Appendices

APPENDIX A

170 Idaho 716
Supreme Court of Idaho,
Boise, September 2021 Term.

Timothy Alan DUNLAP, Petitioner-Appellant,
v.
STATE of Idaho, Respondent.

Docket No. 47179
|
Opinion Filed: August 30, 2022
|
Motion to Stay Remititur Denied: September 26, 2022

Synopsis

Background: Defendant was convicted pursuant to a guilty plea of first-degree murder and was sentenced to death. After the conviction and sentence were affirmed, 125 Idaho 530, 873 P.2d 784, defendant petitioned for post-conviction relief. The District Court, Sixth Judicial District, Caribou County, William H. Woodland, J., denied relief. Defendant appealed. The Supreme Court, 141 Idaho 50, 106 P.3d 376, affirmed conviction, and State conceded error requiring resentencing. After defendant again received sentence of death at resentencing, defendant filed petition for post-conviction relief. The District Court, Don L. Harding, J., summarily dismissed petition. Defendant appealed. The Supreme Court, 155 Idaho 345, 313 P.3d 1, affirmed in part, vacated in part, and remanded. On remand, the District Court, Mitchell W. Brown, J., held evidentiary hearings and denied petition. Defendant appealed.

Holdings: The Supreme Court, Stegner, J., held that:

[1] at resentencing hearing, State did not suppress expert opinions of psychologists rendered in connection with separate lawsuit about defendant's housing at prison, as could violate *Brady*;

[2] exhibit introduced by State at resentencing hearing did not constitute false testimony and thus did not violate due process;

[3] decision not to call friend of defendant as mitigation-evidence witness at resentencing was reasonable trial strategy and thus not ineffective assistance;

[4] any deficiency in defense counsel's failure to present testimony of mental-health expert at resentencing to link defendant's medication for mental health problems to his behavior while incarcerated did not prejudice defendant and thus was not ineffective assistance;

[5] deficiency in defense counsel's failure to object to State's expert's apparently improper bolstering of his own testimony at resentencing hearing did not prejudice defendant and thus was not ineffective assistance; and

[6] decision not to present letter written by defendant to victim's husband as evidence of remorse was reasonable strategy and thus not ineffective assistance.

Affirmed.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Headnotes (53)

[1] **Criminal Law** ⊜ Civil or criminal nature
Criminal Law ⊜ Degree of proof

Post-conviction proceedings are civil in nature, and therefore the applicant must prove the allegations by a preponderance of the evidence.

[2] **Criminal Law** ⊜ Post-conviction relief

Upon review of district court's denial of petition for postconviction relief when evidentiary hearing has occurred, Supreme Court will not disturb district court's factual findings unless they are clearly erroneous.

[3] **Criminal Law** ⊜ Questions of Fact and Findings

Factual finding is clearly erroneous only if it is not supported by substantial and competent evidence in record.

[4] **Criminal Law**⇐Interlocutory, Collateral, and Supplementary Proceedings and Questions

In review of a decision on a petition for post-conviction relief, Supreme Court exercises free review of the district court's application of the relevant law to the facts.

[5] **Criminal Law**⇐Interlocutory, Collateral, and Supplementary Proceedings and Questions

On review of decision on a petition for post-conviction relief, Supreme Court's duty to search for constitutional error with painstaking care is never more exacting than it is in capital case.

[6] **Sentencing and Punishment**⇐Other discovery and disclosure

At resentencing hearing, State did not suppress expert opinions of psychologists rendered in connection with separate lawsuit about defendant's housing at prison, as could violate *Brady*, in capital murder case in which opinions at issue allegedly indicated defendant had mental health issues, where contemporaneous notes from defendant's attorneys indicated they were aware that at least one of the experts believed defendant had mental health problems.

[7] **Criminal Law**⇐Constitutional obligations regarding disclosure

There are three components of a true *Brady* violation: the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching, that evidence must have been suppressed by the State, either willfully or inadvertently, and prejudice must have ensued.

[8] **Criminal Law**⇐Diligence on part of accused; availability of information

When a defendant possesses the salient facts regarding the existence of the evidence that he claims was withheld, there is no *Brady* violation.

[9] **Criminal Law**⇐Diligence on part of accused; availability of information

If a defendant has enough information to be able to ascertain the supposed *Brady* material on his own, there is no suppression by the government.

[10] **Constitutional Law**⇐Proceedings
Sentencing and Punishment⇐Arguments and conduct of counsel

Exhibit introduced by State at resentencing hearing, consisting of a small excerpt of capital murder defendant's mental health records which supported State's theory that defendant's alleged mental health problems were in fact malingering, did not constitute false testimony and thus did not violate defendant's due process rights pursuant to *Napue v. People of State of Ill.*, 79 S.Ct. 1173, 3 L.Ed.2d 1217, even though exhibit did not include two experts' opinions supporting defendant's argument regarding mental health, where State, in using exhibit to

question two expert witnesses, never characterized the opinions in the exhibit as being the only mental-health opinions in the record. U.S. Const. Amend. 14.

[11] **Constitutional Law**⇐Use of Perjured or Falsified Evidence

To establish a due process violation under *Napue v. People of State of Ill.*, 79 S.Ct. 1173, 3 L.Ed.2d 1217, from testimony presented by prosecution, a defendant must show (1) the testimony was false; (2) the prosecutor should have known it was false; and (3) the testimony was material. U.S. Const. Amend. 14.

[12] **Criminal Law**⇐Deficient representation and prejudice in general

Under *Strickland*, a convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components: first, the defendant must show that counsel's performance was deficient, which requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment, and second, the defendant must show that the deficient performance prejudiced the defense, which requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. U.S. Const. Amend. 6.

[13] **Criminal Law**⇐Deficient representation in general

To establish deficient performance, as required to support claim of ineffective assistance, defendant must show that counsel's representation fell below objective standard of reasonableness. U.S. Const. Amend. 6.

[14] **Criminal Law**⇐Adequacy of investigation of mitigating circumstances

Trial counsel has a duty to conduct a thorough investigation in preparation for the penalty phase of a capital case; presentation of some mitigating evidence, even if strong, is insufficient to meet *Strickland* reasonableness standard for an ineffective-assistance claim if other mitigating evidence is available upon reasonable investigation. U.S. Const. Amend. 6.

[15] **Criminal Law**⇐Adequacy of investigation of mitigating circumstances

In analysis of an ineffective-assistance claim arising from penalty phase of a capital prosecution, no relief is mandated where counsel's investigation is not as thorough as it could have been, because courts address not what is prudent or appropriate but only what is constitutionally compelled. U.S. Const. Amend. 6.

[16] **Criminal Law**⇐Adequacy of investigation of mitigating circumstances

In analysis of an ineffective-assistance claim arising from penalty phase of a capital prosecution, while there is no duty on part of counsel to sort through the defendant's entire life, easily-available mitigation evidence cannot be ignored. U.S. Const. Amend. 6.

[17] **Criminal Law**⇐Presumptions and burden of proof in general

In analysis of an ineffective-assistance claim, there is a strong presumption that defense counsel made all significant decisions in the exercise of reasonable professional judgment. U.S. Const. Amend. 6.

[18] **Criminal Law**⇐Adequacy of Representation

In analysis of an ineffective-assistance claim, a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. U.S. Const. Amend. 6.

[19] **Criminal Law**⇐Presumptions and burden of proof in general

In analysis of an ineffective-assistance claim, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. U.S. Const. Amend. 6.

[20] **Criminal Law**⇐Strategy and tactics in general

Tactical decisions made by counsel will not be second-guessed on post-conviction claim asserting ineffective assistance, unless made upon basis of inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. U.S. Const. Amend. 6.

[21] **Criminal Law**⇐Prejudice in general

To establish prejudice, a defendant claiming ineffective assistance of counsel must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different; a "reasonable probability" is a probability sufficient to undermine confidence in the outcome, creating a substantial likelihood that the outcome would have been different, as opposed to a conceivable likelihood. U.S. Const. Amend. 6.

[22] **Habeas Corpus**⇐Adequacy and Effectiveness of Counsel
Habeas Corpus⇐Counsel

The "doubly deferential" standard for analysis of an ineffective-assistance claim comes into play only when a federal court is tasked with determining whether a state court applied *Strickland* unreasonably; it is the "unreasonableness" inquiry that is the "doubly deferential" standard, not that the likelihood of a different result must be substantial rather than just conceivable. U.S. Const. Amend. 6.

[23] **Criminal Law**⇐Introduction of and Objections to Evidence at Trial

In analysis of an ineffective-assistance claim, counsel's choice of witnesses, manner of cross-examination, and lack of objection to testimony fall within the area of tactical, or strategic, decisions, as does counsel's presentation of medical evidence. U.S. Const.

Amend. 6.

[24] **Criminal Law**⇐Sentencing

For additional, unpresented mitigation evidence to demonstrate prejudice, in postconviction claim asserting ineffective assistance during penalty phase of capital murder prosecution, it simply cannot be cumulative of evidence presented at sentencing, but rather must create substantial likelihood of different sentence. U.S. Const. Amend. 6.

[25] **Criminal Law**⇐Presentation of evidence in sentencing phase

Defense counsel's decision not to call further witnesses, such as defendant's teachers and childhood friends, at resentencing hearing in capital murder prosecution was not deficient and thus not ineffective assistance, where defense counsel presented array of mitigating evidence from defendant's immediate family as well as from his first-grade teacher, and the additional witnesses would have offered similar testimony to that already presented. U.S. Const. Amend. 6.

[26] **Criminal Law**⇐Presentation of evidence in sentencing phase

Defense counsel's decision not to call high-school friend of defendant as mitigation-evidence witness, at resentencing hearing in capital murder prosecution, was reasonable trial strategy and thus not ineffective assistance, even though friend testified at post-conviction hearing that he would have been willing to testify at resentencing hearing, where, when friend was contacted by defense counsel's investigator as potential witness for defendant's original sentencing, investigator found that friend was "angry" at defendant "almost to the point of being vindictive." U.S. Const. Amend. 6.

[27] **Criminal Law**⇐Presentation of evidence in sentencing phase

Defense counsel's decision not to call defendant's mother or ex-wife to testify regarding the mental health issues of family members was not deficient and thus not ineffective assistance, in penalty phase of capital murder prosecution, despite argument that such testimony would have provided evidence of genetic component of defendant's mental health issues, where testimony would have been cumulative of expert testimony that defendant's son's mental health condition supported a genetic component to defendant's own illness. U.S. Const. Amend. 6.

[28] **Criminal Law**⇐Presentation of evidence in sentencing phase

Defense counsel's failure to introduce additional anecdotes of defendant's character and mental health was not deficient and thus not ineffective assistance, at resentencing hearing in capital murder prosecution, where evidence would have been cumulative given that defendant's mother, brother, and sister each testified to positive qualities possessed by defendant, as well as to his progression of mental health issues. U.S. Const. Amend. 6.

[29] **Criminal Law**⇐Presentation of evidence in sentencing phase

Defense counsel's failure to present testimony

from mental-health expert to testify to connection between defendant's mental health problems and his behavior while incarcerated was reasonable trial strategy and thus not ineffective assistance, at resentencing hearing in capital murder prosecution; counsel testified that, in his experience, most jurors tended not to trust mental-health experts, and counsel instead chose to present medical evidence through testimony of neuropsychologist. U.S. Const. Amend. 6.

[30] **Criminal Law**⇐Presentation of evidence in sentencing phase

Any deficiency in defense counsel's failure to present testimony of mental-health expert to link defendant's medication for mental health problems to his behavior while incarcerated did not prejudice defendant and thus was not ineffective assistance, at resentencing hearing in capital murder prosecution in which defense sought to connect periods of behavioral problems with absence of medication and periods of good behavior to receipt of medication, so as to support defense theory that defendant was not feigning mental health issues to avoid death penalty; such timeline could equally have been seen by jury as corroborating psychiatrist's testimony that defendant was feigning condition. U.S. Const. Amend. 6.

[31] **Criminal Law**⇐Presentation of evidence in sentencing phase

Any deficiency in defense counsel's failure to present evidence from county jail personnel and inmates as to whether defendant presented danger within prison system did not prejudice defendant and thus was not ineffective assistance, at resentencing hearing in capital murder prosecution; prosecutor focused closing arguments on facts of crime itself, and defense counsel had a disinterested witness describe defendant as lacking the potential for future dangerousness within the prison system. U.S. Const. Amend. 6.

[32] **Criminal Law**⇐Determination

In evaluation of an ineffective-assistance claim, court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. U.S. Const. Amend. 6.

[33] **Criminal Law**⇐Other particular issues in death penalty cases

Any deficiency in defense counsel's failure to move for continuance to allow more time for review of video recording of forensic psychiatrist's interview of defendant, prior to cross-examination of psychiatrist at resentencing hearing in capital murder prosecution, did not prejudice defendant and thus was not ineffective assistance, in case in which psychiatrist testified that defendant was malingering rather than suffering from mental health problems, where previous statements by trial court suggested that motion would almost certainly not have been granted. U.S. Const. Amend. 6.

[34] **Criminal Law**⇐Subsequent Appeals

Law of the case doctrine precluded capital murder defendant's claim of ineffective assistance premised on defense counsel's failure to sit in on forensic psychiatrist's interview of defendant, in case in which psychiatrist testified at resentencing hearing that defendant was malingering rather than suffering from mental health problems, where Supreme Court found on previous appeal of post-conviction proceeding that counsel was not constitutionally required to

be present during interview. U.S. Const. Amend. 6.

[35] **Criminal Law**⇐Subsequent Appeals
Criminal Law⇐Mandate and proceedings in lower court

The "law of the case doctrine" requires that when an appellate court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal.

[36] **Criminal Law**⇐Presentation of evidence in sentencing phase

Any deficiency in defense counsel's failure to ask forensic psychiatrist to explain notes made by defendant's treating mental-health professional, which indicated defendant was suffering from mental health condition, did not prejudice defendant and thus was not ineffective assistance, at resentencing hearing in capital murder prosecution in which psychiatrist testified that defendant was malingering rather than suffering a mental health problem; psychiatrist was experienced expert witness and had already painted treating professional in unfavorable light, and thus it was likely that, had he been asked questions about notes, he would simply have had further opportunity to undermine treating professional's evaluation. U.S. Const. Amend. 6.

[37] **Criminal Law**⇐Presentation of evidence in sentencing phase

Deficiency in defense counsel's failure to object to State's expert's apparently improper bolstering of his own testimony did not prejudice defendant and thus was not ineffective assistance, at resentencing hearing in capital murder prosecution in which expert testified that defendant was malingering rather than suffering from mental health problems; error was unimportant in relation to everything else jury considered on the issue. U.S. Const. Amend. 6; Idaho R. Evid. 702.

[38] **Criminal Law**⇐Prejudice to rights of party as ground of review

"Harmless error" is error unimportant in relation to everything else jury considered on issue in question, as revealed in record.

[39] **Criminal Law**⇐Evidence in general

Proper application of the two-part test for harmless error requires weighing the probative force of the record as a whole while excluding the erroneous evidence and at the same time comparing it against the probative force of the error.

[40] **Criminal Law**⇐Prejudice to Defendant in General

When effect of error is minimal compared to probative force of record establishing guilt beyond reasonable doubt without error, it can be said that error did not contribute to verdict rendered and is therefore harmless.

[41] **Criminal Law**⇐Prejudice to rights of party as ground of review

A finding of harmless error required that Supreme Court conclude that the error did not contribute to the verdict rendered.

[42] **Sentencing and Punishment**⇐Harmless and reversible error

In evaluation of whether error at penalty phase of capital murder prosecution was harmless, if the error did not contribute to the imposition of the death sentence, it cannot be said that it is reasonably likely the result would have been different without the error.

[43] **Criminal Law**⇐Presentation of evidence in sentencing phase

Defense counsel's decision not to present letter written by defendant to victim's husband as evidence of remorse was reasonable strategy and thus not ineffective assistance, at resentencing hearing in capital murder prosecution; counsel stated that letter could have been troubling to jury given its references to defendant's medications and issues he was having with his ex-wife, and other remorse evidence was provided through testimony of defendant's family. U.S. Const. Amend. 6.

[44] **Criminal Law**⇐Post-conviction relief

Capital murder defendant preserved for appeal, following denial of post-conviction relief, his argument that defense counsel was deficient in failing to present remorse evidence beyond defendant's letter to victim's husband at resentencing hearing, where, at close of post-conviction evidentiary hearing on ineffective-assistance claims, defendant submitted proposed findings of fact and conclusions of law which specifically referenced calls made by defendant expressing remorse and conversations that defendant had with fellow inmates expressing remorse. U.S. Const. Amend. 6.

[45] **Criminal Law**⇐Presentation of evidence in sentencing phase

Any deficiency in defense counsel's failure to assert particular argument for admission of notes from defendant's treating mental-health professional did not prejudice defendant and thus was not ineffective assistance, at resentencing hearing in capital murder prosecution, where trial court judge was apparently "entrenched" in his belief that any evidence relating to professional should not be admitted. U.S. Const. Amend. 6.

[46] **Criminal Law**⇐Presentation of questions in general

Both an issue and party's position on issue must be raised before trial court for it to be properly preserved.

[47] **Criminal Law**⇐Arguments and conduct of counsel
Criminal Law⇐Necessity of ruling on objection or motion

Capital murder defendant preserved for appeal, following denial of post-conviction relief, his argument that defense counsel was ineffective at resentencing hearing in failing to seek admission

of physician's treatment notes which indicated defendant suffered from mental health problems, where defendant's post-conviction petition raised issue, and trial court fully decided the issue in its conclusions of law. U.S. Const. Amend. 6.

[48] **Criminal Law**⇐Necessity and scope of proof
Criminal Law⇐Reception and Admissibility of Evidence

A trial court has broad discretion in determining whether to admit or exclude evidence, and its judgment in the fact finding role will only be disturbed on appeal when there has been a clear abuse of discretion.

[49] **Criminal Law**⇐Particular Cases and Issues

In a claim alleging ineffective assistance, where the alleged deficiency is counsel's failure to file a motion, a conclusion that the motion, if pursued, would not have been granted by the trial court, is generally determinative of both prongs of the *Strickland* test for ineffective assistance. U.S. Const. Amend. 6.

[50] **Criminal Law**⇐Deficient representation in general

When a lawyer does all that can be done and is unsuccessful, it cannot be said his representation was ineffective. U.S. Const. Amend. 6.

[51] **Criminal Law**⇐Determination

In determining whether defendant received ineffective assistance of counsel, court must consider totality of evidence before judge or jury. U.S. Const. Amend. 6.

[52] **Criminal Law**⇐Prejudice in general

In analysis of an ineffective-assistance claim asserting that overall deficiencies had pervasive effect, taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the "prejudice" inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors. U.S. Const. Amend. 6.

[53] **Criminal Law**⇐Findings

Postconviction court sufficiently considered the totality of deficiencies found in determining whether defendant was prejudiced and thus received ineffective assistance, in capital murder prosecution in which defendant asserted he received ineffective assistance at resentencing hearing, where court stated that it had considered testimony coupled with "entirety" of evidentiary hearing as well as "entirety" of resentencing. U.S. Const. Amend. 6.

***993** Appeal from the District Court of the Sixth Judicial District, State of Idaho, Caribou County. Mitchell W. Brown, District Judge.

The judgment of the district court is affirmed.

Attorneys and Law Firms

Eric D. Fredericksen, State Appellate Public Defender,

Boise, for appellant Timothy Alan Dunlap. Shannon N. Romero argued.

Lawrence G. Wasden, Idaho Attorney General, Boise, for respondent State of Idaho. L. LaMont Anderson argued.

SUBSTITUTE OPINION.

THE COURT'S PRIOR OPINION DATED JANUARY 5, 2022 IS HEREBY WITHDRAWN.

STEGNER, Justice.

This is an appeal from an order dismissing a petition for post-conviction relief. Timothy Dunlap was sentenced to death by a Caribou County jury in 2006. In 2008, Dunlap filed a petition for post-conviction relief, alleging that numerous errors had occurred at his 2006 sentencing hearing. The district court dismissed the petition in its entirety. Dunlap appealed to this Court. In *State v. Dunlap*, 155 Idaho 345, 313 P.3d 1 (2013) ("*Dunlap V*"), this Court affirmed the dismissal of all but two of Dunlap's claims. These were: (1) multiple claims of prosecutorial misconduct under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); and (2) ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Upon remand, the district court held two evidentiary hearings, one involving each of Dunlap's remaining claims. The district court found that Dunlap had failed to establish either claim and denied Dunlap's request for post-conviction relief. Dunlap timely appealed. For the reasons discussed below, we affirm the decisions of the district court.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1991, Dunlap pleaded guilty to the first-degree murder of Tonya Crane, a bank teller in Soda Springs. The plea agreement allowed the State to seek the death penalty, which it did. Dunlap was sentenced to death by the district court in 1992.

After this Court affirmed Dunlap's conviction and sentence on direct appeal, *State v. Dunlap*, 125 Idaho 530, 873 P.2d 784 (1993) ("*Dunlap I*"), Dunlap filed a petition for post-conviction relief, challenging both his conviction and sentence. This Court once more affirmed his conviction. *Dunlap v. State*, 141 Idaho 50, 106 P.3d 376 (2004) ("*Dunlap II*"). The State, however, conceded that an error had occurred in the original sentencing hearing and agreed that Dunlap should be resentenced. Because the United States Supreme Court had decided *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), in the interim, which held that the Sixth Amendment right to a jury trial extended to imposition of the death penalty, this Court remanded the case for resentencing by a jury instead of a judge. *Id.*

The State again sought the death penalty. This time, the Idaho Attorney General's office was appointed as a special prosecutor. Three Deputy Attorneys General ("DAGs") in the Prosecutorial Assistance Unit of the Attorney General's office were assigned to prosecute Dunlap at his resentencing hearing: Kenneth Robins (lead counsel), Justin Whatcott, and Scott Smith.

Dunlap was represented by two attorneys at the resentencing hearing: David Parmenter and James Archibald. Parmenter was lead counsel and Archibald was co-counsel. The defense team also retained an investigator, Roseanne Dapsauski, as a mitigation specialist.

District Judge Don Harding presided over the resentencing hearing, which took place on seven separate days in February 2006. The State presented testimony from fourteen witnesses: Mary Goodenough, a bank teller ***994** who was working the day Tonya Crane was shot; Margo May, a bank employee who was also working the day Tonya Crane was shot; Claude Mendenhall, a bank patron who was present outside the bank the day Tonya Crane was shot; Steve Somsen, a deputy sheriff with the Caribou County Sheriff's Department; William Long, an FBI agent; Sheriff Ray Van Vleet, the Caribou County Sheriff; Dr. John Obray, a surgeon who had attempted to treat Tonya Crane after she was shot (Obray's deposition was read to jury as he did not testify live); Jerry Bavaro, a Soda Springs police officer; Dorothy Schugt, the owner of the motel where Dunlap stayed while in Soda Springs; Blynn Wilcox, the Soda Springs Chief of Police; Dr. Kerry Patterson, the pathologist who performed the autopsy of Tonya Crane; Don Wyckoff, the lab manager

for the State Crime Lab; Dwight Van Horn, an Idaho State Police firearms inspector; and Marilyn Young, an Indiana newspaper reporter Dunlap had contacted to discuss his prior crime in Indiana as well as Tonya Crane's murder.

Dunlap then presented testimony from seven witnesses: Terry Clem, Dunlap's first-grade teacher; Dr. Mark Cunningham, an expert clinical and forensic psychologist; Judge Richard Striegel, a judge in Indiana who had prior dealings with Dunlap; Mark Dunlap, Dunlap's younger brother; Suzanne Nelson, Dunlap's younger sister; Patricia Henderson, Dunlap's mother; and Dr. Craig Beaver, an expert neuropsychologist. Video depositions of Clem and Striegel were played for the jury, and Cunningham's testimony from a prior post-conviction proceeding was read to the jury; only Dunlap's family members and Beaver testified live.

In rebuttal, the State presented testimony from Daryl Matthews, M.D., a forensic psychiatrist. Dunlap presented no other witnesses in response to Matthews' testimony. The State then read several victim impact statements to the jury and Dunlap made a statement in allocution. Both the State and Dunlap presented closing arguments.

After the close of evidence,

> [t]he jury found that the State proved three statutory aggravating factors beyond a reasonable doubt, specifically: (1) by the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life (I.C. § 19–2515(9)(f)) (the utter disregard aggravator); (2) the murder was committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, kidnapping or mayhem and the defendant had the specific intent to cause the death of a human being (I.C. § 19–2515(9)(g)) (the specific intent aggravator); and (3) the defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society (I.C. § 19–2515(9)(h))1 (the propensity aggravator). The jury further found that all the mitigating evidence, weighed against each aggravator, was not sufficiently compelling to make imposition of the death penalty unjust.

Dunlap V, 155 Idaho at 358, 313 P.3d at 15 (footnotes omitted). Then, "[i]n accordance with the verdict, the district court entered a judgment sentencing Dunlap to death." *Id.*

Dunlap filed a petition for post-conviction relief with the district court on May 27, 2008, alleging that numerous reversible errors had occurred at his 2006 resentencing hearing which entitled him to a new sentencing hearing. On November 24, 2009, the district court granted the State's motion for summary dismissal of the petition. Dunlap appealed to this Court, which affirmed the district court's dismissal of all but two of Dunlap's claims: (1) prosecutorial misconduct under *Brady* and *Napue*; and (2) ineffective assistance of counsel under *Strickland*. We remanded the case, instructing the district court to hold an evidentiary hearing on those issues.

Upon remand, and at the request of the parties, the district court bifurcated the two claims, holding a separate evidentiary hearing for each. At the first evidentiary hearing, held August 26, 27, and 28, 2014, the parties presented evidence on the prosecutorial misconduct claim. On July 29, 2015, the district court denied Dunlap relief under both *Brady* and *Napue* and entered a partial judgment of dismissal as to Dunlap's prosecutorial misconduct claim. Dunlap petitioned this Court for permission to appeal this initial determination, ***995** which this Court denied on September 21, 2015. Dunlap also moved the district court for reconsideration of the dismissal, which the district court denied on September 30, 2015.

The second evidentiary hearing was held in April 2016, and consisted of ten days of testimony. The parties presented evidence regarding Dunlap's ineffective assistance of counsel claims. After granting multiple extensions of time for both parties, the district court denied relief and entered a final judgment dismissing Dunlap's petition for post-conviction relief in its entirety on May 28, 2019. Dunlap moved for reconsideration of the district court's dismissal of his post-conviction relief claims, which the district court denied on December 3, 2019.

Dunlap timely appealed.

II. STANDARD OF REVIEW

[1] [2] [3]"Post-conviction proceedings are civil in nature and therefore the applicant must prove the allegations by a preponderance of the evidence." *Dunlap II*, 141 Idaho at 56, 106 P.3d at 382. "Upon review of a district court's denial of a petition for post-conviction relief when an evidentiary hearing has occurred, this Court will not disturb the district court's factual findings unless they are clearly erroneous." *McKinney v. State*, 133 Idaho 695, 700, 992 P.2d 144, 149 (1999). "A factual finding is clearly erroneous only if it is not supported by 'substantial and competent evidence in the record.' " *Stuart v. State*, 127 Idaho 806, 813, 907 P.2d 783, 790 (1995) (quoting *Pace v. Hymas*, 111 Idaho 581, 589, 726 P.2d 693, 701 (1986)).

[4] [5]"This Court exercises free review of the district court's application of the relevant law to the facts." *Dunlap II*, 141 Idaho at 56, 106 P.3d at 382. However, the " 'duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case.' " *Kyles v. Whitley*, 514 U.S. 419, 422, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (quoting *Burger v. Kemp*, 483 U.S. 776, 785, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987)). This is because

> the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion).

III. ANALYSIS

Dunlap makes two prosecutorial misconduct claims on appeal: first, that the prosecution suppressed favorable and material evidence regarding Dunlap's mental health in contravention of *Brady*; and second, that the prosecution either elicited or failed to correct false testimony in contravention of *Napue*. Dunlap also asserts several ineffective assistance of counsel claims pursuant to *Strickland*. Each will be discussed in turn.

A. The district court did not err in denying relief on Dunlap's prosecutorial misconduct claims.

1. The district court did not err in denying Dunlap relief under *Brady*.

[6]Around the same time as his 2006 resentencing hearing, Dunlap and the Attorney General's office were engaged in a separate lawsuit. On May 7, 2004, Dunlap filed a *pro se* complaint in the U.S. District Court for the District of Idaho, alleging he was being housed inappropriately at the Idaho Maximum Security Institution (IMSI) in violation of his civil rights because he was housed in Tier 2 of "C-block" rather than in the general population (the "federal housing case"). Dunlap named Warden Greg Fisher as a defendant.

William Loomis, a DAG with the Idaho Department of Correction (IDOC) Unit of the Attorney General's office, was assigned to represent Fisher in Dunlap's federal housing case. On January 31, 2005, Loomis emailed both the Chief Psychologist at IDOC, Dr. Chad Sombke, and Fisher, asking Sombke to provide a "brief explanation of why Dunlap is in [T]ier 2 and why he cannot be moved into the general population." ***996** Sombke responded that "C-block Tier 2 is for the stable *mentally ill* and Mr. Dunlap would fit that category." (Italics added.) Sombke noted that, in his opinion, Dunlap would be "cleared psychologically to be moved to [the] general population." Sombke also told Loomis that, while Dunlap "is functional enough to be" in the general population, it was Sombke's opinion that Dunlap would not do well there.[1] Fisher also responded to Loomis' email, stating that he "always defer[red] to the decision of Dr. Sombke as to whether or not [inmates with mental health issues] should be considered for other housing, be it restrictive or general population."

[1] Sombke apparently feared for Dunlap's safety if he were to be housed in the general population.

Dunlap is of slight stature, which could put him at risk of predation by other inmates.

On January 9, 2006, about a month before the resentencing hearing, Loomis called Robins. Loomis planned to seek a stay in Dunlap's federal housing case pending the results of the resentencing hearing, and he asked Robins to provide an affidavit. Robins agreed to do so, and Loomis filed Robins' affidavit with the federal district court. The subject of Dunlap's mental health was apparently never broached at any point during the telephone conversation between Robins and Loomis.

[7]In this appeal, Dunlap argues that, in violation of *Brady*, the State suppressed the 2005 opinions of Sombke and Fisher that Dunlap was mentally ill and housed accordingly. " 'There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.' " *State v. Hall*, 163 Idaho 744, 830, 419 P.3d 1042, 1129 (2018) (quoting *Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)). The district court found that the prosecution had not suppressed any alleged *Brady* evidence, the second prong of the test, and denied relief. Because the district court concluded Dunlap had failed to establish that the State suppressed any potential *Brady* evidence, it did not consider whether the evidence was favorable to Dunlap or resulted in prejudice.

To support his contention that the 2005 opinions of Fisher and Sombke were suppressed by the State, Dunlap presents two main arguments: first, "the district court erroneously concluded knowledge of [Dunlap]'s mental health was not imputed from [D]AGs and state agents who assisted the State in defending against [Dunlap]'s federal lawsuit[ ] to [D]AGs prosecuting [Dunlap]'s capital sentencing." The crux of Dunlap's first argument is that Robins, who was employed in the Prosecutorial Assistance Unit of the Attorney General's office, and Loomis, who worked for the IDOC Unit of the Attorney General's office, are within the same "prosecutor's office" for purposes of *Brady*. Dunlap argues that, given Robins' assistance to Loomis in Dunlap's federal housing case, Robins had a duty to inquire of Loomis regarding any potential *Brady* material. Dunlap urges Loomis' knowledge of Sombke's and Fisher's 2005 opinions should be imputed to Robins.

Second, Dunlap argues the district court improperly shifted the burden to defense counsel to uncover exculpatory evidence known by the State. Dunlap argues that the district court erroneously adopted the "diligent defender" standard set forth in *United States v. Hicks*, 848 F.2d 1 (1st Cir. 1988), and impermissibly shifted the burden the State owed Dunlap under *Brady*. Dunlap further contends this Court rejected the "diligent defender" standard when it decided *Grube v. State*, 134 Idaho 24, 995 P.2d 794 (2000).

We conclude there was no suppression by the State because Dunlap's defense team was apprised of the purportedly suppressed evidence. At the second evidentiary hearing, the district court admitted Parmenter's notes regarding a meeting he had with Dunlap on August 24, 2005. Next to Sombke's name, Parmenter had written "also thinks Tim's crazy."[2] In the note, "crazy" is underlined. ***997** Also admitted were notes written by Dapsauski regarding a meeting she had with Dunlap approximately two months later, on October 21, 2005, which state that Dunlap "got off [death] row in 2002 and then he was sent to C Block, Tier II because that is where Sombke said he should be housed." Dapsauski further noted that Sombke "thinks Tim is crazy and should be on Tier [2] the rest of his life." Dapsauski testified at the second evidentiary hearing that this note was "provided to counsel."

2 We recognize that use of the word "crazy" to describe someone with a mental illness is both archaic and offensive. However, because Dunlap's mental illness is the subject of the dispute here, we find it necessary to quote certain witnesses and evidence verbatim for the sake of clarity and accuracy.

[8] [9]It is clear from the record that not only was Dunlap's defense team aware that Sombke believed Dunlap was mentally ill, but the defense team was also aware that Sombke believed Dunlap was appropriately housed due to his mental health issues. "[W]hen a defendant possesses 'the salient facts regarding the existence of the [evidence] that he claims [was] withheld,' " there is no *Brady* violation. *Hall*, 163 Idaho at 831, 419 P.3d at 1129 (quoting *Raley v. Ylst*, 444 F.3d 1085, 1095 (9th Cir. 2006)). If "a defendant has enough information to be able to ascertain the supposed *Brady* material on his own, there is no suppression by the government." *Id.* at 831–32, 419 P.3d at 1129–30 (quoting *United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991)). Because Dunlap's counsel were aware of the "salient facts," we conclude that there was no suppression by the State. This defeats Dunlap's *Brady* claim, and we need not address the other two prongs of the *Brady* analysis.

Therefore, we hold the district court did not err when it denied Dunlap relief under *Brady*.

2. The district court did not err in denying Dunlap relief under *Napue*.

[10]At the resentencing hearing, the State attempted to portray Dunlap as mentally competent and as a malingerer seeking to avoid execution. To support these theories, the State relied on Exhibit 39, a small excerpt of Dunlap's mental health records comprising four pages of medical chart notes from 2002. The notes discussed instances in which Dunlap had admitted to IMSI mental health professionals that he had concocted stories of delusions, which supported the State's malingering theory. For example, one note, written by Sombke, stated that Dunlap "continued to say that his past behavior was all purposeful and due to him being on death row" and quoted Dunlap as saying " 'I've always said this was all due to my sentence and once I got off, I'd change.' " Another note, written by IMSI clinician Royce Creswell, stated Dunlap, "by his own admission, was faking mental illness and was [ ] adept at the scam." Creswell's note continued: "Wow – This man had me fooled!! He is on no meds of any kind and he is completely clear." It is undisputed that Exhibit 39 did not contain the bulk of Dunlap's chart notes or consist of anything more than a small snippet of Dunlap's records.

Robins used Exhibit 39 to question both Beaver and Matthews about Dunlap's mental health. Robins asked Beaver whether Exhibit 39 was "part of the records that [he] had evaluated" and elicited testimony from Beaver regarding what was contained in those notes. Robins also elicited testimony from Matthews that the notes within Exhibit 39 were "some of the most important documents in the record" and that "[t]he jury should give them powerful weight [because] what you have got here, basically, are a bunch of seasoned mental health professionals who admit that [ ] Dunlap pulled the wool over their eyes."[3]

[3] In *Dunlap V*, this Court found this exchange regarding the weight the jury should give a particular piece of evidence to be harmless error. 155 Idaho at 370–71, 313 P.3d at 26–27.

Robins also questioned Matthews about the medical notes of Dr. Kenneth Khatain, a mental health professional who treated Dunlap at IMSI and concluded Dunlap was mentally ill. Matthews testified that "[o]ne of the remarkable things about those notes is that it looked like that doctor didn't even think about the possibility of malingering. ... I couldn't even find the record where there was a complete evaluation done by this doctor." When asked on cross-examination by Archibald whether Khatain had met with ***998** Dunlap on a monthly basis, Matthews responded that Khatain

> may [have]. I didn't see a month-by-month record from this doctor. I saw about five notes over the course of about five years. So how often he actually met with him and what the frequency of his meetings were, I don't actually know. I do know there were times that he would not meet with them because Mr. Dunlap didn't want [t]o meet with them. So I just don't know the answer to that.

On appeal, Dunlap argues that Exhibit 39 is false because of its "gross omissions," rendering any testimony regarding Exhibit 39 from Beaver and Matthews "false testimony" within the meaning of *Napue*. Additionally, Dunlap contends Matthews falsely testified about Khatain's treatment of Dunlap.

[11]"[T]o establish a *Napue* violation[,] a defendant must show '(1) the testimony was false; (2) the prosecutor should have known it was false; and (3) the testimony was material.' " *State v. Lankford*, 162 Idaho 477, 503, 399 P.3d 804, 830 (2017) (quoting *State v. Wheeler*, 149 Idaho 364, 368, 233 P.3d 1286, 1290 (Ct. App. 2010)). The district court found that the prosecution did not knowingly present false testimony or allow unsolicited false testimony to go uncorrected and denied Dunlap relief on his *Napue* claim. Because the district court concluded Dunlap had failed to establish that the State presented *Napue* evidence, it did not consider whether the presentation of allegedly false evidence was material.

To support his claim that the State knowingly elicited or failed to correct false testimony, Dunlap points to what Exhibit 39 did not contain: Sombke's 2005 opinion that Dunlap was mentally ill and housed correctly and Creswell's 2003 opinion that Dunlap was mentally ill and needed antipsychotic medication. Dunlap contends that "[t]his testimony and evidence left the impression that

[Dunlap] was faking it and everyone at IMSI agreed" even though "Robins knew Exhibit 39 falsely represented Sombke's and Creswell's opinions regarding [Dunlap]'s mental illness." Dunlap additionally contends that Matthews' testimony about only seeing five notes "intentionally impl[ied] Khatain saw [Dunlap] only five times in five years," which was demonstrably false.

During the cross-examination of Beaver, Robins asked if the mental health records contained in Exhibit 39 were "*part of* the records that [Beaver] evaluated." (Italics added.) Beaver answered affirmatively. Additionally, during the direct examination of Matthews, Robins refers to Exhibit 39 as "a series of records dealing with situations where it was asserted that [ ] Dunlap admitted that he actually – that it was all an act or that he made up or malingered mental illness." Robins then asked Matthews, "[i]n *these particular situations*, how should that affect the diagnosis of Mr. Dunlap? What weight should the jury give it?" (Italics added.) Neither Robins, Beaver, nor Matthews ever characterized the opinions in Exhibit 39 as being the only mental health opinions in the record.

As to the testimony regarding Khatain, when asked on cross-examination by Archibald whether Khatain met with Dunlap on a monthly basis, Matthews responded that Khatain "may have" but that he had not seen a "month-by-month record." Dunlap contends that "[h]ow many notes Matthews 'saw' is irrelevant," but it appears that Matthews was simply testifying to his own recollection as to what he reviewed in the IDOC records. Additionally, as pointed out by the State, Matthews' testimony was "couched in uncertainty": Matthews explicitly stated that he "just [didn't] know the answer" and that Khatain "may have" met with Dunlap on a monthly basis.

Because Dunlap has failed to show the existence of false testimony, we hold the district court did not err when it denied Dunlap relief under *Napue*. As such, we need not address the other two prongs of the *Napue* analysis.

B. The district court did not err in denying relief on Dunlap's ineffective assistance of counsel claims.

Dunlap makes three primary ineffective assistance of counsel claims on appeal: first, that the district court applied an improper, heightened standard to the ineffective assistance ***999** of counsel claims; second, that Dunlap's defense team was ineffective in failing to investigate and present certain mitigating evidence; and third, that the district court improperly considered the alleged instances of ineffectiveness in isolation, rather than collectively, when determining their prejudicial effect.

[12]In determining whether a defendant received effective assistance from his counsel, this Court looks to the United States Supreme Court's two prong test set forth in *Strickland*:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. at 687, 104 S.Ct. 2052.

[13] [14] [15] [16]To establish deficient performance, this Court requires a defendant to show that "counsel's representation fell below an objective standard of reasonableness." *State v. Abdullah*, 158 Idaho 386, 417, 348 P.3d 1, 32 (2015) (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052). As this Court set forth in *Dunlap V*:

> Trial counsel has a duty to conduct a thorough investigation in preparation for the penalty phase of a capital case. *See, e.g.*, *Porter v. McCollum*, 558 U.S. 30, 38–41, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009). Presentation of some mitigating evidence, even if strong, is insufficient if other mitigating evidence is available upon reasonable investigation. *Rompilla v.*

> *Beard*, 545 U.S. 374, 387–93, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). However, no relief is mandated where counsel's investigation is not as thorough as it could have been because the courts "address not what is prudent or appropriate, but only what is constitutionally compelled." *Burger v. Kemp*, 483 U.S. 776, 794, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987). This Court held, in *State v. Row*, that counsel is not required to investigate a defendant's "entire life in order to objectively present ... mitigation evidence" and that decisions regarding mental health and allocution statements are "strictly strategic and shall not be second-guessed by this Court." 131 Idaho 303, 313, 955 P.2d 1082, 1092 (1998).

155 Idaho at 388, 313 P.3d at 44. "While there is no duty to sort through the defendant's 'entire life,' easily available mitigation evidence cannot be ignored." *Id.*

[17] [18] [19] [20]There is a "strong presumption" that defense counsel "made all significant decisions in the exercise of reasonable professional judgment." *Abdullah*, 158 Idaho at 418, 348 P.3d at 33 (citing *Cullen v. Pinholster*, 563 U.S. 170, 195, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011)).

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *See Michel v. Louisiana*, [350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)]. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Strickland, 466 U.S. at 689, 104 S.Ct. 2052. "Tactical decisions made by counsel will not be second-guessed on post-conviction relief, ***1000** unless made upon the basis of inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation." *Abdullah*, 158 Idaho at 505, 348 P.3d at 120.

[21]To establish prejudice, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 418, 348 P.3d at 33 (quoting *Strickland*, 466 U.S. at 698, 104 S.Ct. 2052). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome," creating a substantial likelihood that the outcome would have been different, as opposed to a conceivable likelihood. *Id.* (citing *Harrington v. Richter*, 562 U.S. 86, 112, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011)).

1. The district court applied the correct legal standard when analyzing Dunlap's ineffective assistance claim.

Dunlap contends that, rather than applying the correct two-prong analysis under *Strickland*, the district court erroneously applied a "doubly deferential standard" as set out in *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). Dunlap argues that the *Harrington* standard only applies to federal habeas proceedings in which federal courts are reviewing state habeas proceedings, not to the state habeas proceedings themselves, and that both this Court and the United States Supreme Court have misread *Strickland*:

> Though even this Court has cited this incorrect standard with attribution to *Harrington v. Richter*, *Strickland* makes clear that "[t]he result of the proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors cannot be shown by a preponderance of the evidence to have determined the outcome." In fact, *Harrington* cites *Strickland* for the principle that "[t]he likelihood of a different result must be substantial, not just conceivable," even though this principle is nowhere to be found in *Strickland*.

Harrington involved a federal habeas petition that was subject to the requirements of the Antiterrorism and Effective Death Penalty Act (AEDPA). 562 U.S. at 91, 131 S.Ct. 770. In *Harrington*, the defendant first filed a petition for a writ of habeas corpus in state court, alleging ineffective assistance of counsel under *Strickland*. *Id.* at 96, 131 S.Ct. 770. The California Supreme Court denied relief, prompting the defendant to file a subsequent habeas petition in federal court alleging the same claim. *Id.* at 97, 131 S.Ct. 770. The federal district court denied relief, as did a three-judge panel of the Ninth Circuit. *Id.* However, an *en banc* panel of the Ninth Circuit reversed the three-judge panel's decision, determining that the California Supreme Court's denial of relief on the defendant's ineffective assistance of counsel claim was "unreasonable." *Id.*

The Supreme Court then reversed the *en banc* panel of the Ninth Circuit. *Id.* at 91, 131 S.Ct. 770. When evaluating ineffective assistance of counsel claims that are subject to

AEDPA, a federal court may only grant habeas relief in three limited situations: first, if "it is shown that the earlier state court's decision 'was contrary to' federal law then clearly established in the holdings of [the Supreme] Court"; second, if "it 'involved an unreasonable application of' such law"; or third, if "it 'was based on an unreasonable determination of the facts' in light of the record before the state court." *Id.* at 100, 131 S.Ct. 770 (quoting 28 U.S.C. § 2254(d)). Because the Ninth Circuit relied on the second of these scenarios to grant habeas relief, the Supreme Court explained that "[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable." *Id.* at 101, 131 S.Ct. 770.

