review in *Wilson v. Lindler*, 8 F.3d 173, 175 (4th Cir. 1993)). However, this circuit's more restrictive approach in applying the invited error doctrine reached its apex with the court's *en banc* decision in *United States v. Perez*, 116 F.3d 840 (9th Cir. 1997). Because of the potentially far-reaching effect of that decision on the application of invited error doctrine to the petitioner's claims, an extensive discussion of the history and background of the case is in order.

In *Perez*, the defendant was convicted on several drug and firearms charges, including a charge of using or carrying a firearm in relation to drug trafficking in violation of 18 U.S.C. § 924(c)(1). During the trial, both the government and the defendant submitted jury instructions, which were based upon the Ninth Circuit's model instructions but did not reflect the holding of *United States v. Mendoza*, 11 F.3d 126 (9th Cir. 1993), that in a § 924(c)(1) case, the statute's "in relation to" requirement is an essential element of the offense which must be submitted to a jury. On appeal, the government contended that the trial court's error was invited by the defendant's submission of a flawed instruction. The three-judge panel which initially heard the

appeal determined that the Supreme Court's decision in *United States v. Olano*, 507 U.S. 725 (1993) overruled the invited error doctrine, at least in the context of the jury instructions specifically requested by the defendant. *Perez*, 67 F.3d at 1385 n. 13. On *en banc* review, the court concluded that *Olano* did not overrule the invited error doctrine, but did require a reconsideration of how, and under what circumstances, the doctrine could be applied to preclude judicial review.

The Supreme Court's decision in *Olano* did not specifically address the invited error doctrine. Rather, it was an attempt by the Court to better define the "plain error" which may be considered by the appellate courts on direct review under Fed. R.Crim.P. 52(b), despite counsel's failure to interpose a timely objection at trial. In undertaking this task, the Court drew a distinction between forfeited and waived rights, noting that "forfeiture is the failure to make the timely assertion of a right," while a "waiver is the 'intentional relinquishment or abandonment of a known right.'" *Olano*, 507 U.S. at 733. The Court concluded that if an objection is waived, it is not reviewable by the appellate court, but if an objection or right has merely been forfeited by a failure to object, then it may be reviewed for "plain error" under Rule 52(b).

From this decision, six members of the *en banc* panel concluded that the Ninth Circuit's invited error doctrine must be reconsidered. Specifically, the court concluded "that *Olano* limits our application of the invited error doctrine to those rights deemed waived, as opposed to merely forfeited, that is, 'known right[s]' that have been 'intentional[ly] relinquish[ed] or abandon[ed].'" *Perez*, 116 F.3d at 842 (quoting *Olano*, 507 U.S. at 733). In

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short, the court concluded that invited error is only unreviewable if the defendant intentionally relinquished or abandoned a known right. In all other cases, invited error is reviewable under the plain error standard – the same standard which applies if a defendant simply fails to object to the trial court's decisions.³⁸

The *Perez* decision would have a substantial impact on this case. The record is inadequate to determine whether the defendant's attorneys, in submitting the alibi instruction which was ultimately read to the jury as Instruction No. 39, "affirmatively acted to relinquish a known right," by considering the controlling law and "in spite of being aware of the applicable law, propos[ing] or accept[ing] a flawed instruction." *Id.* at 845. Without such evidence of a waiver, the trial court's giving of the alibi instruction would be reviewed under the plain error standard.

³⁸ The Court has some reservation about the long-term vitality of the *Perez* decision. The five remaining members of the *en banc* panel, in a concurring opinion authored by Judge Kleinfeld, concluded that *Olano* could not be extended beyond the reach of Rule 52(b) and has no application to invited error. *Perez*, 116 F.3d at 849. Moreover, to the Court's knowledge, no other circuit has applied *Olano* to the invited error doctrine. See *United States v. Thayer*, 204 F.3d 1352 (11th Cir. 2000) (holding, post-*Olano*, that because the trial court affirmatively asked counsel if the admission of certain testimony was acceptable, the defense's concurrence invited any error so that review is precluded); *In re Grand Jury Subpoena*, 187 F.3d 996 (8th Cir. 1999) (citing *Olano* for proposition that appellant affirmatively waived any objection by advising the court that the court's procedures were "fine" and "acceptable," thereby precluding review of the issue, even for plain error); *United States v. Tandon*, 111 F.3d 482, 487-89 (6th Cir. 1997) (applying invited error doctrine without requiring showing of waiver in post-*Olano* case); *United States v. Hardwell*, 80 F.3d 1471, 1487 (10th Cir. 1996) (suggesting that a waiver occurs under *Olano* whenever a defendant invites a ruling from the Court, so that the ruling is not reviewable). Nevertheless, the *Perez* decision is the law of this circuit and has been applied by other three-judge panels, including application of plain error analysis where a trial court erroneously used an instruction submitted by a defendant. *United States v. Burt*, 143 F.3d 1215 (9th Cir. 1998).