> This is different from asking whether defense counsel's performance fell below *Strickland's* standard. Were that the inquiry, the analysis would be no different than if, for example, this Court were adjudicating a *Strickland* claim on direct review of a criminal conviction in a United States district court. Under AEDPA, though, it is a necessary premise that the two questions are different.

Id. The *Harrington* Court further stated that "[e]stablishing that a state court's application of *Strickland* was unreasonable under [AEDPA] ***1001** is all the more difficult. The standards created by *Strickland* and [AEDPA] are both highly deferential, and when the two apply in tandem, review is doubly so." *Id.* at 106, 131 S.Ct. 770 (internal quotations and citations omitted).

Before answering "[t]he pivotal question" of "whether the state court's application of the *Strickland* standard was unreasonable," the Court laid out the standard for *Strickland's* second prong:

> In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, *Strickland* asks whether it is "reasonably likely" the result would have been different. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between *Strickland's* prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." The likelihood of a different result must be substantial, not just conceivable.

Id. at 111–12, 131 S.Ct. 770 (quoting *Strickland*, 466 U.S. at 696, 693, 697, 104 S.Ct. 2052). The Court found that "[i]t would not have been unreasonable for the California Supreme Court to conclude [the defendant's] evidence of prejudice fell short of *this standard*." *Id.* at 112, 131 S.Ct. 770 (italics added).

[22]Contrary to Dunlap's argument, when the Supreme Court stated "[t]he likelihood of a different result must be substantial, not just conceivable," it was not setting out a "doubly deferential" test under both *Strickland* and AEDPA. Instead, the Supreme Court was simply explaining the second prong of the *Strickland* analysis. The "doubly deferential" standard comes into play only when a federal court is tasked with determining whether a state court applied *Strickland* unreasonably; it is the unreasonableness inquiry that is the "doubly deferential" standard, not that "[t]he likelihood of a different result must be substantial, not just conceivable."

Therefore, we conclude that the district court applied the correct standard to analyze Dunlap's *Strickland* claims that Dunlap's defense team was ineffective in failing to investigate and present certain mitigating evidence.

2. The district court did not err when it concluded that Dunlap's defense team was not ineffective in investigating and presenting mitigating evidence.

a. The district court correctly concluded that Dunlap's defense team was not ineffective in presenting evidence of Dunlap's family life and background.

Dunlap next argues that his defense team was ineffective because more evidence of his family life and background should have been presented. At the second evidentiary hearing, Dunlap presented testimony from: his brother, Mark Dunlap; his sister, Suzanne Nelson; and his mother, Patricia Henderson; each of whom also testified at the 2006 resentencing hearing. Dunlap also presented testimony from several witnesses who did not testify at the 2006 resentencing hearing. Roy Prince, a teacher at Dunlap's high school, testified that, though he did not know Dunlap well and had never actually taught him, he thought Dunlap was "out there" and "didn't fit in" except

"with the theater people." Prince further testified that "it looked ... like a lot of the kids at the high school were afraid of" Dunlap. Mark Baize, a high school friend of Dunlap, testified that he was good friends with Dunlap, but that Dunlap was "shunned [by] a lot" of the other students. Baize further testified that he had never been contacted by anyone on Dunlap's defense team prior to the resentencing hearing but that, if he had, he would have been willing to testify. Paul Locket, Dunlap's high school math teacher, testified that Dunlap had low grades in school and had attempted to "form an army." Jennifer Davidson, Dunlap's ex-wife, testified about her relationship with Dunlap and its eventual decline. She recounted disturbing stories she learned from Dunlap's parents about Dunlap growing up involving potential arson and animal cruelty, and the mental health issues experienced by the son she shares with Dunlap. ***1002** Davidson further testified that she had never been contacted by anyone on Dunlap's defense team prior to the resentencing hearing but that, if she had, she would have been willing to testify. After considering the testimony of each witness, the district court found that Dunlap had failed to satisfy either prong of *Strickland*.

On appeal, Dunlap first argues that the testimony presented at the resentencing hearing—that of his brother, sister, and mother—was presented ineffectively, contending that defense counsel "did little to guide" his mother's testimony. Dunlap also argues that defense counsel should have presented the testimony of additional witnesses, such as Dunlap's teachers and childhood friends. Particularly, Dunlap contends that the defense team should have presented testimony from his ex-wife at the resentencing hearing, as she could have attested to both his odd behavior during their marriage and subsequent divorce, as well as to the mental health issues experienced by their son.

[23] [24]" '[C]ounsel's choice of witnesses, manner of cross-examination, and lack of objection to testimony fall within the area of tactical, or strategic, decisions, as does counsel's presentation of medical evidence.' " *Abdullah*, 158 Idaho at 500, 348 P.3d at 115 (quoting *Giles v. State*, 125 Idaho 921, 924, 877 P.2d 365, 368 (1994)). "For additional mitigation evidence to demonstrate prejudice in a post-conviction proceeding, it simply cannot be cumulative of evidence presented at sentencing, but rather must create a substantial likelihood of a different sentence." *Id.* at 495, 348 P.3d at 110.

In *Abdullah*, this Court held that defense counsel was not ineffective in failing to present additional mitigation evidence from the defendant's family members. *Id.* at 492, 348 P.3d at 107. The evidence in question included traumatic events witnessed or experienced by the defendant. *Id.* This Court held that, although the proffered evidence was "undoubtedly heartfelt, emotional, vivid, and moving," it was cumulative of other evidence presented by counsel. *Id.* "The decision to present a fewer number of witnesses than [the defendant] would now prefer on appeal is a conceivable tactical decision. Under the deferential *Strickland* standard, this decision is 'strongly presumed' to be reasonable." *Id.* As such, this Court held that the defendant's counsel was not deficient in its presentation of mitigation evidence on the defendant's background and family life. *Id.* at 493, 348 P.3d at 108.

[25]Here, Dunlap's defense team presented an array of mitigating evidence from Dunlap's immediate family, as well as from his first-grade teacher. The defense team's choices regarding which witnesses to call is generally a strategic decision afforded deference under *Strickland*. *See Dunlap V*, 155 Idaho at 387, 313 P.3d at 43. Dunlap cannot simply assert on appeal that defense counsel should have put on more witnesses, especially when the additional witnesses would have offered similar testimony to that already presented. *See Abdullah*, 158 Idaho at 492, 348 P.3d at 107.

[26]Also, even though Baize testified at the second evidentiary hearing that he would have been willing to testify at the resentencing hearing in 2006, the district court noted that Dunlap's defense team was aware that Baize was a potential witness. Baize, however, had apparently been contacted by an investigator for Dunlap's original sentencing in 1992 and, according to the investigator's notes, told the investigator "if your [sic] looking for somebody to say nice things about [Dunlap] you came to the wrong place." The investigator described Baize as "angry" at Dunlap "almost to the point of being vindictive." Whether or not the investigator's notes reflect the truth of Baize's feelings about Dunlap in 1992, the notes are reflective of the information Dunlap's resentencing defense team had when making the decision whether to investigate Baize. Given this background, we cannot say that refusing to further investigate Baize was not objectively reasonable.

[27]Furthermore, the evidence Dunlap argues should have been presented includes evidence of the genetic component of his mental illness and additional "humanizing" evidence of Dunlap's good character. However, as found by the district court, Beaver's expert psychological testimony acknowledged ***1003** that Dunlap's son's mental illness supported a genetic component to Dunlap's own mental illness. Additionally, Cunningham testified that there is a genetic predisposition

to the mental disorders suffered by Dunlap. Thus, any additional testimony offered by Dunlap's mother or ex-wife regarding the mental health issues of family members would have been cumulative.

[28]The humanizing evidence Dunlap alleges should have been introduced would also have been cumulative. Dunlap's mother, brother, and sister each testified to positive qualities possessed by Dunlap, as well as his progression of mental health issues. Both Dunlap's first-grade teacher and the judge who committed Dunlap to a mental health hospital testified to the progression of Dunlap's struggle with mental illness. As such, additional anecdotes of Dunlap's character and mental illness would have been cumulative and unlikely to have changed the outcome.

We conclude Dunlap's defense team was not deficient in choosing to limit its mitigation witnesses to certain family and friends of Dunlap. Therefore, we hold that the district court did not err when it concluded that Dunlap's defense team was not ineffective in presenting evidence of Dunlap's family life and background.

b. The district court correctly concluded that Dunlap's defense team was not ineffective in presenting evidence of the connection between Dunlap's mental illness, medication, and behavior at IMSI.

[29]Dunlap next alleges his defense team should have presented evidence of the connection between his mental illness, medication (or lack thereof), and behavior while incarcerated at IMSI. The district court concluded that the defense team was not ineffective in failing to do so. The district court first found that Judge Harding had employed rigid timing and funding restraints on the defense team. The district court also found that Dapsauski had provided Beaver with a timeline on which he could base his testimony and to help him prepare his testimony. Further, the district court acknowledged that even though the materials provided to Beaver "were not organized in a manner perhaps accustomed to by Dr. Beaver" that did not mean that counsel were deficient, particularly because both Beaver and Cunningham were able to provide testimony "addressing the connection between Dunlap's mental illness, medication, and behavior during his confinement at IMSI." The district court continued:

> Finally, the Dunlap Defense Team's determination to rely solely upon Dr. Beaver not only to testify concerning his testing, evaluation and opinions, but to narrate a summary of Dunlap's medical and mental health records, including those maintained at IMSI was a tactical decision and arrived at by the Dunlap Defense Team after consideration, discussion and an exercise of professional judgment.

Therefore, the district court found that Dunlap did not establish deficient performance or prejudice to warrant post-conviction relief.

On appeal, Dunlap argues that

> [c]ounsel's failures to link [Dunlap]'s disciplinary and behavioral issues with the absence of antipsychotics, and their failure to link [Dunlap]'s good behavior to his receipt of proper psychiatric medication, resulted from their failure to review, analyze, and understand [Dunlap]'s IMSI records. If they had, they would have discovered every DOR [Disciplinary Offense Report] occurred when [Dunlap] was unmedicated, but when properly medicated, [Dunlap] is neither violent nor dangerous and does not get DORs. The district court's contrary conclusion, [sic] is erroneous and not supported by substantial evidence.

Dunlap focuses on a "timeline" that, under prevailing professional norms, should have been used to assist the jury in understanding the connection between Dunlap's mental illness symptoms and whether he was taking any medication for those symptoms.

In response, the State argues that Beaver presented the connection between Dunlap's mental health and whether he was taking any medications. Broadly, the State asserts that Dunlap's chief complaint is that counsel chose to rely on Beaver as its primary expert witness, instead of relying on multiple witnesses, ***1004** which the State notes is in

direct contravention of Judge Harding's ruling that only one expert would be appointed to the defense. In short, the State argues that Dunlap did not receive ineffective assistance because only Beaver testified about Dunlap's mental health.

In reply, Dunlap contends that "the State's arguments excusing counsel's shortcomings by pointing to resource limits, imposed by yet another state actor, the district court judge, is inappropriate." Dunlap argues that, at the evidentiary hearing, the defense team "never said their investigation, analysis, argument[,] or presentation of mitigating evidence, or their rebuttal of the State's aggravation case, was curtailed by time or resource limits imposed by the district court" but "was based on just [their] own decision."

Once again, this Court has maintained a deferential standard when reviewing defense counsel's tactical choices: " 'counsel's choice of witnesses, manner of cross-examination, and lack of objection to testimony fall within the area of tactical, or strategic, decisions, *as does counsel's presentation of medical evidence*.' " *Abdullah*, 158 Idaho at 500, 348 P.3d at 115 (quoting *Giles*, 125 Idaho at 924, 877 P.2d at 368) (italics added).

Dunlap has failed to meet his burden in establishing deficient performance. At the evidentiary hearing, Archibald testified that, in his experience, most jurors tended not to trust mental health experts anyway:

> My personal experience about mental health evidence is juries don't believe a lot of it anyway, whether it's for you or against you. I've never had a jury say wow, we really hung on every word that psychologist said. I've never had a jury member say that. Most jury members have said we didn't really pay much attention to the expert.

The defense team's decision to present the medical evidence through Beaver's testimony was strategic and thus, their performance does not fall below an "objectively reasonable" standard.

[30]Additionally, Dunlap has failed to establish prejudice. For example, Matthews testified at the resentencing hearing about the tenuous link between a medication and a diagnosis:

> I do know that a combination of Thorazine and Haldol which was the kind of combination which was mostly used when I was in medical school, that there is no rational reason for combining those two medicines. That it has been suggested to you that he must be very sick because he is taking Haldol and Thorazine[—]by no means is that true. What it means is he has been on an inappropriate combination of medicine that has no indication in psychiatry. So I will encourage the jury not to draw any conclusions from the fact he is taking medication. You don't conclude that someone has a particular sickness because they are taking medicines that might be prescribed for that sickness.

Matthews was then asked, "What if the clinician starts a patient on this particular medicine and concludes that he seems to be doing okay with that particular medicine[, i]s that reflective of an actual diagnosis of whether it is schizo-affective disorder or any other disorder for that matter?" Matthews responded:

> You cannot use response to treatment alone as an indicator that a person has a particular illness, and why not? Well, for a bunch of reasons. *One is that he may be faking the illness to begin with.* That is probably what the situation is for Mr. Dunlap, but also maybe the medicine treats other conditions than the one that you've diagnosed. So you can't say that just because he seems okay on the medicine that he has, that particular illness which you think the medicine should be used for.

(Italics added.) Thus, had the defense team provided the jury with the timeline now suggested by Dunlap, there is every possibility that the jury could have used that timeline to corroborate Matthews' testimony that Dunlap was feigning mental illness. The jury could have

reasonably concluded that the reason Dunlap was well behaved when he was on medication was all an act to convince others he was mentally ill. We cannot say that, but for counsel's failure to provide the jury with a "timeline," there is a reasonable probability that Dunlap would have received a sentence other than death.

***1005** Furthermore, Dunlap's argument that timing and budgeting issues were caused by the district court is precluded by his own admission that his defense team "never said their investigation, analysis, argument[,] or presentation of mitigating evidence, or their rebuttal of the State's aggravation case, was curtailed by time or resource limits imposed by the district court" but "was based on just [their] own decision." While Dunlap's argument is unavailing under these particular facts, we do not condone the practice of the same judge overseeing both a capital trial and sentencing proceedings as well as making financial decisions related to the funding of defense experts. In our view, the best practice is to, pursuant to Idaho Criminal Rule 12.2(d), utilize a second, disinterested "resource judge" to make decisions relating to the defense budget, including the number of expert witnesses that may be retained. *See* I.C.R. 12.2(d).

Nevertheless, under the particular facts of this case, we hold that the district court did not err when it concluded that Dunlap's defense team was not ineffective in presenting evidence of the connection between Dunlap's mental illness, medication, and behavior at IMSI.

c. The district court correctly concluded that Dunlap was not prejudiced by his defense team's deficient performance in failing to present evidence from Caribou County Jail personnel and inmates.

[31]Dunlap next contends that his defense team was ineffective because it failed to adequately investigate, interview, and call witnesses who had interacted with Dunlap during the time he was incarcerated in the Caribou County Jail. Prior to the evidentiary hearing, Dunlap produced affidavits from several individuals who were either employed by or incarcerated at that jail, including Sheriff's deputies and Dunlap's cellmates. Most of these witnesses did not testify at the second evidentiary hearing; however, Dunlap submitted their affidavits. One witness did testify: James Clark, a former inmate at the Caribou County Jail who shared a cell with Dunlap. Clark's testimony described Dunlap's behaviors relating to his mental health and other interactions he had with Dunlap. Clark further testified that "he was never contacted or asked to testify at Dunlap's resentencing trial by the Dunlap Defense Team."

The district court stated it "ha[d] considered Clark's testimony and ha[d] reviewed the Affidavits of those Caribou County Jail Personnel who submitted affidavits." The district court then concluded that Dunlap's defense team was deficient in failing to investigate or interview any individuals from the jail:

> it appears to this [c]ourt that the Dunlap Defense Team would want to develop and present testimony to the jury concerning Dunlap's mental well-being and state which was as current as possible. ... [T]o not investigate, interview, and call someone to verify Dunlap's mental condition and ongoing symptoms consistent with Dr. Beaver's diagnosis appears to this [c]ourt to be deficient under the first *Strickland* prong.

The district court next found that although the defense team was deficient, this deficiency did not "undermine the [c]ourt's confidence in the outcome of the resentencing hearing." The district court found that the disputed testimony was "much the same" as other testimony offered by Dunlap's friends, family, and mental health professionals.

On appeal, Dunlap contends that the jail personnel and inmate evidence was not cumulative of any other evidence before Dunlap's jury. Dunlap asserts that there was no evidence of Dunlap's behavior while he was incarcerated in the jail, and such evidence would have "cast doubt" on Dunlap's "continuing threat to society and risk of future danger." (Citing *Skipper v. South Carolina*, 476 U.S. 1, 4–5, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986).) Dunlap asserts that this evidence was "independently mitigating," and its absence caused prejudice to Dunlap because there was a likelihood that at least one juror would have rejected a sentence of death had it been presented.

In response, the State first challenges the district court's finding of deficiency, arguing that the defense team "arguably" knew of the potential witnesses from the jail and chose ***1006** not to present their testimony as part of its strategy. The State also contends that the district court properly considered all the evidence when concluding that

Dunlap suffered no prejudice.

In reply, Dunlap first asserts that the State has not properly challenged the district court's finding of deficiency on appeal. Dunlap continues that the deficiency finding is supported by the evidence, but that failing to include this evidence was prejudicial. Dunlap alleges that evidence of his behavior while in the jail demonstrated Dunlap's ability to "live peaceably with multiple people in a congregate setting." This evidence, Dunlap argues, was "crucial to dispelling the State's claim that [Dunlap] constitutes a continuing threat to society."

Because we conclude Dunlap has failed to establish prejudice, we need not decide whether the State has properly challenged the district court's deficiency finding. "To prove that counsel's deficient performance prejudiced the defendant, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Dunlap v. State*, 159 Idaho 280, 297, 360 P.3d 289, 306 (2015) ("*Dunlap VI*") (quoting *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052). "A reasonable probability is defined as a probability sufficient to undermine confidence in the outcome. The likelihood of a different result must be substantial, not just conceivable." *Abdullah*, 158 Idaho at 418, 348 P.3d at 33 (citations and quotations omitted).

Here, Cunningham's original testimony was read to the jury. Cunningham testified at length about Dunlap's potential for future dangerousness, specifically within the prison system. While the testimony of Clark may have presented a more recent picture of Dunlap's dangerousness in a prison setting, we find the district court did not err in concluding there was not a reasonable probability that the omitted evidence would have resulted in a different verdict.

Additionally, Dunlap's reliance on *Skipper* is inapposite. In *Skipper*, the defendant had spent seven and a half months in jail awaiting his capital sentencing hearing. 476 U.S. at 3, 106 S.Ct. 1669. Both the defendant (Skipper) and his ex-wife testified that he had behaved well during his stint in jail. *Id.* The defendant also "sought to introduce testimony of two jailers and one 'regular visitor' to the jail to the effect that [the defendant] had 'made a good adjustment' during his time spent in jail." *Id.* The trial court, finding the proffered testimony to be irrelevant, precluded the defendant from calling any of the three witnesses. *Id.* The Supreme Court reversed, stating that "evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating." *Id.* at 5, 106 S.Ct. 1669. The Supreme Court continued,

> the State seems to suggest that exclusion of the proffered testimony was proper because the testimony was merely cumulative of the testimony of petitioner and his former wife that petitioner's behavior in jail awaiting trial was satisfactory, and of petitioner's testimony that, if sentenced to prison rather than to death, he would attempt to use his time productively and would not cause trouble. We think, however, that characterizing the excluded evidence as cumulative and its exclusion as harmless is implausible on the facts before us. The evidence petitioner was allowed to present on the issue of his conduct in jail was the sort of evidence that a jury naturally would tend to discount as self-serving. The testimony of more disinterested witnesses—and, in particular, of jailers who would have had no particular reason to be favorably predisposed toward one of their charges—would quite naturally be given much greater weight by the jury. Nor can we confidently conclude that credible evidence that petitioner was a good prisoner would have had no effect upon the jury's deliberations. The prosecutor himself, in closing argument, made much of the dangers petitioner would pose if sentenced to prison, and went so far as to assert that petitioner could be expected to rape other inmates. Under these circumstances, it appears reasonably likely that the exclusion of evidence bearing upon petitioner's behavior in jail (and hence, upon his likely future behavior in prison) may ***1007** have affected the jury's decision to impose the death sentence. Thus, under any standard, the exclusion of the evidence was sufficiently

> prejudicial to constitute reversible error.

Id. at 7–8, 106 S.Ct. 1669.

Clearly, the facts here do not align with those in *Skipper*. At the resentencing hearing, the prosecutor focused his closing arguments on the facts of the crime itself. While the prosecutor did briefly comment on Dunlap's future dangerousness, the comment was aimed at convincing the jury to consider Dunlap's future dangerousness to society, not in prison, when considering the propensity aggravator. Unlike in *Skipper*, the prosecutor did not state that Dunlap would be a danger to other inmates or prison staff. Additionally, Dunlap had a "disinterested witness," Cunningham, describe Dunlap as lacking the potential for future dangerousness within the prison system. The additional evidence Dunlap now argues should have been presented at the resentencing hearing comes much closer to "cumulative" than the additional evidence in *Skipper*. Again, while the additional testimony of Dunlap's cellmate and others may have offered a more recent picture of Dunlap's dangerousness in a prison setting, we remain unconvinced it establishes a reasonable probability that Dunlap would not have received a death sentence.

Accordingly, we conclude that the district court did not err when it concluded that Dunlap's defense team was not ineffective when they failed to present evidence from Caribou County Jail personnel and inmates.

d. The district court correctly concluded that Dunlap was not prejudiced by his defense team's cross-examination and rebuttal of Matthews.

Dunlap next argues that his defense team failed to adequately cross-examine and rebut Matthews' testimony. The district court found that it was

> an extremely close call concerning whether the Dunlap Defense Team's performance relative to the cross-examination of Dr. Matthews, their decision not to call Dr. Beaver to rebut Dr. Matthews' testimony[,] and their decision not to call others affiliated with IMSI such as Dr. Khatain, Dr. Sombke, Creswell[,] and others constituted deficient performance under the first *Strickland* prong. While the [c]ourt recognizes that many of these determinations can be viewed as strategic and professional judgment determinations, it also seems to this [c]ourt that some additional effort should have been made to minimize Dr. Matthews' testimony.

The district court further recognized that Matthews was a particularly damaging witness, noting that

> [w]hile this [c]ourt did not have the opportunity to see Dr. Matthews testify live, the [c]ourt's review of Dr. Matthews' testimony established, at least in this [c]ourt's mind, that Dr. Matthews was a powerfully persuasive expert. He had a way of expressing himself that was very confident, authoritative, and compelling, perhaps even to a greater degree than other experts and/or mental health witnesses whose testimony the [c]ourt reviewed from the resentencing or even observed live at the evidentiary hearing.

However, the district court did not reach a finding as to whether Dunlap's defense team performed deficiently; "[r]ather," the district court concluded, "regardless of how this [c]ourt may have come down on the issue of deficient performance, Dunlap has failed to establish prejudice."

On appeal, Dunlap makes several related arguments, but each comes down to the same essential contention: that Archibald failed to adequately prepare for his cross-examination of Matthews. Dunlap argues that the defense team failed to provide a DVD copy of Matthews' interview of Dunlap to Beaver in time for Beaver to review the interview and thus prevented Beaver from assisting the defense team in preparing them to cross-examine Matthews. Dunlap also faults Archibald for failing to sit in on the interview or review the DVD himself.

Dunlap next argues that Archibald should have "ask[ed]

Matthews to explain Khatain's numerous notes in [Dunlap]'s IMSI files," in order to rebut Matthews' testimony and prevent Matthews from "undermining Beaver's ***1008** opinion." Had Archibald asked Matthews about the notes, Dunlap contends, it would have been obvious that Khatain had seen Dunlap on a regular basis and made Beaver's reliance on Khatain's notes more credible.

Finally, Dunlap argues that the defense team thoroughly failed to rebut Matthews' "damning" testimony by failing to adequately cross-examine Matthews or call witnesses—both expert and fact—to rebut Matthews. Dunlap points to the defense team's failure to call Beaver to the stand again after Matthews had testified, claiming that Beaver could have "provide[d sur]rebuttal testimony." Dunlap also contends that the defense team could have called Khatain, Sombke, or others to rebut Matthews' testimony that Dunlap "convincingly faked his mental illness and fooled IMSI mental health professionals into believing he was mentally ill, and they only recognized he was faking it when he told them." Dunlap also points to the district court's characterization of Matthews as a particularly persuasive witness and argues that "[w]here even the district judge fell prey, any cursory review of Matthews' testimony reveals how damaging it was to [Dunlap]'s case left unchallenged," thus establishing prejudice under *Strickland.*

The State contends that Archibald did prepare for the cross-examination of Matthews. The State argues that the reason the defense team did not review the DVDs prior to Matthews' testimony was "because of other priorities associated with the resentencing that had already commenced." Archibald's performance was not deficient, the State claims, due to "the time restraints that were imposed by Judge Harding for the resentencing, counsels' need to focus upon other tasks, and counsels' reliance upon Dr. Beaver to review the tapes before he testified ...." The State also points out that "Archibald attempted to attend the interview with Dunlap, but was asked by Dr. Matthews not to be in the same room during the interview."

The State next argues that Archibald made a strategic decision "to not highlight" Matthews' testimony regarding Khatain's notes "because twelve clinic visits as opposed to five clinic visits over the course of five years is hardly a significant difference, particularly when Dr. Matthews concluded his statement with 'I don't actually know [how many times Khatain examined Dunlap].' " The State also contends that the defense team's decision not to call Beaver back to the stand to rebut Matthews was a "tactical decision." The State maintains that "a plethora of expert mental health evidence was presented to the jury by both the [prosecution] and Dunlap from the time he was a child through the time of the resentencing" and any additional fact witnesses Dunlap now argues the defense team should have called to the stand would simply have offered repetitive evidence.

[32]In reply, Dunlap argues that "the State's challenge to the district court's deficiency finding is not before this Court." However, like the district court below, we need not reach the question of deficient performance because we conclude Dunlap has failed to establish prejudice.

> "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069, 80 L.Ed.2d at 699–700. Thus, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* The United States Supreme Court has stated: "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.*

Dunlap VI, 159 Idaho at 297, 360 P.3d at 306.

[33]Regarding the DVDs of Matthews' interview, Dunlap has provided no facts to support that the DVD could have been provided to Beaver sooner than it was. Dunlap admits that, once his defense team possessed the interview DVDs, the DVDs "were overnighted to Beaver." The only way the defense team could have gotten more time to review the DVD was if the defense team had moved for another continuance. However, the district court found that the defense team's ***1009** belief that another continuance would not have been granted was reasonable: "[t]his opinion was a direct product of previous statements made by the trial court." Because the motion would almost certainly not have been granted, Dunlap was not prejudiced by his defense team's failure to move for a continuance. *See Abdullah*, 158 Idaho at 487, 348 P.3d at 102.

[34] [35]As for Archibald's failure to sit in on the interview, this Court has already found that this was not deficient performance:

> Dunlap argues that he was denied effective assistance of counsel by his attorneys' decision not to attend Dunlap's interview with Dr. Matthews .... Significantly, however, the U.S. Supreme Court explicitly observed that [*Estelle*] did not address the presence of counsel during the examination, noting that the Court of

> Appeals had recognized that "an attorney present during the psychiatric interview could contribute little and might seriously disrupt the examination." Thus, [ ] counsel was not constitutionally required to be present during Dr. Matthews' interview ....

Dunlap V, 155 Idaho at 387–88, 313 P.3d at 43–44 (quoting *Estelle v. Smith*, 451 U.S. 454, 471 n. 14, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981)). Because this Court already found that Archibald "was not constitutionally required to be present during Matthews' interview," Dunlap is precluded from arguing this "error" prejudiced him during the instant appeal under the law of the case doctrine:

> The law of the case doctrine, which is well settled in Idaho, requires that when an appellate court, in "deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal[.]" "The underlying purpose of the doctrine is to 'maintain consistency and avoid reconsideration of matters once decided during the course of a single, continuing lawsuit ....' "

State v. Gorringe, 168 Idaho 175, 179, 481 P.3d 723, 727 (2021) (quoting *Berrett v. Clark Cnty. Sch. Dist. No. 161*, 165 Idaho 913, 921–22, 454 P.3d 555, 563–64 (2019)). Therefore, Dunlap has not established prejudice.

[36]Dunlap's next argument is that Archibald should have asked Matthews to explain Khatain's "numerous notes" during cross-examination. While Matthews' testimony clearly painted Khatain in an unfavorable light, Matthews was an experienced expert witness and continuously challenged Archibald's characterizations of Matthews' previous testimony on cross-examination. Given this, it is likely that, had Archibald attempted to ask Matthews more questions, it would have simply given Matthews further opportunities to undermine Khatain's treatment and evaluation of Dunlap. As such, Dunlap has failed to establish prejudice.

We next address Dunlap's argument that his defense team failed to rebut Matthews' "damning" testimony by failing to call witnesses—both expert and fact—to rebut Matthews. Dunlap argues specifically that the defense team should have re-called Beaver to the stand as an expert witness and should have called Khatain and Sombke to the witness stand as "fact witnesses" to dispute Matthews' characterization. Given the amount of testimony regarding Dunlap's mental illness, from his family members as well as Cunningham and Beaver, we cannot say that the additional testimony of one or even all three potential witnesses would have swayed the jury to impose a sentence less than death. Weighing the evidence that could have been offered against what was offered at the resentencing hearing, we conclude that Dunlap has not shown there is a reasonable probability his sentence would have been different. Dunlap has failed to establish prejudice.

Because our confidence in Dunlap's death sentence is not undermined, we hold that the district court did not err when it concluded that Dunlap was not prejudiced by his defense team's cross-examination and rebuttal of Matthews.

e. The district court correctly concluded that Dunlap was not prejudiced by his defense team's failure to object to Matthews' improper bolstering testimony.

Dunlap next alleges that his defense team was ineffective because they failed to object ***1010** to improper bolstering by Matthews. When addressing this claim, the district court stated

> [t]he [c]ourt agrees with the assessment of the State that the issue of improper bolstering relative to Dr. Matthews' testimony and Dunlap's Defense Team's failure to object, was certainly objectionable and potentially amounted to ineffective assistance of counsel under the first *Strickland* prong. However, just as the Idaho Supreme Court concluded that this was "harmless error" (*See Dunlap V*, 155 Idaho 345, 371, 313 P.3d 1, 27), this [c]ourt concludes that this failure did not rise to the level of prejudice under a *Strickland* analysis.

On appeal, Dunlap argues that "Matthews' testimony bolstered reports of non-testifying witnesses that supported his malingering opinion and repeatedly invaded the province of the jury." Dunlap concedes that Matthews' bolstering testimony has already been considered by this Court and found to be "harmless error" under the fundamental error doctrine; however, Dunlap

contends

> [n]evertheless, given the importance of Matthews' testimony to support the State's "not mentally ill"/malingering theory—which went virtually unchallenged—it is hard to imagine Matthews' improper bolstering had no prejudicial impact on [Dunlap]'s jury. This is particularly true in the sentencing phase of a capital trial where only one juror needs to be persuaded to choose life over death. Not only did counsel fail to present testimony from the IMSI professionals Matthews' maligned and who would have contradicted Matthews' narrative of their incompetence, counsel did not even bother to present IMSI records written by the same professionals. These records would have undermined Matthews' bolstering testimony with evidence IMSI mental health professionals considered but rejected the notion that [Dunlap] malingered mental illness, only after years of observing and treating him. The district court's finding that [Dunlap] was not prejudiced is clearly erroneous.

The State essentially argues that this Court's previous determination that the improper bolstering testimony was harmless error should control the prejudice analysis here. While the State has recognized that the prejudice standard in *Strickland* differs from the harmless error standard, it urges this Court to follow the reasoning from *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and conclude that "[t]here is little, if any difference between ... whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24, 87 S.Ct. 824. The State further argues that "Dunlap has failed to establish deficient performance" because "the manner in which witnesses are cross-examined is a tactical decision."

[37] [38] [39] [40]Had Dunlap's defense team timely objected to the bolstering testimony, the trial court likely would have sustained the objection to such a "clear violation" of IRE 702. *See Dunlap V*, 155 Idaho at 370, 313 P.3d at 26. Thus, Dunlap has established deficient performance. *See Abdullah*, 158 Idaho at 530, 348 P.3d at 145. In fact, this Court previously determined Matthews' bolstering testimony to have been error. *Dunlap V*, 155 Idaho at 370, 313 P.3d at 26. It therefore follows that Dunlap's counsel was ineffective in not objecting to Matthews' bolstering testimony. However, this Court has already found that the admission of evidence through Matthews' improper bolstering was harmless. *Id.* at 371, 313 P.3d at 27 ("Although [Matthews' bolstering] constituted prosecutorial misconduct, we find the error to be harmless."). Under this Court's enunciation of the "harmless error" test, "[h]armless error is 'error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.' " *State v. Garcia*, 166 Idaho 661, 674, 462 P.3d 1125, 1138 (2020) (quoting *Yates v. Evatt*, 500 U.S. 391, 403, 111 S.Ct. 1884, 114 L.Ed.2d 432 (1991)). "Proper application of the *Yates* two-part test requires weighing the probative force of the record as a whole while excluding the erroneous evidence and at the same time comparing it against the probative force ***1011** of the error." *Id.* "When the effect of the error is minimal compared to the probative force of the record establishing guilt 'beyond a reasonable doubt' without the error, it can be said that the error did not contribute to the verdict rendered and is therefore harmless." *Id.* (quoting *Yates*, 500 U.S. at 404–05, 111 S.Ct. 1884).

[41] [42]Thus, a finding of harmless error required that this Court conclude that "the error *did not contribute* to the verdict rendered ...." *See id.* (italics added). If an error did not contribute to the imposition of the death sentence, it cannot be said "it is 'reasonably likely' the result would have been different" without the error. *See Harrington*, 562 U.S. at 111, 131 S.Ct. 770 (quoting *Strickland*, 466 U.S. at 696, 104 S.Ct. 2052).

Therefore, we necessarily hold that the district court did not err when it concluded that Dunlap's defense team was not ineffective for failing to object to Matthews' improper bolstering testimony.

f. The district court correctly concluded that Dunlap's defense team was not ineffective in relying on Dunlap's family's testimony and Dunlap's allocution to show remorse.

[43]Dunlap next contends his defense team should have introduced more evidence showing his remorse. On the final day of Dunlap's resentencing hearing, Dunlap presented his allocution statement to the jury. Mark Dunlap, Dunlap's brother, also testified at the resentencing to the remorse felt by Dunlap and his family. Parmenter testified at the second evidentiary hearing that Mark's testimony was particularly moving and emotional and seemed to resonate with the jury and "bring tears to their eyes."

The district court found that the defense team had knowledge of a letter written by Dunlap to Tonya Crane's husband. Parmenter explained that the way the letter had been written, including Dunlap's discussion of his medications and issues with his ex-wife, "might have been part of the reason ... that we might not have submitted" it into evidence. Parmenter also acknowledged that it was the defense team's "call" on whether to call additional witnesses that could testify to Dunlap's remorse. The district court stated:

> While this [c]ourt may well have used a combination of family testimony concerning Dunlap's remorse, Dunlap's allocution, and some other collateral witnesses to bolster this remorse testimony, the [c]ourt cannot say that the Dunlap Defense Team's exercise of professional judgment in determining to rely heavily, if not exclusively, upon family testimony and Dunlap's allocution, was deficient.

The district court then concluded that Dunlap had failed to show prejudice as well because it was not substantially likely that the presentation of additional remorse evidence would have changed the outcome.

On appeal, Dunlap argues that due to the crucial nature of remorse evidence, Dunlap's resentencing counsel should have presented additional evidence, including the letter Dunlap wrote the victim's husband. Dunlap also points out that counsel were aware that, at the time he gave his allocution statements, Dunlap had a flat affect and was unable to express his true remorsefulness. Dunlap argues that his counsel knew the allocution statement was strange and did not go over well with the jury, and that counsel should have reevaluated what other remorse evidence they knew to be in existence and could be presented to the jury. Finally, Dunlap argues that due to the powerful nature of remorse evidence, counsel's failure was prejudicial because at least one juror may have struck the balance in favor of life over death.

[44]In response, the State first contends that Dunlap improperly expanded his remorse claim on appeal by arguing evidence in addition to the letter to the victim's husband should have been admitted. The State argues that the district court's decision on this issue should be affirmed on this basis alone. The State next asserts that there were strategic reasons defense counsel chose not to submit the letter to the jury. The State also points to Parmenter's statements that, while aware of other potential witnesses that could have been called, the defense team chose not to because of Mark's compelling testimony and Dunlap's allocution. The State contends that ***1012** these decisions by the defense team were purely strategic and tactical, and as such may not be second-guessed. (Citing *Abdullah*, 158 Idaho at 500, 348 P.3d at 115.)

As a preliminary matter, we reject the State's contention that Dunlap is raising new arguments on appeal. Specifically, the State maintains that Dunlap's Petition only claimed deficient performance with respect to Dunlap's letter to the victim's husband. This is inaccurate. At the close of the evidentiary hearing on the ineffective assistance of counsel claims, Dunlap submitted proposed findings of fact and conclusions of law to the district court. Dunlap specifically discussed and objected to counsel's failure to present evidence of the letter, in addition to calls to local radio stations expressing remorse and conversations Dunlap had with inmates at the Caribou County Jail expressing remorse. Therefore, we conclude that Dunlap has properly preserved this issue and may argue that remorse evidence outside of the letter to the victim's husband should have been introduced.

However, "strategic and tactical decisions will not be second guessed or serve as a basis for post-conviction relief under a claim of ineffective assistance of counsel unless the decision is shown to have resulted from inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review." *Abdullah*, 158 Idaho at 500, 348 P.3d at 115 (quoting *Pratt v. State*, 134 Idaho 581, 584, 6 P.3d 831, 834 (2000)). "This Court held, in *State v. Row*, that counsel is not required to investigate a defendant's 'entire life in order to objectively present ... mitigation evidence' and that decisions regarding mental health and allocution statements are 'strictly strategic and shall not be second-guessed by this Court.' " *Dunlap V*, 155 Idaho at

388, 313 P.3d at 44 (citing *Row*, 131 Idaho at 313, 955 P.2d at 1092).

Here, Parmenter noted that the letter Dunlap wrote to the victim's husband could be troubling to the jury: it contained references to Dunlap's medications, as well as his refusal to be taken to a mental hospital and issues he was having with his ex-wife. As found by the district court, Parmenter's decision not to submit the letter was a strategic or tactical decision made in order to limit distractions from Dunlap's family's testimony and his allocution statement. Further, any additional remorse evidence would not have created a substantial likelihood that the outcome would have been different. Parmenter and Archibald both testified that they, as well as the jury, were emotionally moved by Mark Dunlap's testimony regarding Dunlap's and his family's remorse.

Therefore, we hold that the district court did not err when it concluded that Dunlap's defense team was not ineffective in relying on Dunlap's family's testimony and Dunlap's allocution to show remorse.

g. The district court correctly concluded that Dunlap's defense team was not ineffective in arguing for admission of the 1995 note from Dr. Estess.

[45]Dunlap next faults his defense team for not admitting the 1995 medical chart notes from Dr. Michael Estess. At the resentencing hearing, Parmenter sought to introduce the medical chart notes, which indicated Dunlap was mentally ill. Judge Harding declined to admit the notes. Estess had purportedly rendered an opposite opinion in 1992 that Dunlap was not mentally ill which had been admitted (in error) in Dunlap's initial case. *See Dunlap V*, 155 Idaho at 379, 313 P.3d at 35. The district court concluded that Dunlap had "failed to establish what more Parmenter or the Dunlap Defense Team could have done to prevail" in getting this evidence admitted. The district court continued: "Judge Harding appeared to be very entrenched relative to his position on this issue and his concern for error if this material was relied upon by Dr. Beaver." The district court concluded that Dunlap failed to establish deficiency or prejudice due to the defense team's failure to adequately argue for admission of the note.

Before the district court, Dunlap filed a motion to reconsider on the ineffective assistance of counsel claims, arguing in part that the district court's finding that Dunlap "failed to show what arguments counsel could have made to admit [the note] is not supported by competent and substantial evidence." The thrust of Dunlap's argument is ***1013** that, had Parmenter argued to Judge Harding the importance of the 1995 note for mitigation, the note would have significantly rebutted the State's malingering theory. Further, Dunlap asserted that Parmenter's failure to raise these arguments was "facially deficient and prejudicial."

In the State's response to Dunlap's motion to reconsider, the State argued that Dunlap raised the issue of Estess' 1995 note for the first time. The State next pointed out that the district court found that Parmenter made an "aggressive argument" in seeking to admit the note at the resentencing hearing, and it is unlikely that any additional argument advanced by Parmenter would have persuaded Judge Harding to admit it. The district court denied Dunlap's motion to reconsider, finding that Dunlap's defense team could have done nothing more to convince Judge Harding to admit the 1995 notes from Estess.

On appeal, Dunlap essentially reiterates his argument that counsel should have done more to get Estess' 1995 note admitted because it contained compelling mitigation evidence. Dunlap argues that this evidence "would have enhanced the strength of [Dunlap's] mental illness theme, undermined Matthews' credibility, and refuted the malingering theory."

In response, the State again alleges that Dunlap has failed to preserve the issues regarding Estess' 1995 note because there was "no mention of the claim during the evidentiary hearing, [and] there was [also] no mention of Dr. Estess." Next, the State asserts that "it is difficult to understand what more Parmenter could have done to convince [Judge Harding] to overrule the [S]tate's objection." Further, the State argues that "merely because Parmenter might have made the additional arguments advocated by Dunlap for the first time on appeal does not mean the district court's finding was clearly erroneous."

[46] [47]As a preliminary matter, we conclude that Dunlap preserved his argument regarding the 1995 treatment note from Estess. Dunlap raised the issue in both his Petition and Closing Argument. Furthermore, the district court fully decided the issue in its conclusions of law, holding that counsel were neither deficient nor that prejudice had resulted. "To state an arguable claim on appeal, 'both the issue and the party's position on the issue must be raised before the trial court for it to be properly preserved ...' " *State v. Barr*, 166 Idaho 783, 786, 463 P.3d 1286, 1289 (2020), *as amended* (June 25, 2020) (quoting *State v. Gonzalez*, 165 Idaho 95, 99, 439 P.3d 1267, 1271 (2019)). "An exception to this rule, however, has been applied by this Court when the issue was argued to or *decided by* the

trial court." *State v. DuValt*, 131 Idaho 550, 553, 961 P.2d 641, 644 (1998) (italics added). Not only did Dunlap raise the issue at multiple junctures below, but the district court clearly decided the issue. The State even concedes in its Respondent's Brief that Dunlap's Petition raised the issue, stating that "in his Petition, Dunlap contends counsel were ineffective by failing to argue admission of Dr. Estess' 1995 treatment notes." Thus, the State's argument that Dunlap failed to preserve this claim is unavailing.

[48] [49]"A trial court has 'broad discretion' in determining whether to admit or exclude evidence, 'and its judgment in the fact finding role will only be disturbed on appeal when there has been a clear abuse of discretion.' " *State v. Joy*, 155 Idaho 1, 6, 304 P.3d 276, 281 (2013) (quoting *State v. Watkins*, 148 Idaho 418, 421, 224 P.3d 485, 488 (2009)). "Where the alleged deficiency is counsel's failure to file a motion, *a conclusion that the motion, if pursued, would not have been granted by the trial court, is generally determinative of both prongs of the* Strickland *test.*" *Abdullah*, 158 Idaho at 487, 348 P.3d at 102 (quoting *State v. Payne*, 146 Idaho 548, 562, 199 P.3d 123, 137 (2008)) (alterations omitted) (italics added).

[50]Here, the district court's conclusion that Parmenter could not have done anything more to admit Estess' 1995 note is supported by the evidence. First, the district court found that Parmenter "aggressively argued" for the admission of the evidence. That finding of fact is acknowledged by both parties. Additionally, the district court noted that Judge Harding was "entrenched" in his belief ***1014** that any evidence related to Estess should not be admitted. Thus, even if Parmenter would have made the argument now presented by Dunlap on appeal, it "would not have been granted by the trial court." *See Abdullah*, 158 Idaho at 530, 348 P.3d at 145. As such, Dunlap has not established that Parmenter's argument was deficient. When a lawyer does all that can be done and is unsuccessful, it cannot be said his representation was ineffective. *See id.*

We therefore hold that the district court did not err when it concluded that Dunlap's defense team was not ineffective in arguing for admission of the 1995 note from Estess.

3. The district court did not err when performing the prejudice analysis under *Strickland* because it considered the totality of the evidence.

Finally, Dunlap argues that the district court considered counsel's deficiencies in isolation to determine that Dunlap had not been prejudiced, but that determining prejudice requires consideration of all the evidence presented to the resentencing jury and in post-conviction proceedings. Dunlap asserts that his defense team's overall "deficiencies had a pervasive effect on the inferences to be drawn from the evidence related to [Dunlap's] mental illness, and dramatically altered the evidentiary picture before the jury."

[51] [52]In determining whether a defendant received ineffective assistance of counsel, the court "must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052.

> Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Id. at 695–96, 104 S.Ct. 2052.

Here, the district court concluded that Dunlap's defense team was not deficient under *Strickland's* first prong in: investigating and presenting mitigation evidence of Dunlap's family history and background; presenting evidence of the connection between Dunlap's mental illness, medication, and behavior at IMSI; relying on Dunlap's allocution and family testimony for remorse; and inability to admit Estess' 1995 treatment note. Because we agree that these were not "errors" under *Strickland*, we conclude the district court did not err in

refusing to consider these "errors" collectively.

[53]The district court explicitly found that Dunlap's defense team was deficient in their investigation into Caribou County Jail personnel and inmates, and assumed without deciding that the defense team performed deficiently in failing to adequately cross-examine and rebut Matthews and failing to object to Matthews' improper bolstering. Thus, under a collective approach, the district court should have considered the cumulative effect of each of these "errors" in determining whether Dunlap was prejudiced by the deficient performance.

The district court did so. In finding the defense team's error in investigating the Caribou County Jail personnel and inmates did not amount to prejudice, the district court explicitly stated it "ha[d] reviewed the[ ] affidavits and considered [the] testimony coupled with the *entirety* of the evidentiary hearing" as well as "the *entirety* of the Dunlap resentencing and upon doing so th[e c]ourt [wa]s not convinced that the introduction of this evidence" "was of such importance as to undermine the [c]ourt's confidence in the outcome of the resentencing hearing." (Italics added.) The district court made the same type of statements when discussing the defense team's failure to adequately cross-examine and rebut Matthews: "The [c]ourt has had the benefit of reading ***1015** and considering the entire resentencing transcript. The [c]ourt has likewise had the benefit of reviewing and considering the evidence propounded by Dunlap at the evidentiary hearing ...."

The district court did not make such statements when discussing the defense team's failure to object to Matthews' bolstering statements; however, as discussed above, this Court already determined Matthews' improper bolstering was harmless and thus "did not contribute" to the imposition of Dunlap's death sentence. *See Garcia*, 166 Idaho at 674, 462 P.3d at 1138 (stating that a finding of harmless error required that this Court find that "the error *did not contribute* to the verdict rendered ....") (Italics added.)

In sum, we hold that the district court did not err when conducting the prejudice analysis under *Strickland* because it considered the impact the totality of the alleged ineffective acts by counsel.

IV. CONCLUSION

For the reasons stated above, we affirm the district court's dismissal of Dunlap's petition for post-conviction relief.

Chief Justice BEVAN, Justices BRODY, MOELLER, and SIMPSON, J. Pro Tem concur.

DECISION ON REHEARING

STEGNER, Justice.

After we initially released this opinion, Dunlap petitioned this Court for rehearing on the *Brady* issue, arguing that we should not have considered the defense team's notes as the notes were not before the district court until the second evidentiary hearing, after the district court had already denied Dunlap's *Brady* claim. We granted rehearing and allowed the parties the opportunity to argue their respective positions. Having considered the issue, we decline to allow strategy to prevail at the expense of truth. In doing so, we reject Dunlap's claim that this Court should be precluded from considering evidence that bears on the merit of the *Brady* claim now on appeal. The parties agreed below to bifurcate the case into two evidentiary hearings: one for the *Brady/Napue* claim and one for the ineffective assistance of counsel claim. The parties were not required to do so, and defense counsel cannot now complain that their strategy did not yield the result they sought. Further, if we were to remand the *Brady* issue to the district court, nothing would prevent the district court from considering all the evidence it has already heard, including evidence from the second evidentiary hearing which clearly shows Dunlap's counsel were aware of facts they claim were withheld by the prosecution. We decline to adopt a rule that would bar us from considering—on de novo review—evidence which a district court could freely consider on remand (which we could then consider on a subsequent appeal).

Chief Justice BEVAN, Justices BRODY, MOELLER, and SIMPSON, J. Pro Tem concur.

All Citations

170 Idaho 716, 516 P.3d 987

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APPENDIX B

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CARIBOU

TIMOTHY ALAN DUNLAP,

PETITIONER,

VS

STATE OF IDAHO,

RESPONDENT.

Case No: CV-2006-0000111

FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM DECISION AND ORDER ON *BRADY/NAPUE* POST-CONVICITON CLAIM

This matter came before the Court for a bench trial on August 26, 27, and 28 of 2014. The trial addressed two (2) of Petitioner's, Timothy Alan Dunlap (Dunlap), Post-Conviction Relief Petition claims.[1] Pursuant to the parties' stipulation, this matter was tried at the Idaho Maximum Security Institution (IMSI) located in Kuna, Idaho. *See* Amended Order Setting Evidentiary Hearing filed March 3, 2015. Dunlap was represented by counsel, Shannon N. Romero and Sarah E. Tompkins. The Defendant, State of Idaho (State), was represented by counsel, L. Lamont Anderson.

At the conclusion of the bench trial and following discussion with counsel, it was determined that the Court would require that a transcript of this bench trial be prepared. The Court outlined a post-trial briefing schedule to be followed by the parties once the transcript had been completed and provided to the Court and parties. The order required that the parties submit their proposed findings of fact and conclusions of law along with closing arguments in separate

[1]Dunlap's Post-Conviction Relief Petition went through a number of revisions and the Post-Conviction Relief Petition that was ultimately the subject of the State of Idaho's Motion for Summary Dismissal was entitled Final Amended Petition for Post-Conviction Relief (Post-Conviction Relief Petition) and was filed on May 27, 2008. This Post-Conviction Relief Petition was 343 pages in length and contained literally volumes of attachments.

submissions to the Court. *See* Minute Entry and Order filed on September 15, 2015. The parties complied with the Court's briefing schedule by submitting the requested post-trial submissions.[2]

On March 4, 2005, Dunlap filed a Motion for Leave to Amend the Final Amended Petition for Post-Conviction Relief (Motion for Leave to Amend).[3] The State filed its Response to Petitioner's Motion for Leave to Amend. This response objects to Dunlap's motion and requests that the Court deny Dunlap's motion. Dunlap filed his Reply to Response to Petitioner's Motion for Leave to Amend. This matter was scheduled for oral argument on May 8, 2015. However, the parties ultimately stipulated to submitting this matter to the Court on the written submissions and without oral argument. *See* Minute Entry and Order filed on May 13, 2015.[4]

Therefore, the Court took this matter under advisement. The Court now enters its Findings of Fact, Conclusions of Law and Memorandum Decision and Order (F.F.C.L & M.D.O.) as required by I.R.C.P. 52(a) and Idaho Code (I.C.) §19-4907(a).

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[2]There were a number of requests for additional time with respect to the parties' briefing schedule, but in each instance, an appropriate motion was filed and the Court granted each of the motions for additional time. Although the Court has not taken the time to verify this, the Court believes that each request for additional time went unopposed by the other party.

[3]A copy of the proposed amended pleading was filed contemporaneous with the Motion for Leave to Amend and a verified copy was filed on March 27, 2015. The proposed amended pleading was entitled "Final Amended Petition for Post-Conviction Relief, Amended Claim EE." Dunlap's proposed amended pleading addresses only Claim EE because the Idaho Supreme Court affirmed summary dismissal with respect to all of the other post-conviction relief claims asserted by Dunlap in his Post-Conviction Relief Petition. Claim EE was one of two (2) claims remanded to this Court for an evidentiary hearing.

[4]Pursuant to Rule 15 of the Idaho Rules of Civil Procedure (I.R.C.P.), the Court will **DENY** Dunlap's Motion for Leave to Amend and the Final Amended Petition for Post-Conviction Relief, Amended Claim EE filed on March 4, 2015 and March 17, 2015 will be stricken from the record. The purpose of formal pleadings is to provide adequate notice to the opposing party concerning the factual basis for the parties' claim. Idaho is a notice pleading jurisdiction. To allow Dunlap to file an amended petition or portion of a petition post-evidentiary hearing serves no purpose. *See* I.R.C.P. 8(a). However, this matter was tried to the Court for three (3) days in August of 2014. All of the issues that were tried to the Court and evidence that was admitted during the course of this trial will be evaluated and considered by the Court as it relates to Dunlap's *Brady/Napue* claims. In essence, this will be viewed in a manner similar to a motion to conform to the evidence as articulated in I.R.C.P. 15(b). If there was evidence introduced at trial with or without objection, that the Court allowed, that will be considered in light of Dunlap's *Brady/Napue* claim.

BACKGROUND AND RELEVANT COURSE OF PROCEEDINGS

In *State v. Dunlap*, 155 Idaho 345, 313 P.3d 1 (2013) (*Dunlap V*), the Idaho Supreme Court, in a consolidated appeal, affirmed "the judgment imposing the death sentence" in Dunlap's criminal proceeding. *Id.* at 357, 313 P.3d at 13. However, in addressing the district court's summary dismissal of Dunlap's post-conviction relief claims, the Supreme Court affirmed "the district court's summary dismissal of Dunlap's petition for post-conviction relief in part, vacate[d] in part, and remand[ed] for further post-conviction relief proceedings." *Id.*

The two (2) issues that the Supreme Court remanded to district court for further post-conviction relief proceedings were: (1) Dunlap's claim asserting that trial counsel was ineffective due to their "failure to adequately investigate and present mitigation evidence and to adequately rebut the State's aggravation evidence." *See Dunlap V*, 155 Idaho at 388, 313 P.3d at; and (2) Dunlap's claims asserting that the State committed *Brady* and *Napue* violations during the course of Dunlap's resentencing hearing in 2006.[5] *See Dunlap V*, 155 Idaho at 388-91, 313 P.3d at 43-47.

Pursuant to the parties' stipulation, the Court bifurcated these two (2) proceedings, first conducting an evidentiary hearing on the *Brady/Napue* issues only; reserving for evidentiary hearing, at a later date, the second issue remanded by the Idaho Supreme Court, those issues dealing with Dunlap's ineffective assistance of counsel claim arising out the claimed failure to adequately investigate and present mitigation evidence at the resentencing trial.

[5] This Court's reference to "*Brady*" in these F.F.C.L. & M.D.O. is a reference to the United States Supreme Court's opinion in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The Court's reference to "*Napue*" in these F.F.C.L. & M.D.O. is a reference to the United States Supreme Court opinion in *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

FINDINGS OF FACT

To the extent that any of the Court's Findings of Fact are deemed to be Conclusions of Law, they are incorporated in the Court's Conclusions of Law.

1. Dunlap entered a guilty plea to first-degree murder in relation to the murder of Tonya Crane. Dunlap was sentenced to death by the Honorable Judge William H. Woodland on April 20, 1992. *See* Findings & Imposition of Sentence in CR-91-488 entered on April 20, 1992.[6]

2. Dunlap initiated a post-conviction relief proceeding in May of 1994. *See* Petition for Post-Conviction Relief filed in SP-94-863.[7]

3. During the course of Dunlap's initial post-conviction relief proceedings, the State conceded that Dunlap should be resentenced. *See* Minute Entry dated April 20, 2000, Minute Entry and Order dated April 20, 2000, and the Post-Conviction Relief trial court's untitled document entered on January 11, 2002.[8]

4. Incident to the State's concession, the trial court ordered that a resentencing be conducted in Dunlap's underlying criminal proceeding.[9] *See* Post-Conviction Relief trial court's untitled document entered on January 11, 2002, untitled page number 10. Additionally, the matter was remanded to district court by the Idaho Supreme Court for sentencing. *Dunlap v. State*, 141 Idaho 50, 66, 106 P.3d 376, 392 (2005).[10]

5. On March 11, 2005, the State filed its Continued Notice of Intent to Seek the Death Penalty as part of its prosecution of the resentencing. *See* Continued Notice of Intent to Seek the

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[6]It should be noted that the Court will take judicial notice of portions of the record of the criminal proceedings in Caribou County Case CR-1991-488 pursuant to Idaho Rules of Evidence 201 (I.R.E.). As required by I.R.E. 201(c), the Court will make note of when judicial notice has been taken and will "identify the specific documents or items that were so noticed."

[7]It should be noted that the Court will take judicial notice of portions of the record of the post-conviction relief proceedings in Caribou County Case SP-94-863pursuant to Idaho Rule of Evidence 201 (I.R.E.). As required by I.R.E. 201(c), the Court will make note of when judicial notice has been taken and will "identify the specific documents or items that were so noticed."

[8]*See* Footnote No. 7.

[9]Although the trial court never expressly states as such, Dunlap's initial death sentence was vacated with the expectation that the matter proceed to resentencing in the underlying criminal proceeding.

[10]*See* Footnote No. 7.

Death Penalty.[11] The matter was eventually scheduled for a resentencing trial for February 13 through 17 and February 21 and 22, 2006. *See* Minute Entry & Order filed August 17, 2005.[12]

6. The Idaho Attorney General's Office became involved in the prosecution of Dunlap's resentencing due to a potential conflict of interest associated with Caribou County's prosecuting attorney at that time, S. Criss James, and the request of the Caribou County commissioners. E.H. Tr. P.318, LL. 2-6.[13]

7. Based upon the conflict, the Caribou County Prosecuting Attorney, S. Criss James, filed a Petition to Appoint Special Prosecutor. *See* Petition to Appoint Special Prosecutor, 91-488 C.R., p. 64.[14] The State's request was granted and the Idaho Attorney General's Office was appointed to act as the Special Prosecutor with respect to Dunlap's resentencing. *See* Order to Appoint Special Prosecutor, 91-488 C.R., p. 66.[15]

8. Initially Deputy Attorney General Scott James was lead counsel for the Dunlap resentencing with Deputy Attorney General, Kenneth Robins (Robins), acting as his second chair. However, as the matter progressed, Scott James left the Attorney General's Office, and Robins assumed the responsibilities of lead counsel. Justin Whatcott (Whatcott) and Scott Smith (Smith) also performed work on the Dunlap resentencing. E.H. Tr. pp. 319-322.

9. During the times relevant to Dunlap's Post-Conviction Relief Petition, specifically Claim EE and the *Brady/Napue* issues and his resentencing, 2004 through 2006, the Idaho Attorney General's Office was divided into seven (7) different units. One of these was called the Criminal Division. E.H. Exhibits "C", "D", and "E".[16] Each unit has a division chief who

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[11] *See* Footnote No. 6.
[12] *See* Footnote No. 6.
[13] The Court will reference the three (3) volume transcript of the evidentiary hearing conducted at the Idaho Maximum Security Institution located in Kuna, Idaho on August 26 through August 28, 2014 as the "E.H. Tr."
[14] The Court will reference the Clerk's Record on Appeal in the underlying Criminal Proceeding CR-91-488 as "91-488 C.R.".
[15] *See* Footnote No. 6.
[16] Exhibits introduced and admitted into evidence at the Evidentiary Hearing conducted on August 26 through August 28, 2014

reported to the Chief Deputy and the Attorney General. *Id.* and E.H. Tr., p. 443.

10. The respective divisions are also divided into units and each unit is led by a unit chief, who, in turn, reports to the division chief. E.H. Tr., p.443.

11. Included within the Criminal Division of the Idaho Attorney General's Office was the Prosecutorial Assistance Unit, the Appellate Unit, the Habeas Unit, the Idaho Department of Corrections Unit, the Idaho State Police Unit, and the Idaho Department of Juvenile Corrections Unit. E.H. Tr., pp. 442-43 and E.H. Exhibits "C", "D", and "E".

12. Included within the responsibilities of the Idaho Attorney General's Criminal Division are, among other things, providing "prosecutorial assistance to counties in cases requiring special expertise, or where there is a conflict of interest." The Prosecutorial Assistance Unit handled the Dunlap resentencing. E.H. Tr. p. 307.

13. The Idaho Attorney General's Office also provided "legal services to various departments that deal with criminal matters." E.H. Exhibits "C", "D", and "E". These departments included the Idaho Department of Corrections (IDOC), along with the Idaho State Police, and the Department of Juvenile Corrections. E.H. Tr., pp. 442-43; E.H. Exhibit "C", "D", and "E".

14. The Prosecutorial Assistance Unit and the Idaho Department of Corrections Unit were located in different buildings estimated to be a couple of miles apart.[17] E.H. Tr., p. 175-76. Each unit had different responsibilities within the Attorney General's Office. The Prosecutorial Assistance Unit was responsible for prosecuting certain criminal cases and the Idaho Department of Corrections Unit was to defend IDOC against civil lawsuits. E.H. Tr. at 176.

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will be referred to herein as "E.H. Exhibit" followed by the specific exhibit number or letter.

[17] The Prosecutorial Assistance Unit was located in a building commonly referred to as the "House of Mirrors" which was located near the State Capitol Building and the Idaho Department of Corrections Unit was located in a building identified as the "Syringa Bank Building." E.H. Tr., p. 175-76.

15. Dunlap was housed at IMSI from at least February of 1993 until February 26, 2005. *See* E.H. Exhibit "Q".

16. On May 7, 2004, Dunlap filed a lawsuit in the Federal District Court for the District of Idaho. Dunlap's lawsuit named Jay Green (Green) and Greg Fischer[18] as Defendants. *See* E.H. Exhibit "G". Green was identified by Dunlap as being a guard at IMSI in his Complaint. *Id.* Warden Fisher was the warden at IMSI at the times relevant to Dunlap's federal lawsuit. *Id.*; E.H. Tr. p. 26.

17. The allegations raised by Dunlap in his Federal Civil Rights Complaint were that his civil rights were being violated because he was being housed in "tier 2 of C-Block ... but was not moved out [into the] General Population." E.H. Exhibit "G", p. 3.

18. William Loomis (Loomis) is a deputy attorney general who worked in the Criminal Division of the Idaho Attorney General's Office. E.H. Tr., p. 13, LL.1-8. At the times relevant to Dunlap's Post-Conviction Relief Petition, 2004 through 2006, Loomis was working with and for IDOC. E.H. Tr., p. 14, LL.13-16.

19. Loomis was assigned by his supervisor, Timothy McNeese, to represent Green and Warden Fisher, agents of IDOC, in Dunlap's Federal Civil Rights Case. E.H. Tr. p. 25, LL. 7-14.

20. Loomis received a copy of Dunlap's Complaint on or about January 31, 2005.[19] Loomis waived service of Dunlap's Federal Civil Rights Complaint on Green and Warden Fisher on January 31, 2005. E.H. Tr., p. 34, LL. 23-25, p. 35, LL. 1-7, pp. 178-80; E.H. Exhibit "F"

[18]The Court understands from review of other exhibits introduced at trial, that the correct spelling is Fisher not Fischer. As such, the Court will refer to him in these F.F.C.L. & M.D.O as Warden Fisher.

[19]Loomis had no recollection concerning when he received this Complaint. However, the first court filings on behalf of Green and Warden Fisher occurred on January 31, 2005. In addition, the first e-mail correspondence in the record involving Loomis and this case also occurred on January 31, 2015. Therefore, the Court concludes that Loomis received the Complaint in close proximity to this date.

entry No. 17.[20]

21. On January 31, 2005, Loomis sent an e-mail to Dr. Chad Sombke (Dr. Sombke). Dr. Sombke responded to this e-mail on the same date. The response to Loomis' e-mail identifies Dr. Sombke as a Ph.D. licensed psychologist working at IMSI. This e-mail was also copied to Loomis' clients, Green and Warden Fisher. *See* E.H. "H".

22. The January 31, 2005 e-mail from Loomis to Dr. Sombke advised that Dunlap had filed a lawsuit which claimed that Dunlap should be housed in the general prison population and not Tier 2 of C Block. The e-mail asked Dr. Sombke to provide a "brief explanation of why Dunlap is in tier 2 and why he cannot be moved into the general population." *Id.* The e-mail also inquired of the Warden Fisher concerning whether "there is a non-medical reason why Dunlap is not in [the] general population." *Id.*

23. Dr. Sombke's response to Loomis' January 31, 2005 e-mail provided that "C-block Tier 2 is for the stable mentally ill and Mr. Dunlap would fit that category." *Id.* Dr. Sombke continues by stating that "I believe he is not in [the] general population due to some security concerns." *Id.* However Dr. Sombke states that "as far as I'm concerned he would be cleared psychologically to be moved to [the] general population. *Id.*

24. The following day, February 1, 2005, Dr. Sombke and Loomis communicated in some fashion. As a result of this communication, Loomis took some notes arising out of the communication. *See* E.H. Exhibit "I". These notes reiterate the statement made by way of e-mail the day previous, that "Dunlap is stable enough to move into [the] general population." *Id.* Although Dr. Sombke expressed his opinion that Dunlap would "not do well in [the] general

[20]The delay in time between Dunlap's Complaint being filed (May 4, 2004) and the Wavier of Service filed on behalf of Green and Warden Fisher (January 31, 2005) appears to be associated with the review process made by the Federal Magistrate, The Honorable Larry M. Boyle. E.H. Exhibit "F". In federal court, in dealing with civil rights lawsuits brought by inmates, the trial judge conducts an initial review of the plaintiff's complaint in an effort to "screen out frivolous lawsuits." E.H. Tr. 178, LL. 8-23. It appears that this process was completed on January 8, 2005. *See* E.H. Tr. "F", entry No.10.

population", he also noted that "he is functional enough to be there." *Id.*

25. On February 1, 2005, Warden Fisher responded to Loomis' January 31, 2005 e-mail. *See* E.H. Exhibit "J". He responded by stating that with respect to "inmates on Tiers 2 and 3 of C Block, I always defer to the decision of Dr. Sombke as to whether or not they should be considered for other housing, be it restrictive or general population." *Id.* In addition, Fisher noted that "Tiers 2 and 3 are for the treatment and management of the acute mental health population at IMSI." *Id.*

26. Presumably in response to Warden Fisher's February 1, 2005 e-mail responding to Loomis' January 31, 2005 e-mail and Loomis' communications with Dr. Sombke, Loomis sent Warden Fisher a second e-mail dated February 1, 2005. This e-mail advised Warden Fisher of Loomis' communications with Dr. Sombke and advised that Dr. Sombke was of the opinion that Dunlap "is stable and from a medical point of view, he could be in the [the] general population." E.H. Exhibit "K". Loomis also inquires "if not for medical reasons, why is'nt [sic] Dunlap in [the] general pop[ulation]?" *Id.*

27. Warden Fisher responded to Loomis' February 1, 2005 e-mail on February 2, 2005 stating: "now that we know that Dr. Sombke is finished with mental health treatment" Dunlap could be considered for reassignment. E.H. Exhibit "K". Warden Fisher describes the process Dunlap would have to follow before such reassignment could occur. *Id.* Warden Fisher also noted the recent history associated with "inmates under sentence of death" seeking release to the general population, noting that only two (2) had been approved and only one of those having succeeded in staying in the general population. *Id.* Warden Fisher stated that in the "short term, inmate Dunlap should be moved to administrative segregation in B block, where the majority of

the inmates under sentence of death (who are in stable mental health) are housed." *Id.*[21]

28. Loomis has no recall of any further discussions with Warden Fisher or Dr. Sombke concerning Dunlap's Federal Civil Rights Complaint. Loomis is unable to identify certain typewritten notes (Dunlap's proposed but non-admitted E.H. Exhibit "L"). Loomis surmises that the typewritten notes "looks to be something that Mr. Burnett would have created."[22] E.H. Tr., p. 50, LL. 6-12.

29. Loomis filed Green's and Fisher's Answer to Dunlap's Federal Civil Rights Complaint in federal court on April 5, 2005. E.H. Exhibit "N". This Answer denied all of the substantive allegations outlined in Dunlap's Federal Civil Rights Complaint and raised a number of affirmative defenses.

30. Loomis brought Kevin Burnett (Burnett) into the litigation associated with Dunlap's Federal Civil Rights Complaint. Burnett is a paralegal who is employed by and works for IDOC. E.H. Tr., p. 200, LL. 15-19. Loomis testified that there is no formal process associated with his determination to involve Burnett in the litigation. E.H. Tr., p. 183, L. 24. Loomis determined that Burnett possessed certain skills and attributes that would be useful on this case: "Mr. Burnett is particularly good at contacting IDOC staff members and getting information because he previously worked for the IDOC. I believe he actually worked here at this particular facility. He

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[21] Dunlap, in his proposed findings of fact, asserts that "Mr. Loomis copied the following people on this email: George Miller, a deputy warden; Jeff Henry, possibly a sergeant or captain of security; Michael Johnson, a deputy warden, and Dr. Sombke. Proposed Findings of Fact and Conclusions of Law Regarding Mr. Dunlap's Brady/Napue Violation Claim, p. 6, ¶18. However, this Court concludes that Exhibit "K" is not clear on this fact. If one reads the content of Warden Fisher's February 2, 2005 response to Loomis' February 1, 2005 e-mail, one is left with the impression that Warden Fisher copied these folks with the e-mail chain. Regardless of who copied this e-mail chain to George Miller, Jeff Henry, Michael Johnson, and Dr. Sombke, each of these individuals, to the best of Loomis' recollection, was an employee of IDOC. E.H. Tr. p. 46, LL. 12-25. This is confirmed, in part, by Warden Fisher's response itself, identifying Miller as a deputy warden, and identifying all three (3) as Administrative Review Committee members.

[22] This does not strike the Court as being unusual, based upon the time that has elapsed between the events in question (2004-2005) and the bench trial on Dunlap's current post-conviction relief claims (August 2014) coupled with Loomis' testimony. On cross-examination, Loomis testified that this was a "relatively simple lawsuit" and that there was nothing particularly memorable or significant about Dunlap's Federal Civil Rights Complaint or Litigation. E.H. Tr., p. 184, LL. 16- 18 and 21-25, p. 185, LL. 1-2. In fact, in response to a question, Loomis acknowledged that it was just another run-of-the-mill housing case from his perspective. *Id.*, p. 185, L. 6.

knows a lot of people in the IDOC." E.H. Tr., p. 184, LL. 6-11.

31. It appears that Burnett conducted much of the preliminary investigation into this litigation. E.H. Tr., pp. 218-223. This investigation included: (1) ordering and reviewing Dunlap's medical records. *Id.* p. 218, L. 24, p. 219, LL. 16-17.[23]; (2) ordering and reviewing Dunlap's "central file" which includes six (6) separate sections, including legal, housing, disciplinary, education. *Id.*, p. 219, LL. 16-25; and (3) identifying and interviewing potential witnesses, Dr. Sombke and Warden Fisher. *Id.* p. 220, LL. 17-21.

32. On October 26, 2005, Loomis sent Dunlap a letter addressing the "Federal Court" order that required the parties to disclose relevant documents by October 31, 2005. Loomis suggested, due Dunlap's current housing in Caribou County until the conclusion of his resentencing hearing in February of 2006, that he "would prefer to wait until [Dunlap's] return to an IDOC institution before mailing you the large stack of documents." This letter was attached to a formal federal court filing, Defendants' Notice Regarding Disclosure of Relevant Documents, filed by Loomis on behalf of his clients, Green and Warden Fisher. Similarly, Defendants' Notice Regarding Disclosure of Relevant Documents notified the trial court of Loomis' correspondence with Dunlap which notified Dunlap that "in lieu of sending a voluminous stack of documents" that Loomis' preference would be to delay the disclosure of relevant documents until Dunlap returned to an IDOC institution. *See* E.H. Exhibit "R".

33. The Court finds that the "voluminous stack of documents" referred to in Defendants' Notice Regarding Disclosure of Relevant Documents and the "large stack of documents" referred to in Loomis' October 26, 2005 letter to Dunlap would have included all documents that Loomis and Burnett believed to be relevant to Dunlap's Federal Civil Rights Complaint, because the

[23] It appears from Burnett's testimony that he reviewed Dunlap's medical records obtained from both the Medical Department at ISCI (E.H. Tr. p. 218-19) and medical records maintained during the relevant times associated with Dunlap's federal civil rights litigation, 2004-2006, from a private entity Correctional Medical Services or Prison Health Services (E.H. Tr. p. 267, LL. 6-22).

production of all relevant documents had been ordered by the federal trial court's order. The Court specifically finds that these materials would have included much, if not all of the information obtained by Burnett and identified in Finding of Fact No. 31. The documents were ultimately provided to Dunlap on March 9, 2006 and were bate-stamped as documents numbered 000001 through 000497. *See* E.H. Exhibit "BBB".

34. This Court finds that after Dunlap's Federal Civil Rights case concluded, neither Loomis, acting as counsel for Green and Warden Fisher, or Dunlap, acting as *pro se* counsel on his behalf, took any steps to retain said records that were the subject of the disclosure reflected by E.H. Exhibit "BBB."[24] Loomis has no recall of either the content or the volume of this disclosure beyond what is reflected in his October 26, 2005 letter to Dunlap and Defendants' Notice Regarding Disclosure of Relevant Documents filed in federal court on the same date. E.H. Tr. p. 71, LL. 11-15, p. 72, L. 25, p. 73, LL. 1-3. Further, Loomis testified that he does not know what happened to the documents. E.H. Tr. p. 514, LL 20-22. Loomis testified that it is likely that Burnett gathered and compiled the documents. E.H. Tr. p. 515, LL. 2-7. This is supported by Burnett's testimony and the Court's finding in Finding of Fact No. 31.

35. Finally, Burnett submitted an affidavit after the evidentiary hearing concluded. At the conclusion of the evidence, counsel for the State, with the consent of Dunlap and his counsel, asked Burnett to conduct one last search IDOC's records for any remaining records from the litigation associated with the Dunlap Federal Civil Rights Complaint. *See* E.H. Tr., p. 531, LL. 9-25. Affidavit of Kevin Burnett, p. 2, ¶2. Burnett testified in this affidavit that the records were not located specifically identifying "documents bate-stamped 1 through 497 as referenced in

[24]It appears that portions of the 497 pages of documents produced have found their way into the record with respect to Dunlap's Post-Conviction Relief Petition, but certainly not the entirety of the 497 pages of records produced. The Court finds that those documents that have found their way into this record are likely the key documents, at least as it related to Green and Warden Fisher's defense of the Dunlap' Federal Civil Rights Complaint. As such they likely became attachments to affidavits and memorandums supporting key motions, such as Green and Warden Fisher's Motion for Summary Judgment.

Exhibit BBB." *Id.*, p. 2, ¶3.

36. Due to Robins' involvement in Dunlap's previous post-conviction relief proceedings, Robins recognized from the outset of his assignment to participate in the Dunlap resentencing that Dunlap's mental health would be a critical issue. E.H. Tr. p. 328, LL. 14-25, p. 329, LL. 1-2.

37. Because of this understanding, Robins suggested that the State retain Dr. Daryl Matthews (Dr. Matthews) to act as an expert witness during Dunlap's resentencing. E.H. Tr. p. 337, LL. 14-25, p. 338, LL 1-3. Although Robins could not recall the date the State retained Dr. Matthews, he testified that it occurred while Scott James was still involved in the case. Additionally, Judge Woodland was still presiding over the criminal case. *Id.*, p. 338, LL. 20-25, p. 339, L. 1. The State also learned early in the resentencing process that Dunlap and his defense team were going to Dr. Craig W. Beaver (Dr. Beaver) as a mental health expert. *Id.*, p. 353, LL. 7-25, p. 354, LL. 1-8.

38. Even though Robins was aware that Dunlap's mental health status had been the subject of a previous post-conviction relief evidentiary hearing, as part of his preparations for the Dunlap resentencing, Robins began the process of gathering medical, specifically mental health records of Dunlap. E.H. Tr., p. 451, LL. 6-12.[25] To facilitate the gathering of Dunlap's medical records, Robins, along with his supervisor, Paul Panther, made a telephone call to Tim McNeese, who was the attorney general over the IDOC legal unit at the time. *Id.*, p. 358, LL. 11-18.[26] This

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[25]Later in Robins' testimony he clarifies why he conducted this investigation for documents associated with Dunlap's mental health. When asked if he "didn't just rely upon the IDOC records that were provided during the first evidentiary hearing", he responds as follows:

> No. In fact that's why we did a separate visit. It was precautionary to make sure that we could present a complete picture.

E.H. Tr., p. 451, LL. 6-12.

[26]Robins, later in his testimony, adds additional information which appears to establish that the process was slightly more complex than just picking up the phone and calling Tim McNeese. In this regard he clarifies that just because the IDOC is part of many departments or agencies that fall within the umbrella of the state of Idaho: they serve different functions and have different interests to protect. He clarified that just because Loomis is a deputy attorney general, he is not part of the prosecution team in the

telephone call occurred sometime prior to January of 2006. *Id.*, p. 358, LL. 11-12.

39. Robins testified that during this telephone call he "inquired about any mental health disciplinary type records and things that may have some bearing on that ultimate conclusion." *Id.*, p. 358, LL. 23-25. Eventually, Robins was able to gain access to the records maintained by IDOC. Robins and Whatcott went to the Syringa Bank Building, where the IDOC unit of Attorney General's Office is located (*See* Finding of Fact No. 14 and Footnote No.17). Robins and Whatcott "deal[t] with a gentleman by the name of Kevin Burnett, who was a paralegal for that unit." *Id.*, p. 359, LL 2-3.

40. Robins and Whatcott were "provided ... with a binder of some records." E.H. Tr., p. 359, LL. 6-7. These records were examined by Robins and Whatcott on-sight. Upon completion of their on-sight review, Robins and Whatcott advised Burnett that they would need copies of the records and made arrangements to have Burnett provide them with copies, based upon their conclusion that "Dr. Beaver and Dr. Matthews would obviously want to examine this kind of stuff." *Id.*, p. 359, LL. 8-12.

41. Robins testified that they ultimately received a copy of the records along with a "copy [being] sent to Mr. Parmenter"; one of Dunlap's resentencing attorneys. *Id.*, p. 359, LL. 12-13. Robins testified that upon providing these records to Mr. Parmenter, he was advised that Mr. Parmenter "already ... [had] these [records] or most of them" and Robins was frustrated about the "duplicative effort." *Id.* p. 457, LL.1-3.

42. On or about January 9, 2006, Loomis reached out to Robins for the stated purpose of

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Dunlap resentencing (E.H. Tr., p. 452, LL. 1-2) and neither was IDOC (E.H. Tr., p. 452, LL. 9-12). Robins discusses this in the following terms when asked if, as a deputy attorney general in the prosecutorial assistance unit, he could just "walk into IDOC and gather up records":

> No. I had to get levels of permission. And even then I don't know that they [IDOC] wanted to let me. You know, it's an agency and when you work for an agency in the state of Idaho it's like having a separate client apart from the people of the state of Idaho.

E.H. Tr., p. 452, LL. 13-19. Apparently, even after the initial telephone call with Tim McNeese, the Attorney General's Office Criminal Division Chief, either Mr. Bywater or Mr. Henderson, made telephone calls to official at IDOC "to help Department of Corrections understand the importance of why we needed these records. *Id.* p. 455, LL. 10-13.

"get[ting] some information about the status of his [Dunlap's] other capital case." E.H. Tr., p. 76, LL. 2-5; p. 343, LL. 21-24. This conversation is documented, in part by notes taken by Loomis on January 9, 2006. *See* E.H. Exhibit "S". These notes reflect that Loomis and Robins discussed Dunlap's resentencing and that the jury selection for this resentencing would begin on February 6, 2006 and that presentation of evidence would commence on February 13, 2006. *Id.* The notes also reflect that Dunlap had a pending death sentence in Ohio which was being collaterally attacked through a habeas petition. *Id.*

43. Robins' recollection of this January, 2006 telephone conversation is better than that of Loomis. E.H. Tr. pp. 343-44. Robins testified that Loomis asked about the Dunlap resentencing and if it was still going forward as scheduled. Robins testified that he asked Loomis what he had going on and Loomis advised him that he was working on "a civil rights violation lawsuit where Dunlap was contending that he shouldn't be held in administrative segregation because he was not under an Idaho death sentence." *Id.*, p. 343, LL. 12-21. Robins' testimony continued by Robins advising Loomis that Dunlap was not under an Idaho death sentence and at that point the conversation transitioned to the Ohio death sentence. *Id.*, p. 344, LL. 3-12. Robins testified that Loomis also advised him that he wanted to "get a stay [in Dunlap's federal civil rights case] if ... the sentencing hearing ... [was] go[ing] forward as planned because if the jury decided to impose the death sentence after the hearing it would essentially moot the practical effect of the lawsuit." *Id.*, p. 343, LL. 22-25, p. 344, LL. 1-2.

44. Robins also testified that as part of this conversation, Loomis requested that Robins provide him with an affidavit "so [Loomis] can get this [Dunlap's Federal Civil Rights Case] stayed." *Id.*, p. 344, LL. 13-14. Robins agreed to provide Loomis with an affidavit. *Id.*, p. 344, L. 15.

45. It does not appear as though the subject of Dunlap's mental health came up during the course of this conversation. The topic is not noted in Loomis' contemporaneous notes of the conversation. *See* E.H. Exhibit "S". Robins does not recall this being a topic of his conversation with Loomis. *See* Findings of Fact Nos. 42, 43 and 44. When Robins was asked specifically if he had any reason to believe this was a topic of the conversation, Robins responds that there is no reason for him to believe this was a topic. E.H. Tr. p. 439, LL 7-11. Finally, Loomis, despite having little, if any, independent recall of the conversations states, in response a to question asking if the subject of Mr. Dunlap's mental health had come up during the course of the January 9, 2006 conversation, that is something he would have "almost certainly" memorialized in his notes of that conversation. E.H. Tr., p. 189, LL. 21-25.

46. As discussed in the January 9, 2006 conversation between Loomis and Robins, on January 12, 2006, Loomis sent Robins, via e-mail, a proposed affidavit for review and signature. *See* E.H. Exhibit "T". This e-mail provides information consistent with the previous telephone conversation, advising Robins of a "1983 case involving Dunlap." It also reiterated Loomis' desire to seek a stay of the federal proceedings while Dunlap was in Caribou County. *Id.*

47. On January 12, 2006, Robins sent Loomis a return e-mail. *See* E.H. Exhibit "U". This e-mail from Robins notifies Loomis that he has attached a copy of the affidavit Loomis sent. The exhibit also reflects an attached document in "Word" format designated as "Dunlap—affROBINS -1-12-06doc" Robins notifies Loomis that he "tweaked [the affidavit] a little to include the conversation I had with Heather Gosselin of the Ohio AG's Office." *Id.* Robins' e-mail states that he will send Loomis a notarized copy of the affidavit. *Id.*

48. The Court having reviewed the testimony of Robins, the e-mail exchange, and the Affidavit of Ken Robins in Support of Defendants' Motion for Stay (Robins' Affidavit),

concludes that the "tweaking" referenced by Robins amounted to the inclusion of paragraph 4. Paragraph 4 is stylistically different than the preceding three (3) paragraphs by utilizing the phrase "your affiant" instead of the term "I" utilized in the preceding three (3) paragraphs and referring to Dunlap as "Timothy Alan Dunlap" as opposed to "Mr. Dunlap" as he is referred to paragraphs 2 and 3 of the affidavit. Finally, as the e-mail suggests paragraph 4, details a conversation with Heather Gosselin. *See* E.H. Exhibit "W".

49. Loomis submitted Robins' Affidavit in support of the Defendants' Motion for Stay and Memorandum in Support in Dunlap's Federal Civil Rights Proceeding. *See* E.H. Exhibits "V" and "W". This motion requested that a stay be entered with respect to Dunlap's Federal Civil Rights Claim "until Dunlap returns to an IDOC facility and his housing status is determined." *See* E.H. Exhibit "V".

50. The Robins' Affidavit, was consistent with the e-mails exchanged between Loomis and Robins (E.H. Exhibits "T" and "U") and the notes and testimony concerning the January 9, 2006 telephone conversation (E.H. Exhibit "S" and Findings of Fact Nos. 42 through 44) outlining Robins' position as a deputy attorney general, his current role in the prosecution and resentencing proceedings with respect to Dunlap, the current housing status of Dunlap being in Caribou County, the dates upon which jury selection and evidence presentations are expected to commence, and information concerning Dunlap's death sentence and habeas proceeding in the state of Ohio. *See* Exhibit "W."

51. On February 17, 2006, Loomis sent Robins another e-mail. *See* E.H. Exhibit "Y". This e-mail requested an update concerning the results of the resentencing hearing in Caribou County involving Dunlap. Robins responded on February 24, 2006, advising that Dunlap had received the death penalty as a result of his resentencing trial. Robins advised that Dunlap had

been returned to Boise, presumably to IMSI. *Id.*

52. Robins testified that he was concerned with the possibility of malingering on Dunlap's part. He testified that he was aware of "allegations or concerns ... third or fourth hand" concerning Dunlap's malingering that made it an issue, that as "a prosecutor, you want to make sure and address." E.H. Tr. p. 475, LL. 8-23. Upon examination, Robins disclosed that there were "a lot of different sources for his concern" that Dunlap was malingering. *Id.*, p. 479, LL. 10-11. Included among those sources were mental health records from Life Springs, which were admitted at Dunlap's resentencing hearing. *See* E.H. Exhibit "13"; and Dunlap's mental health records from Madison State Hospital, also admitted at Dunlap's resentencing hearing. *See* E.H. Exhibit "14".

53. During the course of preparations for resentencing Robins also had concerns about some of the testing performed by Dr. Beaver. Robins testified that as part of Dr. Beaver's testing various "scales are built into some of the psychometric testing." E.R. Tr., p. 481, LL. 4-5. Robins continued that the testing or scales "are designed to detect whether a person is exaggerating symptoms or being candid in his responses on the test." *Id.*, p. 481, LL. 5-7. He testified that one of those scales was "elevated" and that elevation concerned both Dr. Beaver and Dr. Matthews.[27]

54. Robins' concerns regarding Dunlap's mental status and the possibility of malingering were supported by reviewing Dunlap's mental health records obtained from IDOC. Robins testified concerning reports from among those he received from IDOC: (1) chart notes from

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[27] In fact, upon review of E.H. Exhibit "QQ", two (2) of the eight (8) primary scales were elevated. E.H. Exhibit "QQ", p. 2. Beaver continues by concluding as follows:

> In utilizing the classifications scheme discussed by Dr. Rogers et al in the instructional manual for the SIRS, they note conclusive evidence of feigning or malingering of mental illness involves three or more scales in the probable or definitive range. Mr. Dunlap had two in the probable range. These results have some consistency with his psychological testing. More specifically, Mr. Dunlap is overstating or exaggerating to some extent his psychiatric symptoms. However, individuals' exaggerating their psychiatric symptoms does not mean they do not indeed have psychiatric illnesses.

E.H. Exhibit "QQ", p. 2.