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However, the Court is not persuaded that *Perez* applies to habeas review. *Perez* was an attempt to reconcile the invited error doctrine with the Supreme Court's conclusion in *Olano* that Fed.R.Crim.P. 52(b) provides for plain error review of issues raised for the first time on a direct appeal, unless there has been an express waiver of the error. The conclusion reached in *Perez*, is that the plain error review provided for in Rule 52(b), applies not only to errors which counsel fails to object to, but also to errors that counsel invites affirmatively. It is only where the defendant has both invited the error, and relinquished a known right, that the error is waived and therefore unreviewable under Rule 52(b). Thus, the *Perez* decision can best be seen as the court's consideration of the interplay between the invited error doctrine and the plain error standard set forth in Rule 52(b).

Perez does not apply to this habeas review, because the plain error standard of Rule 52(b) does not apply to habeas proceedings. The Supreme Court has made clear, that while the "plain error" standard of Rule 52(b) applies in determining whether a defendant may raise a claim for the first time on direct appeal, the much more restrictive "cause and prejudice" standard applies in determining whether that same claim may be raised in a habeas proceeding. *United States v. Frady*, 456 U.S. 152, 162-69 (1982). This is a critical distinction. Rather than focusing on issues of waiver and forfeiture, as the *Olano* and *Perez* decisions require in cases involving direct review of plain error under Rule 52(b), the focus in a habeas proceeding is whether the petitioner has shown both "cause" excusing his failure to raise the issue below, and "actual prejudice" resulting from the errors of which he complains. *Id.* at 168. Thus, the issue of waiver, which took center stage in the *Perez* discussion of the review of invited error

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on direct appeal, is not even a relevant consideration in reviewing invited error on habeas review. While the Ninth Circuit found the invited error doctrine to be at odds with the plain error standard of Rule 52(b), as that rule was explained in *Olano*, the same cannot be said when the doctrine is compared to the cause and prejudice standard. Nothing about the underlying philosophy of the cause and prejudice standard conflicts with the principles which underlie the invited error doctrine. *Cf. Murray v. Carrier*, 477 U.S. 478, 504 (1986) ("'cause' and 'actual prejudice' are not rigid concepts; they take their meaning from the principles of comity and finality. . . .") with *Perez*, 116 F.3d at 853 (Kleinfeld, J., concurring) ("The moral principle of estoppel is at the heart of invited error doctrine."). The Court therefore concludes that *Perez* does not preclude application of the invited error doctrine in habeas review. Accordingly, the invited error doctrine precludes the Court's consideration of the petitioner's claim that Instruction No. 39 inappropriately required that he bear the burden of persuasion as to his alibi defense.³⁹

4. Conclusion

In conclusion, the petitioner's challenge to the given jury instructions does not rise to

³⁹ Even if the petitioner's claim is not barred under the invited error doctrine, it seems clear that petitioner cannot show the "cause and prejudice" which is necessary to obtain review of an issue raised for the first time in a habeas proceeding. First, the petitioner has failed to show "cause" for his failure to raise the issue at trial or on appeal, which would require that he show some external and objective factor which impeded his efforts to raise the issue in a timely manner. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986); *Hivala v. Wood*, 195 F.3d 1098, 1105 (9th Cir. 1999). Likewise, the petitioner has failed to establish "actual prejudice," which would require that he show, "not merely that the errors at his trial constituted a possibility of prejudice," but that they "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimension." *United States v. Frady*, 456 U.S. 152, 170 (1982); *White v. Lewis*, 874 F.2d 599, 603 (9th Cir. 1989).

the level of a constitutional violation. Taken as a whole, the instructions present the jury with a charge to convict only upon finding no reasonable doubt. The numerous reasonable doubt instructions do not shift the burden of proof. The petitioner attempts to parse out individual phrases to persuade the Court of the unconstitutionality of the given instruction. However, this Court is specifically directed by case law to read the given instructions as a whole. Finally, the Court concludes that the invited error doctrine precludes consideration of the petitioner's claim regarding the alibi instruction. The petitioner's claim for relief will be denied.

J. Claim 12.

In this claim the petitioner alleges that the imposition of the death penalty in Idaho is arbitrary and capricious because of two factors: (1) the fact-finding and sentencing by a judge as required under Idaho Code § 19-2515 is dependent upon the particular judge's moral, philosophical, ethical and religious attitudes toward the death penalty, and (2) the decision whether to seek the death penalty is based on the finances of the county in which the accused is tried. The petitioner sought an evidentiary hearing on the second part of this claim in order to prove that the decision whether to impose the death penalty in Idaho is skewed by the individual county's ability to pay the enormous litigation costs associated with capital cases. The Court denied the request for evidentiary hearing because the petitioner did not raise the claim before the state court, and failed to show there was any likelihood that an evidentiary hearing would reveal systemic defects in the manner in which Idaho imposes the death penalty.