Royce Creswell, a clinician for IDOC, E.H. Tr. p. 370, LL. 19-25, E.H. Exhibit "JJ"; and (2) chart notes from Dr. Sombke.[28]

55. The Creswell chart notes are in reference to psychological assessments conducted on October 15, 2002 and November 7, 2002.[29] *See* E.H. Reference Document No. 22 and State's Exhibit No. 39 in CR-1991-488. The October psychological assessment notes that Dunlap "denies any thinking or emotional problems. In fact he is saying that all the bizzare [sic] symptoms in behavior exhibited the last few years was 'all an act.'" This assessment was followed by a second psychological assessment conducted in November. This assessment notes that "since the vacation of the death sentence/potential for placement in [the] gen[eral] pop[ulation]/Ad Seg placement[,] Mr. Dunlap has made and maintained a remarkable improvement." Creswell continues "in prior observations 'weird' stuff was always there. He, by [his] own admission was faking mental illness and he was adept at the scam." Further on in the assessment, Creswell notes, "wow – This man had me fooled!!! He is on no med[ication]s of any kind and he is completely clear." Finally, Creswell concludes "as noted above – now that he can have a shot at gen[ral] pop[ulation] he has made and maintained a miracolous [sic] change As he has such a history of bizzare [sic] behavior we made a request for six consec[utive] months of good behavior. He is doing his part to date." *Id.*[30]

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[28]These chart notes were part of a larger number of documents introduced as Exhibit "39" at Dunlap's resentencing trial. They were utilized by the parties as a reference document at the time of Dunlap's post-conviction hearing in August 2014, but not admitted into evidence. The Court will take judicial notice of this Exhibit. *See* Footnote No. 6.

[29]There is an earlier record contained in Exhibit "39" that predates the Creswell assessment notes that states that Dunlap "claims he wants general pop[ulation] housing. He STATES that all his prior bad behavior was because he was on death row and mad at his Judge." The name of the individual who created this note is unknown. It appears possible that the last name is Matz. *See* E.H. Reference Document No. 22 and State's Exhibit 39 in CR-1991-488.

[30]Robins points out in examination conducted by Dunlap's counsel, that there were additional assessments conducted by Creswell conducted after the ones contained in Exhibit "39", that were not included in resentencing Exhibit "39". He testified that these were not included because they were not relevant to the issue of malingering and that the defense team had these records. E.H. Tr. p. 386, LL. 2-25, p. 387, LL. 1-8. In fact, the evidence reflected that Creswell ultimately submitted an affidavit, Affidavit of Royce Creswell (Creswell Affidavit), which advised that the conclusions he drew in October and November of 2002 were "irrelevant" and "inaccurate". *See* Creswell Affidavit, p. 2, ¶¶6-7. The Creswell Affidavit further indicated that the assessments conducted after the assessments included in resentencing Exhibit "39" once again noted that Dunlap was decompensating specifically Creswell states as follows in the Creswell Affidavit:

56. Dr. Sombke made similar observations in his Interdisciplinary Progress Notes September 4, 2002. In this progress note, Dr. Sombke notes as follows:

> Spoke with inmate [Dunlap] during an ad[ministrative] seg[regation] hearing. He appeared clear and appropriate. He was asking to be let out of ad[ministrative seg[regation] because his death sentence was overturned. I asked him about his previous delusional beliefs about area 51 and the Government having microphones ect in his cell spying on him. He smiled and said he made it all up in order to get people to believe he was mentally ill. He continued to say that his past behavior was all purposeful and due to him being on death row. "I've always said this was all due to my sentence and once I got off I'd change." Since his death sentence has been dropped he has changed dramatically. He has not acted inappropriately or made verbal threats since. He has stopped taking his med[ication]s but has not decompensated in any manner. He is lucid with goal oriented thoughts.

Id.[31]

57. During the resentencing trial conducted in February 2006, Robins addressed the State's intended use and introduction of resentencing Exhibit "39" during the resentencing trial. In doing so, he noted as follows:

> [m]y purpose in bringing them up at this time is that we have already -- Dr. Cunningham has already alluded to the defendant's behavior while in the institution and so has both the expert witnesses that both sides intend to call in the case. I am simply putting the Court on notice and counsel on notice that we intend to introduce these exhibits through both Dr. Beaver and Dr. Matthews. Both of these are from the records that Dr. Beaver examined as part of his preparation of an opinion for the defense in this case. Dr. Matthews has examined these exhibits. He relies on those exhibits to formulate his diagnosis that he intends to present from the witness stand in this case.
>
> Exhibit 39 is a collection of chart notes from the psychological staff at IMSI where Mr. Dunlap comes out and admits that all of this bad behavior, all of these alleged delusions were just an act to get him off of death row. And we think that is relevant to issues of malingering, as well as the validity of any diagnosis that

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Not even two months later on January 23, 203, I documented that Mr. Dunlap is "slipping (going back into his bizarre behavior) again." "Mr. Dunlap has presented extremely bizarre behavior for extended periods, went off the med[ication]s and now after a few months [without] symptoms, is showing signs that the emotional health is worsening." This demonstrated my previous assessment regarding Mr. Dunlap's "faking" statement as being inaccurate.

[30] H.H. Exhibit "JJ".

[31] Robins points out in examination conducted by Dunlap's counsel, that there were additional chart notes prepared by Dr. Sombke that were not included in resentencing Exhibit "39".

any expert might give, and we [are] asking to admit those for that purpose.

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[I] think that we should make the record that we were originally given a collection of records from counsel. My understanding is that Ms. Dapsauski was the one that obtained those from the department [IDOC]. And once we got those records, we went back and double-checked with the existing file with the Department of Corrections and we got everything from the Department of Corrections and turned it over to counsel before trial.

Resentencing Tr., Vol. 11, p. 1, LL. 18-25, p.2, LL. 1-11, p. 3, LL. 4-12. *See* Footnote No. 6.[32]

58. Dunlap's defense team called Dr. Beaver as a witness at Dunlap's resentencing hearing. This testimony is contained in the Resentencing Tr., pp. 7-140.[33] Dr. Beaver, relying upon the records and conclusions of Dr. Khatain,[34] opines that Dunlap suffers from Schizoaffective Disorder, an Axis I mental illness. *Id.*, p. 39, L. 25, p. 40, L. 4. Specifically, Dr. Beaver testifies as follows:

> [I] tend to agree in terms of what we call AXIS I diagnosis in terms of his current psychiatric state. I think that Dr. Katane, the psychiatrist that has been actively treating him beginning in 2001, through to the time that he wasn't at the maximum security facility, has consistently labeled him as what we call 'schizo-affective disorder" and that means that Tim Dunlap has elements of both schizophrenia and major emotional disorder, such as depression and hypomania, and that he has elements of both of those conditions.
>
> And I think that is probably the best psychiatric diagnosis of Mr. Dunlap given the historical information about him.

Id., p. 39, LL. 24-25, p. 40, LL. 1-10.

59. As part of Dr. Beaver's testimony, he itemized the documents he had reviewed in preparing for his testimony and arriving at his opinions. Id., pp. 14-15. These records included "psychiatric records that began really in about 1975", "a large volume of records from the time

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[32]Resentencing Exhibit "39" was admitted by the resentencing judge. Resentencing Tr., Vol. 11, p. 4, LL. 12-16.
[33]*See* Footnote No. 6.
[34]Dr. Khatain appears to be a psychiatrist employed by IDOC and working at IMSI between 2002 and 2006. Dr. Khatain's name is spelled differently in different parts of the record that the Court is considering. In the Resentencing Transcript, his name is spelled Katane and in the E.H. Transcript, it is spelled Khatain. Both the State and Dunlap, in their post evidentiary hearing submissions, refer to him as Dr. Khatain. Therefore, the Court will refer to Dr. Khatain in this fashion throughout these F.F.C.L. & M.D.O., unless the reference is from a direct quote to the record from the Resentencing Transcript.

that Mr. Dunlap has spent at the Idaho State Maximum Security Institution" which included among other types of records "psychiatric treatment records". *Id.*, p. 14, LL. 23-25, p. 15, LL. 1-2.

60. Dr. Beaver also discussed the complexity of evaluating Dunlap stating that "nothing ... is very straightforward" with Dunlap." *Id.*, p. 15, LL. 16-19. Beaver later characterizes Dunlap as being "pretty pathological [concerning] how he talks about things at times", (*Id.*, p. 25, L. 20) and "notoriously unreliable ... [concerning] what he talks about" (*Id.*, p. 26, LL. 15-16). Because of these issues Beaver testifies that one has to look at and rely "on a lot of other information to try to figure ... [Dunlap] out." *Id.* p. 25, LL. 21-22. This "other information" includes "observations from other people", and more importantly "how they do across time." *Id.*, p. 25, LL. 22-24. Dr. Beaver opines that "in Mr. Dunlap's case I think that is extremely important." *Id.*, p. 25, L. 25, p. 26, LL. 1-6.

61. Dr. Beaver continued in his discussion of Dunlap when asked "why are there so many different opinions." *Id.*, p. 42, L. 25. In response to this query, Dr. Beaver responded in simple terms that Dunlap is a "complex" individual. *Id.*, p. 43, L.15. The more detailed response identified in addition to Dunlap's complexity (or perhaps as components of his complexity) that Dunlap "is not reliable" (*Id.*, p. 43, L. 3), "he tells a different story almost every time you talk with him" (*Id.*, p. 43, LL. 4-5) and Dr. Beaver also notes that "just because you have a psychiatric condition, doesn't mean you are not going to also exaggerate or fake some of you psychiatric problems when you think it might be to your advantage" (*Id.*, p. 43, LL. 10-14). Dr. Beaver admits that Dunlap has faked his psychiatric problems to gain advantage. *Id.*, p. 43, LL. 13-14.

62. Robin's cross-examination of Dr. Beaver at the resentencing trial was admittedly

conducted with an eye towards "either dispel[ling] or challeng[ing] the significance of [Dunlap's mental health]." E.H. Tr., p. 362, LL 11-15. This was done by Robins with the intent of establishing the State's claim that Dunlap was "malingering as a challenge to his death sentence."[35] *Id.*, p. 365, LL. 9-12. Robins also acknowledged that some of his cross-examination of Dr. Beaver at the resentencing hearing was designed to cast doubt on the validity of Dr. Khatain's assessment of Dunlap and Dr. Beaver's subsequent reliance upon Dr. Khatain's diagnosis. *Id.*, p. 368, LL. 20-25, p. 369, L. 1.

63. During the course of Dr. Beaver's cross-examination, he acknowledged that one of the factors that must be considered when making a psychiatric diagnosis utilizing DSM-IV (Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition), is whether the individual is malingering and whether the individual has an incentive to do so. Resentencing Tr., p. 85, LL. 22-25, p. 86, LL. 1-5. Dr. Beaver also acknowledged that Dunlap had the "motive to falsify a diagnosis when he was in the Idaho State Maximum Security Institution" and that motive continued up to the time of his resentencing. *Id.*, p. 87, LL. 3-14. Dr. Beaver also testified that the only way any mental health professional can obtain information about hallucinations is through self-reporting. *Id.*, p. 124, LL. 9-16. In addressing this issue, Dr. Beaver stated that self-reporting "is the way you get that information. I mean you can look at how they are acting and behaving, to see how it correlates with what they are telling you. But, no hallucinations you are relying upon the patient to tell you about them." *Id.*

64. Dr. Matthews, a physician specializing in forensic psychiatry, was called by the State at Dunlap's resentencing. *Id.*, p. 142, L. 25, p. 143, LL. 1-10. His testimony is contained in the

[35] For clarity sake, the quoted language is not that of Robins, but rather counsel questioning Robins. Robins' response to this question was "yes." *Id.*, p. 365, L. 13.

Resentencing Tr., Vol. 11, pp. 142-84.[36]

65. Dr. Matthews discussed what he had done in preparation for his testimony at the resentencing hearing. This included observing Dr. Beaver's testimony at the resentencing hearing (*Id.*, p. 145, LL. 2-3), receiving and reviewing the same mental health, police and court records and materials that Dr. Beaver had reviewed (*Id.*, p.145, LL. 4-7).

66. Dr. Matthews indicated that he conducted an interview and examination of Dunlap on January 30, 2006 over the course of five (5) hours. *Id.*, p. 147, LL. 5-8. Dr. Matthews summarized what occurred during the course of this interview. Dr. Matthews stated as follows:

> I went through, to some extent, a pretty standard psychiatric history: Talking to him about his medications and his health problems, his past mental health care, and then went through questioning about his life history, his childhood, and his relationships that he has had with people over his life span. But also, and I think this is again something that is different from the approach of a clinical doctor, is that I spent a fair bit of time talking to him about his criminal behavior, and talking to him about antisocial things that he has done, and particularly focusing on what his mental state was at the time that he committed the offenses that he has been convicted of.

Id., p. 147, LL. 11-22.

67. During the course of Dr. Matthews' testimony, the following exchange occurred:

> Q. Now, Dr. Matthews, based upon the one-on-one encounter you had with Mr. Dunlap, as well as considering all of the background material that was furnished to you in this case, do [you] have an opinion within a reasonable degree of medical certainty as to whether the defendant, Timothy Alan Dunlap, suffers from any major or mental disorder or other AXIS I condition?
>
> A. Yes, I do have an opinion.
>
> Q. And could you state that opinion for the record?
>
> A. My opinion is that Mr. Dunlap does not have a major mental illness. That he does not have any kind of thing that we in psychiatry call an AXIS I disorder.
>
> Q. Now, based on the same examination, were you able to formulate any diagnosis on any of the other AXES that apply when you do the standard

[36] *See* Footnote No. 6.

examination of someone in the position of Mr. Dunlap.?

A. Yes.

Q. What were those findings?

A. I think that the most important one and the one that really has the most sway in my thinking about Mr. Dunlap, is that Mr. Dunlap has something called "antisocial personality disorder." And antisocial personality disorder is one of those AXIS II personality disorder kind of conditions. I don't think he just has antisocial personality traits or features of this condition. I think he has the whole thing. That he is actually fairly much of a textbook case of antisocial personality disorder, and that he meets probably all of the criteria for antisocial personality disorder.

I think he also has a personality disorder that is called "narcissistic personality disorder," .... And basically, I think he has traits of the other personality disorders that you have heard of. But I think the important answer to your question is that the kind of psychiatric problems that Mr. Dunlap has are all personality disorders. Essentially, this isn't quite right, but it is a way of getting close to it, troublesome habits that continue to get him in trouble over life. Disordered relationships and difficulty in making himself function in a reasonable way in the world, but not the kind of thing that people would call mentally ill or crazy or any of those kind of things.

Id., p. 147, LL. 23-25, p. 148, LL. 1-25, p. 149, 1-12.

68. Dr. Matthews was also asked to discuss Dr. Beaver's testimony and opinions. Dr. Matthews was asked in his opinion what was lacking to support Dr. Beaver's opinion. Dr. Matthews responded as follows:

Well, normally people with schizo-affective disorder, who really have it, have one or two things, delusions .... Those are false beliefs. Really beliefs. Not made up stuff but real beliefs that are false and yet you can't talk the person out of it. You can't convince them of what the truth is. So that is a delusion and you have got to have either that normal or hallucinations, which are abnormal sense experiences. Either hearing voices or seeing things, or that kind of thing. And I have concluded really after looking at the record and examining Mr. Dunlap myself, and now even after listening to Dr. Beaver, I have concluded that he doesn't have those delusion and hallucinations, and I think he probably never have. And that basically the problem is something all together different. All together different.

Id., p. 149, 18-25, p. 150, LL. 1-7.

69. In addressing why he disagrees with Dr. Beaver's conclusions that Dunlap has delusions, Dr. Matthews testifies as follows:

> I am going to use a word that hasn't come up here today so far but I think it should, and that is the word "lie." Mr. Dunlap lies a great deal. He lies continuously and he basically tells two kinds of lies. He tells lies that are helpful to himself to get himself out of jams, and he tells lies that don't make any sense, that aren't helpful to him, that are far-fetched, that are excessive, that don't seem to have any real useful purpose. And there is a name for people who tell lies like that, and they are called "pathological liars." ... What that means is he tells lies that are just out of bounds and they are so out of bounds that they sometimes look like delusions. They sometimes look like actual false beliefs but they are not. They are lies. When Mr. Dunlap tells them, he generally knows that they are not true.
>
> Now sometimes pathological liars seem like they have kind of talked themselves into their lies, and Mr. Dunlap gives the impression sometimes of having talked himself into his lies. But basically, they are far-fetched, tall tales that don't represent any sign of mental illness. In fact, pathological lying is associated with a couple of different conditions but they are all personality disorders. They are antisocial personality disorders....

Id., p. 150, LL. 13-25, p. 151, LL. 1-12.

70. Dr. Matthews also draws upon the psychometric testing performed by Dr. Beaver to support his opinion that Dunlap does not have a major mental illness and to support his characterization of Dunlap as "a malingerer" or a "faker." *Id.*, p. 152, LL. 6-14. Dr. Matthews takes issue with characterizing this as an exaggeration of symptoms stating "it is not really just exaggeration, that it is outright fabrication that he makes up illnesses that he has not really had." *Id.*

71. Dr. Matthews testified that his review of Dunlap's mental health records demonstrate "occasion, after occasion, including his interview with me, Mr. Dunlap has admitted that he fakes illness and mental illness." *Id.*, p. 152, L. 25, p. 153, LL. 1-9.

72. When asked to comment on Resentencing Exhibit "39", Dr. Matthews stated that the jury should give Resentencing Exhibit "39" "powerful weight". *Id.*, p. 153, LL. 21-23. Dr.

Matthews outlined the reasons he thought these records should be given "powerful weight" by the jury: (1) due to the rarity of "people who are malingering to actually admit it" (*Id.*, p. 153, L. 25, p. 154, LL. 1); and (2) that Dunlap basically "pulled the wool" over the eyes of "a bunch of seasoned mental health professionals" (*Id.*, p. 154, LL. 1-2).

73. Dr. Matthews is also critical of Dr. Khatain's failure to consider the possibility of Dunlap's malingering, at least in his chart notes (*Id.*, p. 159, LL. 16-18), or the fact that "other people at his hospital" had previously discussed it" (*Id.*, p. 159, LL. 18-19) and "other doctors" had discussed it "for many years" (*Id.*, p. 159, LL. 20-21).

74. Dr. Matthews was also critical of Dr. Khatain's use of prescription medications stating "that I couldn't even find the record where there was a complete evaluation done by this doctor." *Id.*, p. 159, LL. 21-22. But he cautioned the jury "not to draw any conclusions from the fact that he is taking medication. You don't conclude that someone has a particular sickness because they are taking medicines that might be prescribed for that sickness. *Id.*, p. 160, LL. 17-21. Similarly, he stated that "you cannot use response to treatment alone as an indicator that a person has a particular illness" because the person "may be faking the illness" and secondarily it is possible "the medicine treats other conditions than the one that you've diagnosed." *Id.*, p. 161, LL. 3-11.

75. Finally, in addressing his concerns regarding Dr. Khatain, Dr. Matthews noted that "having a long historical perspective is most helpful in making a diagnosis" (*Id.*, p. 172, L. 25, p. 173, L. 1) and he questioned whether Dr. Khatain had that "long historical perspective cause he didn't say anything about stuff that might have contradicted his diagnosis, even though there is tons of it in the record" (*Id.*, p. 173, LL. 2-4).

76. On cross-examination Dr. Matthews conceded that within the professions of

psychiatry and psychology it is certainly possible "for different mental health professionals to have different opinions." *Id.*, p. 171, LL. 3-6.

77. That two (2) qualified mental health experts might disagree on a diagnosis or the nature and extent of mental health condition was also not surprising to Robins. When asked about this issue, Robins stated, based upon his experience and "career as a prosecutor" that it was "not shocking to [him] that two well credentialed professionals would arrive at different diagnoses looking at the same set of facts. *Id.*, p. 469, LL. 8-9, 25, p. 470, LL. 1-18.

78. On February 22, 2006, the jury returned a verdict finding the existence of all three (3) aggravating circumstances beyond a reasonable doubt, and concluding that all mitigating circumstances, when weighed against each aggravator, were not sufficiently compelling to make death unjust. *Id.*, Vol. 12, p. 95-97.

79. Green and Warden Fisher's Motion to Stay was never acted on by the trial court in Dunlap's Federal civil Rights Action. *See* E.H. Exhibit "F".[37] On March 31, 2006, Green and Warden Fisher, through their counsel, Loomis, filed a Motion for Summary Judgment in Dunlap's federal civil rights proceeding. *See* E.H. Exhibit "Z". This motion for summary judgment was supported by a supporting memorandum (*See* E.H. Exhibit "AA"), an affidavit with supporting documentation from Warden Fisher (*See* E.H. Exhibit "BB"), an affidavit with supporting documentation from Dr. Sombke (*See* E.H. Exhibit "CC"), an affidavit with supporting documentation from Carlolee Kelley (*See* E.H. Exhibit "DD"), and a Statement of Undisputed Facts (*See* E.H. Exhibit "FF").

80. It appears to the Court that while Loomis was the attorney who signed and caused the summary judgment submissions to be filed in Dunlap's Federal Civil Rights Case, Burnett did

[37] E.H. Exhibit "F" reflects that when the trial court ruled upon Green's and Warden Fisher's Motion for Summary Judgment it also found the Motion to Stay to be moot.

the majority of the investigation, interviewing and preparation of affidavits, at least those of Warden Fisher and Dr. Sombke. E.H. Tr., p. 220, LL. 17-25, p. 221, LL. 1-11, p. 224, LL. 22-25, p. 1-5.

81. Although Burnett did not recall the number of times he spoke with Dr. Sombke and Warden Fisher, he did testify that his practice would be to interview individuals approximately two (2) to four (4) weeks ahead of the dispositive motion being filed and he expected that this would have been the case with respect to Dr. Sombke's and Warden Fisher's affidavit. *Id.*, Tr., p. 266, LL. 8-23. Burnett testified that he called Warden Fisher at his home inasmuch as Warden Fisher had retired. *Id.*, p. 269, LL. 1-3. The documents which are attached to Warden Fisher's affidavit were gathered by Burnett and reviewed with Warden Fisher at what Burnett characterizes as their "second meeting." *Id.*, p. 226, LL. 24-25, p. 227, LL. 1-6. The records attached to Warden Fisher's affidavit did not contain any of Dunlap's mental health records. *See* E.H. Exhibit "BB".

82. In Warden Fisher's affidavit he notes that Dunlap's "history is colored with episodes of disruptive behavior." E.H. Exhibit "BB", p. 6, ¶21. He also discusses that he was aware of the fact that Dunlap had "been receiving mental health treatment while ... incarcerated." Warden Fisher's affidavit outlines that in February of 2002, Dunlap was referred and placed in Ad-Seg "due to his history of disruptive behavior and for the protection of staff and other inmates." *Id.*, p. 7, ¶23. Dunlap was under the care of Dr. Sombke and later Dr. Khatain. *Id.*, ¶24. According to Warden Fisher's affidavit, on July 1, 2003, Idaho law was amended "allowing death sentenced offenders to be housed outside of solitary confinement" (*Id.*, ¶25) and on July 3, 2003, Dr. Sombke recommended that Dunlap be moved to the Idaho Security Medical Facility

and said move was approved by Warden Fisher.[38] (*Id.*, ¶26). Warden Fisher notes that "within a short time Dunlap progressed and recommended that Dunlap be moved to an outpatient mental health facility, but in order for this to occur he had be "released from Administrative Segregation." *Id.*, ¶27. Warden Fisher approved this relocation. *Id.*, p. 8, ¶28. Finally, on February 15, 2005, a Restrictive Housing Placement Committee considered and reviewed Dunlap's housing status. *Id.*, ¶30. Dr. Sombke recommended that Dunlap remain on C-2, "noting that he had been medication complaint and doing well." Id., ¶31. This placement was approved by Warden Fisher. *Id.*

83. Burnett testified that there was nothing contained in Warden Fisher's affidavit that was not based upon the attached records. E.H. Tr., p. 264, LL. 23-25, p. 265, LL. 1-2.

84. Burnett also employed a similar process in interviewing and preparing Dr. Sombke's affidavit. He conducted an interview with Dr. Sombke, prior to preparing his affidavit, in order to review materials that Burnett had retrieved. *Id.*, p. 248, LL. 23-25, p. 249, LL. 1-14. Burnett testified that the materials he discussed with Dr. Sombke were the materials he retrieved and that he did not believe that Dr. Sombke provided any documents. *Id.*, 250, LL. 3-6 and 17-18. Finally, Burnett testified that the contents of Dr. Sombke's affidavit were exclusively based upon the records attached to the affidavit. *Id.*, p. 264, LL. 12-22.

85. Dr. Sombke's affidavit establishes that he was the Chief Psychologist for IDOC and assigned to IMSI 2002 through 2005. E.H. Exhibit "CC", p. 1, ¶2. During this same timeframe Dr. Sombke "oversaw [Dunlap's] mental health treatment at IMSI", while Dunlap was "housed in the mental health unit due to his psychiatric needs." *Id.*, p.2, ¶6.

86. Dr. Sombke's outlines in his affidavit his history of dealings with Dunlap. Included

[38]Warden Fisher noted that he "was ultimately responsible to determine the appropriate housing for each inmate confined at IMSI. I placed great weight on the opinions and recommendations of medical treatment providers where mental health inmates are concerned."

within this recitation are the following: (1) Dr. Sombke relates participating in an "Ad-Seg" hearing conducted on September 4, 2002 where Dunlap "seemed lucid with good retention of thoughts (*Id.*, p. 5, ¶18); (2) at this September 4, 2002 "Ad-Seg" hearing Dr. Sombke noted that he queried Dunlap about delusional behavior and Dunlap advised that he had made it all up to convince the staff that he was mentally ill (*Id.*, p. 5, ¶20); (3) Sombke notes that shortly after this "Ad-Seg" hearing in September of 2002, Dunlap's "psychotic symptoms returned becoming more and more pronounced and growing steadily worse" (*Id.*, ¶21); and (4) Sombke concludes his affidavit by stating that while Dunlap "often requested to be placed in the general prison population, it is my opinion that C-2 was the more appropriate housing for Mr. Dunlap because his behavior never fully stabilized to the point where prison administration could be comfortable housing him in the general population" (*Id.*, p.9, ¶38).

87. Burnett testified that he also drafted the Statement of Undisputed Facts, E.H. Exhibit "EE". E.H. Tr., p. 243, LL. 5-15. The Statement of Undisputed Facts was based upon the three (3) affidavits prepared by Burnett, Dr. Sombke's affidavit, Warden Fisher's Affidavit and Carolee Kelley's affidavit. *Id.*, p. 266, LL. 1-4.

88. Burnett testified that although "interdisciplinary note" dated September 4, 2002 was attached to Dr. Sombke's affidavit as part of the chronology of treatment outlined by Dr. Sombke in his affidavit; Burnett did not consider defending Dunlap's civil rights case on the basis of malingering (*Id.*, p. 275, LL. 12-13).[39]

89. Burnett also testified that he was unaware of Dr. Sombke's January 31, 2005 e-mail responding to Loomis' January 31, 2005 e-mail query in which Dr. Sombke responds that "as far as I'm concerned [Dunlap] would be cleared psychologically to be moved into the general

[39]Burnett's initial response was that he considered malingering on Dunlap's part as a defense to Dunlap's civil rights case. *Id.*, p. 272, LL. 5-8, p. 273, L. 2. However, later on in his testimony he backed away from this testimony stating that "in retrospect I don't think I did consider malingering" and explains why. *Id.*, p. 275, LL. 3-13.

population." *See* E.H. Exhibit "H"; E.H. Tr. p. 263, LL. 18-25, p. 264, LL. 1-5.

90. Finally, Burnett testified that the formulation of Green's and Warden Fisher's strategy concerning summary judgment and their reliance upon Dunlap's mental health was not made until after Dunlap had been resentenced to death in February, 2006. E.H. Tr., p. 264, LL. 6-10.

91. Robins testified that all of the documents attached to Dr. Sombke's Affidavit filed in support of Green's and Warden Fisher's Motion for Summary Judgment in Dunlap's Federal Civil Rights Litigation were disclosed to Dunlap and Dunlap's defense team as part of Dunlap's resentencing proceeding. E.H. Tr., p. 486, LL. 8-23.

92. Robins also testified that all of the documents attached to Warden Fisher's Affidavit, except those documents that post-date Dunlap's resentencing hearing, that were filed in support of Green's and Warden Fisher's Motion for Summary Judgment in Dunlap's federal civil rights litigation were disclosed to Dunlap and Dunlap's defense team as part of Dunlap's resentencing proceeding. E.H. Tr., p 484, LL. 19-25, p. 485, p. 486, LL. 1-7.

93. Loomis, as the supervising attorney, reviewed, approved, signed and caused to be filed, each of the documents filed in support of Green's and Warden Fisher's Motion for Summary Judgment. E.H. Tr. p. 53, LL. 4-12, p. 116, LL. 17-25., p. 117, LL. 1-3.

94. On September 6, 2006, the trial court in Dunlap's federal civil right litigation issued its Memorandum Order granting Green and Warden Fisher's Motion for Summary Judgment.

CONCLUSIONS OF LAW

To the extent that any of the Court's Conclusions of Law are deemed to be Findings of Fact, they are incorporated into the Court's Findings of Fact.

1. Dunlap initially filed his post-conviction relief proceeding in April of 2006.

2. Dunlap's Post-Conviction Relief Petition was dismissed in its entirety at the summary disposition stage of these proceeding pursuant to a Memorandum Decision and Order issued on November 24, 2009.

3. In *Dunlap V*, the Idaho Supreme Court affirmed the summary dismissal of Dunlap's post-conviction relief claims except for two (2) issues. *See Dunlap V*, at 388-91, 313 P.3d at 44-47. One of the issues remanded to the Court for evidentiary hearing dealt with Claim EE of Dunlap's Post-Conviction Relief Petition. The specific claim was titled "The State Committed Numerous *Brady* and *Napue* Violations in Violation of the Due Process Clause of the Fourteenth Amendment." Section 1, of Claim EE asserted that "the State failed to disclose Brady evidence that IMSI authorities and medical personal believed Mr. Dunlap was mentally ill and [the State] violated *Napue* by eliciting false testimony by Dr. Daryl Matthews." Post-Conviction Relief Petition, p. 298.

4. In August of 2014, an evidentiary hearing was conducted at the IMSI facility located in Kuna, Idaho. At this evidentiary hearing, the Court heard testimony from Loomis, Burnett and Robins. Certain exhibits were admitted into evidence. The Court took judicial notice of other documents. *See* Memorandum Decision and Order on Dunlap's Motion to Take Judicial Notice. The parties entered into and filed a Stipulation to Foundation and Authenticity of Documents which was filed with the Court on August 12, 2014. Finally, Dunlap brought a Motion to Consider Documents, Affidavits, Attachments and Final Amended Petition as Evidence at the Evidentiary Hearing. At the conclusion of the evidentiary hearing, this motion was revisited at the conclusion of the evidentiary hearing and the Court ruled on this motion after hearing the parties' discussion regarding the same. *See* E.H. Tr., pp. 518 through 530.

5. Post-Conviction Relief proceedings are governed and authorized by the Uniform Post-Conviction Procedure Act (UPCPA) which is codified at I.C. §19-4901 through 4911.

6. In appellate and post-conviction relief proceedings associated with capital cases, I.C. §49-2719 also outlines certain procedural requirements associated with a post-conviction relief proceeding.

7. A petition for post-conviction relief initiates a civil proceeding, a proceeding governed by the I.R.C.P. *Rhodes* v. *State*, 148 Idaho 247, 249, 220 P.3d 1066, 1068 (2009).

8. Just as a plaintiff in a civil lawsuit must establish their claims by a preponderance of the evidence, a petitioner in a post-conviction relief proceeding must "prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based." *State v. Yakovac*, 145 Idaho 437, 443, 180 P.3d 476, 482 (2008). *See also* Idaho Criminal Rule I.C.R. 57(c).

9. "A post-conviction applicant has the burden of proving the grounds upon which he seeks relief" by a preponderance of the evidence. *Sanders v. State*, 117 Idaho 939, 940, 792 P.2d 964, 965 (Ct.App.1990). The trial court, as the finder of fact in post-conviction relief proceedings, is to assess "the credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence." *Grube v. State*, 134 Idaho 24, 27, 995 P.2d 794, 798 (2000).

10. Where there is competent and substantial evidence to support the district court's decision made after an evidentiary hearing on an application for post-conviction relief, that decision will not be disturbed on appeal. *Id.*

DUNLAP'S BRADY CLAIM

11. Under *Brady* and its progeny, the prosecution has a duty to disclose evidence that is both favorable to a defendant and material to either guilt or punishment; the suppression of such evidence violates due process. *Brady*, 373 U.S. at 86-87.

12. In order to prove a *Brady* violation, Dunlap must establish and prove three (3) components with respect to the evidence at issue: (1) "the evidence at issue must be favorable to the

accused, either because it is exculpatory, or because it is impeaching"; (2) "that evidence must have been suppressed by the State, either willfully or inadvertently"; and (3) "prejudice must have ensued." *Dunlap v. State*, 141 Idaho 50, 64, 106 P.3d 376, 390 (citing to *Strickler v. Greene*, 527 U.S. 263, 263, 119 S.Ct. 1936, 1939, 1948, 144 L.Ed.2d 286, 291 (1999).

13. The United States Supreme Court has further clarified that prejudice (sometimes referred to as "materiality") must create a "'reasonable probability' of a different result, and the adjective is important." *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 1566, 131 L.Ed.2nd 490, ___ (1995) (*Kyles*). In explaining this statement the United States Supreme Court stated:

> [T]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Finally, in evaluating materiality or prejudice, the "suppressed evidence [is] considered collectively, not item by item." *Id.* at 436.

14. In *Kyles*, the United States Supreme Court defined the scope of the prosecutor's Brady obligation by stating that "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case." 514 U.S. at 438. The United States Supreme Court continues "But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose in good faith or bad faith ...), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." *Id.* at 438-39. This expansive duty of the prosecutor is also discussed in *State v. Boehm*, 158 Idaho 294, ___, 346 P.3d 311, 317 (Ct.App.2015) (*Boehm*). In *Boehm*, he Idaho Court of Appeals notes, while citing to *State v. Gardner*, 126 Idaho 428, 433, 885 P.2d 1144, 1149 (Ct.App.1994), that the *Brady* obligation "is an obligation of not just the individual prosecutor

assigned to the case, but of all the government agents having a significant role in investigating and prosecuting the offense."

15. However, a prosecutor has "no *Brady* burden when facts are readily available to a diligent defender." *U.S. v. Hicks*, 848 F.2d 1, 4 (1st Cir.1988) (*Hicks*) citing to *Lugo v. Munoz*, 682 F.2d 7, 9-10 (1st Cir. 1982). *Hicks* continues by stating that "in a long line of cases, the Second Circuit has ruled that, where the defense is aware of the grand jury witness and has access to interview that witness and have the witness testify at trial, the government need not disclose the details of the witness' grand jury testimony." *Id.* The *Hicks* Court states that:

> We concur with the Second Circuit in this regard. The statement of the potential witness not called by the government **is in no meaningful way 'suppressed.'** The defense has access to interview the witness to discover exculpatory information. Indeed, the fact that the government is not calling the witness will often be a tip-off that the witness' testimony is potentially helpful to the defendant." By knowing who the witness is, the defendant is 'on notice of the essential facts required to enable him to take advantage of [the] exculpatory testimony....' *Ruggiero*, 472 F.2d at 604."

Id. [Bold Emphasis Supplied].

16. In *U.S v. McFarlane*, 759 F.Supp. 1163, 1168 (W.D.Pa.1991) (*McFarlane*), it was stated that "under *Brady* [Citation Omitted] the government is not required to disclose ... evidence available to the defense from other sources or evidence which the defendant already possesses."

17. In the present case, there is absolutely no evidence to support Dunlap's claim that the State withheld Dunlap's medical records, mental health records or other pertinent records which could arguably be characterized as exculpatory. In this regard, Robins testified that even though he was aware that Dunlap's mental health status had been an issue in one of Dunlap's earlier post-conviction relief proceedings, upon assignment to the case he began anew the process of gathering Dunlap's medical records, specifically his mental health records. *See* Finding of Fact No. 38. Robins was ultimately successful in obtaining from IDOC Dunlap's mental health and disciplinary

records. *See* Finding of Fact No. 39. Robins was provided with a binder of Dunlap's records from IDOC, said records were examined on site, copied and copies of the same were provided to Mr. Parmenter, one of Dunlap's attorneys in the resentencing proceedings. *See* Findings of Fact Nos. 40 and 41. Interestingly, Mr. Parmenter's response upon receipt of these records was that he already had in his possession these records or "most of them." *See* Finding of Fact No. 41. In fact, at the time of Dunlap's resentencing, Robins comments on this issue. He states:

> [I] think that we should make the record that we were originally given a collection of records from counsel [Dunlap's resentencing counsel]. My understanding is that Ms. Dapsauski was the one that obtained those from the department [IDOC]. And once we got those records, we went back and double-checked with the existing file with the Department of Correction and we got everything from the Department of Corrections and turned it over to counsel before trial.

See Finding of Fact No. 57. Although Robins only used portions of these records at the resentencing (resentencing Exhibit 39) it is abundantly clear that both the State and Dunlap had both access to and had been allowed to obtain copies of the entirety of Dunlap's medical and disciplinary files from IDOC.

18. There was no evidence introduced by Dunlap that the State withheld exculpatory evidence concerning his mental health status from his defense team at the time of his resentencing. There has been a great deal of discussion concerning the "large stack of documents" referenced by Loomis in his October 26, 2005 letter to Dunlap and the "voluminous stack of documents" referenced by Loomis in his Notice Regarding Disclosure of Relevant Documents filed in Federal Court. The Court concludes that this is the same set or "stack" of documents that Burnett gathered. *See* Findings of Fact Nos. 31 through 33. These documents, 497 pages, were ultimately provided to Dunlap as part of the discovery and exchange of relevant documents in Dunlap's Federal Civil Rights litigation. *See* Finding of Fact No. 33. At the conclusion of Dunlap's Federal Civil Rights Litigation, neither Loomis nor Burnett took any steps to retain the documents obtained from IDOC

as part of their investigation and preparation for the Dunlap Federal Civil Rights litigation. *See* Finding of Fact No. 34. Apparently, neither did Dunlap, who had been provided with all of this information as part of the trial court's order for disclosures in the Federal Civil Rights litigation.[40]

19. The Court concludes that the documents provided to Dunlap in his Federal Civil Rights Litigation are much the same documents as those obtained by Ms. Dapsauski, on Dunlap's behalf, directly from IDOC (*See* Finding of Fact No. 57) and those provided to Dunlap's defense team by Robins (*See* Findings of Fact Nos. 40, 41, and 57).[41]

20. Therefore, this Court concludes as follows: (1) that there was no evidence produced at trial to support Dunlap's claim that Robins and the State failed to disclose medical, mental health or other records from IDOC that could be characterized as exculpatory. Rather, it appears that Robins turned over to Dunlap's defense team in the resentencing proceeding all the information that it had that was germane to Dunlap's mental health; and (2) in addition to the disclosures made by Robins and the State in Dunlap's resentencing proceedings, Dunlap both had access to the records and in fact had in their possession the records of which they now complain Dunlap was not provided. This circumstance places Dunlap squarely within the holding in *McFarlane*.

21. In addition to having access to and possession of all of Dunlap's pertinent medical, mental and disciplinary records from IDOC, Dunlap had knowledge of, through those records, all of the pertinent players associated with Dunlap's mental health, Dr. Sombke, Dr. Khatain, Royce Creswell and others associated with Dunlap's care while in IDOC custody. Just as Loomis, Burnett, and IDOC did in defense of Dunlap's Federal Civil Right claim, Dunlap's defense team in the

[40] Although there was no direct testimony on this point at the evidentiary hearing, the Court makes this inference based upon the focus and discussion regarding these records and Dunlap's counsels' attempts to locate and obtain a "voluminous amount of documents and addressing on numerous occasions the 497 pages worth of documents." The Court assumes that if Dunlap had retained the same, his counsel would have had access to the same.

[41] Perhaps the only documents that were not part of the documents provided to Dunlap's defense team in the resentencing proceeding that were part of the 497 pages of documents provided to Dunlap in his Federal Civil Rights Litigation with IDOC were housing records. However, this Court concludes that all relevant and potentially exculpatory mental health and/or disciplinary records associated with Dunlap were both turned over to Dunlap and his resentencing defense team by Robins or already available to them or in their possession by virtue of previous review, and copying of Dunlap's records at IDOC.

resentencing and/or their psychologist and expert, Dr. Beaver, could have tracked these individuals down, interviewed them and, if their testimony was deemed to be beneficial to Dunlap at his resentencing hearing, subpoenaed them to testify. This circumstance is analogous to that in *Hicks*. The *Hicks* Court reiterated the proposition that the prosecutor has "no *Brady* burden when facts are readily available to a diligent defender." 848 F.2d at 4. Dunlap and his resentencing defense team were in the exact same position as Loomis and the IDOC. Had they felt the information and chart notes contained within the information they possessed from IDOC warranted it they could have sought out Sombke, Khatain, Creswell or others and obtained the exact same information and testimony as was obtained by Loomis and IDOC in defense of Dunlap's Federal Civil Rights claim. Similarly, they could have had their expert psychologist, Dr. Beaver, interview these individuals and testify regarding their professional opinions as support for his opinions.[42] Similar to the situation discussed in *Hicks*, the attitudes, diagnoses, and opinions of Dr. Sombke, Dr. Khatain, and Creswell were "in no meaningful way 'suppressed'". Like in *Hicks*, Dunlap's resentencing defense team had access to the medical and mental health records of Dunlap that were in the possession of IDOC and the ability to discovery any exculpatory information contained therein and by the exercise of diligence identify any exculpatory opinions or attitudes of the individuals identified within those records. In fact, just as stated in *Hicks*, the mere fact that Robins was not calling the witnesses from IDOC could have been a "tip-off" to Dunlap's resentencing defense team that their opinions and attitudes may have been "potentially helpful" to Dunlap.[43] Finally, as stated in *Hicks*, Dunlap and his resentencing defense team knew who these witness were and therefore, were "on notice of the essential facts required to enable [them] to take advantage of [the potentially] exculpatory testimony." *U.S. v. Hicks*, 848 F.2d 1, 4

[42]Such testimony likely would have been admissible pursuant to I.R.E. 703.
[43]In fact Dr. Beaver finds them to be helpful and relies upon the same in formulating his opinions.

22. In short, this Court can find no evidence to support Dunlap's claim on post-conviction relief that the State violated its *Brady* duty as outlined and articulated above. Rather, this Court concludes that Robins, Whatcott and the State's resentencing prosecution team conducted a reasonable inquiry into Dunlap's mental health issues by reviewing the IDOC files and disclosed the information contained within those files, including potentially exculpatory mental health information, to Dunlap's resentencing defense team.

23. As collateral conclusions, this Court also concludes that none of the individuals involved in the defense of Dunlap's Federal Civil Rights claim against IDOC had **any** involvement in the preparation, development of strategy, or prosecution of Dunlap's resentencing. Neither did any of the State's prosecution team charged with prosecuting Dunlap's resentencing have **any** involvement in the preparation, development of strategy, or defense of Dunlap's Federal Civil Rights claim.[44]

24. It is also significant to the Court that Loomis/Burnett in the defense of Green and Warden Fisher, did not even formulate their defenses strategy and the method upon which they would seek summary judgment until after Dunlap's resentencing hearing had been completed and Dunlap had been resentenced to death. *See* Finding of Fact No. 90.

25. Because the Court has found that Dunlap had failed to establish a "suppression" by the State of any *Brady* material, the Court need not consider the prejudice or materiality element. *See Dunlap v. State*, 141 Idaho 50, 64, 106 P.3d 376, 390 (citing to *Strickler v. Greene*, 527 U.S. 263, 263, 119 S.Ct. 1936, 1939, 1948, 144 L.Ed.2d 286, 291 (1999).

26. Based upon the foregoing, the Court hereby **DENIES** Dunlap's post-conviction relief

[44]Admittedly, due to the proximity in time in which these two (2) proceedings were ongoing, there was some interaction. For example, Burnett was the liaison between IDOC and the Dunlap prosecution team in assisting them in identifying and obtaining documents concerning Dunlap and his medical, mental health and disciplinary records. Similarly, Loomis and Robins spoke and had limited correspondence concerning Dunlap's housing status, but did not discuss the substance of the parties' respective cases and strategies.

claim asserting a *Brady* violation by the prosecution during the course of Dunlap's resentencing trial and proceedings.

DUNLAP'S *NAPUE* CLAIM

27. In *Napue*, the United States Supreme Court announced that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. [Citations Omitted]. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue*, 360 U.S. at 269. In *Napue*, the United States Supreme Court clarifies the "must fall under the Fourteenth Amendment" language by stating that "our own evaluation of the record here compels us to hold that the false testimony used by the State in securing the conviction of the petitioner may have an effect on the outcome of the trial." *Id.* at 272.