The petitioner argues that death is a unique punishment, *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990), and a state's capital sentencing scheme is unconstitutional unless it provides a

meaningful basis for selecting persons receiving the death penalty. *Furman v. Georgia*, 408 U.S. 238 (1972). However, such blanket and generalized observations are not sufficient to establish a basis for relief. A capital defendant seeking to establish a discriminatory or arbitrary application of the death penalty must prove not only a systemic factor that is perceived to be arbitrary, but must show that he was personally injured by the application of that factor in his or her case. *McCleskey v. Kemp*, 481 U.S. 279 (1987). The petitioner has failed to make such a particularized showing here.

Even from a more generalized perspective, the petitioner's claim fails. The Supreme Court has recognized that "[a]pparent disparities in sentencing are an inevitable part of our criminal justice system." *Id.* at 312. There are numerous considerations involved in a prosecutor's decision whether to seek the death penalty, including the economic factors of which the petitioner complains. Likewise, a judge's decision to impose the death penalty may be affected by his or her personal opinions, including the moral, philosophical, ethical and religious attitudes identified by the petitioner. Nevertheless, the Supreme Court has recognized that, despite possible disparities in the way in which the death penalty is imposed, the guarantees of the Constitution are met when "the mode [for determining guilt or punishment] itself has been surrounded with safeguards to make it as fair as possible." *Id.* at 313 (quoting *Singer v. United States*, 380 U.S. 24, 35 (1965)). While *Furman* makes clear that the process by which the death penalty is imposed must be rational, it need not be perfect. *Zant v. Stephens*, 462 U.S. 862, 884 (1983). Judicial subjectivity and the cost-benefit analysis undertaken by prosecutors and county commissioners are mere examples of such

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imperfections, and a far cry from the major systemic defects which would be necessary to justify the broad-based attack on Idaho's death penalty procedures which the petitioner urges the Court to undertake. For these reasons, the Court declines to grant the petitioner relief on this claim.

K. Claim 13.

The petitioner claims the Idaho Supreme Court failed to conduct an adequate proportionality review pursuant to I.C. § 19-2827(c)(3), which required the court to determine whether the sentence of death was excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.⁴⁰ The petitioner argues this failure resulted in a due process violation.

On appeal, the Idaho Supreme Court conducted the following proportionality review of the petitioner's sentence.

In *Leavitt I*, we previously made that determination and expressly held "the sentence of death is not excessive or disproportionate to the penalty imposed in similar cases." 116 Idaho at 294. Although we reaffirm our prior holdings in *Leavitt I*, a new death penalty sentence has been imposed and we must examine anew the issue of proportionality on this appeal.

In *State v. Rhoades (Baldwin)*, 120 Idaho 795 (1991), the Court recently reviewed the purpose of the proportionality analysis required by I.C. § 19-2827(c)(3), and our responsibility in that process.

⁴⁰ Proportionality review was eliminated by a 1994 amendment to the statute.

Our perusal of the legislative history regarding the proportionality of sentences does not offer much guidance. The Statement of Purpose and the committee minutes for the bill that was eventually passed and codified as I.C. § 19-2827 expressed only a concern that the Idaho statute be updated to reflect recent ruling by the United States Supreme Court.

. . . .

There is no mention of proportionality, or any expression by the legislature that we are required to review the proportionality of sentences with a special standard or test. The requirement that the death sentence not be disproportionate to "the penalty imposed in similar cases," is one of several considerations this Court must examine in each death penalty case. The legislature did not see fit to establish a separate standard for proportionality review of sentences when I.C. § 19-2827 was enacted.

This Court looked at the proportionality of death sentences in *State v. Creech*, 105 Idaho 362 (1983), and reviewed several cases in which the death penalty had been imposed or could have been imposed. The Court compared the facts of the crimes with the facts of the case they were reviewing to determine whether or not the sentence was disproportionate. This is the procedure that has been followed by this Court. We must do likewise.

Rhodes (Baldwin), 120 Idaho at 812.

Leavitt II, 121 Idaho at 8, 822 P.2d at 527. The court continued its procedure by outlining the manner in which the petitioner killed the victim, noting the multiple stab wounds, and removal of her sexual organs. The court then stated, "[i]n comparing this crime and this defendant to similar crimes by other similar defendants, the record in this case and the district court's findings and conclusions, we hold that the death sentence is not excessive or disproportionate." *Id.* (footnote omitted). The lengthy footnote listed twenty-six cases in Idaho in which the death penalty had been imposed.

Proportionality review is an evaluation of the sentence imposed in a particular case, to determine whether it is "disproportionate to the punishment imposed on others convicted of the same crime." *See Pulley v. Harris*, 465 U.S. 37, 43 (1984). Although adopted by many state legislatures, comparative proportionality review in death penalty cases is not required by the Eighth Amendment. *Id.* 465 U.S. at 51. Thus, the State of Idaho is not required to provide proportionality review in capital cases. However, "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution -- and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). Thus, if a State decides to provide proportionality review, "it must be conducted consistently with the Due Process Clause." *See Tokar v. Bowersox*, 198 F.3d 1039, 1052 (8th Cir. 1999); *see also Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1308 (9th Cir. 1996).

In *Harris by and through Ramseyer v. Blodgett*, 853 F.Supp. 1239, 1288 (W.D.Wash. 1994), *aff'd on other grounds*, 64 F.3d 1432 (9th Cir. 1995), a similar state proportionality

review scheme was found unconstitutional because it failed to "establish adequate standards or guidelines on which the Court or the parties can rely." There the reviewing court relied on statements by the Washington Supreme Court that the proportionality review statute "provides little guidance" and "is unclear," and found that several problems resulted: (1) the statute did not define "similar cases, considering both the crime and the defendant," (2) there was no procedure to notify the parties of which cases were to be considered similar, (3) the statute did not give an alternative procedure when no similar cases were found, and (4) the statute did not give any standard for reviewing the selected cases. *Id.* at 1288-89. On this basis, the District Court concluded that the proportionality review statute, as applied in that case, violated the Due Process Clause.

The *Harris* decision was a fact-specific ruling. *See Rupe v. Wood*, 93 F.3d 1434, 1443 (9th Cir. 1996). As such, it provides only general guidance as to the types of shortcomings in a statutory proportionality review scheme which may violate the petitioner's due process rights. The petitioner points to several deficiencies in the proportionality review provided in his case, including: (1) the lack of any procedural rules governing procedural review, (2) the statute's lack of any definition of what constitutes "similar cases,"⁴¹ and (3) the Idaho Supreme Court's failure to explain whether the subject of comparison was the facts of the cases or the

⁴¹ As an example the petitioner suggests that "similar cases" could include cases where the death penalty could have been, but was not requested by the State, and non-capital cases where the death penalty was avoided as part of a plea agreement.

characteristics of the defendants in each case.⁴² The Court is unpersuaded that these shortcomings violate the petitioner's due process rights.

This case is clearly distinguishable from *Harris*. Here, the Idaho Supreme Court, despite a lack of legislative guidance, had previously identified the criteria which would be considered, as well as the process which would be employed, in conducting its mandated proportionality review. See *State v. Pizzuto*, 119 Idaho 742, 777-78, 810 P.2d 680, 715-16 (1991), *overruled on other grounds by State v. Card*, 121 Idaho 425, 432, 825 P.2d 1081, 1088 (1991), ("In making the comparison we have considered: (1) the nature of, and the motive for, the crime committed; (2) the heinous nature of the crime; and (3) the nature and character of the defendant to determine whether the sentence was proportionate and just."); *State v. Lankford*, 116 Idaho 860, 877-78, 781 P.2d 197, 214-15 (1989) (same). Moreover, unlike *Harris*, where the Washington Supreme Court concluded that it was not able to find any case that it considered similar to *Harris*', the Idaho Supreme Court engaged in a comparison of the petitioner's case with every Idaho case in which the death penalty had been imposed.⁴³

⁴² Justice Johnson used this particular method in explaining the basis of his conclusion that the sentence was not disproportionate in his concurrence. *Leavitt II*, 121 Idaho at 9-10, 822 P.2d at 528-29.

⁴³ The petitioner points out that the same list of cases has been used in other proportionality reviews, and argues that this indicates that the Idaho Supreme Court has made no meaningful attempt to compare cases. However, that assertion is not accurate. The list of cases considered by the Idaho Supreme Court in conducting proportionality review in the petitioner's case and in other capital cases has not been the same. Compare *State v. Leavitt*, 121 Idaho at 8, 822 P.2d at 527 n. 3, with *State v. Card*, 121 Idaho 425, 447, 825 P.2d 1081, 1103 n. 15 (1991) and *State v. Rhoades*, 120 Idaho 795, 813, 820 P.2d 665, 683 n. 3 (1991) and *State v. Lankford*, 116 Idaho 860, 877-78, 781 P.2d 197, 214-15 n. 4 (1989). Moreover, an overview of its proportionality review in other capital cases, indicates that the Idaho

While this review may not have been conducted to the petitioner's specifications, the same method of review had been used consistently by the Idaho Supreme Court in all other death sentence reviews, and the Court is unable to find any due process violation in the method used.

L. Claim 15.

In this claim, the petitioner alleges that he was denied due process of law and a reliable finding of guilt because the trial court failed to make appropriate inquiries of a seated juror, Jerri Bergeman, who allegedly lied during voir dire by denying she had heard others express opinions concerning the petitioner's guilt. *Trial Transcript, p. 182.* During the trial, petitioner's counsel notified the trial court of Ms. Bergeman's potential bias, as follows:

First, it was reported to us that one of the persons on the jury, namely Jerri Bergeman, has in the past and before being seated on the jury, expressed her opinions regarding the case. Mrs. Bergeman is employed as a beautician in the beauty salon in Blackfoot. One of the ladies who frequents the salon is a Beulah