28. In *Giglio v. U.S.*, 405 U.S. 150, 153-54, 92 S.Ct. 763, 766, 31 L.Ed.2d 104, ___ (1972), the United States Supreme Court explained further concerning this issue by stating as follows:

> As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.' This was reaffirmed in *Pyle v. Kansas*, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942). In *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed2d 1217 (1959), we said, '(t)he same results obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.' *Id.*, at 269, 79 S.Ct., at 1177. Thereafter *Brady v. Maryland*, 373 U.S., at 86, 83 S.Ct., at 1197, held that suppression of material evidence justifies a new trial 'irrespective of the good faith or bad faith of the prosecution.' [Citation Omitted]. When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule. *Napue*, supra, at 269, 79 S.Ct., at 1177. We do not, however automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict....' *United States v. Keogh*, 391 F.2d 138, 148 (CA2 1968). A finding of materiality of the evidence is required under *Brady*, supra at 87, 83 S.Ct., at 1196, 10 L.Ed.2nd 215. A new trial is required if 'false testimony could ... in any reasonable likelihood have affected the judgment of the jury...' *Napue*, supra, at 271, 79 S.Ct., at 1178.

Therefore, as with *Brady*, under a *Napue* analysis, there must also be a finding of prejudice or "materiality. However, as explained by the Idaho Supreme Court in *Sivak v. State*, 134 Idaho 641, 649, 8 P.3d 636, 645 (2000) (*Sivak*), a stricter materiality standard is employed in a *Napue* analysis than a *Brady* analysis. The reason for utilizing this stricter standard is outlined in *Sivak* in the following terms:

> A stricter materiality standard applies to cases involving the prosecution's knowing use of false testimony than to cases where the prosecution has failed to disclose exculpatory evidence. *Agurs*, 427 U.S. at 103-04, 96 S.Ct. at 2397-98, 49 L.Ed.2d at 349-50. This is because these cases "involve a corruption of the truth-seeking function of the trial process. *Id.* at 104, 96 S.Ct. at 2398, 49 L.Ed.2d at 350. In *Bagley*, the U.S. Supreme Court quoted *Agurs* for "the well-established rule that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is *any reasonable likelihood* that the false testimony *could have affected* the judgment of the jury. *Bagley*, 473 U.S. at 678, 105 S.Ct. at 3381, 87 L.E.2d at 491 (quoting *Agurs* 427 U.S. at 103, 96 S.Ct. at 2397, 49 L.Ed.2d at 349 (emphasis added). "[T]he fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt. *Id.* at 680, 105 S.Ct. at 3881, 87 L.Ed.2d 492.

29. This Court can find no support in the evidence for Dunlap's claim that the State knowingly used false evidence during Dunlap's resentencing hearing and more specifically, by the use of Dr. Matthews as its expert witness and by soliciting his opinions concerning the nature and or extend of Dunlap's mental health. Neither can the Court find support for the alternative proposition that although not soliciting false evidence, the State allowed false evidence to go uncorrected.

30. It is certainly not unusual for academics, scientists, specialists within fields, and experts utilized in court proceedings to disagree with one another's opinions and/or conclusions. Dr. Matthews recognized this fact in his testimony at the time of Dunlap's resentencing hearing. See Finding of Fact Nos. 76 and 77.

31. The fact that Dr. Beaver (Dunlap's mental health expert at trial), Dr. Khatain (an IDOC

treating mental health provider), and Dr. Sombke (an IDOC treating mental health provider) opinions differ from those of Dr. Matthews concerning Dunlap's mental health conditions and status, is not dispositive of this issue. Rather, both sets of opinions appear to be rationally based upon different interpretations of the evidence, records, and Dunlap's past history.

32. Psychiatry, psychology and the sciences and disciplines dealing with mental health are certainly not exact sciences and can be subject to varied and competing interpretations. This fact is pointed out (although arising in a different context) by the United States Supreme Court in *Ake v. Oklahoma*, 470 U.S. 68, 81, 105 S.Ct. 1087, 1095, 84 L.Ed.2d 53, ___ (1985).

33. Such testimony certainly falls within the parameters of I.R.E. 702. I.R.E. 702 provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience training, or education, may testify thereto in the form of an opinion or otherwise.

34. The Court is unaware of any challenge to Dr. Matthews's qualifications, training, or expertise in the field forensic psychiatry. Although his opinions differ from those of Dr. Beavers, Dr. Sombke and Dr. Khatain, that does not, in and of itself, establish that his opinions and/or diagnoses are false or untrue.

35. However, Dunlap asserts that because other mental health professionals, perhaps even all other mental health professionals, over the past fifteen (15) years have concluded that Dunlap is mentally ill, that Dr. Matthews' testimony to the contrary and his finding that Dunlap suffers not from an Axis I mental illness, but an Axis II personality disorder, including pathological deceit, is perjured testimony and false. *See* Dunlap's *Brady/Napue* Violation Closing Argument, p. 1-2, and Findings of Fact Nos. 67-69.

36. Based upon the evidence and testimony admitted at trial, the Court, as the finder of

fact, concludes that there is no evidence that Dr. Matthews' testimony was false. While the testimony is certainly disputed (Dr. Beavers testified to different conclusions and diagnoses than Dr. Matthews and it appears that Dr. Sombke and Dr. Khatain also possess different conclusions and diagnoses), all of this disputed information was available to be and appears to have been submitted to the jury in Dunlap's resentencing hearing either through the State and its exhibits (resentencing Exhibit 39) and Dr. Matthews' testimony or by Dunlap's defense team and Dr. Beavers and his review of all the information obtained by Ms. Dapsauski (Finding of Fact No. 57) or his review of all of the information provided by the State (Finding of Fact No. 41 and 57).

37. Based upon this Court's research, the vast majority of the decisions addressing *Napue* violations or claimed violations arise out of eyewitness testimony and not out of expert witness testimony. In *U.S. v. Geston*, 299 F.3d 1130, 1135 (9th Cir. 2002), the Ninth Circuit Court of Appeals rejected a defendant's claim that the prosecutor knowingly presented perjured testimony. In doing so, the Ninth Circuit Court of Appeals noted that "it was within the province of the jury to resolve disputed testimony." This is the state of the record in the present case, two (2) qualified mental health professionals reaching different conclusions and diagnoses with respect to Dunlap's mental health status.

38. Despite the fact that the vast majority of cases in which a *Napue* issue or claim is asserted arise in the context of eyewitness testimony, the State identified one (1) Ninth Circuit Court of Appeals case where the expert opinion of psychiatrist did form the basis of a *Napue* challenge. In *Harris v. Vasquez*, 949 F.2d 1497, 1524 (9th Cir. 1990) the Ninth Circuit Court of Appeals held as follows:

> To support his assertion that Dr. Griswold testified falsely, Harris submits opinions from other psychiatrists that differ, in some respects, from Dr. Griswold's opinion. ... Moreover, these conflicting psychiatric opinions do not show that Dr. Griswold's testimony was false; "psychiatrists disagree widely and

frequently." *Ake*, 470 U.S. at 81, 105 S.Ct. at 1095.

39. The Court concludes that although there was disputed evidence on Dunlap's mental health status at the time of his resentencing hearing, there is no evidence that Dr. Matthews' testimony was false or that the State, knowing it to be false, introduced the same at trial. Neither is there any evidence to support that alternative contention that the State, although not soliciting false evidence, allowed it go uncorrected.

40. Because the Court has determined that there was no false testimony knowingly introduced by the State and/or that false testimony, although unsolicited, was allowed to go uncorrected, the Court does not need to address the prejudice or materiality element.

41. Therefore, the Court finds that there was no *Napue* violation committed by the State at the Dunlap resentencing and as a result the Court will **DENY** Dunlap's claim asserting a *Napue* violation.

CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court **DENIES** Dunlap's post-conviction relief claims as outlined in Section EE of his Post-Conviction Relief Petition. The Court will enter a partial Judgment of Dismissal on this portion of Dunlap's Petition for Post-Conviction Relief.[45] The Court will send out a Notice of Status Conference setting this matter for a Status Conference for the purpose of setting an evidentiary hearing on the second claim that was remanded to this Court for an evidentiary hearing, Dunlap's claim of ineffective counsel for failure to properly investigate and present mitigation testimony.

[45] This will be a partial Judgment of Dismissal due to the fact that the Court will still need to hear evidence on and issue its decision on the other issue remanded by the Idaho Supreme Court in *Dunlap V*.

IT IS SO ORDERED.

DATED this 29th day of July, 2015.

MITCHELL W BROWN
District Judge

CERTIFICATE OF MAILING/SERVICE

I hereby certify that on July. 29, 2015, I mailed/served a true copy of the Findings of Fact, Conclusions of Law and Memorandum Decision and Order on Brady/Napue Post-Conviction Claim on the attorney(s)/person(s) listed below by mail with correct postage thereon or causing the same to be hand delivered.

PETITIONER'S ATTORNEY:
SHANNON N. ROMERO
STATE APPELLATE PUBLIC DEFENDER

- ☐ U.S. Mail
- ☐ E-Mail
- ☐ Courthouse Box
- ☒ Fax: 208-334-2985

RESPONDENT'S ATTORNEY:
L. LAMONT ANDERSON
DEPUTY ATTORNEY GENERERAL

- ☐ U.S. Mail
- ☐ E-Mail
- ☐ Courthouse Box
- ☒ Fax: 208-854-8074

DENISE HORSLEY, Clerk

By: *Sheila Downs*
Sheila Downs
Deputy Clerk

APPENDIX C

Tim A. Dunlap
Full Name/Prisoner Number
35385, L-2-45
I.M.S.I., P.O. Box 51
Boise, ID. 83707
Complete Mailing Address

Plaintiff

U.S. COURTS
04 MAY -7 PM 2:53
RECD. FILED
CAMERON S. BURKE
CLERK IDAHO

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

Tim A. Dunlap
Plaintiff,
(Full name and prisoner number.)

vs.

Jay Green

Greg Fischer
Defendant(s),
(Full name(s). Do not use et. al.)

CIV 04-223-S-LMB
CASE NO.
(To be supplied by the Court)

PRISONER CIVIL RIGHTS COMPLAINT

A. PARTIES

1. Tim A. Dunlap (Plaintiff) is a citizen of I.D. (State)
presently residing at I.M.S.I., P.O. Box 51, Boise, I.D. 83707.
(Mailing address or place of confinement)

2. Defendant Jay Green (Name of first defendant) is a citizen of I.D. (State)
whose address is I.M.S.I., P.O. Box 51, Boise, I.D. 83707,
and who is employed as Guard, I.M.S.I.
(Title and place of employment)

At the time the claim(s) alleged in this complaint arose, was this defendant acting under color

Petitioner's Exhibit G

13.

of state law? ✓ Yes ___ No. If your answer if "Yes," briefly explain: _____

moved once but not out to General Population

3. Defendant Greg Fischer is a citizen of Idy
(Name of second defendant) (State)

whose address is I.M.S.C.I., P.O. Box 37, Boise, ID, 83707

and who is employed as Warden, I.M.S.C.I.
(Title and place of employment)

At the time the claim(s) alleged in this complaint arose, was this defendant acting under color of state law? ✓ Yes ___ No. If your answer is "Yes," briefly explain: _____

moved once, but not out to General Population

NOTE: If more space is needed to furnish the above information for additional defendants, continue on a blank sheet which you should label "APPENDIX A. PARTIES." Be sure to include the same information for each defendant including their complete address and title.

B. JURISDICTION

1. Jurisdiction is asserted pursuant to (CHECK ONE)

✓ 42 U.S.C. § 1983 (applies to state prisoners)

___ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) and 28 U.S.C. § 1331 (applies to federal prisoners)

2. Jurisdiction also is invoked pursuant to 28 U.S.C. § 1343(a)(3). (If you wish to assert jurisdiction under different under different or additional statutes, you may list them below.)

C. CAUSE OF ACTION

1. I allege that the following of my constitutional rights, privileges, or immunities have been violated : (If more space is needed to explain any allegation or to list additional supporting facts, continue on a blank sheet which you should label "APPENDIX D. CAUSE OF ACTION.")

That pursuant to §19-2706 I was moved to tier 2 of C-Block, where I can get out, walk around, etc, but was not moved out to General-Population, violating my civil-rights under 42 U.S.C. §1983, As such I should be moved.

2. Supporting Facts: (Include all facts you consider important, including names of persons involved, places, and dates. Describe exactly how each defendant is involved. State the facts clearly in your own words without citing legal authority or argument.)

Ricklewitt, Porter, Donald Fetterly, and Max Hoffman have been placed in General-Population after their sentence was overturned.

Sgt Jay Greed is involved because it is under his authority to move me, He's claiming that Mr. Bear Claw

said it wasn't being moved until in general population, however, Sgt Green's argument falls apart because it is his claim that the Director said it was due to having a detainer. The memo from warden Fischer clearly states that the detainer is not why it can't be moved.

Warden Fischer is involved because he refuses to move me to A or J Block, which was not the purpose of 819-0706 passing and becoming law. Thus abusing my rights as a prisoner.

D. PREVIOUS LAWSUITS

1. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to the conditions of your imprisonment? Yes ___ No _✓_. If your answer is "Yes," describe each lawsuit. (If there is more than one lawsuit, described the additional lawsuits using this same format on a blank sheet which you should label "APPENDIX E. PREVIOUS LAWSUITS")

a. Parties to previous lawsuit:

Plaintiff(s): _____

_____

Defendant(s) _____

_____

b. Name and location of court and docket (case) number: _____

_____

c. Disposition of lawsuit. (For example, was the case dismissed? Was it appealed? It is still pending?) _____

_____

d. Issues raised: _____

_____

_____

e. Approximate date of filing lawsuit: _____

f. Approximate date of disposition: _____

E. EXHAUSTION OF PRISON OR JAIL GRIEVANCE SYSTEM

1. I have exhausted the grievance system within the jail or prison in which I am incarcerated. ___Yes ___No. If your answer is "Yes, briefly explain the steps taken to exhaust each claim you are bringing against each Defendant. It is advisable to attach proof of exhaustion. If your answer is "No," briefly explain why the grievance system or other administrative remedies were not exhausted.

Attached is a memo from Wanda J. Fischer — proof I've tried to exhaust

all remedies.

F. PREVIOUSLY DISMISSED ACTIONS OR APPEALS

1. If you are proceeding under 28 U.S.C. § 1915, please list each civil action or appeal you have brought in a court of the United States, while you were incarcerated or detained in any facility, that was dismissed as frivolous, malicious, or for failure to state a claim upon which relief may be granted. Please describe each civil action or appeal. If there is more than one civil action or appeal, describe the additional civil actions or appeals using this same format on a blank sheet which you should label "APPENDIX F. PREVIOUSLY DISMISSED ACTIONS OR APPEALS."

a. Parties to previous lawsuit:

Plaintiff(s): _____

_____

Defendant(s): _____

_____

b. Name and location of court and docket (case) number: _____

_____

c. Grounds for dismissal: ( ) frivolous ( ) malicious ( ) failure to state a claim upon which relief may be granted.

d. Approximate date of filing lawsuit: _____

e. Approximate date of disposition: _____

G. IMMINENT HARM

1. Are you in imminent danger of serious physical injury? ____Yes ✓ No. If your answer is "Yes," please describe the facts in detail below without citing legal authority or argument.

H. REQUEST FOR RELIEF

I request the following relief:

1. $500.00 (mental abuse).
2. Order granting that I be moved out to General-Population.

I. Request for Appointment of Attorney

I do ____ do not ✓ request that an attorney be appointed to represent me in this matter. I believe that I am in need of an attorney for these particular reasons which make it difficult for me to pursue this matter without an attorney: _____

Prisoner Original Signature

DECLARATION UNDER PENALTY OF PERJURY

The undersigned declares under penalty of perjury that he/she is the plaintiff in the above action, that he/she has read the above complaint and that the information contained in the complaint is true and correct. 28 U.S.C. § 1746; 18 U.S.C. § 1621.

Executed at Lvn.S.P. (location) on 4/29/04 (date)

Prisoner's Original Signature

APPENDIX D

From: Chad Sombke
To: Loomis, William
Date: 1/31/2005 3:27:20 PM
Subject: Re: Tim Dunlap 35385

C-block Tier 2 is for the stable mentally ill and Mr. Dunlap would fit that category. I believe he is not in general population due to some security concerns. As far as I'm concerned he would be cleared psychologically to be moved to general population.

Chad Sombke, Ph.D.
Licensed Psychologist
Idaho Maximum Security Institution
208-389-0232

>>> William Loomis 01/31/05 03:21PM >>>
Dr. Sombke,
Dunlap has filed a federal lawsuit claiming he should be moved into general population (he is actually suing Warden Fisher and Sgt. Green). I see he is in C Block, tier 2. Is that for stable mental health inmates? Could you send me a brief explanation of why Dunlap is in tier 2 and why he cannot be moved into general population. Warden, if there is a non-medical reason why Dunlap is not in general population, could you let me know what it is. Doctor could you get back to me within the next 10 days or so? Thanks you. Call if questions. 658-2094

CC: Fisher, Gregory; Green, Jay

Petitioner's Exhibit H

APPENDIX E

From: Gregory Fisher
To: William Loomis
Date: 2/1/2005 6:57:03 AM
Subject: Re: Tim Dunlap 35385

For those inmates on Tiers 2 and 3 of C Block, I always defer to the decision of Dr. Sombke as to whether or not they should be considered for other housing, be it restrictive housing or general population. Tiers 2 and 3 are for the treatment and managment of the the acute mental health population at IMSI.

Thanks,
Greg Fisher

>>> William Loomis 01/31/05 03:21PM >>>
Dr. Sombke,
Dunlap has filed a federal lawsuit claiming he should be moved into general population (he is actually suing Warden Fisher and Sgt. Green). I see he is in C Block, tier 2. Is that for stable mental health inmates? Could you send me a brief explanation of why Dunlap is in tier 2 and why he cannot be moved into general population. Warden, if there is a non-medical reason why Dunlap is not in general population, could you let me know what it is. Doctor could you get back to me within the next 10 days or so? Thanks you. Call if questions. 658-2094

CC: Sombke, Chad

Petitioner's Exhibit J

Dunlap

K. Robins. 1/9/06. He is picking the Jury for Dunlap's capital resentencing on 2/6/06. Presentation of evidence will commence on 2/13/06. Dunlap has a pend death sentence in Ohio. He is collateral attack his Ohio death sentence thru a habeas petition.

[redacted].

Petitioner's Exhibit S

APPENDIX G

From: William Loomis
To: ken.robins@ag.idaho.gov
Date: 01/12/2006 08:36:11
Subject: Timothy Dunlap

Ken,
See attached affidavit for your signature. I have a section 1983 case involving Dunlap that he filed while he was here in prison. I want to file a motion to stay while he is Caribou County. Feel free to tinker with affidavit. However, I do want to file the motion as quickly as possible. Fax it back to me at 327-7485. Call if questions.

Petitioner's Exhibit T

Robins, Ken
From: Robins, Ken
Sent: Thursday, January 12, 2006 9:16 AM
To: Loomis, Bill
Subject: LAWRENCE G

Dunlap--affROBINS -1-12-06.doc

Loomer,

Enclosed please find a copy of your the affidavit you sent. I tweaked it a little to include the conversation I had with Heather Gosselin of the Ohio AG's Office. If you need to contact her, she can be reached at (614) 728-7055. I well send the notarized copy over. KMR.

AG Fax (614) 728-8600

Petitioner's Exhibit U

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

TIMOTHY R. McNEESE, ISB #2589
Lead Counsel, Department of Correction

WILLIAM M. LOOMIS, ISB #4132
Deputy Attorney General
Idaho Department of Correction
1299 N. Orchard Street, Suite 110
Boise, Idaho 83702
Telephone (208) 658-2097
Facsimile (208) 327-7485

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

TIM A. DUNLAP, Plaintiff, v. JAY GREEN, GREG FISHER, Defendants.	Case No. CV-04-223-S-LMB DEFENDANTS' MOTION FOR STAY AND MEMORANDUM IN SUPPORT

COMES NOW Defendants, by and through counsel, and hereby move this Court for its order staying the proceedings in this matter. This motion is supported by the affidavit of Deputy Attorney General Ken Robins submitted herewith. As Mr. Robins affidavit establishes, plaintiff is not incarcerated in an IDOC facility at this time. He is housed in the Caribou County jail where

Petitioner's Exhibit V

he is awaiting resentencing in Caribou County. He is currently housed in an out of state IDOC facility. Plaintiff also has a pending death sentence in Ohio. He has filed a habeas corpus petition in Ohio collaterally attacking his death sentence in that state. The state of Ohio has expressed an interest in transporting Plaintiff back to Ohio after his resentencing in Caribou County. *See Affidavit of Ken Robins*, ¶¶ 3-4. Finally, even if Mr. Dunlap were to return to an IDOC facility, it is unclear where he will be housed and at what custody level. Therefore, until Mr. Dunlap returns to an IDOC facility and his housing status is determined, the Defendants respectfully request a stay of this matter

DATED this 13th day of January, 2006.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

/s/
WILLIAM M. LOOMIS
Deputy Attorney General
Counsel for IDOC Defendants

I HEREBY CERTIFY That on the 13th day of January, 2006, I caused to be mailed a true and correct copy of the foregoing to:

TIMOTHY DUNLAP, # 35385
Caribou County Jail
475 E. 2nd S.
Soda Springs, ID 83276

via US Mail, postage prepaid

/s/

WILLIAM M. LOOMIS
Deputy Attorney General, for IDOC defendants

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

TIMOTHY R. McNEESE, ISB #2589
Lead Counsel, Department of Correction

WILLIAM M. LOOMIS, ISB #4132
Deputy Attorney General
Idaho Department of Correction
1299 N. Orchard Street, Suite 110
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Telephone (208) 658-2097
Facsimile (208) 327-7485
Email: wloomis@corr.state.id.us

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

TIM A. DUNLAP, Plaintiff, v. JAY GREEN, GREG FISHER, Defendants.	Case No. CV-04-223-S-LMB AFFIDAVIT OF KEN ROBINS IN SUPPORT OF DEFENDANTS' MOTION FOR STAY

STATE OF IDAHO)
) ss.
County of Ada)

Petitioner's Exhibit W

Ken Robins after first being duly sworn upon his oath, deposes and states from personal knowledge, as follows:

1. I am a deputy attorney general assigned to the criminal law division of the Idaho Attorney General's Office. In that capacity, I serve as a prosecutor responsible for handling certain criminal prosecutions for various Idaho governmental entities.

2. I have been assigned the responsibility of presenting the state's case in the capital resentencing of the plaintiff, Timothy A. Dunlap, IDOC No. 35385. Mr. Dunlap is currently in jail in Caribou County. Jury selection for the resentencing is scheduled to commence on February 6, 2006 and the presentation of evidence is scheduled to begin on February 13, 2006.

3. Mr. Dunlap also has a pending death sentence in Ohio. He has collaterally attacked that sentence through the filing of a habeas corpus petition in Ohio. Although no final decision has been made, the State of Ohio has expressed an interest in transporting Mr. Dunlap to Ohio after his resentencing in Idaho.

4. More specifically, your affiant spoke with Heather Gosselin, Deputy Attorney General for the State of Ohio on December 12, 2005. Ms Gosselin is representing the State of Ohio in the federal habeas Corpus petition that is currently pending in the federal district court in Ohio. She specifically stated that the State of Ohio was interested in bringing Timothy Alan Dunlap back to be confined in the Ohio correctional system. She stated that such a transfer would help litigants in the Ohio federal habeas corpus action more effectively litigate their case. Should the court wish to inquire of Ms. Gosselin, your affiant has further contact information.

5. Further your affiant sayeth naught.

DATED this 12th day of January 2006.

Kenneth M. Robins
Deputy Attorney General
State of Idaho

SUBSCRIBED AND SWORN To before me this 12th day of January 2006.

ROSEAN NEWMAN NOTARY PUBLIC STATE OF IDAHO

NOTARY PUBLIC FOR IDAHO
COMMISSION EXPIRES: 3/10/2011

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of January 2006, I mailed a true and correct copy of the forgoing to:

TIMOTHY DUNLAP, No. 35385
Caribou County Jail
475 E. 2nd S.
Soda Springs, ID 83276

via US Mail, postage prepaid

WILLIAM M. LOOMIS

DARYL B. MATTHEWS, M.D., PH.D.
345 QUEEN STREET, SUITE 900
HONOLULU, HAWAI'I 96813
PHONE: 808-735-8505
FAX: 808-356-0739
EMAIL: DMATTHEWS@JHU.EDU

FORENSIC PSYCHIATRY

DIPLOMATE IN PSYCHIATRY AND FORENSIC PSYCHIATRY, AMERICAN BOARD OF PSYCHIATRY AND NEUROLOGY

February 13, 2006

Kenneth M. Robins, Esq.
Deputy Attorney General
Office of the Attorney General
700 W. Jefferson Street
P. O. Box 83720
Boise, Idaho 83720

Re: State of Idaho v. Timothy Dunlap

Dear Mr. Robins:

I am writing to report the results of my evaluation of Mr. Dunlap. You have asked for a brief report stating my diagnoses and related findings.

Sources of Information

1. Affidavit of Janice D. Ort, Psy.D, 7/31/96
2. Psychiatric evaluation of Timothy Dunlap by Michael E. Estess, M.D., 2/28/92
3. Individual assessment report from Nancy Cowardin, Ph. D., 7/17/99
4. Affidavit of Mark D. Cunningham, Ph.D., 12/16/99
5. Affidavit of Roderick W. Pettis, M.D., no date
6. Psychological evaluation of Timothy Dunlap by Martin Brooks, Ph.D. 3/13/92
7. Interview of Timothy Dunlap by the police, 10/16/91
8. Draft of Timothy Dunlap's social history for mitigation purposes, no date
9. Medical records from Madison State Hospital
10. Medical records from Life Spring Mental Health Services from 1/17/91 through 2/19/91
11. Psychiatric evaluation of Timothy Dunlap by Philip E. Podruch, M.D., 8/26/76
12. Medical records from Southern Indiana Mental Health and Guidance Center, Inc., from 5/4/61 through 10/8/82
13. Testimony of Roderick Pettis, M.D., 4/11/00
14. Testimony of Mark D. Cunningham, Ph.D, 4/12/00
15. Correctional records of Timothy Dunlap from 10/16/91 through 2/16/05

Petitioner's Exhibit X

026429
27 83385

16. Medical records of William Benjamin Moore from 10/28/40 through 12/10/42
17. Medical records of Stella Irene Moore from 10/30/73 through 1/30/74
18. Military records of Timothy Dunlap from 9/4/86 through 8/3/87
19. Southwestern Indiana Rehabilitation Center, 4/10/75
20. Soda Springs Police Department records
21. Corrections and Court Records of Danny Gillette from 9/2/92 through 9/20/95
22. School records of Timothy Dunlap, first semester of 1988 through 1989
23. Affidavit of Patricia Mathers Dunlap Henderson, 12/15/99
24. Testimony of Margo May, 3/31/92
25. Testimony of Danny Gillette, 3/31/92
26. Testimony of Vitorio Bevaro, 3/31/92
27. Testimony of Victor Rodrigues, 3/31/92
28. Testimony of Mary Gooderough, 3/31/92
29. Testimony of Blynn Wilcox, 3/31/92
30. Testimony of Marilyn Young, 3/31/92
31. Testimony of John Dunlap, 4/1/92
32. Testimony of Patricia Dunlap, 4/1/92
33. Testimony of Howard Manwaring, 4/1/92
34. Court records of Timothy Dunlap
35. Psychogical evaluation of Timothy Dunlap by Craig W. Beaver, 1/25/06
36. Psychogical evaluation of Timothy Dunlap by Craig W. Beaver, 1/17/06
37. My Examination of Mr. Dunlap, 1/30/06, approximately 6 hours, videotaped

Consent:

Mr. Dunlap was informed that this examination was being conducted at the request of the Attorney General's office and that it would be shared with his attorney and the Court as well. He was informed that I may be called to testify at his sentencing hearing concerning anything he told me. He was informed that I would not provide him with medical treatment or advice. Mr. Dunlap appeared to understand these issues and agreed to proceed with the examination.

Diagnoses:

Axis I: No diagnosis

Axis II: Antisocial Personality Disorder
Narcissistic Personality Disorder
Borderline personality traits
Schizotypal personality traits

Axis III: Possible seizure disorder

Summary of findings:

Despite varied and at times extreme symptomatic presentations, in my opinion Mr. Dunlap does not suffer from any major mental disorder nor other Axis I condition, nor did he at the time of the offenses to which he has pled guilty. Rather, Mr. Dunlap is an individual with severe personality pathology, all of whose psychiatric diagnoses fall on Axis II, personality disorders. Personality disorders are enduring patterns of perceiving, relating to, and thinking about the environment and oneself which are inflexible and maladaptive, and cause either significant functional impairment or subjective distress. His behavior at the time of the offenses strongly reflects these conditions rather than one or more major mental (Axis I) illnesses.

Two factors have made accurate diagnosis difficult for many clinicians assessing Mr. Dunlap over the years:

1. Mr. Dunlap has periodically malingered major mental illness (falsified or exaggerated symptoms for personal gain). This has been confirmed most recently by Dr. Beaver's psychological evaluation. It has been admitted to by Mr. Dunlap to a correctional mental health staff member.

2. Associated with Mr. Dunlap's personality disorders is an uncommon condition termed pathological lying or *pseudologia fantastica*. The excessive and pointless lying associated with this condition has been misconstrued as delusional thinking in Mr. Dunlap's case. It has also obscured the extent to which some of Mr. Dunlap's lies do not fall within this rubrick, and are rather lies that do further his perceived self interest.

Various attempts have been made to detect the presence of neurologic or neuropsychiatric illness (brain disorder) in Mr. Dunlap although no such conditions have been established with any degree of certainty. My evaluation did not detect the presence of clinically-significant neuropsychiatric illness now or at the time of the offenses.

any testing

Insofar as other information may be forthcoming in my evaluation of Mr. Dunlap, the opinions expressed above are provisional.

Sincerely,

Daryl Matthews, M.D., Ph.D.

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

PAUL R. PANTHER, ISB #3981
Lead Counsel, Department of Correction

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Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

TIMOTHY A. DUNLAP, Plaintiff, v. **JAY GREEN, GREG FISHER,** Defendants.	**Case No. CV-04-223-S-EJL** **MOTION FOR SUMMARY JUDGMENT**

COME NOW Defendants, Greg Fisher and Jay Green (hereafter "Defendants"), by and through counsel, and hereby file their Motion for Summary Judgment.

Pursuant to Fed. R. Civ. Pro. 56(c), the Defendants move this court for its order granting judgment as a matter of law to the Defendants and against the Plaintiff on all claims and causes of action in the above-entitled case.

This motion is based upon the Memorandum in Support of Motion for Summary Judgment and the affidavits of Carolee Kelly, Dr. Chad Sombke and Greg Fisher, which are filed separately.

RESPECTFULLY SUBMITTED This 30th day of March, 2006.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

WILLIAM M. LOOMIS
Deputy Attorney General
Counsel for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of March, 2006, I mailed a true and correct copy of the foregoing MOTION FOR SUMMARY JUDGMENT to the following:

TIMOTHY DUNLAP, No. 35385
IMSI
P.O. Box 51
Boise, Idaho 83707,

via the prison mail system.

WILLIAM M. LOOMIS

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

PAUL R. PANTHER, ISB #3981
Lead Counsel, Department of Correction

WILLIAM M. LOOMIS, ISB #4132
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Telephone (208) 658-2094
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Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

TIMOTHY A. DUNLAP, Plaintiff, v. **JAY GREEN, GREG FISHER,** Defendants.	**Case No. CV-04-223-S-EJL** **MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

COMES NOW Defendants, Greg Fisher and Jay Green (hereafter "Defendants"), by and through counsel, and hereby present this Memorandum in Support of Motion for Summary Judgment filed concurrently.

This memorandum is supported by the affidavits of Greg Fisher, Dr. Chad Sombke and Carolee Kelly, which are filed separately.

Petitioner's Exhibit AA

The Defendants should be granted summary judgment as matter of law for these reasons.

As argued below, Defendant Fisher's decisions regarding the Plaintiff's housing were rationally predicated on the limits placed upon him contained in state law prior to July 1, 2003 and thereafter by the Plaintiff's mental health needs as determined by his mental health providers.

Dunlap's death sentence was not vacated until 2005. Until July 1, 2003 state law required that an inmate sentenced to death be held in solitary confinement. Because he was under a death sentence Dunlap was ineligible to be housed in the general prison population. On July 3, 2003, Dunlap was housed in the Idaho Secured Mental Facility and thereafter in the mental health outpatient unit on the recommendation of IDOC mental health staff.

Plaintiff fails to state a claim against Defendant Green. Defendant Green's only participation in Dunlap's housing assignments, other than cell to cell moves within C-Block, was his participation on a committee that recommended that Dunlap be removed from Administrative Segregation so that he could be housed in the outpatient mental health tier.

At no time were housing decisions regarding Dunlap made on an arbitrary basis. Rather, Dunlap's housing assignments were well considered, appropriate for his needs and rationally based on the recommendations of mental health providers or constrained by the mandates of state law.

BACKGROUND AND PROCEDURAL POSTURE

This is a case in which the Plaintiff, Timothy Allen Dunlap (hereafter "Dunlap"),

an inmate committed to the Idaho Board of Correction, claims to have been denied housing in the general prison population at the Idaho Maximum Security Institution despite being eligible for such housing.

Dunlap is confined under a death sentence having been convicted of first degree murder in 1992.[1] He alleges that Warden Greg Fisher and Sgt. Jay Green arbitrarily refused to house him in the general prison population, despite having allowed four offenders previously sentenced to death to be housed in general population. Dunlap mistakenly believes his death sentence had been vacated prior to February 18, 2005. Thus he was entitled to be housed in A-Block, a general population unit at IMSI. *(Complaint, p.3).*

Based on this allegation alone the Court determined that Dunlap states a colorable Fourteenth Amendment Equal Protection claim.

As a general housekeeping matter, currently before the Court is Defendant's Motion to Stay (dkt. 40). In this motion the defendants seek to stay these proceedings pending Dunlap's re-sentencing in Caribou County, Idaho and his return to the custody of the IDOC. This motion is now moot as Dunlap has been re-sentenced and has returned to the custody of the IDOC.

LEGAL STANDARDS

A. Summary Judgment.

A party is entitled to summary judgment under Fed.R.Civ.P 56(c) "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with

[1] For a period of time from February 18, 2005, when the Idaho Supreme Court issued its *Remittiur* directing the district court to re-sentence Dunlap until February 22, 2006 when he was re-sentenced, Dunlap was not confined under the sentence of death.

the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." "[T]he plain language of Rule 56 mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and upon which that party will bear the burden of proof at trial.'" Lujan v. National Wildlife Federation, 497 U.S. 871, 884, 110 S.Ct. 3170, 3186, 111 L.Ed.2d 695 (1990), *quoting Celotex Corp.v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed. 2d 265 (1986).

While all inferences must be drawn in the light most favorable to the non-moving party, the Ninth Circuit has held that where the moving party meets its initial burden of demonstrating the absence of any genuine issue of material fact, the nonmoving party must "produce 'specific facts showing that there remains a genuine factual issue for trial' and evidence 'significantly probative' as to any [material] fact claimed to be disputed." *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983) (citing *Ruffin v. County of Los Angles*, 607 F.2d 1276, 1280 (9th Cir. 1979), *cert. denied*, 445 U.S. 951, 100 S.Ct. 1600, 63 L.Ed.2d 786 (1980).

B. Equal Protection.

In its Initial Review Order (dkt. 7) the Court set out the standard for consideration of Dunlap's Equal Protection claim.

"The Equal Protection Clause guarantees that 'all persons similarly circumstanced shall be treated alike' by governmental entities. *S.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415(1920). " *Order, p. 3.*

"If a plaintiff is not a member of a protected class, equal protection claims brought by 'a class of one' are valid 'where the plaintiff alleges that [he] has been intentionally treated differently from other similarly situated and that there is no rational basis for the difference in treatment'. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)." *Order*, p. 4.

"Under a rational basis inquiry, in order to prevail on an equal protection claim, Plaintiff must demonstrate that he is being treated in a disparate manner, and that there is no rational basis for the disparate treatment. *More v. Farrier*, 984 F.2d260,271 (8th Cir. 1993). Stated another way, prison officials need only show a rational basis for dissimilar treatment in order to defeat the merits of plaintiff's claim. *Id.* In an equal protection claim, state action is presumed constitutional and 'will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). Where a case 'does not rise to the level of invidious discrimination proscribed by the Equal Protection Clause..., the federal courts should defer to the judgment of the prison officials." *More*, 984 F.2d at 272." *Order, p. 4.*

ARGUMENT

A. At times relevant to the Complaint, Dunlap was housed in the mental health unit at IMSI based on his medical needs as determined by chief psychologist Dr. Chad Sombke.

As an initial matter, Dunlap is not a member of a protected class for Equal Protection purposes. He does not allege that he has been discriminated against based on his race, creed or national origin. He only alleges that he has been treated differently than four other inmates similarly situated. He claims that he was denied housing in the

general prison population while four other former "death row" inmates were granted general population housing to defeat his Equal Protection claims.

Because Dunlap is not a member of a protected class, the Defendants need only show a rational basis for their housing decisions.

Dunlap was housed in C-Block because he needed mental health treatment, including psychotropic medications and monitoring. C-Block is the mental health unit at IMSI.

According to Dr. Sombke, his primary mental health provider, the most appropriate housing for him was in C-Block. *(Aff. Sombke, ¶ 38).*

Warden Fisher approved Dunlap's housing assignments. Dr. Sombke in conjunction with the mental health treatment staff at IMSI assessed Dunlap's psychiatric needs and made recommendations regarding Dunlap's housing. Based on these recommendations, Warden Fisher directed that Dunlap be housed in the mental health unit. *(Aff. Fisher, ¶ 24, 26, 28 and 31).*

As part of his mental health treatment, Dr. Khatain prescribed a number of psychotropic medications for Dunlap. These included Haldol, Thorazine and Tegretol. Haldol was the principal psychotropic and was prescribed to reduce Dunlap's pre-occupation with troublesome recurring thoughts and Dunlap's seeing and hearing things not normally seen and heard. *(Aff. Sombke, ¶ 15, 16).*

Dunlap was not always cooperative with his treatment, regularly refusing to attend the mental health clinic, thereby making it difficult for Dr. Khatain to evaluate the effects of the medicine. *(Aff. Sombke, ¶16).*

Mr. Dunlap's history is colored with episodes of threatening and disruptive behavior. He has harassed staff by threatening to cut off their heads and attempted to pass blood, urine and fecal contaminated objects to staff. *(Aff. Fisher, ¶ 21).*

At various other times he has exhibited delusional beliefs. For example, he referred to "Area 51" and the government planting a microphone in his cell to spy on him. When confronted by Dr. Sombke, he claimed to have made this up to convince staff he was mentally ill. *(Aff. Sombke, ¶ 20).* On another occasion he resisted a staff member who was escorting him from the shower, muttering about Germany in 1945 and telling the officer that he had already lost. *(Aff. Fisher, ¶ 21).*

Warden Fisher and his staff worked closely with Dr. Sombke and the mental health staff to insure Dunlap was housed appropriately given his psychiatric condition.

From January 2002 until July 3, 2003 Dunlap was housed on C-Block, Tier 1. C-Block is the mental health unit at IMSI. Tier 2 is the outpatient mental health unit and Tier 3 is the Idaho Secured Mental Facility ("ISMF"). Although Dunlap was held in solitary confinement during this period this housing was appropriate because of it's close proximity to mental health staff. *(Aff. Sombke, ¶ 13), (Aff. Fisher, ¶ 18).*

Until the Idaho legislature amended and re-designated Idaho Code § 19-2506 Dunlap was housed in "solitary confinement" pursuant to state law. *(Aff. Fisher, ¶ 15,16).*

As of July 1, 2003, prison officials were no longer constrained by statute to house death sentenced inmates in "solitary confinement". This allowed Dr. Sombke the opportunity to recommend transitioning Dunlap into the "ISMF" and eventually into the out patient psychiatric unit on Tier 2. Warden Fisher consistently followed the housing component of the treatment plan recommended by Dr. Sombke.

On July 3, 2003, on the recommendation of Dr. Sombke, Dunlap was transferred to C-Block, Tier 3 for evaluation to determine his suitability to transition to less restrictive conditions of confinement.

Dunlap adapted remarkably well on tier 3. He progressed through the various levels on Tier 3 and by July 14, 2003 he was allowed in the dayroom for one hour without restraints. *(Aff. Sombke, ¶ 26).*

Dunlap moved to C-Block, Tier 2 on August 12, 2003. On that date Dr. Sombke observed the Dunlap had been eagerly awaiting the move and that there were no reports of hallucinations or delusions or any threats toward staff. He appears to have stabilized and is not a current threat. Sombke closely monitored Dunlap while on C-2 since this was the first time he'd had a roommate in over 15 years. *(Aff. Sombke, ¶ 28).*

Initially, Dunlap seemed to adjust well on C-2. However, in October 2003 Dr. Sombke observed that he appeared to be decompensating. He was becoming more isolated and not participating in outdoor exercise on the ballfield or other recreational activity. He only came out of his cell into the day room to use the phone and then returned to his cell. In addition his hygiene was becoming offensive. *(Aff. Sombke, ¶ 28).*

While Dunlap was housed on the mental health unit his behavior was generally appropriate, though erratic. Although he often requested placement in the general prison population, Dr. Sombke's opinion is that the mental health unit was the more appropriate place for housing for Mr. Dunlap due to his mental health needs. Dunlap's behavior never fully stabilized to the point where housing him in the general prison population was a viable option. *(Aff. Sombke, ¶ 38).*

Clearly, Dunlap's housing assigments in C-Block are rationally related to his mental health needs as identified by Dr. Sombke and the mental health staff at IMSI. His housing was part and parcel of his treatment.

Dunlap's behavior continued to be erratic, though mostly appropriate. He required monitoring for his behavior. He lived in a place where his medications and behavior could be monitored by mental health staff.

Defendant Fisher's failure to place Dunlap in the general prison population was anything but arbitrary. Dunlap's housing assignments in the mental health unit were based on the recommendations of Dr. Sombke, which were in turn motivated by his mental health treatment needs.

Because Dunlap's housing was rationally based on his need for mental health treatment his Equal Protection Claim must fail. Even if he were similarly situated to Hoffman, Porter, Fetterly and Leavitt (which Defendants contend he was not), denial of housing in general population was based on the rational need to provide him mental health treatment. As such Defendants Green and Fisher are entitled to judgment as a matter of law.

B. Dunlap was not similarly situated to other death sentenced inmates housed in the general prison population.

The foundation of Dunlap's Equal Protection claim is that he should have been housed in the general prison population as his death sentence had been vacated. This claim fails because, in fact, Dunlap's death sentence was not vacated until February 18, 2005 when the Idaho Supreme Court remanded the penalty phase of Dunlap's murder

trial to the district court for re-sentencing pursuant to the United States Supreme Court's decision in *Ring v. Arizona. (Kelly Aff., ¶ 3, Ex. A and B.)*

Eight days later Dunlap was transferred to the Ada County jail to await re-sentencing in Caribou County.

On this basis alone Dunlap is not similarly situated to Porter, Fetterly, Leavitt or Hoffman and because of this he has failed to meet his burden showing that he suffered arbitrary discrimination when compared to the treatment given to these other individuals.

Porter's death sentence was vacated in 2003, after which he was housed in general population until he was re-sentenced to death in 2004 and returned to restrictive housing. *(Aff. Fisher, ¶ 10).* Porter is currently housed in the general prison population, pursuant to Idaho Code § 19-2706. *(Aff. Fisher, ¶ 8, Ex. M).*

Hoffman is subject to a court order issued by Judge Winmill directing the IDOC to remove him from death row. He has been housed in the general prison population since 2002 pursuant to that order. *(Aff. Fisher, ¶ 10).*

Leavitt's death sentence was vacated in 2001 but re-imposed after an appeal to the Ninth Circuit Court of Appeals in 2004. *(Aff. Fisher, ¶ 10).* At times while the appeal was pending Leavitt was housed in the general prison population. He is currently housed in restrictive housing. *(Aff. Fisher, ¶8, Ex. M).*

Fetterly's death sentence was vacated in 2002 and a fixed life sentence was imposed in 2003. He remains housed in the general prison population.