Supreme Court, assisted largely by the concurring opinions of Justice Johnson, has engaged in a meaningful effort to compare the circumstances of each case to ensure that the imposition of the death penalty has been proportionate and just. *See, e.g., State v. Rhoades*, 120 Idaho at 814-24, 820 P.2d at 684-94 (Johnson, J. concurring) (discussing the constitutional background, legislative history, and the Idaho Supreme Court's treatment of proportionality review; engaging in an extensive explanation of the unique characteristics of that case and comparing it to other death penalty cases through a seven page appendix). The Court therefore concludes that the Idaho Supreme Court's proportionality review in this case has been undertaken in good faith. Once that determination has been made, the United States Supreme Court has made clear that we have no basis to "look behind" the Idaho Supreme Court's conclusion that the petitioner's sentence was proportional to sentences imposed in other case. *Lewis v. Jeffers*, 497 U.S. 764, 779 (1990); *Walton v. Arizona*, 497 U.S. 639, 655-56 (1990); *LaGrand v. Stewart*, 133 F.3d 1253, 1263 (9th Cir. 1998); *Gerlaugh v. Stewart*, 129 F.3d 1027, 1044 (9th Cir. 1997).

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Chaffin. Beulah Chaffin stated that shortly after the Defendant's arrest, she made the statement: "Well, my brother knew who the murderer was." Her brother is Terry VanOrden, I believe.

Trial Transcript, pp. 2097-99. Petitioner's counsel asked the trial court to conduct a hearing to determine whether Ms. Bergeman could be a fair and impartial juror. The court denied the request.

This Court granted the petitioner's request for an evidentiary hearing on this issue, because of a concern that there may be unresolved issues of fact as to whether the petitioner was denied a fair trial because of juror prejudice. The standard for reviewing a claim of juror bias was set forth in *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998). There, the court noted that, "[t]he Sixth Amendment guarantees criminal defendants a verdict by impartial, indifferent jurors. The bias or prejudice of even a single juror would violate . . . [the defendant's] right to a fair trial." *Id.* at 973. However, the court also observed that while it is important for jurors to answer questions truthfully, a juror will not be deemed biased for an honest yet mistaken answer to a voir dire question. *Id.* "[E]ven an intentionally dishonest answer is not fatal, so long as the falsehood does not bespeak a lack of impartiality. *Id.*

In this case defense counsel entered into the following colloquy with Ms. Bergeman during voir dire:

Q: Is there any response or any question that we have asked previously that you ought to respond to and share with us?

A: I guess I should say that I have heard about it. I have had it in my shop.

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And it has been talked about. There hasn't been a guilty or a not guilty discussed. But I'm also a person that doesn't believe in gossip, and I think I can view it partially - impartially.

Q: Do you recall any of the facts that were discussed in the case?

A: No. Whether I knew him or not.

Q: Pardon.

A: Whether I knew him or her.

Q: I see. Did any of the witnesses that were read to you discuss the matter in your shop?

A: No, no.

Q: Have you heard anybody express an opinion as to whether or not there's guilt or innocence?

A: No.

Q: Do you feel that you've got an open mind, and those contacts and those conversations you've overheard would not affect you as a juror.

A: No, I don't think so.

Q: Did you participate in those conversations, or was it just a conversation in the shop?

A: I'm a listener.

Trial Transcript, pp. 181-83. These statements made by juror Bergeman during voir dire were not consistent with the alleged statement of Beulah Chaffin reported to the petitioner's

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attorney. Because the trial court did not conduct a factual hearing to resolve this inconsistency, this Court determined an evidentiary hearing was necessary to determine the extent and effect of any bias on the part of juror Bergeman.

At the evidentiary hearing, Ms. Bergeman, Mr. Terry VanOrden, and Ms. Chaffin each testified regarding their recollection of the events. Mr. VanOrden testified that he knew the petitioner, had tried to get him involved in the Boy Scouts, read the newspaper, and knew of the murder. Mr. VanOrden denied making any statement about the guilt or innocence of the petitioner at all, and specifically denied having made any such statement to his sister, Ms. Bergeman, or having had any contact with her until after the trial. Ms. Bergeman confirmed that she had not heard any such statement from her brother, and also denied having expressed any opinion regarding the guilt or innocence of the petitioner. Ms. Bergeman stated that at trial she kept an open mind regarding the evidence and took her responsibility to review the evidence and apply the trial court's instructions to that evidence very seriously.

Marilyn Turpin, a co-worker with Ms. Bergeman at the time of petitioner's trial, testified that she heard Ms. Bergeman state that her brother told her who killed Danette Elg. *Evidentiary Hearing Transcript, 1-29-99, p. 86.* Beulah Chaffin, a customer of Ms. Turpin, also testified, indicating that she thought she also had heard the statement by Bergeman that her brother told her who killed Danette Elg. Turpin also testified that after she discovered that Ms. Bergeman was seated as a juror, she wondered how that was possible considering the opinions which Bergeman had expressed regarding the case. *Evidentiary Hearing Transcript, 1-29-99, pp. 111-14.*

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After reviewing the testimony presented at the evidentiary hearing, the Court determines that Ms. Bergeman was not a biased or interested juror, and that there is no grounds to conclude that the petitioner was deprived of due process and a reliable finding of guilt. Ms. Bergeman and her brother were credible witnesses at the evidentiary hearing. While there may have been more communication between them prior to the trial, than they remembered at the time of the evidentiary hearing, the Court is convinced that no statements were made by Mr. Van Orden to Ms. Bergeman, or by Ms. Bergeman herself, which would seriously call into question her impartiality as a juror in this matter. While Ms. Turpin and Ms. Chaffin undoubtedly did hear Ms. Bergeman make some comment concerning the case, the comment, even as they described it, was ambiguous and did not amount to the expression of an opinion concerning the petitioner's guilt. Moreover, the Court is convinced, given the unequivocal denials of Bergeman and Van Orden, that Turpin and Chaffin misunderstood Bergeman's statement, giving it a far more sinister gloss than it deserved.

In summary, the Court concludes that Ms. Bergeman was not a biased juror. The petitioner was not denied due process, and is not entitled to relief on this claim.

M. Claim 16.

The petitioner claims the trial court sentenced him under the influence of passion and prejudice as a result of the crime scene photos admitted at the petitioner's trial. This, it is argued, resulted in a violation of his due process rights. As a criminal defendant, the petitioner was guaranteed the right to an impartial judge. *In re Murchison*, 349 U.S. 133, 136 (1955); *Lang v. Callahan*, 788 F.2d 1416, 1418 (9th Cir. 1986). However, a judge's

statements must be scrutinized for bias and prejudice within the context in which they were made. *Lang*, 788 F.2d at 1218 (citing *Hagans v. Andrus*, 651 F.2d 622, 628 (9th Cir. 1981)). A review of the complete record reveals that although the evidence reviewed by the Court was undoubtedly disquieting, and even upsetting, there is no indication that the evidence so inflamed the passion of the trial court as to violate the petitioner's due process rights.

The petitioner was sentenced to death on December 19, 1985. On May 30, 1989, the Idaho Supreme Court reversed the death sentence and remanded it back to the trial court finding there was an inadequate weighing of mitigating circumstances against the aggravating factor. *Leavitt I*, 116 Idaho at 294, 775 P.2d at 608. The court also found that the record did not demonstrate that the trial court adequately considered long-term penal confinement as an adequate protection of society as contrasted with the imposition of the death penalty. *Id.* Upon resentencing the trial court considered each mitigating factor and determined that all the mitigating factors did not outweigh the single aggravating factor, considered alternative sentencing choices, and resentenced the petitioner to death. *Memorandum Decision and Findings of the Court in Considering the Death Penalty Under I.C. § 19-2515, filed January 29, 1990.* The Idaho Supreme Court upheld the trial court's second imposition of the death penalty, and denied the petitioner's contention that the trial court's repeated references to crime scene photographs indicate the trial court acted under passion and prejudice. *Leavitt II*, 121 Idaho at 9, 822 P.2d at 528.

In this petition, the petitioner makes essentially the same argument that was rejected by the Idaho Supreme court in *Leavitt II*. Specifically, the petitioner renews his contention that

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the trial court did not objectively consider the mitigating factors because the photographs of the crime scene affected the judge personally and resulted in a sentence imposed under the influence of passion and prejudice. To support his argument, the petitioner relies on the following comment made by the trial court in the sentencing findings: "It is difficult to conceive of any circumstances that would outweigh the picture presented to the Court of the crime scene." *Findings, 1-29-90, p. 22*. In addition, the petitioner notes that in his dissent in *Leavitt II*, Justice Bistline found that the comments of the trial court on resentencing indicated that the crime scene photographs elicited a "strong emotional response . . . and conceivably may have resulted in an arbitrarily imposed sentence." *Leavitt II*, 121 Idaho at 14, 822 P.2d at 533 (Bistline, J., dissenting).

In denying a request for an evidentiary hearing on this issue, this Court found that the record already developed in this case was adequate to show that the trial court carefully considered all mitigating factors and correctly weighed them against the sole aggravating factor, in accordance with *State v. Charboneau*, 116 Idaho 129, 153-54, 774 P.2d 299, 323-24 (1989), *overruled on other grounds by State v. Card*, 121 Idaho at 432, 825 P.2d at 1088. The record further shows that the sentence was imposed after careful reflection of all the available facts, and that the Idaho Supreme Court determined, as required by I.C. § 19-2827(c)(1), that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor. Moreover, this Court found, in claim 3, that certain comments by the trial court, including those mentioned in this claim, regarding the heinous nature of this crime were

taken out of context and were an appropriate and understandable reaction to a capital crime.⁴⁴

It would be virtually impossible for a trial judge to consider the statutory aggravating circumstances which must be reviewed under Idaho's death penalty scheme, without a thorough assessment of the nature and circumstances of the murder. Undoubtedly, this will in many, if not most, instances require that the judge review crime scene photographs and other forensic evidence which are upsetting and disturbing. However, by merely recognizing that such evidence is unpleasant or revolting, the trial judge does not demonstrate that he or she is biased or unable to perform his or her duty of properly weighing the aggravating circumstances, as reflected in the crime scene photos and evidence, against those factors which mitigate against the imposition of the death penalty. Here, the Idaho Supreme Court has concluded that the trial judge properly performed this weighing process without permitting the disturbing nature of the evidence to create passion or prejudice against the petitioner. This Court agrees. The petitioner has not shown that there has been a due process violation and he is, therefore, not entitled to relief on this claim.