Although Dunlap claims he was similarly situated to Porter, Hoffman, Fetterly and Leavitt, he was not. At time relevant to his complaint, Dunlap was confined under a

death sentence. Whereas the death sentences of Porter, Hoffman, Fetterly and Leavitt were abated when they were housed in general population.

C. Dunlap fails to state a claim against defendant Green.

Dunlap fails to allege any specific facts of unconstitutional conduct against Sgt. Jay Green. Green was the supervisor of C-Block, Dunlap's housing unit. Dunlap's only complaint against Green is that he believes that Green had the authority to move him out of the unit to general population and didn't. He provides no evidence for this assertion, which is in fact wrong.

Dunlap's only basis for his allegations against Green is what appears to be a conversation in which Green told him that IDOC Director Beauclair said he wasn't to be moved because he had a detainer. According to Dunlap this statement was false and was controverted in a memo from defendant Fisher. *(Complaint, p. 4).*

Dunlap is mistaken in his belief that Sgt. Green had the power to move him to the general prison population. According to Warden Fisher, Green's supervisor, Green's only involvement with Dunlap's housing assignments, other than cell assignments on the mental health tier, was membership in restrictive housing review committee that recommended Dunlap be released from Administrative Segregation and to C-2, the outpatient mental health tier as recommended by Dr. Sombke.

Therefore, Sgt. Green is entitled to judgment as a matter of law because there is not causal nexus between acts or omissions of Green and the alleged deprivation suffered by Dunlap. *See, Taylor v. List,* 880 F2d. 1040 (9th Cir. 1989), *Ivey v. Board of Regents of the Univ. of Alaska,*673 F.2d 266, 268 (9th Cir. 1982).

CONCLUSION

In summation, Defendants Green and Fisher are entitled to judgment as a matter of law for the following reasons.

1) Dunlap's housing assignments were not arbitrary, but rationally predicated on constraints contained in state law and latter on his mental needs as determined by his mental health providers;

2) Dunlap was not similarly situated to Hoffman, Fetterly, Porter and Leavitt in that his death sentence was not vacated until February 16, 2005, eight days prior to being released from IDOC custody and transferred to the Ada County jail pending re-sentencing in Caribou County, and;

3) Dunlap has failed to identify any action or omission by Sgt. Green that violated his Equal Protection rights.

DATED this 30th day of March, 2006.

WILLIAM M. LOOMIS
Deputy Attorney General
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of March, 2006, I mailed a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT to the following:

TIMOTHY DUNLAP, No. 35385
IMSI
P.O. Box 51
Boise, Idaho 83707,

via the prison mail system.

WILLIAM M. LOOMIS

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

PAUL R. PANTHER, ISB #3981
Lead Counsel, Department of Correction

WILLIAM M. LOOMIS, ISB #4132
Deputy Attorney General
Idaho Department of Correction
1299 N. Orchard Street, Suite 110
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Telephone (208) 658-2094
Facsimile (208) 327-7485

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

TIMOTHY A. DUNLAP, **Plaintiff,** v. **JAY GREEN, GREG FISHER,** **Defendants.**	**Case No. CV-04-223-S-EJL** **STATEMENT OF UNDISPUTED MATERIAL FACTS**

COME NOW the Defendants, Jay Green and Greg Fisher, by and through counsel pursuant to D. Id. L. Civ. R. 56.1(a) and hereby submit the following statement of material facts

over which there is no genuine dispute in support of their Motion for Summary Judgment filed herewith.

1. The Plaintiff, Timothy A. Dunlap (hereinafter "Dunlap") is an inmate duly committed to the custody of the Idaho Board of Correction for the crime of first degree murder. He was convicted and sentenced in 1992.

2. Defendant Greg Fisher was the Warden of the Idaho Maximum Security Institution (IMSI) during all times relevant to the complaint. Warden Fisher had the authority to recommend to the Director of Idaho Department of Correction that an inmate sentenced to death be removed from restrictive housing and placed in the general prison population, but in a maximum security environment.

3. Defendant Jay Green was Correctional Sergeant and the housing supervisor of C-Block. Other than specific cell assignments within C-Block, Sgt. Green's only involvement in Dunlap's movement was on August 8, 2003 when he was a member of a restrictive housing review committee who affirmed Dr. Chad Sombke's recommendation that Dunlap be removed from Administrative Segregation status.

Green had no further involvement with determining Dunlap's housing status.

4. At all times relevant to the Complaint, Dunlap was under the care of mental health professionals at IMSI due to psychotic and delusional behavior he exhibited while incarcerated.

5. From 1992 until July 1, 2003 Dunlap was housed in solitary confinement (also known as Restrictive Housing or Ad-Seg) at the Idaho Maximum Security Institution along with other inmates sentenced to death pursuant to Idaho Code § 19-2706.

6. On June 24, 2002 the United States Supreme Court decided *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (June 24, 2002). Justice Ginsberg writing for the majority held that a jury, rather than a judge, must weigh aggravating and mitigating circumstances in imposing the death sentence in capital cases. Dunlap's death sentence was not vacated until February 16, 2005 when the Idaho Supreme Court issued it *Remittitur* remanding Dunlap's case to the District Court for further proceedings on sentencing pursuant to *Ring*.

7. Effective July 1, 2003 the Idaho legislature amended and re-designated Idaho Code § 19-2706 to § 19-2705. Subsection eleven removed the requirement that a person under the sentence of death must be held in solitary confinement unless subject to an active death warrant. This amendment allowed the Warden, the discretion, to house individuals under a death sentence, but not a death warrant, in maximum security confinement, but outside of restrictive housing. This presented the opportunity, but not the right, for inmates confined on Death Row to be released to general population within IMSI at the discretion of prison administration.

8. At times between 2002 and the present, inmates Fetterly, Porter, Hoffman and Leavitt were all housed in general population units at IMSI after their death sentences had been vacated.

Fetterley's death sentence was vacated and a fixed life sentence imposed. He remains in general population.

Porter's death sentence was vacated and reinstated after which he was housed in restrictive housing. Currently, as a result of administrative review, he is housed in general population.

Hoffman is awaiting re-sentencing and is housed in general population pursuant to a federal court order.

Leavitt's death sentence was vacated, but reinstated. He is currently housed in restrictive housing.

9. Neither Fetterly, Porter, Hoffman nor Leavitt require mental health treatment to the extent they are required to be housed in the mental health unit.

10. From his entry into the prison system until December 2001 Dunlap's behavior was far from that of a model inmate. During the period from January 1995 until December 2001 he committed twenty-four disciplinary offenses. Included among these were possession of a handcuff key, throwing urine on correctional staff, attempting to pass urine and feces on books to correctional staff, and assaulting a correctional officer by grabbing him through the food slot in his door.

11. At IMSI, C-Block houses both mental health inmates and Administrative Segregation inmates. Tier one houses Administrative Segregation inmates and, prior to July 1, 2003, offenders sentenced to death. From January 2001 through July 3, 2003 Dunlap was housed on Tier 1 of C-Block.

12. Tiers 2 and 3 of C-Block are designated housing units for mental health inmates. Tier 3 houses acutely mentally ill inmates. It consists of fourteen cells, all of which are single celled. Tier 2 houses mental health inmates who are stable and who security and mental health staff feel may be transitioned into a more pro-social environment. Some inmates in C-2 are double celled, others are single celled. All inmates housed on Tier 2 are given greater access to

outside recreation, increased ability to access the unit day room and increased interaction with fellow inmates and staff.

13. Dunlap has been under psychiatric treatment at IMSI since at least 2002. During much of the time between 2002 and February 2005 Mr. Dunlap was prescribed a number of psychotropic medications including Thorazine, Haldol, Tegretol, Prozac and Cogentin.

14. Haldol is a psychotropic medicine that reduces preoccupation with troublesome and reoccurring thoughts, helps reduce unpleasant and unusual experiences such as hearing and seeing things not normally seen and heard.

15. On May 22, 2002 Dr. Khatain discontinued all Dunlap's medicines, including Haldol, due to his non-compliance in attending mental health clinic.

16. In a meeting with Dr. Sombke on September 4, 2002 Dunlap was lucid, goal oriented and had not decompensated.

17. Dunlap decompensated over the next several months.

18. On March 31, 2003 Dr. Khatain renewed Dunlap's his prescription for Haldol secondary to his "psychotic symptoms becoming significantly more noticeable and worse."

19. On May 19, 2003, Dr. Khatain noted improvement and at Dunlap's request prescribed a low dosage of Thorazine.

20. On July 3, 2003, Dunlap was removed from solitary confinement at the recommendation of Dr. Sombke and housed on Tier 3 of C-Block. His mental status and behavior had improved to the point where he could be transitioned to Tier 3. He was still classified as a restrictive housing inmate. The purpose of housing him on Tier three at this time

was to assess his ability to live outside of the more restrictive environment he had experienced in solitary confinement.

21. Sgt. Green, clinician Royce Creswell and Health Services Supervisor Rick Anderson conducted a 30-Day Restrictive Housing Review on Dunlap on August 8, 2003. At the review Dunlap told this committee that he wanted to try general population. Dunlap's behavior continued to be good. The committee recommended that he be released to custody and housed on Tier 2 of C-Block.

22. Warden Fisher affirmed the housing assignment. With the exception of one day (August 23, 2003) he remained housed on C-2 until February 26, 2005.

23. Initially, Dunlap seemed to adjust well on C-2. However, in October 2003 Dr. Sombke observed that he appeared to be decompensating. He was becoming more isolated and not participating in outdoor exercise on the ballfield or other recreational activity. He only came out of his cell into the day room to use the phone and then returned to his cell. In addition his hygiene was becoming offensive.

24. On February 15, 2005, prior to transferring to county jail for re-sentencing, a Restrictive Housing Hearing was held. Deputy Warden Michael Johnson, Deputy Warden George Miller and Capt. Jeff Henry comprised the committee. The reason for the hearing was a - concern on the part of prison administration about Dunlap's ability to function either in isolation (Ad-Seg) or in general population. Dunlap told the committee that he preferred to remain on C-2. He told them he did very well on C-2, but did poorly in Ad-Seg.

25. Dr. Chad Sombke, the psychologist at IMSI, also recommended that Dunlap be housed on C-2 noting that he was medication compliant and was doing well. Sombke did not recommend that Dunlap be housed either in Ad-Seg or in general population.

26. Warden Fisher affirmed the recommendations of Dr. Sombke and the committee.

27. From February 26, 2005 until February 23, 2006 he was confined to either the Ada County jail or the Caribou County Jail awaiting re-sentencing on first degree murder charges.

28. Dunlap was re-sentenced to death in Caribou County on February 22, 2006. He returned to IMSI on February 23, 2006.

29. Consistent with IDOC policy Dunlap is currently housed as a newly committed offender under the sentence of death and is housed in restrictive housing pending an updated evaluation by psychiatric staff.

DATED this 30th day of March, 2006.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

/s/ William M. Loomis

WILLIAM M.LOOMIS
Deputy Attorney General
Counsel for IDOC Defendants

I HEREBY CERTIFY that on the 30th day of March, 2006, I mailed a true and correct copy of the forgoing STATEMENT OF UNDISPUTED MATERIAL FACTS to the following:

TIMOTHY DUNLAP, No. 35385
IMSI
P.O. Box 51
Boise, Idaho 83707,

via the prison mail system.

WILLIAM M. LOOMIS

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

PAUL R. PANTHER, ISB #3981
Lead Counsel, Department of Correction

WILLIAM M. LOOMIS, ISB #4132
Deputy Attorney General
Idaho Department of Correction
1299 N. Orchard Street, Suite 110
Boise, Idaho 83702
Telephone (208) 658-2094
Facsimile (208) 327-7485
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

TIMOTHY A. DUNLAP, **Plaintiff,** v. **JAY GREEN, GREG FISHER,** **Defendants.**	**Case No. CV-04-223-S-EJL** **AFFIDAVIT OF DR. CHAD SOMBKE**

DR.CHAD SOMBKE, being first duly sworn upon his oath, deposes and says as follows:

1. I am a psychologist duly licensed to practice in the State of Idaho and currently in private practice in Meridian, Idaho.

2. From 2002 to 2005 I was employed at different times by the State of Idaho and by the Prison Health Services (PHS) as the Chief Psychologist for the Idaho

Petitioner's Exhibit CC

ORIGINAL

Department of Correction and assigned to IMSI. Prison Health Services is a private medical and mental health care provider contracted to provide medical and mental health care to inmates committed to the custody of the Idaho Board of Correction and incarcerated by the Idaho Department of Correction (IDOC). PHS rendered these services between October 2001 until July 12, 2005.

3. I have a BS, Summa Cum Laude, in Psychology from Mankato State University in Mankato, Minnesota, 1989 and an MS in Counseling Psychology from Utah State University, 1993.

4. I have a Ph.D. in Clinical and Counseling Psychology from Utah State University, 2001.

5. I did my doctoral internship at the Southern Louisiana Internship Consortium in Baton Rouge, Louisiana, from 1996-1997.

6. I am familiar with the Plaintiff in this matter, Timothy Alan Dunlap, as I oversaw his mental health treatment at IMSI between 2002 and February 2005. During this time period Mr. Dunlap was housed in the mental health unit due to his psychiatric needs. I am aware that Mr. Dunlap requested to be housed in general population, but in my opinion C-Block, the mental health unit at IMSI, was more appropriate.

7. During the time period relevant to Mr. Dunlap's Complaint, inmates with mental health problems were housed at IMSI in C-Block. C-Block, tier I housed Administrative Segregation inmates with mental health issues and prior to July 1, 2003, many inmates committed to "Death Row".

8. I am aware that on July 1, 2003, the Idaho legislature amended Idaho Code § 19-2705 to allow the warden of IMSI to house inmates under a death sentence in

other than "solitary confinement". This allowed prison officials the discretion to house inmates under the sentence of death in less restrictive conditions of confinement within a maximum security environment.

9. Tiers 2 and 3 of C-Block are designated housing units for mental health inmates. Tier 3 houses acutely mentally ill inmates and is the Idaho Security Medical Facility. Tier 3 consists of fourteen single occupant cells.

Tier 2 functions as an outpatient mental health unit and houses mental health inmates who are stable and who security staff and mental health staff feel may be transitioned into a more pro-social environment. Some inmates in C-2 are double celled, others are single celled. All inmates housed on Tier 2 are given greater ability to access the unit day room, outdoor recreation and to interact with fellow inmates and staff.

10. Mental health records concerning a particular IDOC inmate are maintained in the medical file of that inmate. These records are kept in the normal course of business and are stored in the medical unit of the prison where the inmate is housed. Mr. Dunlap's records are maintained at the Idaho Maximum Security Institution.

11. During my employment at IMSI I had complete access to Mr. Dunlap's medical records and made several entries in the record myself. Attached as Exhibits A through D are what I believe to be true and correct copies of the following entries into Mr. Dunlap's medical records:

Exhibit A	Interdisciplinary Progress Notes from March 28, 2002 through February 28, 2006. (Bates nos. 000467, 000473, 000477-78, 000480, 000482-83, 000485-88, 000490, 000492 and 000493).
Exhibit B	Psychiatric Consultant's Note/Treatment Plan from March 31, 2003 until February 28, 2006. (Bates nos. 000474, 000476,000479, 000481, 000484, 000489 and 000491)

Exhibit C — Psychotropic Medication Consent Forms dated March 30, 2004 signed by Mr. Dunlap informing him about Prozac, Congentin, Haldol and Tegretol. (Bates nos. 000494-97).

Exhibit D — Physician's Orders dated March 31, 2003 through March 7, 2006. (Bates nos. 468-73).

12. Prior to July 1, 2003 state law required Mr. Dunlap to be housed in solitary confinement because he was subject to a death sentence.

13. With the exception of a one-day stay in the medical unit, from January 2002 until July 3, 2003 Dunlap was housed on tier 1 of C-Block.

14. This housing was appropriate because in my opinion Mr. Dunlap has mental health issues and C-1 is part of the mental health unit, even though it was a restrictive housing tier.

15. During much of the time between 2002 and February 2005 Mr. Dunlap was prescribed a number of psychotropic medications including Thorazine, Haldol, Tegretol, Prozac and Cogentin. A description of potential benefits and potential side effects of these medications is contained in Exhibit D.

16. Haldol was the principal medication prescribed to Mr. Dunlap. Haldol reduces the preoccupation with troublesome and reoccurring thoughts, and helps reduce unusual experiences such as hearing and seeing things not normally seen or heard.

Mr. Dunlap was not always medication compliant, refusing to attend the mental health clinic so that the effects of the medication could be evaluated.

17. On May 27, 2002 Dr. Khatain, the psychiatrist contracted with IMSI, discontinued Mr. Dunlop's prescription for Haldol and Cogentin. (Ex. D, Bates no. 000473).

18. According to the medical record I spoke with Dunlap at an Ad-Seg hearing conducted on September 4, 2002. During this meeting he seemed to be lucid with good retention of thoughts. He told me that he wanted out of Ad. Seg. because his death sentence had been overturned. (Ex. A, Bates no. 00467).

19. At that time I had no independent knowledge if, in fact, his death sentence had been overturned.

20. I asked him about delusional beliefs he'd previously exhibited to staff about "Area 51" and the government placing a microphone in his cell to spy on him. He replied that he made it all up to convince staff he was mentally ill. (Ex. A, Bates no. 00467). At this time I noted that Dunlap was not taking any medications but did not appear to be decompensating at all.

21. Shortly thereafter, in January 2003, Mr. Dunlap's psychotic symptoms returned becoming more and more pronounced and growing steadily worse. He was becoming increasingly more paranoid and delusional. (Ex. A, Bates no. 00493).

During this time his hygiene was poor and at one point his property was removed from his cell secondary to him defecating in his sink and other unsanitary conditions in his cell. (Ex. A, Bates no. 00493, entry dated 3-26-03).

22. On March 31, 2003 Dunlap agreed to see Dr. Khatain. Dr. Khatain dictated in his notes that Dunlap "was willing to take a shot of Haldol Decanoate per staff's encouragement a few days back." Dr. Khatain noted that Dunlap has already begun to improve and he renewed Dunlap's prescriptions for Haldol, Cogentin, Propranolol and Tegretol. (Ex. B, Bates no. 00491).

23. Dunlap's medical record reflects that in April and May he was doing well with his renewed medications. He was less hostile, less threatening, his hygiene was improved and his delusional thinking was gone. (Ex. A, Bates no. 00490, entries dated 4-25-03 and 5-14-03).

24, On July 3, 2003, at my direction, Dunlap was transferred to C-Block, Tier 3. I noted in the record that I believed he was off death row and medication compliant. I noted that he requested to be able to come out of his cell and that he would be on a level two until staff was comfortable with him being out with other inmates.

25. There are four status levels of housing on Tier 3.

Level one is rarely used and consists of an inmate not being allowed out of his cell unless two staff members are present, his legs are restrained with leg irons and his arms are restrained behind the back with handcuffs.

A level two inmate may leave his cell if his arms are restrained behind his back with handcuffs and at least one staff member is present.

A level three inmate may leave his cell and be in the presence of other inmates unrestrained provided a staff member is present.

Finally, a level four status requires operational memorandums outlining special housing considerations. For example, someone who is civilly committed to the Idaho Security Medical Facility would be a level four.

The purpose of this level system is to allow staff to supervise and evaluate each offender in the Idaho Security Medical Facility and safely and gradually move him to the least restrictive conditions of confinement appropriate.

26. Dunlap adapted remarkably well on tier 3. As noted above, he was moved to tier 3 on July 3, 2003. By July 14, 2003 he was allowed in the dayroom for one hour without restraints. (Ex. A, Bates no. 00490, entry dated 7-14-03).

27. Dunlap continued to adapt well during the next few weeks with one entry in his record stating, "He seems to be dealing with re-integrating into an open dayroom prison setting with few or any difficulties" (Ex. A, Bates no. 00498, entry dated 8-01-03).

28 Dunlap was moved to Tier 2 of C-Block on August 12, 2003. On that date I entered the following notation in his medical record. "Inmate has continued to do well off a level. Therefore, he is cleared to move to C-2. He has been eagerly awaiting the move and he plans on moving into general population and getting a job someday. No reports of hallucinations or delusions or any threats toward staff. He appears to have stabilized and is not a current threat. He will be monitored on C-2 closely since this is the first time he has had a roommate in over 15 years. He requested his current roommate since they had gotten along well together while living on C-3. (Ex. A, Bates no. 00488, entry dated 8-12-03).

29. Initially, Dunlap seemed to adjust well to C-2. However, an entry in his record dated October 2, 2003 noted that he was decompensating. He was becoming more isolative and not participating in outdoor exercise on the ballfield or other recreation activities in the dayroom. He only came out of his cell into the day room to use the phone and then returned to his cell. In addition his hygiene was becoming offensive and he was instructed to shower. (Ex. A, Bates no. 00486, entry dated 10-2-03).

30. Between October 2 and December 3, 2003 Dunlap's demeanor improved.

31. On December 3, 2003, an entry in the record indicated the following: that Dunlap started a new job; he had been waiting for the job for two months and; two days later he quit. The reason he gave was that he learned that the state was still going to pursue the death penalty against him. (Ex. A, Bates no. 000485, entry dated 12-3-03).

32. On January 22, 2004, staff noted that once again Dunlap was becoming more isolated and his hygiene was marginal. (Ex. A, Bates no. 000485, entry dated 1-22-03).

33. Between January 22, 2004 and his transfer to county jail for re-sentencing on his first-degree murder charge on February 26, 2005, Dunlap continued to do relatively well on C-2. In general his behavior was appropriate. He continued to be medication compliant, although he attended mental health clinic only sporadically. He continued to exhibit isolative behavior, but would interact with staff and other inmates when approached.

34. I am aware that Dunlap regularly requested to be placed in the general prison population during the time he was housed in C-2. It is my opinion that he was housed appropriately at all times during his term at IMSI.

35. Prior to July 1, 2003 Mr. Dunlap was housed in "solitary confinement" restrictive housing as mandated by state law. Much of that time he was housed on C-1 in close proximity to mental health staff.

36. Within three days of the effective date of the amendment to Idaho Code § 19-2705, Mr. Dunlap was moved to the mental health unit where he began the transition into less restrictive housing.

37. He rapidly progressed through the stages in C-3 and was placed in C-2 a little over a month after being released from solitary confinement.

38. With the exception of one day, he remained on C-2 from August 12, 2003 until February 26, 2005. While on C-2 his behavior was generally appropriate, although he would often isolate himself and refuse to socialize with the other offenders housed on the tier. He was medication compliant, but often refused to attend mental health clinic so that his medications could be effectively monitored. Although he often requested to be placed in the general prison population, it is my opinion that C-2 was the more appropriate housing for Mr. Dunlap because his behavior never fully stabilized to the point where prison administration could be comfortable housing him in general population.

39. Further your affiant sayeth naught.

DATED this 29th day of March, 2006.

Chad Sombke, Ph.D.
DR. CHAD SOMBKE

SUBSCRIBED AND SWORN To before me this 29th day of March, 2006.

NOTARY PUBLIC FOR IDAHO
COMMISSION EXPIRES: 8-21-09

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of March, 2006, I mailed a true and correct copy of the forgoing AFFIDAVIT OF DR. CHAD SOMBKE to the following:

TIMOTHY DUNLAP, No. 35385
IMSI
P.O. Box 51
Boise, Idaho 83707,

via the prison mail system.

William M. Loomis

WILLIAM M. LOOMIS

Idaho Department of Correction

DATE & TIME	INTERDISCIPLINARY PROGRESS NOTES
3/28/02 1515	PA & Lat CXR & AP Apical lordotic view done.
	Report due 4/1/02. Weight 159 lbs. S. Dunn, RN
040802	Pt refused to attend MHC by Dr. Khatain. Will
1724	reschedule before medications expire. D. Patchett
050802	Pt refused to attend MHC. Will notify pt
1800	that if he does not attend the next scheduled
	appointment that medications will be
	discontinued. D. Patchett RN
	Conan [signature]
~~5-2[illegible]~~	~~Seen in MHC by Dr. Khatain: Dr. Khatain~~ Error [signature]
5-22-02	Pt Refused to Attend MHC. Meds DC'ed by Dr. Khatain [signature]
6:30 PM	Conan; see orders [signature]
9/4/02	Spoke with inmate during an ad. seg. hearing. He appeared clean
1041	and appropriate. He was asking to be let out of ad. seg. because his
	death sentence was overturned. I asked him about his previous
	delusional beliefs about area 51 and the Government having microphones
	etc in his cell spying on him. He smiled and said he made it all
	up in order to get people to believe he was mentally ill. He continued to
	say that his past behavior was all purposeful and due to him being
	on death row. "I've always said this was all due to my sentence and
	once I got off I'd change." Since his death sentence has been changed
	he has changed dramatically. He has not acted inappropriately or
	made verbal threats since. He has stopped taking his meds but has
	not decompensated in any manner. He is lucid with goal directed thoughts.
	Will continue to monitor in CL. [signature], Ph.D.

NAME: Dunlap | LOC: | IDOC #: 35385

ALLERGIES: PCN

EXHIBIT A 000467

ED-011 (Rev. 01/02)

Idaho Department of Correction

DATE & TIME | INTERDISCIPLINARY PROGRESS NOTES

12-18-02 **DET SEG RECORD REVIEW**

Pt. Seen in MHC By Dr. Khatain
Dictation # ____

02/04/03 I/m refused to attend Clinic tonight "I can be bothered."

01/28/03 4/5 1149 I/m Dunlap seems to be decompensating on Cx1. His hygiene is growing steadily worse. He is no longer conversational c staff. He is spending T time in bed and T all time c all lights off. Cont. to monitor

02/24/03 4/5 1302 I/m Dunlap continues to be symptomatic of ↑ probs. c his thought disorder. His hygiene cont. to decline and he is no longer willing to speak to this staff member. Cont to monitor.

03/26/03 4/5 1305 I/m cont c ↑ problems on Cx1. Cont. to refuse 80% of medications increasingly paranoid and delusional. Hygiene is poor and property was removed from the I/m's cell 2° to him defecating in his sink and other unsanitary conditions in the cell. Cont to monitor

NAME: Dunlap 35385 | LOC: | IDOC #:

ALLERGIES:

IDOC (Rev 01/01)

000493

Idaho Department of Correction

DATE & TIME | **INTERDISCIPLINARY PROGRESS NOTES**

3/31/03 7:39 PM — Pt. Seen In MHC By Dr. Khatain. Dictation # 24626

4/16/03 4:50pm — Psychiatric Consultant [illegible] Note
SO - Per staff, the pt requested to be put back on an antidepressant. They also report that he has seemed more depressed and that the request is valid.
A/P - Start actual of Prozac 20mg (discussion on SSRI's in the past.)
- RTC as previously scheduled and discuss Klonopin and other issues, as needed.

5/1/03 2:12pm 4/5 — I/m doing well on current meds ↓ in all Sx - less hostile, threatening, ↓ delusional material. More appropriate & ↑ hygiene. Cont to monitor and encourage med compliance

5/14/03 10:05 #4/5 — I/m Cont to show marked improvement since his meds have been re-started. ↓ Delusional Thinking, ↓ paranoia ~~[illegible]~~ verbalized at this time. Will Cont to monitor & encourage Cont. med compliance

NAME: Dunlap 35385 | LOC: | IDOC #:

ALLERGIES:

ED-011 (Rev 01/01)

Idaho Department of Correction

DATE & TIME	INTERDISCIPLINARY PROGRESS NOTES
051903 1730	Pt. Seen in MHC By Dr. Khatain. Dictation # 250347.
	LAP DR.
5-21-03	
062503 1900	Pt refused to attend MHC tonight. Meds renewed scheduled for 3 month follow up per dr. Khatains orders. Hatchett RN
7/3/03 1101 #4	Inmate has been doing well and is asking to come out of his cell. He is off Deathrow and is medication compliant; "No threats to staff lately. I will do whatever it takes to get out of my cell." He will be on a level 2 until staff are comfortable with him coming out with other inmates. Chad Smith, PhD.
7/14/03 0920-#4	Inmate continues to be appropriate and cooperative. Treatment team decided he was safe to take him out of his cell on a level 4. He will be allowed in the day room of housing from 1210-1330 hr. He will also be allowed out of his cell unrestrained. If he does well he will be moved to level 3 and be allowed to interact with other inmates. Chad Smith, PhD
07/22/03	I/m cont to do very well on L-3. Currently a level 3 and seems to be adjusting well to social interaction with staff and peers. Profile is appropriate. Cont to monitor.

NAME: Thurkey 35385 LOC: IDOC #:

ALLERGIES:

MED-011 (Rev. 01/02)

000490

Idaho Department of Correction

DATE & TIME	INTERDISCIPLINARY PROGRESS NOTES
08/01/03 1510 #4/5	I/m Dunlap cont to do remarkably well on C3. He seems to be dealing w/ re-integrating into an open dayroom prison setting ō few if any difficulties. Hygiene compliant and appropriate ō staff and peers.
08/08/03 1530 #4/5	I/m cont to do very well on C3. Considering him for a move to C-2 next week. He is generally quiet ō a blunted affect but responds well to conversation and answers appropriately. Able to make his needs known. Hygiene compliant. Cont. to monitor. [illegible signature]
8/12/03 1326 #5	Inmate has continued to do well on C3 off a level. Therefore, he was cleared to move to C2. He has been eagerly awaiting the move and his plans on moving into general population and getting a job someday. No reports of hallucinations or delusions or any threats towards staff. He appears to have stabilized + is not a current threat. He will be monitored on C2 closely since this is the first time he has had a roommate in over 15 years. He requested his current roommate, since they had gotten along well together while living on C3. [illegible signature], PhD

NAME: Dunlap 35385 **LOC:** C-3-58 **IDOC #:** 35385

ALLERGIES: PCN

Idaho Department of Correction

DATE & TIME	INTERDISCIPLINARY PROGRESS NOTES
08-22-03	I/m doing well on C-2. Requests info about obtaining work. Interacting appropriately w peers & seems to be successfully adjusting to his new socialization. Cont to monitor. PTC
090503 1324	PT WAS WARNED BY DR. JENNINGS & SGT. GREEN THAT HE WOULD BE DENIED FUTURE EMPLOYMENT IF HE KEPT ASKING. THE I/M WAS TOLD THAT HE NEED TO ADJUST TO BEING OUT & OTHER I/M'S FOR 30 TO 45 + DAYS AND THEN REMOVE CELL CLEANING / COFFEE MESS ON TABLE & WALLS + FOOD IS AN ISSUE - SGT. GREEN ASKED THAT I/M PERHAPS KEEP HIS AREA TIDY OR HE MAY RETURN TO TIER-1. No NEW BEHAVIORS. EOC PTC RAMOS.
091003 1820	Pt. refused to attend Mental Health Clinic tonight c Dr. Khetarpal. Orders written and pt rescheduled for 3 months. Ketchum PA
04-20-03 #415 1400	I/m cont to do well on C-2. Has been redirected about some hygiene issues & is showing an effort to improve same. Cont to encourage pro-social b/c. PDT

NAME: Dunlap LOC: C-2 IDOC#: 35385

ALLERGIES: PCN

000487

ED-011 (Rev. 6/02)

Idaho Department of Correction

DATE & TIME	INTERDISCIPLINARY PROGRESS NOTES
[redacted]	PT is becoming more isolative, not participating in ballfield or recreation anymore. Comes out for dayroom to use the phone and return to his cell. PT's hygiene is becoming offensive and PT was told he needed to shower. Continue to monitor. PTC [signature]
10-18-03 1620	I/m cont to do fairly well on C-2. Hygiene is improved & he purchased a new pair of sweat pants to replace his dirty/tatte ones. Recieved 2 visits from his parents this weekend. These went well & he was exited to see them. Cont. to monitor. [signature] PTC
110503 1150	PT CONTINUES TO DO WELL, WAITING FOR EMPLOY OUT SIDE OF THE UNIT. NO ISSUES or CONCERNS AT THIS TIME. SGT. PTC RAMOS
11-13-03	PT IS THE SAME AS BEFORE - WAITING FOR A JOB BUT IS DOING FINE. [signature] PTC [signature]
11-21-03	Physical exam
	PE - SEE FORM

AGE:

HT: WT:

T: 97.5 P: 84 R: 20

B/P 120/82

J SAMUELSON, PAC NOV 21 2003

NAME: Dunlap 35385 LOC: IDOC#:

ALLERGIES:

PCN

(ED-011 Rev. 01/02)

000486

141a

Idaho Department of Correction

DATE & TIME	INTERDISCIPLINARY PROGRESS NOTES
11-24-03 0930	LAB DRAWN [signature]
12-01-03 1725	Pt refused to attend Mental health Clinic c̄ Dr. Khatain. Will schedule for 12-8 and talk c̄ pt regarding importance of attending Mental health Clinic to continue meds. Patchett RN
120303	LAB DRAWN [signature]
12-08-03 1200	I/M started a new job in the kitchen that he had been waiting for, for a couple months. Quit after (2) days, stated it was because he found out the state was still going to pursue the death penalty. Otherwise he has displayed no other changes. PTC [signature]
120803 600pm	Pt. Seen In MHC By Dr. Khatain. Dictation # 267403 [signature]
122203 1259	I/M HAS BEEN QUIET SINCE RECIEVING HIS INDIGENT X-MASS PACKAGE. NO OUTBURST TO NOTE. WILL CONTINUE TO MONITOR. PTC Ramos [signature]
01-22-04 1110#4/5	I/m Dunlap has been more isolative recently. Cont to be med compliant. Hygiene is marginal. Cont to monitor and encourage ↑ interaction. [signature]

NAME: Dunlap 35385 LOC: IDOC#:

ALLERGIES: Penicillin

MED-011 (Rev. 01/03)

000485

Idaho Department of Correction

DATE & TIME	INTERDISCIPLINARY PROGRESS NOTES
02-10-04 0848	PT Remains isolative. Does seem to be in a good mood. Just does not want to socialize with others on the tier. Appropriate with staff. Has no problems or concerns. [signature] PTC
	SICK CALL See Medical Health Request # 178329 Date 3-3-04 Initial ®
030304 1951	Pt. refused to attend mental health clinic again tonight. Will have Dr. Sombke talk c̄ pt re: attending clinic. Medications renewed - pt must follow-up in 4 weeks or medications may be discontinued. Rescheduled for 3/31. [signature] Batchett [signature] [signature] 3/4/04
030404 1118	Spoke c̄ pt this am as to why he did not attend mental health clinic last night. Reports that he was, "having trouble with my hemorrhoids." Told pt that he was scheduled in 4 weeks and that he must attend that clinic. Pt agreed to attend. [signature] Batchett PTC
03/04/04 1715 #4	I/ms Dunlap cont to maintain well on current meds on C-2. He is somewhat isolative and his hygiene remains marginal. Cont. to monitor. [signature]

NAME: Dunlap 35386 LOC: IDOC#:

ALLERGIES:

Penecillin

MED-011 (Rev. 01/03)

000483

Idaho Department of Correction

DATE & TIME	INTERDISCIPLINARY PROGRESS NOTES
03/17/04 #415 1935	I/m Dunlap cont. c̄ ⊖ probs on C-2. While he is isolative @ times he is appropriate and pleasant during conversations c̄ peers and staff. Cont. to monitor [signature]
033004 7:55pm	Pt. Seen In MHC By Dr. Khatain. Dictation # 260895 [signature]
04-08-04 #415 1458	I/m Dunlap cont c̄ ⊖ probs on C-2. He is stable on his current meds. Still requests to be moved to general population. Cont. to monitor [signature]
04-23-04 1422	I/m Dunlap cont to do well on C-2. Isolative @ times and hesitant in his interactions. He remains appropriate. Cont. to monitor [signature]
05/12/04 1026	I/m Dunlap cont. c̄ ⊖ probs on C-2. He remains stable on current meds. Cont. to monitor [signature]

NAME: Dunlap 35385	LOC:	IDOC #:

ALLERGIES:

Penicillin

000482

4ED-011 (Rev. 01/03)

Idaho Department of Correction

DATE & TIME | **INTERDISCIPLINARY PROGRESS NOTES**

06/01/04 545PM — Pt. Seen In MHC By Dr. Khatain. Dictation #2[illegible]

07-13-04 Dunlap cont to do quite well on C-2. Hygiene is fair. Interacts to a limited degree w staff/peers but is appropriate.

KRISTY BECKER, PSYCH. TECH.
EARL CALLAHAN, C.M.S.

7-29-04 LAB DRAW COMPLETE

08/06/04 Im Dunlap cont. to do well on C-7. Appropriate and participatory. Cont. to monitor.

08/23/04 Im Dunlap cont to do quite well on C-2. Isolative @ times but interacts well if initiated by staff/peers. Cont to monitor.

082404 1755 Pt refused to attend mental health clinic tonight. Will renew his medications and reschedule as orders. JOCELYN PATCHETT, PSYC

08/26/04 Im Dunlap cont c groos on C-2. Has had a cell mate x 1 week & seems to be adjusting well to that A. Cont to monitor. KristyBecker PTC

NAME: Dunlap 35386 LOC: IDOC #:

ALLERGIES:

Penicillin

MED-011 (Rev. 01/03)

000480

Idaho Department of Correction

DATE & TIME	INTERDISCIPLINARY PROGRESS NOTES
10-21-04	(late entry for 10-14-04) I/m Dunlap cont. c̄ little Δ on C-2. Seems to be doing well both c̄ having a cell-mate. Will cont. to monitor. [signature] KRISTY BECKER, PSYCH. TECH
10-31-04	I/m Dunlap cont to do quite well on C-2. Interacts appropriately c̄ staff & peers. Will cont. to monitor. [signature] KRISTY BECKER, PSYCH. TECH.
110904 1819	Pt refused to attend mental health clinic tonight. Will renew medications and see pt cellside on 12-1-04. Jocelyn Patchett PTC [signature] JOCELYN PATCHETT, PSYCH TECH [signature] KENNETH KHATAIN, MD 11/9/04
12/01/04 520pm	Psychiatric Consultant's Staffing Note. (S/O) – I am opting to not see this pt cell-side tonight. He's refusing to attend clinic on a regular basis and seeing him cell-side will only re-inforce this behavior. (A/P) – Meds will be continued for now – Treatment Team will discuss options for trying to appropriately encourage clinic attendance. [signature] KENNETH [illegible] MD

NAME: Dunlap 35385

ALLERGIES: PCN

000478

MED-011 (Rev. 01/03)

Idaho Department of Correction

DATE & TIME	INTERDISCIPLINARY PROGRESS NOTES
1/4/2005 5:30pm	~~Pt. Seen In MHC By Dr. Khatain.~~ #1960 JOCELYN PATCHETT, PSYCH. TECH. Dictation # 283477. KENNETH KHATAIN, MD
JAN-10-05 1035	Pt stated that his thorazine was stopped & that he notices no changes. Pt mentioned that he is being resentenced this March/April in Caribou county - Eastern Idaho. Tim is excited about moving to the yard (Mental Health) & stated that he wants to work at C.I. & to make steins in pottery class. Pt had positive attitude, good eye contact & good oriented. Pt stated that he has no other issues or concerns at this time. ANTHONY RAMOS, PSYCH. TECH.
020105 0943	Pt continues to do well on tier & medication complia[illegible] No new issues or concerns for Medical or mental health. Tim skips breakfast usually but has no weight loss issues. [illegible] ANTHONY RAMOS, PSYCH. TECH.
02 15 05 0840	same as above with no changes to note. Staff will continue to monitor. ANTHONY RAMOS, PSYCH. TECH.
03 02 05 0945	Pt was transfered to Court for resentencin[g] no contact at this point. [illegible] ANTHONY RAMOS, PSYCH. TE
022306 1600	Pt returned from county today. He reports that court did not go well for him. He states he was there for re-sentencing and again has been sentenced to death. He will be held in medical until appropriate housing @ IMSI is found. He currently appears stable c̄ current medications. Denies SI/HI. F/U in MHC. J Patchett PT

NAME: Dunlap 33385	LOC:	IDOC #:

ALLERGIES:

PCN

Idaho Department of Correction

DATE & TIME | **INTERDISCIPLINARY PROGRESS NOTES**

DATE & TIME	INTERDISCIPLINARY PROGRESS NOTES
2/23/06 2300	Dunlap is being housed in medical cell #3. He took his meds and had 0 medical complaints. Bmull
2/24/06 2315	Dunlap has been quiet all shift. He took his meds & incident. Bmull — BETH MULLIN, CMS
022706 0600	I/M Dunlap still residing MC #3; took meds & complaint; wants to know when he's leaving medical
022706 1010	Dunlap is very anxious to get placed in permanent Housing. Indicated that he was told there was an empty bed on C-2. Says he got suicidal when left in cell 3 for an extended time when he was last here. Appears Calm & in control at this time. Wants to get his housing one so he can get his property & move ASAP. In Gym clinic
2-27-06 1415	I'm Continues In Medical not for housing No medical Complaints
2/27/06 1530	Dunlap was released to C-Block. Bmull
2-28-06 500pm	Pt. Seen in MHC By Dr. Khatain. Dictation # 118435 — KENNETH KHATAIN, MD

NAME: Dunlap | LOC: | IDOC #: 35385

ALLERGIES: PCN

000475

IED-011 (Rev. 01/02)

PSYCHIATRIC CONSULTANT'S NOTE/TREATMENT PLAN:

Date: 03/31/03 Time: 07:30 p.m.

S: Patient's Name: Timothy Dunlap IDOC#/DOB: 35385

Psychiatric Issues: He was willing to take a shot of Haldol Decanoate per staff's encouragement a few days back. This was secondary to his psychotic symptoms becoming significantly more noticeable and worse. He has already begun to improve. The patient had very little insight into how he was doing prior to getting the shot but agreed that it was in his best interest to be back on the Haldol Decanoate shot 100 mg every two weeks. He has some modest dystonic symptoms and therefore will be placed back on Cogentin with p.r.n. available. He also tends to have some mild akithisia and was informed that he can request Propranolol as he had before. The patient requested unsolicited to be started back on Tegretol as he thought that helped. He described it helping with some muscle twitches but also seemed to be more emotionally stable when on the medication. He denied having any troublesome side effects from that that he could recall.

O: Mental Status Exam:

Appearance, Attitude, and Behavior: He was pleasant and cooperative with intermittent eye contact.

Thought Processes: Generally linear, logical, goal directed, although he was slow to respond at times.

Affect: He appeared relatively euthymic. He remained appropriate and his range was flat.

Suicidal/Homicidal Ideation: Denied both.

Thought Content: Denied any active psychotic symptoms but did appear at times to have to stop and seemed to be responding to some internal cues at times.

Cognition: He was alert and oriented to person, place and time and did not appear overmedicated.

A: See previous notes.

P: Orders/Interventions:

1. Haldol Decanoate 100 mg IM q. two weeks.
2. Cogentin 1 mg b.i.d.
3. Cogentin 1-2 mg b.i.d. p.r.n. breakthrough dystonia.
4. Propranolol 10-20 mg b.i.d. p.r.n. akithisia.
5. Tegretol 200 mg a.m. and 300 mg h.s.
6. Return to clinic in about six weeks or sooner p.r.n.

K. G. [illegible]in, M.D.

KGK/MT3

Date reviewed/signed: 4/7/03

EXHIBIT B

000491

PSYCHIATRIC CONSULTANT'S NOTE/TREATMENT PLAN

DATE: 05/19/03 **TIME:** 5:30 p.m.

S: **PATIENT'S NAME:** Timothy Dunlap **IDOC#/DOB:** 35385

Psychiatric Issues: He was here for a six week follow up. He reports that he is doing reasonably well on the current medications. Staff also feels that he is doing okay. He reported that he is finding himself getting more irritable and aggressive and felt that was better controlled when he was on low dose Thorazine. He was requesting to get back on that if possible. He denied other problems with the medications.

O: **Laboratory Data:** His last screening labs were over two years ago. Discussed labs with the patient and he agreed to a blood draw for routine screening labs.

Mental Status Exam:

Appearance, Attitude and Behavior: He was pleasant and cooperative with reasonable eye contact.

Thought Processes: Linear, logical and goal directed and at a normal rate.

Affect: Relatively euthymic, he remained appropriate and his range was flat.

Suicidal/Homicidal Ideation: Denied both.

Thought Content: Denied active psychotic symptoms.

Cognition: He was alert and oriented to person, place and time.