N. Claim 17.

In this claim the petitioner complains of the trial court's refusal to grant the petitioner's motion for a new trial based on newly discovered evidence of petitioner's mental disease or deficiency. The petitioner raised this issue on direct appeal, arguing that the newly discovered evidence of mental disease or deficiency would show an inability to premeditate and form any intent to commit murder. The Idaho Supreme Court noted that a motion for new trial is

⁴⁴ See Claim 3(b), p. 29.

directed to the sound discretion of the trial court and the decision would not be disturbed absent and abuse of discretion. *Leavitt I*, 116 Idaho at 291, 775 P.2d at 605. The court then affirmed the trial court's denial of the motion on the basis that the newly discovered evidence was not material. *Id.* The court also noted that the proffered tests indicated that the petitioner had an anti-social personality disorder and an intermittent explosive disorder, and neither illness would have prevented the petitioner from forming the requisite intent for murder. *Id.* Although the petitioner has raised the same claim here, he has not briefed the issue and has not demonstrated how this claim raises a constitutional issue. For this reason, the petitioner is not entitled to habeas relief.

O. Claim 18.

The petitioner claims the seizure of his blood during the investigation of Danette Elg's murder violated his Fourth Amendment rights. Prior to the petitioner's arrest, the State obtained an order from a Magistrate Judge, pursuant to Idaho Code § 19-625, authorizing investigators to take blood from the petitioner.⁴⁵ *Memorandum in Support of Summary Judgement, Exhibit C.* Prior to trial, the petitioner filed a motion for an "Order Excluding and/or Suppressing Blood Samples of the Defendant Because Said Samples Were Obtained Without Informed Consent, Without Sufficient Probable Cause. . . ." At the hearing on this motion, counsel for the petitioner requested the trial court review a recorded hearing of the

⁴⁵ The statute authorizes a peace officer, having probable cause to believe that a crime has been committed and reasonable grounds to believe that the identified individual committed the crime, to obtain a court order authorizing the detention of the identified individual to obtain identifying physical characteristic evidence, including blood samples, if such evidence may contribute to the identification of the person who committed the offense. I.C. § 19-625.

evidence which was presented to the state court magistrate to obtain the order authorizing the seizure of the petitioner's blood. However, counsel admitted that he could not affirmatively point to any evidence in the recording that showed probable cause did not exist, but thought the trial court "might want to review that record" anyway. *Trial Transcript, Vol. I, p. 311*. The trial court denied the motion, finding that there wasn't any evidence that the statute was not properly followed. The petitioner did not appeal this issue to the Idaho Supreme Court.

Petitioner has not submitted any briefing to support this claim, apart from the memorandum submitted in support of the motion for evidentiary hearing. In that memorandum, the petitioner alleges that the seizure of his blood during the Elg murder investigation violated his constitutional rights, because intrusions into the human body, including the taking of blood, are "searches," subject to the restrictions of the Fourth Amendment. *Schmerber v. California*, 384 U.S. 757, 766-68 (1966). However, the petitioner also acknowledges that his blood was obtained pursuant to an order of the court. The record of what evidence the magistrate judge relied upon in ordering the petitioner to provide a blood sample, was contained in the recording which counsel for the petitioner referred to at the hearing on the motion to suppress and which he conceded did not establish a lack of probable cause. The petitioner has not attempted to make that recording part of this record or argued that it is unavailable.⁴⁶ Under these circumstances, the Court concludes that the petitioner has failed to carry his burden of establishing that the blood was seized in violation of his Fourth

⁴⁶ There has been no indication from the petitioner that this claim is developable or cognizable.

Amendment rights, and that the use of that evidence at trial violated his constitutional rights. Accordingly, the Court concludes that the petitioner is not entitled to relief on this claim.

VI. Conclusion

Following extensive review of all the petitioner's claims, raised in the Final Petition for Writ of Habeas Corpus, the Court concludes that the petitioner has not raised a claim which entitles him to relief. Accordingly, the petitioner's Motion for Summary Judgment is denied, and his Petition will be dismissed.

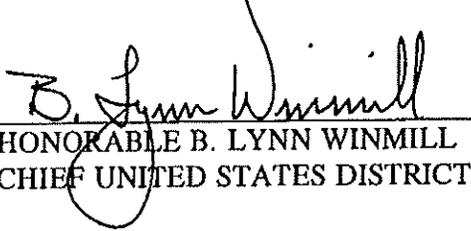
ORDER

Based on the foregoing, and the Court being otherwise fully advised in the premises;

IT IS HEREBY ORDERED that:

- 1) The petitioner's Motion for Summary Judgment is **DENIED**.
- 2) The petitioner's Petition for Writ of Habeas Corpus is **DISMISSED**.

Dated this 6th day of September, 2000.


HONORABLE B. LYNN WINMILL
CHIEF UNITED STATES DISTRICT JUDGE

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
)
Plaintiff)
Respondent,)
)
-vs-)
)
RICHARD A. LEAVITT,)
)
Defendant)
Appellant.)
-----)

Docket No. 16,305

TRANSCRIPT ON APPEAL

Appeal from the District Court of the Seventh
Judicial District of the State of Idaho, in and for the
County of Bingham: HONORABLE H. REYNOLD GEORGE
District Judge

A P P E A R A N C E S:

For the Plaintiff Respondent: THOMAS E. MOSS, Esq.
Prosecuting Attorney
75 East Judicial
Blackfoot, ID 83221

For the Defendant Appellant: DAVID A. PARMENTER, Esq.
Public Defender
995 S. W. Main Street
Blackfoot, ID 83221

* * * * *

STATE'S LODGING **B-2**

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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

* * *

RICHARD A. LEAVITT,)	
)	
Petitioner,)	
)	
-vs-	)	Case No. 13,169
)	
STATE OF IDAHO,)	
)	
Respondent.)	

BE IT REMEMBERED that this cause came on regularly before the Court at the Bingham County Courthouse in Blackfoot, Idaho on Thursday, April 23, 1987, before HONORABLE H. REYNOLD GEORGE, District Judge, sitting in and for Bingham County, without a jury;

DAVID A. PARMENTER, Esq., Blackfoot Idaho, appearing for and in behalf of the Petitioner; THOMAS E. MOSS, Esq., Blackfoot, Idaho, appearing for and in behalf of the Respondent.

WHEREUPON, the following proceedings were had and entered of record, to-wit:

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ROSS L. OVIATT
OFFICIAL COURT REPORTER
Bonneville County Courthouse
Idaho Falls, Idaho 83401

1 we anticipated. By "complex" I mean by all of the
2 different evidentiary items that the State had available,
3 all of the possible leads, other suspects, the great
4 number of witnesses that had knowledge of the case, it
5 became apparent that was very significant and a complex
6 case.

7 Q Did you treat it as such?

8 A Yes, we did.

9 Q Did you treat it as an important case?

10 A Very important. As I mentioned it was a
11 team effort. I don't think any important decision was
12 made without consultation with at least two attorneys,
13 and on many occasions three attorneys were involved in
14 discussing different aspects of the case and deciding
15 what strategy should be used.

16 Q Speaking of that, I'm going to ask you
17 about some things that have been raised in this pro-
18 ceeding. It has been pointed out that I believe
19 Dr. Ed Blake is his name, a serologist, that you hired
20 and made arrangements for, was not called as a witness;
21 is that true?

22 A He was not.

23 Q Would you explain your involvement with
24 Dr. Blake and why he wasn't called?

25 A He analyzed a lot of the blood samples that

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1 were also analyzed by Ann Bradley for the State. For
2 the most part his findings were consistent with those
3 of Ann Bradley. Most importantly with respect to the
4 major evidentiary items, the shorts, the sheet, the
5 blood samples from these items, and other items, his
6 analysis was completely consistent with that of Ann
7 Bradley. Because of that we simply felt that he really
8 had nothing to offer as far as rebutting the testimony
9 of Ann Bradley. In fact, we felt that he would perhaps,
10 in the eyes of the jury, tend to corroborate the
11 findings of Ann Bradley.

12 In addition to his report I might add that
13 I did have several phone conversations with him. I
14 suppose the ledger would reflect the dates and times of
15 those phone conferences. In those conferences he also
16 indicated that he didn't feel like he could say anything
17 that would rebutt Ann Bradley's conclusions.

18 Q. He told you that over the phone?

19 A. That is correct.

20 Q. Now, there are some things that he says
21 with reference to the fact that the State did not pre-
22 serve some of the evidence as well as it could have.
23 I believe that is included in an exhibit presented in
24 this case. Were you aware of that?

25 A. We were, and that was the basis of our motion

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1 in liminie to totally exclude the blood evidence. Of
2 course, that motion was heard prior to the trial and
3 denied, but we used his report as a basis for that motion.

4 Q. So even though there was those kind of things
5 in the report you felt that the bulk of the report was
6 more corroborative of Ann Bradley than contradictory?

7 A. Yes.

8 Q. You felt it would emphasize the strongest
9 part of the State's case I take it?

10 A. That is correct.

11 Q. Did you conference with the other attorneys
12 in your office on that decision as to whether or not to
13 call Dr. Blake?

14 A. I am sure we did. That was a significant
15 evidentiary issue and I'm sure that would have been one
16 that would have involved more than just myself.

17 Q. Another challenge has been raised as to why
18 Julie Barrera was not made a witness in the case. Are
19 you acquainted with Julie Barrera and what her connection
20 with this case was?

21 A. Yes, I am.

22 Q. Would you explain what your understanding
23 of that was?

24 A. That incident, as I recall, was quite
25 thoroughly investigated by Bob Smith, the private

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on or about the 2nd day of June, 2012, I caused to be serviced a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, and addressed to the following:

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