A: See previous notes.

P: **Orders/Interventions:**

1. Start Thorazine 25 mg b.i.d.
2. Continue other medications as written.
3. Labs: Tegretol/CBC/CMP/TSH.
4. Return to clinic in about six weeks or sooner p.r.n.

K. [redacted]natain, M.D.

KGK/MT18

Date reviewed/signed: 5/24/03

PSYCHIATRIC CONSULTANT'S NOTE/TREATMENT PLAN:

Date: 12/08/03 Time: 06:00 p.m.

S: Patient's Name: Timothy Dunlap IDOC#/DOB: 35385

Psychiatric Issues: He had not been seen since 05/19/03. The patient does not like coming to Medical but understands that he needs to do this about every three months in order to keep the medications going. He stated understanding of that this evening. He feels that he is doing well on the current medications without bothersome side effects and wants to remain on them. He specifically denied feeling overmedicated or drugged. He feels that the medications keep his moods from cycling, keep him from getting in trouble, and also reduce some of his previous psychotic symptoms.

O: Mental Status Exam:

Appearance, Attitude, and Behavior: He was pleasant and cooperative with reasonable eye contact.

Thought Processes: Linear, logical, goal directed, and at a normal rate.

Affect: Relatively euthymic. He remained appropriate and his range was flat.

Suicidal/Homicidal Ideation: Denied both.

Thought Content: Denied active psychotic symptoms.

Cognition: He was alert and oriented to person, place and time and did not appear overmedicated or oversedated.

A: See previous notes.

P: Orders/Interventions: Renew the following:

1. Cogentin 1 mg b.i.d.
2. Prozac 20 mg q.a.m.
3. Tegretol 200 a.m. and 300 h.s.
4. Thorazine 25 b.i.d.
5. Haldol Decanoate 100 mg IM q. two weeks.
6. Return to clinic in about three months or sooner p.r.n.

K. G. Matain, M.D.

KGK/MT3

Date reviewed/signed: 12/10/03

000484

PSYCHIATRIC CONSULTANT'S NOTE/TREATMENT PLAN:

Date: 03/30/04 Time: 076:55 p.m.

S: Patient's Name: Timothy Dunlap IDOC#/DOB: 35385
Psychiatric Issues: He is here for a little bit more than a three month follow-up. The last visit he declined to attend secondary to getting a phone call. He reported that he has continued to do well on the medication without bothersome side effects. He described his mood as stable and he denied any current or active psychotic symptoms such as voices, etc.

O: Laboratory Data: Laboratory data of 12/03/03, had not been previously reviewed. On review this evening, his white blood cell count is almost normal. His previous normal white count at 4.1 was at 5.103. His white count of 12/03/03, was 3.9. (This is so close to normal that it is not statistically significant or concerning). Thyroid studies were within normal limits and his Tegretol level was 6.1.
Mental Status Exam:
Appearance, Attitude, and Behavior: He was pleasant and cooperative with reasonable eye contact.
Thought Processes: Linear, logical, goal directed, and at a normal rate.
Affect: Euthymic. He remained appropriate and his range was flat.
Suicidal/Homicidal Ideation: Denied both.
Thought Content: Denied current, active psychotic symptoms.
Cognition: He was alert and oriented and did not appear overmedicated or confused.

A: See previous notes.

P: Orders/Interventions:
1. Continue current meds as written.
2. Return to the clinic in about nine weeks or sooner p.r.n.

K. G. Khatain, M.D.

KGK/MT1

Date reviewed/signed: 3/31/04

000481

PSYCHIATRIC CONSULTANT'S NOTE/TREATMENT PLAN:

Date: 06/01/04 Time: 5:45 p.m.

S: Patient's Name: Timothy Dunlap IDOC#/DOB: 35385

Psychiatric Issues: He is here for nine week follow up. He reports that he has continued to do well on the current medications. He denied feeling over-medicated or confused from the meds. He also denied any breakthrough dystonic symptoms or other bothersome side effects. At this point he feels that he is doing reasonably well and wants to remain on the meds at the current doses.

O: Mental Status Exam:

Appearance, Attitude, and Behavior: He was pleasant and cooperative with reasonable eye contact.

Thought Processes: Linear, logical, goal directed and at a normal rate.

Affect: Relatively euthymic, remained appropriate, and his range was flat.

Suicidal/Homicidal Ideation: Denied both.

Thought Content: Denied active psychotic symptoms.

Cognition: He was alert and oriented and did not appear over medicated or confused.

A: See previous notes.

P: Orders/Interventions:

1. Renew the following: Cogentin 1 mg b.i.d.
2. Tegretol 200 a.m., 300 h.s.
3. Prozac 20 mg a.m.
4. Thorazine 25 mg b.i.d.
5. Haldol Decanoate 100 mg IM q two weeks.
6. Return to clinic in about three months or sooner p.r.n.

K. G. Khatain, M.D.

KGK/MT1

Date reviewed/signed: 6/2/04

000479

PSYCHIATRIC CONSULTANT'S NOTE/TREATMENT PLAN:

Date: 01/04/05 Time: 05:30 p.m.

S: Patient's Name: Timothy Dunlap IDOC#/DOB: ~~[illegible]~~ 35385

Psychiatric Issues: He was last seen in June. He since missed a couple of clinics since he does not like coming down to clinic per his report. He understands that we need to see him every so often to maintain his medications. He denied any new or bothersome side effects from the medications but was requesting that the relatively low dose of Thorazine be stopped since he is on a significant amount of Haldol. (This seemed to be a reasonable request and I stopped it as noted below.)

O: Laboratory Data: Labs of 07/29/04 previously staffed. Discussed labs with the patient.

Mental Status Exam:

Appearance, Attitude, and Behavior: He was pleasant and cooperative with reasonable eye contact.

Thought Processes: Linear, logical, goal directed, and at a normal rate.

Affect: Euthymic. He remained appropriate and his range was flat.

Suicidal/Homicidal Ideation: Denied both.

Thought Content: Denied active psychotic symptoms.

Cognition: He was alert and oriented and did not appear overmedicated or confused.

A: Axis I: As per previous notes: Schizoaffective disorder.

P: Orders/Interventions: Renew the following:

1. Cogentin 1 mg b.i.d.
2. Tegretol 200 a.m. and 300 h.s.
3. Prozac 20 a.m.
4. Haldol Decanoate 100 mg IM q. two weeks.
5. Discontinue Thorazine
6. Return to clinic in about three months or sooner p.r.n.

K. G[illegible]hatain, M.D.

KGK/MT3

Date reviewed/signed: 1/5/05

000476

IMSI
PSYCHIATRIC CONSULTANT'S NOTE/TREATMENT PLAN:

Date: 02/28/06 Time: 05:00 p.m.

S: Patient's Name: Timothy Dunlap IDOC#/DOB: 35385
Psychiatric Issues: He was recently returned to IMSI. He was continued on the medications that he was on in January of 2005 with the exception of not being restarted on the Haldol Decanoate and was on Klonopin 1 mg b.i.d. for ten days as of 02/23/06. The patient feels that he is doing reasonably well with the medication but recognized that he needs to be on the Haldol Decanoate shot. He has some modest psychotic symptoms but understands it will likely get worse without the medication. He is not having any bothersome side effects from the medications. He was left on Cogentin, although not on an antipsychotic. He did require that when on the Haldol and therefore it will be continued.

O: Mental Status Exam:
Appearance, Attitude, and Behavior: He was pleasant and cooperative with reasonable eye contact.
Thought Processes: Linear, logical, goal directed, and at a normal rate.
Affect: Relatively euthymic. He remained appropriate and his range was flat.
Suicidal/Homicidal Ideation: Denied both.
Thought Content: Some modest symptoms. Denied voices or commands.
Cognition: He was alert and oriented. He did not appear overmedicated or confused.

A: Axis I: Schizoaffective disorder - partially treated with current medications.

P: Orders/Interventions:
1. Discontinue Klonopin when current order expires.
2. Renew Prosac 20 mg q.a.m.
3. Renew Tegretol 200 mg a.m. and 300 mg h.s.
4. Renew Cogentin 1 mg b.i.d.
5. Start Haldol Decanoate 100 mg IM q. two weeks.
6. Return to clinic in about six weeks or sooner p.r.n. The patient agreed with this plan.

K. G. Khatain, M.D.

KGK/MT3

Date reviewed/signed 3/1/06

PSYCHOTROPIC MEDICATION CONSENT FORM

I, T. Dunlap, IDOC# 35385, agree to treatment with the following medications in the dosage recommended to me by the physician.

Prozac

I have been made aware that the following are benefits which may occur through taking these medications:
decreased Depression, decreased anxiety, relief from obsessive compulsive disorder

I have been made aware that possible side effects of taking these medications may be:
headache, anxiety, dizziness, fatigue, sedation, sexual dysfunction, nausea

I voluntarily agree to take the medication(s) listed above as prescribed by the physician. I understand that this permission may e revoked at my discretion. I have had an opportunity to ask questions I wished to ask.

Physician's Signature

x
Patient's Signature

3-30-04
Date

J. Patchett PA
Witness

I have been advised to take the medication(s) listed above, but I am unwilling to take the medication as recommended. The possible consequences of not taking the medication have been explained to me. Specifically:

Physician's Signature

Patient's Signature

EXHIBIT C

000494

PSYCHOTROPIC MEDICATION CONSENT FORM

I, T. Dunlap, IDOC# 35385, agree to treatment with the following medications in the dosage recommended to me by the physician.

Cogentin

I have been made aware that the following are benefits which may occur through taking these medications:

help reduce unpleasant side effects of some antipsychotic medication by reducing involuntary muscle spasms; tremors and stiffness.

I have been made aware that possible side effects of taking these medications may be:
drowsiness, dry mouth, blurry vision, restlessness, confusion,nervousness, difficulty urinating, dizziness.

I voluntarily agree to take the medication(s) listd above as prescribed by the physician. I understand that this permission may e revoked at my discretion. I have had an opportunity to ask questions I wished to ask.

Physician's Signature — Patient's Signature

3-30-04 — J. Patchett RC

Date — Witness

I have been advised to take the medication(s) listed above, but I am unwilling to take the medication as recommended. The possible consequences of not taking the medication have been explained to me. Specifically:

Physician's Signature — Patient's Signature

000495

PSYCHOTROPIC MEDICATION CONSENT FORM

I, T. Dunlap, IDOC# 35385, agree to treatment with the following medications in the dosage recommended to me by the physician.

Haldol, thorazine

I have been made aware that the following are benefits which may occur through taking these medications:

Reduce overactivity, reduce preoccupation with troublesome and reoccurring thoughts, help reduce unpleasant/unusual experiences such as hearing and seeing things not normally heard or seen.

I have been made aware that possible side effects of taking these medications may be:
drowsiness, dry mouth, blurry vision, restlessness, tremors, stiffness or muscle spasms, confusion, nervc difficulty urinating, dizziness.

I voluntarily agree to take the medication(s) listd above as prescribed by the physician. I understand that this permission may e revoked at my discretion. I have had an opportunity to ask questions I wished to ask.

Physician's Signature | X [signature] Patient's Signature

3-30-04 Date | J. Patchett PTC Witness

I have been advised to take the medication(s) listed above, but I am unwilling to take the medication as recommended. The possible consequences of not taking the medication have been explained to me. Specifically:

Physician's Signature | Patient's Signature

000496

PSYCHOTROPIC MEDICATION CONSENT FORM

I, T. Dunlap, IDOC# 35385, agree to treatment with the following medications in the dosage recommended to me by the physician.

Tegretol

I have been made aware that the following are benefits which may occur through taking these medications:
helps prevent or reduce the severity of mood swings, may also reduce depression

I have been made aware that possible side effects of taking these medications may be:
drowsiness, dizziness, nausea or vomiting, blurry vision, dry mouth, difficulty urinating, itching, rash.

I voluntarily agree to take the medication(s) listed above as prescribed by the physician. I understand that this permission may e revoked at my discretion. I have had an opportunity to ask questions I wished to ask.

Physician's Signature

X [signature]
Patient's Signature

3-30-04
Date

J. Patchett RC
Witness

I have been advised to take the medication(s) listed above, but I am unwilling to take the medication as recommended. The possible consequences of not taking the medication have been explained to me. Specifically:

Physician's Signature

Patient's Signature

000497

PRISON HEALTH SERVICES, INC.
PHYSICIAN'S ORDERS

NAME: DUNLAP, Timothy PP#: 35385

D.O.B.: 8/22/68 ALLERGIES: PCN

DATE	PHYSICIAN'S ORDER
Feb 11/02	① RTC 8 wks Apr 8
3/15/02 14:26	CXR - PA, lateral, & Lordotic View [signature]
NOTED BY: H. CAMPBELL, HST DATE: 3/15/02 TIME: 1500	
3/25/02 530pm [illegible]	① D/C Haldol dec 2° to pt's unwillingness to take this
	② Haldol 10mg po q HS
	③ Contin Cogentin 1 mg po BID, prn acute dystonia
	④ " Propranolol 20mg po BID, prn akathisia
	⑤ RTC as previously scheduled [signature]
[signature] 03 25 02 1745	
5/27/02 635pm [illegible]	① D/C Haldol, Cogentin & propranolol 2° to noncompliance
	② RTC prn only (pt declined to attend clinic again, thus HS.) [signature]
	Noted [signature] 5-27-02
3.27.03	) Haldol Dec 100 mg IM 1X
	Cogentin 2 mg PO 1X [signature]

60403

EXHIBIT D

000473

Idaho Department of Correction

PHYSICIAN'S ORDERS

DATE & TIME	PHYSICIAN'S ORDER
3/31/03 7:15PM	(1) Haldol dec 100mg im q 2 wks
	(2) Cogentin 1mg po BID
	(3) Cogentin 1-2mg po BID, prn [illegible] dysphoria
	(4) Propranolol 10-20mg po BID, prn akathisia
	(5) Tegretol 200mg po q AM & 300mg po q HS
	(6) RTC in 6 wks, or sooner, prn
	[signature]
NOTED BY: H. CAMPBELL, MA DATE: 4/1/03 TIME: [illegible]	
4/16/03 4:50PM	(1) Prozac 20mg po q AM x 90 days
	(2) RTC as previously stated [signature]
	Batchett PRC 041603 1715
5/19/03 5:30PM	(1) LABS: Tegretol / CBC / comp / TSH
	(2) RTC in 6 wks, or sooner, prn
	(3) Thorazine 25mg po BID x 90 days
	Batchett PRC 051903 1739 [signature]
6/25/03 7:00PM	(1) Renew Haldol dec 100mg im q 2 wks
	(2) " Cogentin 1mg po BID
	(3) " Prozac 20mg po q AM
	(4) " Tegretol 200mg po q AM & 300mg po q HS
	(5) " Thorazine 25mg po BID x 90 days
	(6) D/C prn Cogentin & propranolol
	(7) RTC in 3 months, or sooner, prn [signature]
	Batchett PRC 062503 1859

Name: Dunlap, Timothy IDOC #: 35385 Allergies: [illegible]

MED-006 (Rev 01/02)

000472

Idaho Department of Correction

PHYSICIAN'S ORDERS

DATE & TIME	PHYSICIAN'S ORDER
7-24-03 Noted by [illegible] 7-24-03	Ibuprofen 600mg, card given [signature]
091003 1805	Renew: 1) Cogentin 1mg PO BID 2) Prozac 20mg PO Q AM 3) tegretol 200mg PO Q AM 4) tegretol 300mg PO Q HS 5) thorazine 25mg PO BID 6) Haldol Dec 100mg IM Q 2 weeks — X 90 days. NOTED BY: J. PATCHETT, [illegible] [signature] DATE 091003 TIME 1820 [signature] 9/10/03
11-21-03 NOTED BY: L. OSORIO, M.A. DATE 11/21 TIME [illegible]	Labs: D.P. II - Tegretol [signature] J. SAMUELSON P.A.C. NOV 24 2003
12/8/03 600PM	(1) Renew Cogentin 1mg po BID (2) " Prozac 20mg po q AM (3) " Tegretol 200mg po q AM & 300mg po q HS (4) " Thorazine 25mg po BID (5) " Haldol dec 100mg im q 2 wks (6) RTC ~3 months, or sooner prn. NOTED BY: J. PATCHETT [illegible] DATE 120803 TIME 1759 [signature] x 3 months

Name: Dunlap	IDOC #: 35385	Allergies: Penecillin

MED-006 Rev 01/01

000471

Idaho Department of Correction

PHYSICIAN'S ORDERS

DATE & TIME	PHYSICIAN'S ORDER
030304 1955	Renew: Cogentin 1mg PO BID; Tegretol 200mg PO Q AM; Tegretol 300mg PO Q HS; Prozac 20mg PO Q AM; Thorazine 25mg PO BID; Haldol Dec 100mg IM Q 2weeks — X 90 days. J. Patchett PA
	NOTED BY: J. PATCHETT, RN DATE 030304 TIME 2006
3/30/04 6:50pm	RTC ~ 9 wks, or sooner prn.
	NOTED BY: J. PATCHETT, RN DATE 033004 TIME 1859
6/1/04 5:40pm	Renew Cogentin 1mg po BID; " Tegretol 200mg po q AM + 300mg po qHS; " Prozac 20mg po q AM; " Thorazine 25mg po BID; " Haldol dec 100mg IM q 2 wks; RTC ~ 3 months, or sooner prn 08/24; Labs ~2 months: Tegretol / CBC*
6/2/04 0945	NOTED — RN

Name: Dunlap 35365	IDOC #:	Allergies: Penecillin

000470

MED-006 (Rev. 01/02)

Idaho Department of Correction

PHYSICIAN'S ORDERS

DATE & TIME	PHYSICIAN'S ORDER
082404 1700	Renew: Cogentin 1mg PO BID; Depakote 250mg PO q AM; Depakote 500mg PO q HS; Prozac 20mg PO q AM; Thorazine 25mg PO BID; Haldol Dec 100mg IM q 2 weeks; RTC 3months or sooner PRN — X 90 days — J. Patchett PTC
NOTED BY: J. PATCHETT, PTC DATE 082404 TIME 2000	8/29/04
110904 1825	Renew: Cogentin 1mg PO BID; Depakote 250mg PO q AM; Depakote 500mg PO q HS; Prozac 20mg PO q AM; Thorazine 25mg PO BID; Haldol Dec 100mg IM q 2 weeks; RTC (callout) 12-1-04 — X 90 days — Jocelyn Patchett PTC
NOTED BY: J. PATCHETT, PTC DATE 110904 TIME 1825	KENNETH KHATAIN, MD 11/9/04
1/4/05 5:25PM	D/C Thorazine; Renew Cogentin 1mg po BID; " Depakote 250mg po q AM 500mg HS X 90d; " Prozac 20mg po q AM; " Haldol dec 100mg IM q 2 wks; RTC 3 months or sooner PRN
NOTED BY: J. PATCHETT, PTC DATE 010405 TIME 2000	KENNETH KHATAIN, MD

Name: Dunlap 35385 | IDOC #: | Allergies: PCN

000469

MED-006 (Rev. 6/02)

Idaho Department of Correction

PHYSICIAN'S ORDERS

DATE & TIME	PHYSICIAN'S ORDER
2-23-06	Klonopin 1mg po bid X 10 days
1500	Prozac 20mg po q AM x 30 days
	Tegretol 200mg po q AM x 30 days
	Tegretol 300mg po q hs x 30 days
	Cogentin 1mg po bid x 30 days
	Refer to MH ASAP for management of meds
2/28/06	① D/C Klonopin when current supply expires
4:30 pm	② Renew Prozac 20mg po q Am
	③ " Tegretol 200mg po q Am & 300mg po q HS
	④ " Cogentin 1mg po BID
	⑤ Haldol dec 100mg IM q 2 wks
NOTED BY: J. PATCHETT	⑥ RTC ~ 6 wks, or sooner prn
DATE 030106	
TIME 1045	KENNETH KHATAIN, MD
3/27/06	D/C Klonopin when current supply runs out.
4:45pm	Pls advise pt. Thanks. KENNETH KHATAIN, MD

Name: Dunlap 35385	IDOC #:	Allergies: PCN

MED-006 (Rev. 01/02)

000468

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

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Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

TIMOTHY A. DUNLAP,	)	
	)	
Plaintiff,	)	Case No. CV-04-223-S-EJL
	)	
v.	)	**AFFIDAVIT OF GREG FISHER**
	)	
	)	
	)	
JAY GREEN, GREG FISHER,	)	
	)	
Defendants.	)	

GREG FISHER, being first duly sworn upon his oath, deposes and says as follows:

1. I am the former Warden of the Idaho Maximum Security Institution (IMSI). I was appointed Warden of IMSI on July 1, 2001 and held that position until my retirement, which became effective on July 1, 2005.

ORIGINAL

Petitioner's Exhibit BB

2. Currently the Idaho Department of Correction employs me on a part time basis as a consultant and trainer.

3. I am familiar with the Plaintiff in this matter, Timothy Alan Dunlap, as he was housed at IMSI during my tenure as Warden. I am also familiar with the allegations that he raises in his Complaint. Specifically, I am aware that Mr. Dunlap believes that Sgt. Jay Green and I arbitrarily prevented his being housed in the general prison population when others similarly situated were housed there.

5. As detailed below, IMSI medical staff, security staff, my administrators and I invested a good deal of time to ensure that Mr. Dunlap received appropriate mental health care and was housed appropriately.

6. After July 1, 2003, when inmates sentenced to death were no longer required to hold in solitary confinement Mr. Dunlap was held in the mental health unit at IMSI. Based on Mr. Dunlap's prior behavior while in solitary confinement and the treatment recommendations of his mental health treatment providers, I concluded that the appropriate housing for him was in the outpatient mental health tier located on C-Block, tier 2. Housing in the general prison population would have been inappropriate.

7. I have complete access to Mr. Dunlap's prison records, including medical records, maintained by the IDOC in the normal course of business. Attached as Exhibits A through L are true and correct copies of the following documents that are contained in Mr. Dunlap's IDOC records:

Exhibit A	Offender Profile—a record maintained on a computerized database detailing among other things each housing assignment of an offender while in the custody of the Idaho Department of Correction.

Exhibit B	Query Disciplinary—a list of Disciplinary Offense Reports issued to Mr. Dunlap.
Exhibit C	Administrative Segregation Review—relates Dunlap threatening to do bodily harm to Correctional Officer Root.
Exhibit D	Restrictive Housing Order dated February 5, 2002—Dunlap place in Pre-Hearing Segregation.
Exhibit E	Restrictive Housing Referral Notice dated February 5, 2002
Exhibit F	Restrictive Housing Report of Hearing dated February 15, 2002.
Exhibit G	Staff/Incident Information Report dated May 21, 2001—Presented staff with Inmate Concern Form written in blood or feces.
Exhibit H	Staff/Incident Information Report dated March 18, 2003—talking delusionally and resisting escort after taking a shower.
Exhibit I	30-day Restrictive Housing Review dated August 8, 2003—removal from Ad.-Seg. status for possible transition into general population as a result of good behavior.
Exhibit J	Restrictive Housing Referral Notice dated February 1, 2005.
Exhibit K	Restrictive Housing Report of Hearing dated February 15, 2005—Dunlap informed the committee that he preferred staying on C-2. Approved per Sombke's recommendation.
Exhibit L	Restrictive Housing Order dated February 17, 2005—Warden Fisher approved placement on C-2.

8. In addition, attached collectively as Exhibit M are true and correct copies of the Offender Profiles of inmates Richard Leavitt, Maxwell Hoffman, George Porter and Donald Fetterly. Included in these documents are records showing the imposition of the death sentence, the date the death sentence was vacated (if applicable) and the date

sentence was re-imposed (if applicable). These records are also maintained by the IDOC in the normal course of business.

9. Dunlap claims that he was treated differently from inmates Leavitt, Porter, Fetterly and Hoffman in that they were placed in the prison's general population after their death sentences were vacated, while he remained in the mental health unit.

10. Based on the records contained in Exhibit M, I am aware that:

Leavitt's death sentence was vacated on January 23, 2001. However, the Ninth Circuit Court of Appeals reversed and re-imposed the death penalty for Mr. Leavitt in 2004. Leavitt is housed in restrictive housing pursuant to Idaho Code § 19-2705.

Porter's death sentence was vacated on April 2, 2003 and reinstated on December 20, 2004.

Regarding Hoffman, Judge Winmill granted Hoffman's petition for writ of habeas corpus on April 1, 2002 and ordered that he be re-sentenced within 120 days and that he no longer be classified a death row inmate. (*see*, 94-CV-0200-S-BLW, dkt. 388). This case is currently on appeal.

Fetterly's death sentence was vacated on August 6, 2002 and a sentence of fixed life was imposed on January 28, 2003.

11. Unlike Mr. Dunlap and with the exception of inmate Leavitt, none of these individuals required mental health treatment to the extent it was necessary to house them in the mental health treatment units located in C-2 or C-3.

12. Leavitt was housed in C-2 from March 6, 2002 to September 4, 2002 for what appears to be an assessment of whether he could successfully integrate into a more socialized prison environment after having been held in solitary confinement since 1985.

Leavitt was transferred from C-2 to general population and housed in E-Block on September 4, 2002. *(See, Exhibit M).*

13. At various times, while their death sentences have been in abeyance, each of these four inmates was housed in the general prison population. Hoffman continues to be housed in general population pursuant to Judge Winmill's order even though he is awaiting re-sentencing.

Fetterly is housed in general population since his death sentence has been vacated and a fixed life sentence imposed.

Leavitt is currently in restrictive housing pursuant to Idaho Code § 19-2705. Porter was released into general population on August 19, 2005 after a thorough administrative review that determined placement in the general prison population was appropriate for him.

14. When I served as Warden at IMSI I was never informed, nor was I aware that Mr. Dunlap's death sentence had been vacated.

15. I am aware, that the United States Supreme Court decided *Ring v. Arizona* in June 2002 (holding that aggravating and mitigating factors in capital cases must be determined by a jury, rather than a judge alone). It was my belief that Mr. Dunlap would likely be re-sentenced by a jury pursuant to the *Ring* decision, but I never received notice that his death sentence had been vacated.

Therefore prior to July 1, 2003, I was constrained by existing state law to house Mr. Dunlap in "solitary confinement" because he was under a death sentence.

16. I am further aware that on July 1, 2003, the Idaho legislature amended and re-designated Idaho Code § 19-2706 to allow the warden of IMSI the discretion to

house inmates under a death sentence in other than "solitary confinement", but in a maximum security setting.

17. I am aware that Mr. Dunlap has been receiving mental health treatment while he has been incarcerated.

18. With the exception of a one-day stay in the medical unit, from January 2002 until July 3, 2003 Dunlap was housed on tier 1 of C-Block. *(Exhibit A).* C-1 was the appropriate housing unit for Mr. Dunlap because it was a restrictive housing tier, and complied with the "solitary confinement" requirement of state law and, C-1 also was in close proximity to the mental health unit at IMSI.

19. While incarcerated Mr. Dunlap has regularly exhibited violent and strange behavior and has not always been compliant with prison rules.

20. Since 1995 Mr. Dunlap has been convicted of twenty-four separate disciplinary offenses. Twelve of these occurred in the year 2000 and three in the year 2001. *See Exhibit B for a list of offenses.*

21. In addition, Mr. Dunlap's history is colored with episodes of disruptive behavior. He has harassed staff by threatening to cut off their heads (*Exhibit C*), attempted to pass blood, urine and fecal contaminated objects to staff (*Exhibit G*) and refused to return to his cell after a shower, muttering about Germany in 1945 and telling an officer that he had "already lost". (*Exhibit H*).

22. These episodes of disruptive and bizarre behavior caused me to view Mr. Dunlap's requests to enter the general prison population with great caution and some skepticism.

23. In February 2002, while housed in C-1, Mr. Dunlap was referred to Administrative Segregation. The Ad-Seg committee recommended placement in administrative segregation due to his history of disruptive behavior and for the protection of staff and other inmates. Dunlap objected to this because he appears to have believed that his death sentence had been vacated and he was somehow entitled to be housed in the general population. I affirmed placing Mr. Dunlap in Ad-Seg on February 15, 2002, where he remained until July 3, 2003. (*Exhibits D, E and F*).

24. During this time Mr. Dunlap was under the care of Drs. Sombke and Khatain. Although I was ultimately responsible to determine the appropriate housing for each inmate confined at IMSI, I placed great weight on the opinions and recommendations of medical treatment providers where mental health inmates are concerned.

25. On July 1, 2003, the amendment to Idaho Code § 19-2705 allowing death sentenced offenders to be housed outside of solitary confinement became effective.

26. On July 3, 2003 Dr. Sombke recommended that Mr. Dunlap be moved from C-1 to the Idaho Security Medical Facility located on C-3. I approved the move, even though Mr. Dunlap remained classified as an Administrative Segregation inmate.

27. Within a short time, Mr. Dunlap progressed to the point on C-3 where Dr. Sombke believed that he should be moved to the outpatient mental health facility located on C-2. In order for that to happen, he had to be released from Administrative Segregation.

28. At a restrictive housing review five staff members, including defendant Sgt. Jay Green recommended release to custody so that he might be housed on C-2. I affirmed this decision on August 11, 2003. (*See, Exhibit I*).

29. Other than participating as a member of the restrictive housing review committee who recommended that Dunlap be moved from C-3 to the outpatient unit located on C-2, Sgt. Green was not involved with Mr. Dunlap's housing assignments, other than assigning him to a specific cell placement within C-block.

30. On February 15, 2005 a Restrictive Housing Placement Committee consisting of Deputy Warden Michael Johnson, Deputy Warden George Miller and Captain Jeff Henry reviewed Mr. Dunlap's housing assignment. According to the record of the meeting there was a concern about Mr. Dunlap's ability to function either in isolation or in the general prison population. Mr. Dunlap told the committee that that he did poorly in Ad-Seg, but does very well in C-2. (*See, Exhibit K*).

31. Dr. Sombke recommended that Mr. Dunlap remain on C-2, noting that he had been medication compliant and doing well. Based on this recommendation, which was affirmed by the committee, I authorized Mr. Dunlap's placement on C-2.

32. On February 26, 2005 Mr. Dunlap's death sentence was vacated and he was transferred to the Ada County jail to await re-sentencing in Caribou County. It's my understanding that Mr. Dunlap was housed in the Ada County jail because Caribou County did not have the appropriate facilities to house him on a long-term basis.

33. The decisions I made in housing Mr. Dunlap were appropriate at all times. They were not arbitrary and I certainly did not single him out for special adverse treatment of any kind. Unlike Hoffman, Fetterly, Porter and Leavitt, Mr. Dunlap had

demonstrated mental health needs and I approved housing consistent with the recommendations of his treatment providers.

34. Further your affiant sayeth naught.

DATED this 24 day of March, 2006.

GREG FISHER

SUBSCRIBED AND SWORN to before me this 24 day of March, 2006.

NOTARY PUBLIC FOR IDAHO
COMMISSION EXPIRES: 8-21-09

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of March, 2006, I mailed a true and correct copy of the foregoing AFFIDAVIT OF GREG FISHER to the following:

TIMOTHY DUNLAP, No. 35385
IMSI
P.O. Box 51
Boise, Idaho 83707,

via the prison mail system.

WILLIAM M. LOOMIS

= OFFENDER TRACK ========== OFFENDER PROFILE ============= 03/02/2006 = Page 1
No: 35385 Name: DUNLAP, TIMOTHY ALAN IMSI/C-BLK PRES FACIL

FBI No.: 196037HA4 SID No: ID1751060 Inmate Class: CLOSE
Birthdate: [redacted]/1968 S.S.N.: [redacted] Status Type: Termer
Sex: MALE Ethnicity: WHITE Status Date: 04/20/1992
Height: 5'7 Complexion: FAIR DEATH
Weight: 145 Pre ID Incr: 1 Inst Disch: DEATH
Eyes: BLUE Detain/Warr: TRIED Tent. Par. Date:
Hair: BROWN Nxt Par Hrg:
Birthplace: NEW ALBANY IN Case Mgr/Par Off: DCURTIS
Alerts: VICTIM, MED, REG

Crime	#	Dis	Cnty	Docket Number / Seq	Fac/Lvg	Pd	T	Cl	Bk	Date
MURDER 1ST		I	CARIB	91-488 1	IMSI/C-BLK	00	1	1	A	02/27/2006
					IMSI/MEDIC	00	1	3	A	02/23/2006
					CARIBOU/JB					02/22/2006
					VAC SENT	CARIBOU/SH				05/19/2005
					VAC SENT	ADA/SH				02/26/2005
					IMSI/C-BLK	00	2	45	A	03/23/2004
					IMSI/C-BLK	00	2	45	B	03/10/2004
					IMSI/C-BLK	00	2	45	A	08/24/2003
					IMSI/J-BLK	00	3	74	A	08/23/2003
					IMSI/C-BLK	00	2	45	A	08/12/2003
					IMSI/C-BLK	00	3	58	A	07/03/2003
					IMSI/C-BLK	00	1	10	A	05/22/2002
					IMSI/C-BLK	00	1	23	A	05/09/2002
					IMSI/C-BLK	00	1	3	A	01/08/2002
					IMSI/MEDIC	00	1	3	A	01/07/2002
					IMSI/C-BLK	00	1	3	A	07/13/2001
					IMSI/C-BLK	00	1	8	A	02/07/2001
					IMSI/C-BLK	00	1	12	A	01/05/2001
					IMSI/B-SEG	00	3	68	A	12/29/2000
					IMSI/C-BLK	00	1	12	A	12/19/2000
					IMSI/B-SEG	00	3	73	A	12/18/2000
					IMSI/C-BLK	00	1	12	A	11/22/2000
					IMSI/C-BLK	00	1	23	A	11/22/2000
					IMSI/B-SEG	00	3	78	A	11/19/2000
					IMSI/B-SEG	00	3	75	A	08/14/2000
					IMSI/C-BLK	00	1	8	A	07/06/2000
					IMSI/B-SEG	00	3	74	A	06/15/2000
					IMSI/C-BLK	00	1	8	A	04/19/2000
					IMSI/B-SEG	00	3	82	A	04/10/2000
					IMSI/C-BLK	00	1	8	A	09/16/1999
					IMSI/C-BLK	00	1	14	A	12/03/1998
					IMSI/B-SEG	00	1	26	A	07/19/1996
					IMSI/B-SEG	00	2	58	A	01/17/1995
					IMSI/B-SEG	00	2	41	A	01/16/1995
					IMSI/ADSEG	00	2	58		11/05/1993
					IMSI/ADSEG	00	2	48		10/19/1993
					IMSI/ADSEG	00	2	55	A	05/13/1993
					IMSI/ADSEG	00	2	43	A	02/10/1993
					IMSI/ADSEG	00	2	40	A	02/10/1993

EXHIBIT A

IMSI/UNKWN	00	02/10/1993
RT/DETAINR	OS/DETAIN	07/23/1992
IMSI/ADSEG	00 2 58	04/20/1992
HISTORY	DIS/CRTORD	02/13/1992
IMSI/ADSEG	00 3 80 A	02/04/1992
IMSI/UNKWN	00	01/28/1992

Previous Numbers:
Superceded Numbers:

EXHIBIT A

= DISCIPLINARY ========== QUERY DISCIPLINARIES ========== 03/07/2006 = Page 1
No: 35385 Name: DUNLAP, TIMOTHY ALAN IMSI/C-BLK PRES FACIL

DOR No	Hearng Dte	Facility	Crime	Sanct	Actn	Tme	Prob Date	Fnl
010808	12/27/2001	IMSI	INTENINJUR	LSTPV	ENFRC	90		A
010798	12/24/2001	IMSI	COMDISEASE	PUNSG	ENFRC	15		A
010302	05/21/2001	IMSI	COMDISEASE	PUNSG	PRBTN	30	12/06/2001	A
			COMDISEASE	LSTPV	ENFRC	30		A
010015	12/29/2000	IMSI	POSSESSION	PUNSG	ENFRC	15		A
000613	12/18/2000	IMSI	RULEORDVIO	PUNSG	ENFRC	30		A
000560	11/14/2000	IMSI	INTENINJUR	PUNSG	ENFRC	30		A
000517	10/26/2000	IMSI	DESTRPPTY	PUNSG	ENFRC	15		A
000519	10/25/2000	IMSI	AGGBATTERY	PUNSG	ENFRC	30		A
000485	10/12/2000	IMSI	DESTRPPTY	PUNSG	ENFRC	15		A
			DESTRPPTY	RESTI	ENFRC			A
000476	10/04/2000	IMSI	DESTRPPTY	PUNSG	ENFRC	15		A
			DESTRPPTY	RESTI	ENFRC			A
000417	08/21/2000	IMSI	AGGBATTERY	PUNSG	ENFRC	30		A
			AGGBATTERY	RESTI	ENFRC			A
000403	08/15/2000	IMSI	AGGBATTERY	PUNSG	ENFRC	30		A
000401	08/13/2000	IMSI	DESTRPPTY	RESTI	ENFRC			A
000313	06/19/2000	IMSI	DESTRPPTY	EXDTY	INVKD	15		A
			DESTRPPTY	RESTI	ENFRC			A
000314	06/15/2000	IMSI	DESTRPPTY	EXDTY	PRBTN	15	12/19/2000	A
			DESTRPPTY	RESTI	ENFRC			A
000214	04/14/2000	IMSI	DISRESPECT	PUNSG	ENFRC	9		A
990236	03/04/1999	IMSI	DISRESPECT	RPRMD	ENFRC			A
990148	02/08/1999	IMSI	DISRESPECT	RPRMD	ENFRC			A
970077	01/23/1997	IMSI	SEXPROPOS	LSTPV	ENFRC	30		A
			SEXPROPOS	LSTPV	PRBTN	30	03/27/1997	A
960954	11/15/1996	IMSI	UNAUTHPROB	RPRMD	ENFRC			A
960119	02/10/1996	IMSI	PARTICIPAT	PUNSG	ENFRC	15		A
			PARTICIPAT	LSTPV	ENFRC	30		A
950688	12/18/1995	IMSI	USING ABUS	PUNSG	ENFRC	15		A
950050	01/17/1995	IMSI	PARTICIPAT	PUNSG	ENFRC	10		A
950045	01/16/1995	IMSI	PARTICIPAT	PUNSG	ENFRC	10		A

EXHIBIT B

= DISCIPLINARY ========== QUERY DISCIPLINARIES ========== 03/23/2006 = Page 1
D No: 35385 Name: DUNLAP, TIMOTHY ALAN IMSI/C-BLK PRES FACIL

Offense Facility: IM IMSI
Place of Offense: C-3A
Reporting Associate: C/O R. JACKSON
Reviewing Supervisor: 1877 JHARDISO
Staff Hearing Asst:

DOR Log Number: 010808
Date of Offense: 12/27/2001
Report Date: 12/27/2001
Date to Shift Supv: 12/27/2001
Deliver to Inmate: 12/27/2001

Disciplinary Comments: I WAS SERVING BREAKFAST TO INMATE DUNLAP ,HE SUDDENLY REACHED OUT AND GRABBED MY LEFT HAND AND ATTEMPTED TO PULL IN TO THE BEANSLOT. HE STOOD BY HIS DOOR LAUGHING AND SAID I SCARED YOU DIDNT I NIG

Contraband/Evidence Found? N
Confidential Info Used? N
Offense vs. Staff? Y

Witnesses Requested and Denied? N
Staff Asst Requested and Denied? N

Hearing Officer: 5180
Hearing Tape ID #: 0141
Reviewing Auth Date: 01/04/2002

Hearing Sched Date: 12/31/2001
Hearing Adjud Date: 01/02/2002
Probn Sanct Invoked Date:

Charged Offense	Convicted Offense	Plea	Fdg	San	Acn	Time	Pbn EndDt	Fnl
05.1 A INTENINJUR	05.1 A INTENINJUR	NG	G	V	E	90		A

= DISCIPLINARY ========== QUERY DISCIPLINARIES ========== 03/23/2006 = Page 1
No: 35385 Name: DUNLAP, TIMOTHY ALAN IMSI/C-BLK PRES FACIL

Offense Facility: IM IMSI
Place of Offense: C-BLK
Reporting Associate: C/O IANNAZZO
Reviewing Supervisor: 1310 DBUTLER
Staff Hearing Asst:

DOR Log Number: 010798
Date of Offense: 12/24/2001
Report Date: 12/24/2001
Date to Shift Supv: 12/24/2001
Deliver to Inmate: 12/24/2001

Disciplinary Comments: INMATE URINATED ON A BOOK AND PASSED BOOK BACK TO STAFF DURING FEEDING.

Contraband/Evidence Found? N
Confidential Info Used? N
Offense vs. Staff? Y

Witnesses Requested and Denied? N
Staff Asst Requested and Denied? N

Hearing Officer: 5180
Hearing Tape ID #: 0141
Reviewing Auth Date: 01/04/2002

Hearing Sched Date: 12/27/2001
Hearing Adjud Date: 01/02/2002
Probn Sanct Invoked Date:

Charged Offense	Convicted Offense	Plea	Fdg	San	Acn	Time	Pbn EndDt	Fnl
04.5 A COMDISEASE	04.5 A COMDISEASE	NG	G	G	E	15		A

= DISCIPLINARY ========== QUERY DISCIPLINARIES ========== 03/23/2006 = Page 1
No: 35385 Name: DUNLAP, TIMOTHY ALAN IMSI/C-BLK PRES FACIL

Offense Facility: IM IMSI
Place of Offense: C BLK T1
Reporting Associate: RAMOS
Reviewing Supervisor: 2318 JSMITH
Staff Hearing Asst:

DOR Log Number: 010302
Date of Offense: 05/21/2001
Report Date: 05/21/2001
Date to Shift Supv: 05/21/2001
Deliver to Inmate: 05/21/2001

Disciplinary Comments: I/M SENT OUT A KITE THAT WAS WRITTEN IN BODY FLUIDS BLOOD/FECES.

Contraband/Evidence Found? Y
Confidential Info Used? N
Offense vs. Staff? N

Witnesses Requested and Denied? N
Staff Asst Requested and Denied? N

Hearing Officer: 3528 SBROOD
Hearing Tape ID #: 01018
Reviewing Auth Date: 06/08/2001

Hearing Sched Date: 05/26/2001
Hearing Adjud Date: 06/06/2001
Probn Sanct Invoked Date:

Charged Offense	Convicted Offense	Plea	Fdg	San	Acn	Time	Pbn EndDt	Fnl
04.5 A COMDISEASE	04.5 A COMDISEASE	NP	G	G	P	30	12/06/2001	A
		NP	G	V	E	30		A

= DISCIPLINARY ========== QUERY DISCIPLINARIES ========== 03/23/2006 = Page 1
D No: 35385 Name: DUNLAP, TIMOTHY ALAN IMSI/C-BLK PRES FACIL

Offense Facility: IM IMSI
Place of Offense: C 12
Reporting Associate: MEO
Reviewing Supervisor: 2756 JRENTIE
Staff Hearing Asst:

DOR Log Number: 010015
Date of Offense: 12/29/2000
Report Date: 12/29/2000
Date to Shift Supv: 12/29/2000
Deliver to Inmate: 12/29/2000

Disciplinary Comments: INMATE WAS IN POSSESSION OF A HANDCUFF KEY.

Contraband/Evidence Found? Y
Confidential Info Used? N
Offense vs. Staff? N

Witnesses Requested and Denied? N
Staff Asst Requested and Denied? N

Hearing Officer: 3528 SBROOD
Hearing Tape ID #: 01001
Reviewing Auth Date: 01/08/2001

Hearing Sched Date: 01/04/2001
Hearing Adjud Date: 01/04/2001
Probn Sanct Invoked Date:

Charged Offense	Convicted Offense	Plea	Fdg	San	Acn	Time	Pbn	EndDt	Fnl
09.4 B POSSESSION	09.4 B POSSESSION	NG	G	G	E	15			A

Idaho Maximum Security Institution
Administrative Segregation Review

Inmate: DUNLAP

IDOC #:35385

Custody: CLOSE Last Classification Date: 1/03/02

Placement Date: 050902

Initial Placement Offense: INMATES DEATH SENTENCE WAS OVERTURNED

Investigative File #: (If Applicable):

Referred By: TCM Date:

Crime(s):MURDER 1

Sentence:DEATH / UNKNOWN Parole Eligible: N/A

IDOC Discharge Date:

Review Sessions

Today he told C/O Root to suck his dick and that he was going to cut his head off. He claimed the staff was rude and that he determined that Root was threatening him due to his looking at him for over 5 seconds. He appears to be obsessed with living in general population but still owes over 2 month on the agreement made between TCM and him. We recommend inmate going to clinic and afterwards being reviewed again in 30 days.

EXHIBIT C

000104

IDAHO DEPARTMENT OF CORRECTION
DIVISION OF PRISONS

RESTRICTIVE HOUSING ORDER

DATE: 02-05-2002 INMATE NAME: DUNLAP NUMBER 35385

Inmate has been placed into the following status:

( ) Deathrow in accordance with Idaho Code, Section 19-2705

(XX) Segregation (Maximum 7 days) PHS

( ) Extension of Segregation (Total Time of 14 days)

( ) Administration Segregation (Indicate Conditions of Confinement Level)

( ) Level I*

( ) Level II*

( ) Level III*

( ) Detention* (Days:_____ Release Date: _____)

( ) Protective Custody*

( ) Transit

( ) Special Needs*

REASON: Inmate Dunlap has been referred to Administrative Segregation. Segregation is necessary pending the outcome of his hearing.

02-05-2002, Lt. Hardison
Authorized Signature, Title Date

2-6-02
Warden's Review Date

DISTRIBUTION:

White:	Central File
Yellow:	Daily Shift Summary
Blue:	Cell Block
Green:	Division of Prisons
Pink:	Inmate

*Requires a hearing prior to placement

RECEIVED
FEB 06 2002
IMSI RECORDS

02-319.A
Revised 7-1-97

EXHIBIT D 000375

IDAHO DEPARTMENT OF CORRECTION
DIVISION OF PRISONS
RESTRICTIVE HOUSING REFERRAL NOTICE

DATE: February 05, 2002

TO: DUNLAP IDOC No: 35385

FROM: Lt. Hardison
Restrictive Housing Referral Chair

Re: Referral to Restrictive Housing

You have been referred to the Restrictive Housing Placement Committee. Within ten (10) days and after 48 hours of receipt of this notice, you will have the opportunity to attend a hearing to determine whether or not placement in restrictive housing is appropriate. Your entire central file and prior criminal history may be considered by the committee in making a decision.

THE REASON FOR THIS REFERRAL IS:

( ) To protect you from other inmates
(XX) To protect other inmates from you
(XX) To stabilize a volatile or difficult situation
( ) To facilitate a criminal/administrative investigation
( ) To provide a cooling-off period for agitated, confrontive or combative inmates
( ) To medically isolate you
(XX) To separate you as a special needs inmate

TYPE OF HOUSING BEING CONSIDERED:

(XX) Administrative Segregation (Indicate COC Level)
- ( ) Level I
- ( ) Level II
- ( ) Level III

( ) Protective Custody
( ) Special Needs

I hereby acknowledge receipt of this notice of hearing.

Inmate's Signature Date Staff Witness

02-319.B, Revised; 7-1-97

EXHIBIT E

000377

IDAHO DEPARTMENT OF CORRECTION
DIVISION OF PRISONS

RESTRICTIVE HOUSING REPORT OF HEARING

DATE OF HEARING: 2-15-02 TIME OF HEARING: 1011 hrs.

INMATE NAME: Dunlap IDOC# 35385

STAFF REPRESENTATIVE? ( ) Yes ( ) None Requested, but Assigned (X) No
NAME: _____

EVIDENCE RELIED UPON DURING HEARING:

- (X) Disciplinary Record
- (X) Prison Records from past institutionalization
- ( ) Psychological information
- (X) Attitude towards authority
- ( ) Institutional record on work assignments
- ( ) Adjustments to institutional programs
- (X) Willingness and ability to live with other inmates
- ( ) Programming
- ( ) Classification
- (X) Documented behavior and past behavior
- ( ) Escape Risk
- ( ) Drug Trafficking
- ( ) Disruptive Group Involvement

SUMMARY OF EVIDENCE & TESTIMONY:

Facility: Inmate has history of disruptive outburst to Pers a Safety risk to Staff & other Inmates.

Inmate: Doesn't feel this should happen cause his sentence has been vacated

RECOMMENDED DISPOSITION

- (X) Placement in Ad Seg
  - ( ) Level I
  - ( ) Level II
  - ( ) Level III
- ( ) Protective Custody
- ( ) Special Needs

REASONS FOR RECOMMENDATION (include any dissenting opinions of committee):

Death sentence has been vacated current charges pending, current property level should not change for Dunlap.

Restrictive Housing Placement Committee:

		Recommendation
Chair:	[signature]	I-1 C-Blk.
Member:	Lt. Ramirez	I-1 C-Blk
Member:	M Mahoney	I-1 C-Blk.

FINAL DISPOSITION:

- (X) Placement Authorized
- ( ) Placement Not Authorized
- ( ) Placement Amended as Follows: _____

[signature] 2/15/02
Facility Head Date

Distribution:
Original - Central File
Copy - Inmate
Copy - Team Case Management File
Copy - Division of Prisons

02-319.c, Revised: 7-1-97

000374

EXHIBIT E

ID[illegible]D DEPARTMENT OF CORRECTI[illegible]S
IDAHO MAXIMUM SECURITY INSTITUTION
STAFF, INCIDENT / INFORMATION REPORT

UNIT COPY

IR #:0105-35-108 PAGE: 1 OF 1
DATE: 05/21/01 TIME: 02:00
LOCATION: C- BLOCK Tier 1, Cell# 9 TYPE OF INCIDENT: Battery on staff via Bodily Fluids

INDIVIDUALS INVOLVED

NAME: DUNLAP IDOC# 35385 Cell# 8
NAME: IDOC# Cell#
NAME:

REPORT (WHO, WHAT, WHEN, WHERE, HOW, AND WHY)

While engaged in the process of conducting 02:00 count on the time and date stated above I noticed that inmate Dunlap had set out two (2) concern forms for staff to retrieve and disperse through the out going mail. Upon further inspection it was apparent that the readings had been scribed in other than an IDOC authorized correspondence instrument. The writing (s) were presented in what appeared to be some form of bodily fluid, the proper precaution of no direct contact was taken with these forms whilst completing the unit count. At the recommendation of both the Shift Commander (Lt. Smith) and the Assistant Shift Commander (Sgt. DeForest) I had correctional medical staff member - CMS Bortz run a test (Propper-Seracult Blood/Fecal test) for bodily fluids on both of the concern forms. Indicative by the blue registration on the test blotter, both of the forms tested positive for either one or both blood and or fecal matter. **Blood and or fecal matter that are contaminated have the high probability of transmitting a potentially hazardous disease to the recipient/victim when directed in this manner.** As a result of Mr. Dunlap's actions a Disciplinary Offence Report (DOR) will be issued for Battery of staff. End of report.

REPORTING STAFF: C/O Ramos, A. SIGNATURE: [signature] DATE: 05/21/01

ACTION TAKEN BY SHIFT COMMANDER

Initial:

REPORT REVIEW

ASSISTANT SHIFT COMMANDER: DATE:
SHIFT COMMANDER: DATE:

000136

EXHIBIT G

IDAHO DEPARTMENT OF CORRECTIONS
IDAHO MAXIMUM SECURITY INSTITUTION
STAFF INCIDENT / INFORMATION REPORT

IR#: 0303-35-116 PAGE: 1 OF 1

DATE: 3/18/03 TIME: 0922 HRS.

LOCATION: C-block tier-1 shower area TYPE OF INCIDENT: use of directional force

INDIVIDUALS INVOLVED

NAME: Dunlap IDOC#: 35385

NAME: IDOC#:

REPORT (WHO, WHAT, WHEN, WHERE, HOW, AND WHY)

On the above date and time I began to escort Inmate Dunlap # 35385 from the tier-1 lower shower back to cell C-10. Dunlap exited the shower, took a couple of steps in the direction of his cell, then stopped walking. Dunlap began talking about Germany in 1945 saying that I had already lost. I instructed Dunlap to continue walking towards his cell but Dunlap began to back up. I had my left hand on the bicep/tricep area Dunlap's right arm and placed the forearm of my left arm against Dunlap's back to stop him from backing up any farther. I then walked forward with Dunlap and placed him in his cell. C/O Banks responded to Dunlap's cell at about the time went into his cell. Once in the cell, Dunlap turned to face C/O Banks and I. Dunlap made a movement as if to either kick or run out of his cell. I secured the cell door and C/O Banks and I removed the wrist restraints. End of Report

REPORTING STAFF: C/O Acree SIGNATURE: J. Acree DATE: 03/18/03

****

ACTION TAKEN BY SHIFT COMMANDER

INITIAL:

REPORT REVIEW

ASSISTANT SHIFT COMMANDER: DATE:
SHIFT COMMANDER: DATE:
CAPTAIN: DATE:

ADMINISTRATIVE REVIEW

DEPUTY WARDEN OF SECURITY: DATE:
DEPUTY WARDEN OF OPERATIONS: DATE:

****

ORIGINAL I.R. MUST BE SUBMITTED TO THE SHIFT COMMANDER
RETURN TO THE CAPTAIN FOR FINAL ROUTING AND FILING

INFORMATION REPORT
APPROVED 10/97-REVISED 10/01

EXHIBIT H

000257

IDAHO DEPARTMENT OF CORRECTION
DIVISION OF PRISONS
30-DAY RESTRICTIVE HOUSING REVIEW

DATE/TIME OF REVIEW: 8/08/03 809
INMATE NAME: Dunlap IDOC # 35385
CURRENT HOUSING: C-58-a LEVEL: Close

SUMMARY OF REVIEW

STAFF COMMENTS **Inmate has shown exceptional behavior since returning to take medications.**
INMATE COMMENTS I want to try general population in order to qualify for a possible exception.
REASONS FOR RECOMMENDATION Inmate has shown good behavior over the past year. He has been placed on Tier 3 per Dr. Sombke and needs to be released from Ad. Seg. in order to be placed onto Tier 2 mental health.

RECOMMENDED DISPOSITION

- ☐ RECOMMEND CONTINUING AD SEG.
- ☒ RECOMMEND RELEASE TO CUSTODY
- ☐ OTHER

CLASSIFICATION COMMITTEE
Chairman: Sgt. Jay A. Green
Member: R. Creswell
Member: R. Anderson

ADMINISTRATIVE REVIEW

- ☒ Recommend Approval
- ☐ Recommend Denial
- ☐ Other:_____

8/11/03
Captain Date

- ☑ Recommend Approval
- ☐ Recommend Denial
- ☐ Other:_____

08/08/03
DWS Date

ADMINISTRATIVE REVIEW

- ☑ Recommendation Approved
- ☐ Recommendation Denied
- ☐ Other:_____

8/11/03
Warden Date

RECEIVED
AUG 12
IMSI RECORDS

ORIGINAL TO CENTRAL FILE, COPIES TO INMATE AND TCM FILE

EXHIBIT I

000372

IDAHO DEPARTMENT OF CORRECTION
DIVISION OF PRISONS
RESTRICTIVE HOUSING REFERRAL NOTICE

DATE: 2/1/05

TO: DUNLAP IDOC No: 35385

FROM: M Johnson
Restrictive Housing Referral Chair

Re: Referral to Restrictive Housing

You have been referred to the Restrictive Housing Placement Committee. Within ten (10) days and after 48 hours of receipt of this notice, you will have the opportunity to attend a hearing to determine whether or not placement in restrictive housing is appropriate. Your entire central file and prior criminal history may be considered by the committee in making a decision.

THE REASON FOR THIS REFERRAL IS:

- (X) To protect you from other inmates
- (X) To protect other inmates from you
- (X) To stabilize a volatile or difficult situation
- ( ) To facilitate a criminal/administrative investigation
- ( ) To provide a cooling-off period for agitated, confrontive or combative inmates
- ( ) To medically isolate you
- ( ) To separate you as a special needs inmate

TYPE OF HOUSING BEING CONSIDERED:

- (X) Administrative Segregation (Indicate COC Level)
  - ( ) Level I
  - ( ) Level II
  - ( ) Level III
- ( ) Protective Custody
- ( ) Special Needs

I hereby acknowledge receipt of this notice of hearing

Inmate Signature 2/1/05 Date Staff Witness

02-319.B, Revised; 7-1-97

000368

EXHIBIT J

IDAHO DEPARTMENT OF CORRECTION
DIVISION OF PRISONS

RESTRICTIVE HOUSING REPORT OF HEARING

DATE OF HEARING: 2-15-05 TIME OF HEARING: 0918

INMATE NAME: Dunlap IDOC# 35385

STAFF REPRESENTATIVE? ( ) Yes ( ) None Requested, but Assigned (✓) No
NAME: _____

EVIDENCE RELIED UPON DURING HEARING:

- (✓) Disciplinary Record
- ( ) Prison Records from past institutionalization
- (✓) Psychological information
- ( ) Attitude towards authority
- ( ) Institutional record on work assignments
- ( ) Adjustments to institutional programs
- (✓) Willingness and ability to live with other inmates
- ( ) Programming
- (✓) Classification
- (✓) Documented behavior and past behavior
- ( ) Escape Risk
- ( ) Drug Trafficking
- ( ) Disruptive Group Involvement

SUMMARY OF EVIDENCE & TESTIMONY:

Facility: concern for his ability to function well in isolation or gen pop.

Inmate: prefers to remain on C-2. Says he did program in Ad Seg, but does very well on C-2

RECOMMENDED DISPOSITION

- ( ) Placement in Ad Seg
  - ( ) Level I
  - ( ) Level II
  - ( ) Level III
- ( ) Protective Custody
- ( ) Special Needs

C-2

REASONS FOR RECOMMENDATION (include any dissenting opinions of committee):
Dr. Semple recommends C-2. Inmate is medication compliant and doing well. Dr. Semple does not recommend isolation in Ad Seg, nor general population.

Restrictive Housing Placement Committee: Recommendation

Chair: [signature] C-2
Member: [signature] C-2
Member: [signature] C-2

FINAL DISPOSITION:

- (✓) Placement Authorized C-2
- ( ) Placement Not Authorized
- ( ) Placement Amended as Follows: _____

[signature] 2/15/05
Facility Head Date

Distribution:
Original - Central File
Copy - Inmate
Copy - Team Case Management File
Copy - Counselor

EXHIBIT 6

03-319.c, Revised; 11-02

000367

IDAHO DEPARTMENT OF CORRECTION
DIVISION OF PRISONS
Institution: IMSI
RESTRICTIVE HOUSING ORDER

DATE: 2/16/05 INMATE NAME: Dunlap NUMBER: 35385

Inmate has been placed into the following status: ***In Housing Unit:*** *C-Block*

- ☐ Death Row in accordance with Idaho Code, Section 19-2705
- ☐ Segregation (Maximum 7 days) ***Status:***
- ☐ Extension of Segregation (Maximum 14 days) ***Status:***
- ☒ Administrative Segregation*
- ☐ Detention* (Days: Release Date:
- ☐ Protective Custody*
- ☐ Transit
- ☐ Special Needs*

REASON: Warden Fisher had approved to keep Inmate Dunlap housed in C-2 only.

Sgt. St.Paul Date: 2/16/05
Authorizing Supervisor, Title

G. Fisher Date: 2-17-05
Wardens Review

DISTRIBUTION:
Original: Shift Commander / Central File
Copy: Cell Block
Copy: Inmate
* Requires a hearing prior to placement

02-319.A
Revised 7-02

EXHIBIT L

000366

= OFFENDER TRACK ======= QUERY OFFENDER BY NAME ========== 03/07/2006 = Page 1
DOC No: 15470 Name: FETTERLY, DONALD KENNETH IMSI/J-BLK PRES FACIL

FBI No.: 174831N3 SID No: ID 050218 Inmate Class: MEDIUM -X
Birthdate: [redacted]1956 S.S.N.: [redacted] Status Type: Termer
Sex: MALE Ethnicity: WHITE Status Date: 02/24/1984
Height: 5'9 Complexion: FAIR LIFE NOPAR
Weight: 150 Pre ID Incr: 1 Inst Disch: LIFE NOPAR
Eyes: HAZEL Detain/Warr: NONE Tent. Par. Date:
Hair: BLONDE Nxt Par Hrg:
Birthplace: OSWEGO NY Case Mgr/Par Off: MMAHONEY
Alerts: VICTIM, MED, REG

Crime	#	Dis	Cnty	Docket Number / Seq	Fac/Lvg	Pd	T	Cl	Bk	Date
MURDER 1ST		I	CANYO	C-5576 1	IMSI/J-BLK	00	1	3	A	02/09/2006
GRND THEFT		I	CANYO	C-5576 1	IMSI/J-BLK	00	3	68	A	02/03/2006
BURGLARY 2		I	CANYO	C-5576 1	IMSI/A-BLK	00	3	96	A	02/03/2006
MURDER 1ST		A	CANYO	C-5576 1	IMSI/E-BLK	00	1	8	A	01/06/2006
FORGERY GN	3	D	CANYO	I015470	IMSI/G-BLK	00	2	24	A	12/19/2005
					ISCI/TR					12/19/2005
					ISCI/UNT08	00	A	6	A	12/17/2005
					IMSI/G-BLK	00	2	24	A	12/16/2005
					IMSI/E-BLK	00	1	10	A	10/21/2005
					IMSI/G-BLK	00	2	23	A	09/02/2005
					IMSI/MEDIC	00	1	3	A	08/31/2005
					IMSI/G-BLK	00	2	23	A	04/15/2005
					IMSI/E-BLK	00	1	1	A	02/25/2005
					IMSI/A-BLK	00	1	21	A	01/12/2005
					IMSI/E-BLK	00	2	22	A	12/01/2003
					IMSI/MEDIC	00	1	1	A	12/01/2003
					IMSI/E-BLK	00	2	22	A	10/14/2003
					IMSI/MEDIC	00	1	3	A	10/13/2003
					IMSI/E-BLK	00	2	22	A	10/06/2003
					IMSI/E-BLK	00	2	21	A	06/13/2003
					IMSI/MEDIC	00	1	1	B	06/12/2003
					IMSI/MEDIC	00	1	1	A	06/11/2003
					IMSI/E-BLK	00	2	21	A	02/08/2003
					IMSI/MEDIC	00	1	1	B	02/06/2003
					IMSI/E-BLK	00	2	21	A	11/30/2002
					IMSI/E-BLK	00	2	18	A	09/04/2002
					IMSI/E-BLK	00	1	5	A	08/23/2002
					IMSI/B-SEG	00	1	14	A	06/25/2002
					IMSI/C-BLK	00	1	13	A	05/22/2002
					IMSI/C-BLK	00	1	10	A	03/30/2002
					IMSI/C-BLK	00	1	4	A	05/19/2000
					IMSI/MEDIC	00	1	2	A	05/10/2000
					IMSI/C-BLK	00	1	4	A	05/02/2000
					IMSI/MEDIC	00	1	2	B	04/19/2000
					IMSI/C-BLK	00	1	4	A	03/28/2000
					IMSI/MEDIC	00	1	2	A	03/27/2000
					IMSI/C-BLK	00	1	4	A	02/23/2000
					IMSI/C-BLK	00	1	15	A	02/18/2000
					ISCI/TR					02/18/2000

EXHIBIT M

ISCI/MED	00	0	5	1		02/10/2000
ISCI/TR	ST.AL/BOIS					02/10/2000
LONG HOSP	ST.AL/BOIS					02/10/2000
IMSI/MEDIC	00	1	2	A		02/04/2000
ISCI/TR						02/04/2000
ISCI/MED	00	0	6	1		01/28/2000
IMSI/TR						01/28/2000
IMSI/MEDIC	00	1	2	A		01/26/2000
IMSI/C-BLK	00	1	15	A		12/30/1999
IMSI/C-BLK	00	1	7	A		07/07/1999
IMSI/C-BLK	00	1	3	A		03/02/1999
IMSI/MEDIC	00	1	2	B		02/24/1999
IMSI/C-BLK	00	1	3	A		12/31/1998
IMSI/MEDIC	00	1	2	B		12/30/1998
IMSI/C-BLK	00	1	3	A		12/03/1998
IMSI/B-SEG	00	1	15	A		11/30/1998
IMSI/B-SEG	00	1	21	A		05/12/1998
IMSI/B-SEG	00	1	14	A		03/05/1998
IMSI/B-SEG	00	1	13	A		02/18/1998
IMSI/B-SEG	00	1	19	A		01/05/1998
IMSI/MEDIC	00	1	3	A		12/29/1997
IMSI/B-SEG	00	1	19	A		11/30/1997
IMSI/MEDIC	00	1	3	A		11/29/1997
IMSI/B-SEG	00	1	19	A		10/07/1996
IMSI/MEDIC						10/03/1996
IMSI/B-SEG	00	1	19	A		07/19/1996
IMSI/ADSEG	00	2	51			11/24/1993
IMSI/ADSEG	00	2	54	A		12/03/1992
IMSI/MEDIC	00		2	A		11/27/1992
IMSI/ADSEG	00	2	54	A		05/02/1990
IMSI/ADSEG	00	2	51			02/24/1984
ISCI/UNT07	00					02/24/1984
HISTORY	SENT DISCH					02/18/1981
ISCI/UNT07	00					06/14/1978
CCD PROBTN	CCD SPRVSN					09/07/1977
ISCI/UNT07	00					06/09/1977
NICI/UNKWN	00					03/04/1977
ISCI/UNT07	00					02/18/1977

revious Numbers:
uperceded Numbers:

=ERTS ========== QUERY OFFENDER ALERTS ========== 03/07/2006 = Page 1

Doc No: 15470 Name: FETTERLY, DONALD KENNETH IMSI/J-BLK PRES FACIL

Security Class	SECURITY
Alert	DEATH ROW SENTENCE STATUS
Status	INACTIVE
Authorized By	KELLY, CAROLEE J
Orignated By	KELLY, CAROLEE J
Start Date	08/06/2002
Expiration Date	
Review Date	
End Date	01/28/2003

NOTES: 8-6-02 VACATED, 1-28-03 SENTENCED TO FIXED LIFE

========== CONSIDERATIONS==========

= FFENDER TRACK ======= QUERY OFFENDER BY NAME ========== 03/07/2006 = Page 1
D No: 30968 Name: PORTER, GEORGE JUNIOR ISCI/MED PRES FACIL

FBI No.: 424602R10 SID No: ID1585250 Inmate Class: CLOSE -X
Birthdate: [redacted]/1956 S.S.N.: [redacted] Status Type: Termer
Sex: MALE Ethnicity: WHITE Status Date: 10/04/1990
Height: 6'2 Complexion: FAIR DEATH
Weight: 160 Pre ID Incr: 0 Inst Disch: DEATH
Eyes: HAZEL Detain/Warr: NONE Tent. Par. Date:
Hair: BROWN Nxt Par Hrg:
Birthplace: MOSCOW ID Case Mgr/Par Off: DAGREENE
Alerts: MED, REG, SEC

Crime	# Dis	Cnty	Docket Number / Seq	Fac/Lvg	Pd	T	Cl	Bk	Date
MURDER 1ST	I	LEWIS	6053	ISCI/MED	00	0	3	2	02/23/2006
				ISCI/MED	00	0	2	1	02/20/2006
				SHORT HOSP	ST.AL/BOIS				02/17/2006
				IMSI/A-BLK	00	1	10	A	01/26/2006
				IMSI/J-BLK	00	3	81	A	01/21/2006
				IMSI/A-BLK	00	1	32	A	08/19/2005
				IMSI/B-SEG	00	1	12	A	07/18/2005
				IMSI/B-SEG	00	1	13	A	07/18/2005
				IMSI/B-SEG	00	1	12	A	02/06/2004
				IMSI/J-BLK	00	3	92	A	01/06/2004
				IMSI/A-BLK	00	3	65	B	01/05/2004
				IMSI/J-BLK	00	3	89	A	12/22/2003
				IMSI/A-BLK	00	3	65	B	10/14/2003
				IMSI/A-BLK	00	3	65	A	10/14/2003
				IMSI/G-BLK	00	1	4	A	08/13/2003
				IMSI/G-BLK	00	1	11	A	05/31/2003
				IMSI/A-BLK	00	2	43	A	05/08/2003
				IMSI/B-SEG	00	1	12	A	05/22/2002
				IMSI/C-BLK	00	1	19	A	03/07/2002
				IMSI/C-BLK	00	1	20	A	10/30/2001
				IMSI/C-BLK	00	1	1	A	10/08/1999
				IMSI/C-BLK	00	1	18	A	09/17/1999
				IMSI/C-BLK	00	1	9	A	02/23/1999
				IMSI/C-BLK	00	1	8	A	12/03/1998
				IMSI/B-SEG	00	1	20	A	07/19/1996
				IMSI/ADSEG	00	2	52	A	11/30/1994
				IMSI/ADSEG	00	2	53	A	11/05/1990
				IMSI/ADSEG	00	2	46	A	10/10/1990
				IMSI/UNKWN	00				10/09/1990
				IMSI/ADSEG	00	2	46	A	10/05/1990
				IMSI/UNKWN	00				10/05/1990
				IMSI/ADSEG	00	2	53	A	10/04/1990
				IMSI/ADSEG	00	2	46	A	10/04/1990

revious Numbers:
perceded Numbers:

= ALERTS ========== QUERY OFFENDER ALERTS ========== 03/07/2006 =
Doc No: 30968 Name: PORTER, GEORGE JUNIOR ISCI/MED PRES FACIL

Security Class		SECURITY
Alert Description		DEATH ROW SENTENCE STATUS
Status	A	ACTIVE
Authorized By	2126	KELLY, CAROLEE J
Initiated By	2126	KELLY, CAROLEE J
Start Date	08/30/1990	Exp Date
Review Date		End Date

NOTES: 8-10-1990 DEATH SENTENCE; 4-2-2003 SENTENCE VACATED/11-3-03
OFFENDERS MOTION FOR POST CONVICTION DISMISSED/12-20-04 ORDER
VACATING DEATH SENTENCE REVERSED.

Esc or F10 to exit

IMSI/B-SEG	00	1	2	A	05/22/2002
IMSI/C-BLK	00	1	5	A	02/26/2002
IMSI/B-SEG	00	3	65	A	01/31/2002
IMSI/C-BLK	00	1	5	A	12/26/2001
IMSI/B-SEG	00	3	66	A	12/21/2001
IMSI/C-BLK	00	1	5	A	09/20/2001
IMSI/B-SEG	00	3	78	A	09/03/2001
IMSI/C-BLK	00	1	6	A	08/29/2001
IMSI/C-BLK	00	1	12	A	08/29/2001
IMSI/B-SEG	00	3	80	A	08/08/2001
IMSI/C-BLK	00	1	12	A	08/06/2001
IMSI/C-BLK	00	1	9	A	06/21/2001
IMSI/C-BLK	00	1	12	A	02/07/2001
IMSI/C-BLK	00	1	8	A	01/05/2001
IMSI/B-SEG	00	3	77	A	12/29/2000
IMSI/C-BLK	00	1	8	A	10/13/2000
IMSI/B-SEG	00	3	77	A	09/27/2000
IMSI/C-BLK	00	1	19	A	08/11/2000
IMSI/B-SEG	00	3	79	A	08/04/2000
IMSI/C-BLK	00	1	19	A	07/26/2000
IMSI/C-BLK	00	1	12	A	06/12/2000
IMSI/B-SEG	00	3	91	A	06/07/2000
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IMSI/B-SEG	00	1	14	A	11/17/1998
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IMSI/B-SEG	00	3	66	A	08/21/1998
IMSI/B-SEG	00	1	16	A	05/29/1998
IMSI/MEDIC	00	1	3	A	05/28/1998
IMSI/B-SEG	00	1	16	A	05/15/1998
IMSI/B-SEG	00	1	29	A	04/24/1998
IMSI/B-SEG	00	1	12	A	03/12/1998
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IMSI/ADSEG	00	2	44	A	01/13/1994
IMSI/ADSEG	00	2	46	A	07/08/1993
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IMSI/ADSEG	00	2	51	A	01/22/1992
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IMSI/ADSEG	00	2	62	A	08/01/1990
IMSI/ADSEG	00	2	44	A	11/15/1989
ISCI/UNKWN	00				09/14/1988
CO TEMP	OWYHEE/SH				08/22/1988
ISCI/UNT07	00				06/14/1988

revious Numbers:
uperceded Numbers:

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= ALERTS ========== QUERY OFFENDER ALERTS ========== 03/07/2006 =
 Doc No: 27402   Name: HOFFMAN, MAXWELL ALTON          IMSI/A-BLK PRES FACIL

     Security Class          RECORDS
     Alert Description       COURT DATE PENDING

     Status            I     INACTIVE
     Authorized By     3917  COURT ORDER
     Initiated By      3771  WILMOTH, L. RENAE
     Start Date        11/18/2002   Exp Date        11/19/2002
     Review Date       11/19/2002   End Date        11/29/2002

     NOTES: OWYHEE CO SP02-1715, JUDGE CULET, 11/19/02 AT 3:00PM, COURT TEMP



Esc or F10 to exit
```

= OFFENDER TRACK ======= QUERY OFFENDER BY NAME ========== 03/20/2006 = Page 1
DOC No: 23081 Name: LEAVITT, RICHARD ALBERT IMSI/B-SEG PRES FACIL

FBI No.: 625403DA6 SID No: 000956847 Inmate Class: MINIMUM
Birthdate: [redacted]1958 S.S.N.: [redacted] Status Type: Termer
Sex: MALE Ethnicity: WHITE Status Date: 12/19/1985
Height: 6'2 Complexion: RUDDY DEATH
Weight: 160 Pre ID Incr: 0 Inst Disch: DEATH
Eyes: BROWN Detain/Warr: NONE Tent. Par. Date:
Hair: BROWN Nxt Par Hrg:
Birthplace: BLACKFOOT ID Case Mgr/Par Off: TGILLESP
Alerts: MED, REG, SEC

Crime	# Dis	Cnty	Docket Number / Seq	Fac/Lvg	Pd	T	Cl	Bk	Date
MURDER 1ST	I	BINGH	4110 1	IMSI/B-SEG	00	1	7	A	07/17/2005
				IMSI/B-SEG	00	1	8	A	07/17/2005
				IMSI/B-SEG	00	1	7	A	04/08/2005
				IMSI/MEDIC	00	1	1	A	04/07/2005
				IMSI/B-SEG	00	2	49	A	09/17/2004
				IMSI/MEDIC	00	1	1	A	09/16/2004
				IMSI/B-SEG	00	2	49	A	07/20/2004
				IMSI/B-SEG	00	1	4	A	07/12/2004
				ISCI/TR					07/12/2004
				ISCI/MED	00	0	3	1	07/10/2004
				SHORT HOSP	ST.AL/BOIS				07/08/2004
				IMSI/TR					07/08/2004
				IMSI/B-SEG	00	1	4	A	11/15/2003
				IMSI/B-SEG	00	3	93	A	11/03/2003
				IMSI/B-SEG	00	3	73	A	10/23/2003
				IMSI/J-BLK	00	3	72	A	10/14/2003
				IMSI/E-BLK	00	2	16	A	05/31/2003
				IMSI/E-BLK	00	2	18	B	04/29/2003
				IMSI/A-BLK	00	3	65	B	03/29/2003
				IMSI/A-BLK	00	3	73	B	03/26/2003
				IMSI/J-BLK	00	3	77	A	03/24/2003
				IMSI/E-BLK	00	2	19	A	02/01/2003
				IMSI/E-BLK	00	2	18	A	11/30/2002
				IMSI/E-BLK	00	2	18	B	09/04/2002
				IMSI/C-BLK	00	2	35	A	05/09/2002
				IMSI/C-BLK	00	2	42	A	03/06/2002
				IMSI/C-BLK	00	1	14	A	09/16/1999
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				IMSI/B-SEG	00	3	95	A	11/24/1998
				IMSI/B-SEG	00	1	30	A	03/31/1998
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				IMSI/B-SEG	00	2	53	A	03/04/1996
				IMSI/MEDIC					02/21/1996
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				IMSI/ADSEG	00	2	41	A	02/05/1992
				IMSI/ADSEG	00	2	57	A	05/13/1991

IMSI/ADSEG	00 2 51 A	05/02/1990
IMSI/UNKWN	00	02/16/1990
RT/OS/CS	BINGHAM/SH	02/11/1990
ISCI/UNKWN	00	12/22/1989
RT/OS/CS	BINGHAM/SH	10/06/1989
ISCI/UNKWN	00	04/27/1987
RT/OS/CS	BINGHAM/SH	04/11/1987
ISCI/UNT07	00	12/19/1985

Previous Numbers:
Superceded Numbers:

= FENDER TRACK ======= QUERY OFFENDER BY NAME ========== 03/20/2006 = Page 1

Doc No: 23081 Name: LEAVITT, RICHARD ALBERT IMSI/B-SEG PRES FACIL

Security Class	SECURITY
Alert	DEATH ROW SENTENCE STATUS
Status	INACTIVE
Authorized By	KELLY, CAROLEE J
Orignated By	KELLY, CAROLEE J
Start Date	12/19/1985
Expiration Date	
Review Date	
End Date	01/23/2001

NOTES: 12-19-1985 DEATH SENTENCE;1-23-2001 CONVICTION VACATED/9TH CIRCUIT COURT OVERTURNED WINMILL'S DECISION TO VACATE THE CONVICTION/6-15-05 SUPREME COURT DISMISSED APPEAL

========== CONSIDERATIONS==========

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

TIM A. DUNLAP, Plaintiff, vs. JAY GREEN, GREG FISHER, Defendants.	)	Case No. CV04-223-S-EJL **MEMORANDUM ORDER**

Pending before the Court in this case is Defendants' Motion for Summary Judgment (Docket No. 41). Plaintiff has filed a response, as well as two supplements (Docket Nos. 45, 46, and 47). Having reviewed the parties' filings, the Court concludes that a hearing is unnecessary to resolve the pending Motion for Summary Judgment. Accordingly, the Court enters the following Order.

I.

BACKGROUND

Plaintiff was convicted of first degree murder and sentenced to death in 1992. All inmates sentenced to death were formerly housed in solitary confinement ("death row"), pursuant to state statute. On July 1, 2003, the Idaho legislature amended the statute and vested the Warden of the Idaho Maximum Security Institution (IMSI) with the discretion to determine the housing assignments of inmates who are under a death sentence but not under a death warrant. *See* Idaho Code § 19-2705, which superseded former Idaho Code § 19-

Petitioner's Exhibit FF

2706.

On July 3, 2003, Plaintiff was housed in the Idaho Secured Mental Facility (C-3) of IMSI. He was later housed in the mental health outpatient unit (C-2), as recommended by Idaho Department of Correction (IDOC) mental health staff. Plaintiff's death sentence was vacated in 2005. As a result, he was placed in the custody of Caribou County and was not housed in an IDOC facility from approximately February 23, 2005, to February 23, 2006. On February 22, 2006, he was resentenced to death, whereupon he was returned to IMSI.

II.

STANDARD OF LAW

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Material facts are those which may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In a motion for summary judgment, the moving party bears the "initial burden of identifying for the court those portions of the record which demonstrate the absence of any genuine issues of material fact." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp v. Catrett*, 477 U.S. 317, 322 (1986)). If the moving party points to portions of the record demonstrating that there appears to be no genuine issue of material fact as to claims or defenses at issue, the burden of production shifts to the non-moving party. To meet its burden of production, the non-moving party

"may not rest upon the mere allegations contained in his complaint, but he must set forth, by affidavits, exhibits or otherwise, specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56; *see T.W. Electric Serv.*, 809 F.2d at 630 (internal citation omitted).

The Court does not determine the credibility of affiants or weigh the evidence set forth by the non-moving party. All inferences that can be drawn from the evidence must be drawn in a light most favorable to the nonmoving party. *T.W. Elec. Serv.*, 809 F.2d at 630-31 (internal citation omitted).

Rule 56(c) requires the Court to enter summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. The existence of a scintilla of evidence in support of the non-moving party's position is insufficient. Rather, "there must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson v. Liberty Lobby*, 477 U.S. at 252.

Under the Equal Protection Clause, "all persons similarly circumstanced shall be treated alike" by governmental entities. *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). However, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940).

Equal protection claims alleging disparate treatment or classifications are subject to a heightened standard of scrutiny when they involve a "suspect" or "quasi-suspect" class, such as race or national origin, or when they involve a burden on the exercise of

fundamental personal rights protected by the Constitution. *See, e.g., City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985). Otherwise, equal protection claims are subject to a rational basis inquiry. *See Heller v. Doe by Doe*, 509 U.S. 312, 319-20 (1993). Accordingly, inmate classification decisions not based on a suspect or quasi-suspect class are subject to a rational basis analysis. *See Allgood v. Morris*, 724 F.2d 1098, 1100 (4th Cir. 1984).

In order to prevail on an equal protection claim, Plaintiff must demonstrate that he is being treated in a disparate manner, and that there is no rational basis for the disparate treatment. *More v. Farrier*, 984 F.2d 269, 271 (8th Cir. 1993). Stated another way, prison officials need show only a rational basis for dissimilar treatment in order to defeat the merits of Plaintiff's claim. *Id.*, 984 F.2d at 271. Where a case "does not rise to the level of invidious discrimination proscribed by the Equal Protection Clause. . . , the federal courts should defer to the judgment of the prison officials." *More*, 984 F.2d at 272.

Plaintiff's equal protection claims are also cognizable under the theory that he is a "class of one," because he has asserted that he "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). "[T]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Id.* at 564 (internal citation omitted).

Prison housing assignments are functions wholly within the discretion of the prison administration. *See Olim v. Wakinekona*, 461 U.S. 238, 245 (1983); *Meachum v. Fano*, 427 U.S. 215, 225 (1976). The Supreme Court has cautioned the federal courts not to interfere with the day-to-day operations of the prisons, especially those things related to security, a task which is best left to prison officials who have particular experience in dealing with prisons and prisoners. *See Turner v. Safley*, 482 U.S. 78, 89 (1987) (First Amendment claims).

III.

DISCUSSION

A. Plaintiff's Claims

Plaintiff's claims arise from the time period between July 1, 2003, when the Idaho statute changed to allow inmates under sentences of death to be housed in assignments other than isolation units, and June 23, 2005, when he was transported to Caribou County for his resentencing hearing.

Plaintiff asserts that he was treated differently from four other inmates were who removed from death row as a result of the statute change and placed within the general population. Defendants Warden Greg Fisher and Sergeant Jay Green counter that Plaintiff was not similarly situated to those inmates, and that his housing placement had a rational basis because it was based on the recommendations of mental health providers.

B. Plaintiff's Initial Placement after Discretionary Statute was Enacted

When the statute became effective, Warden Fisher based his initial decision to house

Plaintiff in the mental health unit at IMSI on Plaintiff's prior behavior and the treatment recommendations of his mental health treatment providers. *Warden Greg Fisher Affidavit*, at ¶ 6 (Docket No. 41-5); *Dr. Chad Sombke Affidavit*, at ¶ ¶ 13-16 (Docket No. 41-3).

Plaintiff's prior behavior included threatening to cut off correctional officers' heads, writing an Inmate Concern Form with blood or feces rather than ink, and talking delusionally and resisting an escort after taking a shower. *Fisher Affidavit*, Exhibits C, G, and H. Warden Fisher notes that since Plaintiff has been incarcerated, he has been convicted of 24 separate disciplinary offenses, of which 12 occurred in the year 2000, and three in 2001. *Fisher Affidavit*, at ¶ 20 & Exhibit B.

As part of his mental health treatment, Plaintiff had been prescribed a number of psychotropic drugs by Dr. Khatain, the psychiatrist, to reduce Plaintiff's preoccupation with troublesome recurring thoughts and seeing and hearing things not normally seen and heard. *Sombke Affidavit*, ¶¶15-16.

C. Placement of Other Death Row Inmates

Warden Fisher notes that three of the other former death row inmates who have been in general population and to whom Plaintiff compares himself (Porter, Fetterly, and Hoffman) did not require mental health treatment to the extent that it was necessary to house them in the mental health treatment units located in C-2 or C-3. *Fisher Affidavit*, at ¶ 11. The fourth former death row inmate, Leavitt, was housed in C-2 from March 6, 2002, to September 4, 2002, for an assessment of whether he could successfully integrate into a more socialized prison environment after having been held in solitary confinement since 1985.

Fisher Affidavit, at ¶ 12. After his assessment, Leavitt was transferred from C-2 to general population. *Id.*

D. Plaintiff's Movement from C-3 to C-2

After Plaintiff was placed in the Mental Health Unit in C-3, he progressed to the point where Dr. Sombke believed Plaintiff should be moved to the outpatient mental health facility in C-2. *Fisher Affidavit*, at ¶ 27; *Sombke Affidavit,* at ¶ 24. At a restrictive housing review meeting, five staff members, including Defendant Sergeant Jay Green, recommended that Plaintiff be moved to C-2. Warden Fisher affirmed the decision on August 11, 2003. *Fisher Affidavit*, at ¶ 28. Plaintiff was moved to C-2 on August 12, 2003. *Sombke Affidavit*, at ¶ 28.

Plaintiff's housing assignment, C-2, is an outpatient mental health clinic setting that houses inmates with mental disorders who are stable and can be transitioned into a more pro-social environment. C-2 residents are given greater access to the unit's dayroom and outdoor recreation, and have increased opportunities to interact with other inmates and staff. *Sombke Affidavit*, at ¶ 9.

E. Consideration of Moving Plaintiff from C-2 to General Population

On February 15, 2005, a restrictive housing placement committee reviewed Plaintiff's housing assignment. The record of the meeting shows that there was a concern about Plaintiff being able to function in isolation or in general population. At that time, Plaintiff told the committee that he did poorly in isolation, but was doing very well in C-2. *See Fisher Affidavit*, Exhibit K. Dr. Sombke recommended that Plaintiff remain in C-2, noting that he had been compliant with his medication and was doing well. Based on this recommendation,

which was affirmed by the committee, Warden Fisher authorized Plaintiff's continued housing in C-2. *Fisher Affidavit*, at ¶¶ 30- 31.

While in C-2, Plaintiff had several episodes of inappropriate behavior, beginning in October 2, 2003, when he began to isolate himself and exhibit offensive hygiene habits, and again on January 22, 2004, when the same symptoms occurred. In light of all of the foregoing, Dr. Sombke opines that Plaintiff was housed appropriately at all times during his incarceration at IMSI. *Sombke Affidavit*, at ¶¶ 27-34. Dr. Sombke also states that "[a]lthough [Plaintiff] often requested to be placed in the general population, it is my opinion that C-2 was the more appropriate housing for Mr. Dunlap because his behavior never fully stabilized to the point where prison administration could be comfortable housing him in general population." *Id.* at ¶ 38.

For the most part, Plaintiff remained in C-2 housing until February 26, 2005, when he was returned to Caribou County's custody for resentencing. Plaintiff remained in Caribou County's custody for approximately one year until he was resentenced to death on February 22, 2006. He was then returned to IMSI.

F. Analysis and Conclusion

Plaintiff has provided no evidence to show that Defendants were acting arbitrarily in determining his housing placement, rather than following the recommendations of the mental health providers at the prison and relying on his prior prison record, which contains some very disturbing behavioral problems. Plaintiff has not shown that he is similarly situated to other inmates with death sentences, nor has he shown that he has been singled out for an

arbitrary housing assignment. The Court also rejects Plaintiff's other arguments, such as his contentions that (1) there is a conspiracy to prevent his and other IMSI prisoner claims from going to trial, and (2) failure to allow him to have a pet is an Eighth Amendment cruel and unusual punishment violation (Docket Nos. 45, 46 & 47).

Because there is a rational basis for Defendants' decision to house Plaintiff in C-Block, his equal protection rights have not been violated. Prison housing assignments are functions wholly within the discretion of the prison administration. *See Olim v. Wakinekona*, 461 U.S. at 245; *Meachum v. Fano*, 427 U.S. at 225. Here, there is ample evidence supporting Defendants' decision to house Plaintiff in C-block. The Court will not second-guess prison officials when security interests are at stake. *See Turner v. Safley*, 482 U.S. at 89. Plaintiff's Complaint shall be dismissed with prejudice.

MEMORANDUM ORDER 9

IV.

ORDER

NOW THEREFORE IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment (Docket No. 41) is GRANTED. Plaintiff's case is dismissed with prejudice.

IT IS FURTHER HEREBY ORDERED that Defendants' Motion for a Stay (Docket No. 40) is MOOT now that Plaintiff has been returned to the custody of the Idaho Department of Correction.

DATED: **September 6, 2006**

Honorable Edward J. Lodge
U. S. District Judge